CRIMINAL LAW AND COOPERATIVE FEDERALISM

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ABSTRACT

Cooperative federalism is now commonplace in the prosecution of street-level drug and gun crime in the United States. This Article argues that this cooperative federalism presents new—and largely unexplored—constitutional problems. In particular, unlike the civil regulatory context, cooperation threatens the constitutional rights of individual criminal defendants by allowing executives to circumvent local juries, judges, and laws. Moreover, this cooperation also potentially weakens the ability of states to function as political entities that can hold their law enforcement officers accountable in an area of traditional state police power. These problems suggest an important larger project exploring the solutions to these problems of cooperative federalism in criminal law.

INTRODUCTION

In the early morning hours of April 21, 2003, Detroit police officers stopped Spence Gray's car.[1] Police found a gun in Gray's pocket and arrested him.[2] Nine days later, Gray appeared in a state court "pre-examination" hearing.[3] The judge informed him that he faced three state firearm possession charges.[4] The state prosecutor offered him a two-year plea deal.[5] If he refused to plead guilty, however, the prosecutor told Gray that he would not face a trial under Michigan law or in front of a local jury.[6]

Instead, the prosecutor told Gray that the federal government would immediately take the case.[7] The state court judge encouraged Gray to take the deal, explaining that to avoid harsh federal penalties, he only had to serve "two years here [in the state system]."[8] The judge explained to Gray that in federal courts "the facts of the case aren't tried any differently. It's just the severity level of the

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1. United States v. Gray, 382 F. Supp. 2d 898, 899 (E.D. Mich. 2005).
2. *Id.*
3. *Id.*
4. *Id.* at 899–900.
5. *Id.* at 900.
6. *Id.*
7. *Id.* (describing how the federal government had already charged him with a federal gun crime before his "pre-examination" hearing).
8. *Id.*

penalty."[9] Gray refused and was transferred to federal court where he faced five to seven years in federal prison.

Mr. Gray's federal prosecution was the product of the federal government's Project Safe Neighborhoods program, a funding program that seeks to encourage an "unprecedented partnership" between city and federal executive-branch authorities in the enforcement of street-level gun and drug crimes.[10] These formalized cooperative programs have transformed the federal criminal law docket, allowing the federal government to enforce the growing number of street-level gun and drug crimes in the federal code.[11]

This kind of cooperative prosecution has been justified as an effective way to decrease urban crime rates by increasing criminal penalties for small-scale, gun and drug crimes that violate both state and federal law.[12] In fact, the overlapping criminal jurisdiction allows state and local executive branch enforcement officials to "leverage" federal law to avoid state-level criminal law and procedures which they perceive to be too lenient. They do so either through federal prosecution or threats to prosecute followed by "strong" plea deals at the state level.[13]

This kind of "leverage" is by design. An implementation guide for Project Safe Neighborhoods describes how the "partnership" is geared toward yielding the most "effective and vigorous prosecution tools available."[14] The guide explains how federal criminal law offers particularly "effective" tools, including more restrictive pre-trial bail laws, longer sentences, and suppression law that is "more favorable than controlling state law."[15] One of the key ways to leverage these more "effective" federal policies, the report concludes, is to use "the possibility of severe federal sanctions . . . as an incentive for a defendant to accept a strong state plea bargain."[16]

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9. *Id.*

10. U.S. DEP'T OF JUSTICE, PROJECT SAFE NEIGHBORHOODS: AMERICA'S NETWORK AGAINST GUN VIOLENCE TOOL KIT 1-5 (2001), https://www.bja.gov/programs/psn/psn_toolkit.pdf [hereinafter PROJECT SAFE NEIGHBORHOODS TOOL KIT]. By "street-level crime," I mean purely local gun and drug possession crimes.

11. The problem with the federalization of criminal law therefore is not the large numbers of federal statutes criminalizing street-level activity but instead the way that these statutes are used in cooperative agreements. In reality, federal law enforcement agencies like the FBI and ATF do not have the resources or the capability to engage in street-level enforcement. Thus, cooperation with the state and local police forces that do are critical for the federal government in actually enforcing many of the crimes in the federal code. *See* Daniel C. Richman, *"Project Exile" and the Allocation of Federal Enforcement Authority*, 43 ARIZ. L. REV. 369, 378 (2001).

12. *Id.* at 370–71 (discussing justifications for cooperative prosecution schemes).

13. *See* John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 702–03 (1999) (describing how cooperative arrangements between state, local, and federal authorities are aimed at circumventing the "disadvantages of state law" and the "political, racial, and/or ideological position" of state juries).

14. PROJECT SAFE NEIGHBORHOODS TOOL KIT, *supra* note 10, at 2-16.

15. *Id.* at 2-17.

16. *Id.*

Federal executive officials have argued that these cooperative prosecution agreements are a good example of the benefits of cooperative federalism.[17] Although it is disputed, they argue that harsher sentencing has reduced crime and increased deterrence. Citing anecdotal evidence that offenders now are changing their behavior, it has been largely seen as a common-sense solution to persistent crime problems. This success had led to its growing importance in American criminal law enforcement.

Yet federal trial courts have expressed concerns that cooperative programs like Project Safe Neighborhoods concentrate too much power in the hands of executive branch enforcement officials and erode individual rights by circumventing defendant-friendly state and local laws on street crime. A district court in Virginia argued that a predecessor cooperative program to Project Safe Neighborhoods—called Project Exile—raises "serious questions respecting basic principles of federalism."[18] In particular, it argued that Project Exile "lowers citizens' expectations of [Virginia's] public servants, it insulates those officials from constructive criticism, and it dissipates political pressure that citizens might otherwise exert to improve the performance of local law enforcement."[19] Another court has argued that a key element of these cooperative programs—the use of local district attorneys in federal court as "Special United States Attorneys"—threatens the "underpinning of federalism."[20] The court went on to argue that "it was precisely such aggregations of power that the founding fathers sought to avoid when they established a federal system of government via the Constitution."[21]

These concerns, however, have yielded few tangible remedies for criminal defendants.[22] This Article will explore whether recent developments in Tenth Amendment jurisprudence offer potential ways for courts to redress these concerns. In 2011, the Court held that criminal defendants—and not just states—have standing to raise claims under the Tenth Amendment.[23] Underlying this holding was the notion that the Tenth Amendment's guarantee that States "function as political entities in their own right" is critical in ensuring individual liberty.[24] The Court explained that the Tenth Amendment did this by ensuring clear political

17. *See* Andrew V. Papachristos et al., *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223, 226 (2007); U.S. DEP'T OF JUSTICE, PROJECT SAFE NEIGHBORHOODS: STRATEGIC INTERVENTIONS, MIDDLE DISTRICT OF ALABAMA: CASE STUDY 5 i (2007), https://www.bja.gov/publications/md_alabama.pdf; Press Release, U.S. Dep't of Justice, U.S. Attorney Charles E. Peeler Announces Progress in Making Georgia Communities Safer Through Project Safe Neighborhoods (2018), https://www.justice.gov/usao-mdga/pr/us-attorney-charles-e-peeler-announces-progress-making-georgia-communities-safer-0.

18. United States v. Jones, 36 F. Supp. 2d 304, 313 (E.D. Va. 1999).

19. *Id.* at 313–14.

20. United States v. Belcher, 762 F. Supp. 666, 669, 671 (W.D. Va. 1991).

21. *Id.* at 671.

22. *See infra* Section II.

23. Bond v. United States, 564 U.S. 211, 222 (2011). So far, most individual Tenth Amendment challenges to criminal legislation have failed. *See, e.g.*, United States v. Felts, 674 F.3d 599 (6th Cir. 2012) (rejecting a Tenth Amendment commandeering challenge to the Sex Offender Registration and Notification Act).

24. *Bond*, 564 U.S. at 221.

accountability and allowing the "[s]tates to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."[25] Finally, it reasoned that the Tenth Amendment also protected individuals by preventing Congress from *shifting the costs of regulation to the States* and therefore not bearing the financial costs of the expansion in regulation.[26]

Cooperative prosecution programs, like Project Safe Neighborhoods, implicate these very concerns. In particular, these cooperative programs undermine the rights of criminal defendants by allowing executive collusion across the jurisdictional boundary of federalism. This cooperation in turn effectively robs state and local communities of their "voice" in holding their executive officials politically accountable in the enforcement of criminal laws traditionally seen to be within the police power of the states (and outside the federal interest).[27] Finally, by allowing the federal government to rely on state and local police, this cooperation also allows the federal government to avoid the costs of regulating this kind of conduct.

These constitutional concerns, however, are unlikely to yield effective judicial challenges to prosecutions under cooperative prosecution. They do, however, help to suggest strong arguments for city-based political mobilization. In particular, they suggest compelling reasons for local communities to reassert political control over their local executive branch officials in the prosecution of street crime. This increased control can in turn allow them to create different—and potentially more effective and locally-tailored—strategies for combatting street crime.[28]

This Article is divided into five parts. Section I describes the overlapping federal and state regulation of street crime. Section II describes the way in which this overlapping criminal law scheme has led to cooperation. It examines the Project Safe Neighborhoods program and its key predecessor program (Project Exile) to understand how state and local officials seek to explicitly circumvent state-level criminal law policy and institutional processes. Section III describes how courts have criticized cooperative programs like Project Safe Neighborhoods for undermining federalism and threatening individual rights but have not been able to give individual defendants remedies. Section IV discusses the Supreme Court's recent cases on cooperative federalism and the Tenth Amendment. Section V describes how the doctrine has recently been applied in the criminal context. It shows that courts—in response to Tenth Amendment challenges to cooperative prosecution—have few

25. *Id.* The Court continued: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Id.* at 222

26. *Id.*

27. Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 L, & SOC. INQUIRY 239, 265 (2005).

28. *See* Saki Knafo, *Change of Habit: How Seattle Cops Fought An Addiction to Locking up Drug Users*, HUFFINGTON POST (Aug. 28, 2014), https://www.huffingtonpost.com/2014/08/28/seattle-lead-program_n_5697660.html (describing the Law Enforcement Assisted Diversion).

ways of countering this cooperation. This Article argues that these concerns, however, provide strong reasons supporting city-based mobilization against cooperation with the federal government.

I. OVERLAPPING CRIMINAL REGULATION OF STREET CRIME

In modern-day America, most street crime—defined here as possession or trafficking of crimes involving guns or drugs—is criminalized at both the state and federal level. This kind of crime was once considered the sole province of the states. Since the "tough on crime" era in the 1990s, however, the federal government has passed a number of statutes criminalizing street-level gun and drug possession and trafficking crimes. This led to a massive increase in federal criminal prosecutions—and the overall jail population—during this time.[29]

The statutes at the center of this federal street-crime regime are those punishing gun and drug possession or trafficking.[30] Prosecutions under these statutes make up almost half of the federal criminal docket.[31] In 2017, drug possession and trafficking crimes comprised more than 30% of the federal criminal docket; gun possession crimes comprised more than 12% of the docket.[32] By contrast, fraud, non-fraud white collar crime, and racketeering crimes made up less than 15% of the docket.[33]

A. *Doctrinal Basis*

Courts have upheld this growing federal involvement in street crime under the interstate commerce clause. The key case was a 1977 Supreme Court case. In *Scarborough v. United States*,[34] the Court held that to obtain a conviction under 18 U.S.C. App. § 1202(a), a provision outlawing the possession of guns by convicted felons[35] that is now one of the key gun offenses in the federal code (18 U.S.C. § 922 (g)), the Government need only prove that "the firearm possessed by the convicted felon traveled *at some time* in interstate commerce."[36] Given that virtually every firearm has traveled in commerce at some point, the "in commerce" element has become a mere formality in most federal firearms trials. For instance, the evidentiary rules for proving that a gun traveled in interstate commerce are minimal. An expert ATF Agent can rely on hearsay evidence as to identify the place of

29. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 14 (1998).

30. *See, e.g.*, 18 U.S.C. §§ 922(g)(1), 924(c); (2012); 21 U.S.C. § 841(a)(1) (2012).

31. Glenn R. Schmitt & Cassandra Syckes, *Overview of Federal Criminal Cases Fiscal Year 2017*, U.S. SENT'G COMM'N 2 (June 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf. In 2017, these kind of drug and gun possession/trafficking crimes made up 42.1% of the federal criminal docket. *Id.*

32. *Id.*

33. *Id.*

34. 431 U.S. 563 (1977).

35. *See id.* at 564 n.1 (providing full text of 18 U.S.C. App. § 1202(a)).

36. *Id.* at 568 (emphasis added).

manufacturing, when his opinion is based on his experience, personal knowledge, and examination, and relying heavily on firearms stamps.[37] This expansive reasoning has extended to drug crimes as well, as drugs also frequently travel in interstate commerce.

Some judges have argued that the *Scarborough* standard is far too lenient.[38] In *United States v. Alderman*, the Ninth Circuit considered the constitutionality of a federal statute criminalizing the possession of body armor.[39] The Ninth Circuit cited cases where other Circuits had questioned the viability of *Scarborough*'s incredibly broad "in commerce" definition after the "New Federalism" cases of the 1990s.[40] But the Ninth Circuit concluded as the other Circuits did that "[u]ntil the Supreme Court tells us otherwise . . . we [must] follow Scarborough unwaveringly."[41]

The *Alderman* case was ultimately denied certiorari. Dissenting from his denial of certiorari in *Alderman*, Justice Thomas (joined by Justice Scalia) complained that:

> The Ninth Circuit's interpretation of *Scarborough* seems to permit Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines. Congress arguably could outlaw "the theft of a Hershey kiss from a corner store in Youngstown, Ohio, by a neighborhood juvenile on the basis that the candy once traveled . . . to the store from Hershey, Pennsylvania." *United States v. Bishop*, 66 F.3d 569, 596 (CA3 1995) (Becker, J., concurring in part and dissenting in part). The Government actually conceded at oral argument in the Ninth Circuit that Congress could ban possession of french fries that have been offered for sale in interstate commerce.[42]

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37. *See* Hollon v. United States, No. 92-00110, 1994 WL 43396, at *4 (6th Cir. Feb. 11, 1994); *see also* United States v. Vasser, 163 F. App'x 374, 376 (6th Cir. 2006) (holding an ATF Agent, properly qualified by experience, specialized training in interstate nexus identification and prior testimony as an expert in interstate nexus, may testify as to where a firearm was manufactured and offer his opinion whether it had traveled in interstate commerce, as "technical or specialized knowledge" which would assist the jury's understanding of a concept (interstate nexus) not within the expertise of an average juror, and determining a fact in issue); United States v. Miller, 59 F. App'x 81, 83 (6th Cir. 2003) (holding expert testimony by an ATF Agent sufficient where the ATF Agent testified the markings on the firearm indicated it was manufactured outside the United States and so had traveled in interstate commerce and that from his personal knowledge the firearm was not manufactured in the state of possession); United States v. Vincent, 20 F.3d 229, 236 (6th Cir. 1994) (holding that testimony of an ATF Agent who through personal knowledge knows the place of manufacture of the firearm and who is available for cross examination, is not hearsay).

38. *See, e.g.*, United States v. Kuban, 94 F.3d 971, 979 (5th Cir. 1996) (DeMoss, J., dissenting) ("I would hold that the 'affecting commerce' mantra of *Scarborough* has been changed by *Lopez*'s requirement of a substantial affect on commerce and *Scarborough*'s 'minimal nexus' can no longer satisfy *Lopez*'s requirement that the regulated activity must exert a substantial economic effect on interstate commerce.").

39. United States v. Alderman, 565 F.3d 641 (9th Cir. 2009). The relevant statute makes it unlawful for a person convicted of a felony involving a "crime of violence" to possess body armor. 18 U.S.C. § 931 (2012) (criminalizing the possession of body armor by felons as of Nov. 2, 2002).

40. *See, e.g.*, Symposium, *The New Federalism After* United States v. Lopez, 46 CASE W. L. REV. 631 (1996).

41. *Alderman*, 565 F.3d at 648 (internal quotation marks and citations omitted).

42. Alderman v. United States, 131 S. Ct. 700, 703 (2011) (Thomas, J., dissenting).

Yet, this broad interpretation of the scope of the federal government's power to criminally regulate gun and drug crime has proven stable. The extent of judicial deference to this broad understanding of national criminal power is demonstrated in the so-called New Federalism cases of the 1990s. The New Federalism cases were trumpeted as a judicial move that would limit the expansion of federal criminal commerce clause power. These cases, however, did very little to slow the expansion of federal power into what were once considered local and non-economic activities.

The Court was very careful to limit the scope of its holding in these cases. For instance, in *Lopez*, Chief Justice Rehnquist recounts the history of Commerce Clause jurisprudence and makes it clear that the opinion is not going to depart too far from case law.[43] Justices Kennedy and O'Connor argue that courts should not block national power too broadly as the "one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process."[44]

Furthermore, the Court was careful to ensure that its holding would not weaken the power of the federal government to criminally regulate vast swaths of conduct. The central holding of *Lopez* was that Congress could regulate purely local, non-economic activity (such as gun possession) if the federal statute had a jurisdictional element, preserving a "case-by-case inquiry" that the activity "affects interstate commerce."[45] Yet this inquiry has been so easy as to create little to no barrier to federal regulation: lower courts have relied on a "minimal nexus" standard that is so low virtually every case falls under federal jurisdiction.[46]

As the scope of the federal government's power over criminal conduct has expanded, the Court held that these new federal criminal laws regulating street crime do not preempt state laws. According to the Supreme Court, the general rule of preemption is that "State laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution'" are invalid under the Supremacy Clause of the constitution.[47] But the Supreme Court has provided a large exception to this clear standard: there is a strong presumption against preemption when Congress legislates in a field that the States have traditionally occupied. This presumption is rooted in the concept of federalism—specifically, that the constitutional design favors an ongoing role for the States in areas traditionally regulated by them, absent a clear conflict with federal law or a statement from Congress to

43. United States v. Lopez, 514 U.S. 549, 552–59 (1995).

44. *Id.* at 577 (Kennedy, J. & O'Connor, J., concurring).

45. *Id.* at 561 (majority opinion). Congress re-enacted the same law that was struck down in L*opez* by simply adding in a jurisdictional element. United States v. Danks, 221 F.3d 1037, 1038–39 (8th Cir. 1999).

46. *See* Scarborough v. United States, 431 U.S. 563, 577 (1977). For the practice of the lower courts, see Barbara Taylor, *Close Enough for Government Work: Proving Minimal Nexus in a Federal Firearms Conviction:* United States v. Cory, 56 MAINE L. REV. 187 (2004).

47. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (quoting Gibbons v. Odgen, 22 U.S. 1 (1824)).

the contrary.[48] In this sense, the presumption bears strong resemblance to the "clear statement" rules in related areas.

In the criminal context, this exception to the general rule has meant that the federal government's regulation of street crime has not preempted, but instead overlapped, with state law. The Court has explained that "we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress."[49] One of the few examples of a state criminal law being preempted was found in case where federal interest was "so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject."[50] Drug and gun crimes, by contrast, are exactly the kind of laws that do not represent a strong federal interest; they are therefore never preempted. This approach has largely been supported by scholars as an important "safeguard" of federalism.[51] As we will see, however, one of the practical effects of this failure to preempt is the opposite: to allow executive agents to undermine a safeguard of federalism by circumventing laws and protections passed by state legislatures and exercised by local juries.

B. Harsh Federal Law

While state and federal law now cover similar conduct, the state and federal criminal law regimes are radically different. Generally, federal criminal law is harsher and offers fewer protections to criminal defendants than state law.[52]

First, states provide criminal defendants with far more constitutional protections. State supreme courts now regularly provide more protection to defendants under state constitutional law than the Supreme Court has under the United States Constitution.[53] For example, many state supreme courts have adopted more stringent versions of the exclusionary rule and Fourth Amendment protections against search and seizure.[54]

Second, legislatively determined procedural rules are also more pro-defendant in state venues. The power of the grand jury exemplifies this: "A federal grand jury

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48. Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2087–97 (2000).

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

50. Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956) (citing *Rice*, 331 U.S. at 230).

51. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1429 (2001) ("By requiring the statute to be clear in this respect, the presumption ensures that Congress and the President—rather than politically unaccountable judges—make the crucial decision to preempt state law through constitutionally prescribed lawmaking procedures designed to safeguard federalism."). Of course, not all have supported this approach. *See, e.g.*, Dinh, *supra* note 48.

52. *See generally* Donald E. Wilkes Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); EMILY ZACKLIN, LOOKING FOR RIGHTS IN THE ALL THE WRONG PLACES (2013) (describing how states have traditionally been the areas in which rights have been protected).

53. *See* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV 1141 (1984).

54. *Id.* at 1184.

investigation may be commenced any time a prosecutor chooses."[55] In many states, grand juries must operate under rules of evidence and cannot, for instance, cannot be presented with hearsay evidence.[56] Federal grand juries, however, are not required to and can, for instance, deliver an indictment based solely on hearsay when most state grand juries cannot.[57] Furthermore, prosecutors can grant greater immunity to those who testify in front of federal grand juries in comparison with state ones.[58]

Third, state evidentiary rules are stricter than federal ones.[59] For instance, in many states, a defendant cannot be convicted based on the uncorroborated evidence of an accomplice.[60] In federal court, a defendant can be convicted on such evidence.[61] Many states also rely on less flexible standards by which to evaluate the reliability of an informant's tip in assessing probable cause.[62] Finally, the federal system provides for a "good faith" exception to the warrant requirement that many states do not.[63]

Fourth, state juries are less likely to convict than federal juries. This stems from the nature of the jury pool. State and city juries are frequently drawn from smaller and urban areas that include more minorities. They therefore include a population that has less trust for police and is more sensitive to the potential problems of harsh penalties and mass incarceration. By contrast, federal juries are drawn from much larger districts, which include a whiter and more suburban population.[64] These jurors are far more likely to want harsh penalties and to convict criminal defendants.[65]

Finally, the federal criminal law sentencing regime is far harsher than state ones.[66] This is particularly true for the kinds of gun and drug possession crimes that are the subject of cooperative agreements. An individual charged with

55. John C. Jeffries, Jr. & Honorable John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1108 (1995). "A formal allegation that a crime has occurred is not required; an anonymous tip or rumor may suffice. Indeed, an investigation may be commenced simply to provide assurance that the law has *not* been violated." *Id*.

56. *Id*. at 1111.

57. *Id*. at 1109.

58. *Id*. at 1111.

59. *See id*. at 1108–17 (justifying why federal grand juries have far more powers).

60. N.Y. CRIM. PROC. LAW. § 60.22 (McKinney 1989).

61. *See also* Jon O. Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L. REV. 979, 999 (1993) (arguing that courts do not take seriously their obligation to assess sufficiency of evidence in light of the 'reasonable doubt' standard in conspiracy cases).

62. Michael J. Gorman, *Survey: State Search and Seizure Analogues*, 77 MISS. L. J. 417, 420–57 (2007) (identifying Alaska, Massachusetts, New Mexico, New York, and Tennessee).

63. *See id*. at 424–53 (identifying in this category Connecticut, New Jersey, New Mexico, Georgia, North Carolina, and Pennsylvania).

64. *See* Richman, *supra* note 11, at 382; *see also* United States v. Jones, 36 F. Supp. 2d 304, 307–08 (E.D. Va. 1999).

65. For a study on conviction likelihood, see Shamena Anwar et. al, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. OF ECON. 2, 1017–55 (2012), https://academic.oup.com/qje/article/127/2/1017/1826107.

66. Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, 21 CRIM. JUST. 16, 17 (2006).

trafficking fifty grams of methamphetamine would face a minimum sentence of seventy months and a maximum of ninety-three months under North Carolina law.[67] The same amount of methamphetamine would authorize a sentence between 120 months and life imprisonment in the federal system.[68]

This punitive streak in federal law is also visible over time. In federal drug trafficking cases, sentences more than doubled, while in the states sentences remained largely the same.[69] For firearms crimes, federal sentences increased after guideline amendments took effect, while the length of sentences stayed about the same in the states.[70]

There are a number of explanations for why federal criminal law is harsher than state criminal law. The first reason is a practical one. The substance of federal law is less protective because federal criminal law was originally developed to prosecute a small number of more specialized —and hard to combat—crimes.[71] One of the first targets of federal criminal law prosecution was organized crime. To effectively combat such crime, it was thought that prosecutors would need far fewer impediments. As Bill Stuntz writes, "because federal agents and prosecutors tend to reserve tough federal statutes for serious misconduct . . . Congress faces little pressure to make those statutes less tough."[72] This is compounded by the fact that the federal government has far more resources to incarcerate than state governments.

A second reason points to the political process underlying the formulation of federal policy. National level policy formulation "severely underrepresent[s] the interests of citizens facing serious crime victimization—most frequently the poor and racial minorities."[73] By drowning out the voices of the local communities it crowds out "progressive local solutions" which tend to be less punitive and more rights protective.[74] Federal policy formulation is instead dominated by suburban interests and police special interest groups. These groups tend to see harsh penalties and streamlined criminal law procedures as the most effective way to combat violent crime. In this way, the "punitive turn" in American federal criminal law can be traced in part to the movement of criminal law policy formulation away from local, high crime communities to a diffuse centralized locus in the federal center, Washington, D.C.[75]

67. N.C. GEN. STAT. ANN. § 90-95(h)(3b) (West 2018).

68. 21 U.S.C. § 841(b)(1)(A)(viii) (2012).

69. Wright, *supra* note 66, at 18.

70. *Id.*

71. *See* Jeffries & Gleeson, *supra* note 55, at 1095; *see also* John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper*, 16 RUTGERS L.J. 495 (1985).

72. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2028 (2008).

73. LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL 5 (2008).

74. Doris Marie Provine, *The Perils of Federalism: Race, Poverty, and the Politics of Crime Control by Lisa L. Miller*, 43 LAW & SOC'Y REV. 714, 715 (2009) (book review).

75. *See* Stuntz, *supra* note 72, at 1975.

II. COOPERATION ON STREET CRIME PROSECUTION

During the "tough on crime" period of the 1990s, the federal government—responding to strong political incentives—sought to aggressively tackle street-level crime by creating formal agreements with state and local law enforcement. An early and famous example of this was Rudy Giuliani's use of a "federal day" when—on a randomly selected day—local New York police would pass along perpetrators of street crimes to face charges in federal court rather than state court.[76] The idea of this cooperation was that the harsher federal sanctions would deter individuals from street crime going forward.

This kind of formalized cooperation carried benefits for both federal and state executive-branch officials. For the federal government executives, cooperative agreements were essential to enforcing these new criminal statutes and showing voters that the federal government could be tough on crime. The federal government lacks a street-level police force.[77] Thus, cooperation with state and city authorities allowed the federal government to actually combat street-level crime and therefore show their superiors (and voters) a stellar statistical record of successful prosecutions.[78] On the other side, state and local executive branch officers embraced this federal involvement because they viewed tougher federal penalties as more effective and as a means of accessing federal funding. This has led to a system of codependence where executive branch enforcement agents from both levels of government rely on each other for different things.[79]

The key inspiration for this kind of formalized executive cooperation is Project Exile—a program started in Richmond, Virginia. Project Exile's outsized influence stems from its perceived successes in reducing persistent street crime. In fact, these "local-federal partnerships are designing their interventions at least in part on the basis of technocratic empirical analyses of what types of interventions have worked elsewhere."[80] Project Exile has since been scaled up to a national level in the Project Safe Neighborhoods program.

A. *Project Exile*

One of first major programs in which the federal government teamed up with state and local authorities to tackle street level crime was Project Exile in Richmond, Virginia.[81] During the 1990s, Richmond had one of the worst rates of

76. William Glaberson, *Giuliani's Powerful Image Under Campaign Scrutiny*, N.Y. TIMES (July 11, 1989), https://www.nytimes.com/1989/07/11/nyregion/giuliani-s-powerful-image-under-campaign-scrutiny.html.

77. *See* Richman, *supra* note 11, at 378.

78. *Id.*

79. Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 4 CRIME & JUST. 377, 407–26 (2006).

80. Philip J. Cook & Jens Ludwig, *Fact-Free Gun Policy*?, 151 U. PA. L. REV. 1329, 1336–37 (2003).

81. These programs had even deeper roots in the late George H.W. Bush administration. In April 1991, Attorney General Richard Thornburgh announced "Project Triggerlock," which would use federal firearms statutes to "protect the public by putting the most dangerous offenders in prison for as long as the law allows."

violent crime for a mid-sized city in the United States. Things were so bad in Richmond at the time that although Richmond accounted for only 3% of Virginia's overall population, it had nearly 27% of the state's homicides.[82]

Started as a joint program between U.S. Attorney Helen F. Fahey and city police in Richmond, Virginia, in an effort to reduce that city's high violent crime rate, Project Exile is credited, at least in part, with the dramatic reduction in Richmond's homicide rate.[83] The project made heavy use of deputized state prosecutors to handle the expanding federal gun docket.[84] The Assistant United States Attorney David Schiller described Project Exile's strategy as largely indiscriminate: "all felons with guns, guns/drug cases and guns/domestic violence cases in Richmond are federally prosecuted, without regard to numbers or quantities."[85]

Under Project Exile, when a local police officer apprehends an individual with a gun, the officer "page[s] an ATF agent, who is available 24 hours a day."[86] ATF and the Richmond police then decide "whether Federal prosecution would provide the most effective incapacitation for the offender."[87] The decision on whether to take the case federal is made "in large part on where the penalty is harshest."[88] When the United States Attorney obtains an indictment charging the defendant with federal firearm-related crimes, the Commonwealth's Attorney drops the state charges and the case proceeds in federal court.

Local, state, and federal executive officials made it clear that cooperation with the federal government was meant to circumvent state criminal law policies. The United States Attorney, the Commonwealth's Attorney, and the Chief of Police asserted that federal intervention was necessary because "state court judges were unlikely to impose sentences sufficiently severe to serve as sufficient punishment for, or adequate deterrence of, narcotics related firearm offenses."[89] Furthermore, the public relations campaign attributed "Richmond's

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The purpose of the project was to identify repeat and violent offenders who used guns and to prosecute them in federal court. The project was implemented in several jurisdictions across the country. The ATF further responded with "Operation Achilles Heel", an effort to work with state and local authorities to round up more than 600 of the nation's "most violent criminals." Project Triggerlock continued through the end of the Bush administration and into the Clinton Administration." Bonita R. Gardner, *Separate and Unequal: Federal Tough-On-Guns Program Targets Minority Communities for Selective Enforcement*, MICH. J. RACE & L. 305, 309 (2007).

82. Kathryn Jermann, *Project Exile and the Overfederalization of Crime*, 10 KAN. J.L. & PUB. POL'Y 332, 333 (2000).

83. William Clauss & Jay S. Ovsiovitch, *"Project Exile" Effort on Gun Crimes Increases Need for Attorneys to Give Clear Advice on Possible Sentences*, 72 N.Y. ST. B.A. J. 35, 35 (2000).

84. Richman, *supra* note 11, at 379–80.

85. Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to "Help" Localities Fight Gun Crime*, 440 POL'Y ANALYSIS 1, 3 (2002).

86. *Profile No. 38, Project Exile, U.S. Attorney's Office—Eastern District of Virginia*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, https://www.ojjdp.gov/pubs/gun_violence/profile38.html (last visited Feb. 20, 2019)

87. *Id.*

88. Gardner, *supra* note 81, at 315.

89. United States v. Jones, 36 F. Supp. 2d 304, 309 (E.D. Va. 1999).

historical and disproportionately high murder and wounding rate from firearms" to the "unwillingness and refusal of Richmond Circuit Court judges to enforce the laws of the Commonwealth of Virginia."[90] Supporters of the program also admitted that federal prosecution allowed them to avoid predominantly black Richmond juries.[91] The jury pool for the state circuit court in Richmond is 75% African-American; by contrast, the jury pool for the Eastern District of Virginia is only about 10% African-American.[92]

Federal intervention also allowed for more leverage in keeping the accused in jail prior to trial.[93] The wider distribution of federal prisons allowed those convicted of gun crimes to be "exiled" to a faraway prison. Fahey explained that Project Exile was "named for the idea that if the police catch a criminal in Richmond with a gun, the criminal has forfeited his right to remain in the community . . . [He] will be 'exiled' to federal prison."[94] Finally, federal prosecution allowed for harsher mandatory minimum sentences.[95]

B. Expansion

Programs like Project Exile quickly spread to the rest of the country. Part of this expansion was the product of the perceived dramatic effect of Project Exile's cooperative prosecution in lowering Richmond's high crime rate.[96] Local and state officials looking for ways to increase their prosecution rates, reduce crime, and gain federal money eagerly sought to cooperate with the United States Attorneys in their home districts.

It was also the product of rare confluence of bipartisan political support from both gun-control Democrats and gun-rights Republicans. The gun lobby preferred to focus on targeting inner city gun offenders and not gun traffickers. Charlton Heston, president of the National Rifle Association ("NRA"), described the "fearless prosecutors" of Project Exile during hearings in November 1999.[97] Gun

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90. Brief of Appellant at 7, United States v. Nathan, 202 F.3d 230 (4th Cir. 2000) (No. 98-4750).

91. *Jones*, 36 F. Supp. 2d at 308 ("At a local Bench-Bar Conference discussing the issue, an Assistant United States Attorney ('AUSA') stated that one goal of Project Exile is to avoid 'Richmond juries.' The same admission was made by the AUSA prosecuting *United States v. Scates*, 3:98cr87, sentencing transcript at 36–37, (E.D. Va. Nov. 24, 1998).").

92. Healy, *supra* note 85, at 11.

93. Richman, *supra* note 11, at 379.

94. Healy, *supra* note 85, at 3.

95. Gardner, *supra* note 81, at 309.

96. *See* Erin Dalton, *Targeted Crime Reduction Efforts in Ten Communities-Lessons for the Project Safe Neighborhoods Initiative*, 50 U.S. ATT'YS' BULL. 16, 16–25 (2002) (discussing how the federal government has invested millions in attempting widespread replication of Exile).

97. *Project Exile: A Case Study in Successful Gun Law Enforcement: Hearing Before the Sub. Comm. on Crim. Just., Drug Pol'y, & Hum. Resources of the H. Comm. on Gov't Reform*, 106th Cong. 10 (1999) (statement of Charlton Heston, President, National Rifle Association); *see also Pending Firearms Legislation and the Administration's Enforcement of Current Gun Laws: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 79 (1999) (statement of Wayne R. LaPierre, Executive Vice President, National

control advocates like Sarah Brady also endorsed the program for taking guns off the streets.[98] As a result, it soon spread to a number of other cities.[99]

These programs also were seen as a way of circumventing state-level criminal law. In Rochester, New York, "[t]he stated purpose of the Project Exile program is to federally prosecute firearms-related crimes in order to take advantage of federal pre-trial detention and sentencing statutes."[100] In Wisconsin, a state Senator described how Wisconsin state laws were simply not sufficient to address the problems: "[u]nfortunately, cases against straw purchasers are difficult to prosecute in Wisconsin. Under current law, the assistant district attorney must convincingly demonstrate that the defendant, at the time of purchase, intended to transfer the firearm to a third party."[101] In Tennessee, the state district attorney general "want[ed] the U.S. attorney [in western Tennessee] to try even more federal gun law violations because Tennessee laws 'just don't have much teeth.'"[102] As local executive branch authorities saw an opportunity to avoid local and state barriers to effective prosecution, the cooperative circumvention model began to spread around the United States.

C. Project Safe Neighborhoods

In 2001, President George W. Bush sought to take advantage of this spontaneous growth and announced an initiative to take "[Project] Exile national."[103] To do this, he created the Project Safe Neighborhoods (PSN) initiative.[104] In a letter to United States Attorneys around the country, President Bush declared a need for a "focused national strategy" to stop violent crime.[105] The President argued that "bringing together Federal, state, and local law enforcement . . . will play a key role in reducing gun violence in America."[106] Attorney General Ashcroft explained that PSN would build on "existing local programs" in order to create an "unprecedented partnership among all levels of government" for "reducing

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Rifle Association) (noting NRA's support for Project Exile: "[T]he fierce prosecution of Federal gun laws that has cut crime rates overnight in the few places it's been tried.").

98. Richman, *supra* note 11, at 373, 381.

99. *Id.* at 390 (including Buffalo and Rochester in New York). Project Exile also has been implemented in Albuquerque, New Mexico. United States v. Raymond, 369 F. App'x 958, 969 (10th Cir. 2010) ("'Project Exile' . . . involved a series of monthly meetings between the USAO and the District Attorney's Office in Bernalillo County. At such meetings, those in attendance would go over reports for the purpose of identifying cases which warranted federal prosecution by the USAO or further follow up by the ATF.") (internal citations omitted).

100. United States v. Grimes, 67 F. Supp. 2d 170, 172 (W.D.N.Y. 1996).

101. Brian Burke, *Operation Ceasefire and Senate Bill 301 Provide New Weapons in the Fight Against Gun Violence in Wisconsin*, 73 MAR WIS. LAW. 22 (2000).

102. James W. Brosnan, *4 in Pool for U.S. Atty. Coleman's Job\Western District Contenders Made Names in Public Service, Practice*, COMMERCIAL APPEAL, Jan. 28, 2001, at A1.

103. Healy, *supra* note 85, at 3.

104. PROJECT SAFE NEIGHBORHOODS TOOL KIT, *supra* note 10, at iii.

105. *Id.* at 1-3.

106. *Id.*

gun violence."[107] He stated that the concept was "disarmingly simple: federal, state and local law enforcement officers and prosecutors working together to investigate, arrest and prosecute criminals with guns to get the maximum penalties available under state or federal law."[108]

Under the Trump administration, this commitment to Project Safe Neighborhoods has been increased. Attorney General Jeff Sessions stated that "Project Safe Neighborhoods is not just one policy idea among many. This is the centerpiece of our crime reduction strategy."[109] In a 2018 speech, President Trump described how his administration was committed to "restore" Project Safe Neighborhoods as "one of the most effective crime prevention strategies in America."[110] As part of this increased commitment, the federal government has provided for significantly more grants to local police forces as well as additional assistant United States attorneys to prosecute street crime in federal court.[111]

The circumvention goals of Project Exile have been at the center of PSN. A widely disseminated implementation guide for PSN described it as a particularly convenient way to circumvent "ineffective" state-level criminal law and procedures.[112] An implementation guide for Project Safe Neighborhoods describes how the "partnership" is geared toward yielding the most "effective and vigorous prosecution tools available."[113] The guide explains how federal criminal law offers particularly "effective" tools, including more restrictive pre-trial bail laws, longer sentences, and suppression law that is "more favorable than controlling state law."[114] One of the key techniques to leverage these more "effective" federal policies, the report concluded, is to use "the possibility of severe federal sanctions . . . as an incentive for a defendant to accept a strong state plea bargain."[115]

This new program also drew on a key part of the Project Exile model: the creation of Special Assistant United States Attorneys (SAUSA). In the $2 billion federal appropriation, the program appropriated significant money for special United States Attorneys.[116] The inclusion of a large number of SUSAs was critical in

107. *Id.* at 1-5.

108. Attorney General John Ashcroft, Prepared Remarks at the Project Safe Neighborhoods National Conference (Jan. 30, 2003), http://www.usdoj.gov/archive/ag/speeches/2003/013003agpreparedremarks.htm.

109. Press Release, U.S. Dep't of Justice, Attorney General Sessions Announces Reinvigoration of Project Safe Neighborhoods and Other Actions to Reduce Rising Tide of Violent Crime (Oct. 5, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-reinvigoration-project-safe-neighborhoods-and-other.

110. President Donald Trump, Remarks at the 2018 Project Safe Neighborhoods Conference (Dec. 7, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-2018-project-safe-neighborhoods-national-conference/.

111. *Id.*

112. *See* Baker, *supra* note 13, at 702–03 (describing how cooperative arrangements between state, local, and federal authorities are aimed at circumventing the "disadvantages of state law" and the "political, racial, and/or ideological position" of state juries).

113. PROJECT SAFE NEIGHBORHOODS TOOL KIT, *supra* note 10, at 2-16.

114. *Id.* at 2-17.

115. *Id.*

116. *See id.* (discussing the SAUSA role).

allowing the federal system to serve as a harsh super-venue for state and local law enforcement.

This growing cooperation led to a remarkable jump in the number of firearm-related cases prosecuted in federal court: in 2005, the Department of Justice "reported a seventy-three percent increase in the number of firearms cases filed nationwide in federal courts in the five years since the federal government had launched the program."[117] Remarkably, this increase in federal charges only encompassed two statutes: 18 U.S.C. § 922(g), which prohibits those with a felony record from possessing a firearm ("felons-in-possession");[118] and 18 U.S.C. § 924(c), which enhances sentences for those caught with guns "during and in relation to any crime of violence or drug trafficking crime."[119] These charges suggest PSN's focus on urban communities—and not the gun traffickers who supply the guns to these areas. In fact, PSN has not sought to actively enforce other federal gun crimes including gun trafficking, corrupt gun dealers, stolen guns, selling to minors, obliterating serial numbers, and lying on the background check form.[120]

III. JUDICIAL UNEASE WITH COOPERATIVE CRIMINAL PROSECUTION

These cooperative programs have faced repeated challenges in courts. Three types of claims have been most prevalent. First, many have argued that these cooperative programs unfairly target African-American populations and therefore are racially discriminatory in practice. Second, others have argued that these programs unconstitutionally interfere with their rights to adequate representation. Third, defendants have argued that these programs help prosecutors unfairly achieve the jury pool. Courts have generally expressed sympathy for these claims and have criticized the broad pooling of executive power in these cooperative programs. They have not, however, given defendants remedies for these claims.

A. Selective Prosecution

Many defendants have challenged these kinds of programs for selective race-based prosecution in violation of the equal protection clause.[121] Research shows

117. Victoria L. Killion, *No Points for the Assist? A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecutions*, 82 TEMP. L. REV. 789, 797 (2009).

118. 18 U.S.C. § 922(g) (2012). Section 922(g) also prohibits from possessing a firearm: fugitives, unlawful drug users or addicts, those with mental defects, unlawful aliens, those discharged from the Armed Forces under dishonorable conditions, those who have renounced their U.S. citizenship, who is subject to a court restraining order or for those convicted of a misdemeanor crime of domestic violence. *Id.*

119. 18 U.S.C. § 924 (c)(1)(A) (2012).

120. *The Enforcement Gap: Federal Strategy Neglects Sources of Crime Guns*, AMERICANS FOR GUN SAFETY FOUND. 2 (Oct. 2004) https://www.issuelab.org/resources/475/475.pdf.

121. *See*, *e.g.*, United States v. Venable, 666 F.3d 893, 895 (4th Cir. 2012) (involving Project Exile and selective prosecution); United States v. Manuel, 64 F. App'x 823, 827 (2d Cir. 2003) (holding defendant was not entitled to discovery on selective prosecution claim against Project Exile); United States v. Deloach, 208 F.3d 210 (4th Cir. 2000) (involving Project Exile and selective prosecution); Manuel v. United States, Nos. 04-CV-

that these programs disproportionately target African-American communities.[122] In particular, rather than prosecuting gun traffickers (or setting up a computerized gun registry), these programs target high-crime, urban crime centers which generally include large African American populations.[123] In one case, prosecutors stipulated that as many as 90% of Project Exile defendants were African American.[124]

Although courts have expressed concern about the broad executive discretion to pick and choose certain defendants for prosecution, they have failed to grant any of these claims. To successfully make out a claim, a criminal defendant must establish "(1) that similarly situated individuals of a different race were not prosecuted, and (2) that the decision to prosecute was invidious or in bad faith."[125] The first prong of the test is very difficult to establish—in particular because achieving the threshold for discovery and gaining access to this information is very difficult.

And even if the court grants discovery, proving that similarly situated individuals were treated differently is very difficult. The Supreme Court acknowledged this reality in *McCleskey v. Kemp*, a selective prosecution case in which defendant argued that the State of Georgia discriminatorily selected African Americans for execution.[126] The Court noted: "[t]here are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted [therein] tends to show which of the directed factors were effective, but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion."[127]

The second prong—discriminatory intent—is even harder to establish.[128] In one case, the Eastern District of Virginia held that an admission by an Assistant United States Attorney that Project Exile was aimed at avoiding African-American juries could be "given a less nefarious construction" and therefore did not establish discriminatory intent.[129]

Despite the failure of these claims, courts have expressed concern with the way that the federal government has failed to divulge information about these programs. One court expressed considerable "distaste" that the government had refused to disclose its policies for choosing which cases would end up in federal court.[130] Another court considering a selective prosecution claim took the

06995A, 00-CR-0130A, 2006 WL 1330107, at *1 (W.D.N.Y. May 15, 2006) (same); United States v. Grimes, 67 F. Supp. 2d 170, 172 (W.D.N.Y. Aug. 18, 1999).

122. Gardner, *supra* note 81, at 317.

123. *Id.* at 315–17.

124. United States v. Jones, 36 F. Supp. 2d 304, 311 (E.D. Va. 1999).

125. United States v. Olvis, 97 F.3d 739, 743 (4th Cir.1996) (internal quotation marks and citations omitted).

126. McCleskey v. Kemp, 481 U.S. 279, 286 (1987).

127. *Id.* at 291.

128. *See* United States v. Grimes, 67 F. Supp. 2d 170, 173 (W.D.N.Y. 1999) (rejecting selective prosecution claim because of a lack of discriminatory animus).

129. United States v. Jones, 36 F. Supp. 2d 304, 313 (E.D. Va. 1999).

130. United States v. Venable, 666 F.3d 893, 900 (4th Cir. 2012) (quoting opinion from the district court for the Eastern District of Virginia).

opportunity to "express its concern about the discretion afforded individuals who divert cases from state to federal court for prosecution under Project Exile."[131]

B. Ineffective Assistance of Counsel

Defendants have also argued that these cooperative agreements fatally undermine the relationship between a client and his or her lawyer.[132] The Sixth Amendment guarantees every criminal defendant effective representation.[133] Cooperative arrangements can seriously disrupt the provision of effective representation. In particular, agreements where state authorities automatically pass a defendant to federal court if the defendant refuses a state plea deal place unreasonable burdens on state defense attorneys. This cooperation requires state defense attorneys to be familiar with the intricacies of the federal sentencing guidelines—an almost impossible task given the amount of relevant conduct that might go into a federal sentence and the lack of time and information the defense attorney has. Although courts have granted some ineffective assistance of counsel claims, they have been unable to provide defendants with a remedy that restores the original state-level plea deal. The lack of evidence that federal and state prosecutors are working together is problematic.

The most egregious example of this problem arose in Detroit. Richard Morris was arrested on three firearm related charges and presented with a state-level plea deal.[134] Morris's state-level attorney was told that the offer required an immediate response.[135] Without the benefit of discovery, his attorney was forced to speak to Mr. Morris about the plea deal in the "bull pen"—a place where she had to communicate through a mesh panel in the presence of other detainees.[136] Morris refused the offer without more time and was immediately transferred to federal court.[137]

Once he was told of his federal sentencing exposure, Morris immediately filed a motion to remand his case to state court. The district court granted Morris's claim and ordered the state to give him more time to consider his original plea deal. On appeal, the Sixth Circuit agreed that Morris's right to effective counsel had been violated but held that the federal court had no right to force the state prosecutors to

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131. *Jones*, 36 F. Supp. 2d at 311.

132. *See, e.g.*, Ellington v. United States, Nos. 06-CV-14880, 04-CR-80163, 2007 WL 1289880, at *2 (E.D. Mich. Apr. 30, 2007); United States v. Powell, Nos. 03-CV-80659-DT, 05-CR-74487-DT, 2006 WL 2571989, at *2 (E.D. Mich. Sept. 5, 2006); United States v. Robinson, 408 F. Supp. 2d 437, 440–41 (E.D. Mich. 2005) (rejecting an ineffective assistance of counsel claim about state court representation because there was no jurisdiction).

133. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to effective assistance of counsel.").

134. United States. v. Morris, 377 F. Supp. 2d 630, 632 (E.D. Mich. 2005).

135. *Id.*

136. *Id.*

137. *Id.*

reinstate the plea deal.[138] Therefore, the court dismissed the federal indictment and returned Miller to state custody.

In another case, state officials offered the defendant a two-year state plea deal and told him that a refusal would place him in federal proceedings.[139] His state-level lawyers did not know the sentencing exposure he faced in federal prison, and the defendant refused the state offer.[140] Once he was transferred to federal court, he argued that he had received ineffective assistance of counsel at the state level. The court granted the motion and asked the prosecution to provide information about the "dual prosecution agreement between the U.S. Attorney's Office and the Wayne County Prosecutor's Office that is part of Project Safe Neighborhoods."[141] The court would then use this information to determine whether it would require the state officials to give the defendant the original two-year plea deal.[142] The prosecutor, however, immediately dismissed the case and refused to provide the information, depriving the court of jurisdiction to enforce the original state plea deal.[143]

Finally, in *United States v. Gray*, the defendant rejected a two-year state plea agreement and went onto face a harsher plea agreement in federal court.[144] The defendant argued that he was denied effective counsel and that his initial deal should be binding because the "PSN initiative reflects sufficiently close cooperation and collaboration between the state and federal prosecuting authorities that the state prosecutor's 24-month plea offer should be binding on the federal prosecutor."[145] The district court rejected this argument, stating that the prosecution in federal court is "entirely separate and distinct."[146]

C. Jury Pool Challenges

Defendants have challenged these programs for allowing more pro-prosecution jury pools. In 1999, a defendant challenged Project Exile for representing "an unconstitutional attempt to avoid a jury pool consisting of greater numbers of African-Americans."[147] The parties stipulated to the fact that Richmond jury pool was 75% African American and the jury pool for the Eastern District of Virginia was only 10% African American. They also agreed that an Assistant United States Attorney ("AUSA") had admitted that one goal of Project Exile was to avoid "Richmond juries."[148]

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138. United States v. Morris, 470 F.3d 596, 603 (6th Cir. 2006).
139. United States v. Nixon, 315 F. Supp. 2d 876, 877 (E.D. Mich. 2004).
140. *Id.* at 877–78.
141. *Id.* at 878–79.
142. *Id.* at 878.
143. *Id.* at 879.
144. United States v. Gray, 382 F. Supp. 2d 898, 900 (E.D. Mich. 2005).
145. *Id.* at 901.
146. *Id.*
147. United States v. Jones, 36 F. Supp. 2d 304, 306 (E.D. Va. 1999).
148. *Id.* at 308.

The court, however, ultimately rejected the claim, stating that "a defendant has no right to a jury of any particular racial composition so long as that jury is fairly selected from the jurisdiction it serves."[149] The court went on to state, however, that Project Exile did raise "serious questions respecting basic principles of federalism."[150] It reasoned that Project Exile's aims were "undeniably local in both nature and effect."[151] The court was particularly concerned that the program would undermine the relationship between state voters and their government by lowering "citizens' expectations of the Commonwealth's public servants, it insulates those officials from constructive criticism, and it dissipates political pressure that citizens might otherwise exert to improve the performance of local law enforcement."[152] The court concluded by stating that Project Exile was a "substantial federal incursion into a sovereign state's area of authority and responsibility."[153] In the court's view, the state officials acquiescence made it "no less troublesome."[154] Ultimately, however, the court could grant the defendant no relief.

In *United States v. Nathan*, the defendant challenged his prosecution under the Tenth Amendment.[155] The court reached the same conclusion, holding that a defendant has no right to a certain jury pool. The trial court said that the federal government had embarked on "a major incursion into the sovereignty of Virginia."[156] The court went on to argue that the "risk of attenuating the Tenth Amendment" is present even in the voluntary form.[157] On appeal, the Fourth Circuit concluded that the "voluntary" nature of state cooperation in Project Exile saved it from a Tenth Amendment challenge.[158]

IV. STREET CRIME COOPERATIVE FEDERALISM AND THE TENTH AMENDMENT

This Section will examine the federalism implications of street crime cooperative federalism. The Supreme Court has looked at the constitutional problems of cooperative federalism largely through the lens of civil and regulatory law in the creation of the "anti-commandeering doctrine." In recent years, however, the Court has also extended Tenth Amendment jurisprudence to individual criminal defendants. This Section will seek to link the two lines of Tenth Amendment jurisprudence.

149. *Id.* at 311.
150. *Id.* at 313.
151. *Id.*
152. *Id.* at 313–14.
153. *Id.* at 316.
154. *Id.*
155. United States v. Nathan, No. 3:98CR116, 1998 U.S. Dist. LEXIS 15124, at *17 (E.D. Va. July 21, 1998).
156. *Id.* at *26.
157. *Id.* at *33.
158. United States v. Nathan, 202 F.3d 230, 233 (4th Cir. 2000).

A. Anti-Commandeering Doctrine

One of the Court's most searching analyses of cooperative federalism can be found in the anti-commandeering context. In *New York v. United States*, the Court considered whether Congress could "commandeer" a state legislative process in the regulation of low-level nuclear waste.[159] This waste regulation was a classic cooperative federalism scheme.

The Court began its analysis by arguing that both case law and Founding-era history suggest that the federal government cannot "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[160] The Court explained that legislative "commandeering" of states disrupts the relationship of democratic accountability between state voters and their elected government.[161] In particular, the Court argued that Congressional legislation that commandeers state government is problematic because it diminishes the accountability of state officials.[162] The Court explained that this accountability is diminished when "federal coercion" stops "elected state officials" from "regulat[ing] in accordance with the views of the local electorate in matters not pre-empted by federal regulation."[163]

Despite the connotations of compulsion in the Court's language of "commandeering," the Court explained that commandeering does not have to involve compulsion. Instead, the Court directly discussed cooperative federalism where "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests."[164] Compulsion is not needed, the Court reasoned, because

> [t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for *the protection of individuals*.[165]

The Court later reiterated that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[166]

159. New York v. United States, 505 U.S. 144 (1992).
160. *Id.* at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).
161. *Id.* at 168.
162. *Id.*
163. *Id.* at 169. This argument had hints of a guarantee clause argument. The Court concluded by suggesting the proximity of its Tenth Amendment theory to the Guarantee Clause in the final section of the opinion. Although it considered the Guarantee Clause separately, the Court analyzed it through largely the same language of preserving state autonomy.
164. *Id.* at 182.
165. *Id.* at 181 (emphasis added).
166. *Id.*

The extent of the Court's critique of cooperative federalism can be seen in Justice White's partial concurrence. Justice White criticized this decision for undermining "cooperative federalism," a situation where the states "bargained among themselves to achieve compromises for Congress to sanction."[167] Noting that Congress does have the power to directly regulate radioactive waste, as opposed to "compelling state legislatures" to regulate according to their scheme, White stated that the "ultimate irony of the decision today is that in its formalistically rigid obeisance to 'federalism,' the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems."[168]

The Court next considered the Tenth Amendment in *Printz v. United States*.[169] In *Printz*, the Court considered whether the federal government could require state agents to take part in a federal gun control program.[170] The Court began with a long historical discussion showing that the federal government has never compelled state executive branch officers to execute federal law.[171] The Court next described the importance of "dual sovereignty" in the American system.[172] The Court explained that the American system of constitutional government sees Americans as having "two political capacities, one state and one federal, each protected from incursion by the other."[173] The state and national governments should act concurrently and the tension between different sovereigns or "double security" would ensure the promise of liberty.[174] Federalism therefore required that "a State's government []represent and remain accountable to its own citizens."[175] Citing another problem with commandeering executive branch officers, the Court noted it would weaken the President because "Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[176]

The Court finally argued that commandeering state-level executive branch officials undermines important budgetary checks on the expansion of federal power. The Court explained that if state-level executive agents carry out federal law, the national government does not have "to absorb the financial burden of implementing a federal regulatory program" and "Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."[177]

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167. *Id.* at 194 (White, J., concurring in part and dissenting in part).
168. *Id.* at 210.
169. 521 U.S. 898 (1997).
170. *Id.* at 901.
171. *Id.* at 905–18.
172. *Id.* at 918.
173. *Id.* at 920 (quoting U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 838 (1995))
174. *Id.* at 922.
175. *Id.* at 920.
176. *Id.* at 923.
177. *Id.* at 930.

B. Key Principles Underlying this Tenth Amendment Jurisprudence

This Tenth Amendment jurisprudence has broadly relied on three broad justifications. First is the justification that the Tenth Amendment helps to ensure that federalism remains a structural protection on individual liberty. As the Court stated in *New York*, "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities."[178] The Court continued, "To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals . . . . [and this reduces] the risk of tyranny and abuse from either front.'"[179]

Second, the Tenth Amendment is meant to ensure *clear political accountability*.[180] "When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame."[181]

Third, and finally, the Tenth Amendment "prevents Congress from *shifting the costs of regulation to the States*."[182] "If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs."[183] But if Congress can induce the States to enact and enforce its program, Congress need not engage in any such analysis.[184]

C. Extension to Individual Criminal Defendants

In recent years, the Supreme Court has extended its Tenth Amendment federalism jurisprudence to the criminal law context. In *Bond v. United States*, the Court held that criminal defendants have standing to bring Tenth Amendment claims.[185] Underlying this holding is the idea from *New York* and *Printz* that federalism should help to ensure individual rights. The Court held that "the allocation of

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178. New York v. United States, 505 U.S. 144, 181 (1992).
179. *Id.* at 181 (internal citations omitted).
180. *See* Murphy v. Nat'l Collegiate Athletic Ass'n 128 S. Ct. 1461, 1477 (2018).
181. *Id.*
182. *Id.* (emphasis added).
183. *Id.*
184. *See*, *e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1360–61 (2001).
185. Bond v. United States, 564 U.S. 211, 222 (2011). So far, the only area where the Court has found such an "inviolable" core of state sovereignty is in the federal "commandeering" of state officers. The Court explains that Congress exercises it enumerated powers "subject to the limitations contained in the Constitution." *New York*, 505 U.S. at 156. For instance, Congress can regulate publishers engaged in interstate commerce through its Commerce power, but must do so without violating the First Amendment. *Id.* The Tenth Amendment also restrains the power of Congress to legislate under enumerated powers. *Id.* The Court explains that "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *Id.* at 157. Ultimately, *"[t]he Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power*." *Id.*; *see also* Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave*, 23 HARV. J.L. & PUB. POL'Y 551, 565–66 (arguing that Congress's enumerated powers cannot leave states without certain powers).

powers between the National Government and the States" protects the "people, from whom all governmental powers are derived."[186]

In support, the Court reiterated the autonomy theory of federalism, stating that the "federal balance" required protecting the "integrity, dignity, and residual sovereignty of the States" and ensuring "that States function as political entities in their own right."[187] This balanced system of federalism ultimately promotes individual liberty because the government is "more responsive by putting the States in competition for a mobile citizenry"[188] and provides citizens with greater "involvement in democratic processes."[189]

In a second decision three years later, the Court struck down a statute in order to maintain a "balance" between federal and state power.[190] The Court went on to argue that Congress must be "reasonably explicit" when it legislates in a way that affects this important balance.[191] In particular, the Court stressed the idea that the "clearest" principle of federalism is that "the punishment of local criminal activity" is an area of "traditional state authority."[192]

V. TENTH AMENDMENT PROBLEMS WITH COOPERATIVE PROSECUTION OF STREET CRIME

Cooperative criminal prosecution of street crime strikes at the heart of these federalism concerns.[193] It implicates all three of the broad Tenth Amendment concerns. First, cooperative prosecution programs like PSN are a classic example of a "departure" from the federal structure that undermines individual liberty.[194] As we have seen in this Article, executive branch law enforcement officials cooperate to circumvent—and therefore depart from—state and local laws and juries. By aggregating executive power across local, state, and federal government, these agreements undermine key checks that protect the rights of criminal defendants such as state law and criminal juries. It therefore turns federalism against the individual, reversing the rights-protective nature of federalism overall.

Second, these programs undermine political accountability by circumventing regulation in line with the views of the "local electorate."[195] These cooperative

186. *Bond*, 564 U.S. at 221.
187. *Id.*
188. *Id.*
189. *Id.*
190. Bond v. United States, 572 U.S. 844, 858 (2014).
191. *Id.* (quoting BFP v. Resolution Tr. Corp., 511 U.S. 531, 544 (1994)).
192. *Id.* (citing United States v. Morrison, 529 U.S. 598, 618 (2000)).
193. The theory of state autonomy present in the commandeering cases has never been applied to criminal law.
194. New York v. United States, 505 U.S. 142, 181–82 (1992).
195. *Id.* at 169. This argument had hints of a Guarantee Clause argument. The Court concluded by suggesting the proximity of its Tenth Amendment theory to the Guarantee Clause in the final section of the opinion. *Id.* at 183–86. Although it considered the Guarantee Clause separately, the Court analyzed it through largely the same language of preserving state autonomy.

agreements undermine the ability of state voters and their legislative representatives to hold their own state and local officials accountable for drug and gun possession crimes. The ability to hold officials accountable is at the heart of a sovereign political entity. This is particularly true in a state's exercise of one of its core police powers: the power to prosecute non-economic street crime.

Furthermore, by depriving state voters of meaningful ways of controlling their own street-level criminal law policy, for instance by establishing drug courts rather than harsh sentencing, such programs weaken the accountability of state governments. As the Virginia district court stated, it "lowers citizens' expectations of the Commonwealth's public servants, it insulates those officials from constructive criticism, and it dissipates political pressure that citizens might otherwise exert to improve the performance of local law enforcement."[196]

Relatedly, these agreements also signal disdain for state-level criminal law policy. This is done in an area where the states have long been seen as the traditional and constitutionally correct locus for criminal law prosecution. As the Court wrote in 1971, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States."[197] This also signals a problematic lack of comity from the federal government for state-level policy. In *Younger v. Harris*, the Court discusses a "notion of 'comity,'" which involves:

> [A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[198]

The Court went on to explain that it means:

> [A] sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[199]

Third, these cooperative agreements allow the federal government to avoid a key political check on its ability to encroach on state autonomy: the full cost of prosecuting drug and gun possession crimes. Without the cooperation of state and local police, the federalization of street crime would be largely meaningless as United States Attorney's offices would lack the resources to investigate, arrest, and prosecute drug and gun crimes. Thus, these agreements undermine one of the key

196. United States v. Jones, 36 F. Supp. 2d 304, 313–14 (E.D. Va. 1999).
197. United States v. Bass, 404 U.S. 336, 349 (1971).
198. Younger v. Harris, 401 U.S. 37, 44 (1971).
199. *Id.*

political checks on federal expansion into street crime: the sheer cost of enforcing street crime.

A. Judicial Solutions?

Despite the pressing federalism concerns with these kinds of crimes and the recent ability of criminal defendants to bring Tenth Amendment claims, there remain serious obstacles to challenging in court. First, cooperative prosecution programs supported by federal funding such as PSN are not a statutory requirement, but instead voluntary actions taken by different levels of law enforcement.[200] The voluntary and financial nature of the program therefore means there is unlikely to be a successful anti-commandeering claim in this area.

The remaining possible line of attack for individual criminal defendants is to bring an individual claim that spending on cooperative prosecutions exceeds the spending power of the federal government. The Spending Clause permits Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[201]

The Supreme Court, however, has noted the breadth of Congress's spending power, citing previous cases establishing that Congress may use this power to "attach conditions on the receipt of federal funds" in furtherance of "broad policy objectives," and that this power is not limited to goals that Congress could achieve only through some other enumerated power.[202] The Court has reviewed "several general restrictions articulated in our cases" that cabin Congress's authority under this power.[203] First, as the Spending Clause itself explains, the exercise of power under that Clause must be "in pursuit of 'the general Welfare.'"[204] Courts should "defer substantially" to Congress's judgment that any expenditure under this power satisfies this restriction.[205] Second, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[206] Third, the conditions must be related "to the federal interest in particular national projects or programs"—what the opinion later called the "germaneness" requirement.[207] Fourth, and "[f]inally, . . . other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[208] It is unlikely that any of these "independent bars" would render spending on

200. 34 U.S.C. § 60701 (effective June 18, 2018); *see also* Richman, *supra* note 79, at 379 (describing the relationship between local, state, and federal officials to be one of "codependence").

201. U.S. CONST. art. I, § 8, cl. 1.

202. South Dakota v. Dole, 483 U.S. 203, 206 (1987).

203. *Id.* at 207.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 207, 208.

208. *Id.* at 208.

cooperation prosecution unconstitutional. These programs are at least arguably in the general welfare, allow the state to act knowingly, and are related to the federal interest.

One might try to argue that they violate another constitutional provision: the Tenth Amendment. The problem with this argument, however, is that spending on PSN and other programs does not *necessarily* condition their receipt on the circumvention of state law. The failure of courts to address these constitutional problems is hardly surprising: There has been a long tradition in Supreme Court jurisprudence of deferring to the political process in policing the borders of federalism.

B. Political Solutions: The Localist Approach

Given the lack of judicial solutions to this problem, the remaining answer lies in political mobilization at the local level. The Tenth Amendment problems discussed above suggest political arguments that could be deployed in support of local resistance to this kind of cooperation. In particular, local officials could stress the importance of holding their executive branch officials accountable through state laws, city juries, and defense attorneys. The circumvention story at the center of street crime criminal cooperation is one that would strike many city voters as unpalatable and problematic, particularly as the tough on crime phase comes to an end.

A reassertion of local control over gun and drug crime could involve innovative approaches targeted to better solve the problems of street crime. In particular, city officials could argue that mass incarceration and the punitive turn in the federal system disproportionately affect minority communities and are aggravating poverty in inner city areas. Alternatives might involve the creation of drug courts for non-violent drug possession crimes that seek to divert some offenders from the prison system. In recommending this kind of approach, city residents would be acknowledging that—at least when it comes to crime prevention—the solutions that are formulated and designed at the local level are likely to produce the best outcomes.

In responding to these Tenth Amendment concerns, city residents would be recognizing the importance of local, city-based citizenship and mobilization.[209] Viewing oneself as a local citizen in turn stresses the importance of exercising autonomy and control over things that have an immediate effect on one's own lives.[210] Indeed, through engagement with city or municipal government and their fellow city residents, local citizens can find answers that suit the needs or requirements of their own cities.

209. Janine Brodie, *Imagining Democratic Urban Citizenship*, *in* DEMOCRACY, CITIZENSHIP AND THE GLOBAL CITY 110, 118 (Engin F. Islin ed., 2000); Yishai Blank, *Spheres of Citizenship*, 8 THEORETICAL INQUIRIES L. 411, 413, 418 (2007) (noting the various spheres of citizenship—local, national, and global).

210. Rose Cuison Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORDHAM URB. L.J. 573, 581 (2010)

This concept of local citizenship is particularly important in the context of street crime. Street crime enforcement has traditionally been seen as a local police power issue. This reflects the fact that street crime is frequently tied to local causes and problems; uniform national policies are less likely to take account of these differences. We have already seen this in practice. A national policy process, by drowning out the voices of the local communities, creates policies which are more punitive and therefore less cognizant of the *local* costs.[211] One of the best examples is the underappreciated cost of incarceration on families in cities.[212]

A move toward local citizenship and mobilization is already underway in other areas of crime enforcement.[213] Although cities are largely understudied in the federalism literature, particularly in their power relation with states, they are increasingly playing an important role in resisting federal immigration law.[214] This is perhaps best exemplified in the "sanctuary city" movement. In this context, city electorates have elected mayors that have appointed police chiefs and district attorneys who have steadfastly refused to cooperate with federal officials. They have justified this resistance to fully cooperate with federal immigration policy on the basis that compliance will undermine key local interests. Many have argued that cooperation with the federal government's aggressive immigration policies will dissuade undocumented individuals from reporting crimes and engaging with police.

A reassertion of city-based identity would thus respond to the Tenth Amendment concerns with cooperation. First, regaining control over street crime would restore a "healthy balance" between the federal and local governments, thus helping to ensure the rights-enhancing aspects of multi-level government. In particular, it would reestablish the importance of state laws and procedural protections put in place to protect the rights of criminal defendants. Second, a rising sense of urban identity and citizenship would increase the political accountability of local executive branch officials. City electorates could now hold executive-branch officials accountable for their policies. Finally, it would also ensure that harsh federal criminal law policies could not be enforced without the federal government bearing the cost. Apparent from the immigration context, the federal government relies heavily on the cooperation of city executive-branch officers to enforce its policies. In street crime, the federal government is fully reliant on local executive branch officials in enforcement.

211. *See* Provine, *supra* note 74, at 715.

212. *See, e.g.*, Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

213. *See, e.g.*, Villazor, *supra* note 210, at 581.

214. *See generally id.* (discussing the concept of local citizenship).

CONCLUSION

In 1992, the Supreme Court explained that the Constitution "protects us from our own best intentions" and does so by dividing "power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[215] These are important words to heed in the case of cooperative criminal prosecution. Although these executive agreements to pool prosecutorial resources might be seen as expedient in curbing violent crime, they erode the ability of city voters (and their representatives) to craft their own policies in an area of traditional state police power. Furthermore, they also concentrate the executive power of local, state, and federal officials in a way that undermines the ability of local communities to protect the most vulnerable populations in a democratic society: criminal defendants.

Although there are unlikely to be judicial solutions to these constitutional concerns, they can serve as the basis for a renewed concept of local, (or, in this case, city) control over the formulation of policy. This would require a clear elucidation of the advantages of local control over crime policy. In particular, an increase in local control would help to protect the rights of individual criminal defendants while also allowing context-specific experimentation with solutions to street crime that go beyond harsh punishment and mass incarceration. In so doing, cities could become sanctuaries not just from harsh immigration policies, but also from harsh street crime policies.

215. New York v. United States, 505 U.S. 144, 187 (1992).