

ARTICLES

UNEQUAL JUSTICE: THE FEDERALIZATION OF CRIMINAL LAW

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INTRODUCTION

From humble beginnings,¹ federal substantive criminal law has grown to prohibit a wide range of conduct, including much that state criminal laws also proscribe.² This expansion, commonly called federalization, has recently attracted substantial academic criticism.³ Some

1. Under the Constitution, Congress has explicit power to criminalize only counterfeiting, see U.S. CONST. art. I, § 8, cl. 6; "Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* cl. 10; offenses committed on federal property, see *id.* cl. 17; and treason, see *id.* art. III, §3, cl. 2. Although the First Congress soon criminalized other conduct, such as obstruction of justice in federal courts, see Crimes Act of 1790, 1 STAT. 112, until the Reconstruction era, federal criminal law was limited to "punishment of acts directly injurious to the central government." L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 65 (1948). See also DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829 (1985).

2. Some have estimated that there are now over 3000 separate federal crimes. See, e.g., REPORT OF THE FED. CTS. STUDY COMM. 106 (1990) [HEREINAFTER REPORT] (citing 3000 figure). See also United States v. Lanier, 73 F.3d 1380, 1382 (6th Cir. 1996) (en banc) (referring to "more than 700 crimes in the federal criminal code"), vacated, 117 S. Ct. 1219 (1997). Many of these federal crimes duplicate existing state criminal offenses. See, e.g., Sarah Sun Beale, *Too Many and Yet Too Few: New Principles to Define Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997-98 (1995) (listing overlapping federal and state crimes); *infra* notes 42-59 and accompanying text.

3. Three recent Symposia address the topic. See Symposium: *Federalism and the Criminal Justice System*, 98 W. VA. L. REV. 757 (1996); Symposium: *The Federal Role in Criminal Law*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15 (1996); Symposium: *Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System*, 46 HASTINGS L.J. 965 (1995). See also Symposium: *Rethinking Federal Criminal Laws*, 1 BUFF. CRIM. L. REV. (forthcoming 1997); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary From the Federalization of State Crime*, 43 U. KAN. L. REV. 503 (1995); Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681 (1992); William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651 (1994); H. Scott Wallace, *Compulsive Disorder: Stop Me Before I Federalize Again*, PROSECUTOR, May-June 1994, at 21; H. Scott Wallace, *The Drive to Federalize Is a Road to Ruin*, CRIM. JUST., Fall 1993, at 8 [hereinafter *Road to Ruin*]; Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455 (1994); Greg Hollon, Note, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499 (1996); James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795 (1994). Government officials have also devoted attention to federalization. See, e.g., Renée M. Landers, *Reporter's Draft for the Working Group on the Mission of the Federal Courts*, 46 HASTINGS L.J. 1255 (1995). For earlier discussions of the proper scope of federal criminal law, see John S. Baker, *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 RUTGERS L.J. 495 (1985); Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213 (1984); Robert Eugene Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289 (1919); Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J. L. & PUB. POL'Y 117 (1987); Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973); 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); Camille Kenny, Comment, *Federal Criminal*

critics bemoan the federal government's intrusion into matters historically left to the states.⁴ Others denounce the burden on the federal judiciary of an increasing criminal caseload.⁵ However, there has been far less attention devoted to what may be the most troubling consequence of federalization: the dramatically disparate treatment of similarly situated offenders, depending on whether they are prosecuted in federal or state court.⁶ This Article addresses that consequence and contends that equal protection doctrine has a role to play in preventing unprincipled disparity.

Jurisdiction: A Case Against Making Federal Cases, 14 SETON HALL L. REV. 574 (1984). Not all agree that federalization deserves the attention it now receives. See G. Robert Blakely, *Federal Criminal Law: The Need, Not For Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175, 1176 & n.4 (1995) (concluding that "[w]e should not be talking about 'federalization'" and characterizing Symposium on federalization as "a tragic waste of intellectual resources").

4. See, e.g., Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 968 (1995) (noting that some critics "believe that some of the recently enacted federal crimes inappropriately infringe on federalism interests by taking matters traditionally of local concern out of the hands of local officials"); Schwarzer & Wheeler, *supra* note 3, at 664-65 (summarizing contentions of critics).

5. See, e.g., Beale, *supra* note 2, at 983-91 (describing the "most visible cost" of federalization as "the burden imposed on the relatively small federal judicial system"); Gorelick & Litman, *supra* note 4, at 968 (noting critics' concern that federalization "will swamp the federal courts with 'local' crimes, thereby preventing them from fulfilling a traditional role of adjudicating distinctively federal matters"); REPORT, *supra* note 2, at 6 (describing "the long-expected crisis of the federal courts" caused in part by "the expanded federal effort to reduce drug trafficking."). Not all observers agree that federalization has created unmanageable burdens for the federal judiciary. See Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1034, 1038-47 (1995) (describing claims of crisis in federal judicial caseload as a "myth"); Schwarzer & Wheeler, *supra* note 3, at 672-85 (discussing arguments on both sides). Cf. Dennis E. Curtis, Comment, *Congressional Powers and Federal Judicial Burdens*, 46 HASTINGS L.J. 1019, 1024-25 (1995) (proposing an increase in the size of the federal judiciary).

6. Although Professor L.B. Schwartz recognized, almost half a century ago, that the growth of federal criminal law could cause disparate treatment, see Schwartz, *supra* note 1, at 71-72, almost all of the recent treatment of federalization focuses on other issues. See Little, *supra* note 5, at 1037 ("The current critique of the federalization of crime can be described as encompassing four general types of concerns: (1) workload, (2) open forum, (3) dignity, and (4) federalism concerns."); Schwarzer & Wheeler, *supra* note 3 (discussing federalization debate without mention of disparity in treatment). Government efforts to address federalization are similarly deficient. See Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1277 (1995) (government's two major concerns are caseload of federal courts and federal/state relations). Professor Beale has addressed the issue of disparate treatment. See Beale, *supra* note 2, at 982, 996-1004. See also Hollon, *supra* note 3 (discussing disparate treatment); Kenny, *supra* note 3, at 576 (noting "inherent unfairness to a defendant who loses the increased protections his state constitution may afford when he is brought into federal court"). Professor Beale identifies disparate treatment and increased burdens on the federal judiciary as the principle adverse consequences of federalization. See Beale, *supra* note 2. She proposes shifting litigation of federal offenses to the state courts as a solution. See *id.* at 1008-15; see also Mengler, *supra* note 3, at 535 (presenting a similar proposal). Beale recognizes that transfer of prosecutions to the states will not alone

As a result of the growth of federal criminal law, much criminal conduct is now subject to federal as well as state prosecution.⁷ Although the states prosecute the majority of offenders whose conduct violates both state and federal law, federal prosecution is not uncommon.⁸ Because of differences between federal and state criminal justice systems, an offender will often fare worse if prosecuted in federal court rather than state court. He⁹ may be detained pending trial when he would have been released if charged in state court,¹⁰ denied discovery allowable in state court,¹¹ and confronted with evidence that would have been suppressed in state court.¹² If convicted, a federally

end disparate treatment. As a result, she also calls for "uniform standards. . . to determine which categories of cases will be subject to state rather than federal law." She proposes two means of achieving that objective: "general federal enforcement of all cases falling within a statutory provision or the promulgation and enforcement of clear standards identifying classes of cases that will be subject to general federal prosecution." Beale, *supra* note 2, at 1016. Both approaches are consistent with the equal protection requirements that I discuss in this Article.

7. Prosecution by both federal and state authorities for the same conduct is infrequent. See *United States v. Davis*, 906 F.2d 829, 832 (2d Cir. 1990) (stating that "successive prosecutions for the same conduct remain rarities"); Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model For Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 77 (1996) (Department of Justice prosecutes following state prosecution for same conduct fewer than 150 times per year out of approximately 65,000 annual federal prosecutions). Despite the fact that successive federal prosecutions constitute a minute portion of the federal criminal caseload, two recent high-profile federal civil rights prosecutions following state court acquittals—the federal trial of Los Angeles Police Department officers for using unreasonable force while arresting Rodney King and the federal trial of Lemrick Nelson, Jr., for the killing of Yankel Rosenbaum—have drawn considerable attention to the "dual sovereignty exception" to the Double Jeopardy Clause. Dual sovereignty is a doctrine which allows one sovereign, such as the federal government, to prosecute after another sovereign, such as a state, has already done so. See, e.g., Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995); Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994); Susan N. Herman, *Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play on Double Jeopardy*, 95 COLUM. L. REV. 1090 (1995); Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. REV. 649 (1994); Yale Kamisar, *Call It Double Jeopardy*, N.Y. TIMES, Feb. 14, 1997, at 37. See generally Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992). Although federalization of criminal law increases opportunities for successive federal prosecutions, the focus of this Article is different—the decision to prosecute some offenders in federal court when they are eligible for state prosecution.

8. See *infra* notes 170-74 and accompanying text.

9. Because most federally-prosecuted offenders are male, see, e.g., U.S. SENTENCING COMM'N ANNUAL REPORT app. B (1994) (84.7% of convicted federal offenders are male), throughout this Article I use the masculine pronoun to refer to offenders. I use the female pronoun when referring to prosecutors and defense attorneys.

10. See *infra* notes 129-34 and accompanying text.

11. See *infra* notes 135-39 and accompanying text.

12. See *infra* notes 140-58 and accompanying text.

prosecuted defendant is likely to receive a longer sentence¹³ and to serve far more of that sentence than he would if sentenced in state court.¹⁴

*United States v. Palmer*¹⁵ provides a stark example of such federal/state court disparity. Palmer and Roberts were partners in a marijuana-growing operation at Palmer's residence.¹⁶ After police arrested the men, the federal prosecutor assigned to the case chose not to bring charges against Roberts, who, as a result, was prosecuted in state court.¹⁷ The state court sentenced him to a fine of \$1,000—which was waived because Roberts was indigent—and assessed court costs and fees of \$176.¹⁸ Palmer was considerably less fortunate. The federal prosecutor brought charges against him. After Palmer was convicted, the federal court sentenced him to a nonparolable ten-year

13. See *infra* notes 159-66 and accompanying text.

14. See *infra* notes 167-69 and accompanying text. Similar issues can arise in other contexts. See, e.g., *United States v. Juvenile Male #1*, 86 F.3d 1314 (4th Cir. 1996) (prosecution of juvenile as an adult in federal court); Allison Boyce, Note, *Choosing the Forum: Prosecutorial Discretion and Walker v. State*, 46 ARK. L. REV. 985 (1994) (discussing choice between juvenile and adult court); cf. Jon J. Jensen & Kerry S. Rosenquist, *Satisfaction of a Compelling Governmental Interest or Simply Two Convictions for the Price of One*, 69 N.D. L. REV. 915 (1994) (federal prosecution after conviction in tribal court).

15. 3 F.3d 300 (9th Cir. 1993), *cert. denied*, 510 U.S. 1138 (1994).

16. A deputy sheriff arrested Roberts after discovering marijuana in his car during a traffic stop. See *id.* at 302. Another deputy told Roberts that if he cooperated, the deputy would make efforts to prevent Roberts from being charged in federal court. See Brief of Defendant/Appellant at 5, *Palmer* (No. 91-30291). Roberts told the deputy about the marijuana at Palmer's residence. See *Palmer*, 3 F.3d at 302. Aware that the federal Drug Enforcement Administration (DEA) was interested in Palmer, who had a previous federal conviction and was the subject of an earlier DEA investigation, the deputies' supervisor notified a DEA agent. See *id.* The agent in turn notified an Assistant United States Attorney, who indicated that "the federal government would be interested in prosecuting the case if more than 100 marijuana plants were found." *Id.* The deputies obtained a search warrant for Palmer's residence and, along with a DEA agent, executed the warrant, finding 258 marijuana plants and growing equipment. See Brief of Defendant/Appellant at 7, *Palmer* (No. 91-30291).

17. The federal prosecutor considered bringing charges against Roberts and rewarding him for his cooperation simply by seeking a reduced federal sentence. When the federal prosecutor learned that a deputy sheriff had induced Roberts' cooperation by promising to make efforts to foreclose federal prosecution, see *supra* note 16, the federal prosecutor chose to not bring federal charges at all. See Affidavit of Earl A. Hicks, at 2-3, *United States v. Palmer* (CR 91-030-JLQ).

18. See *Palmer*, 3 F.3d at 305 n.3. Roberts also benefited from reduced state law charges in state court. He could have been charged with manufacturing marijuana, in violation of WASH. REV. CODE § 69.50.401(a)(1)(iii) (1985), but instead he agreed to plead guilty to possession of over 40 grams of marijuana, in violation of WASH. REV. CODE § 69.50.401(d) (1985). Although both crimes carry the same statutory maximum sentence, the guidelines enacted as part of Washington's Sentencing Reform Act of 1991 treat the manufacturing charge as a more serious offense. See WASH. REV. CODE § 9.94A.320 (1988) (requiring imposition of longer sentence). See also WASH. REV. CODE §§ 9.94A.120(1), 9.94A.310 (1988).

term of imprisonment and an eight-year supervised release term, the most lenient sentence that federal law allowed.¹⁹

Cases like *Palmer*, in which partners in crime receive different treatment because one is prosecuted in state court and the other in federal court, are atypical.²⁰ However, comparably dramatic sentencing differentials and other disparities²¹ routinely occur when some offenders are prosecuted in state court and others, who may not be their partners but have engaged in the same criminal conduct and are otherwise similarly situated, are instead selected for federal prosecution and the often harsher treatment that it entails. Such disparate treatment occurs nationwide on a daily basis when some defendants, engaged in drug transactions, weapons offenses, or other crimes over which there is overlapping federal and state criminal jurisdiction, happen to be among the unlucky ones selected for federal prosecution.²²

Despite the significant ramifications of the forum selection decision, there is little administrative direction or judicial oversight to guide federal prosecutors in exercising their discretion to choose among offenders eligible for federal prosecution. Although there were valid reasons for the federal prosecutor to seek harsher treatment for *Palmer* than for *Roberts*,²³ the prosecutor could have made the same selection decision without good reason, perhaps selecting *Roberts* but not *Palmer*. Without fear of violating Department of Justice policy or risking judicial review, the federal prosecutor could have flipped a coin to select who to prosecute in federal court and, consequently, who to subject to the possibility of a vastly more severe federal sentence. Neither the United States Attorney's Office that chose

19. See *Palmer*, 3 F.3d at 305 n.3. *Palmer* was sentenced under 21 U.S.C. § 841(b)(1)(B)(vii) (1992), which requires a minimum nonparolable ten-year mandatory imprisonment term and an eight-year supervised release term for possession of 100 or more marijuana plants with intent to distribute if the offender has a prior conviction for a drug trafficking crime. The statute allows for imposition of a maximum sentence of life imprisonment. See *id.*

20. For other examples, see *United States v. Vilchez*, 967 F.2d 1351 (9th Cir. 1992) (reversing district court's departure from mandatory five-year sentence to reduce defendant's sentence to three-year sentence that partner received in state court); *United States v. Reyes*, 966 F.2d 508 (9th Cir. 1992), *cert. denied*, 506 U.S. 927 (1992) (two defendants possessed sawed-off shotgun; federally prosecuted defendant received 57-month sentence, state-prosecuted defendant received 300-day sentence).

21. See *infra* Part I.B.

22. See *infra* notes 275-85 and accompanying text.

23. Unlike *Roberts*, *Palmer* refused to cooperate with law enforcement. See *Palmer*, 3 F.3d at 302. *Palmer* also had a prior conviction for marijuana trafficking, had been the subject of an earlier DEA investigation, see *id.*, and was growing marijuana at a residence where his two young daughters lived. See Brief of Defendant/Appellant at 5, *Palmer* (No. 91-30291). These differences between *Palmer* and *Roberts* did not warrant the enormous disparity in treatment.

to prosecute only Palmer nor the Department of Justice has a policy requiring prosecutors to have rational reasons for determining which eligible offenders to prosecute in federal court.²⁴ Similarly, although its consideration of Palmer's equal protection and due process challenges prompted the Ninth Circuit to characterize the prosecutor's charging decision as "troubling"²⁵ and to conclude that "[t]here is something basically wrong with this type of exercise of prosecutorial discretion,"²⁶ the court refused to review the prosecutor's decision to select only Palmer. Consistent with approaches that other courts have taken, the *Palmer* court held that "separation of powers concerns prohibit us from reviewing a prosecutor's charging decisions absent a prima facie showing that it rested on an impermissible basis, such as gender, race or denial of a constitutional right."²⁷

Even if courts refuse to enforce it, equal protection obligates prosecutors to have a rational basis for distinguishing between offenders who are charged and those who are not. Both the letter and the spirit of that command mandate that federal prosecutors have valid reasons for distinguishing between offenders who are subjected to harsher treatment as a result of federal prosecution and those who are instead charged in state court. The Department of Justice should amend its administrative guidelines to ensure compliance with equal protection principles.

The judiciary's role in limiting federalization-induced disparity also merits examination. One scholar has noted that, to date, "no participants in the current federalization debate suggest a change in [the] doctrine" precluding judicial oversight of charging decisions absent proof of intentional discrimination.²⁸ Critical examination of the underpinnings of this doctrinal limitation reveals, however, that the possibility of judicial oversight should be a topic of debate. If the

24. The federal prosecutor assigned to the case told the trial judge that "our office does not have a policy" governing whether offenders should be charged in state or federal court. Brief of Defendant/Appellant at 9, *Palmer* (No. 91-30291). For a discussion of Department of Justice policy, see *infra* Part III.A-B.

25. *Palmer*, 3 F.3d at 305 n.3.

26. *Palmer*, 990 F.2d 490, 496 n.6 (9th Cir.), *superseded*, 3 F.3d 300 (9th Cir. 1993), *cert. denied*, 510 U.S. 1138 (1994). The Ninth Circuit initially reversed Palmer's conviction, finding that the trial court erroneously admitted a post-arrest statement that Palmer made. See *id.* at 493-95. It later amended its opinion, determining that the error was harmless and affirming the conviction. See *Palmer*, 3 F.3d at 303-05. The court removed the "basically wrong" sentence from its amended opinion without explanation.

27. *Palmer*, 3 F.3d at 305.

28. Little, *supra* note 5, at 1082. Critics instead have recommended legislative and administrative solutions to federalization-related problems. See, e.g., JUD. CONF. OF THE U.S. COMM. ON

Department of Justice does not require that its prosecutors make principled charging decisions, and if courts are confronted with evidence that federal prosecutors' selection decisions may be wholly unprincipled, courts should rethink their reluctance to scrutinize those decisions. Although courts should, at most, conduct limited review that would rarely afford defendants a judicial remedy, such oversight would promote principled charging decisions.

Part One of this Article discusses legislative and judicial contributions to the expansion of federal substantive criminal law and its increasing overlap with state criminal prohibitions. This Part then identifies some significant procedural and sentencing disparities between federal and state prosecution.

Part Two explores the constraints that equal protection doctrine imposes on prosecutors' selection of offenders and contends that equal protection requires charging decisions to be rationally related to legitimate government objectives. Part Two also explains why the rational relationship requirement has particular significance for federal prosecutors' decisions to select only some eligible offenders for federal prosecution when others are charged in state court.

LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FED. CTS., 23-27 (1995) [hereinafter LONG RANGE PLAN] (recommending congressionally imposed limits on jurisdiction of federal courts); Beale, *supra* note 2, at 1015-18 (proposing prosecutive guidelines); Little, *supra* note 5, at 1077-83 (proposing legislative and administrative guidelines); Mengler, *supra* note 3, at 527-34 (recommending recodification and prosecutive guidelines). In the not-too-distant past, without focusing on the federalization-specific topic of federal prosecutors' decisions to bring charges when state prosecution also is available, several scholars proposed that charging decisions be subject to judicial oversight, more clearly defined administrative constraints, or both. See, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1971); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); Amy Grossman Applegate, *Prosecutorial Discretion and Discrimination in the Decision to Charge*, 55 TEMP. L.Q. 35 (1982); Charles P. Bubby & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473 (1976); Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976); Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659 (1981); Daniel J. Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L.J. 88; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981). But cf. Philip J. Cardinale & Steven Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View*, 29 SYRACUSE L. REV. 659, 660 (1978) (contending that any right to claim discriminatory or arbitrary enforcement of the law is "unsound in theory, misguided in policy, and self-defeating in practice"); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993) (contending that prosecutorial discretion is necessary given the characteristics of the American criminal justice system).

Part Three discusses the Department of Justice's prosecutive guidelines and present practice and demonstrates that Department policy not only fails to give federal prosecutors sufficient guidance to guarantee compliance with the equal protection rationality requirement, but that it also promotes selection for undesirable reasons. Part Three then proposes amendments to the Department's prosecutive guidelines to rectify these problems.

Part Four raises the possibility of limited judicial oversight of charging decisions in the event the Department of Justice does not amend its policy. It suggests that the reasons for judicial reluctance to review charging decisions generally apply with less force when courts need only assess the rationality of federal prosecutors' decisions to select some eligible offenders for prosecution under federal statutes that duplicate state criminal prohibitions.

I. FEDERALIZATION AND DISPARITY

A. FEDERALIZATION²⁹

Participants in the federalization debate commonly define the process as simply the enactment of federal legislation that allows prosecution in federal court of offenses that the states can also prosecute.³⁰ Although this definition gives a general sense of the process, it focuses exclusively on Congress' role, ignoring essential judicial contributions. Both Congress *and* the courts have played a substantial part in the expansion of federal criminal law.

1. *Legislative Involvement*

Not all federal criminal legislation gives rise to federalization concerns. First, some federal criminal laws govern conduct beyond the

29. For historical accounts of federalization, see, for example, 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 775-779 (1983) [hereinafter *ENCYCLOPEDIA*]; Baker, *supra* note 3; Beale, *supra* note 6, at 1278-82; Bradley, *supra* note 3, at 261; Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *HASTINGS L.J.* 1135, 1137-45 (1995); Maloney, *supra* note 3.

30. See, e.g., Little, *supra* note 5, at 1030 n.2 ("'Federalization of crime' is a term of art used . . . to describe congressional legislation that provides for federal jurisdiction over criminal conduct that could also be prosecuted by state or local authorities."); Chippendale, *supra* note 3, at 455 n.1 (stating that "federalization refers to the creation of federal offenses for criminal acts amenable to state and local prosecution").

territorial reach of state laws.³¹ Second, the subject matter of some federal criminal prohibitions does not concern the states. Federal criminal statutes that outlaw treason,³² conspiracies to defraud the United States,³³ and efforts to obstruct justice in federal courts³⁴ prohibit conduct that harms the nation or federal government exclusively³⁵ and thus safeguard distinct federal interests that state laws do not address.³⁶

Third, some federal statutes prohibit conduct that is the same as or similar to that which state law proscribes but, by definition, protect distinct federal interests. For example, federal law criminalizes assaults on federal agents "while engaged in or on account of the performance of official duties."³⁷ State criminal law may prohibit assaultive conduct generally, but the federal government has a unique interest in preventing and punishing assaults on its agents while they are performing official duties.³⁸ State laws that do not distinguish between the harm caused by assaults on private citizens and the harm caused by assaults on federal agents do not safeguard that distinct federal interest. When such interests are present, the federal government

31. The constitutional grant of congressional power "[t]o define and punish. . . Felonies committed on the high Seas," U.S. CONST. art. I, § 8, cl. 10, and to "exercise exclusive Legislation in all Cases whatsoever" involving certain federal property, *id.* cl. 17, have enabled Congress to provide for federal criminal jurisdiction over crimes committed within the "special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 7 (1994), which sometimes extends beyond the jurisdiction of individual states. *See, e.g.,* *United States v. Jenkins*, 734 F.2d 1322, 1325 (9th Cir. 1983) (exclusive federal jurisdiction over crime committed on federal military base), *cert. denied*, 469 U.S. 1217 (1985).

32. *See* 18 U.S.C. § 2381 (1996).

33. *See* 18 U.S.C. § 371 (1996).

34. *See, e.g.,* 18 U.S.C. § 1503 (1996) (jury-tampering in federal cases); § 1510 (obstruction of federal investigation); § 1512 (witness-tampering in federal cases); and § 1513 (retaliation against witnesses, victims, or informants in federal cases).

35. *See* Schwartz, *supra* note 1, at 66-67 (describing "self-defensive" federal crimes as promoting "[i]mportant values in terms of prestige of the central authority").

36. "Distinct" or "unique" federal interests differ from "important," "significant," or "substantial" federal interests. The former terms denote federal interests that are different than those protected by state laws; the latter terms express the importance of a federal interest, whether or not states share that interest.

37. 18 U.S.C. § 111(a)(1) (1996) describes the prohibited activity. 18 U.S.C. § 1114 (1996) lists the federal officers and employees protected by the prohibition.

38. *See* *United States v. Feola*, 420 U.S. 671, 683-84 (1975) (federal statute criminalizing assaults on federal officers does not require that assailant know that the victim is a federal officer because Congress may have wanted to provide a federal forum regardless of assailant's knowledge of victim's identity). *See also* Van Alstyne, *supra* note 3, at 1746 (noting that although states can prosecute counterfeiting as larceny by trick, "the interest of the United States—to protect its currency from debasement—is independent of, and not the same as the state's interest—to protect persons from a species of criminal fraud").

has good reason to apply its own substantive and procedural rules and to control the prosecution in its own courts, even though a state forum may be available.³⁹ Although enactment of this third category of federal criminal statutes arguably falls within the definition of federalization because these prohibitions overlap with state criminal laws,⁴⁰ even critics of federalization agree that cases involving distinct national or federal interests are properly the subject of federal criminal law.⁴¹

In contrast, many federal statutes duplicate state laws by prohibiting the same or similar conduct and enabling federal prosecutors to bring charges to protect interests no different than those that state laws address. Congress routinely enacts such "duplicative" federal legislation.⁴² For example, it has passed laws that prohibit drug

39. State criminal law may fail to address the distinct harm suffered by the federal government or the nation as a whole. For example, state law may impose a punishment that the federal government would deem insufficient to deter and punish harms to distinct federal interests. *See Feola*, 420 U.S. at 684 (asserting that federal prosecution of assaults on federal officers may be important to "insure uniformly vigorous protection of federal personnel, including those engaged in locally unpopular activity"). In addition:

If genuinely national interests are at stake, the controversies should not have to compete with local breaches of the peace crowding the calendar of a county court of quarter sessions. The judge who determines these controversies should be able to give them the time and consideration appropriate to matters of such gravity. He should be a specialist in devising solutions that grow out of an understanding of national objectives and a national point of view. The exigencies of the Department of Justice are also to be considered. It is easier to prepare cases for eighty-four district courts, now operating under uniform rules of criminal procedure, than to conduct proceedings in thousands of courts operating under scores of procedural codes.

Schwartz, *supra* note 1, at 67.

40. *See Little, supra* note 5, at 1072-73 (questioning why murder of President should not be prosecuted in state court).

41. *See LONG RANGE PLAN, supra* note 28, at 21 (stating that "[n]o one seriously disputes that conduct directly injurious to or affecting the federal government or its agents" should be the subject of federal law enforcement); Little, *supra* note 5, at 1036 (noting that federal crimes that protect unique federal interests "are not the topic of current federalization critiques").

42. I use the term "duplicative federal legislation" to signify federal criminal statutes that (1) prohibit the same or similar conduct as state criminal laws and (2) are susceptible to use as a means of protecting the same interests as state criminal laws. Professor Schwartz uses the term "auxiliary federal criminal law" to mean roughly the same thing. *See Schwartz, supra* note 1, at 70-73. I prefer the term "duplicative" because Schwartz's terminology suggests that the function of the overlapping federal law is to assist the states. As I explain later, use of duplicative federal laws can, in fact, achieve the opposite effect. *See infra* notes 269-70 and accompanying text. I refer to federal statutes that prohibit conduct beyond the territorial or substantive reach of state criminal laws and those that by definition protect interests distinct from those protected by state law as "nonduplicative."

trafficking,⁴³ firearms offenses,⁴⁴ certain forms of theft and embezzlement,⁴⁵ arson,⁴⁶ fraud committed by mail or telephone,⁴⁷ bank fraud,⁴⁸ robbery and extortion,⁴⁹ fraudulent use of credit cards,⁵⁰ and auto theft,⁵¹ all of which are subject to prosecution in state courts. Recently, Congress has added statutes that prohibit carjacking⁵² and domestic violence,⁵³ both of which are also within the purview of state law.⁵⁴ Although some duplicative federal crimes require proof of elements not present in the definition of state crimes, such as a connection to interstate commerce⁵⁵ or use of the mail,⁵⁶ I demonstrate that these elements do not ensure that prosecutions are limited to cases involving unique or significant federal interests.⁵⁷ To be sure, federal prosecutors do employ duplicative federal statutes in cases that involve distinct federal interests, such as prosecutions of national and international fraud and drug conspiracies, but they also can (and often do) use them when no such federal interests are at stake.⁵⁸ In short, there is nothing in the definitions of duplicative federal crimes that necessarily distinguishes conduct that will subject an offender to state criminal charges from conduct which gives rise to analogous federal charges.⁵⁹

43. See 21 U.S.C. § 841(a)(1) (1996).

44. See 18 U.S.C. §§ 921-924 (1996).

45. See *id.* § 659.

46. See *id.* § 844.

47. See *id.* §§ 1341, 1343.

48. See *id.* § 1344.

49. See *id.* § 1951.

50. See *id.* § 1644(a).

51. See *id.* § 2312.

52. See *id.* § 2119.

53. See *id.* § 2261.

54. For additional examples of duplicative federal laws, see Beale, *supra* note 2, at 979-80; John C. Jeffries, Jr. & Honorable John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1095-97 (1995).

55. See, e.g., 18 U.S.C. § 659 (1996) (theft or embezzlement from interstate shipments); *id.* § 1951 (robbery or extortion affecting interstate commerce).

56. See *id.* § 1341.

57. See *infra* Part I.A.2.b.

58. See *infra* Part III.C.

59. Congress also contributes to federalization in other ways. For example, in response to perceived crime problems, it passes criminal statutes susceptible to broad interpretation that can be used to prosecute conduct different than that which gave rise to the legislation. See, e.g., NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 51 (2d ed. 1993); Baker, *supra* note 3, at 500 (discussing "broadly drafted" federal criminal statutes). This phenomena is illustrated by criminal laws passed in response to concerns about organized crime and racketeering but which do not contain language limiting their application to those crime problems. See, e.g., 18 U.S.C. § 894 (1996) (antiloansharking statute); *id.* § 1951 (robbery and extortion). Congress further contributes to federalization by enacting federal

2. *Judicial Involvement*

The enactment of duplicative federal criminal legislation is only one step in the process of federalization. The judiciary has also contributed. First, it has interpreted the Constitution, particularly the Commerce Clause, to give Congress substantial latitude to enact federal criminal legislation. Second, it has broadly construed the jurisdictional elements of federal criminal statutes, allowing application of federal criminal legislation despite the absence of distinct or substantial federal interests.

a. *Constitutional interpretation: Perez to Lopez*: Because Congress lacks a general police power,⁶⁰ it must rely on its specifically enumerated powers to enact federal criminal law.⁶¹ Most commonly, it relies on its power to regulate interstate commerce.⁶² Without judicial blessing of congressional use of these powers, federalization cannot occur. Historically, courts have bestowed such blessings; they have routinely upheld duplicative federal criminal laws.

Most notably, in *Perez v. United States*,⁶³ the Supreme Court upheld a federal criminal antiloansharking law prohibiting collection of extensions of credit by extortionate means.⁶⁴ Although enacted under the Commerce Clause power, the antiloansharking statute does not

crimes with principal elements that are satisfied by proof of violations of state laws. *See, e.g., id.* §§ 1961-62 (federal racketeering statute proven in part by demonstrating "racketeering activity," which includes violations of state laws); *id.* §§ 1956, 1957 (federal money-laundering statutes proven in part by demonstrating "specified unlawful activity," which includes violations of state laws); *id.* § 1952 (Travel Act prohibits certain travel connected to "unlawful activity," which can be demonstrated by violations of state law).

60. *See United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1869); 2 *ENCYCLOPEDIA*, *supra* note 29, at 779.

61. *See Cushman*, *supra* note 3, at 291.

62. *See* 2 *ENCYCLOPEDIA*, *supra* note 29, at 779 (citing commerce power, power to tax, and postal power as those used to expand federal criminal jurisdiction); Landers, *supra* note 3, at 1259 (expansion of federal criminal law "has been fueled by the Commerce Clause").

63. 402 U.S. 146 (1971). *See generally Stern*, *supra* note 3.

64. Although the Supreme Court did not cite the specific statute at issue in *Perez*, the lower court opinion made clear that the defendant had been prosecuted for violating 18 U.S.C. § 894 (1970). *United States v. Perez*, 426 F.2d 1073, 1074 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971). Section 894 states in part:

Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means (1) to collect or attempt to collect any extension of credit, or (2) to punish any person for the nonrepayment thereof, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 891(7) defines "[a]n extortionate means [as] any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

require "that the conduct sought to be regulated have any connection whatever with commerce."⁶⁵ Furthermore, there was no proof that Perez's loansharking activity—the use of threats to extort increasingly large interest payments from a butcher who had borrowed money from him—had any connection to interstate commerce.⁶⁶ Despite this, the *Perez* Court concluded that the statute was a constitutional exercise of the commerce power and could be used to prosecute Perez because its enactment was supported by congressional findings that loansharking in the aggregate affected interstate commerce.⁶⁷ After *Perez*, federal criminal legislation, like other federal regulatory legislation, benefited from the Court's view that "[e]ven if a particular individual's activity has no perceptible interstate effect, it can be reached by Congress through regulation of that class of activity in general as long as that class, considered as a whole, affects interstate commerce."⁶⁸

Perez was an open invitation to Congress to federalize criminal law. It enabled Congress to extend federal criminal jurisdiction to any criminal activity that Congress found to have an effect on interstate commerce, even where such effect was purely a result of aggregated instances of local activity.⁶⁹ Justice Stewart, the lone dissenter in *Perez*, noted that the majority's rationale applies to "almost all criminal activity, be it shoplifting or violence in the streets."⁷⁰ Relying on *Perez*, lower federal courts have upheld legislation that allows federal prosecutions for drug trafficking⁷¹ and related offenses,⁷² participation in illegal gambling businesses,⁷³ and possession of a machine gun,⁷⁴ without a requirement that the government prove any connection to interstate commerce.⁷⁵

65. *Perez*, 426 F.2d at 1083 (Hays, J., dissenting).

66. See *Perez*, 402 U.S. at 147-48.

67. See *id.* at 154-57.

68. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting).

69. After *Perez*, one observer noted that "constitutional constraints on the growth of federal criminal law through the Commerce Clause are almost nonexistent." Baker, *supra* note 3, at 501.

70. *Perez*, 402 U.S. at 158 (Stewart, J., dissenting).

71. See 21 U.S.C. § 841(a)(1) (1996).

72. See, e.g., *id.* § 856 (establishment of drug manufacturing operation); *id.* § 863(a)(1) (sale of drug paraphernalia).

73. See 18 U.S.C. § 1955 (1996).

74. See *id.* § 922(o).

75. See, e.g., *United States v. Janus Indus.*, 48 F.3d 1548, 1555-56 (10th Cir. 1995) (drug paraphernalia); *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991) (possession of machine gun); *United States v. Visman*, 919 F.2d 1390, 1392 (9th Cir. 1990) (growing marijuana); *United*

Although *Perez* suggested that Congress has almost unlimited power to enact federal criminal legislation under the Commerce Clause, *United States v. Lopez*⁷⁶ recently gave notice that there are limits. In *Lopez*, the Court assessed the constitutionality of 18 U.S.C. § 922(q), a federal law criminalizing the possession of handguns near schools.⁷⁷ The statute, like the law upheld in *Perez*, did not require the government to prove "that the possession be connected in any way to interstate commerce."⁷⁸ By a 5-4 vote the Court determined that Congress exceeded the powers granted by the Commerce Clause when it enacted the statute.⁷⁹

In *Lopez*, the Court made clear that Congress could regulate a targeted activity only if it had a *substantial* effect on interstate commerce.⁸⁰ Other than this clarification of Commerce Clause doctrine, however, the *Lopez* Court did not question the validity of earlier decisions upholding federal regulations at the outer edges of the commerce power, such as the antiloansharking law in *Perez*. Rather, it found that the challenged gun law was different. Unlike other federal regulations that survived similar challenges, "[s]ection 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define

States v. Rodriguez-Camacho, 468 F.2d 1220, 1221 (9th Cir. 1972) (intrastate drug trafficking); *United States v. Ceraso*, 467 F.2d 653, 657-58 (3d Cir. 1972) (gambling); *United States v. Becker*, 461 F.2d 230, 233-34 (2d Cir. 1972) (gambling); .

76. 115 S. Ct. 1624 (1995). For a discussion of *Lopez*, see Deborah Jones Merritt, *Commerce*, 94 MICH. L. REV. 674 (1995).

77. Enacted as part of the Gun Free School Zones Act of 1990, the statute was codified at 18 U.S.C. § 922(q)(1)(A) when *Lopez* committed the offense. See *Lopez*, 115 S. Ct. at 1626. The statute provided that "[i]t shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." A "school zone" was defined as the grounds of or within 1,000 feet of the grounds of a school. See 18 U.S.C. § 921(a)(25). Violations of the statute were punishable by a prison term of up to five years, to run consecutive to any other term of imprisonment, and a fine. See *id.* § 924(a)(4). Despite the possible length of the sentence, violations were deemed to be misdemeanors. See *id.* Congress later recodified the statute at 18 U.S.C. § 922(q)(2)(A) (1996). See *infra* note 84.

78. *Lopez*, 115 S. Ct. at 1626.

79. "The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress '[t]o regulate Commerce . . . among the several States. . . ." *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3).

80. "[A]dmittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. . . . We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 1630 (citations omitted). For different perspectives on the meaning of "substantial" in this context, see Merritt, *supra* note 76, at 677-82.

those terms.”⁸¹ In addition, unlike other federal gun laws that the Court had determined to be proper exercises of the Commerce Clause power,⁸² “§ 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects . . . [or has] an explicit connection with . . . interstate commerce.”⁸³ Finally, the majority noted that there were no findings in either the legislation or its legislative history that gun possession near schools affects interstate commerce.⁸⁴ Much of the battle between the majority and dissenting opinions in *Lopez* is fought over the persuasiveness of these efforts to distinguish earlier decisions.⁸⁵

81. *Lopez*, 115 S. Ct. at 1630-31. The Court distinguished the ban on guns near schools from regulation of commercial activities such as intrastate coal mining, intrastate extortionate credit transactions, discrimination against potential customers at restaurants and hotels, and production and consumption of home-grown wheat—all federal legislation that the Court has upheld. See *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981); *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). It is not readily apparent why growing and consuming wheat is any more an “economic” or “commercial” activity than gun possession. In dissent, Justice Breyer questioned that distinction. He also contended that neither the race-based exclusion prohibited by the regulation in *McClung* nor the use of force criminalized by the antiloansharking statute in *Perez* were commercial activities. See *Lopez*, 115 S. Ct. at 1663-64 (Breyer, J., dissenting).

82. For example, in *United States v. Bass*, 404 U.S. 336 (1971), the Court tacitly concluded that former 18 U.S.C. § 1202(a) (repealed 1986), which prohibited felons from “receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm,” was a proper exercise of the commerce power.

83. *Lopez*, 115 S. Ct. at 1631. The *Lopez* Court also stressed that the definition and enforcement of criminal law is a function over which states exercise primary authority. See *id.* at 1631 n.3.

84. See *id.* at 1631-32. Conceding that absence of legislative findings alone is not fatal, the Court nonetheless remarked that such findings “would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye . . .” *Id.* at 1632. Congress later amended the statute, adding such findings. See *id.* at 1632 n.4. The findings are now codified at 18 U.S.C. § 922(q)(1) (1996). In *Lopez*, the Court considered only the constitutionality of the prefundings version of the statute. See *Lopez*, 115 S. Ct. at 1632 n.4.

85. For example, Justice Souter criticized the commercial/noncommercial distinction as similar to the now discredited distinction between direct and indirect effects on commerce. See *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting) (asking whether majority opinion “does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring.”). Justice Souter also contended that because federal commerce power is plenary, it cannot diminish in force merely because it touches an area, like criminal law, which is traditionally a state concern. See *id.* at 1655. He also argued that under rational basis review, the presence of explicit legislative findings may be helpful to the Court but their absence cannot affect the constitutionality of the statute. See *id.* at 1655-56. Justice Breyer added that there is no “principled distinction” between “commercial” and “non-commercial” activities that enables the Court to distinguish *Lopez* from earlier decisions. *Id.* at 1663-64 (Breyer, J., dissenting).

Although the case has received considerable attention,⁸⁶ at present it appears that *Lopez* will have little impact on federalization of criminal law.⁸⁷ Lower courts have almost uniformly distinguished *Lopez* rather than applying it to invalidate criminal laws passed pursuant to the Commerce Clause.⁸⁸ Because many duplicative federal criminal statutes contain the sort of jurisdictional element requiring proof of a connection to interstate commerce that 18 U.S.C. § 922(q) lacked,⁸⁹ they will survive *Lopez*.⁹⁰ Of the few Commerce Clause-dependent federal statutes that do not have such a jurisdictional element, the federal drug trafficking prohibition of 21 U.S.C. § 841(a)(1) is the most significant.⁹¹ It too will weather *Lopez*.⁹² Unlike possession of a gun near a school, drug trafficking is inherently commercial,

86. The day after the Supreme Court decided *Lopez*, the *New York Times*, *Los Angeles Times*, and *Washington Post* ran front page stories about the decision. See *High Court Kills Law Banning Guns in a School Zone*, N.Y. TIMES, Apr. 27, 1995, at A1; *Supreme Court Rejects Federal School Gun Ban*, L.A. TIMES, Apr. 27, 1995, at A1 ("ruling with broad implications for constitutional law and with potentially far-reaching impact on domestic social policy"); *Ban on Guns Near Schools is Rejected; Congress Exceeds Commerce Power, High Court Holds*, WASH. POST, Apr. 27, 1995, at A1 (quoting Professor Glenn Harland Reynolds: "This is quite possibly the most important decision for the decade in how the country does business."). The *Michigan Law Review* devoted a symposium to *Lopez*. See *Symposium: Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995); see also Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1 (1996).

87. See Judge Louis H. Pollak, *Symposium: Reflections on United States v. Lopez: Foreword*, 94 MICH. L. REV. 533, 553 (1995) (stating that "there is less in *Lopez* than meets the eye.").

88. See, e.g., *United States v. Gomez*, 87 F.3d 1093, 1095 n.2 (9th Cir. 1996) ("Since *Lopez*, defendants have brought numerous Commerce Clause challenges to federal criminal statutes, most of which have not succeeded."); Merritt, *supra* note 76, at 712-28 (discussing lower court opinions).

89. See, e.g., 18 U.S.C. § 659 (1994) (prohibiting theft from or of interstate shipments); *id.* § 844(i) (criminalizing arson of real or personal property "used in" or "affecting" interstate commerce); *id.* § 922(g) (prohibiting felons and others persons in restricted class from shipping or transporting firearms in interstate commerce, possessing firearms in or affecting interstate commerce, and receiving a firearm that was shipped or transported in interstate commerce); *id.* § 1343 (prohibiting fraud by use of "wire, radio, or television communication in interstate or foreign commerce"); *id.* § 1951 (prohibiting obstructing or affecting "commerce" by robbery or extortion). See also *Lopez*, 115 S. Ct. at 1664 (Breyer, J., dissenting) (noting that "at least" 25 criminal statutes of federal criminal statutes contain the words "affecting commerce"); Merritt, *supra* note 73, at 696 (asserting that many federal statutes require the government to prove a link to interstate commerce). Although some federal statutes require only that the criminalized activity "affect commerce," "commerce" is defined to include interstate commerce and to exclude commerce that is wholly intrastate. See, e.g., 18 U.S.C. § 1951(b)(3) (1996).

90. See *supra* notes 82-83 and accompanying text.

91. Federal appellate courts have uniformly rejected *Lopez*-based challenges to the federal drug trafficking statute. See, e.g., *United States v. Kim*, 94 F.3d 1247, 1249-50 (9th Cir. 1996) (citing cases).

a factor the *Lopez* Court deemed critical to its constitutional analysis.⁹³ Also, like the constitutionally valid statute in *Perez*, and unlike the invalid provision in *Lopez*, section 841(a)(1) is buttressed by congressional findings that even local possession and distribution of drugs "have a substantial and direct effect upon interstate commerce."⁹⁴

Nor does *Lopez* appear to bar future enactment of duplicative federal legislation. In this regard, perhaps the most significant aspect of *Lopez* is what the Court did not do: It did not cast immediate doubt upon the continuing vitality of *Perez*, but instead it strained to harmonize its ruling with its earlier decisions.⁹⁵ Thus, as long as a regulated activity can be characterized as "commercial" or Congress includes a jurisdictional element requiring proof of a connection to interstate commerce in its legislation, it seems likely that Congress can continue to federalize criminal law.⁹⁶ This is particularly so if Congress buttresses the legislation with findings that the prohibited activity, in the aggregate, has a detrimental impact on interstate commerce.⁹⁷ Ultimately, *Lopez* may have less impact on constitutional Commerce Clause jurisprudence than on statutory interpretation.

92. See, e.g., Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained and Other Lessons In Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 740 (stating that approximately 40% of federal criminal cases are drug cases); Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 19 (1996) ("Drug control has become the dominant business of federal criminal justice."). For a list of other federal statutes that Congress enacted pursuant to the Commerce Clause, but which lack explicit jurisdictional elements, see *supra* notes 71-74 and accompanying text.

93. See *Lopez*, 115 S. Ct. at 1630-31.

94. 21 U.S.C. § 801(3) (1996).

95. *Lopez* repeatedly cites *Perez* and distinguishes the antiloansharking law from the ban on guns near schools. See *Lopez*, 115 S. Ct. at 1629-31; see also Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 37 (1996) (noting that *Lopez* "did not overrule a single [Supreme Court] commerce clause decision").

96. I use the term "likely" because the Court did not make clear the extent to which the Commerce Clause makes any single factor that it discusses in *Lopez* either necessary or sufficient. For a thorough discussion of factors that may have played a role in the *Lopez* decision and a means of addressing their importance, see Merritt, *supra* note 76.

97. Of course, *Lopez* may be only the Court's initial assault on Congress' liberal use of the Commerce Clause, foreshadowing more severe restrictions in the future. However, such a development is unlikely. A significant expansion of *Lopez* could jeopardize certain economic and antidiscrimination statutes passed pursuant to the Commerce Clause that have become fixtures in American society. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 241 (1964) (provisions of Civil Rights Act of 1964 preventing racial discrimination by restaurants, motels, and other privately owned places of public accommodation); *United States v. Darby*, 312 U.S. 100 (1941) (minimum wage and maximum hour

b. *Statutory interpretation of jurisdictional elements*: Because jurisdictional elements requiring proof of some connection to interstate commerce are common in federal criminal laws⁹⁸ and because Congress may seek to insulate future legislation from *Lopez*-inspired invalidation by including such elements,⁹⁹ the way in which courts interpret those elements is critical to federalization of criminal law. Restrictive interpretation, requiring proof that the conduct in a particular case has a significant connection to interstate commerce, could operate to limit application of federal statutes to cases involving distinct or substantial federal interests. Although the Supreme Court has given jurisdictional elements some content,¹⁰⁰ both the Supreme Court and lower federal courts have construed them so liberally that the statutes in which they appear apply to cases in which there are no distinct or substantial federal interests.

Consider, for example, a jurisdictional element that apparently would have saved the gun law in *Lopez*, one "which might limit its reach to a discrete set of firearm possessions that additionally [would] have an explicit connection with or effect on interstate commerce."¹⁰¹

regulations to protect employees). Justice Thomas seems to be the only member of the Court inclined to take the narrow Commerce Clause path. See *Lopez*, 115 S. Ct. at 1650 n.8 (Thomas, J., concurring) ("I might be willing to return to the original [more restrictive] understanding [of the Commerce Clause]. . . ."). Two members of the majority, Justices Kennedy and O'Connor, clearly are unwilling to do so. See *id.* at 1634, 1637 (Kennedy, J., concurring) (characterizing the holding in *Lopez* as "necessary though limited" and noting that *Heart of Atlanta, McClung, Perez*, "and like authorities . . . are not called in question by our decision today"). The remaining justices who signed the majority opinion appear more intent on warning Congress about the future than rethinking the past. "Admittedly, some of our prior cases have taken long steps down [the] road [to a general federal police power]. . . but we decline here to proceed any further." *Id.* at 1634. See also Brickey, *supra* note 95, at 37 (describing the *Lopez* opinion as "judicial saber rattling").

98. See *supra* note 89.

99. Indeed, Congress recently enacted a criminal prohibition identical to the one that the Court struck down in *Lopez* except for the inclusion of a jurisdictional element, requiring that offenders possess "a firearm that has moved in or that otherwise affects interstate or foreign commerce . . ." 18 U.S.C.A. § 922(q)(2)(A) (1996). See Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 369-70 (1997).

100. See *Rewis v. United States*, 401 U.S. 808 (1971) (rejecting interpretation of the Travel Act, 18 U.S.C. § 1952, which prohibits interstate travel in furtherance of certain criminal activity, to allow conviction of operators of an illegal lottery merely because customers traveled from outside of the state to place wagers); *United States v. Bass*, 404 U.S. 336 (1971) (interpreting former 18 U.S.C. app. § 1202(a) to require proof of some interstate commerce connection in prosecutions for receipt and possession of a firearm by restricted classes of persons).

101. *Lopez*, 115 S. Ct. at 1631.

Section 922(g), a principal federal firearms law¹⁰² which makes it illegal for certain classes of persons such as convicted felons to possess or receive firearms or ammunition, contains such an element.¹⁰³ It prohibits possession of only those firearms or ammunition "in or affecting commerce," and receipt if the firearm or ammunition "has been shipped or transported in interstate or foreign commerce."¹⁰⁴ Both the Supreme Court and lower courts have interpreted the "in commerce" language to require only that the firearm or ammunition have traveled in interstate commerce at any time before the defendant receives or possesses it.¹⁰⁵ Thus, federal law criminalizes firearm possession by prohibited persons except in the unlikely event that the gun, the ammunition, and the gunpowder¹⁰⁶ are all manufactured in and have never left the state in which the defendant possesses them.

102. Section 922(g) is the result of a merger of its predecessors, 18 U.S.C. app. §§ 1202(a)-(b) and 18 U.S.C. § 922(d), (g)-(h). The predecessor statutes were similar but not identical in coverage. See *Bass*, 404 U.S. at 341-42 (describing differences). In 1986, Congress repealed § 1202 and created § 922(g) in its present form as part of the Firearms Owners Protection Act, Pub. L. No. 99-308, § 102(6)(D), 100 Stat. 449, 452 (1986); H.R. REP. NO. 99-495 (1986), reprinted in 1986 U.S.C.C.A.N. 1327, 1349. See *United States v. Wallace*, 889 F.2d 580, 583 (5th Cir. 1989) (describing history of § 922(g)). For a thorough discussion of the history of federal firearms legislation, see *United States v. Lopez*, 2 F.3d 1342, 1348-60 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

103. Section 922(g) also prohibits fugitives from justice, drug users and addicts, persons adjudged mentally defective or committed to mental institutions, illegal aliens, persons dishonorably discharged from the Armed Forces, persons who have renounced citizenship, and persons subject to certain restraining orders from shipping, transporting, and possessing firearms or ammunition in interstate or foreign commerce. See *id.* § 922(g)(2)-(8).

104. Although the "possess" clause of § 922(g) refers only to "commerce," not "interstate commerce," courts interpret that clause to require a connection between possession and interstate or foreign commerce. See *Wallace*, 889 F.2d at 583; *United States v. Gillies*, 851 F.2d 492, 493 (1st Cir. 1988).

105. In dicta in *Bass*, 404 U.S. at 350, the Court interpreted language in a similar federal firearms statute, former 18 U.S.C. App. § 1202(a), which precluded felons and others from receiving a firearm "in commerce or affecting commerce," to allow conviction "if [the prosecution] demonstrates that the firearm received has previously traveled in interstate commerce." The Court acknowledged that "[t]his is not the narrowest possible reading of the statute . . ." *Id.* at 350-51. In *Scarborough v. United States*, 431 U.S. 563, 575 (1977), the Court held that a defendant violates § 1202(a) by possessing a firearm that has traveled in interstate commerce at any time before possession. The Court recognized that this requires only a "minimal nexus" between the possession and interstate commerce. *Id.* at 577. In *Barrett v. United States*, 423 U.S. 212 (1976), the Court held that the prosecution can prove a violation of 18 U.S.C. § 922(h), a predecessor to § 922(g), by demonstrating that the defendant purchased a firearm that had moved in interstate commerce at any time before his purchase, even if the movement was simply from the manufacturer to the dealer who later sold the firearm. Lower courts have followed that lead when interpreting § 922(g). See, e.g., *United States v. Fitzhugh*, 984 F.2d 143, 146 (5th Cir. 1993); *United States v. Carter*, 981 F.2d 645, 648 (2d Cir. 1992); *Wallace*, 889 F.2d at 583-84; *United States v. McCarty*, 862 F.2d 143, 145 (7th Cir. 1988).

106. The definition of "ammunition" includes "propellant powder designed for use in any firearm." 18 U.S.C. § 921(a)(17)(A) (1994).

Although the "in commerce" jurisdictional element means something, it doesn't mean much.¹⁰⁷ The distinction between those persons whom the statute reaches and those who fortuitously escape coverage has nothing to do with any discernible federal interest.¹⁰⁸

The same holds true for another commonly used federal jurisdictional element: the requirement that some aspect of the criminal activity affect interstate or foreign commerce.¹⁰⁹ Relying on the Supreme Court opinions interpreting "affecting interstate or foreign

107. See Pollak, *supra* note 87, at 549-50 ("The *Lopez* opinion does not discuss how easy it is to add the necessary 'jurisdictional element,'" which may be seen as a "lawyers' gimmick."). The prosecution could have satisfied such a jurisdictional element in *Lopez*. The parties stipulated that a federal agent would testify that the gun had been manufactured outside of Texas. See *Lopez*, 2 F.3d at 1368. Thus, although the Supreme Court was sufficiently troubled by the implications of a federal prosecution of *Lopez* that it determined for the first time in almost 60 years that Congress had exceeded its Commerce Clause powers, apparently it would have affirmed the conviction had Congress included the virtually meaningless requirement that the government prove that the gun traveled across state lines at any time before *Lopez* possessed it. But see Merritt, *supra* note 76, at 696 n.88 (contending that the "in commerce" requirement is a meaningful standard).

108. See *United States v. Morales*, 902 F.2d 604, 607 (7th Cir. 1990) ("What the federal interest is in punishing the possession of a firearm by a person convicted of Illinois felonies escapes us . . ."); Brickey, *supra* note 95, at 30 ("In commerce" basis for exercise of federal jurisdiction "enables the federal government to assert criminal jurisdiction over virtually any state crime by tacking on marginally relevant jurisdictional elements."); Merritt, *supra* note 76, at 717-18 (describing link to interstate commerce as "tenuous" and "weak").

109. See generally *Maloney*, *supra* note 3, at 1796 ("The Commerce Clause has become, in recent years, the foundation for an expanding federal criminal jurisdiction over intrastate activities, on the theory that such activities 'affect interstate commerce.'").

The Supreme Court has also been generous when construing the "mailing" element of 18 U.S.C. § 1341 (1996), the federal mail fraud statute, which Congress enacted pursuant to the postal power granted by U.S. CONST. art. I, § 8, cl. 7. The statute, which criminalizes "scheme[s] devised or intending to defraud or for obtaining money or property by fraudulent means" requires proof of "use or causing the use of the mail in furtherance of the fraudulent scheme." See § 1341; Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 226 (1992). In *Schmuck v. United States*, 489 U.S. 705, 715 (1989), the Court held that the "in furtherance" component of the mailing requirement is satisfied if "the mailing is part of the execution of the scheme as conceived by the perpetrator at the time. . . ." Thus, the Court determined that the statute applied to the defendant's sale of automobiles to retail dealers after he had "rolled back" the odometers because it was essential to the scheme that the defrauded dealers would mail title application forms to the state Department of Transportation after they had purchased the automobiles. See *id.* Thus, mailings initiated by the victims after they had been defrauded were sufficient to satisfy the "mailing" requirement.

Writing for four members of the Court in dissent, Justice Scalia contended that the mail fraud statute was not meant to create "a general federal remedy against fraudulent conduct, with the use of the mails as the jurisdictional hook," *id.* at 722-23, implying that the majority had done just that. One commentator agrees that the *Schmuck* Court "effectively has taken the crime well beyond its post-office origin. The Court has provided prosecutors with a more accessible statute to use for crimes involving fraud." See Podgor, *supra*, at 262-63.

For more on the development of the mail fraud statute and its role as one of the first federal crimes to duplicate state criminal prohibitions, see Miner, *Federal Courts*, *supra* note 3, at 120-21;

commerce" as an expression of congressional intent "to exercise its full power under the Commerce Clause,"¹¹⁰ lower federal courts have held that proof of even minimal or tangential effects on interstate commerce are sufficient to satisfy this element¹¹¹ in cases involving robbery,¹¹² bribery and extortion,¹¹³ arson,¹¹⁴ racketeering,¹¹⁵ and

Schwartz, *supra* note 1, at 65; Wallace, *Road to Ruin*, *supra* note 3. See generally Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980).

110. Russell v. United States, 471 U.S. 858, 859 (1985). See also *Scarborough*, 431 U.S. at 572. In *Stirone v. United States*, 361 U.S. 212 (1960), the Court interpreted the language "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce" in the Hobbs Act, 18 U.S.C. §1951, to "manifest[] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Id.* at 215 (emphasis added). Although the italicized language does not appear in other federal statutes, the Court has reached the same conclusion when Congress uses the words "affecting interstate or foreign commerce."

111. Under *Lopez*, as a matter of constitutional interpretation, Congress can regulate an activity pursuant to its Commerce Clause powers only if the activity, if aggregated, has a substantial effect on interstate commerce. See *supra* note 80 and accompanying text. However, when considering whether the facts in a particular case satisfy an "affecting commerce" jurisdictional element in a federal criminal statute, lower federal courts seem satisfied with minimal, as opposed to "substantial," effects. See *infra* notes 112-116 and accompanying text. *Lopez* has prompted some lower courts to rethink such a generous view of the jurisdictional element. See *infra* note 120 and accompanying text.

112. See, e.g., *United States v. Zeigler*, 19 F.3d 486 (10th Cir. 1994) (robberies of gas stations, restaurants, and food stores for amounts as little as \$160 sufficient for federal jurisdiction because they deplete assets that may have been used in interstate commerce); *United States v. Brown*, 959 F.2d 63 (6th Cir. 1992) (robbery of small tavern that purchased goods from distributors who in turn purchased them from out-of-state); *United States v. Jarrett*, 705 F.2d 198 (7th Cir. 1983) (robbery of jewelry store in which \$2,000 of the total amount taken was proven to affect interstate commerce); *United States v. Caldarazzo*, 444 F.2d 1046 (7th Cir. 1971) (robbery of jewelry salesman who was carrying property of various businesses involved in interstate commerce). See also *Merritt*, *supra* note 76, at 725 ("Courts have readily concluded that extortion or robbery affects commerce whenever it targets a business purchasing supplies from other states, serving customers in other states, or otherwise operating in interstate commerce."). But see *United States v. Quigley*, 53 F.3d 909 (8th Cir. 1995) (robbery of money to be used to purchase beer not sufficient to show effect on interstate commerce); *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1986 (1995) (robbery in which defendant took personal car that victim used to attend business meetings and from which victim made business-related telephone calls not sufficient).

113. See, e.g., *United States v. Stillo*, 57 F.3d 553 (7th Cir.), *cert. denied*, 116 S. Ct. 383 (1995) (state judge's agreement to accept a bribe from an attorney who was working with FBI sufficient for federal jurisdiction because if the attorney had not been working with the government, the bribe would have depleted the law firm's assets that could have been used to purchase goods in interstate commerce); *United States v. Shields*, 999 F.2d 1090 (7th Cir. 1993) (state judge's acceptance of bribe was sufficient under theory of "depletion of assets otherwise available for interstate purchases"); *United States v. Pascucci*, 943 F.2d 1032 (9th Cir. 1991) (extortion threat regarding disclosure of marital infidelity was sufficient because the defendant threatened to tell the victim's employer who was engaged in interstate commerce); *United States v. Frasch*, 818 F.2d 631 (7th Cir. 1987) (extortion from off-track betting parlor set up as government sting operation was sufficient because government operation purchased goods in interstate commerce); *United States v. Davis*, 707 F.2d 880 (6th Cir. 1983) (sheriff's extortion from deputy sheriffs was

other criminal activity.¹¹⁶ As the Sixth Circuit noted in conjunction with 18 U.S.C. § 1951, a federal statute with an "affecting commerce" requirement: "Given the Hobbs Act's undeniably broad reach, the

sufficient because the victims were receiving federal funding); *United States v. Price*, 617 F.2d 455 (7th Cir. 1979) (extortion from a contractor was sufficient because he purchased copper wire that had moved in interstate commerce).

114. See, e.g., *Russell*, 471 U.S. at 858 (arson of vacant rental property sufficient for federal jurisdiction); *United States v. Ryan*, 41 F.3d 361 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995) (closed commercial property that had received utility services from out-of-state company sufficient); *United States v. Menzer*, 29 F.3d 1223 (7th Cir. 1994) (residence used for business sufficient); *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994) (mobile home that received electricity from interstate power grid sufficient); *United States v. Turner*, 995 F.2d 1357 (6th Cir. 1993) (vacant rental property sufficient); *United States v. Shively*, 927 F.2d 804 (5th Cir. 1991) (arson of residential property and vehicle sufficient due to minimal ties to victim's business); *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990) (residential property heated by out-of-state natural gas sufficient); *United States v. Medeiros*, 897 F.2d 13 (1st Cir. 1990) (commercial site used for law enforcement sting operation sufficient); *United States v. Mayberry*, 896 F.2d 1117 (8th Cir. 1990) (temporarily closed sawmill sufficient); *United States v. Doby*, 872 F.2d 779 (7th Cir. 1989) (residence containing rental unit sufficient); *United States v. Shriver*, 838 F.2d 980 (8th Cir. 1988) (bar closed due to earlier firebombing sufficient); *United States v. Grossman*, 608 F.2d 534 (4th Cir. 1979) (backhoe that had previously moved in interstate commerce and was financed and insured by out-of-state companies sufficient); *United States v. Sweet*, 548 F.2d 198 (7th Cir. 1977) (local tavern sufficient).

Before the Supreme Court decided *Russell*, some courts gave the arson statute a more restricted reading. See *United States v. Mennuti*, 639 F.2d 107 (2d Cir. 1981) (no federal jurisdiction over arson of residential property); *United States v. Monholland*, 607 F.2d 1311 (10th Cir. 1979) (no federal jurisdiction over firebombing of state judge's car). Post-*Russell* cases have questioned whether those earlier decisions survive. See, e.g., *Shively*, 927 F.2d at 808; *Stillwell*, 900 F.2d at 1107. But see *United States v. Voss*, 787 F.2d 393 (8th Cir. 1986) (post-*Russell* case finding no federal jurisdiction over residential arson despite insurance coverage from out-of-state company).

Some courts have concluded that *Lopez* requires a narrower view of the jurisdictional requirement in the federal arson statute. See *infra* note 120.

115. See, e.g., *United States v. Muskovsky*, 863 F.2d 1319 (7th Cir. 1988) (interstate telephone calls by prostitution ring to get credit card approval sufficient for federal jurisdiction even though FBI operated credit card company); *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981) (minimal effect on interstate commerce sufficient); *United States v. Barton*, 647 F.2d 224, 233 (2d Cir. 1981) (asserting that the RICO statute "has an even more expansive jurisdictional predicate than does" the federal arson statute).

116. See, e.g., *United States v. Nukida*, 8 F.3d 665, 670-72 (9th Cir. 1993) (rejecting requirement of substantial effect on interstate commerce for purposes of federal product-tampering prosecution). See also *United States v. Baker*, 82 F.3d 273 (8th Cir.), *cert. denied*, 117 S. Ct. 538 (1996) (victim's use of ATM machine to obtain money to pay police officer to avoid arrest satisfied Travel Act requirement that facility in interstate commerce be used to facilitate extortion even though transaction triggered an intrastate transfer of funds). In *United States v. Grey*, 56 F.3d 1219, 1223-26 (10th Cir. 1995), the court acknowledged that a minimal effect on interstate commerce is sufficient to satisfy the "affecting interstate commerce" element of 18 U.S.C. § 1956, the federal money-laundering statute, but found the evidence insufficient to meet that low standard. In cases involving attempts to violate federal law, the mere "realistic probability" of an effect on interstate commerce is sufficient for federal jurisdiction. See, e.g., *Shields*, 999 F.2d at 1098; *United States v. Peete*, 919 F.2d 1168, 1174-75 (6th Cir. 1990).

United States could in theory prosecute virtually every would-be thief. . . . no matter how trivial the amount at issue."¹¹⁷ That comment aptly characterizes the insignificance of such jurisdictional elements.

It is with regard to interpretation of such elements that *Lopez* may have its most pronounced impact.¹¹⁸ *Lopez* held that in order for Congress to be able to regulate an activity by use of its Commerce Clause power, the activity must "substantially effect" interstate commerce.¹¹⁹ Because "affecting commerce" jurisdictional elements express the outer reach of congressional Commerce Clause power, courts may determine that the government must prove that the alleged criminal activity in individual cases has a substantial effect on interstate commerce in order to satisfy such jurisdictional elements.¹²⁰ This would constitute a significant change in existing doctrine, precluding the federal government from using proof of a minimal affect on interstate commerce as a jurisdictional hook to support federal prosecution.

Nonetheless, *Lopez* is far from an antidote for federalization.¹²¹ As a matter of constitutional interpretation, it most likely leaves untouched existing and future duplicative federal statutes that either include jurisdictional elements or pertain to activity that can be characterized as "commercial." Even if it does lead to narrower statutory interpretation of "affecting commerce" jurisdictional elements, *Lopez* will not serve as a limit in three of the most significant areas of

117. *United States v. Brown*, 959 F.2d 63, 68 (6th Cir. 1992).

118. *See* Merritt, *supra* note 76, at 727-28.

119. *See* *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995).

120. *See* *United States v. Gomez*, 87 F.3d 1093, 1094-96 (9th Cir. 1996); *United States v. Pappadopoulos*, 64 F.3d 522, 524-28 (9th Cir. 1995) (*Lopez* requires proof of substantial impact on interstate commerce in arson case). *See also* *United States v. Denali*, 73 F.3d 328 (11th Cir. 1996) (*per curiam*) (same). *But see* *United States v. Flaherty*, 76 F.3d 967 (8th Cir. 1996) (*Lopez* not applicable to federal arson statute because arson statute has a jurisdictional element); *United States v. Stillo*, 57 F.3d 553, 558 n.2 (7th Cir.), *cert. denied*, 116 S. Ct. 383 (1995) ("The [*Lopez*] Court did not call into question the Hobbs Act which—unlike the school gun ban—is aimed at a type of economic activity, extortion, and contains an express jurisdictional element. Nor did the *Lopez* decision undermine this Court's precedents that minimal potential effect on [interstate] commerce is all that need be proven to support a conviction."); *United States v. Grey*, 56 F.3d 1219, 1225-26 (10th Cir. 1995) (post-*Lopez* decision holding that proof of minimal effect sufficient under money-laundering statute).

121. *But see* Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 809 (1996) ("*Lopez* could be profound in breaking, and even reversing, the overfederalization of criminal law.").

overlapping federal jurisdiction: drug, gun, and fraud cases.¹²² The principal federal drug statute has no jurisdictional element for courts to construe more narrowly.¹²³ The principal federal firearms statute, 18 U.S.C. §922(g), allows for federal prosecution when the firearm has moved in interstate commerce without proof of any effect on interstate commerce.¹²⁴ Similarly, none of the principal duplicative fraud statutes require proof of an effect on interstate commerce.¹²⁵

B. DISPARATE TREATMENT

Although the substance of federal criminal law has come to duplicate much of state criminal law, the procedures that apply and the sentences that convicted defendants receive and serve in the federal criminal justice system are often far different than those encountered in state courts. Notwithstanding some significant exceptions,¹²⁶ defendants typically fare considerably worse when prosecuted in federal court. In fact, differences between federal and state law that favor federal prosecutions are most striking in cases involving frequently charged duplicative federal statutes, like drug and firearms prosecutions. As a result, the disparity between federal and state prosecution

122. See Little, *supra* note 5, at 1043-46 (contending that much of the concern with federalization involves an increase in federal gun and drug prosecutions); Bowman, *supra* note 92, at 733 & n.190 (fraud and drug cases make up over half of federal cases).

123. See 21 U.S.C. §841(a)(1) (1996).

124. The Court recognizes "three broad categories of activity that Congress may regulate under its commerce power: . . . use of the channels of interstate commerce[,] . . . the instrumentalities of interstate commerce, or persons or things in interstate commerce, . . . [and] activities having a substantial relation to interstate commerce." *Lopez*, 115 S. Ct. at 1629-30 (citations omitted). *Lopez* applies only to statutes that regulate the third category of activity. See *id.* at 1630. In a case decided less than a week after *Lopez*, the Court clearly held that even if there is insufficient evidence that the criminal activity satisfies an "affecting commerce" requirement in a federal statute, sufficient proof to satisfy a statutorily defined "alternate criterion" for federal jurisdiction can sustain a conviction. See *United States v. Robertson*, 115 S. Ct. 1732, 1733 (1995) (per curiam). Because 18 U.S.C. § 922(g) (1996) allows for conviction if the gun has moved in interstate commerce, see *supra* notes 101-108 and accompanying text, *Lopez* is likely to have little if any effect on its application. See *Pappadopoulos*, 64 F.3d at 527-28 (proof that the gun is an article or good in commerce is sufficient); *United States v. Hanna*, 55 F.3d 1456, 1462 n.2 (9th Cir. 1995).

125. The mail fraud statute, 18 U.S.C. § 1341 (1996), is based primarily on the postal power. The only exception is its application to mailings conducted by private companies, such as the United Parcel Service, that do business in interstate commerce. See *id.* The wire fraud statute, 18 U.S.C. § 1343 (1996), requires only that the fraud be "transmit[ed] or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce," whether or not there is any effect on interstate commerce. The bank fraud statute, 18 U.S.C. § 1344 (1996), does not require proof of any connection to interstate commerce.

126. See *infra* note 128.

is a hallmark of federalization. Without attempting to provide an exhaustive list,¹²⁷ I will describe five ways in which defendants receive less favorable treatment in federal court than state court.¹²⁸

First, the Federal Bail Reform Act of 1984 is more likely to result in pretrial detention without bail than state law.¹²⁹ Unlike some state statutes, federal law allows detention based solely on a prediction of dangerousness.¹³⁰ In addition, unlike state laws, federal law imposes a rebuttable presumption that defendants charged with most federal drug felonies and some firearms offenses should be detained without

127. For additional examples, see Beale, *supra* note, 2 at 997 & n.70 (discussing "procedural rights related to joinder, severance, and pretrial discovery"); Jeffries & Gleeson, *supra* note 54, at 1103-1125 (describing admissibility of accomplice testimony, investigative powers of federal grand jury, and ability to use harsh sentences as means of obtaining cooperation).

128. This comparison is subject to two objections. First, one might question why there should be concern for those prosecuted in federal court even if there is a difference between treatment that works to the disadvantage of federally prosecuted defendants. That is, it is possible to consider federal prosecution to be the "norm" and to conclude that those who escape federal prosecution are simply lucky. I reject this contention because both historically, *see, e.g.*, Brickey, *supra* note 29, at 1172 ("The original role of federal criminal law was auxiliary to that of the states."), and numerically, *see infra* notes 176-177 and accompanying text, state prosecution is the "norm." Second, a critic could correctly note that in some critical areas, like jury size and nonunanimity, defense discovery obligations, and sentencing of recidivist felons, state law is less favorable to criminal defendants than federal law. Perhaps the most noteworthy example is California's "three-strikes-and-you're-out" statute, requiring draconian sentences for recidivist felons. If so, why focus on the disadvantages of federal law? My principal reason for doing so is that federal prosecutors, who typically have more freedom to select a few defendants for prosecution than do their state counterparts, *see infra* Part II.C., can exploit those differences when choosing which offenders to prosecute in federal court. If federal law is advantageous, they can prosecute the case; if not, they can have the state prosecute the case.

129. The federal law is codified at 18 U.S.C. §§3142-3156 (1996).

130. The federal bail statute, 18 U.S.C. § 3142(e) (1996), requires pretrial detention if, after a hearing, a judicial officer finds that no conditions of pretrial release "will reasonably assure . . . the safety of any other person and the community." Although many state bail laws do allow consideration of future dangerousness, some do not allow consideration of that factor. *Cf. YALE KAMISAR, WAYNE R. LAFAYE & JERALD H. ISRAEL, MODERN CRIMINAL PROCEDURE* 877 (8th ed. 1994) (reporting that "most [states] permit some consideration of the defendant's dangerousness in the pretrial release determination"). *See also* BARBARA GOTTLIEB, *PUBLIC DANGER AS A FACTOR IN PRETRIAL RELEASE: A COMPARATIVE ANALYSIS OF STATE LAWS* (1985); Michael W. Youtt, Note, *The Effect of Salerno v. United States on the Use of State Preventive Detention Legislation: A New Definition of Due Process*, 22 GA. L. REV. 805, 810-811 (1988). Some of the states that do allow consideration of dangerousness require that the defendant first have a prior conviction or be on pretrial release, probation, or parole at the time of the subject offense. *See id.* at 811-12. Federal law contains no such restriction.

Of course, in those states that do not have statutes that specifically allow pretrial detention based on a finding of dangerousness, judges may nonetheless consider dangerousness when setting bail. *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* §20.03 (3d ed. 1993); Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 7 (1989) (discussing judges setting high bails for dangerous felons and recidivists as a method of achieving "sub rosa detention").

bail as both dangers to the community and flight risks.¹³¹ These differences likely account, in part, for the fact that in 1992, approximately fifty percent of federal drug trafficking defendants were detained or unable to post bail pending disposition of their cases¹³² compared to thirty-five percent of drug trafficking defendants charged in state courts in the seventy-five largest counties.¹³³ The increased likelihood of pretrial incarceration in federal court is significant for a variety of reasons other than the loss of liberty. It can hamper efforts to prepare for trial and may cause a defendant to serve most or all of his sentence without being found guilty.¹³⁴

Second, federal law often gives defendants less access to pretrial discovery than does state law.¹³⁵ The law governing disclosure of witness statements is a telling example. Under the federal Jencks Act, the prosecution need only disclose existing verbatim, substantially verbatim, or adopted statements of those witnesses who actually testify at trial and need not do so until after the witness has testified on direct examination.¹³⁶ In noncapital cases, the defendant has no right to a

131. Section 3142(e) states that "it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person" committed a drug trafficking crime carrying a maximum sentence of 10 years or more or a violation of 18 U.S.C. § 924(c), a federal statute criminalizing the use or carrying of a firearm during a crime of violence or drug trafficking offense. See 18 U.S.C. § 3142(e) (1996). Unless rebutted, the presumption requires detention. See *id.* Almost all federal drug trafficking crimes carry maximum sentences of 10 or more years, thus triggering the rebuttable presumption. See 21 U.S.C. §§ 841(b), 960 (1996).

State statutes do not contain such presumptions. See KAMISAR ET AL., *supra* note 130, at 877 (noting that "only a few states have adopted . . . a full-scale preventive detention scheme" like the federal government).

132. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, at 460 tbl.5.11 (1995) [hereinafter SOURCEBOOK]. Of these defendants, 41% were detained; 9.3% were unable to post bail. See *id.*

133. See *id.* at 511, tbl. 5.65. Of these defendants, 5% were detained; 30% could not post bail. See *id.* The differences in federal and state law may not be the only explanation for the higher detention rate in federal court, however. The severity of offenses committed and problems of overcrowding in state pretrial detention facilities may also play a role in the disparity.

134. For a discussion of the various costs to the accused of pretrial detention, see *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 728-29 (5th ed. 1996).

135. See KAMISAR ET AL., *supra* note 130, at 1234 (describing the "ABA Model" adopted by some states that is "considerably broader" than the "Federal Model" with respect to defense discovery).

136. The Jencks Act, which is codified at 18 U.S.C. § 3500 and Rule 26.2 of the Federal Rules of Criminal Procedure, allows discovery of witness statements only after a witness has testified on direct examination. See 18 U.S.C. § 3500(b); FED. R. CRIM. P. 26.2(a). The Act also

witness list before trial.¹³⁷ Even if the defendant can identify potential government witnesses, the witnesses have no obligation to give interviews.¹³⁸ In marked contrast, some states allow the defense to take pretrial depositions of potential prosecution witnesses.¹³⁹

Third, federal law often provides defendants with fewer opportunities for suppression of evidence as a result of constitutional violations than does state law. While the Burger and Rehnquist Courts have interpreted constitutional doctrines requiring suppression of evidence narrowly,¹⁴⁰ numerous state courts have construed their constitutions more broadly, conferring rights that the Supreme Court does not recognize and requiring suppression where the Supreme Court does not.¹⁴¹ For example, various state doctrines are more favorable to defendants concerning what constitutes a "seizure";¹⁴² whether a

employs a definition of "statement" that includes only verbatim, substantially verbatim, and adopted statements. See 18 U.S.C. § 3500(e) (1996); FED. R. CRIM. P. 26.2(f).

137. See, e.g., *United States v. Sukumolochan*, 610 F.2d 685, 688 (9th Cir. 1980).

138. See, e.g., *United States v. Black*, 767 F.2d 1334, 1338 (9th Cir. 1985).

139. See, e.g., ALASKA STAT. § 15(a) (Michie 1994); FLA. STAT. ANN. § 3.220(d) (West 1973); IND. CODE ANN. §35-37-4-3 (Michie 1994); VT. STAT. ANN. R. CRIM. P. §15(a) (1983) (allowing witness depositions as a matter of right in felony cases). See generally KAMISAR ET AL., *supra* note 130, at 1235; John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675 (1988).

140. For a discussion of the development of these doctrines, see Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure: Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

141. See generally NEIL COLMAN & CATHERINE GREENE, *STATE CONSTITUTIONAL CRIMINAL PROCEDURE* (1994); BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* (1991); Kenneth J. Melilli, *Exclusion of Evidence in Federal Prosecutions on the Basis of State Law*, 22 GA. L. REV. 667 (1988); Tom Quigley, Comment, *Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 285 (1988).

142. Compare *California v. Hodari D.*, 499 U.S. 621 (1991) (no seizure when police officer simply shows authority to which defendant does not respond), with *State v. Oquendo*, 613 A.2d 1300 (Conn. 1992) (seizure occurs when police make a show of authority that would lead a reasonable person to believe that he is not free to leave). Compare *Florida v. Bostick*, 501 U.S. 429 (1991) (no suspicion needed when police ask defendant for consent to search bag as long as manner of questioning does not suggest lack of choice), with *People v. Hollman*, 581 N.E. 2d 204 (N.Y. 1992) (intrusive questioning that indicates suspicion of wrongdoing requires some articulable basis), *State v. Quino*, 840 P.2d 358 (Haw. 1992) (same), and *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996) (same).

defendant has "standing" to object to a search or seizure;¹⁴³ the determination of whether there is "probable cause";¹⁴⁴ the existence of a "good faith" exception to the exclusionary rule;¹⁴⁵ whether there is "consent" to conduct a warrantless search;¹⁴⁶ whether a warrant is needed to search automobiles,¹⁴⁷ containers found in automobiles,¹⁴⁸ and trash;¹⁴⁹ inventory searches;¹⁵⁰ electronic monitoring by undercover agents and informants;¹⁵¹ use of pen registers;¹⁵² use of dog

143. Compare *Rakas v. Illinois*, 439 U.S. 128 (1978) (requiring a legitimate expectation of privacy to challenge search), and *Rawlings v. Kentucky*, 448 U.S. 98 (1980), with *Commonwealth v. Frazier*, 571 N.E.2d 1356 (Mass. 1991) (defendant has standing if possession is essential to charges), and *Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983) (granting automatic standing if defendant has ownership or possession of seized property). See generally David A. Macdonald, Jr., Comment, *Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course*, 63 TEMP. L. REV. 559 (1990).

144. Compare *Illinois v. Gates*, 462 U.S. 213 (1983) (allowing assessment of informant information by consideration of "totality of circumstances"), with *People v. Griminger*, 524 N.E.2d 409 (N.Y. 1988) (requiring that information satisfy two-pronged "*Aguilar-Spenelli*" test), *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989) (same), *State v. Jones*, 706 P.2d 317 (Alaska 1985) (same), and *State v. Jackson*, P.2d 136 (Wash. 1984) (same).

145. Compare *United States v. Leon*, 468 U.S. 897 (1984) (recognizing good faith exception when police rely on warrant), with *State v. Noveinbrino*, 519 A.2d 820 (N. J. 1987) (refusing to recognize good faith exception), and *State v. Gutierrez*, 863 P.2d 1052 (N.M. 1993) (same).

146. Compare *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (consent to search considered valid even if subject does not know of right to refuse consent), with *State v. Johnson*, 346 A.2d 66 (N.J. 1975) (requiring knowledge of right to refuse consent).

147. Compare *Chambers v. Maroney*, 399 U.S. 42 (1970) (warrantless search of automobile at police station not a Fourth Amendment violation), with *State v. Benoit*, 417 A.2d 895 (R.I. 1980) (police need warrant to search car at police station). Compare *New York v. Belton*, 453 U.S. 454 (1981) (after arrest, police can search entire passenger compartment of arrestee's vehicle), with *Commonwealth v. White*, 669 A.2d 896 (Pa. 1995) (requiring actual exigency before allowing passenger compartment search following arrest).

148. Compare *California v. Acevedo*, 500 U.S. 565 (1991) (no warrant needed to search container in car when police have probable cause to search container), and *United States v. Ross*, 456 U.S. 798 (1982) (no warrant needed to search container found in car when police have probable cause to search car), with *State v. Savva*, 616 A.2d 774 (Vt. 1991) (warrant required to search containers found in cars).

149. Compare *California v. Greenwood*, 486 U.S. 35 (1988) (trash not protected by Fourth Amendment), with *State v. Hempele*, 576 A.2d 793 (N.J. 1990) (warrant required to search garbage), *State v. Tanaka*, 701 P.2d 1274 (Haw. 1985) (warrant required to search or seize garbage), and *State v. Morris*, 680 A.2d 90 (Vt. 1996) (warrant required for trash search).

150. Compare *Illinois v. LaFayette*, 462 U.S. 640 (1983) (police not required to use less intrusive means of safeguarding property before conducting an inventory search), with *State v. Perham* 814 P.2d 914 (Haw. 1991) (state must show that inventory search is least intrusive means). Compare *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory search of closed console in car towed for parking violations constitutional), with *State v. Opperman*, 247 N.W.2d 673 (S.D. 1976) (inventory search of car unreasonable).

151. Compare *United States v. White*, 401 U.S. 745 (1971) (plurality opinion) (no Fourth Amendment violation if undercover operative secretly records or transmits conversation with target of investigation without judicial approval), with *Commonwealth v. Blood*, 507 N.E.2d 1029

sniffs,¹⁵³ and whether there is a "plain touch" exception to the probable cause requirement.¹⁵⁴ Similarly, some states have stricter doctrines governing the admissibility of statements that criminal suspects make to police.¹⁵⁵ Because federal suppression doctrine governs in federal court—even when state or local police acquire evidence in violation of state but not federal law¹⁵⁶—these differences and others provide opportunities for suppression in state courts that are not available in federal court.¹⁵⁷ Like variations between state and federal pretrial release and detention law, these differences are prone to surface in prosecutions involving drugs and guns. Investigations into drug and firearms offenses frequently involve techniques, such as searches and seizures and use of electronic monitoring devices, that provide opportunities for motions to suppress.¹⁵⁸

(Mass. 1987) (surreptitious electronic recording or transmission requires warrant), and *People v. Beavers*, 227 N.W.2d 511 (Mich. 1975) (same).

152. Compare *Smith v. Maryland*, 442 U.S. 735 (1979) (use of pen register not a search and does not require judicial approval), with *People v. Sporleder*, 666 P.2d 135 (Colo. 1983) (en banc) (requires probable cause and warrant), *State v. Thompson*, 760 P.2d 1162 (Idaho 1988) (use of pen register is a search), *Richardson v. Texas*, 865 S.W.2d 944 (Tex. Ct. App. 1993) (use of pen register may be a search), and *State v. Gunwall*, 720 P.2d 808 (Wash. 1986) (en banc) (pen register use requires warrant).

153. Compare *United States v. Place*, 462 U.S. 696 (1983) (dog sniff of luggage in public place not a "search"), with *People v. Dunn*, 564 N.E.2d 1054 (N.Y. 1990) (dog sniff requires reasonable suspicion), and *Commonwealth v. Johnston*, 530 A.2d 74 (Pa. 1987) (same).

154. Compare *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (police officer conducting pat-down can seize nonthreatening object he feels in defendant's pocket and believes to be contraband), with *People v. Diaz*, 612 N.E.2d 298 (N.Y. 1993) (rejecting "plain touch" exception as a matter of state law).

155. See, e.g., *State v. Vernon*, 385 So. 2d 200 (La. 1980) (prosecution must prove voluntariness of statement to police beyond a reasonable doubt, not by preponderance of evidence, as is case in federal court); *State v. Miller*, 388 A.2d 218 (N.J. 1978) (same); *People v. Pinzon*, 377 N.E.2d 721 (N.Y. 1978) (unlike federal law, statement not admissible if taken after attorney attempted to speak with client in custody and requested that questioning stop); *State v. Isom*, 761 P.2d 524 (Or. 1988) (unlike federal rule, statement taken after invocation of *Miranda* rights not admissible to impeach).

156. See *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1373 (9th Cir. 1987). See also *United States v. Fossler*, 597 F.2d 478, 481-82 (5th Cir. 1979) (evidence admissible in federal prosecution despite earlier suppression in state proceeding).

157. See, e.g., *United States v. Goodapple*, 958 F.2d 1402 (7th Cir. 1992) (defendant alleged that he lost benefit of more stringent wiretapping protections when prosecuted in federal court); *United States v. Allen*, 954 F.2d 1160 (6th Cir. 1992) (stricter state search and seizure law not applicable in federal court); *United States v. Renfro*, 620 F.2d 569 (6th Cir. 1980) (evidence suppressed in earlier state prosecution admissible under federal law).

158. See KAMISAR ET AL., *supra* note 130, at 31 ("In narcotics cases . . . motions to suppress are quite common."); Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. Ill. L. Rev. 223, 228 (author's study revealed that "motions to suppress physical evidence are most likely to be raised in drug cases").

Fourth, several aspects of federal sentencing law make federal prosecution less favorable to defendants. Although there are significant variations in state sentencing schemes, some generalizations are possible. Federal law often allows greater maximum sentences for drug trafficking.¹⁵⁹ In addition, some federal laws, most notably those dealing with drug trafficking and weapons offenses, require imposition of harsh statutory mandatory minimum sentences¹⁶⁰ which can be as long or longer than the *maximum* sentences permitted under some state laws.¹⁶¹ Federal law permits execution of offenders who commit certain crimes in states that do not authorize a death penalty for analogous offenses.¹⁶² The federal sentencing guidelines also require that judges increase sentences, often dramatically, based upon proof that the defendant engaged in uncharged relevant conduct.¹⁶³ Evidence of that uncharged conduct may come in the form of hearsay and without many of the procedural protections available at trial.¹⁶⁴ Finally, the federal sentencing guidelines constrict sentencing judges'

159. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, DRUGS, CRIME, AND THE JUSTICE SYSTEM: A NATIONAL REPORT 179-180 (1992) [hereinafter DRUGS AND CRIME] (listing maximum sentences for drug offenses in state and federal courts).

160. See, e.g., 18 U.S.C. § 924(c)(1) (1996) (requiring mandatory consecutive sentences from 5 to 30 years for various firearms violations); 21 U.S.C. § 841(b) (1996) (requiring mandatory sentences from 5 years to life for drug trafficking offenses). Many states do not have mandatory minimum sentencing laws. See U.S. SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 136-37 tbl.4 (1995) [hereinafter COCAINE AND FEDERAL SENTENCING POLICY].

161. Federal law generally requires a minimum ten-year term of imprisonment for first-time offenders who possess a certain quantity of drugs. See 21 U.S.C. § 841(b). *But cf.* 18 U.S.C. § 3553(f) (1996) (establishing a limited "safety valve" allowing first-time offenders who attempt to cooperate with the government to avoid the imposition of mandatory minimum sentences). In contrast, some states have maximum sentences shorter than ten years. See DRUGS AND CRIME, *supra* note 159, at 179-80.

162. See Brickey, *supra* note 29, at 1166-67.

163. For example, U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) (1995), defines "relevant conduct" to include acts committed by the defendant or co-conspirators "that were part of the same course of conduct or common scheme or plan as the offense of conviction." Such "relevant conduct" increases the "offense level" used to determine the defendant's sentence in the same manner as conduct for which the defendant has been convicted. *Id.* § 1B1.3(a). See also Bowman, *supra* note 92, at 702-04 (explaining relevant conduct provisions). The federal guidelines sometimes require federal courts to increase defendants' sentences based on conduct that resulted in acquittal. See *United States v. Watts*, 117 S. Ct. 633 (1997).

164. See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 208-220 (1991); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 289-92 (1992). Unlike federal law, numerous states have guidelines systems that "reject routine sentence enhancements based on unconvicted, 'real-offense' factors." Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 6 FED. SENTENCING REP. 123 (1993).

ability to consider certain types of mitigating evidence.¹⁶⁵ Although some states have also adopted guideline regimes, they provide significantly more flexibility than the federal system and have less severe results.¹⁶⁶

Fifth, defendants frequently serve a greater portion of the sentences imposed in federal court. Under federal law, there is no parole eligibility. Even with full credit for good behavior in prison, a federally prosecuted defendant must serve eighty-five percent of the sentence imposed.¹⁶⁷ In contrast, as a result of parole eligibility and good time credit, inmates sentenced to state prisons in 1992 will serve only thirty-eight percent of the sentences imposed.¹⁶⁸ State defendants imprisoned for drug trafficking will serve only a third of their sentences.¹⁶⁹

II. FEDERAL PROSECUTORS AND EQUAL PROTECTION

Federal prosecutors are the footsoldiers of federalization. Armed with congressionally created and judicially blessed duplicative criminal statutes, they bring charges in numerous cases that could be prosecuted in state courts.¹⁷⁰ For example, of the defendants whose federal cases terminated in acquittals, convictions, or dismissals in 1994, 9228

165. See U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1-5H1.12 (1995).

166. See Frase, *supra* note 164, at 123-24.

167. Under 18 U.S.C. § 3624(b) (1996), a defendant may reduce his sentence by 54 days per year by complying with institutional regulations.

168. PATRICK A. LANGAN & HELEN A. GRAZIADEI, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1992, BUREAU OF JUSTICE STATISTICS BULLETIN 4 tbl.4 (1995). Thirty states retain indeterminate sentencing schemes that allow for early release on parole. See COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 160, 136-37 tbl. 4. Congress has encouraged states to impose longer sentences on defendants convicted of certain violent offenses and to require that such defendants serve a larger portion of their sentences by linking the availability of federal grants for prison construction to state enactment of harsher sentencing regimes. See 42 U.S.C. §§ 13701-13704 (1994).

169. See LANGAN & GRAZIADEI, *supra* note 168, at 4 tbl.4 (34% of sentence imposed). See also COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 160, at 143 ("[A]ccording to the Department of Justice, state courts in 1988 sentenced drug traffickers to an average maximum sentence of 66 months in prison. Of the maximum 66 months, the Department of Justice Bureau of Statistics estimated that, on average, 20 months, or roughly 30 percent, were actually served.").

170. In 1980, after studying the charging practices of the United States Attorney's Office for the Northern District of Illinois, Professor Frase concluded that "[f]ederal prosecutors appear to give as much or more attention to offenses that are also prosecutable, at least in theory, by state and local prosecutors" as they do to "crimes with no direct state counterpart." Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 285 (1980). See also Jeffries & Gleeson, *supra* note 54, at 1098 ("It follows that the federalization of crime is increasingly in the hands of the prosecutors. . . .")

were charged with violations of the principal federal drug trafficking statute,¹⁷¹ 3911 were charged with violations of federal firearms laws,¹⁷² and 3281 were charged under federal mail, wire, and bank fraud¹⁷³ statutes.¹⁷⁴ These statutes duplicate the coverage of state drug, firearms, and theft laws. Although prosecution under duplicative federal statutes constitutes a substantial portion of federal prosecutors' caseloads,¹⁷⁵ most offenders who are eligible for both federal and state prosecution are charged in state court.¹⁷⁶ Indeed, federal prosecutors lack the resources to bring charges in more than a small percentage of such cases.¹⁷⁷

As a result of the disparity between state and federal procedural and sentencing regimes, much is at stake when federal prosecutors determine which offenders to charge in federal court. Federal prosecutors' selection decisions are made more significant by the high conviction rate in federal court¹⁷⁸ and the rigid determinative federal

(1996); Merritt, *supra* note 76, at 708 ("Overlapping state and federal offenses give federal prosecutors unfettered power to decide which defendants will be prosecuted under federal law and which will be left to state law.").

171. See 18 U.S.C. § 841(a) (1996).

172. See *id.* §§ 922, 924; 26 U.S.C. § 5861 (1996).

173. See 18 U.S.C. §§ 1341, 1343, 1344 (1996).

174. These figures are based on information from the Executive Office of United States Attorneys obtained as a result of Freedom of Information Act Request Number 95-2125 (on file with the author).

175. See *supra* note 122.

176. See Gorelick & Litman, *supra* note 4, at 973 (stating that the Department of Justice prosecutes "only a small percentage of conduct falling under federal criminal legislation"). For example, of all felony convictions in 1992, 12.8% of defendants charged with weapons offenses, 9.3% charged with drug trafficking, and 20.4% charged with fraud were prosecuted in federal court. See SOURCEBOOK, *supra* note 132, at 497 tbl.5.45.

177. In 1994, there were 4099 federal prosecutors, see U.S. SENTENCING COMM'N ANNUAL REPORT app. B (1994), hardly a sufficient number to handle the more than one million felony cases in state courts. See BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS 45 (1995) (providing graph showing felony cases filed in 1993 in general jurisdiction courts in 32 states). In contrast, in 1994, there were 2343 chief prosecutors and 22,278 assistant prosecutors handling cases in state and local courts. See CAROL J. DEFANCES, STEVEN K. SMITH & LOUISE VAN DER DOES, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1994 BUREAU OF JUSTICE STATISTICS BULLETIN 12-13 app. 1, 2 (1996). See also Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 85, 88 (1996) (stating that "federal prosecutors can bring only a small percentage of criminal cases in any given area of criminal enforcement").

178. According to the Administrative Office of United States Courts, of those federally prosecuted criminal defendants whose cases were disposed of in the 12-month period ending September 30, 1994, over 83% were convicted by guilty plea or trial. See L. RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: REPORT OF THE DIRECTOR, A-78 tbl.D-4 (1994). See also 1995 SOURCEBOOK, *supra* note 132, at 478-79 tbl.5.29 (approximately 85% of federal cases disposed in 1995 resulted in convictions).

sentencing rules.¹⁷⁹ Because of the relative certainty of conviction and harsher sentencing, from an offender's perspective, the federal prosecutor's decision to bring federal charges may be the single most important decision that any actor in the criminal justice system makes.¹⁸⁰ Defendants chosen for federal prosecution bear the brunt of federalization, losing procedural protections and receiving and serving longer sentences.

The significance of selection decisions has not escaped the attention of some offenders chosen for federal prosecution. Defendants have raised a variety of unsuccessful challenges to their federal prosecutions and resulting sentences.¹⁸¹ Because they contend that they

179. See Bowman, *supra* note 92, at 717-18 (describing predictability of ultimate sentence under federal sentencing regime).

180. See *United States v. Redondo-Lemos*, 955 F.2d 1296, 1298 (9th Cir. 1992) ("Because serious drug trafficking crimes often carry mandatory minimum sentences, the crime with which the [offenders] are charged normally determines the punishment they will suffer. As a practical matter, then, the charging decision winds up being the *only* decision that matters.").

181. Three claims are common: (1) that referral from law enforcement officials for federal prosecution without written, reviewable standards violates due process; (2) that more severe federal prosecution violates equal protection; and (3) that the disparity between federal and state sentences warrants a downward departure under the sentencing guidelines. Federal appellate courts have uniformly rejected these contentions. See, e.g., *United States v. Oakes*, 11 F.3d 897, 898-99 (9th Cir. 1993) (apparently random selection of defendant for federal prosecution and mandatory five-year sentence for growing marijuana when state prosecution would have required only 0-90 days imprisonment did not violate equal protection); *United States v. Jacobs*, 4 F.3d 603, 604-05 (8th Cir. 1993) (federal prosecution precluding possibility of parole or probation that would have been available in state court did not violate equal protection or due process); *United States v. Deitz*, 991 F.2d 443, 447-48 (8th Cir. 1993) (defendant who was prosecuted in federal court because a violation of the state speedy trial act precluded state prosecution was not entitled to downward departure to address disparity between federal and theoretical state sentence); *United States v. Hall*, 977 F.2d 861, 863-64 (4th Cir. 1992) (defendant not entitled to departure from sentencing guidelines to conform sentence to that received by coconspirator prosecuted in state court); *United States v. Beede*, 974 F.2d 948, 951-53 (8th Cir. 1992) (finding no violation of due process when federal charges requiring longer sentence were brought in response to defendant's refusal to plead guilty in state court); *United States v. Vilchez*, 967 F.2d 1351, 1353-56 (9th Cir. 1992) (district court's decision to depart from guidelines and mandatory minimum sentence was inappropriate because disparity between federal and state sentences not a proper ground for departure and does not establish equal protection or due process violation); *United States v. Robinson*, 967 F.2d 287, 289-90 (9th Cir. 1992) (federal prosecution of case originating with state parole search not a violation of due process); *United States v. Maxwell*, 966 F.2d 545, 549 (10th Cir. 1992) (police referral of defendant for federal prosecution and resulting mandatory minimum sentence did not violate due process); *United States v. Reyes*, 966 F.2d 508, 509-10 (9th Cir. 1992) (federal prosecution of defendant for possession of unregistered sawed-off shotgun did not violate due process or enable court to depart from guidelines when co-accused prosecuted in state court); *United States v. Williams*, 963 F.2d 1337, 1341-42 (10th Cir. 1992) (reversing district court's determination that referral of case to federal prosecutor without written standards violated due process and its consequent imposition of sentence below mandatory minimum and guidelines requirements); *United States v. Nance*, 962 F.2d 860, 864-65 (9th Cir. 1992) (no due process violation when case was referred for federal prosecution without

have received harsher treatment than similar others charged in state court, claims of equal protection violations most accurately describe their plight.¹⁸² As discussed below, although courts have generally

written guidelines); *United States v. Ucciferri*, 960 F.2d 953, 954-55 (11th Cir. 1992) (reversing district court for dismissing counts of indictment because federal prosecution permitted even if done "for the sole purpose of taking advantage of less stringent federal restrictions on the use of informants, wire taps, and search warrants"); *United States v. Morehead*, 959 F.2d 1489, 1498-99 (10th Cir. 1992) (federal prosecutor's choice of defendant for federal prosecution and consequent harsher sentence without formulated standard did not violate equal protection or due process); *United States v. Goodapple*, 958 F.2d 1402, 1410-11 (7th Cir. 1992) (due process not violated when federal prosecution deprived defendant of benefits of state wiretap statute and more lenient sentence); *United States v. Parson*, 955 F.2d 858, 873 n.22 (3d Cir. 1992) (federal prosecution did not violate due process or require remedial downward departure based on lower sentence defendant would have received in state court); *United States v. Carter*, 953 F.2d 1449, 1461-62 (5th Cir. 1992) (referral for federal prosecution and potentially longer sentence without reviewable guidelines or standards did not violate due process); *United States v. Andersen*, 940 F.2d 593, 595-97 (10th Cir. 1991) (referral for federal prosecution without guidelines did not violate due process despite federal sentence in excess of eighteen years compared to possible sentence of no more than five years in state court); *United States v. Turpin*, 920 F.2d 1377, 1387-88 (8th Cir. 1990) (rejecting argument that federal prosecution following dismissal of state charges violated due process by subjecting defendant to longer sentence and easing burden of proof for consideration of other crimes used in calculating sentence). Some district courts have been sympathetic to such arguments, but their efforts to grant relief have not survived appeal. See, e.g., *United States v. Williams*, 746 F. Supp. 1076 (D. Utah 1990) (holding that referral for federal prosecution without benefit of neutral, written guidelines violated due process when federal conviction required substantially harsher sentence), *rev'd*, 963 F.2d 1337 (10th Cir. 1992).

Some defendants raise extra-legal challenges. For example, federal prisoners have created "major disturbances" because of dissatisfaction with disparities between their sentences and sentences that they would have received in state court. See U.S. Dep't of Justice, *Overlapping and Separate Spheres: A Three-Branch Round Table on State and Federal Jurisdiction* 90-91 (Mar. 7, 1994) (transcript, on file with the *Southern California Law Review*).

Defendants prosecuted in the federal district court in Washington, D.C., have raised similar claims based on the ability of the United States's Attorney's office there, which prosecutes in both federal court and District of Columbia Superior Court, to select the forum and thus which law will apply. That office's practice of selecting some defendants for harsher treatment in federal district court is described in detail in *United States v. Mills*, 726 F. Supp. 1359 (D.D.C. 1989), *rev'd*, 964 F.2d 1186 (D.C. Cir. 1992) (en banc).

182. Due process challenges miss the mark because the decision to file charges in federal court rather than state court alone works no deprivation of a protected interest, a prerequisite for a due process violation. See *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). Rather, it only subjects the defendant to federal adjudicative procedures, which presumably provide whatever process is due before subjecting a defendant to a deprivation. Although federal procedures may be less advantageous and federally imposed deprivations more severe than those that a defendant would experience in state court, if each complies with due process in its own right, the differences between federal and state procedures do not make selection of the former a cognizable deprivation. Cf. *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 566 (1996) (claim that state cannot require an indigent to pay a fee to appeal termination of parental rights fits the equal protection framework better than due process because there is no independent right to appeal).

Motions for departures from the sentencing guidelines are only available in atypical cases involving factors that the Sentencing Commission did not contemplate when drafting the guidelines. See 18 U.S.C. § 3553(b) (1994); U.S. SENTENCING GUIDELINES MANUAL 5 (1995). See also *Koon v. United States*, 116 S. Ct. 2035, 2044 (1996). Although the Supreme Court recently

failed to recognize or acknowledge it, equal protection requires prosecutors to have a rational basis for distinguishing between those who are prosecuted and those who are not. This constitutional obligation has particular significance when federal prosecutors bring charges under duplicative federal statutes against only a small portion of eligible offenders. Even if courts refrain from enforcing the equal protection rationality requirement, federal prosecutors should comply with it.

A. EQUAL PROTECTION

Equal protection doctrine "is essentially a direction that all persons similarly situated should be treated alike"¹⁸³ by the government. It requires that both federal¹⁸⁴ and state officials¹⁸⁵ have a valid reason for treating people differently than others who appear to be similarly situated.¹⁸⁶ Courts faced with equal protection claims determine whether the government's disparate treatment of some persons "trammels fundamental personal rights or is drawn upon inherently suspect

approved of a downward departure based in part on the fact that defendants were prosecuted in federal court following acquittals and a hung jury in a lengthy, highly publicized state court trial, *see id.* at 2053, that situation is atypical. *See supra* note 7. In contrast, federal-state disparities are hardly atypical and likely were known to the Sentencing Commission.

183. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

184. Although the Equal Protection Clause is located in the Fourteenth Amendment, which applies only to the states, the Supreme Court has determined that the Due Process Clause of the Fifth Amendment imposes similar restrictions on the federal government. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985); *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Court appears to have adopted the view that the amendments provide identical protection and that federal and state classifications are subject to the same level of scrutiny. *See Adarand Const., Inc. v. Pena*, 115 S. Ct. 2097 (1995) ("[A]ll racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny."). Of course, the Court may apply differential levels of review to classifications other than those based on race, but after *Adarand* that seems unlikely. *See generally* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977).

185. The requirement applies to administrative actors, as well as legislators. *See, e.g.*, *Allegheny Pittsburgh Coal Co. v. County Comm'r of Webster County*, 488 U.S. 336 (1989) (requiring state tax assessor to make rational distinctions when assessing value of taxpayers' properties); *Wayte v. United States* 470 U.S. 598 (1985) (prohibiting federal prosecutors from selecting persons for prosecution because of their exercise of First Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that equal protection prevented the local board of supervisors from discriminatory distribution of licenses for the operation of laundries in wooden buildings).

186. Typically the valid reason will demonstrate that, despite appearances, those who receive differential treatment are different in some critical respect and thus not "similarly situated." For a discussion of the meaning of "similarly situated," *see* Applegate, *supra* note 28, at 48-54; *infra* notes 388-89 and accompanying text.

distinctions such as race, religion, or alienage. . . ."¹⁸⁷ If so, courts subject the discriminatory classification to "strict scrutiny" and find it unconstitutional unless it is narrowly tailored to achieve a compelling governmental interest.¹⁸⁸ If a classification does not implicate a suspect class or fundamental right, courts apply less rigorous review, often simply asking whether the classification is rationally related to a legitimate governmental end.¹⁸⁹ If there is no rational reason, the disparate treatment is unconstitutional.¹⁹⁰ In some situations, such as those involving gender discrimination, courts apply a "heightened" standard of review less exacting than strict scrutiny but more searching than rational relationship review.¹⁹¹

Although the Court has had difficulty achieving consensus on the precise nature of the rational relationship requirement,¹⁹² it is settled law that the requirement is deferential and not meant to serve as "a license for courts to judge the wisdom, fairness, or logic" of governmental classifications.¹⁹³ Thus, imperfect classifications will survive review so long as they bear some rational relationship to a legitimate

187. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

188. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 217 (1982) ("With respect to . . . classifications [that disadvantage a suspect class or impinge on the exercise of a fundamental right], it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."). Professor Gunther has described such scrutiny as "strict" in theory and fatal in fact." *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

189. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

190. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 532-33 (1973).

191. *See, e.g., United States v. Virginia*, 116 S. Ct. 2264, 2274-76 (1996) (applying heightened scrutiny for gender-based classifications); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (same).

192. *See, e.g., United States R.R. Bd. v. Fritz*, 449 U.S. 166, 176-77 n.10 (1980) ("The most arrogant legal scholar would not claim that [the eleven cited Supreme Court decisions applying the rational relationship test] applied a uniform or consistent test under equal protection principles."). For example, when the Court applies the rational relationship test to determine the constitutionality of legislative classifications, sometimes it hypothesizes reasons supporting the challenged classification scheme. *See, e.g., Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 652 (1992) (concluding that a state "could thus have decided" that venue rules more favorable to corporate defendants incorporated in that state than corporate defendants incorporated out of state are justified by greater inconvenience that defending distant lawsuit will create for resident corporate defendants). On other occasions the Court has examined only the actual reasons given for the classification. *See, e.g., Cleburne*, 473 U.S. at 448-50 (assessing the city council's reasons for the classification scheme, as found by the lower federal court). *See generally* *Schweiker v. Wilson*, 450 U.S. 221, 243 n.4, 244 n.6 (1981) (Powell, J., dissenting).

193. *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). *See also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (stating that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of

government purpose.¹⁹⁴ At its most solicitous, the test allows for otherwise inexplicably underinclusive classifications on the grounds that the government may seek to make changes "one step at a time, addressing itself to the phase of the problem which seems most acute."¹⁹⁵ Despite the deferential nature of the rationality standard, the Court has applied it to invalidate a handful of challenged classifications.¹⁹⁶ At minimum, it seems that a legislative classification will not survive rational basis review if it imposes an unequal burden on an individual or group selected due to irrational fears,¹⁹⁷ animosity,¹⁹⁸ or unprincipled or thoughtless error.¹⁹⁹

legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines"). Although, like the passage from *Dukes*, the language quoted in the text refers to "legislative," not "governmental," choices, the rational relationship requirement applies to administrative classifications as well as legislative ones. See *supra* note 185. There is reason to believe that the rational relationship test may be less deferential when applied to administrative decisions. See *infra* note 237.

194. See, e.g., *Heller*, 509 U.S. at 320-21 (stating that "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose," the classification will survive review "even when there is an imperfect fit between means and ends"); *Dukes*, 427 U.S. at 303 (commenting that "rational distinctions may be made with substantially less than mathematical exactitude").

195. *Cleburne*, 473 U.S. at 458 (Marshall, J., concurring and dissenting) (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)).

196. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620 (1996) (applying the rationality standard to invalidate a statewide initiative banning state and local ordinances prohibiting discrimination based on sexual orientation); *Allegheny Pittsburg Coal Co. v. County Comm'r. of Webster County*, 488 U.S. 336 (1989) (applying the rationality standard to prohibit a property value assessment method that burdened owners of recently purchased commercial property); *Cleburne*, 473 U.S. at 432 (local zoning ordinance restricting group homes for mentally retarded unconstitutional); *Hooper v. Bernalillo County Tax Assessor*, 472 U.S. 612 (1985) (tax exemption for Vietnam War veterans residing in state before specified date); *Zobel v. Williams*, 457 U.S. 55 (1982) (state statute granting dividends to residents based on length of residency); *United States Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973) (provision of Federal Food Stamp Act withholding benefits from households containing unrelated persons); *Lindsey v. Normet*, 405 U.S. 56 (1972) (appeal provision of wrongful detainer statute requiring posting of double bond by tenants).

197. See *Cleburne*, 473 U.S. at 448 (stating that "mere negative attitudes, or fear" are not a rational basis for a classification burdening the mentally retarded unless they are substantiated by "properly cognizable" factors); *id.* at 455 (Stevens, J., concurring and dissenting) ("The record convinces me that this permit was required because of the irrational fears of neighboring property owners. . . .").

198. See, e.g., *Romer*, 116 S. Ct. at 1627 (the challenged state initiative "seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests"); *Moreno*, 413 U.S. at 534 ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

199. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (in separate concurring opinions, six members of the Court determined that dismissal of plaintiff's unlawful termination

B. CHARGING DECISIONS AND SELECTIVE PROSECUTION DOCTRINE

1. *The Prohibition Against Discriminatory Charging Decisions*

Although the Supreme Court is loath to constrain prosecutors' charging discretion,²⁰⁰ it has concluded that the Constitution imposes some restrictions, including those mandated by equal protection.²⁰¹ When determining whether a charging decision runs afoul of equal protection, courts employ "selective prosecution" doctrine²⁰² which prohibits prosecutors from bringing charges because of an offender's race, religion, or other suspect characteristic, or in response to an offender's exercise of a constitutional right, even if there is evidence to support the charges.²⁰³ These prohibitions are consistent with the

claim due to state's inadvertent scheduling error which set conference past time deadline prescribed by state statute violated equal protection). See also *infra* notes 293-94 and accompanying text.

200. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.") (footnote omitted).

201. See, e.g., *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Due process also limits charging discretion, preventing prosecutors from increasing charges in retaliation for a defendant's exercise of a litigation-related right. See, e.g., *Blackledge v. Perry*, 417 U.S. 21 (1974). But see *Bordenkircher*, 434 U.S. at 357 (allowing a prosecutor to file additional charges when a defendant refuses to plead guilty and instead exercises his right to go to trial).

202. Selective prosecution doctrine is not limited to cases that are at issue here, those in which the federal government brings charges under duplicative federal statutes. Prosecutors make a variety of other types of charging decisions that the doctrine addresses. For example, it applies when federal prosecutors decide which offenders to charge under nonduplicative federal statutes. See, e.g., *Wayte v. United States*, 470 U.S. 598 (1985) (selecting only some draft nonregistrants for prosecution under federal Selective Service laws). It also applies when state prosecutors choose to prosecute some offenders but not others. See *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (involving allegations of selective enforcement of Sunday closing laws). These sorts of decisions are referred to as "screening decisions"—prosecutors "screen" offenders to be prosecuted from those who are not.

The doctrine also applies to other types of charging decisions such as the determination which of several offenses to charge, see *United States v. Batchelder*, 442 U.S. 114 (1979) (prosecutor's decision to select one of two applicable federal statutes), and the decision whether to file charges that require enhanced sentences based on the nature of an offense or a defendant's criminal record. See, e.g., *Oyler v. Boles*, 368 U.S. 448 (1962) (decision whether to seek mandatory life sentence for habitual offenders). For a general discussion of the different types of charging decisions, see Vorenberg, *supra* note 28, at 1524-32.

203. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court held that the equal protection ban on improper discriminatory classifications applies to administrators, as well as legislators. That decision set the stage for the imposition of the same restriction on prosecutors' charging decisions. In *Yick Wo*, a board of supervisors' racially discriminatory distribution of licenses for laundries in wooden buildings led to prosecution of only Chinese laundry operators for zoning code infractions. The Court determined that these procedures violated equal protection. When

"strict" and "heightened" scrutiny branches of equal protection—there is never a legitimate, much less a compelling, reason for prosecuting a person because of his race, religion, gender, or exercise of a constitutional right. Most courts assume that a defendant who can prove that he has been a victim of this sort of discriminatory selective prosecution is entitled to dismissal of the indictment or reversal of his conviction.²⁰⁴ Although theoretically stringent, the prohibition on discriminatory selective prosecution is largely meaningless in practice because courts require that a defendant raising such a claim prove both discriminatory effect and discriminatory intent, burdens that are all but impossible to satisfy.²⁰⁵

the Court later upheld the rejection of a request for injunctive relief to prevent the allegedly selective enforcement of a Sunday closing law in *Two Guys from Harrison-Allentown*, 366 U.S. at 582 (1961), it noted that a defense of discriminatory prosecution would be available if the plaintiff were to be charged. "Since appellant's employees may defend against any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination, we do not believe that the court below was incorrect in refusing to exercise its injunctive powers at that time." *Id.* at 588-89. In *Oyler v. Boles*, 368 U.S. 448 (1962), the Supreme Court first addressed the merits of a criminal defendant's claim that a prosecutor's charging decision violated equal protection. Although it found no violation in that case, the Court made clear that a charging decision "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" would run afoul of equal protection. *See id.* at 456. In *Wayte v. United States*, 470 U.S. 598 (1985), the Court concluded that a charging decision based on an offender's exercise of a constitutional right, such as the First Amendment right to protest government policy, would be unconstitutional.

204. *See, e.g.,* *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972). Although the courts in those cases reversed convictions as a remedy, presumably they would have dismissed the indictments had they made the same findings before trial began. The Supreme Court has yet to rule on whether dismissal is warranted. *See United States v. Armstrong*, 116 S. Ct. 1480, 1484 n.2 (1996) ("We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race.").

205. *Ah Sin v. Wittman*, 98 U.S. 500 (1905), demonstrates that equal protection challenges require proof of discriminatory effect, that is, that the administrative actor has treated similarly situated others differently. In *Ah Sin*, the Court rejected a habeas corpus challenge which alleged that a sheriff had enforced a local antigambling ordinance in a manner that discriminated against Chinese because the petitioner failed to prove that others were violating the ordinance but not being prosecuted. *See also Armstrong*, 116 S. Ct. at 1487; *McCleskey v. Kemp*, 481 U.S. 279, 356-59 (1987) (Blackmun, J., dissenting). In *Wayte*, the Court reiterated the discriminatory effect requirement and held that a claimant also must prove discriminatory intent. "[E]qual protection standards . . . require petitioner to show both that the [government's] enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose." 470 U.S. at 608 (footnote omitted). Equal protection doctrine imposes the same requirement in other contexts. *See Washington v. Davis*, 426 U.S. 229 (1976).

The need to prove discriminatory effect and intent has been described as "an impossibly high burden of proof on defendants attempting to raise claims of selective prosecution in the racial context." Note, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1542 (1988) (footnote omitted) [hereinafter *Developments*]. *See also* Barry Lynn

2. *The Requirement of Rational Charging Decisions*

In contrast to the clear prohibition against discriminatory charging decisions, courts have been markedly less certain about whether selective prosecution doctrine incorporates the "rationality" component of equal protection—whether it requires that prosecutors' charging decisions, like other governmental actors' decisions, be rationally related to a legitimate objective.²⁰⁶ When addressing equal protection challenges to federal prosecutors' decisions to bring charges under duplicative federal statutes, appellate courts frequently take one of two approaches. Some tacitly deny the existence of a rational basis requirement by articulating a selective prosecution standard that applies only if there is proof of discrimination based on a suspect characteristic or exercise of constitutional rights.²⁰⁷ In other words, these courts

Creech, Note, *And Justice For All: Wayne v. United States and the Defense of Selective Prosecution*, 64 N.C. L. REV. 385, 408 (1986) ("Because the government is not likely to announce publicly its intent to discriminate and defendants are not generally entitled to discovery until they have made a prima facie case, defendant will rarely succeed in demonstrating that their prosecution was motivated by a discriminatory purpose.") (footnote omitted).

206. Under the Court's multitiered approach to equal protection, charging decisions do not merit strict or heightened scrutiny. Although the decision to prosecute may ultimately result in an offender's loss of life or liberty—fundamental interests that typically trigger strict scrutiny—charging decisions alone do not burden those interests. They only subject selected offenders to procedures that may result in a loss of life or liberty.

207. For example, in *United States v. Jacobs*, 4 F.3d 603 (8th Cir. 1993), the court concluded:

Jacobs does not assert that the decision to prosecute him in federal forum was based upon an improper motive such as race, gender, national origin, religious beliefs, or political affiliation. Likewise, he does not allege that the prosecution was retaliatory or vindictive in nature. Accordingly, there is no merit to his contention that the federal prosecution violated his Fifth Amendment rights.

Id. at 605 (citations omitted). See also *United States v. Morehead*, 959 F.2d 1489, 1499 (10th Cir. 1992) ("In the absence of proof that the choice of forum was improperly motivated or based on an impermissible classification as a matter of constitutional law, the prosecutor's discretion to prosecute in a federal rather than a state forum does not violate due process or equal protection . . .").

Several scholars have noted this judicial reluctance to apply a rational basis standard. As Professor Gifford has explained:

The rule articulated by most federal and state courts is that the prosecution violates the defendant's equal protection rights, thereby entitling the defendant to a dismissal of charges, only when "the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible consideration as race, religion, or the desire to prevent his exercise of constitutional rights."

Gifford, *supra* note 28 at 661-62 (footnote omitted) (quoting *United States v. Berrios*, 501 F.2d 1207, 1211, (2d Cir. 1974)). *Berrios* first stated this rule, which most courts have since followed "with unthinking but general acceptance." DAVIS, *supra* note 28, at 164. See also Applegate, *supra* note 28, at 47; Gifford, *supra* note 28, at 680 ("In the case of constitutional challenge to the prosecutor's charging decision, there does not appear to be even a minimum rationality requirement when no suspect classification or fundamental right is involved."). In other contexts, some lower courts have explicitly denied the right to rational administrative classifications. See, e.g., *E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988)

apparently conclude that as long as a charging decision is not motivated by considerations that would trigger strict or heightened scrutiny, it need not be rational. Other courts neither confirm nor deny the existence of a right to rational charging classifications but refuse to conduct review unless faced with evidence of improper discrimination.²⁰⁸ It may matter little to a criminal defendant seeking judicial relief whether a court does not recognize an equal protection-based restriction on prosecutorial discretion, or simply refuses to conduct the review necessary to enforce that restriction, but the difference should matter to prosecutors. If, contrary to some lower court decisions, equal protection imposes a rationality requirement, prosecutors are bound to comply with that constitutional command whether or not courts are willing to enforce it.²⁰⁹ Thus, putting aside the question of

("Even arbitrary administration of a statute, without purposeful discrimination, does not violate the equal protection clause."). *But see id.* at 1115-16 (Kravitch, J., concurring and dissenting) (asserting that equal protection rational relationship requirement does apply to administrative decisions).

Although some cases conclude that "bad faith" charging decisions violate equal protection, it is not clear whether courts use that term to denote charging decisions based on malice or animosity, *see Gifford, supra* note 28, at 677 ("[p]resumably," personal hatred is sufficient to show bad faith), which would extend selective prosecution doctrine beyond classifications that trigger strict or heightened scrutiny, or whether "bad faith" is simply shorthand for charging decisions brought because of race or religion, *see, e.g., United States v. Gordon*, 817 F.2d 1538, 1539 (11th Cir. 1987), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir. 1988) (stating that evidence "that the decision to prosecute was invidious or *in bad faith because it was based upon an impermissible factor such as race*" is a prerequisite for selective prosecution claims) (emphasis added), or in response to the exercise of a constitutional right. *See Mark Lemle Amsterdam, The One-Sided Sword: Selective Prosecution in Federal Courts*, 6 RUT.-CAM. L.J. 1, 22 (1974) (interpreting "bad faith" to mean in response to the exercise of a constitutional right). *See generally* Cardinale & Feldman, *supra* note 28, at 671 (discussing ambiguity of term "bad faith").

Some courts have held that a claim of malicious enforcement entitles a litigant to relief in a civil action filed under 42 U.S.C. §1983. *See, e.g., Yerardi's Moody St. Restaurant & Lounge v. Board of Selectmen*, 932 F.2d 89, 92 (1st Cir. 1991) (recognizing maliciousness as a grounds for relief); *LeClair v. Saunders*, 627 F.2d 606, 610-11 (2d Cir. 1980) (same). *But see Futernick v. Sumpter Township*, 78 F.3d 1051, 1057-58 (6th Cir.), *cert. denied*, 117 S. Ct. 296 (1996) (rejecting malicious enforcement as a grounds for relief). Even if courts were to prohibit malicious prosecutions on equal protection grounds, such a prohibition would still fall short of a requirement that prosecutors have affirmatively rational reasons for charging decisions.

208. *See, e.g., United States v. Oakes*, 11 F.3d 897, 899 (9th Cir. 1993) ("[W]e have no jurisdiction to review prosecutors' charging decisions, absent proof of discrimination based on suspect characteristics such as race, religion, gender or personal beliefs."); *United States v. Palmer*, 3 F.3d 300, 305 (9th Cir. 1993) ("[S]eparation of powers concerns prohibit us from reviewing a prosecutor's charging decisions absent a prima facie showing that [the selection of the defendant for federal rather than state prosecution] rested on an impermissible basis, such as gender, race or denial of a constitutional right." (footnote omitted)).

209. As the Ninth Circuit noted in *United States v. Redondo-Lemos*:

The judicial branch is not the only one charged with enforcing the Constitution of the United States. The President and Congress, and all of the subordinate employees

judicial enforcement, it is useful to consider whether equal protection imposes such an obligation.

Judicial refusal to recognize a constitutionally imposed requirement that prosecutors make rational charging decisions is a departure from standard equal protection doctrine. Lower courts have reached such a conclusion primarily by interpreting the language in several Supreme Court opinions to require proof of deliberately impermissible discrimination, such as that which would trigger strict or heightened scrutiny in other contexts, before finding that administrative actors, like prosecutors, have violated equal protection. For example, in *Snowden v. Hughes*,²¹⁰ the Court stated that

[t]he unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.²¹¹

Similarly, in *Oyler v. Boles*,²¹² the Court held that a prosecutor's selective charging decisions are unconstitutional if "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."²¹³ Some lower courts construe these passages as

within their respective branches, have a solemn responsibility to comply with the Constitution in the performance of their assigned functions. This responsibility is derived directly from the Constitution and is reinforced by the oath of office administered to every government employee before he enters on duty. 5 U.S.C. §3331. When no judicial remedy is available to enforce constitutional strictures, we must rely on the diligence and good faith of the officials of the other branches to avoid constitutional violations.

955 F.2d 1296, 1299 (9th Cir. 1992) (citation omitted). See also Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (suggesting that legislators have duty to interpret the Constitution and abide by limitations even if courts do not enforce them).

210. 321 U.S. 1 (1944). The Court rejected Snowden's claim that he had suffered an injury of constitutional magnitude when members of a state election Primary Canvassing Board failed to designate him as one of two Republican nominees for the Illinois General Assembly, despite the fact that he had received sufficient primary election votes to be nominated, state law required that he be designated as a nominee, and the Board had properly designated the other Republican nominee.

211. *Id.* at 8. See also *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 353 (1918) ("Mere errors of judgment by officials will not support a claim of discrimination [under equal protection]. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity.").

212. 368 U.S. 448 (1962).

213. *Id.* at 456.

requiring that a litigant prove improper discrimination to mount a successful equal protection challenge to an administrative classification.²¹⁴ Other courts conclude that *Oyler's* prohibition on "arbitrary classification[s]" protects only against group discrimination, not against irrational charging decisions that harm individuals.²¹⁵ However, less restrictive interpretations are equally plausible. The language in *Snowden* can be read to merely require proof of something more than mistaken selection.²¹⁶ In addition, as LaFave and Israel have explained, the language in *Oyler* prohibiting arbitrary classifications may bar charging decisions that are not rationally related to legitimate government ends.²¹⁷

Lower courts also rely on *Wayte v. United States*,²¹⁸ in which the defendant challenged his prosecution for failure to register for the draft by claiming that his vocal protest of Selective Service laws made

214. See, e.g., *United States v. Bustamante*, 805 F.2d 201, 202 (6th Cir. 1986) (citing *Oyler*); *United States v. Hazel*, 696 F.2d 473, 474-75 (6th Cir. 1983) (citing *Oyler*); *United States v. Wilson*, 639 F.2d 500, 503-04 (9th Cir. 1981) (citing *Oyler*); *United States v. Swanson*, 509 F.2d 1205, 1208-09 (8th Cir. 1975) (citing *Snowden*); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (citing *Snowden*); Applegate, *supra* note 28, at 46-47, 54 n.129 (discussing lower courts' treatment of *Oyler*); Gifford, *supra* note 28, at 680 (same); Givelber, *supra* note 28, at 113 (same). See also Cardinale & Feldman, *supra* note 28, at 671 n.86 (contending that *Snowden* and *Oyler* should be read to require a defendant to "show that the prosecutor had the specific intent to discriminate" in order to establish an equal protection violation).

215. See, e.g., *Futernick v. Sumpter Township*, 78 F.3d 1051, 1058 (6th Cir.), *cert. denied*, 117 S. Ct. 296 (1996); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481-82 (7th Cir. 1990); Cardinale & Feldman, *supra* note 28, at 667, 672. Others have reached the opposite conclusion. See, e.g., *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (rejecting the view that equal protection is "limited to protecting members of identifiable groups"); *United States v. Torquato*, 602 F.2d 564, 569 n.9 (3d Cir. 1979).

216. Other language in *Snowden* suggests as much: "[W]here the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws." *Snowden*, 321 U.S. at 8. See also Cardinale & Feldman, *supra* note 28, at 670 ("One commentator has remarked that 'intent' can take on meaning anywhere along a continuum from 'not accidental or negligent' at one end to 'with specific knowledge of a violation' at the other." (quoting Andrew B. Weissman, *The Discriminatory Application of Penal Laws by State Judicial and Quasi-Judicial Officers: Playing the Shell Game of Rights and Remedies*, 69 Nw. U. L. Rev. 489, 504 (1974))).

217. See 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §13.4(c), at 192-98 (1984). See also *United States v. Cyprian*, 756 F. Supp. 388, 394-95 (D.N.D. 1991) (repeating analysis in LAFAVE & ISRAEL); Givelber, *supra* note 28, at 116 n.116 (describing *Oyler's* ban on "arbitrary or unjustifiable standards" as "shorthand" for classifications that do not "bear[] an arguably reasonable relationship to legitimate state purposes"). That construction has the dual advantage of being consistent with both the common usage of "arbitrary," see BLACK'S LAW DICTIONARY 104 (6th ed. 1990) (defining "arbitrary" as "[i]n an unreasonable manner, as fixed or done capriciously or at pleasure"), and general equal protection doctrine, which imposes a rationality requirement.

218. 470 U.S. 598 (1985).

it more likely that he would be charged. The Court rejected the claim, holding that in order to prevail on a selective prosecution claim a defendant must prove that the prosecutor selected him because of his exercise of his First Amendment rights.²¹⁹ From this, lower courts apparently reason that *Wayte* imposes a "proof-of-improper-purpose" threshold for *all* selective prosecution claims.²²⁰ A defendant who only questions the rationality of a charging decision can never satisfy this requirement because a rationality challenge tacitly concedes an inability to prove that the prosecutor has an improper discriminatory purpose. However, *Wayte* does not impose such a threshold. Although *Wayte* does require proof of an improper prosecutorial purpose, it does so only in those cases in which the defendant's equal protection claim is predicated on an allegation that an exercise of a constitutional right (or membership in a suspect class) played a role in the charging decision.²²¹ *Wayte* never challenged the decision to prosecute him but not others who had also failed to register as simply irrational. Thus, the Court had no occasion to address the viability of such a claim.

Whatever force lower courts' interpretations of *Snowden*, *Oyler*, and *Wayte* may have once had,²²² it is unlikely that they survived *Wade*

219. See *supra* note 205.

220. For example, in *Esmail*, 53 F.3d at 178-79, the court cited *Wayte* for the proposition that [t]he [only] form of selective prosecution . . . that is actionable under the federal Constitution . . . is where the decision to prosecute is made either in retaliation for the exercise of a constitutional right, such as the right to free speech or to the free exercise of religion, or because of membership in a vulnerable group.

See also *Developments*, *supra* note 205, at 1540-41 (reading *Wayte* as imposing purposefulness threshold for all selective prosecution claims).

221. Cf. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1303-04 n.1 (9th Cir. 1991) (Canby, J., concurring) ("The [*Wayte*] Court did not say . . . that in a case of pure arbitrariness, such as a coin toss decision, due process inquiry would be precluded.").

222. At the root of lower courts' interpretations of *Snowden*, *Oyler*, and *Wayte* as limiting selective prosecution doctrine to cases involving deliberately improper discrimination may be the fear that a more generous view would compel prosecutors and administrators to treat all similarly situated persons the same absent a rational reason to do otherwise, regardless of the prosecutor's or administrator's state of mind. Such a "strict liability" equal protection requirement would enable any person to assert a right to the more lenient treatment that any similarly situated person already had received or receives in the future, whether or not the government actor intended to treat the complaining person more harshly or even knew that the other person had received more favorable treatment. The Eleventh Circuit raised the specter of such a result in *E & T Realty v. Strickland*, 830 F.2d 1107 (11th Cir. 1987):

The problem with the district court's standard [that an arbitrary but not improperly discriminatory administrative classification violated equal protection] is that *any* departure from state law would give rise to a constitutional claim. Under the district court's standard, if local government decisionmakers correctly applied a facially neutral resolution in hundreds of cases and erroneously applied it in a single case, they could never

v. United States,²²³ a more recent Supreme Court decision. In *Wade*, a unanimous Court concluded that the Constitution requires that all prosecutorial decisions, including charging decisions, be rationally related to legitimate government ends. The Court did not suggest equal protection prohibits only improper discriminatory decisions. At issue in *Wade* was whether there are limitations on federal prosecutors' discretion to refuse to file sentencing motions acknowledging defendants' "substantial assistance" in the investigation or prosecution of another person. Without such motions, courts are powerless to depart downward from statutory mandatory minimum sentences and sentencing guidelines ranges to credit a defendant's cooperation.²²⁴

again apply it correctly without violating equal protection. A plaintiff [alleging a constitutional violation under 42 U.S.C. § 1983], to whom the statute was subsequently correctly applied, could establish a denial of equal protection merely by proving that the statute was misapplied in a single previous incident and that there is no rational reason for the difference between the single previous misapplication and the subsequent correct application to him.

Id. at 1114. The Eleventh Circuit's position—doubting the existence of a constitutional obligation at all, rather than simply questioning the propriety of judicial review—is unpersuasive. As is explained in detail below, *see infra* notes 287-88 and accompanying text, there is a middle ground between a rigid requirement of equal treatment without regard to a prosecutor's mental state on one hand and a threshold requiring proof of deliberate improper discrimination sufficient to trigger strict or heightened scrutiny on the other. Simply put, without running afoul of the Supreme Court's selective prosecution doctrine, courts can require proof that the prosecutor knows of a pool of similarly situated persons being treated more leniently before imposing equal protection constraints.

223. 504 U.S. 181 (1992). After law enforcement officials arrested Wade in possession of cocaine, handguns, and \$22,000 in cash, he agreed to cooperate with them, giving "valuable assistance" that resulted in the convictions of other drug dealers. *See id.* at 183; *Wade v. United States*, 936 F.2d 169, 170-71 (4th Cir. 1991). Despite Wade's cooperation, the government did not make a "departure motion" at Wade's sentencing. As a result, the court could not reduce his sentence to reward his cooperation. Understandably disillusioned, Wade moved the district court for a downward departure from the sentencing guidelines and sought permission to inquire into the government's reasons for refusing to make a departure motion to determine if that refusal was arbitrary or in bad faith. The district court denied both requests. *See id.* at 171. After the Court of Appeals for the Fourth Circuit affirmed the district court decision, Wade successfully petitioned the Supreme Court for certiorari. *See id.* at 172-73.

224. 18 U.S.C. § 3553(e) (1996) empowers federal prosecutors to move a court to depart from a statutorily imposed mandatory minimum sentence to reward a defendant's "substantial assistance in the investigation and prosecution of another person." Section 5K1.1 of the *United States Sentencing Guidelines* allows federal prosecutors to make a similar motion for a departure from the sentencing guidelines. In order for a court to depart from both a statutory minimum and the guidelines, a prosecutor must make both motions. *See United States v. Melendez*, 116 S. Ct. 2057 (1996). Without such motions, federal courts are powerless to depart from the mandatory minimums and guidelines to reward a defendant for cooperating with the government. *See, e.g., United States v. Emery*, 34 F.3d 911, 912-13 (9th Cir. 1994).

The *Wade* Court found that constitutional requirements constrain the government's discretion to refuse to file departure motions.²²⁵ For example, the Court noted that Wade "would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of a defendant's race or religion."²²⁶ More importantly, the Court also made clear that the decision not to move for a departure must be rational, a point that the government conceded. The Court wrote: "Wade would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end"²²⁷ Significantly, the Court accepted without question that the same restriction applies to charging decisions: "[W]e see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions, *see, e.g., Wayte v. United States*. . . ."²²⁸ By citing *Wayte*, which involved an equal protection challenge to a charging decision, the Court clearly indicated that charging decisions, indeed virtually all prosecutorial decisions, must be rational.²²⁹

Whether or not there are valid reasons for courts to refrain from enforcing this "rational prosecution" obligation—a topic that Part Four of this Article addresses—*Wade* makes sense. Equal protection

225. *See Wade*, 504 U.S. at 185. The Court's opinion does not state whether equal protection or due process principles impose the constraints. Elsewhere, the Court has noted that when assessing the constitutionality of allegedly arbitrary classifications, "an argument based on equal protection essentially duplicates an argument based on due process." *See Chapman v. United States*, 500 U.S. 453, 465 (1991) (citing *Jones v. United States*, 463 U.S. 354, 362 n.10 (1983)).

226. *Wade*, 504 U.S. at 186. The Court determined, however, that Wade "never alleged, much less claimed to have evidence tending to show, that the Government refused to file a motion for suspect reasons such as his race or his religion." *See id.*

227. *Id.*

228. *Id.* at 185.

229. Despite *Wade*, the Supreme Court later determined in *Purkett v. Elam*, 115 S. Ct. 1769 (1995) (per curiam), that a prosecutor's reason given to justify the exercise of a peremptory challenge need not "make[] sense" in order to comport with equal protection, exempting such decisions from any rationality requirement. *See id.* at 1771. *Purkett's* apparent rejection of a rationality requirement is likely limited to peremptory challenges, which litigants historically could exercise without any reason at all. *See Batson v. Kentucky*, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting) (stating that "unadulterated equal protection analysis is simply inapplicable to peremptory challenges. . . . A clause that requires a minimum 'rationality' in government actions has no application to 'an arbitrary and capricious right.'" (citations omitted)). *See generally* *Swain v. Alabama*, 380 U.S. 202, 211-21 (1965). In addition to the historical pedigree of peremptory challenges, the *Purkett* Court may have been influenced by the fact that prospective jurors' interests in being free from arbitrary peremptory challenges are far less significant than other interests that equal protection doctrine addresses. Because other prosecutorial decisions, including charging decisions and departure motions, affect more substantial interests and are not characterized by a history of accepted irrational use, *Purkett* is not a retreat from *Wade*.

compels government actors to behave rationally when classifying people in other contexts.²³⁰ These contexts often involve commercial or economic interests that are far less compelling than those at stake when prosecutors determine who to select for prosecution.²³¹ In light of the profound effect that charging decisions have on the lives of those chosen, including possible pretrial detention, the rigors of criminal prosecution, and the potential deprivation of life or liberty that a conviction entails, it would be anomalous for the Constitution to exempt charging decisions from a standard that applies to governmental classifications affecting less significant interests.

Indeed, it may be appropriate for courts to hold charging decisions to a more demanding standard than that applied to less consequential classifications. The Court purports to reject such a position, maintaining that unless a classification impairs a fundamental right or burdens a protected class, equal protection scrutiny does not vary with the importance of the interests at stake.²³² Several justices have questioned whether a rigid three-tiered approach, with an extremely deferential standard applied to all classifications that do not merit strict or heightened scrutiny, is consistent with the Court's treatment of the cases or desirable. Justice Marshall argued that the Court's equal protection decisions can and should be explained as the application of "a spectrum of standards" involving "variations in the degree of care with which the Court will scrutinize particular classifications depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."²³³ Similarly, Justice Stevens contends that all equal protection decisions apply a single, flexible standard of rationality that "includes a requirement that an

230. See, e.g., *Allegheny Pittsburg Coal Co. v. County Comm'r of Webster County*, 488 U.S. 336 (1989); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 532-33 (1973).

231. See, e.g., *Burlington N. R.R. v. Ford*, 504 U.S. 648 (1992) (ability to choose in-state venue for civil lawsuit); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (ability to operate a pushcart in French Quarter of New Orleans).

232. See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (refusing to apply standard more stringent than traditional rationality approach to state decision to impose a ceiling on payments under Federal Aid to Families With Dependent Children program despite fact that decision could deprive large families of "the most basic economic needs of impoverished human beings").

233. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). See also *Dandridge*, 397 U.S. at 520-212 (1970) (Marshall, J., dissenting) (arguing that "concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against . . . and the asserted state interests in support of the classification"); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 459-60 (1985) (Marshall, J., concurring in part and dissenting in part); *Plyler v. Doe*, 457 U.S. 202, 230-31 (1982) (Marshall, J., concurring).

impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."²³⁴ Unlike traditional rational relationship analysis, this approach would require balancing the purpose of the classification against the burdens that it imposes. Both the Marshall "spectrum" view and the Stevens unified-rationality approach would likely require greater scrutiny of prosecutors' charging decisions than the traditional standard.²³⁵ Even if these formulations of the Court's equal protection jurisprudence are inaccurate, or if charging decisions need not meet a requirement more demanding than that which governs less significant classifications, such decisions certainly must satisfy the same minimal standard that applies elsewhere.

The equal protection rationality requirement does not prohibit intentionally selective charging decisions. Indeed, the Court has stated that "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."²³⁶ Rather, as in other contexts, the rationality standard simply demands that prosecutors have valid reasons for charging decisions that treat one offender differently than others who appear to be similarly situated.²³⁷ The reason given must do more than describe why the selected offender has

234. *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring). See also *Michael M. v. Superior Ct. of Sonoma County*, 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting).

235. These alternative formulations of equal protection help explain some of the Court's decisions applying the rational relationship standard to invalidate legislative classifications. For example, the Court has struck down laws that deny publicly funded education to children of illegal immigrants, see *Plyler v. Doe*, 457 U.S. 202 (1982); zoning for group housing for the mentally retarded, see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); and federal food stamps to needy households containing unrelated members, see *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), despite compelling arguments that there were rational reasons for the classifications in those cases. See *Plyler*, 457 U.S. at 249-53 (Burger, C.J., dissenting); *Cleburne*, 473 U.S. at 458-59 (Marshall, J., concurring in part and dissenting in part); *Moreno*, 413 U.S. at 546 (Rehnquist, J., dissenting).

236. *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

237. There is reason to believe that equal protection rationality review is more stringent when applied to administrators' decisions than legislative classifications. In *Allegheny Pittsburgh Coal Co. v. County Comm'r of Webster County*, 488 U.S. 336, 344 (1989), the Court struck down a local assessment practice that created significant disparities between mining property that had been recently sold and that which had not, but noted that "[w]e need not . . . decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be." Three years later, in *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992), the Court upheld a provision of the California Constitution that created similar disparities between sold and unsold property, but which, unlike the Webster County disparities, resulted from a provision resulting from a statewide ballot initiative rather than an administrator's enforcement policy.

been prosecuted: It must distinguish between those who are prosecuted and those who are not.²³⁸ In addition, there must be a rational connection between the reason for the differential treatment and a legitimate government objective.²³⁹

C. PROSECUTION UNDER DUPLICATIVE FEDERAL STATUTES

Although there is no reason why the rationality requirement should not apply to all prosecutorial charging decisions, it has greater import for federal prosecutors' decisions to select only some eligible offenders for prosecution under duplicative federal statutes. To explain why this is so it is necessary to compare prosecutors' decisions to bring charges generally with federal prosecutors' decisions to bring charges under duplicative federal statutes. Assume there is a pool of offenders, all of whom have committed a particular crime. If the crime is a serious one, typically both state prosecutors and those federal prosecutors enforcing nonduplicative federal statutes will bring charges against all known and convictable members of that pool. Prosecutors have a powerful incentive to do so because a decision not to prosecute would enable the offenders to escape punishment.²⁴⁰ Such an outcome not only runs contrary to a prosecutor's obligations

238. See, e.g., *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating that equal protection "imposes a requirement of some rationality in the nature of the class singled out . . . requir[ing] that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made'" (citations omitted)).

239. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (Brennan, J., dissenting) ("When faced with a challenge to a . . . classification under the rational-basis test, the court should ask first, what the purposes of the [classification] are, and, second, whether the classification is rationally related to achievement of those purposes."); *Zobel v. Williams*, 457 U.S. 55, 62-63 (1982) (determining that state objective of rewarding citizens for past contributions to state "is not a legitimate state purpose").

240. Arguably, in cases of overlapping jurisdiction, a state prosecutor could decide not to bring charges in a serious case without fear that the offender will go unpunished because federal prosecution would be available. In reality, however, state prosecutors cannot rely on federal prosecutors to serve as a "safety net" by prosecuting convictable offenders whose conduct violates both state and federal law. Federal prosecutors almost certainly lack the resources to pursue more than a handful of offenders who state prosecutors deem unworthy of prosecution. See *supra* note 177.

Similarly, the possibility of state prosecution does not serve as an effective safety net if federal prosecutors fail to bring charges against known and convictable violators of nonduplicative federal statutes. First, there may be no analogous state law. Even if there is a state law that prohibits the violator's conduct, it may not adequately protect the interests that the federal law is meant to safeguard. As a result, federal prosecutors may be loath to rely on state prosecution to vindicate distinct federal interests, particularly in serious cases.

as a law enforcement official, but also may prove harmful to a state prosecutor's chances of future electoral success.²⁴¹

Thus, for serious offenses, two factors usually will distinguish prosecuted from unprosecuted offenders: whether they are known and whether they are convictable. Obviously, prosecutors cannot and do not bring charges against offenders who have not been identified as having committed an offense. Even when prosecutors know that someone has committed an offense, they usually will not bring charges if they lack sufficient admissible evidence to prove the case. Although they may screen offenders who commit minor offenses like possession of small amounts of drugs for personal use, gambling, and prostitution by use of other criteria as well,²⁴² the costs of choosing not to prosecute any known and provable serious offenses outweigh any advantages gained by selectivity.²⁴³

In contrast, federal prosecutors selecting offenders who violate duplicative federal statutes have far greater freedom. As is true for

241. Although there is disagreement about the extent to which state and local prosecutors are politically accountable, repeated failure to prosecute cases against known serious offenders would almost certainly harm reelection efforts. Compare Beale, *supra* note 2, at 994 ("State criminal laws are enforced by elected state and local prosecutors who are . . . politically accountable to their varied constituencies."), with Gifford, *supra* note 28, at 670 ("In theory, [state and local prosecutors] can be defeated for re-election if the public disapproves of abuses in the charging decision. In reality, however, the prosecutor's decisions are not highly publicized, and voters' memories are short. The election of the prosecutor is not a referendum on charging policies."), and Bubany & Skillern, *supra* note 28, at 488, 492 n.105 (noting that political controls on prosecutors are "conjectural" and "illusory"; "[r]arely is the public aware of any activity of the prosecutor other than in connection with sensational trials reported by the news media. Additionally, prosecutors' policies are seldom publicized, elections are infrequent, and the voter's memory is short." (footnote omitted)). Because almost all local and state prosecutors are elected, see DeFRANCES ET AL., *supra* note 177, at 1 (95% of chief prosecutors elected locally), they likely perceive political pressure to bring charges in most or all provable serious cases, whether such pressure actually exists. No similar pressures affect federal prosecutors, who are appointed by the President and are not accountable to a local constituency. See Frase, *supra* note 170, at 249.

242. See Givelber, *supra* note 28, at 97, 106 ("Only those laws whose violation does not have an immediate, personal effect on unconsenting others are likely candidates for unequal or sporadic enforcement. Gambling laws, licensing laws, post-no-bills laws, Sunday closing laws are typical examples.") (footnotes omitted); Vorenberg, *supra* note 28, at 1531 ("Prosecutors exercise the greatest charging discretion when dealing with minor offenses, such as consensual crimes, petty thefts, and assaults without serious injury.").

243. See Abrams, *supra* note 28, at 11-12 (stating that "[p]rosecutors probably do not exercise much discretion to withhold prosecution where violent crimes . . . have been committed"); Gifford, *supra* note 28, at 666 & n.32 ("Decisions to forego prosecution on policy grounds are obviously less frequent in cases of violent felonies"; they are largely based on "whether there is sufficient evidence to convict"); Vorenberg, *supra* note 28, at 1526 ("Prosecutors exercise the least discretion over those crimes that most frighten, outrage, or intrigue the public, such as murder, rape, arson, armed robbery, kidnapping, and large-scale trafficking in hard drugs.").

charging decisions generally, federal prosecutors may not prosecute because they do not know of the offense or offender, or because they lack sufficient admissible evidence to convict. However, federal prosecutors have considerably greater latitude to screen offenders—even those who have committed serious crimes—using additional criteria because, where duplicative statutes are involved, their failure to prosecute does not mean that the offenders go unpunished. Because an offender's conduct will also violate state law, he is subject to state prosecution even if the federal prosecutor chooses not to bring charges. State prosecutors will likely have the resources to prosecute cases that federal prosecutors do not pursue, and, as the primary prosecution entity in their jurisdiction, have an obligation to do so. Thus, federal prosecutors are free to ignore or decline to prosecute cases against known and convictable offenders.²⁴⁴

Significantly, because federal prosecutors lack the resources necessary to review the evidence in all cases eligible for duplicative federal prosecution,²⁴⁵ they *must* resort to methods of screening cases other than consideration of the “convictability” of individual offenders. Federal prosecutors can employ a variety of methods to accomplish this preliminary sorting. For example, they may review only those cases that are investigated by federal law enforcement agencies or those that involve threshold quantities of drugs or money, especially dangerous or violent offenders, or particular federal offenses. In short, they can employ policy-based screening mechanisms before having to conduct case-specific assessments of evidence.²⁴⁶ Alternatively (and problematically), federal prosecutors may not employ predetermined screening criteria at all, distinguishing instead between the cases that they review and those that they overlook with no principled basis for doing so.

244. See Frase, *supra* note 170, at 250 (“[F]ederal criminal laws frequently overlap with state statutes, permitting the federal prosecutor additional flexibility in the selection of cases.”).

245. See *supra* note 177.

246. Professors Bubany and Skillern noted a similar dichotomy when they discussed “two basic standards” that prosecutors use when determining when to bring charges: “(1) the convictability of the accused and (2) the desirability of obtaining a conviction vis-a-vis pursuing some other course. In other words, the prosecutor determines not only whether he *can* convict, but also whether he *should* convict.” Bubany & Skillern, *supra* note 28, at 479 (footnote omitted). Although state prosecutors and federal prosecutors enforcing nonduplicative federal statutes will almost always answer the second question affirmatively when serious crimes are involved, they have more flexibility when considering whether to prosecute minor offenses. When the costs of allowing unprosecuted offenders to go unpunished are low, prosecutors have more freedom to screen cases by use of methods other than consideration of the strength of evidence. See *supra* notes 242-43 and accompanying text.

These differences help explain why the equal protection rationality requirement is particularly important as a limit on federal prosecutors' decisions about whether to bring charges under duplicative federal statutes. First, their greater freedom to ignore offenders—a freedom afforded by the “safety net” of potential state prosecution—carries with it an enhanced risk that selection will be arbitrary, increasing the importance of an equal protection rationality constraint. More discretion does not necessarily lead to unprincipled decision-making, but it certainly magnifies the danger.²⁴⁷

Second, equal protection is more likely to be applicable to a federal prosecutor's decision to select only some offenders. Equal protection does not constrain a prosecutor's charging discretion unless, at a minimum, the prosecutor knows of uncharged offenders who are similarly situated to those who the prosecutor has charged.²⁴⁸ Thus, equal protection doctrine has nothing to say about a prosecutor's failure to charge unknown similarly situated others. However, it may have something to say when a federal prosecutor chooses to prosecute some offenders and ignore others who instead are prosecuted in state court. Federal prosecutors are aware that their state counterparts are bringing charges for crimes also covered by federal statutes. They know that the offenders exist, have been identified, apprehended, charged, and are eligible for prosecution under duplicative federal statutes. Although federal prosecutors may not be familiar with the specific evidence against each such offender, this ignorance is the product of their own preliminary screening decisions by which they select cases for review. Thus, federal prosecutors arguably have sufficient “knowledge” of such offenders to trigger an equal protection obligation to have a rational basis for treating them differently than similar federally prosecuted offenders.²⁴⁹ In short, a federal prosecutor's awareness that similarly situated offenders are charged in state court may create otherwise nonexistent equal protection obligations.

247. The same holds true for other charging decisions that do not present prosecutors with the choice of bringing charges or allowing the offender to go unpunished. For example, prosecutors have considerable latitude when determining whether to seek the death penalty or other sentencing enhancements based on the criminal history of the offender or the nature of the offense. A decision not to seek death or an enhanced sentence does not allow the offender to avoid punishment.

248. See *Oyler v. Boles*, 368 U.S. 448, 456 (1962). See also *infra* notes 287-89 and accompanying text. Viewed from another perspective, the prosecutor's lack of knowledge of uncharged offenders is a rational basis for differential treatment.

249. For a more detailed discussion of whether federal prosecutors “know” of the offenders prosecuted in state court, see *infra* notes 287-89 and accompanying text.

Finally, federal prosecutors' selection criteria, or lack thereof, are more susceptible to the limits that the rational relationship constraint imposes. The principal criterion that state prosecutors and federal prosecutors enforcing nonduplicative federal statutes use in deciding whether to prosecute known offenders who commit serious crimes is the likelihood of conviction.²⁵⁰ This method of distinction between charged and uncharged offenders is eminently rational. In contrast, when federal prosecutors enforcing duplicative federal statutes make preliminary selection decisions by screening cases without consideration of the evidence, as they are able to and indeed must do, there is no similar guarantee that the screening criteria will be rational. As a result, there is a greater chance that a rationality requirement can inform their charging decisions.²⁵¹

III. DEPARTMENT OF JUSTICE POLICY AND PRACTICE

The profound effect that federal charging decisions can have on the treatment of offenders, federal prosecutors' considerable discretion when enforcing duplicative statutes, and the absence of meaningful judicial oversight make effective administrative guidance critical. Unfortunately, Department of Justice policy falls short of dictating an affirmative obligation to make rational selection decisions. Furthermore, in an effort to provide guidance to federal prosecutors making charging decisions, the Department encourages an approach that infringes on state law enforcement policy and may be unfair to offenders. Existing practice reflects these policy deficiencies. Federal prosecutors sometimes select offenders for prosecution without determining whether there is a principled basis for distinguishing them from similar offenders who receive more lenient treatment because they are charged in state, not federal, court. The Department should amend its policy to require federal prosecutors to have a rational basis for making these decisions.

A. THE "PRINCIPLES OF FEDERAL PROSECUTION"

The "Principles of Federal Prosecution" provide Department of Justice standards for the charging decisions of federal prosecutors in

250. See *supra* notes 240-42 and accompanying text.

251. Cf. Abrams, *supra* note 28, at 11 (noting the difference between strength-of-evidence considerations, which "do not lend themselves to much meaningful systemization," and "considerations . . . linked to particular offense categories," which do).

the United States Attorney's offices.²⁵² To a degree, these guidelines promote rational charging decisions by precluding federal prosecutors from considering an offender's "race, religion, sex, national origin, or political association, activities or beliefs; [t]he [federal prosecutor's] own personal feelings concerning the [offender], the [offender's] associates, or the victim; or [t]he possible effect of the decision on the [prosecutor's] own professional or personal circumstances."²⁵³ However, other than explicitly prohibiting charging decisions based on these improper considerations, the guidelines do not ensure that federal prosecutors will have affirmatively rational reasons for selecting which among all eligible convictable offenders will be subject to federal prosecution.²⁵⁴

The guidelines permit commencement of federal prosecution only if the government attorney believes that the offender's conduct constitutes a federal offense provable by admissible evidence.²⁵⁵ They urge declination of prosecution despite such a belief, however, if "[n]o substantial federal interest would be served by prosecution" or if "[t]he person is subject to effective prosecution in another jurisdiction."²⁵⁶ These provisions appear to require that federal prosecutors have a rational basis for differentiating between defendants selected for federal prosecution—cases in which there is a substantial federal interest—and defendants that are left to the states for prosecution—those subject to effective prosecution in another jurisdiction. This appearance is deceptive.

The guidelines require that prosecutors conduct the "substantial federal interest" and "effective prosecution in another jurisdiction" inquiries only after assessing the evidence and determining that there is

252. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.000 (1993) [hereinafter DOJ MANUAL].

253. *Id.* § 9-27.260(A)(1)-(3).

254. See Mengler, *supra* note 3, at 533 (noting that the Department of Justice has not issued specific guidelines about when cases that the states can prosecute should be brought in federal court).

255. The prosecutor must believe "that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction. . . ." DOJ MANUAL, *supra* note 252, § 9-27.220(A). Elsewhere, the manual explains that the federal prosecutor can bring charges only if she "believes that the person probably will be found guilty by an unbiased trier of fact." *Id.* § 9-27.220(B).

256. *Id.* § 9-27.220(A)(1)-(2). Section 9-27.230(A) lists factors that a prosecutor should consider when determining whether there is a "substantial federal interest." Section 9-27.240(A) lists factors to be considered when determining whether an offender is subject to "effective prosecution in another jurisdiction."

a provable offense.²⁵⁷ The guidelines do not address the preliminary screening decisions by which federal prosecutors distinguish between the cases that they review and those that they ignore. Thus, although the guidelines may encourage rational distinctions between cases that federal prosecutors actually assess and decline and those that they assess and prosecute, they do not require that there be a rational basis for distinguishing between eligible offenders prosecuted in federal court and those who are instead prosecuted in state court because federal prosecutors never reviewed the evidence against them.²⁵⁸ Other

257. See *id.* § 9-27.220 (requiring assessment of grounds for declination only after assessment of evidence).

The guidelines provide less than clear direction even in regard to applying the declination criteria. The manual states that a prosecutor “*may* properly decline to take action” when no substantial federal interest will be served by federal prosecution or when effective prosecution is available in another jurisdiction. *Id.* § 9-27.220(B) (emphasis added). In addition, “[i]t is left to the judgment of the attorney for the government whether such a situation exists.” *Id.* Furthermore, the guidelines are advisory, having little binding effect in individual cases. Section 9-27.140 allows United States Attorneys in each federal district to depart from the prosecutive guidelines “as necessary in the interests of fair and effective law enforcement within the district.” Although “[a]ny significant modification or departure contemplated as a matter of policy or regular practice must be approved by the appropriate Assistant Attorney General and the Deputy Attorney General,” no such approval is required for departures in individual cases. *Id.* § 9-27.140(A)

258. In 1994, the Department of Justice intimated that it would soon amend the “Principles of Federal Prosecution” to require federal prosecutors to “meet with local prosecutors to establish local rules for distinguishing which offices would handle which [drug] cases.” *Drug Charging Jurisdiction*, DOJ ALERT, Mar. 21, 1994. Although such an amendment would promote rational selection of offenders for federal prosecution from among all eligible drug offenders, to date there has been no such amendment. See Mengler, *supra* note 3, at 533 (discussing DOJ failure to establish drug guidelines).

On its face, a provision in a different portion of the *United States Attorneys' Manual* suggests that federal prosecutors have an obligation to meet with state and local prosecutors to determine which cases to prosecute in federal court among all cases that are eligible for federal prosecution. Section 9-2.142(I)(E) states:

In order to ensure the most efficient use of law enforcement resources, *whenever a matter involves overlapping federal and state jurisdiction*, federal prosecutors should at the earliest possible time coordinate with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and to resolve all criminal liability for the acts in question if possible.

DOJ MANUAL, *supra* note 252, § 9-2.142(I)(E) (emphasis added). Read literally, this provision appears to impose on federal prosecutors a duty to consider the propriety of federal prosecution for every eligible offender, a mandate that would dramatically alter present practice. However, because the quoted provision does not appear in the “Principles of Federal Prosecution,” but rather in the “Petite Policy” portion of the manual, which applies when “contemplated federal prosecution is based on substantially the same act(s) or transactions(s) involved in a prior state or federal prosecution,” *id.* § 9-2.142(II)(A), it almost certainly imposes the obligations to coordinate with state and local prosecutors *only* in those cases in which there is a risk of prosecutions by both federal and state authorities. Thus, the provision is designed to reduce the likelihood of dual prosecutions, rather than to rationally allocate offenders between federal and state courts. For a discussion of the “Petite Policy,” see *infra* note 312.

sections in the *United States Attorneys' Manual*, which provide offense-specific charging guidance, do not remedy this deficiency.²⁵⁹

B. THE "COMPARATIVE ADVANTAGE" APPROACH

Among other considerations, the "Principles of Federal Prosecution" encourage federal prosecutors to select cases based on differences between federal and state laws. They instruct federal prosecutors to take into account whether there are "legal or evidentiary problems that might attend prosecution in the other jurisdiction."²⁶⁰ They also mandate consideration of the "probable sentence" available in the other jurisdiction.²⁶¹ Taken together, these factors suggest that federal prosecutors should select offenders in order to take advantage of procedural and sentencing disparities between federal and state law. They encourage federal prosecutors to file federal charges because critical evidence has been or will be suppressed in state court, a defendant has greater bail or discovery rights in state court, or a longer sentence is required in federal court.²⁶² Consistent

259. For example, sections 9-101.200 and 9-101.400(B), which became effective in July 1992, discuss when drug cases should be charged in federal court. These sections mandate the sufficiency of the evidence in individual cases as one factor to be considered and discuss the declination of federal prosecution and referral of cases to state and local prosecutors as alternatives to federal prosecution. Thus, the sections suggest that the guidelines apply to cases that the federal prosecutor has already reviewed, giving federal prosecutors guidance about when to bring charges and when to decline prosecution in those cases. There is no indication that the sections are meant to apply more broadly to promote rational policies for differentiating between cases involving all drug offenders eligible for federal prosecution, whether or not the federal prosecutor has assessed the evidence. Similarly, although section 9-43.110 discourages federal prosecution of mail-fraud schemes that "consist[] of some isolated transactions between individuals [and] involv[e] minor loss to the victims," it otherwise imposes no general obligation on federal prosecutors to ensure that there is a rational basis to select only some of the eligible fraud cases and leave others for state prosecution. DOJ MANUAL, *supra* note 252, § 9-43.110.

Further complicating matters, it sometimes appears as if federal prosecutors are unaware of these guidelines or that they ignore them. For example, although section 9-131.040 limits use of the robbery provisions of the Hobbs Act, 18 U.S.C. § 1951, to "instances involving organized crime, gang activity, or wide-ranging schemes," it is used in more mundane circumstances. See, e.g., *United States v. Quigley*, 53 F.3d 909 (8th Cir. 1995) (Hobbs Act prosecution of case involving stabbing and armed robbery of eighty cents to be used to purchase beer).

Although individual United States Attorney's Offices often have their own internal guidelines, see KAMISAR ET AL., *supra* note 130, at 903 n.c., because they are not available to the public, it is impossible to determine if they address the issues raised here.

260. DOJ MANUAL, *supra* note 252, § 9-27.240(B)(2).

261. See *id.* § 9-27.240(A)(3).

262. See Hollon, *supra* note 3, at 513 n.57 (noting that the *United States Attorneys' Manual* "appears virtually to instruct federal prosecutors to go after particular defendants on the basis that a harsher sentence can be obtained under federal law").

with these administrative guidelines, both the Attorney General²⁶³ and a former Deputy Attorney General²⁶⁴ have cited the benefits of more advantageous federal law as a valid reason for selecting offenders for federal prosecution.²⁶⁵ Although the policy of seeking a comparative advantage does promote comparison of federally prosecuted offenders with those charged in state court, it does not always ensure rational selection of offenders. Even when it does promote rational charging decisions, the comparative approach has other shortcomings.

The effort to obtain a comparative advantage does not always rationally distinguish between defendants selected for federal prosecution and those who are not. When compared with state laws, some federal laws, such as those that increase the possibility of pretrial detention or routinely require longer sentences in drug cases, are uniformly advantageous to federal prosecutors. In those cases, a desire to take advantage of federal law does not explain the selection of some eligible defendants rather than others who would also be subject to the prosecution federal doctrines.²⁶⁶ To screen rationally in such cases, federal prosecutors must have some independent basis for selecting the offenders against whom they seek to obtain the comparative advantage that federal law confers—for example, reliable information that a defendant is an organized crime figure or a major drug trafficker.²⁶⁷ Such characteristics, as opposed to the advantages of federal law, serve to rationally distinguish the selected offenders from

263. In testimony before the Senate Judiciary Committee, then Attorney-General-designate Janet Reno explained that when she served as district attorney for Dade County, Florida, her office referred a case against corrupt police officers to federal authorities in part to avoid more liberal state discovery rules. See Hearings of the Senate Judiciary Committee on the Nomination of Janet Reno to be Attorney General (Mar. 9, 1993), available in LEXIS, News Library, SCRIPTS File.

264. In a recent article responding to critics' concerns about federalization, former Deputy Attorney General Jamie Gorelick cited the "comparative advantage" of federal procedures such as "preventive detention" and "stiffer penalties" as reasons for federal rather than state prosecution. See Gorelick & Litman, *supra* note 4, at 976-77.

265. See Harry Litman & Mark D. Greenberg, *Reporters' Draft for the Working Group on Federal-State Cooperation*, 46 HASTINGS L.J. 1319, 1324-27 (1995) (discussing use of comparative advantage approach to take advantage of "long sentences [and] favorable procedural rules such as preventive detention"). Federal District Court Judge Stanley Marcus has "confessed" that during his tenure as a United States Attorney he prosecuted cases in federal court because of procedural advantages in that forum. See Landers, *supra* note 3, at 1263-64.

266. Thus, it is not surprising that former Deputy Attorney General Gorelick has concluded that "[t]he comparative advantage approach does not imply that a federal prosecution should be brought whenever the federal government has a comparative advantage." Gorelick & Litman, *supra* note 4, at 977.

267. See Jeffries & Gleeson, *supra* note 54 (contending that advantages in federal court justify bringing organized crime prosecutions in that forum).

those not prosecuted. Without such distinguishing characteristics, a selection decision made to take advantage of a uniformly advantageous federal law does not explain the different treatment and thus does not satisfy equal protection.²⁶⁸

268. *United States v. Batchelder*, 442 U.S. 114 (1979), does not suggest otherwise. In *Batchelder*, the Court stated that "[t]he prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause." *Id.* at 125. The federal prosecutor in *Batchelder* had the option of bringing charges under one of two different federal firearms statutes, both of which prohibited convicted felons like Batchelder from possessing firearms. The prosecutor chose to use 18 U.S.C. § 922(h), which allowed imposition of a sentence of up to five years imprisonment, rather than 18 U.S.C. App. § 1202(a), which carried a maximum sentence of only two years imprisonment. After conviction, the court imposed a five-year sentence. *See id.* at 116. On appeal, Batchelder claimed that the government's ability to select which statute to charge could result in unequal treatment of people who had committed the same crime and thus violated equal protection and due process. The Court rejected the claim, noting that in cases in which criminal conduct violates more than one criminal statute, prosecutors have broad discretion to select charges, "so long as [they do] not discriminate against any class of defendants." *Id.* at 124. Analogizing such cases to *Batchelder*'s, the Court held that "[j]ust as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced." *Id.* at 125. Lower courts have relied on *Batchelder* to deny the constitutional claims of defendants subject to harsher penalties in federal court. *See, e.g., United States v. Nance*, 962 F.2d 860, 865 (9th Cir. 1992); *United States v. Andersen*, 940 F.2d 593, 596 (10th Cir. 1991).

However, *Batchelder* is not inconsistent with the view that equal protection requires federal prosecutors to have rational reasons for determining which offenders are subject to the possibility of longer sentences. First, *Batchelder* did not involve allegations that the government had treated similarly situated others differently. Batchelder merely argued that the *possibility* of disparate treatment violated equal protection and due process. Thus, there was no reason for the Court to consider prosecutors' obligations to rationally distinguish between similarly situated offenders. Second, the Court determined only that the prosecutor may be "influenced" by the possibility of a longer sentence. The Court did not address a situation in which the desire to impose harsher penalties is the only reason for the changing decision, without some independent basis for distinguishing between offenders. Third, *Batchelder* involved a selection of one federal statute rather than another, not a selection between state and federal forums. Thus, concerns about the effect charging decisions would have on state criminal justice systems, *see infra* notes 269-70 and accompanying text, were absent. Finally, at the time the Court decided *Batchelder*, federal judges had largely unfettered sentencing discretion. The judge who sentenced Batchelder was free to impose a sentence no longer than that which would have been available had the government brought charges under § 1202(a). As the Court acknowledged, judicial discretion was available to ameliorate any improprieties in the charging decision: "[A prosecutor's] decision to proceed under § 922(h) does not empower the Government to predetermine ultimate criminal sanctions. Rather, it merely enables the sentencing judge to impose a longer prison sentence than § 1202(a) would permit. . . ." *Batchelder*, 442 U.S. at 125. In contrast, under the present federal sentencing regime, with its mandatory minimum sentences and rigid guidelines, the prosecutor's decision to select a defendant for federal prosecution will likely preclude the sentencing court from taking into consideration the shorter sentence that would have been imposed in state court and reducing the federal sentence accordingly. *See United States v. Reyes*, 966 F.2d 508, 509-10 (9th Cir. 1992) (district courts lack authority to depart from sentencing guidelines to conform sentence to that received by co-accused who is prosecuted in state court).

In other circumstances, however, federal law may provide a comparative advantage only in certain cases, thus serving to distinguish the selected offender from others who instead are prosecuted in state court. For example, in a particular case, state law may require suppression of evidence that is admissible in federal court. Resort to federal law for its comparative advantage in such cases provides a rational basis for distinction and thus does not raise equal protection concerns. Nonetheless, these situations may be problematic for other reasons which should matter to the Department of Justice.

First, when promoted as a method of selection, the comparative advantage approach encourages federal prosecutors to intentionally circumvent legal protections that states afford offenders. In essence, these selection decisions defeat the policies underlying state laws, such as states' determinations that people who commit crimes within their borders are entitled to certain procedural protections and should be subject to certain punishments.²⁶⁹ Conflicts between the policies embodied in the federal and state criminal justice systems are unavoidable, given the expansion of federal substantive criminal law and the procedural and sentencing differences between the two systems. However, the Department of Justice should be wary of exacerbating

269. In fact, some state attorneys general and judges have expressed displeasure with the intrusion of federal criminal law. See, e.g., Brickey, *supra* note 29, at 1165-66 n.170 (summarizing views of attorneys general and judges); *Reports and Proposals: Federalization of Crime Is Focus of Federal Bar Association Panel Discussion*, 58 Crim. L. Rep. (BNA) 1175-76 (Nov. 22, 1995) (giving judges' views of federalization).

One might respond that a federal prosecution does nothing to prevent a state from treating those who violate state law any way that the state deems fit. Double jeopardy doctrine does not bar a state from bringing charges when there has been a federal prosecution. See *supra* note 7. Although some states have statutory prohibitions on state prosecutions following federal prosecutions, see, e.g., CAL. PENAL CODE § 687 (West 1995); N.Y. CRIM. PROC. LAW §§ 40.10-40.30 (McKinney 1995), such laws reflect state policy choices and are not imposed by the federal government. Thus, unless they have chosen to bar successive prosecutions in their own courts, states are free to apply any procedural rules and impose any sentences they deem appropriate, independent of federal charging decisions, prosecutions, and sentences.

Although technically correct, this view ignores the real concern—the federal government's intrusion into law enforcement and its prosecutorial decisions that override state policy choices. Subsequent state prosecutions not only fail to rectify that intrusion; at worst, they effectively increase the offenders' sentences, exacerbating the problem. When federal prosecutors select an offender *in order to* circumvent more prodefendant state law, rather than because of some other federal interest, their conduct infringes on the states' historical role as the primary enforcer of criminal law, an infringement that a subsequent state prosecution will not remedy. The problem is not simply that the federal government is increasing its involvement in law enforcement, although some critics see that as a concern, see *supra* note 4, it is that federal prosecutors' charging decisions in individual cases purposefully frustrate state policy determinations about a matter that historically has been within state and local control.

the situation by encouraging its trial-line prosecutors, who are unlikely to be sensitive to state-federal comity concerns, to exploit differences as a principal method of selecting offenders.

Selection of defendants in order to defeat state procedural protections can also reduce the efficacy of state efforts to deter police and prosecutorial misconduct. State and local law enforcement officers who are aware that evidence obtained in violation of state constitutional law is nonetheless admissible in federal court will have less incentive to respect state constitutional rights.²⁷⁰ The same holds true for state prosecutors, who may be more willing to violate state laws protecting defendants knowing that if courts sanction them by dismissal or another remedy that forecloses state prosecution, federal prosecution remains available. In fact, if investigators believe that federal prosecution will be advantageous, they may violate state constitutional guarantees intentionally in an attempt to make the state forum unavailable and thus prompt federal prosecutors to bring charges.

Finally, and perhaps most disturbing, selecting offenders for federal prosecution in order to obtain a legal advantage can penalize them for having valid claims under state law. Often, multiple aspects of federal law, frequently including sentencing, are more favorable to the prosecution than state law. If a federal prosecutor selects a defendant in order to obtain a comparative advantage by avoiding a state constitutional or procedural protection, such as a prodefendant discovery or suppression doctrine, the defendant may not only be stripped of that benefit, but he may also be subject to other aspects of federal law that are harsher than those that he would have faced in state court.²⁷¹ There is a danger that when police or state prosecutors

270. Cf. *State v. Isom*, 761 P.2d 524, 528-29 (Or. 1988) ("[F]ar from discouraging the [local] police [from continuing to question a suspect after he requests a lawyer], the federal rule [allowing statements taken in violation of *Miranda* to be used to impeach] they were following actually encourages unconstitutional interrogation where the suspect has taken the police at their word and declined to talk. . . . Police officers have a duty to uphold the constitution of this state and may not intentionally violate a person's constitutional rights without serious sanctions.").

271. This scenario occurred in *United States v. Deitz*, 991 F.2d 443 (8th Cir. 1993). Deitz was charged with drug offenses in an Arkansas court. The case was dismissed when the state failed to bring the case to trial within the time limits of the state speedy trial act. As a result of his successful assertion of state rights, Deitz was charged in federal court, where he received a longer sentence than he would have if convicted in state court. On appeal, the Eighth Circuit affirmed the trial court's refusal to depart downward from the applicable federal sentence. See *id.* at 447-48. In dissent, Senior Judge Bright noted that "the defendant who asserts rights granted under state law now faces increased penalties in a federal court." *Id.* at 449 (Bright, J., dissenting). See also *United States v. Reilly*, 76 F.3d 1271 (2d Cir. 1996); *People v. Reilly*, 606

violate state law, federal prosecutors will intervene to salvage prosecutions, and defendants will suffer harsher treatment because their state constitutional or statutory rights have been violated. The defendant will not go free when the constable blunders; instead, he will receive a longer sentence in federal court.

C. CHARGING PRACTICES

Because prevailing doctrine ensures that federal prosecutors will almost never have to explain decisions to ignore, reject, or select offenders,²⁷² and because practices vary from district to district, it is difficult to determine how federal prosecutors choose which offenders to prosecute under duplicative federal statutes and whether they do so for reasons related to legitimate government objectives.²⁷³ At best, one would hope that federal prosecutors make charging decisions, including decisions that determine which cases they will consider for prosecution, based on predetermined guidelines or standards designed to further the goals of effective law enforcement. Some United States Attorneys' Offices do employ such guidelines.²⁷⁴

N.Y.S. 2d 836 (1994). Reilly received a six-month sentence in state court for growing marijuana. He appealed, alleging that the search that uncovered the marijuana violated state constitutional guarantees broader than those available in federal court. The appellate court agreed, suppressing the marijuana needed to convict him, reversing the conviction, and dismissing the indictment. *See id.* at 840. As a result, Reilly was prosecuted in federal court and exposed to the possibility of a mandatory minimum sentence of five years imprisonment. *See United States v. Reilly*, 875 F. Supp. 108 (N.D.N.Y. 1994), *aff'd*, 76 F.3d 1271 (2d Cir. 1996). Fortunately for Reilly, the federal district judge suppressed the marijuana on other grounds, *see Reilly*, 875 F. Supp. at 121, and the Second Circuit affirmed.

272. Prosecutors need not produce discovery related to a selective prosecution claim unless a defendant presents some evidence of discriminatory effect and intent. *See United States v. Armstrong*, 116 S. Ct. 1480, 1488 (1996). Although *Armstrong* only addressed the discriminatory effect requirement in the context of the threshold burden to obtain discovery, it mentioned with approval that Courts of Appeals require a defendant seeking discovery to present evidence of "discriminatory effect and discriminatory intent." *Id.*

273. In 1980, Professor Frase studied the charging practices of the United States Attorney's Office for the Northern District of Illinois. *See Frase*, *supra* note 170. Although instructive, Frase's study has limited application to the present inquiry. First, Frase only considered those matters actually referred to the office for prosecution. He did not examine cases that had been prescreened by some selection method that limited the number of cases that the office had to consider. *See id.* at 255. Second, Frase's study is now 16 years old and precedes the present federalization concerns. Third, it only reflects the charging practices of a single United States Attorney's Office.

274. For example, some districts use quantitative guidelines to determine whether federal prosecution is warranted, imposing a threshold weight figure in drug cases or a dollar figure in fraud or money-laundering cases. These districts prosecute only those cases involving amounts above the threshold. *See, e.g., COCAINE AND FEDERAL SENTENCING POLICY*, *supra* note 160, at

On the other hand, one might fear that even if they obey constitutional and administrative prohibitions barring the conscious selection of offenders for obviously improper reasons such as race, some federal prosecutors nonetheless select offenders haphazardly, without rationally distinguishing them from similarly situated others who receive radically different treatment in state court.²⁷⁵ Although these federal prosecutors may not intentionally select defendants for bad reasons, they do not do so for principled reasons either. Some observers have concluded that such a fear is valid,²⁷⁶ and anecdotal evidence supports their conclusions.

For example, some federal prosecutors apparently bring charges in drug cases against offenders who are no different than those routinely charged in state courts. In 1990, the Federal Courts Study Committee noted that "[t]he federal system [is being] overwhelmed with [drug] cases that could be prosecuted in state courts," and that "at the present time minor [drug] cases that lack . . . a connection [to interstate or foreign commerce] are being brought in many districts."²⁷⁷ Similarly, numerous reported appellate decisions describe federal

139 (discussing 50 gram threshold for crack cocaine prosecutions in the Central District of California); Bowman, *supra* note 92, at 739 n.219 (describing five kilogram powder guidelines in United States Attorney's Office for the Southern District of Florida in the early 1990s). Those guidelines can serve as rough indicators of the most serious offenders in that district.

275. See, e.g., *United States v. Palmer*, 3 F.3d 300 (9th Cir. 1993), *cert. denied*, 510 U.S. 1138 (1994). See also discussion *supra* notes 15-27 and accompanying text. In *Palmer*, there was evidence that the United States Attorney's Office had no policy for determining which cases were prosecuted in state court and which cases were charged in federal court. See *supra* note 24.

276. Professor Beale contends that "the decision to bring charges in federal rather than state court is made on an ad hoc basis. . . . [M]any [United States Attorney's Offices have] no standards to guide individual prosecutors." Beale, *supra* note 2, at 999-1000. See also Curtis, *supra* note 177, at 86 ("[E]rratic prosecution of and disparate penalties for similarly situated defendants are commonplace."). Professor Givelber expressed a similar concern in 1973: "In reality, then, a decision to selectively prosecute an offender for a crime may involve neither a rational policy nor a considered value judgment nor expertise." Givelber, *supra* note 28, at 104.

In the Central District of California, where I practiced as a federal prosecutor from 1987 until 1994, screening decisions for many cases involving duplicative federal statutes were made according to predetermined guidelines based largely, but not wholly, on drug weights and dollar amounts. Sometimes, however, offenders who did not satisfy the predetermined guidelines, and who were no different than offenders being charged in California state courts, were charged in federal court and subjected to harsher penalties.

277. REPORT, *supra* note 2, at 37 (1990); see also Beale, *supra* note 2, at 990 (describing complaints of district court judges in the District of Columbia about prosecution of minor drug cases in federal courts). Because the Department of Justice at one time considered workload of individual United States Attorney's Offices as a factor when allocating resources, there was a danger that federal prosecutors pursued minor drug cases to inflate their statistics and obtain more resources. See DOJ ALERT, Nov. 1, 1993.

prosecutions in robbery,²⁷⁸ bribery and extortion,²⁷⁹ and arson²⁸⁰ cases of offenders whose crimes appear identical to cases routinely prosecuted in state courts.

Furthermore, the federal government has adopted policies, at both the national and local level, that promote prosecution of offenders under duplicative federal statutes but ignore the possibility that similarly situated others are charged in state court. For example, in early 1991, in order to take advantage of lengthy federal sentences, the Department of Justice announced "Operation Triggerlock," a vigorous federal effort to prosecute cases involving possession and use of firearms in violation of federal law,²⁸¹ despite the fact that far more firearms offenders were prosecuted in state court.²⁸² In the Southern District of New York, from 1983 until 1989, a program dubbed "Federal Day" mandated federal prosecution of all drug arrestees on randomly selected days.²⁸³ Obviously, the only thing that distinguished offenders prosecuted in federal court from those charged in state court was the day of the week on which they happened to be arrested.²⁸⁴ Likewise, the federal government periodically prosecutes defendants who are arrested in random law enforcement "sweeps." These sweeps take place during a short period of time and involve numerous arrests either in a specific geographical area, for violation of

278. See, e.g., cases cited *supra* note 112.

279. See, e.g., cases cited *supra* note 113.

280. See, e.g., cases cited *supra* note 114.

281. See *Gun Crimes Targeted By Prosecutors*, WASH. POST, Apr. 11, 1991, at A14; *Thornburg Orders Drive on Gun Violence*, N.Y. TIMES, Mar. 27, 1991, at A20. Federal statutes criminalizing possession of a firearm by a convicted felon, see 18 U.S.C. § 922(g) (1) (1996), use of a firearm during a drug trafficking crime or a crime of violence, see *id.* § 924(c)(1), and possession of a firearm by a career criminal, see *id.* § 924(e)(1), "form[ed] the core of the program." Michael M. Baylson, *Mandatory Minimum Sentences: A Federal Prosecutor's Viewpoint*, 40 FED. B. NEWS & J. 167 (1993).

282. In October 1992, then-President Bush claimed that there had been nearly 8,000 arrests as a result of Triggerlock. See *Bush v. Clinton, The Candidates on Legal Issues*, 78 A.B.A. J. 57, 60 (1992). That year alone there were approximately 26,422 defendants who the states convicted of firearms offenses. See SOURCEBOOK, *supra* note 132, at 498 tbl.5.46.

283. See *United States v. Aguilar*, 779 F.2d 123, 125 (2d Cir. 1985) (describing "Federal Day" as "the day of the week when federal law enforcement authorities have decided to convert garden-variety state law drug offenses into federal offenses"); Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. TIMES, Dec. 29, 1989, at A18 ("In Manhattan, under a program known as Federal Day, more than 1,200 Federal indictments have been handed up since 1983 in cases developed by the local authorities. [D]uring one random day a week[,] all drug arrests are processed in Federal court. . . .").

284. See *Aguilar*, 779 F.2d at 125 (involving a "Federal Day" case that "was developed by New York City police officers, concerns readily visible criminal conduct requiring no special investigatory resources or equipment, and involves a \$30 [heroin] transaction").

a particular crime, or both, without regard to whether similarly situated others are charged in state court.²⁸⁵

D. AMENDING THE "PRINCIPLES OF FEDERAL PROSECUTION"

Although available evidence does not reveal the prevalence of unprincipled selection of offenders for duplicative federal prosecution,²⁸⁶ existing administrative guidelines do not prohibit such selection. This deficiency, coupled with anecdotal evidence that federal prosecutors sometimes do choose offenders who appear to be no different than those prosecuted for analogous offenses in state court, is sufficiently troubling to warrant amendment of the "Principles of Federal Prosecution" to ensure compliance with the equal protection rationality requirement. Before describing specific proposals, however, it is worthwhile to consider two objections to the conclusion that amendments are needed to conform Department of Justice policy to the constitutional requirement of rational charging decisions.

1. *What Does Equal Protection Require?*

First, equal protection imposes constraints only when a prosecutor "knows" of similarly situated offenders who will receive different treatment as a result of a charging decision. Therefore, one could argue that even if federal prosecutors are bound to obey the rational relationship component of equal protection, they do not know enough about cases against offenders prosecuted in state court to trigger a constitutional obligation to rationally distinguish them from defendants selected for federal prosecution. Second, one might contend that intentionally random selection of offenders for federal prosecution is a rational method of classification because it promotes deterrence. If so, then as long as federal prosecutors do not choose defendants for improper reasons like race or personal animosity, unprincipled or

285. See, e.g., *United States v. Bourgeois*, 964 F.2d 935, 936 (9th Cir. 1992) ("On June 14 and 15, 1990, federal agents and local law enforcement officers arrested more than 100 alleged gang members in South Central Los Angeles. These arrests were part of a publicized, nationwide effort, dubbed 'Operation Streetsweep,' that resulted in at least 160 arrests in 11 states."); *United States v. Peterson*, 768 F.2d 64, 65 (2d Cir. 1985) ("This case arose out of one of the New York City Police Department's 'buy operations'—numerous purchases in a targeted area of small amounts of drugs, supposedly for personal use, by undercover agents, followed by arrests and federal prosecution of the sellers. The sweep here was 'Operation Pressure Point'; the target area was the area around Eighth Avenue and 115th Street in Harlem.").

286. Because doctrine does not require prosecutors to explain charging decisions, see *supra* note 272 and accompanying text, it is difficult, if not impossible, to determine the prevalence of unprincipled charging.

haphazard selection may be sufficiently random to satisfy equal protection. Because the Department guidelines already prohibit improper reasons, there is no need to add an affirmative obligation to have rational reasons.

a. *What do federal prosecutors "know"?:* The Supreme Court established the equal protection knowledge requirement in *Oyler v. Boles*.²⁸⁷ After Oyler's conviction for second-degree murder, a state prosecutor charged him as a habitual offender under a statute that imposed a mandatory life sentence. Oyler claimed that the charging decision violated equal protection because the prosecutor had not sought to enhance the sentences of other eligible repeat offenders. The Court noted that Oyler had not alleged that the prosecutor knew of the other eligible offenders and determined that this defect was fatal to his equal protection claim.²⁸⁸

At issue here is whether *Oyler's* knowledge requirement insulates federal prosecutors from having to rationally distinguish offenders whom they charge under duplicative federal statutes from those whom the state prosecutes instead. On one hand, federal prosecutors have some general awareness that there are apprehended offenders being prosecuted in state court who are eligible for prosecution under duplicative federal statutes. That is, unlike those who escape prosecution altogether, offenders charged in state court are in some sense "known" to federal prosecutors. On the other hand, if federal prosecutors have not considered the merits of the cases against these offenders, they may not "know" about them, just as the *Oyler* Court concluded that the prosecutor there did not know about the uncharged but eligible habitual offenders in that case.

287. 368 U.S. 448 (1962).

288. See *id.* at 456. See also *Rickett v. Jones*, 901 F.2d 1058 (11th Cir. 1990). *Rickett* challenged a prosecutor's decision to charge him under an Alabama habitual offender sentencing statute that requires prosecutors to bring charges against all eligible offenders. See *id.* at 1059. *Rickett* claimed that the prosecutor's failure to file identical charges against his codefendant Battles, who arguably was also eligible for habitual offender sentencing, violated equal protection. See *id.* The lower court determined that the prosecutor did not charge Battles as a habitual offender because the prosecutor had neglected to request readily available records that showed that Battles was eligible for such treatment. See *id.* at 1061, 1063 n.2 (Johnson, J., concurring). The appellate court held that the prosecutor's negligent failure to identify Battles as eligible did not violate *Rickett's* equal protection rights because *Rickett* demonstrated the existence of only one potentially eligible but unselected offender. See *id.* at 1060-61. The court noted, however, that "if failure to apply the [habitual offender statute] were to become more than occasional and random, the federal Constitution might be violated, requiring federal court intervention." *Id.* at 1061.

The latter position, denying that federal prosecutors have sufficient knowledge to trigger constitutional concerns, takes too narrow a view of equal protection. The focus of inquiry should not be limited to the manner in which federal prosecutors select offenders from the pool of cases they have already chosen to review, but should also extend to the earlier decision to review some cases and ignore others. Because federal prosecutors are aware of the larger pool of apprehended offenders, equal protection obligates them to have a rational basis for distinguishing cases they review from cases they do not. Not only must federal prosecutors act rationally when they select from among the pool of offenders whose cases they do review, they also must act rationally when they choose which apprehended violators of duplicative federal statutes will make up that pool.²⁸⁹

Even if federal prosecutors have no constitutional obligation to rationally select the pool of potential federal prosecutees, the Department of Justice should impose such an obligation as a matter of policy. Adherence to a narrow construction of equal protection would inform federal prosecutors that they have no duty to consider the problem of disparate treatment and can avoid equal protection concerns as long as they remain subjectively ignorant of cases involving similarly situated offenders. A responsible commitment to the principles underlying equal protection should compel the Department to require more of its prosecutors, mandating that they determine whether their charging practices result in disparate treatment, rather than enabling them to close their eyes to that probability.

In addition, the Department has publicized its successful efforts to achieve cooperation among federal, state, and local law enforcement agencies.²⁹⁰ Federal prosecutors often work with their state and local counterparts, and they routinely bring charges against offenders

289. Justice Marshall made this point in his dissent in *Wayte v. United States*, 470 U.S. 598 (1985), in the context of allegations of discriminatory selective prosecution. Marshall wrote: "If the Government intentionally discriminated in defining the pool of potential prosecutees, it cannot immunize itself from liability merely by showing that it used permissible methods in choosing whom to prosecute from this previously tainted pool." *Id.* at 630 (Marshall, J., dissenting). If, as I have contended, equal protection requires rational charging decisions as well as prohibiting discriminatory ones, then Justice Marshall's observation applies with equal force when federal prosecutors determine which offenders' cases they will review for possible federal prosecution.

290. See, e.g., Robert L. Jackson, *Violent Crime Down in 1995*, *Justice Department Reports*, L.A. TIMES, Sept. 18, 1996, at A14; Justice Dep't Hearing, Federal News Service, Oct. 10, 1996, available in LEXIS, Nexis Library; Justice Dep't Hearing, Federal News Service, Apr. 25, 1996, available in LEXIS, Nexis Library; *Transcript of News Conference*, Federal Document Clearinghouse, Inc. NBC Professional, May 13, 1996, available in LEXIS, Nexis Library.

who have been arrested by local police or joint federal and local task forces.²⁹¹ It would be inconsistent for the Department to tout these accomplishments and pursue cases resulting from arrests by local agencies while denying that it has an obligation to rationally determine which offenders will be prosecuted in which forum. Rather, the Department should adopt an approach consistent with the spirit of both equal protection and federal, state, and local cooperation by having a rational and consistent basis for determining which offenders are prosecuted in state court and which are prosecuted in federal court.

b. *Is random selection rational?*: If one concludes that random selection, such as that employed in federal prosecutive policies like "Federal Day," comports with equal protection, it may follow that intentionally unprincipled selection does as well.²⁹² In *Logan v. Zimmerman Brush Co.*,²⁹³ the Supreme Court considered the constitutionality of random selection. Six justices concluded that a state's termination of an employment discrimination claim because of a state agency's accidental random scheduling error established a classification that violated the rationality requirement of equal protection.²⁹⁴ The Court, however, has never determined whether *intentional* random selection is similarly infirm.²⁹⁵ Lower courts that

291. See *United States v. Davis*, 906 F.2d 829, 831 (2d Cir. 1990) ("As the challenge facing the nation's law enforcement authorities has grown in sophistication and complexity, cooperation between federal and local agencies has become increasingly important and increasingly commonplace."); Curtis, *supra* note 177, at 89 ("Joint state-federal task forces abound. State law enforcement officers are encouraged to make referrals for federal prosecution of crimes within state jurisdiction.").

292. Of course, if unprincipled selection is not purely random, possibilities for abuse exist. See Frase, *supra* note 170, at 283 ("Such 'arbitrary' selection raises greater potential risks that the prosecutor will 'randomly' select his enemies. . . .").

293. 455 U.S. 422 (1982).

294. Although the majority decided the case on due process grounds, see *id.* at 433-38, Justice Blackmun, who authored the majority opinion, was joined by Justices Brennan, Marshall, and O'Connor in a concurring opinion finding an equal protection violation. See *id.* at 438-42. Justices Powell and Rehnquist dissented from the majority's due process holding, but agreed that there was an equal protection violation. See *id.* at 443-44; *Rickett v. Jones*, 901 F.2d 1058, 1063 & n.3 (11th Cir. 1990) (Johnson, J., concurring) (describing treatment of equal protection issue in *Logan*).

295. A remark in *Lehr v. Robertson*, 463 U.S. 248 (1983), suggests that intentional random selection is constitutional, at least in some contexts. In *Reed v. Reed*, 404 U.S. 71, 76 (1971), the Court determined that a state statute that preferred men to women as administrators of decedents' estates violated equal protection despite the state's contention that it "reduce[d] the workload of probate courts by eliminating one class of contests." Twelve years later, in *Lehr*, while discussing the statute that it had struck down in *Reed*, the Court intimated that a "coin flip" would have been a preferable means of reducing the administrative workload of probate courts. See *Lehr*, 463 U.S. at 265-66 n.24. See also *Delaware v. Prouse*, 440 U.S. 648, 667 (1979)

have considered the issue in passing have reached contrary conclusions.²⁹⁶ Some observers contend that purely random selection is consistent with equal protection because all are equally likely to be selected.²⁹⁷ Others conclude that random selection is problematic, and possibly unconstitutional, because the basis for selection has nothing to do with legitimate government objectives.²⁹⁸ Arguably, in situations in which the government must selectively prosecute, random selection is unrelated to any objective that the government seeks to further.²⁹⁹

(Rehnquist, J., dissenting) (assuming that a random traffic stop by a police officer does not violate equal protection). Even if intentional random selection as a means of selecting estate administrators and motorists subject to traffic stops does not violate equal protection, it does not necessarily follow that the same is true for random selection for prosecution, a decision with far higher stakes. See *infra* notes 302-303 and accompanying text.

296. Compare *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992) (noting that "[g]iven the significance of the prosecutor's charging and plea bargaining decisions, it would offend common notions of justice to have them made on the basis of a dart throw, a coin toss or some other arbitrary or capricious process" and suggesting that although such decisionmaking violates due process, separation of powers concerns precludes judicial review), with *Futernick v. Sumpter Township*, 78 F.3d 1051, 1059 (6th Cir.), *cert. denied*, 117 S.Ct. 296 (1996) ("It is clearly not a violation of equal protection if a local regulator, faced with limited resources, picks people to regulate in a perfectly random manner."), *Esmail v. Macrane*, 53 F.3d 176, 178-79 (7th Cir. 1995) ("[Random] selective prosecution, although it involves dramatically unequal legal treatment, has no standing in equal protection law."), and *United States v. Steele*, 461 F.2d 1148, 1152 (9th Cir. 1972) (stating that "mere random selection" would be a satisfactory method of selecting for prosecution among those who failed to complete census forms).

297. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 230 (1992) ("In an equally significant sense both the criminal justice system that creates low probabilities of apprehension and conviction and the lottery are fair so long as the ex ante costs and benefits are equalized among the participants."); Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 867 n.344 (1978) [hereinafter *Closer Scrutiny*] ("[W]hen the class is limited by lot, all are 'treated equally' with respect to their chance to win [or lose] the lottery."). This view requires that one define the government's "treatment" of individuals for purposes of equal protection analysis as its exposure of them to the potential of benefits or burdens. It seems more likely that the Court would assess the equality of "treatment" at the point at which the government actually imposes the benefits or burdens. The opinions of Justices Blackmun and Powell in *Logan*, which represented the views of six of the Justices on the Court, see *supra* notes 293-94 and accompanying text, suggest that the Court would adopt the latter approach. In *Logan*, all potential employment discrimination claimants were equally likely to be the victim of a random scheduling error which would terminate their claims. Rather than conclude that equal potential exposure to such a claim-terminating error satisfied equal protection, the six justices instead asked whether there was a rational basis for the government to treat Logan differently than the others by actually terminating his claim and determined that there was not.

298. See, e.g., Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 524-27 (1989); *Closer Scrutiny*, *supra* note 297, at 861-68 ("Burdening one person within the broad class serves the goal as well as burdening another.").

299. The draft lottery, the random selection of jury venires, and social experiments are commonly cited as examples of random selection. See, e.g., Simons, *supra* note 298, at 527 n.276 (jury selection and draft); Ahkil Reed Amar, Note, *Choosing Representatives By Lottery Voting*, 93 YALE L.J. 1283, 1307 (1984) (referring to selection of jury venires by lottery); *Closer Scrutiny*,

However, unlike the idiosyncratic, negligent random selection in *Logan*, intentional randomness is not necessarily unrelated to government objectives. Random distribution of burdens or benefits itself may further objectives that other selection methods cannot achieve. Indeed, some contend that the imposition of random harsh sentences is a rational means of maximizing the deterrent effect of limited law enforcement resources.³⁰⁰ If this is true, then federal prosecutors may achieve a similar deterrent effect by selecting offenders for harsher treatment in federal court in a random or unprincipled manner.³⁰¹ Under this view, as long as they do not make charging decisions for bad reasons, the Constitution does not require that prosecutors have good ones.

However, the interests at stake in the selective enforcement of duplicative federal statutes are sufficiently high that the Department of Justice should refrain from adopting the view that purely random or unprincipled selection is constitutional or desirable as a means of making charging decisions. Although random classifications affecting less important interests may not merit concern,³⁰² random determination of an offender's procedural protections or sentence seems fundamentally unfair, particularly without proof of a tangible deterrent effect. It is difficult to reconcile the guarantee of equal protection with the intentional use of a policy that randomly subjects one offender to a small fine and another who is similarly situated to the near

supra note 297, at 863-65. For a discussion of experiments with random leniency, see Peter Westen, *To Lure the Tarantula From Its Hole: A Response*, 83 COLUM. L. REV. 1186, 1196 n.29 (1983).

300. See, e.g., *Futernick*, 78 F.3d at 1057 n.8 (6th Cir. 1996) ("[R]andom choice may be one of the most sensible methods to allocate 'equally' finite enforcement resources.") (emphasis omitted); *Falls v. Town of Dyer*, 875 F.2d 146, 148 (7th Cir. 1989) ("Government rationally may decide that imposing stiff penalties on 10% of offenders is the best way to enforce the law against all."); Beale, *supra* note 2, at 1003 ("[T]here is an economic argument that the arbitrary selection of a few cases for harsh sentencing is the most efficient, i.e., least expensive, means of promoting deterrence."). However, in *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court concluded that random police stops of motorists for license and registration checks were unlikely to deter unlicensed persons from driving. See *id.* at 660.

301. Some, including the local district attorney, questioned the efficacy of the random Federal Day program as a deterrent. See Robert M. Morgenthau, *We Are Losing the War on Drugs*, N.Y. TIMES, Feb. 16, 1988, at A21 ("If the war on drugs is to succeed, the Federal Government must give us more than Panglossian rhetoric or showy 'Federal days'—the marching of street peddlers off to Federal, rather than state, court."); Deborah Squiers, *Banker Turned Defender Manages Legal Aid Unit For Local Federal Courts*, N.Y. L.J., Nov. 15, 1990, at 1 (quoting Federal Public Defender Leonard Joy as characterizing Federal Day program as "absurd. It makes good press but I don't think it ever made any dent.").

302. For example, random selection of persons to serve on jury panels is certainly constitutional.

certainty of a ten-year term of imprisonment.³⁰³ Even if constitutional doctrine does not preclude such a practice, the Department of Justice should as a matter of policy. It would be unthinkable for the Department to propose legislation requiring judges to spin a roulette wheel to determine criminal defendants' procedural protections and sentences. The Department should not risk the same result by giving its prosecutors free reign to make unprincipled charging decisions.

This is not to suggest that the Department of Justice has chosen to promote random or unprincipled selection. It has not.³⁰⁴ However, by employing guidelines that do not require federal prosecutors to compare offenders whom they charge with those prosecuted in state court and that only prohibit federal prosecutors from bringing charges for bad reasons, the Department allows its prosecutors to ignore similarly situated state-prosecuted offenders and to make selection decisions without good reason.

2. *Proposed Changes*

Regardless of whether equal protection requires prosecutors to make rational charging decisions and bars unprincipled classifications, the Department should be sufficiently concerned with the disparity wrought by unguided charging discretion to provide additional direction to its prosecutors.³⁰⁵ It could do so by making four changes to the "Principles of Federal Prosecution."

First, the Department should charge its prosecutors with learning, as a general matter, the nature and severity of crimes committed by all known offenders eligible for federal prosecution. Because known offenders typically are prosecuted either in state or federal court, this

303. Although the Selective Service draft lottery also employs random selection to make choices involving similarly important interests, there may be compelling societal reasons justifying use of such classification in that context, such as "placing a cross section of the community . . . on the battlefield." See *Closer Scrutiny*, *supra* note 297, at 865. In addition, random selection may be preferable to any other method of selection. In contrast, even if placing a fair cross section of the community in federal prison were a legitimate governmental aim, random selection for federal prosecution would not further that objective because the sample of offenders would be skewed by disparities in arrest rates.

304. When Senator Joseph Biden proposed legislation requiring a nationwide Federal Day program patterned after the random program employed in the Southern District of New York, the Department of Justice opposed it, although not because of concerns that it would promote unprincipled disparity. Rather, the Department saw the program as an unjustified congressional intrusion into federal prosecutors' charging discretion. See Ann Pelham & Richard Connelly, *U.S. Judges Oppose Federal Day Measure*, TEX. LAW., May 28, 1990, at 12.

305. For a discussion of the virtues of consistency in prosecutorial decisionmaking, see Abrams, *supra* note 28, at 4 n.8.

would require federal prosecutors to keep abreast of cases involving state-prosecuted offenders whose conduct makes them eligible for federal prosecution as well. Individual United States Attorney's Offices could do so by working with local law enforcement agencies or prosecutors to learn of the types of cases that are referred to state prosecutors.³⁰⁶

Federal prosecutors would not need to conduct detailed review of the cases against eligible offenders, a task that would deplete precious federal prosecutive resources. Indeed, the focus should not be on the strength of the evidence in individual cases, but rather on general characteristics that could serve to rationally distinguish offenders prosecuted by the state from those charged in federal court. Such characteristics might include the quantity of drugs or money involved in the offense.

Second, the Department should require that individual United States Attorney's Offices develop and consistently apply internal prosecutive classification schemes that use particular characteristics of crimes and criminals in order to distinguish cases that will not be reviewed from cases the federal prosecutors will review to determine whether there is sufficient evidence to prosecute. Although the schemes need not be rigid, exceptions should be tailored to minimize the possibility of disparate treatment of similarly situated offenders.³⁰⁷ Local prosecutive guidelines are preferable to nationwide legislative and administrative classification schemes because local guidelines would allow federal prosecutors to tailor standards to local crime problems. Although this proposed change is more modest than those calling for policies limiting federal prosecution to cases that are either distinctly federal in nature or require federal law enforcement resources,³⁰⁸ the mandated use of a rational selection scheme may

306. The Supreme Court recently determined that information about the existence of similarly situated offenders prosecuted in state court is available to defendants attempting to raise selective prosecution challenges. See *United States v. Armstrong*, 116 U.S. 1480, 1489 (1996) (describing task of proving existence of similarly situated others as not "insuperable" for defendants). Federal prosecutors, who have the benefit of cooperative relationships with state and local law enforcement agencies, should have little or no difficulty obtaining the same information.

307. For example, a United States Attorney's Office may, as a general matter, review for prosecution only those cocaine cases that involve possession or distribution of five or more kilograms of cocaine. But the same office may make exceptions for cases involving less than five kilograms if, for example, there is evidence that an offender employed firearms or violence while trafficking in drugs, or had prior convictions for drug trafficking.

308. For proposals suggesting that federal prosecution be limited to cases that involve some distinct or unique federal interest or characteristic, see *supra* note 28.

prompt individual United States Attorney's Offices to use federalism-based proposals as models. The Department should also encourage its prosecutors to work with local prosecutors to develop mutually agreeable classification schemes allocating federal and state prosecutive resources to maximize the advantages of overlapping jurisdiction while guaranteeing roughly equal treatment for similarly situated offenders.³⁰⁹

Third, the Department should prohibit random selection of offenders for federal prosecution. Absent compelling evidence that random selection effectively deters crime, far too much is at stake to allow federal prosecutors to select offenders by chance.³¹⁰

Fourth, rather than encourage federal prosecution as a means of gaining a comparative advantage, the Department should require that there be some characteristics of a case, other than a mere desire to avoid state procedural protections and take advantage of federal sentencing doctrines, to warrant federal prosecution. If there are legitimate reasons for prosecuting an offender in federal court independent of the imposition of harsher treatment, defendants' loss of state court advantages should not preclude federal prosecution. When federal prosecution is uniformly advantageous, however, the desire to obtain a tactical or strategic advantage alone should not suffice.³¹¹

In addition, although not mandated by either the letter or the spirit of equal protection, the Department should require the exercise

309. Presently, United States Attorneys are "urged to cooperate fully with state and local prosecutors and investigators" in drug cases, DOJ MANUAL, *supra* note 252, § 9-101.200(F), and instructed to "meet or confer with state and local prosecutors in connection with referral of federal cases for prosecution." *Id.* § 9-101.200 (H). This obligation should be expanded to all cases involving overlapping federal and state jurisdiction and to require rational determination of the appropriate forum for prosecution for all such cases. *See also* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6-7 (1997) (recommending "efforts to rationalize" use of federal and state resources to combat drug trafficking and use).

310. Were there reliable evidence that a prosecutor's ability to give different treatment to like cases provides a higher level of deterrence and "more bang for the buck" than would a system of clearly established, uniform sanctions, one could argue that gains in crime control outweigh the inherent unfairness of unpredictable differentiation. Such clear gains have not been shown, however, and the burden of persuasion ought to be on those who advocate a policy that seems dangerously at odds with basic notions of equal protection. . . .

Vorenberg, *supra* note 28, at 1550 (footnote omitted).

311. Such a change would make Department policy consistent in capital and noncapital cases. The *United States Attorneys' Manual* death penalty guidelines state that "[i]n states where the imposition of the death penalty is not authorized by law, the fact that the maximum federal penalty is death is insufficient, standing alone, to show a more substantial interest in federal prosecution." DOJ MANUAL, *supra* note 252, § 9-10.000.

of considerable caution before bringing charges in cases (1) involving offenders who would have been prosecuted in state court but for their anticipated or actual assertion of state constitutional or procedural protections and (2) where federal prosecution will not only have the effect of circumventing those protections, but will also prejudice the offenders in other ways, such as the imposition of a longer sentence. Although the federal government may have a legitimate ground for prosecuting such cases, particularly when the operation of state constitutional or procedural doctrines requires suppression of critical evidence or precludes state prosecution altogether, the Department should not tread on the state policies that require these results and penalize defendants whose state rights are violated without a compelling reason for doing so. It may be appropriate to require both a substantial federal interest in the prosecution and advance approval by a high-level Department of Justice official to prosecute such cases, as is required when federal prosecutors seek to bring charges after there has been a conviction or acquittal in state court.³¹²

IV. JUDICIAL ENFORCEMENT

If the Department of Justice were to do nothing to ensure that its prosecutors have a rational basis for selecting only some known eligible offenders to be subject to harsh federal doctrines and federal courts concluded that unprincipled selection is routine, judicial enforcement of the rationality requirement might be appropriate. Although lower federal courts have almost³¹³ unanimously refused to conduct such review,³¹⁴ the Supreme Court has never foreclosed the

312. In cases involving federal prosecution after a state court acquittal or conviction, the Department of Justice's "Petite Policy" requires a determination that a "substantial federal interest" was left "demonstrably unvindicated" by the state prosecution or sentence and prior approval by an Assistant Attorney General. *See id.* §§ 9-2.124(IV)-(V). Because the Petite Policy applies only if there has been a prior acquittal, conviction, or dismissal on the merits after jeopardy has attached, it does not govern federal prosecutors' decisions to bring charges after pretrial suppression of evidence or dismissal of charges. *See generally* Litman & Greenberg, *supra* note 7, at 75-76. Although Litman and Greenberg believe that the Petite Policy provides "insights" for the federalization debate, the Department of Justice has not imposed Petite-Policy-like constraints on decisions to prosecute some offenders in federal court when others who have engaged in similar criminal conduct are prosecuted in state court.

313. An oft-cited and rare exception is *United States v. Robinson*, 311 F. Supp. 1063 (W.D. Mo. 1969), in which the court held that a prosecution of a private detective, but not government officials, for illegal wiretapping was irrational and thus violated equal protection. *See generally* Cardinale & Feldman, *supra* note 28, at 665 & n.45 (discussing *Robinson*).

314. For example, in *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995) the court held: [T]he [only] form of selective prosecution. . . that is actionable under the federal Constitution. . . is where the decision to prosecute is made either in retaliation for the exercise

possibility of limited judicial oversight. Indeed, in *Wade*, the Court apparently reached the opposite conclusion. The Court held not only that federal prosecutors' refusals to request downward departures for cooperation must be rational, but that, given a sufficient showing, federal courts have an obligation to determine if the prosecution has complied with that mandate.³¹⁵ *Wade* also suggests that its analysis applies to charging decisions.³¹⁶

In order to determine why lower federal courts have consistently reached a different result and to explore whether judicial review to assess the rationality of charging decisions is ever appropriate, it is necessary to consider the principal barriers to review. First, courts commonly invoke the doctrines of "separation of powers" and the "presumption of regularity" of charging decisions to preclude judicial review entirely absent proof of improper discrimination. Second, in part as an outgrowth of these doctrines, courts place evidentiary obstacles in the path of litigants who attempt to gain review of charging decisions. Third, the deferential nature of rational basis scrutiny may prompt courts to refuse to conduct review because they perceive it as a meaningless exercise. Finally, courts may be reluctant to grant the generally accepted remedy for selective prosecution, dismissal of charges, because it is too draconian. Examination of these obstacles

of a constitutional right, such as the right to free speech or to the free exercise of religion, or because of membership in a vulnerable group.

See also *Jones v. White*, 992 F.2d 1548, 1571 (11th Cir. 1993); *United States v. Gutierrez*, 990 F.2d 472, 475 (9th Cir. 1992); *United States v. Fares*, 978 F.2d 52, 59 (2d Cir. 1992).

315. See *Wade v. United States*, 504 U.S. 181 (1992). The *Wade* Court "agree[d]" that prosecutorial power to move for a reduced sentence "is subject to constitutional limitations that district courts can enforce." *Id.* at 185 (emphasis added). The Court further held that "federal district courts have the authority to review the Government's refusal to file a substantial-assistance motion and to grant a remedy. . . ." *Id.*

The *Wade* Court concluded that *Wade's* showing was insufficient to merit review. Unfortunately, it neglected to explain what a defendant must demonstrate in order to obtain review. See David Fisher, Note, *Fifth Amendment—Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to file Substantial Assistance Motion*: *Wade v. United States*, 212 S. Ct. 1840 (1992), 83 J. CRIM. L. & CRIMINOLOGY 744, 757, 764 (1993). *Wade* had claimed that the district court precluded him from showing that rationality review was appropriate because it erroneously believed that no relief was possible under any circumstances. Thus, he asked the Court for a remand to prove to the district court that the government had acted arbitrarily or in bad faith by refusing to move for a reduced sentence because of "factors that are not rationally related to any legitimate state objective." *Wade*, 504 U.S. at 186 (quoting *Wade's* reply brief). The Court rejected that request. It determined that the district court had given *Wade* an opportunity "to state for the record what evidence he would introduce to support his position." *Id.* at 184. In response, *Wade's* attorney only "explained the extent of *Wade's* assistance to the Government." *Id.* Although that was a "necessary condition for relief, it [was] not a sufficient one." *Id.* As presented, *Wade's* claim "failed to rise to the level warranting judicial enquiry." *Id.*

316. See *supra* notes 227-29 and accompanying text.

reveals that whatever force they may have generally to preclude review of charging decisions is diminished considerably when defendants ask courts to determine only whether a decision to prosecute under a duplicative federal statute is rationally related to a legitimate government objective.

A. DOCTRINES PRECLUDING JUDICIAL REVIEW

1. *Separation of Powers*

Lower courts often cite separation of powers concerns to justify their refusal to review charging decisions absent evidence that the prosecution is motivated by forbidden factors like race or the exercise of a constitutional right.³¹⁷ It is noteworthy, however, that the Supreme Court has never invoked separation of powers concerns to bar judicial review of prosecutors' charging decisions.³¹⁸ The separation of powers doctrine prevents each branch of government from interfering with the constitutional functions of the coordinate branches.³¹⁹ A forceful statement of the role the doctrine plays in limiting judicial review of executive branch charging decisions appears in *United States v. Redondo-Lemos*.³²⁰ In that case, the court determined that although due process prohibits irrational or arbitrary charging decisions, separation of powers precludes judicial involvement absent proof of improper discrimination:

Such judicial entanglement in the core decisions of another branch of government—especially as to those bearing directly and substantially on matters litigated in federal court—is inconsistent with the division of responsibilities assigned to each branch by the Constitution. The Office of the United States Attorney cannot function as

317. See, e.g., *United States v. Jennings*, 991 F.2d 725, 730 (11th Cir. 1993); *United States v. Hayes*, 589 F.2d 811, 819 (5th Cir. 1979); Gifford, *supra* note 28, at 663 ("Review [of charging decisions] is considered inappropriate. . . because of constitutionally significant separation of powers considerations."); Hollon, *supra* note 3, at 522.

318. There is no mention of the separation of powers doctrine in the Supreme Court's selective prosecution decisions. See *United States v. Armstrong*, 116 S. Ct. 1480 (1996); *Wayte v. United States*, 470 U.S. 598 (1985); *United States v. Batchelder*, 442 U.S. 114 (1979); *Oyler v. Boles*, 368 U.S. 448 (1962).

319. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 18 (2d ed. 1988). Tribe describes the "model" of "separated and divided powers" as demonstrating

the degree to which various governmental arrangements comport with, or threaten to undermine, either the *independence* and *integrity* of one of the branches or levels of government, or the ability of each to fulfill its mission in checking the others so as to preserve the *interdependence* without which independence can become domination.

Id.

320. 955 F.2d 1296 (9th Cir. 1992).

prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbiter of the cases presented to it. In the end, the type of intense inquiry that would enable a court to evaluate whether or not a prosecutor's charging decision was made in an arbitrary fashion would destroy the very system of justice it was intended to protect.³²¹

Although these considerations mandate some limitation on judicial oversight of charging decisions, they do not compel complete abdication of review. Indeed, courts do review charging decisions if there is evidence that they were motivated by racial or other improper considerations. The resulting inquiry may require intrusive measures, such as discovery and testimony by executive branch officials, and remedies, like dismissal, that undercut executive decisions.³²² Similarly, when confronted with evidence that federal legislators have enacted statutory classifications that are not rationally related to legitimate government objectives, the Supreme Court does not hesitate to review core decisions of a coordinate branch of government and invalidate the legislation if necessary.³²³

Thus, the question is not whether separation of powers doctrine bars review entirely, but rather under what circumstances review is appropriate. Intrusive and stringent oversight of federal prosecutors' charging decisions obviously threatens executive prerogative, particularly if a defendant can obtain such review without having to make a considerable threshold showing to demonstrate the need for review. However, if a federal court is confronted with evidence that federal prosecutors have selected an offender in an unprincipled manner and that the charging decision subjects the offender to significantly less favorable procedural protections and sentencing doctrines than those the offenders would have received in state court, separation of powers

321. *Id.* at 1300. Kenneth Culp Davis disputes the claim that separation of powers precludes federal courts from reviewing prosecutors' discretionary decisions for abuse, arguing that:

This reason is so clearly unsound as to be almost absurd. If separation of powers prevents review of the discretion of executive officers, then more than a hundred Supreme Court decisions spread over a century and three quarters will have to be found contrary to the Constitution! If courts could not interfere with abuse of discretion by executive officers, our fundamental institutions would be altogether different from what they are.

DAVIS, *supra* note 28, at 210.

322. See, e.g., *United States v. Armstrong*, 116 S. Ct. 1480 (1996); *Wayte v. United States*, 470 U.S. 598 (1985).

323. See, e.g., *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding that a statutory classification in the federal Food Stamp Act violated equal protection because it was not rationally related to a legitimate government end).

concerns should not automatically foreclose review, particularly if the court can resolve the claim by conducting limited review.

Restrained judicial oversight is possible. In an analogous context, when assessing only the rationality of legislative classifications, courts conduct remarkably nonintrusive review. Where a statute does not explicitly set forth a classification scheme, courts will interpret the legislation to ascertain the scheme it creates.³²⁴ Then, the courts will either make efforts to determine the legislature's *actual* reasons for creating the classification scheme,³²⁵ or they will hypothesize *possible* reasons for creating such a scheme.³²⁶ Finally, courts will determine whether these reasons are legitimate³²⁷ and whether the classification scheme rationally furthers them.³²⁸ Courts conducting such review do not require that legislators testify about their motives³²⁹ or present evidence to support empirical assumptions upon which the challenged classification schemes rest.³³⁰

Assessment of the rationality of prosecutors' charging decisions would require an approach that is only slightly more intrusive. Although courts can glean legislative classification schemes from the text of statutes, federal prosecutors' classifications schemes (if they employ coherent schemes) may not be obvious from individual charging decisions. Thus, in order to enable courts to assess the rationality of charging decisions, prosecutors must reveal the classification scheme, if any, that resulted in the challenged selection. Other than

324. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-39 (1992) (Blackmun, J., concurring) (interpreting statute that did not explicitly create classification). At times the classification scheme may be complex. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221, 231-32 (1981).

325. For example, in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), the Court struck down a city ordinance under the equal protection rational relationship test after rejecting as unpersuasive and impermissible the reasons the city gave for distinguishing between group homes for retarded persons and other group homes. See *id.* at 448-50. The Court did not make any effort to hypothesize possible justifications for the challenged ordinance.

326. See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993) (holding that the legislature need not state a reason for a classification scheme; rather, statutory classification should be upheld if any conceivable state of facts can provide a rational basis for the scheme).

327. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 62-63 (1982) (determining that the state objective of rewarding citizens for past contributions to the state "is not a legitimate state purpose").

328. See *United States R.R. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (Brennan, J., dissenting) ("When faced with a challenge to a . . . classification under the rational-basis test, the court should ask, first, what the purposes of the [classification] are, and, second, whether the classification is rationally related to achievement of those purposes.").

329. See *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) ("To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.").

330. See *Heller*, 509 U.S. at 320 ("A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification.").

this requirement, which alone should not preclude review,³³¹ rationality review of charging decisions need not be any more intrusive than similar review of legislative decisions. Once informed of the classification scheme, courts can determine whether that scheme is rationally related to legitimate objectives, just as they would with legislative classifications.³³²

Even if no more intrusive than rationality review of legislative classifications, such oversight of charging decisions probably would be more frequent. Once courts determine that a legislative classification is rational, there is no threat of repeated review of that statute. In contrast, because every offender may challenge his selection for prosecution, there is a danger that requests to review virtually every charging decision will flood the federal courts. Two factors minimize this danger. First, a defendant would be required to make some threshold showing to obtain review.³³³ Second, once courts determine that certain selection criteria are rational, and thus acceptable as a means of choosing offenders, defendants whose selection satisfied those criteria would be far less likely to challenge their selection and, if they did, courts could summarily reject the challenges.

2. *The "Presumption of Regularity"*

Courts also invoke the "presumption of regularity" to refrain from reviewing charging decisions unless offenders establish racial or other improper discriminatory effect and purpose.³³⁴ This doctrine requires that courts presume that prosecutors have discharged their duties properly unless a defendant presents clear evidence of a constitutional violation.³³⁵ The presumption is based on "a concern not to unnecessarily impair the performance of a core executive constitutional function" and the "relative competence of prosecutors and courts."³³⁶ As the Court stated in *Wayte v. United States*:

[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and

331. See *infra* notes 342-46 and accompanying text.

332. See *supra* note 323 and accompanying text.

333. See *infra* notes 358-70 and accompanying text.

334. The Supreme Court did not explicitly apply the doctrine, which requires courts to presume the regularity of official acts absent contrary evidence, to prosecutors' charging decisions until 1996. See *United States v. Armstrong*, 116 S. Ct. 1480 (1996). On the "presumption of regularity," see Applegate, *supra* note 28, at 38.

335. See *Armstrong*, 116 S. Ct. at 1486.

336. *Id.*

the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.³³⁷

Assessment of these twin concerns—the cost of judicial inquiry and the competence of judicial review—reveals that although they provide some support for requiring offenders who allege discriminatory charging to shoulder the burden of proving purposeful discrimination, they do not justify a blanket refusal to review the rationality of charging decisions. Even if courts afford prosecutors a presumption of regularity, a showing that casts significant doubt about the rationality of charging classifications should be sufficient to overcome reluctance and gain some judicial scrutiny.

a. *Costs of judicial inquiry:* *Wayte* identifies three costs of judicial inquiry—delay, chilling of prosecutorial decisionmaking, and disclosure of law enforcement policy. None of these concerns merits complete judicial refusal to assess the rationality of charging decisions. Delay resulting from inquiry into a charging decision, like delay resulting from any inquiry unrelated to factual guilt, increases inconvenience to witnesses and victims, threatens to cause memories to fade, burdens prosecutors and court dockets, and prevents the swift imposition of justice without furthering the search for the truth. However, courts commonly conduct lengthy pretrial inquiries into collateral matters, such as the legality of police acquisition of evidence. The avoidance-of-delay justification for judicial deference to charging decisions does not explain why the litigation of equal protection rights is less worthy than other matters for which delay is tolerated.

In addition, unlike claims of improper discrimination, which invariably require discovery and possibly an evidentiary hearing,³³⁸ challenges to the rationality of charging decisions do not necessitate

337. 470 U.S. 598, 607-08 (1985) (citations omitted).

338. A claimant like *Wayte*, who makes an affirmative accusation that the government has chosen to prosecute him for a forbidden reason, is unlikely to be mollified by a prosecutor's facially neutral explanation for the charging decision. The claimant believes that he knows the real reason for his selection and will reject the proffered reason as pretextual. Resolution of the

significant delay. Convinced that the government is treating him differently than others like him, an offender simply seeks to ascertain why it is doing so. At least initially, he is requesting only that the prosecution inform the court of the classification scheme that has led to the disparate treatment³³⁹ and that the court assess its rationality, not that the court order discovery or an evidentiary hearing.³⁴⁰

Fear of chilling prosecutorial decisionmaking should prompt a court to hesitate before conducting review only if judicial scrutiny threatens to deter prosecutors from bringing charges in meritorious cases. Again, there is a significant difference between claims of improper discriminatory charging and inquiries into the rationality of

claim requires discovery and review of internal government documents to determine whether the government possesses direct or circumstantial evidence to support the defendant's claim. An evidentiary hearing may also be necessary to allow examination of government actors to uncover evidence of illegal discrimination.

Notably, in *Wayte*, the defendant's "broad request" for discovery led to a district court order that required both the production of documents and testimony by government witnesses, spawning litigation that the dissent characterized as a "saga," see *Wayte*, 470 U.S. at 617 (Marshall, J., dissenting), and justifying the Court's concern about delay. Other cases involving allegations of improper discriminatory charging in which courts have ordered discovery have produced similar results. See *United States v. Armstrong*, 48 F.3d 1508, 1535 (1995) (Rymer, J., dissenting) ("In this case alone, locating more than 3,000 files and figuring out which were crack and firearms prosecutions, the racial identity of each defendant. . . and the investigating authorities will be a time-consuming and expensive process"), *rev'd*, 116 S.Ct. 1480 (1996); Government's Petition for Writ of Certiorari at 23 n.3, *Armstrong* (No. 95-157) (discussing case in which "more than 1,000 hours of work by attorneys, support personnel, and law enforcement officers were required to collect data and prepare affidavits in response to a [selective prosecution] discovery motion" and trial was delayed "by more than four months").

339. After having received a description of that scheme, the defendant can accept it, or challenge it in a variety of ways, only some of which may ultimately result in the delay necessary for discovery or an evidentiary hearing. However, unlike an improper discrimination claim, a rationality inquiry does not necessarily require those time-consuming measures.

340. In a somewhat analogous context, claims of equal protection violations in the exercise of peremptory challenges during jury selection—so-called *Batson* objections—the Court has approved a relatively simple and speedy procedure for a trial court to determine whether there has been a violation without the need for either discovery or an evidentiary hearing. See *Purkett v. Elem*, 115 S. Ct. 1769, 1770-71 (1995) (per curiam). Courts resolve those claims, which can arise repeatedly during jury selection, based solely on immediate explanations and arguments from the parties. There is no reason why courts cannot employ a similar procedure to resolve at least some challenges to charging decisions, particularly rationality challenges. Like *Batson* claims, they could be resolved expeditiously with (1) a defendant's showing of prejudicial disparate treatment, (2) a prosecutor's oral disclosure of the reasons for the selection decision, (3) any necessary argument from both parties, and (4) a judicial determination as to whether the reason satisfies the rational relationship component of equal protection. But see *Armstrong*, 116 S. Ct. at 1480 (noting that a *Batson* claim differs from a selective prosecution claim because in former context, the entire voir dire takes place before the judge to whom the equal protection challenge is made and the prosecutor need answer only about decisions in that case); *McCleskey v. Kemp*, 481 U.S. 279, 297 n.17 (1987).

charging decisions. A judicial determination that a prosecutor has engaged in patently improper conduct, such as bringing charges for racially discriminatory reasons or in retaliation for the exercise of a constitutional right, can impose a significant stigma. Thus, the threat that a court will erroneously make such a finding may deter prosecutors from engaging in legitimate conduct.³⁴¹ However, the possibility of a court making an erroneous adverse ruling when conducting the far less sensitive and more deferential rationality inquiry does not pose the threat of a similar stigma. Indeed, prosecutors, as well as other litigants in an adversary system, routinely advance justifications for their actions.

The fear-of-disclosure-of-enforcement-policy rationale for reluctance to allow judicial inquiry is similarly unpersuasive.³⁴² Even assuming that in-court disclosure of that portion of the prosecution's classification scheme that led to charges against the complaining offender would reveal the government's overall enforcement policy and would be disseminated to potential offenders,³⁴³ methods exist to limit

341. Cf. Patrick J. Guinee, Comment, *The Trend Toward the Extension of Batson to Gender-Based Peremptory Challenges*, 32 DUQ. L. REV. 833, 845 (1994) (suggesting that application of equal protection doctrine to bar racially and sexually discriminatory peremptory challenges has a "chilling effect").

342. Initially, one might conclude that forced disclosure of enforcement policy promotes rather than undermines enforcement. To the extent that criminal law is intended to deter prohibited behavior, it is necessary to inform the public about what is criminal. Thus, it may seem unwise to keep secret that conduct likely to result in prosecution. However, when the government lacks the resources to prosecute all known violations of the criminal law or engages in less than complete prosecution for other reasons, disclosure of enforcement policy can be counterproductive. Having decided to prosecute some but not all known offenders, the government may hope to maximize deterrence by keeping secret its selection criteria. Requiring prosecutors to disclose the criteria may provide potential offenders with sufficient information to structure their activities so that they can violate the law but avoid prosecution. See Abrams, *supra* note 28, at 29. Federal prosecutors are loath to disclose their selection criteria for this reason. See, e.g., Pizzi, *supra* note 28, at 1343 n.88 (discussing the refusal of an Assistant United States Attorney in the Southern District of Florida to disclose drug quantity guidelines for fear of enabling smugglers to alter behavior to avoid federal prosecution).

343. It is not always the case that in-court disclosure of the pertinent portions of the prosecutive charging classification scheme in a single case will reveal the government's enforcement policy in its entirety. Even if it does, it is by no means certain that an in-court statement of the classification scheme will be disseminated outside of court and will thus undermine enforcement policy. Those who are in court to hear the stated explanation or otherwise learn of it must be able to grasp its significance and communicate it to other potential offenders accurately. Only potential offenders who routinely keep abreast of judicial proceedings will be able to determine the contours of an overall enforcement policy as it is revealed on a piecemeal basis in court. Such offenders may be able to ascertain the policy even without in-court disclosure. Habitual and sophisticated criminals, or their attorneys, may be students of the patterns of arrests and charging decisions, and they may be able to determine with some certainty what activity will lead to prosecution and what will not. Furthermore, even disclosure and effective dissemination of

disclosure. In response to a showing by a prosecutor that public, in-court disclosure of the basis for prosecution in a particular case may jeopardize law enforcement efforts, a court could issue a protective order, allowing the defense attorney alone to learn of the relevant classification scheme and preventing her from disseminating it.³⁴⁴ Alternatively, courts could allow the prosecutor to make an *ex parte, in camera* disclosure so that only the court would learn the nature of the classification that led to the charging decision.³⁴⁵ Although such a procedure would deny both the defendant and his attorney the ability to argue that the stated classification was irrational, a judge could conduct that inquiry alone.³⁴⁶ Defendants may not embrace such a procedure, but would most certainly prefer it to a judicial refusal to conduct rationality inquiry because of concerns about disclosure of enforcement policy.

Finally, the fear-of-disclosure rationale is even less compelling in the specific context of challenges to prosecution under duplicative federal statutes. Even if judicial inquiry does result in dissemination of the federal government's enforcement plan, knowledgeable offenders will not be assured freedom from state prosecution for their criminal conduct. Thus, depending on offenders' perceptions of the relative costs of federal and state prosecution, the threat of the latter might still be sufficient to deter them despite their knowledge of the federal enforcement policy.

b. *Judicial incompetence*: *Wayte* identifies four factors that "are not readily susceptible to the kind of analysis the courts are competent to undertake": "the strength of the case, the prosecution's general

enforcement policy may be of little assistance to some offenders because it may not be possible to structure criminal activity to both avoid prosecution and still profit from the crime. Finally, disclosure of a charging classification scheme does not bind the prosecutor to a consistent course of conduct in the future. Indeed, if a prosecutor believes that as a result of disclosure offenders have altered patterns of criminal activity as a means of avoiding prosecution, nothing prevents her from changing that policy and prosecuting those who have structured their activity to avoid being charged.

344. Cf. FED. R. CRIM. P. 16(d)(1) (allowing protective orders restricting discovery).

345. Cf. *United States v. Sai Keung Wong*, 886 F.2d 252, 256 (9th Cir. 1989) (district court allowed *in camera* interview of confidential informant without presence of defendant or counsel).

346. In cases in which there is a rationality claim rather than a contention that the government has engaged in improper discrimination, it would be easier for the court to conduct review without benefit of input from the defense. In the former case, unlike the latter, there would be no need for the court to sift through discovery or other evidence to support allegations of discriminatory impact and intent. Instead, the court could simply assess the rationality of the classification scheme.

deterrence value, the Government's general enforcement priorities, and the case's relationship to the Government's overall enforcement plan."³⁴⁷ Once again, these factors are not persuasive grounds for a blanket refusal to forego rationality review of charging decisions.

Wayte's concern about judicial inability to evaluate the strength of cases is compelling. Prosecutors routinely make charging decisions based on the strength of evidence, choosing to prosecute some defendants but not others who may appear to be similarly situated based on assessments of numerous factors including predictions about the probable outcome of a jury trial, willingness or credibility of witnesses, or likelihood of suppression of evidence—considerations that are both beyond the expertise of reviewing courts and likely rational.³⁴⁸ However, federal prosecutors enforcing duplicative federal statutes routinely screen cases for reasons other than the strength of the evidence.³⁴⁹ These preliminary screening decisions, if principled, are likely to be policy-based and are akin to the types of legislative and administrative decisions that courts routinely subject to equal protection review. There is no need for courts reviewing policy determinations to venture into areas outside of their expertise, like evaluation of evidence, or second-guess decisions uniquely within the expertise of prosecutors.³⁵⁰

347. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

348. Other considerations also preclude judicial review of prosecutors' strength-of-evidence determinations. In order to evaluate such a classification, a court would have to compare the strength of the case in which a defendant has raised a selective prosecution claim with the strength of potential cases that were not charged. That evaluation, which would necessarily occur before the trial in the case pending in the court and without trial in the uncharged comparison pool cases, would be fact-specific and possibly complex, resting on judgments about witness credibility, jury reaction to witnesses or evidence, strength of potential defenses, and a myriad of other factors. Such judgments are uniquely within the expertise of prosecutors. Courts lack not only the proficiency to make those judgments, particularly without having heard evidence at trial, but they also do not have access to sufficient information to evaluate them.

Even if a court were equipped to review investigative and prosecutive decisions regarding the merits of individual cases, the disclosure necessary for a court to conduct that review would require significant delay and thus would militate against review. *See* discussion *supra* notes 338-40 and accompanying text. It would also require disclosure of the opinions and conclusions of investigators and prosecutors about the strength of cases and the credibility of witnesses in both charged and uncharged cases. In short, it would require intrusive and detailed judicial assessment of investigative and prosecutive decisions, requiring judges to act as both law enforcement officials and prosecutors and raising separation of powers concerns. *See* discussion *supra* Part IV.A.1.

349. *See supra* notes 240-246 and accompanying text.

350. For example, a court is as equipped to assess the rationality of a prosecutorial policy to bring charges only in drug cases involving certain threshold quantities of drugs as it is to review the rationality of a statute that requires increased penalties in cases involving those qualities.

Wayte also expresses apprehension about judicial competence to review "the prosecution's general deterrence value, the Government's general enforcement priorities, and the case's relationship to the Government's overall enforcement plan."³⁵¹ Despite the distinction drawn above between judicial ability to review policy-based decisions and inability to review evidence-based charging decisions, this passage suggests that in the context of charging decisions, courts are ill-equipped to review both. This concern, however, like other concerns expressed in *Wayte*, is best understood in the context of claims that the prosecution is motivated by an improper discriminatory purpose, not those questioning the rationality of charging decisions.

In order to resolve a claim of discriminatory charging, a court must consider circumstantial evidence of bad intent, including proof of an imperfect fit between the selection of the defendant and the reason for the classification scheme. The existence of a less discriminatory means of achieving the same objective is circumstantial evidence of discriminatory purpose. In addition, it tends to undercut a finding that the means used to achieve the government's objective are sufficiently narrowly tailored to that objective to satisfy strict scrutiny.³⁵² By considering such evidence, courts are necessarily second-guessing policy decisions that play a role in charging, hypothesizing that there may be less discriminatory methods of achieving the same result.

Examination of the facts in *Wayte* clarifies the Court's concern and demonstrates that it is inapplicable when courts assess only the rationality of charging decisions. In *Wayte*, the defendant claimed that the government had prosecuted him for violating the Selective Service laws only because he was a vocal opponent to draft registration.³⁵³ The district court found that "the inference is strong that the Government could have located non-vocal non-registrants, but chose not to" and ordered discovery.³⁵⁴ In doing so, the district court tacitly questioned the government's selection of vocal registrants to maximize deterrence ("general deterrence value"); the government's decision whether it would expend the resources necessary to take action against nonvocal violators as well ("general enforcement priorities");

351. *Wayte*, 470 U.S. at 607.

352. See *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) (stating that the equal protection strict scrutiny test includes an inquiry into whether there are other means of achieving legitimate government objectives that impose less of a burden on constitutionally protected interests).

353. See *Wayte*, 470 U.S. at 604.

354. *Id.* at 605 (citations omitted).

and how the government planned to deal with the widespread Selective Service violations generally ("overall enforcement plan"). In short, the district court exceeded its competence by implying that the government could and should have prosecuted nonvocal nonregistrants.³⁵⁵ Mere rationality review does not require similar intrusive inquiry into potential hidden motives, consideration of less intrusive methods of achieving the desired result, or judicial second-guessing of enforcement policy. In order to conduct rationality review, a court need only ascertain the portion of the government's classification scheme that explains the challenged charging decision and determine if the selection of the defendant for prosecution is both consistent with that explanation³⁵⁶ and rationally related to a legitimate objective of federal law enforcement. Rationality review does not allow a court to impose its views of better or less discriminatory methods of achieving the stated governmental objective and thus does not implicate the problems that *Wayte* identifies.³⁵⁷

355. See *id.* at 612-13.

356. Defendants could challenge a prosecutor's explanation by presenting evidence that the prosecutor's reason for selecting the defendant also applies to at least some unselected offenders in the comparison pool. Such a showing should serve to undermine a prosecutor's explanation only if she knew that the comparison pool offenders shared the characteristic used to select the defendant. Alternatively, a defendant could challenge the explanation by showing that the government had prosecuted offenders who did not satisfy the purported selection criteria.

357. The *Wade* Court's conclusion that courts can review the rationality of prosecutors' refusals to file sentencing reduction motions to reward defendants for their cooperation, see *supra* notes 223-231 and accompanying text, further suggests that the concerns expressed in *Wayte* are not meant to foreclose limited rationality review of charging decisions but rather reflect reluctance to impose on prosecutors the discovery, evidentiary hearings, and intense scrutiny necessary to resolve claims of improper discrimination. If the Court is willing to allow judicial inquiry into the rationality of decisions to move for substantial assistance departures, as *Wade* seems to hold, there is no reason why it should be unwilling to do the same with respect to charging decisions, especially those that are policy-based. Review of a prosecutors' decision whether to file a "substantial-assistance" departure motion is no less costly or more intrusive than review of a charging decision. Nor are courts any more capable of conducting that review. Indeed, the opposite may be true. A prosecutor's decision whether or not to move for a sentencing reduction to reward cooperation requires a detailed and fact-specific inquiry into matters such as the defendant's role in the offense, the usefulness of information that he has given, his credibility and candor, the completeness of his information, his culpability relative to that of the people about whom he has provided information, and expectations of future cooperation—all of which are matters within the province of the prosecutor. See *United States v. Smith*, 953 F.2d 1060, 1065 (7th Cir. 1992), *overruled on other grounds by* *Wade v. United States*, 504 U.S. 181 (1992) (listing the following questions as unreviewable for arbitrariness: "How valuable was the assistance? How valuable was this investigation, compared with others that a prosecutor may seek to encourage by doling out greater rewards for cooperation?"). But cf. Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. Rev. 105, 125 (1994) (giving examples of policy-based substantial assistance practices in some federal districts). Inquiry into those factors is evidence-based, time-consuming, intrusive, and beyond the expertise of courts. But see *id.* at 157-58 (contending that judges are better equipped

B. EVIDENTIARY OBSTACLES

Courts frustrate efforts to obtain judicial review of charging decisions by imposing evidentiary hurdles that aggrieved offenders are unable to overcome. Before courts will conduct review or order requested discovery,³⁵⁸ a claimant must present some evidence of: (1) discriminatory impact by demonstrating that the prosecutor has treated him differently than others who appear to be similarly situated in all relevant respects;³⁵⁹ (2) prosecutorial awareness of the similarly situated others;³⁶⁰ and (3) discriminatory intent by showing that the prosecutor has selected him for an impermissible reason.³⁶¹

When an offender challenges a charging decision by a state prosecutor or a federal prosecutor enforcing a nonduplicative federal statute, all three hurdles are often insurmountable regardless of the merit of the claim. Except for rare crimes that offenders commit publicly, like violations of Sunday closing laws, most people engaged in criminal conduct attempt to avoid detection. Thus, proof of the existence of a pool of similarly situated offenders who escaped prosecution will be nearly impossible unless a defendant conducts some sort of independent criminal investigation.³⁶² Even if a defendant were able to identify such a pool of offenders, it is unlikely that he will be able to prove that the prosecutor was aware of them, preventing the defendant from satisfying the knowledge requirement. Finally, even if the prosecutor has consciously selected the defendant for an impermissible reason, she almost certainly will have avoided generating any tangible evidence of that intent.³⁶³ In the event some evidence of bad intent exists, the prosecutor will have exclusive possession of it.³⁶⁴ Because a defendant must present some evidence of both discriminatory

than prosecutors to determine whether a departure is warranted). Indeed, such review could jeopardize on-going investigations or require comparisons between the defendant and others who had provided information, potentially jeopardizing the anonymity and safety of cooperators.

358. See *United States v. Armstrong*, 116 S. Ct. 1480 (1996).

359. See, e.g., *Wayte*, 470 U.S. at 608-09; *Ah Sin v. Wittman*, 198 U.S. 500, 507-08 (1905).

360. See *Oyler v. Boles*, 368 U.S. 448 (1962); *supra* notes 287-288 and accompanying text.

361. See *Wayte*, 470 U.S. at 608-610; *supra* note 205.

362. See *Givelber*, *supra* note 28, at 94 ("Most . . . crime is not . . . publicly obvious, and the persons alleging denial of equal protection face a considerable burden in even establishing that the law is knowingly inconsistently applied.").

363. In addition, the prosecutor's decisionmaking may be influenced by unconscious motives. See, e.g., *Developments*, *supra* note 205, at 1523-25 (discussing unconscious racism which will not generate any tangible evidence).

364. See *Applegate*, *supra* note 28, at 86.

impact and discriminatory intent to compel discovery,³⁶⁵ he will rarely be able to gain access to that evidence.

In contrast, when an offender selected for prosecution under a duplicative federal statute questions the rationality of the selection decision, he has a better chance of surmounting the first two evidentiary obstacles and the possibility of persuading a court to lower the third. It is far easier to identify offenders who have been charged in state court than those who have escaped prosecution altogether.³⁶⁶ Likewise, because the similarly situated offenders have been identified and charged in state court, complainants can make a stronger showing that federal prosecutors are aware of their existence.³⁶⁷

Finally, courts should not require offenders who only question the rationality of a charging decision to shoulder the burden of presenting evidence of the prosecutor's intent. Although courts confronted with claims of improper discriminatory purpose require defendants, rather than the prosecution, to come forward with some evidence of the prosecutor's reasons for selecting them, the same allocation of the burden when entertaining rationality claims makes little sense.³⁶⁸ Unlike an improper discriminatory motive claimant, a rationality claimant does not profess to know why the prosecution has selected him. He will have no particularized suspicions to inform efforts to discover the nature of the classification scheme.³⁶⁹ He is as likely to be able to

365. See *supra* note 272.

366. A defendant would first determine whether the federal statute he is charged under duplicates some state criminal statute. If so, he could determine, by polling the local defense bar, or by obtaining—either through voluntary compliance, subpoena, or other court order—files or data compilations from state prosecutors or courts to show the existence of a pool of people who the state prosecuted for the same conduct that led to his federal charges. The *Armstrong* Court concluded that such a task is “not . . . insuperable.” *United States v. Armstrong*, 116 S. Ct. 1480, 1489 (1996).

367. For a fuller discussion of this topic, see *supra* 287-91 and accompanying text.

368. Some have argued that it also makes little sense to require improper discriminatory motive claimants to present evidence of the prosecutor's intent because the prosecutor will almost always have exclusive access to that information. See, e.g., Applegate, *supra* note 28, at 86-87; *Developments*, *supra* note 205, at 1549. Despite the force of those contentions, the requirement is firmly entrenched in cases in which defendants allege their prosecutions are based on improper discriminatory motives. See, e.g., *Wayte v. United States*, 470 U.S. 598, 608 (1985) (requiring that defendant “show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose”).

369. In contrast, a defendant who alleges an improper motive is likely to have at least some circumstantial evidence to support his claim—whatever evidence initially raised his suspicions about the prosecutor's motives. Even if the defendant's evidence is insufficient to prevail, it will provide some guidance as to how to develop his claim further. See Bubany & Skillern, *supra* note 28, at 503-04 (“Absent a suspect criterion such as race, religion, or cultural background, it is unlikely that the defendant will be able to prove arbitrary action.”).

determine why he has been chosen for federal prosecution when similarly situated others have not as he would be able to determine why he was struck by lightning during a thunderstorm when others standing nearby were not. Thus, when confronted with evidence of a comparison pool of disparately treated offenders and prosecutorial awareness of that pool, there is good reason for courts to require that federal prosecutors disclose the classification scheme that resulted in the defendant's selection.³⁷⁰

370. Requiring federal prosecutors to explain selection of defendants for prosecution under these circumstances is consistent with the procedure the Court has mandated for litigating equal protection objections to peremptory challenges in *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. See, e.g., *J.E.B. v. Alabama*, 114 S. Ct. 1419 (1994) (holding that *Batson* precludes gender as well as race discrimination in exercise of peremptory challenges); *Georgia v. McCollum*, 505 U.S. 42 (1992) (*Batson* applies to defendants' peremptory challenges); *Powers v. Ohio*, 499 U.S. 400 (1991) (*Batson* applies even when juror and defendant are different races; safeguards jurors' rights); *Hernandez v. New York*, 500 U.S. 352 (1991) (describing application of test). Those cases hold that once a defendant presents prima facie evidence that a prosecutor has exercised a peremptory challenge in a racially or sexually discriminatory manner, the trial court must compel the prosecutor to give a race- or gender-neutral explanation for the challenge. The trial court then determines whether the explanation is satisfactory. See, e.g., *Hernandez*, 500 U.S. at 358-59. The *Batson* analogy is compelling because the degree of judicial intrusion is similar to that proposed here—in both cases, the court requires only an oral explanation justifying the exercise of prosecutorial decision, not discovery or an evidentiary hearing, and resolves the issue at that time, without unduly delaying the proceedings. If equal protection requires that a prosecutor faced with prima facie evidence of discrimination explain the reasons for a peremptory challenge in order to avoid denying a potential juror the "opportunity to participate in civic life," *Powers*, 499 U.S. at 409, it surely should require as much for a federally-prosecuted defendant who can demonstrate that he is subject to harsher treatment in federal court when others are not. Although the *Batson* procedures have been criticized for threatening to turn the "side-show" of jury selection into "part of the main event," *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring), a federal prosecutor's charging decision, which plays a significant role in determining the defendant's constitutional and procedural protections and the length of the sentence he may receive and serve if convicted, clearly is the main event. See *supra* notes 178-80 and accompanying text. Thus, upon a showing of prejudicial disparate impact, there is greater reason to require a prosecutor to explain her charging decision despite any minimal delay or intrusiveness than there is to compel explanation of the exercise of peremptory challenges.

To be sure, there are significant differences between the *Batson* context and this one. See *Armstrong*, 116 S. Ct. at 1480 (describing some differences between *Batson* and selective prosecution claims). For example, under *Batson*, a prima facie showing of discriminatory motive, not merely prejudicial disparate impact, is necessary to trigger both the prosecutor's duty to explain and judicial review. However, as *Wade* makes clear, allegations and proof of improper discrimination are not the *sine qua non* of judicial review of prosecutorial decisions. See *supra* notes 223-29 and accompanying text. Unlike charging decisions, peremptory challenges need not be rational. See *Purkett v. Elgin*, 115 S. Ct. 1769, 1771 (1995). Thus, the *Batson* procedures application only to cases of improper discrimination stems from the broad discretion associated with peremptory challenges, rather than from any general limitation on judicial review of prosecutorial decisionmaking.

Recognition of a judicially enforceable right to rationality review would provide a defendant subjected to differential treatment as a result of a federal charging decision with two nonexclusive options. First, he could contest the rationality of the charging decision by showing disparate impact and prosecutorial awareness of similarly situated others. Such a showing would compel a prosecutor to explain the charging decision.³⁷¹ Second, if the defendant believes that the real reason for prosecution is race, exercise of a constitutional right, or some other forbidden characteristic, he can seek discovery and an evidentiary hearing to establish that allegation. However, under prevailing law, he must present some proof of improper motive before a court will order discovery and conduct review.

C. THE DEFERENTIAL NATURE OF RATIONALITY REVIEW

Arguably, recognition and enforcement of a right to rational charging classifications will do no more than enable federally prosecuted defendants to jump from the frying pan into the fire; that is, they escape excessive judicial deference to charging decisions only to confront solicitous rationality review.³⁷² As long as the prosecutor had some rational method—severity of the crimes committed, a connection to interstate commerce, the investigative agency involved, or the offender's criminal record—for distinguishing offenders who were selected from those who were not, charging decisions would withstand equal protection review. It would be unusual for a court to determine that a federal prosecutor's charging decision does not satisfy the deferential rationality standard. Federal courts' refusal to conduct rationality review at all may be due in part to their recognition that such oversight would be a futile gesture and thus unworthy of the costs, however minimal, review may impose.

Even if rationality review is of doubtful efficacy as a remedy for aggrieved defendants, judicial enforcement of a right to rational

371. If public disclosure would harm the government's enforcement efforts, the court should either limit disclosure to the defense attorney alone with a protective order preventing dissemination, or, alternatively, allow for *in camera*, *ex parte* disclosure only. See *supra* notes 344-46 and accompanying text.

372. One commentator opined that:

[g]enerally speaking, judicial refusal to review the prosecutor's charging decision except in cases of invidious or bad faith discrimination appears to be inevitable, or at least of no consequence. As in the case of judicial review of legislation, review of the charging decision would yield the conclusion that the decision regarding prosecution is in most instances rationally related to a legitimate law enforcement goal.

Gifford, *supra* note 28, at 704.

charging classifications could have a salutary effect on the administration of justice in federal courts. First, it would give unequivocal notice to federal prosecutors that they have a constitutional obligation to rationally differentiate between those offenders subjected to harsher treatment in federal court and those who could be but are not. Under existing law, federal prosecutors may conclude that as long as they are not motivated by an improper discriminatory purpose, they are free to select offenders for federal prosecution for any reason or no reason at all. Certainly decisions that deny the existence of a right to rational charging classifications altogether³⁷³ support that conclusion. Cases that preclude rationality review without affirmatively recognizing the existence of such a right³⁷⁴ are similarly flawed. Busy federal prosecutors may overlook the subtle difference between judicial refusal to recognize a right and judicial refusal to enforce a right. There is a danger that at least some federal prosecutors haphazardly select a portion of those to be charged in federal court. If we expect federal prosecutors, like other governmental actors, to have rational reasons for treating similarly situated people differently, it makes sense to clearly state that equal protection imposes such a norm. Current doctrine teaches the opposite lesson.

Second, the threat of judicial inquiry and a requirement that federal prosecutors explain charging decisions when defendants make a sufficient threshold showing would encourage them to develop and adhere to rational classification schemes for selecting eligible offenders.³⁷⁵

373. See cases cited *supra* note 207.

374. See *supra* note 208.

375. See Bubany & Skillern, *supra* note 28, at 505 (judicial review "assists the prosecutor in developing impartial policies influenced only by matters pertinent to maintaining a just system"); Givelber, *supra* note 28, at 112 ("the process of analyzing why the law has been selectively enforced should lead the prosecutor to make more thoughtful enforcement decisions").

To say that the Constitution requires federal prosecutors to have a rational classification scheme does not suggest that the scheme would be judicially enforceable—that is, that departures from the scheme would provide a defendant with a claim for relief. Prosecutors could justify departures from the scheme as long as the departures were rational. Requiring only that charging decisions be rational gives prosecutors considerably more flexibility than an approach that allows court to force them to comply with a set of predetermined prosecutive guidelines. For a discussion of judicial enforcement of prosecutive guidelines, see Beale, *supra* note 2, at 1017-18 n.143.

Third, forcing prosecutors to have good reasons for selection would have a prophylactic effect, decreasing the possibility that improper discriminatory motives will play some conscious or unconscious role in a federal prosecutor's charging decisions.³⁷⁶

In addition to prompting federal prosecutors to employ rational selection schemes, enforcement of a right to rational charging classifications may result in a beneficial modification of current defense practice. In the context of duplicative federal prosecutions, prevailing selective prosecution doctrine prompts defendants to focus their efforts on a problem that rarely exists—racially discriminatory selection of offenders—and offers a remedy that is stringent in theory but illusory in practice. At the same time, it draws attention away from the injustice of dramatic disparities in treatment without good reason. While defendants engage in wasted efforts to satisfy impossible burdens of proving intentional racial discrimination that probably does not exist,³⁷⁷ there is nothing to prevent the arbitrary imposition of harsher treatment on those unlucky enough to be selected for federal prosecution. By limiting review to those defendants who allege racial discrimination or other improper motives, existing doctrine also promotes frivolous claims. Even if a defendant does not believe that discriminatory motives prompted prosecution, he must make those allegations if he is to have any chance of relief from disparate treatment resulting from federal prosecution.³⁷⁸ These claims waste judicial and prosecutorial resources, unfairly subject federal prosecutors

376. "Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community—racial and ethnic minorities, social outcasts, the poor—will be treated most harshly." Vorenberg, *supra* note 28, at 1555. See generally Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657 (1995) (When there are grounds for believing that decisions may be the "product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decision makers to give reasons may counteract some of those tendencies.").

377. Notably, the Chief Judge of the Central District of California, the federal district that spawned claims of discriminatory charging practices in crack cocaine cases, determined that there was "no evidence that prosecutive decisions by the United States Attorney's Office for the Central District of California are made on the basis of race." Dan Weikel, *Judge Finds No Bias in Crack Prosecutions*, L.A. TIMES, Apr. 2, 1996, at A1. This decision was made despite the fact that the United States Attorney's Office had never prosecuted a white defendant under the draconian federal cocaine base laws and had almost exclusively prosecuted black defendants. See *United States v. Armstrong*, 116 S. Ct. 1480, 1495 n.6 (1996) (Stevens, J., dissenting).

378. The lead defense attorney in *Armstrong*, who alleged purposeful racial discrimination to support her client's selective prosecution claim, admitted to a reporter that "[w]e don't know why it's [the large number of black males being prosecuted for crack cocaine trafficking in federal court] happening." David G. Savage, "Selective Prosecution" Case to Be Heard by High Court, L.A. TIMES, Oct. 31, 1995, at A4. Rather than accuse the prosecutor of intentional racial

to meritless and damaging accusations,³⁷⁹ and reduce the chances that courts will give serious consideration to the rare meritorious claim. If, instead, defendants who were able to make a sufficient threshold showing could require a prosecutor to explain the reasons for her charging decisions, it might decrease the number of unsubstantiated claims of racially discriminatory selection.

Enforcement of the right may also ease some of the pressure that federalization imposes on federal dockets. Aware that they will not be able to selectively subject offenders to harsher treatment without a reason for doing so, federal prosecutors may be less inclined to prosecute the cases that many courts and commentators believe do not "belong" in federal court—those that are indistinguishable from the multitude of street-corner drug sales, weapons offenses, robberies, residential arsons, and petty frauds that are prosecuted daily in state courts.³⁸⁰

D. RELUCTANCE TO DISMISS CHARGES AS A REMEDY

Finally, federal courts' refusal to review charging decisions may reflect an aversion to dismissing charges against offenders simply because similarly situated others have not been prosecuted. Courts have assumed that the remedy for selective prosecution is dismissal,³⁸¹ yet the Supreme Court recently stated that it has "never determined whether dismissal of the indictment, or some other sanction, is the proper remedy" for selective prosecution.³⁸² If a less draconian remedy was available, courts might be more willing to review charging decisions.

discrimination, she could only speculate: "I think there is an unconscious racism that is resulting in the steady stream of young black males going into custody for enormous periods of time." *Id.*

379. Judicial review "can eliminate ill-founded or random complaints against the prosecutor's office and avoid the aura of suspicion that attaches to unpublished, secret practices." Bubany & Skillern, *supra* note 28, at 505.

380. Several observers believe that the availability of longer sentences has prompted federal prosecutors to bring charges in many cases where there are overlapping state and federal crimes. See, e.g., Beale, *supra* note 2, at 1004 (stating that "sentencing is probably the most important factor that motivates prosecutors to bring federal charges when there is dual jurisdiction"); Little, *supra* note 5, at 1079 & n.240. A requirement that federal prosecutors have an independent reason for bringing charges may reduce the number of federal prosecutions.

381. See *supra* note 204.

382. *Armstrong*, 116 S. Ct. at 1484 n.2. Although the Supreme Court limited its discussion to race-based selective prosecution challenges, like the one raised in *Armstrong*, it follows that the appropriate remedy for any selective prosecution claim, including one premised on allegations that the decision is not rationally related to a legitimate government objective, remains an open question.

Arguably, an aggrieved defendant is only entitled to the same treatment received by the similarly situated offenders whom he identifies to demonstrate disparate treatment. If a federally prosecuted defendant establishes an equal protection violation by identifying a pool of offenders who are prosecuted in state court, instead of dismissing the case, the court could attempt to afford the defendant the benefit of the state doctrines he would otherwise be denied.³⁸³ For example, if state law contains no presumptions requiring pretrial detention, equal protection could preclude a federal court from relying on federally imposed presumptions to detain a defendant. If state law grants discovery rights to a defendant that are not guaranteed by federal statutes or rules, equal protection could require that the defendant be afforded equivalent rights.³⁸⁴ If state constitutional law requires suppression of evidence but federal law does not, the federal court could order suppression, finding that admission of the evidence would violate the defendant's equal protection rights. Similarly, a federal court could find that application of harsh federal sentencing guidelines or mandatory minimum provisions of federal sentencing statutes violates equal protection if similarly situated offenders in state court were not subject to similarly harsh sentences. Unfettered by those restraints on sentencing discretion, a federal court would be free to sentence an offender within the statutory maximum sentence in a manner consistent with sentences received and served by offenders prosecuted in state court.³⁸⁵

383. Not only is such a remedy less draconian than dismissal, it ensures that a defendant will not "slip through the cracks" and avoid state prosecution because of a federal prosecutor's failure to refer the case to the state after a dismissal. *Cf.* Frase, *supra* note 170, at 277-80 (noting that numerous defendants whose cases federal prosecutors decline because of the availability of state prosecution are never charged in state court).

384. In *Armstrong*, the Court held that there is no statutory right to discovery to pursue a selective prosecution claim. *See Armstrong*, 116 S. Ct. at 1485. Instead, the Court assumed that upon a sufficient showing by the defendant, equal protection principles compel discovery to determine whether there has been an equal protection violation, *see id.* at 1485-86, an assumption that lower courts have accepted without question. If equal protection can require discovery to determine whether there has been a constitutional violation absent a statutory mandate, certainly it can compel discovery to remedy a violation.

385. In other contexts, federal courts approximate how much time a defendant will actually serve if he receives a particular sentence in state court. *See, e.g., United States v. Yates*, 58 F.3d 542 (10th Cir. 1995) (when determining "reasonable incremental punishment" under § 5G1.3(c) of the federal sentencing guidelines, for purposes of deciding whether to have federal sentence run concurrent, consecutive, or partially consecutive to undischarged state sentence, courts should approximate "real or effective" state sentence, not the sentence actually imposed). Attempts to equalize treatment will necessarily be imperfect in many cases.

Such oversight and remedial action would not unduly constrain federal prosecutors. It would merely subject them to the same constraints that control other government actors—the equal protection guarantees believed to be essential in contexts in which far less than lengthy prison sentences are at stake. Because the remedy for violating an offender's equal protection rights would consist of an effort to approximate the treatment similarly situated offenders receive in state court, judicial enforcement of the rationality requirement would, in essence, leave federal prosecutors' charging discretion untouched. They would not be denied the opportunity to prosecute defendants, only the ability to subject them to harsher treatment in cases in which they lack a rational basis for bringing the federal prosecution. The availability of appellate review of district court rationality determinations could further allay prosecutors' concerns.³⁸⁶ It would provide them with a forum in which they could contest adverse determinations, and it would allow for the development of a common law of proper reasons for selection for federal prosecution. This precedent would then provide guidance and be binding on lower courts.

The possibility of judicial review of charging decisions leaves a number of questions for courts to resolve. For example, how much of a difference between federal and state procedures is sufficient to warrant equal protection review?³⁸⁷ How many similarly situated offenders are necessary to trigger equal protection concerns?³⁸⁸ How similar must offenders be to be "similarly situated?"³⁸⁹ How should courts treat case-specific doctrinal differences between federal and state law, such as the application of an evidentiary rule that does not necessarily prejudice defendants but may operate to a defendant's disadvantage under the facts of a particular case? By requiring its prosecutors to develop and apply rational classification schemes, the Department of

386. Courts could require that defense efforts to have state doctrines imposed during trial be raised pretrial to enable prosecutors to appeal adverse decisions. Cf. FED. R. CRIM. P. 12(f) (requiring that certain motions be made before trial); 18 U.S.C. § 3731 (1996) (allowing interlocutory appeals of pretrial rulings).

387. See *Salter Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 725 (1973) (minor differences do not establish equal protection violations).

388. See *Rickett v. Jones*, 901 F.2d 1058, 1060-61 (11th Cir. 1990) (isolated departure not enough); Applegate, *supra* note 28, at 74-75 (one not enough).

389. See *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996) (offenders are similarly situated "when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them"). See also Pizzi, *supra* note 28, at 1369 (stating that "it is easy to agree that similar offenders should be treated similarly, but deciding which offenders are 'similar' turns out to be much harder than we thought it would be").

Justice could make judicial resolution of these questions unnecessary. However, if judicial involvement is ultimately needed, these questions and others should not preclude defendants who are unequally burdened by federal prosecution from receiving the same equal protection guarantees as others on the losing end of government classifications.

CONCLUSION

The federalization of substantive criminal law and the disparity between treatment received in federal and state criminal justice systems have created what Professor Sara Sun Beale aptly characterizes as a "cruel lottery,"³⁹⁰ in which some unfortunate offenders are subject to dramatically harsher treatment than similarly situated others. Equal protection, which requires that government actors have a rational basis for imposing differential treatment—even in contexts in which there is far less at stake than in the criminal justice system—should impose the same obligation on prosecutors. It compels federal prosecutors, whose selection decisions can mean the difference between pretrial release and detention, dismissal and conviction, or a slap on the wrist and a lengthy prison term, to use principled methods of determining which eligible offenders will be subject to federal rather than state prosecution. To ensure rational charging decisions, the Department of Justice should amend its "Principles of Federal Prosecution" to require that federal prosecutors not only avoid bad reasons for making charging decisions, but that they have good ones for treating federally prosecuted offenders differently than those charged in state court.

If faced with evidence that arbitrary selection is routine and unchecked by administrative policy, courts should reconsider their reluctance to review charging decisions absent proof of improper discrimination. Considerations that counsel judicial restraint are not convincing barriers to limited judicial oversight of the rationality of federal prosecutors' decisions to bring charges under duplicative federal statutes. Although such review would rarely result in a finding of an equal protection violation and the need to grant a remedy, it would prompt federal prosecutors to make principled selection decisions.

390. See Beale, *supra* note 2, at 997.