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## Legitimacy and Federal Criminal Enforcement Power

**ABSTRACT.** A defining feature of criminal federalism is extreme disparities in case outcomes across state and federal forums. All else being equal, prosecution in the federal forum entails a significantly higher likelihood of conviction, and a higher penalty. But why do such disparities exist? Conventional explanations point to differences among sovereigns' legal rules, resources, and dockets. These understandings, while valid, neglect to account for a less tangible source of federal criminal power: legitimacy. "Legitimacy" refers to the concept, refined through decades of empirical research, that citizens comply with the law, and defer to and cooperate with legal authority, when they perceive both the laws and the authorities to be fair. A legitimacy-based exploration of the federal criminal justice system significantly enriches our understanding of the sources of federal criminal enforcement power. Distilling those sources, moreover, reveals surprising and counterintuitive implications: to emulate the sources of federal legitimacy in local systems, we need more localized criminal justice.

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## INTRODUCTION

In litigation, forum matters. Nowhere is that more true than in criminal litigation, where the choice of court in which to prosecute—state or federal—is perhaps the single most significant factor influencing a case’s outcome. All else being equal, a defendant prosecuted in federal court is more likely to be convicted, and to receive a longer sentence of imprisonment, than if prosecuted for the same conduct in state court.<sup>1</sup> The disparity has received particular attention in the area of so-called “street crimes”—the drug, gun, and violent offenses that make up the bulk of urban criminal felony dockets—because these are the sorts of crimes that many argue have historically been (and should continue to be) left largely to the states.<sup>2</sup> For all the focus on the merits and equities of federal prosecution of street crime, though, there has been no concerted exploration of the antecedent question: why do the disparities exist in the first place?

The question is important because interpretations of forum disparities inform our understanding of the sources of federal criminal enforcement power. To date, scholars have treated these disparities largely as the product of tangible differences: in sovereigns’ legal rules (whether substantive,

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1. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 668-69 (1997) (“Notwithstanding some significant exceptions, defendants typically fare considerably worse when prosecuted in federal court. . . . [This] disparity . . . is a hallmark of federalization.”); Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, CRIMINAL JUSTICE 2000, BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 95 (2000), [http://www.ncjrs.gov/criminal\\_justice2000/vol\\_2/o2d2.pdf](http://www.ncjrs.gov/criminal_justice2000/vol_2/o2d2.pdf); *infra* note 149 and cross-references cited therein.
  2. See, e.g., Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 789-90, 812-13 (1996); John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 673-74, 678 (1999); 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, 979-81 (1995); Clymer, *supra* note 1, at 645-46. The historical claim is, however, debatable. The federal government’s involvement in violent crime began around the time of the New Deal, precisely as the federal government began to intervene in many other areas previously considered the proper province of state and local officials but which, today, are readily accepted as proper subjects of federal control. See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 387 (2006) (noting that the notorious kidnapping of Charles Lindbergh’s son in 1932 began “a wave of congressional enactments targeting criminal behavior that had hitherto been the exclusive province of state and local enforcers”). Nevertheless, federal involvement in street crime did increase significantly beginning in the 1960s, see *id.* at 382, 390-400, and it is this relatively more recent policy shift that has generated criticism.

procedural, or constitutional), in resources, and in caseloads. These interpretations have framed our analysis of criminal federalism on issues ranging from the “federalization” of criminal law to the allocation of enforcement power and the exercise of federal enforcement discretion.<sup>3</sup>

The conventional interpretations of forum disparities are accurate, but incomplete. This Article seeks to supplement them with a different framework—one focused not on rules or resource allocations but rather on citizens’ perceptions of legal authority. The work primarily of social psychologists, criminologists and criminal law theorists, this framework—broadly-termed, “legitimacy”—posits that a system perceived as providing fair process and just laws promotes compliance with the law and respect for and deference to law enforcement authorities.<sup>4</sup> The impressive body of empirical and theoretical work on legitimacy has not yet been mined for its potential to explain forum disparities in criminal adjudication.

This Article undertakes that effort. It offers a fresh look at the causes of forum disparities in street crimes, an alternative framework for understanding them, and a new agenda for inquiry. These disparities manifest not just differences in legal rules and resource allocations but also how actors within the respective criminal justice systems—primarily witnesses, juries, and judges—perceive the system’s legitimacy. Exploring forum disparities through the lens of legitimacy enriches our understanding of the sources of federal criminal power. And the policymaking implications are surprising and counterintuitive: by distilling the sources of federal legitimacy, we see the need for more localized criminal justice.

The need to engage these matters is urgent because the stakes are high—for defendants, victims, and the communities affected by street crime. Consider the following:

- A defendant has been arrested forty-four times for various offenses, including narcotics trafficking, gun possession, robbery, and

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3. See, e.g., Beale, *supra* note 2, at 998-99; Clymer, *supra* note 1, at 669-75; Daniel C. Richman, “Project Exile” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 398 (2001); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 916-17 (2000); Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL’Y 247, 286, 295 (1997); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2027-29 (2008).

4. See PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* (2008); PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton Univ. Press 2006) (1990).

shooting. He has been prosecuted in his local county court for each of the forty-four arrests—sometimes facing substantial terms of imprisonment under state law—yet never once convicted. On his forty-fifth arrest, he is prosecuted for robbery and gun possession in federal court, where he is convicted and receives a sentence of thirty-two years' imprisonment.<sup>5</sup>

- A defendant has thirty-one convictions in state court, including two prior felony convictions for robbery. He also has numerous arrests that resulted in dismissals, including arrests for two robberies for which local grand juries refused to return indictments. A federal grand jury later returns indictments on those very same two robberies, along with five others; a federal petit jury convicts the defendant of those crimes; and a federal judge sentences him to thirty years' imprisonment.<sup>6</sup>
- A twenty-three-year-old defendant has eight prior criminal convictions, including separate convictions for illegal gun possession and for aggravated assault with a firearm on a police officer. He has never served more than eighty days in jail for any one offense. His ninth conviction, for possessing a firearm as a convicted felon, occurs in federal court. The federal judge sentences him to more than seven years' imprisonment.<sup>7</sup>

These cases are extreme examples of what has aptly been called “unequal justice.”<sup>8</sup> The phenomenon has directed a great deal of scholarly attention to the federalization of crime and the proper exercise of federal enforcement discretion.<sup>9</sup> Nowhere in this literature, though, do scholars truly grapple with the reasons for these forum disparities. Explanations serve largely as premises

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5. See Nathan Gorenstein, *Man Who Avoided Conviction Despite 44 Arrests Now Faces 32-Year Term*, PHILA. INQUIRER, Feb. 2, 2012, [http://articles.philly.com/2012-02-02/news/31016967\\_1\\_conviction-rate-robbery-cases-court-system](http://articles.philly.com/2012-02-02/news/31016967_1_conviction-rate-robbery-cases-court-system); John Sullivan, Emilie Lounsberry & Dylan Purcell, *Gun Arrests Galore, No Convictions at All*, PHILA. INQUIRER, Dec. 16, 2009, [http://articles.philly.com/2009-12-16/news/24988541\\_1\\_robbery-victim-mandatory-minimum-five-year-sentence-gun-crime](http://articles.philly.com/2009-12-16/news/24988541_1_robbery-victim-mandatory-minimum-five-year-sentence-gun-crime) (detailing the defendant's criminal record).
  6. See Brief of Appellee United States of America at 26, 37-39, *United States v. Andrews*, 270 F. App'x 5 (2d Cir. 2008) (No. 06-4240) (on file with author).
  7. See *United States v. Thomas*, 447 F. App'x 568, 569 (5th Cir. 2011) (per curiam); Brief for Appellee, the United States of America at 7-11, *Thomas*, 447 F. App'x 568 (No. 11-30148), 2011 WL 2527772, at \*7-11 (detailing the defendant's criminal record).
  8. Clymer, *supra* note 1; Stuntz, *supra* note 3.
  9. See sources cited *supra* note 3.

for other debates, rather than starting points for independent inquiry. We are told that federal sentencing statutes and guidelines are more severe, and less malleable, than their state counterparts.<sup>10</sup> Federal evidentiary and procedural rules are more favorable to the prosecution.<sup>11</sup> The federal government has substantially greater resources to expend on each case.<sup>12</sup> Federal prosecutors can be more selective in deciding which cases to bring.<sup>13</sup>

Each of these points has merit, and, collectively, they go a long way towards explaining forum disparities in street-crime cases. But a number of criminal enforcement phenomena illuminate their limitations. How, for instance, do we explain why federal prosecutors, who generally intervene in street-crime cases to secure a higher penalty, bring cases even when federal penalties are less severe than applicable state penalties?<sup>14</sup> Why have Virginia's firearms laws, which effectively replicate federal penalties, not replicated federal outcomes in firearms cases?<sup>15</sup> What does it mean to say that federal procedural and evidentiary rules are more favorable to the prosecution – does

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10. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1312-14 (2005); Beale, *supra* note 2, at 998-99; Clymer, *supra* note 1, at 674-75; Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730-32 (2002); Simons, *supra* note 3, at 916-17; Stacy & Dayton, *supra* note 3, at 286-87; Ronald Wright, *Federal or State? Sorting as a Sentencing Choice*, CRIM. JUST., Summer 2006, at 16, 17.
  11. See Baker, *supra* note 2, at 685-86, 703-06; Clymer, *supra* note 1, at 669-73; John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1103-17 (1995).
  12. See Richman, *supra* note 3, at 397 (observing that a lower ratio of cases per prosecutor is among federal prosecutors' advantages relative to their local counterparts); Stacy & Dayton, *supra* note 3, at 294 (noting that as compared to the federal government, states "are especially inclined to underinvest" in street crime enforcement because it particularly afflicts poor urban neighborhoods); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 117-21, 134-37 (2005) (arguing that as case volume per federal prosecutor has fallen over the last five decades, acquittal rates have generally gone down, but acknowledging that the reasons for this correlation are unclear).
  13. See Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 10 (2012) (attributing the high federal guilty plea rate to the fact that federal prosecutors have the luxury of charging "only rock-solid cases[,] as they can decline most cases safely in the knowledge that state and local actors must pursue them"); Richman, *supra* note 1, at 95 ("Without the political obligations of State authorities to maintain order within a territorial jurisdiction and to prosecute every provable serious offense, Federal agencies are largely free to invest strategically in the cases they do take.").
  14. See *infra* notes 49-51 and accompanying text.
  15. See *infra* notes 68-79 and accompanying text.

lowering the evidentiary or procedural hurdles to bringing cases necessarily make it easier to win those cases? Resources and selectivity in charging are critical, to be sure; but what, exactly, do federal prosecutors select for, and when and why do resources matter? To address the disparities between federal and local prosecution of street crime, we must broaden our understanding of the sources of federal prosecutorial power.

Legitimacy encapsulates the theoretical principle that citizens comply with laws, and defer to and cooperate with legal authorities, when they perceive both the laws and the authorities to be fair.<sup>16</sup> It is the deference and cooperation aspects of legitimacy that I engage here.<sup>17</sup> Deference to and cooperation with law enforcement impact case outcomes.<sup>18</sup> Case outcomes, in turn, reflect legitimacy. If witnesses will not testify; if juries do not credit the prosecution's evidence; if sentences prescribed by a legislature or sentencing commission seem off-kilter in relation to a community's views, then prosecutors and judges must, and will, resolve the individual cases before them in light of those realities.

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16. For a more thorough statement of legitimacy principles, see 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, 234 (2008).
  17. Much of the literature on legitimacy has focused on legitimacy's impact on compliance, that is, willingness to obey the laws and legal authorities. In that vein, inverse correlations have been shown between citizens' trust in the federal government and rates of street crime and homicide. See GARY LAFREE, *LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA* 91-113 (1998); RANDOLPH ROTH, *AMERICAN HOMICIDE* 448-52 (2009). Because federal and state laws with respect to street crime are by now nearly co-extensive, see Richman, *supra* note 1, at 82, 90-91, there is no way to evaluate whether the federal criminal justice system in particular promotes heightened compliance with the criminal law (and thus lower crime rates). My aim instead is to explore legitimacy's potential influence on deference to and cooperation with federal authorities in the prosecution of cases—primarily deference and cooperation of witnesses, jurors, and judges—and to theorize how such cooperation and deference might help, in part, to explain outcome disparities between the state and federal forums in criminal prosecutions.
  18. See Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 217 (2012) (“To the extent that people see the system as in conflict with their judgments of justice, [] acquiescence and cooperation is likely to fade and be replaced with resistance and subversion. . . . Witnesses may lose an incentive to offer their information or testimony. Citizens may fail to report crimes in the first instance. Jurors may disregard their jury instructions. Police officers, prosecutors, and judges may make up their own rules. And offenders may resist adjudication processes and punishments rather than participate in them.”).

A legitimacy-based account of the federal criminal justice system broadens our understanding beyond the tangible, to encompass less overt sources of federal power. It opens new avenues of inquiry: about the foundations of citizens' trust in the law, the law's enforcers, and the institutions of legal authority; the relationship between law and social norms; citizens' identification with the governing authority; and the place of the jury within the larger electorate. Exploring the sources of federal legitimacy, moreover, reveals surprising implications for criminal federalism: the interactions that may matter most to legitimacy are not those between the federal government and states, but those between states and their localities.

For all the scholarly focus on legitimacy on the one hand and federal prosecution of street crime on the other, we have yet to bridge these two strains of literature. That is, we have yet to consider legitimacy's role in federal street crime enforcement. We should. If legitimacy partly explains the outcome disparities between state and federal forums, we must reconceptualize these disparities as more than just reflections of different sovereigns' legal rules or resource allocations. In many respects, they are that; but the disparities also reflect something else, something that cannot be remedied merely by a change in laws, or rules, or budgets. And so we need to begin asking new questions: not only about how allocations of power in the criminal justice system (between sovereigns as well as between legislators, courts, and law enforcers) affect citizens' trust in the system, but also about how the need for citizens' trust should inform how we allocate power.

This Article unfolds in four parts. Part I tests the limits of conventional explanations of forum disparities in street crime prosecution. Part II provides the conceptual framework of legitimacy theory in criminal justice and describes legitimacy's significance in criminal adjudication. Part III explores federal prosecution of street crime through this framework, examining the legitimacy-enhancing features of federal criminal enforcement. These features do not make it "more legitimate" in a normative sense, and this Article makes no claim in that regard. The focus here is on perceptions of legitimacy—in the eyes of jurors, witnesses, and judges. Part IV takes on the normative implications. Criminal federalism inquiries, particularly in the context of street crime, have largely focused on how criminal power should be allocated between state and federal sovereigns. Yet if forum disparities in prosecutions of street crimes arise at least in part from a legitimacy gap, then we should also be asking an entirely different question: how can we translate the legitimacy-enhancing features of the federal system into local justice systems? Unpacking the sources of federal legitimacy reveals that, counterintuitively, the best way to emulate these sources in local systems is by *enhancing* localism—through greater

accountability, participation, and local voice in both criminal lawmaking and law enforcement.

To be clear, the goal of this endeavor is not to emulate federal conviction rates or penalties, but rather to emulate those features of the federal system that serve, in part, to align written and applied law. Enhancing localism in urban criminal justice systems will help close the distance between written and applied law in those systems. And it will do so in a way that is more substantively just, because it will derive from the trust and cooperation of citizens most affected by street crimes and their enforcement. Attention to localism in urban criminal justice systems will thus enhance substantive justice not only in those systems, but overall: greater legitimacy in local urban justice systems will lessen the perceived need for federal prosecution of street crime and the relatively harsh penalties that come with it.<sup>19</sup>

It should be noted that this Article applies theories derived from empirical research in one area (local urban justice systems) to another (the federal justice system) in which similar empirical work has not yet been done.<sup>20</sup> In this sense, the Article sets forth a research agenda for further work. It is my hope that this agenda encourages us to think more broadly about the sources of federal enforcement power in street crime and, perhaps, beyond.

## I. CONVENTIONAL ACCOUNTS OF FORUM DISPARITIES AND THEIR LIMITS

Over the last five decades, federal criminal law has vastly expanded, and the bulk of that expansion has been in the area of violent crimes and narcotics.<sup>21</sup> In the late 1960s and early 1970s, Congress passed three pieces of criminal legislation that would prove to become staples of federal violent crime and narcotics prosecutions: the Gun Control Act of 1968, which marked the beginning of a sustained federal legislative effort at controlling gun crime;<sup>22</sup> the Racketeer Influenced Corrupt Organizations Act, enacted to respond to mob

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19. This is not to say that federal penalties for street crime are necessarily substantively unjust (although one could certainly make a strong argument that they are unjust in certain cases and even whole categories of cases). My point here, rather, is that penalties are most apt to be substantively just when supported by the communities most affected by the crime and its punishment.

20. See *infra* note 150.

21. Richman, *supra* note 1, at 88-91.

22. Pub. L. No. 90-618, 82 Stat. 1213.

crime but soon discovered by prosecutors as a potent tool for prosecuting violent inner city gangs;<sup>23</sup> and the Comprehensive Drug Abuse Prevention and Control Act of 1970, which began the federal government's foray into criminal drug enforcement.<sup>24</sup> A series of amendments to the drug laws over the next several decades saw marked increases in the types of drugs and drug-related conduct subject to federal criminal prosecution and in the penalties associated with federal drug crimes.<sup>25</sup> Recidivist enhancements became a common feature of federal drug, gun, and violent crime penalties.<sup>26</sup>

Over this period, and with increasing intensity over the last two decades, federal prosecutors have used these and other laws to prosecute street crime.<sup>27</sup> The enforcement effort has received sustained attention from the Department of Justice, with particularly vigorous contributions coming from those U.S. Attorney's Offices in districts that encompass inner cities with high levels of gun and drug crime. And with rare exceptions, the courts have acceded to the federal government's authority in this area in the face of federalism-based challenges.<sup>28</sup>

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23. Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title IX, 84 Stat. 941.
24. Pub. L. No. 91-513, 84 Stat. 1236.
25. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, among other things strengthened the penalties for certain drug offenses, established mandatory minimum sentences for certain gun crimes, and overhauled the federal sentencing system, abolishing parole and creating a sentencing commission directed to establish mandatory guidelines for all federal criminal defendants. In 1986 and 1988, Congress passed two Anti-Drug Abuse Acts, Pub. L. No. 99-570, 100 Stat. 3207, and Pub. L. No. 100-690, 102 Stat. 4181, each of which added additional mandatory minimum sentences for certain drug-trafficking offenses, particularly those related to crack cocaine. The Comprehensive Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, further increased drug penalties.
26. *E.g.*, 18 U.S.C. § 3559(c) (2012) (federal “three strikes” statute, described *infra* note 42); 18 U.S.C. § 924(e) (mandating a minimum of 15 years’ imprisonment for defendants convicted of any of nine offenses, including illegal gun possession, who have three prior convictions for certain drug-trafficking or violent crimes). Certain federal narcotics-trafficking penalties give prosecutors discretion to double penalties for defendants previously convicted of a felony drug trafficking crime. *See* 21 U.S.C. §§ 841(b)(1), 851.
27. By the term “street crime,” here and throughout this Article, I refer to gun offenses, narcotics offenses, and episodic violent crimes such as robbery and homicide. Street crimes may be perpetrated by individuals acting alone or as part of organized criminal activity (such as gang and drug-trafficking operations). I exclude from this term international (cross-border) narcotics trafficking.
28. *See generally* Richman, *supra* note 1, at 88-90 (citing cases). *United States v. Lopez*, 514 U.S. 549 (1995), has proven one of the few exceptions. Richman, *supra* note 1, at 90 (describing *Lopez* as “little more than a speed bump” in the Court’s acquiescence in the “complete

This relatively recent federal prosecutorial focus has generated much academic commentary, most of it negative, concerning the propriety of federal enforcement of what have traditionally been considered “local” crimes. The debate has largely proceeded within the familiar federalism framework, with some commentators arguing for increased federal intervention and a vocal majority decrying the federal government’s infringement on local police powers.<sup>29</sup> The participants in this particular federalism debate, though, do not line up along the typical political divisions.<sup>30</sup> And that is because, unlike other federal interventions in the criminal justice system—for instance, habeas corpus proceedings, the procedural constraints imposed on states by the Warren Court, or § 1983 actions against law enforcement officers—this federal intervention has resulted in substantially less favorable outcomes for criminal defendants. On the whole, federal prosecution results in a more certain conviction and a likely higher sentence than a defendant would receive were he prosecuted in a local county courthouse.<sup>31</sup> It is, in fact, this salient feature that drives much of the academic debate.<sup>32</sup>

It is also what drives federal prosecutions. Unlike large-scale white-collar or regulatory crimes, which typically require expertise and resources more available at the federal level, the default forum for street crimes is local. The corollary to this division of labor is that when the local district attorney can provide a prosecution that is equally or nearly as effective as would occur in federal court, in the form of a high likelihood of conviction and a substantial sentence, federal prosecution offers little value-added.

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federalization of criminal law”). Although *United States v. Morrison*, 529 U.S. 598 (2000), and *Jones v. United States*, 529 U.S. 848 (2000), are often cited as *Lopez*’s jurisprudential analogues, they are not. The Court in *Morrison* struck down a civil remedy under the Violence Against Women Act; several federal courts of appeals have upheld the constitutionality of that Act’s criminal provisions without disturbance. *E.g.*, *United States v. Page*, 167 F.3d 325, 325 (6th Cir.) (en banc), *cert. denied*, 528 U.S. 1003 (1999); see *United States v. Larsen*, 615 F.3d 780, 786 (7th Cir. 2010) (joining “the Second, Fourth, Fifth, and Sixth Circuits in holding that the [criminal-penalty provision] is a valid exercise of Congress’s power under the Commerce Clause to regulate the channels or instrumentalities of, or persons in, interstate commerce”). And in *Jones*, the Court excluded private residences from the federal arson statute as a matter of statutory interpretation, not constitutional limitation.

29. See sources cited *supra* notes 2-3, 10-13.

30. See Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L. J. 1029, 1065-66 (1995).

31. See sources cited *supra* note 1.

32. See, *e.g.*, sources cited *supra* notes 2-3, 10-13.

The disparity between federal and local enforcement of street crime, then, matters not just from an equity perspective but from an instrumental perspective as well: generally speaking, it is this disparity that drives federal intervention. And yet there has been relatively little attention paid to the possible explanations for it. The disparity has been the starting point for academic commentary, rather than its focus. What attention it has received has been mostly geared towards marshaling arguments in favor of, or against, federal intervention. Proponents of federal intervention argue that federal procedural rules, ample investigative resources, and enforcement discretion give prosecutors important tools for prosecuting violent crime.<sup>33</sup> Opponents argue that the outcome disparity violates the Equal Protection Clause or, at least, offends common notions of equity, and that federal intervention constitutes an end-run around state legislatures' sentencing preferences.<sup>34</sup>

In all of these arguments, the reasons for the disparities are largely presumed: federal sentences for gun and drug crimes are in most instances harsher and less malleable than their state counterparts; federal rules of criminal procedure are generally more favorable to prosecutors; and federal prosecutors have vastly more resources to devote to each case, as well as the luxury of choosing which cases they will bring.<sup>35</sup> Each of these points is correct, and, collectively, they do a great deal of work in explaining criminal forum disparities. They do not, though, go the distance in explaining the extent and depth of the outcome disparities that exist. Let us examine why.

#### A. *The Penalties Explanation*

The leading explanation for the disparity between federal and local outcomes in street crime prosecution is relatively more stringent federal penalties, which we are told affect outcomes in two ways. First, harsher and more compulsory federal statutory penalties explain the substantially higher federal conviction rate: high penalties pressure defendants to plead guilty in exchange for lower sentences, resulting in more guilty pleas, fewer trials, and therefore fewer acquittals.<sup>36</sup> Second, higher federal statutory penalties result in longer federal sentences.<sup>37</sup>

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33. See Jeffries & Gleeson, *supra* note 11; Stacy & Dayton, *supra* note 3, at 286-87.

34. E.g., Beale, *supra* note 2; Clymer, *supra* note 1; O'Hear, *supra* note 10.

35. See *supra* notes 1-3, 10-13.

36. See Clymer, *supra* note 1; Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1270 (2010); Wright, *supra* note 10, at 84-86, 129-34; see also Stacy & Dayton,

The theory is not wrong, but it has several important limitations. First, it is not always the case that penalties for prosecuted federal crimes are higher than those under applicable state law. Second, even when federal penalties are higher than their state counterparts, this difference alone does not account for the depth of the outcome disparities we see. Third, federal case disposition data reveals a somewhat more complicated relationship between penalties and conviction rates.

Begin with the first limitation. It is undoubtedly correct that in many circumstances the federal penalty for a crime is significantly harsher than the state penalty for essentially the same crime.<sup>38</sup> But that is not always the case, and, critically, it is not the case in a number of areas in which we see robust federal enforcement. A corollary to the history of escalating federal penalties for drug and gun crimes is the history of escalating state penalties for such crimes, a history that has been largely overlooked in the violent-crime federalism debates.<sup>39</sup>

New York's Rockefeller Drug Laws, passed in 1973, were at the time the nation's harshest. The penalties, which remained in effect until amendments in 2004 and 2009, included mandatory minimums that exceeded those under applicable federal law.<sup>40</sup> Other states soon followed suit. Michigan and Florida are just two examples of states whose drug penalties eclipsed their federal

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*supra* note 3, at 286-87 (noting that relatively harsher federal sentences induce defendants to cooperate). Cooperation almost always entails pleading guilty to charged crimes (and sometimes also admitting to uncharged crimes).

37. Barkow, *supra* note 10, at 1312-14 n.169; Clymer, *supra* note 1; Stacy & Dayton, *supra* note 3, at 286-87.
38. See, e.g., O'Hear, *supra* note 10, at 731-32; Simons, *supra* note 3, at 916-19.
39. Even when commentators have acknowledged instances in which state penalties are harsher than federal counterparts, they have assumed that, in those instances, federal prosecutors defer to state prosecution. See, e.g., Clymer, *supra* note 1, at 669 n.128. In fact, though, federal prosecutors *do* prosecute even in instances where the applicable state statute would (if applied) result in a harsher sentence. See *infra* notes 50-51 and accompanying text.
40. For instance, prior to 2004, a first-time offender found in possession of four ounces (approximately 113 grams) of any controlled substance other than marijuana faced a mandatory minimum term of fifteen years. N.Y. PENAL LAW §§ 220.21, 60.05, 70.0(3) (McKinney 1995), amended by 2004 N.Y. Sess. Laws 1474 (McKinney). Under federal law, the highest mandatory minimum penalty for a first-time felony drug offense was (and still is) ten years. See 21 U.S.C. § 841(b)(1)(A) (2012). Then-mandatory federal sentencing guidelines for such an offense ranged from 27 to 71 months for cocaine and 63 to 150 months for heroin, depending on the offender's criminal history. See U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(11), 2D1.1(c)(7) & Sentencing Table (2003).

counterparts for decades.<sup>41</sup> Beginning in the 1990s, many states passed “three strikes” statutes that applied to defendants with substantially less severe criminal histories than did the federal “three strikes” statute, or even the federal Armed Career Criminal statute.<sup>42</sup> Among them were California and Louisiana, which mandated life imprisonment upon conviction of, respectively, *any* third felony crime<sup>43</sup> or certain narcotics-trafficking crimes or “crimes of violence,” broadly defined to include such offenses as purse-snatching.<sup>44</sup> California’s law

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41. From 1973 to 1998, Michigan’s notorious “650-lifer law” (the subject of an unsuccessful Eighth Amendment challenge in *Harmelin v. Michigan*, 501 U.S. 957 (1991)) imposed mandatory lifetime imprisonment without parole for possession of at least 650 grams of cocaine; from 1998 to 2002, the statute imposed a mandatory term of twenty years, and it was not until 2003 that Michigan abolished mandatory terms for drug offenses. MICH. COMP. LAWS § 333.7401 (1997), *amended by* 1998 Mich. Legis. Serv. 319 (West), *amended by* 2002 Mich. Legis. Serv. 665 (West). Florida’s drug trafficking statute, still in effect, mandates a sentence of seven years for possession of at least 200 grams of cocaine, fifteen years for at least 14 grams of heroin or 400 grams of cocaine, twenty-five years for at least 28 grams of heroin, and mandatory life for more than 30 kilograms of heroin or 150 kilograms of cocaine. *See* FLA. STAT. ANN. § 893.135(1)(b)-(c) (West 2012). First-time offenders and even some second-time offenders subject to these statutes would face lower mandatory penalties under federal law. *See* 21 U.S.C. § 841(b)(1) (mandating a sentence of ten years for trafficking in at least 1 kilogram of heroin or 5 kilograms of cocaine, five years for at least 100 grams of heroin or 500 grams of cocaine, and no mandatory minimum for lesser quantities); 21 U.S.C. § 851 (giving prosecutors discretion to double applicable mandatory minimum terms for defendants previously convicted of a felony drug-trafficking crime).
  42. The federal “three strikes” statute, 18 U.S.C. § 3559(c), imposes a mandatory sentence of life imprisonment upon conviction for a “serious violent felony” (defined as any offense punishable by at least ten years which requires the use, or involves significant risk, of force) if the defendant has been convicted on separate prior occasions of either two “serious violent felonies” or one “serious violent felony” and one “serious drug offense” (defined as conduct punishable under 21 U.S.C. § 841(b)(1)(A)). A provision of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), mandates a minimum of fifteen years’ imprisonment for defendants convicted of illegal gun possession who have three prior convictions for certain drug-trafficking or violent crimes.
  43. *See* CAL. PENAL CODE §§ 667(e)(2)(A)(ii), 1170.12(c)(2)(A)(ii) (West 1994), *amended by Proposition 36*, CAL. SECRETARY ST. (2012), <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop36>. California’s statute required a minimum of at least 25 years’ imprisonment prior to parole-eligibility. California amended its three strikes statute in 2012 by making it applicable only if (i) the “third strike” conviction is for a “serious” or “violent” felony or for certain sex, drug, and firearm offenses, or (ii) the defendant has a prior conviction for rape, murder, or child molestation. *See* CAL. PENAL CODE §§ 667(e)(2)(A)(ii), 1170.12(c)(2)(A)(ii) (West 2012).
  44. LA. REV. STAT. ANN. § 15:529.1(A)(3)(b) (West 2013). The “three strikes” provision renders convicted offenders ineligible for parole or any other form of early release. Louisiana also has a “four strikes” provision that mandates twenty years’ imprisonment upon a fourth felony conviction for *any* crime. *See* LA. REV. STAT. ANN. § 15:529.1(A)(4).

was so harsh it was challenged as “cruel and unusual” before the U.S. Supreme Court, a distinction thus far not accorded to any federal sentencing law with the exception of the death penalty.<sup>45</sup> And while many states’ penalties for gun crimes are less severe than federal penalties, not all are. Florida, Maryland, Virginia, and New York are all examples of states whose mandatory minimum penalties for illegal firearms use or possession exceed those under applicable federal law.<sup>46</sup>

The last two decades have also seen a movement in many states away from indeterminate sentencing schemes, under which offenders could secure a significantly earlier release date from a parole board. Beginning in the 1980s, and hastened in the mid-1990s in significant part by the federal “truth-in-sentencing” grant program, many states began adopting some form of determinate sentencing; requirements that prisoners (particularly those convicted of violent crimes) serve at least 85% of their imposed sentence, a ratio that substantially mirrors federal sentencing rules;<sup>47</sup> or some combination of both.<sup>48</sup>

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45. The law ultimately withstood the challenge, *see Ewing v. California*, 538 U.S. 11 (2003), as did a substantially similar three-strikes statute in Texas that was also challenged on Eighth Amendment grounds, *see Rummell v. Estelle*, 445 U.S. 263 (1980). Federal defendants routinely (and almost always unsuccessfully) challenge non-death penalty sentences as “cruel and unusual” in violation of the Eighth Amendment, *see, e.g., United States v. Vaughn*, 527 F. App’x 826 (11th Cir. 2013) (upholding mandatory life sentence in federal drug case as non-violative of Eighth Amendment and noting that “outside the context of capital punishment, there have been few successful challenges to the proportionality of sentences” (internal citations omitted)). The Supreme Court has yet to hear such a challenge.
  46. In Florida, since 1999, the possession or discharge of a firearm in connection with a drug-trafficking offense or certain violent felony offenses results in a consecutive mandatory minimum sentence of ten or twenty years, respectively—twice the terms applicable for single violations under the comparable federal law. *Compare* FLA. STAT. ANN. § 775.087(2)(a) (West 2012), *with* 18 U.S.C. § 924(c). Maryland, New York, and Virginia have all enacted mandatory minimum terms for possession of a firearm, whereas there is no mandatory minimum under federal law for the equivalent crime. *See* MD. CODE ANN., PUB. SAFETY, § 5-133(c)(1)–(2) (West 2012) (five-year minimum for defendants with drug-trafficking felony and/or violent felony convictions); N.Y. PENAL LAW §§ 70.02(1)(b), 70.02(3)(d), 265.03(3) (2013) (3½-year mandatory minimum penalty); VA. CODE ANN. §§ 18.2-308.2, 18.2-308.4(C) (2010) (five-year or two-year mandatory minimum penalty for violent and non-violent felons, respectively).
  47. *See* 18 U.S.C. § 3624(b) (enabling federal prisoners to receive up to fifty-four days credit per year of imprisonment for “good time,” defined as exemplary compliance with prison disciplinary rules).
  48. By 1999, fourteen states (including Florida, Illinois, Ohio, Arizona, and North Carolina)

If more favorable federal prosecutorial outcomes were dictated by prescribed penalties, one would expect to see little federal enforcement of street crimes in states whose own drug, gun, or violent crime statutes were as least as harsh as federal statutes.<sup>49</sup> But that is not what has happened; federal prosecutors have prosecuted thousands of cases that would be subject to an equally or more severe penalty under applicable state law. An examination of federal prosecutions of crimes covered under each of the above-discussed state laws<sup>50</sup> reveals that federal enforcement efforts are not necessarily the product of relatively higher *prescribed* penalties under federal law.<sup>51</sup>

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had abolished any early-release by a parole board, and thirty-four states (including New York, Pennsylvania, California, Michigan, Missouri, Louisiana, Virginia, and the District of Columbia) had required some or all prisoners to serve at least eighty-five percent of their imposed sentence notwithstanding any parole release or other earned adjustments. BUREAU OF JUSTICE STATISTICS, NCJ 170032, TRUTH IN SENTENCING IN STATE PRISONS 2-3 (1999).

49. Indeed, that is what some scholars presume. *See, e.g.*, Clymer, *supra* note 1.
50. I use these laws as illustrations. An exhaustive state-by-state comparison of violent crime, firearms, and narcotics laws, and their penalties relative to comparable federal laws, is well beyond the scope of this Article, and, as noted, I do not quarrel with the basic premise that most federal penalties are more severe than their state counterparts. My point, rather, is that federal cases are brought even in instances where applicable state penalties are equally or more severe.
51. According to data from the Federal Judicial Center:
- Between 2001 and 2011, federal prosecutors in Florida charged at least 1,043 defendants (an average of 95 per year) with a violation of 18 U.S.C. § 924(c)—even though Florida law mandates double the imprisonment time for the same effective conduct. *See supra* note 46.
  - Between 2001 and 2011, federal prosecutors in Virginia have prosecuted at least 1,572 defendants (an average of 143 per year) with a violation of 18 U.S.C. § 922(g), and 1,550 defendants (an average of 141 per year) with a violation of 18 U.S.C. § 924(c)—even though Virginia’s penalties for the same conduct are at least as, and in many instances more, severe. *See supra* note 46.
  - In the five years preceding New York’s 2006 gun law amendment, which mandates a term of three and a half years for illegal firearm possession, there were at least 1,024 federal cases prosecuted in New York State for a violation of 18 U.S.C. § 922(g), while in the five years following the amendment, there were 846 defendants prosecuted for that crime—a decrease of only 17%, notwithstanding the absence of any mandatory penalty for the equivalent federal crime. *See supra* note 46.

According to data from the United States Sentencing Commission:

- Between 1991 and 2008 (the latest year for which offense-specific data is available), federal prosecutors have charged at least twenty-one California defendants and at least 386 Louisiana defendants under the ACCA (which mandates fifteen years’ imprisonment) even though these defendants would be eligible for mandatory life imprisonment under their respective states’ “three-strikes” statutes.

- Federal prosecutors have prosecuted at least 2,359 Florida defendants for cocaine offenses and 2,397 for heroin offenses that would have carried a mandatory minimum sentence of life imprisonment if prosecuted under state law.
- In 1997 (the earliest year for which drug weight data is available, and the year before Michigan amended its mandatory life term for offenses involving at least 650 grams of cocaine), federal prosecutors charged at least 126 defendants with cocaine offenses that would have carried a minimum sentence of life imprisonment if prosecuted under state law. Moreover, the changes in Michigan's penalty scheme for cocaine offenses involving at least 650 grams, *see supra* note 41, appear to have had little effect on federal prosecutions of cocaine offenses: in the five years preceding Michigan's 2002 repeal of a mandatory minimum for cocaine offenses involving at least 650 grams, federal prosecutors charged 373 defendants with such offenses, while in the five years following the repeal, they charged 322 defendants with such offenses—a decrease of just 14%.

(Datasets for FJC and USSC data are available at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072>, and <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/83>, subject to restricted use agreement; data analysis is on file with author.)

A few notes on context and methodology are in order. First, context. Charging patterns vary widely across districts. The ACCA is a good example of such variation. Some districts in states less populous than California and Louisiana charge more ACCA cases, while others in states nearly as populous, or more populous (in the case of Louisiana), charge fewer. For instance, New York, nearly four times the population of Louisiana and more than half the population of California, charged just 109 ACCA cases between 1991 and 2008. *See* FJC and USSC data and analysis on file with author. For state population data, see <http://quickfacts.census.gov/qfd/states/06000.html> (California); <http://quickfacts.census.gov/qfd/states/36000.html> (New York); and <http://quickfacts.census.gov/qfd/states/22000.html> (Louisiana). (It should be noted that the Sentencing Commission data files indicate that there are thousands of federal defendants in California whose status under the ACCA went unreported, which may result in an understatement of the total number subject to the ACCA.)

Second, methodology. There are two variables that can change applicable mandatory minimums for federal gun and drug charges: (i) multiple counts of conviction; and (ii), for drug offenses, prior felony convictions for certain drug-trafficking offenses can, in some instances, double the applicable mandatory minimum sentence or even raise it to a mandatory life sentence. *See supra* note 41. To mitigate these confounding variables, I did several things. With respect to the offenses under 18 U.S.C. § 922(g) (which criminalizes firearm possession by prohibited persons such as convicted felons), I analyzed only defendants for whom this was the sole count of conviction. With respect to the offenses under 18 U.S.C. § 924(c) (which criminalizes the possession or use of a firearm in furtherance of a drug-trafficking crime or crime of violence, and so is typically charged with one or more of those other crimes), I analyzed only defendants for whom 18 U.S.C. § 924(c) was the count carrying the most severe penalty as calculated by the Federal Judicial Center, and for whom it was the sole count of conviction for that crime (because multiple convictions under § 924(c) significantly increase the applicable mandatory minimum under federal law). With respect to drug offenses, the sentencing commission's data files do not provide specifics on defendants' prior convictions, making it difficult to ascertain the mandatory minimum sentence the defendant faced prior to conviction. I therefore rely only

Are all these cases inadvertent misallocations of federal resources? To the contrary, they are intentioned and deliberate. Most federal street crime prosecutions are initiated at the request of local police and district attorney's offices intimately familiar with applicable state penalties and the sentences typically imposed in actual cases.<sup>52</sup> These cases are part of a sustained collaboration between federal and local law enforcement to reduce drug-trafficking and violent crime.<sup>53</sup> And they are predicated on federal and local prosecutors' belief that the defendant is more likely to be convicted and sentenced to a substantial incarceration term if prosecuted in federal court— notwithstanding a higher applicable penalty on the state's codebooks.<sup>54</sup>

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upon charges that would have carried at least as severe a penalty under state law notwithstanding a defendant's prior drug-trafficking convictions—that is, life imprisonment. See 21 U.S.C. §§ 841(b)(1)(A), 851 (providing a mandatory minimum sentence of life for a defendant with two prior qualifying drug-trafficking convictions, subject to prosecutorial discretion). This methodology also avoids the issue of multiple counts impacting applicable penalties, since the minimum penalty faced under state law in any event is life. My drug offense methodology led me to focus on these specific Michigan and Florida statutes, even though there are other state penalty schemes that carry (or carried) higher penalties for first-time and even some second-time drug-trafficking offenders. New York's Rockefeller laws, which like the federal narcotics laws contain recidivist enhancements, are, of course, a notorious example. See *supra* note 40.

In short, the limitations of these datasets make it impossible to ascertain fully and accurately the number of federal criminal defendants who would have faced the same or harsher penalties under state law. And the methodology I employ with respect to the drug offenses carries its own pitfalls. Namely, it focuses on large-quantity drug offenses that may constitute interstate or even international drug-trafficking in addition to (or in lieu of) street-level offenses. Notwithstanding these limitations, though, this data at least illuminates an under-noticed feature of federal charging decisions in gun and drug offenses: they are not necessarily motivated by applicable state penalties.

52. See generally SCOTT H. DECKER & JACK McDEVITT, NAT'L INST. JUST., PROJECT SAFE NEIGHBORHOODS: STRATEGIC INTERVENTIONS, GUN PROSECUTION CASE SCREENING 5-6 (2006) (discussing local prosecutors' role in federal case screening); Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 244-47, 253-54 (2005) (discussing local law enforcement collaboration in federal charging decisions).
53. See generally SCOTT H. DECKER ET AL., U.S. DEP'T JUST., PROJECT SAFE NEIGHBORHOODS: STRATEGIC INTERVENTIONS: GUN PROSECUTION CASE SCREENING: CASE STUDY 1 (2006) (discussing intentional efforts to increase federal prosecution of gun crimes across all federal districts through partnerships with federal and local prosecutors and local and state law enforcement agencies).
54. Miller & Eisenstein, *supra* note 52, at 257-58 ("When asked why [the local ADAs] bother taking those cases [in which applicable state and federal penalties are similar] to federal court if the defendants are not likely to receive a longer sentence anyway, the ADA replied,

The second and more fundamental limit to federal/state penalty differences as a source of outcome disparity is that these differences do not account for the depth of the disparities that exist. The case synopses offered in the Introduction illustrate the point. For Shateek Andrews, the Bronx robber, local grand juries did not even return indictments on the armed robberies of which he was ultimately convicted in federal court—and for which he would have faced a penalty of ten to twenty-five years under state law.<sup>55</sup> Had John Gassew, the Philadelphian arrested forty-four times for various gun and violent crimes, been convicted in local court on even one of those occasions, he would have faced a mandatory minimum sentence of ten years upon his second conviction; had he been convicted on just two occasions, he would have faced a mandatory minimum sentence of twenty-five years upon his third conviction.<sup>56</sup> A large portion of the disparity in applicable penalties is very often a function of antecedent disparities in the ability to convict.

Penalties, of course, affect the ability to convict: the higher the penalty, the greater the inducement to reduce it through a negotiated plea bargain.<sup>57</sup> But in

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‘Because they are much more likely to get convicted in the federal system.’”). A prime example of this dynamic occurs in Baltimore, Maryland, where state law mandates a five-year penalty for gun possession by defendants previously convicted of certain crimes. *See* MD. CODE ANN., PUB. SAFETY, § 5-133(c) (LexisNexis 2011). Notwithstanding the *absence* of any mandatory minimum term for the equivalent federal crime, federal prosecutors routinely threaten to prosecute defendants who do not plead guilty in state court to the mandatory five-year penalty—a tactic that has proven quite successful at garnering the desired state court outcomes. *See* Press Release, Baltimore EXILE Partners Announce 60% Increase in Violent Defendants Charged Federally Since 2005, Feb. 20, 2008, <http://www.justice.gov/usao/md/news/archive/BaltimoreEXILEPartnersAnnounce60IncreaseinViolentDefendantsChargedFederallySince2005.html>.

55. Had Andrews been prosecuted in state court for first degree armed robbery, he would, as a prior violent felony offender, have faced a sentence of 10 to 25 years. N.Y. PENAL LAW §§ 70.04, 70.02 (McKinney 2004 & Supp. 2007).
56. *See* 42 PA. CONS. STAT. ANN. § 9714(a) (West 2007).
57. “Charge bargaining” is the practice in which prosecutors offer a defendant the chance to plead guilty to a charge with a lower penalty than might apply under initially filed or as-yet unfiled charges. Because charge bargaining goes unreported, its frequency is difficult to ascertain; one qualitative study of federal sentencing guidelines circumvention practices in ten districts found that circumvention occurred in approximately 20% to 35% of cases resolved by guilty plea, and that of the various methods of circumventing guidelines and mandatory penalties, charge bargaining was “the most important.” *See* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1293-94 (1997). Attempts to quantify charge-bargaining from available data kept by the Sentencing Commission can be misleading because those datasets do not contain

this dynamic, too, case disposition data reveals a more nuanced story. For one thing, guilty plea rates do not increase (or decrease) in tandem with applicable penalties. Homicide offenses have one of the lower guilty plea rates in the federal system, but carry the highest statutory and Guidelines penalties.<sup>58</sup> Immigration offenses have one of the highest guilty plea rates, yet most do not carry mandatory minimums or particularly high Guidelines ranges.<sup>59</sup> And

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information on counts initially filed and dismissed, or on counts promised to be filed absent a plea. The recent report by Human Rights Watch attempting to quantify a “trial penalty” for federal defendants charged with narcotics-related offenses suffers from this limitation. See HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 102 n.326 (Dec. 2013). Defendants who go to trial receive on average higher sentences than those who plead guilty, *id.* at 102-04, but it is impossible to tell, based on sentencing data alone, whether this is the result of plea bargaining, reductions for cooperation, the effects of trials on judges’ sentencing decisions, or the fact that defendants facing higher penalties at the outset may more often chose to take their chances at trial—or a mix of some or all of these causes, and others. Research on these questions is sorely needed.

58. From 2002 to 2012, the guilty plea rate for homicide offenses has ranged from a low of 67.0% (in 2004) to a high of 79.0% (in 2012), with a mean of 73.8%. The overall guilty plea rate in the federal system has ranged from a low of 85.8% (in 2003) to a high of 89.0% (in 2012), with a mean of 87.3%. See *Judicial Business Archive*, U.S. CTS., <http://www.uscourts.gov/Statistics/JudicialBusiness/archive.aspx> (click on each of the desired years (2002-2012), then click on “Table D-4 Defendants Disposed of, by Type of Disposition and Major Offense”) (last visited Dec. 11, 2013) (providing copies of the annually published report *Judicial Business of the U.S. Courts*). “Homicide offenses” cover a number of different federal statutes, most of which carry mandatory minimum terms of imprisonment, and all of which carry the highest possible Guidelines ranges and maximum terms of life (or death—although prosecutors are not permitted to enter into a binding plea agreement with a death-eligible defendant before the Attorney General has decided whether to seek the death penalty, see UNITED STATES ATTORNEYS’ MANUAL (USAM) § 9-10.110, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/index.html](http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html) (last updated 2011)). See, e.g., 18 U.S.C. § 924(c), (j) (2012) (mandatory minimum of ten years for discharge of firearm, and additional punishment if the discharge results in death); *id.* § 1111 (mandatory life imprisonment for murder in the first degree); 21 U.S.C. § 848(a)-(b) (mandatory minimum of twenty years’ imprisonment).
59. Over the last eight years, the guilty plea rate for immigration offenses excluding illegal reentry has ranged from a low of 92.8% (in 2008) to a high of 95.4% (in 2010), with a mean of 94.0%. *Judicial Business Archive*, *supra* note 58 (click on each of the desired years (2005-2012), then click on “Table D-4 Defendants Disposed of, by Type of Disposition and Major Offense”). I exclude illegal reentry because the Sentencing Commission allows a four-level Guidelines reduction for a speedy guilty plea by those defendants, a unique penalty-based inducement. See U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2013); Memorandum from James M. Cole, Dep. Att’y Gen., U.S. Dep’t of Justice, Department Policy on Early Disposition or “Fast-Track” Programs 3 (Jan. 31, 2012), <http://www.justice.gov/dag/fast-track-program.pdf>.

narcotics offenses, which tend to have high mandatory minimums and Guidelines ranges (and, for defendants with previous felony drug convictions, a plea-inducing penalty enhancement), have a guilty plea rate that hovers close to the mean for all offenses.<sup>60</sup> It is difficult to ascribe this distribution to specific causal factors.<sup>61</sup> But there are correlations, and one that stands out is ease of proof. Of federal crimes, murder is among the hardest to prove. Federal murder cases almost invariably require eyewitness testimony, usually depend upon accomplice testimony (which always carries great risk for the government), and typically involve witnesses fearful of retaliation. Immigration offenses, on the other hand, are among the easiest to prove. They are generally established with evidence of the defendant's presence, identity, and unlawful immigration status (proven by unassailable records). Federal narcotics offenses are also relatively easy to prove. They typically involve wiretaps, undercover drug purchases, or sale-quantity amounts of drugs seized from the defendant or his residence.<sup>62</sup> Penalties certainly incentivize plea-bargaining, but as this breakdown of guilty plea rates suggests, the outcome of that process is heavily guided by the likelihood of conviction on each potential count.<sup>63</sup>

There is more. The acquittal rate for tried cases, the overall acquittal rate, and the guilty plea rate have not changed significantly since the Supreme Court decided *United States v. Booker*,<sup>64</sup> which rendered advisory the previously mandatory Sentencing Guidelines. To the extent the Sentencing Guidelines' stiff mandatory sentences, coupled with an essentially assured reduction in

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60. Over the last decade, the guilty plea rate for narcotics offenses has ranged from a low of 86.5% (in 2005) to a high of 89.5% (in 2010), with a mean of 88.3%. *Judicial Business Archive*, *supra* note 58 (click on each of the desired years (2002-2012), then click on "Table D-4 Defendants Disposed of, by Type of Disposition and Major Offense"). For overall federal guilty plea rate data, see *supra* note 58.

61. The data show only terminated charges and do not indicate whether or how those differ from the charges initially filed. In the event of multiple counts, the data reflect the outcome of the most severe count upon termination. Non-guilty plea resolutions reflect defendants who did not enter a guilty plea to any count. See E-mail from Kristin Garry, Admin. Office of the U.S. Courts, to author (July 24, 2013) (on file with author).

62. See Stuntz, *supra* note 3, at 2021-25 (arguing that the relative ease of proving narcotics offenses as compared to violent crime has escalated the "war on drugs").

63. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470 (2004) (arguing that of the variety of factors influencing plea-bargaining, "[t]he strength of the prosecution's case is the most important factor").

64. 543 U.S. 220 (2005).

return for a guilty plea,<sup>65</sup> accounted for the high rate of guilty pleas and low rate of acquittals in the federal system, one might expect to see the guilty plea rate drop and the acquittal rate rise following *Booker*. Yet eight years after *Booker*, the federal guilty plea rate has only increased while the acquittal rate has further decreased. At the same time, non-government sponsored downward departures and variances from the Guidelines have been granted ever more frequently, and government-sponsored downward departures and variances have only slightly increased.<sup>66</sup> This inverse trend is even more pronounced with respect to street crimes.<sup>67</sup>

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65. The Sentencing Guidelines permit up to a three-level reduction in offense level in cases resolved by guilty plea. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2013).
66. In 2003, before either *Booker* or its predecessor, *Blakely v. Washington*, 542 U.S. 296 (2004), which invalidated a mandatory state guidelines regime, had been decided, the guilty plea rate in the federal system was 85.8% and the acquittal rate was 0.87%. LEONIDAS RALPH MECHAM, 2003 JUDICIAL BUSINESS tbl.D-4 (2003), in *Judicial Business Archive*, *supra* note 58, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2003/appendices/d4.pdf>. Between 2004 and 2012, the federal guilty plea rate has climbed, from approximately 86% in 2004 to 89% in 2012, and the acquittal rate has steadily decreased, from 0.78% in 2004 to 0.40% in 2012. *Judicial Business Archive*, *supra* note 58 (click on each of the desired years (2004-2012), then click on “Table D-4 Defendants Disposed of, by Type of Disposition and Major Offense”). Meanwhile, the frequency of below-Guideline variances (i.e., *Booker*-based departures and/or below-Guidelines sentences) has steadily increased. In 2006, the year after *Booker*, sentencing courts granted non-government sponsored below-Guideline variances in 8% of cases; by 2012, the rate had jumped to 14.9%. Compare U.S. SENT’G COMM’N, ANNUAL SOURCEBOOK OF SENTENCING STATISTICS tbl.27 (11th ed. 2006) [hereinafter 2006 SOURCEBOOK], [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2006/sbtoc06.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2006/sbtoc06.htm) (tabulating both *Booker*-based departures and *Booker* based variances and reporting government-sponsored downward departures and variances in 27.6% of cases), with U.S. SENT’G COMM’N, ANNUAL SOURCEBOOK OF SENTENCING STATISTICS tbl.27 (17th ed. 2012) [hereinafter 2012 SOURCEBOOK], [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm) (demonstrating that the frequency of government-sponsored downward departures and variances had increased by just three percentage points from FY 2006 to FY 2012).
67. In 2003, the guilty plea and acquittal rates, respectively, for violent offenses were 82.3% and 1.5%; for drug offenses, 87.9% and 0.5%; for firearms offenses, 83.3% and 1.6%. MECHAM, *supra* note 66, at app. 214 tbl.D-4. In 2012, the respective guilty plea and acquittal rates for violent offenses were 84.1% and 0.9%; for drug offenses, 89.5% and 0.3%; and for firearms offenses, 88.3% and 0.8%. THOMAS F. HOGAN, 2012 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.D-4 (2012), in *Judicial Business Archive*, *supra* note 58, <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/statistical-tables-us-district-courts-criminal.aspx>. Meanwhile, between 2006 and 2012, the percentage of cases in which courts granted *Booker*-based below-Guidelines variances or departures jumped markedly across the board in violent crimes and narcotics cases: in murder cases, from 2.6% to 14.3%; in robbery cases, from 11.1% to 20%; in narcotics trafficking cases, from

There is, as well, another story that should give us pause when considering the relationship between prescribed penalties and outcomes. In 1997, the Clinton Administration piloted a firearm enforcement program in the Eastern District of Virginia, “Project Exile,” under which the U.S. Attorney adopted and prosecuted every local firearm case from the city of Richmond.<sup>68</sup> While a debate continues as to that program’s effect on homicide and violent crime rates,<sup>69</sup> there is no debate as to its efficacy at convicting and punishing those it prosecuted: in its inaugural year it boasted an 86% conviction rate and an average sentence of more than four-and-a-half years.<sup>70</sup> Less attention has been paid to the relative failure of the State of Virginia’s version of Project Exile.<sup>71</sup> On the heels of federal Exile’s touted successes, Virginia’s legislature passed a series of firearm statutes that were nearly exact replicas of their federal statutory counterparts, with the added hammer of mandatory minimum sentences that closely approximated (and in some respects exceeded) the federal sentencing guidelines.<sup>72</sup> What’s more, the Virginia legislature also reformed its bail statute to create a presumption of pre-trial detention in firearms cases, a provision absent from the federal bail statute.<sup>73</sup> State and federal grants were awarded to the Virginia localities selected to implement Exile, each of which assigned a full-time prosecutor dedicated to prosecuting Exile cases from arrest to sentencing, and each of which developed training

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8.1% to 16.8%; and in firearms cases, from 8.9% to 17.2%. Compare 2006 SOURCEBOOK, *supra* note 66, at tbl.27 (tabulating both *Booker*-based departures and *Booker*-based variances), with 2012 SOURCEBOOK, *supra* note 66, at tbl.27 (same).

68. See Richman, *supra* note 3, at 370.

69. Compare Michael Janofsky, *Fighting Crime by Making Federal Case About Guns*, N.Y. TIMES, Feb. 10, 1999, <http://www.nytimes.com/1999/02/10/us/fighting-crime-by-making-federal-case-about-guns.html> (citing those who credited Project Exile for the 36% decline in Richmond’s homicide rate between 1997 and 1998), with Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 251 (Jens Ludwig & Philip J. Cook eds., 2003) (arguing that the evidence is inadequate to show that Project Exile caused the decline).

70. Janofsky, *supra* note 69.

71. An exception is Richman, *supra* note 3, at 407-08 (noting that this failure tended to diminish prospects of a politically acceptable exit strategy for the federal program).

72. Sherri Johnson et al., *Evaluation of the Virginia Exile Program: Final Report*, VA. DEP’T CRIM. JUST. SERVICES 6 (July 2003), <http://www.dcs.virginia.gov/research/documents/exileFinal.pdf> [hereinafter VIRGINIA EXILE REPORT]; see U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 & Sentencing Table (2003).

73. VIRGINIA EXILE REPORT, *supra* note 72.

teams and working partnerships with local law enforcement.<sup>74</sup> So what happened when Virginia effectively adopted federal firearms law and dedicated intense efforts and resources to enforcing it? Virginia state prosecutors could not replicate the federal conviction or average sentence rates. Indeed, they did not even come close: of the 404 defendants prosecuted under Virginia Exile laws in the year after enactment, only 155—just 38%—were convicted of an Exile offense and received the full mandatory minimum sentence.<sup>75</sup>

If Project Exile amounts to a natural experiment, it is an imperfect one. In the first year of Federal Exile, federal prosecutors prosecuted all firearms cases in Richmond susceptible of federal jurisdiction,<sup>76</sup> but, in the first year of Virginia Exile, local prosecutors prosecuted only firearms cases declined by the U.S. Attorney.<sup>77</sup> For this reason, one might counter that Virginia Exile simply demonstrates another frequently advanced explanation for federal/state outcome disparities: federal prosecutors' ability to selectively prosecute only the strongest cases, while leaving local prosecutors with cases more challenging to prove.<sup>78</sup> But this doesn't explain the depth of the disparity; even if every federally adopted case had been prosecuted locally and resulted in a conviction, the local conviction rate would rise to just 53%.<sup>79</sup> Something additional is at

74. None of the six localities selected to implement Virginia Exile expended the full grant award amounts, indicating resources were not lacking. *Id.* at 16.

75. *Id.* at 57.

76. Charles D. Bonner, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 928-29 (1998); Richman, *supra* note 3, at 379. The federal jurisdictional bar is quite low, requiring, under 18 U.S.C. § 924(c), proof that the gun was used either in connection with a federal violent or drug trafficking crime, or, under 18 U.S.C. § 922(g), proof that the seized gun was manufactured outside the state where the defendant possessed it. Federal jurisdiction for illegal gun possession is readily had in Virginia, a state without a major firearms manufacturer. See *Annual Firearms Manufacturing and Export Report*, BUREAU OF ALCOHOL, TOBACCO & FIREARMS (2011), <http://www.atf.gov/files/statistics/download/afmer/2011-final-firearms-manufacturing-export-report.pdf> (providing state-by-state listing of firearms manufacturers and firearms produced and showing that, of the over 6.3 million firearms manufactured in the United States in 2011, only 3,770—approximately 0.06%—were made in Virginia).

77. Of the 527 Exile defendants prosecuted in the program's first year, 123 (23%) were prosecuted federally. VIRGINIA EXILE REPORT, *supra* note 72, at 57.

78. Indeed, this was one explanation given by local Virginia prosecutors. See *id.* at 2. I address this general theory in Section I.C.

79. See *id.* at 57. My calculation assumes 123 defendants would be added to the 404 locally prosecuted, and that each of these 123 would be convicted. The same 53% rate results if the analysis is performed on cases rather than defendants. See *id.*

play in the Exile story—something beyond penalties, resources, and case selection.

All this is not to say that prescribed penalties do not impact outcomes: of course they do. In many states and for many crimes, more stringent federal penalties indeed give federal prosecutors extraordinary leverage, particularly when accounting for guilty pleas induced via charge bargaining.<sup>80</sup> But even when federal penalties do operate in this manner, they do not act in isolation. Other, less overt forces are at play.

### *B. The Procedural Rules Explanation*

Another frequent explanation for better federal prosecutorial outcomes is federal procedural rules that tend to advantage prosecutors. Commentators have pointed out that in recent years many state courts (and, in some instances, legislatures) have increased defendants' procedural protections above the floor set by federal constitutional law.<sup>81</sup> Some states, for instance, do not recognize the "good faith" exception to the warrant requirement.<sup>82</sup> Others rely on less flexible standards in evaluating the reliability of an informant's tip in assessing probable cause.<sup>83</sup> Still others prohibit convictions based only on certain types of evidence, most notably uncorroborated accomplice testimony.<sup>84</sup> And other states have stricter requirements for grand juries to indict—for instance, requiring that grand jury evidence comport with the rules of trial

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80. See Wright, *supra* note 12, at 153 n.225, 154; *supra* note 57. This is certainly true in the context of narcotics defendants with prior felony drug-trafficking convictions, where federal law permits prosecutors to double applicable penalties at their discretion, offering an enormous plea-bargaining "chip." See 21 U.S.C. §§ 841(b)(1), 851 (2012). Charge bargaining, though, raises more questions about forum disparities than it answers. What distinguishes federal prosecutors' charge-bargaining leverage from that of local prosecutors when state law supplies similar penalties for a given crime? Resources play a role, to be sure, but do not quite account for the depth of the disparities we see. See *supra* note 74 and accompanying text; *infra* notes 106-113 and accompanying text.

81. *E.g.*, Clymer, *supra* note 1, at 671-73.

82. See Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417, 424, 427, 444, 446, 448, 453 (2007) (identifying in this category Connecticut, Georgia, New Jersey, New Mexico, North Carolina, and Pennsylvania).

83. See *id.* at 420, 435, 446-47, 457 (identifying Alaska, Massachusetts, New Mexico, New York, and Tennessee).

84. See Charles Steigler, *Offering Monetary Rewards to Public Whistleblowers: A Proposal for Attacking Corruption at its Source*, 9 OHIO ST. J. CRIM. L. 815, 821 n.21 (2012) (identifying seventeen states with such a ban).

admissibility.<sup>85</sup> Procedural rules such as these undoubtedly give federal prosecutors a leg up on their state and local counterparts in certain states. But in prosecutions of street crime, how much does that leg up really matter?

In practice, probably not a great deal. As an initial matter, the distinctions between federal and state constitutional criminal procedure are not so stark. In a number of states, state constitutional search and seizure doctrine has not diverged at all from federal search and seizure doctrine as set forth by the federal courts.<sup>86</sup> And even in states where it has, those differences operate largely at the margins; most of the time, constitutional infirmities in street crime cases, if present, will exist under both state and federal law.<sup>87</sup>

More to the point, though, federal prosecution of street crime is rarely a stand-alone enterprise. Rather, it operates as a complement to what is almost entirely a state and local law enforcement effort.<sup>88</sup> This has two ramifications for constitutional criminal procedure. First, because many federal narcotics and violent crime cases begin in state court, those cases have already arguably satisfied state procedural law: local prosecutions would not have been initiated absent a likelihood of prevailing on a suppression motion. Second, even cases filed in federal court at the outset will have generally relied at least to some extent on assistance from local law enforcement officers, who must operate within state constitutional constraints.<sup>89</sup>

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85. Jeffries & Gleeson, *supra* note 11, at 1111 & n.63 (noting that the use of hearsay testimony before the grand jury is prohibited in New York, California, Alaska, Nevada, and South Dakota).
86. This has been the case in California (where, pursuant to a 1982 voter referendum, claims relating to the exclusion of evidence on grounds of unreasonable search and seizure arising under state law are measured by the same standard governing such claims under federal law), Florida, Kansas, Kentucky, Maine, Maryland, Michigan, Missouri, Nebraska, Texas, and West Virginia. See Gorman, *supra* note 82, at 422 & n.19, 425-26, 431-36, 439, 441, 457-58, 462.
87. See generally Gorman, *supra* note 82 (providing an overview of the key differences between federal and state constitutional criminal procedure across all fifty states). Suppression motions in criminal cases invariably rest on the credibility of the law enforcement officers whose actions are the subject of constitutional challenge. In this respect, there may be differences in how such credibility questions are resolved between state and federal forums (and as between federal and local law enforcement agents, see *infra* Section III.A). But that is to be distinguished from forum-based differences in procedural rules and doctrine.
88. See Daniel C. Richman, *Judging Untried Cases*, 156 U. PA. L. REV. 219, 222 (2007).
89. This is not to say that local law enforcement always abides by state and federal constitutional requirements, but rather that, among those cases in which prosecutors have elected to file charges, the vast majority are not saddled with constitutional infirmities under either state or federal law. See *infra* Section I.C.

It is difficult to overstate this second point. Enforcement of street crime, even at the federal level, requires local policing knowledge and expertise.<sup>90</sup> Even the DEA and ATF, which investigate almost exclusively narcotics and gun cases, have relatively little pre-investigation knowledge of neighborhood intricacies and interpersonal relationships among an investigation's subjects. A DEA agent might identify a particular target as a member of a violent drug gang, but the officers in the local precinct already *know* that target, potentially very well. They may have arrested the target or his accomplices on prior occasions; they probably know what bars or clubs the target and his gang frequent; or they might already have an informant who can "make buys" (purchase narcotics in an undercover capacity) from the target or his gang. Such intimate knowledge is critical in federal street crime prosecutions.

The practical upshot of this dynamic is that narcotics and violent crime investigations do not happen without local law enforcement involvement.<sup>91</sup> And, because local law enforcement can never be sure in the end whether the case will "go federal," they must operate under state procedural requirements. That means that if, for instance, state law requires a warrant when federal law does not, the local police will often err on the side of getting a warrant. This is not always the case; sometimes, it is clear from the outset that the federal government intends to devote its resources to the case and will prosecute no matter what. But given the absence of advance knowledge as to what an investigation will ultimately uncover, it is generally difficult to make that prediction.<sup>92</sup> More often than one might think, federal investigations do not

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90. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 786 (1999) ("As federal interest moves down to more episodic criminal activity, like street crimes, agencies become more dependent on local police departments, the only entities whose tentacles reach every street corner.").

91. For this reason, many such cases are investigated by task forces composed of federal, local, and sometimes state officials. Examples include the Organized Crime Drug Enforcement Task Forces; the High Intensity Drug Trafficking Areas Program; and REDRUM (murder spelled backwards). See *Organized Crime Drug Enforcement Task Forces*, U.S. DEP'T JUST., <http://www.justice.gov/criminal/taskforces/ocdetf.html> (last visited Dec. 11, 2013); *High Intensity Drug Trafficking Areas (HIDTA) Program*, WHITE HOUSE, <http://www.whitehouse.gov/ondcp/high-intensity-drug-trafficking-areas-program> (last visited Dec. 11, 2013); *Report of the Drug Enforcement Administration: 1990-1994*, U.S. DEP'T JUST. 82, <http://www.justice.gov/dea/about/history/1990-1994.pdf> (last visited Dec. 11, 2013).

92. Although the expansion of federal criminal law has effectively made federal prosecution of most any narcotics or violent crime possible, in practice there is a divide between "federal" and "local" matters. See Richman, *supra* note 1, at 82-83; see also *Principles of Federal Prosecution*, UNITED STATES ATTORNEYS' MANUAL § 9-27.240 (Aug. 2002), [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm) (describing, in broad

ultimately result in federal prosecutions.<sup>93</sup> And even when a federal investigation does result in federal prosecution, it is not always the case that every subject ensnared will be prosecuted federally; some will be prosecuted in state court, where state rules of procedure will govern.

And what of the evidentiary limitations imposed by some states, such as prohibitions on the use of uncorroborated accomplice testimony<sup>94</sup> or stricter evidentiary requirements in the grand jury? These rules may go a good deal of the way toward explaining why federal prosecutors are able to *bring* cases that state and local prosecutors cannot, but they don't fully explain why federal prosecutors *win* those cases. More liberal evidentiary licenses are a double-edged sword when it comes to proving a case before a trial jury. Such rules may permit indictments or convictions based on less evidence, but the prosecutor's burden of proof to the jury remains. Federal prosecutors, of course, know this; it is why they do not hew to the bare minimum of evidentiary requirements. In

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terms, those factors federal prosecutors should consider in deciding whether to charge a case or decline in favor of another prosecuting authority). Absent extenuating circumstances, federal prosecutors tend to decline drug-trafficking cases that involve lower quantities of drugs. See Klein & Grobey, *supra* note 13, at 49; Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1456 (2004). As a result, a fair number of cases begun as federal investigations end up in state court.

93. See EXEC. OFFICE FOR U.S. ATT'YS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2012, at 36-37 tbl.3, 85 tbl.14 (2012), [http://www.justice.gov/usao/reading\\_room/reports/asr2012/12statrpt.pdf](http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf) (reporting that, in FY 2012, 715 narcotics cases and 1,641 violent crime cases were declined by federal authorities in favor of prosecution by another authority or on another charge or for lack of federal interest, and 13,942 narcotics cases and 11,890 violent crime cases were filed in federal court that year). While some of these declined cases may have been investigated by state or local rather than federal authorities, the increasing prevalence of joint task forces in violent crimes and narcotics-trafficking cases has made jurisdictional boundaries in street crime investigations more fluid. See *supra* note 91 and accompanying text.
94. To say that a state bars conviction based solely on accomplice testimony is, in any event, not as stringent an evidentiary limitation as it might seem. In New York, for instance, the courts have expressly rejected the notion that the accomplice testimony rule requires independent evidence of guilt. *People v. Reome*, 933 N.E.2d 186, 188 (N.Y. 2010) ("The corroborative evidence need not show the commission of the crime; it need not show that defendant was connected with the commission of the crime. It is enough if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth." (quoting *People v. Dixon*, 131 N.E. 752, 754 (N.Y. 1921))). In the *Reome* case, the court upheld a defendant's rape conviction based on a single accomplice identification corroborated by the victim's description of the events, notwithstanding the fact that the victim did not identify the defendant and DNA evidence matched the three accomplices but not the defendant. *Id.*

the vast majority of street-crime prosecutions, federal prosecutors, like their state counterparts, will hesitate to proceed absent corroboration (and, ideally, substantial corroboration) of accomplice witnesses through other evidence.<sup>95</sup> And when they cannot do so, the question remains: what explains federal prosecutorial successes even in the face of relatively flimsy proof?

Professor John Jeffries and Judge John Gleeson touched on this issue when, in explaining how federal prosecutors obtain convictions in organized crime cases based on accomplice testimony, they observed that “one of the most dramatic advantages of the federal system” is that, by insulating accomplice witnesses from the other evidence in the case, “an accomplice-based case can be made to hinge not on the credibility of the inherently unreliable accomplices, but on the jury’s assessment of the integrity of the prosecutors. Federal prosecutors usually win such cases.”<sup>96</sup> The question that has yet to be answered is: *why?*

### C. *The Selectivity and Resources Explanations*

Two other leading explanations for the disparities between federal and local street crime prosecution outcomes are interrelated. The first is that, unlike state and local prosecutors who bear ultimate accountability for criminal prosecutions, federal prosecutors have the luxury of choosing which cases they bring.<sup>97</sup> The second, a corollary of the first, is that federal prosecutors have a lower caseload and therefore substantially greater time and resources to devote to their cases than local prosecutors.<sup>98</sup> In short, a great deal of federal prosecutorial success can be attributed to the political economy of prosecution in our federalist system.

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95. See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 117 (2011); Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G REP. 292, 293 (1996).

96. Jeffries & Gleeson, *supra* note 11, at 1105-06 (“No matter how well accomplices have been quarantined [from the other witnesses and evidence], there is always a link among them—the prosecution team. Defense attorneys frequently are forced to argue, explicitly or implicitly, that the accomplice witnesses have told a conveniently consistent story because the government put them up to it.”). And on the battleground of integrity, the authors argue, federal prosecutors have the upper hand. *Id.*

97. See sources cited *supra* note 13.

98. See sources cited *supra* note 12.

These points have strong intuitive appeal. Being able to cherry-pick one's cases, and having fewer cases and more resources to spend on them, seems a recipe for prosecutorial success<sup>99</sup>—and, to a large degree, it is. However, in assessing these federal advantages, we must also consider to what extent state and local prosecutors lack them.

Start with case selection. It is true that state attorneys general and county district attorneys are directly accountable to their electorate in a way that appointed U.S. Attorneys are not. It is also true that state and local prosecutors (particularly local prosecutors) are responsible for prosecuting all readily provable crimes committed within their jurisdiction. Yet notwithstanding these pressures, local prosecutors frequently decline cases.<sup>100</sup> Political accountability imposes pressure to bring cases,<sup>101</sup> but it also imposes pressure to win them.<sup>102</sup> How these competing forces impact local district attorneys' dismissal patterns, and how those patterns compare to evidentiary-based federal declinations,<sup>103</sup>

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99. For a detailed examination of how and why inadequate resources in many urban district attorneys' offices severely damage prosecutorial effectiveness, see Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 279-97 (2011).
100. See BARBARA BOLAND & ELIZABETH BRADY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *THE PROSECUTION OF FELONY ARRESTS*, 1980, at 1 (1985), <https://www.ncjrs.gov/pdffiles1/bjs/97684.pdf> (finding in a study of 28 urban county courts that “[a]pproximately 50% of all felony arrests the police make do not lead to a conviction but are rejected by the prosecutor before court charges are filed or are later dismissed in court”); KATHLEEN B. BROSI, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., *A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING* 7 fig.2 (1979) (finding pre-filing declination rates in five major urban jurisdictions ranging between 18% and 48%); MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 127-29 (1979); MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 100 (1978). The sources cited here are all regrettably dated, highlighting the need for renewed attention to local police-prosecutor relations.
101. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600 (2005) (noting the political pressures on local prosecutors to prosecute the crimes most visible to voters: violent felonies, major thefts, and hard drugs).
102. See, e.g., Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 442 n.164 (1992) (“Elected state prosecutors often face bitter contests in which their win-loss record becomes a campaign issue.”).
103. Federal prosecutors decline cases for a variety of reasons, which frequently include lack of evidence, absence of criminal intent, request by the investigating agency, prosecution by another authority or for another crime, insufficient federal interest, and lack of federal jurisdiction. See EXEC. OFFICE FOR U.S. ATT'YS, *supra* note 93, at 85 tbl.14. Notably,

are complex questions worthy of further study. But we should not presume federal prosecutors are always more willing and able than their local counterparts to decline weak cases.

Moreover, given the nature of gang and drug-related street crime, in which victims of one crime are often also perpetrators of another, it is not necessarily the case that political accountability breeds aggressive enforcement. Indeed, the contrary may be true. It is no accident that much of the federal street-crimes docket consists of crimes against other criminals—robberies of drug dealers, murders of rival gang members, and the like. It is not merely the jurisdictional hook that lures the feds, who could easily fill their Hobbs Act docket with far more sympathetic victims of, for instance, convenience store robberies.<sup>104</sup> It is the *absence* of political pressure on local district attorneys to bring cases involving unsympathetic (and usually disenfranchised) victims. These cases are often the most challenging to bring, and to win.

This raises another point. We should not presume that in selecting cases, federal prosecutors' interest in winning convictions outweighs other interests. To the contrary, the history of federal criminal enforcement is peppered with hard-fought, high-profile cases that have generated both wins and losses. Federal prosecutors certainly “cherry pick” their cases—but often, the cherries are not the quick or easy cases.<sup>105</sup>

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prosecution by another authority is a distinct reason given for declination; weak cases are declined *because* they are weak, not because they will be prosecuted by local authorities.

104. Most federal robberies (apart from bank robberies) are prosecuted under the Hobbs Act, 18 U.S.C. § 1951 (2012), enacted pursuant to the Commerce Clause, which prohibits obstruction of interstate commerce by robbery. As a practical matter, this limits federal robbery prosecutions to those involving commercial establishments and illegal narcotics or narcotics proceeds.
105. Others have commented upon the variety of incentives influencing federal prosecutorial case selection, and the tendency of federal prosecutors to choose more challenging cases. *See, e.g.*, Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 273 (2000) (noting that, compared to drug defendants in state courts, federal drug defendants tend to be a “wealthier, more prestigious set of criminals, who are more likely to have private lawyers”); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 966-67 (1997) (“The motivations of those attracted to a job for which the remuneration can be comparatively low, in a legal market where the opportunities to shirk abound, will be far more complex [than just conviction-maximization]. Much work remains to be done in exploring the personal ideologies of prosecutors, the influence of long-term economic self-interest, and the psychological aspects of prosecutors’ self-selection.”); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1884-85 (2000) (arguing that federal prosecutors tend to seek out marginal cases because a prosecutor’s value in the private market is enhanced by trial experience).

Whatever can be said of federal prosecutors' selection criteria, though, the fact remains that federal prosecutors have substantially fewer cases to prosecute than their local counterparts.<sup>106</sup> This translates into more per-case resources in the form of time, manpower, and money. The claim that federal prosecutors' resources contribute to their success is unassailable. But how far can it take us?

Resources are critical; prosecutors cannot bring cases without them. Moreover, in a system that depends almost entirely on pretrial resolutions for its effective functioning, resources help define the "going rate" for the punishment of offenses. The greater the pressure prosecutors face to dispose of cases without the expense and time of a trial, the weaker their leverage in plea negotiations. Because much of a federal prosecutor's docket is discretionary,<sup>107</sup> particularly in the street crime context, she can afford to take to trial those defendants who will not agree to an appropriate (in the prosecutor's view) plea bargain. This willingness and ability in turn reduces the discount rate offered for a guilty plea, at least relative to offers that might be extended by her local, overburdened counterparts.

Yet this is only part of the story. Willingness to proceed to trial means very little without the proven ability to secure a guilty verdict. Resources undoubtedly help in that regard, but it is worth asking how and why this is so. Federal prosecutors do not have unlimited time and money (particularly in low-profile street crime cases) to pursue every evidentiary lead and every possible target, to make unlimited undercover drug buys, or to wiretap every phone for which they could seek court approval. They, too, must make choices. And, almost uniformly, federal prosecutors choose to devote their resources to preparing cases for trial. Federal prosecutors and agents scrupulously track down and prepare witnesses (including law enforcement witnesses, who sometimes require substantial preparation), and devote time and funds to securing witnesses' safety. These choices matter not merely because they improve trial outcomes in individual cases, but also because they leave a lasting impact on participants' (and ultimately the community's) perceptions of federal law enforcement – perceptions that reap benefits in future cases.<sup>108</sup>

It is worth thinking, as well, about those high-profile cases in which the federal government has expended seemingly limitless resources, and lost. John

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106. See Klein & Grobey, *supra* note 13, at 7; Richman, *supra* note 3, at 397.

107. See *supra* note 97 and accompanying text.

108. I explore these dynamics further *infra* Part III.

Edwards,<sup>109</sup> Roger Clemens,<sup>110</sup> and the “African sting” prosecution under the Foreign Corrupt Practices Act<sup>111</sup> are all recent examples of cases in which resources could not overcome the challenge of prosecuting conduct on the margins of what the public deems imprisonment-worthy.<sup>112</sup> These sorts of cases present evidentiary burdens quite different from street crimes, but the lesson translates: even abundant resources cannot cure a deficit of trust in the government’s case.<sup>113</sup>

The foregoing discussion is not meant to discredit conventional explanations for forum disparities but, rather, to expose the complexities within them. Each explanation, and all of them together, takes us quite far in understanding criminal forum disparities. But there are other factors we must explore too. The balance of this Article starts that project.

## II. LEGITIMACY AND CRIMINAL ENFORCEMENT

The concept of “legitimacy” in governance, and in criminal enforcement in particular, has received sustained and deep engagement over the last several decades by social psychologists, criminologists, and legal theorists. As a result, there is now a rich body of theoretical and empirical literature that helps us to understand what factors influence perceptions of legitimacy in law enforcement.

The work of Tom Tyler and others demonstrates that people comply with the law in large part out of a sense of obligation to the authorities enforcing the

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109. Charlie Savage, *Another High-Profile Failure for a Justice Dept. Watchdog*, N.Y. TIMES, May 31, 2012, <http://www.nytimes.com/2012/06/01/us/edwards-case-a-blow-to-justice-dept-corruption-unit.html>.

110. Juliet Macur, *Clemens Found Not Guilty of Lying About Drug Use*, N.Y. TIMES, June 18, 2012, <http://www.nytimes.com/2012/06/19/sports/baseball/roger-clemens-is-found-not-guilty-in-perjury-trial.html>.

111. Leslie Wayne, *Bribery Case Falls Apart, and Tactics Are Doubted*, N.Y. TIMES, Feb. 23, 2012, <http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html>.

112. For an expanded discussion of this dynamic, see Stuntz, *supra* note 105.

113. Commentators have attributed the African Sting fiasco in particular to an erosion of juror trust, compounded by embarrassing text messages sent by FBI agents to the government’s informant, which “savag[e]d the credibility and professionalism of [the] agents.” Del Quentin Wilber, *Racy, Vulgar Texts Hurt Justice Department’s Largest Sting Operation Targeting Foreign Bribery*, WASH. POST, Feb. 13, 2012, [http://articles.washingtonpost.com/2012-02-13/local/35445544\\_1\\_text-message-fbi-agents-informant](http://articles.washingtonpost.com/2012-02-13/local/35445544_1_text-message-fbi-agents-informant).

law (“legitimacy”), as well as because the law comports with their own personal conceptions of right and wrong (“personal morality”).<sup>114</sup> In studies that have compared the influence on compliance of various attitudinal and background factors, legitimacy and personal morality proved to be among the most significant.<sup>115</sup> By contrast, the threat of sanction was among the least influential factors.<sup>116</sup> The relative unimportance of instrumental motivations might explain why people continue to commit crimes despite the threat of harsh punitive sanctions.<sup>117</sup>

These two aspects of compliance—“legitimacy” and “personal morality”—have spawned two largely separate bodies of literature.<sup>118</sup> The former asks what factors influence people’s support for and obligation to the governing authorities, while the latter asks which crimes, theories of liability, theories of defense, and penalties most comport with public conceptions of right and wrong. Research has shown that people’s perceptions of an authority’s legitimacy are influenced most by their perceptions of the fairness of the

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114. See TYLER, *supra* note 4; TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME & JUST.* 283 (2003). The perceived obligation to obey the law reflects a belief that the authority is entitled to regulate behavior, and it is therefore a component of an authority’s legitimacy. TYLER & HUO, *supra*, at 101-03.
115. In his seminal study of 1,575 adults in Chicago, Tyler assessed the independent impact on compliance of people’s perceptions of eleven different factors: obligation to obey the law and allegiance to or support for the relevant authority (legitimacy); likelihood of getting caught (deterrence); judgments of their peer group (peer disapproval); personal belief in the morality of the law in question (personal morality); evaluation of the quality of performance by the authority (evaluation); and background factors: gender, race, age, income, education, and political leanings. The results revealed that personal morality had the strongest impact on compliance, followed by gender, age, income, and then legitimacy. Peer disapproval had a moderately significant influence, and least influential were political leanings, deterrence, race, and evaluation. TYLER, *supra* note 4, at 59.
116. Comparing legitimacy to deterrence, Tyler found legitimacy five times more likely than deterrence to influence compliance. *Id.*
117. I say “might” because the efficacy of deterrence depends in large part on the likelihood people ascribe to getting caught. If punishment is harsh but highly uncertain, it is unlikely to deter. Certain punishment, regardless of its severity, will probably have a much greater impact on behavior—albeit substantially less of an impact than non-instrumental factors such as legitimacy. See TYLER, *supra* note 4, at 59-60; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *NW. U. L. REV.* 453, 458-64 (1997).
118. For discussions of the two theories in tandem, see Bowers & Robinson, *supra* note 18; and Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 *HOFSTRA L. REV.* 707 (2000).

process and procedures by which it enforces the law.<sup>119</sup> This theory of compliance has thus come to be known as “procedural legitimacy.” The extent to which substantive law aligns with personal morality has been described alternatively as “moral credibility,” “moral alignment,” or “empirical desert.”<sup>120</sup> Both theories concern the ability of governing authorities to harness voluntary compliance, cooperation, and deference, as opposed to coercing it through threat of sanction.

### A. Procedural Legitimacy

What factors influence perceptions that an authority is legitimate? Substantial qualitative research suggests that, in interactions with the courts and police, people place greater value on the process of their interaction with criminal justice authorities and the motives of those authorities than on whether the outcome of the interaction is ultimately fair or favorable to them.<sup>121</sup> These two factors—termed “procedural justice” and “motive-based trust”—have been shown to significantly shape citizens’ perceptions of the

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119. See Tyler, *supra* note 114, at 292-97 (collecting studies).

120. See Bowers & Robinson, *supra* note 18; Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement* (Yale Law & Econ. Research Paper No. 477, 2013), <http://ssrn.com/abstract=2292517>.

121. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 67-96, 102-16 (1975) (finding that in laboratory studies of simulated trials, litigants were more accepting of verdicts from adversary trials than inquisitorial trials, the former of which they viewed as a fairer procedure, independent of the favorableness of the verdict); TYLER, *supra* note 4, at 104-08 (finding, in a study of 1,575 diverse adults in Chicago, that respondents assessed the legitimacy of police and courts primarily on the basis of the fairness of the procedures used, rather than the outcome obtained); TYLER & HUO, *supra* note 114, at 30, 53-90 (finding, in a study of 1,656 diverse adults in Oakland and Los Angeles who had had recent personal experiences with the police and/or local courts, that respondents were more willing to defer to authorities they believed had treated them fairly and whom they trusted as having fair motives).

Social psychologists call the former a “relational” view of justice, because it concerns the relationship between the individual and the authority, and the latter an “instrumental” view of justice. TYLER, *supra* note 4, at 276. The substantial research in this area does not discount entirely instrumental influences; it comes as no surprise that people are more accepting of favorable decisions, and are more inclined to believe favorable decisions to be a result of fair process. TYLER & HUO, *supra* note 114, at 55-56, 84. Rather, the research demonstrates that when assessed independently, process is the dominant factor shaping people’s attitudes and behavior toward authorities. *Id.* at 53-56, 84.

legitimacy of legal authorities.<sup>122</sup> Procedural justice and motive-based trust influence people's overall views of the legitimacy of criminal justice authorities (courts and police), as well as their willingness to defer to and cooperate with those authorities in a particular case.<sup>123</sup>

What personal traits influence perceptions of legitimacy? Age, race or ethnicity, gender, education, income, and political affiliation, among other things, each have an impact; yet when isolated, the influence of each of these background characteristics is relatively minor.<sup>124</sup> Research further suggests that across racial and ethnic groups, procedural justice, rather than outcomes, is the key predictor of perceived legitimacy;<sup>125</sup> lower perceptions of legitimacy among minorities can be traced to feelings of unfair treatment rather than outcomes.<sup>126</sup> In addition, personal identification with the group or entity through which authority is exercised ("superordinate identification") has been shown to have significant impact on evaluations of authority and perceptions of legitimacy.<sup>127</sup>

Procedural legitimacy has tremendous promise for governance in general and criminal justice in particular because it enables governance based on the public's trust. A legitimate authority has the diffuse support of those whose behavior it regulates, a construct often described as a "reservoir" of trust or goodwill.<sup>128</sup> Such diffuse support, in turn, allows the authority to impose and effectuate unfavorable outcomes on those adjudged guilty of wrongdoing. Diffuse support also gives the authority discretionary latitude to regulate within a range of behavior, even when the regulation is at odds with the moral beliefs of some (or even many) members of the community.<sup>129</sup> Procedural

122. TYLER & HUO, *supra* note 114, at 54-96.

123. *Id.* at 177-97 (finding, based on four separate studies, that people's evaluations of the quality of local police and courts were influenced most by perceptions of whether those authorities treated community residents fairly and with dignity, and cared about residents' concerns).

124. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 532-34 (2003); Tyler & Jackson, *supra* note 120.

125. Sunshine & Tyler, *supra* note 124, at 532.

126. TYLER & HUO, *supra* note 114, at 162; Sunshine & Tyler, *supra* note 124, at 522-23.

127. See TYLER & HUO, *supra* note 114, at 115-22; Yuen J. Huo et al., *Superordinate Identification, Subgroup Identification, and Justice Concerns: Is Separatism the Problem; Is Assimilation the Answer?*, 7 PSYCH. SCI. 40 (1996). Thus, for instance, identification with one's city or country has been shown to influence perceptions of legitimacy.

128. TYLER, *supra* note 4, at 26, 29.

129. *Id.* at 25-26, 279-80.

legitimacy is thus particularly important in a pluralistic society with diverse moral beliefs.

Legitimacy is self-reinforcing, as is its absence. Research has shown that preexisting conceptions of an authority's legitimacy influence compliance, deference, and cooperation, which in turn enhance the authority's ability to govern fairly, further reinforcing its legitimacy.<sup>130</sup> By contrast, preexisting perceptions of illegitimacy result in noncompliance and refusal to cooperate and defer, breeding more crime and hindering the criminal justice system's ability to enforce the law—often resulting in resort to force or other methods that further erode legitimacy.<sup>131</sup> Legitimacy is self-reinforcing in another sense too: people who perceive the criminal justice system as legitimate are more likely to be influenced by process concerns than instrumental concerns in their interactions with the justice system.<sup>132</sup> Put differently, legitimacy moves people to value process over outcome, while illegitimacy moves people to value outcome over process. In a system in which unfavorable outcomes are inevitable, illegitimacy thus creates “a spiral of increasing conflict and decreasing legitimacy.”<sup>133</sup>

### *B. Moral Credibility*

Empirical research indicates that people are more likely to comply with laws with which they agree<sup>134</sup> and more willing to defer to and assist authorities they view as enforcing just laws.<sup>135</sup> Substantive law that does not

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130. TYLER & HUO, *supra* note 114, at 126; Tyler, *supra* note 114, at 287.

131. TYLER & HUO, *supra* note 114, at 131.

132. *Id.* at 126–28.

133. *Id.* at 131.

134. TYLER, *supra* note 4, at 37 (citing five separate studies); Bowers & Robinson, *supra* note 18, at 258–63. *But see* Christopher Slobogin & Laura Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 101–03 (2013) (presenting empirical data indicating that personal agreement with criminal laws does not substantially influence compliance).

135. *See* Bowers & Robinson, *supra* note 18, at 256–63 (collecting studies). Tyler's work, however, indicates that while people's individual compliance with the law is highly influenced by the extent to which they agree with the law on a moral level (sometimes referred to as “personal morality”), people's perceptions of legitimacy—i.e., their support for authorities and sense of obligation to obey them—and their willingness to defer to authority are not significantly influenced by distributive fairness. *See* TYLER, *supra* note 4, at 97, 103; TYLER & HUO, *supra* note 114, at 54–56; *see also* Tyler, *supra* note 114, at 292 (noting that although “distributive justice judgments have a role in shaping people's reactions to their encounters with legal

reflect the community's norms is ultimately unsustainable because effective law enforcement depends on the cooperation and respect of those within its ambit (witnesses, victims, jurors, judges, prosecutors, and defendants).<sup>136</sup>

Moral credibility's limitations are obvious. What if the moral convictions of a society's members are dissonant?<sup>137</sup> What if social norms depart from philosophical and ethical conceptions of justice?<sup>138</sup> For moral legitimists, these limitations arise from the law's own inability to shift community norms. While the criminal law "sometimes nurtures the norm[s]" through prosecution and enforcement, "[t]he criminal law is not an independent player in that process," but merely "a contributing mechanism."<sup>139</sup> Accordingly, for a society to function effectively, it must derive both moral and procedural legitimacy. That is, it must strive to enact laws with which the public largely agrees and, in the absence of societal agreement, it must be able to draw on the public's support for its institutions as the final arbiters of what the law should be.<sup>140</sup>

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authorities . . . procedural justice judgments consistently are found to have the major influence").

136. See Bowers & Robinson, *supra* note 18, at 217 ("To the extent that people see the system as in conflict with their judgments of justice, that acquiescence and cooperation is likely to fade and be replaced with resistance and subversion. . . . Witnesses may lose an incentive to offer their information or testimony. Citizens may fail to report crimes in the first instance. Jurors may disregard their jury instructions. Police officers, prosecutors, and judges may make up their own rules. And offenders may resist adjudication processes and punishments rather than participate in them.").
137. Paul Robinson and John Darley give as an example the breakdown wrought by dissonant moral beliefs on abortion. See Robinson & Darley, *supra* note 117, at 482-83 (describing a trajectory from peaceful protest to unlawful killing of doctors providing abortion services); see also Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 399-400 (2000) ("[L]egitimacy is a more stable basis for voluntary compliance than is personal morality," because "[w]hile greater legitimacy translates into more compliance whether or not compliance is in the personal interest of an individual, one's personal moral schedule may or may not be in line with authoritative dictates.").
138. See Bowers & Robinson, *supra* note 18, at 216 ("[P]eople's shared intuitions of justice are not justice, in a transcendent sense. People's shared intuitions can be wrong.").
139. Robinson & Darley, *supra* note 117, at 473.
140. See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 712 (1994) (discussing how, because of its legitimacy as an institutional authority, the Supreme Court has been able to legitimate abortion policies that lack moral support from a large portion of the American public).

### C. *Legitimacy and Criminal Adjudication*

In the context of criminal investigation and adjudication, work on procedural legitimacy has primarily focused on how the criminal process affects perceptions of legitimacy.<sup>141</sup> In fact, though, criminal adjudication has a dual function: it both affects and *reflects* legitimacy.

Begin with the criminal jury. Empirically assessing the factors motivating jurors' decisionmaking is exceedingly difficult; defendants' due process rights limit the means and methods by which researchers can investigate jurors' pre-trial attitudes and predilections,<sup>142</sup> jurors themselves may be unaware of the factors influencing their reasoning,<sup>143</sup> and the interaction of both known and unknown variables obscures attempts to isolate and control for them.<sup>144</sup> Nevertheless, the empirical work on juries, for all its limitations, tends to support what criminal practitioners intuit: jurors' assessment of the evidence, and predisposition to the prosecution, is guided in part by their perceptions of the legitimacy of the pertinent laws and legal authorities. On the whole, jurors who report trust and confidence in the police are more likely to be predisposed to the prosecution in a local criminal case.<sup>145</sup> So, too, are jurors who believe the applicable laws, and the consequences of conviction, to be fair.<sup>146</sup>

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141. See generally Bowers & Robinson, *supra* note 18, at 237-40 & nn.113-27 (summarizing studies of the public's and defendants' views of various adjudicatory procedures, including plea bargaining, as well as views on courts more generally).
  142. See Amy Farrell, Liana Pennington & Shea Cronin, *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 LAW & SOC. INQUIRY 773, 794 (2013) (noting that in studies of real juries, defendants' rights prevent researchers from posing pre-trial questions to jurors, thus obscuring the extent to which jurors post-trial responses were influenced by the trial itself).
  143. Paula Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for States Courts Study of Juries*, 78 CHI-KENT L. REV. 1249, 1264 (2003) ("Indeed, some psychologists would argue that it is unlikely that the majority of jurors would be able to say with any certainty which specific factors led them to their decision." (citing R.E. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF HUMAN JUDGMENT (1980))).
  144. See, e.g., John R. Hepburn, *The Objective Reality of Evidence and the Utility of Systematic Jury Selection*, 4 LAW & HUMAN BEHAV. 89, 90 (1980) (discussing the difficulties of accounting for and isolating variables in jury research).
  145. See Farrell, Pennington & Cronin, *supra* note 142, at 779, 783 (2013) (analyzing post-trial questionnaire responses from nearly 2,000 jurors who had collectively served on 210 separate non-capital felony cases in four different urban jurisdictions—Washington, D.C.; the Bronx, New York; Los Angeles County, California; and Maricopa County, Arizona—and finding that, holding certain other juror characteristics and case-specific variables constant,

The criminal jury, though, is only the beginning of legitimacy's measure. As others have pointed out, the adjudication of criminal cases serves an expressive function.<sup>147</sup> It tells us what conduct is actually prohibited, and what

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the probability of a juror favoring the prosecution prior to deliberations is 75% for jurors reporting high trust and confidence in police, and 47% for jurors reporting no trust and confidence in the police); Stephen P. Garvey, Paula Hannaford-Agor, Valerie P. Hans, Nicole L. Mott & G. Thomas Munsterman, *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUDIES 371, 396-97 (2004) (analyzing the same dataset used by Farrell, Pennington, and Cronin and finding that in addition to evidentiary strength, the credibility of police testimony and juror beliefs about fairness of applicable laws and penalties all significantly affected jurors' pre-disposition to the prosecution, as measured by jurors' first pre-deliberation votes); Hepburn, *supra* note 144, at 97, 98 (analyzing the effect of juror attitudes and demographics on verdicts in simulated trials and concluding that "the strength of the evidence is relative, influenced by case-relevant juror attitudes" towards police and punishment).

Parentetical summaries of jury studies necessarily gloss over complexities of the findings, which, as noted, must be approached with caution. The Farrell, Pennington & Cronin study in particular presented mixed findings: it measured the effects of juror trust and confidence in police on jurors' predisposition to the prosecution prior to deliberations and on jurors' first, pre-deliberation votes, and found a stronger correlation with respect to the former than the latter. Farrell, Pennington & Cronin, *supra* note 142, at 784, 787. The study further found a stronger correlation between trust in police and predisposition to the prosecution for black jurors than for white jurors, with the racial gap narrowing as black juror trust and confidence in the police increased. *Id.* at 788-90. *But see* Garvey et. al, *supra*, at 397-98 (finding, in a study of the same dataset, that race had a limited influence on juror decision-making except with respect to drug offenses tried in the District of Columbia). The Farrell, Pennington & Cronin study also measured the effect on juror predisposition and first juror votes of juror trust and confidence in the courts and found a reverse correlation: jurors reporting high trust in the courts were less predisposed to the prosecution than jurors reporting low trust in the courts. *Id.* at 784. (Trust in courts had no effect on juror first votes. *Id.* at 787.) The authors postulate that the inverse correlation between trust in courts and predisposition to the prosecution could reflect the former as evincing a strong belief in defendants' due process rights, which might translate into a more robust application of reasonable doubt. *Id.* at 793-94. Likewise, jurors with low trust in courts may perceive courts as too lenient towards criminal defendants. *Id.* My focus in this Article is perceptions of the legitimacy of law enforcement (police, federal agents, and federal and local prosecutors) as opposed to courts.

146. Farrell, Pennington & Cronin, *supra* note 142, at 785; Garvey et al., *supra* note 145, at 396-97; Hannaford-Agor & Hans, *supra* note 143, at 1266-68 (analyzing the same dataset as Garvey et al. and finding that jurors' attitudes about the fairness of applicable laws influenced juror decision-making).
147. See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (discussing the expressive function of criminal prosecution); Richman & Stuntz, *supra* note 101, at 586 ("[C]riminal litigation is not just a means of rationing criminal punishment. It is also a source of productive signals and valuable information."); Robinson & Darley, *supra*

level of opprobrium we accord that conduct. The legislature defines crimes, but prosecutors decide whether to charge those crimes. Likewise, the legislature ascribes penalties for crimes; but prosecutors decide, by virtue of the charges they bring, which penalties will apply, and judges decide what specific sentence will be imposed in a given case. And in a system that functions almost entirely through plea-bargaining, prosecutors' decisions—which cases to charge, what charges to bring, and what charges to dismiss—reflect the realities of how juries or judges decide tried cases, and what sentences judges will impose. In short, the criminal law in the statute books can be quite different from the criminal law in practice. The adjudication of cases, through trials, guilty pleas, and sentencings, tells us what “the law” in each jurisdiction really is.

Prosecutors dismissing cases or charges because witnesses refuse to cooperate or because juries will not credit the testimony of those who do; juries acquitting defendants, or grand juries refusing to charge them, because of a lack of trust in the prosecution's evidence; judges sentencing far below mandated or advisory terms because of a fundamental disagreement with those penalties; and plea bargaining practices that reflect these realities—all of these phenomena are expressive. And what they express, at least in part, is a disagreement between the community and the criminal justice authority over how the criminal law should be written, how it should be enforced, or both. They are symptoms of the criminal justice system's illegitimacy. And the symptoms feed the disease. When the public sees that certain conduct is rarely policed or penalized, it internalizes those norms. The newly internalized norms result in the perception by some in the community that the law is under-enforced and by others that the law “as written” is over-punitive relative to community norms. These perceptions further erode legitimacy.<sup>148</sup>

In contrast, when we see a criminal justice system characterized by relatively high rates of convictions, adherence to mandated or advisory penalties, and pre-trial resolutions that reflect these realities, we must ask

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note 117, at 472 (“[C]riminal law enforcement and adjudication activities send daily messages to all who read or hear about them. Every time criminal liability is imposed, it reminds us of the norm prohibiting the offender's conduct and confirms its condemnable nature. . . . Further, every adjudication offers an opportunity to confirm the exact nature of the norm or to signal a shift or refinement of it.”).

148. See Jeffrey Fagan, *Legitimacy and Criminal Justice: Introduction*, 6 OHIO ST. J. CRIM. L. 123, 130 (2008) (“[S]trong enforcement of laws that the community greets with ambivalence can erode legitimacy. Under-enforcement for acts that are widely viewed as deserving punishment damages legitimacy, as well. Distributive justice concerns also damage legitimacy when there is (perceived) asymmetry between the harm of the act and the severity of the punishment.”).

whether legitimacy might have something to do with that. As I have acknowledged, these aspects of the federal criminal justice system<sup>149</sup> can all be explained by other factors, up to a point. Let us consider whether legitimacy might, at least in part, fill the explanatory gap.<sup>150</sup>

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149. These characterizations of the federal criminal justice system are, of course, broad generalizations. The ninety-four federal judicial districts are notoriously impervious to collective description, as are the hundreds of local urban county districts throughout the United States. Although an exacting empirical comparison (were it even possible) is beyond the scope of this Article, examples of these forum disparities appear throughout. See *supra* notes 5-7, 54, 68-79 and accompanying text; *infra* notes 211-220, 240 and accompanying text. In addition, the existing national data paint, in broad strokes, an overall picture worth noting.

In 2006, the most recent year for which data is available on felony case outcomes in the nation's 75 largest counties, only 50% of defendants charged with a violent felony offense were convicted of a violent felony offense (an additional 11% were convicted of a misdemeanor offense) and only 59% of defendants charged with a felony drug offense were convicted of a felony drug offense (an additional 10% were convicted of a misdemeanor offense). The guilty plea rate was 45% for violent felony offenses (an additional 10% of felony defendants pled guilty to a misdemeanor offense), and 56% for felony drug offenses (an additional 9% pled guilty to a misdemeanor drug offense). Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, BUREAU JUST. STAT. 11 tbl.11 (2010), <http://www.bjs.gov/content/pub/pdf/fdluco6.pdf>. Now consider federal case disposition data for the same year: an 88.9% conviction rate (and an 81% plea rate) for violent felony offenses, and a 91.7% conviction rate (and 87.8% plea rate) for felony drug offenses. JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 249-50 tbl.D-4 (2007), in *Judicial Business Archive*, *supra* note 58, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/appendices/d4.pdf>.

The above comparison should be taken as a rough indication, not a measure. The urban county dataset measures both initial charges and outcomes in a statistical sample of felony cases filed in 2006 and resolved within one year, while the federal dataset measures outcomes of all federal cases terminated in 2006, regardless of when charged and without regard to the initial charge. (The county data thus does not account for 11% of cases within the statistical sample that were not resolved within one year—a factor that likely substantially under-represents trial outcomes, and thus likely over-represents conviction rates, because tried cases generally take longer to resolve than untried cases, and some tried cases end in acquittals whereas all pled cases end in convictions.) In addition, it bears noting that some of the disparity reflected in this comparison likely comes from differences in case processing: federal prosecutors are able to screen and decline cases almost entirely before initiating legal process, while in some counties, local prosecutors do not assess cases until after charging. In such counties, post-charging screening will invariably result in a higher number of dismissals.

150. Most of the empirical work on procedural legitimacy has focused on local criminal justice systems. There are inherent limitations of using studies of legitimacy in one context (local policing and local criminal cases) to advance theories in another (the federal criminal justice

### III. LEGITIMACY, STREET CRIME, AND THE FEDERAL JUSTICE SYSTEM

A legitimacy inquiry focuses on the public's belief that the laws and criminal justice authorities are entitled to deference. Accordingly, to assess a justice system's legitimacy, we must examine the relevant authority, the relevant public, and the laws. This Part addresses each of these three elements and their interactions with one another.

#### A. Authority

In every prosecution there are two relevant authorities: the authority that investigates and the authority that prosecutes. In state and local prosecutions, both authorities are typically arms of the locality: the police and the district attorney's office.<sup>151</sup> In federal prosecutions of violent crimes and narcotics, the prosecuting authority is the United States, specifically the United States Department of Justice (typically operating through the United States Attorney's Office for the district in which the crime is being prosecuted). The investigating authority may be federal (for instance, the FBI, DEA, or ATF), may consist of only the local police, or might include (as is usually the case in violent crimes or narcotics cases) a combination of the two. But even when only the local police were involved up to the point of arrest—as is often the case when the federal government “adopts” a local case already underway in state court—there will almost always be a federal agent assigned to shepherd the case through the federal system or, at the very least, to offer assistance with evidence evaluation or collection.<sup>152</sup> The federal agent assigned to the case sits

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system). Cf. Tyler & Mitchell, *supra* note 140, at 747 (cautioning that empirical studies of local justice systems might not apply in the context of national-level legal authorities such as the Supreme Court). In the particular context of street crime, though, empirical research within local justice systems *can* inform our understanding of the federal criminal justice system. Because federal street crime prosecutions supplant local cases, they are a parallel alternative that can be contrasted with local prosecution at every stage. I do not apply research on local criminal justice systems to national-level political institutions that perform entirely different roles. Rather, I undertake a comparison of local and federal prosecution of substantially similar cases.

151. In some instances the state attorney general might investigate and/or prosecute, but rarely for episodic street crime.
152. For instance, federal prosecutions of felon-in-possession cases—the street crime cases most often adopted from state courts—will usually involve an ATF agent who acts as the “case agent.” Even though the ATF agent will not have had any involvement in the apprehension

with the prosecutor at counsel table and is often introduced to the jury either during voir dire or in the government's opening statement as one of the representatives of the United States responsible for bringing the case on behalf of the federal government. From the standpoint of public perception, the "face" of any federal prosecution will always be the federal government.

The significance of federal authority is not lost on federal prosecutors. Often, they can be heard in courtrooms telling the jury in opening statements that it is their privilege to "represent the United States." In cases with little federal investigatory involvement, prosecutors may make strategic choices specifically to ensure that a federal law enforcement agent appears before a jury. For instance, in felon-in-possession cases in which local police apprehended the defendant and seized the firearm, federal prosecutors sometimes decline to stipulate to the fact that the gun was manufactured in another state (the requisite interstate element of the crime) in order to call an ATF agent as an expert witness on the firearm's site of manufacture. In a drug case investigated by local police, federal prosecutors might call a DEA agent as an expert witness to testify that the type of packaging and amount of drugs seized is consistent with distribution rather than personal use.

Federal prosecutors do these things because they intuitively understand the power of the federal authority. But what accounts for that power? It is not enough to say that the federal authority garners legitimacy simply because it is "federal." History gives us examples of how quickly that construct can break down.<sup>153</sup> Nor can one generalize about "federal" authority, a concept that can have very different meanings depending on the context.<sup>154</sup> We must instead

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of the defendant, the agent will usually either testify himself or arrange for testimony by another ATF agent as to the interstate nexus element of the firearm.

153. Tom Tyler cites the Vietnam War as an example of a crisis that taxed citizens' willingness to defer to institutions of government authority. See TYLER, *supra* note 4, at 271; see also MARGARET LEVI, CONSENT, DISSENT, AND PATRIOTISM 177 (1997) (discussing how public "dissatisfaction with federal government policy increased markedly during the Vietnam era"). Other examples include Watergate; the FBI abuses uncovered by the Church Committee hearings; and, more recently, the atrocities committed by U.S. armed forces in the Abu Ghraib prison in Iraq, the federal government's inadequate and ineffectual response to the Hurricane Katrina disaster, and the perceived abuses of the government's "warrantless wiretapping" and NSA phone data collection programs.
154. The "federal authority" exercises power through a variety of different institutions, and public opinion surveys consistently show that Americans accord them very different levels of trust and respect (for instance, the Supreme Court tends to garner relatively high levels of respect and trust, whereas Congress does not). See, e.g., Jeffrey M. Jones, *Confidence in U.S. Public Schools at New Low*, GALLUP POL. (June 20, 2012), <http://www.gallup.com/poll/155258/Confidence-Public-Schools-New-Low.aspx>. And context matters. Citizens' trust in and

examine what it is about the nature of street crime, and the nature of federal law enforcement, that might enhance the legitimacy of the federal authority in street crime prosecutions.

Street crime prosecutions have three salient features. First, they typically rely on the testimony of local police officers. Second, the credibility of law enforcement witnesses (whether local police or federal agents) is often critical to a disputed issue in the case. Third, violence, or the threat of it, lurks within every case.

Consider the first feature. Street crime is so-called because it takes place, or at least originates, in the street: the open-air drug market, the corner store robbery, the drive-by shooting. Local police protect the streets. Even in cases arising from long-term federal investigations, federal prosecutors will inevitably draw upon the testimony of local police officers who, over the course of the investigation or preceding it, responded to reports of episodic crime related to the government's case.<sup>155</sup>

The second feature—the enhanced importance of law enforcement's credibility—is perhaps the single biggest evidentiary difference between street crime and white collar prosecutions. In white collar cases, law enforcement plays a supporting role. Agents might seize evidence or make an arrest, but

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respect for federal authorities, and willingness to obey them, will undoubtedly vary depending on whether the matter concerns social policy, fiscal policy, national security, the criminal law, or any other of the broad areas subject to federal authority. For instance, in one study of Supreme Court legitimacy and abortion rulings, respondents indicated a weak general feeling of obligation to federal authority: 60% disagreed with the statement, "I feel that I should accept the decisions made by government leaders in Washington even when I disagree with them," 48% agreed that "[t]here are times when it is all right for people to disobey the government," and 66% agreed with the statement, "I can think of situations in which I would stop supporting the policies of our government." Tyler & Mitchell, *supra* note 140, at 807. The authors postulated that these weak feelings of an obligation to obey could be explained by the fact that some federal laws implicate moral or ideological differences among citizens. *Id.* at 761-62. This is, of course, the case for abortion, the subject of the study. It would not be the case for federal laws related to, for instance, robbery or murder—conduct that is equally prohibited by local, state, and federal law and for which there is no significant room for moral disagreement. For this reason, any consideration of the "federal authority" must be narrowly tailored to the precise federal entity and federal laws at issue.

155. There are a number of ways this happens. The government might introduce evidence of a defendant's prior bad acts under Federal Rule of Evidence 404(b). In a conspiracy case, the government might introduce prior arrests of the co-conspirators to demonstrate the background of the conspiracy and the relationship of the co-conspirators. In a RICO prosecution, the government must introduce evidence of a "pattern of racketeering activity" (so-called "predicate acts"), which, in a violent crime or drug case, will almost always involve prior local arrests and/or convictions. *See* 18 U.S.C. §§ 1962(a), 1961(1)(A) (2012).

very little depends on their word. It is difficult for a defendant to argue that a law enforcement agent planted evidence when the evidence consists of reams of detailed financial statements or emails on the defendant's own computer. And because a defendant will often have retained counsel prior to having been arrested or even approached by law enforcement, he ordinarily will not make any statements to the agents. In violent crime and narcotics cases, in contrast, law enforcement officers in many ways *are* the evidence—or, at least, a substantial part of it. It is they who respond to the scene, where they witness first-hand either the crime in progress or its immediate aftermath. If the defendant attempts to flee, they give chase. When they apprehend the defendant, they search him and question him. If he has contraband, it is they who seize it; if he speaks, it is they who hear it. The testimony of law enforcement officers in street-crime cases is critical. Sometimes, it is the only evidence that bears on guilt.<sup>156</sup>

The third feature, violence, is critical because it imposes a uniquely onerous burden on victims and witnesses (including cooperating defendants). Violence is ever-present in street-crime cases. Witnesses fear retaliation even if no overt threat against them is ever made.<sup>157</sup> Even in cases in which no violent act is charged, such as drug cases or gun possession cases, the threat of violence against witnesses remains.<sup>158</sup> The near inseparability of drugs and violence in

156. For instance, felon-in-possession cases typically establish the element of possession solely based on the testimony of the police who caught the defendant carrying a gun. The remaining elements—possession “in interstate commerce,” satisfied by proof that the gun was manufactured in another state, and the defendant's prior conviction—are almost never in dispute.
157. In a study of 260 victims with cases pending in Criminal Court in Bronx County, New York, 57% of victims who had not been threatened feared reprisals, and 71% of all respondents said that they would feel threatened if the defendant were released on bail. Robert C. Davis, Barbara E. Smith & Madeline Henley, *Victim/Witness Intimidation in the Bronx Courts: How Common Is It, and What Are Its Consequences?*, VICTIM SERVICES AGENCY 13 (1990), [http://www.popcenter.org/problems/witness\\_intimidation/PDFs/Davis\\_etal\\_1990.pdf](http://www.popcenter.org/problems/witness_intimidation/PDFs/Davis_etal_1990.pdf).
158. See Gary Gately, *Baltimore Struggles to Battle Witness Intimidation: Prosecutors Say Violence, Threats Hinder Testimony*, BOS. GLOBE, Feb. 12, 2005, [http://boston.com/news/nation/articles/2005/02/12/baltimore\\_struggles\\_to\\_battle\\_witness\\_intimidation](http://boston.com/news/nation/articles/2005/02/12/baltimore_struggles_to_battle_witness_intimidation) (reporting one drug gang's murder of a woman and her family after she confronted gang members about selling drugs on her street and another gang's hurling Molotov cocktails at the house of a woman who had called police to report drug dealing); Nancy Phillips, Craig R. McCoy & Dylan Purcell, *Witnesses Fear Reprisals, and Cases Crumble*, PHILA. INQUIRER, Dec. 14, 2009, [http://articles.philly.com/2009-12-14/news/24988519\\_1\\_witnesses-murder-case-police-and-prosecutors](http://articles.philly.com/2009-12-14/news/24988519_1_witnesses-murder-case-police-and-prosecutors) (reporting that an alleged Philadelphia drug kingpin was accused of ordering at least seven witness-related murders in order to protect his drug business).

the inner city is so well-recognized that it has spawned permitted evidentiary inferences in gun and drug cases.<sup>159</sup> And in actual violent crime cases (murders, shootings, robberies), the threat of witness retaliation is palpably real. In some cities, witness intimidation in violent crime cases has become so prevalent that it has crippled local prosecutors' ability to bring successful cases.<sup>160</sup>

If local policing, law enforcement credibility, and violence lie at the heart of street crime cases, we must ask which aspects of the federal authority bear on these issues. Three critical features stand out. First, federal law enforcement does not police citizens. Second, federal prosecutors have demonstrated a robust commitment to policing local police departments' interactions with citizens. Third, federal law enforcement has cultivated a sterling reputation for witness protection. Each of these three aspects of federal law enforcement authority implicates procedural legitimacy's key components: procedural justice and motive-based trust.<sup>161</sup>

Begin with the absence of policing. This matters to public perception because, from the standpoint of perceptions, policing in the inner city is an enterprise with great downside and little upside. Urban police forces suffer from high levels of community dissatisfaction.<sup>162</sup> Victims of crime perceive the

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159. *E.g.*, *United States v. Wallace*, 532 F.3d 126, 131 (2d Cir. 2008) (holding that a jury could properly infer intent to distribute narcotics from, among other things, defendant's possession of a firearm); *United States v. White*, 969 F.2d 681, 684 (8th Cir. 1992) ("Because a gun is 'generally considered a tool of the trade for drug dealers, [it] is also evidence of intent to distribute.'" (quoting *United States v. Schubel*, 912 F.2d 952, 956 (8th Cir. 1990))); *United States v. Garrett*, 903 F.2d 1105, 1113 (7th Cir. 1990) ("Intent to distribute has been inferred in cases where small amounts of drugs . . . have been possessed in conjunction with other indicia of drug distribution, such as a weapon." (footnote omitted)).

160. *See Gately*, *supra* note 158 (describing Baltimore prosecutors' estimate that witness intimidation occurs in 95% of all homicide cases in Baltimore, with the result that cases are dropped or defendants are acquitted, and Boston police's estimate that two-thirds of Boston's 64 murders in 2004 remained unsolved due to witness intimidation); David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES, Mar. 1, 2007, <http://www.nytimes.com/2007/03/01/nyregion/01witness.html> (describing how rampant witness intimidation in New Jersey and elsewhere has led to prosecutors' refusals to even bring charges in violent crime cases that depend on a single witness's testimony); Phillips, McCoy & Purcell, *supra* note 158 (describing a continuing epidemic of witness intimidation in Philadelphia, in which 13 witnesses were killed over 10 years, countless others are threatened into silence, and case after case collapses as a result).

161. *See supra* notes 121-123 and accompanying text.

162. *See Fagan*, *supra* note 148, at 127-28.

police as unresponsive;<sup>163</sup> suspects and defendants perceive the police as overbearing and abusive.<sup>164</sup> Because both street crime and policing tend to be more concentrated in poor, minority communities, minorities, and African-Americans in particular, perceive these failures as by-products of pervasive racial discrimination by local police forces.<sup>165</sup> High crime levels and underfunding exacerbate the police practices that fuel these perceptions. Overburdened police forces have little time to investigate episodic street crime beyond the immediate aftermath and even less time to follow up with victims and apprise them of the status of their case. In a number of cities, political pressure to clamp down on violent crime has resulted in police departments adopting order maintenance policing, a technique that has come to be equated with aggressive enforcement of minor misdemeanor laws and pervasive use of stop-and-frisk.<sup>166</sup>

Federal law enforcement agents, in contrast, have all of the benefits of being law enforcers without the attendant burdens of policing. The feds do not walk a beat, which means that they do not have occasion to stop and frisk people. They are not the ones who show up in response to a 911 call. They do not interact with the community at all, in fact, save for the relatively rare situations in which they are called in to investigate a crime after it has already been reported. The lack of community interaction with federal law enforcement matters a great deal, because research has shown that people's

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163. See Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1725-27 (2006).

164. Fagan, *supra* note 148, at 127-28.

165. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 71 (1997) ("Large numbers of blacks are convinced that, in general, law enforcement authorities value the safety and well-being of whites more than that of blacks."); Fagan, *supra* note 148, at 127-28; Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 458-63, 482, 499 (2000); Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 *LAW & SOC'Y REV.* 129, 151-152 (2000) (demonstrating that blacks in low-income, high-crime neighborhoods perceived themselves as receiving inferior treatment by police as compared to both blacks and whites in higher-income, lower-crime neighborhoods).

166. See Fagan & Davies, *supra* note 165, at 462, 470-71 (describing collateral effects of New York's order-maintenance policing on minorities' trust in police); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 *U. CHI. L. REV.* 271, 272 (2006) (noting that New York, Chicago, and Los Angeles have all adopted policing strategies predicated on "more aggressive enforcement of minor misdemeanor laws, also known as 'order maintenance' policing"); Philip B. Heymann, *The New Policing*, 28 *FORDHAM URB. L.J.* 407, 422-40 (2000) (discussing order maintenance policing efforts in New York, Boston, and Chicago); Weitzer, *supra* note 165, at 151 (describing similar dynamic in Washington, D.C.).

perceptions of and satisfaction with police is grounded heavily in their personal experience.<sup>167</sup> That personal experience, in turn, significantly influences perceptions of the justice system's legitimacy.<sup>168</sup>

Now consider the federal authority's sustained and visible role in enforcing the rights of individuals against local police misconduct. Rodney King,<sup>169</sup> Abner Louima<sup>170</sup>—the federal criminal prosecutions of local police officers in cases such as these evoke positive images of the federal government as much as they evoke negative images of the local police forces involved.<sup>171</sup> And the federal

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167. See JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 144-45 (1997) (collecting studies showing that “how police handle investigatory stops and requests for assistance from citizens shapes evaluations of police performance and perceptions of the fairness of police in general”).
168. TYLER & HUO, *supra* note 114, at 28-30, 132-33, 178 (finding, in a study of 1,656 adults in Oakland and Los Angeles, that 30% of the variance in people's overall assessment of legitimacy was linked to their judgments about their own recent interactions with the police, and, applying same method to Tyler's 1990 study of 1,575 adults in Chicago, finding that 24% of the variance in people's overall assessment of legitimacy in that study was linked to their judgments about their own recent interactions with the police).
169. Three months after a local jury in Simi County, California acquitted four police officers charged in a videotaped beating of King, sparking days of rioting and nationwide protests, the U.S. Attorney for the Central District of California filed federal criminal civil rights charges against those officers. See Robert Reinhold, *U.S. Jury Indicts 4 Police Officers in King Beating*, N.Y. TIMES, Aug. 6, 1992, <http://www.nytimes.com/books/98/02/08/home/rodney-indict.html>. The federal trial resulted in the convictions of two officers and the acquittal of two officers. Seth Mydans, *Verdict in Los Angeles; 2 of 4 Officers Found Guilty in Los Angeles Beating*, N.Y. TIMES, Apr. 18, 1993, <http://www.nytimes.com/books/98/02/08/home/rodney-guilty.html>.
170. The U.S. Attorney for the Eastern District of New York prosecuted the police officers involved in a brutal beating and sexual assault of Louima, a Haitian immigrant, as well as those involved in a subsequent cover-up attempt. Of seven officers tried, six officers were convicted—the ringleader of the attack was convicted of assault and sentenced to 30 years' imprisonment, while three others were convicted of conspiracy to obstruct justice (one of whom was also convicted of joining in the attack), and two others for lying to investigators. The conspiracy convictions and the conviction of the officer who joined in the attack were reversed on appeal. *The Louima Ruling; Chronology of the Case*, N.Y. TIMES, Mar. 1, 2002, <http://www.nytimes.com/2002/03/01/nyregion/the-louima-ruling-chronology-of-the-case.html>.
171. This is why the upended federal convictions in *United States v. Bowen*, the highly-publicized “Danziger Bridge” case (the federal prosecution of five New Orleans police officers for the September 4, 2005, shooting of six unarmed civilians, causing the death of two), has ramifications for federal authority that extend well beyond that case. See Order and Reasons at 124, *United States v. Bowen*, No. 10-204, (E.D. La. Sept. 17, 2013), 2013 WL 5233325, at \*63 (ordering a retrial based on prosecutors' online postings regarding the defendants, described as misconduct “committed by those with significant authority who act in the

government has prosecuted less notorious cases of police misconduct, securing convictions that might lack national notoriety but nevertheless matter greatly to local communities.<sup>172</sup> The federal government's use of civil injunctions to remedy pervasive and systemic civil rights violations has also burnished its reputational capital when it comes to policing.<sup>173</sup>

In short, the federal government doesn't police the community, and it does police the police. In cases that depend both on the local police and law enforcement credibility generally, then, the federal authority has a uniquely powerful voice. When a federal agent takes the witness stand, he is, in a very real sense, a physical embodiment of the federal authority. And when a federal prosecutor calls a local police officer to the stand, that officer, too, becomes

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name of the 'United States of America' when they enter court and at all other times, and who have now left a fractured public trust"). The incident is all the more disheartening to New Orleans residents because the federal prosecution, like some other federal civil rights prosecutions, arose following a failed prosecution in state court. See Juliet Linderman, *Reversal of Danziger Bridge Convictions a "Bitter Pill" for Hurricane Katrina Survivors*, NEW ORLEANS TIMES-PICAYUNE, Sept. 17, 2013, [http://www.nola.com/crime/index.ssf/2013/09/reversal\\_of\\_danziger\\_bridge\\_co.html](http://www.nola.com/crime/index.ssf/2013/09/reversal_of_danziger_bridge_co.html).

172. See, e.g., John Marzulli, *Guilty Brooklyn Cop: "I Don't Know Why I Didn't Commit Suicide Yet,"* N.Y. DAILY NEWS, Oct. 15, 2012, <http://www.nydailynews.com/new-york/brooklyn/guilty-brooklyn-don-didn-commit-suicide-article-1.1184296> (describing a guilty plea by police officer charged with federal civil rights violations for unlawfully handcuffing and pepper-spraying a man at a bar without justification); Don Terry, *Philadelphia Shaken by Criminal Police Officers*, N.Y. TIMES, Aug. 28, 1995, <http://www.nytimes.com/1995/08/28/us/philadelphia-shaken-by-criminal-police-officers.html> (detailing the federal prosecutions and resulting convictions of a string of Philadelphia police officers who unlawfully framed innocent citizens for drug crimes, a scandal that substantially undermined the community's trust in the police); Mark Fazlollah & Aubrey Whelan, *Grand Jury Probing Corruption in Phila. Police Narcotics Unit*, PHILA. INQUIRER, Jan. 19, 2004, [http://www.philly.com/philly/news/20140118\\_Federal\\_grand\\_jury\\_probing\\_corruption\\_in\\_Philadelphia\\_police\\_narcotics\\_unit.html](http://www.philly.com/philly/news/20140118_Federal_grand_jury_probing_corruption_in_Philadelphia_police_narcotics_unit.html) (describing federal grand jury investigation and prosecution into corruption offenses among certain officers in the Philadelphia Police Department's narcotics unit).
173. See 42 U.S.C. § 14141 (2006) (authorizing the Department of Justice to investigate law enforcement agencies for engaging in a "pattern or practice" of civil rights violations and to impose systemic reforms upon those agencies, by court order if necessary). Since the law's passage in 1994, the U.S. Department of Justice has exercised its oversight authority aggressively in actions against dozens of state and municipal police departments, including those in New Orleans, Los Angeles, Detroit, Pittsburgh, and the District of Columbia. See Civil Rights Div., *Special Litigation Section Cases and Matters: Law Enforcement Agencies*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/spl/findsettle.php#police> (last visited Dec. 20, 2013); POLICE EXEC. RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 1 (2013) (noting that "more than 25 police departments have experienced some form of DOJ involvement in the last two decades," which has primarily involved the investigation of improper use of force, unlawful stops and searches, and biased policing).

imbued with federal authority. Implicit in the act of calling the officer to testify is the judgment—by the federal entity with the proven ability to prosecute him—that the officer has acted appropriately in the discharge of his duties and that he is telling the truth.

Finally, the federal government's reputation for witness protection further enhances its power in street crime prosecutions by signaling a protected space to otherwise reticent witnesses. It is not that the feds can guarantee witness safety—they can't, as any federal agent will attest. It is that witnesses *perceive* safety in the hands of a federal agent. Resources certainly play a role in this, but not the only one. Indeed, for witnesses in public housing (as many are), relocation is less a question of money than bureaucratic hassle. It is also about image. The federal witness protection program is the stuff of lore in popular culture.<sup>174</sup> And although few witnesses in street crime cases need avail themselves of such stringent protection measures, their mere existence graces federal agents with credibility. Indeed, in joint federal-local investigations, it is no accident that witness security tends to be the primary responsibility of federal agencies, regardless of the extent to which local law enforcement agencies share in the expenses. When it comes to witness security, federal agents inspire trust in a way local law enforcement simply doesn't. In urban criminal justice systems “gridlocked with fear,”<sup>175</sup> this trust can pave the path to the witness stand.

### *B. The Public: Authority and Community Interaction*

Legitimacy focuses on public perceptions of authority. Who, then, is “the public?” In a criminal justice system, the public is the community subject to the justice system—those who serve on its juries, elect its district attorneys (and, in many states, its judges), and are policed by its police department. In state and local justice systems, the community is the local county. In large cities, the local county is typically confined to an urban area, which may or may not include surrounding suburbs.<sup>176</sup>

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174. The federal “Witsec” program has generated television shows, *e.g.*, *In Plain Sight* (USA Network); books, *e.g.*, PETE EARLEY & GERALD SHUR, *WITSEC: INSIDE THE FEDERAL WITNESS PROTECTION PROGRAM* (2002); and movies, *e.g.*, *FEDERAL PROTECTION* (Chariot Communications 2002); *ERASER* (Warner Bros. 1996); *BIRD ON A WIRE* (Universal Pictures 1990).

175. Gately, *supra* note 158 (quoting Nicole Krivda, a Baltimore prosecutor).

176. The late William Stuntz postulated that, because “metropolitan counties typically include both cities and close-in suburbs,” the rise in the white suburban population in the latter half

In federal prosecutions, the community is the federal district, and it has two distinguishing features. First, a federal district's community does not elect its prosecutor or its judges.<sup>177</sup> Second, the federal district always comprises a larger geographic area than the local county.<sup>178</sup> Depending on the district, it can comprise anything from one city and its surrounding counties to an entire state.<sup>179</sup> Federal juries are therefore less representative of the local community in which the crime occurred. And the lack of direct political accountability by federal criminal justice authorities (both judges and prosecutors) means that these authorities will be less beholden to local constituents. In short, in the federal justice system, "the public" is both geographically broad and politically diffuse.

Scholarly attention on the jury's role in the federal criminal justice system has focused principally on these two features and their impact on racial

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of the twentieth century resulted in a political power-shift that has led to negative consequences for local urban justice systems. *See* Stuntz, *supra* note 3, at 2002. While Stuntz's description of county scope is accurate with respect to certain counties (for instance, his examples of Chicago, Atlanta, Cleveland, and Detroit), it is not for a number of the nation's most notoriously crime-ridden inner cities. Bronx County, in New York, is comprised entirely of the borough of the Bronx and includes no surrounding suburbs. The same is true for Philadelphia, Baltimore (which operates as an independent city with no county control), New Orleans, and Washington, D.C., as well as some smaller urban areas (Richmond, Virginia, the site of Project Exile, *see supra* notes 68-79 and accompanying text, among them). These so-called "consolidated city-counties" thus present real-world applications of some of the reform theories that Stuntz and other scholars have advanced, a point I take up in further detail in Section IV.A.

177. The United States Attorney and judges for the district are appointed by the President of the United States (usually selected for the President by the senators of the district's state). Federal judges serve lifetime appointments, while U.S. Attorneys typically serve until the conclusion of the appointing President's time in office.
178. The sole exception is the District of Columbia, in which the local and federal court districts are geographically coterminous.
179. Particularly populous districts, or those spanning large geographic areas, may have more than one courthouse location in the district, in which case each courthouse location may draw jurors from a narrower pool. For instance, the Southern District of New York is comprised of eight counties: two counties in New York City (New York County and Bronx County), and six in the suburbs. The two courthouses in Manhattan draw jurors from these two New York City counties and three surrounding counties (Westchester, Rockland, and Putnam counties), while the courthouse in White Plains draws jurors from six suburban counties (Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan). *See Amended Plan for the Random Selection of Grand and Petit Jurors in the United States District Court for the Southern District Of New York*, U.S. DIST. CT., S. DIST. N.Y. (Feb. 2009), [http://www.nysd.uscourts.gov/jury\\_handbook/juryplan\\_feb\\_2009.pdf](http://www.nysd.uscourts.gov/jury_handbook/juryplan_feb_2009.pdf).

composition<sup>180</sup> and prosecutorial discretion.<sup>181</sup> Here, I focus on three additional effects of geographic breadth and political diffuseness and how those effects might bear on legitimacy. I first consider the impact on jurors' self-identification. Next, I examine the demographic alignment between the jury pool and the larger electorate. Finally, I consider the empowerment of law over norms.

### 1. Juror Identification

Research has demonstrated that one's identity with the group through which authority is exercised—that is, the “superordinate” group—significantly impacts perceptions of legitimacy.<sup>182</sup> This phenomenon operates on two levels. First, the more one self-identifies with the superordinate group, the more likely one is to value the relational (i.e., process) rather than the instrumental (i.e., outcomes) in assessing legitimacy.<sup>183</sup> Second, high levels of identification with a superordinate group are correlated with increased perceptions of legitimacy.<sup>184</sup> Studies have shown, moreover, that these correlations remain regardless of the strength of an individual's identification with his or her own subgroup—indicating that, even in societies divided into subgroups along racial, ethnic, socioeconomic, or other lines, shared identification with the superordinate group enhances perceptions of the legitimacy of authorities.<sup>185</sup>

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180. The geographic breadth of federal districts results in less minority representation in federal jury venues as compared to local venues within the same district. See, e.g., Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79 (2004); Nancy Gertner, *12 Angry Men (and Women) in Federal Court*, 82 CHI.-KENT L. REV. 613 (2007).

181. Richman & Stuntz, *supra* note 101; Stuntz, *supra* note 3.

182. See Huo et al., *supra* note 127.

183. See *id.* at 42-43 (finding that persons proud to be part of their employer's organization were more likely to value relational concerns in their interactions with supervisors than those less proud of the organization); see also Heather J. Smith & Tom R. Tyler, *Justice and Power: When Will Justice Concerns Encourage the Advantaged to Support Policies Which Redistribute Economic Resources and the Disadvantaged to Willingly Obey the Law?*, 26 EUR. J. SOC. PSYCHOL. 171, 183, 191-92 (1996) (finding, in two studies, one of 352 white adults and one of 150 African-American adults, a significant correlation between strong self-identification as “American” and relational views of justice, as well as a significant correlation between weak self-identification as “American” and instrumental views of justice).

184. TYLER & HUO, *supra* note 114, at 116-22.

185. Yuen J. Huo, *Procedural Justice and Social Regulation Across Group Boundaries: Does Subgroup Identity Undermine Relationship-Based Governance?*, 29 PERSONALITY & SOC. PSYCHOL. BULL.

And a number of studies have shown that strong self-identification with America in particular enhances both valuation of relational concerns and perceptions of legitimacy.<sup>186</sup>

The research on superordinate identification can enrich our thinking about the jury. A jury is tasked with overcoming differences in order to reach agreement. It must speak as a single body rather than as the collection of individuals who comprise it. And through the deliberative process, jurors' perceptions are further refined. Uniform perceptions among jurors may be self-reinforcing; asymmetry may breed greater movement in juror views.

In federal court, the superordinate authority is the United States, and the superordinate group, Americans. In a local county court, on the other hand, the authority's identity is less pronounced. The prosecutor is an agent of the locality, but she enforces state law. She might describe herself, variously, as representing the state or the "people" of an unarticulated community. The superordinate group, then, is also undefined. In a Bronx County court, for instance, is the superordinate group those residing in the county (the Bronx), the locality (New York City), or the state whose laws the prosecutor seeks to enforce (New York State)?

One study in particular supports the distinction between national and local identification. In that study, which polled 1,656 adults in Oakland and Los Angeles, eighty-nine percent of respondents said that being an American was important to their identity, while only sixty-two percent of respondents said that being a resident of their city was important to their identity.<sup>187</sup> More significantly, the study tested the extent to which self-identification at the national versus local level influenced perceptions of legitimacy. The correlation between national identity and legitimacy was nearly three times greater than the correlation between local identity and legitimacy.<sup>188</sup> In other words, people self-identifying more strongly as Americans were more likely to perceive authorities as legitimate.<sup>189</sup>

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336, 346 (2003) ("[E]ven in a highly volatile context fraught with ethnic tension—minorities' encounters with the police and courts—identification with a diffuse social category such as the nation can facilitate cooperation with the directives of authorities whose responsibility it is to maintain social cohesion."); Huo et al., *supra* note 127, at 45.

186. See Huo, *supra* note 185, at 336; Smith & Tyler, *supra* note 183, at 182-83.

187. See TYLER & HUO, *supra* note 114, at 30, 120 tbl.7.4.

188. See *id.* at 122 tbl.7.6 (identifying a beta weight of 0.31 in a regression of legitimacy against pride in the United States and identifying a beta weight of only 0.12 in a regression of legitimacy against pride in city).

189. The study tested perceptions of legitimacy of the police and courts. See *id.* at 28, 32-33.

One cannot ascribe too much importance to a single study, particularly when confined to one state. Additional studies in different states and localities are needed, along with studies that assess self-identification with one's state and the impact of blended authority on superordinate identification. But this study, and superordinate identification research more generally, has intriguing and potentially significant implications. Strong juror identification with the prosecuting authority in federal cases might, in small part, explain why, for instance, in the District of Columbia the conviction rate is substantially higher in federal court than Superior Court, even while the two forums share the same jury pool.<sup>190</sup> It might also in part explain why the federal District of the Virgin

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Although the study did not specifically limit itself to local police and courts, it appears to have been so limited in practice, simply as a result of the nature of most citizen encounters with law enforcement and the judicial system. *See id.* at 32-33; *see also supra* notes 167-168 and accompanying text (describing the importance of recent interactions in driving perceptions). The study thus indicates, interestingly, that self-identification on a national level translates into perceptions of legitimacy of local institutions.

190. In 2007-2013, the most recent years for which conviction rate data is available from the D.C. Superior Courts, the overall felony conviction rate has averaged 67% (and the conviction rate in jury trials, 62.2%) while the overall conviction rate average from 2007-2012 (2013 is not yet available) in federal court in the District of Columbia was 84.4% (and the conviction rate in jury trials was 92.8%). *Compare Annual Reports and Documents*, D.C. CTS., <http://www.dccourts.gov/internet/about/orgperf/annualreports.jsf> (click on the "Annual Report – Statistical Summary" for each of years 2007-2013 and scroll down to the "Criminal Division Case Activity" table) (last visited Feb. 18, 2014), *with Judicial Business Archive, supra* note 58 (click on each of the desired years (2007-2012), then click on "Table D-7 Defendants Disposed of, by Type of Disposition and District"). (For the D.C. Superior Court conviction rate, I calculated the total number of felony guilty pleas and jury and bench trial guilty verdicts as a percentage of total disposed felony cases; for the jury trial conviction rate, I calculated guilty verdicts as a percentage of total jury trials.) It should be noted that the federal court dataset tracks outcomes by individual defendants, while the D.C. Superior Court dataset tracks outcomes by cases (which may or may not include multiple defendants). Because of the potential for mixed verdicts or judgments in multi-defendant cases, disposition data tends to reflect a higher conviction rate if calculated by case outcome as opposed to defendant outcome. In other words, were these two court systems to use the same methodology, the disparity might be even more pronounced.

To be clear, there are a number of causes contributing to the conviction rate differential in the District of Columbia, including, most significantly, differences in the size and nature of the docket in each forum; in the total mix of factors, superordinate identity surely plays a relatively minor role. Nevertheless, the comparison is worth noting in light of other constants (or "controls") unique to that district, namely, the jury pool and the prosecuting office are the same in federal and local court. This also complicates the influence of superordinate identity in D.C. Superior Court prosecutions, because federal and local authority are blended: federal prosecutors charge violations of the local city code that arise almost entirely from local arrests. *See* EXEC. OFFICE FOR U.S. ATT'YS, U.S. DEP'T OF JUSTICE,

Islands, where U.S. citizen residents cannot vote in national elections and many are apparently apathetic as to their political status,<sup>191</sup> has the lowest conviction rate of any federal district.<sup>192</sup> It may also in part explain why all-white federal juries in the Jim Crow south convicted white defendants accused of crimes against African-American victims far more frequently than did all-white juries in state courts at that time.<sup>193</sup>

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UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2011, at 14 (2011), [http://www.justice.gov/usao/reading\\_room/reports/asr2011/11statrpt.pdf](http://www.justice.gov/usao/reading_room/reports/asr2011/11statrpt.pdf).

191. See Sam Dimeo, *Political Status Referendum Falls Short in U.S. Virgin Islands*, ASSOCIATED PRESS, Oct. 11, 1993, <http://www.apnewsarchive.com/1993/Political-Status-Referendum-Falls-Short-In-U-S-Virgin-Islands/id-a35f49515fb08b46bcd53142ad7fbfoa> (observing that “[a]pathy appeared to be the strongest sentiment” in a 1993 political status referendum, where voter turnout was so low that the referendum was deemed invalid).
192. *Judicial Business Archive*, *supra* note 58, (click on each of the desired years (2008-2012), then click on “Table D-7 Defendants Disposed of, by Type of Disposition and District”) (showing that over the last five years, the conviction rate in the District of the Virgin Islands averaged 44.9%, as compared to an average conviction rate of 90.9% for the federal judicial system as a whole). While the District of the Virgin Islands has a much higher jury conviction rate, *see id.* (jury conviction rate of 69.8%), the total conviction rate reflects not just outcomes in tried cases, but importantly, prosecutors’ assessments of how cases will fare at trial. Generally speaking, a dismissal reflects the prosecutor’s belief that she will not secure a conviction at trial.

It is interesting to compare the Virgin Islands with Puerto Rico (86% conviction rate and 90.3% jury conviction rate over the last five years, *id.*), where in a 2012 political status plebiscite, sixty-one percent of voters who indicated a preference for one of three non-territory political status options wanted Puerto Rico to become a U.S. state. *See* Associated Press, *Puerto Ricans Opt for Statehood in Referendum*, USA TODAY, Nov. 7, 2012, <http://www.usatoday.com/story/news/world/2012/11/07/puerto-rico-referendum/1689097>. (Other unincorporated territories are Guam and the Northern Marianas Islands, which also have federal conviction rates well below average, but which have significantly smaller caseloads.) Again, conviction rate differences are the product of multiple contributing factors. The District of Puerto Rico has a high volume of cases, most of which involve narcotics charges, whereas the District of the Virgin Islands has a lower volume of cases, many of which involve violent crimes including firearm offenses. *Judicial Business Archive*, *supra* note 58 (click on each of the desired years (2008-2012), then click on “Table D-7 Defendants Terminated, by Major Offense and District”). As noted, the former are relatively easier to prove than the latter. *See supra* note 62 and accompanying text. For a discussion of the tangled and complex influences on Puerto Ricans’ and U.S. Virgin Islanders’ identification as Americans, including in particular issues of race and ethnicity, see ROBERT E. STATHAM, JR., *COLONIAL CONSTITUTIONALISM: THE TYRANNY OF UNITED STATES’ OFFSHORE TERRITORIAL POLICY AND RELATIONS* 25-64 (2002).

193. See Campbell Robertson, *Last Chapter for a Court with a Place in History*, N.Y. TIMES, Sept. 17, 2012, <http://www.nytimes.com/2012/09/18/us/mississippi-courthouse-with-rich-civil-rights-past-set-to-close.html> (recounting the 1967 federal conviction, by an all-white

Note the qualifier: *in part*. There are numerous complex factors that impact a jury's decision in a given case or that contribute to patterns of jury decisions over time. Many of them, such as evidentiary strength or case type, surely have a greater impact than superordinate identification. And subgroup identification is also important; clearly, in criminal law and in street crime in particular, race matters.<sup>194</sup> But to this complex mix of influences, we should add superordinate identification, and we should undertake to better understand its potential impact on juries across forums.

## 2. *Adjudicative-Legislative Alignment*

The distinguishing feature of “street crime,” as its name implies, is its locus. Unlike many other types of crime, street crimes harm not just their immediate victims, but the public life of the local community.<sup>195</sup> Streets, parks, schoolyards, the entryways and stairwells of apartment buildings, the corner store—these are the “scene of the crime.” For residents in communities ravaged by street crime, the places of daily life become zones of fear. They also become the focus of police attention. For street crimes, more than any other, it is the local community that principally bears the burdens of the law's violations and its enforcement.

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federal jury in Mississippi, of seven defendants for the brutal murders of three civil rights activists—the first of subsequent civil rights convictions against white defendants by all-white federal juries in the South).

194. The complexities of race, crime and the jury have generated a deep and thoughtful body of literature. See KENNEDY, *supra* note 165, at 242-44; Paul Butler, *Racially Based Jury Nullification: Black Power in The Criminal Justice System*, 105 YALE L.J. 677 (1995); William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 129-30 (1987) (explaining social psychological phenomenon of “ingroup-outgroup bias,” and its application to race-based peremptory challenges); Samuel R. Sommers and Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003) (surveying the empirical literature); see also Fagan, *supra* note 148 (discussing tensions within minority communities regarding crime, law enforcement and imprisonment); Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 (2008) (same); Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137 (1997) (providing empirical data suggesting African-American views on drug law enforcement are complex and sometimes in tension).
195. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 553, 558-59 (1997).

The law-making that defines and punishes street crimes, though, occurs at the state rather than local level. Because states comprise all demographics while street crime affects primarily urban areas, laws governing street crime are made at a level of government not directly answerable to the communities the laws most affect. Adjudication, on the other hand, occurs at the local county level. To the extent, then, that local county norms of conduct or ideologies about punishment differ from state norms, those differences manifest in case adjudication. Juries might acquit more often for certain crimes. Judges might seek ways to circumvent sentences mandated by the state legislature.

This is precisely what happened in California during the time of its original “three strikes” law, a statute that was enacted pursuant to a state-wide referendum ballot.<sup>196</sup> Juries and local judges in San Francisco—a consolidated city-county<sup>197</sup> and the only county in the state in which a majority of voters voted against the law—frequently nullified the law; as a result, the San Francisco District Attorney declined to enforce it.<sup>198</sup> Juries in San Diego County, on the other hand—a county comprised of both urban and suburban areas, in which approximately 76% of voters had voted in favor of the three strikes law—regularly returned convictions in three strikes cases, resulting in robust enforcement of the law in San Diego County.<sup>199</sup> A similar dynamic occurred in Virginia when the state legislature enacted firearms laws that mirrored federal law. In Richmond County, also a consolidated city-county, and the site of the tremendously successful federal “Project Exile,”<sup>200</sup> local prosecutors ran into roadblocks when they sought to replicate federal results in local court. Many local judges balked when told that the new laws mandated a presumption of detention in all firearms cases, and simply granted bail as if the

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196. The statute, enacted in 1994, mandated a sentence of at least 25 years to life imprisonment for any defendant convicted of a third felony offense, regardless of severity. See CAL. PENAL CODE §§ 667, 1170 (West 1995). A 2012 referendum modified the law to permit this enhanced sentence only for certain enumerated felonies. See CAL. PENAL CODE §§ 667, 1170 (West 2012); *Statement of Vote November 6, 2012, General Election*, CAL. SEC’Y OF STATE DEBRA BOWEN 13 (2012), <http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf>.

197. See *supra* note 176.

198. See Tony Perry & Maura Dolan, *Two Counties at Opposite Poles of “Three Strikes” Crime Debate: San Francisco Is Restrictive in Applying Law, San Diego Takes Hard Line*, L.A. TIMES, June 24, 1996, [http://articles.latimes.com/1996-06-24/news/mn-18004\\_1\\_san-diego-county](http://articles.latimes.com/1996-06-24/news/mn-18004_1_san-diego-county). *People v. Superior Court*, 917 P.2d 628 (Cal. 1996) found that judges had authority to dismiss the allegation that a defendant had an otherwise qualifying prior felony conviction “in furtherance of justice.” *Id.* at 630.

199. Perry & Dolan, *supra* note 198.

200. See *supra* notes 68-70 and accompanying text.

heightened evidentiary standard did not exist.<sup>201</sup> Some judges were reported to engage in nullification, acquitting defendants despite strong evidence of guilt simply to avoid imposing what they viewed to be an excessive punishment.<sup>202</sup> And in New York, the 2006 law mandating a three-and-a-half-year term for illegal possession of a gun has been applied inconsistently. Defendants in the Bronx often avoid any state prison sentence, while the mandatory minimum sentence is vigorously enforced against defendants in Queens County.<sup>203</sup>

On the surface, the federal criminal justice system would seem to operate in a similar fashion: laws are made at the national level (by the U.S. Congress) and adjudicated at the local level (by juries and judges in the ninety-four federal districts). In reality, it is not at all similar. An overlooked feature of the federal criminal justice system is its alignment, at least in terms of demographics, between the legislative and adjudicative levels. Almost every federal district contains urban centers, suburbs, and rural areas.<sup>204</sup> In some

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201. See VIRGINIA EXILE REPORT, *supra* note 72, at 73.

202. *Id.* at 30-31. Almost all defendants charged with gun crimes in Richmond County elected to proceed before a judge rather than a jury. *Id.* at 30. Virginia is one of the few states in the nation to permit jury sentencing.

203. See Sam Roberts, *Prison Isn't as Mandatory as State's Gun Laws Say*, N.Y. TIMES, Jan. 20, 2013, <http://www.nytimes.com/2013/01/21/nyregion/prison-not-as-mandatory-as-ny-state-gun-laws-say.html>. Like California's three strikes statute, see *supra* note 198, the New York gun statute permits judges to sentence a defendant to less than three-and-a-half years if the interests of justice so require. And as in California, that provision has been interpreted unevenly across different localities. See Roberts, *supra*; *supra* note 198.

204. Compare *Urbanized Areas and Urban Clusters: 2010*, U.S. CENSUS BUREAU, [http://www.census.gov/geo/maps-data/maps/pdfs/thematic/2010ua/UA2010\\_UAs\\_and\\_UCs\\_Map.pdf](http://www.census.gov/geo/maps-data/maps/pdfs/thematic/2010ua/UA2010_UAs_and_UCs_Map.pdf) (last visited Feb. 1, 2012), with *Geographic Boundaries of the United States Courts of Appeals and the United States District Courts*, U.S. CTS., <http://www.uscourts.gov/uscourts/images/CircuitMap.pdf> (last visited Dec. 11, 2013). Note that the U.S. Census Bureau defines an "urbanized area" as one containing more than 50,000 inhabitants and an "urbanized cluster" as one containing between 2,500 and 50,000 inhabitants. See *Urban and Rural Classification*, U.S. CENSUS BUREAU, <http://www.census.gov/geo/reference/urban-rural.html> (last visited Dec. 11, 2013). For a breakdown of the percentage of urban and rural areas in each county of the United States, both by population and land area, see *Percent Urban and Rural in 2010 by State and County*, U.S. CENSUS BUREAU, [http://www2.census.gov/geo/ua/PctUrbanRural\\_County.xls](http://www2.census.gov/geo/ua/PctUrbanRural_County.xls) (last visited Feb. 10, 2014). For a state-by-state breakdown of the specific counties within each federal judicial district, see *Federal Judicial Districts*, FEDSTATS <http://www.fedstats.gov/mapstats/fjd> (last updated Apr. 20, 2007).

These maps and datasets illustrate the tremendous range of population densities within federal judicial districts. But even these fail to fully capture the reality of lived experience. Densely-populated suburban areas, such as Nassau County in New York State, can be classified by the U.S. Census as "urbanized areas." See *Urbanized Areas and Urban Clusters*:

districts urban areas might be more represented, while in others suburban or rural areas might make up more of the mix. But there is not a single federal district (with the exception of the District of Columbia) that does not at least contain some portion of all three types of neighborhoods.<sup>205</sup> In this sense, federal districts reflect the mix of communities that occurs on a national level.

This means that within the federal system there is less demographic disconnect between the constituencies that elect the lawmakers (i.e., the national electorate) and serve as jurors (i.e., the district-wide jury pool). For street crime, which primarily affects one demographic (urban dwellers), the demographic alignment between the legislative and adjudicative communities is significant. If criminal adjudication at least partly serves to give voice to “community” norms, it is unsurprising that in the federal system we see less discord between the norms of the community that makes the laws and the norms of the community that adjudicates violations of them, particularly when it comes to cases of street crime.

This is not to say this aspect of the federal system is preferable; those who think of the jury as a “check” on legislators and prosecutors might argue it is not (an argument I engage in Part IV). But before we talk about the jury’s role in constraining the criminal law, we must appreciate the jury’s relationship to the polity – not just the polity that elects district attorneys and judges, but the polity that elects lawmakers.<sup>206</sup>

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2010, *supra*; *Percent Urban and Rural in 2010 by State and County*, *supra*. Accordingly, it is worth noting the U.S. Attorneys’ Offices’ own descriptions of their districts. For example, the Eastern District of New York’s website describes Nassau and Suffolk counties as “suburban.” See U.S. ATT’Y’S OFF. FOR E. DISTRICT N.Y., <http://www.justice.gov/usao/nye> (last visited Dec. 11, 2013).

205. Compare *Urbanized Areas and Urban Clusters*, *supra* note 204, with *Geographic Boundaries of the United States Courts of Appeals and the United States District Courts*, *supra* note 204.
206. In this vein, it is also worth noting that where they exist, differences in jury selection procedures between federal and local districts may exacerbate this distinction in legislative-adjudicative alignment. All but seventeen federal districts compile juror venires from lists of registered voters. See JODY GEORGE, DEIRDRE GOLASH & RUSSELL WHEELER, *FED. JUD. CTR., HANDBOOK ON JURY USE IN THE FEDERAL DISTRICT COURTS* 11-12 (1989) (noting that a small number of districts with large minority populations have supplemented voter registration lists with other sources, including driver’s license records and state jury selection lists); John P. Bueker, Note, *Jury Source Lists: Does Supplementation Really Work?*, 82 *CORNELL L. REV.* 390, 391 (1997). While some states similarly select jurors solely from voter registration lists, many supplement from additional sources such as driver’s license records or income or property tax records. See Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, NAT’L CENTER FOR ST. CTS. 13-14 (Apr. 2007). One effect of these selection differences may be minority

### 3. *The Empowerment of Law over Norms*

If the arguments of moral legitimists are correct, criminal law can do little to move a community's social norms when those norms are well established and widely adopted.<sup>207</sup> But theories of moral legitimacy also recognize that, when norms within a community differ, criminal law has the power to dictate which norm will prevail—a power strengthened by the authority's reservoir of public support.<sup>208</sup> If the authority dictating the law is perceived as legitimate, the community will defer to the law's enforcement. Over time, continued enforcement might even serve to shift social norms to align more closely with the law's dictates. Even if the law fails to shift norms, enforcement will continue—people will be arrested, prosecuted, convicted, and sentenced in accordance with prescribed penalties—as a result of the larger community's deference to the authority as the legitimate arbiter of conflicting norms.

A larger and more geographically diverse community contains a larger and more diverse set of norms. It follows, then, that the larger and more diverse the community, the greater the criminal law's power to dictate norms. This is what we see in the federal criminal justice system: a large “community” encompassing broad swaths of a state's population, communities, and attendant norms. Such norm diversity, in turn, empowers federal criminal law.

The empowerment is most visible in the prosecution of street crimes, where the relevant norm-setting community is uniquely delineated along geographic lines. A defendant accused of insider trading would almost certainly never face twelve jurors all within the community of Wall Street investors and traders, regardless of whether he were tried in federal or state court. But a defendant accused of selling heroin on the corner could, conceivably, face quite different communities, from the perspective of norms, in a federal versus local forum. The local forum would almost certainly include jurors who were personally affected by drugs or neighborhood drug dealing and its attendant violence; who knew someone so affected, a drug dealer, or the family members

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representation on juries. *But see* Bueker, *supra*, at 392 (arguing that source supplementation has been shown not to enhance minority representation on juries). But another important effect is perceptions of legitimacy: to the extent that federal districts cull only from the ranks of registered voters, they are selecting from among those citizens who participate in the larger political process, and who therefore may be more predisposed to believing in the system's legitimacy. (I am grateful to Hosea Harvey for pointing me to the issue of jury selection procedures.)

207. *See supra* notes 134–140 and accompanying text.

208. *See supra* notes 128–129 and accompanying text.

of an imprisoned drug dealer; or who were, or knew others who were, subjects of police stops. The federal forum might result in a jury bereft of any personal experience with street-level drug dealing and enforcement of the drug laws.

The jury, though, is only the start of the law-over-norm dynamic in federal court; it is at sentencing that the real work gets done. Consider one salient example. In inner-city communities, illegal gun possession, particularly by those already involved in the criminal justice system, is a norm of street life that conflicts with, and effectively lays siege to, the norms of the large majority of community residents (who are law-abiding).<sup>209</sup> The criminal law in nearly every state aligns with the norms of the law-abiding residents and prohibits convicted felons from carrying a firearm.<sup>210</sup> Yet in some local urban courts, the street norm overshadows the criminal law. In these courts, non-custodial sentences are not infrequent, notwithstanding the law's applicable penalties.

For instance, in New York prior to 2006 (when the legislature decreed a three-and-a-half-year mandatory-minimum penalty for illegal gun possession), non-custodial sentences for illegal gun possession were common—even though then-existing statutes mandated a sentence of two to eight years, subject only to departures for mitigating circumstances.<sup>211</sup> And in

209. Research indicates that anywhere from forty to ninety percent of youths involved in the criminal justice system carry firearms. See DEANNA WILKINSON & JEFFREY FAGAN, SITUATIONAL CONTEXTS OF GUN USE BY YOUNG MALES IN INNER CITIES 6 (2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/194120.pdf>; see also *id.* at 1-2 (“[G]uns have become an important part of the discourse of social interactions in modern urban life, with both symbolic meaning (power and control), social meaning (status and identity), and strategic importance. Getting and using a gun against another person has become a rite of passage into manhood, or at least into a respectable social identity within this context.”).

210. See generally BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, STATE LAWS AND PUBLISHED ORDINANCES – FIREARMS (31st ed. 2010-2011), <https://www.atf.gov/files/publications/download/p/atf-p-5300-5-31st-edition/2010-2011-atf-book-final.pdf> (collecting firearms laws and ordinances of all fifty states, effective through January 2011). In a number of states convicted felons may have their firearms rights restored under certain circumstances; such state reinstatements are recognized and permitted under federal law. See Michael Luo, *Felons Finding it Easy to Regain Gun Rights*, N.Y. TIMES, Nov. 13, 2011, <http://www.nytimes.com/2011/11/14/us/felons-finding-it-easy-to-regain-gun-rights.html> (reporting on reinstatement rules in 11 states). *But see* Jay Buckley, *Firearms for Felons? A Proposal to Prohibit Felons from Possessing Firearms in Vermont*, 35 VT. L. REV. 957, 957 (2011) (noting that “Vermont has no state law that bans firearms for felons”).

211. See *New York State Violent Felony Offense Processing 2006-2010*, REP. N.Y. ST. DIV. CRIM. JUST. SERVICES 6, 13 (2012), <http://www.criminaljustice.ny.gov/crimnet/ojsa/nys-violent-felony-offense-processing-2006-2010.pdf> (noting that as a result of the law, which went into effect in November 2006, prison sentences for gun possession crimes in New York City increased by 126.8% between 2006 and 2010, even as the total number of weapons possession cases in

the Bronx, custodial sentences in gun cases remain rare, despite the new law.<sup>212</sup> In Virginia in 2000, following the passage of mandatory sentences for certain gun crimes, some judges evaded the new sentencing laws through the use of charge reductions, bench trial acquittals, and suspension of sentences.<sup>213</sup> Probationary sentences for gun possession are not uncommon in Philadelphia, where, in 2010, fifteen percent of defendants convicted under Pennsylvania's felon-in-possession statute received sentences of probation and an additional twelve percent received sentences of imprisonment in county jail, for which the average minimum hovered around one year—notwithstanding sentencing guidelines ranging from eighteen months to ten years depending on the defendant's criminal history (guidelines that are, incidentally, substantially similar to federal sentencing guidelines for the equivalent crime).<sup>214</sup>

In federal courts, in contrast, most judges tend to have little tolerance for illegal gun possession. In 2012, the median sentence for federal defendants convicted of illegal possession of a firearm was nearly four years, notwithstanding the absence of any legislatively-mandated penalty.<sup>215</sup> Federal judges could choose, if they wished, to sentence felons-in-possession of firearms to non-custodial sentences or even sentences far below the advisory guidelines range, yet they almost never do.<sup>216</sup> A sentence of probation for illegal firearm possession is practically unheard of in federal court.<sup>217</sup>

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the city declined by 18%); N.Y. PENAL LAW §§ 70.02.3(c), 70.02.4(b) (McKinney 2013).

212. See *supra* note 203 and accompanying text.

213. See VIRGINIA EXILE REPORT, *supra* note 72, at 37-38, 53, 58-59.

214. See 18 PA. CONS. STAT. ANN. §§ 6105(a.1)(1), 1103(2) (West 2000 & Supp. 2013) (providing statutory penalties for the offense); *Summary of Sentences by Offense Category and County*, PA. SENT'G COMM'N 2010 (on file with author and available from Pennsylvania Commission on Sentencing) (for 18 P.S.A. § 6105); PENNSYLVANIA SENTENCING GUIDELINES IMPLEMENTATION MANUAL 36, 53 (6th ed. 2008); U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(6) & Sentencing Table (2010) (guidelines range from 15 months to ten years depending on the circumstances of the offense and the defendant's criminal history). I cite to the manuals in effect as of 2010, the latest year for which sentencing data is available from the Pennsylvania Commission on Sentencing. With respect to the felon-in-possession offenses, there have been no subsequent amendments to the sentencing guidelines in either Pennsylvania or the federal system. See PENNSYLVANIA SENTENCING GUIDELINES IMPLEMENTATION MANUAL 47, 71 (7th ed. 2012); U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(6) & Sentencing Table (2013).

215. HOGAN, *supra* note 67, at tbl.D-5, (showing a median sentence of 46 months).

216. See *id.*

217. See 2012 SOURCEBOOK, *supra* note 66, at tbl.12 (reporting that just 2.9% of defendants charged with firearms-related crimes received only probation). This statistic, moreover,

I use the felon-in-possession statutes in these three states<sup>218</sup> as an illustration of a more widespread phenomenon of disparate sentencing patterns in street crime cases between the federal and local forums. In 2004, for instance (the most recent year for which data are available), twenty-two percent of all defendants convicted of violent felony offenses in state courts received a non-custodial sentence.<sup>219</sup> In federal court, violent felony offenses almost never result in non-custodial sentences.<sup>220</sup> These sorts of disparities are, of course, the product of many forces, including case and defendant selection and, in some jurisdictions, differing applicable penalties (whether mandated or advisory).<sup>221</sup> In this respect, though, the felon-in-possession example offered here is particularly useful: these crimes are, by and large, the same across forums—both with respect to the nature of the crime and the applicable penalties—and yet forum-based disparities persist.

This is norm diversity in action. Federal judges preside over a diverse class of criminal cases arising from a diverse community of litigants. In addition to street crimes, federal judges also see a fair share of white-collar crimes, immigration offenses, and interstate narcotics trafficking. They also see many more civil cases compared to their local urban counterparts (who, in many

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includes those defendants who received a sentence reduction for cooperation with the government.

218. I chose these states because (i) they have publicly-available, offense-specific sentencing data for felon-in-possession cases in a mode that is readily comparable to the equivalent federal crime (on the dearth of offense-specific state sentencing data, see Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1354-55 (2005)); and (ii) these states, or cities within the states, have made visible efforts to combat gun crime through the use of these statutes. The dynamic in illegal gun possession cases in these states, though, has been observed by researchers more broadly. See EDMUND F. MCGARRELL ET AL., NAT'L INSTS. JUSTICE, PROJECT SAFE NEIGHBORHOODS - A NATIONAL PROGRAM TO REDUCE GUN CRIME: FINAL PROJECT REPORT 16-17 & n.15 (2009) ("PSN officials in many jurisdictions report that for years illegal possession of a firearm by a felon or concealed carrying offenses, and even crimes committed with a firearm present but no shooting, were routinely treated as non-violent offenses with high rates of dropped charges, dismissed cases, and suspended sentences.").
219. Bureau of Justice Statistics, *Felony Sentences in State Courts, 2004*, U.S. DEP'T JUST. 3 (2007), <http://www.bjs.gov/content/pub/pdf/fssco4.pdf>.
220. 2012 SOURCEBOOK, *supra* note 66, at tbl.12 (showing that for most violent crimes no defendants received probation, for robbery 1.9% of defendants received probation, and for assault 10.6% of defendants received probation; the table does not indicate whether these defendants were cooperators).
221. See sources cited *supra* notes 10, 13.

jurisdictions, preside over only criminal cases).<sup>222</sup> And they see litigants from urban, suburban, and rural areas. This means that, when a defendant charged with possessing a gun appears before a federal judge for sentencing, he does not come on the heels of ten others like him. In all likelihood, he also does not come on the heels of ten others who have committed more serious violent crimes, such as murder, armed robbery, or rape. To the federal judge, the defendant's gun possession appears very much aberrant, outside the norms of the large community over which the judge exercises her authority.<sup>223</sup>

In local courthouses, street norms often translate into courthouse norms: when 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.<sup>224</sup> Federal prosecution of street crime is largely an effort to shift that culture by leveraging the federal law's power over entrenched local courthouse norms and the street norms that generate them.<sup>225</sup> The norm-shifting effort is indeed a key component in many federal gun prosecution campaigns. Posters are displayed in local communities advertising the sentences given in federal gun cases, and defendants in local gun cases may be threatened with federal prosecution if they do not agree to a sentence closely approximating what they would likely receive in federal court.<sup>226</sup>

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222. It is a common feature of many urban justice systems to assign judges to either a criminal or civil docket. This is the practice, for instance, in New York, Chicago, Philadelphia, Baltimore, Washington, D.C., and San Francisco.

223. There are certainly other factors at work, too. Federal prosecutors tend to prosecute defendants with more egregious criminal records, which naturally garner more severe sanction. But to some degree this explanation is circular: federal prosecutors choose such defendants precisely because they have not, *despite* their records, received sufficient (in the prosecutor's view) sentences in local court. The examples offered in the Introduction illustrate this dynamic.

224. See MCGARRELL ET AL., *supra* note 218, at 16-17 & n.15 (discussing the dynamic in some jurisdictions when gun cases become routine). For studies of how courtroom norms develop, particularly with respect to the disposition of frequently-prosecuted crimes, see ROY B. FLEMMING, PETER F. NARDULLI & JAMES EISENSTEIN, *THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES* (1992); and PETER F. NARDULLI, JAMES EISENSTEIN & ROY B. FLEMMING, *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* (1988).

225. For a theoretical account of punishment's expressive power to influence social norms, see Kahan, *supra* note 147.

226. See DECKER & McDEVITT, *supra* note 52, at iii, 8; Press Release, *supra* note 54 (discussing the Maryland U.S. Attorney's Office's use of "Federal Letters of Intent to Prosecute").

The success of the federal norm-shifting endeavor is certainly debatable. Even assuming punishment's ability to alter norms of conduct—a highly disputed contention<sup>227</sup>—the vastly fewer numbers of federal compared to state cases present a practical challenge, to say the least, to any real norm-shifting exercise. But at least in the federal courthouse, for those few cases prosecuted, and perhaps in local forums where federal prosecution is threatened, the criminal law acquires more power than it otherwise might.

### C. Moral Credibility: Penalties, Perceptions, and Communities

When it comes to street crime, moral credibility primarily revolves around penalties. There is no disagreement as to whether armed robbery should be criminalized; the debate is simply over what the penalty for such conduct should be. While some might posit that the same cannot be said for drug crimes, in fact the public overwhelmingly supports criminalization of “hard” drugs such as powder cocaine, crack, and heroin.<sup>228</sup> The severity of the penalties associated with drug crimes and the concern that many drug offenders should receive treatment rather than imprisonment animate much of the debate over the “war on drugs.”

Moral credibility in street crime, then, turns principally on punishment, and the issue of punishment is morally fraught—all the more so for street crime because it primarily impacts the poor and minorities. What is the “right” sentence for a particular crime or a particular defendant? Is this question even answerable? And if it isn't, then what empowers a legislature or a sentencing commission to decree punishment? In particular, what inspires fidelity to the penalty-drafters' wishes? These questions underlie the remainder of this Part, which considers the extent to which federal penalties pertaining to street crime align with public and judicial views, the ramifications of moral credibility gaps

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227. See Meares, *supra* note 137; Robinson & Darley, *supra* note 117. *But see* Kahan, *supra* note 147.

228. See, e.g., *Americans Decry War on Drugs, Support Legalizing Marijuana*, ANGUS REID PUB. OPINION 1-2 (June 6, 2012), [http://www.angus-reid.com/wp-content/uploads/2012/06/2012.06.06\\_Drugs\\_USA.pdf](http://www.angus-reid.com/wp-content/uploads/2012/06/2012.06.06_Drugs_USA.pdf) (finding, in a nationwide survey of 1,017 adults, that less than 10% of respondents favored legalizing powder cocaine, crack, heroin, or methamphetamine, while over 50% favored legalizing marijuana); *11% Favor Legalizing, Regulating Cocaine*, RASMUSSEN REP. (May 21, 2012), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/may\\_2012/11\\_favor\\_legalizing\\_regulating\\_cocaine](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/may_2012/11_favor_legalizing_regulating_cocaine) (finding, in a survey of 1,000 likely voters, that only 11% of respondents favored legalizing cocaine). I discuss the federal response to marijuana-legalization trends *infra* notes 265-266 and accompanying text.

within the federal system, and why moral credibility with respect to street crime might differ across federal and local forums.

1. *Moral Credibility in the Federal System*

Empirical data on public and judicial views of federal penalties reveal three salient facts. First, there is no “uniform” view as to the appropriate sentence for a crime; individual views differ, sometimes markedly. Second, despite the absence of uniformity on an individual level, with few exceptions federal penalties accord with median public (and judicial) views. And third, in the few instances where there is a significant gap between federal penalties and public and judicial views—what I refer to as a “moral credibility gap”—there *are* ramifications for federal enforcement power, albeit not at the extremes we see in some local county courts. This Subsection sets out data supporting the above points, and the next Subsection considers moral credibility’s potential role in forum-based outcome disparities in prosecutions of street crime.

Two important studies reveal an absence of uniform public opinion as to the appropriate sentences for federal crimes. In 1994, Peter Rossi and Richard Berk were tasked by the U.S. Sentencing Commission with undertaking the first (and, as yet, only) systematic study of public opinions of federal sentences under the Federal Sentencing Guidelines.<sup>229</sup> The Rossi and Berk study compared the Guidelines rules for determining sentences, and the resulting sentences, with the rules and sentences preferred by a representative sample of the American public.<sup>230</sup> It drew two principal conclusions. First, there was substantial variation among respondents with respect to appropriate penalties.<sup>231</sup> As the authors succinctly put it: “One person’s two-year sentence

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229. PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 4-6, 13-15 (1997).

230. *Id.* at 4, 33. Respondents were given vignettes on a series of crimes, each setting forth specific details about the nature of the crime and its impact, as well as background information about the offender. *Id.* at 34-50, 55. For each vignette, respondents were asked to specify the type and amount of punishment they would impose. *Id.* at 40. By varying specific features in each vignette (for example, the use of a gun in a robbery, or whether the defendant had children), the researchers ascertained the weight respondents accorded to particular features, thus providing an account of what factors the public considers important in apportioning punishment. *Id.* at 36-37. The researchers then assessed the extent to which the Guidelines reflected public views of sentences and sentencing rationales. *Id.* at 75-79.

231. *Id.* at 79-82.

may be the equivalent of another's four-year sentence."<sup>232</sup> Second, despite the lack of uniformity among respondents, the Guidelines penalties tended, in most cases, to approximate the respondent median or mean.<sup>233</sup> There was one glaring exception to this general trend: crack cocaine penalties. Median respondent views as to the appropriate penalties for crack offenses were approximately twelve years lower than existing federal penalties under statutes and the sentencing guidelines.<sup>234</sup>

In 2010, the U.S. Sentencing Commission amassed federal judges' opinions of the Guidelines, along with statutorily-mandated penalties, through a detailed survey.<sup>235</sup> The Sentencing Commission's survey, while using a different methodology than the Rossi and Berk study,<sup>236</sup> likewise revealed a wide range of opinions on the appropriate sentences for given crime categories.

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232. *Id.* at 98. An example from the study illustrates the point. In a vignette in which the defendant is convicted of robbing a convenience store, the median sentence of respondents was 5 years; the mean was 8.5 years. *Id.* at 64 tbl.4.5. These appear to approximate the Guidelines median and mean, which are 6.5 years and 7.6 years, respectively. *Id.* at 92 tbl.5.5. Yet individual responses varied considerably. Of the 596 respondents to this vignette, 1.6% chose probation, 0.3% chose death, 4% chose life imprisonment, and the remainder varied within those extremes. *Id.* at 64 tbl.4.5.
233. *Id.* at 149 (finding "remarkable agreement between average respondent sentences and guidelines sentences, not just overall but in sentencing determinants. Time and again, the patterns [of guidelines and respondent sentences for given crimes] were nearly identical"). Conformity between respondents' views and the Guidelines' penalties, though, varied for each vignette and across different crimes. With respect to a street robbery, for instance, the respondent median was 4.1 years lower than the Guidelines median, but there was almost no mean difference. *Id.* at 88 tbl.5.4. For firearms offenses, the respondent median was 0.5 years lower than the Guidelines median, but the respondent mean was 2.5 years higher than the Guidelines mean. *Id.*
234. Crack penalties "represent[ed] the greatest disparity between the guidelines and respondents" in the Rossi and Berk study. *Id.* at 95. The median respondent sentence for a crack cocaine offense vignette was 10 years, while the median Guidelines sentence for the same vignette was 22 years. *Id.* at 92 tbl.5.5.
235. *Results of Survey of United States District Judges: January 2010 Through March 2010*, U.S. SENT'G COMM'N (June 2010) [hereinafter *U.S.S.C. Survey*], [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Projects/Surveys/20100608\\_Judge\\_Survey.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Projects/Surveys/20100608_Judge_Survey.pdf).
236. Whereas the Rossi and Berk study used a factorial survey to gather data on what penalties respondents believed were appropriate for a given set of facts and then compared the results to the sentence that would be calculated under the Federal Sentencing Guidelines on those facts, see ROSSI & BERK, *supra* note 229, the Sentencing Commission's survey instead asked judges whether, as a general matter, they believed the Guidelines and certain statutorily mandated penalties were "appropriate," "too high," or "too low," *U.S.S.C. Survey, supra* note 235, at tbls.1, 8.

For any given crime category, judges expressed differing views on the appropriateness of applicable penalties. But on the whole, a slight but consistent majority of judges believed both the Guidelines and statutorily-mandated penalties were appropriate—with the exception of crack cocaine and certain child pornography penalties.<sup>237</sup> Nearly three-quarters of surveyed judges believed that both Guidelines and mandatory minimum penalties for crack cocaine possession were too high.<sup>238</sup> The only other crime category for which judges expressed a similar view was possession and receipt of child pornography (an offense category on which Rossi and Berk did not canvass public views and for which, in any event, Guidelines penalties were then far lower).<sup>239</sup>

What are we to draw from this data? On one level, it empirically confirms what criminal practitioners know to be true: when it comes to sentencing, moral beliefs can be wildly divergent. Indeed, the Guidelines were borne of the desire to mitigate this inescapable reality. On another level, though, the data reveals a less obvious trend: there is, to a large degree, moral alignment between federal penalties and average public and judicial views. How much might this alignment explain the relatively high degree of adherence to prescribed penalties within the federal system, at least with respect to street crimes?<sup>240</sup> Let us consider the two documented instances of moral credibility

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237. *U.S.S.C. Survey*, *supra* note 235, at tbls.1, 8.

238. Seventy-six percent thought the mandatory minimum penalties for crack cocaine were too high, and 70% thought the Guidelines penalties were too high. *Id.* at tbls.1, 8. The survey was conducted from January through March 2010, while the Fair Sentencing Act of 2010, which greatly reduced the mandatory minimum penalties for crack offenses, was pending in Congress but had not yet been passed. See *Bill Summary and Status, 111th Congress*, S. 1789, LIBR. OF CONGRESS: THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01789:@@@D&summ1&> (last visited Mar. 11, 2014).

239. 71% of judges believed the mandatory minimum penalty for receipt of child pornography was too high, and 69% and 70% of judges believed the Guidelines penalties were too high for the offenses of, respectively, receipt and possession of child pornography. *U.S.S.C. Survey*, *supra* note 235, at tbls.1, 8.

240. See *2012 Annual Report*, U.S. SENT'G COMM'N 44 (2012), [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/ar12toc.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/ar12toc.htm). In only 13.9% of cases did judges sentence defendants to a term below the applicable Guidelines range, where the below-range sentence was pursuant to *Booker* rather than a guidelines' departure provision and not at the prosecution's request; of those cases, the median decrease from the minimum guidelines term was 14 months, a median decrease of 35.1%. *Id.* For street crimes (comprising the offense categories of murder, manslaughter, robbery, burglary, drugs and firearms), the average rate of *Booker*-based below guidelines sentences was 13.5%, and the median percent decrease from the Guidelines minimum ranged between 28% (for firearms)

gaps in federal penalties and their ramifications for enforcement, sentencing, and penalty reform.

Start with crack, a story that is, by now, well known. Congress' decision to impose significantly enhanced penalties for trafficking in the base form of cocaine (crack) as opposed to the powder form (cocaine) began, after a number of years, to meet with a rising tide of disapproval from nearly all sides. Legal scholars, federal judges, the Sentencing Commission, and even law enforcement—including then-Attorney General Janet Reno—publicly criticized the crack/powder penalty disparity, both for its lack of grounding in scientific and criminological data and for the racially disparate sentences it generated.<sup>241</sup> Anecdotal reports surfaced of jury nullification and judicial resignations.<sup>242</sup> Though it took decades, Congress ultimately heeded the calls and amended the laws in 2010 to substantially lessen, but not eliminate, the crack-powder disparity.<sup>243</sup>

Inside the courtroom, however, the crack story weaves a considerably more complicated narrative. In some respects, the disaffection did not generate palpable results. Defendants in crack cases cooperated at least as often as defendants in other narcotics cases.<sup>244</sup> Pre-*Blakely/Booker*, judges sentenced

and 100% (for simple drug possession). See 2012 SOURCEBOOK, *supra* note 66, at tbls.27, 31C. Local prosecutors and judges do not necessarily accord state penalty-drafters the same level of deference. See *supra* notes 196-203 and accompanying text.

241. *Dorsey v. United States*, 132 S. Ct. 2321, 2328-29 (2012) (reciting the history of crack laws, subsequent public opposition, and the Fair Sentencing Act of 2010); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1282 (1996) (describing the critical response to the disparity among African-American commentators and academics, as well as federal judges, prosecutors, and juries). Despite Reno's criticism, her Justice Department did not ultimately support proposed amendments to the laws. It is worth noting as well that criticism, though widespread, was not uniform. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994) (arguing that "the state was justified in penalizing possession of crack cocaine more harshly than possession of powdered cocaine"); Meares, *supra* note 194, at 138 n.2 (citing sources supporting the federal crack penalty scheme).
242. Spade, *supra* note 241, at 1281-82; William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1827 (1998) (reporting anecdotal evidence of jury nullification).
243. See Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (codified as amended at 21 U.S.C. § 841(b)(1) (2012)) (reducing the powder/crack ratio of the weight required to generate certain mandatory sentences from 100:1 to 18:1).
244. In the year preceding *Booker*, 29.5% of defendants convicted of crack cocaine offenses earned a government-sponsored downward departure based on substantial assistance to the government, compared to 26.9% of powder cocaine defendants, 21.5% of heroin defendants, 31% of methamphetamine defendants, and 17% of marijuana defendants. See U.S. SENT'G COMM'N, ANNUAL SOURCEBOOK OF SENTENCING STATISTICS tbl.45 (9th ed.

crack defendants to within-Guidelines sentences nearly as often as they did powder cocaine offenders.<sup>245</sup> And prosecutors continued to bring large numbers of crack cases, disposing of them without significant discounts.<sup>246</sup> The disaffection did manifest in sentencing post-*Booker*, when non-government-sponsored, below-Guidelines sentences for crack offenses began to increase steadily, at a rate and to a degree higher than for powder offenses.<sup>247</sup> Moreover, this trend immediately reversed following the enactment of the FSA: in just the quarter following its enactment, the amount of non-

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2004), [http://www.uscc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2004/sbtoco4.htm](http://www.uscc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2004/sbtoco4.htm). That distribution of cooperation rates among drug offenders has not substantially changed following either *Booker* or the Fair Sentencing Act of 2010 (FSA), which reduced the crack/powder penalty disparity. See 2012 SOURCEBOOK, *supra* note 66, at tbl.45 (reporting substantial assistance rates of 27.1% for crack defendants, 28.2% for powder cocaine defendants, 31.5% for methamphetamine defendants, 24.3% for heroin defendants, and 16.3% for marijuana defendants).

245. See U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 51 (2007).
246. In the ten years preceding the FSA, crack cocaine cases as a percentage of all narcotics cases remained consistently above 20%, with a low of 20.2% in 2002, and a high of 24.3% in 2008. See *Annual Reports and Sourcebook Archives*, U.S. SENT'G COMM'N, [http://www.uscc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/Archives.cfm](http://www.uscc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/Archives.cfm) (click on the link in the "Sourcebook" column for each of the desired years (2000-2010), then click the link for "Primary Drug Type of Offenders Sentenced Under Each Drug Guideline," which corresponds to Table 33) (last visited Dec. 11, 2013). It is only since the passage of the FSA that federal crack prosecutions have declined. See *id.* at year 2011 (17.3%) and 2012 (13.8%) (2012 link is at [http://www.uscc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/Table33.pdf](http://www.uscc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table33.pdf)). During the pre-FSA years, moreover, the government agreed to very few below-guidelines sentences for non-cooperating defendants prosecuted for crack offenses: between 2006, when the Sentencing Commission began reporting government-sponsored below-range sentences for non-cooperating defendants, and 2010, the year the FSA was enacted, the government only agreed to below-guidelines sentences in, on average, 3.2% of crack cases. See *Sourcebook Archives*, *supra*, (click on the link in the "Sourcebook" column for each of the desired years (2006-2010), then click the link for "Sentences Relative to the Guideline Range for Drug Offenders by Each Drug Type," which corresponds to Table 45) (last visited Dec. 11, 2013). Unfortunately, there is no data analysis available on national conviction rates for crack offenses.
247. U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, PART C 6, 7 (2012) [hereinafter *BOOKER CRACK COCAINE REPORT*], [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Booker\\_Reports/2012\\_Booker/Part\\_C4\\_Crack\\_Cocaine\\_Offenses.pdf](http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_C4_Crack_Cocaine_Offenses.pdf); U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, PART C (ANALYSIS OF POWDER COCAINE TRAFFICKING OFFENSES) 6, 7 (2012), [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Booker\\_Reports/2012\\_Booker/Part\\_C3\\_Powder\\_Cocaine\\_Offenses.pdf](http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_C3_Powder_Cocaine_Offenses.pdf).

government-sponsored, below-Guidelines sentences decreased by about one third.<sup>248</sup>

Now consider the story of child pornography penalties.<sup>249</sup> While the crack story might be characterized as one of public views diverging from static laws, the child pornography story is one of laws steadily and quickly moving off-track from public (or at least, judicial) views.<sup>250</sup> For more than three decades, Congress has steadily increased maximum penalties, added mandatory minimum penalties, and repeatedly directed the Sentencing Commission to impose harsher Guidelines penalties for child pornography offenses.<sup>251</sup> As a result, penalties for child pornography are now higher than for actual child abuse, a situation that strikes many judges as unjust.<sup>252</sup> The political story, too, is quite different. Apart from the vocal dissent of some federal judges,<sup>253</sup> there has been far less public outcry to Congress, at least as compared to what occurred in the case of crack penalties.<sup>254</sup> This may be in part because the divergence between penalties and views has become pronounced only fairly recently, with the enactment of the 2003 PROTECT Act.<sup>255</sup> Or it may be in part

248. See *BOOKER CRACK COCAINE REPORT*, *supra* note 247, at 7 (showing a decrease of non-Government sponsored below-Guidelines cases from approximately 30% to approximately 20%).

249. Although child pornography is not a street crime, and for this reason falls outside this Article's focus, I consider it here because any consideration of the crack penalties suggests a comparison to the other documented moral credibility gap in the federal system. As discussed *infra* notes 260-262 and accompanying text, a number of differences in the nature of these crimes makes comparison difficult. Despite these limitations, though, it is nevertheless worth considering other, non-offense-specific differences that might also explain the somewhat different paths of these two moral credibility gaps.

250. See Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 *LAW & CONTEMP. PROBS.* 27, 37 (2013). As noted, Rossi and Berk did not canvass public views on pornography penalties, which were at the time substantially less severe than they were 15 years hence, at the time of the Sentencing Commission's survey of federal judges. See *supra* note 239 and accompanying text.

251. U.S. SENT'G COMM'N, *REPORT TO CONGRESS: THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 6-8* (2009), [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Projects/Sex\\_Offenses/20091030\\_History\\_Child\\_Pornography\\_Guidelines.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf).

252. Steiker, *supra* note 250, at 37-44.

253. *Id.* at 38.

254. Thus far, there have been no bills proposed in Congress to reduce child pornography penalties. In comparison, bills to amend the crack/powder disparity were introduced in Congress almost yearly beginning in 1993. See Steiker, *supra* note 250, at 30.

255. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of

because the disparity between child pornography and child abuse penalties doesn't raise the disturbing specter of racially disparate outcomes, as did the crack/powder disparity. Or it may be because those who view and traffic in child pornography are simply less sympathetic as a political matter. Whatever the reason, there has been little in the way of genuine movement for penalty reform inside Congress, at least at present.

Inside the courtroom, though, the divide between applicable penalties and judicial views has real effects. Non-government-sponsored, below-Guidelines sentences for possession, receipt, or distribution of child pornography, at nearly forty percent, far eclipse any other offense category.<sup>256</sup> And the degree of departure is substantial: sentences for such offenses are discounted by thirty-eight percent, which translates into a median discount of forty months—again, far above almost any other offense category.<sup>257</sup> Prosecutorial practices have changed, too: as penalties gradually increased, prosecutors offered more frequent and more substantial sentencing discounts to defendants.<sup>258</sup> And unlike in crack cases, at least some federal judges in child pornography cases have been reported to blatantly flout mandatory minimum penalties by throwing out jury verdicts and ordering retrials or threatening to advise juries of the mandatory penalties in direct disregard of permissible federal procedure.<sup>259</sup>

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2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, 42, and 47 U.S.C.).

256. 2012 SOURCEBOOK, *supra* note 66, at tbl.27.

257. 2012 SOURCEBOOK, *supra* note 66, at tbl.31C.

258. See U.S. SENT'G COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 134-35 (2012), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Sex\\_Offense\\_Topics/201212\\_Federal\\_Child\\_Pornography\\_Offenses/Full\\_Report\\_to\\_Congress.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Full_Report_to_Congress.pdf) (observing that government-sponsored below range sentences have steadily increased from 2.1% in 2005 to 11.2% in 2010).

259. See A.G. Sulzberger, *Defiant Judge Takes on Child Pornography Law*, N.Y. TIMES, May 21, 2010, <http://www.nytimes.com/2010/05/22/nyregion/22judge.html> (reporting how, following a guilty verdict in a federal jury trial for possession and receipt of child pornography, Judge Jack Weinstein informed the jurors of the penalties that would result; learned that a number of jurors would have voted to acquit had they been aware of the penalties; and subsequently dismissed the verdict and ordered a new trial); Benjamin Weiser, *A Judge's Struggle to Avoid Imposing a Penalty He Hated*, N.Y. TIMES, Jan. 13, 2004, <http://www.nytimes.com/2004/01/13/nyregion/a-judge-s-struggle-to-avoid-imposing-a-penalty-he-hated.html> (reporting how, in a federal trial for advertising child pornography, then-district Judge Gerry Lynch pledged to advise jurors, pre-deliberations, of the applicable ten-year mandatory penalty—a practice ultimately disallowed by the Second Circuit).

How, then, to explain the different trajectory of these two moral credibility gaps? There is, of course, no single answer to this question. One reason is the differences between defendants. Crack defendants generally have substantial criminal histories, while child pornography defendants typically have no criminal history, a circumstance that might make within-Guidelines sentences in many crack cases more palatable for judges.<sup>260</sup> Child pornography defendants are also overwhelmingly white whereas crack defendants are overwhelmingly black, a difference that might lead some to conclude that the contrasts between the two sentencing patterns reflect some level of racism within the system, however unconscious.<sup>261</sup> Still another explanation is the relationship of the Guidelines to mandatory minimum terms. In the case of crack cocaine, the Sentencing Commission gradually sought to *reduce* Guidelines penalties in an effort to bring the Guidelines more in line with public and judicial views, which in turn led to less distance between mandatory terms and Guidelines ranges. In the case of child pornography, Congress usurped the Commission's role, effectively legislating Guidelines ranges that grew far higher than mandatory minimum terms.<sup>262</sup>

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260. Compare U.S. SENT'G COMM'N, *supra* note 258, at 143 (reporting that, in 2010, over 80% of child pornography offenders fell within the Guidelines' lowest criminal history category, Category I), with U.S. SENT'G COMM'N, ANNUAL SOURCEBOOK OF SENTENCING STATISTICS tbl.37 (15th ed. 2010) [hereinafter 2010 SOURCEBOOK], [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/sbtoc10.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/sbtoc10.htm) (reporting that 28.3% of crack offenders fell within the Guidelines' highest criminal history category, Category VI, while 22.2% fell within Category I and the rest were distributed fairly evenly across the remaining categories). The differences in criminal history, though, don't entirely explain the greater adherence to the Guidelines in crack cases given that the applicable Guidelines range takes into account an offender's criminal history.
261. Compare U.S. SENT'G COMM'N, *supra* note 258, at 143 (reporting that, in 2010, approximately 90% of child pornography defendants were white), with 2010 SOURCEBOOK, *supra* note 260, at tbl.34 (reporting that, in 2010, 78.5% of crack defendants were black); see also MICHELLE ALEXANDER, THE NEW JIM CROW 102-05 (2010) (describing the rise of racial bias in crack cocaine prosecutions). The primary reason a large majority of judges objected to federal crack penalties, though, is *because* of the penalties' racially disparate impact—a circumstance that would seem to undercut race-based theories of relatively greater Guidelines-adherence in crack cases. Moreover, post-*Booker* sentencing practices in crack cases on the whole mitigated racial disparities wrought by the federal crack laws. See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1688 (2012) (“By imposing below-guideline sentences that they could not have imposed under the mandatory guidelines, in fiscal year 2010 alone, judges spared more than 860 black defendants sentenced under the crack or career offender guidelines over 3300 years of unnecessary incarceration.”).
262. See Steiker, *supra* note 250, at 28-33, 37-41 (discussing the different trajectories of

But perhaps the most compelling explanation stems from the dynamic underlying the Guidelines/mandatory minimum relationship: the trajectory of the moral credibility gap. In the case of crack, public and judicial views gradually parted ways from a static law. In the case of child pornography, the law continues to part ways, quite drastically, from judicial views. And so in the former scenario, there was hope and promise that the penalty-drafters would ultimately narrow the credibility gap (which they did).<sup>263</sup> In the latter, it is primarily the penalty-drafters who have created and enlarged the credibility gap. This bodes poorly for legislative reform. Trust in the legislative system is eroded, and courts feel it incumbent upon themselves to correct the imbalance.

Moral credibility, then, impacts federal criminal enforcement power. Most federal penalties (and particularly those for street crime) have substantial public and judicial support. Those that don't have been less consistently applied. And the extent of the divergence between written and applied law depends on the trajectory of written law and public views. Where the system is at least receptive (if not immediately responsive) to public views, actors within that system are more willing to trust the system to make necessary corrections. Where the system is perceived as having deliberately run off-track from community conceptions, actors within the system are more likely to flout it.<sup>264</sup> Indeed, the Justice Department's own recognition of this dynamic lies at the heart of its recent efforts to align its enforcement practices with evolving community views on penalties—and even, in the case of marijuana, on decriminalization.<sup>265</sup> The Department has launched these initiatives not merely

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congressional and Commission penalty-drafting with respect to crack and child pornography).

263. The FSA was indeed an effort to engender greater credibility for federal law and for the law enforcement agencies (both federal and local) that enforce it. See *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 26 (2009) (statement of John F. Timoney, Chief of Police, Miami Police Dep't) (advocating for the elimination of the crack/powder penalty disparity on the ground that "police departments across America face a much more difficult challenge gaining the trust of their communities if there are glaring inequities in the justice system that are allowed to persist"); *id.* at 4-6 (statement of Lanny A. Breuer, Assistant Att'y Gen., Criminal Div., U.S. Dep't Justice) ("Public trust and confidence are essential elements of an effective criminal justice system. Our laws and their enforcement must not only be fair, but they must also be perceived as fair. . . . We also believe that the [sentencing] structure [for crack offenses] is especially problematic because a growing number of citizens view it as fundamentally unfair.").
264. I explore the significance of this observation to local justice systems *infra* Subsection IV.A.2.
265. The Justice Department's "Smart on Crime" initiative directs federal prosecutors to consider alternatives to incarceration for low-level, non-violent offenders. See U.S. DEP'T OF JUSTICE,

for the criminal defendants who benefit, but primarily for law enforcement agents and prosecutors, whose efforts to fight crime are significantly strengthened by the trust and support of the communities they serve.<sup>266</sup>

## 2. *Moral Credibility and Forum Disparities*

The examples of crack cocaine and child pornography teach us that moral credibility affects federal criminal justice. We might, then, conclude that federal conviction rates and sentences in street crime cases may owe, at least partially, to public and judicial agreement (on average) with federal penalties for such crimes. Yet if so, why might we see such different outcomes in local urban justice systems? How, in other words, might moral credibility, or its absence, partially explain forum disparities in street crime cases?

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SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (2013), <http://www.justice.gov/ag/smart-on-crime.pdf>. The Department's new marijuana policy, implemented in the wake of a series of state ballot referendums that legalized marijuana possession for medicinal, and then recreational, purposes, advises federal prosecutors to refrain from enforcing federal marijuana laws that conflict with the laws in those states, except where federal enforcement is necessary to address certain enumerated federal interests (such as preventing distribution for the benefit of gangs and cartels, preventing violence and drugged driving, and preventing distribution to minors or to states where marijuana remains illegal). See Memorandum on Guidance Regarding Marijuana Enforcement from Deputy Att'y Gen. James M. Cole to All U.S. Att'ys (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

266. See Att'y Gen. Eric Holder, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> ("Because [mandatory minimums] oftentimes generate unfairly long sentences, they breed disrespect for the system. When applied indiscriminately, they do not serve public safety. They—and some of the enforcement priorities we have set—have had a destabilizing effect on particular communities, largely poor and of color. And, applied inappropriately, they are ultimately counterproductive. . . . Ultimately, this is about much more than fairness for those who are released from prison. It's a matter of public safety and public good."); see also *Conflicts Between State and Federal Marijuana Laws: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 3 (2013) (statement of James M. Cole, Deputy Att'y Gen.), <http://www.judiciary.senate.gov/pdf/9-10-13ColeTestimony.pdf> (describing the new federal marijuana enforcement policy, which largely defers to state laws and enforcement practices in states that have legalized or partly legalized marijuana, as "consistent with our efforts to maximize our investigative and prosecutorial resources during this time of budget challenges, and with the more general message the Attorney General delivered last month to all federal prosecutors, emphasizing the importance of quality priorities for all cases we bring, with an eye toward promoting public safety, deterrence, and fairness").

To the extent moral credibility bears on forum disparities, surely it is not a result of differences between applicable federal and state penalties. As noted, even when penalty differences are miniscule or non-existent, forum-based outcome disparities persist.<sup>267</sup> Moreover, as others have observed, applicable federal penalties are, in most instances, harsher than their state counterparts.<sup>268</sup> In such cases, one would hardly expect public or judicial agreement with federal penalties to result in greater *leniency* at the state level (whether through plea-bargaining, jury verdicts, or judicial sentencing discretion).

Greater moral credibility gaps in local forums, then, must derive, if at all, from differences in public perceptions. What factors influence public perceptions of punishment, and how might the different “publics” in the two systems exacerbate (or mitigate) those influences? A careful examination of the Rossi and Berk study reveals both why a representative sample of the American public agrees, at the median, with most federal street crime penalties, and why we might see less robust agreement in local systems.

Rossi and Berk sought to ascertain which demographic, experiential, and attitudinal factors most closely associated with individuals’ views on sentencing.<sup>269</sup> Utilizing regression analyses, the researchers found a number of statistically significant factors that related to views on punishment.<sup>270</sup> Specific to street crimes (what the study authors label as “drug trafficking,” “drug possession,” and “street crimes”),<sup>271</sup> statistically significant factors<sup>272</sup> were:

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267. See *supra* notes 49-51 and accompanying text.

268. See *supra* notes 37-38 and accompanying text.

269. ROSSI & BERK, *supra* note 229, at 167-206. Among demographic factors, they considered age, race/ethnic group, gender, income, education, and residential locus (both geographic region and community size). Among experiential factors, they considered the respondent’s level of contacts with the justice system, whether the respondent had ever been a crime victim, and the respondent’s perception of the crime problem in his or her community. Among attitudinal factors, they considered the respondent’s views on the level of rights that should be accorded an accused, the level of civil rights that should be accorded minorities, the amount of welfare benefits that should be accorded the poor, the amount of investigative freedom that should be given to police, the level of attention that should be given to environmental pollution, and how the respondent self-identified politically. *Id.*

270. ROSSI & BERK, *supra* note 229, at 200-01 tbl.8.17.

271. Thus, Rossi and Berk break down what I define as street crimes into separate categories of “drug trafficking,” “drug possession,” and “street crimes.” As a result, some of the “drug trafficking” crimes they study might fall under the categories of international or interstate drug trafficking, as opposed to street-level dealing. My use of the term “street crimes” when referring to the Rossi and Berk data reflects their definition, not mine.

272. That is, the factors with *p*-values less than 0.05.

1. Region of residence;<sup>273</sup>
2. Age;<sup>274</sup>
3. Views on the investigative freedom of police;<sup>275</sup>
4. Views on the rights accorded an accused;<sup>276</sup>
5. Views on civil rights accorded minorities;<sup>277</sup>
6. The frequency of contacts with the justice system;<sup>278</sup>
7. Social and political views;<sup>279</sup>
8. Years of education.<sup>280</sup>

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273. Respondents from New England tended to give the least severe sentences; respondents in the West South Central (Texas, Oklahoma, Arkansas, Louisiana) and East South Central (Kentucky, Tennessee, Alabama, Mississippi) regions gave the most severe sentences. *Id.* at 200-01 tbl.8.17 (respondents in both these regions imposed over 6.5 years more than New Englanders in drug trafficking cases and over 3 years more than New Englanders in street crime cases). Other regions ranged between the two extremes. *Id.* For a description of geographic regions in table 8.17, see *id.* at 175 tbl.8.1.
274. Respondents aged 50-64 sentenced on average 2.1 years more for drug trafficking offenses and 0.6 years more for drug possession offenses than respondents aged less than 35. *Id.* at 200-01 tbl.8.17. Respondents aged 35-49 on average sentenced 0.91 years more in street crimes cases than respondents aged less than 35. *Id.*
275. Those who believed police are given too much investigative freedom sentenced less severely than those who believed police investigative freedom to be appropriate or insufficient. *Id.* (on average 1.67 years less for drug trafficking, 0.31 years less for drug possession, and 0.76 years less for street crimes).
276. Those who believed an accused should have fewer rights sentenced more severely than those who believed an accused should have more rights. *Id.* (on average 1.64 years more for drug trafficking offenses and 1.09 years more for street crimes; views on defendants' rights were not statistically significant for drug possession sentencing).
277. Those who believed minorities should be accorded fewer civil rights sentenced more severely in drug trafficking crimes than those who believed minorities should be accorded more civil rights. *Id.* (on average 1.15 years more in drug trafficking cases; civil rights views were not statistically significant for drug possession or street crimes sentencing).
278. Those who had more contacts with the justice system, including the civil justice system, on average sentenced drug trafficking offenses and street crimes more severely than those who had fewer justice system contacts. *Id.* (respectively, 0.98 years and 0.59 years more; justice system contacts were not a statistically significant factor for drug possession sentencing). The study counted as "contact" any of the following interactions: jury service, reporting crimes to the police, being sued in court, testifying in court as a witness, being arrested, or serving time in jail or prison. *Id.* at 192 tbl.8.11. The study did not differentiate among types of contact (i.e., whether the person had been a defendant, had simply called the police to report a crime, or had some other type of contact with the justice system). *Id.* at 192.
279. Those who self-identified as "liberal" in social and political views sentenced less severely for drug trafficking, drug possession, and street crimes than those who did not so identify. *Id.* at 200-01 tbl.8.12 (0.74 years, 0.12 years, and 0.26 years less, respectively).

Rossi and Berk's study did not test the extent of sentencing variance by community type (i.e., urban, suburban, or rural). Instead, they measured only the effects of community size, which, by virtue of the methodology they employed, lumped these differing residential milieus together.<sup>281</sup> Further research, then, is needed to ascertain empirically the correlation between community type and sentencing views. But a reasonable hypothesis is that, with the potential exceptions of region (which will manifest in both the federal and local forums in a given region of the country)<sup>282</sup> and education, the influence of the remaining factors will tend to be more pronounced in local urban courts. The young are more concentrated in cities,<sup>283</sup> as are those who identify as having "liberal" views.<sup>284</sup> And it is city residents—and particularly residents of the inner-city, where most street crime occurs—who are most disaffected by local policing and by the treatment accorded suspects, defendants and minorities in particular.<sup>285</sup>

On this last point, Rossi and Berk's findings impart a particularly important message. Perceptions of procedural justice—that is, perceptions of the fairness with which law enforcement treats citizens—correlate with perceptions of the fairness of laws. And procedural justice perceptions are a particularly significant in the street crime arena, where police-citizen encounters are endemic.

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280. Those who were more educated sentenced less severely for drug trafficking, drug possession, and street crimes as compared to those who were less educated. *Id.* (0.26 years, 0.10 years and 0.20 years less, respectively).

281. As the authors noted, their measure of community size was "not very sensitive to the considerable differences in the actual living conditions that respondents face within each size class," an unfortunate limitation of their dataset. *Id.* at 178.

282. This will be true at the district court level, but it may not be true at the federal appellate level, at least in circuits that encompass significant areas in more than one geographic region. These include the Second, Sixth, and Ninth Circuits.

283. See Lindsay M. Howden & Julie A. Meyer, *2010 Census Briefs: Age and Sex Composition: 2010*, U.S. CENSUS BUREAU 11 fig.7 (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

284. Using the results of the latest presidential election as a proxy for political views, with few exceptions urban counties strongly favored the Democratic candidate (Barack Obama) over the Republican candidate (Mitt Romney), even in states carried overwhelmingly by Romney. See *Election 2012: President Map*, N.Y. TIMES, <http://elections.nytimes.com/2012/results/president> (last updated Nov. 29, 2012).

285. See *supra* notes 162-166 and accompanying text.

The effects of such credibility gaps may also be particularly destabilizing in local courts, which deal with a narrower range of crime categories.<sup>286</sup> If a significant number of street crime penalties and enforcement practices are perceived as unjust in a system for which such crimes are the mainstay, the effects can be profound.<sup>287</sup> Conversely, when credibility gaps are perceived as isolated and limited, and the enforcing authority is otherwise perceived as legitimate, the authority maintains legitimacy through its “reservoir” of support.<sup>288</sup> This “reservoir” dynamic partly explains the federal government’s relative success in enforcing even unpopular laws. Indeed, even the crack and child pornography laws, for all their criticism, have generated a relatively low level of dissent in the courthouse—at least as compared to what occurs in some local courts when there is marked disagreement between penalties and public or judicial views.<sup>289</sup>

This federal “reservoir” dynamic might also explain, at least in part, why the nearly three decades-long crack/powder differential, and for that matter the nearly five decades-long “war on drugs,” has well outlasted the federal government’s thirteen-year assault on liquor. The federal government in 1920 held an entirely different place in criminal law enforcement, and American life for that matter, than it does today. The Volstead Act came at a time when the federal government enforced very few criminal laws. The feds in the 1920s were not prosecuting swindlers and fraudsters to any great degree; they were not policing stock trades; and they were not taking on organized crime or international terrorists.<sup>290</sup> They were also not overseeing the distribution of the

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286. See *supra* text accompanying notes 222-223.

287. Paul Robinson and John Darley call this phenomenon the “generalization of disrespect”: the more laws citizens perceive as immoral, the more apt they are to discredit the entire system as opposed to the select laws with which they disagree. More generalized systemic aversion is also more likely to occur where unjust results are not readily attributable to a particular legal rule. Robinson & Darley, *supra* note 117, at 483-85.

288. See *supra* notes 128-129 and accompanying text.

289. See *supra* notes 196-203, 209, and accompanying text. In this sense, it is worth noting that even with the greater number of below-range sentences in child pornography cases, the median sentence in those cases has *risen* along with the Guidelines range, albeit at a lower rate than the Guidelines’ increase. And even post-*Booker*, the median sentence is still far above the statutory mandatory minimum. U.S. SENT’G COMM’N, *supra* note 258, at 135.

290. The Post Office Act of 1872 and, subsequently, the Offenses Against the Postal Service Act of 1909 were the precursors of the modern-day federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (2012), but despite these acts’ breadth, it was not until the New Deal era that federal prosecution of large-scale frauds became widespread. See Richman, *supra* note 1, at 83-87. The federal securities fraud statutes were first passed in 1933 and 1934. Securities Act

many benefits and services integral to modern American life, such as Social Security, food stamps, urban housing, Medicare and Medicaid, which have in turn given rise to new arenas of federal criminal enforcement.<sup>291</sup> There are many reasons Prohibition ultimately failed.<sup>292</sup> But probably among them—or at least, among the reasons it failed so swiftly—is the fact that the federal government at the time had a far smaller reservoir of support, at least with respect to criminal enforcement, than it does today.<sup>293</sup>

Of course, federal and local enforcement patterns, and the trust reservoirs those patterns create (or deplete) do not remain static. A second decade of transformative national security challenges brings with it a new landscape of both federal and local enforcement,<sup>294</sup> and with that, a change in the relationship between citizens and the institutions of authority. The direction of that change, its permutations, and its particular impact on street crime enforcement—and perhaps, forum disparities—remain to be seen.<sup>295</sup>

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of 1933, ch. 38, Pub. L. No. 73-22, 48 Stat. 74, (codified as amended at 15 U.S.C. §§ 77a-77aa (2012)); Securities Exchange Act of 1934, ch. 404, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78pp). The federal RICO statute, the primary tool used to combat organized crime, was first passed in 1970. Organized Crime Control Act of 1970 § 901(a), Pub. L. No. 91-452, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968).

291. Congress criminalized fraud upon health care benefits in 1996, Health Insurance Portability and Accountability Act § 242(a)(1), Pub. L. No. 104-191, 110 Stat. 2016 (1996) (codified as amended at 18 U.S.C. § 1347); fraud in connection with food stamps in 1964, The Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 708 (codified at 7 U.S.C. § 2024); and fraud in connection with an entity receiving federal housing funds in 1948, Crimes and Criminal Procedure § 1012, Pub. L. No. 80-772, 62 Stat. 752 (1948) (codified at 18 U.S.C. § 1012).
292. For a cogent argument as to why class-based enforcement undermined both Prohibition and the federal crack laws, see Stuntz, *supra* note 242. See generally DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2011).
293. This is not to say the federal government would have better luck enforcing the Volstead Act today. Just as the federal government holds an entirely different place in modern American life, so too does liquor. For a richly detailed history of alcohol, alcoholism, and public drunkenness at the dawn of the twentieth century, and its impact on Prohibition's rise, see OKRENT, *supra* note 292.
294. See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 *STAN. L. REV.* 289 (2012).
295. Anti-terrorism presents a particularly tangled set of reputational consequences for federal and local law enforcement. Some federal anti-terrorism efforts, most notably the enforcement of immigration laws among select minority communities, have detracted from federal law enforcement's standing in those communities. As a result, local police forces, which depend on the support and cooperation of minority communities to fight street crime, have in many instances declined to cooperate with federal immigration enforcement efforts. See Daniel C. Richman, *The Right Fight*, *BOS. REV.*, Dec. 1, 2004, <http://www>

#### IV. WHY LEGITIMACY MATTERS

A legitimacy-focused exploration of the federal criminal justice system enhances our understanding of federal criminal power. It also challenges us to reconsider the significance of forum disparities in criminal cases. These disparities are not merely the result of different sovereigns' choices of legal rules, or of resource allocations between sovereigns. They are also the result of less intentioned forces.

This observation yields a number of insights. First, it explains why states that have sought to emulate federal prosecutorial outcomes merely by emulating federal penalties have largely come up short. Virginia Exile is just one example of a state borrowing from federal penal laws;<sup>296</sup> there are others.<sup>297</sup> Appreciating legitimacy's role in federal criminal justice illuminates the shortcomings of this approach. If legitimacy at least in part explains federal prosecutorial success, legislators' attempts at emulation have been misdirected—or, at least, they have been directed at a piece of federal criminal enforcement that has questionable value in isolation. Worse, this single-minded approach can affirmatively undermine successful law enforcement if the laws lack the support of the communities they most affect.

Second, attention to legitimacy reveals a deeper and more complicated federalism. While much of the criticism of federal intervention in street crime has focused on the circumvention of state laws and procedures,<sup>298</sup>

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.bostonreview.net/forum/right-fight (describing this dynamic). In other circumstances, joint anti-terrorism enforcement efforts by federal, state and local law enforcement authorities has burnished the reputational standing of each; a recent example of this phenomenon is the successful search for the Boston Marathon bombing suspects. See Katharine Q. Seele, William K. Rashbaum & Michael Cooper, *2nd Bombing Suspect Caught After Frenzied Hunt Paralyzes Boston*, N.Y. TIMES, Apr. 19, 2013, <http://www.nytimes.com/2013/04/20/us/boston-marathon-bombings.html>.

296. See *supra* notes 72-73 and accompanying text.

297. A number of states have enacted laws similar to 18 U.S.C. § 924(c), the federal prohibition that carries a minimum five-year sentence of imprisonment for possession of a firearm in connection with a drug trafficking or violent crime. (The five-year minimum penalty was enacted in 1971 pursuant to Public Law Number 91-644.) Such states include California, see CAL. PENAL CODE §§ 12022, 12022.53 (West 2010) (3, 4, or 10 year minimum, depending on coordinate offense); Florida, see FLA. STAT. ANN. § 775.087(2)(a) (West 1999) (minimum of 10 or 20 years, depending on coordinate offense); New York, see N.Y. PENAL LAW § 265.09(2) (McKinney 1980) (five year minimum); and Pennsylvania, see 42 PA. CONS. STAT. ANN. § 9712.1(a) (West 1994) (five year minimum).

298. See sources cited *supra* notes 10-11.

circumvention also occurs on a more fundamental level. Federal intervention bypasses the essence of localized criminal justice: beat policing, community-delineated jury pools, local courthouse norms. Is this sort of evasion of the local desirable?<sup>299</sup> To be sure, there are good arguments on both sides. But given the structural and political dynamics of our system, these arguments are largely futile. So long as urban crime persists and localities feel unequipped to handle it, Congress and the Justice Department will respond. And so long as there are limited federal budgets and a lack of political appetite to expand them, the federal role in street crime enforcement will remain a supporting one.

Focusing on legitimacy thus presents a different, and ultimately more answerable, question: Is there a way to achieve legitimacy in street crime enforcement without circumventing localism? This Part argues that the answer to this question is yes and that, counterintuitively, the lesson we should draw from the federal system is the need for *more* localism in criminal justice, not less. Because if we distill federal legitimacy to its elements—enhanced citizen trust, juror cohesion, greater norm diversity, and public agreement with written law—we can see that the best way to translate these features into local systems is to embrace localism: by enhancing community voice and participation, and local law enforcement credibility. Not only will this approach stem the impetus for federal street-crime prosecutions, it will also result in a more substantively just system overall—a system that embodies the desires and beliefs of the communities most affected by street crimes and their enforcement.

#### A. A Legitimacy-Based Reform Agenda

By understanding the sources of legitimacy in federal street crime enforcement, we can theorize how to incorporate these features into local systems. In the federal system, legitimacy is derived in four principal ways: (i) enhanced citizen trust, arising from federal oversight of local policing, witness protection, and an absence of citizen policing; (ii) juror cohesion, arising from the relationship between the jury and the prosecuting authority, as well as the jury and the larger electorate; (iii) an empowerment of law over norms, arising

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299. Some may argue that the federal system's circumvention of localism makes it *illegitimate*. My use of the term "legitimacy" is not in the normative sense, but rather in the descriptive theoretical sense: federal prosecutors achieve success relative to their local counterparts because interactions of authority, community, and personal morality play out to prosecutors' advantage in the federal system.

from the breadth and diversity of participants in the justice system; and (iv) moral credibility, arising from an alignment between the laws and the adjudicative audience for those laws (judges and juries) and trust in the relevant penalty-drafting institutions.

Not all of these sources can be emulated in local systems. As long as there are police-citizen encounters, there will always be some level of citizen discontent, no matter how fair the encounter's process or the officer's motives. And self-identification with one's country, for example, can't necessarily be replicated on the local level. Nevertheless, some sources of federal legitimacy can be translated to local systems. I suggest three principal areas of focus. First, improving local policing and redirecting federal intervention towards investigation and witness protection in local cases can enhance citizen trust. Second, increasing local community voice in the formulation of sentencing policy and criminal laws can contribute to both juror cohesion with the lawmaking electorate and moral credibility. Third, increasing local voice at sentencing and resorting to more, but substantially less severe, mandatory penalties can help empower law over norms.

### 1. *Enhancing Citizen Trust*

Building citizen trust in law enforcement should be done at two levels: first, by strengthening and reforming local policing and, second, by reinventing the federal role in street crime investigations.

The need for policing reform is hardly a novel cry,<sup>300</sup> but insufficient attention has been given to the attendant law enforcement benefits. Explaining away federal prosecutorial success as a product of laws, procedures, or resources diminishes the importance of the law's enforcers in the successful enforcement of the law. Rooting out police misconduct—in all its forms, from misuse of force to discourtesy—should not be the agenda only of inner-city communities, activists, and civil rights prosecutors. It should be a principal priority of law enforcement and, critically, of local police forces themselves. Police department focus on these issues will not only improve police-citizen relations on an individual level, but will also enhance credibility more systemically. Visible, department-wide focus on police-citizen relations will engender citizen trust, just as the federal government engenders trust by virtue

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300. See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012); Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 383-85 (2011).

of its role in local policing oversight. Some police departments are beginning to make active efforts in this regard, but far more must be done.

At the same time, the federal government should reimagine its role in street crime enforcement as one of support for local prosecutions, rather than the inverse. Over the last several decades, “joint task forces” (law enforcement teams comprised of federal, state, and local officers) have been created to investigate crimes ranging from drug trafficking to violent gangs to human trafficking to terrorism.<sup>301</sup> These groups have been organized with an eye to making federal cases. But why operate only under that model? Joint task forces can be utilized to prosecute local cases too. Local police and prosecutors could then rely on these task forces to help them investigate and bring stronger cases. One example of this model is New York City’s Office of the Special Narcotics Prosecutor, which collaborates with and frequently brings cases investigated by federal agencies and joint task forces.<sup>302</sup> This model could be expanded more broadly.

This new federal role would have two principal benefits. First, more cross-pollination between federal and local law enforcers might benefit local policing and thereby enhance citizen trust. Of course, there are risks to greater federal involvement in local investigations.<sup>303</sup> As federal agents play greater community-facing roles, they risk losing some of the credibility that inures by virtue of their rarefied position. And a larger law enforcement role for any authority carries the potential for abuse.<sup>304</sup> But currently, at least, federal agents are far from reaching that point in street crime investigations; they could play a greater role while still retaining their reputational benefits. And a greater diversity of sovereign authorities in criminal investigations might serve to mitigate the potential for abuse or misconduct that sometimes accompanies

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301. See sources cited *supra* note 91; see also *Protecting America from Terrorist Attack*, FED. BUREAU INVESTIGATION, [http://www.fbi.gov/about-us/investigate/terrorism/terrorism\\_jtfts](http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jtfts) (last visited Jan. 28, 2014) (describing the Joint Terrorism Task Force); *Violent Gang Task Forces*, FED. BUREAU INVESTIGATION, [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/gangs/violent-gangs-task-forces](http://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs/violent-gangs-task-forces) (last visited Jan. 28, 2014) (describing violent gang task forces); *Human Trafficking – FBI Initiatives*, FED. BUREAU INVESTIGATION, [http://www.fbi.gov/about-us/investigate/civilrights/human\\_trafficking/initiatives](http://www.fbi.gov/about-us/investigate/civilrights/human_trafficking/initiatives) (last visited Jan. 28, 2014) (describing human trafficking task forces).

302. See *2012 Annual Report*, OFF. OF THE SPECIAL NARCOTICS PROSECUTOR OF THE CITY OF NEW YORK, [http://www.nyc.gov/html/snp/downloads/pdf/ar\\_2012.pdf](http://www.nyc.gov/html/snp/downloads/pdf/ar_2012.pdf).

303. For discussion of the risks of increased federal policing, see William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL’Y, 665, 670-74 (2002).

304. J. Edgar Hoover’s FBI is a historical example. See generally ATHAN G. THEOHARIS & JOHN STUART COX, *THE BOSS: J. EDGAR HOOVER AND THE GREAT AMERICAN INQUISITION* (2012).

consolidated sovereign power. In this sense, dual-sovereign criminal investigations would serve, on a very grassroots level, one of federalism's fundamental aims.<sup>305</sup> Given the absence of effective law enforcement oversight from coordinate government branches,<sup>306</sup> more functional oversight through a "cooperative federalism" model might do a great deal of good.

Second, a larger federal investigative presence will significantly enhance both the protection of witnesses in local cases and those witnesses' perceptions of security. As it now stands, federal agencies protect witnesses in federal cases; witnesses in local cases virtually never receive federal protection. In line with that model, the last Congress's proposed fix for local witness intimidation was to make it a federal crime.<sup>307</sup> The proposed bill was well-intentioned, but its approach one-dimensional. Why engage federal protection only through federal prosecution? And why engage it only after the fact, by prosecution of past threats or harms to witnesses? By then, the harm to the local case has already been done, and federal prosecution serves merely as a deterrent against future crimes. If local law enforcement were able to leverage federal witness protection at the outset, before threats are made—by having federal agents take the lead on witness security, interface with and provide a federal point-of-contact for witnesses on security matters—the effects of witness intimidation would decrease. Would-be intimidators would be deterred at the outset simply by knowing the feds are on the case; witnesses would both be and feel safer, engendering greater witness trust and cooperation. And unlike federal prosecution, which requires a federal jurisdictional hook,<sup>308</sup> federal law

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305. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1495 (1987) (“[I]n separating and dividing power, whether horizontally or vertically, the Federalists pursued the same strategy: Vest power in different sets of agents who will have personal incentives to monitor and enforce limitations on each other’s powers.”).

306. See Harmon, *supra* note 300 (discussing the inability of constitutional criminal procedure to constrain unlawful policing practices and arguing in favor of new legal paradigms for regulating police conduct); Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 661-69 (2004) (discussing the importance of remedying minor police misconduct and the challenges of doing so through standard rule enforcement methods); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (discussing how the Warren Court’s constitutional criminal procedure doctrines have incentivized many of the police abuses we see today).

307. State Witness Protection Act of 2012, S. 2127, 112th Cong. (2012).

308. The proposed bill, for example, would have reached only witness tampering with a specified connection to interstate commerce. See *id.* § (c). Practically speaking, this means it could be used only in cases involving threats made over the phone or Internet, through the mail, or by persons who, in the course or in furtherance of the witness tampering offense, crossed state lines or used a firearm transported over state lines.

enforcement assistance requires no jurisdictional nexus, thus permitting broader federal aid.

Encouraging more federal-local collaboration at the pre-charging stage would strengthen local cases, thus reducing the need for federal prosecutions. Fewer resources would be spent on federal prosecutions and federal prisons, and the resulting savings could be devoted instead to federal law enforcement agencies. Localities would retain jurisdiction and control over their criminal prosecutions, and cases would be adjudicated by residents of the cities where the crimes, and the law enforcement response to them, occur.

## 2. *Legislative-Adjudicative Alignment and Moral Credibility*

We should also strive to enhance both juror cohesion with the lawmaking electorate (what I've called legislative-adjudicative alignment) and the moral credibility of laws. Greater local voice in criminal lawmaking and penalty-drafting can bring us closer to both goals. And we can strengthen local voice at two levels: in the formulation of sentencing policy and in criminal lawmaking.

States that use sentencing commissions can make more concerted efforts to incorporate the views of urban localities when formulating penalties. This could involve deliberate outreach or, better yet, reconstituting sentencing commission membership to ensure participation by local inner-city community leaders personally familiar with the tolls of both crime and punishment. As it now stands, many states' commissions call for membership by members of the judiciary, the prosecution and defense bars, and sentencing experts from academia and elsewhere.<sup>309</sup> A few allow a seat for non-lawyer citizens, and some for crime victims. But none expressly call for membership from a broader group of citizens from the state's urban centers. If sentencing commissions' recommendations were the product of input from the localities most affected by those crimes, the recommendations would be more credible (and probably more substantively just, as well). Credible recommendations are more likely to be followed, further reinforcing their credibility. A ready illustration of the potential of local voice in sentencing policy is the District of Columbia. Its sentencing commission, comprised entirely of local community members, has

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309. For an overview of the membership criteria for each state's sentencing commission, see Neil B. Kauder & Brian J. Ostrom, *State Sentencing Guidelines: Profiles and Continuum*, NAT'L CENTER FOR ST. CTS. (July 2008), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/NCSC%20Sentencing%20Guidelines%20profiles%20July%202008.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/NCSC%20Sentencing%20Guidelines%20profiles%20July%202008.pdf).

made concerted efforts to develop sentencing policy in line with the views of local judges and residents.<sup>310</sup> As the commission continues to develop and amend its policies in line with local views, judicial compliance with the sentencing guidelines has increased; in 2012, Superior Court judges complied with the advisory guidelines in 98% of felony cases.<sup>311</sup>

With respect to lawmaking, localities should consider more robust use of local laws. In the mid-1990s, cities inundated with gang violence passed public order ordinances designed to reclaim public spaces for communities.<sup>312</sup> Many of these ordinances did not survive constitutional vagueness challenges, and the exercise was largely abandoned.<sup>313</sup> But the idea of empowering localities to legislate (or lobby state legislatures) on issues of urban crime should not be cast aside. City ordinances, or state laws that apply uniquely to certain cities, permit local prosecutors to enforce laws with strong local support. Chicago, for instance, has passed a series of firearms ordinances; while some have been struck down on Second Amendment grounds,<sup>314</sup> the city council has retooled these laws to survive Second Amendment challenges.<sup>315</sup> Philadelphia was able to lobby the Pennsylvania legislature to mandate stricter requirements for gun possession in that city. Thus, under Pennsylvania law, it is illegal to carry a concealed firearm in the city of Philadelphia.<sup>316</sup> Currently, local laws like these

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310. See *2012 Annual Report*, DC SENTENCING AND CRIMINAL CODE REVISION COMMISSION, at i, iii (Apr. 26, 2013), [http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/annual\\_report\\_2012.pdf](http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/annual_report_2012.pdf) (listing membership and noting continual modifications to the guidelines based on assessments of judicial compliance with the guidelines, to insure that the guidelines' sentencing recommendations are appropriate).

311. *Id.* at iii, 53.

312. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153-54 (1998); Livingston, *supra* note 195, at 554-56.

313. *E.g.*, *City of Chicago v. Morales*, 527 U.S. 41 (1999); see Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101 (2002).

314. *E.g.*, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

315. John Byrne & Hal Dardick, *City Council Passes Daley Gun Restrictions 45-0*, CHI. TRIB.: CLOUT STREET (July 2, 2010, 11:26 AM), [http://newsblogs.chicagotribune.com/clout\\_st/2010/07/city-council-passes-daley-gun-restrictions-450.html](http://newsblogs.chicagotribune.com/clout_st/2010/07/city-council-passes-daley-gun-restrictions-450.html). A number of lawsuits challenging Chicago's gun ordinances are winding their way through the courts. For a list of cases, see *Gun Rights Lawsuits: Court Status of 9 Challenges to City, State and County Rules*, CHI. TRIB., Mar. 8, 2012, [http://articles.chicagotribune.com/2012-03-08/news/ct-met-gun-lawsuit-box-20120308\\_1\\_second-amendment-arms-firearms-retailers-gun-rights](http://articles.chicagotribune.com/2012-03-08/news/ct-met-gun-lawsuit-box-20120308_1_second-amendment-arms-firearms-retailers-gun-rights).

316. See 18 PA. CONS. STAT. ANN. § 6108 (West 2000). In Pennsylvania, unlike in Illinois, state firearms laws preempt conflicting local laws. As a result, city-specific firearms offenses must be enacted by the state legislature.

have gone largely unenforced because they do not entail prison time: prosecutors prefer to spend their resources on “serious” crimes, and the absence of a custodial penalty sends a strong message that the crime is not serious.<sup>317</sup> Strengthening the penalties for these laws, even by small amounts, will result in more enforcement; enforcement, in turn, might be more successful when juries and judges feel more personal allegiance to the laws.<sup>318</sup> Of course, locally applicable laws can only do so much to combat the sorts of crimes (such as gun and drug trafficking) that easily cross city lines. But the crimes that most immediately and directly impact communities—street-level drug sales, shootings, robberies, homicides, gun brandishing—tend to be geographically confined. For these types of crimes, local laws can be effective and can impart a message to the public, judges, and juries that the penal law has not been foisted upon them by a governing body with little understanding of the issues surrounding urban street crime and its enforcement.

Greater local voice in penalty-drafting will not only strengthen trust in the laws themselves but will also engender more confidence in the institutional frameworks of criminal lawmaking. As we have seen in the federal system with the examples of crack and child pornography, sentencing courts are more likely to adhere to law when there is trust that the system will work to rectify perceived injustices.<sup>319</sup> Where, in contrast, trust in lawmaking institutions to remedy injustice is eroded, legitimacy suffers.<sup>320</sup> Fair process in penalty-

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317. In Pennsylvania, for instance, carrying a concealed weapon in Philadelphia is a misdemeanor, *see id.* §§ 6108, 6119, and carrying a firearm at all in any public park, playground or recreation center in Philadelphia constitutes a violation that results in a maximum \$2,000 fine. *See* PHILA., PA CODE § 16-306 (2011) (criminalizing carrying a firearm in government-owned buildings). In Chicago, the penalties for gun ordinance violations are similarly lenient. *See* Monica Davey, *Strict Gun Laws in Chicago Can't Stem Fatal Shots*, N.Y. TIMES, Jan. 29, 2013, <http://www.nytimes.com/2013/01/30/us/strict-chicago-gun-laws-cant-stem-fatal-shots.html> (discussing how lax penalties result in anemic enforcement of Chicago's gun ordinances).

318. For instance, currently under consideration by the Pennsylvania legislature—a result of sustained lobbying by Philadelphia's mayor, police commissioner, and city council—is a bill that would mandate a two-year prison term for anyone carrying a gun illegally in Philadelphia. *See* Allison Steele & Amy Worden, *Mandatory 2-Year Prison Term Proposed for Illegal Firearm Users in Phila.*, PHILA. INQUIRER, Apr. 6, 2013, [http://articles.philly.com/2013-04-06/news/38309721\\_1\\_gun-purchase-gun-violence-gun-control](http://articles.philly.com/2013-04-06/news/38309721_1_gun-purchase-gun-violence-gun-control). The genesis of this proposal lies more in the complicated politics of gun regulation than in ideals of local empowerment. Nevertheless, the concept is worth serious consideration.

319. *See supra* notes 262-264 and accompanying text.

320. *See id.*

drafting thus not only generates fairer penalties, it also generates greater support for those penalties.

Enhancing localism at the penalty-drafting level is critical. While some scholars have articulated a vision of criminal justice localism based on less federal prosecution and more narrowly-drawn local districts,<sup>321</sup> these proposals address only the adjudicatory piece. Yet the need for localism in criminal lawmaking and penalty drafting is equally important; without it, we see the sort of dysfunction that exists in some consolidated city-counties, where local voice is robust in the courthouses but diluted in statehouses and sentencing commissions.<sup>322</sup> It is worth noting that in these cities, reforms, when they have finally come, have arisen not as a result of local adjudicative voice (in the form of low conviction rates and sentences that depart significantly from those legislated or advised), but rather from political forces outside the criminal justice system. Such was the case in the New York, where policing and drug law reforms came not from the message sent by distrustful juries in isolated local jurisdictions,<sup>323</sup> but rather from the political attention spurred by a federal civil rights class action<sup>324</sup> and budgetary pressures on the state level.<sup>325</sup> In

321. See Stuntz, *supra* note 3, at 2034-36 (advocating for more narrowly-drawn urban jury districts separated from suburban communities); cf. Heather K. Gerken, *The Supreme Court 2009 Term – Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 30-33 (2010) (more broadly advancing a theory of localism as a means of dissent from sovereign power, using the local jury – either criminal or civil – as an example).

322. See *supra* notes 196-203, 211-214, and accompanying text.

323. See Clyde Haberman, *Fix a Ticket, Alienate a Bronx Jury*, N.Y. TIMES: CITY ROOM (June 6, 2011, 8:35 AM), <http://cityroom.blogs.nytimes.com/2011/06/06/fix-a-ticket-alienate-a-bronx-jury> (“[T]he Bronx has long been rough going for [prosecutors], especially when police testimony is pivotal.”); Chris Herring, *Bronx Acquittals Set Record*, WALL ST. J., May 4, 2010, <http://online.wsj.com/news/articles/SB10001424052748704608104575221271762806324> (reporting a jury conviction rate of only 43% in 2009, which many attribute to “tensions between the police and the community”); cf. William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES, Apr. 13, 2013, <http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html> (reporting a jury conviction rate in Bronx criminal court that has declined from 67% in 1989 to 46% in 2011, and discussing the deleterious effects of trial delays on conviction rates).

324. The case, *Floyd v. City of New York*, No. 08 Civ. 1034, 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013), raised public awareness of the New York City Police Department’s stop-and-frisk practices’ impact on minorities, catapulting the issue onto the political stage. The case precipitated legislation by the New York City Council, reforms by the NYPD, and a landslide victory by a mayoral candidate whose promises to end the practices became a centerpiece of his campaign. See Michael Barbaro & David W. Chen, *De Blasio Is Elected New York City Mayor in Landslide*, N.Y. TIMES, Nov. 5, 2013, <http://www.nytimes.com/2013/11/06/nyregion/de-blasio-is-elected-new-york-city-mayor.html>; Jim

Philadelphia, it was likewise not low conviction rates, but rather a federal civil rights class action that finally yielded reforms to policing practices.<sup>326</sup> In New Orleans, policing reforms were spurred not by messages from the city's courthouse, but by the intervention of the Justice Department's Civil Rights Division.<sup>327</sup> In California, despite decades of trial-level dissent in San Francisco

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Dwyer, *Vowing to Slay the (Already Subdued) Stop-and-Frisk Dragon*, N.Y. TIMES, Dec. 5, 2013, <http://www.nytimes.com/2013/12/06/nyregion/de-blasio-and-bratton-promise-to-deliver-on-goals-but-give-no-credit.html>; J. David Goodman, *City Council Votes to Increase Oversight of New York Police*, N.Y. TIMES, June 27, 2013, <http://www.nytimes.com/2013/06/27/nyregion/new-york-city-council-votes-to-increase-oversight-of-police-dept.html> (reporting passage of the Community Safety Act, which would, among other things, create an independent inspector general to monitor NYPD policies and practices and make it easier for plaintiffs to sue the NYPD for bias-based profiling); Wendy Ruderman, *Number of Frisks Fell in '12, Police Data Show*, N.Y. TIMES, Feb. 8, 2013, <http://www.nytimes.com/2013/02/09/nyregion/number-of-frisks-fell-in-12-police-data-show.html> (reporting that "[a]fter criticism from a federal judge last spring and widening political protests," new police officer stop-and-frisk training was instituted, resulting in a 34% decrease in stops in the last three quarters of 2012 compared to the same period in 2011).

Although the district judge's findings and remedies were initially stayed pending the City's appeal, Mayor De Blasio has reversed the New York City Law Department's course in the case, vowing to reform the NYPD's stop-and-frisk practices largely in accordance with the district court's ruling, to settle the case, and to dismiss the City's appeal. See Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop and Frisk Practices*, N.Y. TIMES, Jan. 30, 2014, <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html>. In that vein, it is no accident that De Blasio picked Zachary Carter to lead the City's legal department; as the United States Attorney in Brooklyn in the 1990s, Carter had overseen the federal civil rights prosecution in the Abner Louima matter. See *supra* notes 169-173 and accompanying text; Annie Correal, *De Blasio Names City's Top Lawyer, Appearing to Signal a Further Shift in Policy*, N.Y. TIMES, Dec. 29, 2013, <http://www.nytimes.com/2013/12/30/nyregion/de-blasio-announces-pick-for-new-york-citys-top-lawyer.html>.

325. Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 25, 2009, <http://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html> (describing how budgetary pressure to reduce imprisonment rates and shifting political winds combined to permit legislation to reduce drug penalties).
326. Consent Decree, *Bailey v. City of Philadelphia* (E.D. Pa. June 21, 2011) (No. 10-5952), [http://www.aclupa.org/download\\_file/view\\_inline/744/198](http://www.aclupa.org/download_file/view_inline/744/198); see also Erica Goode, *Philadelphia Defends Policy on Frisking, with Limits*, N.Y. TIMES, July 11, 2012, <http://www.nytimes.com/2012/07/12/us/stop-and-frisk-controls-praised-in-philadelphia.html> (describing the class action lawsuit's role in altering the Philadelphia Police Department's approach to citizen stops); Phillips, McCoy & Purcell, *supra* note 158 (describing city's low conviction rates).
327. Press Release, U.S. Dep't of Justice, Justice Department Announces Consent Decree with City of New Orleans to Resolve Allegations of Unlawful Misconduct by New Orleans Police Department (July 24, 2012), <http://www.justice.gov/opa/pr/2012/July/12-ag-917.html> (detailing DOJ's suit against NOPD under 42 U.S.C. § 14141). Jury conviction rates in New

courthouses, reforms to the three strikes law came only after a U.S. Supreme Court order to relieve prison overcrowding coincided with a mounting state debt crisis and plunging crime rates.<sup>328</sup> Indeed, the recent reforms to many states' criminal laws are the product not of local adjudicative voice but rather changing political realities at the state level, spurred by fiscal constraints on state budgets, new evidence-based research on the effects of imprisonment, and decreasing levels of crime.<sup>329</sup>

Making criminal justice systems more accountable to the local citizenry is a laudable goal. To get there, we must focus not only on localizing adjudication, but on localizing lawmaking and penalty-drafting as well.

### 3. *Empowering Laws over Norms*

Finally, we should focus on ways to empower laws over norms. This is of a piece with the prior goal—aligning the legislative and adjudicative institutions and written law with moral beliefs—because community involvement in lawmaking will result in laws that more closely align with community norms. But we must also strive to empower adherence to those community-sanctioned laws in the face of conflicting street norms (among the much smaller, non-law abiding community), and the courthouse norms that those street norms engender.

One relatively recent project tilts in that direction. Project Safe Neighborhoods (PSN), a billion-dollar program operated by the Department of Justice, is a federal-state-local collaboration in major cities across the United States. The PSN approach varies by locality, but, in some cities, violent offenders and gang members are brought to “offender notification meetings” where a range of community members—religious leaders, parents, social

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Orleans are notoriously low, a circumstance that many observers attribute to jurors' mistrust of police testimony. John Simerman, *Orleans Parish Conviction Rates in Jury Trials Hold Steady, and Relatively Low*, TIMES-PICAYUNE, Jan. 16, 2012, [http://www.nola.com/crime/index.ssf/2012/01/orleans\\_parish\\_conviction\\_rate.html](http://www.nola.com/crime/index.ssf/2012/01/orleans_parish_conviction_rate.html) (reporting a conviction rate in tried cases that has “perennially hovered around 55 percent to 60 percent,” which many observers have attributed to jurors' mistrust of police testimony).

328. *Brown v. Plata*, 131 S. Ct. 1910 (2011). See generally Barkow, *supra* note 10, at 1285 (arguing that cost constraints have a salutary effect on states' sentencing policies).
329. See Adrienne Austin, *Criminal Justice Trends: Key Legislative Changes in Sentencing Policy, 2001-2010*, VERA INST. JUST. 4 (Sept. 2010), <http://www.courts.ca.gov/documents/ccp-sentencingtrends.pdf> (attributing states' recent sentencing reforms to a combination of lower crime rates, fiscal pressures, concerns about over-burgeoning prison populations, and new, evidence-based research on behavioral modification).

workers, and reformed offenders—impress upon offenders that the norms of street life will no longer be tolerated and federal law enforcers advise that future criminal conduct will be prosecuted federally.<sup>330</sup> This particular PSN approach, which has been used in some parts of Chicago, Indianapolis, and cities in North Carolina and, most recently, Connecticut, has been lauded as highly effective.<sup>331</sup> The model relies on the threat of federal prosecution, but its fundamental approach to norm-shifting—by giving voice to the norms of the broader community—can be translated to local forums too.<sup>332</sup>

One way to do that is to give community members and leaders a role in criminal sentencing hearings. A program called “Ceasefire PA” is an effort along those lines in local Philadelphia gun cases.<sup>333</sup> The group, formed in response to gun violence in Pennsylvania, has initiated a “courtwatch” program, in which local community members and leaders attend and testify on behalf of the local community at sentencing hearings.<sup>334</sup> Early anecdotal evidence indicates that the program has been successful at impressing upon judges the gravity with which the community views gun-related crimes.<sup>335</sup> This

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330. See Jack McDevitt et al., *Offender Notification Meetings: Case Study 2*, in PROJECT SAFE NEIGHBORHOODS: STRATEGIC INTERVENTIONS, U.S. DEP’T JUST., [https://www.bja.gov/Publications/Offender\\_Notification\\_Meetings.pdf](https://www.bja.gov/Publications/Offender_Notification_Meetings.pdf). In some offender meetings, reformed ex-gang members are brought in to speak to offenders, as well. *Id.*

331. See Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223 (2007) (presenting empirical evidence demonstrating that homicide levels have decreased in Chicago neighborhoods that have instituted PSN relative to those that have not).

332. One of the brilliant successes of the offender notification meetings tactic is that it seeks to pre-empt criminal conduct, thus reducing the need for prosecution at all. My proposals, in contrast, are aimed at making local criminal prosecution more effective in instances where it is needed. But as local criminal prosecution becomes more effective (in the sense that outcomes are more certain and transparent, and align more closely with written law), it, too, might be used as a tool for crime-reduction in the way that PSN uses the threat of federal prosecution.

333. See Alex Wigglesworth, *CeaseFirePA: Advocates Take to Courtrooms to Tip Scales of Justice Against Gun Felons*, PHILA. METRO, Sept. 30, 2012, <http://www.metro.us/philadelphia/news/local/2012/09/30/ceasefirepa-advocates-take-to-courtrooms-to-tip-scales-of-justice-against-gun-felons>.

334. *Id.*; see also *Courtwatch*, CEASEFIREPA, <http://www.ceasefirepa.dreamhosters.com/programs/court-watch> (last visited Feb. 1, 2013) (describing the Courtwatch program and listing recent Courtwatch reports).

335. See Wigglesworth, *supra* note 333. Among the most notable achievements was the resentencing of Kevin Pickard, a defendant who, in the process of shooting his intended 19-year-old target, also shot two brothers, aged 2 and 8, who were playing outside in the street.

sort of broader community involvement might serve to shift courthouse norms in courts where violent crimes and gun-related cases have become routine.

Another method of empowering law over norms is through a more effective use of mandatory minimum penalties. Legislatures have largely operated at the extremes, with most criminal penalties carrying either no mandatory term or a mandatory term of at least five or ten years. But there is a middle ground, and much to be said for a more graduated approach to shifting sentencing norms.<sup>336</sup> Local judges used to giving probationary terms for gun crimes may balk when told the legislature has suddenly mandated a sentence of five years. But a one- or two-year mandatory penalty is a less drastic change. Washington, D.C. undertook precisely this tactic in gun cases. In 2007, the city council passed a law mandating a one-year sentence of imprisonment for any defendant in possession of a firearm who has a prior felony conviction, and a three-year sentence of imprisonment for any such defendant with a prior violent felony conviction.<sup>337</sup> In the years following, federal prosecutions of firearms offenses in the city decreased by eighty-five percent.<sup>338</sup> This legislative tactic could be applied to any number of street crimes for which sentencing

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The brothers survived after extended hospitalization. At Pickard's initial sentencing, the local judge assigned to his case sentenced him to three concurrent terms of five to ten years' imprisonment. Craig R. McCoy, *Minimum Sentence for Gunman in Shooting of 2 Children*, PHILA. INQUIRER, Aug. 11, 2012, [http://articles.philly.com/2012-08-11/news/33138250\\_1\\_kevin-pickard-three-concurrent-sentences-minimum-sentence](http://articles.philly.com/2012-08-11/news/33138250_1_kevin-pickard-three-concurrent-sentences-minimum-sentence). The District Attorney's Office moved for reconsideration and resentencing, which the judge granted. At the resentencing hearing one week later, the courtroom was filled with community members expressing outrage over the initial sentence. At his resentencing, Pickard was sentenced to 17 to 34 years' imprisonment. See Mensah M. Dean, *Community Anger Leads to Stricter Sentence for Man Who Shot Kids*, PHILA. DAILY NEWS, Aug. 19, 2012, [http://articles.philly.com/2012-08-19/news/33273288\\_1\\_community-work-shot-kids-court-sessions](http://articles.philly.com/2012-08-19/news/33273288_1_community-work-shot-kids-court-sessions).

336. Cf. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) (discussing the tension between criminal law and social norms in the context of date rape, drunk driving, and domestic violence, and arguing that the law can better shift social norms through a more graduated approach).
337. Omnibus Public Safety Amendment Act, 2006 D.C. Legis. Serv. 16-306 (Act 16-482) (West) (codified at D.C. CODE § 22-4503 (2013)).
338. According to data from the Federal Judicial Center, in the five years preceding the 2006 law, federal prosecutors in the District of Columbia prosecuted 353 cases in which 18 U.S.C. § 922(g) (2012) was the most severe count, an average of approximately 71 cases per year; in the five years following the law, federal prosecutors prosecuted only 53 such cases, an average of just 10 per year. (Datasets for FJC and USSC data are available at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072> and <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/83> subject to restricted use agreement; data analysis is on file with author.)

data indicates a significant difference between the sentence suggested by statute or guidelines and the sentences most often imposed in actual cases.

Of course, this approach must go hand-in-hand with localities' involvement in criminal lawmaking; mandatory penalties should only be used as a method of implementing *localities'* desires with respect to sentencing. If the communities most affected by street crime want to ensure that judges imprison criminals for certain crimes, tempered mandatory penalties can and should be used to achieve that objective. Washington, D.C., Philadelphia, Chicago, New York, and Baltimore are all examples of localities that are seeking (and in the case of Washington, D.C., have achieved) mandatory minimum terms for certain gun crimes. When the communities most affected by crime ask for specific laws, state legislatures should listen. Similarly, if the communities affected by crime ask to repeal mandatory sentences for certain crimes—and this will probably be the case for many non-violent drug offenses—legislatures should listen to that too.

To be sure, there are costs to this strategy. Mandatory minimum penalties achieve uniformity at the expense of individualized sentencing, a tradeoff that can result in unfair outcomes.<sup>339</sup> The penalties do not eliminate discretion but merely transfer it, from judges to prosecutors and from sentencing decisions to charging decisions.<sup>340</sup> And in our current state of mass incarceration, increased use of mandatory penalties in many ways seems directed at precisely the wrong goal. But by accompanying mandatory minimums with other reforms, we can reduce these costs. Lessening the severity of mandatory minimum penalties mitigates the effects of overbreadth and reduces prosecutors' incentive to use penalties as bargaining chips. Increased local voice in criminal lawmaking and administration will ensure that the penalties, and prosecutors' charging decisions, align with local desires. And over the long term, imprisonment rates might well decrease. More mandatory minimums, but with lesser terms, will reduce the distance between written and applied law. Laws applied as written engender trust in and compliance with the written law, resulting in fewer

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339. See, e.g., Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 85-86 (2003); Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1620-21 (2012) [hereinafter Barkow, *Sentencing Guidelines*].

340. See Barkow, *Sentencing Guidelines*, *supra* note 339, at 1620 & n.103; Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1430 (2008) (discussing the transfer of discretionary power from judges to prosecutors under a mandatory guidelines regime, which is effectively similar in this respect to legislatively-mandated penalties).

arrests, convictions, and punishments. Moreover, to the extent that federal sentences contribute to nationwide incarceration rates,<sup>341</sup> more, yet tempered, mandatory minimum penalties at the state or local level will help lessen penalties overall. If local law enforcement could better trust in local systems to effectively deal with street crime, requests for federal intervention—and the hefty prison sentences that come with it—would recede.

The proposals set forth here entail high up-front outlays, in that significant resources must be spent on strengthening local justice systems before a diminution of federal prosecution could be politically acceptable. Yet continuing on our current trajectory is far more costly—not just in terms of resources over the long term but, more fundamentally, in the tax on our collective trust in the justice system. The key is to refocus our approach. Rather than debating which sovereign should enforce which criminal laws, we should instead turn our efforts to thinking about how to engender legitimacy in local criminal justice systems. And rather than relying on criminal adjudication as the primary vehicle for local voice and participation, we should strive for a system that incorporates local voice elsewhere too—a system that functions more collaboratively at the outset, through the trust and confidence of the governed.

## CONCLUSION

Forum disparities in street crime cases have been conceptualized primarily as the product of tangible differences among sovereigns' legal rules (penalties, procedures, evidentiary rules) and in resources and caseloads. This understanding is accurate, but it neglects to account for the intangible features that also fuel federal prosecutorial success: enhanced citizen trust, the jury's identification with the prosecuting authority and relation to the larger electorate, greater diversity of social norms, and moral credibility. These features arise from the unique ways that the components of legitimacy—authority, community, and personal morality—interact in the federal criminal justice system.

This understanding of federal criminal power has a number of implications. First, it puts outcome disparities in a new light. They are not

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341. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 272 (2013) (noting that over the last decade, the federal prison population has increased 400%, a rate nearly three times that of the states, and that federal prisons currently house more inmates than the prisons of any single state).

necessarily (or not only) the natural outgrowth of our federalist order, but also reflections of less intended dynamics of urban crime and policing. In this respect, criminal outcome disparities should be understood less as an inevitable feature of federalism, and more as a symptom of dysfunction.

Second, the federal system achieves its legitimacy-based features largely through circumventing the local in criminal justice systems: beat policing, community-delineated jury pools, and entrenched courthouse norms. But legitimacy need not only be had in these ways. Once we appreciate the legitimacy-based features of the federal system, we can theorize means of translating these features into local systems in ways that preserve, and even enhance, localism.

It is here that we should focus our intellectual efforts. Let us put aside for now the debates on which crimes should be prosecuted by which sovereign. Instead, let us envision how we might rebuild local criminal justice systems so as to enhance legitimacy. If we do this, forum disparities will naturally recede, making questions of forum and sovereign power allocation ultimately less important. This, in turn, will enhance the legitimacy of our larger, multi-jurisdictional system of criminal justice.