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Federalism and Criminal Law: What the Feds Can Learn from the States

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FEDERALISM AND CRIMINAL LAW: WHAT THE FEDS CAN LEARN FROM THE STATES

*Rachel E. Barkow**

Criminal law enforcement in the United States is multi-jurisdictional. Local, state, and federal prosecutors all possess the power to bring criminal charges. An enduring question of criminal law is how authority should be allocated among these levels of government. In trying to gain traction on the question of when crime should be handled at the federal level and when it should be left to local authorities, courts and scholars have taken a range of approaches. Oddly, one place that commentators have not looked for guidance on how to handle the issue of law enforcement allocation is within the states themselves. States have the option of vesting authority in a state-level actor—typically, the attorney general—or in local district or county attorneys. This choice, like the choice between federal and state authority, also requires a balancing of the advantages of centralization against the loss of local values. How states choose to strike that balance is therefore informative for the question of local versus federal authority in that states are weighing the same issues.

This Article accordingly looks to the states for guidance on when criminal enforcement responsibility should rest with local authorities and when it should reside with a more centralized actor (be it one at the state or federal level). A comprehensive empirical survey of criminal law enforcement responsibility in the states—including a review of state codes and caselaw and interviews with state prosecutors—reveals remarkable similarity among the states about the degree of local control that is desirable. The states are virtually unanimous in their deference to local prosecutors, the relatively small number of categories they identify for centralized authority in a state-level actor, and their support of local prosecution

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efforts with resources instead of direct intervention or case appropriation. The state experience thus provides an alternative model of central–local cooperation to the one used at the federal level.

The Article explains that a main source of the difference in approach is sentencing policy. In the states, questions of procedure and sentencing are irrelevant to the allocation of power because they are the same at both levels of government. States thus serve as laboratories where sentencing differences and variation in procedural rules are taken out of the equation and the focus is on institutional competence. In contrast, the federal government typically decides whether to vest authority in federal prosecutors based on whether or not it agrees with local sentencing judgments. Because sentencing proves to be so central to federal prosecutions of local crime, the Article concludes by urging those interested in federalism to pay greater attention to the role of sentencing as a driver of the federal government's decision to get involved with questions of local crime.

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INTRODUCTION

Criminal law enforcement in the United States is multi-jurisdictional. Local, state, and federal prosecutors all possess the power to bring criminal charges. An enduring question of criminal law is how authority should be allocated among these levels of government. The Supreme Court has wrestled repeatedly with the issue of how the Constitution allocates criminal power between the federal government and the states.¹ The first significant shot fired in the Rehnquist Court's federalism revolution was *United States v. Lopez*,² in which the Court held that Congress overreached in passing the Gun-Free School Zones Act because the possession of a gun near a school zone was a matter for localities, not the federal government. Indeed, jurisdiction over crime—and the power to strip an individual of liberty—is the quintessential question of federalism and state power.

Scholars have also relentlessly pursued the issue of when crime should be a matter of federal concern and when it should be left to local prosecutors.³ In trying to gain traction on the question of when crime should be handled at the federal level and when it should be left to local authorities, commentators have taken a range of approaches. While the Court is limited to what the Constitution says about the division of power between federal and state governments, scholars are free to approach the question from a normative perspective, and they have considered arguments rooted in everything from political economy to civic republicanism to varying procedural advantages offered by different jurisdictions.⁴ These methods

1. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding the application of the Controlled Substances Act against a federalism challenge); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating a civil remedy for gender-motivated violence under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990 because the prohibited conduct did not substantially affect interstate commerce); *Perez v. United States*, 402 U.S. 146 (1971) (upholding the federal loan-sharking statute as a valid use of Congress's Commerce Clause power).

2. 514 U.S. 549.

3. For a sampling of the vast scholarly debate, see William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008) (addressing the relationship between equality and the location of law enforcement); 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 (1995) (arguing that there are too many federal prosecutions given the capacity of the federal courts and criticizing intermittent federal enforcement because of the disparities it produces in similar cases); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995) (providing an overview of the federalism debate); Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247 (1997).

4. See *infra* Section I.A.

are all designed to answer the same question of when a centralized, uniform approach is preferable to local variation.

Oddly, one place scholars have not looked for guidance is within the states themselves: specifically, how states handle the issue of law enforcement allocation. There are, after all, *three* layers of prosecution in the United States, not two. States have the option of vesting authority in a state-level actor—typically, the attorney general—or in local district or county attorneys. This choice, like the choice between federal and state authority, also requires a balancing of the advantages of centralization against the loss of local values. The internal allocation of prosecution responsibility within the states is important and interesting in its own right. But how states choose to strike the balance between local and centralized authorities is also informative for the question of local versus federal authority because states are weighing the same issues. If states are to be seen as laboratories of experiment,⁵ this is surely an area where the results bear on federal policy, not just the policies of other states.

Indeed, this intrastate perspective is particularly valuable because states have the primary responsibility for law enforcement in the United States and typically must pay the incarceration costs for those prosecuted, whether by local-level or state-level prosecutors.⁶ If local prosecutors are not using state prison resources effectively or are imposing externalities on other intrastate jurisdictions, states should have a greater incentive to intervene than the federal government because they pick up the tab for the state's prison costs with their limited budgets. Moreover, inefficient crime fighting is far more likely to have spillover effects within a state than across state lines because most criminal activity, and particularly violent criminal activity, likely stays within a local area.⁷ The federal government, in contrast, is not on the frontlines of most criminal law enforcement efforts and instead picks the cases it wishes to pursue.⁸ The law enforcement portion of the federal budget is comparably minuscule, and it serves no disciplining effect on decision making.⁹ Because of these practical realities, states are more likely than

5. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

6. State prisons are run and funded by state governments. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 719–20 (1996). Local jails, which generally house misdemeanor offenders and state prisoners while their cases are pending, are funded by local jurisdictions. States have made some efforts recently to shift incarceration costs to localities by making greater use of local jails, but states continue to pay the lion's share of incarceration costs. See, e.g., Molly Hennessy-Fiske & Richard Winton, *Bid to divert California prisoners to county jails denounced*, L.A. TIMES, May 23, 2009, at A8 (reporting on complaints about plans to divert state prisoners to local jails in order to shift costs of incarceration to local jurisdictions); Amy Gardner, *Board Weighs Suing State Over Crowded Jails*, WASH. POST, June 3, 2008, at B5 (same).

7. Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1715–16 (2006) (disputing claims that many criminals will cross state boundaries); Samuel R. Gross, *Jurisdictional Competition in Criminal Justice: How Much Does It Really Happen?*, 104 MICH. L. REV. 1725, 1727 (2006) (“[T]o the extent that differences in policy might cause criminals to relocate, we expect them to travel as little as possible.”).

8. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1305–06 (2005).

9. *Id.* at 1301–08.

Congress to consider the costs and benefits associated with how criminal law enforcement should be allocated. All else being equal, states have strong incentives to get the right mix of law enforcement to maximize the use of their prison resources. States therefore offer a helpful comparative framework for the question of when local law enforcement makes sense and when it does not.

This Article accordingly looks to the states for guidance on when criminal enforcement responsibility should rest with local authorities and when it should reside with a more centralized actor (be it one at the state or federal level). Part I begins by explaining how knowledge of intrastate practice fills a void in the existing debate over the federalization of crime. Part I argues that state legislatures and Congress are making similar choices about when to share authority with or take matters over from local prosecutors. In addition, the relationship between central state prosecutors (typically attorneys general) and local prosecutors can, to some extent, be analogized to the relationship between Main Justice and U.S. attorneys' offices and between federal prosecutors and local prosecutors. Part I acknowledges important differences in these relationships but explains that the variation is also a valuable basis for comparison, because to the extent institutional and political differences are driving the allocation decision, one can then assess the normative worth of those differences.

Part II takes up the task of describing the actual practice in the states. The information in Part II is based on a comprehensive empirical survey of criminal law enforcement responsibility in the states, including a review of state codes and caselaw and interviews with state prosecutors. What is most striking about this data is the remarkable similarity among states regarding the degree of local control that is desirable and how to accomplish it. The states are virtually unanimous in their deference to local prosecutors, the small number of categories they identify for centralized authority in a state-level actor, and their support of local prosecution efforts with resources instead of direct intervention or case appropriation.

Part III compares the states' approach with the federal government's push toward centralization and away from local control. It goes on to explain a main reason for the difference. Whereas the states are focused directly on the relative institutional competence of prosecutors at the state and local level, the federal government is just as likely to make prosecutorial allocation decisions based on whether or not it agrees with local sentencing judgments. Because sentencing proves to be so central to federal prosecution of local crime, the Conclusion urges those interested in federalism to pay greater attention to the role of sentencing as a driver of the federal government's decision to get involved with questions of local crime.

I. THE FEDERALISM DEBATE IN CRIMINAL LAW

Over the last several decades, federal criminal law has mushroomed beyond recognition. The number of federal criminal laws now hovers somewhere over 4,000, with roughly 40% of the laws passed after the Civil

War coming in the 25-year period between 1970 and 1998.¹⁰ Many of these laws are written in sweepingly broad terms,¹¹ overlap with one another,¹² and cover ground already addressed by state law, including violent crimes.¹³ Often, new federal laws are passed or existing laws are expanded in the wake of a highly publicized crime, with little analysis of whether there is an actual need for federal involvement.¹⁴ The result is a federal prison population that is now larger than the prison population of any single jurisdiction¹⁵ and a federal docket of almost 70,000 criminal cases annually, roughly double the figure from 25 years earlier.¹⁶ The number of drug cases in particular has

10. Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 392, 399 (2009) (citing TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, *THE FEDERALIZATION OF CRIMINAL LAW* 7 (1998) [hereinafter TASK FORCE]).

11. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19 (2001).

12. *Id.* at 519.

13. Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 244 (2005) (“[O]nly about 5% of all federal criminal cases involved federal statutes with no local or state counterpart.”) (citations omitted); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. REV. RES. 377, 382 (2006) (“[I]t was not until 1964 that such street crimes became the subject of sustained federal policy making . . . however, federal movement into this area quickly went from a trot to a gallop”); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 880–81 (2005); see also Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 674 (1997) (noting several ways in which the sentencing procedures for federal criminal convictions result in harsher sentences than the equivalent sentences under state sentencing regimes).

14. TASK FORCE, *supra* note 10, at 14–17 (“New crimes are often enacted in patchwork response to newsworthy events, rather than . . . in response to an identifiable federal need.”); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755 (2005) (“Federal criminal law . . . [contains] legislation drafted in response to whatever crime is the focal point in the media—even if that offense is already defined and punished harshly and effectively under state law.”); Julie R. O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 654 (2006) (“[R]edundancies [in the federal code] again can be traced largely to the political desire to react to a given scandal . . . by enacting a ‘new’ section that simply repeats existing prohibitions (and by jacking up statutory maximum penalties to underscore congressional resolve).”).

15. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008—STATISTICAL TABLES (March 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf> (noting there were 201,142 federal prisoners at mid-year 2008 compared to 173,320 in California, the state with the largest prison population). To give a sense of perspective of the growth of the federal prison system, the federal government did not even open a federal prison until 1895, and had only 5 as of 1930. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1147 (1995). Between 1930 and 1989, however, the number of prisons grew to 47, and the population of federal prisoners went from 13,000 to 53,000. *Id.* at 1147–48. In the last 20 years, the number of federal prisons has more than doubled to 115 institutions and the population has almost quadrupled with a population of more than 209,000 prisoners. Fed. Bureau of Prisons, *About the Bureau of Prisons*, <http://www.bop.gov/about/index.jsp> (last visited Sept. 1, 2010).

16. Beale, *supra* note 10, at 400 & n.173. The number of federal criminal cases has not followed a steady upward trajectory. In 1932, there were more than 86,000 federal criminal cases. Little, *supra* note 3, at 1040.

exploded, rising approximately 300% in the stretch from 1980 to 1990¹⁷ and another 45% from 1990 to 2000.¹⁸

An additional, roughly contemporaneous trend has been the centralization of prosecutorial power within the federal government.¹⁹ Increasingly, the Department of Justice in Washington, D.C. (“Main Justice”) has sought to control the charging and plea decisions of federal prosecutors. Main Justice has issued a series of directives establishing charging practices in federal criminal cases against individuals and corporations,²⁰ and the *United States Attorneys’ Manual* covers more specific policies. Federal prosecutors have also been ordered to seek approval from or provide notice to Main Justice with respect to two hundred types of decisions,²¹ including whether to bring cases under a variety of criminal statutes (such as the Racketeer Influenced and Corrupt Organizations Act),²² deciding whether or not to seek the death penalty in death-eligible cases,²³ and obtaining a wiretap.²⁴ Main Justice has also spent more time keeping track of local statistics on which cases are brought, with an eye toward controlling the mix.²⁵ The firing of U.S. attorneys in 2006 may have been, in the words of the Main Justice’s inspector general and Office of Professional Responsibility, “fundamentally flawed” and “severely damag[ing]” to the Department’s credibility,²⁶ but it was nevertheless consistent with these other attempts to shift power over criminal law enforcement to Main Justice.²⁷ Main Justice has also grown increasingly

17. Brickey, *supra* note 15, at 1153.

18. *Many Factors Influence Criminal Filings Over 10-Year Period*, THIRD BRANCH, NOV. 2001, at 6.

19. Beale, *supra* note 10, at 397–405 (chronicling the power shift to Main Justice); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1440–43 (2008) (describing Main Justice’s efforts to centralize power since the late 1980s).

20. See, e.g., Memorandum from John Ashcroft, Attorney Gen., to All Federal Prosecutors (Sept. 22, 2003), available at http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm (setting forth Justice Department’s charging and plea policies); Memorandum from Richard Thornburgh, Attorney Gen., to All U.S. Attorneys, Setting Forth Justice Dep’t’s Plea Policies (Mar. 13, 1989), reprinted in 6 FED. SENTENCING REP. 297, 347 (1994).

21. Beale, *supra* note 10, at 402 & n.187.

22. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9–110.101, 9–110.300 to 9–110.400 (1997).

23. *Id.* § 9–10.040. For discussions of this practice, see John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697 (2003), and Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347 (1999).

24. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 22, § 9-7.010.

25. Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2097 (2009).

26. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 356, 358 (Sept. 2008).

27. Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 187–88 (2008) (claiming the firings exemplify “the

vocal about the need to check regional variations among judges in their sentencing practices, another sign of its desire to have a central, uniform approach to federal criminal law.²⁸

Like the expansion of the federal criminal code, these efforts to give Main Justice more centralized authority come at the expense of local control over criminal enforcement. U.S. attorneys may be federal appointees, but they are more responsive to local interests than Main Justice.²⁹ They are typically drawn from the district in which they serve, and they necessarily pay attention to the local values and practices in their district.³⁰ U.S. attorneys and federal judges in a district are also more likely than Main Justice to take into account the attitudes and values of local juries in making their decisions. Thus, to the extent Main Justice takes on a decision-making role for itself or orders a particular standard that disregards local jury preferences,³¹ that too has the effect of stripping local communities of some of their law enforcement power.³²

The increasing use of federal criminal law to address local crime has hardly gone unnoticed. The federal judiciary was one of the first institutions to offer critical commentary. The Federal Courts Study Committee cautioned in 1990 that the federal judiciary's "most pressing problems . . . stem from unprecedented numbers of federal narcotics prosecutions."³³ In numer-

centralization of authority within DOJ"). *See generally*, Beale, *supra* note 10, at 374–80 (describing the inspector general's findings in U.S. attorney firings).

28. For example, Justice Department officials pushed for passage of the Feeney Amendment to the PROTECT Act, which aimed to restrict judicial departures under the Sentencing Guidelines. Richman, *supra* note 25, at 2098–99; *see also* Eric Holder, Attorney Gen., Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium: Rethinking Federal Sentencing Policy, 25th Anniversary of the Sentencing Reform Act (June 24, 2009) (transcript available at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-0906241.html>) [hereinafter Holder speech] (observing that the percentage of defendants sentenced within the guidelines has decreased and that this development should be closely followed).

29. JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 43–45 (1978); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 785 (1999).

30. Beale, *supra* note 10, 422–24; Richman, *supra* note 25, at 2094 & nn. 36–37, 2095 & n.39, 2105; *see also* Robert H. Jackson, *The Federal Prosecutor—His Temptations*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940) (“[W]ith his knowledge of local sentiment and opinion, his contact with and intimate knowledge of the views of the court, and his acquaintance with the feelings of the group from which jurors are drawn, it is an unusual case in which [the U.S. attorney’s] judgment should be overruled.”).

31. Although local juries can check this to some extent through their power to acquit, that protection is limited by the fact that more than 95 percent of the cases are resolved by plea. U.S. Dep’t of Justice, *Statistical Tables*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2007/fjs07st.pdf> (last visited Oct. 4, 2010).

32. This is not to say that all federal efforts have been towards centralization at the expense of U.S. attorneys’ offices. Dan Richman has explained the ways in which Congress has either accepted or supported decentralization at the federal level. *See* Richman, *supra* note 29, at 805–10. In addition, Sara Beale has described other dynamics that help prosecutors in U.S. attorneys’ offices retain discretion and independence from Main Justice. Beale, *supra* note 10, at 405–09. But despite some counter-trends that have helped prosecutors retain discretion in local offices, it is accurate to describe federal criminal prosecution today as, overall, more centralized than in previous decades. *See* Stith, *supra* note 19, at 1440–43.

33. REPORT OF THE FEDERAL COURTS STUDY COMM. 35 (1990).

ous year-end reports, Chief Justice Rehnquist warned of the increased burden on the federal courts because of federal criminal law's growth.³⁴ These warnings fell on deaf ears in Congress. Far from scaling back federal criminal law, Congress continued to expand it in the years following the judiciary's reports.³⁵

The Supreme Court then offered its perspective on the issue in 1995.³⁶ That year, the Court decided the case of *United States v. Lopez*, which invalidated a congressional statute that made it a federal crime to carry a firearm within one thousand feet of a school.³⁷ The Court disagreed with the government's claim that the statute was a proper exercise of the Commerce Clause power. Five years later, under the same rationale, the Court struck down a law creating a federal civil remedy for victims of gender-motivated crimes of violence.³⁸ In both cases, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."³⁹ In the Court's view, there was "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of victims."⁴⁰ These cases were the Court's effort to remind Congress that it was a body with enumerated and limited powers and that it could not interfere with local power—and increase the burdens on the federal judiciary—at will. Unlike the judicial reports, these opinions had the force of law, and they unsettled what had been a consistently deferential jurisprudence under the Commerce Clause.

34. See, e.g., William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, reprinted in *THIRD BRANCH* (Wash., D.C.), Jan. 1999, at 2 ("[T]he trend to federalize crimes that traditionally have been handled in state courts is . . . taxing the Judiciary's resources and . . . threatens to change entirely the nature of our federal system."); William H. Rehnquist, *The 1997 Year-End Report of the Federal Judiciary*, reprinted in *THIRD BRANCH* (Wash., D.C.), Jan. 1998, at 2 ("[T]he Judicial Conference of the United States has raised concerns about legislation pending in Congress to 'federalize' certain juvenile crimes, maintaining its long-standing position that federal prosecutions should be limited to those offenses that cannot or should not be prosecuted in state courts."); William H. Rehnquist, *Chief Justice Issues 1992 Year-End Report*, reprinted in *THIRD BRANCH* (Wash., D.C.), Jan. 1993, at 2–3 (noting the burden on the judiciary from proposed laws expanding federal jurisdiction); William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, reprinted in *THIRD BRANCH*, (Wash., D.C.), Jan. 1992, at 3 (noting the increased burden it would create for the courts if Congress passed the Violence Against Women Act and the Violent Crime Control Act).

35. Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 *ARIZ. ST. L.J.* 825, 825 (2000).

36. For an argument that the decision in *Lopez* was designed to stem the tide of criminal cases flooding federal courts, see Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 *DUKE L.J.* 1641, 1646–54 (2002).

37. 514 U.S. 549 (1995).

38. *United States v. Morrison*, 529 U.S. 598 (2000).

39. *Id.* at 617.

40. *Id.* at 618.

Commentators were quick to observe that the Rehnquist Court's approach in these cases was part of a larger federalism revolution.⁴¹

Despite the rhetoric, the practical significance of the Court's federalism cases on criminal law has been negligible. The cases did not stop Congress from its relentless push to pass new criminal laws.⁴² Lower courts failed to follow the Supreme Court's lead, with few of them employing *Lopez*'s analysis to new contexts.⁴³ The Court itself also put the brakes on any meaningful limits. It never regulated federal power to intervene with local criminal authority through the Spending Clause.⁴⁴ And the Court has signaled that it will engage in very little additional substantive Commerce Clause regulation beyond the limited context of *Lopez* and *Morrison*.⁴⁵ The strongest indicator that the Court was throwing in the towel on policing Congress's Commerce Clause authority came in 2005, when the Court decided *Gonzales v. Raich*.⁴⁶ In that case, the Court upheld Congress's power to criminalize possession of marijuana that was neither intended for nor entered the stream of commerce and that was authorized under a state law that allowed marijuana for medicinal use.⁴⁷ The Court conceded that the case was factually distinguishable from *Wickard v. Filburn*⁴⁸—the case that, ac-

41. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13 (1995). Justice Souter's dissent in *Lopez* suggested that the case could become "epochal." 514 U.S. at 615 (Souter, J., dissenting). In addition to *Lopez* and *Morrison*, the Court's federalism revival also included cases involving the ability of Congress to commandeer local officials, to abrogate state sovereign immunity, and to use its power under Section Five of the Fourteenth Amendment. Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 13 (2003).

42. See Brian W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 FED. SENT'G. R. 295, 296 (2008) (noting ninety-one federal crimes were created between 2000 and 2007) (citing John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 26, June 16, 2008, at 1); John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, 5 ENGAGE MAG., Oct. 2004, at 23, 26 (asserting there were sixty-seven new federal crimes passed between 1997 and 2003).

43. See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1256 (2003); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 370.

44. For an excellent analysis of this issue, see Garnett, *supra* note 41, at 66–67.

45. The Court has cut back on some of its other federalism decisions as well. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (affirming Congress's ability to allow money damages from states for violations of the Americans with Disabilities Act); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (upholding a provision of the Family and Medical Leave Act allowing money damages from states for violations). Relatedly, the Court recently upheld the civil commitment of a mentally and sexually dangerous federal inmate beyond the point at which his criminal sentence would otherwise terminate under 18 U.S.C. § 4248 as an appropriate use of Congress's authority under the Necessary and Proper Clause. *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010).

46. 545 U.S. 1 (2005).

47. *Id.* at 7–9.

48. 317 U.S. 111 (1942). In *Raich*, the Court admitted that it was "factually accurate" to note three differences from *Wickard*, namely that (1) the Controlled Substances Act at issue in *Raich* did not exempt small operations as did the agriculture act at issue in *Wickard*; (2) "*Wickard* involved a

ording to *Lopez*, offered “perhaps the most far reaching example of Commerce Clause authority over intrastate activity”⁴⁹—and three dissenting judges made clear their view that *Raich* was “irreconcilable”⁵⁰ with and “materially indistinguishable”⁵¹ from the Court’s decisions in *Lopez* and *Morrison*.⁵² Yet a majority of the Court nonetheless accepted the federal scheme in *Raich* because it was part of a comprehensive statute addressing narcotics trafficking, even though the particular conduct at issue involved purely intrastate conduct with no demonstrated proof that it affected the broader market.⁵³ As the dissent characterized it, the decision effectively made *Lopez* “nothing more than a drafting guide,”⁵⁴ because all Congress needs to do to survive judicial review is to sweep its regulation of intrastate behavior into a broader regulatory scheme of interstate activity. In the wake of *Raich* and other decisions cutting back on the Court’s commitment to federalism, even those who proclaimed the Court’s initial efforts a “revolution” conceded that its time had passed.⁵⁵ The Court’s federalism revolution seems to have gone out with a whimper, leaving little room for constitutional regulation of the issue.

But the normative questions of the proper role of the federal government in criminal law—including the appropriate sweep and enforcement of federal criminal law, and whether Main Justice should attempt centralized control over federal prosecutors—remain. And a debate over those issues continues to rage in policy discussions and legal scholarship.

After describing the current state of the debate in Section I.A, Section I.B argues for opening a new line of inquiry about the proper allocation of

‘quintessential economic activity’—a commercial farm—whereas respondents [in *Raich*] do not sell marijuana;” and (3) the record in *Wickard* demonstrated that wheat production on individual farms, in the aggregate, did in fact have a “significant impact on market prices,” whereas there was no record evidence in *Raich* that the use of medical marijuana affected the overall market. *Raich*, 545 U.S. at 20.

49. *United States v. Lopez*, 514 U.S. 549, 560 (1995).

50. *Raich*, 545 U.S. at 43 (O’Connor, J., dissenting).

51. *Id.* at 45.

52. *See id.* at 54 (“[I]f the Court today is right about what passes rationality review before us, then our decision in *Morrison* should have come out the other way.”). In both *Lopez* and *Morrison*, the Court had emphasized that when it had previously “sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.” *United States v. Morrison*, 529 U.S. 598, 611 (2000) (citing *Lopez*, 514 U.S. at 559–60).

53. As the principal dissent noted, the majority’s decision in *Raich* “suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal.” 545 U.S. at 45 (O’Connor, J., dissenting).

54. *Id.* at 46.

55. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 509–10 (2006) (determining that the “federalism revolution” has either slowed or stopped); *see also* Erwin Chemerinsky, *The Assumptions of Federalism*, 58 *STAN. L. REV.* 1763, 1764 (2006) (describing the “wan[ing]” of the federalism revolution).

criminal law enforcement power based on the relationship between states and their localities.

A. Current Methodologies

The expansion of federal criminal law and the Rehnquist Court's attempts to police it have spawned an avalanche of scholarship. Much of the commentary on federalism is general in nature, without any particular emphasis on criminal enforcement in particular.⁵⁶ Although the costs and benefits of federal versus local control are, of course, relevant to the more specific question of whether responsibility for criminal law should be federalized, the most relevant and informative scholarship for those interested in identifying the proper scope of federal involvement in criminal law enforcement tends to tackle that question head-on. To the extent arguments from the larger literature are relevant, the specific pieces on criminal law typically incorporate them and discuss their particular relevance or irrelevance to crime.

And there has been no shortage of commentators interested in the specific question of when the federal government should play a role in criminal law enforcement and when it should leave matters to local control.

One school of analysis approaches these questions as the Supreme Court has and is largely interested in what the Constitution has to say about the relationship among the different institutions. These scholars take what is essentially a doctrinal approach to the federalism question, analyzing it much the same way a court would. This line of scholarship therefore looks at constitutional text, history, and theory to address the question of which criminal powers are within federal authority and which fall outside it.⁵⁷

Another group of scholars focuses not on the constitutional question of where power can or must reside, but on the normative question of where power should reside. A subset of this group tends to focus on arguments grounded in "the political economy of the different governmental institu-

56. The literature on federalism is far too voluminous to cite fully. For a sampling, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 118-40 (1995); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Roderick M. Hills, Jr., *The Constitutional Rights of Private Government*, 78 N.Y.U. L. REV. 144 (2003); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Herbert P. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (book review).

57. See, e.g., Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 93 (1996) (arguing that the history of federal criminal jurisdiction shows that, among other things, "a rigid dual federalism" has never been embraced); Brandon L. Bigelow, Note, *The Commerce Clause and Criminal Law*, 41 B.C. L. REV. 913, 941 (2000) (arguing that the Tenth Amendment should be an external limit on federal criminal law and that history can be used as a guide in defining the scope of state sovereignty); Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 2009-15 (2008) (describing scholarship that takes doctrinal and historical approaches to the federalism question).

tions” that make up the criminal justice system.⁵⁸ These scholars, for example, analyze the incentives of officials at the different levels of government given voter and interest-group demands.⁵⁹ They also consider whether a “race to the top” or a “race to the bottom” might suggest the wisdom of greater or lesser federal involvement in criminal enforcement.⁶⁰ Efforts in this vein also include scholarship that addresses the political and institutional failings of federal law enforcement that may put it at a disadvantage compared to local actors.⁶¹

Still another major approach to the normative question of federalism in criminal law focuses on procedural differences between federal and state systems to decide where best to allocate power.⁶² Some advocates of federal law enforcement point to what they see as procedural advantages in federal court. These include fewer restrictions on the government’s use of informants,⁶³ easier access to wiretaps and warrants,⁶⁴ less generous discovery rights for defendants,⁶⁵ and broader grand jury powers.⁶⁶ The federal jury pool may also differ from the relevant state jury pool,⁶⁷ so it is possible that prosecutors might see an advantage in drawing from the federal pool over a more localized state jury pool. The federal government’s superior witness protection program has also been cited as a plus.⁶⁸ Opponents of increased federal involvement in matters traditionally left to local prosecutors often

58. Doron Teichman, *Decentralizing Crime Control: The Political Economy Perspective*, 104 MICH. L. REV. 1749, 1760 (2006).

59. *E.g.*, Stuntz, *supra* note 3, at 1975–82.

60. *See, e.g.*, Barkow, *supra* note 7, at 1715–23; Gross, *supra* note 7, at 1727–31; Wayne A. Logan, *Crime, Criminals, and Competitive Crime Control*, 104 MICH. L. REV. 1733, 1744–47 (2006); Stacy & Dayton, *supra* note 3, at 291; Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1840–41 (2005). These scholars follow the jurisdictional competition work pioneered by Charles Tiebout. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

61. *See, e.g.*, TASK FORCE, *supra* note 10, at 20–22 (emphasizing that federal statutes are used quite rarely, which means they have little impact on crime rates but present a danger of selective and arbitrary prosecutions).

62. *See, e.g.*, John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1101, 1125 (1995) (arguing that federal prosecutors should have a role in fighting organized crime, which they define as “group criminality involving violence,” because federal procedure provides particular advantages for those kinds of cases); Richman, *supra* note 13, at 397.

63. John Jeffries and Judge John Gleeson point out that one of the main advantages for bringing organized crime cases in federal court is the ability of federal prosecutors to use uncorroborated accomplice testimony. Jeffries & Gleeson, *supra* note 62, at 1104.

64. Beale, *supra* note 3, at 1004.

65. *Id.*

66. Jeffries & Gleeson, *supra* note 62, at 1108.

67. Nancy Gertner, *12 Angry Men (And Women) in Federal Court*, 82 CHI.-KENT L. REV. 613, 616, 619 (2007) (explaining that federal jury pools are less diverse than the corresponding state jury pool because the pool in federal court is “expanded to include the more racially homogenous suburbs” and pointing out that, in Boston in particular, that has meant that “the vast majority of juries in federal court . . . did not have a single African-American member”).

68. Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 970 (1995).

look to judicial resources, typically observing that the size and structure of the federal judiciary is not suited for taking on a larger share of criminal matters.⁶⁹

Given the richness of the debate and the sheer quantity of articles addressing the question, it is perhaps hard to believe that anything more can be added to the vast literature on federalism and crime.

But there is an important omission from the current analysis. To the extent scholars are seeking to answer the normative question of when power over criminal enforcement should be centralized or left with local authorities, they have overlooked a valuable source of information. As the next Section explains, the states have been wrestling with that same basic question since their inception, and their experience offers insights into the larger federalism debate.

B. *The Relevance of State Practice*

The question of how much control local actors should have over criminal law enforcement is not unique to federalism and the issue of national power. Just like the federal government, states, too, must ask when local prosecutors should retain authority over prosecutions and when a centralized, statewide prosecutor should assume responsibility for an area of criminal law or otherwise intervene in a local action.

There is ample scholarship discussing the relevance of localism (that is, the relationship between states and their local governments) to questions of federalism (that is, the relationship between the federal government and the states and their localities). In both contexts, the values of centralization are weighed against the virtues of decentralization. Thus, local-government law scholars have recognized the “natural points of connection” between federalism and localism,⁷⁰ and that the normative questions—and answers—of localism and federalism therefore often go hand-in-hand. Indeed, as Richard Briffault has noted, “[T]he ‘intellectual case for federalism’ often converges with the case for decentralization, or localism.”⁷¹ The normative argument for federalism rests on values such as democratic political participation, increased representation of diverse interests, and innovation—all of which are also hallmarks of localism.⁷² In fact, local governments are far more poised than state governments “to provide citizens with opportunities for political

69. See Beale, *supra* note 3, at 983–91.

70. David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 381 (2001); see also Frank S. Alexander, *Inherent Tensions Between Home Rule and Regional Planning*, 35 WAKE FOREST L. REV. 539, 542 (2000) (“Inherent in both the current federalism debates and the continuing struggles with home rule . . . is the question of at what point an issue is purely local and when is it a matter for determination by a larger community of interests.”).

71. Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1304 (1994) (quoting McConnell, *supra* note 56, at 1491).

72. See *id.* at 1305, 1315 (“These virtues of federalism—participation, diversity, intergovernmental competition, political responsiveness, and innovation—are, of course, among the very values regularly associated with local autonomy.”).

participation, to reflect diversity, to increase the likelihood of innovation and experimentation, and to engage in the kind of competition that constrains governmental behavior.”⁷³ Thus, when states consider whether to defer to local governments, they are wrestling with the very same questions that the federal government considers when it decides whether to defer to states. At the heart of both is a debate over the merits of decentralization.⁷⁴

Federalism scholars, too, have highlighted that federalism questions often are—or should be—about localism as much as they are about state power.⁷⁵ This is true of federalism’s critics and proponents alike. Supporters such as Michael McConnell and Deborah Jones Merritt, for example, explicitly praise federalism for the fact that it respects local autonomy and the interests of communities.⁷⁶ Critics like Ed Rubin and Malcolm Feeley are critical of federalism doctrine because it focuses on the federal–state relationship when, in their view, any benefits of federalism would come from preserving the autonomy of local governments.⁷⁷

Even the Court has emphasized the value of local authority instead of speaking exclusively about state sovereignty when discussing federalism. For example, the Court in *Lopez* worried about an interpretation of the Commerce Clause that would “‘effectually obliterate the distinction

73. *Id.* at 1348.

74. For a discussion of the relationship between centralized and decentralized units of government that shows the parallels between the relationship between state and local entities and the federal government and the states, see Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1359–60 (1997).

75. Briffault, *supra* note 71, at 1311–12 (noting that scholars and judges have rested the case for federalism on arguments about political decentralization); see also Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 441 (2002) (“[I]n functional analysis of the values that federalism serves, the significance of local governments is enormous.”).

76. *E.g.*, McConnell, *supra* note 56, at 1511 (arguing that the case for federalism is an “argument for substantial state and local autonomy” and for the “devolution of governing authority to state, city, and community levels”) (emphasis added); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 5 n.20 (1988) (“The benefits produced by local governments . . . may be counted among the benefits of maintaining independent state governments.”); *id.* at 7 (“[A] major advantage of federalism lies in the ability of state and local governments to draw citizens into the political process [through the] greater accessibility and smaller scale of local government.”); see also Ehrlich, *supra* note 35, at 837 (noting the values of federalism include “the closeness of government bodies to their constituents [and] the preservation of the ability of local and state governments to experiment in social policy”); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 508, 516 (1995) (observing that neither the Constitution nor debates among the Framers suggest “that the federal government was to have a significant role in prosecuting crimes affecting the local community” and that there are sound policy reasons for a limited federal role, including the fact that “most crime is local in nature, and consequently, the local community feels the brunt of the offense”).

77. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 919–20 (1994). Rubin and Feeley go on to argue that protecting states actually harms local political participation, but as Rick Hills persuasively argues, the evidence for this claim is lacking. Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187 (2005).

between what is national and what is local and create a completely centralized government.”⁷⁸

Although fundamental normative questions of federalism and localism are the same, no one has bothered to look to see how the states have answered them in the context of criminal law. Perhaps one reason the connection between federalism and localism is missed in this area is because discussions of federalism in this context, particularly at the Supreme Court, more often revolve around the rhetoric of sovereignty.⁷⁹ In terms of constitutional doctrine, this makes sense because states are explicitly protected in the Constitution as sovereigns, whereas local communities are not. On the contrary, the Court has emphasized that localities are nothing more than “political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”⁸⁰ It is therefore no surprise that the Court typically addresses federalism issues as questions of state versus national power without much attention to how power is then allocated within a state.

But if one is interested in the question of power allocation as a normative question of institutional design and not about constitutional interpretation, the parallels between federalism and localism cannot be ignored.⁸¹ Both turn on striking the right balance between centralization and local control.

Certainly the questions of how much to protect local control and how much to centralize are at the heart of governmental decision making about prosecutorial power.⁸² State legislatures, like Congress, must decide when to strip localities of authority over crime or provide concurrent authority in a

78. *United States v. Lopez*, 514 U.S. 549, 557 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)); *see also id.* at 567–68 (worrying about an interpretation of the Commerce Clause under which “there never will be a distinction between what is truly national and what is truly local”).

79. *E.g., Lopez*, 514 U.S. at 564 (“[I]n areas such as criminal law enforcement . . . States historically have been sovereign.”); *see also* Briffault, *supra* note 71, at 1328 (“The Court has been more attentive to the formal differences between states and local government than the scholarly advocates of federalism, much as the Court has continued to employ the rhetoric of state sovereignty . . .”).

80. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *see also* *Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933) (“A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.”); *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (“[M]unicipalities have no inherent right of self government which is beyond the legislative control of the State.”).

81. Despite recognizing the parallels between normative questions of localism and federalism, Richard Briffault has argued that courts should avoid analyzing these normative values in reviewing congressional actions because those are “essentially political decisions [that] ought to have occurred in the political arena.” Briffault, *supra* note 71, at 1350. This Article takes no position on how courts should assess federalism claims in criminal law, but instead argues that the “essentially political decisions” made by state political actors weighing the values of decentralization should inform the same political decisions made by federal political actors.

82. Barron, *supra* note 70, at 381.

state-level actor.⁸³ The position of a state attorney general (“AG”) was created in some states in response to a concern with “sectionalism” and a desire “to protect public rights and redress public injuries throughout the entire state, independent of the attitude of local authorities who might be indifferent, incapable, or even antagonistic.”⁸⁴ What authority states give to attorneys general is therefore quite telling because that authority reflects the state legislative judgment of when the need for centralization outweighs claims of localism. Similarly, when state-level prosecutors are given discretion to intervene in local matters, they must decide, like their federal-level counterparts, whether to exercise it or whether their involvement would interfere too greatly in local matters. And a centralized state-level prosecutor with supervisory powers over local prosecutors must, like Main Justice, determine how much control it wants to keep at the central level instead of letting local actors respond to local concerns.

To be sure, there are important differences between the states and the federal government in terms of their relationship with local actors. State legislatures have greater control over local authorities than Congress has over state or local authorities. State legislatures pass the criminal laws that local prosecutors must enforce; Congress, in contrast, cannot insist that local prosecutors enforce federal laws.⁸⁵ In addition, it is difficult for the president and the Department of Justice to take credit for addressing crime without federal prosecutions. In contrast, the state AG is generally perceived as the chief law enforcement officer of the state. That means the state AG can claim credit for local prosecutions even if she did not bring the cases herself. Similarly, if crime rates fall, the state AG can again campaign on that fact, even if she formally lacked jurisdiction over the main index crimes. The public perception is what counts, and the state AG’s position puts her in a better position to get credit for reductions in crime and government wins in big cases without necessarily having to prosecute those cases herself.

These differences must be kept in mind, but they do not render the state experience with local actors irrelevant. On the contrary, in many ways the differences between the states and the federal government make the internal state relationships between state and local actors an even more valuable frame of reference for federalism questions. Most of the ways in which

83. Various government reformers, for example, have put pressure on states over the years to employ more centralized control over prosecutorial power. See NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 11–14 (1931) (citing decentralization as a reason that criminal justice in the states is “ineffective”); Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 433 (1960) (explaining that effective law enforcement and protection of individual rights are hampered in part by the lack of centralized control over the separate principalities of local prosecutors); Earl H. De Long & Newman F. Baker, *The Prosecuting Attorney: Provisions of Law Organizing the Office*, 23 J. AM. INST. CRIM. L. & CRIMINOLOGY 926, 963 (1933); Note, *The Common Law Power of State Attorneys-General to Supersede Local Prosecutors*, 60 YALE L.J. 559, 559 n.2 (1951) (citing sources).

84. *State v. Bowles*, 79 P. 726, 728 (Kan. 1905).

85. *Printz v. United States*, 521 U.S. 898 (1997). Although Congress may use its spending power to achieve similar results, the realities of federal grants might make it hard to get the money directly to the relevant local actors.

federal and state practice differ revolve around the greater ability, willingness, and incentive of the federal government to make symbolic gestures with crime legislation and targeted enforcement in high-profile or select matters.

Consider first the differences between federal and state prosecutors. Federal prosecutors focus on the cases they bring, not on the ones they do not. Because primary law enforcement responsibility rests with the states, state prosecutors are blamed for underenforcement, not federal prosecutors. Similarly, federal prosecutors do not concern themselves as much with how their selection of cases affects a community. They do not have an obligation to fix local problems, and they are not directly accountable to those communities. The federal government's enforcement decisions therefore largely ignore the day-to-day realities of local communities.

The relationship between state and local prosecutors, in contrast, has a much firmer grounding in practical concerns.⁸⁶ Even though the state AG may not be directly responsible for local crimes under state law—indeed, the state AG may lack authority to address them directly—the public perceives the state AG as sharing responsibility for local problems. Because state AGs are going to be held responsible for local conditions to some extent, they therefore have an incentive to fix any problems on the ground.⁸⁷ Thus, how state AGs go about addressing local crime can be quite informative for those seeking to understand what type of intervention might be most effective. Unlike federal prosecutors who can, to a larger extent, get by on symbolic gestures, state-level prosecutors are going to have a greater incentive to make sure things are actually working well. Put another way, to the extent there is divergence in state and federal approaches to the issues of when and how a centralized actor should intervene in criminal law enforcement, it is often because state-level actors are weighing more of the relevant variables than the federal actors are.⁸⁸

The differences between the respective legislatures—Congress and state legislatures—also offer a valuable basis for comparison. Congress and state

86. As Stephen Schulhofer and Ilene Nagel observed in their landmark study of federal plea bargaining under the Sentencing Guidelines:

All the players at the local level (prosecutors, defense attorneys, probation officers, and trial court judges) deal with cases on an individual, "micro" level. Both the offense and the offender are highly specific and contextualized. In contrast, the key players at the national level (Congress, the Commission, the Department of Justice, and the appellate courts) deal with sentencing policy at the "macro" level, thinking about appropriate treatment for broad, aggregated categories.

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, 1298 (1997).

87. Email from James Tierney, Dir., Nat'l State Attorneys Gen. Program, Columbia Law Sch., to Rachel Barkow (Mar. 6, 2010, 18:22) (on file with author).

88. How prosecutors choose to exercise delegated power is an important locus of the federalism debate. See Jeffries & Gleeson, *supra* note 62, at 1101 ("[T]he right place to locate a debate about the federalization of crime is not the text of federal statutes, whether enacted or proposed, but the resources and priorities of federal prosecutors.").

legislatures are generally making different decisions about their respective jurisdiction's involvement in criminal law enforcement and its relationship to local communities. A key decision for Congress is whether or not to create a federal crime at all. After making that decision, Congress also has to decide whether to place exclusive or concurrent authority with the federal prosecutor. Exclusive authority would require the federal government to make a significant investment in law enforcement resources, to assume exclusive responsibility for an area of law (and take the blame if crime rates in that area go up), and it would raise political questions about interfering with the states' police power. Thus, Congress overwhelmingly opts for concurrent jurisdiction in areas of traditionally local concern. In those areas, federal law leaves it up to the discretion of federal prosecutors whether to get involved.⁸⁹ So, for Congress, the main issue is whether a federal statute is needed to address an issue that overlaps with local control and, if so, what its terms should be.

State legislatures, in contrast, do not primarily affect local authority by deciding whether to create a state crime. Most criminal laws that local prosecutors enforce, and every serious offense they enforce, are state crimes.⁹⁰ Differences between state and local prosecutions are therefore not based on the source of law being enforced. If state legislators wish to affect the state-local relationship, they must instead directly confront the question of whether to let local prosecutors enforce state laws exclusively or whether to give a state-level prosecutor concurrent or exclusive jurisdiction. Most states face no constitutional limitations on their ability to allocate power to state-level, as opposed to local-level, prosecutors.⁹¹ States, like the federal government, face the same issues in terms of deciding between exclusive and concurrent jurisdiction. Exclusive jurisdiction would mean states would have to expand their law enforcement budgets and resources, which would similarly raise political issues with local jurisdictions to the extent the areas were viewed as traditionally local matters. As a consequence, like the federal government, states tend to opt for concurrent jurisdiction when state-level actors are given authority at all, except for some limited areas of specialized regulatory crimes.

89. See Gorelick & Litman, *supra* note 68, at 973 (observing that Congress passes new laws with the expectation that federal prosecutors will exercise their discretion about when to intervene in areas where states have concurrent jurisdiction).

Although some commentators have raised the possibility of enforcing federal laws in state courts to address concerns about strained federal judicial resources, Beale, *supra* note 3, at 1010–14, the Supreme Court's decision in *Printz* forecloses any option that would mandate state prosecutors to bring those actions.

90. 6 EUGENE MCQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS*, § 23.6 (3d ed. 2007); see Briffault, *supra* note 71, at 1343 (“[E]ven under the most generous definitions of home rule, local governments lack power . . . to define and punish serious crimes.”). For a discussion of the scope of local criminal laws, see, for example, Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1423–35 (2001).

91. Barron, *supra* note 70, at 392 (“There are few, if any, matters of concern to state residents that, as a formal legal matter, the state legislature would be barred from addressing because of the need to respect the rights to self-government of local communities.”).

It is important to note that, at the state level, a preference for local enforcement⁹² is a conscious choice,⁹³ not a dictate of state constitutional law.⁹⁴ Thus, because the question for state legislators is an explicit question of institutional allocation and they typically have freedom to make that decision however they think best, it is more likely that state legislators will focus on the institutional advantages and disadvantages of each actor than federal legislators will. That makes the state experience all the more informative for those interested in striking the right balance between federal and local allocation of power because the framework in the states is more likely to have been developed with direct attention to the question of enforcement allocation.

In addition, to the extent the question is whether to give a centralized actor the discretion to intervene with concurrent jurisdiction, states are still facing a somewhat different set of enforcement choices than the federal government because state-level prosecutors are more independent than their federal counterparts. Whereas the attorney general of the United States is appointed and removable by the president and serves his law enforcement agenda,⁹⁵ almost all state attorneys general are separately elected from the governor and may not even be a member of the same party as the governor.⁹⁶ Thus, while Congress has to decide whether it trusts giving the president's appointee control over a criminal justice issue rather than letting that issue remain within state control, state legislatures typically must decide which of two independently elected prosecutors it would prefer to enforce existing

92. See *infra* Part III.

93. Barron, *supra* note 70, at 390–91 (“[S]tate legislatures possess the formal legal power to delegate large swaths of authority to their local governments or to withhold such powers from them as the legislatures choose.”).

94. Even when localities enjoy state constitutional grants of authority, that power is often subject to revision by the state or is easily overruled. See Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 *YALE L.J.* 2542, 2558 (2006) (“[A]uthority that cities exercise is almost always . . . subject to revision [and] . . . [s]tate legislatures have been aggressive in overruling local decisions with which they do not agree.”).

95. The attorney general also has a duty to uphold the rule of law, regardless of the president's agenda. NANCY V. BAKER, *CONFLICTING LOYALTIES* 2–4 (1992); Green & Zacharias, *supra* note 27, at 191–92.

96. The governor appoints the attorney general in five states: Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming. Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 *REV. POL.* 525, 530 (1994); see *infra* Part II. The attorney general is a member of the governor's cabinet in Florida, Michigan, and Arizona, but is independently elected. The attorney general and governor of these states are not required to be on the same ticket or even be members of the same party, creating inevitable conflicts which have led scholars to debate the efficacy of these plural executives. Compare Michael Hoover, *Turn Your Radio On: Brailey Odham's 1952 "Talkathon" Campaign for Florida Governor*, 66 *THE HISTORIAN* 701, 706 n.19 (2004) (“[Florida's] plural executive system is considered a weak form of government because . . . [t]he governor must depend on the will of a potentially independent cabinet to administer effectively.”), with Daniel Webster & Donald L. Bell, *First Principles for Constitution Revision*, 22 *NOVA L. REV.* 391, 417–18 (1997) (noting that a cabinet of independently elected officers who may be political opponents has vexed many governors, but “provides some worthwhile protection for the people”).

state laws: locally elected prosecutors or a prosecutor chosen in a statewide election.

Consider first Congress's choice about whether to delegate to a federal prosecutor. As a general matter, Congress is more likely to delegate power to an executive agency or official when the same political party controls the executive and the legislature.⁹⁷ Under this traditional view, one might think Congress would prefer to leave matters with the states and local prosecutors if the alternative would be passing a law that would end up being enforced by a presidential appointee of a different party. But this general framework for thinking about delegation is inapplicable to questions of criminal law. Members of Congress have little to gain from leaving things as they are—that is, with states and localities. In contrast, legislators typically benefit politically when they enact or expand federal criminal laws.⁹⁸ As Bill Stuntz has persuasively explained, the politics of criminal law are less about party affiliation because both parties share the same incentive to appear as tough as possible.⁹⁹ Thus, any delegation is a good delegation from Congress's perspective, because it benefits from the symbolic act of passing the law. As the past three decades prove, Congress is thus nearly always willing to accede to an executive request for a new, more expansive, or more punitive criminal law, regardless of whether the president is in the same party as the governing coalition in the legislature and no matter what the politics in the states. If the executive then exercises its discretion in an unpopular manner, the blame falls squarely on it, not the legislature.¹⁰⁰

The focus of blame on the executive branch holds true in criminal law in a way it does not in other regulatory contexts because the enforcer is rightly seen as the key decision maker. In other regulatory areas, Congress's role is more important than it is in criminal law because there are interest groups on both sides arguing about the substantive content of the law itself. In addition, whereas criminal procedure is dominated by constitutional rules, administrative procedure is largely a creature of legislative action. As a result, Congress can give regulated entities a greater or lesser role in how the agency shapes its policies.¹⁰¹ Again, that makes Congress a greater source of interest group attention in other contexts than in criminal law. In criminal law, the key decision maker is in the executive branch or, in the case of constitutional procedures, the courts. Thus, from Congress's perspective, the politics are always in favor of more criminal law, no matter what party holds

97. DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS* 131–33, 154–55 (1999).

98. Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. REV.* 715, 727–30 (2005).

99. Stuntz, *supra* note 11, at 529–33.

100. *Id.* at 548–50 (“[P]ublic displeasure toward overaggressive prosecution is more likely to be visited on the prosecutorial agent than on the legislative principal.”).

101. See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 *J.L. ECON. & ORG.* 93 (1992); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Va. L. REV.* 431, 443–44 (1989); McNollgast, *Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures*, 6 *J.L. ECON. & ORG.* (SPECIAL ISSUE) 307, 312 (1990).

the White House, because it reaps only benefits from such a decision and does not pay a price.

Now consider the politics of the state allocation decision. State legislatures, like Congress, have the same political incentives to create new and expansive crimes and increase penalties. But, unlike Congress, which has only federal prosecutors as a relevant enforcement option if it wants federal involvement at all, state legislatures have the choice of which actor within a state to give enforcement power. In most states, both the attorney general and local prosecutors are elected.¹⁰² State legislatures thus cannot control either option with appointment or removal, nor, for that matter, can the governor in most places.¹⁰³ Although the party affiliation of the state attorney general might give a legislature more or less control over general enforcement policy—or, if not control, at least some level of predictability—it is unclear whether party affiliation will end up making much of a difference. For starters, as noted, both parties tend to coalesce on criminal justice policy far more than they differ. Second, the choice is not a binary one between a single statewide prosecutor and a single local prosecutor. Rather, there are numerous local prosecutors in a state, each typically independently elected by his or her community. Thus, some local prosecutors will share the party affiliation of the state legislature and some will not. It is unclear how legislatures weigh that mix against a state attorney general's party affiliation. Certainly some state legislative representatives will push for local control in their district.¹⁰⁴ Third, the state attorney general is less likely to be a puppet of party sentiment than a controller of it, because the attorney general is often a leader in state party politics and an aspirant for even higher office.¹⁰⁵ Finally, because the enforcement allocation decision tends to long outlast a prosecutor's term in office—because shifting policy as actors change with elections would create too much destabilization—it is less likely that legislators will make the decision based on the party affiliation of those in office at the time, unless those affiliations are relatively stable over time.

102. STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005 11 (2006) (data showing local prosecutors are elected in 47 states; 3 exceptions are Alaska, Connecticut, and New Jersey); Clayton, *supra* note 96, at 530 (noting that the attorney general is elected in 43 states).

103. In the few states that look like the federal model, the allocation of power between local and statewide prosecutors does not differ from the allocation of power in those states where the AG is elected separately or not a member of the governor's cabinet. *See infra* Part II.

104. Hills, *supra* note 77, at 213 (“[S]tate legislatures in the United States generally function as assemblies of ambassadors from the different local jurisdictions within the state [making them likely to] defer to each legislator on local matters within their own district.”).

105. Clayton, *supra* note 96, at 530 (“The office's election and tenure provides the attorney general autonomy to represent whatever positions he or she believes are in the public interest or are required by law, regardless of the preferences of the state's governor or legislature.”); Colin L. Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, PUBLIUS, Spring 2003, at 37, 40 (“[O]f the 166 attorneys general who served at least two years between 1980 and 1999, more than 70 ran for a governorship or a U.S. Senate seat [and] [a]nother 20 ran for or were appointed to a lower court seat, a federal agency post, or another position in state government.”).

All this suggests that the allocation decision for state legislatures is less likely to turn on the ability of the legislature to control the prosecutor than on other concerns. Fiscal concerns are likely at the top that list, which is another way in which state and federal politics differ. The states have more limited budgets than the federal government. This means that states may be more likely to cede control over criminal law enforcement to local prosecutors to keep those prosecutions funded by a local as opposed to statewide tax base.¹⁰⁶ The federal government may be comparatively more willing to foot the bill for federal prosecutors from the federal tax base because it is not responsible for the enforcement of most criminal laws, as the states are, and because prosecution expenses are such a small part of the federal budget.¹⁰⁷ From a comparative standpoint, scarcity alone does not dictate that decisions will be better or worse than those made with abundant resources, so the fact that states may seek to save money does not by itself make their decisions substantively better or worse than those made by a federal government with more resources.

But there are independent reasons to believe that state budget constraints are more conducive to rational decision making than decisions made in the shadow of the federal budget. As I have explained at greater length elsewhere, focusing on the costs as well as the benefits of criminal justice policies improves decision making because it allows the state to compare alternatives rationally, with an eye toward maximizing the social benefit from the money spent.¹⁰⁸ In addition, focusing on costs as part of a cost-benefit analysis can help check various cognitive biases that the public and politicians may share about criminal justice policy, including a tendency to overestimate the frequency and intensity of particular types of violent crimes and a preference for short-term solutions, like incarceration, that may not always yield the most effective long-term results.¹⁰⁹ In the current political climate, “[t]here is only one reason for legislatures to hesitate to pass [ever harsher and broader criminal laws]: cost.”¹¹⁰ Considering the costs of enforcement and punitive strategies as well as their benefits can thus serve a valuable disciplining function, improve deliberation, and help increase the likelihood that the state adopts a course that will yield the greatest enforcement benefits.¹¹¹ To the extent that cost decisions are driving state allocation decisions, then, those decisions may prove to be highly informative.

106. Barron, *supra* note 70, at 393–94 (explaining that local taxing authority is one reason for local power). Most local prosecutors receive the bulk of their funding from local sources. Perry, *supra* note 102, at 4 (“[H]alf of all [local prosecutors’] offices received at least 82% of their funds for prosecutorial functions from the county government . . . [and] [a]bout 32% of offices relied exclusively on the county for their budget.”).

107. Barkow, *supra* note 8, at 1301.

108. *See id.* at 1291–92.

109. *See id.* at 1293–94.

110. William J. Stuntz, Bordenkircher v. Hayes: *Plea Bargaining and the Decline of the Rule of Law*, in *CRIMINAL PROCEDURE STORIES* 351, 377 (Carol S. Steiker ed., 2006).

111. *See* Barkow, *supra* note 8, at 1294–97.

Moreover, state governments must pay the prison costs for all defendants, regardless of whether those defendants are prosecuted by a local prosecutor or a state appointee.¹¹² So, even if states save money in prosecution and policing costs by giving prosecution power to localities, they have to weigh that savings against the fact that they lose direct control over prison costs.¹¹³ Because prison costs are a significant portion of state budgets,¹¹⁴ states have incentives to make sure that those prison resources are being used effectively. In turn, that means that states should pay some attention to whether local or state officials are superior at prioritizing crimes. If states are uniformly deciding that local actors are better suited to make those judgment calls, that lends support to the idea that whatever benefits are had by centralization, they are not worth the corresponding costs. If, in contrast, states are deciding that centralization is appropriate, that, too is likely to be based on a weighing of the advantages and disadvantages of centralized versus local authority. Either way, the state approach offers a valuable perspective that can inform the federalism question in a way that is currently missing from the existing debate, because Congress is unlikely to be seriously addressing any of these issues.

In addition, it is important to remember what federal legislators are deciding to do with their larger budgets. They are not creating federal prosecutors' offices that are anywhere near large enough to enforce adequately all existing federal laws—including laws dealing with common offenses like theft, fraud, robbery, narcotics trafficking, and weapons possession and use.¹¹⁵ And Congress is certainly not funding a full-scale federal police force. On the contrary, the scheme established at the federal level is, relatively speaking, sparse.¹¹⁶ There are over six times as many state and

112. Because most states leave prosecutorial power with local communities, "local prosecutors effectively dictate the level of spending that the state legislature must maintain." Misner, *supra* note 6, at 720.

113. JOSEPH DILLON DAVEY, *THE POLITICS OF PRISON EXPANSION* 83 (1998) ("[L]ocally elected prosecutors . . . have little or no concern about how [state] prisons are funded.").

114. Spending on corrections has increased at a faster rate than spending in any other area, including other law enforcement costs such as police and courts. Barkow, *supra* note 8, at 1287 & n.49; Misner, *supra* note 6, at 726.

115. There are approximately 5,300 prosecutors in the U.S. attorneys' offices around the country to police those 4,000-plus criminal laws. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T. OF JUSTICE, RESOURCE MANAGEMENT OF UNITED STATES ATTORNEYS' OFFICES: AUDIT REPORT 09-03 1 (2008), available at <http://www.justice.gov/oig/reports/EOUSA/a0903/final.pdf>. To give a sense of perspective, New York City alone has 1,727 prosecutors. Richman, *supra* note 25, at 2088. A single federal law like the Hobbs Act covers by its terms just about any holdup of a business, so Congress hardly expects full enforcement but rather highly selective decisions by federal prosecutors. Gorelick & Litman, *supra* note 68, at 973.

116. In fiscal year 2003, the federal government spent approximately \$20 million on police protection, as compared to \$11 million by the states and nearly \$58 million by local governments. KRISTEN A. HUGHES, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES: 2003, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jeeus03.pdf>. In this respect, then, Congress and state legislatures are similar. Neither is taking on broad-scale enforcement responsibility. See Schragger, *supra* note 94, at 2563-64 ("State and federal officials intervene fairly regularly in local affairs but rarely to take on the baseline social

local police employees as federal.¹¹⁷ And local prosecutors outnumber federal prosecutors by a five-to-one ratio.¹¹⁸ As a result, the best federal prosecutors can do—and all Congress can reasonably expect them to do—is cherry-pick cases that would otherwise go to local enforcement without ever hoping to cover anything close to all or even a significant proportion of those cases covered by federal law.¹¹⁹

States could adopt a similar scheme to the federal one in terms of having a central authority selectively target only certain cases. Indeed, in most states, they could do it right now with the existing personnel in attorney general offices, because it is a regime that is heavier on symbolic-message cases than it is on practical, large-scale enforcement. Thus, states could provide that state-level prosecutors could bring actions under any state law at their discretion and trust state prosecutors to choose when to do that given existing resources. States often have highly sophisticated investigative bureaus within their AG offices,¹²⁰ so those investigators could provide state-level prosecutors with support similar to that provided to federal prosecutors by the FBI. Thus, whether or not states opt to follow the federal model can offer some indication of its wisdom. If states are choosing to spend their law enforcement funds elsewhere, that, too, is valuable comparative data for thinking about the federal system because states have the capacity for this same scheme.

In sum, because states face the same basic questions about local control over crime as the federal government and have greater incentives to maximize the use of their crime-fighting resources, looking at state practice offers a valuable comparative perspective for analyzing questions of federalism.¹²¹ In addition, to the extent state legislatures and Congress face different issues because of different institutional options or political dynamics, it is possible to evaluate those dynamics to determine whether, in an ideal world, we would want those to be the driving factors of the institutional allocation decision or whether, in fact, we would prefer to have the decision made on other grounds reaching different conclusions. Either way, there is a wealth of information to be had by looking at the states.

welfare responsibilities of tax-base-dependent local governments.”); Stuntz, *supra* note 3, at 2014 (noting that local governments pay 90 percent of the costs of local policing).

117. HUGHES, *supra* note 116, at tbl.5 (noting 156,607 federal police protection employees, compared to 105,933 employed by state governments and 856,396 by localities). *Id.* at tbl.3.

118. Stuntz, *supra* note 3, at 2028.

119. TASK FORCE, *supra* note 10, at 18 (“[I]n practice federal law enforcement can only reach a small percent [of violent crime.]”); Gorelick & Litman, *supra* note 68, at 976 (“It is Congress’s expectation that only a tiny fraction of the conduct falling under such statutes will be prosecuted federally.”); Richman, *supra* note 25, at 2089–90 (“[The federal system] has long been characterized by extraordinarily broad substantive statutes enforced by a relatively small bureaucracy that can pick and choose among possible targets.”).

120. NAT’L ASS’N ATTORNEYS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 307–08 (Emily Myers & Lynne Ross eds., 2d ed. 2007). Some states give the attorney general supervisory authority over the state police as well. *Id.* at 306–07.

121. See Barron, *supra* note 70, at 381.

II. THE ALLOCATION OF LAW ENFORCEMENT WITHIN THE STATES

Because state practice can offer insights into the question of when federal law enforcement is appropriate, this Part looks at how the states divide responsibility between state and local prosecutors. Section II.A begins with a discussion of the methodology used to obtain intrastate allocation information. Section II.B then describes the dominant approach in most states of deferring to local actors. Section II.C provides a description of the few states that take an alternative view of a statewide prosecutor's function.

A. Methodology

Before turning to the substance of the findings, a description of the methodology is in order. Researching criminal law enforcement authority in all the states poses many problems. First, criminal law enforcement responsibility is often scattered across state codes, not limited to a section devoted to criminal law. Second, even if one accurately catalogs all the criminal laws on the books that describe which actor has the power to bring criminal charges, statutory law may not accurately reflect the law in practice because some laws are simply not enforced. Third, many state laws vest what appears to be broad residual authority in state attorneys general to prosecute crimes, either at the request of the governor or at the attorney general's discretion. But the only way to know how these laws operate in practice is to talk to the people who administer them.

The goal, then, is to make the survey of state practice as complete as possible without devoting so many years to the effort that information becomes out of date before it can be put to paper. In that vein, the research methodology here followed this basic framework: The first step was to look at state constitutions and codes for the stated criminal jurisdiction of attorneys general. Second, for those states with laws that were unclear in any respect about the allocation of responsibility between attorneys general and local prosecutors, the state's caselaw was consulted to determine if the judiciary resolved the issue. Third, each state attorney general's website was reviewed to determine how the office itself characterized its authority. Fourth, and finally, in any state where the attorney general's power was discretionary in any respect or where the law was otherwise uncertain, interviews were conducted with representatives from each AG's office to find out more about how the AG has exercised that authority. Relevant information was gathered for the first three steps from all 50 states. In states that delegate all authority to the attorney general, steps one through three produced a full accounting of state practice.¹²² In the remaining 47 states, some follow-up was necessary for clarification or to confirm what appeared to be the practice from the written materials. Of those states, 37 responded to requests for clarification or confirmation. Ten states did not respond to telephone requests for information about how author-

122. Those states were Alaska, Delaware, and Rhode Island.

ity was exercised in practice,¹²³ but in 5 of those states, the practice seems reasonably clear from the material obtained through the first three steps; interviews in those states were sought only to confirm, not to clarify, what appears to be the state practice.¹²⁴ Moreover, given the consistency in the 40 states where full information is available, it is reasonable to assume that the states with missing interview data follow that same general pattern, particularly because the statutes, caselaw, and public relations information from those states all point in the same direction as the vast majority of states where interviews were obtained.

Piecing together these sources thus creates a well-informed general impression of state- versus local-level jurisdiction within a state, even if some individual cases or narrow categories of criminal law enforcement are overlooked or if survey data from a handful of states is absent.

B. *The Consensus in the States*

What stands out most in looking at state practice is the remarkable degree of uniformity. In almost every state, a conscious choice has been made to defer to local prosecutors. States have centralized authority in a statewide prosecutor in a handful of areas, and there is remarkable overlap among the states in terms of the content of those areas. But outside these contexts, local prosecutors are responsible for the vast bulk of criminal law enforcement within a state. And these local prosecutors are operating in most states with little centralized supervision by a state-level actor.¹²⁵

1. *The Limited Jurisdiction of State-Level Prosecutors*

Most states vest state-level prosecutors—typically the attorney general—with exclusive or concurrent jurisdiction over just a handful of areas that repeat themselves in state after state. This Section provides an overview of those crimes that are often handled by state-level prosecutors.¹²⁶

123. The states that did not return calls for additional information were Maryland, Michigan, New Mexico, North Dakota, Oklahoma, Pennsylvania, Texas, Utah, Vermont, and Wisconsin.

124. The written materials from New Mexico, North Dakota, Pennsylvania, Texas, and Wisconsin are quite specific about how the practice works in those states. For example, in Texas, according to a state case from 1996, “the attorney general has no authority to initiate criminal prosecutions.” *Lone Starr Multi Theatres, Inc. v. Texas*, 922 S.W.2d 295, 298 (Tex. Ct. App. 1996). The New Mexico AG’s website explains that “[p]rimary jurisdiction for the majority of crimes lies with the local District Attorney” and that only “[o]n occasion” does a DA send a case to the AG’s office. *Prosecutions FAQ*, OFF. N.M. ATT’Y GEN., <http://www.nmag.gov/office/Divisions/Pros/faq.aspx#> (last visited Sept. 1, 2010). Thus, while confirmation through an interview with someone familiar with the practice on the ground would have been helpful, the written materials that are available provide a fairly vivid picture of how things are working.

125. Criminal law thus mirrors what one sees in general across subjects: states are “far more likely to devolve power to elected local officials” than the federal government is. Hills, *supra* note 77, at 210, 213.

126. This is not exclusive, of course. Some states give their state-level prosecutors additional jurisdiction in isolated areas. In Arizona, for example, the attorney general has the authority to prosecute and enforce transportation code violations and fraud in Indian crafts. ARIZ. REV. STAT. ANN.

a. Public Corruption and Election Fraud

States uniformly view public corruption, including local corruption, as an area that demands attention from a state-level officer to avoid both actual and perceived conflicts of interest.¹²⁷ States also frequently give state-level prosecutors authority over the related areas of voter and election fraud.¹²⁸ Just as public corruption has statewide ramifications and is often poorly prosecuted at the local level, voter and election fraud also present distinctly statewide concerns.

b. Benefits Fraud

State-level prosecutors handle federal benefits fraud claims in forty-nine states.¹²⁹ Uniformity in this context is prompted by federal law, which

§§ 28-333, 28-5923(B), 44-1231.03(A) (2002). Hawaii's attorney general can bring criminal actions when there is an artificial shortage of petroleum products. HAW. REV. STAT. § 486H-17 (2008). The Illinois attorney general may be requested to initiate criminal prosecutions for violations of the Illinois Archaeological and Paleontological Resources Protection Act. 20 ILL. COMP. STAT. 3435/3.1 (2008). The Missouri attorney general is authorized to prosecute criminal gambling violations. MO. REV. STAT. § 313.830.7 (2000). New Jersey allows the attorney general to initiate terrorism prosecutions, N.J. STAT. ANN. § 2C:38-2(e) (West 2001), as does South Carolina, S.C. CODE ANN. § 14-7-1630(A)(6), -1630(B) (2009). The goal here is not to create a comprehensive catalog, but to document the common areas seen across vast numbers of states.

127. In state attorney general offices, public corruption units or other mechanisms for vesting control over local corruption are common. *See, e.g.*, ME. REV. STAT. ANN. tit. 5, § 200-A (2009); OKLA. STAT. tit. 74, § 223 (2001); 71 PA. CONS. STAT. § 732-205(a)(1) (1990); S.C. CODE ANN. § 14-7-1630(A)(3) (1976); WYO. STAT. ANN. § 9-1-605 (2010); William H. Pryor, Jr., *A Report from the State's Law Firm*, 62 ALA. LAW. 264, 267 (2001); Telephone Interview by Sam Raymond with Jon Fussner, Senior Assistant Attorney Gen., Or. (June 11, 2009); Telephone Interview with Stan Alexander, Assistant Attorney Gen., Miss. Attorney Gen.'s Office (June 18, 2009); *About the Office*, OFFICIAL WEBSITE ATT'Y GEN. MASS., <http://www.mass.gov/?pageID=cagohomepage&L=1&L0=Home&sid=Cago> (follow "About the Office" hyperlink) (last visited Oct. 9, 2010); *About the Public Integrity Bureau*, N.Y. OFF. ATT'Y GEN., <http://www.ag.ny.gov> (follow "Our Office" hyperlink; then follow "Public Integrity Bureau" hyperlink) (last visited Sept. 1, 2010); *AG-Crime & Victims*, OFF. ATT'Y GEN., http://www.michigan.gov/ag/0,1607,7-164-17334_18113---,00.html (last visited Oct. 9, 2010); *Attorney General's Public Integrity Unit*, OFF. NEV. ATT'Y GEN., <http://ag.state.nv.us/integrity/integrity.htm>; *Criminal*, ARIZ. ATT'Y GEN. TERRY GODDARD, <http://www.azag.gov/Criminal> (last visited Sept. 1, 2010); *Criminal Division*, OFF. LA. ATT'Y GEN. <http://www.ag.state.la.us/Article.aspx?articleID=6&catID=0#> (last visited Oct. 9, 2010); *Protecting Public Integrity*, ST. CONN. DIVISION CRIM. JUST., <http://www.ct.gov/csa/cwp/view.asp?a=1798&q=285770> (last visited Sept. 1, 2010); *Public Corruption*, OFF. ATT'Y GEN. GA., <http://law.ga.gov/02/ago/home/0,2705,87670814,00.html> (follow "Crime and Crime Victims" tab; then follow "Public Corruption" hyperlink) (last visited Sept. 1, 2010); *Public Integrity & Special Investigations Branch*, KY: ATT'Y GEN. JACK CONWAY, <http://ag.ky.gov/criminal/dci/special/> (last visited Sept. 1, 2010); *Special Prosecutions*, KY: ATT'Y GEN. JACK CONWAY, <http://ag.ky.gov/criminal/special.htm> (last visited Sept. 1, 2010).

128. ARIZ. REV. STAT. ANN. § 16-1021 (2006); 15 ILL. COMP. STAT. 205/4 (2008); N.H. REV. STAT. ANN. § 7:6-c (2003); N.M. STAT. ANN. § 1-19-36 (2009); N.Y. EXEC. LAW § 70 (McKinney 2010); OHIO REV. CODE ANN. § 109.95 (LexisNexis 2007); S.C. CODE ANN. § 14-7-1630(A)(4)(2009); TEX. ELEC. CODE ANN. § 273.021 (West 2010); UTAH CODE ANN. §§ 20A-7-213, -312 (LexisNexis 2010); VA. CODE ANN. § 2.2-511(A) (2010); Pryor, *supra* note 127, at 267 (explaining that the Alabama attorney general's office maintains a public corruption section to prosecute election fraud cases); *Attorney General's Public Integrity Unit*, NEV. ATT'Y GEN., <http://ag.state.nv.us/integrity/integrity.htm> (last visited Oct. 9, 2010).

129. DANIEL R. LEVINSON, DEP'T OF HEALTH AND HUMAN SERVS., STATE MEDICAID FRAUD CONTROL UNITS: ANNUAL REPORT: FISCAL YEAR 2007, available at <http://oig.hhs.gov/>

requires states to operate Medicaid fraud control units unless they receive a waiver from the federal government.¹³⁰ The federal government funds 75 percent of the operating costs of these units, with the states contributing the other 25 percent.¹³¹ In addition to bringing fraud cases, these units handle claims of patient abuse and neglect, so charges can go beyond fraud, embezzlement, false claims, and the like to include crimes such as negligent homicide and sexual abuse.¹³² State-level prosecutors in many states also handle others types of benefit fraud, such as welfare fraud¹³³ and workers' compensation fraud.¹³⁴

c. Regulatory Crimes

State-level prosecutors typically have the authority to pursue regulatory crimes. Although states vary in the precise mix, most states have a state-level prosecutorial unit that prosecutes environmental crimes.¹³⁵

publications/docs/mfcu/mfcu_2007.pdf. North Dakota is the exception. Stephen M. Blank et al., *Health Care Fraud*, 46 AM. CRIM. L. REV. 701, 757 n.424 (2009).

130. Most states (forty-three) have placed these units within their attorney general's office, but six states place them within some other state agency. LEVINSON, *supra* note 129, summary.

131. *Id.* at 1. The states and federal government share any money that is recovered from Medicaid fraud investigations. Blank, *supra* note 129, at 757.

132. See LEVINSON, *supra* note 129, at 4–11 (describing homicide, sexual abuse, and other charges brought in Medicaid fraud control unit investigations); Blank et al., *supra* note 129, at 757 (stating Medicaid fraud control units may prosecute abuse and neglect claims against certain facilities).

133. See, e.g., *About the Office*, OFFICIAL WEBSITE ATT'Y GEN. MASS., *supra* note 127; *AG—Criminal Justice Bureau*, OFF. ATT'Y GEN., <http://www.michigan.gov/ag/0,1607,7-164-19441-60568--,00.html> (last visited Aug. 20, 2010); *Criminal Justice Division*, UTAH OFF. ATT'Y GEN., <http://attorneygeneral.utah.gov/criminaljustice.html> (last visited Aug. 20, 2010).

134. See, e.g., IDAHO CODE ANN. § 72-518 (2006); N.Y. WORKERS' COMP. LAW § 132(1) (McKinney 2006); OHIO REV. CODE ANN. § 109.84(B) (LexisNexis 2007); *AG—Criminal Justice Bureau*, OFF. ATT'Y GEN., *supra* note 133 (Michigan); *Insurance Fraud Support Unit*, OFF. LA. ATT'Y GEN., <http://www.ag.state.la.us> (follow "Programs" hyperlink; then follow "Crime" hyperlink; then follow "Insurance Fraud Support Unit" hyperlink) (last visited Aug. 20, 2010); *Workers' Compensation Fraud Unit*, NEV. ATT'Y GEN., <http://ag.state.nv.us> (follow "Office Organization" hyperlink; then follow "Bureau of Criminal Justice" hyperlink; then follow "Workers' Compensation Fraud Unit" hyperlink) (last visited Aug. 20, 2010).

135. See, e.g., ARIZ. REV. STAT. ANN. §§ 49-263, -926 (2005); Pryor, *supra* note 127, at 266 (describing the duties and projects of the Alabama attorney general's Environmental Division); IDAHO CODE ANN. §§ 39-109 (2002); 415 ILL. COMP. STAT. 5/44(m) (2008); IOWA CODE ANN. § 455B.112 (West 1997); N.Y. ENVTL. CONSERV. LAW §§ 71-1933(10), -2105(3) (McKinney 1997); N.D. CENT. CODE § 32-40-05 (2010); OKLA. STAT. tit. 27A, § 2-3-504(E) (2001); *About the Office*, OFFICIAL WEBSITE ATT'Y GEN. MASS., *supra* note 127; *About the Office: Public Protection Department*, ARK. ATT'Y GEN. DUSTIN MCDANIEL, http://www.ag.arkansas.gov/about_office_what_we_do_public_protection_department.html (last visited Aug. 20, 2010); *AG—Crime & Victims*, OFF. ATT'Y GEN., *supra* note 127 (Michigan); *Criminal Division*, OFF. LA. ATT'Y GEN., *supra* note 127; *Environmental Crimes Bureau*, OFF. N.J. ATT'Y GEN., <http://www.njdcj.org/ecb.htm> (last visited Sept. 3, 2010); *Environmental Enforcement*, OHIO ATT'Y GEN., <http://www.ohioattorneygeneral.gov/About/Sections/Environmental-Enforcement> (last visited Sept. 3, 2010); *Protecting the Environment*, MD. ATT'Y GEN., <http://www.oag.state.md.us/lawenforcement.htm> (last visited Sept. 3, 2010); *Role of the Office of the Attorney General*, VIRGINIA.GOV, http://www.oag.state.va.us/OUR_OFFICE/Role.html (last visited Sept. 3, 2010); *Special Prosecutions Unit*, COLO. ST. ATT'Y GEN.,

In addition, state-level prosecutors typically handle business and white collar crimes, including antitrust and sometimes securities violations, either exclusively or concurrently with local prosecutors.¹³⁶ Many state AGs are also responsible for prosecuting criminal tax violations¹³⁷

<http://www.coloradoattorneygeneral.gov> (follow “Departments” hyperlink; then follow “Special Prosecutions Unit” hyperlink) (last visited Sept. 3, 2010).

136. See, e.g., COLO. REV. STAT. § 11-51-603 (2009) (giving both state attorney general and district attorney authority to prosecute securities violations); HAW. REV. STAT. §§ 417E-9(b), 480-20(a), 485A-508 (2004) (vesting authority in the Hawaii attorney general to bring criminal actions dealing with corporate takeover law, criminal and civil antitrust actions, and criminal actions for fraud under the state securities act); IDAHO CODE ANN. § 30-14-508(g) (2004) (allowing the Idaho attorney general to prosecute under state securities fraud law); 740 ILL. COMP. STAT. 10/6 (2008) (vesting the Illinois attorney general with concurrent authority to bring criminal antitrust actions); IND. CODE § 24-1-2-5 (1998) (granting the Indiana attorney general authority to bring antitrust actions); IOWA CODE ANN. § 502.508(2) (West 2008) (giving the Iowa attorney general authority to bring securities fraud cases); KAN. STAT. ANN. § 17-12a508(c) (West 2007) (vesting the Kansas attorney general with power to bring criminal actions under state securities act); ME. REV. STAT. ANN. tit. 10, § 1107 (2009) (Maine attorney general is responsible for prosecuting unlawful restraints of trade); MD. CODE ANN., COM. LAW § 11-207 (LexisNexis 2005) (Maryland attorney general can prosecute antitrust violations); MISS. CODE ANN. § 7-5-54 (2009) (Mississippi attorney general has jurisdiction over white collar crimes); MO. REV. STAT. § 416.051(2) (2000) (Missouri attorney general has jurisdiction over antitrust cases); NEB. REV. STAT. § 84-211, 212 (2008) (Nebraska attorney general has power over antitrust matters); N.H. REV. STAT. ANN. § 21-M:9 (2000) (New Hampshire attorney general can bring criminal action to redress unfair or deceptive trade practices); N.M. STAT. ANN. § 57-1-10 (2000) (New Mexico attorney general has authority for antitrust enforcement); N.Y. GEN. BUS. LAW §§ 342-b, 358 (McKinney 1996) (New York attorney general is given authority to bring antitrust and securities prosecutions in New York); OKLA. STAT. tit. 79, § 206(B) (2001) (Oklahoma attorney general can bring criminal actions under state antitrust law); S.C. CODE ANN. § 14-7-1630(A)(7) (Supp. 2009); TEX. REV. CIV. STAT. CODE ANN. § 581-3 (West 2009); UTAH CODE ANN. § 61-1-21.5 (LexisNexis 2010) (Utah attorney general has concurrent jurisdiction to bring actions under state securities act); *About the Office*, ARIZ. ATT’Y GEN. TERRY GODDARD, <http://www.azag.gov/AboutOffice/#CRM> (last visited Sept. 3, 2010) (explaining that the attorney general’s office has jurisdiction over “white collar crime”); *Antitrust and Business Competition*, CAL. OFF. ATT’Y GEN., <http://ag.ca.gov/antitrust/> (last visited Sept. 3, 2010) (noting that the attorney general is responsible for civil and criminal antitrust enforcement); *Bureau of Criminal Justice*, NEV. ATT’Y GEN., <http://ag.state.nv.us/org/bcj/bcj.htm> (last visited Sept. 3, 2010) (describing Nevada attorney general’s securities fraud unit); *Career Opportunities: Division of Criminal Law*, CAL. OFF. ATT’Y GEN., <http://ag.ca.gov/careers/descriptions/crimlaw.php> (describing the special crimes unit that prosecutes “largescale, investment and financial frauds and those in which the elderly were targeted”); *Criminal Division*, OFF. LA. ATT’Y GEN., *supra* note 127; *Law Enforcement*, MD. ATT’Y GEN., <http://www.oag.state.md.us/lawenforcement.htm> (last visited Sept. 3, 2010) (noting that Maryland attorney general’s office has a unit dedicated to white collar crimes); *Criminal Division*, OFF. MICH. ATT’Y GEN., <http://www.michigan.gov/ag/> (follow “About the Office” hyperlink; then follow “Criminal Justice Bureau” hyperlink) (last visited Sept. 3, 2010) (noting that Michigan attorney general’s office handles criminal securities and fraud); *Fighting Crime and Fraud*, TENN. OFF. ATT’Y GEN. & REP., <http://www.tennessee.gov/attorneygeneral/crime/crime.html> (last visited Sept. 3, 2010) (“The Attorney General . . . exercises original prosecutorial powers in the areas of securities and state contract fraud.”); *Financial Crimes and Antitrust Bureau*, OFF. ATT’Y GEN., <http://www.njdcj.org/fincab.htm> (last visited Sept. 3, 2010) (noting that the New Jersey attorney general’s office has unit responsible for white collar and antitrust crime).

137. See, e.g., ARIZ. REV. STAT. ANN. § 42-1004(E) (2004); COLO. REV. STAT. ANN. § 24-35-112 (West 2009); 35 ILL. COMP. STAT. 130/16 (2008); IND. CODE § 6-3-6-11 (1998); IOWA CODE § 421.19 (2006); KAN. STAT. ANN. §§ 75-702, -5133 (1997); MINN. STAT. § 297E.13(6) (2007); N.Y. TAX LAW § 512(3) (McKinney 2006); OKLA. STAT. tit. 68, § 252(2) (2001); *Criminal Justice Division*, UTAH OFF. ATT’Y GEN., *supra* note 133; *Financial Crimes and Antitrust Bureau*, OFF. N.J. ATT’Y GEN., <http://www.njdcj.org/fincab.htm> (last visited Oct. 11, 2010).

and consumer fraud.¹³⁸ State AGs also enforce a host of other regulatory laws.¹³⁹

d. Conflicts

State AGs often have authority to step in when local prosecutors cannot handle a case because of a conflict.¹⁴⁰ In addition to general provisions

138. AG authority over consumer fraud may be exclusively civil in some jurisdictions, but others also have jurisdiction under criminal fraud statutes. *See, e.g.*, GA. CODE ANN. § 16-8-104 (2007) (authorizing the Georgia attorney general and district attorneys to prosecute cases of residential mortgage fraud); IDAHO CODE ANN. § 41-213(3) (2010) (establishing that the Idaho attorney general has concurrent authority with county attorneys over insurance fraud); NEV. REV. STAT. § 205.372 (2009) (authorizing the Nevada attorney general to prosecute mortgage lending fraud); OHIO REV. CODE ANN. § 1345.02(E)(3) (LexisNexis 2006) (authorizing the Ohio attorney general to initiate criminal prosecutions for consumer law violations if the local prosecuting attorney declines to prosecute or requests the attorney general to bring the case); OKLA. STAT. tit. 15, § 762(B) (2001) (establishing that the Oklahoma attorney general has “powers of a district attorney to investigate and prosecute suspected violations of consumer laws”); *About the Attorney General*, COLO. ST. ATT’Y GEN., http://www.coloradoattorneygeneral.gov/about_ag (last visited Sept. 3, 2010) (noting that the Colorado attorney general is responsible for enforcing consumer protection and antitrust laws); *Assisting Consumers*, KAN. ATT’Y GEN., <http://www.ksag.org/page/assisting-consumers> (last visited Sept. 3, 2010) (stating that the office is responsible for prosecuting violations of state consumer protection act); *Consumer Protection*, N.D. ATT’Y GEN., <http://www.ag.state.nd.us/CPAT/CPAT.htm> (last visited Sept. 3, 2010) (explaining that North Dakota attorney general’s “Consumer Protection and Antitrust Division (CPAT) enforces the state’s consumer fraud laws”); *Division of Criminal Justice*, ST. N.J. OFF. ATT’Y GEN., <http://www.njdcj.org/fincab.htm> (last visited Sept. 3, 2010) (explaining that dedicated unit handles investment and consumer fraud); *Prosecutions FAQ*, OFF. N.M. ATT’Y GEN., *supra* note 124 (noting that the attorney general prosecutes pyramid scheme violations).

139. These include banking, *see, e.g.*, IDAHO CODE ANN. § 26-2247 (2000); OKLA. STAT. tit. 6, § 1414(C) (2001); insurance fraud, *see, e.g.*, *Criminal Justice Division*, UTAH OFF. ATT’Y GEN., *supra* note 133; *Insurance Fraud Unit*, NEV. ATT’Y GEN., <http://ag.state.nv.us/org/bcj/ifu/ifu.htm> (last visited Sept. 3, 2010); public utilities, *see, e.g.*, N.H. REV. STAT. ANN. § 365:43-4 (1984); food labeling, *see, e.g.*, N.M. STAT. ANN. § 25-2-7 (1978); and labor law, *see, e.g.*, N.Y. LAB. LAW § 214 (McKinney 2009). *See also* N.Y. EXEC. LAW § 63(3) (McKinney 2010) (giving New York’s attorney general authority to prosecute upon request by various state agencies).

140. *See, e.g.*, 71 PA. CONS. STAT. § 732-205(a)(3) (1990); S.C. CODE ANN. § 14-7-1650(C)(2) (West Supp. 2009); TENN. CODE ANN. § 8-6-112(a)(2) (West 2010); Telephone Interview by Sam Raymond with Chris Topmiller, Unit Chief Special Prosecutor’s Unit, Idaho Attorney Gen.’s Office (June 16, 2009); Telephone Interview by Sam Raymond with Darrel Mullins, Assistant Attorney Gen., Criminal Appeals Div., Iowa Attorney Gen.’s Office (June 11, 2009); Telephone Interview by Sam Raymond with David McLaughlin, Senior Assistant Attorney Gen., Special Prosecutor Unit, Ga. Dep’t of Law (June 8, 2009); Telephone Interview by Sam Raymond with Judy Fishburne, Supervising Legal Researcher, Nev. Attorney Gen.’s Office (June 12, 2009); Telephone Interview by Sam Raymond with Lee Davidson, Assistant Attorney Gen., Kan. Attorney Gen.’s Office (June 15, 2009); Telephone Interview by Sam Raymond with Michael Atterbury, Deputy Bureau Chief of the Trial Assistance Div., Ill. Attorney Gen.’s Office (June 16, 2009); Telephone Interview with Frank Brindisi, Assistant Attorney Gen., La. (Jan. 29, 2009); Telephone Interview with Alexander, *supra* note 127; Telephone Interview with Jason Tran, Deputy Attorney General, Cal. Off. of the Attorney Gen. (June 3, 2009); *About the Office*, ARIZ. ATT’Y GEN. TERRY GODDARD, *supra* note 136; *Crime and Safety*, WASH. ST. OFF. ATT’Y GEN., <http://www.atg.wa.gov/page.aspx?ID=2332> (last visited Oct. 10, 2010); *Criminal Justice Division*, UTAH OFF. ATT’Y GEN., *supra* note 133; *Kentucky Attorney General—Special prosecutions*, OFF. ATT’Y GEN., <http://ag.ky.gov/criminal/special.htm> (last visited Oct. 10, 2010); *Opinions and Law Resources*, MONT. DEP’T JUST., <http://www.doj.mt.gov/resources/default.asp> (last visited Oct. 10 2010); *Prosecutions Division*, N.M.A.G., <http://www.nmag.gov/office/Divisions/Pros/Default.aspx#> (last visited Oct. 10, 2010); *Working with prosecuting attorneys in Missouri*, MO. ATT’Y GEN., <http://ago.mo.gov/prosecutors.htm> (last visited Oct. 10, 2010).

allowing the state AG to bring cases when there is a conflict, specific statutes also seem to reflect this policy.¹⁴¹

2. *The Infrequent Exercise of Discretion to Intervene with Local Decision Making*

Some attorneys general have broader authority under state law to intervene in local prosecutions. This power stems from either the state AG's authority to indict cases that cross county or district lines or a more generalized grant of statutory authority to bring charges whenever the AG is of the view that it would be appropriate. Although both of these sources of power could be used as a basis for large-scale state AG involvement in local matters, just about every attorney general with this kind of broad discretionary power opts not to use it except in rare cases.

a. *Multi-Jurisdictional Crime*

Many states give a state-level prosecutor the authority to address crimes that cross county or district lines. This authority is analogous to the power federal prosecutors have under the Commerce Clause to address crimes that cross state lines. Congress and federal prosecutors have used the interstate dimensions of crime—no matter how tenuous—to enlarge federal prosecutorial power to cover traditionally local crimes.¹⁴²

State-level prosecutors, in contrast, are virtually unanimous in their view that multi-jurisdictional crime should be interpreted narrowly. With few exceptions,¹⁴³ state AGs tend not to take expansive views of their power to

141. In Louisiana, the AG can supersede local district attorneys "for cause," LA. CONST. art. IV, § 8, and in the rare cases in which this power has been used, it was because the local prosecutor was self-interested in the prosecution at issue, see Charles J. Yeager & Lee Hargrave, *The Power of the Attorney General To Supersede a District Attorney: Substance, Procedure & Ethics*, 51 LA. L. REV. 733, 745 (1991). In Indiana, the AG has concurrent jurisdiction with local prosecutors to bring an action when a sheriff is accused of failing to protect the life of a prisoner in the sheriff's custody. IND. CODE § 4-6-2-1.1(3) (1998). Because a local prosecutor's office may have a conflict of interest in bringing a case against a local sheriff, this law reflects the same basic policy of using state-level prosecutors because a conflict of interest could undermine proper enforcement of the law.

142. See, e.g., 18 U.S.C. § 844(i) (2006) (making arson a federal crime if the property set on fire is "any building, vehicle, or other real or personal property used in interstate or foreign commerce"); *id.* § 2119 (creating a federal crime of car jacking as long as the motor vehicle involved has "been transported, shipped, or received in interstate or foreign commerce"). The Senate passed a bill in 1994 that would have made it a federal crime to commit any crime with a handgun that crossed state lines, and if murder was committed with a gun that had crossed state lines, the bill would have authorized the death penalty. Beale, *supra* note 36, at 1649–50. As Judge Friendly observed, just because there is an element of a crime that crosses state lines does not mean that the crime itself is of federal interest. HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 58 (1973) ("Why should the federal government care if a Manhattan businessman takes his mistress to sleep with him in Greenwich, Connecticut, although it would not if the love-nest were in Port Chester, N.Y.?).

143. See *infra* Section II.C. Although I was unable to obtain an interview with someone in the Oklahoma attorney general's office, the website description of the MultiCounty Grand Jury indicates that it is used largely for public corruption. See *Office Sections*, OKLA. OFF. ATT'Y GEN., <http://www.oag.state.ok.us> (follow "Sections" hyperlink) (last visited Sept. 3, 2010). The South Carolina AG has authority to bring a range of crimes to the state grand jury, most of which involve

bring charges for crimes that cross jurisdictional boundaries. For example, California has a “Special Crimes Unit” that works with local prosecutors upon request in complex cases involving multi-jurisdictional activity. This can include “high-tech crimes where the scope and complexity of the offenses exceed the investigative and prosecutorial resources of local law enforcement.”¹⁴⁴ In Colorado, the state AG brings multi-jurisdictional organized crime cases when a state investigator brings the case to the AG’s attention, but even then the AG’s office first obtains consent from the local prosecutors in the jurisdictions affected by the crime.¹⁴⁵

In Illinois, the law vesting the state attorney general with the authority to convene a state grand jury in cases involving more than one county contains numerous limits on the exercise of that power. In addition to showing that the offense involves more than one county, the AG must also demonstrate that a county grand jury cannot effectively investigate and indict the case and either that all relevant state’s attorneys consent to the state grand jury or, if one or more state’s attorneys objects, that there is good cause for impaneling it.¹⁴⁶

New York’s law is similarly restrictive. The state has an organized crime task force that addresses organized crime activities “carried on either between two or more counties” or between a county in New York and another jurisdiction.¹⁴⁷ The task force includes a deputy, but the AG’s office cannot bring criminal charges without the approval of the governor and the appropriate district attorney.¹⁴⁸ So, for example, because the Manhattan district attorney typically does not consent, the AG lacks authority to bring any such cases involving Manhattan.

b. Broad Grants Exercised Sparingly

Some states give the AG the authority to prosecute any criminal case and leave it to the attorney general to decide whether to intervene. On

subject areas that are commonly within the jurisdiction of attorneys general in other states, such as election crimes, public corruption, securities crimes, and environmental crimes. S.C. CODE ANN. § 14-7-1630(A) (West Supp. 2009). But the attorney general of South Carolina also has jurisdiction over areas that are not typically brought by a state-level prosecutor in other states, including narcotics, criminal gang activity, terrorism, and false statements related to immigration. *Id.* The attorney general’s authority over drug crimes is directly tied to its multi-county nature. *Id.* § 14-7-1630(A)(1). The office brings a number of these cases, but that number varies depending on which counties are involved. Telephone Interview by Darryl Stein with Curtis Pauling, S.C. State Grand Jury Office (June 26, 2009). But as the Supreme Court of South Carolina has noted, “[I]t is a fact of common knowledge that the duty to actually prosecute criminal cases is performed primarily and almost exclusively by the solicitors in their respective circuits except in unusual cases or when the solicitors call upon the Attorney General for assistance.” *State ex rel. McLeod v. Snipes*, 223 S.E.2d 853, 855 (S.C. 1976).

144. *Career Opportunities: Division of Criminal Law*, CAL. OFF. ATT’Y GEN., *supra* note 136.

145. Telephone Interview by Sam Raymond with Rob Shapiro, First Assistant Attorney Gen. for Special Prosecutions, Colo. Attorney Gen.’s Office (June 11, 2009).

146. 725 ILL. COMP. STAT. 215/3 (2008). Circuit judges assess the AG’s claims. *Id.*

147. N.Y. EXEC. LAW § 70-a(1)(a) (McKinney 2010).

148. *Id.* § 70-a(7).

paper, this is a dramatic departure from the limited jurisdiction of state-level prosecutors in other states. In practice, there is typically little difference. Most state-level prosecutors who possess broad jurisdictional grants of power are exercising their discretion sparingly and with a focus on specific areas.¹⁴⁹

In California, the state constitution gives the AG “all the powers of a district attorney” to prosecute “[w]henever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county.”¹⁵⁰ Yet, even with this broad constitutional mandate, the AG in California limits herself to post-conviction proceedings, benefits fraud, and complex white collar and high-tech crimes.¹⁵¹

Similarly, in Nebraska, the AG has the authority to prosecute “any cause or matter, civil or criminal, in which the state may be a party or interested.”¹⁵² In practice, the AG does “not normally get involved unless requested” by a county attorney, which happens in large measure because county prosecutors are part-time and often need more resources.¹⁵³ Without such a request, it is “very, very rare” for the AG to step in when a local prosecutor has decided not to prosecute.¹⁵⁴

The Oregon AG may, when he or she “considers the public interest requires, with or without the concurrence of the district attorney, direct the county grand jury to convene for the investigation and consideration of such matters of a criminal nature as the Attorney General desires to submit to it.”¹⁵⁵ Despite having the legal power to act without approval from the dis-

149. Earlier studies of attorney general practice have similarly found that AGs rarely initiate or intervene in local prosecutions. THE NAT'L ASS'N OF ATTORNEYS GEN. COMM. ON THE OFFICE OF THE ATTORNEY GEN., POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL 107 (Oct. 1977) (“There is little statistical data on how frequently Attorneys General initiate prosecutions, but it appears that this power is infrequently exercised.”); Earl H. De Long, *Powers and Duties of the State Attorney-General in Criminal Prosecution*, 25 AM. INST. CRIM. L. & CRIMINOLOGY 358, 395 (1935) (“Although the attorney-generals of most of the forty-eight states are authorized to conduct criminal prosecutions . . . the extent of state participation in this phase of criminal law enforcement is negligible.”).

150. CAL. CONST. art. V, § 13.

151. See *Career Opportunities: Division of Criminal Law*, CAL. OFF. ATT'Y GEN., *supra* note 136 (showing that California attorney general's criminal division does not have a section with the responsibility to act as a district attorney to prosecute state laws that are being inadequately enforced).

152. NEB. REV. STAT. § 84-203 (2008); see also *id.* § 84-204 (“The Attorney General . . . shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties.”).

153. Telephone Interview with John Freudenberg, Criminal Bureau Chief, Neb. Attorney Gen.'s Office (June 2, 2009).

154. *Id.* One case where the AG did bring charges after the local prosecutor decided not to prosecute involved a twenty-eight-year-old who had sex with a thirteen-year-old girl and then married her. *Id.* It is noteworthy that state law requires the AG to create a child protection division, and that division is authorized to prosecute cases if a county attorney declines to do so. NEB. REV. STAT. § 84-205 (13) (2003).

155. OR. REV. STAT. § 180.070(2) (2009).

strict attorney, it is “extremely rare” and perhaps may never have been the case that the AG acted without the concurrence of the local prosecutor.¹⁵⁶

In South Dakota, the AG is authorized to bring criminal cases “when-ever in his judgment the welfare of the state demands.”¹⁵⁷ In practice, however, the South Dakota AG generally brings cases only when local prosecutors request assistance.¹⁵⁸

The Iowa AG likewise has the authority to prosecute cases “when, in the attorney general’s judgment, the interest of the state requires such action.”¹⁵⁹ But the Iowa AG typically uses this discretion when a local prosecutor refers the case, which happens “when the county attorney has a conflict of interest” or “when an especially serious or complicated case requires prosecution resources in addition to those already available in the county attorney’s office.”¹⁶⁰ The AG does take a more aggressive view of the state’s role in drug cases, with five state-level prosecutors responsible for bringing major methamphetamine drug cases,¹⁶¹ but otherwise the Iowa AG mainly follows the blueprint of most other states in terms of the areas in which she brings cases.¹⁶²

The Massachusetts AG similarly has broad authority to bring criminal charges, but in practice the office “focuses on cases that reflect the state-wide jurisdiction and areas of investigative and prosecutorial expertise not

156. Telephone Interview with Jon Fussner, *supra* note 127.

157. S.D. CODIFIED LAWS § 1-11-1(2) (2010); *see also id.* § 23-3-3 (“In any and all criminal proceedings in any and all courts of this state and in any county or part of the state, the attorney general shall have concurrent jurisdiction with the state’s attorney or state’s attorneys of the several counties of the state.”).

158. Sometimes the state’s division of criminal investigation will bring a case to the AG, and the AG will prosecute it, but more often, the AG will give the case to local prosecutors unless the case is a major one. Telephone Interview by Sam Raymond with Katie Hanson, Assistant Attorney Gen., S.D. (Aug. 14, 2009).

159. IOWA CODE § 13.2(1)(b) (2010).

160. *See Area Prosecutions Division*, OFF. ATT’Y GEN., http://www.iowa.gov/government/ag/fighting_crime/prosecuting_felony_offense.html (last visited Oct. 10, 2010) (listing cases “requiring specialized legal training” including “Medicaid fraud, violence against women, environmental crime, securities fraud, obscenity, correctional institution crime and tax crimes”).

161. *See New Summary of Attorney General’s Office Actions to Fight Meth*, OFF. ATT’Y GEN., http://www.iowa.gov/government/ag/fighting_crime/summary_fight_meth.html (last visited Oct. 10, 2010).

162. Similarly, although some states recognize that the AG possesses broad common law powers, the attorney general almost never uses those powers. For example, even though Arkansas recognizes such broad common law powers, *State ex rel. Williams v. Karston*, 187 S.W.2d 327, 329 (Ark. 1945), the attorney general does not exercise those powers to initiate prosecutions or intervene in the decisions of local prosecutors. Telephone Interview with Nicana Sherman, Assistant Attorney Gen., Ark. (Jan. 29, 2009) (noting that the AG’s office would not get involved with an ongoing local prosecution and that AG prosecutors might assist local prosecutors at their request but otherwise the AG does not initiate prosecutions except in specific categories of cases such as environmental, Medicare fraud, and business crimes). The Illinois AG also possesses common law powers, which include the authority to initiate prosecutions. *People v. Buffalo Confectionary Co.*, 401 N.E.2d 546, 549 (Ill. 1980). In practice, however, the AG brings cases in limited areas set out by statute, when local prosecutors request it, if there is a conflict with the local prosecutor, or if the case is particularly complex. Telephone Interview with Michael Atterbury, *supra* note 140.

addressed by other law enforcement offices, particularly in the protection of taxpayer funds and the integrity of governmental agencies.”¹⁶³

The New Jersey AG may “participate in” or “initiate” “any investigation, criminal action or proceeding,” whenever the AG is of the opinion that “the interests of the State will be furthered by so doing.”¹⁶⁴ The New Jersey AG seems to have been more willing to exercise this power than some of her counterparts in other states, using it to tackle organized crime and gangs.¹⁶⁵ But even with this somewhat more aggressive view of how discretionary authority should be used, the AG generally only exercises discretion to bring charges in major cases and will give cases to local prosecutors where there is less criminal activity than originally suspected.¹⁶⁶

Some states allow AGs to bring any type of criminal action as long as it is at the request of the governor,¹⁶⁷ one of the legislative branches,¹⁶⁸ or some other government official.¹⁶⁹ But these political officials have been no more willing to interfere with local prosecutors than state AGs. In Colorado, for example, the governor has requested the AG to bring a prosecution only once in ten years.¹⁷⁰ In Georgia, where the governor can

163. *About the Office*, OFFICIAL WEBSITE ATT’Y GEN. MASS., *supra* note 127.

164. N.J. STAT. ANN. § 52:17B-107 (West 2001).

165. Telephone Interview by Sam Raymond with John Quelch, Assistant Attorney Gen., Office of the N.J. Attorney Gen. (June 15, 2009).

166. *Id.* State AGs do not necessarily need broad discretionary authority to target organized violent crime. Many states have adopted a state version of the federal Racketeer Influenced and Corrupt Organization (“RICO”) Act, 18 U.S.C. §§ 1961–68 (2006), which targets enterprise criminality. See Russell D. Leblang, *Controlling Prosecutorial Discretion under State RICO*, 24 SUFFOLK U. L. REV. 79, 80 (1990) (noting that more than half the states have a comparable RICO statute); A. Laxmidas Sawkar, Note, *From the Mafia to Milking Cows: State RICO Act Expansion*, 41 ARIZ. L. REV. 1133, 1134 n.6 (1999) (citing thirty state RICO statutes). State RICO statutes could be used, like the federal RICO statute, to go after violent crimes by affiliated individuals. Neither my interviews nor a search of caselaw involving questions about state RICO prosecutions, however, revealed state RICO laws to be a widely employed source of criminal prosecution authority for state AGs outside areas already targeted by state-level prosecutors.

167. See, e.g., GA. CONST. art. V, § 3, ¶ 4; MD. CONST. art. V, § 3(a)(2); COLO. REV. STAT. § 24-31-101(1)(a) (2009); IDAHO CODE ANN. § 31-2227 (2006); OHIO REV. CODE ANN. § 109.02 (LexisNexis 2007) (governor can ask AG to prosecute a person who has been indicted).

168. See, e.g., MD. CONST. art. V, § 3(a)(2) (allowing the general assembly to direct a prosecution by law or joint resolution); KAN. STAT. ANN. § 75-702 (1997) (allowing the Kansas attorney general to prosecute “when required by the governor or either branch of the legislature”); WIS. STAT. ANN. § 165.25(1m) (West 2010) (providing that Wisconsin’s statewide department of justice will appear in criminal matters, including as prosecutor, “[i]f requested by the governor or either house of the legislature”).

169. In Kentucky, the AG can bring criminal cases when requested:

by the Governor, or by any of the courts or grand juries of the Commonwealth, or upon receiving a communication from a sheriff, mayor, or majority of a city legislative body stating that his participation in a given case is desirable to effect the administration of justice and the proper enforcement of the laws of the Commonwealth.

KY. REV. STAT. ANN. § 15.200(1) (LexisNexis 2008).

170. Telephone Interview with Rob Shapiro, *supra* note 145.

also request the AG to represent the state in any criminal case,¹⁷¹ the AG's office estimates that the governor requested AG involvement fewer than ten times in the past twelve years.¹⁷² Governors in Idaho,¹⁷³ Mississippi,¹⁷⁴ Missouri,¹⁷⁵ Ohio,¹⁷⁶ Virginia,¹⁷⁷ and Washington¹⁷⁸ have been similarly reluctant to use their power to request AG involvement in criminal matters.¹⁷⁹ In Kansas, either branch of the legislature or the governor can request that the AG prosecute an action, but this is seldom if ever done.¹⁸⁰ Instead, the AG typically intervenes only when a county attorney requests help because of a conflict of interest or because of insufficient resources to handle the case.¹⁸¹ In Kentucky, the governor, a mayor, a majority of a city legislative body, a court or grand jury,¹⁸² and local prosecutors can also request that the AG intervene in cases.¹⁸³ In practice, local prosecutors and judges are the ones who make these requests, not the governor, mayors, legislators, or sheriffs.¹⁸⁴ In Louisiana, the attorney general can institute or intervene in criminal proceedings or supersede the district attorney for cause with court

171. GA. CONST. art. V, § 3, ¶ 4.

172. Telephone Interview with David McLaughlin, *supra* note 140.

173. Telephone Interview with Chris Topmiller, *supra* note 140.

174. Telephone Interview with Stan Alexander, *supra* note 127.

175. Telephone Interview by Sam Raymond with Ted Bruce, Deputy Chief Counsel of the Pub. Safety Div., Mo. Attorney Gen.'s Office (June 11, 2009).

176. Telephone Interview with James Slagle, Chief of Criminal Justice Section, Ohio Attorney Gen.'s Office (July 15, 2009).

177. Telephone Interview by Sam Raymond with Patrick Dorgan, Dir. of Criminal Prosecutions and Enforcement Div., Va. Attorney Gen.'s Office (Aug. 14, 2009).

178. Telephone Interview by Sam Raymond with Sara Olson, Assistant Attorney Gen., Wash. (June 4, 2009).

179. For a discussion of the historical reluctance of New York governors to appoint special prosecutors to supersede district attorneys, see Lawrence T. Kurlander & Valerie Friedlander, *Perilous Executive Power—Perspective on Special Prosecutors in New York*, 16 HOFSTRA L. REV. 35, 49–52 (1987).

180. Telephone Interview with Lee Davidson, *supra* note 140.

181. *Id.* The Wisconsin Department of Justice, a statewide agency, is similarly authorized to bring charges in criminal matters upon request of the governor or either house of the legislature. WIS. STAT. ANN. § 165.25(1m) (West, Westlaw through 2009 Act 406). Although I was unable to interview anyone in this office, there is little evidence to suggest that this authority is exercised in Wisconsin to a greater extent than it is in other states that follow this framework. The Wisconsin department does have a "Division of Criminal Investigation" that investigates crimes "that are statewide in nature or importance," which the website identifies as arson, financial crimes, illegal gaming, computer crimes, drug trafficking, government corruption, and crimes against children. *Agency Division/Bureau Descriptions*, WIS. DEP'T JUST., <http://www.doj.state.wi.us/site/divs.asp> (last visited Sept. 9, 2010). The department will also assist local law enforcement at their request in homicide investigations and cases involving multi-jurisdictional fraud or theft. *Id.* But I did not find any indication that the department brings its own prosecutions without the request of local prosecutors or that the governor or either house of the legislature is requesting the department's involvement on a regular basis.

182. KY. REV. STAT. ANN. § 15.200(1) (LexisNexis 2009).

183. *Id.* § 15.190.

184. Telephone Interview by Sam Raymond with Tom Marshall, Assistant Attorney Gen. for Special Prosecution, Ky. Attorney Gen.'s Office (July 20, 2009).

authorization.¹⁸⁵ The AG in Louisiana has sought to use this authority rarely.¹⁸⁶ Instead, as elsewhere, the AG typically gets involved with local cases only with the district attorney's consent.¹⁸⁷

3. *The Limited Supervisory Authority of State-Level Prosecutors*

In most states, the relationship between state-level and local prosecutors is coordinate, not hierarchical, with the exception of appellate jurisdiction.

a. *No Hierarchical Relationship*

“[I]n practically all jurisdictions, either the constitution or laws of the state make the two offices separate and distinct, and vest in the prosecuting attorney certain powers, and impose upon him certain duties, which can neither be increased nor decreased by the attorney-general.”¹⁸⁸ Even in those states that have laws on the books that vest a state attorney general with supervisory powers, the relationship between local and state prosecutors is typically cooperative, and the AG in most places does not seek to centralize authority over prosecution.

In some states, this is because state courts have interpreted these provisions narrowly. For example, even though the California state constitution gives the AG “direct supervision over every district attorney,”¹⁸⁹ California courts have concluded that this “does not contemplate absolute control and direction.”¹⁹⁰ Hawaii is similar. Local prosecutors in Honolulu are authorized to “[p]rosecute offenses against the laws of the state under the authority of the attorney general.”¹⁹¹ But the Hawaii courts have interpreted that provision not to confer “power to usurp, at his sole discretion, the functions of the public prosecutor.”¹⁹² Instead, the AG in Hawaii can intervene in local prosecutions when it is “clearly apparent that compelling

185. LA. CONST. art. IV, § 8, cl. 2. The cause requirement requires the AG to show “a right or interest of the state is not being satisfactorily represented or asserted by a district attorney.” See Yeager & Hargrave, *supra* note 141, at 737–38 (quoting Lee Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 765, 835 (1977)).

186. Yeager & Hargrave, *supra* note 141, at 735 (noting that Louisiana’s attorney general has used this power only twice as of 1991).

187. LA. CONST. art. IV, § 8, cl. 2 (“[T]he attorney general shall have authority . . . upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case . . .”); Telephone Interview with Frank Brindisi, *supra* note 140. Similarly, in Tennessee, judges can appoint an attorney pro tempore under the constitution if a district attorney fails to prosecute according to the law, TENN. CONST. art. VI, § 5, but judges have not used this power. Telephone Interview by Sam Raymond with Mark Fulks, Senior Counsel for the Criminal Justice Div. of the Attorney Gen., Tenn. (Aug. 14, 2009).

188. *State v. Finch*, 280 P. 910, 912 (Kan. 1929).

189. CAL. CONST. art. V, § 13.

190. *People v. Brophy*, 120 P.2d 946, 953 (Cal. App. 2d 1942).

191. Revised Charter of Honolulu § 8-104(b) (2001).

192. *Amemiya v. Sapienza*, 629 P.2d 1126, 1129 (Haw. 1981).

public interests require”¹⁹³ it, a situation that has rarely been found by the AG because there are only four counties in the state, the AG believes they do a good job, and the AG is able to talk things through with local prosecutors whenever any issues arise.¹⁹⁴ The Idaho AG has statutory authority “[w]hen required by the public service, to repair to any county in the state and assist the prosecuting attorney thereof in the discharge of duties.”¹⁹⁵ The Idaho Supreme Court has interpreted this narrowly,¹⁹⁶ and the AG mainly uses this power in cases involving conflicts of interest by the local prosecutor or to support counties that are too small to bring complex cases on their own.¹⁹⁷ Likewise, in Nebraska, though the AG may “[e]xercise supervisory powers over all district attorneys of the state in all matters pertaining to the duties of their offices,”¹⁹⁸ the Nebraska Supreme Court has made clear that this “cannot sensibly be read as a grant of power to usurp the function of the district attorney.”¹⁹⁹ The Nebraska AG therefore intervenes in local actions only when there is a conflict of interest.²⁰⁰

Courts have taken a narrow view of statutory language that allows AGs to “assist” in local prosecutions “when, in [the AG’s] judgment, the interest of the people of the State requires it.”²⁰¹ The Illinois courts have held that this provision does not allow the AG “to take exclusive charge” of cases where the state attorney also has authority.²⁰² More importantly, the AG’s office itself has used this power in a limited fashion. The AG does not intervene in local prosecutions, but instead provides assistance upon request by local prosecutors and takes over when there is a conflict or the

193. *Id.* This includes a local prosecutor’s refusal to act when it “amounts to a serious dereliction of duty on his part, or where, in the unusual case, it would be highly improper for the public prosecutor and his deputies to act.” *Id.*

194. Telephone Interview with Bridget Holthus, Special Assistant to the Haw. Attorney Gen. (May 28, 2009).

195. IDAHO CODE ANN. § 67–1401(7) (2006).

196. *Newman v. Lance*, 922 P.2d 395, 399–400 (Idaho 1996). The version of this provision interpreted by the Idaho Supreme Court was even more favorable to broad AG authority than the law as it is currently written: the version in 1996 stated that the Idaho attorney general was allowed to “exercise supervisory powers over prosecuting attorneys in all matters pertaining to their duties.” *State v. Summer*, 76 P.3d 963, 968 (Idaho 2003) (quoting IDAHO CODE ANN. § 67–1401 (1996)). In 1998, the Idaho legislature omitted this provision, which the Idaho Supreme Court has observed “apparently reduc[es] the authority of the attorney general in relation to county prosecuting attorneys.” *Id.*

197. Telephone Interview with Chris Topmiller, *supra* note 140.

198. *Ryan v. Eighth Judicial Dist. Court*, 503 P.2d 842, 846 n.4 (Nev. 1972) (Mowbray, J., dissenting).

199. *Id.* at 844 (majority opinion).

200. Telephone Interview with Judy Fishburne, *supra* note 140.

201. 15 ILL. COMP. STAT. 205/4 (2009). The Illinois attorney general also has the duty to assist local prosecutors when they request it. *Id.*

202. *Illinois v. Dasaky*, 709 N.E.2d 635, 640 (Ill. App. Ct. 1999) (citing *People v. Buffalo Confectionary Co.*, 401 N.E.2d 546, 549 (Ill. 1980)).

matter is particularly complex.²⁰³ Indiana's law mirrors the law in Illinois.²⁰⁴ Just as its neighboring state uses this power sparingly, so does Indiana. The AG does not view itself as having a right to intervene in local judgments, but rather offers assistance when local prosecutors need it, particularly in complicated cases.²⁰⁵

In New Jersey, the AG "shall maintain a general supervision over said county prosecutors with a view to obtaining effective and uniform enforcement of the criminal laws throughout the State."²⁰⁶ The New Jersey Supreme Court has clarified that this does not mean that there is an "ordinary chain of command between the attorney-general and the county prosecutors," even though the AG does have the authority to "ensure the proper and efficient handling of the county prosecutors' 'criminal business.'"²⁰⁷ And, as a matter of practice, the New Jersey AG typically intervenes only in cases where there is a conflict of interest with the local prosecutor.²⁰⁸

The attorney general in Pennsylvania "may petition the court having jurisdiction over any criminal proceeding to permit the Attorney General to supersede the district attorney."²⁰⁹ But it is up to the judge whether to grant the petition, and the AG must "establish[] by a preponderance of the evidence that the district attorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion."²¹⁰ As one court has observed, this is a "narrowly circumscribed power" that rests on "cumbersome court proceedings" and therefore does not undermine the district attorney's autonomy.²¹¹ By requiring judicial review of any request to supersede, the Pennsylvania

203. Telephone Interview with Michael Atterbury, *supra* note 140. Utah appears to follow a similar framework. The AG has authority to "exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their office." UTAH CODE ANN. § 67-5-1(6) (LexisNexis 2010). The AG's website indicates that the AG's office views this as a cooperative relationship more than a hierarchical one. The state-level prosecutors "regularly consult with and actively assist prosecutors throughout the state, often in high-profile and difficult or sensitive cases." *Criminal Justice Division*, UTAH OFF. ATT'Y GEN., *supra* note 133. State-level attorneys "frequently handle cases for county attorneys who have a conflict of interest" or in rural areas with small offices that "request assistance with major cases." *Id.* Although no one from the AG's office would call to confirm, it appears from this description and a search of Utah caselaw that the AG is not exercising direct supervisory control or interfering regularly with local matters unless requested.

204. Compare IND. CODE § 4-6-1-6 (1998), with 15 ILL. COMP. STAT. 205/4 (2009), *Buffalo Confectionary*, 401 N.E.2d at 549, and *Dasaky*, 303 Ill. App. 3d. at 992.

205. Telephone Interview by Sam Raymond with Bryan Corbin, Public Info. Officer for Policy and Litig., Ind. Attorney Gen.'s Office (June 16, 2009).

206. N.J. STAT. ANN. § 52:17B-103 (West 2001).

207. *Yurick v. State*, 875 A.2d 898, 903 (N.J. 2005) (internal quotations and citations omitted).

208. Telephone Interview with John Quelch, *supra* note 165.

209. 71 PA. STAT. ANN. § 732-205(a)(4) (West 1990).

210. *Id.*

211. *Carter v. City of Phila.*, 181 F.3d 339, 353-54 (3d Cir. 1999).

legislature was careful not to “imping[e] upon the jurisdiction and duties of the constitutionally created office of county-elected district attorney.”²¹²

Unlike the courts in other states, the New Hampshire Supreme Court has not interpreted a broad statutory grant narrowly. New Hampshire law states that the AG “shall have and exercise general supervision of the criminal cases,”²¹³ and that county attorneys are “under the direction of the attorney general.”²¹⁴ The Supreme Court has concluded this “give[s] [the AG] the power to control, direct and supervise criminal law enforcement by the county attorneys in cases where he deems it in the public interest.”²¹⁵ But while the highest court in the state has not limited the AG’s power under this law, the AG itself has taken a narrow view in practice. The New Hampshire AG’s office seldom intervenes in cases without the request of a county prosecutor.²¹⁶

This same kind of relationship between the AG and state’s attorneys exists in other states. Formally, the AG in South Dakota has the statutory power “[t]o consult with, advise, and exercise supervision over the several state’s attorneys of the state.”²¹⁷ In practice, the relationship is not hierarchical. The AG gets involved in local prosecutions only when local prosecutors ask for help.²¹⁸ The story is largely the same in Montana. By statute, the Montana AG has the duty “to exercise supervisory power over county attorneys . . . [which] include[s] the power to order and direct county attorneys in all matters pertaining to the duties of their office.”²¹⁹ If directed by the AG, the county prosecutor must bring a prosecution.²²⁰ Although the AG has used this authority in Montana, particularly in capital cases and crimes against children, the power has been exercised “infrequent[ly]” and typically the AG does not intervene in local matters unless requested.²²¹

To be sure, not every state AG has interpreted what seems to be broad statutory supervisory power so narrowly. In Iowa, the AG has a duty to “[s]upervise county attorneys in all matters pertaining to the duties of their

212. *Commonwealth v. Carsia*, 491 A.2d 237, 247 (Pa. Super. Ct. 1985) (quoting COMMONWEALTH OF PA. JOINT STATE GOV’T COMM’N, FINAL REPORT ON THE OFFICE OF ELECTED ATTORNEY GEN. 5 (1978)). For an example of a matter in which a trial court rejected an AG request to supersede when a district attorney refused to bring a homicide charge against a policeman who killed a civilian, see *Commonwealth v. Schab*, 383 A.2d 819 (Pa. 1978).

213. N.H. REV. STAT. ANN. § 7:6 (2003).

214. *Id.* § 7:34; see also *id.* § 7.11 (“[An] officer or person, in the enforcement of [any criminal] law, shall be subject to the control of the attorney general whenever in the discretion of the latter he shall see fit to exercise the same.”).

215. *Wyman v. Danais*, 147 A.2d 116, 118 (N.H. 1958).

216. Telephone Interview by Sam Raymond with Stephen Fuller, Senior Assistant Attorney Gen., N.H. Attorney Gen.’s Office (June 16, 2009).

217. S.D. CODIFIED LAWS § 1-11-1(5) (2004).

218. Interview with Katie Hanson, *supra* note 158.

219. MONT. CODE ANN. § 2-15-501(5) (2009).

220. *Id.*

221. Telephone Interview by Sam Raymond with Mark McLaverty, Assistant Attorney Gen., Mont. (June 11, 2009).

offices.”²²² Unlike the AGs in some states, the Iowa AG does use this authority, particularly when the case involves a serious felony or the local prosecutor has limited resources.²²³ Supervision in this context can mean telling local prosecutors to stop a prosecution or to commence one. But even though the AG interprets this power broadly, the office uses the authority “prudently.”²²⁴

The dominant picture in the states is one where the AG seeks to forge a cooperative relationship with local prosecutors by responding to their needs and working with them, not taking matters out of their control. If the local prosecutor needs investigative help, forensic support, a larger budget, lobbying assistance, or anything else that the AG is in a position to give, the AG typically seeks to provide it to make sure that criminal justice works well within his or her state. James Tierney, the former attorney general of Maine, often counsels new attorneys general, and he emphasizes their responsibility to get things done using interpersonal relationships and the network of criminal justice professionals within the state. As he puts it, states and their attorneys general can and must subscribe to a “fix it” culture of solving problems, rather than a concern with turf battles.²²⁵ This produces the non-hierarchical and cooperative relationships seen time and again among prosecutors within states.

b. State-Level Prosecutors' Control over the Development of Law

While states typically take a hands-off approach in terms of taking charge of local prosecutions, there is an exception. Even among those states that generally defer to local prosecutors,²²⁶ almost all states give the attorney general authority over appeals in the state's highest court.²²⁷ This appellate

222. IOWA CODE § 13.2(1)(h) (2010).

223. Telephone Interview with Darrel Mullins, *supra* note 140.

224. *Id.*

225. Email from James Tierney, *supra* note 87.

226. A stark example of this is probably West Virginia, where the AG does not have authority to prosecute criminal cases, but does handle appeals before the West Virginia Supreme Court of Appeals. See *Criminal Matters*, W.V. ATT'Y GEN., <http://www.wvago.gov/attorneygeneral.cfm?fx=duties> (last visited Sept. 3, 2010).

227. See, e.g., GA. CONST. art. V, § 3, ¶ 4; MD. CONST. art. V, § 3(a)(1); ALA. CODE § 36-15-1(2) (LexisNexis 2010); ARIZ. REV. STAT. ANN. § 41-193(A)(1) (2004); ARK. CODE ANN. § 25-16-704(a) (2002); CAL. GOV'T CODE § 12512 (West 2005); COLO. REV. STAT. § 24-31-101(1)(a) (2009); FLA. STAT. 16.01(4) (2008); IDAHO CODE ANN. § 19-4909 (2004); 15 ILL. COMP. STAT. 205/4 (2000); IND. CODE § 4-6-2-1 (1998); IOWA CODE ANN. § 13.2(1)(a) (West 2010); KAN. STAT. ANN. § 75-702 (1997); KY. REV. STAT. ANN. § 15.020 (LexisNexis 2008); MICH. COMP. LAWS § 14.28 (1979); MINN. STAT. ANN. § 8.01 (West 2005); MISS. CODE ANN. § 7-5-29 (1972); MO. REV. STAT. § 27.050 (2000) (except misdemeanors); MONT. CODE ANN. § 2-15-501(1) (2009); NEB. REV. STAT. § 84-205(10) (2008); NEV. REV. STAT. § 228.140 (2009); N.H. REV. STAT. ANN. §§ 7:6 (2003); N.M. STAT. ANN. § 8-5-2(A) (2003); N.C. GEN. STAT. § 114-02(1) (2009); N.D. CENT. CODE § 54-12-01(1) (2003); OHIO REV. CODE ANN. § 109.02 (LexisNexis 2007); OKLA. STAT. tit. 74, § 18b(A)(1) (2001); S.C. CODE ANN. § 1-7-40 (West Supp. 2009); S.D. CODIFIED LAWS § 1-11-1(1) (2010); TENN. CODE ANN. § 8-6-109(b)(2) (2010); TEX. GOV'T. CODE ANN. § 402.021 (West 2009); UTAH CODE ANN. § 67-5-1(2) (LexisNexis 2010); VA. CODE ANN. § 2.2-511(A) (2010); W.VA. CODE § 5-3-2 (2010); WIS. STAT. ANN. § 165.25(1) (West 2010); WYO. STAT.

authority gives the AG an important mechanism for overseeing local prosecutors, even in the absence of direct supervisory control, because local prosecutors learn which points of law the AG will defend on appeal and which ones she will not. This, in turn, can affect positions local prosecutors take in the first instance.

4. *Less-Populated States: The Exceptions that Prove the Rule*

Some less-populated states give state-level actors more control over criminal prosecutions, but on closer inspection, each of these states follows the same basic model of limited authority. Consider first the three states that give state-level prosecutors the primary responsibility for all criminal prosecutions. In Alaska and Rhode Island, that authority rests directly with the state attorney general.²²⁸ In Delaware, the AG appoints the state prosecutor, who manages the criminal division of the state's department of justice, which is responsible for bringing all criminal cases.²²⁹ Because the state prosecutor is appointed by the AG and reports to the AG's chief deputy,²³⁰ it is fair to characterize prosecutions in Delaware as under the control of a statewide prosecutor.

Although Alaska, Delaware, and Rhode Island give prosecutorial control to a statewide actor, they are still properly viewed as conforming to the general pattern in most states. Each of these states is of a size that approximates

ANN. § 9-1-603(a)(ii) (2010); *State v. Aragon*, 234 P.2d 356, 358 (N.M. 1950); Telephone Interview with Jon Fussner, *supra* note 127; Telephone Interview with Paul Heinzl, N.J. Attorney Gen.'s Office (June 2, 2009) (explaining that New Jersey attorney general can supersede in cases where county prosecutor appeals, though this power is rarely exercised). Some states vary from this approach. In Kansas, the attorney general delegates this power to local prosecutors, who are permitted to handle the appeals, as long as they first file their briefs with the AG's office. This gives the AG's office the opportunity to evaluate the briefs to determine whether it should handle the appeal itself. Telephone Interview with Lee Davidson, *supra* note 140. In New York, the AG is entitled to notice when the constitutionality of a statute, rule, or regulation is at issue, so the AG can decide whether to intervene to defend the law being challenged. N.Y. EXEC. LAW § 71 (McKinney 2010). In Washington, the prosecuting attorneys in the counties handle their own appeals, and the AG steps in only in "exceptional cases at the insistence of local prosecutors." Telephone Interview with Sara Olson, *supra* note 178. Similarly, in Pennsylvania, the AG handles appeals only "in his discretion, upon the request of the district attorney" or if a specific law otherwise allows. 71 PA. CONS. STAT. § 732-205(c) (1990). In Connecticut, local prosecutors can bring appeals, *see infra* note 248, though only two state's attorneys currently do. In Georgia, the AG is responsible only for capital felony actions in the state's highest court. GA. CODE ANN. § 45-15-3(5) (2002). But the AG's office also files briefs in cases where it lacks jurisdiction if it is a case of significance to the state. Telephone Interview with David McLaughlin, *supra* note 140. The Hawaii AG also lacks exclusive authority over criminal appeals before the state's highest court, Telephone Interview with Bridget Holthus, *supra* note 194, as does the Massachusetts AG, Telephone Interview with David Friedman, First Assistant Attorney Gen., Mass. (June 8, 2009).

228. ALASKA STAT. § 44.23.020(4) (2008); CAROL J. DEFRAnces, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2001, 2 (2002).

229. DEL. CODE ANN. tit. 29, §§ 2504(6), 2505(c) (2003).

230. The heads of the three county offices in Delaware are also appointed by the attorney general and report to the state prosecutor. *Preventing Crime*, DE. DEP'T JUST.: ATT'Y GEN.'S OFF., <http://attorneygeneral.delaware.gov> (follow "Preventing Crime" hyperlink) (last visited Sept. 3, 2010).

the largest counties of some of the larger, more populous states.²³¹ The populations of Alaska and Delaware would not put them among the top ten cities in the country.²³² At just over one million, Rhode Island is more populous than Alaska and Delaware, but that size still puts Rhode Island on par with a large U.S. city.²³³ In terms of geographic area, Rhode Island and Delaware are the smallest states in the country. Thus, the statewide prosecutors in these states represent relatively small communities, and therefore reflect local preferences.²³⁴

This is also true of the three northeastern states that vest authority in state-level prosecutors to bring homicide prosecutions and pursue other crimes that in most states are brought by local-level prosecutors. In Maine, the AG has exclusive responsibility for bringing homicide prosecutions in the state.²³⁵ In neighboring New Hampshire, the AG brings all murder cases and investigates most homicides²³⁶ and prosecutes cases where the defendant is charged with a crime “punishable with death or imprisonment for life.”²³⁷ In Vermont, the AG is responsible for prosecuting homicides and for other criminal matters “when, in his judgment, the interests of the state so require,” which has in practice included a variety of crimes that are elsewhere pursued by local officials, such as domestic violence and felonies involving firearms.²³⁸

231. See Hills, *supra* note 77, at 211 (“[S]tates [with] small populations . . . are functionally equivalent to the county or municipal governments of other states.”). Rhode Island (1,050,788) is more populous, but is still comparable to a large U.S. city. See *U.S. Census Bureau July 2008 Resident Population Data*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2009/ranks/rank01.html> (published Dec. 22, 2008).

232. See *Alaska QuickFacts from the U.S. Bureau*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/02000.html> (last revised Aug. 16, 2010); *Delaware QuickFacts from the U.S. Bureau*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/10000.html> (last revised Aug. 16, 2010).

233. See *U.S. Census Bureau July 2008 Resident Population Data*, U.S. CENSUS BUREAU, *supra* note 231.

234. See Hills, *supra* note 77, at 211–12 (discussing Connecticut and Rhode Island specifically and raising the general point that small states are more properly viewed as local governments). In fact, Alaska, Connecticut, and Rhode Island do not even have counties as relevant governmental units. DALE KRANE ET AL., *HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* 34, 78–79 (2001). And Delaware has only three counties, the fewest of any state in the country. *Id.* at 88.

235. *Office of the Maine AG: Homicide*, OFF. ME. ATT’Y GEN., http://www.maine.gov/ag/crime/crimes_we_prosecute/homicides.shtml (last visited Oct. 10, 2010).

236. Telephone Interview with Stephen Fuller, *supra* note 216.

237. N.H. REV. STAT. ANN. § 7:6 (2003).

238. VT. STAT. ANN. tit. 3, § 157 (2003). Although I was unable to conduct an interview to find out more about how the office interprets the discretionary power, the office’s trial and investigative unit states its focus is on “matters that are (1) statewide or multi-jurisdictional in nature, (2) require significant resources beyond those normally available at the county level, or (3) involve a conflict of interest for a State’s Attorney Office.” *Office of the Attorney General of Vermont, Trial and Investigative Unit*, OFF. ATT’Y GEN., <http://www.atg.state.vt.us/officeorganization-information/office-organization.php> (follow “Criminal Division” hyperlink; then follow “Trial and Investigative Unit” hyperlink) (last visited Oct. 10, 2010). In practice, that appears to mean prosecutions that grow out of the efforts of the Vermont Drug Task Force, which focuses on large-scale drug investigations, child sex assault, computer crimes, serious felonies involving firearms, domestic violence, and elder abuse. *Id.* Thus, this office appears to involve itself in a wide variety of matters, such as

James Tierney notes that having the Maine AG's office handle homicides is a matter of efficiency, not politics. The handful of prosecutors in the AG's office who bring homicide cases have developed a specialty in dealing with these cases and with the two medical examiners who work on these cases in the state's lone crime lab.²³⁹ From the perspective of district attorneys, this arrangement is also efficient. Because Maine is a rural state, individual districts may go years at a time without a homicide, but then get three or four in one year. Having the AG handle the cases keeps the work at a more consistent level.²⁴⁰ Tierney's description of why the Maine AG handles homicides thus comports with a view of the state as essentially a local government. With one crime lab and rural counties that may have inconsistent homicide numbers from year to year, it makes sense to have one office take responsibility. That it is a state-level office is of little moment because vesting authority at that level of government is not about the need for centralization or uniformity, but efficiency in light of the state's demographics.

And to the extent the AGs in New Hampshire and Vermont bring additional charges that are traditionally brought by local prosecutors,²⁴¹ that can be explained in the same way the structure in Delaware and Rhode Island is explained: New Hampshire, Maine, and Vermont are all relatively sparsely populated, homogenous states; thus the state-level offices are themselves representative of a local community.²⁴²

A seventh state, Connecticut, has created a state commission, known as the Criminal Justice Commission, to select its chief state's attorney²⁴³ and

domestic violence prosecutions and firearm-related crime, that would in most other places be conducted by prosecutors at the local level.

239. Email from James Tierney, *supra* note 87.

240. *Id.*

241. Aside from giving state-level prosecutors responsibility over homicides, neither Maine nor New Hampshire differ much from other states in terms of the kinds of cases the AG's office handles: they bring the usual mix of benefits fraud, antitrust, consumer, and environmental cases. See generally N.H. DEP'T JUST., <http://doj.nh.gov/> (last visited Oct. 8, 2010) (describing Division of Public Protection); *Crimes We Prosecute*, OFF. ME. ATT'Y GEN., http://www.maine.gov/ag/crime/crimes_we_prosecute/index.shtml (listing types of cases prosecuted by the AG). Despite having the legal right to intervene in local actions, the New Hampshire AG respects the independence of county prosecutors and rarely gets involved with local matters unless asked. Telephone Interview with Stephen Fuller, *supra* note 216. The AG in Vermont, in contrast, appears to bring a wider variety of cases. See *Office of the Attorney General of Vermont, Trial and Investigative Unit*, *supra* note 238.

242. Vermont has the second-lowest population of any state in the country, at 621,270. *State Rankings: Statistical Abstract of the United States*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2009/ranks/rank01.html> (published Dec. 8, 2008). Maine and New Hampshire are approximately the same size, with a population of 1,316,456 and 1,315,809, respectively. *Id.* They are thus comparable to a medium-sized city like San Diego. See *State & Country QuickFacts: San Diego, California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06/0666000.html> (last revised Aug. 16, 2010).

243. In Connecticut, the attorney general exercises only civil jurisdiction and lacks authority to bring criminal prosecutions. The chief state's attorney is the state's chief prosecutor, filling the criminal law enforcement role that in other states is performed by an attorney general. *About Us*, ST. CONN., DIV. CRIM. JUST., <http://www.ct.gov/csao/> (follow "About Us" hyperlink) (last visited Oct. 8, 2010).

the state's attorney for each of its judicial districts.²⁴⁴ The commission is a state body composed of the chief state's attorney and six gubernatorial nominees (two of whom must be judges from the state's superior court) who have been approved by the state's general assembly.²⁴⁵ Thus, to the extent the state has put the appointment of local prosecutors in the hands of a state independent agency, there is more state-level involvement in prosecution in Connecticut than the model followed by most states where local prosecutors are elected by their communities.

Even with this appointment structure, Connecticut operates in practice much like other states that give local prosecutors primary responsibility for criminal law enforcement. The Office of the Chief State's Attorney in Connecticut has only a handful of specialized units that handle prosecutions, and those areas largely mirror the ones seen in other states.²⁴⁶ The state's attorneys retain primary responsibility for bringing almost all criminal prosecutions in their local districts, with little supervision or oversight by the chief state's attorney.²⁴⁷ Indeed, state's attorneys can even handle all of their own appeals if they choose.²⁴⁸ The chief state's attorney cannot intervene in a state's attorney's case unless he or she finds by "clear and convincing evidence" that the state's attorney is guilty of misconduct or has a conflict of interest, and the Criminal Justice Commission must agree with that assessment after receiving written statements from the state's attorney and the chief state's attorney.²⁴⁹ Moreover, the chief state's attorney cannot appear in district court on his or her own without getting the consent of the state attorney in that district.²⁵⁰

244. CONN. CONST. art. XXIII; CONN. GEN. STAT. § 51-275a (2009). Connecticut's constitution prior to 1984 vested authority in the state's judiciary to appoint state's attorneys. The state transferred that authority to an executive branch agency in part because of a concern that it created a conflict of interest to have the judges before whom prosecutors appear appoint them and in part to make the state prosecutors more accountable to the public. *Judiciary Part 2: Hearing on House Joint Resolution 35 Before the Joint Standing Committee* at 2 (Conn. March 5, 1984) (statement of Joseph Lieberman, Attorney Gen.; *Conn. Gen. Assembly House Proceedings* 99 (May 2, 1984) (remarks of Rep. Tulisano). For its part, the judiciary appeared to endorse the switch because it no longer wished to retain its powers of appointment. *See Resolution Proposing an Amendment to the Constitution Concerning Appointment of State's Attorneys, Conn. Gen. Assembly, Senate Proceedings* at 153 (May 8, 1984) (statement of Sen. Owens).

245. CONN. GEN. STAT. § 51-275a(a) (2009).

246. The Chief State's Attorney's Office has bureaus to handle prosecutions for Medicaid fraud, elder abuse, cold cases, political corruption, and crimes that extend beyond one judicial district or are "especially time-consuming or require specialized or technical resources" including environmental and economic crimes. State of Connecticut Division of Criminal Justice, Office of the Chief State's Attorney, <http://www.ct.gov/csao> (follow "Index of Programs and Services" hyperlink; then follow "Chief State's Attorney—Administration and Special Investigative Units" hyperlink) (last visited Oct. 8, 2010).

247. Telephone Interview with Patricia M. Froehlich, State's Attorney's Office (Feb. 4, 2009).

248. Currently state's attorneys in two judicial districts handle their own appeals. *Id.*

249. CONN. GEN. STAT. § 51-277(d)(3) (2009). State's attorneys also cannot be removed from their offices except by the Criminal Justice Commission after due notice and hearing. *Id.* § 51-278b(b).

250. *Id.* § 51-277(d)(2). To the extent that state-level involvement is greater in Connecticut than elsewhere, it is important to note that like other small states, Connecticut closely approximates

C. A Few Exceptions

Not every state fits comfortably into the limited authority model. There are exceptions where states have given a statewide prosecutor greater authority over violent and other crimes that elsewhere are handled predominantly if not exclusively by local prosecutors.²⁵¹ But even though these states depart from the traditional state approach to a degree worth noting, they still interfere with local authority far less than the federal government does.

1. Florida's Statewide Prosecutor

The state that diverges most dramatically from the limited authority model and most closely approximates the federal approach is Florida. In 1986, Florida amended its constitution to create a position in the attorney general's office known as the "statewide prosecutor."²⁵² Florida vested the statewide prosecutor with the authority to bring criminal charges in just about any type of case—from murder to prostitution, robbery to larceny—as long as the offense occurred "in two or more judicial circuits" or "any such offense is connected with an organized criminal conspiracy affecting two or more judicial circuits."²⁵³ Florida created the position because of a perceived need to address organized crime that transcended the state's circuit boundaries.²⁵⁴

Unlike other state AGs that use multi-jurisdictional authority sparingly, the statewide prosecutor in Florida has used his power to prosecute a range of cases, some of which are more traditionally local matters. Just like the caseload of other state-level prosecutors, the Florida statewide prosecutor's docket has a large proportion of fraud, white collar, and computer

a local government with a population of just 3.5 million. *State Rankings: Abstract of the United States*, *supra* note 242.

251. Michigan likely belongs in this category. The AG's website indicates that the office handles domestic violence cases in Northern Michigan, firearms-related assaults in Detroit, RICO prosecutions, and child pornography and internet predator cases. *Criminal Prosecutions Bureau*, MICH. ATT'Y GEN., <http://www.michigan.gov/ag> (follow "About the Office" hyperlink; then follow "Criminal Justice Bureau" hyperlink) (last visited Sept. 3, 2010). This suggests a robust practice of violent crime prosecution at the state level. But because no one from the Michigan AG's office would return repeated calls for more information, I was unable to determine how many cases were brought in these categories and what the relationship was with local prosecutors in bringing such cases. The Mississippi AG's office has an Internet Crimes Against Children Unit that brings child pornography cases over the internet, but because it otherwise leaves violent crimes to local prosecutors, it seems to fit the general profile outlined above. Telephone Interview with Stan Alexander, *supra* note 127. Virginia has a similar regime. The AG can bring prosecutions for violations of laws against child pornography, but most crimes are handled by local prosecutors. VA. CODE ANN. § 2.2-511(A) (West 2010); Telephone Interview with Patrick Dorgan, *supra* note 177.

252. FLA. CONST. art. IV, § 4.

253. FLA. STAT. § 16.56(1)(a) (2009).

254. R. Scott Palmer & Barbara M. Linthicum, *The Statewide Prosecutor: A New Weapon Against Organized Crime*, 13 FLA. ST. U. L. REV. 653, 654–63 (1985).

crime cases.²⁵⁵ But unlike most other states, Florida has a statewide prosecutor who also spends a great deal of time on crimes that are elsewhere prosecuted locally. One out of five cases brought by the statewide prosecutor is a narcotics or violent crime case.²⁵⁶ The office also targets cases involving gangs,²⁵⁷ and many of its theft cases would be prosecuted locally in most other states.²⁵⁸

Florida therefore most resembles the federal government in its approach. Like the federal government,²⁵⁹ Florida takes a broad view of organized crime and views it as subject to centralized oversight.

One difference between Florida and the federal government, however, is that the Florida statewide prosecutor has indicated he will not bring a case if the local state attorney objects.²⁶⁰ According to the statewide prosecutor, this “is not generally a large issue” because “[t]he case-types that make up a majority of our case load are not usually sought after by the local prosecutors.”²⁶¹ While the federal government also typically acts with the consent of local prosecutors,²⁶² that is not always the

255. In 2005, these categories combined to make up 44% of the office’s docket. Letter from James J. Schneider, Gen. Counsel, Office of the Attorney Gen., State of Fla., to Ed Lintz, New York University (Mar. 9, 2009) (on file with the author). Another 12% of cases involved identity theft, an issue also pursued by some other state AGs in recent years. *See, e.g.*, KY. REV. STAT. ANN. § 15.231 (West 2010) (AG has concurrent authority with local prosecutors to bring identity theft cases); MISS CODE. ANN. § 97-45-23 (2010) (AG can bring identity theft prosecutions); S.C. CODE ANN. § 14-7-1630(A)(10) (2010); Martha Coakley, *Privacy Protection, Safety and Security: A State Law Enforcement Perspective*, in 970 COPYRIGHTS, TRADEMARKS & LITERARY PROP. 970, at 333 (PLI Course Handbook Series No. 19129, 2009) (describing Massachusetts AG’s increasing role in fighting identity theft); *Cyberspace Law*, NAT’L ASS’N OF ATT’YS GEN., <http://www.naag.org/cybercrime.php> (last visited Aug. 20, 2010) (noting that Cyber Crime Project provided training to AGs on computer-related crimes, including computer-aided identity theft). In 2006, the same issues represented 68% of the caseload. Letter from James J. Schneider to Ed Lintz, *supra*. In 2007, they represented 61% of the caseload. *Id.* In that year, the office tracked RICO cases separately, and they made up an additional 7% of the docket. *Id.* In 2008, 51% of the cases were made up of fraud, computer crime, identity theft, and other white collar crimes. An additional 11% were RICO cases. *Id.*

256. Letter from James J. Schneider to Ed Lintz, *supra* note 255.

257. *Id.* (gang-related cases made up 3 percent of the caseload in 2008). South Carolina’s AG also has authority to bring charges for gang-related activity. S.C. CODE ANN. § 14-7-1630(A)(2) (Supp 2009). The AG has had this power since 2008, but only one gang crime was prosecuted as of June 26, 2009. Telephone Interview with Curtis Pauling, *supra* note 143.

258. *See Statewide Prosecution News Releases*, OFF. ATT’Y GEN. FLA., <http://myfloridalegal.com/> (follow “Programs and Units” hyperlink; then follow “Statewide Prosecution” hyperlink; then follow “News and Releases” hyperlink) (last visited Sept. 3, 2010).

259. *See, e.g.*, Brief & Short Appendix of the United States, *United States v. Leija-Sanchez*, 602 F.3d 797 (7th Cir. 2010), 2009 WL 3867203; Gorelick & Litman, *supra* note 68, at 976–77.

260. Letter from James J. Schneider to Ed Lintz, *supra* note 255 (noting that the statewide prosecutor brings cases “committed by an organized criminal conspiracy affecting multiple [judicial circuits]” so long as the local state attorney has no objections).

261. *Id.*

262. Until the *United States Attorneys’ Manual* was revised in 1997, local prosecutors were given virtual veto power over U.S. attorneys for certain enumerated crimes. *See UNITED STATES ATTORNEYS’ MANUAL*, *supra* note 22, § 9-103.132 (“United States Attorneys are required to obtain the approval of the Assistant Attorney General of the Criminal Division prior to seeking an indictment or filing an information . . . if the state or local prosecutor with responsibility for prosecuting a state charge . . . objects to a federal prosecution.”); Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State*

case.²⁶³ Thus, even the most aggressive state view of centralized authority over prosecution is not as far-reaching as that of the federal government.

Despite this important difference, Florida does mirror the federal approach to a significant extent. If other states followed Florida's pattern, that would provide evidence that states share the federal government's view of the proper balance between centralization and local authority. But because Florida is the only state that closely resembles the federal government, it is more telling that the other states have rejected anything remotely close to this model.

2. Alabama's State-Level Review

Alabama also departs from the limited authority model. Alabama vests power in the attorney general "at any time he sees proper, either before or after indictment" to "superintend and direct the prosecution of any criminal case in any of the courts of this state."²⁶⁴ While Alabama's AG could use this authority to intervene in any local matter, he has traditionally exercised that power in a more targeted way. The office has established divisions that mirror those seen in states that vest AGs with more limited jurisdiction: environmental crimes, public corruption, election fraud, bid-rigging, other white collar crimes, and Medicaid and welfare fraud.²⁶⁵

Alabama has gone beyond the traditional list, however, in creating a violent crimes division. This unit brings violent cases not only when district attorneys have conflicts or request help—a practice common throughout the states—but also at the request of victims.²⁶⁶ The Alabama AG's office views its state-level lawyers as " 'prosecutors of last resort' for victims or family members"²⁶⁷ who have been turned away by local prosecutors.²⁶⁸ For

Crimes, 47 CASE W. RES. L. REV. 921, 966 (1997). Although the *United States Attorneys' Manual* no longer requires consent from local prosecutors, some federal guidelines still mandate reliance on local prosecutions unless federal interests cannot be adequately addressed, giving local prosecutors a limited power to maintain control of a case. See, e.g., *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing on S. 909 Before the S. Comm. on the Judiciary*, 111th Cong. 3–4 (2009) (statement of Eric H. Holder, Jr., Att'y Gen. of the United States) (explaining the DOJ's "backstop policy" of initially deferring to state and local authorities); UNITED STATES ATTORNEYS' MANUAL, *supra* note 22, § 8-3.170, 9-27.240 & 9-61.111 (Dep't of Justice 1997).

263. See Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 930–36 (2000) (detailing the incentives and ambiguities that often lead federal prosecutors to expand the reach of their power, regardless of state prosecutorial interests); see also Miller & Eisenstein, *supra* note 13, at 262 ("Local prosecutors' willingness to work with federal authorities is a relatively new phenomenon; nexus relations have a checkered past, with the typical scenario involving aloof or downright hostile relations.").

264. ALA. CODE § 36-15-14 (2010). The attorney general in Alabama also has the authority to direct district attorneys to "aid or assist in the investigation or prosecution of any case in which the state is interested." *Id.* § 36-15-15.

265. Pryor, *supra* note 127, at 264–69.

266. Telephone Interview with Don Valeska, Division Chief of Violent Crimes, Assistant Attorney General, Alabama (Jan. 28, 2009).

267. Pryor, *supra* note 127, at 267.

268. Telephone Interview with Don Valeska, *supra* note 266. Although the AG's office has authority to get involved if a DA has brought a case but the victim is unhappy with how the case is

instance, at the urging of victims or their families who were dissatisfied with district attorneys who were not going forward with their cases, the Alabama AG's office successfully prosecuted a state trooper for murdering his wife for insurance money, secured a conviction against a county commissioner who assaulted his son's high school basketball coach, and brought charges against a man who murdered his seventeen-year-old wife.²⁶⁹ Thus, Alabama's state-level prosecutors get involved in areas that are reserved for local prosecutors in other states. The chief of the unit that handles these cases has explained that Alabama believes this kind of oversight is important to keep local prosecutors accountable and protect the interests of victims and their families.²⁷⁰

Alabama's approach is therefore not so much about substantive disagreements with local prosecutors or a view that state-level prosecutors handle certain categories of cases more effectively. Instead, the Alabama AG gets involved in cases where it appears that victims are being unjustly ignored, perhaps because of some kind of bias by local prosecutors. The cases against the county commissioner and the state trooper, for instance, appear to have stalled at the local level because of a reluctance by local prosecutors to bring actions against these specific public officials, not because of a considered view about the merits of the cases. The office requires the victims or their families who are requesting assistance to write a letter to the AG explaining why AG involvement is necessary—a process the office uses to help demonstrate that the AG's involvement is at the urging of individuals, and not for political grandstanding.²⁷¹

3. Arizona's State-Level Drug Enforcement

Arizona's attorney general has authority “when deemed necessary by the attorney general” to “prosecute and defend *any* proceeding . . . in which the state . . . is a party.”²⁷² In many respects, the Arizona AG uses this authority relatively sparingly. The AG in Arizona, like the AG in most states, has jurisdiction over traditional areas such as consumer fraud, white collar crime, environmental crime, public corruption, and cases where local prosecutors

proceeding, the chief of the unit that handles these cases says that is “relatively rare” and could not think of an example where it had occurred. *Id.* Instead, the AG's office typically gets involved in cases where the DA is not proceeding with the case at all or where the DA asks for help. *Id.*

269. Pryor, *supra* note 127, at 267–68.

270. Telephone Interview with Don Valeska, *supra* note 266. Valeska is “always amazed when we talk to prosecutors of other states that they don't have that leeway.” *Id.*

271. *Id.*

272. ARIZ. REV. STAT. § 41-193(A)(2) (2010) (emphasis added).

have conflicts.²⁷³ And, despite this sweeping authority, the AG's office does not normally take on violent crimes like homicides or sex offenses.²⁷⁴

But the Arizona AG has used this authority to establish a drug unit, which takes on drug trafficking and money laundering organizations in the state. Even in its Tucson office, which is quite small,²⁷⁵ drug cases are brought on a regular basis.²⁷⁶ To be sure, most cases are still brought by county prosecutors, but because the state-level prosecutor is more involved in drug cases than in other states, it would not be fair to group Arizona with the overwhelming majority of state-level prosecutors who leave those cases virtually exclusively with local prosecutors.²⁷⁷

III. LEARNING FROM THE STATES

The state relationship with localities contrasts markedly with the federal relationship with localities in several respects. This Part explores those differences. After making these comparisons, this Part explains how sentencing variation is one of the main drivers of the alternative approaches.

A. *The States and Federal Government Compared*

Several important differences between states and the federal government emerge in terms of their relationships with local prosecutors.

1. *Centralization Within a Jurisdiction*

One important difference between states and the federal government involves centralization within a jurisdiction. Whereas the federal government has increasingly sought to achieve centralized control of its local outposts through detailed memos and manuals that specify how local prosecutors must behave and through centralized approval processes, there has been almost no comparable effort in the states. Aside from giving state-level prosecutors control over appeals to the state's highest court, and thus development of the law in the state, most state legislatures allow local authorities to operate without much oversight in the day-to-day application of that law.

273. *About the Office*, ARIZ. ATT'Y GEN., <http://www.azag.gov/AboutOffice/#CRM> (last visited Oct. 8, 2010).

274. Telephone Interview with Reina Gallego, Tucson Office, Ariz. Attorney Gen. (June 3, 2009). The office does, however, have authority to prosecute sex offenses against children that span more than one jurisdiction. ARIZ. REV. STAT. §§ 21-422(B), 21-427(B) (2010).

275. The office had five prosecutors as of June 2009. Telephone Interview with Reina Gallego, *supra* note 274.

276. *Id.*

277. The Utah Attorney General's Office has a meth lab unit, so it is also likely bringing drug cases on a regular basis at the state level. But the meth lab unit is funded through federal money, so this is not an independent judgment of the state that these cases are particularly appropriate for state-level enforcement. *Criminal Justice Division*, UTAH ATT'Y GEN., <http://attorneygeneral.utah.gov/criminaljustice.html> (last visited Oct. 8, 2010) ("The Meth Lab prosecutors are funded through federal money . . .").

And for their part, state AGs seem content to work cooperatively with local attorneys without trying to control how state law is meted out in every outpost. Thus, even though Main Justice has hardly achieved complete control over U.S. attorneys and local districts still enjoy a degree of autonomy, Main Justice has sought far more control over its local outposts than state-level prosecutors have.

The state experience thus provides an alternative model to the one that has increasingly dominated the interactions between Main Justice and U.S. attorneys' offices in recent years.²⁷⁸ To be sure, important differences exist in the relationships within the respective sovereigns that give local prosecutors greater leverage vis-à-vis state prosecutors than U.S. attorneys have vis-à-vis Main Justice. In particular, local prosecutors have an independent political base and budget support that U.S. attorneys lack. It is beyond the scope of this Article to explore all of these internal differences and the ways in which they affect the application and uniformity of law within jurisdictions. But the state experience is at least worth a closer look because states seem to manage without tight, centralized control.

2. Differences in Substantive Crimes Identified by Legislators for Central Control

State legislatures differ markedly from Congress in their enforcement allocation choices. While both levels of government have their share of symbolic legislation, there are important differences in how those laws get enforced. As noted in Part I, states have more freedom than Congress does to dictate enforcement discretion. And most states do not follow the federal model that gives prosecutors the option of bringing what would otherwise be local charges at their discretion. Instead of giving statewide prosecutors the flexibility to bring prosecutions at their discretion, the majority of state legislatures identify specific categories suitable for the state-level prosecutor. Interestingly, the package of substantive areas repeats itself in state after state, with public corruption, benefits fraud, and regulatory crimes being targeted for state-based, as opposed to local, enforcement. Similarly, state legislatures also have in common a preference for passing laws that give local prosecutors the right to request assistance from statewide prosecutors or to allow state prosecutors to step in when there is a conflict. In some states, state legislatures leave a wider category of cases available to state-level actors but place a gatekeeping function in the governor or some other elected official so that state-level prosecutorial discretion is not unlimited.

Congress has also identified public corruption, fraud, and regulatory crimes as areas suitable for centralized as opposed to local prosecution, and as in the states, these categories make sense for specialized treatment. Federal prosecutors and investigators in the FBI and other federal law

278. For a discussion of the relationship between Main Justice and the U.S. attorneys' offices, see Daniel Richman, *Federal Sentencing in 2007—The Supreme Court Holds—The Center Doesn't*, 117 YALE L.J. 1374 (2008).

enforcement agencies can, like their state-level counterparts, develop expertise in these complex areas whereas local prosecutors may not have a critical mass of these cases or sufficient personnel to develop the specialized knowledge necessary to pursue them effectively. And in the case of public corruption, federal prosecutors may also be well-situated to address conflicts of interest that would exist if states had exclusive jurisdiction to police corruption within their boundaries.

The difference is that Congress has opted to expand the list of substantive areas that can be taken away from local authorities. Federal gun and drug laws in particular overlap with large swaths of traditionally local categories of crime, and broad statutes like RICO²⁷⁹ and the Hobbs Act²⁸⁰ similarly allow federal prosecutors to pursue local crimes like murder or robbery.

3. Differences in the Types of Centralization

There is a third important difference between the federal government's allocation decisions and those of the states: the kind of involvement with local practice each has pursued. Some commentators have pointed out that federal prosecutions bring benefits to local communities otherwise starved for crime-fighting resources. Particularly in cases involving complex crimes, the additional resources of the federal government are often highlighted as a benefit.²⁸¹ But there is no reason that the federal government has to provide resource support by assuming responsibility for prosecuting the case.

The state experience demonstrates that resources are easily provided without having to shift prosecutorial authority. Despite their limited budgets and resources, state AGs and state-level institutions have offered local jurisdictions help with everything from electronic surveillance to technical support to additional manpower to prosecutorial training,²⁸² all without

279. 18 U.S.C. § 1959 (2010).

280. 18 U.S.C. § 1951 (2010).

281. See, e.g., James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 223–24 (2008) (noting that one reason federal prosecutors get involved in matters is that local prosecutors “lack the competence or motivation” to deal with certain local problems or “the magnitude of the problem or complexity of a prosecution overwhelms local resources”); Richman, *supra* note 29, at 783 (noting that local communities can benefit from federal prosecutions because they can use federal resources for “expensive tools such as electronic surveillance, witness protection, and prosecutorial support for investigations”).

282. See, e.g., Interview by Sam Raymond with Forrest Bright, Dir. of the Wyo. Dep't of Criminal Investigation (June 3, 2009) (noting that a branch of the AG's office investigates cases but then turns the cases over to local prosecutors to bring charges); *District Attorney Assistance*, OR. DEP'T JUST., http://www.doj.state.or.us/divisions/criminal_justice_index.shtml (Oregon has a state-level program that “provides trial and investigative assistance, technical legal and prosecutorial advice and services, and legal education and training in areas of criminal law and procedure” to district attorneys); *Division of Law Enforcement Services*, WIS. DEP'T JUST., <http://www.doj.state.wi.us/dles/> (ensures that local and state police meet recruiting and training qualifications and provides technical assistance and training); *Office of Prosecution Services*, MO. ATT'Y GEN., <http://ago.mo.gov/prosecutors.htm> (provides technical assistance to all state prosecutors); *Opinions and Law Resources*, MONT. DEP'T JUST., *supra* note 140 (provides training and assistance

assuming control over criminal prosecutions at the state level. There is no reason the federal government could not follow this same model, as many commentators have advocated.²⁸³ Indeed, the federal government has provided resource support to states and localities,²⁸⁴ but federal funding is slight compared with state and local needs.²⁸⁵ The federal approach has been less about providing resources than assuming responsibility for the prosecution of the case or allowing local prosecutors to use the threat of federal involvement for greater leverage in their own negotiations with defendants.²⁸⁶

4. Differences in How Centralized Prosecutors Exercise Discretion and Oversight

Finally, even in those states that follow the basic federal framework and similarly give statewide prosecutors the ability to bring prosecutions at their discretion, that discretion is getting exercised very differently at the state level than at the federal level. As Part II explained, this discretionary power is rarely used in the states to assume control of a matter. Instead, state AGs maintain uniformity in state law through appellate oversight and seek to cooperate with local prosecutors on matters of common concern. Federal prosecutors, in contrast, often step into matters that could otherwise rest with local authorities by actually assuming control of the cases. So, prosecutors vested with the same discretionary power are making very different choices about how to exercise it.

to local prosecutors); *Resources for Law Enforcement*; TEX. ATT'Y GEN., <http://www.oag.state.tx.us/criminal/maincrim.shtml> (noting that the AG provides help with “specialized and technical matters such as computer forensics, complex financial investigations, money laundering, white collar crime, and election fraud” and that its prosecutors will assist county and district attorneys with difficult areas of criminal law, such as capital murder, election fraud, and public corruption, at their request); *W. Va. Prosecuting Inst.*, <http://www.wvpai.org/> (providing training, legal research, and technical assistance to county prosecutors).

283. See, e.g., TASK FORCE, *supra* note 10, at 55 (noting that the federal government can support local crime fighting by providing financial and technical resources); SHAPIRO, *supra* note 56, at 78 n.1 (observing that “[a] good example” of an area in which the federal government should take a hands-off approach except through grants or revenue support “may well lie in certain areas of criminal law enforcement involving activity essentially local in its impact”); Beale, *supra* note 3, at 1008; Stuntz, *supra* note 3, at 2025 (noting that today “the federal government is a key source of law” in state criminal matters when it should instead be “a key source of money, especially for cash-strapped urban police forces”).

284. See Beale, *supra* note 3, at 1009–10 (describing federal funding for local police and community-based justice programs as well as FBI technical support for state and local police).

285. For instance, in 2003, state and local expenditures for crime totaled more than \$155 billion dollars. BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, STATE AND LOCAL EXPENDITURES FOR CRIME, 2000–2006, <http://bjs.ojp.usdoj.gov/content/glance/expgov.cfm> (last visited Oct. 10, 2010). Federal grants in that same year were just over \$5 billion, or a little more than 3% of the total spent by states and localities. BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003, <http://bjs.ojp.usdoj.gov/content/pub/pdf/jeeus03.pdf> (last visited Oct. 10, 2010).

286. In that way, the federal government is providing a type of resource to localities because the threat of federal involvement can aid local prosecutors in obtaining pleas and cooperation, which in turn saves the cost of trials. But that kind of resource support goes to sentencing, as Section III.B explains.

B. *The Importance of Sentencing Policy*

What accounts for the different paths being followed by federal and state governments? This is obviously a complex topic that requires more than one article to address. For example, path dependency and cultural norms likely account for at least part of the differences one sees, but giving that appropriate treatment would require an in-depth analysis of the history and norms within each jurisdiction and the interactions among all the key players. But even if interpersonal relationships, culture, and history are playing key roles, that does not mean that some universal facts might not be driving some of the stark differences that one sees in nearly every state. Moreover, the fact that practices in at least some states, such as Florida, and at the federal level have evolved over the years—and dramatically in recent decades—shows that path dependency is not a sufficient explanation. Jurisdictions can and do change their allocation practices. Thus, it is helpful to consider how institutional differences—at both the legislative level and executive level—may also be driving the dramatic differences one sees in the federal and state approaches to the allocation of prosecutorial power.

One reason Congress and state legislatures make different decisions is that, as noted above, federal and state legislators have different choices available to them. While both have the power to pass symbolic laws—and both do—state legislators have the freedom to dictate expressly which level of government is responsible for prosecution. Congress, in contrast, cannot mandate local prosecutions of federal law.²⁸⁷ If Congress passes a federal criminal law and wants to see it enforced, federal prosecutors will get the nod.

But Congress has other options that are comparable to the states. Intervention with local decisions does not need to consist of taking over prosecutorial power. Instead, Congress could opt to provide resources to local prosecutors and to use that power of the purse to influence crime policy. Congress could, for instance, offer financial incentives for states to bring prosecutions of federal violations, as it has done with Medicare and Medicaid fraud. It could also spend more money on crime labs, equipment, or local police forces.²⁸⁸ If witness protection is an issue, Congress could fund that.

Congress certainly knows how to use this spending power to alter local policies, but it chiefly uses it to get states to alter sentencing policies. For example, in the Violent Crime Control and Law Enforcement Act of 1994, Congress provided incentive grants for states with the goal of encouraging them to adopt Congress's preferred truth-in-sentencing policy that required

287. *Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”).

288. *See, e.g.*, 42 U.S.C. § 3796dd (2006) (creating the Office of Community Oriented Policing Services, which gives the attorney general the right to allocate grants to local governments); Richman, *supra* note 13, at 391–92 (discussing federal funding programs). For a discussion of the merits of in-kind aid versus direct funding, see Richman, *supra* note 13, at 401–02.

violent offenders to serve at least 85 percent of their sentences.²⁸⁹ Congress has also created incentives for states to adopt certain sex offender registration laws and minimum sentencing terms.²⁹⁰ The Anti Car Theft Act similarly sought to change state sentencing policy with the promise of federal grants.²⁹¹

That Congress uses its grant power chiefly to influence sentencing is telling. Sentencing policy differences are often at the root of the differing approaches of the states and the federal government in addressing the central–local balance. As noted above, local and state prosecutors apply the same state laws, so there is no set sentencing differential when one or the other brings the case. In contrast, federal law typically establishes higher sentences than state law for the same conduct,²⁹² so one of the chief motivators for federal involvement is a different view of what sentence is appropriate. Congress is often quite explicit about this. For example, when it passed the Violence Against Women Act that provided a civil remedy for gender-motivated crimes of violence that were already covered by state law, it explained that a reason for the intervention was “unacceptably lenient punishments” for those convicted in state courts.²⁹³

It is not just Congress that is making decisions with a focus on sentencing. That same factor is also the most persuasive explanation for why federal prosecutors are more likely to use their discretionary power than statewide prosecutors are in those states where state prosecutors can intervene at their discretion. When federal prosecutors choose to exercise their discretion to bring a prosecution instead of leaving the matter to localities,²⁹⁴ they are

289. Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 3559(c) (2000).

290. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2006) (making federal funding contingent on state adoption of certain registration and notification requirements for sex offenders); Aimee’s Law, 42 U.S.C. § 13713 (2006) (creating an incentive for states to adopt minimum terms for sex offenders by exempting states that adopt such sentencing laws from having to reimburse other states that have to prosecute the parolees of the exempted state).

291. Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3389 (codified in scattered sections of 15 U.S.C., 18 U.S.C., 19 U.S.C., and 42 U.S.C.); Teichman, *supra* note 60, at 1871.

292. TASK FORCE, *supra* note 10, at 30. Indeed, some federal mandatory *minimum* sentences are higher than state *maximum* penalties. Michael O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures To Reduce Federal–State Sentencing Disparities*, 87 IOWA L. REV. 721, 730 (2002).

293. United States v. Morrison, 529 U.S. 598, 620 (2000); *see also* Richman, *supra* note 29, at 783 (noting that federal prosecution is advantageous for state and local law enforcement because it “generally result[s] in higher sentences for defendants”).

294. Federal prosecutors have the option of bringing charges even when local prosecutors already have without running afoul of the Double Jeopardy Clause because the states and federal government can each charge the same conduct under the dual sovereignty doctrine. But a Department of Justice policy, known as the “Petite Policy,” discourages federal actions when state prosecutions have already been brought. This policy precludes the initiation or continuation of a federal prosecution following a prior state or federal prosecution unless three substantive prerequisites are satisfied. First, “the matter must involve a substantial federal interest;” second, the “prior prosecution must have left that interest demonstrably unvindicated;” and third, “applying the test that is applicable to all federal prosecutions, the government must believe that the defendant’s conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to

making a decision to charge a defendant under a federal law that typically imposes a more severe sentence,²⁹⁵ through either a mandatory minimum or the application of guidelines that have high rates of compliance among federal judges.²⁹⁶ For example, former Attorney General Alberto Gonzales touted the use of the federal RICO law to target gangs because it “is an innovative approach to fighting criminals with tough penalties that may be unavailable in the state system.”²⁹⁷ Similarly, when former Attorney General William Barr announced support for Project Triggerlock, a program that uses federal firearms laws to prosecute “the most dangerous violent criminals in each community,” he noted that “[v]iolent criminals typically prosecuted in State court will be prosecuted Federally to take advantage of stiff mandatory sentences without the possibility of parole.”²⁹⁸ Indeed, the motto for Project Triggerlock was “[a] gun plus a crime equals hard Federal time.”²⁹⁹ The U.S. attorney’s office in Richmond adopted a similar program, Project Exile, because it made use of stiffer federal sentences and the federal prison system, which was likely to mean the offender served his or her time far from home.³⁰⁰ Thus, in the 1990s, the federal government made an “institutionalized commitment . . . to take cases that would have otherwise been pursued locally” precisely because federal sentences were more severe.³⁰¹ The *United States Attorneys’ Manual* makes this explicit. In advising federal

obtain and sustain a conviction by an unbiased trier of fact.” In addition, “the prosecution must be approved by the appropriate Assistant Attorney General.” UNITED STATES ATTORNEYS’ MANUAL, *supra* note 22, § 9-2.031. Notably, when a local prosecutor has already achieved a conviction under state law, one factor that can overcome the presumption that the state prosecution was adequate is that the state sentence was “manifestly inadequate.” *Id.*

295. Beale, *supra* note 3, at 996–98 (observing that defendants in federal court usually receive higher sentences than those prosecuted for the same conduct in state court); Miller & Eisenstein, *supra* note 13, at 243 (citing an empirical study of cocaine distribution cases in Pennsylvania in state and federal court from 1997 and 1999 and finding that federal defendants received sentences roughly 2.5 times as long as state court defendants, controlling for drug quantity and prior record).

296. See U.S. SENTENCING COMM’N, PRELIMINARY QUARTERLY DATA REPORT, 1 tbl.1 (detailing that judges are departing downward on their own in only 16.6 percent of cases).

297. Matthew Hardwick Blumenstein, Note, *RICO Overreach: How the Federal Government’s Escalating Offensive Against Gangs Has Run Afoul of the Constitution*, 62 VAND. L. REV. 211, 216 (2009) (citing remarks of Attorney General Alberto R. Gonzales).

298. WILLIAM P. BARR, OFFICE OF THE ATT’Y GEN., 1991 ANNUAL REPORT OF THE ATT’Y GEN. OF THE U.S. 19.

299. Richman, *supra* note 13, at 396 (internal quotation and citation omitted).

300. *Id.* at 397–98.

301. *Id.* at 397 (discussing the “institutionalized commitment” to greater federal involvement and the importance of federal sentences to that effort); *United States v. Oakes*, 11 F.3d 897, 898 (9th Cir. 1993) (“The government admits that Oakes was prosecuted in federal court primarily because federal law provides for stiffer penalties and more rigorous forfeiture of defendant’s property.”); Gorelick & Litman, *supra* note 68, at 976–77 (acknowledgement by former high-level Department of Justice officials that “[t]he availability of stiffer penalties in the federal system is also a potential comparative advantage” particularly in multi-offender cases where it can be used to induce cooperation); Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. TIMES, Dec. 29, 1989, at A1 (describing then-United States Attorney for the Southern District of New York Rudolph Giuliani’s federal day initiative—where one day each week, all drug offenders arrested by the local police were charged with a federal crime— as aiming to increase deterrence through longer federal sentences).

prosecutors whether or not to decline to prosecute because a matter could be brought in another jurisdiction, the manual tells federal prosecutors to consider “[t]he other jurisdiction[']s ability and willingness to prosecute effectively” and “[t]he probable sentence or other consequences if the person is convicted in the other jurisdiction.”³⁰² The manual reflects the Department’s view that the two are inextricably linked by explaining that “[t]he ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted.”³⁰³ Thus, the Department’s own express policies reflect that increased federal involvement in local matters is often based on the fact that federal prosecutors disagree with state judgments about the appropriate sentence for criminal conduct and what makes an “effective” prosecution.³⁰⁴

To the extent federal procedural advantages are cited as justifying federal involvement in local crime, those procedural advantages are often dependent upon the ability of federal prosecutors to credibly threaten defendants with longer sentences to gain cooperation. For example, when John Jeffries and Judge John Gleeson argue that federal prosecutors do a better job bringing organized crime cases than state and local prosecutors, they argue it is because of various aspects of federal law. Although their list of federal procedural advantages includes the ability to use uncorroborated accomplice testimony and hearsay evidence before the federal grand jury, the real driving force aiding federal prosecutors is federal sentencing law. Jeffries and Gleeson themselves admit as much, noting that “much of the credit for [federal prosecutors and investigators’] success [against organized crime] goes to the effect of the Sentencing Guidelines.”³⁰⁵ After all, it is the operation of the guidelines that gets accomplices to testify in the first place, whether before a grand jury or at trial. Without that threat, the other differences would not matter nearly as much, if at all. Sentencing therefore drives

302. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 22, § 9-27.240.

303. *Id.*

304. Even Main Justice’s increased oversight of U.S. attorneys’ offices in recent years can be explained in part by a concern with sentencing severity. For example, the Ashcroft Memorandum instructed federal prosecutors “[to] charge and pursue *the most serious*, readily provable offense or offenses that are supported by the facts of the case,” thus urging prosecutors to pursue criminal charges that would yield the longest sentences. Memorandum from John Ashcroft, Att’y Gen., to All Fed. Prosecutors (Sept. 22, 2003) (emphasis added), <http://www.usdoj.gov/opa/pr/2003/September/03ag516.htm>. Similarly, Attorney General Ashcroft’s oversight of cases eligible for the death penalty also seemed most concerned with severity. Although Main Justice has been reviewing cases that are eligible for the death penalty since 1994, Richman, *supra* note 278, at 1392, there was a shift in the direction of that review. Attorney General Reno overruled decisions by U.S. attorneys for and against the death penalty in about equal numbers, whereas Ashcroft was far more likely to overrule decisions not to seek the death penalty rather than decisions to pursue it. Gleeson, *supra* note 23, at 1697 & n.2 (noting that Reno overruled U.S. attorneys 53 times and in 26 of those cases, the U.S. attorney had decided not to seek the death penalty; in his first two and half years in office, Ashcroft overruled U.S. attorneys 40 times and in 33 of those cases, the U.S. attorney had decided not to seek the death penalty).

305. Jeffries & Gleeson, *supra* note 62, at 1123.

much of the federal push for involvement, whether by legislators or prosecutors.³⁰⁶

State-level prosecutors, in contrast, are not able to choose different laws with different sentences than the ones being considered by local prosecutors. Nor are there procedural differences, because the matters will be brought in state court regardless of whether the prosecutor is a state or local official. If there are differences between the two, they are institutional and cultural differences about whether one office has more or less resources than the other and about whether the local community has a greater or lesser interest than the state. Thus, when a statewide prosecutor has discretion to bring a prosecution but chooses not to, the statewide prosecutor is concluding that institutional differences are not sufficient and if anything, the better course is to leave matters with local prosecutors and to provide resource support if needed. That explains why out-and-out intervention tends to occur only when there is evidence of local corruption or a conflict of interest, or in substantive areas where the state interest is strong, such as with regulatory and business crimes that affect the entire state economy and not just the local community.

This is not to say that when the federal government intervenes in local matters to pursue higher sentences, it does so without local approval. On the contrary, local and federal prosecutors often cooperate on cases.³⁰⁷ Local prosecutors are typically quite happy to have federal prosecutors take on local cases so that defendants receive longer sentences, and they often willingly use the prospect of federal prosecution to gain leverage in their own plea negotiations with defendants.³⁰⁸ Local police officers also often prefer the federal option for the same reasons.³⁰⁹ But it is not necessarily the case that local officials making these assessments reflect the views of the larger electorate in a community. Nor is there any assurance that they are selecting

306. Differences in the jury pool may be driving some decisions to go to federal court, *see supra* note 67, but one rarely sees that admitted openly. After all, if that is the motivating factor, then federalization would be based on the desire to create less-diverse juries that do not represent the community in which the crime occurred. It is hard to imagine anyone condoning a theory of federal involvement on that basis.

307. Miller & Eisenstein, *supra* note 13, at 252–59. In some instances, state prosecutors can be designated as federal prosecutors and try the federal cases. *See* Brickey, *supra* note 15, at 1159–60.

308. Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1250 (2006) (noting how the threat of federal prosecution benefits state prosecutors in their plea bargains); Miller & Eisenstein, *supra* note 13, at 243, 254–59; Richman, *supra* note 29, at 783 (observing that “[t]he threat of federal charges carrying higher effective penalties can be used by state prosecutors to extract guilty pleas from defendants in their own system”).

309. *See, e.g.*, Testimony Before the United States Sentencing Commission, available at http://www.ussc.gov/AGENDAS/20090709/Kelly_testimony.pdf (July 10, 2009) (testimony of Raymond W. Kelly, Police Commissioner, New York, New York) (noting the value of stricter federal sentences in getting “a number of suspects to give up information”); Regional Hearing Before the United States Sentencing Commission, available at <http://www.ussc.gov/AGENDAS/20090210/Transcript.pdf> (Feb. 10–11, 2009) (testimony of Larry Casterline, Chief of Police, High Point, North Carolina) (noting that federal jurisdiction is the “most effective tool . . . to deter repeat and serious drug offenders”).

the right cases for this differential sentencing treatment or that allowing cases to be handpicked for harsher treatment comports with notions of due process or federalism.³¹⁰ And of course, there remains the substantive issue of whether federal involvement and the higher sentences it brings, on balance, produce better policy.

The point here is not to answer the questions of whether federal sentences are more appropriate or should be used as bargaining chips in select cases, but to highlight that this, in fact, is the question that we should often be asking when we talk about federalism and crime. The different approach to federal and state relationships with localities largely boils down to this difference: the federal government—Congress and prosecutors—largely decides to prosecute crimes that could be handled locally on the belief, which may be shared by local law enforcement officials, that federal sentences (and, to a lesser extent, procedures) are preferable to state sentences. In the states, questions of procedure and sentencing are irrelevant to the allocation-of-power decision because they are the same at both levels of government. States thus serve as laboratories where sentencing differences and variation in procedural rules are largely taken out of the equation. What is left is a question of institutional competence assuming the same rules. And when that is the question, states are overwhelmingly of the view that it makes more sense to leave matters to local control except in the handful of areas where the nature of the crime makes more centralized enforcement appropriate, particularly crimes where local enforcers might have a conflict of interest or areas that require specialization that a centralized office is well-suited to develop, such as regulatory crimes. To the extent the federal government intervenes in these same categories, it shares the states' view of institutional competency, and there is much to support that view in those cases.³¹¹

But unless just about every state is mistaken—and, as noted, there are independent reasons besides consensus to believe the states are getting it right (in particular, incentives to focus on competency and the fact that they bear the costs of those decisions)—the federal government is reaching farther than institutional competency suggests it should. And the main reason appears to be sentencing. Federalism seen this way, then, is not really about federalism at all, but instead is about sentencing law and policy. To the extent this is correct, sentencing policy should be the focal point in analyzing federal criminal prosecutions that touch on traditionally local concerns.

310. For a discussion of how the discretion of federal prosecutors to pick and choose the cases that are subject to harsher federal punishment may present equal protection concerns, see Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997).

311. There is also no serious debate or disagreement with the federal government addressing crime that "intrudes upon federal functions, harming entities or personnel acting in a federal capacity, or when it addresses offenses committed on sites where the federal government has territorial responsibility, or when it addresses matters of international crime." TASK FORCE, *supra* note 10, at 47.

CONCLUSION

The states and the federal government both assess the value of local control over crime when they make decisions about whether to centralize or decentralize power. But while the value of local prosecutorial power is the same in both contexts, it is being weighed against different variables. At the state level, centralization brings its values of uniformity, consistency, and the possibility for specialization. In most cases, states have found those values are not enough to trump the benefits of local law enforcement. To be sure, there are areas where institutional competence pushes the states toward centralization, and here, again, the uniformity is striking. Public corruption, regulatory crimes, and matters where local prosecutors have conflicts make up the AG's docket in most states precisely because the benefits of bringing those cases at a higher level of government outweigh the costs to local autonomy. To the extent the federal government focuses on these same areas, it can also be explained as a reliable weighing of institutional competence.³¹²

But the federal government weighs more than just institutional competence in making decisions about whether to take on an area of criminal law. It also considers the value of having a different set of sentencing policies. This disagreement over sentencing policy goes a long way toward explaining why the federal government has intervened in a host of areas of traditional local control that states have left untouched and why federal involvement goes beyond resource support.

The debate over the federalization of crime, viewed in this light, thus boils down to a question of sentencing policy and whether (and when) it is appropriate for the federal government to step into an area of traditional local authority over crime because of a differing view of sentencing policy. It is beyond the scope of this Article to make substantive comparisons between federal and state sentencing laws in those areas where the federal government has opted to intervene and the states have not.³¹³

But it is the goal of this Article to shift attention to the fundamental role that sentencing is playing in choices about federalization. With all the attention in federalism debates to constitutional history and institutional competence, it is easy to overlook or discount the role of sentencing in actual allocation decisions. But the state experience reveals that sentencing is likely the driving force in the federal government's determination to take

312. This would also be true of those offenses involving unique national concerns that do not present themselves as questions of localism, such as offenses against the federal government itself, corruption cases involving state actors, and criminal activity with international dimensions. The Judicial Conference has identified these areas as appropriate for federal involvement. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS: AS APPROVED BY THE JUDICIAL CONFERENCE 23–24 (1995).

313. For an argument that the political process in the states is more likely to produce sound sentencing outcomes than the federal political process, see Barkow, *supra* note 8, at 1299–312. This is consistent with other research on the advantages of local control over law enforcement. Bill Stuntz recently described the historical connection between local control and more egalitarian punishment schemes. As he puts it, “In our time, centralized democratic power seems associated with discrimination and severity,” whereas “[i]n the past, local democratic control of criminal justice appears to have produced equality and lenity.” Stuntz, *supra* note 3, at 1975.

greater charge of criminal matters from localities in those areas where the states have opted not to intervene. Endorsing federal involvement in those areas thus should depend to a large extent on whether one believes the federal government is more likely to set the “correct” levels of punishment. That is a different debate than the one that has dominated the federalism literature, but my hope is that this Article will help get that conversation started.