THE STRUCTURE OF CRIMINAL FEDERALISM

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Scholars and courts have long assumed that a limited federal government should stick to genuinely "federal" crimes and leave "local" crimes to the states. By that measure, criminal federalism has failed; federal criminal law largely overlaps with state crime, and federal prosecutors regularly do seemingly "local" cases. Despite nearly unlimited paper jurisdiction, however, the federal enforcement footprint has remained tiny and virtually static for a century. Something is strongly limiting the federal system, just not differences in substantive coverage.

The answer is different enforcement responsibilities. The police power means states alone provide basic public safety and criminal justice. Rather than inefficiently duplicate that role, the federal system leverages the states' existing people and infrastructure, supplementing and correcting inevitable enforcement breakdowns. Far from signaling a federalism failure, overlapping law and cooperative enforcement thus powerfully constrain the federal system by keeping it secondary and small.

Overlapping criminal enforcement, this Article demonstrates, is deeply rooted in law and tradition. Overlapping enforcement also offers a novel federalism model in which the states are neither separate nor servants but entrenched on the front lines, genuinely cooperating with federal backup to enforce criminal policy. Scholars, courts, and policymakers can and should embrace, rather than resist, the real structure of criminal federalism.

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INTRODUCTION

For at least a century,[1] "[s]cholars have . . . relentlessly pursued the issue of when crime should be a matter of federal concern and when it should be left to local prosecutors."[2] The federal system intervenes selectively, leaving nearly all criminal enforcement to the states.[3]

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1 *See, e.g.*, ARTHUR C. MILLSPAUGH, BROOKINGS INST., CRIME CONTROL BY THE NATIONAL GOVERNMENT 43–59 (1937); Symposium, *Extending Federal Powers over Crime*, 1 LAW & CONTEMP. PROBS. 399 (1934); Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 545–46 (1925); *see also* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 63 (1904) (finding "impossible to deny that the federal government exercises a considerable police power of its own"); Markus Dirk Dubber, *"The Power to Govern Men and Things": Patriarchal Origins of the Police Power in American Law*, 52 BUFF. L. REV. 1277, 1334 (2004) (noting that the *Federalist Papers* essentially conceded a federal police power).

2 Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 521 & n.3 (2011) (citing authorities).

3 *See* Daniel C. Richman & William J. Stuntz, Essay, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 608–09 (2005); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1422–23 (2008); *infra* Part I.

This Article uses "state" and "federal" as a shorthand because only those two entities possess full sovereign criminal authority. *See* Gamble v. United States, 139 S. Ct. 1960,

Deciding when to act—which crimes to prohibit federally, which cases to prosecute, and where to allocate federal resources—requires a theory of the federal system's role in relation to the states. But a workable theory has proven elusive.

Underlying that pursuit is a puzzle. Many scholars and the Supreme Court worry that federal criminal law long ago blew past whatever line should exist.[4] Federal jurisdiction is enormous. The federal criminal code almost entirely overlaps with state criminal law. Federal prosecutors routinely charge seemingly "local" crimes, like drug dealing, weapons possession, robbery, and fraud.[5]

Yet as other scholars have observed, the federal system's actual enforcement footprint is small; it prosecutes fewer than five percent of felonies nationwide,[6] preferring to operate mostly as an "adjunct" to the states' much larger justice systems.[7] That has remained true for at least a century, even as federal jurisdiction, statutes, and enforcement priorities have expanded dramatically.[8] Something *is* strongly restraining the federal system, but not jurisdiction, statutes, or crime categories.

The answer, this Article proposes, lies in a form of enforcement federalism that is robust, well-entrenched, and shaped differently than existing federalism models would suggest. The states' police power is much more than the laws states can enact. It assigns to the states responsibility for basic public safety, criminal law, and criminal enforcement. Consequently, the states need comprehensive criminal codes and justice systems—the laws, personnel, and infrastructure to respond to and address public safety and crime.

Duplicating state enforcement would be pointless, inefficient, and politically unpalatable. So the federal system has evolved to doing

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1964, 1966–69 (2019) (reaffirming the dual-sovereigns doctrine). Within each, enforcement is much more multilayered and dynamic. *See generally* Barkow, *supra* note 2; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999).

4 *See infra* Section II.A.

5 The overfederalization literature is enormous. *See, e.g.*, Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 126–27 (2005); Sara Sun Beale, Essay, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 754 (2005); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 646 (1997); Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 874 n.6, 944–48 (2015); Stephen F. Smith, *Federalization's Folly*, 56 SAN DIEGO L. REV. 31, 47 (2019).

6 *See infra* notes 87–90 and accompanying text.

7 Stith, *supra* note 3, at 1422–23; *accord, e.g.*, Richman & Stuntz, *supra* note 3, at 612; William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2028 (2008).

8 *See infra* notes 87–90 and accompanying text.

something different: "backstop"[9] state enforcement errors and breakdowns, which inevitably occur given how much states have to do. Together, those very different roles keep the states entrenched on the front lines of criminal justice and the federal system small, supplemental, and dependent.

Critics worried about overfederalization, including many scholars and the Supreme Court, have thus misunderstood criminal federalism. They have assumed that federalism means separating "truly national"[10] crime from "traditionally local criminal conduct."[11] But overlap is a foundational, even essential ingredient of criminal federalism. The Constitution, federal law, and federal norms give states almost unfettered control over their laws and officers, and having the police power provides strong incentives to maximize the reach of state law and enforcement. So virtually *every* crime is a local offense, even seemingly federal ones like terrorism, securities fraud, and counterfeiting[12]—a crime listed in the Constitution itself.[13] Overlap is not only inevitable but a primary restraint on federal power: the federal government cannot go far when the states are already there.

That explains why decades of scholarship exhorting federal actors to "stop 'playing district attorney'"[14] and resist "federaliz[ing] state crimes" unless there is "a gap otherwise left by state law"[15] have failed utterly to change federal behavior. Likewise, the Supreme Court's caselaw trying to yank federal statutes and prosecutions out of "purely local crime,"[16] such as *United States v. Lopez*[17] and *Bond v. United States*,[18] have proven singularly ineffectual on the ground.[19] Criminal federalism does not rely on separation. Overlap is part of criminal federalism's basic architecture.

For the same reason, scholars' and the Court's quest to identify "traditional" federal crimes[20] is misguided. The seeds of overlapping state-federal law and cooperative enforcement were planted immediately, in the Constitution and early federal law. The federal-state

9 William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 666 (2002).

10 United States v. Lopez, 514 U.S. 549, 568 (1995).

11 Jones v. United States, 529 U.S. 848, 858 (2000) (quoting United States v. Bass, 404 U.S. 336, 350 (1971)); *see infra* Section II.A.

12 *See infra* Section II.A.

13 U.S. CONST. art. I, § 8, cl. 6.

14 Smith, *supra* note 5, at 46.

15 Barkow, *supra* note 5, at 122.

16 Bond v. United States (*Bond II*), 572 U.S. 844, 848 (2014).

17 514 U.S. 549 (1995).

18 *Bond II*, 572 U.S. 844.

19 *See infra* Section II.A.

20 *See infra* Section II.A.

relationship quickly developed and has since maintained a tradition of overlapping law and cooperative enforcement, a tradition that has proven exceptionally effective and durable over time, despite strong incentives to increase federal power.

What shapes federal intervention is not whether a crime is "federal" or "local" but a combination of procedural advantages that flow from being supplemental and policy decisions about where to direct those advantages. Being supplemental means doing some things well, like concentrating resources on hard cases, and some things poorly, like trying to take primary responsibility for public safety in populated areas.[21] Scholars often criticize the federal system for operating differently than the states,[22] but the federal system *is* different. It plays a different role within the American justice system, one that hugely shapes how the federal system operates and where it directs scarce enforcement resources.

Put another way, whether a crime is "federal" is a *policy* question, one the Constitution left largely open ended.[23] The federal criminal system did not evolve away from genuinely federal crime toward more-local crime. National criminal concerns change over time, and the federal government—which remains accountable to voters who care deeply about crime—has responded.[24]

The point is not simply that, like everywhere else, cooperative federalism has triumphed. Scholars and courts across the political spectrum have long sought effective restraints on the federal criminal system. For traditionalists, including the Court, criminal enforcement is the heart of the states' police power. If states lack any clear zone of authority there, it's hard to imagine where states remain powerful.[25] Scholars primarily object to federal prosecutions' often-unequal results, especially higher conviction rates and sentences, compared with the states.[26]

With violent crime rising for the first time in years,[27] the Biden administration has recommitted to using federal resources, including federal prosecutions, to address street violence.[28] If history is any

21 *See infra* Part III.

22 *See infra* Section III.A.

23 *See infra* Parts II–III.

24 *See infra* Section III.B.

25 *See infra* notes 114–16 and accompanying text.

26 *See infra* Section III.A.

27 *See* Press Release, Fed. Bureau of Investigation, FBI Releases 2020 Crime Statistics (Sept. 27, 2021), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2020-crime-statistics/ [https://perma.cc/N7PU-QQKG].

28 *See* Merrick B. Garland, Att'y Gen. of the U.S., Remarks at Meeting with President Biden and Members of New York Gun Violence Strategic Partnership (Feb. 3, 2022),

guide, controversy will follow,[29] particularly in an era justly sensitive to consequences of overcriminalization and overincarceration on marginalized individuals and communities.[30]

Given those misgivings, cooperative criminal federalism can seem frustratingly formless. Defenders tend to stress cases the federal system does well, like civil rights or defeating the mafia, or advantages the federal system enjoys, like greater resources or greater legitimacy.[31] But for skeptics, procedural advantages mean relying on little more than self-restraint by federal actors. Yet Congress has incentives to seem tough on crime, prosecutorial guidelines are vague and unenforceable, and prosecutorial discretion is broad and lacks oversight.

What's missing is a more robust cooperative criminal federalism, one with workable limits grounded in—rather than separating from—law and tradition. Overlapping, cooperative federalism based on the state-federal enforcement relationship meets those criteria. And it offers a very different model of federalism from either traditional federal-local separation or the "'new' . . . nationalist school of federalism," which conceives of states as agents implementing federal policy.[32] In criminal law, states are neither separate nor "servant[s]";[33] they control criminal justice, and they enjoy near-total autonomy doing it.

Framing cooperative criminal federalism properly offers critical doctrinal, theoretical, and practical payoffs. It explains why the Supreme Court's repeated efforts to constrain federal criminal law using substantive law, especially enumerated powers, has failed. And it uncovers other doctrines, especially anticommandeering and (avoiding)

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https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-meeting-president-biden-and-members/ [https://perma.cc/C94P-R88A].

29 *See* Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 380 (2006).

30 *See infra* notes 280–81 and accompanying text.

31 *See, e.g.*, Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 854–55 (2018); Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 972 (1995); John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1103 (1995); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1079 (1995); Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?,"* 50 SYRACUSE L. REV. 1317, 1352 (2000); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2316–17 (2014); Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863, 1901–02 (2012); Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 282 (1997).

32 Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1917 (2014); *see* authorities cited *infra* note 417.

33 *See generally* Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633, 2365 (2006).

preemption, that better enforce criminal federalism by promoting state primacy and therefore federal dependence.[34] Federal gun prosecutions, as in *Lopez*, have never displaced state enforcement; preempting state immigration law in *Arizona v. United States*[35] did.

Federal criminal scholarship's quest to find genuinely "federal interest" crimes has struggled for the same reasons. The federal system's many critics should focus on what a supplemental enforcer can contribute rather than trying to limit the federal government to truly "federal" matters or trying to persuade the fundamentally different federal system to behave more like the states. The news for reformers is good: the federal system is small and adaptable; it can respond to evidence about where it helps and where it hurts.

Congress and executive officials should continue embracing their role as supplemental enforcers. They need to get out of the business of being plenary, even on federal enclaves like reservations or military bases. Nor should they try to override state autonomy even in seemingly federal matters, such as in immigration or marijuana enforcement, with heavy-handed coercion or blanket preemption. Institutionally, the Department of Justice and federal agencies should deemphasize quantity metrics and adjust investigative and prosecutorial priorities to match emerging evidence indicating where federal efforts are most effective. For good or for bad, overlapping law and enforcement frame American criminal federalism. The better question is how to embrace that structure.

Part I explains how the state and federal systems' enforcement relationship defines both systems and restrains the federal system. The states supply the basics of everyday criminal justice, but they struggle under that responsibility, often trading outcomes for moving cases along. Rather than duplicate that role, the federal system supplements inevitable enforcement breakdowns, leaving it free to enforce selectively but ultimately secondary to and dependent on the states.

Part II answers what enforcement has to do with federalism. Conventional criminal federalism theory assumes that federalism means separating, as much as possible, federal from local and that, historically, the federal and state systems achieved separation. This Part argues that overlapping law and cooperative enforcement are rooted in federalism doctrine and tradition. What has changed is not the character of federal-local relationships as much as crime trends that both systems have adjusted to.

Part III addresses what, in a cooperative and overlapping scheme, makes a case "federal." Federal criminal law and procedure have

34 *See infra* notes 166–76 and accompanying text.

35 567 U.S. 387 (2012).

evolved a unique toolkit designed to amplify the strengths and avoid the weaknesses of being a supplemental enforcer. Complaints that the federal system operates differently than the states are therefore misplaced; the federal system *is* different because of its position relative to the states. Instead, what drives federal enforcement are policy choices about where to deploy federal strengths most effectively, considerations that apply across kinds of crimes.

Part IV considers implications for doctrine, theory, and policy. It explains how cooperative enforcement federalism contributes to longstanding debates in criminal scholarship and offers implications for federalism scholarship more broadly, which has yet to theorize a form of cooperative federalism that embraces states' autonomy and even primacy. And it offers proposals, some quite counterintuitive, for Congress, executive officials, and courts to embrace the federal supplemental role while letting the states do their jobs.

I. CRIMINAL ENFORCEMENT FEDERALISM

The Court and scholars want to preserve "'the federal-state balance' in the prosecution of crimes," with the states possessing the far greater share.[36] By traditional measures, like statutes and jurisdiction, they have failed. But scholars have observed an "extreme disjunction between federal jurisdiction and federal resources"[37] that suggests jurisdiction alone does not determine the federal justice system's reach.

The answer lies in enforcement. The Court's criminal federalism cases begin with the premise that "[t]he States have broad authority to enact legislation for the public good—what we have often called a 'police power.'"[38] But the police power is broader than legislative authority.[39] It is responsibility for providing basic public safety,[40] a job *only* the

36 Jones v. United States, 529 U.S. 848, 858 (2000) (quoting United States v. Bass, 404 U.S. 336, 349 (1971)). This Article accepts that the states have the police power and the federal system is supposed to be more limited. *See* Heather K. Gerken, Comment, *Slipping the* Bonds *of Federalism*, 128 HARV. L. REV. 85, 91 (2014) ("[A]ny lawyer worth her salt believes that the federal government is supposed to be a government of limited powers.").

37 Richman & Stuntz, *supra* note 3, at 613.

38 *Bond II*, 572 U.S. 844, 854 (2014) (quoting United States v. Lopez, 514 U.S. 549, 567 (1995)).

39 A few scholars have examined the police power's relationship with criminal federalism, notably Richman and Stuntz. *See, e.g.*, Richman & Stuntz, *supra* note 3, at 600–08 (describing local enforcement and explaining why it creates different prosecutorial incentives); Stuntz, *supra* note 9, at 665–66 (considering how the War on Terror might affect the "localism" of American justice); *see also* John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 690–98 (1999). Professor Gardner has done some work on policing. Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 17–23 (2019).

40 *See* Dubber, *supra* note 1, at 1277–78.

states possess.[41] That division of responsibility has pushed the state and federal systems into different, complementary roles, with the states providing comprehensive safety and justice and the feds supplementing inevitable enforcement breakdowns.

A. The Primary States

Providing basic public safety means doing a lot while being stretched thin. Police remain the primary public-safety force in America,[42] but crimefighting is only a small part of the job.[43] Officers spend most of their time responding to noncriminal matters like medical emergencies, stranded pets, or (seriously) an alligator loose in the neighborhood.[44] They provide security at ballgames and courthouses and guide funeral processions and hurricane evacuations.[45] County sheriffs run jails, serve legal process, manage civil forfeiture, and register sex offenders.[46] Even within criminal matters, serious felonies are a small slice of the job; far more time is devoted to traffic and lesser crimes.[47]

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41 *See* Richman & Stuntz, *supra* note 3, at 600–05.

42 An important, vigorous debate is ongoing over whether police in America do too much. But for the foreseeable future, they do quite a lot, and much of it does not involve investigating crime.

43 *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 150 (1993) ("People think of the police as crime-fighters; but order is . . . their prime goal."); Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 81–105 (2021) (demonstrating that today and historically, police have done much more than solve crime).

44 *See* Baughman, *supra* note 43, at 81–105; Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html [https://perma.cc/QE3Y-V49S]; *see also, e.g.*, Jacob Scholl, *Police Respond to Alligator on Loose in Idaho Neighborhood*, IDAHO STATE J. (Aug. 8, 2020), https://www.idahostatejournal.com/news/local/police-respond-to-alligator-on-loose-in-idaho-neighborhood/article_9b3dc0d6-2798-5ceb-a19f-0a58654e8c36.html [https://perma.cc/EEH7-S5GZ].

45 *See, e.g.*, *About the State Highway Patrol*, N.C. DEP'T OF PUB. SAFETY, https://www.ncdps.gov/our-organization/state-highway-patrol/about-State-Highway-Patrol/ [https://perma.cc/T9YT-DV4P].

46 *See, e.g.*, *About Us*, CUYAHOGA CNTY., https://sheriff.cuyahogacounty.us/en-US/About-Us.aspx [https://perma.cc/TKX9-ZAHT].

47 *See* Baughman, *supra* note 43, at 101–03 (describing self-reported time by police). Surveys among Americans who reported having police contact made similar findings. Over half met police during traffic incidents, and another quarter reported crime or a problem to police. The next-highest category—around six to seven percent—encountered police when police were providing help or services. Just over five percent encountered police during a criminal investigation, and fewer than three percent encountered police as suspects. MATTHEW R. DUROSE, ERICA L. SMITH & PATRICK A. LANGAN, U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 1 (2007), https://www.bjs.gov/content/pub/pdf/cpp05.pdf [https://perma.cc/6QB6-JPZE]. Reflecting that division, the

State court systems similarly handle enormous, varied dockets of mostly less serious matters. In 2018 and 2019,[48] very conservatively, state courts terminated around thirty-three million traffic cases, ten million misdemeanors, and just under three million felony cases.[49] By comparison, federal courts topped out around 200,000 criminal cases.[50] State numbers do not even include civil or juvenile matters, which the same judges often handle.

Caseloads are heavy. Defense attorneys' loads are notorious,[51] but "state court judges . . . have far heavier caseloads than do federal judges" too.[52] Many local prosecutors average hundreds of cases each year, including scores of felonies and hundreds of misdemeanors,[53] sometimes while also handling child support enforcement or juvenile proceedings.[54] Federal prosecutors' numbers are closer to ten.[55]

Not all cases are equally strong. Providing public safety means doing something with whatever case comes in the door. Police fail to

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New York Police Department's Detective Bureau is one of twenty-three bureaus and major offices. *See Bureaus*, CITY OF N.Y., https://www1.nyc.gov/site/nypd/bureaus/bureaus.page [https://perma.cc/BZ58-NR9U].

48 I focused on those years because the pandemic and court shutdowns make case statistics in 2020 and 2021 less representative.

49 State court data are from CSP STAT. *CSP STAT*, NAT'L CTR. FOR STATE CTS., https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat/ [https://perma.cc/J8GU-MK4C] (for felony and misdemeanor stats: choose "criminal"; then select "total felony" or "total misdemeanor"; then select "outgoing cases" from dropdown; and then select "2018" or "2019" from dropdown. For traffic stats: choose "traffic"; then select "total traffic"; then select "outgoing cases" from dropdown; and then select "2018" or "2019" from dropdown). I selected "Outgoing Cases" to ease federal comparisons because comparable federal misdemeanor data are reported for terminated cases. 2018 case numbers were 2,861,546 felonies (thirty-three states); 9,509,622 misdemeanors (thirty-one states); 33,258,252 traffic (thirty-one states). In 2019, they were 2,917,574 felonies (thirty-three states); 11,940,555 misdemeanors (thirty-two states); and 32,736,064 traffic (thirty states). These numbers likely grossly understate case volumes because many states supplied no information and are absent from the data.

50 *See infra* note 275 and accompanying text.

51 *See* Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 LAW & CONTEMP. PROBS. 83, 83–84 (2017).

52 Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 993 n.63 (1995); *see also* Little, *supra* note 31, at 1042–43.

53 *See* Adam M. Gershowitz & Laura R. Killinger, Essay, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 267–71 (2011).

54 STEVEN W. PERRY, U.S DEP'T OF JUST., PROSECUTORS IN STATE COURTS, 2005, at 4 (2006), https://bjs.ojp.gov/content/pub/pdf/psc05.pdf [https://perma.cc/3PLP-YRJA].

55 *See* U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2007, at 2–3, 10 (2008), https://www.justice.gov/sites/default/files/usao/legacy/2008/06/17/07statrpt.pdf [https://perma.cc/3M4X-BGWV].

solve many—and for some kinds of crimes, most—cases.[56] But they still must try, which can wear officers down.[57] Prosecutors similarly cannot jettison every feeble case; they would lose legitimacy. But neither can they devote too much time trying to improve them.[58] The only solution is triage[59]: close or dismiss the weakest cases, quickly resolve less serious ones,[60] and try to plead iffy cases to lesser offenses or reduced sentences.

And evidence suggests that's exactly what state actors do. Whereas federal conviction rates exceed ninety percent,[61] most state rates are closer to 60 to 70 percent depending on the offense.[62] As one study observed, criminal cases enter a "crime funnel" in which many reported incidents never even result in charges, and from there, rates of conviction, incarceration, and prison terms trend downward.[63]

The crime funnel is also observable in prosecutors' behavior. Nearly *half* of state felonies are dismissed or pleaded down,[64] practices that are almost unheard of federally.[65] Sentences, a fair proxy for how seriously prosecutors invested in a case, are lower across the board in state court than federally, often dramatically so.[66] In state cases, only

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56 *See* JOSEPH M. BESSETTE, CHARLOTTE BAILEY, LANE CORRIGAN, ELISE HANSELL & NINA KAMATH, THE CRIME FUNNEL 23 fig.19 (2016); Baughman, *supra* note 43, at 112–16.

57 *See* Kimbriell Kelly, Wesley Lowery & Steven Rich, *Buried Under Bodies*, WASH. POST (Sept. 13, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/13/ feature/even-with-murder-rates-falling-big-city-detectives-face-daunting-caseloads/ [https://perma.cc/MD5Q-PZVP].

58 *See* Gershowitz & Killinger, *supra* note 53, at 285–86.

59 *See id.* at 286.

60 Alexandra Natapoff has explored this phenomenon in misdemeanor cases. *See generally, e.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

61 *E.g.*, MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2015–2016, at 9 (2019), https://bjs.ojp.gov/content/pub/pdf/fjs1516.pdf [https://perma.cc/D9WJ-CZ2C].

62 *See* BRIAN A. REAVES, U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 24 tbl.21 (2013), https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/FBW2-FCPG] (calculating a 66% conviction rate for felonies and misdemeanors, including 61% for violent crimes, 66% for drug crimes, and 67% for weapons offenses).

63 BESSETTE ET AL., *supra* note 56, at 5–27.

64 REAVES, *supra* note 62, at 24 tbl.21.

65 Federal prosecutors dismiss around six percent of felonies. MOTIVANS, *supra* note 61, at 9 tbl.6. Federal felony drug defendants almost never plead to misdemeanor drug possession. *See* U.S. SENT'G COMM'N, WEIGHING THE CHARGES: SIMPLE POSSESSION OF DRUGS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4–5, 10 (2016). Though felon in possession of a firearm, 18 U.S.C. § 922(g)(1) (2018), is one of the most common federal charges, the U.S. Code does not even have a lesser-included misdemeanor, like carrying a concealed weapon. *See* U.S. SENT'G COMM'N, WHAT DO FEDERAL FIREARMS OFFENSES REALLY LOOK LIKE? 2, 9 (2022); Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 676–77 (2021).

66 *See* Barkow, *supra* note 2, at 574; *see also* authorities cited *infra* note 269.

violent felonies regularly result in prison terms exceeding five years, with rape and murder alone averaging over ten; others convicted of felonies receive fewer than five years, and defendants who plead down to misdemeanors serve little if any time.[67]

Enforcement also weakens as cases get harder. Among felonies, rape and aggravated assault cases, which often involve he-said, she-said evidence and reluctant witnesses and victims, either go unsolved or are pleaded down in the greatest numbers.[68] Local police and prosecutors similarly neglect or plead down complicated but nonviolent white-collar and technical crimes rather than invest more effort and resources.[69]

Scholars and journalists have also documented how justice diminishes even more markedly when crime involves disadvantaged or disfavored communities and victims, including racial and ethnic minorities, rape victims, prostitutes, undocumented workers, domestic violence victims, and victims of police brutality and hate crimes.[70] The reasons

67 *See* REAVES, *supra* note 62, at 29–30 tbls.24–25.

68 *See id.* at 22; BESSETTE ET AL., *supra* note 56, at 8–9, 15–16.

69 *See* Michael L. Benson, Francis T. Cullen & William J. Maakestad, *Local Prosecutors and Corporate Crime*, 36 CRIME & DELINQ. 356, 362–64 (1990) (reporting that local prosecutors were more willing to prosecute complex, white-collar crime when the offender or conduct were particularly blameworthy); Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 526–29 (2004); *see also* Michael L. Benson, William J. Maakestad, Francis T. Cullen & Gilbert Geis, *District Attorneys and Corporate Crime: Surveying the Prosecutorial Gatekeepers*, 26 CRIMINOLOGY 505, 510–11 (1988) (finding that district attorneys cited lack of resources as one major reason they did not bring more white-collar cases).

70 *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29–75 (1997); JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 5–12 (2015); THOMAS ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS 2–14, 54–60 (2019); Brown, *supra* note 31, at 854–57; Simmons, *supra* note 31, at 1869–70; James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 50–52 (2012); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1722–44 (2006); Ouziel, *supra* note 31, at 2292–300; Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1150–61 (2018); Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1292–99 (2016); Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 81–95 (2009); Wesley Lowery, Kimbriell Kelly, Ted Mellnik & Steven Rich, *Where Killings Go Unsolved*, WASH. POST (June 6, 2018), https://washingtonpost.com/graphics/2018/investigations/where-murders-go-unsolved/ [https://perma.cc/R5C5-UYJK]; Paul Duggan, *For the Family of a Slain D.C. Teenager, a Hard Lesson in the Vagaries of Criminal Justice*, WASH. POST (Dec. 28, 2021, 8:00 AM), https://www.washingtonpost.com/dc-md-va/2021/12/29/tyshon-perry-stabbing-kipp-plea/ [https://perma.cc/SX5X-5UPV].

are complex, probably a mixture of discrimination, low trust in law enforcement,[71] and official numbness or burnout.[72]

States' breadth is their greatest strength and weakness. By necessity, they have comprehensive resources to provide public safety and criminal justice—police, prosecutors, jails, prisons, traffic cameras, social workers, firefighters, traffic courts, and so on. But those resources must stretch far. So state actors logically trade quality for quantity.

B. The Supplemental Federal Layer

When scholars describe the federal system as an adjunct or supplement to the states, it is rarely a compliment.[73] Scholars have long presumed that the federal system could stick to exclusively or specially federal casework.[74]

But supplementing states is not just a policy choice; it flows quite naturally from the states' designated role providing public safety and criminal justice. It would be difficult and highly inefficient to have two governments serve that function. If a robbery occurs, someone needs to answer the 911 call and respond. Whether the robbery was of a

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71 There is a rich literature on legitimacy influencing justice. *See* KENNEDY, *supra* note 70, at 24–26; Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2068–126 (2017); Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 400 (2012); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 237–38 (2008); *see also* Ouziel, *supra* note 31, at 2268–77 (discussing this literature).

72 "[W]hen certain criminal conduct is endemic, prosecutions of those crimes become routine. Routine cases tend to garner less outrage; the result is a courtroom culture of acceptance, in which street norms tend to dictate the 'going rate' of punishment for a crime." Ouziel, *supra* note 31, at 2300.

73 *See* authorities cited *supra* note 7; *see also, e.g.*, Brown, *supra* note 31, at 854–55; Stacy & Dayton, *supra* note 31, at 248; Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 2 (2012). *But see* Renée M. Landers, *Prosecutorial Limits on Overlapping Federal and State Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 71 (1996); Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 80 n.21 (1996); Champion v. Ames, 188 U.S. 321, 357 (1903) (upholding a federal antilottery statute because "Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit" lotteries).

74 For example, Richman and Stuntz fully recognize that the federal system supplements the states, but they assert that "[f]ederal prosecutors have had their own sphere of exclusive responsibility" like "national security" and "counterfeiting and immigration crimes." Richman & Stuntz, *supra* note 3, at 609–10; *see* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 542 (2001) ("There are a few important offenses over which federal prosecutors have exclusive jurisdiction, but those offenses are a small portion of federal criminal dockets.").

business—and therefore a federal crime[75]—or not really does not matter in the moment. September 11 was a national tragedy, but locals responded first by necessity. Outside federal enclaves—a far narrower exception than is often appreciated[76]—there is no federal criminal world. There is crime, and some government has to respond by default. In the American justice system, tradition and federalism[77] assigned that job to the states.

The federal system has never even tried to compete. Federal officials have virtually never[78] served as first responders or supplied 911 dispatch; federal courts do not operate juvenile, domestic-relations, or traffic courts in meaningful numbers; the federal government does not operate local jails or supply social workers, foster homes, juvenile detention facilities, or schools.[79]

Federal criminal dockets do not resemble those of state courts. Felonies dominate federal dockets, though they comprise a small portion of state cases; misdemeanors are few and concentrated on immigration at the southwestern border; traffic cases are exceedingly rare.[80] State volumes dwarf the federal system. In 2018 and 2019, the federal system heard a bit over 0.4% of the state court docket, including fewer than 2.5% of felonies, 1% of misdemeanors, and 0.06% of traffic

75 *See* 18 U.S.C. § 1951 (2018).

76 *See infra* notes 152–55, 314–23 and accompanying text.

77 *See infra* Section II.B.

78 Again, outside a few enclaves and mostly in a limited way. *See infra* notes 152–55, 314–23 and accompanying text.

79 Federal enclaves are a small and only partial exception. *See infra* notes 152–55, 314–23 and accompanying text.

80 In 2018 and 2019, for example, about 38% of federal criminal cases were felonies, about half were misdemeanors, mostly immigration cases along the southwest border; and around 10% traffic. But even those numbers can be deceiving. The overwhelming majority of cases are immigration offenses occurring in five districts in the southwestern border. *See infra* notes 324–26 and accompanying text. Otherwise, federal judges—mostly magistrates—hear some traffic and misdemeanor cases arising on scattered federal enclaves.

Percentages derive from Tables D-4, M-1, and M-2 for the twelve-month period ending September 30, provided by the U.S. courts. *Caseload Statistics Data Tables*, U.S. CTS., https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables [https://perma.cc/WDV4-ESU8] (type D-4 into the search by table number; choose "ending September 30" from the dropdown menu under reporting period; choose "2019" from the dropdown menu under reporting period end year; click "apply"; then download the table. Repeat this process for tables "M-1" and "M-2"). To try to match the state categories, I defined felonies as the data in Table D-4 less the cases in Table M-1 and less the "Other Traffic Offenses" in Table D-4; misdemeanors as the data in Tables M-1 and M-2 plus "Drunk Driving" in Table D-4, less "Other Traffic Offenses" in Table M-2; and traffic as "Other Traffic Offenses" in Table M-2 plus "Other Traffic Offenses" in Table D-4. The precise percentages were, for 2019, 38.42% felonies, 52.47% misdemeanors, and 9.1% traffic, and for 2018, 38.02% felonies, 51.65% misdemeanors, and 10.34% traffic.

offenses.[81] The federal case distribution looks different too; in 2019, the largest share (33%) were immigration cases, followed by drugs (28%) and weapons (14%).[82]

Its personnel are limited too.[83] In 2007, criminal federal prosecutors numbered fewer than 7000;[84] their local counterparts numbered around 25,000.[85] The largest federal investigative agency other than Border Patrol and Bureau of Prisons, which have unusual and relatively narrow functions, is the FBI; in 2008, it employed only 12,760 agents.[86] Local law enforcement employed over 800,000 full- and part-time sworn officers.[87]

The federal justice system is less a true justice system than a specialist operation designed to perform a limited, secondary role. And that both limits and liberates federal enforcers. The federal system has huge gaps—almost no patrol, no jails, fewer investigators and

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81 The precise totals were, in 2019, 207,142 cases (79,586 felonies, 108,697 misdemeanors, and 18,859 traffic offenses), and, in 2018, 191,171 cases (72,675 felonies, 98,734 misdemeanors, and 19,762 traffic). I derived these data from the sources cited *supra* notes 49 and 80. The precise percentages were, in 2018, 2.51% of felonies, 1.04% of misdemeanors, and 0.06% of traffic cases, and in 2019, 2.66% of felonies, 0.90% of misdemeanors, and 0.06% of traffic offenses. Again, not all states supplied data, so these percentages overstate the federal share.

82 *Federal Judicial Caseload Statistics 2019*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 [https://perma.cc/9AA6-AHKR].

83 *See* Barkow, *supra* note 2, at 543.

84 In 2007, DOJ employed 5707 assistant United States attorneys (AUSAs), about 79% of whom handled criminal matters, yielding about 4509 criminal AUSAs. U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2007, at 2–3 (2007), https://www.justice.gov/usao/reading_room/reports/asr2007/07statrpt.pdf [https://perma.cc/K628-L6GC]. Those AUSAs comprised about 66% of DOJ prosecutors and litigators, *id.*, which means DOJ employed about 8647 prosecutors and litigators. Assuming roughly the same share (79%) handled criminal prosecutions as within the districts, an estimated 6831 criminal prosecutors worked department wide. *Id.*

85 2007 is the most-recent year for which state prosecutor staffing is available. The precise figure of assisting prosecutors was 24,937, but that number excluded all supervisors, presumably some of whom also handled criminal matters. STEVEN W. PERRY & DUREN BANKS, U.S. DEP'T OF JUST., PROSECUTORS IN STATE COURTS, 2007—STATISTICAL TABLES 4 tbl.2 (2011).

86 BRIAN A. REAVES, U.S. DEP'T OF JUST., FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 2 (2012), https://bjs.ojp.gov/content/pub/pdf/fleo08.pdf [https://perma.cc/U755-ZDHU]. The Bureau of Prisons officers are mostly correctional officers, not criminal investigators. Border Patrol monitors mostly the southwestern border but does not lead criminal investigations; the FBI equivalent in the Department of Homeland Security is Homeland Security Investigations, which employs fewer agents. *See id.* at 14; *see also Homeland Security Investigations*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/about-ice/homeland-security-investigations/ [https://perma.cc/3LWZ-TRY6].

87 BRIAN A. REAVES, U.S. DEP'T OF JUST., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/csllea08.pdf [https://perma.cc/6QR7-EJ2F].

prosecutors, and fewer social services. So federal authorities remain enmeshed in, and dependent on, the states for personnel, facilities, access, and information, the lifeblood of criminal enforcement.[88] Yet they are free to choose when and how to intervene, knowing the states had the basics covered.

The Dylann Roof case offers a real-world example. His crime had obvious federal interests; a white supremacist committed a heinous massacre in a state with a deplorable civil-rights record.[89] But throughout, federal authorities leveraged state advantages. Roof fled after the murders, triggering a nationwide manhunt.[90] Though federal agents participated, it was patrol officers in Shelby, North Carolina, who arrested him during a traffic stop.[91] The FBI then interrogated him—at the Shelby police station.[92]

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88 *See* Richman, *supra* note 29, at 409 (describing the benefits of being the plenary enforcer for developing cases); Richman, *supra* note 3, at 785–86 (same).

89 *See* Krishnadev Calamur & Eyder Peralta, *Police Arrest Suspect in Charleston Church Shooting*, NAT'L PUB. RADIO: THE TWO-WAY (June 18, 2015, 6:32 AM), https://www.npr.org/sections/thetwo-way/2015/06/18/415402764/police-search-for-man-suspected-of-killing-9-at-s-c-church/ [https://perma.cc/565A-WF4V]. South Carolina has a long, sordid history embracing slavery, the Klan, and Jim Crow. *See generally, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 431 (1988) ("Nowhere did the Klan become more deeply entrenched than in a group of Piedmont South Carolina counties . . . ."); Lou Falkner Williams, *Federal Enforcement of Black Rights in the Post-Redemption South: The Ellenton Riot Case*, 172, 172–93, *in* LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH (Christopher Waldrep & Donald G. Nieman eds., 2001) (describing efforts in South Carolina, during and after Reconstruction, to suppress Black voters violently and federal struggles to enforce civil-rights laws there); JACK BASS & W. SCOTT POOLE, THE PALMETTO STATE: THE MAKING OF MODERN SOUTH CAROLINA 72–78 (2009) (noting Jim Crow's grip and brutal racial violence in South Carolina in the early twentieth century); *see also* Jelani Cobb, *Inside the Trial of Dylann Roof*, THE NEW YORKER (Jan. 29, 2017), https://www.newyorker.com/magazine/2017/02/06/inside-the-trial-of-dylann-roof/ [https://perma.cc/H4KF-ZFGX] (describing the racist history underpinning the Dylann Roof trial).

90 Calamur & Peralta, *supra* note 89.

91 *Police Dash Cam Shows Moment of Dylan Roof's Arrest*, ABC7 (June 23, 2015), https://abc7news.com/dylann-roof-dylan-charleston-shooting-emanuel-african-methodist-episcopal-church/801345/ [https://perma.cc/RD4C-GF3S]; Erik Ortiz & F. Brinley Bruton, *Charleston Church Shooting: Suspect Dylann Roof Captured in North Carolina*, NBC NEWS (June 18, 2015, 8:25 PM), https://www.nbcnews.com/storyline/charleston-church-shooting/charleston-church-shooting-suspect-dylann-roof-captured-north-carolina-n377546/ [https://perma.cc/C2NR-8QQ6]. A community member's tip led to his capture. *See S.C. Shooting Suspect Caught Thanks to Tip by N.C. Florist*, CBS NEWS (June 19, 2015, 9:18 AM), https://www.cbsnews.com/news/charleston-shooting-suspect-dylann-roof-captured-thanks-to-tip-by-florist-debbie-dills/ [https://perma.cc/CVP8-QNU2].

92 *See* Janae Frazier & Tony Santaella, *Dylann Roof Laughed at Times During Taped Confession*, WCNC (Dec. 9, 2016, 11:13 PM), https://www.wcnc.com/article/news/local/dylann-roof-laughed-at-times-during-taped-confession/275-367561930/ [https://perma.cc/KVY6-35BM]; Jason Sickles, *Dylann Roof's Arrest: How a Small-Town Police Foiled the Accused Charleston Killer's Getaway*, YAHOO NEWS, https://news.yahoo.com/dylann-roofs-

Rather than charge Roof immediately, the feds let South Carolina take custody and hold him on state murder charges while federal investigation continued.[93] More than a month later, federal prosecutors indicted Roof, but they left him in state custody, shuttling him to and from federal court until after his federal conviction and death sentence.[94] South Carolina then consented to release him to federal custody,[95] but lacking their own pretrial holding facility, the U.S. Marshals left him at the local jail. He then pleaded guilty to nine state murder counts and received a state sentence of nine life sentences plus ninety years, a plea the local district attorney described as an "insurance policy to the federal conviction and sentence."[96] Afterward, U.S. Marshals took him from the local jail to the federal Bureau of Prisons facility, where he sits on death row.[97]

The Roof case illustrates how public safety's largely reactive function drives enforcement choices. A shooting occurs, and police and EMS must respond quickly. The shooter escapes, and patrol coverage provides the best chance of apprehending him. Once arrested, the shooter needs somewhere to go—to a station for an interview and then to a jail for holding. Charges and an initial appearance follow immediately, even as the investigation continues. Strategy can follow later. When it does, cooperation serves both systems' effort to obtain justice.

The enormity and absurdity of duplicating that infrastructure federally best explains how federal enforcement has remained so small for so long. Congress would have to invest billions in expanding federal courts, hiring hundreds of thousands of personnel, and constructing hundreds of facilities—all to match what the states already have. It would be pointless, inefficient, and politically stupid.

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arrest-how-smalltown-police-foiled-the-accused-charleston-killers-getaway-115653519.html [https://perma.cc/B2QB-6DAT].

93 *See* Yamiche Alcindor & Doug Stanglin, *Affidavits Spell Out Chilling Case Against Dylann Roof*, DETROIT FREE PRESS (June 19, 2015, 10:43 PM), https://www.freep.com/story/news/nation/2015/06/19/dylann-roof-charleston-police-charged-murder-black-church/28975573/ [https://perma.cc/JQJ8-HEN9].

94 Motion for Writ of Habeas Corpus Ad Prosequendum at 1, United States v. Roof, 225 F. Supp. 3d 419 (D.S.C. 2016) (No. 15-CR-00472).

95 *Id.*

96 Matt Zapotosky & Mark Berman, *Charleston Church Shooter Dylann Roof Pleads Guilty in State Court, Avoids Second Death Penalty Trial*, WASH. POST (Apr. 10, 2017, 2:38 PM) https://www.washingtonpost.com/news/post-nation/wp/2017/04/10/charleston-church-shooter-dylann-roof-pleads-guilty-in-state-court-avoids-second-death-penalty-trial/ [https://perma.cc/6LQB-JJAP].

97 *See id.*; Dan McCue, *Dylann Roof Transferred to Federal Death Row*, COURTHOUSE NEWS SERV. (Apr. 24, 2017) https://www.courthousenews.com/dylann-roof-transferred-federal-death-row/ [https://perma.cc/X9KN-HMCT].

Empirical evidence supports that conclusion. Susan Klein and Ingrid Grobey found that federal cases have "averaged between 2% to 5% of the totally national criminal felony caseload for the last century."[98] That annual share "has been more-or-less stable since 1918, with a brief spike in the number of federal prosecutions during the Prohibition Era. This pattern holds true even in those areas where jurisdiction is concurrent, such as possession of controlled substances, fraud, and weapons offenses."[99] Klein and Grobey further found "no causal connection (or even a correlation) between the number of federal criminal statutes and the annual number of federal criminal prosecutions."[100] A 1990s study by Professors Stacy and Dayton reached similar findings, noting that, adjusted for population increases, federal filings actually fell after Prohibition and continued trending downward in the later twentieth century.[101]

These studies confirm what Professors William Stuntz and Daniel Richman have described as the federal "norm of radical underenforcement."[102] But calling those limits a "norm" seems like an understatement. The years between the 1920s and the 1990s probably saw the greatest expansion of federal jurisdiction and the federal administrative state in U.S. history.[103] Federal politicians made highly public efforts to address crime.[104] And the federal criminal footprint largely shrunk.

To the extent scholars have addressed the phenomenon at all, they usually ascribe it to differences in political accountability.[105] Richman and Stuntz offer the most thorough account, arguing that because only the locals are politically accountable for crime, Congress can take a "symbolic stand" on crime without accepting real responsibility to

98 Klein & Grobey, *supra* note 73, at 36.

99 *Id.* at 36–37 (footnote omitted).

100 *Id.* at 17.

101 *See* Stacy & Dayton, *supra* note 31, at 256.

102 Richman & Stuntz, *supra* note 3, at 613.

103 *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 483–91 (1997). Prof. Gardbaum observed that federal expansion does not necessarily come at states' expense; both governments can grow together. *See id.* That perhaps helps explain why the federal share of criminal has remained so small: it reflects growth in the broader justice system. But even in raw numbers, the federal case load has never been large. *See* Stacy & Dayton, *supra* note 31, at 256.

104 Scholars often cite federal tough-on-crime policies during the Nixon or Reagan administrations. *E.g.*, Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 39 (2010). In fact, its origins lay in the Kennedy and Johnson administrations, and their focus on urban poverty, including crime. MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S, at 22 (2005).

105 *See, e.g.*, Barkow, *supra* note 5, at 125–27; Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 259–60 (2007).

fund a substantial enforcement bureaucracy.[106] Federal prosecutors, likewise liberated from voter pressure to address real crime incidents, select cases that further their professional image rather than do the grunt work of ordinary cases.[107]

Political accountability does not fully explain *why* the federal system chose that path. Resource constraints are not a complete explanation. Congress can print money and has spent plenty on issues less important to voters. Or the federal system, which spends much more per case than the states, could stretch existing resources further.[108] Congress and executive officials have incentives to do so. Voters—to whom federal politicians are directly accountable—care deeply about crime.[109] Federal prosecutors could pursue career glory by racking up career stats. The federal system has resisted those temptations because it would be pointless; the states are already there.

II. THE FEDERALISM OF OVERLAPPING ENFORCEMENT

Overlapping enforcement does not unleash the federal system; it restrains it. Making overlap essential to limiting the federal justice system contradicts conventional wisdom about how criminal federalism works. For decades, most scholars and the Supreme Court have presupposed that in criminal justice, federalism means that "matter[s] for federal enforcement" differ from "traditionally local criminal conduct,"[110] so federal criminal law should not excessively "intrude" on,[111] "displace,"[112] or "overlap" with the domain of state and local crime.[113] That project, by all accounts, has failed miserably.

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106 Richman & Stuntz, *supra* note 3, at 610.

107 *See id.* at 613–15; *see also* Stuntz, *supra* note 74, at 543–44 ("[F]ederal prosecutors' agenda is consistent with the pursuit of professional advancement.").

108 *See infra* note 287 and accompanying text.

109 *See infra* note 399 and accompanying text.

110 Jones v. United States, 529 U.S. 848, 858 (2000) (citing United States v. Bass, 404 U.S. 336, 350 (1971)); *accord Bond II*, 572 U.S. 844, 864 (2014) (distinguishing "traditionally" state crimes like assault from crimes "traditionally" left to the federal government, like terrorism); United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) ("[E]ducation is a traditional concern of the States." (first citing Milliken v. Bradley, 418 U.S. 717, 741–42 (1974); and then citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968))); *Bass*, 404 U.S. at 338–39 (describing gun crimes as "traditionally left to the States").

111 *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring); Clymer, *supra* note 5, at 645–46; Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 KAN. L. REV. 503, 523 (1995).

112 *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *accord Bond II*, 572 U.S. at 865 (quoting Bond v. United States (*Bond I*), 564 U.S. 211, 224 (2011)); *Jones*, 529 U.S. at 859 (Stevens, J., concurring).

113 *Jones*, 529 U.S. at 860 (Stevens, J., concurring); *accord, e.g.*, Barkow, *supra* note 5, at 122; Clymer, *supra* note 5, at 668; Stephen F. Smith, *Overcoming Overcriminalization*, 102 J.

This Part argues that the theory, not federalism, is the problem. Overlapping law and cooperative enforcement are deeply rooted in American law and tradition. The Constitution, federal law, and longstanding norms have given states almost total control over their law and enforcers, and the police power creates powerful incentives for states to do everything. All crime is local. And it always has been.

A. The Federal-Local Crime Distinction

Conventional criminal federalism theory assumes that separation restrains federal power and thereby preserves the "'federal-state balance' in the prosecution of crimes."[114] Whenever federal actors—Congress, executive officials, and courts—enact and enforce federal criminal power, they should focus on "truly national"[115] crimes and leave to the states "traditionally local criminal conduct."[116] Conventional theories assert that separate federal crime is also more rooted in constitutional law and tradition.[117] But the federal-local distinction seems to have failed utterly to describe, let alone change, actual federal behavior. It is time to reexamine whether something is wrong with the theory.[118]

Scholars and the Court have long used the federal-local distinction to prioritize federal *enforcement*. Scholars tend to group crimes into three categories based on their federal-ness. They generally support federal enforcement of "offen[ses] against direct federal interests"—the "money, property and persons associated with the federal

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CRIM. L. & CRIMINOLOGY 537, 554–55 (2012); JAMES A. STRAZZELLA, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 55 (1998).

114 *Jones*, 529 U.S. at 858 (quoting *Bass*, 404 U.S. at 349); *accord Bond II*, 572 U.S. at 858 (emphasizing protecting "the 'usual constitutional balance of federal and state powers'" (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991))); *Lopez*, 514 U.S. at 562 (noting presumption that Congress doesn't "significantly change[] the federal-state balance" without speaking clearly (quoting *Bass*, 404 U.S. at 349)).

115 *Lopez*, 514 U.S. at 568.

116 *Jones*, 529 U.S. at 858 (quoting *Bass*, 404 U.S. at 350).

117 *See* authorities cited *supra* note 110; *see also infra* notes 179–88 and accompanying text.

118 Other scholars have noted the essential incoherence of separating federal from local. *See, e.g.*, Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 257–58, 282 (2005) (describing the "quest to distinguish matters of local concern from matters of national concern" as "quixotic"); Neil S. Siegel, *Distinguishing the "Truly National" from the "Truly Local": Customary Allocation, Commercial Activity, and Collective Action*, 62 DUKE L.J. 797, 806–13 (2012) (same). This Article contributes to that rich literature by examining why it does not work in criminal law and also reconsidering well-known federalism cases, like *Lopez*, as decisions about criminal *enforcement*.

government"[119]—such as "national security" or "counterfeiting and immigration crimes."[120] Next are crimes that "are not being, or by their nature cannot be, handled appropriately at the state level."[121] Lists often include "major international drug trafficking, corruption,"[122] "corporate and white collar crime, organized crime, and civil rights violations."[123] The least federally important are essentially "local" crimes like "theft offenses, drug offenses, violent crimes, and fraud-type crimes"[124] that "could also be prosecuted in the state courts."[125]

Bond v. United States illustrates the Court's similar approach.[126] Learning that her husband had impregnated her best friend, Ms. Bond, a microbiologist, stole some poison from her employer and bought more online. Then she smeared it on the victim's home, car, and mailbox—and stole some mail for good measure.[127] The state slapped Bond on the wrist; when the harassment continued,[128] local police referred the victim to the U.S. Postal Inspection Service.[129] Federal prosecutors charged Bond with mail theft and, more creatively, violating the Chemical Weapons Convention Implementation Act.[130]

The cert question in *Bond* was whether the broad chemical weapons statute Congress drafted—which indisputably covered Bond's conduct[131]—exceeded Congress's treaties power.[132] Chief Justice Roberts's majority opinion dodged, refusing to invalidate or narrow the statute but holding that Congress did not mean the text to reach Bond's

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119 NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 2–3 (7th ed. 2020); *accord, e.g.*, Paul D. Carrington, *Federal Use of State Institutions in the Administration of Criminal Justice*, 49 SMU L. REV. 557, 566 (1996); Clymer, *supra* note 5, at 653–54; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2566 (2004).

120 Richman & Stuntz, *supra* note 3, at 609–10.

121 Smith, *supra* note 5, at 46–47.

122 *Id.* at 47.

123 Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 811 (1996).

124 Stuntz, *supra* note 74, at 542 n.149.

125 ABRAMS ET AL., *supra* note 119, at 2, 2–3. The overfederalization debate could be read simply as a disagreement about which crimes fall into the second versus the third categories. *See* authorities cited *supra* note 31.

126 *See Bond II*, 572 U.S. 844 (2014).

127 *See id.* at 852.

128 "Bond subjected the woman to a campaign of harassing telephone calls and letters, acts that resulted in a criminal conviction on a minor state charge. Bond persisted in her hostile acts . . . ." *Bond I*, 564 U.S. 211, 214 (2011).

129 *See Bond II*, 572 U.S. at 852, 864 (reporting that the victim repeatedly called local police, who "took no action" and then referred her to "the post office").

130 *See id.* at 852–53; 18 U.S.C. § 229(a) (2018).

131 *See Bond II*, 572 U.S. at 867–68 (Scalia, J., concurring in the judgment).

132 *See id.* at 854 (majority opinion).

"purely local" crime.[133] So how could the Court (and future federal prosecutors) know that Bond's crime was too "local"? Federal law has "traditionally" handled matters like "assassination, terrorism, and acts with the potential to cause mass suffering,"[134] whereas Bond's crime was a "local" (implicitly, trivial)[135] "assault" that Pennsylvania law covered and that state prosecutors had already "declined to prosecute."[136]

Bond is a weird case. But the Court has used similar reasoning in every major decision narrowing or striking down federal criminal laws. *United States v. Bass*, which narrowed the federal felon-in-possession statute to require proof of an interstate nexus, reasoned that gun possession is "local criminal conduct."[137] *United States v. Lopez* similarly struck down a federal statute prohibiting gun possession near a school because the gun possession was "local"[138] and, as the concurrence observed, schools are "traditional state concern."[139] *Jones v. United States* narrowed the federal arson statute to arsons of businesses, not residences, explaining that residential arson "is a paradigmatic common-law state crime" and therefore "traditionally local."[140]

At this point readers might object that those cases are about whether the crime exceeded Congress's enumerated powers; whatever the Court said about "local," burning down a business is more commercial than residential arson. That is rather the point. Whether a crime is "federal," in the sense that it falls within the Commerce Clause, says little about which crimes the federal system should prosecute and absolutely nothing about whether the offense is "local."[141]

The Court's cases demonstrate the problem. *Bass* and *Lopez* targeted "local" gun possession, but federal prosecutors can satisfy the Commerce Clause simply by proving that the gun was manufactured out of state.[142] Felon-in-possession cases are a federal staple[143] even

133 *Id.* at 848.

134 *Id.* at 864.

135 The Justices could not hide their disdain. Bond's crime was an "unremarkable local offense," "an amateur attempt by a jilted wife to injure her husband's lover." *Id.* at 848. Justice Scalia was characteristically cutting: "Somewhere in Norristown, Pennsylvania, a husband's paramour suffered a minor thumb burn at the hands of a betrayed wife. The United States Congress . . . has made a federal case out of it." *Id.* at 867 (Scalia, J., concurring in the judgment) (footnote omitted).

136 *Id.* at 864, 866 (majority opinion).

137 404 U.S. 336, 350 (1971).

138 514 U.S. 549, 568 (1995).

139 *Id.* at 577 (Kennedy, J., concurring).

140 529 U.S. 848, 858 (2000) (quoting *Bass*, 404 U.S. at 350); *id.* at 859.

141 *See* Alison L. LaCroix, *Redeeming* Bond*?*, 128 HARV. L. REV. F. 31, 37 (2014) ("Judicial assessments of localness do not define the boundaries of Congress's power under Article I . . . .").

142 *See* Scarborough v. United States, 431 U.S. 563, 575 (1977).

143 *See supra* note 54.

though the crime no less "local" than possessing a gun in a school zone. *Jones* eliminated (the few) federal residential arson cases but left undisturbed equally "traditionally local" business arsons.[144] And the Court has left intact many other broad federal jurisdictional statutes.[145]

None of *Bond*'s distinctions work either. Yes, assault is a state crime, but so are terrorism and similar acts;[146] in fact, Pennsylvania, where the crime occurred, has a similar chemical weapons statute.[147] Federal prosecutors routinely, lawfully charge crimes the locals decline.[148] Anyway, the locals did prosecute Bond, the harassment continued, and police *invited* federal help.[149] And was stealing the victim's mail any less "local"—or, really, less trivial—than stealing poisonous chemicals and buying more online during a months-long harassment campaign?

Bond is such a weird case because it took conventional federalism theory to its flawed conclusion. By refusing to strike down or even narrow the statute, the Court invalidated a prosecutorial decision for exceeding *Congress's* enumerated power. But whatever the treaty power means for Congress's legislative authority, it simply does not answer which crimes should stay local and which should "go federal."

B. The "Local" in Constitutional Federalism

The federal-local distinction fails because it underestimates *state law* and jurisdiction. The Constitution imposes few limits on state criminal law's reach.[150] It forbids states from enacting are bills of attainder and ex post facto laws.[151] It gives Congress "exclusive"

144 *See* John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 306–07 (1986). Historically, arson of a residence was a common-law crime, whereas arson of a business was a statutory one, but both were prosecuted locally. *See id.* at 324–31.

145 For examples of broad federal nexuses, see, for example, 18 U.S.C. §§ 1201, 1591, 1951 (2018). Possessing a gun that was manufactured out of state is pretty broad too. *See* 18 U.S.C. § 922(g) (2018).

146 *See infra* notes 266–67, 349–56 and accompanying text.

147 18 PA. CONS. STAT. § 2716 (2022).

148 *See* Gamble v. United States, 139 S. Ct. 1960, 1964, 1966–69 (2019) (recognizing that state and federal governments possess separate sovereign authority to prosecute crimes). DOJ policy strongly discourages duplicative state-federal convictions. *See* U.S. DEP'T OF JUST., JUSTICE MANUAL §§ 9–2.031, 9–27.200 (2018) (discussing DOJ's *Petite* policy for such cases). So federal cases that could proceed at the state level—and nearly all can except some immigration offenses, *see infra* Section II.B—need the state to step aside, either by declining to charge or dismissing pending state charges. Thus, state declination is the norm, not a reason to reject federal jurisdiction.

149 *See supra* notes 128–29 and accompanying text.

150 Obviously, state law cannot violate rights like equal protection or due process; the point is that substantive coverage is nearly unlimited.

151 U.S. CONST. art. I, § 10, cl. 1.

legislative authority over some federal enclaves,[152] though Congress has created concurrent jurisdiction anyway.[153] Congress also has some, but not absolute,[154] exclusivity in Indian Country.[155]

And that's about it. Scholars and the Court have sometimes assumed that other constitutional provisions created some federal exclusivity,[156] but supporting evidence is lacking. The four crimes listed in the Constitution—counterfeiting, piracy and crimes on the high seas, violations of the laws of nations, and treason[157]—always have been and remain state crimes.[158] Nor is that an oversight; early courts—federal

152 *See* U.S. CONST. art. I, § 8, cl. 17.

153 Congress quickly discovered that it was easier to adopt state law than reinvent a new criminal code. *See* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 166 (2d ed. 2002) (explaining that even the First Congress tried to "avoid the difficulty of drafting a comprehensive criminal code" by establishing local legislatures or adopting state law when possible for federal enclaves); Daniel Richman, Making Federal Cases 49 (Aug. 9, 2022) (unpublished manuscript) (on file with author). That policy continues. *See, e.g.*, 18 U.S.C. § 13 (2018) (adopting state law for crimes in federal enclaves not covered by federal statute). Congress also usually authorizes concurrent enforcement jurisdiction. *E.g.*, 16 U.S.C. § 480 (2018) (preserving concurrent jurisdiction in national forests); *see* United States v. Gabrion, 517 F.3d 839, 846–56 (6th Cir. 2008) (describing the legal foundation for exclusive and concurrent federal jurisdiction over federal properties).

154 Especially after *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

155 That is a legal term of art that captures, roughly, tribal reservations. 18 U.S.C. § 1151 (2018).

156 *See, e.g.*, Fox v. Ohio, 46 U.S. (5 How.) 410, 433–35 (1847) (distinguishing the state offense of uttering counterfeit coins from the sovereign offense of counterfeiting); William Van Alstyne, Presentation, *Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1740, 1751 n.21 (1989) ("[D]efining and punishing piracy on the high seas is properly understood to be a power vested in the United States alone."); *see also* Richman & Stuntz, *supra* note 3, at 609–10 (listing counterfeiting in federal prosecutors' "sphere of exclusive responsibility").

157 U.S. CONST. art. I, § 8, cl. 6, 10; *id.* art. III, § 3.

158 *See* Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 268–69 (2011). For more counterfeiting examples, see, for example, State v. Eberly, 332 P.3d 683, 684, 687–88 (Haw. Ct. App. 2014); State v. McMurry, 909 P.2d 1084, 1085–87 (Ariz. Ct. App. 1995); Cross v. State, 176 S.E.2d 517, 518–19 (Ga. Ct. App. 1970); State v. Scarano, 175 A.2d 360, 362–63 (Conn. 1961); *Ex parte* Dixon, 264 P.2d 513, 516–17 (Cal. 1953). Federal statistics strongly suggest that the feds aren't prosecuting most, or even much, counterfeiting. *See* U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2020, at 13 (2021) (110 filings nationwide).

For law of nations offenses, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 823–26 (1997); David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515, 522–30 (1992) (describing state prosecutions that offended federal international interests). For treason, see Gilbert v. Minnesota, 254 U.S. 325 (1920) (rejecting federal preemption of a state statute criminalizing advocating against federal military enlistment); Brief of the Commonwealth of

and state—widely understood that "states could punish the same acts that federal law proscribed,"[159] sometimes even over federal objections.[160]

That norm has endured. Criminal preemption rarely receives separate scholarly study,[161] but is a story of remarkable federal restraint. Congress basically does not do it. Congress explicitly reserved states' authority to enforce their criminal laws, even ones covering the same subjects or offenses as federal statutes.[162] It frequently disclaims preemption again in particular statutes.[163] Federal courts have exclusive jurisdiction over the federal criminal code,[164] which probably explains why some crimes—especially offenses in federal schemes like tax or bankruptcy—seem exclusively federal. But states can and do prosecute acts that those schemes cover.[165]

The Court has only found state criminal statutes preempted twice, and neither involved express preemption. *Pennsylvania v. Nelson* held

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Massachusetts as Amicus Curiae, Pennsylvania v. Nelson, 350 U.S. 497 (1956) (No. 236) (collecting state sedition laws in force before preemption).

And for offenses in the air and on sea, see Skiriotes v. Florida, 313 U.S. 69, 74–77 (1941) (crimes on the high seas); State v. Stepansky, 761 So. 2d 1027, 1036–37 (Fla. 2000) (affirming the defendant's conviction for burglary and attempted sexual battery on a cruise ship that departed from and returned to a Florida port); Cloyd v. State, 943 So. 2d 149, 158–61 (Fla. Dist. Ct. App. 2006) (affirming the conviction of a commercial pilot for flying while intoxicated); Corbin v. State, 672 P.2d 156, 157–59 (Alaska Ct. App. 1983) (affirming state authority to prosecute a theft on the high seas and collecting other cases applying state criminal law to crimes on the seas or in the air outside state territorial boundaries). *But see* People v. Costa, 469 N.Y.S.2d 545, 547 (N.Y. Sup. Ct. 1983) (holding the state could not prosecute the defendant for attempting to blow up an airplane that was scheduled to land in New York).

159 Collins & Nash, *supra* note 158, at 268, 268–69; *id.* at 269 n.98 (collecting cases).

160 One early United States attorney actually represented a defendant in state court in a bid to avoid an international mess. *See* Bederman, *supra* note 158, at 521.

161 Only a couple of scholars have directly mentioned criminal preemption. Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 43; Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1553–54 (2002); Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 88 (1996).

Scholars sometimes touch criminal preemption for specific crimes. *See, e.g.*, Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009). Others mention it when analyzing the related, but distinct, dual-sovereignty doctrine. *See, e.g.*, Van Alstyne, *supra* note 156, at 1744–45; Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995).

162 *See* 18 U.S.C. § 3231 (2018).

163 *See, e.g.*, 18 U.S.C. §§ 233, 896, 927 (2018); 21 U.S.C. § 903 (2018); 29 U.S.C. § 1144(b)(4) (2018).

164 *See* 18 U.S.C. § 3231 (2018).

165 *See infra* notes 341–45 and accompanying text.

that a federal sedition law preempted a similar state statute,[166] but it rested on dubious reasoning and has been ignored since.[167] *Arizona v. United States*[168] held that federal law preempted some Arizona immigration statutes, including a crime and an arrest directive to local officers.[169] *Arizona* has more teeth, but, as Section III.B explains, regarding immigration as exclusively federal is a serious overstatement. Criminal immigration remains an overlapping and cooperative enterprise.[170]

Federal law thus leaves ample room for state criminal law and enforcement, even in seemingly federal zones. As Part I explained, having the police power provides states strong incentives to fill those areas. They must be able to respond to, investigate, and charge whatever crime occurs—whether it is a conventional murder, a massacre by a white supremacist, or a terrorist bombing. They cannot wait to find out if a shooting will become a major federal civil rights case down the road. The states' unique breadth of independence and burden of regulatory responsibility has entrenched them on the front lines of criminal enforcement.

That suggests that the Court and scholars have wrongly focused on enumerated powers as the primary doctrine to restrain federal criminal power. The temptation is understandable: enumerated powers were designed to limit federal power, and they do seem more, well, legal—and therefore enforceable—than enforcement discretion.[171] But evidence suggests that they have simply not performed that role well. If state primacy and autonomy most strongly constrain federal power, then anticommandeering[172] and avoiding preemption,[173] which

166 350 U.S. 497, 500–04 (1956).

167 *Nelson* defined federal power and expertise in national security aggressively, claiming "amateur" locals would ruin spycraft and concluding that "Congress has intended to occupy the field of sedition." *Id.* at 504, 507, 504–07. The opinion appears to be a relic of Cold War hysteria; its description of federal law enforcement is absurd, and everybody has ignored it. Before *Nelson*, states regularly prosecuted sedition. Brief of the Commonwealth of Massachusetts as Amicus Curiae, Pennsylvania v. Nelson, 350 U.S. 497 (1956) (No. 236) (collecting state sedition laws in force before preemption). States continued prohibiting sedition against the state, which, whatever *Nelson* said, is indistinguishable from national sedition. *See, e.g.*, People v. Epton, 227 N.E.2d 829, 835 (N.Y. 1967); State v. Levitt, 203 N.E.2d 821, 824 (Ind. 1965). National security has been and remains a cooperative scheme, as expert domestic terrorism agencies like the NYPD illustrate. *See infra* notes 349–56 and accompanying text.

168 567 U.S. 387 (2012).

169 *See id.* at 400–10.

170 *See infra* notes 324–38 and accompanying text.

171 *See* authorities cited *infra* note 415.

172 *See* Printz v. United States, 521 U.S. 898, 933 (1997); Gardner, *supra* note 39, at 17–23; Mikos, *supra* note 161, at 1424.

173 *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

protect state law and officers from federal domination, deserve much more attention from criminal cases and scholarship.

Those doctrines may be overlooked because they are so deeply ingrained in the federal-state relationship. Like criminal preemption, norms favoring state independence over criminal law and enforcement have endured remarkably well, even in "federal" areas.[174] Federal efforts to coopt unwilling local officers have not gone well. The Jefferson administration tried to force state officers and courts to enforce its unpopular British trade embargo—and the entire policy foundered.[175] Prohibition is the largest buildup of federal enforcement resources in history, but even then the federal system was so dependent on state help that, historians concur, local officials' resistance sunk it.[176] Perhaps having learned that lesson, the federal system—even under President Trump[177]—gave up marijuana decriminalization without a fight.[178]

Constitutional criminal federalism has proven confounding because it rests on contradictory principles. The federal government's powers are limited and enumerated. But it acts directly on people in the states who elect its politicians, so it shares criminal jurisdiction with the states, whose own laws and enforcement responsibilities are comprehensive. Messy, overlapping enforcement is not a federalism failure but part of the structure.

C. The Tradition of Overlapping Law and Cooperative Enforcement

The Court's criminal federalism opinions also rest on historical assumptions about what is "traditionally" local.[179] *Bond*, for example,

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174 *See infra* Section III.B.

175 DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801–1829, at 75–76, 84–85, 88–89, 91 (1985); *accord* Kurland, *supra* note 161, at 64–68, 78; *see* Collins & Nash, *supra* note 158, at 267–68.

176 The Eighteenth Amendment granted concurrent federal and state enforcement authority. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. But as usual, the feds depended on state assistance, which proved unforthcoming and probably contributed to Prohibition's downfall—a victory for uncooperative federalism. *See* Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 6–7, 25–42 (2006); Gardner, *supra* note 39, at 36–43.

177 *See* Lisa Lambert, *Trump to Lift Legal Threat to States That Permit Marijuana Use*, REUTERS (Apr. 3, 2018, 8:01 PM), https://www.reuters.com/article/us-usa-trump-marijuana/trump-to-lift-legal-threat-to-states-that-permit-marijuana-use-idUSKBN1HL001/ [https://perma.cc/5T9E-XG7U].

178 *Gonzales v. Raich* does not change that conclusion. It arose after DEA agents seized Angel Raich's marijuana plants administratively; Ms. Raich was not charged criminally. *See* 545 U.S. 1, 7 (2005).

179 *See supra* note 110.

assumed that terrorism is traditionally federal;[180] the dissenters in *Gonzales v. Raich* (admittedly not strictly a criminal case) insisted that drug enforcement is traditionally local.[181] Some criminal scholars have similarly claimed that traditionally, federal and state governments operated "wholly independent spheres of law enforcement within the federalist system."[182]

The history of federal criminal law and enforcement is an enormous topic that deserves greater scholarly attention.[183] But existing evidence shows how deeply rooted overlapping law and cooperative federalism is. What has changed is not truly the nature of federal criminal law but crime trends and, with them, federal policies responding to them.

1. Pre–Civil War

Conventional accounts posit that before the Civil War, "[f]ederal criminal law was . . . limited to a short list of uniquely federal offenses,"[184] letting state law protect private victims.[185] "[R]edundant"

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180 *See supra* note 134 and accompanying text.

181 545 U.S. at 51–52 (O'Connor, J., dissenting).

182 Gardner, *supra* note 39, at 40–41.

183 Historians have certainly fleshed out aspects of criminal federalism. *See generally, e.g.*, GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES (2021); LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE (2015). And Daniel Richman has studied the relationship. *See, e.g.*, Richman, *supra* note 153; Richman, *supra* note 29.

184 Carrington, *supra* note 119, at 558; *accord, e.g.*, Ashdown, *supra* note 123, at 791; Beale, *supra* note 52, at 981 n.11; Brickey, *supra* note 5, at 1138; Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 830 (2000); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 702–03 (2017); Mengler, *supra* note 111, at 510. Prof. Stephen Smith sums up this historical account:

> From the founding until the Civil War, two bedrock constitutional principles constrained federal criminal law enforcement. The first principle was that, unlike the states, the federal government lacked the "police power," understood as the power to protect the health, welfare, and morals of citizens against the predation of criminals. The second constitutional principle, closely related to the first, was that the federal government had no inherent power but only limited, enumerated powers. Together, these constitutional principles left the federal government only a limited role in criminal law. Federal enforcers "confined [their] prosecutions to less than a score of offenses" involving crimes that either occurred outside of state jurisdiction or uniquely threatened the operations, property, or personnel of the federal government. All other matters were left entirely to state-court enforcement.

Smith, *supra* note 5, at 34–35 (footnotes omitted) (quoting STRAZZELLA, *supra* note 113, at 5).

185 *See* Mengler, *supra* note 111, at 510; *accord, e.g.*, Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996).

federal-state criminal enforcement[186] marked "a sharp break from the traditional view of the federal system"[187] in which "there was virtually no overlap between federal and state offenses."[188] Evidence does not support those assertions.

The first overlapping crimes appeared in the Constitution.[189] Early federal statutes enacted many more, with some even expressly preserving concurrent jurisdiction.[190] The omnibus Crimes Act of 1790 included offenses such as uttering a forged federal instrument, helping federal fugitives hide or escape from local jails, committing violence against public ministers or ambassadors, and stealing from a physician's residence a federally executed prisoner's body awaiting dissection.[191] A 1792 statute prohibited robbing a mail carrier or stealing mail;[192] an 1810 revision added, among other crimes, wounding a mail carrier during a robbery, mutilating a mail bag, theft or embezzlement by a mail employee, and even stealing a newspaper.[193] More forgery and fraud statues followed.[194]

Private individuals were victims, especially of postal theft and robberies.[195] In fact, among the most prosecuted federal crimes during this era were assaults and murders on ships, albeit within admiralty jurisdiction.[196] That means early federal prosecutors—far from focusing exclusively on important national crime—often prosecuted sailors' brawls and disputes with their officers.[197] Early statutes even offer some contributions to the "rogues' gallery of inadvisable and sometimes silly

186 Carrington, *supra* note 119, at 558.

187 Beale, *supra* note 5, at 754.

188 Ehrlich, *supra* note 184, at 830; *accord, e.g.*, 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, 1278 (1995) ("Until the Civil War, . . . there was little if any overlap between the offenses subject to state and federal prosecution."); Brickey, *supra* note 5, at 1138.

189 *See infra* notes 157–60.

190 HENDERSON, *supra* note 175, at 10–11; Richman, *supra* note 153 (manuscript at 107).

191 Crimes Act of 1790, ch. 9, 1 Stat. 112.

192 Act of Feb. 20, 1792, ch. 7, §§ 16–17, 1 Stat. 232, 236–37.

193 Act of Apr. 30, 1810, ch. 37, §§ 19–20, 2 Stat. 592, 598; HENDERSON, *supra* note 175, at 10, 32.

194 *See* HENDERSON, *supra* note 175, at 33.

195 *See* Richman, *supra* note 153 (manuscript at 99–100).

196 *See id.* at 32–36; *see also* HENDERSON, *supra* note 175, at 134–42, 215 (reporting the tally of admiralty assaults and murders and noting that many piracy cases included murder charges).

197 *See* Richman, *supra* note 153 (manuscript at 37–38).

federal crimes,"[198] like thwarting dissection, mutilating a mailbag (a $500 fine!), and stealing or destroying a newspaper.[199]

Cooperative enforcement existed too because, like today, the federal enforcement bureaucracy was comparatively small. So it leveraged state people and facilities. Local justices of the peace and magistrates could arrest federal offenders and decide their bail, and the U.S. Marshals housed prisoners in state and local facilities.[200] In one case, an Italian diplomat was charged federally for sending threatening letters to President Washington, a British ambassador, and a part-owner of a ship involved in the Genêt Affair.[201] The local federal postmaster arrested him and brought him before a state alderman who, with the assistance of local constables, conducted the investigation and later testified at the federal trial.[202] The trade-embargo fiasco even supplies an early example of uncooperative federalism.

Critics might respond that the federal system at least restricted itself to "acts directly injurious to the federal government or its narrowly defined national interests,"[203] leaving general welfare to the states.[204] Yet fugitive slave recovery had little to do with federal "stuff" and meddled in outraged abolitionist states (not to mention the enslaved human beings dragged to bondage).[205] In 1791, Congress reluctantly enacted the whiskey excise tax to raise revenue—but only after "physicians endors[ed] the tax on the grounds that it would cut down on Americans' excessive drinking of hard liquor."[206] The prisoner dissection offenses were intended to promote science.[207] New postal crimes

198 Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1499 & n.26 (2008).

199 *See* HENDERSON, *supra* note 175, at 32.

200 *See id.* at 6; Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 278 (2013).

201 John D. Gordan III, United States v. Joseph Ravara*: "Presumptuous Evidence," "Too Many Lawyers," and a Federal Common Law Crime*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 106, 111–13 (Maeva Marcus ed., 1992).

202 *Id.* at 112–22.

203 Mengler, *supra* note 111, at 510; *accord, e.g.*, Beale, *supra* note 52, at 981 n.11; Brickey, *supra* note 5, at 1138–39; Hopwood, *supra* note 184, at 702–03; Smith, *supra* note 5, at 34–35; *see also* Norman Abrams, *Uncovering the Legislative Histories of the Early Mail Fraud Statutes: The Origin of Federal Auxiliary Crimes Jurisdiction*, 2021 UTAH L. REV. 1079, 1080 ("Scholars who study federal criminal law and judges who decide federal criminal cases have uniformly concluded that the original federal auxiliary crime was mail fraud.").

204 *See* Beale, *supra* note 185, at 40; Mengler, *supra* note 111, at 510.

205 *See* Richman, *supra* note 153 (manuscript at 115–16, 125–26).

206 GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 135 (2009). According to Wood, the concern was legitimate; early Americans were wasted. *See id.* at 339–40.

207 David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 830–831 (1994).

targeted rising highway robberies.[208] In 1827, Congress attacked vice by prohibiting postal officials from acting as lottery agents.[209]

Or consider *United States v. Coombs*,[210] which upheld a federal prosecution for stealing goods that had washed onto Rockaway Beach in New York from a distressed ship.[211] The merchandise was above the mean high tide, placing it outside admiralty jurisdiction, but Justice Story held that the Commerce Clause authorized the statute and prosecution anyway.[212] The Court recognized that states had concurrent jurisdiction over the theft; indeed, the federal statute expressly persevered concurrent jurisdiction.[213] But concurrent enforcement offered practical benefits, preventing enforcement gaps and ensuring federal law applied consistently on ships and land.[214]

Less evidence currently exists that federal actors consciously saw their role as supplementing state enforcement. One example does leap out from the Constitution itself. States' failure to enforce law-of-nations violations so plagued the Articles of Confederation government that it helped motivate the Constitutional Convention, which explains that crime's presence in the Constitution.[215] *Coombs* similarly saw value in overlap: federal law should not "rely upon state legislatures or state laws, for the protection of rights and interests specifically confided by the constitution to the authority of congress," even though state law prohibited the thefts.[216]

The real problem with the "national interest" theory of federal crime is that it begs the question. Which crime matters are nationally significant is a time-bound policy question. Early crimes and prosecutions addressed the concerns of the era. Piracy, neutrality, slave-trade violations, and law-of-nations offenses figured prominently but have mostly faded.[217] Meanwhile, modern federal crimes like antitrust, terrorism, environmental, and civil rights were largely missing. Before the late nineteenth century, Congress passed just one law penalizing, with a fine, violations of federal immigration law;[218] it lasted four years

208 *See* HENDERSON, *supra* note 175, at 32.

209 Act of March 2, 1827, ch. 61, § 6, 4 Stat. 238, 238–39.

210 37 U.S. (12 Pet.) 72 (1838).

211 *Id.* at 82–83.

212 *Id.* at 76–79.

213 *Id.* at 81.

214 *Id.* at 81–83.

215 Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 30 (2009).

216 37 U.S. (12 Pet.) at 81.

217 *See* William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 149–52 (1993).

218 Act of June 18, 1798, ch. 54, 1 Stat. 566 (repealed 1802).

(from 1798 to 1802) and was widely ignored.[219] Times changed, and national crime concerns changed with them.

2. Post–Civil War

The Civil War might mark a turning point in how consciously the federal system supplemented state criminal enforcement.[220] The classic example is Reconstruction and its efforts to target Southern states' appalling failure to protect freed Blacks from official and private violence. Probably the broadest federal crime in American history was a Reconstruction-era statute that conferred federal jurisdiction over any state crimes that the states were not enforcing.[221]

Federal officials also joined their local counterparts in stepping up vice enforcement. The Reconstruction Congress expanded postal offenses targeting vice, including prohibiting mailing obscene material and lotteries.[222] The Supreme Court, upholding the lotteries statute, remarked that the federal offenses "supplemented" similar state crimes.[223] Congress enacted mail fraud, today's workhorse white-collar statute, in 1872[224] and prohibited, over the next decades, other criminal mail schemes.[225] Nor was the 1910 Mann Act the first federal

219 *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1882 (1993); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 611–13 (2008).

220 *But see* Abrams, *supra* note 203, at 1125 (concluding that Congress did not even "conscious[ly]" enact mail fraud as a "pure federal offense auxiliary to state criminal enforcement," though Abrams thinks it undoubtedly was).

221 Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, 27; Brickey, *supra* note 5, at 1140 (citing § 3, 14 Stat. at 27).

222 *See* Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 218–19 (1984); Brickey, *supra* note 5, at 1140; Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 903 (2000).

223 Champion v. Ames, 188 U.S. 321, 357 (1903). The Court reasoned that Congress assisted state prohibitions by prohibiting mailing or transporting materials interstate. *Id.*

224 Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323; *see* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771–72, 779–83 (1980) ("To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love."). For the enactment history, see generally Abrams, *supra* note 203. Today, wire fraud, mail fraud's electronic twin, carries much of the load, but its origins remain firmly nineteenth century.

225 *See* Anuj C. Desai, *Can the President Read Your Mail? A Legal Analysis*, 59 CATH. U. L. REV. 315, 328–32 (2010); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 441–42 (1995).

attempt to combat prostitution;[226] Congress tried to regulate the practice as early as 1875 by banning importing an alien prostitute.[227]

This era also saw the first drug regulations, which, far from being "the traditional domain of States,"[228] as the *Raich* dissenters claimed, emerged locally and federally simultaneously. Two events prompted the shift. First, the opium crisis in Asia created diplomatic and domestic pressure for the United States to combat the international drug trade, especially after the United States assumed control of the Philippines.[229] Second, drug addiction had become "a significant problem"[230] for Americans after chemists invented new, now-familiar drugs like heroin, cocaine, and methamphetamine that could be easily sold to consumers directly or in products like children's cough syrup.[231] It was not Nixon or Reagan but President *Taft* who announced the first federal antidrug policy, in 1909.[232]

A few states experimented with drug regulation and prohibition in the nineteenth century, but most prohibited cocaine and opiates between 1906 and 1914 and marijuana in the teens and twenties.[233]

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226 White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–24 (2018)). Scholars sometimes assume that it was. *E.g.*, Gardner, *supra* note 39, at 34–36.

227 Act of March 3, 1875, ch. 141, § 3, 18 Stat. 477, 477; Bradley, *supra* note 222, at 220–21. Congress added a harboring statute in 1907, which the Supreme Court struck down for punishing a state crime. Keller v. United States, 213 U.S. 138, 144 (1909).

228 Gonzales v. Raich, 545 U.S. 1, 51 (2005) (O'Connor, J., dissenting); *see also id.* at 74 (Thomas, J., dissenting) (arguing that federal regulation was "displac[ing] state regulation in areas of traditional state concern" (quoting United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring))).

229 U.N. OFF. ON DRUGS & CRIME, 2008 WORLD DRUG REPORT 172–91 (2008); H. WAYNE MORGAN, DRUGS IN AMERICA: A SOCIAL HISTORY, 1800–1980, at 105–08 (1981); DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 24–68 (3d ed. 1999).

230 Bradley, *supra* note 222, at 225.

231 Cocaine, heroin, methamphetamine, and the hypodermic needle were all invented in the mid-to-late nineteenth century, and they increasingly entered everyday life. MORGAN, *supra* note 229, at 11–25; MUSTO, *supra* note 229, at 1–3, 45–51, 61–64; NICHOLAS L. PARSONS, METH MANIA: A HISTORY OF METHAMPHETAMINE 27–28, 30–38, 46–48 (2014); Joseph F. Spillane, *Making a Modern Drug: The Manufacture, Sale, and Control of Cocaine in the United States, 1880–1920*, *in* COCAINE: GLOBAL HISTORIES 29, 29 (Paul Gootenberg ed., 1999).

232 In his First Annual Message to Congress in 1909, Taft declared that "the manufacture, sale and use of opium and its derivatives in the United States should be so far as possible more rigorously controlled by legislation." Norman Ansley, *International Efforts to Control Narcotics*, 50 J. CRIM. L. & CRIMINOLOGY 105, 107 (1959) (quoting William Howard Taft, U.S. President, First Annual Message (Dec. 7, 1909), *in* 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7789, 7799 (1917)).

233 *See* George Fisher, *Racial Myths of the Cannabis War*, 101 B.U. L. REV. 933, 945–49 (2021); MUSTO, *supra* note 229, at 91–120; Audrey Redford & Benjamin Powell, *Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914*, 20 INDEP. REV. 509, 519 (2016).

Meanwhile, Congress began trying to suppress opium consumption as early as the 1860s by raising tariffs and then banning imports starting in 1887 (to satisfy a treaty obligation with China),[234] a policy it continued into the twentieth century.[235] The Pure Food and Drug Act of 1906 regulated drug ingredients, then the Harrison Act of 1914 applied stamp taxes to coca and opiate products.[236] Prohibition and the Volstead Act followed in 1919,[237] and marijuana fell under federal regulation in 1937.[238]

From the outset, federal agents partnered with the locals to enforce federal laws.[239] Nor were federal energies limited to "high-level" or international dealers. Early enforcement targeted addicts and physicians perceived as enabling them, to the point where two federal addiction-treatment facilities were constructed for federal prisoners in the 1930s.[240] Ironically, the heavily criticized increase in the federal drug docket during the 1980s and 1990s was partially a shift from simple possession offenses to big, complex distribution cases.[241]

Regulatory crimes likewise track the emergence of the regulatory state at the federal and state levels.[242] Congress enacted the Sherman Antitrust Act of 1890 after states had begun enacting antitrust laws.[243]

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234 The Chinese government pushed for an American ban on smoking opium to discourage Chinese opium exports and suppress Chinese opium consumption. *See* Redford & Powell, *supra* note 233, at 512–16.

235 *See* Ansley, *supra* note 232, at 105–07; DAVID T. COURTWRIGHT, DARK PARADISE: A HISTORY OF OPIATE ADDICTION IN AMERICA 15–28 (2001); Redford & Powell, *supra* note 233, at 513–23; Ernest E. Stanford, *The Tariff and the Crude Drug*, 9 J. AM. PHARM. ASS'N 966, 968 (1920). Federal officials did enforce these bans. *See* Brolan v. United States, 236 U.S. 216, 217, 219–22 (1915) (upholding a conviction for conspiracy to receive smuggled opium and remarking that drug-import restrictions "have been in force for more than fifty years"); Mary C. Greenfield, *Bordering Reality: Trade, Tariffs, and Illegitimate Capitalism in Sumas, 1846–1919*, 24 COLUMBIA: MAG. NW. HIST., Spring 2010, at 3, 5–7 (2010) (describing enforcement of opium customs in Sumas, Washington).

236 Act of June 30, 1906, ch. 3915, 34 Stat. 768; Act of Dec. 17, 1914, ch. 1, 38 Stat. 785; MORGAN, *supra* note 229, at 107; MUSTO, *supra* note 229, at 54–68.

237 U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI; National Prohibition Act, ch. 85, 41 Stat. 305 (1919).

238 Marihuana Tax Act of 1937, ch. 553, 50 Stat 551.

239 *See* MORGAN, *supra* note 229, at 118–29, 142–45.

240 *Id.* at 135; *see* MUSTO, *supra* note 229, at 184. Despite Prohibition, in the 1920s, narcotics offenders comprised the largest share of federal prisoners. *Id.* at 184.

241 *See* Beale, *supra* note 188, at 1285–86.

242 *See* FRIEDMAN, *supra* note 43, at 113–19, 282.

243 Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890); FRIEDMAN, *supra* note 43, at 113–19; Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2335–42 (2013); Charles S. Dameron, Note, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners*, 125 YALE L.J. 1072, 1084–89 (2016); Maroney, *supra* note 31, at 1321–22.

State blue-sky laws emerged in the 1910s and 1920s before federal securities laws joined them 1933 and 1934.[244]

What about violent street crime? Again, some federal violent crimes, such as postal robberies and assaults at sea, date to the Founding, but "violent bad guys" *were* mostly a state matter.[245] Modern federal street-type crimes began when Congress criminalized interstate-shipment theft in 1913[246] and interstate car theft (the Dyer Act) in 1919.[247] It added familiar fare such as weapons offenses,[248] kidnapping,[249] bank robbery,[250] interstate transportation of stolen goods,[251] and robbery and extortion affecting interstate commerce (the precursor to the Hobbs Act)[252] in the 1920s and 1930s.[253] Caseloads rivaled anything seen in modern times; Prohibition cases alone exceeded 65,000, with the total criminal caseload topping 90,000.[254]

After Prohibition, federal street-crime cases receded, as did the federal docket, but they never vanished. Drug and Dyer Act cases remained staples for decades; bank robbery cases rose and ebbed too.[255] Street crime, mainly drugs and weapons prosecutions, garnered increased federal attention—in statutes passed, money spent, and cases prosecuted—starting in the late 1960s and intensifying in the 1980s

244 *See* Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 359–89 (1991).

245 Richman, *supra* note 29, at 383.

246 Act of Feb. 13, 1913, ch. 50, 37 Stat. 670 (the Carlin Act).

247 National Motor Vehicle Theft Act, ch. 89, 41 Stat. 324 (1919); Klein & Grobey, *supra* note 73, at 11–12; Maroney, *supra* note 31, at 1323.

248 *E.g.*, National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934); Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938).

249 Act of June 22, 1932, ch. 271, 47 Stat. 326. Though scholars often assume federal kidnapping was enacted because of the Lindbergh baby abduction, the bill had already been introduced because organized crime had begun kidnapping for profit. Bradley, *supra* note 222, at 228–29. Congress then expanded the law a couple years later. *Id.* at 231; *see* Act of May 18, 1934, ch. 301, 48 Stat. 781 (1934).

250 Act of May 18, 1934, ch. 304, 48 Stat. 783.

251 National Stolen Property Act, ch. 333, 48 Stat. 794 (1934).

252 Act of June 18, 1934, ch. 569, 48 Stat. 979 (1934). The Hobbs Act amended the offense in 1946. Act of July 3, 1946, ch. 537, 60 Stat. 420; *see also* Michael McGrail, Note, *The Hobbs Act After* Lopez, 41 B.C. L. REV. 949, 956–57 (2000) (describing the Hobbs Act's legislative history).

253 *See* Klein & Grobey, *supra* note 73, at 11–12; Simons, *supra* note 222, at 904–05.

254 *See* Simons, *supra* note 222, at 910–11.

255 *See* Daniel C. Richman & Sarah Seo, *Driving Toward Autonomy? The FBI in the Federal System, 1908–1960*, at 52–53 (Univ. Iowa Legal Studs. Rsch. Paper, No. 2019-22, 2019), https://ssrn.com/abstract=3415103 [https://perma.cc/36B2-UADD] (explaining that the federal government finally restricted Dyer Act cases in the 1970s); L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 64 n.1 (1948) (reporting cases in 1947).

and 1990s.[256] Along with immigration, drugs and, to a lesser extent, weapons offenses dominate federal dockets today.[257]

At first glance, that history supports scholars' widespread intuition that federal involvement in street crime is a new, troubling entry into a state area.[258] But viewed another way, the federal system simply responded to changing crime trends and local needs. True, violent offenses like murder, assault, and rape were historically state cases, but they still are today.

What changed was crime, and especially nationwide crime trends. Note the two periods of intense federal activity: the 1920s to 1930s and the 1960s to 1980s. Those periods also saw the highest violence and homicide rates of the century and, possibly, in U.S. history.[259] Street crime became a criminal policy issue nationwide. The states were already increasing weapons, violence, and street-crime prosecutions.[260] The federal response tracks a secondary system helping overwhelmed locals with the biggest crime problem of the day.

Street crime is not unique. Even seemingly "federal" crime is much more temporal than scholars often acknowledge. Federal tax offenses date to 1954.[261] White-collar enforcement waxed and waned, such as when the FBI reoriented agents away from auto theft toward white-collar crime, affecting federal case numbers.[262] A 1945 snapshot listed, among the most-charged federal crimes, price control, juvenile delinquency, and draft evasion,[263] none of which even register today.[264]

256 *See* Richman, *supra* note 29, at 390–400; Charles & Garrett, *supra* note 65, at 658–65, 674–76.

257 *See* Klein & Grobey, *supra* note 73, at 6; *see also* U.S. SENT'G COMM'N, FISCAL YEAR 2021: OVERVIEW OF FEDERAL CRIMINAL CASES 5 (2022).

258 *See, e.g.*, Baker, *supra* note 39, at 681–82 (arguing that "[d]rug offenses are the main avenue through which federal law enforcement has insinuated itself into street crime" but "[f]ederal law enforcement has extended its reach" to "weapons and violence"); Clymer, *supra* note 5, at 667–68 (identifying "three of the most significant areas of overlapping federal jurisdiction" as "drug, gun, and fraud cases"); Charles & Garrett, *supra* note 65, at 644; William Partlett, *Criminal Law and Cooperative Federalism*, 56 AM. CRIM. L. REV. 1663, 1667 (2019); *see also* Little, *supra* note 31, at 1037 ("[T]he current federalization critique focuses almost entirely on federal narcotics and firearms offenses . . . .").

259 *See infra* note 393 and accompanying text.

260 *See, e.g.*, Charles & Garrett, *supra* note 65, at 646 (noting that federal gun regulation in the 1920s and 1930s arose after "[s]tate and local authorities, which had been expanding their regulation over weapon possession and carrying," seemed "incapable of addressing the increasing mobility of crime and criminals"); *id.* at 678 (acknowledging that state firearms enforcement and punishments increased substantially between 1965 and 1995).

261 Klein & Grobey, *supra* note 73, at 101.

262 *See infra* note 432 and accompanying text.

263 Schwartz, *supra* note 255, at 64.

264 *See* U.S. SENT'G COMM'N, *supra* note 257, at 4.

Indeed, national security and immigration enforcement—areas where the Supreme Court has assumed "traditional" federal primacy—have changed radically over time. Scholars have increasingly recognized national security as another site of cooperative federalism, dating to state militias in the early Republic.[265] Historically, locals also investigated and prosecuted domestic-terrorism-type cases, such as the bombing that precipitated Chicago's Haymarket Riot,[266] President McKinley's assassination, and the anarchist conspiracy suspected of plotting his assassination.[267]

Though federal law assumed primacy over immigration policy in the late nineteenth century, immigration *crimes* were mostly enacted in the 1920s, with the most common offenses, particularly illegal reentry, dating to the 1950s.[268] That timing was no coincidence; two world wars and communist anxieties led both the states and the federal government to increase enforcing draft-dodging, sedition, and immigration.[269]

Terrorism enforcement reemerged after Oklahoma City bombing and September 11.[270] Most federal terrorism statutes date to the 1990s and 2000s, with just one enacted earlier—in 1986.[271] Many state terrorism statutes were enacted around the same time.[272]

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265 *See, e.g.*, Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 991 (2020); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012); *see also* Erin F. Delaney, *Justifying Power: Federalism, Immigration, and 'Foreign Affairs'*, 8 DUKE J. CONST. L. & PUB. POL'Y 153, 153 (2013) ("Immigration federalism is all the rage.").

266 *See* Douglas O. Linder, The Haymarket Riot and Subsequent Trial: An Account 5–6 (Oct. 23, 2007) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023969/ [https://perma.cc/7YNF-LAW3].

267 *See* ERIC RAUCHWAY, MURDERING MCKINLEY: THE MAKING OF THEODORE ROOSEVELT'S AMERICA 16–19, 24 (2003); Sidney Fine, *Anarchism and the Assassination of McKinley*, 60 AM. HIST. REV. 777, 777–86 (1955). After the assassination, Congress considered, but did not pass, statutes making assassinating the President a federal crime. Richard B. Sherman, *Presidential Protection During the Progressive Era: The Aftermath of the McKinley Assassination*, 46 HISTORIAN 1, 2–12 (1983).

268 *See* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1836–38 (2007); Klein & Grobey, *supra* note 73, at 102, 110. The sole exception is issuing a passport without authority, which was criminalized in 1902. *Id.* at 102.

269 *See* Klein & Grobey, *supra* note 73, at 110; Richman, *supra* note 29, at 385 (ranking immigration cases third after Prohibition enforcement and District of Columbia prosecutions in 1930); Schwartz, *supra* note 255, at 64 (estimating that in 1947 immigration, with fraud and theft, comprised the largest share of the federal criminal docket); Waxman, *supra* note 265, at 298.

270 *See* Waxman, *supra* note 265, at 301–03, 303 n.66; Richman, *supra* note 29, at 407.

271 18 U.S.C. § 2332 (2018); Klein & Grobey, *supra* note 73, at 98.

272 *See* statutes cited *infra* notes 350–51; *see also* James C. McKinley Jr., *A NATION CHALLENGED: IN ALBANY; Unified State Legislators Pass Tougher Antiterrorism Bills*, N.Y. TIMES

Immigration became a major federal criminal priority even more recently. By the early 1990s, immigration prosecutions had fallen behind drugs, fraud, firearms, and larceny and numbered fewer than 6,000.[273] Beginning in the mid-1990s, however, criminal immigration cases doubled, then doubled again and yet again.[274] They peaked at 94,000 in 2013, dipped slightly, then soared over 100,000 between 2018 and 2020.[275]

The matters dominating state courts, year in and year out, are pretty static—the "the murders, robberies, and rapes of ordinary citizens."[276] The federal system, by contrast, constantly shifts its focus as trends evolve.[277] Or as Charles Warren put it, "[T]he Federal judicial system has not been a logical development on lines of consistent theory; it has been the product of temporary necessities and emergencies, arising from both political, sectional, and economic conditions."[278]

III. WHAT MAKES A CASE "FEDERAL"?

As counterintuitive as it sounds, neither the Constitution nor tradition answers when cases should be prosecuted federally and when they should remain local crimes. It is a policy question, one that federal authorities have answered differently as crime has evolved. But the federal-state enforcement relationship shapes those decisions. It pushes federal enforcers toward cases that fit the federal system's unique position. And it makes selectivity—and therefore the necessity for good reasons to intervene—the baseline across crime categories.

(Sept. 18, 2001), https://www.nytimes.com/2001/09/18/nyregion/nation-challenged-albany-unified-state-legislators-pass-tougher-antiterrorism.html [https://perma.cc/NP29-SPHR] (describing New York legislation enacting new terrorism crimes after September 11).

273 U.S. SENT'G COMM'N, CHANGING FACE OF FEDERAL CRIMINAL SENTENCING 9–10 (2009); JOHN SCALIA & MARIKA F.X. LITRAS, U.S. DEP'T OF JUST., IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 2000, at 1 (2002).

274 Cases reached 15,000 in the late 1990s, then jumped to over 35,000 around 2004, and then to about 80,000 in 2008. MARK MOTIVANS, U.S. DEP'T OF JUST., IMMIGRATION, CITIZENSHIP, AND THE FEDERAL JUSTICE SYSTEM, 1998–2018, at 20 (2019); *see also* Rodríguez, *supra* note 219, at 569 n.1 (describing immigration trends in the 1990s).

275 MOTIVANS, *supra* note 274.

276 Richman, *supra* note 29, at 382; *accord, e.g.*, Smith, *supra* note 113, at 542 (listing "murders, rapes, drug dealing, burglaries, and thefts" as "the responsibility of state enforcers").

277 *See* FRIEDMAN, *supra* note 43, at 268 ("State dockets fluctuate, too, but there is a fairly steady and predictable diet of assault, burglary, theft of various forms, and the like. The federal docket is all fits and starts.").

278 Warren, *supra* note 1, at 598; *accord* WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, FED. JUD. CTR., ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 27–28 (1994) ("The search through history for the traditional role of the federal courts or traditional indicia of federal jurisdiction is unavailing.").

A. The Federal Toolkit

Part I explained why the federal system is better understood as a specialist system supplementing enforcement breakdowns. Scholars have long known that federal criminal laws, procedures, enforcement choices, and results differ significantly from the states.[279] For many, those differences indict the federal system, especially because they often are often more pro-prosecutor and more punitive,[280] serious concerns in an age rightly sensitive to the consequences of overincarceration.[281] But as several examples illustrate, those differences flow naturally from the federal system's very different purpose and the toolkit it has developed to serve that role.

Case selection—Critics complain that federal prosecutors only "cherry pick" the easiest or coolest cases.[282] Federal cases are not all easy, however, and if all federal prosecutors did was steal the glory and leave the dreck behind, one would expect to see more full-scale revolt from the locals, who generally seem happy, even eager, to collaborate with the feds.[283]

But if the states are trading quality for quantity, then it makes sense for the feds to select for cases—hard cases, high profile cases, egregious offenders, or egregious facts—that warrant the kind of quality investment the states cannot regularly supply.[284] It also explains why

279 *See, e.g.*, Brown, *supra* note 105, at 259 ("Federal practice is different and worse."); Stuntz, *supra* note 74, at 542–43 (highlighting the unique "pathologies" of the federal system).

280 *See, e.g.*, Beale, *supra* note 52, at 997–1001; Barkow, *supra* note 5, at 123–24; Clymer, *supra* note 5, at 668–97; Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 78–80 (2012); Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730 (2002); Smith, *supra* note 113, at 574–76.

281 *See, e.g.*, Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 25–26 (1997) (citing evidence questioning whether longer sentences provide public safety); Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 212–24 (2008).

282 Beale, *supra* note 188, at 1296 (reporting that criticism); *see* Richman, *supra* note 29, at 379 (same); *see also* Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 259 (2005) (reporting a state prosecutor's complaint that federal prosecutors "have a tendency only to accept cases that are absolutely dead bang sure winners").

283 *See* Ouziel, *supra* note 31, at 2267–68; *see infra* notes 491–92 and accompanying text.

284 *See* Ouziel, *supra* note 31, at 2266. One study comparing federal and state robbery cases concluded that "the factors that increase the odds of a federal indictment include use of a weapon, a conspiracy, prior violent or drug-related arrests, and the presence of a minor victim." Susan R. Klein, Michael Gramer, Daniel Graver & Jessica Winchell, *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006–2010*, 51 HOUS. L. REV. 1381, 1426 (2014).

federal prosecutors often favor strong cases[285]: taking many weak cases would, in the long run, bog federal prosecutors down in precisely the way weak cases do state prosecutors, and that would help nobody.[286]

Intensive resources—The federal government dedicates vastly more money and personnel per case,[287] a bounty that translates into higher-quality case work by agents, attorneys, and judges. Greater resources per case help the federal system step in when overstretched personnel or strained resources are making some cases or kinds of cases too hard for locals to address effectively.

Some scholars have urged the federal government to focus instead on helping the states get better at tackling resource-intensive cases through block grants;[288] by permitting states to prosecute federal crimes;[289] or by creating specialized state teams that "selectively target only certain cases."[290] Yet states simply cannot abandon providing public safety and responding to all crime, which creates overwhelming pressure to spread, rather than concentrate, resources.[291] In fact, few localities have successfully emulated the federal resource-intensive approach.[292] Pouring federal resources on the states is like pouring water

285 Federal prosecutors only may charge offenses when "the admissible evidence will probably be sufficient to obtain and sustain a conviction" and should avoid any charge they "cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient and admissible evidence at trial;" otherwise, they could suffer "a dismissal, or a reversal on appeal." U.S. DEP'T OF JUST., *supra* note 147, at §§ 9-27.220, 9-27.300. Lack of evidence is consistently the primary reason federal prosecutors decline cases. *E.g.*, U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2019, at 60 (2020).

286 *See* Ouziel, *supra* note 31, at 2264. One local prosecuting official told interviewers that the state system has "short-term incentives" to "move[] very quickly to get rid of . . . cases," which means offenders get lower sentences and "come right back into the system," whereas federal offenders receive longer sentences, and "[y]ou tend not to see them come back." Miller & Eisenstein, *supra* note 282, at 259.

287 Despite handling less than five percent of felonies and vanishingly few misdemeanor and traffic cases, the federal government spends one-fifth of the national policing budget and one-fourth of national legal functions. EMILY D. BUEHLER, U.S. DEP'T OF JUST., JUSTICE EXPENDITURES AND EMPLOYMENT IN THE UNITED STATES, 2017, at 4 (2021).

288 *See, e.g.*, Baker, *supra* note 39, at 680 (arguing that "the federal government" cannot do much about local crime "other than through spending" and that states face a "lack of funding for personnel and resources"); Mengler, *supra* note 111, at 536–37.

289 *See, e.g.*, Beale, *supra* note 52, at 1010–11; Carrington, *supra* note 119, at 560–62.

290 Barkow, *supra* note 2, at 543.

291 "[I]magine the consequences if a police force stopped patrolling one neighborhood so as to better focus on crime in another." Daniel C. Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 404 (2001).

292 Only one state (Florida) has created a statewide prosecutorial team targeting violent crime. *See* Barkow, *supra* note 2, at 565–67. Virginia tried, and failed, to emulate a federal program in Richmond that successfully used gun prosecutions to drive down violent crime. Ouziel, *supra* note 31, at 2293–94. And federal block crime grants in the 1960s and 1970s proved unable to change state criminal enforcement behavior. *See* Richman, *supra* note 29, at 391–92.

on the pavement. The advantage of having a separate system serving a different purpose is decisive.

Proxy charging—Prosecutors use proxy, or pretextual, charging when they bring easier-to-prove charges against somebody suspected of more serious wrongdoing, like Al Capone charged with tax evasion.[293] Modern examples include charging violent offenders with drugs or weapons offenses,[294] sex offenders with possessing child pornography,[295] terrorists with immigration violations,[296] and white-collar defendants (like Martha Stewart) with lying.[297]

State prosecutors do proxy charging too, but only in the federal system are "Capone-style tactics . . . the rule."[298] Not only do federal prosecutors embrace it, but Congress enacted many common proxy statutes fully intending for prosecutors to use them that way. Proxy charging has received understandable criticism; it can seem a little unsavory and more than a little unfair.[299] But as Stuntz and Richman have observed, proxy charging is "closely tied . . . to federalism."[300]

They blame political accountability, but as Part I explained, that is more symptom than cause.[301] The real culprit is being supplemental: because federal authorities need a reason beyond necessity to intervene, virtually all federal charges are a proxy for whatever motivated the intervention, often the offender's criminal history, the seriousness of the crime, or the policy goals (such as combatting terrorism) driving federal interest.

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293 *See generally* Richman & Stuntz, *supra* note 3 (describing the practice, its problems, and its potential benefits); Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135 (2004) (describing and defending it).

294 *See* Litman, *supra* note 293, at 1143–47; Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 FORDHAM URB. L.J. 573, 595, 599 (1999) (defending using federal tools to fight violent crime).

295 *See* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 880–86 (2011).

296 *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 963 (2002).

297 *See* Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1468 (2009).

298 Richman & Stuntz, *supra* note 3, at 618; *see* Murphy, *supra* note 297, at 1448.

299 *E.g.*, LEOVY, *supra* note 70, at 8–9; WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 300–01 (2011); Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 805 (2016); *see* Litman, *supra* note 293, at 1147–58 (analyzing objections to pretextual prosecutions); Richman & Stuntz, *supra* note 3, at 588–99 (same); *see also* Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1431–42, 1434–50 (2001) (listing theoretical and practical objections to conflating utilitarian crime control with justice). Discomfort can vary depending on the target. *See* Epps, *supra*, at 804–05. And line drawing can prove tricky; was El Chapo prosecuted federally in New York for his drug violations there or for the violent chaos he was inflicting in Mexico? The answer is probably both.

300 Richman & Stuntz, *supra* note 3, at 599.

301 *See supra* notes 102–08 and accompanying text.

Results—Federal sentences typically exceed those of the states, often by a lot.[302] To many scholars that disparity, more than anything else, distinguishes and even discredits the federal system.[303] The aim, emphatically, is not to defend, wholesale, federal disparities but to offer scholars, including critics, a deeper explanation for why they arise. Because longer sentences are not simply prosecutorial abuse or congressional stupidity; they flow from the federal system's supplemental position.

Disparities arise partially from the features already discussed. Federal prosecutors favor cases involving egregious facts or violent offenders, charge winnable cases with easier-to-prove offenses, and investigate and litigate thoroughly. Compelling proof, quality lawyering, and egregious case facts or offender history are a recipe for more convictions and longer sentences, even at the state level.

But unique to the federal system, Congress is not trying to establish a comprehensive penalty scheme for American crime. That is the states' job. Congress is trying to supplement an area where states fall short—results—and, at the same time, signal where federal actors should direct efforts. Scholars who wonder why the federal system does not match comparable state sentences[304] and offer proposals to even them[305] miss a basic point: federal sentences serve a different purpose.

That explains federal sentencing law's notable focus on penalizing especially bad conduct and bad criminal records, including the sentencing chart.[306] Guidelines for specific offenses[307] or certain offenders[308] further enhance sentencing ranges for conduct or criminal history, as do most (controversial)[309] statutory mandatory minimums.[310]

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302 *See* Barkow, *supra* note 2, at 574–75; Beale, *supra* note 52, at 997–98.

303 *See* authorities cited *supra* note 262; *see also, e.g.*, Ashdown, *supra* note 123, at 811; Barkow, *supra* note 5, at 123–24; Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 882 (2005).

304 *See, e.g.*, Barkow, *supra* note 5, at 126–27; Smith, *supra* note 303, at 883–84. Federal law is exquisitely calibrated to reflect defendants' (mostly state) criminal histories, and federal lawyers and judges spend countless hours reviewing state sentences. Everybody is perfectly aware that federal sentences tend to be longer; that's rather the point.

305 *See, e.g.*, O'Hear, *supra* note 280, at 766–67.

306 *See* U.S. SENT'G GUIDELINES MANUAL 407 (U.S. SENT'G COMM'N 2021).

307 *E.g.*, *id.* §§ 2A3.1, 2K2.1.

308 *E.g.*, *id.* §§ 4B1.1, 4B1.5.

309 *E.g.*, Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 219–24 (2019); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 1–5 & nn.1–16 (2010) (collecting criticisms).

310 For example, mandatory minimums apply for dealing greater quantities of drugs, 21 U.S.C. § 841(b) (2018); carrying, brandishing, or discharging a gun during a drug crime

The Sentencing Guidelines also use an extreme version of "real offense" sentencing, which calculates sentences based on what occurred rather than the elements of the defendant's offense of conviction.[311] For example, Bernie Madoff blew the top off the federal sentencing chart not because of what he was convicted of—other defendants convicted of the same crimes can face little or no jail time.[312] He ran the largest Ponzi scheme in history, and federal sentencing law was designed to capture the underlying reality.

B. Selecting Cases Across Crime Categories

Federal law and procedure thus direct federal prosecutions by amplifying the "plus" factor that motivates them in the first place. Scholars have often instead assumed that crime categories drive—or should drive—federal enforcement decisions.[313] Yet the federal system's limited size and functions force it to enforce selectively across virtually all categories. Some crimes simply fit the federal system's strengths or policy concerns more often. This Section uses scholars' three federal categories—federal-interest crimes, seemingly federal crimes, and local crimes—to show that enforcement decisions among categories are matters of degree rather than kind.

1. Federal-Interest Crimes

Federal enclaves—Federal properties are the only place where federal authorities provide some basic public safety, like answering 911 and conducting patrols. But true exclusivity is so rare that the federal

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or a crime of violence, 18 U.S.C. § 924(c) (2018); kidnapping a minor, *id.* § 1201(g); or, during a bank robbery, kidnapping or killing a victim, *id.* § 2113(e). Criminal-history-based mandatory minimums apply, for example, to drug defendants, 21 U.S.C. § 851 (2018); and for defendants convicted of being a felon in possession (the Armed Career Criminal Act), 18 U.S.C. § 924(e) (2018).

311 *See* U.S. SENT'G GUIDELINES MANUAL §§ 1A.4, 1B1.3 (U.S. SENT'G COMM'N 2021) (explaining the concepts of real-offense sentencing and relevant conduct that shape federal sentencing guidelines); *see also* David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 271–72 (2005) (describing and criticizing federal real-offense sentencing). *But see* Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 (1997).

312 The base offense level for his convicted offenses was a 7, which, without factual enhancements, would almost never lead to prison. *See* U.S. SENT'G GUIDELINES MANUAL § 2B1.1 (U.S. SENT'G COMM'N 2021). But his case's facts, such as the total money he stole and the number of victims he defrauded, resulted in 42 levels of enhancements, for a total offense level of 52 (after acceptance of responsibility). Government's Sentencing Memorandum at 17–18, United States v. Madoff, No. 09-cr-213 (S.D.N.Y. June 6, 2009). The federal sentencing table tops out at 43. U.S. SENT'G GUIDELINES MANUAL 407 (U.S. SENT'G COMM'N 2021).

313 *See supra* notes 119–25 and accompanying text.

system has shied away from ever developing the capacity for being the primary enforcer, even in federal enclaves. Overlapping enforcement remains the norm.

Congress welcomed state law and enforcement on federal lands from the Founding onward.[314] Today, state prosecutions of crimes on federal properties are not just permissible but common.[315] And even though the federal system does keep a basic enforcement apparatus on many federal properties, those properties are mostly places where people work or visit, like national parks, airplanes, or federal buildings, not where they live out their lives. Yosemite has a Park Service Police force and even a full-time federal magistrate, but its public-welfare needs do not resemble those of nearby Sacramento.[316]

When people do live on federal properties, Congress has typically created proto-state local governments, such as by giving District of Columbia and U.S. territories home rule and local justice systems. For example, the U.S. Attorney's Office for the District of Columbia operates two criminal sections, one for federal prosecutions and one to

314 Congress quickly discovered that it was easier to adopt state law than reinvent a new criminal code on federal properties. *See* SURRENCY, *supra* note 153, at 166 (explaining that even the First Congress tried to "avoid the difficulty of drafting a comprehensive criminal code" by establishing local legislatures or adopting state law when possible for federal enclaves); *see also* Richman, *supra* note 153 (manuscript at 49) (describing how Congress quickly used state law to fill federal gaps). That policy continues in modern times. *See, e.g.*, 18 U.S.C. § 13 (2018) (adopting state law for crimes in federal enclaves not covered by federal statute); District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, §§ 302, 602(a)(9), 87 Stat. 774, 784, 813–14 (1973) (establishing home rule for the District of Columbia). For concurrent enforcement, see, for example, 16 U.S.C. § 480 (2018) (preserving concurrent jurisdiction in national forests); United States v. Gabrion, 517 F.3d 839, 846–56 (6th Cir. 2008) (describing the legal foundation for exclusive and concurrent federal jurisdiction over federal properties).

315 *See, e.g.*, People v. Rinehart, 377 P.3d 818, 820–29 (Cal. 2016) (holding that California could prosecute the defendant for illegal mining practices on federal land); Campbell v. State, No. E2015-01292-CCA-R3-HC, 2015 WL 9255317, at *2 (Tenn. Crim. App. Dec. 16, 2015) (denying a habeas petition of a defendant convicted of murdering a woman in the Cherokee National Forest); State v. Quick, 806 P.2d 907, 909–10 (Ariz. Ct. App. 1991) (affirming the defendant's conviction for growing marijuana in Tonto National Forest); State v. Larson, 577 A.2d 767, 769–71 (Me. 1990) (affirming the defendant's conviction for murdering his wife in Acadia National Park); *see also* Kleppe v. New Mexico, 426 U.S. 529, 543–44 (1976) (explaining that generally "the State is free to enforce its criminal and civil laws" on federal property).

316 *See* Jesse McKinley, *Spectacular Distractions Are the Perks of Judgeship*, N.Y. TIMES (Aug. 10, 2009), https://www.nytimes.com/2009/08/11/us/11yosemite.html [https://perma.cc/76W3-FPEP].

handle local crime in D.C. Superior Court.[317] Local and federal enforcement differ even in the quintessentially federal enclave.

The only residential enclaves that lack genuine home rule are Indian Country and some military bases. Neither is exclusively federal, however. Indian Country criminal jurisdiction is very complicated,[318] but states retain some jurisdiction,[319] and Congress has transitioned more criminal authority to tribal leadership.[320] The military justice system[321] covers most base residents, leaving only nonmilitary family and base visitors stuck in the federal civilian system. And on both properties, federal and local officers often help each other, especially when crimes cross borders.[322]

The federal system has a clear and underappreciated track record on federal enclaves. Given the opportunity to assume primary criminal enforcement, it has declined, repeatedly. Left are a few odd pockets of default exclusivity, where, Part IV argues, it has—not coincidentally—performed poorly.[323]

Immigration—Immigration is the other area where some federal exclusivity exists. *Arizona v. United States* did preempt some state crimes.[324] And the federal system has increasingly resembled the nation's primary criminal immigration enforcer. Not only have raw case numbers skyrocketed, but criminal prosecutions have taken a greater share versus administrative proceedings.[325] The federal system has done many more petty cases, with misdemeanor illegal-entry prosecutions going from 18 to 73 percent of criminal immigration filings.[326]

But that degree of primacy emerged recently, in the twenty-first century.[327] And federal primacy remains constricted. Preemption is

317 *See United States Attorney's Office, District of Columbia, Divisions*, U.S. DEP'T OF JUST. (Feb. 3, 2020), https://www.justice.gov/usao-dc/divisions [https://perma.cc/Q372-AS7A].

318 *See infra* note 465 and accompanying text.

319 Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022).

320 *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 822–26 (2006).

321 The military justice system is also a creature of federal law, but it operates independently from the federal civilian system that this Article discusses.

322 *See, e.g.*, People v. Renteria, 82 Cal. Rptr. 3d 11, 17–18 (Cal. Ct. App. 2008) (affirming a state conviction when the defendant fled on a California highway, but the high-speed chase continued and ultimately concluded on Camp Pendleton).

323 *See infra* notes 457–68 and accompanying text.

324 567 U.S. 387, 400–10 (2012).

325 While criminal case filings skyrocketed, *see supra* notes 272–74, apprehensions of undocumented individuals plunged from 1.8 million in 2000, MARK MOTIVANS, U.S. DEPT. OF JUST., IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2010, at 6 (2013), to below 400,000 in 2018, MOTIVANS, *supra* note 274, at 16.

326 MOTIVANS, *supra* note 325, at 20.

327 *See id.*

incomplete; *Kansas v. Garcia*[328] reaffirmed that states remain free to criminalize some conduct involving someone's undocumented status, such as fraud, forgery, and employment-related crimes.[329] Many states do.[330]

Scholars like Cristina Rodríguez and Adam Cox have increasingly asserted that immigration enforcement is a cooperative federalism scheme.[331] That is equally true criminally. Local officers can and do help enforce even core, preemptive federal immigration crimes, including along the border.[332] Practically, federal immigration enforcement still depends heavily on state and local help to identify, arrest, and detain people.[333]

Beyond the southwestern border, federal primacy fades. The locals still vastly outnumber federal agents, even in border states. The other eighty-nine federal districts that do not share a border with Mexico are not even trying to apprehend the millions of undocumented people in their jurisdictions.[334] Misdemeanors largely vanish,[335] and

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328 140 S. Ct. 791 (2020).

329 *See id.* at 804–07.

330 *See, e.g.*, CAL. PENAL CODE § 113 (West 2022); State v. Diaz-Rey, 397 S.W.3d 5, 8–10 (Mo. Ct. App. 2013) (holding that Missouri could prosecute an illegal immigrant for forgery when he used a false social security number on employment paperwork); State v. Hernandez-Mercado, 879 P.2d 283, 287 (Wash. 1994) (en banc) (affirming the state's authority to prohibit noncitizens from possessing firearms); *see also, e.g.*, Gomez-Ramos v. State, 676 S.E.2d 382, 385–86 (Ga. Ct. App. 2009) (holding the state could forfeit the defendant's bond after she was deported and could not, under federal law, legally reenter the United States).

331 *See* Cox, *supra* note 161, at 47; Rodríguez, *supra* note 219, at 630.

332 *See* Arizona v. United States, 567 U.S. 387, 411–13 (2012); J. David Goodman & Kirsten Luce, *Helicopters and High-Speed Chases: Inside Texas' Push to Arrest Migrants*, N.Y. TIMES (Dec. 11, 2021), https://www.nytimes.com/2021/12/11/us/texas-migrant-arrests-police.html [https://perma.cc/UQZ6-3UFS].

333 *See* Mara Liasson, *President Trump Is Not Backing Down from Controversial Proposal on Sanctuary Cities*, NPR (Apr. 15, 2019; 5:24 PM), https://www.npr.org/2019/04/15/713616850/president-trump-is-not-backing-down-from-controversial-proposal-on-sanctuary-cit/ [https://perma.cc/YCX5-HEZ7]; *How ICE Uses Local Criminal Justice Systems to Funnel People into the Detention and Deportation System*, NAT'L IMMIGR. L. CTR. (Mar. 2014), https://www.nilc.org/issues/immigration-enforcement/localjusticeandice/ [https://perma.cc/27HY-GHJ5].

334 *See* Mohammad M. Fazel-Zarandi, Jonathan S. Feinstein & Edward H. Kaplan, *The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990 to 2016*, PLOS ONE, Sept. 2018, at 1; *U.S. Unauthorized Immigrant Population Estimates by State, 2016*, PEW RSCH. CTR. (Feb. 5, 2019), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ [https://perma.cc/3AT6-AHGB].

335 Some districts along the northern border do a comparative handful of misdemeanor immigration cases; the remaining districts basically do zero. *See, e.g.*, U.S. COURTS, TABLE M-2, U.S. DISTRICT COURTS—PETTY OFFENSE DEFENDANTS DISPOSED OF BY U.S. MAGISTRATE JUDGES, BY NATURE OF OFFENSE, DURING THE 12-MONTH PERIOD ENDING

felony case numbers are far fewer, both in absolute numbers and relative to other federal charges.[336]

Moreover, *felony* immigration cases operate more like gun or drugs cases than plenary immigration enforcement, even in border districts. The federal system openly focuses on more serious offenders, such as terrorists, drug cartel members, and violent recidivists.[337] Federal prosecutors nationwide treat immigration offenses like other federal charges, as a tool to use selectively to address bigger crime problems rather than as a felony they must enforce in all circumstances.[338]

Federal money, actors, and institutions—The sense that crimes involving federal "things"—property, people, institutions, money—are uniquely or primarily federal is largely inaccurate. States can and do prohibit and prosecute frauds on and thefts of federal property[339] and

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SEPTEMBER 30, 2019 (2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_m2_0930.2019.pdf [https://perma.cc/FX47-LJDE].

336 *See* U.S. SENT'G COMM'N, ILLEGAL REENTRY OFFENSES 8 fig.1, 9 fig.2, 13 fig.7 (2015).

337 *See id.* at 8, 16–23 (describing criminal histories); 8 U.S.C. § 1326(b) (2018) (increasing the statutory maximum depending on the prior conviction); U.S. SENT'G GUIDELINES MANUAL § 2L1.2(b) (U.S. SENT'G COMM'N 2021) (enhancing a low base offense level for prior convictions); *see also* Memorandum from John Morton, Dir., U.S. Immig. & Customs Enf't, to All Field Off. Dirs., All Special Agents in Charge & All Chief Counsel 4 (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/6G5V-UX8B] (announcing the Obama administration's intent to focus immigration action against serious offenders).

338 *See, e.g.*, Press Release, U.S. Dep't of Just., Department of Justice Releases Report on Its Efforts to Disrupt, Dismantle, and Destroy MS-13 (Oct. 21, 2020), https://www.justice.gov/opa/pr/department-justice-releases-report-its-efforts-disrupt-dismantle-and-destroy-ms-13/ [https://perma.cc/9MLJ-DDGJ] (reporting using immigration tools to combat drug cartel MS-13).

339 *See, e.g.*, People v. Hamilton, 241 Cal. Rptr. 3d 765, 770–76 (Cal. Ct. App. 2018) (holding the state could prosecute the defendant, a mail carrier, for filing false disability paperwork with the U.S. Department of Labor to obtain federal workers' compensation but finding that the state's evidence was insufficient); State v. Herrera, 315 P.3d 311, 314–19 (N.M. Ct. App. 2013) (holding that New Mexico could prosecute the defendants for defrauding the U.S. Department of Veterans Affairs and observing that "[f]raud has been prosecuted as a crime in New Mexico since before . . . statehood"); People v. Caridi, 850 N.Y.S.2d 573, 574 (N.Y. App. Div. 2008) (affirming the defendant's conviction for filing false payroll certificates with the U.S. Department of Housing and Urban Development); State v. Jones, 958 P.2d 938, 939, 943 (Utah Ct. App. 1998) (affirming a federal employee's conviction for defrauding the Federal Employee Retirement System); People v. Lewis, 693 N.E.2d 916, 920 (Ill. App. Ct. 1998); State v. Stewart, 833 P.2d 1085, 1086–87 (Mont. 1992); State v. Heston, 704 P.2d 541, 543 (Or. Ct. App. 1985) (considering what restitution the defendant owed the Department of Veterans' Affairs after he falsified loans documents); State v. Duncan, 255 S.W.2d 430, 431–32 (Ark. 1953); State v. Frach, 94 P.2d 143, 144, 146 (Or. 1939); *see also, e.g.*, Commonwealth v. Crawford, 254 A.3d 769, 773–74 (Pa. Super. Ct. 2021) (affirming the defendant's conviction for lying about his veterans' status to join and defraud the American Legion); Scaletta v. State, No. 2586, 2017 WL 475949, at *1 (Md. Ct. Spec. App. Feb. 6, 2017) (affirming the defendant's theft conviction for forging military documents to obtain money from a veterans' charity). *But see* People v. Dillard, 231 Cal.

crimes by federal employees or against federal employees, institutions, and buildings.[340]

They can also prohibit *conduct* violating federal statutory schemes; states have prosecuted acts that would violate federal tax,[341] copyright[342] or bankruptcy law.[343] Moreover, many, probably most major federal statutory schemes are jointly administered with states, so states

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Rptr. 3d 106, 112–23 (Cal. Ct. App. 2018) (holding that a state conviction for defrauding a U.S. Health and Human Services program was preempted).

340 *See, e.g.*, Guss v. State, 296 So. 3d 734, 736–37 (Miss. Ct. App. 2020) (affirming the defendant's conviction for accepting a controlled delivery of methamphetamine that had been intercepted at the post office); Lilly v. State, 596 S.W.3d 509, 510–11 (Ark. Ct. App. 2020) (affirming a conviction for first-degree terroristic threatening after the defendant threatened the Department of Veterans' Affairs online); State v. Nelson, 1st Dist. Hamilton No. C–140352, 2015-Ohio-660, at ¶¶ 1–2 (affirming the defendant's conviction for assaulting a security guard at a federal courthouse); State v. Herrera, 315 P.3d 311, 318–19 (N.M. Ct. App. 2013) (explaining that New Mexico could prosecute offenses on Veterans' Affairs property); People v. Jones, 579 N.E.2d 829, 832, 847 (Ill. 1991) (affirming a state murder conviction when one victim was a postal employee driving her mail truck); McIntosh v. State, No. CACR97–1161, 1998 WL 171088, at *1–2 (Ark. Ct. App. Apr. 8, 1998) (affirming the defendant's conviction for punching a reporter on the sidewalk of a federal courthouse within federal property); Moreno v. State, 328 So. 2d 38, 38–39 (Fla. Dist. Ct. App. 1976) (affirming the defendants' convictions for kidnapping a postal employee at his home, bringing him to the post office, and forcing him to let them into the post office to steal money); State v. Van Treese, 200 N.W. 570, 570–71 (Iowa 1924) (affirming a postal employee's conviction for larceny from the post office); *see also* State v. Moulton, 991 A.2d 728, 733–35 (Conn. App. Ct. 2010) (vacating the conviction of a federal employee for making a threatening phone call to her employer post office for improper jury instructions and insufficient evidence but not because the state lacked authority to prosecute the crime); State v. Ruffin, 572 So. 2d 232, 234, 238 (La. Ct. App. 1990) (affirming a murder conviction after the defendant and his accomplices tried to rob an undercover postal inspector and cooperating postal employee who was involved in dealing drugs).

341 *See, e.g.*, State v. Radzvilowicz, 703 A.2d 767, 772–73, 785–88 (Conn. App. Ct. 1997) (affirming the defendant's forgery conviction predicated on forged federal tax filings). States enforce violations of their tax codes, *see* Barkow, *supra* note 2, at 548–49, 548 n.137 (documenting state tax enforcement divisions), and since most states piggyback on federal tax filings anyway, most state tax violations are probably also federal crimes. For an example of the states using tax law to prosecute white-collar crime, see *infra* note 367 and accompanying text.

342 *See, e.g.*, State v. Awawdeh, 864 P.2d 965, 967–68 (Wash. Ct. App. 1994) (holding that federal copyright law did not preempt a state conviction for, essentially, making counterfeit recordings and noting a similar decision in another state (citing People v. Borriello, 588 N.Y.S.2d 991, 996–97 (N.Y. Sup. Ct. 1992))).

343 *See, e.g.*, State v. Lutz, 8th Dist. Cuyahoga No. 80241, 2003-Ohio-275, at ¶¶ 1–10, 44–45, 145 (affirming the defendant's convictions for various state crimes, including extortion, state RICO, retaliation, and intimidation after he and two others filed fraudulent involuntary bankruptcy petitions to harass a state judge and a business nemesis).

can and do handle fraud in those programs,[344] such as through congressionally mandated Medicare-fraud units.[345]

Civil and administrative law offer additional alternatives that further free federal criminal prosecutors to enforce selectively.[346] Tax enforcement is mostly administrative and civil.[347] Federal frauds often can be enforced civilly, including through qui tam actions.[348]

Federal "stuff" prosecutions probably seem more federal because they have more factors favoring federal adoption. Federal agents care when a colleague is assaulted. Busy state prosecutors probably, on balance, care less about thefts of federal property. People usually pay more in federal than state taxes, so more tax cheats probably go federal. But those are just part of the overall calculus about which cases within this category are worth prosecuting federally. Selectivity remains the norm.

National security—Domestic national security crimes are not, and never have been, exclusively federal.[349] Today, most states have terrorism-related offenses,[350] including chemical-weapons statutes like the

344 *See, e.g.*, State v. Wallace, 828 N.E.2d 125, 128–30 (Ohio Ct. App. 2005) (holding that the state could prosecute Social Security fraud); Commonwealth v. Morris, 575 A.2d 582, 584–86 (Pa. Super. Ct. 1990) (same); People v. Brom, 541 N.E.2d 745, 746–47 (Ill. App. Ct. 1989) (affirming the defendant's conviction for federal student loan fraud and observing that state money contributed to the fund); *see also* Tom Jackman, *Fraud Inevitably Follows Disasters, so Authorities in Texas, Florida Prepare for Post-Storm Scams*, WASH. POST (Sept. 8, 2017, 10:19 AM), https://www.washingtonpost.com/news/true-crime/wp/2017/09/08/fraud-inevitably-follows-disasters-so-authorities-in-texas-florida-prepare-for-post-storm-scams/ [https://perma.cc/NLC2-2AJE].

345 Stephen M. Blank, Justin Alexander Kasprisin & Allison C. White, *Health Care Fraud*, 46 AM. CRIM. L. REV. 701, 756–58 (2009); Barkow, *supra* note 2, at 546–47 (documenting state-level federal benefits fraud units); *see, e.g.*, People v. Miran, 964 N.Y.S.2d 309, 317–18 (N.Y. App. Div. 2013) (affirming New York's authority to prosecute Medicare fraud).

346 *See generally* Anthony O'Rourke, *Parallel Enforcement and Agency Interdependence*, 77 MD. L. REV. 985 (2018).

347 The number of tax evaders that the IRS refers for federal prosecution is small and has been declining. *See Odds of IRS Referral for Criminal Prosecution*, TRACIRS (2021), https://trac.syr.edu/tracirs/highlights/current/criminalG.html [https://perma.cc/BP2D-HPLA]; *see also* INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK, 2021, at 56 (2021) (documenting the quantity of IRS enforcement actions).

348 *See* Blank et al., *supra* note 345, at 755–56 (noting the growing prevalence of qui tam actions to combat healthcare fraud); *see also, e.g.*, Press Release, U.S. Dep't of Just., Justice Department Recovers over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 [https://perma.cc/Q64D-U9K3].

349 *See supra* notes 266–67 and accompanying text.

350 *See, e.g.*, ALA. CODE § 13A-10-152 (2022); ALASKA STAT. § 11.56.807 (2021); ARIZ. REV. STAT. ANN. § 13-2308.01 (2022); ARK. CODE ANN. § 5-54-202 (2022); CAL. PENAL CODE § 787 (West 2022); CONN. GEN. STAT. § 53a-300 (2022); FLA. STAT. § 775.30 (2022); GA. CODE ANN. § 16-11-37 (2021); IDAHO CODE § 18-8106 (2022); 720 ILL. COMP. STAT. 5/29D-14.9 (2022); IND. CODE § 35-50-2-18 (2021); KAN. STAT. ANN. § 21-5423 (2022); KY. REV.

one in *Bond*.[351] Modern federal policy deliberately integrates locals into national security enforcement, especially through the FBI's Joint Terrorism Task Forces (JTTFs).[352]

The federal government is primarily—though not exclusively—responsible abroad, mainly through the military and agencies like the CIA. But states engage in foreign policy and conduct criminal investigations and even enforcement abroad.[353] And though most terrorism cases seem to go federal,[354] New York, at least, has investigated and prosecuted international terrorism cases.[355]

So federal terrorism cases are not legally different than federal drug prosecutions. Terrorism cases often play to federal strengths, such as a national and international reach, sophisticated scientific analysis, deep pockets, and big results. But that is an enforcement choice,

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STAT. ANN. § 525.045 (West 2022); MASS. GEN. LAWS ch. 269, § 14 (2022); MICH. COMP. LAWS § 750.543f (2022); MINN. STAT. § 609.714 (2022); NEV. REV. STAT. § 202.445 (2022); N.J. STAT. ANN. § 2C:38-2 (West 2022); N.M. STAT. ANN. § 30-20A-3 (2022); S.C. CODE ANN. § 16-23-720 (2022); VT. STAT. ANN. tit. 13, § 3502 (2022); VA. CODE ANN. § 18.2-46.5 (2022). This list is far from exhaustive.

351 *See, e.g.*, ALA. CODE § 13A-10-193 (2022); ARIZ. REV. STAT. ANN. § 13-2308.03 (2022); ARK. CODE ANN. § 5-54-208 (2022); COLO. REV. STAT. § 18-12-109 (2022); 720 ILL. COMP. STAT. 5/29D-15.2 (2022); MASS. GEN. LAWS ch. 269, § 14 (2022); MISS. CODE ANN. § 97-37-25 (2022); NEV. REV. STAT. § 202.446 (2022); N.H. REV. STAT. ANN. § 644:2-a (2022); N.J. STAT. ANN. § 2C:38-3 (West 2022); N.C. GEN. STAT. § 14-288.21 (2022); OHIO REV. CODE. ANN. § 2909.26 (LexisNexis 2022); OKLA. STAT. tit. 21, § 1268.6 (2022); TENN. CODE ANN. § 39-13-806 (2022). Again, this list is not exhaustive.

352 Waxman, *supra* note 265, at 307–08; *see Joint Terrorism Task Forces*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces/ [https://perma.cc/DJ76-YZLD] (reporting that JTTFs are composed of "hundreds of participating state, local, and federal agencies" that "are our nation's front line of defense against terrorism, both international and domestic").

353 *See* Rodríguez, *supra* note 219, at 615–16 (summarizing scholarship observing states and localities "engag[ing] in foreign policy" or affecting "foreign affairs"). Some police departments even have stations abroad. Ali Winston, *Stationed Overseas, but Solving Crimes in New York City*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/nyregion/terrorism-nypd-intelligence-crime.html [https://perma.cc/FZ2J-J3TU]; Daniel Yi, *Nation's Borders Don't Stop Special LAPD Unit*, L.A. TIMES (Mar. 16, 1998, 12:00 AM), https://www.latimes.com/archives/la-xpm-1998-mar-16-me-29450-story.html [https://perma.cc/H5MM-DPBZ].

354 Klein and Grobey found that in 2006, all international felony terrorism cases were prosecuted federally, Klein & Grobey, *supra* note 73, at 19, though it is possible domestic-terrorism acts were prosecuted locally under other statutes, like murder or assault.

355 *See* Colin Moynihan, *He Was Accused of Sowing Terror Overseas. He Was Caught by the N.Y.P.D.*, N.Y. TIMES (Jan. 22, 2023), https://www.nytimes.com/2023/01/22/nyregion/nypd-terror-law-abdullah-el-faisal.html [https://perma.cc/35XT-936H] (describing how New York police investigated and the Manhattan District Attorney's Office charged an international terrorism case). Arguably, the NYPD is one of the nation's premier antiterrorism agencies simply because a lot more terrorism occurs there than in many federal districts nationwide.

not a function of federal exclusivity. And as September 11 unforgettably demonstrated, the locals remain the front line, even for national emergencies.[356]

2. Seemingly Federal Crime

Scholars and judges seem comfortable with federal regulatory, white-collar, corruption, and civil-rights prosecutions.[357] Yet all those offenses overlap completely with state law. States prohibit and enforce regulatory and white-collar crimes,[358] even in seemingly "federal" areas like labor,[359] antitrust,[360] environmental regulation,[361] and workplace safety.[362] Not only can states prosecute their own corrupt officials, but they can, and occasionally have, prosecuted bribery of federal agents or affecting federal matters.[363] Civil rights offenses are, at bottom,

356 As the appellate court covering Manhattan put it, "[A] local community will typically be the most directly affected by a terrorist attack there." People v. Pimentel, 53 N.Y.S.3d 262, 264 (N.Y. App. Div. 2017).

357 *See supra* notes 121–25 and accompanying text.

358 *E.g.*, Commonwealth v. Labadie, 3 N.E.3d 1093, 1102–03 (Mass. 2014) (holding that the state could prosecute a credit union employee for embezzling the credit union's funds); People v. Dewald, 705 N.W.2d 167, 172–73 (Mich. Ct. App. 2005) (per curiam) (affirming the defendant's fraud convictions when he solicited funds for two fake political action committees during the 2000 election and recount), *abrogated on other grounds by* People v. Melton, 722 N.W.2d 698 (Mich. Ct. App. 2006); State v. Bonham, 28 P.3d 303, 304–08 (Alaska Ct. App. 2001) (allowing state prosecutions for perjury and submitting misleading securities filings that the defendants submitted while running a Ponzi scheme for which they were also prosecuted federally); State v. Cain, 757 A.2d 142, 151–52 (Md. 2000) (affirming a state conviction for mail fraud); People v. Cannon, 599 N.Y.S.2d 809, 811 (N.Y. App. Div. 1993) (affirming the defendant's conviction for larceny from a federally insured bank).

359 *See, e.g.*, State v. Klinakis, 425 S.E.2d 665, 668–70 (Ga. Ct. App. 1992) (permitting the state to prosecute the defendant for an assault that occurred during a labor dispute).

360 *See, e.g.*, Peoples Sav. Bank v. Stoddard, 102 N.W.2d 777, 795–96 (Mich. 1960) (affirming the state's authority to prohibit monopolies).

361 *See, e.g.*, People v. Rinehart, 377 P.3d 818, 820–29 (Cal. 2016) (holding that California could prosecute the defendant for environmentally dangerous mining despite federal regulations).

362 *See, e.g.*, People v. Pymm, 563 N.E.2d 1, 5–7 (N.Y. 1990) (affirming the state's authority to prosecute workplace-safety violations despite OSHA); People v. Chi. Magnet Wire Corp., 534 N.E.2d 962, 966 (Ill. 1989) (the state could prosecute the defendant for unsafe working conditions).

363 *See, e.g.*, State *ex rel.* Marshall v. Turner, 175 So. 2d 809, 810–11 (Fla. Dist. Ct. App. 1965) (affirming the state's authority to prosecute a federal narcotics agent for violating the state's antibribery law); *see also* People v. Lafaro, 165 N.E. 518, 519–20 (N.Y. 1929) (affirming a conviction for trying to bribe a police officer not to refer the defendant for federal prosecution for violating Prohibition).

classic state crimes like murder, assault, and communicating threats, and nearly all states have enacted civil rights statutes also.[364]

Though reliable state data are hard to come by, some evidence suggests that the federal government prosecutes more of these cases than the states, through some combination of federal expertise, federal resources, and path dependency.[365] States do not lack capacity altogether, however; as Rachel Barkow has demonstrated, many states have their own specialist agencies to handle complex matters, corruption, and other matters where the locals might have a conflict of interest.[366] And civil and administrative enforcement, such as in securities, environmental, antitrust, and civil rights matters, give federal prosecutors even more options.

Like everywhere else, cooperative enforcement is the norm. For example, a joint local, SEC, and British investigation led to Robert DePalo's conviction in state court for fraud, money laundering, and tax crimes, mostly involving British victims.[367] Similarly, an employer faced state manslaughter charges after joint local-OSHA investigation into an employee's death.[368] State and local officials prosecuted many recent, high-profile civil rights cases parallel to federal proceedings,

364 *See Laws and Policies*, U.S. DEP'T OF JUST. (Oct. 14, 2022), https://www.justice.gov/hatecrimes/laws-and-policies/ [https://perma.cc/DCL9-LGTD].

365 *See* James E. Alt & David Dreyer Lassen, *Enforcement and Public Corruption: Evidence from the American States*, 30 J.L. ECON. & ORG. 306, 314, 331 (2012) (finding "that greater prosecutor resources result in more convictions for corruption"); Adriana S. Cordis & Jeffrey Milyo, *Measuring Public Corruption in the United States: Evidence from Administrative Records of Federal Prosecutions*, 18 PUB. INTEGRITY 127, 129–30 (2016) ("[W]hile it seems plausible that most public corruption cases are handled by federal prosecutors, some caution is warranted in interpreting federal convictions of state and local officials.").

366 *See* Barkow, *supra* note 2, at 547–49.

367 *See* Christopher M. Matthews, *Manhattan DA Charges NY Broker-Dealer in International Fraud*, WALL ST. J. (May 20, 2015, 4:49 PM), https://www.wsj.com/articles/manhattan-da-charges-ny-broker-dealer-in-international-fraud-1432144347/ [https://perma.cc/7M9K-GVQU]; Rebecca Rosenberg, *Fraudster Who Tried to Sway Juror Gets Nearly Max Sentence*, N.Y. POST (Sept. 4, 2018, 7:53 PM), https://nypost.com/2018/09/04/fraudster-who-tried-to-sway-juror-gets-nearly-max-sentence/ [https://perma.cc/Y6EJ-MWJ6].

368 Eli Pace, *Avon-Based Employer Charged with Manslaughter in 2018 Worker's Death at Granby Construction Site*, VAIL DAILY (Aug. 23, 2019), https://www.vaildaily.com/news/crime/avon-based-employer-charged-with-manslaughter-in-2018-workers-death-at-granby-construction-site/ [https://perma.cc/3RDL-8KKH].

including Derek Chauvin,[369] Dylann Roof,[370] and Ahmaud Arbery's murderers.[371]

The perception that federal prosecutions are *necessary* because these cases "are not being, or by their nature cannot be, handled appropriately at the state level"[372] is therefore not accurate. The real argument might be that these crimes more often fit the federal toolkit. A resource-intensive approach works well for complex or sophisticated crime. As Prof. Darryl Brown has argued, the mere fact it is supplemental makes it a good check on some crimes that states chronically underenforce, such as police brutality.[373]

Those points are all perfectly valid. But it is unclear why "effectiveness" is limited only to some kinds of crime. Depending on the case, a locality might quite effectively prosecute a civil-rights matter but drop the ball on a violent robbery. The two felonies that have the lowest solve rates are rape and aggravated assault (usually shootings).[374] Though the Court obviously disagreed, the *Bond* prosecution fits this mold: the feds intervened after state efforts to stop Carole Ann Bond's unhinged harassment failed.

3. Local Crime

Which brings up overfederalization's bête noir, "street crime"—drugs, weapons, and violent offenses.[375] Though federal factors here

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369 *See* Janelle Griffith & Corky Siemaszko, *Derek Chauvin Guilty of Murder in George Floyd's Death*, NBC NEWS (Apr. 20, 2021, 11:10 PM), https://www.nbcnews.com/news/us-news/derek-chauvin-verdict-reached-trial-over-george-floyd-s-death-n1264565/ [https://perma.cc/A784-AMKD]; Josh Campbell, Eric Levenson & Stella Chan, *Derek Chauvin Pleads Guilty in Federal Court to Violating George Floyd's Civil Rights*, CNN (Feb. 21, 2022, 7:11 PM), https://www.cnn.com/2021/12/15/us/derek-chauvin-federal-plea-change-wednesday/index.html [https://perma.cc/AV78-XHPL].

370 *See* Dave Berndtson, *Dylann Roof Pleads Guilty in State Trial for Charleston Church Massacre*, PBS NEWS HOUR (Apr. 10, 2017, 12:21 PM), https://www.pbs.org/newshour/nation/dylann-roof-expected-plead-guilty-state-trial-charleston-church-massacre/ [https://perma.cc/WHL3-2YRS].

371 Eliott C. McLaughlin, Devon M. Sayers, Alta Spells & Steve Almasy, *Guilty Verdicts in the Trial of Ahmaud Arbery's Killers Met with Relief and Joy in Georgia and Beyond*, CNN (Nov. 24, 2021, 9:34 PM), https://www.cnn.com/2021/11/24/us/ahmaud-arbery-killing-trial-wednesday-jury-deliberations/index.html [https://perma.cc/J6Y4-T9JE].

372 Smith, *supra* note 5, at 46–47.

373 *See* Brown, *supra* note 31, at 854–57.

374 *See supra* note 68 and accompanying text.

375 *See, e.g.*, Baker, *supra* note 39, at 681–82 (arguing that "[d]rug offenses are the main avenue through which federal law enforcement has insinuated itself into street crime" but "[f]ederal law enforcement has extended its reach" to "weapons and violence"); Clymer, *supra* note 5, at 667–68 (identifying "three of the most significant areas of overlapping federal jurisdiction" as "drug, gun, and fraud cases"); Little, *supra* note 31, at 1037 ("[T]he

might be fewer, or arise less often, the federal government plays the same supplemental role that it does in other kinds of crime.

Drug offenses—Drug offenses epitomize overlapping state and federal jurisdiction,[376] the controversies it engenders,[377] and the difficulty in using federalism concepts to distinguish kinds of offenses. Though some commentators accept a federal role prosecuting kingpins and international drug cartels,[378] most critics strongly object to federal prosecutions of street- and midlevel dealing.[379]

That has intuitive logic, but the boundaries collapse quickly on the ground. Consider a DEA press release announcing a multicount state indictment against "a Mexico-based drug kingpin and five others in a wide-ranging conspiracy to smuggle multi-kilogram quantities of fentanyl and heroin from Mexico for distribution in the New York City area."[380] A federal-state-local task force conducted the investigation. One officer negotiated purchasing fentanyl and heroin directly with one defendant located in Mexico, who arranged for intermediaries to supply the drugs in New York City.[381] Officers ultimately seized over twenty kilograms of narcotics at a New York City hotel, and, later, during a traffic stop and then an apartment search in the city.[382]

International, kingpin, cartel, or multikilo cases seem more federal because federal agencies have stations abroad[383] and those cases often use cool federal tools like wiretaps, international task forces, and high-tech equipment. But states can and do charge kingpins and

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current federalization critique focuses almost entirely on federal narcotics and firearms offenses . . . .").

376 *See* Beale, *supra* note 52, at 997–98; Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 820 (2004). That is particularly true after *Gonzales v. Raich* held that federal law can prohibit drug possession, even homegrown medical marijuana. *See* 545 U.S. 1, 22 (2005).

377 *See* Sanford H. Kadish, Comment, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1251 (1995) ("[T]o talk about overfederalization without mentioning drugs is like talking about Hamlet without the Prince or to use a more pertinent image like narrating a melodrama without its arch villain.").

378 *See, e.g.*, Smith, *supra* note 5, at 46–47; Mengler, *supra* note 111, at 526.

379 *See, e.g.*, Smith, *supra* note 5, at 33; O'Hear, *supra* note 280, at 727–28.

380 Press Release, Frank A. Tarentino III, Special Agent in Charge, U.S. Drug Enf't Admin., Drug Kingpin Indicted in New York: Trafficked Enough Fentanyl into NYC to Kill Ten Million People (Mar. 27, 2018), https://www.dea.gov/press-releases/2018/03/27/drug-kingpin-indicted-new-york/ [https://perma.cc/957X-XQSM].

381 *See id.*

382 In fact, the traffic stop was at 121st Street and Amsterdam Avenue, *id.*, where Columbia Law School houses students and associates, including yours truly.

383 *See, e.g.*, *Foreign Offices*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/foreign-offices/ [https://perma.cc/EP8L-MTQ9]; *International Operations*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/about-ice/homeland-security-investigations/international-operations#map [https://perma.cc/Z7J9-VAGN].

international cartel leaders under state law,[384] with or without federal involvement.[385] States can employ tools like wiretaps and multiagency task forces too, they can buy or borrow high-tech equipment, and they can operate internationally themselves[386] or, more often, with federal assistance.[387]

Otherwise, it is not so obvious that federal intervention is more justified or essentially different for kingpins than midlevel or street dealing. The legitimate public safety concerns that drive drug cases,[388] like the harms of addiction, overdoses, and drug-related violence, affect localities whether the supplier is based in Mexico or down the street or whether the supplier managed two hundred or two hundred thousand kilos. Restricting federal prosecutions to cartels and kingpins might make sense if one believed in decapitation theory, that eliminating a kingpin or cartel extinguishes a drug supply and therefore the public-safety problems drugs visit on localities. At this point,

384 *See, e.g.*, Press Release, Cyrus R. Vance, Jr., N.Y. Cnty. Dist. Att'y, Three Drug Traffickers, Including Drug Kingpin, Indicted for Running Cocaine Delivery Service (June 30, 2016), https://www.manhattanda.org/three-drug-traffickers-including-drug-kingpin-indicted-running-cocaine-delivery-servic/ [https://perma.cc/L4LK-2VNJ] (announcing charges against major drug dealers under New York's kingpin statute and other state statutes). Some states have their own kingpin statutes, as was the case here. *E.g.*, MD. CODE ANN., CRIM. LAW § 5-613 (LexisNexis 2022); N.J. STAT. ANN. § 2C:35-3 (West 2022); N.Y. PENAL LAW § 220.77 (McKinney 2022).

385 *See, e.g.*, Press Release, Frank A. Tarentino III, *supra* note 379 (announcing an indictment against major drug dealers by the state after a joint federal-state investigation); Marissa Wenzke & Courtney Friel, *Skid Row Drug Kingpin, Found with $600,000 in $1 Bills, Is Sentenced to 11 Years in Prison*, KTLA (Aug. 7, 2017, 4:07 PM), https://ktla.com/news/local-news/skid-row-drug-kingpin-found-with-600000-in-1-bills-is-sentenced-to-11-years-in-prison/ [https://perma.cc/9K5K-ZTR7] (describing the sentencing of a drug kingpin following a wiretap investigation by the local police and district attorney's office).

386 *See supra* note 353.

387 *See Office of International Affairs (OIA)*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-oia [https://perma.cc/S95Q-LUWK]; *see also Transnational Crime*, U.S. DEP'T OF STATE, https://www.state.gov/transnational-crime/ [https://perma.cc/QP6Z-KX2M] (offering "unique global investigative resources to U.S. law enforcement").

388 The point is not to ignore critics' objection that criminal drug enforcement is racially biased, *see generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010), or produces more harm than benefits, *see, e.g.*, Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 294 (2015); Pew Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return: Penalty Increases Enacted in 1980s and 1990s Have Not Reduced Drug Use or Recidivism*, 28 FED. SENT'G REP. 4, 6–7 (2015). As Section IV.C discusses, those concerns should influence federal policy, but they are not *federalism* objections or objections unique to lower-level dealers. Ineffective or biased enforcement is just as problematic for kingpins as street dealers and domestic versus international dealing.

however, that would be foolishly optimistic; experience has shown that, like any market, competitors quickly fill supply gaps.[389]

Cartels and kingpins seem more federal for the same reason that civil rights, corruption, and white-collar crimes do: they play to the federal toolkit's strengths. But the *reasons* underlying those prosecutions is the same as for street-level dealers: public safety and, above all, violence. The federal system often uses drug charges to address chronic violence or particularly violent recidivists,[390] even for high-profile prosecutions of cartels like MS-13 and leaders like "El Chapo."[391] Especially for localities, however, street dealing can be an even bigger problem because its open visibility can drive dangerous public shootings.[392] It is no coincidence that federal drug prosecutions spiked as drug-related violence did in the 1980s and 1990s.[393]

Part IV takes up the much harder question whether that remains a smart or well-founded policy. But looking at the federal-state relationship, the difference between a local shooter fighting over turf and El Chapo is one of (extreme) degree rather than kind.

Guns and violent crime—The same dynamic plays out across the federal weapons and violent-crime docket. The objective, even more

389 For a vivid illustration, see Carlos Dobkin & Nancy Nicosia, *The War on Drugs: Methamphetamine, Public Health, and Crime*, 99 AM. ECON. REV. 324, 345 (2009) (finding that a major disruption in methamphetamine precursors disrupted meth availability for four months). Evidence also suggests that the "kingpin strategy" can generate greater violence by destabilizing drug markets. *See* Jason M. Lindo & María Padilla-Romo, *Kingpin Approaches to Fighting Crime and Community Violence: Evidence from Mexico's Drug War*, 58 J. HEALTH ECON. 253, 253–54 (2018).

390 According to the Drug Enforcement Administration, the major federal program to combat drug organizations, the Organized Crime Drug Enforcement Task Force (OCDETF), exists "to mount a comprehensive attack and reduce the supply of illegal drugs in the United States and diminish the violence and other criminal activity associated with the drug trade." *Organized Crime Drug Enforcement Task Force (OCDETF)*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/operations/ocdetf [https://perma.cc/UNE8-GCP5]; *see, e.g.*, Sharon R. Kimball, Seth Adam Meinero & Joseph M. Pinjuh, *OCDETF and PSN: Partner Strategies to Thwart Gangs and Violent Organizations*, 66 DEP'T JUST. J. FED. L. & PRAC. 67 (2018).

391 *See* Press Release, U.S. Dep't of Just., *supra* note 338 (announcing prioritizing MS-13 prosecutions because the cartel has committed "acts of violence and abuse that exhibit a wanton disregard for human life"); Press Release, U.S. Dep't of Just., Joaquin "El Chapo" Guzman, Sinaloa Cartel Leader, Sentenced to Life in Prison Plus 30 Years (July 17, 2019), https://www.justice.gov/opa/pr/joaquin-el-chapo-guzman-sinaloa-cartel-leader-sentenced-life-prison-plus-30-years/ [https://perma.cc/D3RF-3RWQ] ("Guzman Loera and his organization relied upon violence to maintain its power . . . .").

392 *See* authorities cited *infra* note 451.

393 *See* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 92 (2011); *see* Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375, 383–84 (2017); *see also* authorities cited *infra* note 481.

directly, is to combat local, chronic violence.[394] Whether that policy is wise or effective is a complex question that is beyond this Article to resolve.[395] But the longstanding assumption that these cases present the biggest federalism problem deserves reconsideration.[396]

From a "balance" perspective, states face zero risk of losing their primacy precisely because violent crime has always been, and remains, the bread and butter of state dockets. A century of federal street-crimes prosecutions has, tellingly, not budged the states' dominance.[397]

And if the federal system is supplementing *enforcement* breakdowns rather than legal gaps, then violent crime seems an obvious area for cooperative enforcement. Violent crime consumes state resources, often results in enforcement breakdowns, and can create pockets of chronic underenforcement, such as in Chicago or Baltimore.[398] Federal, state, and local officials face more political pressure for those breakdowns than others because, among crime issues, preventing and

394 *See, e.g.*, EDMUND F. MCGARRELL, NATALIE KROOVAND HIPPLE, NICHOLAS CORSARO, TIMOTHY S. BYNUM, HEATHER PEREZ, CAROL A. ZIMMERMANN & MELISSA GARMO, PROJECT SAFE NEIGHBORHOODS—A NATIONAL PROGRAM TO REDUCE GUN CRIME: FINAL PROJECT REPORT iii (2009); Richman, *supra* note 291, at 374–83 (describing precursor programs to PSN, including Operation Ceasefire, Project Triggerlock, and Project Exile); Press Release, Robert K. Hur, U.S. Att'y, U.S. Dep't of Just., Attorney General William P. Barr Announces Launch of Operation Relentless Pursuit: The Operation Will Surge Federal Law Enforcement Resources into Seven of America's Most Violent Cities—Including Baltimore (Dec. 18, 2019), https://www.atf.gov/news/pr/attorney-general-william-p-barr-announces-launch-operation-relentless-pursuit/ [https://perma.cc/4UD2-9EKS] (announcing "Operation Relentless Pursuit" to "combat[] violent crime in seven of America's most violent cities").

395 For example, empirical evidence about the impact of federal weapons prosecutions is mixed. *See, e.g.*, Edmund F. McGarrell, Nicholas Corsaro, Natalie Kroovand Hipple & Timothy S. Bynum, *Project Safe Neighborhoods and Violent Crime Trends in US Cities: Assessing Violent Crime Impact*, 26 J. QUANTITATIVE CRIMINOLOGY 165 (2010); MCGARRELL ET. AL., *supra* note 394 (finding some benefits); Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223 (2007) (same). *But see* J.C. Barnes, Megan C. Kurlychek, Holly Ventura Miller, J. Mitchell Miller & Robert J. Kaminski, *A Partial Assessment of South Carolina's Project Safe Neighborhoods Strategy: Evidence from a Sample of Supervised Offenders*, 38 J. CRIM. JUST. 383 (2010) (observing an increase in firearm-related crimes after South Carolina's PSN program began); Ben Grunwald & Andrew V. Papachristos, *Project Safe Neighborhoods in Chicago: Looking Back a Decade Later*, 107 J. CRIM. L. & CRIMINOLOGY 131 (2017) (finding less long-term benefit from Project Safe Neighborhoods in Chicago a decade later but calling for more research).

396 *See supra* note 258 and accompanying text.

397 *See supra* note 99 and accompanying text.

398 *See, e.g.*, LEOVY, *supra* note 70, at 6–11; Lowery et al., *supra* note 70; Kelly et al., *supra* note 57.

responding to violence is one of—if not the greatest—concerns voters have for all levels of government.[399]

IV. THE FEDERAL-STATE CRIMINAL RELATIONSHIP

Lopez was right: "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'"[400] But the Supreme Court and scholars often overlook the essential point. The states are *primary*, not exclusive; the feds are secondary and therefore overlapping. The conversation should flip from fruitlessly preserving "a strict dichotomy between federal and state authority when it comes to criminal law enforcement"[401] to embracing overlapping enforcement.

A. Reframing Criminal Federalism

Discussions of criminal federalism often start with jurisdiction, but they should start with crime. Public safety and criminal justice are essentially reactive enterprises. *Somebody* needs to respond when crime occurs; somebody needs to provide the basic machinery of safety and criminal justice. And some government needs to serve as the default, or else enforcement breakdowns, even chaos, would ensue. Imagine if a 911 operator needed to sort out, in the moments after a shooting, whether the offender is motivated by racial hate or a workplace grievance.

The police power, the Constitution, and tradition assigned that job to the states. That obligation pushes state law and enforcement everywhere, even into "federal" crimes and enclaves. Local authorities cannot ignore a shooting because the offender is motivated by racial hate or a drug deal because the heroin came from another country. Counterfeit currency can buy a soda at the local store. Bombing a federal building creates a local tragedy. Federal properties are located in and share crime problems with their state and local neighbors.

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399 *See* Michael O'Hear & Darren Wheelock, *Violent Crime and Punitiveness: An Empirical Study of Public Opinion*, 103 MARQ. L. REV. 1035, 1050–51, 1069–70 (2020) (finding, consistent with past polls, that the public cares more about violent-crime enforcement than other kinds of crime); Eli Yokley, *Most Voters See Violent Crime as a Major and Increasing Problem. But They're Split on Its Causes and How to Fix It*, MORNING CONSULT (July 14, 2021, 6:00 AM), https://morningconsult.com/2021/07/14/violent-crime-public-safety-polling/ [https://perma.cc/5Z5A-JN85]; Chris Jackson, *Americans View Increases in Violent Crime as a National Issue Rather Than a Local One*, IPSOS (Oct. 23, 2021), https://www.ipsos.com/en-us/news-polls/axios-Violent-Crime-2021/ [https://perma.cc/AAQ7-E5FR].

400 United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).

401 Barkow, *supra* note 5, at 122.

Without comprehensive public-safety responsibility, the federal government has never had reason to duplicate the massive infrastructure necessary to meet voters' expectations. Daryl Levinson has pointed out that government actors do not automatically begin "empire-build[ing];" they are most responsive instead to voters' expectations, which may or may not favor greater jurisdiction.[402] Criminal federalism illustrates his point. The states' longstanding criminal-justice obligations have provided the necessary incentives to build institutional capacity. The federal system has always lacked that pressure and therefore remained small.

Yet, the Constitution also made the federal government directly accountable to local voters. So federal officials have good reason to care about policies that matter to voters, and crime is undeniably a major one. Professors Richman and Stuntz might be right that voters do not hold federal politicians responsible for, say, traffic enforcement or policing,[403] but they do expect the federal government to act like any government does and address national safety and welfare, including crime.

It is especially problematic to claim, as the federal-interest theory does, that the federal justice system's interests do not include general welfare and morality. Criminal law *exists* to promote and protect public safety and morals. Whether a robbery victim is a mail carrier or private citizen might affect federal jurisdiction, but the motivation for criminalizing either robbery is the same: robberies hurt victims and society. Federal tax evaders deprive the federal coffers, but they go to prison rather than pay civil penalties because their cheating is morally wrong.[404]

Or as Mark Dubber explains: "The problem with the compromise upon which the union was built was that it insisted that the power to police was inherent in the very concept of government, while at the same time ostensibly erecting a government without that very power."[405] Whatever you call it, the federal government has an interest in police-power-type concerns, like crime, safety, and welfare.

And because crime is so tied to the place where it occurs, federal politicians and executive officials properly care about crimes that seem local. Put another way, federal agents and prosecutors cannot avoid the "state domain"; they live there. They work crimes occurring in and

402 Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 935–36, 940–41 (2005).

403 *See supra* notes 106–07 and accompanying text.

404 *See* United States v. Engle, 592 F.3d 495, 504–05 (4th Cir. 2010) (finding a tax-evasion sentence substantively unreasonable because the district court focused only on the defendant's ability to pay restitution instead of all penal considerations).

405 Dubber, *supra* note 1, at 1334.

affecting their communities, they partner daily with the local officials responsible for public safety there, and they meet defendants and victims mostly from nearby areas. That is true if they are working a complex fraud scheme bilking the elderly, tax evasion involving an area physician, theft from a military base in the district, or a plot to attack a local federal building.

The problem is not simply that modern reality has trumped constitutional principles. The Constitution itself failed to create a separate world of federal crime. Instead, it created two sovereign governments that have independent criminal jurisdiction but largely share physical jurisdiction. Lawrence Friedman put it nicely: the "national criminal justice system was piled on top of the state systems."[406] Ever since, as Robert Cover observed, "it is the structure of overlap that has been constant, rather than the particular rules and areas of dispute."[407]

So conventional criminal federalism wrongly equates separation with restraint and overlap with failure. Criminal federalism theory needs to adjust to how deeply overlapping, messy, cooperative federalism is rooted in criminal law and tradition. The failure to do so explains why caselaw and scholarship have struggled so long to identify workable boundaries between the state and federal systems.

That is not to suggest that enumerated powers and statutes play no role in criminal federalism. They do restrict Congress's legislative authority. And federal prosecutors cannot charge a crime that Congress has not enacted or a statute that exceeds Congress's powers. So *Bass*, *Lopez*, and *Jones* (and maybe *Bond*)[408] reminded Congress and prosecutors that the federal system has limits, which reinforces its small, supplemental role.

But enumerated powers simply contribute too little to other key aspects of the federal-state criminal relationship. They control the executive only indirectly and partially. They are an Article I constraint on *Congress*, and the executive can still engage with crimes outside those powers. For example, despite *Jones*, ATF agents still investigate

406 FRIEDMAN, *supra* note 43, at 71.

407 Robert Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 51, 54 (Martha Minow, Michael Ryan & Austin Sarat eds., 1995).

408 *Bass*, *Lopez*, and *Jones* policed the boundaries of the Commerce Clause, which remains the primary power Congress relies on to enact criminal statutes. *Bond*, as always, is weirder because it left the statute intact. One could read *Bond*, however, as a case about federal prosecutors failing to accept a statutory gap. Federal postal crimes covered mail theft but not smearing arsenic on the mailbox. The chemical-weapons charge was probably an end run around that problem (and the lack of serious penalties for mail theft), but arguably that end run was a little too creative.

residential arsons.[409] Enumerated powers likewise do not prevent federal courts from considering a defendant's local criminal history or the local impact of his federal offense.[410] And they do not negate states' power to enact crimes or enforce even seemingly federal crimes.

Enumerated powers also do not identify which crimes, crime problems, and cases the federal system should address, for two reasons. First, being a limited enforcer means the federal system will never approach the outer limits of its paper jurisdiction. Even if the federal system adopted the narrowest conception of federal criminal jurisdiction, it still would have to make enforcement choices. The federal system simply never has prohibited or prosecuted every offense even within its core jurisdiction, such as crimes on federal enclaves, counterfeiting, or international drug trafficking.[411]

And second, enumerated powers offer little guidance about how to make those choices. That is the Supreme Court's essential error. A business arson might fit better within the Commerce Clause. But the reasons to care about arson are basically the same as for residential fires: arsons risk lives and property and cause financial and emotional harm. Gun possession is a public safety risk whether the gun traveled in interstate commerce or not. Few think that the crimes listed in the Constitution are the sole offenses within federal jurisdiction,[412] but the Constitution just doesn't answer which other crimes and crime concerns the federal system should address.

Instead, where to direct federal attention within the federal government's paper jurisdiction is a policy choice that Congress, executive officials, and—to a smaller extent—the federal courts make. But the structure of criminal federalism strongly shapes those choices. Being small and dependent rules out a lot. It blocks the federal system monopolizing enforcement of any crime, from drugs to counterfeiting to robbery. It prevents the federal system from overriding state policy choices, like objections to the Jeffersonian embargo and Prohibition

409 *See* Kayla Clarke, *$25K Reward for Info That Leads to Conviction of Those Responsible for Detroit Fire That Trapped Firefighters*, CLICKON DETROIT (July 29, 2022, 6:43 PM), https://www.clickondetroit.com/news/local/2022/07/29/25k-reward-for-info-that-leads-to-conviction-of-those-responsible-for-detroit-fire-that-trapped-firefighters/ [https://perma.cc/5KNW-2L7L].

410 *See* 18 U.S.C. § 3553(a) (2018).

411 *See* U.S. CONST. art. I, § 8, cl. 6; 21 U.S.C. § 844 (2018); Gonzales v. Raich, 545 U.S. 1, 22 (2005).

412 *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1412 (2001) ("The Constitution undoubtedly confers power on the federal government to adopt a broad range of federal crimes."); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 833 (1994) (reporting that the First Congress quickly enacted crimes beyond those listed in the Constitution).

or legalizing marijuana. It also strongly pushes federal law and enforcement toward "plus" cases that fit the federal system's supplemental purpose and procedural advantages. If federal actors know that they will only ever handle a small slice of criminal matters, then the question becomes not how much federal enforcement to do but where to do it. Selectivity becomes the ingrained habit that, over thousands of cases and a century of experience, has proven a powerful constraint.

The states enjoy a much bigger voice in that debate than is often appreciated. Scholars know that cooperative criminal enforcement is the norm, with local officers and prosecutors often contributing to adoption decisions.[413] But if this Article is correct, then they are everywhere and possess, over the long term, almost a veto over federal excess and bad policy. Scholars who try to focus on uniquely "federal" interests miss how effectively state and local policy can sculpt federal priorities.

Meanwhile, federal exclusivity—which the Court and scholars have long equated with federal limits—undermines states' power. *Lopez* and *Bond* never displaced the locals;[414] *Arizona v. United States* did. Subtracting the states from an area does not enhance their power elsewhere, but it does push federal enforcement to build up the capacity to take on more primary responsibilities, which increases the overall federal footprint. In Daryl Levinson's terms, exclusivity promotes empire-building because voters expect competent, comprehensive enforcement. Judges and scholars who want to limit the federal system should welcome overlap and embrace doctrines that preserve it, like anticommandeering and avoiding preemption, and forget trying to create a separate federal zone.

Properly understanding states' role in the federal-state criminal relationship has implications for broader federalism debates. Criminal federalism vividly illustrates the core conundrum in federalism theory. Separate-spheres federalism is outdated.[415] But cooperative federalism and similar iterations seem, to critics, to ultimately rely on annoyingly mushy alternatives like policy choices or institutional self-restraint rather than robust, enforceable limits.[416]

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413 *See, e.g.*, Brickey, *supra* note 5, at 1164–65; Richman, *supra* note 29, at 405–06.

414 In both cases, the state remained free to prosecute or not.

415 *See* Bridget A. Fahey, *Data Federalism*, 135 HARV. L. REV. 1007, 1074 (2022) ("[A]cademic accounts of federalism have increasingly rejected the outdated assumption that the federal government and the states operate in separate spheres, instead embracing the premise that the federal government and the states govern together in a much wider range of contexts than was once understood.").

416 *See* Gerken, *supra* note 36, at 86 (traditional federalism has "managed to generate doctrine that is more manageable, more comprehensible, and therefore more likely to

Scholars have therefore offered federalism theories about how states can restrain federal power in cooperative schemes. Most envision an overarching federal statutory scheme that sets policy for states to implement. "Picket fence federalism," for example, emphasizes how shared policy goals commit state agency officials "to the mission of the federal statute that they help to implement" and develop "a common sense of vocation and professional culture with the federal agency officials who oversee them."[417] The "new" "nationalist school of federalism," likewise, studies "[t]he power states enjoy as national government's agents" when "implementing and interpreting federal law."[418] Though some of those scholars have touched neighboring areas like immigration and marijuana, they have not focused on criminal enforcement itself.[419]

And they have missed that criminal enforcement works differently. No overarching federal statutory scheme frames the relationship.[420] In fact, the states are not agents of federal policy at all; they enjoy near-complete autonomy, historical primacy, and enormous institutional advantages. If anything, they lead criminal enforcement, with the federal system following behind. At the risk of contributing yet another federalism metaphor to the literature,[421] criminal enforcement uses free-safety federalism,[422] with the feds providing a thin, roving backup to the states' broad defensive line. What binds them are not federal statutes but the shared responsibility for providing public safety and criminal justice efficiently.

Criminal federalism puts the cooperation back in cooperative federalism. For traditionalists, it identifies a meaningful distinction between local and federal authority, one grounded in a legal doctrine—

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endure"); Schapiro, *supra* note 118, at 283 ("What cooperative federalism lacks is an adequately-specified normative theory."); *see also id.* at 282–83 (concluding that empowerment federalism "provides insufficient guidance" to federal actors about how to "resolve tensions that arise due to the overlap of state and federal power").

417 Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1236 (2001).

418 Gerken, *supra* note 32, at 1893. *See generally, e.g.*, Symposium, *Federalism as the New Nationalism*, 123 YALE L.J. 1875 (2014); Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689 (2018).

419 *See, e.g.*, Jessica Bulman-Pozen, Essay, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2043–51 (2018); Rodríguez, *supra* note 219, at 617–36.

420 This Article thus joins Bridget Fahey's work highlighting federalism outside statutory schemes Congress has organized. *See* Fahey, *supra* note 415, at 1074–77.

421 *See* Amy L. Stein, *Pitfalls Along the Brave New Energy Federalism Path*, 95 TEX. L. REV. *SEE ALSO* 114, 116–17 (2017) (counting seventeen federalism flavors).

422 James Comey agrees. *See* William K. Rashbaum, *Kelly Seeks U.S. Trials for Some Gun Crimes*, N.Y. TIMES (Apr. 19, 2002), https://www.nytimes.com/2002/04/19/nyregion/kelly-seeks-us-trials-for-some-gun-crimes.html [https://perma.cc/X4L2-PG5H].

the police power—and enforceable through concepts like avoiding preemption and anticommandeering. And above all, it *works*.

B. Some Concerns

The consequences of federal enforcement are serious, and this Article does not solve them all. But courts and scholars have focused too long on criticisms that do not resonate on the ground and ultimately do not work. Above all, pushing the federal system away from "local" crime toward uniquely "federal" crime makes no sense on the ground and, if anything, aggrandizes federal power.

Overlapping enforcement does not solve punitiveness concerns, but it can redirect reformers toward more effective proposals. Having a supplemental enforcer can mean two enforcers that, combined, can bring more cases and obtain more convictions and longer sentences.[423] That concern has deeper resonance as scholars object that criminal enforcement disproportionately harms minority and marginalized communities,[424] leading some to propose radically reducing or abolishing incarceration.[425]

Abolishing the federal system seems unlikely. U.S. attorneys' offices and federal judges have existed since 1789, to say nothing of the now-large federal administrative apparatus. Scholars like Darryl Brown and Kami Chavis Simmons have noted benefits to having a second review in some kinds of cases, like civil rights and corruption.[426] And frankly, law enforcement is a messy enterprise led by fallible human beings, making cooperation and backup systems logical. Robert Cover long ago recognized similar benefits of overlapping federal-state

423 *See supra* Section III.A.

424 *See* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 304 (2018) (distinguishing quantitative complaints about overcriminalization and qualitative critiques about mass incarceration); Smith, *supra* note 113, at 537 ("Few issues have received more sustained attention from criminal law scholars over the last half-century than overcriminalization. It is fair to say that the judgment of the scholarly community has been overwhelmingly negative."); *see also, e.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 21–50 (2017).

425 *See, e.g.*, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 461–62 (2018); Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1943–49 (2019); V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453 (2019); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161–64 (2015); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4–10 (2019); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612–13, 1623–24 (2017).

426 *See* Simmons, *supra* note 31, at 1886–87 (civil rights); Brown, *supra* note 31, at 854–55 (corruption).

criminal enforcement,[427] and scholars have identified other areas where redundancy is normal and even valuable.[428] As Adam Cox has pointed out, "[e]nforcement redundancy . . . is the norm" in American law, and not just between federal and state/local prosecutors.[429]

Likewise, efforts to try to make the federal system look less, well, supplemental are probably doomed to fail.[430] Its unique advantages are not happenstance or bad policy; they flow from the role it is playing in relation to the states, backing up enforcement weaknesses. Enforcement means consequences, including convictions and sentences. And trying to supplement calls for a different toolkit, one tailored to do fewer cases very thoroughly.

But the history of federal enforcement offers hope for reformers. Within its narrow role, federal priorities can change quickly and dramatically. Immigration has swung wildly over time. Drug prosecutions shifted from addicts and enabling physicians to street gangs. On the other hand, hangovers can persist. Prohibition ended, but it took years for Prohibition-type cases to vanish, and the federal footprint never quite fully receded afterward.[431]

To pick a small example, Congress enacted the Dyer Act, the federal auto theft statute, in 1919 as Prohibition kicked off an era of gangsters capitalizing on weak interstate criminal cooperation.[432] By the 1970s, however, the FBI was still bringing Dyer Act cases to pad its stats, annoying federal prosecutors. J. Edgar Hoover's successor extinguished the agency's reliance on the Dyer Act and pushed his agents to work complex white-collar crime.[433] Dyer Act cases have never returned.

Rather than changing how the federal system operates, critics should focus on reorienting priorities. Scholars and policymakers must openly debate which crime issues could benefit from federal attention and which ones do not. Scholarship focusing on concrete effects of federal programs, such as work by Jeffrey Fagan, Tracey Meares, and Andrew Papachristos,[434] furthers that debate.

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427 *See* Cover, *supra* note 407, at 80–83.

428 *See generally, e.g.*, Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016) (civil law); Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415 (2012).

429 Cox, *supra* note 161, at 31.

430 *See* Ouziel, *supra* note 31, at 2317, 2317–18 (identifying other, deeper forces driving forum disparities beyond "different sovereigns' choices of legal rules" and "resource allocations").

431 *See* Stacy & Dayton, *supra* note 31, at 258; Richman & Stuntz, *supra* note 3, at 610.

432 *See* Richman & Seo, *supra* note 255, at 7–8, 13; Richman & Stuntz, *supra* note 3, at 614.

433 *See* Richman & Stuntz, *supra* note 3, at 614.

434 A classic example is Papachristos et al., *supra* note 395.

Those critiques can include objections from scholars like Monica Bell and Tracey Meares, who have explained why too much enforcement or enforcement perceived as illegitimate can undermine public safety, particularly in disadvantaged communities.[435] Over the last two decades, federal authorities have reduced drug prosecutions and penalties, especially for crack cocaine, in the face of mounting evidence that they unequally punished Black Americans.[436]

Reformers also should focus on procedural and legal tools that incentivize federal enforcers' behavior. Reducing and increasing penalties is the big one.[437] Sentencing is probably the strongest signal federal actors—agents, prosecutors, and judges—receive about where to direct priorities. So although federal sentences will probably always exceed average state sentences, Congress and the U.S. Sentencing Commission can change which ones invite the toughest enforcement response.

Other overlooked policy levers shape federal priorities. For example, federal investigative agencies have internal case priorities. Because cases do not arise in a vacuum—agents bring them to prosecutors—where agencies direct resources can affect prosecutors' charging decisions, as the Dyer Act example shows. Within the Department of Justice, internal policies also affect behavior. The Obama administration successfully directed prosecutors to use drug mandatory minimums less often.[438]

And as scholars have increasingly realized elsewhere for criminal justice, the real action is in the states.[439] Federal authorities have little choice but to earn states' cooperation through persuasion and relationships. They do not control state law or state officers and cannot force states to help.[440] If local authorities want to stymie federal authorities, they can decline to share information, jail space, or task force officers with the federal government. They can refuse to turn over evidence, offenders, or information. They can prosecute first, which, under the *Petite* policy, would defeat most federal prosecutions.[441] Imposing coercive spending conditions, as the Trump administration tried

435 *See* authorities cited *supra* note 71.

436 *See generally* Jesselyn McCurdy, *The First Step Act Is Actually the "Next Step" After Fifteen Years of Successful Reforms to the Federal Criminal Justice System*, 41 CARDOZO L. REV. 189 (2019) (documenting that trend).

437 *See, e.g.*, Barkow, *supra* note 5, at 125; Beale, *supra* note 52, at 997–1001.

438 *See* Mona Lynch, Matt Barno & Marisa Omori, *Prosecutors, Court Communities, and Policy Change: The Impact of Internal DOJ Reforms on Federal Prosecutorial Practices*, 59 CRIMINOLOGY 480, 499 fig.2 (2021).

439 *See, e.g.*, PFAFF, *supra* note 424, at 32–33.

440 *See* Printz v. United States, 521 U.S. 898, 935 (1997).

441 *See* authorities cited *supra* note 147.

in immigration matters,[442] might work immediately but risks damaging partnerships that the federal system survives on. Being the unchallenged, plenary enforcer gives states control over where the justice system goes, and the feds tend to follow.[443]

Prosecutorial discretion is at the heart of federal adoption. That will always make critics nervous because it lacks precise limits or strong judicial review.[444] But the story of federal criminal enforcement is not one of boundless discretion or aggrandizing power. Real, workable restraints have operated. The task is to continue identifying where they exist and how to employ them effectively.

C. Some Practical Implications

What now? This Article cannot unspool every implication of a revised criminal federalism theory. But this Section offers some concrete proposals for each branch of government, focusing especially on counterintuitive proposals or ones that contradict conventional wisdom.

1. Congress

Congress—usually overfederalization's archvillain[445]—deserves credit for virtually never preempting state criminal law. Not even the federal statutes in *Arizona* contained express preemption clauses. Congress should continue that trend. It also should avoid using the spending power to coerce locals into helping,[446] as was the case with the Trump administration's immigration policy. State autonomy is a virtue in our federalism, and in the long run, criminal law works better when the feds don't burn relationships with the locals.

Critics typically urge Congress to give more money directly to states and stop passing so many criminal laws. Neither suggestion helps much. Funding is fine, but it will not solve the burdens of plenary enforcement. The number of laws has no effect on enforcement

442 *See* Gardner, *supra* note 39, at 76–79 (describing that policy).

443 *See* O'Hear, *supra* note 376, at 806–43 (describing state and local control over drug policy despite federal involvement).

444 Jeff Bellin has helpfully collected, and critiqued, the basic literature criticizing prosecutorial discretion. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 182–87 (2019).

445 *See* Simons, *supra* note 222, at 897 ("Blame for the federalization boom usually falls on Congress . . . .").

446 *See* Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 9 (2003) (urging Spending Clause limits).

anyway,[447] and, as scholars like Samuel Buell have argued, broad federal laws have unique virtues for a supplemental enforcer.[448]

Since the federal system is best used sparingly and, more importantly, effectively, Congress should try to calibrate penalties to reflect current crime problems and achieve actual crime reduction. The task is not easy; what causes crime to drop is one of the hardest empirical questions in policy. But a confluence of scholarship, policy critique, and real-world experience can offer insight.

Federal drug penalties increasingly seem like an unnecessary hangover from the crime wave of the late twentieth century. They are among the harshest in the system, and drug offenders make up the greatest proportion of federal prisoners.[449] The human costs are high. Realistically, the federal system is not going to win a war on drugs. The absolute numbers of federal cases are not enough to make a dent in the national, let alone international, drug trade.

Instead, federal drug prosecutions are mostly proxies for chronic crime, especially violence. But federal law is not well calibrated to emphasize violent offenders or true recidivists. The main driver in drug sentences, including mandatory minimums, is drug weight.[450] The relationship between weight and violence is, at best, debatable.[451] Drug weight makes sense to identify true kingpins or nodes of major leadership within drug organizations. Otherwise, evidence is mounting that drug offenses are not good predictors for recidivism and violence.[452]

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447 *See* Klein & Grobey, *supra* note 73, at 11–16.

448 *See* Buell, *supra* note 198, at 1526–53; *see also* John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 4 (1983) ("Historically, Congress has intended that the mail fraud statute evolve over time to reach novel forms of misconduct not contemplated by the legislature at the time the statute was enacted." (footnote omitted)).

449 MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2019, at 13 tbl.9, 14 fig.6 (2021).

450 *See* 21 U.S.C. § 841(b) (2018).

451 I know of no empirical evidence correlating drug quantities to violence. To the contrary, research has consistently found that drug violence concentrates around street-level and open-air dealing, where user quantities, not multikilo deliveries, are sold. *See* William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1814–18 (1998) (noting "[t]he violence and social injury that attends illegal street [drug] markets"); Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 275–76 & nn.98–100 (2006) (reporting research connecting homicide spikes to open-air street dealing); Jeffrey Fagan & Daniel Richman, *Understanding Recent Spikes and Longer Trends in American Murders*, 117 COLUM. L. REV. 1235, 1266 (2017) (describing how violence concentrates at street-level dealing); *see also* Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077, 1099–100 (2017) (describing "the violence at the trade's lowest levels").

452 *See* U.S. SENT'G COMM'N, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 9 (2021).

Federal weapons and violent offenders are most likely to have serious criminal histories and to recidivate, including violently.[453] Yet federal law—including penalty enhancements—punishes drug offenders more heavily and more often than violent weapons violators.[454]

Congress should reorient drug penalties toward violence and extreme recidivism. It should eliminate penalties based on weight except for a single "kingpin" statutory enhancement that imposes truly high drug-quantity requirements, which prosecutors would have to meet with proof beyond a reasonable doubt. Basic drug penalties should be reduced, both statutorily and in the Sentencing Guidelines, to fall below weapons and violence penalties. And enhancements should target offenders with many predicates, not just two, or prior violent convictions, not drugs.

Another, less obvious item for Congress's to-do list is to abandon the role of plenary enforcer, even in federal enclaves. Congress, to its credit, has embraced local rule in territories and the District of Columbia and has started giving tribes more criminal sovereignty. But the process is not complete. The federal government is increasingly taking over immigration enforcement along the southwest border, it retains significant authority to prosecute serious felonies in Indian Country, and it remains the exclusive enforcer on some military bases.

Being plenary is such a tiny slice of what the federal government does that it has never organized the basic capacity to do it. The states (or equivalent locals), for all their downsides, are better equipped to handle the day-to-day work of public safety. Tackling how to address American immigration policy, crime on military bases, and crime on reservations is a vastly larger project than this Article can resolve. But a few suggestions point the way.

For immigration, Congress (and courts, enforcers, and scholars) should tread carefully before preempting more state immigration-related crimes. Not all border states treat undocumented immigrants

453 *See* U.S. SENT'G COMM'N, THE CRIMINAL HISTORY OF FEDERAL OFFENDERS 5 (2018); U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010, at 32 fig.17, 33 tbl.6 (2021) [hereinafter U.S. SENT'G COMM'N, RECIDIVISM].

454 *Compare* 21 U.S.C. § 841(b) (2018), *with* 18 U.S.C. § 924 (2018). The principal penalty enhancement for weapons offenders is the Armed Career Criminal Act, which requires three qualifying drug or violent predicates and defines those predicates narrowly. 18 U.S.C. § 924(e) (2018). Few offenders qualify, and they tend to have serious, violent histories and high recidivism rates. *See* U.S. SENT'G COMM'N, RECIDIVISM, *supra* note 453, at 6, 7; U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 36 (2018). Drug offenders, however, can receive the career offender enhancement under the Sentencing Guidelines, which requires only two predicate drug or violent convictions and defines them more loosely. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2021).

badly or even support heavy-handed enforcement.[455] Not every instance of violating immigration law needs to "go federal," but that is where excluding the states could lead.[456]

Congress should give states concurrent jurisdiction over all military bases. Most criticisms of the military justice system focus on sexual assaults of service members.[457] But after the murder of a female soldier stationed at Ft. Hood, an independent review found that problems ran deeper: the U.S. Army did a poor job keeping soldiers safe and responding to crime.[458] The Army's investigative agency, the Criminal Investigation Division (CID), was grossly out of its depth; agents were inexperienced, undertrained, overburdened, and distracted by their duties as soldiers.[459] And that report considered cases involving soldiers, who are at least visible and important to military leadership. Civilians live and work on bases too. Journalists discovered, for example, that reports of juvenile-on-juvenile sexual assaults on base were basically shelved.[460] The cases fell through a gap: military courts lacked jurisdiction, and DOJ is not set up to handle juvenile matters well.[461]

These results should not be surprising. Military bases are missing a plenary enforcer. The Army tries to mimic police, social services, and courts, and it has tried to improve CID since the Ft. Hood review.[462] But its day job is fighting wars, and that will not change. Congress should invite the states in and fund local officers and prosecutors to cover bases.

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455 *See* Rodríguez, *supra* note 219, at 617–36 (demonstrating how states vary).

456 In fact, after *Prigg v. Pennsylvania* held that states could not enact procedural protections beyond what the Fugitive Slave Act provided, 41 U.S. (16 Pet.) 539, 612, 622–25 (1842), federal enforcers doubled down on increasing federal capacity to enforce the law, Richman, *supra* note 153 (manuscript at 119–22).

457 *See* Lolita C. Baldor, *Congress Set to Change Military Sexual Assault Prosecutions*, L.A. TIMES (Dec. 8, 2021, 3:22 PM), https://www.latimes.com/politics/story/2021–12-08/congress-set-to-change-military-sexual-assault-prosecutions/ [https://perma.cc/8TEP-NQPP] (describing a new law stripping military commanders of authority over sexual assault prosecutions and giving responsibility to prosecutors).

458 *See* FORT HOOD INDEP. REV. COMM., REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE ii–iii (2020).

459 *See id.* at 53–67.

460 *See* Justin Pritchard & Reese Dunklin, *U.S. Military Overlooks Sex Abuse Among Service Members' Kids*, ARMY TIMES (Mar. 13, 2018), https://www.armytimes.com/news/pentagon-congress/2018/03/13/ap-investigation-us-military-overlooks-sex-abuse-among-kids/ [https://perma.cc/YA67-HQVC].

461 *See id.*

462 *See* U.S. Army Pub. Affs., *Army Announces CID Restructure and SHARP Policy Improvements*, U.S. ARMY (May 6, 2021), https://www.army.mil/article/246054/army_announces_cid_restructure_and_sharp_policy_improvements/ [https://perma.cc/6HE3-4V93].

Indian Country poses a different challenge. Scholars generally agree that reservations lack effective, credible justice systems,[463] with horrifying rates of crime and violence, particularly against indigenous women and children.[464] Centuries of genocide, discrimination, and government exclusion are surely major factors. But Indian Country justice systems also lack a workable structure. Criminal jurisdiction is an illogical patchwork of federal, state, and tribal enforcement that leaves gaps and leads to breakdowns.[465] That issue has taken greater prominence since *McGirt v. Oklahoma* returned most of eastern Oklahoma to tribal land.[466] The Court limited *McGirt* by extending state jurisdiction over some crimes on tribal lands in *Oklahoma v. Castro-Huerta*,[467] but the full ramifications remain to play out.

The point here is not to take a position on the hard question about how to effectively provide safety and justice to tribal members and residents. But one option—let the federal system take over—should be off the table. The federal system is not an effective alternative to a plenary local enforcer, particularly where, as Kevin Washburn has pointed out, the federal "cavalry" arriving has a distinctly frightening connotation.[468] Residents deserve a real plenary enforcer.

2. Executive Officials

This is not another article urging, as some scholars have, more robust prosecutorial guidelines.[469] The federal system already has guidelines governing federal adoption,[470] but they are broad and flexible because they must coherently apply across all cases, localities, and crime trends.[471] They are also unenforceable. Even if they became more specific or enforceable, experience federally and elsewhere

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463 *See, e.g.*, Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 729–41 (2006) (describing why federal prosecutors are ill suited for Indian Country cases).

464 Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1566–69, 1574–76, 1582–83 (2016) (concluding that in Indian Country, many people, especially women and children, lack "basic public safety").

465 *See* Bill Denke, Bruce Lee, Matthew Lysakowski & Jason O'Neal, *Jurisdictional Solutions in Indian Country to Support Missing or Murdered Indigenous People Efforts*, 69 DEP'T JUST. J. FED. L. & PRAC. 71, 73–74 (2021); Riley, *supra* note 464, at 1576–85; Washburn, *supra* note 463, at 715–18.

466 140 S. Ct. 2452, 2459 (2020).

467 142 S. Ct. 2486, 2491 (2022).

468 Washburn, *supra* note 463, at 735, 735–38.

469 *See, e.g.*, Clymer, *supra* note 5, at 708; Simons, *supra* note 222, at 963.

470 U.S. DEP'T OF JUST., *supra* note 147 §§ 9–2.031, 9–27.200.

471 *See* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 423 (2009).

suggests that prosecutorial guidelines do not provide much constraint.[472] Vague federal guidelines simply do not explain why federal prosecutors have consistently prosecuted fewer than five percent of felonies nationwide for a century.[473] The point is to harness *those* influences.

DOJ could make one major change, quickly, that would have a large effect: stop measuring agents, prosecutors, and U.S. Attorneys' Offices by their case numbers.[474] The ninety-three U.S. attorneys compete for resources from Washington, and one way to win attention, money, and staff is by increasing case numbers.[475] Other actors in the federal system face similar pressure: investigative agencies count employees' arrest stats, and some districts measure their line attorneys by case statistics too.

The FBI's "Quality over Quantity" program killed Dyer Act cases and successfully reduced reliance on stats in the 1970s.[476] DOJ could repeat that effort across components. It should develop metrics to assess districts' quality and detect when they are chasing stats, perhaps by comparing similar districts and using local crime data. Main Justice should not reward outlier districts with more resources but counsel them to pull back and refocus on quality. Though U.S. attorneys retain considerable control over their attorney staff, Main Justice should emphasize retaining and promoting attorneys working quality cases.

Investigative agencies should not use arrest numbers to measure agent performance. Measures should include what happened after arrest, since shoddy work—sloppy evidence gathering, latent case weaknesses, poor trial preparation—often appears only in the crucible of trial court. Agencies also might solicit reviews from attorneys and other law enforcement agencies that their agents partner with.

Agents build cases.[477] DOJ and federal investigative agencies therefore should consciously hire, train, and promote agents who can deliver quality work in the areas federal policy wants to emphasize. The FBI did just that after September 11, emphasizing counterintelligence and linguistic expertise.[478] One looming challenge is hiring

472 Evidence that prosecutorial guidelines meaningfully change behavior is weak. *See* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 853–55 (2018) (reviewing PFAFF, *supra* note 424).

473 *See supra* note 98 and accompanying text.

474 *See* Simons, *supra* note 222, at 932–33.

475 *Id.*; Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 775 (2003).

476 *See* Richman & Stuntz, *supra* note 3, at 614; Richman & Seo, *supra* note 255, at 54.

477 Federal prosecutors often collaborate with agents during investigations, but prosecutors simply cannot do most of the legwork. Richman, *supra* note 475, at 751, 758.

478 *See* Robert S. Mueller, III, Dir., Fed. Bureau of Investigation, Remarks Before the House Appropriations Subcommittee on Science, the Departments of State, Justice and

agents with technical expertise. People today live their lives on cell phones, social media, and the internet, and criminal activity—and evidence of it—therefore will increasingly occur on tech platforms.[479] Agencies need more techies, and they might need to invest in higher salaries to compete for tech talent.[480]

Quality should also shape how the federal government conceives and discusses crime initiatives. The feds are not going to win a war on much of anything—not drugs, not immigration, and certainly not crime. Federal leaders can draw national attention to crime problems, and federal actors can assist local communities, but trying to solve anything merely by ramping up raw federal numbers is destined to fail.

Instead, like Congress, executive leaders should assess, candidly, the impact of federal efforts, positive and negative. For example, just as Congress should revisit drug sentencing, DOJ should reconsider whether the federal drug docket is achieving its primary aim, curbing chronic street crime and violence. Whether or not the federal increase in drug prosecutions in the 1980s or 1990s was a good idea, it had a logic. The drug trade was driving a horrifying homicide surge, and federal drug prosecutions disrupted organizations and removed shooters (and potential victims) from the violence.[481]

That logic might not hold today. Though homicides and, to some degree, violent crimes are rising again,[482] drugs do not appear to be

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Commerce, and Related Agencies (Sept. 14, 2006), https://archives.fbi.gov/archives/news/testimony/the-fbi-transformation-since-2001/ [https://perma.cc/C9U9-V3R8]. Not everyone agrees that the effort succeeded. *See* Bruce Falconer, *The FBI's Least Wanted*, MOTHER JONES (May/June 2009), https://www.motherjones.com/politics/2009/05/fbis-least-wanted/ [https://perma.cc/9N6B-MNN6].

479 *E.g.*, Devlin Barrett, *Poison Pill: How Fentanyl Killed a 17-Year-Old*, WASH. POST (Nov. 30, 2022, 8:00 AM), https://www.washingtonpost.com/national-security/2022/11/30/fentanyl-fake-pills-social-media/ [https://perma.cc/6PDR-V7A2] (reporting that people increasingly buy drugs on social media and criticizing tech companies for not doing more to stop it). The FBI's standoff with Apple in 2016 over accessing a terrorism suspect's cell phone contents is a high-profile example. *See* Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 102–03, 112–22 (2018) (describing the standoff and how tech platforms like Apple and Facebook increasingly control information that law enforcement wants to access).

480 The federal government generally struggles to develop and retain tech talent. *See* Letter from Candice N. Wright, Dir., Sci., Tech. Assessment, & Analytics, Taka Ariga, Chief Data Scientist & Dir. of Innovation Lab & David Hinchman, Acting Dir., Info. Tech. & Cybersecurity, Gov't Accountability Off., to Kirsten Gillibrand, Chair, Subcomm. on Pers., Comm. on Armed Servs., U.S. Senate 10 (Nov. 19, 2021), https://www.gao.gov/products/gao-22-105388/ [https://perma.cc/76KC-JBBD]; Jeff Mazur, *Gen Z Doesn't Want to Work for the Government*, GOV'T EXEC. (May 14, 2020), https://www.govexec.com/management/2020/05/gen-z-doesnt-want-work-government/165362/ [https://perma.cc/TW4M-EJCT].

481 *See* Fagan & Richman, *supra* note 451, at 1261–67.

482 *See supra* note 27 and accompanying text.

driving the trend. The opioid epidemic does not seem to have generated as many homicides[483] (overdoses are another, tragic, story). Instead, anecdotal reports suggest that people are increasingly using guns to settle personal disputes.[484] If true, prosecuting drug organizations will not efficiently target the source of violence. Nor will it identify shooters well, especially since, as subsection IV.C.1 explained, drug sentencing does not emphasize violence.

3. Courts

Courts can best check federal growth by leaving state law alone. Federal and state criminal law overlap often and quite effectively; preemption is rarely necessary. And before invalidating state crimes, courts must understand the real enforcement consequences of leaving the feds standing alone in an area of criminal law.

Courts also shape prosecutorial behavior through sentencing. Judges can signal dissatisfaction by using their discretion to vary from the Sentencing Guidelines,[485] but that has limits. The Sentencing Commission does aggregate sentencing data to identify when federal judges, at least, think the Commission is getting it wrong. For DOJ, however, judges' sentencing practices only affect the federal prosecutors in their districts, and other judges in the same district might sentence differently, reducing incentives to change charging choices.

But how judges interpret sentencing law across cases *can* shape prosecutor behavior. For example, as I will explore further in another article,[486] federal law uses violent convictions to select and punish offenders. Empirical evidence suggests that logic has foundation; violent convictions predict dangerousness reasonably well, better than drugs.[487] Yet caselaw deciding what counts as "violent" is "chaos."[488] Because drug offenses remain easier to prove, courts have incented prosecutors to focus increasingly on drug offenders.

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483 *See* Fagan & Richman, *supra* note 451, at 1267–70.

484 *E.g.*, Peter Hermann, Katie Mettler, Dana Hedgpeth & John D. Harden, *Homicides Soar in District, Maryland Suburbs in 2021*, WASH. POST (Dec. 31, 2021, 6:00 PM), https://www.washingtonpost.com/dc-md-va/2021/12/31/2021-homicides-dc-rising/ [https://perma.cc/PTZ8-NYU8]; Mara H. Gottfried, *In Record Year for St. Paul Homicides, 36 Killed, Many in Domestic Violence or Minor Disputes*, TWIN CITIES PIONEER PRESS (Sept. 12, 2022, 8:04 AM), https://www.twincities.com/2021/12/25/record-year-for-st-paul-homicides-35-killed-many-in-domestic-violence-or-minor-disputes/ [https://perma.cc/46HG-NLK9].

485 *See* United States v. Booker, 543 U.S. 220, 227, 233 (2005).

486 Erin C. Blondel, Crimes of Violence and Violent Crime (Feb. 27, 2023) (unpublished manuscript) (on file with author).

487 *See supra* notes 452–54 and accompanying text.

488 Barkow, *supra* note 309, at 202.

Judges probably are bristling at the harsh mandatory minimums that violent convictions often trigger,[489] an understandable reaction.[490] But this Article has shown that the core question is where to direct federal enforcement. Judges should appreciate that as they interpret sentencing law, they are signaling who should go federal, and those signals might not be the ones they intend.

4. The States

State and local officials participate extensively in federal enforcement. Agencies volunteer tens of thousands of officers to serve as cross-sworn federal task force officers[491] and local prosecutors to bring local cases federal as Special Assistant United States Attorneys.[492] Countless other locals participate informally, through networks that the feds rely on to build, investigate, and prosecute cases. States have a real voice in federal cases on the ground.

Yet little state or local law structures that relationship. One reason cooperative criminal federalism alarms critics is that it often leaves decisionmaking to low-level bureaucrats[493] or, in the case of criminal enforcement, police officers and prosecutors. If state and local officials or legislatures do not like the results, as in the case of heavy-handed immigration, they can and should object in statute or directives to officers. If reformers object, they should advocate for those changes. The states have the power of the cooperator; they should use it.

CONCLUSION

Criminal federalism is doing well. The states, not the federal government, serve as America's front line, providing public safety and enforcing criminal law. The federal government has never challenged that role; instead, it has developed its own system that capitalizes on its supplemental role. It is cooperative federalism in which the governments meet as equals and have figured out how to fit together rather than step on each other's toes.

Federal restraints are important. But they come not from policing the boundary between "local" and "federal" but embracing how those

489 *See* Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547, 564–66 (2001).

490 *See* Luna & Cassell, *supra* note 309, at 1, 1–5 & nn.1–16 (collecting criticisms of federal mandatory-minimum sentencing).

491 *See* Harmon, *supra* note 5, at 944–48 (describing the many ways that local officers can become federally deputized task force officers).

492 *See* Partlett, *supra* note 258, at 1677–78.

493 *See* Fahey, *supra* note 415, at 1077–78 (drawing attention to midlevel bureaucrats who shape intergovernmental data sharing outside major legal oversight).

two systems overlap. They come from letting the states do their job, providing public safety, and holding the feds to what they do well: helping, but never replacing, the states.