

ARTICLES

IMMIGRANT SANCTUARY AS THE “OLD NORMAL”: A BRIEF HISTORY OF POLICE FEDERALISM

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Three successive presidential administrations have opposed immigrant-sanctuary policy, at various intervals characterizing state and local government restrictions on police participation in federal immigration enforcement as reckless, aberrant, and unpatriotic. This Article finds these claims to be ahistorical in light of the long and singular history of a field this Article identifies as “police federalism.” For nearly all of U.S. history, Americans within and outside of the political and juridical fields flatly rejected federal policies that would make state and local police subordinate to the federal executive. Drawing from Bourdieusian social theory, this Article conceptualizes the sentiment driving this longstanding opposition as the orthodoxy of police autonomy. It explains how the orthodoxy guided the field of police federalism for more than two centuries, surviving the War on Alcohol, the War on Crime, and even the opening stages of the War on Terror. In constructing a cultural and legal history of police federalism, this Article provides analytical leverage by which to assess the merits of immigrant-sanctuary policy as well as the growing body of prescriptive legal scholarship tending to normalize the federal government’s contemporary use of state and local police as federal proxies. More abstractly, police federalism serves as an original theoretical framework clarifying the structure of police governance within the federalist system.

INTRODUCTION 2
I. THE STRUCTURE OF POLICE FEDERALISM 10

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A.	“I Will Send in the Feds!”: The Myth and Reality of the Power to Police	10
B.	Mapping the Field of Police Federalism	17
II.	ORTHODOXY AND HERESY IN THE FIELD OF POLICE FEDERALISM	23
III.	TRADITIONAL POLICE FEDERALISM (1789–1967)	28
A.	The First Police (1789–1918)	29
B.	Vice-Crime Federalism (1909–1931)	34
1.	The Prospects for Effective Prohibition Enforcement.....	36
2.	“An Extraordinary Executive Order”	43
C.	Violent-Crime Federalism (1932–1967)	48
IV.	POLICE AS FEDERAL PARTNERS (1968–2004)	55
V.	POLICE AS FEDERAL PROXY (2008 TO PRESENT)	61
A.	Counterterrorism, Homeland Security, and Preservation of the Partnership Model	62
B.	The War on Immigration.....	67
VI.	RECONSIDERING THE “RADICALISM” OF IMMIGRANT SANCTUARY	73
A.	The Prospect of a New Normal in Criminal Administration	74
B.	The Heretical Quality of Contemporary Immigration Enforcement.....	80
	CONCLUSION	83

INTRODUCTION

As told by the federal executive, the story of police federalism¹ is a story of the law enforcement present where federal, state, and local governments work together, pooling the nation’s law enforcement resources in order to keep Americans safe.² It is a story premised on a shared consciousness about what security is and what it is not. Three successive presidential administrations have pitched this story in their opposition to the practice of immigrant sanctuary,³ at various intervals

1. “Police federalism” is meant to indicate the relationship between the federal government and state and local governments with respect to “police” (that is, sworn law enforcement personnel at the subfederal level of government). The concept also encompasses the relationship between states in regard to their respective internal police institutions.

2. For an early description of this collaborative model, see George W. Bush, Preface to Office of Homeland Sec., National Strategy for Homeland Security, at iii, iii–iv (2002), <https://www.dhs.gov/sites/default/files/publications/nat-strat-hls-2002.pdf> [<https://perma.cc/Z6GK-2AP2>] [hereinafter Bush, National Strategy Preface].

3. Throughout this Article, “immigrant sanctuary” references the state and local government policy and practice of restricting police and other subfederal government officials from participation in the enforcement of federal immigration law. For a detailed discussion of immigrant sanctuary as a lay concept and the implications of immigrant-sanctuary policy, see Ming H. Chen, Trust in Immigration Enforcement: State

characterizing state and local government laws restricting police participation in immigration enforcement as aberrant, reckless, or unpatriotic.⁴

A White House press release circulated in April 2017 serves as a recent example. In response to a federal court injunction blocking the Justice Department from withholding federal funds from immigrant-sanctuary jurisdictions,⁵ the Office of the Press Secretary published a statement asserting that public officials in immigrant-sanctuary jurisdictions had “the blood of dead Americans on their hands.”⁶ In the view of the White House, the court’s injunction was a “gift to the criminal gang

Noncooperation and Sanctuary Cities After Secure Communities, 91 Chi.-Kent L. Rev. 13, 19–21 (2016) (framing sanctuary policies as a form of noncooperative federalism); Ingrid V. Eagly, Immigrant Protective Policies in Criminal Justice, 95 Tex. L. Rev. 245, 253–54 (2016) (describing recent subfederal immigrant protective policies); Trevor George Gardner, The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case, 34 St. Louis U. Pub. L. Rev. 313, 314–17 (2014) [hereinafter Gardner, Promise and Peril] (describing and providing an empirical account of the “second wave” of immigrant sanctuary between 2001 and 2008); Christopher N. Lasch, Sanctuary Cities and Dog-Whistle Politics, 42 New Eng. J. on Crim. & Civ. Confinement 159, 161–64 (2016) (describing the debate over sanctuary policies as a site for political contests); Christopher N. Lasch et al., Understanding “Sanctuary Cities,” 59 B.C. L. Rev. 1703, 1705–12 (2018) (outlining the Trump Administration’s immigration policies and attempts by “sanctuary cities” to counter those policies); Jennifer Ridgely, Cities of Refuge: Immigration Enforcement, Police, and the Insurgent Genealogies of Citizenship in U.S. Sanctuary Cities, 29 Urb. Geography 53, 65–72 (2008) (exploring the history of municipal sanctuary policies); Rose Cuison Villazor, What is a “Sanctuary”?, 61 SMU L. Rev. 133, 143–50 (2008) (exploring sanctuary’s contemporary meanings by examining its public and private dimensions).

4. See Bay Area News Grp., ICE Wants Access to SF Jails, East Bay Times (July 24, 2008), <https://www.eastbaytimes.com/2008/07/24/ice-wants-access-to-sf-jails-2/> [https://perma.cc/TXA3-QJWC] (last updated Aug. 15, 2016) (describing federal officials’ frustration with San Francisco’s sanctuary laws); Julia Preston & Steven Yaccino, Obama Policy on Immigrants Is Challenged by Chicago, N.Y. Times (July 10, 2012), <http://www.nytimes.com/2012/07/11/us/obama-policy-on-illegal-immigrants-is-challenged-by-chicago.html> (on file with the *Columbia Law Review*) (describing Immigration and Customs Enforcement (ICE) officials’ criticism of Chicago’s sanctuary policy). For a discussion of the impact of federal initiatives—particularly the inclusion of immigration data in the National Crime Information Center Database—that undermine sanctuary policies, see Laura Sullivan, Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database, 97 Calif. L. Rev. 567, 569 (2009).

5. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017). The Justice Department took this action pursuant to Executive Order 13768, titled “Enhancing Public Safety in the Interior of the United States.” See Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter Sanctuary Cities E.O.]. The Order itself accuses the subfederal governments restricting police participation in immigration enforcement of “willfully” violating federal law and causing “immeasurable harm to the American people and to the very fabric of our Republic.” *Id.*

6. Statement on Sanctuary Cities Ruling, The White House (Apr. 25, 2017), <https://www.whitehouse.gov/briefings-statements/statement-sanctuary-cities-ruling/> [https://perma.cc/J957-35K6].

and cartel element,” facilitated “the worst kind of human trafficking and sex trafficking,” and put “thousands of innocent lives at risk.”⁷

The press release ends with a recommitment to the rule of law, allegedly in response to a rising tide of lawlessness:

[W]e will pursue all legal remedies to the sanctuary city threat that imperils our citizens, and continue our efforts to ramp up enforcement to remove the criminal and gang element from our country. Ultimately, this is a fight between sovereignty and open borders, between the rule of law and lawlessness, and between hardworking Americans and those who would undermine their safety and freedom.⁸

Members of Congress have also promised vigilance in response to the radicalism of immigrant sanctuary. In an exchange with then-Homeland Security Secretary Jeh Johnson at a 2015 Judiciary Committee hearing, Republican Congressman Trey Gowdy of South Carolina rejected Johnson’s representation that state and local governments could refuse police participation in the enforcement of federal civil immigration law. Gowdy felt the need to state the obvious—that Secretary Johnson “work[ed] for the *United States of America*,” adding, “How in the hell can a city tell you no?”⁹

Gowdy’s question reflects two assumptions of the emerging antisantuary position. One, that as Americans we hold a shared notion of public security, and two, that social and political norms dictate that state and local governments should readily defer to the federal government in its pursuit of public security. To this end, subfederal governments should, as a matter of course, permit the federal government to deploy subfederal police, individually or collectively, to enforce federal law. Such assumptions signal that some of the most ardent proponents of federal government minimalism lose their ideological bearings when contemplating matters of crime control and domestic and national security. For Gowdy and much of the federal executive, reflexive state and local police cooperation with any federal policy placed under the banner of “security” is eminently practical—simply a matter of good governance and common sense.¹⁰

7. Id.

8. Id.

9. United States Department of Homeland Security: Hearing Before the H. Comm. on the Judiciary, 114th Cong. 69 (2015) (statement of Rep. Gowdy, Member, H. Comm. on the Judiciary) (emphasis added).

10. See Tal Kopan, House Passes ‘Kate’s Law’ and Bill Declaring War on Sanctuary Cities, CNN Politics (June 29, 2017), <https://www.cnn.com/2017/06/29/politics/kates-law-sanctuary-cities-house-bill-immigration/index.html> [<https://perma.cc/2N8N-AZYW>] (highlighting the rule of law rhetoric used by nominally small-government Republicans to justify increased coordination between the federal, state, and local governments in the immigration-enforcement context).

This Article’s chief contention is that these assumptions about police, police governance, and police federalism are flagrantly ahistorical. For nearly all of U.S. history, federal and state governments have followed an alternative doctrine that this Article identifies as the “orthodoxy of police autonomy.” The term is meant to convey the philosophy that informed the “old normal” in police federalism, when the federal government would dutifully avoid even the appearance that it was managing the affairs and routine activity of state and local police.

Justice Scalia obliquely referenced this history in his opinion in *Printz v. United States*,¹¹ noting “an absence of federal executive-commandeering statutes” in the history of federal–subfederal government relations.¹² The history of police federalism offered in this Article lends evidence to Scalia’s empirical claim; it shows the federal government, and state and local police departments, operating with near absolute independence. Historically, Americans have not only supported this arrangement but have insisted that the federal government keep its distance from local police institutions.¹³ Prudent or not, the American public

11. 521 U.S. 898, 935 (1997) (striking down the Brady Bill’s requirement that subfederal law enforcement officers perform background checks for prospective gun purchasers). In *Printz*, the Supreme Court applied anticcommandeering principles in striking down the Brady Bill’s requirement that subfederal law enforcement officers perform background checks for prospective gun purchasers. *Id.* Moreover, when the federal government has attempted to commandeer state and local governments, such action has been found unconstitutional by the Court. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581–82 (2012) (striking down a conditional spending provision of the Affordable Care Act on the theory that the provision, in effect, compelled states to implement a federal program by way of a financial inducement so coercive as to “leave[] the States with no real option but to acquiesce”); *New York v. United States*, 505 U.S. 144, 174–77 (1992) (holding that the take-title provision of the Low-Level Radioactive Waste Management Act, which required states to take legal ownership of and legal liability for low-level waste, violated the Tenth Amendment as it represented a form of federal commandeering).

12. *Printz*, 521 U.S. at 916. In an earlier part of the majority opinion in *Printz*, Scalia commented at length on the relevance of the absence of federal commandeering statutes in the historical record:

[W]e do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States’ executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power. . . .

Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States’ executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption.

Id. at 907–09.

13. See Ted Gest, *Crime & Politics: Big Government’s Erratic Campaign for Law and Order 1*, 5 (2001) (describing how “crime controls once were purely local issues in the United States”); Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the*

has traditionally rejected the prospect of the local beat cop serving as an agent of the federal government.¹⁴

In tracing the history of police federalism from the nation's inception to the present, this Article captures the cultural and institutional norms that have shaped the field and highlights their interdependence. Regrettably, this history has been lost entirely on the immigrant-sanctuary debate. In debating sanctuary, neither immigration hawks nor immigrant-welfare advocates acknowledge that the federal government has never before insisted (or even asked) that all state and local police departments enforce federal immigration law.¹⁵ One would, moreover, be

American State 25–26 (2016) (describing resistance to federal Prohibition and the “vast expansion of central state authority” among conservatives with “strong antiliquor sentiments”). Public support for police independence from the federal government survived Roosevelt's New Deal movement and the federal government's expansion throughout the twentieth century. See *infra* Parts III–IV.

14. See Gest, *supra* note 13, at 6 (discussing the traditional separation of local policing from the federal government). This orientation is somewhat at odds with the project of “uncooperative federalism,” in which subfederal governments derive most of their governing authority from the discretion they hold in their enforcement of federal law. See Heather M. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *Yale L.J.* 1889, 1902–03 (2014) (emphasizing the role of “contestation” in healthy policymaking). In the framework of uncooperative federalism, federalism “creates a multiplicity of institutions with lawmaking power through which to develop consensus.” Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 *Yale L.J.* 2094, 2097 (2014). In this sense, the ideological diversity of the subfederal governments operating under an overarching policy frame creates conflict but also fosters the conflict negotiation that ultimately leads to national integration. *Id.* This sort of uncooperative federalism is based upon a qualitatively different antagonism than that apparent in the history of police federalism. The history of police federalism reflects the “combative” model of federalism, which advises unqualified subfederal government abstinence from the enforcement of federal law as the ultimate check against the expansion of federal government power in a particular policy field. See, e.g., Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 *Brook. L. Rev.* 1231, 1250–61 (2004) (explaining how the anticommandeering doctrine helps secure constitutional rights through federalism by enabling states to decline to follow federal policies that may violate those rights); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 *Brook. L. Rev.* 1277, 1280–301 (2004) (demonstrating how federalism in the form of state and local noncooperation on antiterrorism measures protects civil liberties from federal encroachment).

15. This federal aspiration should be distinguished from the early stages of American immigration enforcement in which state governments could legally regulate immigration within their borders irrespective of the disposition of the federal government, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 *Colum. L. Rev.* 1833, 1883–84 (1993), and from the federal government's authorization of state and local government enforcement of the Immigration Act of 1882, see Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 *Ohio St. L.J.* 1105, 1115 (2013) (“But while federal officials sometimes continued to enlist state and local police assistance even after Congress established exclusive federal control over immigration in 1891, these episodes were largely ad hoc, informal, and limited.”). For a rich historical account of the haphazard and piecemeal quality of federal use of subfederal government in the early nineteenth century, see Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century*

hard-pressed to identify analogous federal criminal, domestic, or national security measures premised upon the participation of *all* subfederal police institutions—17,985 and counting.¹⁶ This sort of administrative ambition is largely absent from the historical record, not because of the federal anticommandeering rule (established by the Court in 1997)¹⁷ but because of deeply rooted cultural norms.¹⁸

The historical norms of police federalism, evident throughout this Article’s review of the historical record, take on greater significance when set against the applied criminology literature and the national security federalism literature of the past twenty years. Scholars writing in these two fields tend to overlook the historical norms of police federalism, instead placing their analytical focus on precisely how state and local police best fit within an imagined domestic and national security umbrella.¹⁹ The normative question guiding this literature is not *whether* local police should be participating in federal public security initiatives,

Origins of American Immigration Policy 6, 201 (2017) (identifying New York and Massachusetts as the two subfederal governments driving enforcement of the 1882 Immigration Act until federal assertion over ports of entry in 1891); Matthew J. Lindsay, Disaggregating “Immigration Law,” 68 Fla. L. Rev. 179, 202–15 (2016) (describing early immigration regulation, which was controlled mainly by the states, as an “unexceptional aspect of both the state police power and the federal commerce power”).

Separately, it is worth noting that Professor Gerald Neuman’s historical work reflects the architecture of this Article in that he seeks to expose a deep-seated assumption about historical norms that inform contemporary understanding of the legitimacy of specific structural forms of immigration federalism. See Neuman, *supra*, at 1834–35. However, while Neuman’s focus is on the history of migration management at the state level, this Article’s historical evidence derives from the law, policy, and norms regarding the federal government’s relationship with police.

16. See Final Report of the President’s Task Force on 21st Century Policing 29 tbl.1 (2015) [hereinafter 21st Century Policing], http://www.theiacp.org/Portals/0/taskforce_finalreport.pdf [<https://perma.cc/64GC-JV7C>].

17. See *supra* notes 11–12 (discussing the Court’s anticommandeering jurisprudence).

18. See *infra* Part III (detailing the American public’s historical aversion to federal government intrusion into subfederal police activity).

19. National security has traditionally been a field in which the federal government holds considerable influence based on the condition social theorist Max Weber referred to as bureaucratic legitimacy. See 1 Max Weber, *Economy and Society* 212–15, 220–27, 244 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (1922) (positing that legal authority is built upon bureaucratic administration and is created from a reliance on society’s rules and laws). See generally Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 *Ann. Rev. Psychol.* 375, 378 (2006) (describing Weber’s typology of legitimating ideologies). And similar to normative projects prevalent in the federalism literature, an emerging literature on “national security federalism” takes cooperation between the federal government and subnational governments on national security matters as a prerequisite for strong security, leaving open for debate only the precise quality of this cooperation. See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 *Stan. L. Rev.* 289, 292–95 (2012) [hereinafter Waxman, *National Security Federalism*]; see also Aziz Z. Huq, *The Social Production of National Security*, 98 *Cornell L. Rev.* 637, 658–63 (2013).

but *how*—how can police be effectively integrated into the public security apparatus of the federal executive?

The history of police federalism places this evolving normative project in context. It reveals subfederal resistance movements like immigrant sanctuary as the “old normal,” in sync with the customary relationship between the federal government and the neighborhood police department. Furthermore, it reveals recent federal efforts to incorporate all of the nation’s police departments into the enforcement arm of the Immigration and Customs Enforcement (ICE) as a radical deviation.²⁰ To establish this contextual point, this Article delivers a history of police federalism in several brief chapters. Part I maps the field of police federalism. It establishes the legal and administrative structure of the field to explain the relationship between law, police authority, and police governance within the federalist system. Part II then proposes French sociologist Pierre Bourdieu’s “field theory” as a helpful framework for developing insights into the relationship between culture and public security institutions.²¹ Legal scholars have periodically used field theory to better understand “socially patterned activity” among legal institutions and associated actors.²² In keeping with the precepts of the theory, this

20. In prior work, I have characterized both the federal government’s pursuit of the centralization of executive criminal administration across the federalist system as well as subfederal government consent to this project as contributing to an institutional homology in criminal justice. There is relatively little institutional variance across jurisdictions and thus minimal innovation within the field despite widespread dysfunction. See Trevor Gardner, *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, 46 Fla. St. L. Rev. (forthcoming Aug. 2019) (manuscript at 8–13) [hereinafter Gardner, *Right at Home*] (on file with the *Columbia Law Review*). Similarly, this Article is intended in significant part to demonstrate the value of the subfederal posture of “combative federalism” within the field of executive criminal administration. As one avid supporter of combative federalism argued three decades ago:

“Combative federalism,” under which federal programs are exclusively federal, presents a desirable alternative To protect the feedback mechanism that permits states to react to federal actions, the federal government ought to do more itself; it ought to provide funds directly, and be responsible for the administration of the programs it funds. Only the ensuing combat, prompted by the reactions of the states, can guarantee an effective political check on the exercise of national power.

Federalism and Administrative Structure, 92 Yale L.J. 1342, 1343 (1983) (summarizing a paper presented by Robert M. Cover at the Yale Law Journal Symposium on the Legacy of the New Deal, held in 1983).

When practicing abstinence by way of combative federalism (as opposed to contentious collaboration by way of uncooperative federalism), subfederal governments shun cooperation with the federal government in the interest of preserving subnational government autonomy over the long term. *Id.* To be clear, this is not a general endorsement of combative federalism, but an argument as to its utility as a norm in the field of executive criminal federalism.

21. See generally Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice trans., Cambridge Univ. Press 1977) (1972) (laying out the tenets of field theory).

22. See Richard Terdiman, *Translator’s Introduction to Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings L.J.* 805, 805–11 (1987)

Article takes police federalism as an institutional field within the governing structure of federalism, shaped by a public “orthodoxy” (that is, a broadly held belief system) that informs institutional behavior within the field. The notion of public orthodoxy brings to light the critical distinction between the historical norms of police federalism and the tenor of the contemporary antisansctuary position.

Part III introduces the first stage of the historical record and proposes a “traditional” model of police federalism (from 1789 to 1967) in which the federal criminal justice system and its subfederal counterparts operate independently. Despite federal initiatives such as the early-twentieth-century War on Alcohol (or perhaps because of them), the American public has for most of the nation’s history held to the belief that the federal government should not be able to determine routine subfederal police activity. Contrary to recent propaganda from the federal executive, there is substantial historical evidence that the public and its elected representatives have long understood federal deployment of police as antidemocratic and antithetical to a free society.

Part IV turns from the traditional model to the “partnership model,” initiated in the 1960s through President Lyndon Johnson’s War on Crime. Though the federal government revolutionized police federalism in the 1960s by funding state and local police departments as part of an effort to improve police infrastructure, neither the Johnson Administration nor members of Congress considered the possibility of using state and local police as the primary enforcers of federal law—a distinction limited to the police federalism of the present.

Part V unpacks this most recent stage in which federal officials expect that state and local police will periodically serve as federal proxies. The stage is marked by a shift from the federal government merely funding state and local police institutions and sporadic federal–subfederal partnering, to the immigration-enforcement model established by the Department of Homeland Security (DHS) between 2008 and 2014. During this discrete period of innovation (and well after the first wave of counterterrorism programming in 2001), DHS officials based the administrative structure of immigration enforcement on the incorporation of *all* police departments into a single, centralized enforcement apparatus. These are the first meaningful representations of the long-feared national police state, defined in historical public discourse as an administrative framework in which state, county, and city police align to serve as agents of the federal government.

Part VI closes by recasting contemporary immigration enforcement as a radical administrative project when situated in relation to the history

(analyzing Bourdieu’s “juridical field”); see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943, 949–62 (1995) [hereinafter Lessig, *Regulation of Social Meaning*] (using Bourdieusian field theory to examine the effects of legal policy on social meaning).

of police federalism, and immigrant sanctuary as a traditional response to federal overreach in the field of security.

I. THE STRUCTURE OF POLICE FEDERALISM

This Part begins with a review of the constitutional provisions that serve as the basis of police authority. These provisions establish the cornerstone for a structural model of police federalism made up of three primary fields of administrative authority: (1) federal authority over federal law enforcement; (2) state authority over state and local police; and (3) federal authority over state and local police. While the first two fields are widely recognized, the third receives far less attention in criminal law scholarship in part because it is a murkier field of governing authority established not merely by federal law but also by way of what is generally conceived as state and local government consent.

A. *“I Will Send in the Feds!”: The Myth and Reality of the Power to Police*

In the *Washington Post* podcast “Can He Do That?,” host Allison Michaels helps listeners get a handle on the scope of Donald Trump’s powers as President, the legality of various actions taken by his Administration, and, more abstractly, the degree to which Trump is reshaping presidential norms.²³ Michaels’s project was one of several public education initiatives introduced in the weeks and months after President Trump’s election, in no small part due to unusual claims then-candidate Trump made during his 2016 campaign regarding his intended use of federal executive power.²⁴

23. See Can He Do That: A Podcast Exploring the Powers and Limitations of the American Presidency, Wash. Post, <https://www.washingtonpost.com/graphics/politics/can-he-do-that-trump-podcast/> [<https://perma.cc/6ATA-D87S>] (last visited Sept. 10, 2018).

24. In his speech accepting the Republican Party nomination for president, Trump focused the national public’s attention on the issue of public security. Trump self-identified as the law-and-order candidate and vowed to “liberate our citizens from the crime and terrorism and lawlessness that threatens their communities,” signaling a heavier federal hand in criminal enforcement. Donald J. Trump, Address Accepting the Presidential Nomination at the Republican National Convention in Cleveland, Ohio (July 21, 2016), <https://www.presidency.ucsb.edu/node/318521> [<https://perma.cc/XX8K-4JK6>]; see also Patrick Healy & Jonathan Martin, His Tone Dark, Donald Trump Takes G.O.P. Mantle, N.Y. Times (July 21, 2016), <https://www.nytimes.com/2016/07/22/us/politics/donald-trump-rnc-speech.html> (on file with the *Columbia Law Review*). Trump ended the election cycle with an Inauguration Day speech in which he described “the crime and the gangs and the drugs” as part of a larger story of present-day “American carnage.” Aaron Blake, Trump’s Full Inauguration Speech Transcript, Annotated, Wash. Post (Jan. 20, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/20/donald-trumps-full-inauguration-speech-transcript-annotated/> [<https://perma.cc/2386-X74J>].

At least a few Americans have seen this movie before. In a speech during the presidential election cycle of 1968 entitled “Toward Freedom from Fear,” Richard Nixon warned that the nation must reject the liberal focus on the social causes of crime in order to “wage an effective national war against [the] enemy within.” Richard Nixon, Remarks in

One such claim pertained to the city of Chicago. In several speeches in the heat of the presidential race, Trump promised Americans that his Administration would put an end to the city’s homicide epidemic.²⁵ He argued that President Obama had ignored Chicago’s urban “carnage,” the 4,000 killings (by Trump’s count) during Obama’s tenure in office.²⁶

Trump continued to draw the city of Chicago into the national spotlight well after his win in November 2016. Only five months later, he tweeted, “If Chicago doesn’t fix the horrible ‘carnage’ going on, 228 shootings in 2017 with 42 killings (up 24% from 2016), I will send in the Feds!”²⁷ In considering the significance of the communication, Chicago media outlets pointed out that the Justice Department was already working with Chicago police and prosecutors to reduce Chicago’s homicide rate and that this sort of federal support had been in place for some time.²⁸ Chicago Police Superintendent Eddie Johnson told the local press that while he welcomed the federal government to send additional resources, he would not endorse the rumored mobilization of National Guard troops, arguing that the National Guard was not trained for street-level criminal enforcement.²⁹

The sober reality is that the federal government lacks the resources to send a legion of law enforcement officers to police violent crime at a given location over an extended period. Apart from the case of

New York City: “Toward Freedom from Fear” (May 8, 1968), <https://www.presidency.ucsb.edu/node/326773> [<https://perma.cc/59LS-H3UA>]; see also Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *Stud. Am. Pol. Dev.* 230, 251 (2007) (detailing conservative politicians’ “uncompromising position on crime and lawlessness” during the 1960s).

25. See, e.g., Address by Donald J. Trump, *supra* note 24.

26. Rick Pearson & Monique Garcia, Trump Cites Chicago Gun Violence in Speech, *Chi. Trib.* (July 22, 2016), <http://www.chicagotribune.com/news/local/politics/ct-donald-trump-chicago-violence-speech-met-0722-20160721-story.html> (on file with the *Columbia Law Review*). There were 3,904 criminal homicides in Chicago from 2009 to 2016, according to data published by the Chicago Police Department. See Ryan Marx, Data: Chicago Homicide Data Since 1957, *Chi. Trib.* (Mar. 2, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-homicides-data-since-1957-20160302-htmlstory.html> (on file with the *Columbia Law Review*); see also Azadeh Ansari & Rosa Flores, Chicago’s 762 Homicides in 2016 Is Highest in 19 Years, *CNN* (Jan. 2, 2017), <https://www.cnn.com/2017/01/01/us/chicago-murders-2016/index.html> [<https://perma.cc/Y8UJ-N879>].

27. Donald J. Trump (@realDonaldTrump), Twitter (Jan. 24, 2017), <https://twitter.com/realdonaldtrump/status/824080766288228352> [<https://perma.cc/6YZU-4SBJ>].

28. See John Wagner & Mark Berman, Trump Threatens to “Send in the Feds” to Address Chicago “Carnage,” *Wash. Post* (Jan. 25, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/01/24/trump-threatens-to-send-in-the-feds-to-address-chicago-carnage/> [<https://perma.cc/J2TW-ZBRS>].

29. See Jason Meisner et al., Trump’s Tweet Sends Law Enforcement Scrambling to Figure Out Its Meaning, *Chi. Trib.* (Jan. 25, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-trump-chicago-violence-met-20170125-story.html> (on file with the *Columbia Law Review*).

Reconstruction,³⁰ Congress has never given the federal executive the resources necessary to broadly police a major American city.³¹ Moreover, President Trump is constitutionally barred under the Tenth Amendment from issuing policy directives to local law enforcement—the President cannot lawfully “send in the feds” to direct the activities of Chicago police.³² Given these constraints, both logistical and legal, how are we to understand the president’s power to police?

The power to police derives from the “police power,” a more general governing authority left to the various states by way of the Tenth Amendment.³³ The police department is just one institution by which state governments execute this broad and nebulous authority. Blackstone attempted to clarify the police power in *Commentaries on the Laws of*

30. See Jonathan Simon, *Governing Through Crime: How The War on Crime Transformed American Democracy and Created a Culture of Fear* 82–84 (2007) (describing the “broad federal police power” created during Reconstruction). During Reconstruction, the federal government exercised a form of police power that was based on the Thirteenth, Fourteenth, and Fifteenth Amendments—each of which gave Congress the power to enforce these Amendments by appropriate legislation. See U.S. Const. amend. XIII, § 2; id. amend. XIV, § 5; id. amend. XV, § 2.

31. See Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 *Emory L.J.* 1, 15–16 (2012) (discussing the limited prosecutorial resources available to the executive and challenging claims of “over-federalization”); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 *Harv. L. Rev.* 780, 843–45 (2006) (arguing that Congress devotes “too much legislative energy to making law for the occasional federal prosecution” instead of funding local officials who do most of the work in controlling crime). Professor Susan Klein and Ingrid Grobey’s conclusion that claims of “over-federalization” represent an overreaction in the legal academy is based on an imprecise assessment of the scope of the federal role in criminal justice. The authors fail to acknowledge the federal activity central to this Article, namely federal government influence over state and local police departments. For other commentary on the reach of federal criminal law and federal criminal law enforcement, see Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 *Cornell L. Rev.* 1, 2–38 (2003) (evaluating the impact of the “New Federalism” of the Rehnquist Court on established Supreme Court doctrines in the context of the criminal law); Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 *Tex. Rev. L. & Pol.* 1, 2–8 (1997) (outlining and criticizing the steadily increasing role of the federal government in the criminal law); Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 *Am. Crim. L. Rev.* 1863, 1884–87 (2012) (“Because the [Hate Crimes Prevention] Act greatly expands the federal government’s authority to prosecute hate crimes, critics have argued the Act is yet another example of the overfederalization of the criminal law.”).

32. See *Printz v. United States*, 521 U.S. 898, 933–35 (1997) (holding that the Tenth Amendment bars the federal government from commandeering state law enforcement officials for the purpose of enforcing federal law); see also Gardner, *Promise and Peril*, supra note 3, at 317–18 (detailing the significance of *Printz*’s anticcommandeering rule in the context of Homeland Security administration).

33. See U.S. Const. amend. X.

England,³⁴ comparing it to the power of the king in a monarchy as a “macro householder.”³⁵ Among the king’s responsibilities was the regulation of the “order” of the kingdom; accordingly, the king directed citizens of the kingdom to follow any number of rules regarding propriety, neighborliness, and good manners.³⁶ According to Blackstone, the theoretical responsibilities of the state are nearly identical and serve as the primary rationale for the police powers of modern government.³⁷

American legal scholar Ernst Freund identified the police power as the most comprehensive of government powers and, as a result, the least specified. He critiqued Blackstone’s codification of the police power to a neat list of offenses as entirely arbitrary, writing, “It would be impossible to discover any principle upon which these particular matters are brought together and separated from others.”³⁸ Freund ultimately concluded that the police power is not a fixed object but “elastic [and] capable of development.”³⁹ It is, in Freund’s view, the power to promote the public welfare by “regulating the use of liberty and property.”⁴⁰

34. See 1 William Blackstone, *Commentaries* *230–70; see also Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* 48–62 (2005) (discussing the Blackstonian notion of police household management).

35. Dubber, *supra* note 34, at 49.

36. *Id.*

37. *Id.*

38. Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 2 (1904). For a similar analysis, see Pierre Bourdieu, *From the King’s House to the Reason of State: A Model of the Genesis of the Bureaucratic Field*, in Pierre Bourdieu and Democratic Politics: The Mystery of Ministry 51 (Loïc Wacquant ed., Richard Nice & Loïc Wacquant trans., 2005) (theorizing the transition from the dynastic to the bureaucratic state).

39. Freund, *supra* note 38, at 3.

40. *Id.* at iii. For additional analysis of the concept of the police power, see David Fellman, *Due Process of Law in Nebraska: Police Power—I*, 9 Neb. L. Bull. 357, 357–61 (1931) (describing the nature and origins of the police power); Stephen A. Siegel, *Lochner* Era Jurisprudence and the American Constitutional Tradition, 70 N.C. L. Rev. 1, 6–23 (1991) (describing the birth of the police power doctrine in *Lochner*-era debates over the role of the legislature’s regulatory power); George W. Wickersham, *The Police Power, a Product of the Rule of Reason*, 27 Harv. L. Rev. 297, 297 (1914) (arguing that police power is the “result of the application of the ‘rule of reason’ in the construction of written constitutions”). Freund’s expansive view of the police power has been subject to pointed criticism within debates regarding the constitutional authority of municipal governments. See David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 491 (1999) (emphasizing the value of local governments and their responsibility for “structuring political struggles over the most contentious of public questions”); Paul D. Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, 41 Am. J. Legal Hist. 368, 378–80 (1997) (describing Judge Cooley’s preference for localism, which followed from the idea that “civil liberty was dependent on active self-government, and that self-government could be best conducted locally”); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 Wis. L. Rev. 83, 85 (advancing the idea that cities are constitutionally vulnerable because they “have no set place in the American constitutional structure”).

Police departments exercise just a subset of the state's police powers and have done so since the introduction of the police institution into public life.⁴¹ American and European scholars have written extensively about the genealogy of the police department, though these narratives give insufficient attention to the distinctions between the American and European systems of national governance. In the United States, the national government, as distinct from the states, does not possess a police power per se but a commerce power that serves as the legal basis for the federal criminal justice system.⁴² How, then, should the federal and subfederal roles in the field of police federalism be understood given the legal authority upon which each is based?

The criminal literature generally falls short in answering this question, as it tends to situate police federalism in a binary schematic: The federal government directs federal law enforcement within the scope of federal criminal jurisdiction, while the states hold authority over state police within the scope of state criminal jurisdiction, despite conveying most of their authority over municipal police to the respective internal municipalities.⁴³ Within this scheme, criminal scholars often debate whether the federal government or state governments are more to blame for large-

41. See Dubber, *supra* note 34, at 64; Fabien Jobard, *Conceptualizing of Police*, in *Encyclopedia of Criminology and Criminal Justice* 519–20 (Gerben Bruinsma & David Weisburd eds., 2014). According to sociologist Giuseppe Campesi, the “police” did not take shape as an institutional figure in modern society until 1667, when the city of Paris introduced the “office of the police lieutenant” under the French monarch. See Giuseppe Campesi, *A Genealogy of Public Security: The Theory and History of Modern Police Powers* 93 (Filippo Valente trans., Routledge 2016) (2009). A parallel project of “police science” developed in France and England in the late eighteenth century with the primary purpose of maximizing the welfare of the population. Dubber, *supra* note 34, at 63–77. Channeling this history in his historical study of police, Michel Foucault argued that police institutions are not oriented toward law but toward tactics used to ensure a specific arrangement, which many have come to understand as “social order” (with the criminal law becoming one of many artifacts used by the police institution to maintain this order). *Id.* at 71–74.

42. Dubber, *supra* note 34, at 144–47.

43. See Kathleen F. Brickley, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *Hastings L.J.* 1135, 1135–44 (1995) (contending that the expansion of federal criminal law and the enlargement of a national police power cannot be reconciled with “long-standing principles of federalism”).

scale penal problems such as mass imprisonment,⁴⁴ overcriminalization,⁴⁵ and the proliferation of criminal records.⁴⁶ There is a literature lamenting the “federalization” of American criminal law and corresponding growth in federal criminal administration since the Prohibition era.⁴⁷ A

44. Many criminal scholars continue to study and analyze the American criminal justice “system” as a single system rather than as a series of semi-autonomous criminal justice systems at the federal, state, county, and city levels of government. This Article’s introduction and modeling of the concept of “police federalism” helps to protect against this sort of theoretical misstep.

Author and civil rights lawyer Michelle Alexander’s *The New Jim Crow*, for example, captured the attention of the academic world and the public at large by depicting contemporary American criminal justice as a racial caste “system” analogous to the Jim Crow South. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010). Alexander argues that the virtual life sentence imposed by arrest and imprisonment (specifically, the implications of arrest and imprisonment for voting, employment, and public assistance) fosters an advanced marginalization for many African Americans reminiscent of that found in much of the country following Emancipation. See *id.* at 94–96. Alexander’s analogy lies within a larger historical narrative in which the American criminal justice system is the latest in a series of public institutions morphing to manage large swaths of the African American population. See Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the US*, *New Left Rev.*, Jan.–Feb. 2002, at 4141–42, 52–53.

While *The New Jim Crow* is a path-breaking and indispensable contribution to the literature on race, crime, and social marginality, the book’s unitary model of contemporary American criminal justice does not, at first blush, square with the realities of American federalism. How is it possible to understand the rise of a Jim Crow system of criminal justice within and across the federal, state, and municipal levels, each of which operates within its own matrix of constitutional and statutory authority? See *supra* notes 20–22 and accompanying text; *infra* Figure 1.

In this vein, critics have suggested that the Jim Crow model fails to account for the heterogeneous quality of American government. They ask, for example, how the city of Washington, D.C., with six consecutive black mayors after 1973 and a majority-black population, sustained African American overrepresentation in arrest and imprisonment totals. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 *N.Y.U. L. Rev.* 21, 38–42 (2012); see also James Forman, Jr., *Locking Up Our Own: Crime and Punishment in Black America* 18–22 (2017). The concept of police federalism could be a starting point in explaining the D.C. case and the practice of Jim Crow criminal justice across a variegated criminal justice landscape. Rather than taking executive criminal administration in Washington, D.C. as a standalone system independent of the federal government, or the nation as a unitary criminal justice system (rather than several thousand semiautonomous systems), police federalism together with field theory provides a framework for studying the symbiotic quality of federal, state, and municipal policing within the federalist system.

45. See Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* 7–10 (2008) (suggesting that both state and federal governments are responsible for overcriminalization).

46. James B. Jacobs, *The Eternal Criminal Record* 33–42 (2015) (exploring the ways in which local police practices of record keeping, such as rap sheets, have developed over time into national databases for accessing an individual’s criminal record).

47. See, e.g., Brickley, *supra* note 43, at 1136–44. This and similar projects document and theorize the rapid growth in federal crime policy and administration concurrent with the steep rise in incarceration rates in the 1970s, 80s, and 90s. See, e.g., *id.* at 1147–48; see

competing literature suggests that the intense focus many scholars place on the federal criminal justice system is a waste of time, energy, and ink, given that the vast majority of criminal processing takes place at the state and local levels of government.⁴⁸ Scholars claiming the greater importance of subfederal criminal administration have inspired a second wave of research on the geographic distribution of U.S. imprisonment, choosing to highlight regional variation. For instance, recent studies show that the disparity in imprisonment rates across the fifty states exceeds the disparity in imprisonment rates among the nations of Europe.⁴⁹ Moreover, of the states with the thirteen highest incarceration rates in the United States, twelve are in the South.⁵⁰ Louisiana leads the nation in this regard, imprisoning its residents at a rate of 816 per

also Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* 89–99 (1997).

48. In fiscal year 2015, 18.1 million criminal cases entered state court systems while the U.S. Attorneys' Offices of the Justice Department filed only 54,928 criminal cases in federal court. Court Statistics Project, Nat'l Ctr. for State Courts, *Examining the Work of State Courts: An Overview of 2015 State Court Caseloads* 3 tbl. (2016), http://www.courtstatistics.org/~/_/media/Microsites/Files/CSP/EWSC%202015.ashx [<https://perma.cc/U8K2-NTN5>]; Dep't of Justice, *United States Attorneys' Annual Statistical Report: Fiscal Year 2015*, at 4 tbl.1, <https://www.justice.gov/usao/file/831856/download> [<https://perma.cc/FAL2-BQNC>]. Today, however, scholars are far more attentive to the decentralized quality of the federal system and derivative variation in crime policy and enforcement practice. See John F. Pfaff, *Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform* 13–16 (2017). Professor John Pfaff argues that because state governments bear the cost of incarceration, the sentencing decisions made at the county level fail to register with county officials in terms of their cost to the public. *Id.* Recent studies of the death penalty offer another helpful example of scholarship addressing penal variation within the federalist system. After finding that capital punishment is heavily concentrated in the states of the former Confederacy (and also within a subset of counties within those states), criminal scholars have come to challenge the notion that the death penalty is a uniquely American phenomenon among Western nations, flowing from a deep-seated cultural dysfunction that blankets three hundred million people, the fifty states, and several thousand municipalities. See David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* 11–17 (2010) (arguing that the death penalty bears the distinctive features of America's political institutions, including federalism and local democracy). Close examination of the regional concentration of state-sponsored executions has prompted criminal scholars to rethink the theory that the U.S. disposition toward capital punishment is far afield of the nation's similarly situated peers. *Id.* The fact that the history of capital punishment abolition in the United States is older than that of Europe, given capital punishment's relatively early elimination by several states, underscores the point. *Id.* at 11.

49. See Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 36, 39, 42–43 & figs.2-2 & 2-5 (Jeremy Travis et al. eds., 2014) [hereinafter *Growth of Incarceration in the United States*], <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes> (on file with the *Columbia Law Review*).

50. E. Ann Carson, U.S. Dep't of Justice, *Prisoners in 2014*, at 7–8 & tbl.6 (2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf> [<https://perma.cc/VH9P2RPG>].

100,000.⁵¹ New York, in contrast, imprisons at a rate of 265 per 100,000.⁵² To put this state-level data in context, Russia, which has the second highest national rate of incarceration in the world and the fourth highest prison population, incarcerates at a rate of 474 per 100,000 residents.⁵³ In highlighting the intranational variation in U.S. incarceration rates, scholars hope to expose the harshest state and municipal criminal systems, which had been left to operate in the shadows given the prior focus on aggregate national imprisonment data.⁵⁴

This Article is based in part on the belief that neither the federalization nor the subfederal criminal justice literatures offer a complete rendering of police federalism. It is not simply that the federalization literature obscures criminal processing at the subfederal level, nor that the subfederal criminal justice literature fails to adequately account for the dramatic expansion of the federal criminal justice system over the past century. Both literatures omit a third subfield of administrative power governing police activity.

B. *Mapping the Field of Police Federalism*

If we think of police federalism as an institutional field, we immediately identify two “subfields” of police authority: the federal government’s authority by way of federal statutes to direct federal law enforcement agents within federal criminal jurisdiction and the authority of state governments (preserved by the Tenth Amendment) to direct state and local police within state criminal jurisdictions. States hold ultimate authority over the police departments operating internally.⁵⁵ We might think of these two subfields within the field of police federalism as the “traditional model,” in which the scope of the federal government’s power in police administration is clearly bound. Parts III and IV of this Article will show that federal law enforcement agents and state and local

51. *Id.* at 8.

52. *Id.* at 8 tbl.6.

53. See Growth of Incarceration in the United States, *supra* note 49, at 36–37.

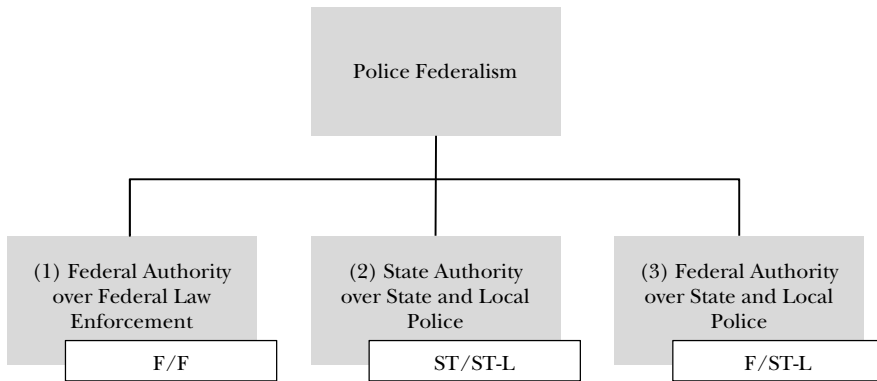
54. In a comprehensive study of capital punishment practice in the United States, Professor David Garland highlights the mistake in framing the United States as a single system of national criminal justice as well as the substantial state-level variation in penal culture and practice. See David Garland, *Penalty and the Penal State*, 51 *Criminology* 475, 483–85 (2013). For additional social science research on idiosyncratic state-level penal development, see generally Mona Lynch, *Sunbelt Justice: Arizona and the Transformation of American Punishment* (2010) (using Arizona as a case study to explore regional developments in penal ideologies and continued reliance on “get tough” policies); Joshua Page, *The Toughest Beat: Politics, Punishment, and the Prison Officers Union in California* (2011) (exploring how the California Correctional Peace Officers Association helped shape the state’s penal landscape in the latter half of the twentieth century).

55. For a review of the power of state governments over police in relation to that of local governments and in relation to federal–local collaboration, see generally John S. Baker, Jr., *Police Powers and the Federalization of Local Crime*, 72 *Temp. L. Rev.* 673, 690–701 (1999).

police have traditionally worked within the parameters of these first two subfields.

There is, however, a third subfield within the field of police federalism that must be recognized in a comprehensive accounting of police authority in the United States. Within this third field, the federal government may deploy, in part or en masse, state and local police in its pursuit of federal public security objectives. Scholarly accounts of the evolution of the police power as it relates to criminal justice often overlook the third subfield in the process of formulating structural models of police governance.⁵⁶

56. For models of crime governance established in the criminal justice literature, see Alexander, *supra* note 44, at 25–26; Dubber, *supra* note 34, at 144–45; Bernard Harcourt, *The Illusion of Free Markets: Punishment and the Myth of the Natural Order* 204–05 (2011); Lynch, *supra* note 54, at 1–7; Lisa Miller, *The Perils of Federalism* 5 (2008); William J. Stuntz, *The Collapse of American Criminal Justice* 64–65 (2011) [hereinafter Stuntz, *The Collapse*]; Brickey, *supra* note 43, at 1137–41; Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 *Syracuse L. Rev.* 1127, 1132 (1997); Task Force on the Federalization of Criminal Law, *Am. Bar Ass’n, The Federalization of Criminal Law* (1998), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_pubs_catalog_fedcrimlaw1.authcheckdam.pdf [https://perma.cc/98M2-T342]. For early identification and analysis of the third subfield, see Malcolm M. Feeley & Austin D. Sarat, *The Policy Dilemma: Federal Crime Policy and the Law Enforcement Assistance Administration* 93 (1980). Immigration scholars have also addressed the institutional dynamics within the third subfield, though with the principal interest of tracking the recent evolution of the immigration-enforcement system rather than that of police administration. Scholarship in this vein includes Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 *Wm. & Mary Bill Rts. J.* 577, 597–609 (2013) [hereinafter Chacón, *Transformation*] (arguing that the Court’s formal adherence to traditional notions of immigration federalism will fail to translate into federal primacy in practice); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 *U. Chi. L. Rev.* 87, 89–93, 129–31 (2013) (providing a large-scale empirical evaluation of Secure Communities and finding little evidence that the rollout was “driven more by local politics than federal policy”); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 *N.Y.U. L. Rev.* 1126, 1128–34 (2013) [hereinafter Eagly, *Criminal Justice for Noncitizens*] (offering an empirical study of how local criminal process is organized around immigration enforcement and finding that criminal law’s integration with immigration enforcement has a “powerful impact on local criminal process”); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 *UCLA L. Rev.* 1819, 1849–58 (2011) (positing that the federal government abdicates much of its immigration authority when it allows state and local governments to enforce federal immigration law).

FIGURE 1: THE THREE SUBFIELDS OF POLICE FEDERALISM⁵⁷

Two additional points help to convey the importance of the third subfield. First, the federal government’s administrative power within this third subfield is considerably broader than the power available to it in either of the other two subfields. In Subfield 1, the federal government exercises its power to police using federal law enforcement agents who represent about ten percent of law enforcement personnel nationally.⁵⁸ The administrative power available to the federal government in Subfield 1 is far less than if it had the ability to deploy both federal law enforcement agents and state and local police,⁵⁹ and necessarily greater than any one of the analogous state powers bounded within the respective state jurisdictions (represented in Subfield 2). While any one state government directs thousands of police to enforce the state criminal code, this power is dwarfed by the federal government’s theoretical power in Subfield 3 to orchestrate federal enforcement initiatives using the nearly 1.1 million state and local police.⁶⁰ Within the third field, in which

57. For a more thorough explanation of the field of police federalism, see *infra* note 80.

58. Compare Brian A. Reaves, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Federal Law Enforcement Officers*, 2008, at 1 (2012), <https://www.bjs.gov/content/pub/pdf/fleo08.pdf> [<https://perma.cc/65JV-QPBB>] (“In September 2008, federal agencies employed approximately 120,000 full-time law enforcement officers . . .”), with Brian A. Reaves, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Census of State and Local Law Enforcement Agencies*, 2008, at 1 (2011), <https://www.bjs.gov/content/pub/pdf/cslea08.pdf> [<https://perma.cc/E64D-RDZV>] (“In September 2008, state and local law enforcement agencies employed more than 1.1 million persons on a full-time basis . . .”).

59. See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 *Vand. L. Rev.* 1419, 1445 (2009) (offering a comprehensive analysis of the federal government’s challenges in securing this authority over subfederal police in its efforts to enforce the federal marijuana prohibition).

60. Duren Banks et al., Bureau of Justice Statistics, U.S. Dep’t of Justice, *National Sources of Law Enforcement Employment Data 2 tbl.1* (2016), <https://www.bjs.gov/content/pub/pdf/nsleed.pdf> [<https://perma.cc/2WWQ-N9MK>] [hereinafter *Law Enforcement*

subfederal government consent to collaboration is the political and institutional norm, the federal government can deploy the nation's police in aggregate.⁶¹

TABLE 1: SUBFEDERAL POLICE TOTALS (1850–1990)⁶²

Date	Marshals and Constables	Policemen and Detectives	Sheriffs and Bailiffs	Total
1850	3,400	2,900	1,500	7,800
1860	4,300	3,600	2,100	10,000
1870	3,600	13,500	3,900	21,000
1880	5,700	14,900	6,900	27,500
1900	8,300	40,200	6,800	55,300
1910	9,800	68,300	10,800	88,900
1920	5,700	92,900	9,800	108,400
1940	10,000	149,600	15,000	174,600
1950	7,700	203,100	19,400	230,200
1960	7,800	261,000	26,100	294,900
1970	5,200	371,800	34,400	411,400
1980	0	491,600	60,800	552,400
1990	0	614,400	119,400	733,800

Politicians, security bureaucrats, and security scholars lobbying for the federal government's utilization of the power available in Subfield 3

Employment Data]. For further discussion of the distribution of law enforcement personnel across the federalist system, see generally Mikos, *supra* note 59, at 1463–69.

61. The ICE Secure Communities Program illustrates this sort of dramatic expansion of federal power. The program is based on the consolidation of police services in all of the nation's states and municipalities. ICE describes the comprehensive quality of the program on its website: "ICE completed full implementation of Secure Communities to all 3,181 jurisdictions within 50 states, the District of Columbia, and five U.S. Territories on January 22, 2013." Secure Communities, U.S. Immigration & Customs Enf't, <https://www.ice.gov/secure-communities> [<https://perma.cc/C8JD-VKRT>] (last updated Mar. 20, 2018); see also Cristina Rodríguez et al., Migration Policy Inst., A Program in Flux: New Priorities and Implementation Challenges for 287(g), at 3 (2010), <https://www.migrationpolicy.org/research/program-flux-new-priorities-and-implementation-challenges-287g> [<https://perma.cc/UV9A-VDLF>] (describing section 287(g) of the Immigration and Nationality Act, which allowed state, county, and local law enforcement to enter into agreements with ICE to perform "certain immigration functions"). For a more detailed discussion of the Secure Communities Program, see *infra* section V.B.

62. Historical Statistics of the United States 1395–96 (Susan B. Carter et al. eds., Millennial Ed. Online 2006), <https://hsus.cambridge.org/HSUSWeb/table/jumpyby.do?id=Ba1677-1720> (on file with the *Columbia Law Review*).

point to the security benefits, namely the coordinated protection of the citizenry against new and diverse security threats through the pooling of the nation’s law enforcement resources.⁶³ But the consolidation of law enforcement institutions also comes with steep costs. The historical review in Parts III through V is meant, in part, to show that the historical norms of police federalism developed through careful and sustained reflection on the nature of these costs.

Second, the power of the federal government to deploy state and local police in Subfield 3 should not be narrowly attributed to federal legislation, federal agency policy, or state or local government consent. The centralization of federal, state, and municipal police administration must also be attributed to the *norms* of police federalism.⁶⁴ These norms are often obscured by the analytical boundaries of constitutional analysis that render federal authority over police as a function of either federal commandeering (now unconstitutional) or state and local government consent.⁶⁵ Introduced at the culmination of a series of federalism cases over the past forty years,⁶⁶ the anticommandeering rule bars the federal government from using state and local police as proxies in the absence of state and local government consent.⁶⁷

However, recent events in contemporary immigration enforcement suggest the shortcomings of limiting the study of federal government power over police to the constitutional question of unlawful federal commandeering. As immigration politics shifted in the mid-2000s and subdivisions in DHS shifted their focus from counterterrorism to immigration

63. See, e.g., Office of Homeland Sec., National Strategy for Homeland Security 3 (2002) [hereinafter Office of Homeland Sec., National Strategy], <https://www.dhs.gov/sites/default/files/publications/nat-strat-hls-2002.pdf> [<https://perma.cc/Z6GK-2AP2>] (recognizing “the crucial role of state and local governments . . . in securing our homeland”); Daniel Richman, The Right Fight: Enlisted by the Feds, Can Police Find Sleeper Cells and Protect Civil Rights, Too?, *Bos. Rev.* (Dec. 1, 2004), <http://bostonreview.net/forum/right-fight> [<https://perma.cc/LC4N-PMWY>] (describing the federal government’s efforts to establish “institutional linkages” of data sharing between all levels of government following 9/11).

64. A number of law scholars have explored the question of norm production within the structural context of federalism. See generally Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 *Yale L.J.* 1256, 1284–94 (2009) (describing the value of uncooperative federalism); Adam B. Cox, Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule, 33 *Loy. L.A. L. Rev.* 1309, 1316–20 (2000) (proposing that the anticommandeering rule is “more plausibly defended on expressive grounds than on grounds articulated by the Supreme Court”); Gardner, *Promise and Peril*, *supra* note 3, at 314–17.

65. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.” (internal quotation marks omitted) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992))).

66. See *id.* at 898; *United States v. Lopez*, 514 U.S. 549, 551–52 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded Congress’s Commerce Clause power); *New York*, 505 U.S. 144.

67. See *Printz*, 521 U.S. at 933.

enforcement, security administrators crafted a plan to enlist not one, or several, but all subfederal police departments via jail officials to aid in enforcing federal immigration law. The Secure Communities Program (2008) and the Priority Enforcement Program (2014) were both premised on full state and local police participation—aligning the roughly 18,000 subfederal law enforcement agencies⁶⁸ to enforce federal immigration law. In organizing the initiative, the federal government did not simply extend an invitation to state and local police. It aggressively challenged the police departments that resisted cooperating with federal immigration authorities by way of sustained local and national criticism.⁶⁹

In light of these events in the field of immigration enforcement, this Article pushes beyond the legal literature's dichotomy of *commandeering* and *consent* toward a more supple analysis of the exercise of federal power in the field of police federalism. To this end, and in keeping with the trend in criminal law scholarship of accounting for institutional legitimacy in studying police and criminal procedure,⁷⁰ this Article relates the historical norms of police federalism to federal designs for immigration enforcement and the practice of immigrant sanctuary. What are the historical norms that shaped police governance within the system of American federalism, and to what extent have these norms changed over time? The answer to these questions should inform our political and

68. See 21st Century Policing, *supra* note 16, at 29 tbl.1.

69. See, e.g., Mike Aldax, *Feds Ask Newsom to Ease City's Sanctuary Policies*, S.F. Examiner (July 24, 2008), <http://www.sfexaminer.com/feds-ask-newsom-to-ease-citys-sanctuary-policies/> [<https://perma.cc/MH9B-J8TB>] (describing the San Francisco Sheriff's response to accusations of fault by ICE for their failure to report the custody of an alien felon who had committed a triple murder); Bay Area News Grp., *Immigration Official Asks Newsom for Access to SF Jails*, East Bay Times (July 23, 2008), <http://www.eastbaytimes.com/2008/07/23/immigration-official-asks-newsom-for-access-to-sf-jails/> [<https://perma.cc/Z4RB-CV6T>] (describing the San Francisco Sheriff's policy of not cooperating "with ICE investigations and detention" unless dictated by federal law). For background information on the triple murder and the attendant public outcry that set off the dispute between ICE and the San Francisco Sheriff's Department, see Maria L. La Ganga, 'Sanctuary City' No Haven for a Family and Its Grief, L.A. Times (July 26, 2008), <http://articles.latimes.com/2008/jul/26/local/me-sanctuary26> [<https://perma.cc/RG78-EPB7>].

70. See generally Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. Legal Stud. 609 (1998) (arguing that rational choice analysis of crime must incorporate considerations of social meaning); Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 Wm. & Mary L. Rev. 1865 (2013) (arguing that scholars should "account for what people say that they care about when assessing police agent behavior specifically and police agencies in general" and that such evaluations should "not depend on the actual lawfulness of police conduct"); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231 (2008) (suggesting that police can enhance their institutional legitimacy and secure more community cooperation by employing normatively fair judicial procedures); Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. Empirical Legal Stud. 751 (2014) (arguing that widespread use of street stops undermines police legitimacy and thus lowers willingness to cooperate with legal authorities).

scholarly debates regarding the efficacy and legitimacy of interjurisdictional public security governance.

II. ORTHODOXY AND HERESY IN THE FIELD OF POLICE FEDERALISM

When scholars consider the relationships among law enforcement agencies within the federalist system, they often turn their attention to Tenth Amendment jurisprudence or the federal crime bills that designate funding for state and local criminal justice systems. These legal mechanisms are meant to explain the field of criminal federalism and, by extension, police federalism, while “norms”—both social and institutional—get short shrift.⁷¹ Perhaps this is because it seems perfectly obvious that the public law itself is the product of tradition and custom as well as contemporary values. Norms tend to dictate law, which, in turn, shapes social and institutional behavior—habits, practice, and performance.⁷² But the jurisprudence of police federalism was relatively sparse (if it existed at all) until the 1970s.⁷³ Before that point, the practice of police federalism was dictated by what Justice Scalia controversially described as constitutional principles of “dual sovereignty,” or what might be simply regarded as constitutionally informed norms against federal meddling in subfederal executive affairs.⁷⁴

What are these norms exactly? How might a theory of the normative inform our understanding of the social and jurisprudential trajectory of American federalism generally and police federalism specifically? Though broadly acknowledged in the criminal literature, “norms” tend to be

71. Professor Robert Ellickson makes a similar argument about the neglect of social norms in legal scholarship in his popular study of farmers and cattle ranchers in Shasta County, California. See Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* 4 (1994). In *The Regulation of Social Meaning*, Professor Lawrence Lessig unpacks the concept of social norms in relation to government action or lack thereof in frameworks similar to those found in this Article: “Government has always and everywhere advanced the orthodox by rewarding the believers and by segregating or punishing the heretics. The permissible means for advancing such orthodoxy may be limited, and the instances may be few, but the end has always been the place of government.” Lessig, *Regulation of Social Meaning*, *supra* note 22, at 946. And later, he writes that “[i]t makes sense to speak as if government does not ‘prescribe’ orthodoxy only so long as we ignore the ways in which governments, as well as others, act to construct the social structures, or social norms, or what I will call here the *social meanings* that surround us.” *Id.* at 946–47. See also Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. Pa. L. Rev. 2181, 2184–86 (1996) (arguing that interpreting the meaning underlying social norms may “cue us to better ways to regulate” behavior).

72. See Lessig, *Regulation of Social Meaning*, *supra* note 22, at 947 (positing that social norms are “built, or remade, or managed by government”).

73. See *Printz v. United States*, 521 U.S. 898, 925 (1997) (“Federal commandeering of state governments is such a novel phenomenon that this Court’s first experience with it did not occur until the 1970’s . . .”).

74. See *id.* at 918–20 (“Although the States surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty.’” (quoting *The Federalist* No. 39 (James Madison))).

undertheorized.⁷⁵ To develop a more penetrating account of the normative as it relates to police federalism, this Part draws on Bourdieusian field theory regarding the relationship between “structure” (here, the constellation of public institutions intersecting with the police department) and “culture” (broadly held norms, values, and customs). This Part and the remainder of this Article take police federalism as a field of law enforcement institutions whose structural arrangement is a function of both law and associated norms.

Field theory is based on three concepts: the *field*, the *orthodoxy* within the field, and the *habitus* or disposition of the institutions within the field in keeping with the established orthodoxy.⁷⁶ Bourdieu defines the *field* as “an area of structurally, socially patterned activity or ‘practice’”;⁷⁷ the field’s *orthodoxy* as a “socially legitimized belief which is announced as a requirement to which everyone must conform”;⁷⁸ and *habitus* as represented by the “structures of [institutional] behavior” shaped by the orthodoxy.⁷⁹ The institutional relationships across an institutional field, then, are based on the orthodoxy within the field.⁸⁰ In sum, the orthodoxy of a given field dictates the behavior (that is, the habitus) of the field’s institutions. Institutional habitus, in turn, determines the field’s structural arrangement—for example, whether police administration is centralized at the federal level or the state level, or alternatively, is highly localized. Within this theoretical framework, orthodoxy and habitus

75. See Bernard E. Harcourt, *After the Social Meaning Turn: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 *Law & Soc’y Rev.* 179, 182 (2000) (arguing for a four-pronged approach to overcome the “critical methodological issue” in empirical research on criminal law and social meaning); Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement*, 79 *Or. L. Rev.* 391, 392 (2000) (proposing a theory, based in social psychology, which outlines how the state can implement policies which increase community capacity for social control and facilitate law-abiding behavior); Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 *J. Legal Stud.* 553, 563 (1998) (arguing that rational choice theory is well suited to analyzing social norms and that “the idea of social meaning” adds little to the literature). But see Mark Tushnet, “Everything Old Is New Again”: Early Reflections on the “New Chicago School,” 1998 *Wis. L. Rev.* 579, 584–87 (suggesting that the New Chicago School does not engage with significant sociological literature on norms and law and overemphasizes modeling versus empirical investigation).

76. See Terdiman, *supra* note 22, at 805–12.

77. *Id.* at 805.

78. *Id.* at 812.

79. *Id.* at 807.

80. The field of police federalism (as formulated for this Article’s inquiry) consists in broad strokes of the three aforementioned law enforcement subfields: the field in which the federal government directs federal law enforcement agents (F/F); the field in which state governments direct state and local police (ST/ST-L); and, finally, the field in which the federal government directs state and local police (F/ST-L). See *supra* Figure 1.

together determine the quality of police governance across the federalist system.⁸¹

Applying field theory to police federalism helps us better understand the social pressures underlying the distribution of federal, state, and local government authority over police administration. Legal scholars tend to explain the exercise of government authority in the field of police federalism by way of an analysis of public law—a survey of constitutional and statutory mechanisms and an analysis of their interaction.⁸² By introducing a theory of the normative, we establish a third critical mechanism by which authority over police administration comes to be determined within the federalist system.

In this light, Parts III through V demonstrate that for nearly all of American history, the orthodoxy of police autonomy has shaped the contours of police federalism, even in the years immediately following the 9/11 attacks. For a variety of reasons, Americans have traditionally rejected the prospect of centralized police administration, judging this condition to be antithetical to the nation’s core values and an invitation to federal abuse of the most intimate form of government power.⁸³ From a very early stage in the nation’s history, the orthodoxy of police autonomy established a corresponding habitus across the field of police federalism in which the nation’s public officials consistently rejected policies granting the federal government authority over state and local police. As a direct result, the United States has long maintained a decentralized system of police governance in which the federal government has exercised relatively little influence over police activity.⁸⁴

To sharpen this Article’s analysis of police federalism by way of field theory, it might be helpful to situate the centralization of police administration as a competing belief system. Bourdieu framed the belief

81. See Terdiman, *supra* note 22, at 811. Professor Richard Terdiman references Bourdieu’s definition of habitus outlined in *Outline of a Theory of Practice*:

[T]he habitual, patterned ways of understanding, judging, and acting which arise from our particular position as members of one or several social “fields,” and from our particular trajectory in the social structure (*e.g.*, whether our group is emerging or declining; whether our own position within it is becoming stronger or weaker).

Id.

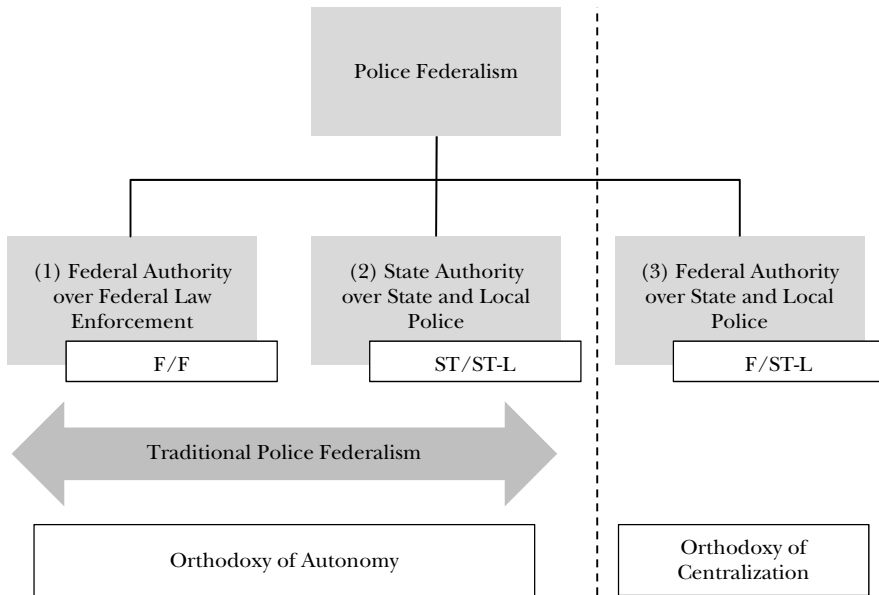
82. See *supra* notes 55–56 and accompanying text.

83. See George E. Berkley, *Centralization, Democracy, and the Police*, 61 *J. Crim. L., Criminology & Police Sci.* 309, 309 (1970) (“A centralized police, it is often argued, is not only inconsistent with, but actually a threat to, democratic government.”); *Decentralized Police Organizations*, *Encyclopedia Britannica*, <https://www.britannica.com/topic/police/Decentralized-police-organizations> [<https://perma.cc/D9Y9-LMVX>] (last visited Sept. 10, 2018) (“It has been argued that the nation would suffer, and local governments would be enfeebled, should all offenses become federal offenses and all police power be transferred to Washington, D.C.”).

84. See *Decentralized Police Organizations*, *supra* note 83 (“The United States has what may be the most decentralized police system in the world . . .”).

system opposing the prevailing orthodoxy within a field as the field's "heresy."⁸⁵ In the field of police federalism, the competing belief systems would then be the orthodoxy of police autonomy and the heresy of centralized police administration. The heresy of centralization advocates for an alternative institutional habitus in which subfederal governments reflexively agree to subfederal police participation in federal public security initiatives. In Bourdieu's model, a field's orthodoxy is sustained in significant part by the ready identification of the field's heresy.⁸⁶ Orthodoxy and heresy are therefore best understood in relation to one another. Together, they represent a sociology of the normative.⁸⁷

FIGURE 2: TRADITIONAL POLICE FEDERALISM



At this point, readers may be asking the reasonable question: Why field theory? What exactly does field theory contribute to the conceptual

85. See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings L.J.* 814, 837 n.53 (1987).

86. *Id.*

87. See Jacques Berlinerblau, *Toward a Sociology of Heresy, Orthodoxy, and Doxa*, 40 *Hist. Religions* 327, 332 (2001) (“[O]rthodoxy is not as the orthodox would always have it—in singular possession of an invariable ‘truth.’ Rather, its contents are to be construed as fluid, as developing in a dialectic with heterodoxy.”). Professor Jacques Berlinerblau quotes Malcolm Lambert’s theorizing of the specific structural relation: “[I]t takes two to create a heresy; the heretic, with his dissident beliefs and practices; and the Church, to condemn his views and to define what is orthodox doctrine.” *Id.* at 330–31 (internal quotation marks omitted) (quoting Malcolm Lambert, *Medieval Heresy* 4–5 (1992)).

understanding of police federalism? At the very least, field theory reveals three faulty assumptions that tend to obscure the struggle for authority over the municipal police department and its frontline officers. First and foremost, field theory provides an analytical framework by which to challenge the notion that cooperation in criminal enforcement is in keeping with the nation’s traditions—quite the opposite. It is actually the orthodoxy of police autonomy, animating practices such as immigrant sanctuary, that aligns with historical norms.⁸⁸ Until very recently, Americans roundly rejected the idea that the federal government should dictate the best practices of the municipal police department, reflecting a long-standing fear in American culture of a national police state.⁸⁹ Field theory accounts for this sentiment in its conception of a field “orthodoxy” and relates orthodoxy to both institutional behavior and structural outcomes.

Second, field theory challenges the assertion that federal projects in police federalism are apolitical. Instead, by its theory of power relations, it identifies the field of police federalism as a site of struggle—over the legitimacy of both discrete federal security initiatives and overarching orthodoxies within the field.⁹⁰ Alternatively, the decision to ignore the “norms” within the field of police federalism or to theorize power struggles over norms makes it seem as though the institutional arrangements

88. See *infra* Parts III–V (detailing this normative history in stages that unfold throughout the nineteenth, twentieth, and twenty-first centuries).

89. See *infra* Parts III–V.

90. Police federalism has itself been a function of three criminal justice policy taboos that have broken down in succession since the nation’s inception. The first of the three policy taboos forbade a federal criminal justice system comparable to that of state and local criminal justice systems. This taboo broke down in the early twentieth century during the federal government’s campaign against vice. See *infra* section III.B. The second pertained to federal involvement in subfederal criminal justice matters. Until President Johnson’s War on Crime, beginning in the mid-1960s, the federal government had not taken a formal role in subfederal criminal administration. The American public appears to have eliminated this informal bar on federal involvement under the pressures of the political conflicts of the 1960s, when it welcomed both the Law Enforcement Assistance Act of 1965, Pub. L. No. 89-197, 79 Stat. 828 (repealed 1968), and the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of 47 U.S.C.). The two bills greenlit federal funding of state and local criminal justice systems. See Omnibus Crime Control and Safe Streets Act §§ 2–3; Law Enforcement Assistance Act § 5. The final taboo, implicated in the ongoing War on Immigration, is that of federal direction of state and local police activity. The War on Crime and the early initiatives of DHS did not seek to dictate the routine activity of police departments as a general matter, but contemporary immigration enforcement, which is designed to encompass all police departments, consists of the sort of national policing project that Americans have historically rejected. See *infra* section V.B. The “three taboos” theory of the federalization of crime policy offers important nuance to the historical process of federalization. Similar to this Article’s presentation of the trajectory of police federalism, it shows the struggle over control of state and local criminal justice systems as ongoing rather than as having climaxed in the latter half of the twentieth century.

within the field arise organically (that is, without deliberation and intentionality).⁹¹

Third, and very much related to the second challenge, field theory casts doubt on claims in politics and in crime and public security scholarship regarding the inevitability of the centralization of the nation's police institutions. In applying field theory to the historical record, we can see with clarity moments similar to the present in which political elites of various stripes insisted with an air of certainty that the centralization of police authority would be critical to protecting the security of the nation.⁹² The failure of these past centralization campaigns is instructive. Police autonomy stood as the dominant philosophy of police governance for two centuries despite repeated attempts by federal officials to pivot to an ideology more amenable to centralized police and public security governance.⁹³ We live at an analogous moment in the nation's history as we see the federal government again looking to overcome historical norms rejecting the centralization of police administration. Parts III through V place this ongoing federal campaign in a historical context.

III. TRADITIONAL POLICE FEDERALISM (1789–1967)

In the early development of the modern federal criminal justice system—initially through the criminalization of vice and in a subsequent campaign against violence—the federal government took care not to encroach on state and local government control of police. Federal sensitivity to police autonomy reflected the principle, unchallenged in the nation's first century, that police should be entirely free from federal influence. This Part uses the historical record to convey the federal government's relationship to subfederal police at the nation's inception

91. This Article might be considered, among other things, an extension of the democracy-and-policing literature. See, e.g., Stuntz, *The Collapse*, *supra* note 56, at 6–7; Veena Dubal, *The Demise of Community Policing? The Impact of Post-9/11 Federal Surveillance Programs on Local Law Enforcement*, 19 *Asian Am. L.J.* 35, 37–38 (2012) (arguing that the recent growth in joint federal and local surveillance programs destabilizes mutual trust in local community policing); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 *N.Y.U. L. Rev.* 1827, 1832 (2015) (contending that it is “both unacceptable and unwise for policing to remain aloof from the democratic processes that apply to the rest of agency government”); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 *New Crim. L. Rev.* 157, 159–63 (2012) (exploring the ways in which “crimmigration” alters, expands, and directs institutions of “policing and punishment”).

92. See, e.g., *infra* notes 171–184 and accompanying text (describing backlash over President Coolidge's executive order over Prohibition).

93. Evidence of this inclination can be found in the Wickersham Commission's solutions to Prohibition enforcement dysfunction and in the recommendations of subsequent federal crime commissions. See *infra* section III.B.1. For a more thorough and detailed discussion of the evolution of federal crime commissions and their role in American public life, see generally Franklin E. Zimring, *The Accidental Crime Commission: Its Legacies and Lessons*, 96 *Marq. L. Rev.* 995, 1002–07 (2013).

and over the course of the buildup of federal criminal administration in the first half of the twentieth century. The orthodoxy of police autonomy lies at the heart of this narrative as it informed two early taboos in American criminal administration: a national police force and a federal role in subfederal police activity.⁹⁴ These taboos, in turn, shaped an institutional habitus within the field of police federalism in which federal and subfederal executive criminal administration would remain almost entirely independent.

A. *The First Police (1789–1918)*

The Founders modeled the relationship between the federal government and subfederal criminal law enforcers long before the term “police” entered the American lexicon.⁹⁵ They had envisioned municipal systems of criminal enforcement that would draw the criminal enforcer from the same social circle as those subject to his authority, in sharp contrast to the top-down quality of criminal administration in Europe.⁹⁶ With the British Crown’s remote authority over the colonists as a common reference point, the Framers doubted that the prospective national government could deploy criminal enforcement officers while also holding to democratic principles.⁹⁷

94. See *supra* note 90 and accompanying text.

95. See Dubber, *supra* note 34, at 86–93. The term “police” originated in France, and there is evidence in the historical record that the English language never offered an equivalent term or concept. See *id.* at 64–65. The word “police” first appeared in American law in 1829 in the Revised Statutes of the State of New York, and then in Massachusetts state law in 1836, at which point the term proliferated throughout the country. *Id.* at 59. This is not to say that the police institution first entered American life in the middle of the nineteenth century. Police commissioners and peace officers began patrolling American cities in the 1770s and 1780s. *Id.* at 88. Moreover, inquiries into the history of American criminal justice suggest that slave governance in the American colonies exhibited some of the characteristics of modern policing, particularly in the codes related to slave movement on the plantation and the relationship between slaves and whites. The Virginia Slave Code of 1775, for instance, sets a series of mandates and restrictions for slaves, dictating what slaves “cannot do with whites [and] the things that whites cannot do for slaves . . . [such as] illegitimacy[,] intermarriage, and the baptism of slaves.” Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 *Yale J.L. & Human.* 417, 433 (1993); see also Dubber, *supra* note 34, at 61. The federal government’s early attempts to control the Native American population under the Bureau of Indian Affairs have been proposed as a second example of early policing in the United States. See Dubber, *supra* note 34, at 87. The trouble with tracing the origins of policing in the United States is that criminal scholars have found it difficult to mark the boundaries of the concept of police. See *id.*

96. See Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 *Emory L.J.* 1, 21–22 (1996).

97. See *id.* at 21–22 & n.69. Because of their sense of the Crown as a remote government that had trampled the individual liberty of colonists, the Framers generally opposed the idea of criminal regulation by a remote, centralized government. See *id.* at 21–23. “[T]he concept of criminal regulation by the federal government struck a nerve that was perhaps more sensitive than the one struck by the concept of federal economic

As a reflection of this and other similar concerns, the Founders designed the Constitution to charge the states with the management of the nation's "internal order" (the "liberties and prosperities of the people," and the "improvement, and prosperity of the State"), and the federal government with managing "external objects" such as war and peace and international commerce.⁹⁸ In explaining the scope of federal administrative authority relative to states, Treasury Secretary Alexander Hamilton, a leading proponent of federal government power, stated that Congress could not lawfully establish an agency "superintending the police of the city of Philadelphia" given that the Constitution did not authorize Congress to regulate Philadelphia police or any other state or local police force.⁹⁹ The nation's earliest political leaders had adopted a structural arrangement for the American system of government by which subfederal police would be insulated from the direct application of federal government power.¹⁰⁰

This arrangement had little relevance in the nineteenth century as the federal government was largely absent from criminal administration during much of this period. Between 1789 and 1872, the federal government did not criminalize social deviance apart from that which resulted in injury to the federal government itself.¹⁰¹ Federal criminal law included offenses like perjury, treason, international smuggling, federal bank robbery, and violent acts against a foreign ambassador, but generally did not address social vice and interpersonal violence.¹⁰² Unless committed on federal property, criminal sanction for acts like murder, rape, and robbery fell exclusively within the purview of local elected public officials and associated police.¹⁰³ While states extended their criminal codes throughout the nineteenth century, federal criminal jurisdiction held to this narrow range of activity related to federal property and

regulation." *Id.* at 21–22. Professor Adam Kurland attempts to make sense of the balance between federal and state criminal authority by tracing its history from the Articles of Confederation through the federalism cases of the Rehnquist Court in the 1990s. See *id.* at 3–5. Throughout his article, Kurland highlights competing interests and ideologies in the debate over federalism and federal criminal law and compares our understanding of the federal–state relationship in 1996 with that of the Framers and their contemporaries. *Id.* at 11–12. He concludes that the Framers intended concurrent criminal jurisdiction (rather than exclusive federal or state criminal jurisdiction) and identifies legislative restraint and respect for local autonomy as the distinguishing factors between then and now. See *id.* at 12.

98. The Federalist No. 45, at 215–16 (James Madison) (Hallowell, Masters, Smith & Co. 1852); see also Dubber, *supra* note 34, at 86–87.

99. John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 Rutgers L.J. 495, 509 n.53 (1985) (quoting Gerald Gunther, *Constitutional Law* 85 (11th ed. 1980)).

100. See *id.* at 504–13.

101. See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *Crime & Just.* 377, 382–83 (2006) [hereinafter Richman, *The Past, Present, and Future*].

102. See Brickey, *supra* note 43, at 1138.

103. *Id.*

procedure.¹⁰⁴ Federal criminal enforcement therefore required very little in the way of resources. The federal government relied heavily on both “stipendiary police” (bounty hunters)¹⁰⁵ and the privately owned Pinkerton Detective Agency to investigate suspected violations of federal criminal law, employing just a small cadre of full-time sworn federal officers.¹⁰⁶ As might be expected, limited federal criminal enforcement on the front end of the federal justice system resulted in relatively few criminal offenders for the back end. The federal government did not operate a single prison facility until the end of the nineteenth century, opening its first in 1895 and two others in the early 1900s.¹⁰⁷ These three facilities comprised the entire federal prison system until 1925.¹⁰⁸

It would be misleading, nevertheless, to suggest that the federal government did not leave its mark in the nineteenth century on the field of criminal justice. The federal executive waged a number of high-profile enforcement campaigns in the nation’s first century despite the narrow scope of its criminal jurisdiction. At the urging of Secretary Hamilton, President Washington responded to a revolt against a new federal tax on whiskey (the “Whiskey Rebellion”) with a military-based enforcement initiative that included mass arrests and mass prosecutions.¹⁰⁹ Congress later extended federal criminal jurisdiction beyond matters relating to federal property and procedure in the 1871 Civil Rights Act, which was passed during Reconstruction in an effort to dismantle the Ku Klux Klan and other racial terrorist groups.¹¹⁰ Neither campaign would transform

104. *Id.* at 1139.

105. See 3 *Encyclopedia of Careers and Vocational Guidance* 55 (14th ed. 2008).

106. See Richman, *The Past, Present, and Future*, *supra* note 101, at 384. In recounting the development of the federal criminal justice system, Professor Daniel Richman notes that the Department of Justice (DOJ) was not established until 1870 and in its early years relied on the Treasury Department’s Secret Service agents and the Pinkerton Detective Agency for investigative work. *Id.*

107. Brickey, *supra* note 43, at 1146–47.

108. *Id.* Historical records show state and local criminal justice systems undergoing rapid growth over the same period. For example, the subfederal police population grew from 2,900 in 1850 to 40,200 in 1900, to 92,900 in 1920. *Historical Statistics of the United States*, *supra* note 62, at 1395–96.

109. See Richard H. Kohn, *The Washington Administration’s Decision to Crush the Whiskey Rebellion*, 59 *J. Am. Hist.* 567, 580–84 (1972).

110. See Will Maslow & Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862–1952*, 20 *U. Chi. L. Rev.* 363, 369–70 (1953). Following the passage of the 1871 Civil Rights Act, the federal government briefly attempted aggressive enforcement, but enthusiasm dissipated fairly quickly. See *id.* at 370–73. From 1871 to 1873, the annual number of criminal prosecutions under the Act increased from 314 to 1,304 before dropping to 25 by 1878. *Id.* at 370 n.29. The decline was a result of, among other things, the cost of the prosecutions, which placed a significant strain on the courts, and also the political compromise in 1876 that elected President Hayes and ended Reconstruction, ushering in a period of reconciliation. See *id.* at 370–71; see also Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 *N.Y.U. L. Rev.* 1, 11 (1985). Over the next three decades, court cases and legislation greatly reduced the protections provided by the 1871 Civil Rights Act. See

the character of American policing or the basic parameters of police federalism. In both initiatives, the federal government deployed the military as a provisional federal police force charged with identifying and apprehending criminal suspects for federal prosecution.¹¹¹ But federal officials showed little interest in utilizing state and local police to systematically enforce federal law.

Finally, crime policy scholars might be inclined to point to the Fugitive Slave Acts of 1793 and 1850 as evidence against the historical claim of a bright line between the federal government and subfederal police. But this would be a mistake, attributable to a misinterpretation of the institutional implications of the Acts. The portion of the 1793 Act pertaining to runaway slaves was not a criminal law, and thus its directives regarding slave removal pertained to the interstate transfer of property rather than criminal fugitives.¹¹² Moreover, the Act specifically required that subfederal judicial officials hear claims regarding the return of fugitive slaves to the South but made no clear demands on subfederal police.¹¹³ So, while the enforcement of the Fugitive Slave Act of 1793 called for a commandeering project of sorts, it was one targeting the

Blackmun, *supra*, at 11 (listing a series of Jim Crow laws that undermined the 1871 Civil Rights Act); Maslow & Robison, *supra*, at 370–72 (“While the wave of northern sentiment for equality was receding . . . the Supreme Court was issuing a series of decisions which . . . incorporated into law the victory of white supremacy.”). For an additional overview of the impact of civil rights organizing on the American state-building process, see Megan Ming Francis, *Civil Rights and the Making of the Modern American State* 1–26 (2014).

111. See Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 *St. Louis U. L.J.* 331, 333 (1967) (“The [1871 Civil Rights Act] provided that, when domestic violence so obstructed law enforcement[,] . . . failure of [state] officials to apply for federal assistance . . . would amount to a denial of equal protection of the laws, giving the President the right to intervene with federal military forces . . .”); Kohn, *supra* note 109, at 580–84 (describing Washington’s decision to send in the army to subdue the Whiskey Rebellion).

112. See Fugitive Slave Act of 1793, ch. 7, §§ 3–4, 1 Stat. 302, 302–05 (repealed 1864). The law was challenged and clarified in *Prigg v. Pennsylvania*, in which the Court concluded that enforcement participation by states was voluntary. See 41 U.S. (16 Pet.) 539, 550 (1842). Sections 1 and 2 of the Act pertained to the transfer of criminal fugitives, while Section 3 addressed the issue of “fugitives from labor.” Fugitive Slave Act of 1793 §§ 1–3. The Act further provided:

That when a person held to labour in any of the United States . . . shall escape into any other of the said states or territory, the person to whom such labour or service may be due . . . is hereby empowered to seize or arrest such fugitive from labour . . . and to take him or her before any judge of the circuit or district courts of the United States . . . [I]t shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labour, to the state or territory from which he or she fled.

Id. § 3. Nothing in Section 3 draws subfederal police into the enforcement of the Act.

113. See Fugitive Slave Act of 1793 § 3.

state judiciary rather than subfederal police institutions.¹¹⁴ The Court ultimately rejected this relatively subtle form of commandeering in *Prigg v. Pennsylvania*, ruling that the federal government could not legally mandate that state judges enforce federal law.¹¹⁵ In response, Congress passed the Fugitive Slave Act of 1850,¹¹⁶ which established a federal slave deportation system that included removal procedures structured around federal search and arrest warrants, federal distribution of certificates of removal, fines for procedural obstruction, and the appointment of local citizen-deputies to aid in enforcement.¹¹⁷

Police had no official role in the enforcement of either of the Acts. Congress did not attempt to conscript subfederal police in the 1793 Act and instead built its own enforcement infrastructure after the *Prigg* decision, effectively bypassing subfederal criminal justice systems altogether. If it holds any relevance to the question of the historical norms of police federalism, the history of the Fugitive Slave Acts serves as evidence of the orthodoxy of police autonomy.

114. The Act of 1793 authorized a forcible seizure of the alleged slave by the master. See *Prigg*, 41 U.S. (16 Pet.) at 613 (“[T]he owner must . . . have the right to seize and repossess the slave, which the local laws of his own state confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding states.”). The master or his representative could apprehend the person alleged to be his property and bring this person before a state tribunal. A number of states passed “personal liberty laws” making it a crime to remove an alleged runaway slave from the state without the permission of state officials. Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 *Cath. U. L. Rev.* 921, 927–28 (2012). Some took the additional step of forbidding internal police from assisting in slave rendition. See Christopher N. Lasch, *Rendition Resistance*, 92 *N.C. L. Rev.* 149, 174 (2013) [hereinafter Lasch, *Rendition Resistance*] (noting that several states took the view that they had the “authority to pass legislation touching on the rendition process” and “passed anti-kidnapping and ‘personal liberty’ laws designed to offer some minimum procedural protections” to alleged fugitive slaves).

115. See *Prigg*, 41 U.S. (16 Pet.) at 615–16.

116. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

117. *Id.* at §§ 4–7; see also McKanders, *supra* note 114, at 931. See generally Lasch, *Rendition Resistance*, *supra* note 114, at 163–82 (placing the practice of immigrant sanctuary in historical context by recounting resistance to criminal and slave arrests executed for the purpose of interstate transfer).

Would the combination of the bright-line rule against federal commandeering established in *Printz* and adherence to the “old normal” of police federalism, in which federal deployment of subfederal police is anathema, lead to a more robust system of internal immigration enforcement analogous to the slave-deportation system triggered by the *Prigg* decision? The doubling down of the federal executive in the form of further development of federal immigration-enforcement infrastructure is one possible response to the proliferation of immigrant sanctuary. However, given a decade of gridlock over federal immigration policy, congressional approval of the funding necessary for a significant escalation of internal immigration enforcement seems unlikely. See Russell Berman, *Trump Places A Risky Bet on Congress*, *Atlantic* (Sept. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/09/trump-congress-daca-immigration/538860/> [<https://perma.cc/WA33-GGBG>] (“Since 2006, Congress has tried and failed to reform immigration laws no matter which party was in power.”).

B. *Vice-Crime Federalism (1909–1931)*

The federal government changed its orientation to subfederal police departments in the early twentieth century in conjunction with mass immigration from Europe, the Second Industrial Revolution, and a corresponding fear that social vice was on the rise in urban America.¹¹⁸ Amid national panic over perceived increases in alcohol, marijuana, and opium trafficking and consumption by new immigrant classes and the purported spread of “white slavery” in the form of white female prostitution,¹¹⁹ the federal government dramatically expanded its role in executive criminal administration. In what appears in retrospect to be a methodical campaign to criminalize vice, Congress expanded the scope of federal criminal jurisdiction through a series of crime bills intended to confront the perceived threat to the nation’s moral order.¹²⁰

118. See Raymond A. Mohl, *The New City: Urban America in the Industrial Age, 1860–1920*, at 128–33 (1985); Stuntz, *The Collapse*, *supra* note 56, at 15–16. See generally Jessica R. Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI 25* (2014) (exploring the expansion of the Federal Bureau of Investigation (FBI) against a backdrop of increased immigration to American cities and perceived moral degradation).

119. Pliley, *supra* note 118, at 1–3.

120. The U.S. Attorney General introduced the FBI in 1908 as the investigative arm of the DOJ, coupled with the U.S. Marshals Service, which had been operating since 1789. Nancy E. Marion, *A History of Federal Crime Control Initiatives, 1960–1993*, at 23–24 (1994). The FBI was charged with investigating the relatively few federal criminal offenses, while the Marshals Service sought federal fugitives, guarded federal courts, transported federal prisoners, and operated the Federal Witness Security program. *Id.*

TABLE 2: MAJOR FEDERAL LEGISLATION ON VICE CRIME (1909–1937)¹²¹

Date	Legislation	Description
1909	Opium Exclusion Act ¹²²	Manufacturing, buying, and selling of opium without a license
1910	White-Slave Traffic Act (“Mann Act”) ¹²³	Transporting women across state lines for sex work or “immoral purposes”
1914	Harrison Narcotics Tax Act ¹²⁴	Producing or distributing drugs without registering with the federal government
1919	Eighteenth Amendment ¹²⁵ and the National Prohibition Act (“Volstead Act”) ¹²⁶	Making, importing, or selling liquor

This Article refers to this era of enforcement as “vice-crime federalism,” building on similar terminology used in the criminal law literature to describe the federal government’s incremental entry in the early twentieth century into new frontiers of criminal administration.¹²⁷ Vice-crime federalism would change the structural character of American criminal justice in several respects. It came to mark the end of the federal government’s hands-off approach to criminal justice (largely intact since

121. Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* 158–59 tbl.A.1 (2014). The Comstock Act, which barred the circulation of literature related to sex and abortion, might also be considered part of the early movement to federalize vice crime. Comstock Act, ch. 258, 17 Stat. 598 (1873).

122. Narcotic Drugs Import and Export Act, ch. 100, 35 Stat. 614 (1909).

123. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)).

124. Harrison Narcotics Tax Act of 1914, ch. 1, 38 Stat. 785.

125. U.S. Const. amend. XVIII (repealed 1933).

126. National Prohibition (Volstead) Act, ch. 85, 41 Stat. 305 (1919) (repealed 1935).

127. See Richman, *The Past, Present, and Future*, supra note 101, at 382–407 (detailing the history of the federal government’s involvement in “violent crime federalism”). Professor William Stuntz has argued that when moral issues reach the field of crime policy they tend to “go national”: “[T]hey migrate up the sovereignty ladder rather than holding steady on one of the lower rungs. Both the earlier culture war that focused on liquor and prostitution and the more recent one that has emphasized drugs and abortion were shaped by that political reality.” Stuntz, *The Collapse*, supra note 56, at 161. See also Michael A. Lerner, *Dry Manhattan: Prohibition in New York City* 2 (2007) (arguing that the Eighteenth Amendment had committed the country to a “seemingly impossible mission” since “[n]ever before had the federal government attempted to regulate the private lives of adults to the degree that Prohibition did”).

1789¹²⁸) and initiated the haphazard development of the modern federal criminal justice system. The period thus served as the first phase of a process criminal scholars now identify as the “federalization” of the criminal law.¹²⁹ Yet, similar to the federal criminal enforcement activity of the nineteenth century, this early stage of federalization did not substantially impact state and local criminal justice systems, where the vast majority of criminal processing has always occurred.¹³⁰ As will become apparent in the forthcoming discussion of Prohibition, federal officials encountered a normative firewall (an orthodoxy) standing between the new federal laws criminalizing vice¹³¹ and their ability to direct state and local police in the enforcement of these new prohibitions.

1. *The Prospects for Effective Prohibition Enforcement.* — Historical accounts of Prohibition show the orthodoxy of police autonomy hampering federal efforts at Prohibition enforcement. Prohibition advocates had assumed that the Eighteenth Amendment established the specific terms of Prohibition enforcement—a bar on intoxicating liquors as well as a delegation of enforcement responsibilities across the federalist system. The first section of the Amendment banned the manufacture, sale, and transportation of “intoxicating liquors” for intended use in beverages, while the second gave Congress and the states “concurrent power” for enforcement.¹³² In the minds of Prohibition advocates and federal officials, the Amendment’s call for concurrent enforcement established a shared legal obligation¹³³ but the language failed to translate into a consensus across the three levels of government regarding precisely how enforcement responsibility should be shared.¹³⁴

128. See Richman, *The Past, Present, and Future*, supra note 101, at 383.

129. See generally Brickey, supra note 43, at 1143–45.

130. See Feeley & Sarat, supra note 56, at 3 (“[T]he crime problem and efforts to control crime typically have been regarded as the responsibility of state and local government.”).

131. See supra Table 2.

132. U.S. Const. amend. XVIII, §§ 1–2 (repealed 1933). The legal landscape governing Prohibition was further complicated by the litany of Prohibition statutes enacted by state governments. State prohibition laws complicated the regulatory framework, extending alcohol restrictions and establishing additional enforcement protocols. See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 *Wm. & Mary L. Rev.* 1, 5 n.6 (2006).

133. *Rhode Island v. Palmer* (Nat’l Prohibition Cases), 253 U.S. 350, 387 (1920) (“The words ‘concurrent power’ . . . do not mean joint power . . . nor do they mean that the power to enforce is divided between Congress and the several States . . .”).

134. Section Two of the Eighteenth Amendment provided that “Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.” U.S. Const. amend. XVIII, § 2. Prohibition advocates appeared optimistic about the soon-to-be-launched national enforcement program despite the fact that such a campaign was unprecedented in American society. Billy Sunday, a Christian minister and well-known Prohibition activist, gathered an audience of 10,000 people for a midnight sermon on January 16, 1920, the eve of the first day of the Eighteenth Amendment’s enforcement. Sunday predicted that alcohol’s downfall would be met with the rise of

The federal investment in Prohibition enforcement exceeded that of any prior criminal enforcement initiative yet never translated into an effective national enforcement regime. The National Prohibition Act, a clarifying federal statute regarding the terms of Prohibition, had assigned federal enforcement administration to the Bureau of Internal Revenue, a finance agency within the Treasury Department housing a relatively small stable of field agents.¹³⁵ The Prohibition Unit within the Bureau initially employed 1,550 field agents and another 1,500 staff members.¹³⁶ In the late 1920s, the Prohibition Unit became a standalone federal agency, and by 1930 it included approximately 4,000 employees on a budget of \$13 million.¹³⁷ By comparison, J. Edgar Hoover’s Bureau of Investigation (the modern FBI) operated on a budget of \$2 million in the same fiscal year.¹³⁸

Federal officials had developed the infrastructure for Prohibition enforcement while operating under the mistaken assumption that Prohibition agents at the Treasury Department would coordinate with subfederal police to establish a seamless national system of enforcement.¹³⁹ And while subfederal enforcement cooperation did materialize in some areas of the nation, it failed to take shape in others.¹⁴⁰ Many

moral society: “The reign of tears is over. The slums will soon be a memory. We will turn our prisons into factories and our jails into storehouses and corncribs. Men will walk upright now, women will smile and children will laugh. Hell will be forever for rent.” Mark Thornton, *Cato Inst., Alcohol Prohibition Was a Failure* 5 (1991) (quoting Michael Woodiwiss, *Crime, Crusades and Corruption: Prohibitions in the United States, 1900–1987*, at 6 (1988)), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa157.pdf> [<https://perma.cc/B9QW-2FTF>]. Muckraking journalists described the city breweries as the cause of “city savagery” and attributed the proliferation of city saloons to “new colonies” of foreign immigrants. McGirr, *supra* note 13, at 24–25.

The chief officer of the Prohibition Bureau, John Kramer, shared Sunday’s rosy outlook for the prospects of effective enforcement. Kramer announced that Prohibition would “be obeyed in the cities, large and small, and in villages and where it is not obeyed it will be enforced.” *Id.* at 69. He further stated that liquor would not be sold, “nor given away, nor hauled in anything on the surface of the earth . . . or in the air.” *Id.* (internal quotation marks omitted); see also Norman H. Clark, *Deliver Us from Evil: An Interpretation of American Prohibition* 162 (1976) (quoting John Kramer).

135. See National Prohibition (Volstead) Act, ch. 85, tit. 1, § 2, 41 Stat. 305 (1919) (repealed 1935); U.S. Nat’l Comm’n on Law Observance & Enf’t, *Enforcement of the Prohibition Laws of the United States: Message from the President of the United States Transmitting a Report*, H.R. Doc. No. 722, at 8–10 (1931) [hereinafter *Second Wickersham Report*]. Few local governments established similar Prohibition units at the local level, and local police—particularly those in big cities—often refused to enforce Prohibition restrictions in the course of their routine activities. See *Second Wickersham Report*, *supra*, at 39–43.

136. McGirr, *supra* note 13, at 69.

137. *Id.*

138. *Id.*

139. *Id.* at 70–71 (noting Prohibition’s “manifest gaps and imperfections” and that “Prohibition policing differed by region, by rural or urban setting, and most especially by race, ethnicity, and class”).

140. See *Second Wickersham Report*, *supra* note 135, at 39–43.

large cities rejected the Prohibition project entirely.¹⁴¹ The American city would eventually become a primary focus of the National Commission on Law Observance and Enforcement (NCLC), an investigative body commissioned by President Herbert Hoover to explain the government's ineffective enforcement of the Eighteenth Amendment.¹⁴² Hoover eventually asked the NCLC—popularly known as the Wickersham Commission—to also address criminal enforcement generally in response to widespread speculation that a crime wave had taken hold across the entire nation, attributable in significant part to booming liquor sales.¹⁴³ In executing the dual mandate of Prohibition and national public safety, the Commission ultimately produced an expansive fourteen-volume review of criminal administration in the United States—1,600,000 words in total.¹⁴⁴ Archival

141. The National Commission on Law Observance and Enforcement report on Prohibition enforcement concludes with a commentary on the urban–rural divide. *Id.* at 43.

142. See Herbert Hoover, Remarks at the First Meeting of the National Commission on Law Observance and Enforcement (May 28, 1929), <https://www.presidency.ucsb.edu/node/210035> [<https://perma.cc/AA4M-3RQ5>] (“It is my hope that the Commission shall secure an accurate determination of fact and cause, following them with constructive, courageous conclusions which will bring public understanding and command public support of its solutions.”); see also Zimring, *supra* note 93, at 995 (“President Herbert Hoover . . . had created the Commission as an apologist for, and in an attempt to reform, the federal law that created and administered the prohibition of alcohol in the United States in the years after 1919.”).

143. See Herbert Hoover, Statement on the National Commission on Law Observance and Enforcement (June 27, 1930), <https://www.presidency.ucsb.edu/node/210910> [<https://perma.cc/2NRT-99XH>] (observing a growth in “crime of all kinds” and an increase in federal and prison populations and noting that the Commission’s appropriation request for non-Prohibition work had failed in the Senate). By the time the Commission began its work in 1931, Hoover had expanded its mission to include a variety of topics relating to state and local criminal systems, including corruption, child offenders, criminal statistics, and crime among the foreign born. See Nat’l Comm’n on Law Observance & Enf’t, Report on Criminal Statistics 1–5 (1931); Nat’l Comm’n on Law Observance & Enf’t, Report on the Child Offender in the Criminal Justice System 1–6 (1931); Nat’l Comm’n on Law Observance & Enf’t, Report on Crime and the Foreign Born 1–5 (1931); Nat’l Comm’n on Law Observance & Enf’t, Report on Lawlessness in Law Enforcement 1–6 (1931). The broader mandate—to evaluate criminal justice efficacy across the nation—was a watershed moment in the history of criminal federalism, one that criminal scholars still fail to appreciate. See Zimring, *supra* note 93, at 998 (noting the “vast majority of the consultant papers published by the Commission were not about Prohibition or its enforcement but about crime and criminal justice”); see also Franklin E. Zimring et al., *Crime Commissions*, in *Encyclopedia of Crime & Justice* 334, 335 (Joshua Dressler ed., 2d ed. 2002) (acknowledging the Commission attempted, for the first time in American history, to “present to a national audience a body of research into the problems of crime and its control” but noting the reports and recommendations “had little impact on the administration of criminal justice”).

144. Zimring, *supra* note 93, at 1004. The first report detailed the administrative structure of federal Prohibition enforcement. See Nat’l Comm’n on Law Observance & Enf’t, *Enforcement of the Prohibition Laws of the United States: Message from the President of the United States Transmitting a Report*, H.R. Doc. No. 252, at 7 (1930). In its second report, the Commission detailed the quality of collaboration between the federal government and subnational criminal systems through a typology of four state enforcement

data from the Wickersham Commission’s investigations—the maps, statistical analysis, and numerous investigative memoranda the Commission used to draft the Report on Prohibition—reveal the intricacy of the federal accounting of state and local police departments in the Prohibition era.¹⁴⁵ For instance, a document titled “Survey of the Tenth Prohibition District”¹⁴⁶ offers an assessment of state and local Prohibition enforcement

regimes. See Second Wickersham Report, *supra* note 135, at 40. The third report focused on public support for Prohibition and the rise in corruption and crime since Prohibition’s enactment. See Nat’l Comm’n on Law Observance & Enf’t, Report on Criminal Statistics 1–5 (1931).

145. See Second Wickersham Report, *supra* note 135, at 1–3. The Wickersham Commission described four types of subfederal enforcement regimes, ranging from a high level of enforcement to none. Type 1 enforcement systems developed Prohibition laws prior to the ratification of the Eighteenth Amendment and had robust popular support for Prohibition. See *id.* at 40. The Commission concluded that state Prohibition laws shaped the attitudes of local law enforcement authorities and impressed upon them the importance of apprehending violators and coordinating with federal officials. *Id.* Type 1 states also had exceptional statistics on enforcement and “special state enforcing machinery” dedicated exclusively to the Prohibition cause:

The state officers likewise have been under exceptional pressure to do their whole duty. They state that the state machinery of enforcement is as efficient as it can be made within the practicable limits of expenditure. It works in entire harmony with the federal agencies. The number of convictions under the state law is impressive, and of seizures thereunder no less so.

Id. at 40–41. The report cited Kansas and Virginia as two Type 1 states and praised their zealous pursuit of bootlegging through the appointment of law enforcement officers and “special attorneys” whose sole task was Prohibition enforcement. *Id.* However, the report also noted that even in the most aggressive Prohibition-enforcement states, liquor trafficking was persistent in cities and mining towns. See *id.* at 41. Type 2 states also banned alcohol prior to the Eighteenth Amendment, but typically left enforcement to the federal government. *Id.* at 40. The Wickersham Report notes again that this was especially true for the cities in Type 2 states, most of which had lobbied against state Prohibition laws. See *id.* at 41. The Commission found Type 2 states particularly troubling given the strictly symbolic quality of the alcohol restriction. The report’s author concluded, “In view of the admission of the federal prohibition authorities that there can be no effective federal enforcement without state co-operation, this tendency [to abstain from enforcement] is significant.” *Id.* Type 3 states passed Prohibition laws after Congress passed the National Prohibition Act. *Id.* at 41–42. While many Type 3 states had made an effort at enforcement at the initial stages of the Prohibition period, their enforcement efforts quickly diminished. See *id.* The Commission identified Illinois as a Type 3 state, labeling enforcement as “unsatisfactory” in sixteen Illinois counties, “bad” in twenty-seven, and “very bad” in the “chief city of the state”—Chicago. *Id.* The authors added that enforcement was poor in every urban community “of much importance” in Illinois but found the opposite to be true of rural counties more generally, which tended to support Prohibition and actively enforce Prohibition laws. See *id.* at 41–43. Finally, Type 4 states did not pass Prohibition laws, even after the Eighteenth Amendment was ratified and the federal government passed the Prohibition Act. *Id.* at 42. The Commission reported that in Type 4 states the federal government shouldered the entire enforcement burden. See *id.* Type 4 states were “some of the most important states in the Union” and generally received heavy traffic from tourists. *Id.*

146. The federal government established an administrative framework by which it enforced the Eighteenth Amendment within twenty-seven “prohibition districts,” each led

based on federal agent interviews conducted with county judges, prosecutors, sheriffs, and chiefs of police.¹⁴⁷ The survey featured enforcement “efficiency ratings” based on a ratings system applied to individual state actors, groups, and categories of interest to Prohibition officers, including “sheriff,” “public sentiment,” “juries,” “illicit distilling,” and “unlawful selling, transporting and possession.”¹⁴⁸ Remarkably, a score sheet for the Northern District of Alabama (just one of several subdistricts of the Tenth Prohibition District) identifies specific officers of the court by name (for example, Sheriff B.F. Griffin, Probate Judge W.L. Pratt, County Solicitor J.F. Ellison).¹⁴⁹ Each of the assessed subjects was assigned a grade, ranging from “Excellent” to “Poor.”¹⁵⁰ A key at the beginning of the report explains the enforcement grades: “‘Excellent’ means not only active interest in enforcement but special aptitude also; ‘Good’ is somewhat less than excellent; ‘Fair’ is average; ‘Poor’ denotes no interest taken, and ‘Bad’ signifies an attitude of opposition to enforcement.”¹⁵¹ County score sheets also provide tabulations for subdistricts. A federal auditor scored the sheriffs of the Middle District of Alabama as follows: six excellent, seven good, five fair, two poor, and three bad.¹⁵²

The exhaustive federal investigation and reporting on subfederal police activity in the interest of Prohibition enforcement appears to be the first normative challenge to police autonomy and a notable break from the institutional habitus of wholly independent spheres of law

by a federal prohibition administrator. Albert E. Sawyer, *The Enforcement of National Prohibition*, *Annals Am. Acad. Pol. & Soc. Sci.*, Sept. 1932, at 10, 27.

147. Nat’l Comm’n on Law Observance & Enf’t, *Prohibition Subcomm.*, Research Project, at 10 (on file with the *Columbia Law Review*). These materials are held at the National Archives at College Park, Maryland. Findings from the report were based on a careful comparison of data compiled by a team of federal investigators and a parallel study conducted by a “Deputy Administrator.” *Id.* The first paragraph of the report offers a synopsis of the method:

In making this survey investigators visited each county . . . and interviewed judges, prosecuting attorneys, sheriffs, chiefs of police and any other public officials connected with law enforcement. After the investigation of a district was completed, the Deputy Administrator was asked to submit an independent survey for comparative purposes. Whenever the survey of the investigators differed from that of a Deputy Administrator, conditions were carefully checked by them in order to arrive at as correct an estimate as possible. It is believed that the final result approximates conditions as closely as is practical in a work of this kind.

Id.

148. *Id.* at 15.

149. *Id.* at 19.

150. *Id.* at 15.

151. *Id.* at 10.

152. *Id.* at 30–38.

enforcement within the federalist system. This was the beginning of the end of traditional police federalism.¹⁵³

The NCLC came to identify the state and local governments that refused to deploy police to investigate and arrest for Prohibition violations as the root of Prohibition dysfunction.¹⁵⁴ For various reasons, big-city police generally refused to enforce Prohibition laws,¹⁵⁵ and the Commission soon recognized that the federal government could not reasonably police 100 million citizens for Prohibition violations with its 4,000 Prohibition employees.¹⁵⁶ It seemed, moreover, that the federal resources committed to Prohibition enforcement had already been exhausted.¹⁵⁷ By 1930, Prohibition cases represented half of all federal arrests and yet the federal enforcement effort was widely considered to be wholly inadequate.¹⁵⁸

The Commission compared state and local government refusal to enforce the Prohibition Amendment to a communicable disease: “In states which decline to cooperate and in those which give but a perfunctory or lukewarm cooperation, not only does local enforcement fail, but those localities become serious points for infecting others.”¹⁵⁹ The Commission further lamented that local criminal justice systems were too small. Municipal court judges, intent on relieving their respective court dockets, routinely dismissed credible cases against Prohibition violators

153. See *supra* Figure 2.

154. See Second Wickersham Report, *supra* note 135, at 52–54 (discussing the problem of state cooperation during Prohibition and the impact it had on enforcement). For an extended discussion of subfederal enforcement abstinence from federal crime-policy initiatives, see Gardner, *Right at Home*, *supra* note 20.

155. See Second Wickersham Report, *supra* note 135, at 42, 52–54 (discussing reasons that certain cities failed to enforce the Prohibition laws, including lack of state appropriations for enforcement and adverse public opinion of the laws).

156. See McGirr, *supra* note 13, at 69, 123. The Commission identified Maryland as a unique and favorable case in which the governor and state legislature openly opposed Prohibition yet local law enforcement consistently aided federal officials. See Second Wickersham Report, *supra* note 135, at 43. Upon recognizing the lack of public support for Prohibition and thus the low probability of conviction or significant punishment, Maryland police would detain offenders and then transfer them to federal authorities for federal prosecution. *Id.* at 43. Maryland state police appeared to have a great deal of autonomy relative to the state system of governance, which benefitted federal interests. This administrative dynamic is also present in the Homeland Security era—until 2008, the federal government appeared frequently to form immigration-enforcement partnerships with local police departments rather than through elected political representatives. See *infra* section V.A.

157. See Second Wickersham Report, *supra* note 135, at 20 (explaining the difficulties of effective Prohibition implementation given the limited resources and “enforcement machinery” available to the federal government).

158. See Nat’l Comm’n on Law Observance & Enf’t, *Enforcement of the Prohibition Laws of the United States: Message from the President of the United States Transmitting a Report*, H.R. Doc. No. 252, at 1 (1930).

159. Second Wickersham Report, *supra* note 135, at 59.

and handed down relatively light sentences for convicted defendants.¹⁶⁰ The Commission advised that the federal government should itself advocate for the expansion of state and local criminal justice systems to jumpstart subfederal Prohibition enforcement.¹⁶¹

The Commission ultimately opposed the repeal of the Eighteenth Amendment,¹⁶² but emphasized the need for greater state and local government buy-in.¹⁶³ Accordingly, it concluded that Prohibition enforcement would fail absent direct and sustained engagement by local police:¹⁶⁴

It is true that the chief centers of non-enforcement or ineffective enforcement are the cities. But since 1920 the United States has been preponderantly urban. A failure of enforcement in the cities is a failure in the major part of the land in population and influence. . . .

. . . The internal policing of the states necessary to the proper enforcement of such a law as this can only be accomplished with the active cooperation of the local police force and can best be enforced by the local agencies alone where they are free from corrupt political influences.¹⁶⁵

Commission Chairman George Wickersham similarly urged consolidation of the nation's law enforcement infrastructure to improve Prohibition enforcement and public safety in general: "Unification, centralization of responsibility, and means of insuring cooperation between Federal and State agencies are things to which we must come, quite apart from the exigencies of enforcement of prohibition, but which can not be achieved

160. See, e.g., *id.* at 42 (discussing Missouri crime data showing the low proportion of liquor prosecutions for which a sentence was carried out).

161. *Id.* at 43.

162. *Id.* at 83.

163. See *id.* at 39–43, 83–84.

164. Other scholarship assessing the Commission's findings regarding Prohibition enforcement draws a similar conclusion: "[W]hat attracted most attention were the commission's contradictory and inconclusive findings By a large majority, the commission opposed the repeal of the Eighteenth Amendment, but at the same time it presented substantial evidence that effective enforcement was unattainable." Zimring et al., *supra* note 143, at 335; see also Second Wickersham Report, *supra* note 135, at 59 (discussing the need for state cooperation for effective enforcement).

165. Second Wickersham Report, *supra* note 135, at 43. Federal officials found that lack of enforcement undermined respect for the criminal law. In a 1926 interview with the *New York Times*, the U.S. Attorney for the Southern District of New York maintained that even Prohibition abolitionists should continue to support enforcement given that nonenforcement represented a dangerous breakdown in the social order: "Both safety and property are seriously jeopardized by the growing attacks upon the institution of law, which find their mainspring in lax enforcement of prohibition and the train of evils that accompanies this condition. Organized society is sitting upon a powder keg with a lighted match." James C. Young, *Padlocks Close Cafes but Rum Keeps Flowing*, *N.Y. Times*, Jan. 3, 1926, § 8, at 9, <https://timesmachine.nytimes.com/timesmachine/1926/01/03/100036804.pdf> (on file with the *Columbia Law Review*).

overnight.”¹⁶⁶ However, Wickersham’s colleagues on the Commission concluded that “unification” was a political nonstarter given Americans’ “strong and justified antipathy to over-centralization” of police administration.¹⁶⁷ Apart from the difficult politics, the Committee itself believed that a consolidated police force for Prohibition enforcement (consisting of federal, state, and municipal officers) was “wholly at variance with the general spirit of our Constitution” and from a normative standpoint found the prospect of a nationalized police force that could reach into every corner of American society “disquieting.”¹⁶⁸

The dim prospects for effective Prohibition enforcement stemmed from the unwillingness of local governments to enforce the Prohibition amendment and the federal government’s inability to extend the long arm of the law a bit further. Given political norms and legal restrictions, the federal government could not coerce the local governments that had gone rogue, nor could it grow its own enforcement arm given national public sensibilities regarding the prospect of “federal policing.”

2. “*An Extraordinary Executive Order.*” — The federal government did, on occasion, experiment with Prohibition enforcement schemes that could be reasonably characterized as federal policing. In an anecdote exemplifying the dysfunction of Prohibition enforcement, the governor of Pennsylvania and the mayor of Philadelphia appealed to President Coolidge for help in cracking down on bootleggers and liquor distributors,¹⁶⁹ and in December 1923, Coolidge granted General Smedley D. Butler a year’s leave from the Marine Corps to serve as Philadelphia’s head of public safety.¹⁷⁰

166. Nat’l Comm’n on Law Observance & Enf’t, Report on the Enforcement of the Prohibition Laws of the United States, H.R. Doc. No. 252, at 7 (1930).

167. Second Wickersham Report, *supra* note 135, at 64.

168. *Id.*

169. See Pinchot Joins Plea for General Butler, N.Y. Times, Dec. 10, 1923, at 9, <https://timesmachine.nytimes.com/timesmachine/1923/12/10/106024888.pdf> (on file with the *Columbia Law Review*).

170. Butler Gets Furlough to Serve Philadelphia, N.Y. Times, Dec. 14, 1923, at 38, <https://timesmachine.nytimes.com/timesmachine/1923/12/14/106026052.pdf> (on file with the *Columbia Law Review*). Philadelphia police closed 1,000 saloons and made several hundred arrests in Butler’s early weeks on the job. See All Crime Falls Off in Philadelphia, N.Y. Times, Jan. 14, 1924, at 2, <https://timesmachine.nytimes.com/timesmachine/1924/01/14/104241061.pdf> (on file with the *Columbia Law Review*). But of the approximately 6,000 arrests made in the first eight months of 1925, only 212 resulted in a criminal conviction. Gen. Butler Reviews Philadelphia ‘Clean-Up,’ N.Y. Times, Sept. 27, 1925, § 8, at 16, <https://timesmachine.nytimes.com/timesmachine/1925/09/27/104187996.pdf> (on file with the *Columbia Law Review*). In December 1924, Coolidge extended Butler’s furlough by one year, but he made it clear that he would not extend the General’s leave beyond 1925. See Gen. Butler’s Leave Extended One Year, N.Y. Times, Dec. 10, 1924, at 7, <https://timesmachine.nytimes.com/timesmachine/1924/12/10/101625768.pdf> (on file with the *Columbia Law Review*); see also General Butler’s Job, N.Y. Times, Sept. 7, 1925, at 10, <https://timesmachine.nytimes.com/timesmachine/1925/09/07/104064552.pdf> (on file with the *Columbia Law Review*). Various press accounts do not provide enough information

A similar attempt by the Coolidge Administration to govern police participation in Prohibition enforcement involves a military officer charged with managing enforcement in designated municipalities. Frustration with the quality of county-level police efforts prompted Colonel Ned M. Green, the federal Prohibition Administrator for the State of California, to ask President Coolidge to issue an executive order that would convey to designated state and local police an enforcement authority similar to that of federal Prohibition agents.¹⁷¹ Green argued that he could not effectively police liquor trafficking in California because local liquor traffickers, when facing a police crackdown, moved operations to a neighboring county.¹⁷² Temporary federal employment of subfederal police officers at a nominal rate of compensation (\$1 per year) would grant these officers federal authority to perform cross-border enforcement actions.¹⁷³ In effect, the order would eliminate county borders for designated county officers for the narrow purpose of Prohibition enforcement.¹⁷⁴ Colonel Green and the Coolidge Administration believed the order to be a straightforward solution to the problem of traffickers exploiting county borders to insulate liquor manufacturing.¹⁷⁵ If the Prohibition Bureau limited the cross-border program to police officers who enlisted voluntarily and municipalities that did not expressly bar this

to attribute the meager conviction totals to any one factor. However, circumstantial evidence suggests that Philadelphia residents were generally hostile to Prohibition enforcement, making convictions difficult to come by. See Gen. Butler Reviews Philadelphia 'Clean-Up,' supra ("In the words of the General himself, his efforts have made him as popular as a porcupine at a picnic."). Upon General Butler's exit from his post as Director of Public Safety, the *New York Times* reported, "He came, he saw, but he did not conquer." General Butler's Job, supra. The Philadelphia enforcement flop, along with the Commission's conclusion—repeated throughout the Wickersham Commission report—that Americans would not accept centralized law enforcement, lends evidence to this Article's primary claim regarding American attitudes in the early twentieth century regarding federal management of state and local police. See President Opposes Officers' Absences, N.Y. Times, Nov. 26, 1924, at 21, <https://timesmachine.nytimes.com/timesmachine/1924/11/26/104059980.pdf> (on file with the *Columbia Law Review*) (describing President Coolidge's unwillingness to continue granting military officers leaves of absence to accept temporary enforcement positions with states or municipalities).

171. See Asked Order for California, N.Y. Times, May 26, 1926, at 2, <https://timesmachine.nytimes.com/timesmachine/1926/05/26/98475202.pdf> (on file with the *Columbia Law Review*).

172. See id.

173. See Richard V. Oulahan, Andrews to Try Out Coolidge Dry Order First in California, N.Y. Times, May 23, 1926, § 1, at 1, <https://timesmachine.nytimes.com/timesmachine/1926/05/23/100075183.pdf> (on file with the *Columbia Law Review*).

174. See Exec. Order No. 4439, Use of State and Local Officials in Enforcing Prohibition (May 8, 1926), <https://www.presidency.ucsb.edu/node/328745> [<https://perma.cc/F27V>JCY7>].

175. See Asked Order for California, supra note 171; Coolidge Defends Dry Order as Valid, N.Y. Times, May 26, 1926, at 1, <https://timesmachine.nytimes.com/timesmachine/1926/05/26/98475201.pdf> (on file with the *Columbia Law Review*).

sort of dual police function, the program would presumably avoid running afoul of the terms of traditional police federalism.

It quickly became apparent, however, that the federal executive’s view of the order fell well outside of the mainstream. The *New York Times* published a series of withering editorials condemning the policy, the first of which—titled “An Extraordinary Executive Order”—characterized Coolidge’s directive as “one of the queerest illustrations of the vicious effects of Prohibition.”¹⁷⁶ The editorial board’s concern extended beyond the order’s impact on the parameters of Prohibition enforcement to its implications for all of civic life under a regime that could “lay hands on State, county, and municipal officers” to enforce “any other Federal statute under the Constitution.”¹⁷⁷ Critics also expressed alarm over the prospect of the federal government using the order to deploy police from a state that enthusiastically enforced the Prohibition Amendment to a neighboring state where public support for Prohibition was relatively weak and the infrastructure for enforcement relatively thin.¹⁷⁸ From a legal standpoint, the order must also have seemed a shameless end run around the Supreme Court’s decision six years earlier in the *National Prohibition Cases*, which held among other things that the Eighteenth Amendment did not obligate the states to coordinate Prohibition enforcement with the federal government.¹⁷⁹

Backlash to Coolidge’s order was broad and nonpartisan.¹⁸⁰ The *New York Times* described the U.S. Senate as having been hit by a storm that was “merely the beginning of a widespread cyclone, with thunder and lightning, produced by President Coolidge’s executive order empowering the employment of State, county, and municipal officers as federal Prohibition agents.”¹⁸¹ A law professor addressing the constitutionality of the order not long after its introduction wrote that public outrage ebbed only after the White House insisted it would limit its application to the specific county-border problem Colonel Green had identified in California.¹⁸² In clarifying the scope of the program, a White House

176. An Extraordinary Executive Order, *N.Y. Times*, May 24, 1926, at 18, <https://timesmachine.nytimes.com/timesmachine/1926/05/24/99986586.pdf> (on file with the *Columbia Law Review*).

177. *Id.*

178. See Coolidge Dry Order Attacked in Senate as Unconstitutional, *N.Y. Times*, May 22, 1926, at 1, <https://timesmachine.nytimes.com/timesmachine/1926/05/22/104207604.pdf> (on file with the *Columbia Law Review*).

179. *Rhode Island v. Palmer* (Nat’l Prohibition Cases), 253 U.S. 350, 387 (1920).

180. See Congress Renews Assault on Order, *N.Y. Times*, May 25, 1926, at 1, <https://timesmachine.nytimes.com/timesmachine/1926/05/25/98380090.pdf> (on file with the *Columbia Law Review*); Order Will Be Enforced, *N.Y. Times*, May 25, 1926, at 1, <https://timesmachine.nytimes.com/timesmachine/1926/05/25/98380092.pdf> (on file with the *Columbia Law Review*).

181. Oulahan, *supra* note 173.

182. See James Hart, Some Legal Questions Growing Out of the President’s Executive Order for Prohibition Enforcement, 13 *Va. L. Rev.* 86, 107 (1926); A Confessed Mistake,

spokesman was quoted saying that the President intended the order to apply only to “certain localities in California.”¹⁸³ Sounding dubious, the editorial board concluded that Coolidge, in issuing the order, had been “betrayed . . . by the lingering official delusion that anything asked in the name of prohibition ought at once to be granted.”¹⁸⁴

The notion that the Coolidge Administration had made a fundamental political miscalculation is further supported by a series of public statements by General Lincoln C. Andrews, Assistant Secretary of the Treasury and head of federal Prohibition enforcement. Andrews had been an adamant proponent of the cross-border initiative, sharing his intent in the days immediately following Coolidge’s order to incrementally extend the initiative from its launching point in California to the opposite coastline.¹⁸⁵ He initially directed those opposing the order on federalism grounds to the language of the Eighteenth Amendment:

When the people wrote the Eighteenth Amendment they decided that the Federal Government should have police power hitherto reserved to the States. They forced us to use the police power, making jurisdiction concurrent between the Federal and the State Governments. I must lean on the States and communities to carry their burden in the enforcement of prohibitory laws.¹⁸⁶

Within six months of issuing this statement, the general reversed his position regarding the federal role in subfederal enforcement. Speaking to the Baltimore Drug Exchange, a group opposed to federal regulation of the drug trade, Andrews apologized to the people of Baltimore for the recent course of federal Prohibition enforcement and stated that local enforcement should be left to local police.¹⁸⁷ He referred to federal

N.Y. Times, May 25, 1926, at 26, <https://timesmachine.nytimes.com/timesmachine/1926/05/25/98380234.pdf> (on file with the *Columbia Law Review*).

183. A Confessed Mistake, *supra* note 182.

184. *Id.*

185. See Oulahan, *supra* note 173.

186. *Id.* (internal quotation marks omitted) (quoting General Andrews). Andrews responded to the criticism of federal overreach by explaining that the executive order had come at the request of California public officials who wanted to “try out an amalgamation of the Federal and State prohibition agents.” *Id.* Critics responded with claims that under the order, the federal government could throw “open the gates to permit the entry into the Federal establishment of a whole municipal police force and even the designation of Governors of States as Federal officials.” *Id.* A Brooklyn politician explained that the order had embarrassed local public officials battling a crime wave, given that city policemen would have to choose between obeying General Andrews’s orders or those of the city commissioner. *Id.* He added, “It would be possible [under the order] to shift the Baltimore police to raid New York cabarets and homes. It is an indirect violation of all home rule notions.” *Id.* (internal quotation marks omitted) (quoting Rep. Loring M. Black, Jr.).

187. See Andrews Deplores Federal Intrusion, N.Y. Times, Dec. 11, 1926, at 2, <https://timesmachine.nytimes.com/timesmachine/1926/12/11/110039212.pdf> (on file with the *Columbia Law Review*).

attempts to incorporate local police into the federal enforcement effort as a “big mistake,” adding, “It also is part of my policy that the work of local enforcement should be left to the police and judicial officers of each community.”¹⁸⁸

The federal government’s newfound sense of the appropriate bounds of Prohibition enforcement left federal officials no closer to solving the original problem: The federal Prohibition Bureau could not credibly enforce the Eighteenth Amendment without leveraging local criminal justice infrastructure.¹⁸⁹ The NCLC eventually concluded that the federal government would continue to face an enforcement stalemate:

As things are at present, there is a virtual local option. It seems to be admitted by the government and demonstrated by experience that it is substantially impracticable for the federal government alone to enforce the declared policy of the National Prohibition Act effectively as to home production. Obviously, nullifications by failure of state cooperation and acquiesced-in nullification in homes have serious implications. Enforcement of a national law with a clearly announced national policy, such as is set forth in Section 3 of the National Prohibition Act, cannot be pronounced satisfactory when gaps of such extent and far-reaching effect are left open.¹⁹⁰

The Commission’s assessment came without clear advice on how to fill the gaps of the enforcement apparatus. Despite its intensive investigation of the failures of Prohibition enforcement, the Commission was unable to offer constructive advice on how to win the interest and material support of ambivalent state and local public officials and their constituents.¹⁹¹ Commission members considered the dramatic expansion of the federal enforcement arm but concluded that federal administrative expansion was neither politically nor culturally feasible.¹⁹² Officials in the federal executive considered the same but found this sort of federal police power “unthinkable in America.”¹⁹³ Two years after the publication of the Wickersham Commission report in 1931, the Twenty-first Amendment was ratified, bringing the Prohibition era to a definitive end.¹⁹⁴

One of the central charges of the Wickersham Commission—to investigate Prohibition-enforcement activity of state and local police—was itself out of step with the orthodoxy of police autonomy and a deviation from the customs of police federalism. But the primary conclusions

188. *Id.* (internal quotation marks omitted) (quoting General Andrews).

189. See *supra* notes 139–147 and accompanying text.

190. Second Wickersham Report, *supra* note 135, at 59.

191. See Zimring, *supra* note 93, at 1006–07.

192. See *supra* notes 155–157 and accompanying text.

193. *Post*, *supra* note 132, at 26.

194. See U.S. Const. amend. XXI, § 1.

of the Commission—that effective Prohibition enforcement required the centralization of police administration and yet, that police centralization was politically infeasible—speak to the orthodoxy’s prevailing authority in the Prohibition era.

C. *Violent-Crime Federalism (1932–1967)*

In the years immediately following the repeal of Prohibition, federal officials turned their attention from vice to violence. Congress pivoted from the historical practice of leaving matters of interpersonal violence to state and local government by enacting a series of violent-crime statutes between 1932 and 1934,¹⁹⁵ to be enforced by federal law enforcement agents and prosecuted in federal courts. The federal government’s first antiviolence campaign thus adhered to the traditional binary between federal and subfederal criminal administration. It was executed within the scope of federal criminal jurisdiction, bounded by state and local criminal jurisdiction, and without the benefit of systematic contributions from state and local police. Even in what might be considered the golden age of federal criminal administration, when crime was first considered a national epidemic and the mythical federal law enforcement hero—the “G” man—came to national prominence,¹⁹⁶ police rarely, if ever, formally served within the administrative framework of federal criminal enforcement. At the dawn of the violent-crime federalism era, police were neither partners of nor proxies for the federal government. Federal and subfederal law enforcement agents operated within two independent spheres of criminal administration.

195. See *infra* Table 3.

196. See Richman, *The Past, Present, and Future*, *supra* note 101, at 388.

TABLE 3: MAJOR FEDERAL LEGISLATION ON VIOLENT CRIME (1919–1934)¹⁹⁷

Date	Legislation	Description
1919	National Motor Vehicle Theft Act (“Dyer Act”) ¹⁹⁸	Interstate transport of stolen cars
1932	Federal Kidnapping Act (“Lindbergh Act”) ¹⁹⁹	Kidnapping across state lines (capital offense)
1934	National Firearms Act ²⁰⁰	Gun sales
1934	National Stolen Property Act ²⁰¹	Interstate stolen property
1934	Federal Bank Robbery Act ²⁰²	Robbery of a national bank
1934	Anti-Racketeering Act ²⁰³	Extortion by telephone, telegraph, or radio

It may be helpful to first provide a rough outline of the period of “federalization” that bridged the later stages of Prohibition and the opening federal campaign against violent crime. In 1930, just before Prohibition’s repeal in 1933, federal criminal prosecutions totaled 87,305.²⁰⁴ Professor Daniel Richman notes that of these prosecutions, roughly 57,000 (65%) were for prohibition violations, 8,000 (9%) were based in the District of Columbia (home to the federal government), 7,000 (8%) were related to immigration, and 3,500 (4%) to drugs.²⁰⁵ This distribution indicates the nature of the federal government’s investment in criminal enforcement just before its first antiviolence campaign. Apart from Prohibition, the federal government still made only modest contributions to the project of crime control.

197. Murakawa, *supra* note 121, at 158–59 tbl.A.1 (compiling a list of major federal statutes on violent crime).

198. National Motor Vehicle Theft (Dyer) Act, ch. 89, 41 Stat. 324 (1919) (codified as amended at 18 U.S.C. §§ 2311–2313 (2012)).

199. Federal Kidnapping (Lindbergh) Act, ch. 271, 47 Stat. 326 (1932) (codified as amended at 18 U.S.C. §§ 1201–1204 (2012)).

200. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–6872 (2012)).

201. National Stolen Property Act, ch. 333, 48 Stat. 794 (1934) (codified as amended at 18 U.S.C. §§ 2311, 2314–2315 (2012)).

202. Federal Bank Robbery Act, ch. 304, 48 Stat. 783 (1934) (codified as amended at 18 U.S.C. § 2113 (2012)).

203. Anti-Racketeering Act, ch. 569, 48 Stat. 979 (1934) (repealed 1946).

204. Richman, *The Past, Present, and Future*, *supra* note 101, at 385.

205. *Id.*

The federal role in crime control would expand in the aftermath of the kidnapping and murder of aviator Charles Lindbergh's infant son in March 1932.²⁰⁶ The police charged Bruno Richard Hauptmann, a German immigrant from the Bronx, New York, with the crime, which the press described as the "biggest story since the Resurrection."²⁰⁷ The national public attention the Lindbergh story received gave the federal government a rare opening to build out federal criminal enforcement infrastructure—an opening the Wickersham Commission had repeatedly noted was not available as a remedy for Prohibition enforcement dysfunction.²⁰⁸

Congress passed the Lindbergh Act in 1932, two years before Hauptmann's arrest. The Act made the transportation of kidnapping victims across a state or national border a federal felony.²⁰⁹ The federal antiviolence campaign continued with Franklin Roosevelt's election to the presidency in November of the same year. Early in his presidency, Roosevelt promised an expanded federal role in crime control, in keeping with his vision for the federal government under the New Deal.²¹⁰ Within six months of Roosevelt's 1934 message to Congress, 105 different crime bills had been considered.²¹¹ Meanwhile, the federal prison population began to reflect newfound federal ambitions in criminal administration, nearly doubling from 13,000 inmates in 1930 to 24,360 in 1940.²¹²

Why did the federal government begin to obsess in the mid-1930s over interpersonal violence? The Lindbergh kidnapping is often referenced as a seminal moment for federal crime policy,²¹³ but it might be better understood as a pivotal point in the emerging national conversation about crime. The notion of a national crime problem had crystallized

206. See Feb. 13, 1935: Lindbergh Baby Kidnapper Found Guilty of Murder, *N.Y. Times: The Learning Network* (Feb. 13, 2012), <https://learning.blogs.nytimes.com/2012/02/13/feb-13-1935-lindbergh-baby-kidnapper-found-guilty-of-murder/> (on file with the *Columbia Law Review*).

207. Martha Sherrill, *The Case of the Senior Schwarzkopf*, *Wash. Post* (Feb. 4, 1991) (internal quotation marks omitted) (quoting journalist H.L. Mencken), <https://www.washingtonpost.com/archive/lifestyle/1991/02/04/the-case-of-the-senior-schwarzkopf/3e47470f-544a-48ed-b84a-2d197b33afb1/> [<https://perma.cc/4MSZ-9YH7>].

208. See *supra* notes 162–164 and accompanying text.

209. See Federal Kidnapping (Lindbergh) Act, ch. 271, 47 Stat. 326 (1932) (codified as amended at 18 U.S.C. §§ 1201–1204 (2012)); Richman, *The Past, Present, and Future*, *supra* note 101, at 38.

210. See Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1934), <https://www.presidency.ucsb.edu/node/208328> [<https://perma.cc/Y29B-EJFE>] (“[T]hese violations of law call on the strong arm of Government for their immediate suppression; they call also on the country for an aroused public opinion.”); see also Richman, *The Past, Present, and Future*, *supra* note 101, at 387.

211. See Richman, *The Past, Present, and Future*, *supra* note 101, at 387.

212. *Id.* at 389.

213. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 *N.Y.U. L. Rev.* 870, 880–81 (2015); Richman, *The Past, Present, and Future*, *supra* note 101, at 387.

in the 1930s as a result of a mix of factors, including public anxieties over mass immigration from Europe, a related domestic geopolitics that cast city-society as morally corrupt,²¹⁴ the rise of organized crime,²¹⁵ an uptick in the national crime rate,²¹⁶ and the advent of “crimes of mobility.”²¹⁷ Criminal law scholars have recently investigated the last of these factors, contending that the technological innovations that delivered cars, railroads, and airplanes to mainstream American life allowed for more sophisticated criminal activity and created a corresponding demand for equally sophisticated criminal enforcement tactics and programming.²¹⁸ At the time, the federal government seemed best suited to develop an enforcement infrastructure capable of combatting mobile, interstate criminal activity. The Dyer and Lindbergh Acts targeted mobile crimes, opening the door to a series of federal violent-crime statutes passed in 1934, including the National Firearms Act, the National Stolen Property Act, the Federal Bank Robbery Act, and the Anti-Racketeering Act.²¹⁹ This was the beginning of a congressional antiviolence campaign that to this day seems to lack any semblance of a limiting principle apart from the constitutional principles applied by the federal judiciary.²²⁰

Nevertheless, there remained a clear split between the federal and subfederal criminal justice systems. The federal government enforced the federal criminal law, local governments enforced state criminal law, and federal officials gave repeated assurances that in carving out a greater federal role in criminal administration they would not seek to bridge this

214. See McGirr, *supra* note 13, at 118; Pliley, *supra* note 118, at 183.

215. See Richman, *The Past, Present, and Future*, *supra* note 101, at 386–87.

216. Statistics from the 1920s do show a spike in a number of crime indicators. Municipal court cases rose from 100,000 in 1920 to 350,000 in 1929, and the national assault rate increased from 12 in 100,000 in 1920 to 16 in 100,000 in 1933. McGirr, *supra* note 13, at 194.

217. See Lawrence M. Friedman, *Crimes of Mobility*, 43 *Stan. L. Rev.* 637, 654 (1991); Sarah A. Seo, *Antinomies and the Automobile: A New Approach to Criminal Justice Histories*, 38 *Law & Soc. Inquiry* 1020, 1030–31 (2013) (book review).

218. Legal historian Lawrence Friedman argues that Americans viewed increased mobility as a boon, but also as a threat—to public safety, cultural norms, and conservative values. See Friedman, *supra* note 217, at 638. These fears, it seems, were often conflated. It was certainly true that humanity—immigrants, workers, and criminal offenders—was on the move in America. But anxieties about the cultural changes derivative of mobility became difficult to distinguish from legitimate public safety concerns. *Id.*; see also Marion, *supra* note 120, at 38 (referencing President Johnson’s comments about mobility as a rationale for expansion of the federal role in crime control).

219. See *supra* Table 3.

220. See, e.g., *United States v. Morrison*, 529 U.S. 598, 618 (2000). The Supreme Court held that Congress lacked the authority to enact the Violence Against Women Act under the Commerce Clause because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.” *Id.* at 613. But see Mary-Christine Sungaila, *United States v. Morrison: The United States Supreme Court, the Violence Against Women Act and the “New Federalism,”* 9 *S. Cal. Rev. L. & Women’s Stud.* 301, 313 (2000) (finding that the view “endorsed in *Morrison* appears to have had little effect on the courts’ inclination to uphold Congressional legislation”).

division of labor.²²¹ The taboo forbidding meaningful federal participation in criminal justice had been broken but the other regarding federal authority over state and local police held strong.

Leading federal security administrators lobbied for the federal government to steer clear of state and local criminal justice affairs. In the midst of a crime wave (one that contemporary observers would likely characterize as occurring “on his watch”), U.S. Attorney General William D. Mitchell insisted that the nation’s violent gang problem (and organized crime in general) was a “local problem” and that the federal government would not serve as a backstop for local criminal justice systems struggling to curb gang activity.²²² President Herbert Hoover took the same stance, arguing that despite the federal government’s criminal investigation of Al Capone and other mob leaders, criminal enforcement initiatives and crime policy solutions should come from local government officials.²²³ President Hoover called for a public “awakening” that would reveal “the failure of local government to protect its citizens from murder, racketeering, corruption, and a host of other crimes.”²²⁴

FBI Director J. Edgar Hoover, notorious for his abuse of federal power in the criminal context, struck a similar chord in 1932. As the federal government developed its criminal enforcement infrastructure (more than doubling its FBI agents between 1932 and 1939²²⁵) and broadened the scope of federal criminal jurisdiction, Hoover sought to assure municipal police that the federal government would not look to incorporate their departments into a national police force.²²⁶ In a speech to the International Association of Chiefs of Police (IACP), Hoover specifically addressed the federal role in standardizing crime statistics.²²⁷ While offering nominal federal support in pursuit of this goal, Hoover drew a red line at federal supervision of the data collection of local police departments, promising that the FBI would only act “as a receiving station” for crime data produced at the municipal level.²²⁸ Hoover added, “If my personal desires were the controlling factor in solving this problem, unquestionably I should be very willing and glad to relieve the [IACP] of this responsibility but constitutional limitations and other

221. See J. Edgar Hoover, *The United States Bureau of Investigation in Relation to Law Enforcement*, 23 *J. Crim. L. & Criminology* 439, 451 (1932) [hereinafter Hoover, *United States Bureau of Investigation*].

222. Richman, *The Past, Present, and Future*, *supra* note 101, at 386.

223. See Herbert Hoover, *The President’s News Conference* (Nov. 25, 1930), <https://www.presidency.ucsb.edu/node/212495> [<https://perma.cc/3PLP-AHEX>].

224. *Id.*; see also Richman, *The Past, Present, and Future*, *supra* note 101, at 386.

225. Richman, *The Past, Present, and Future*, *supra* note 101, at 388.

226. See Hoover, *United States Bureau of Investigation*, *supra* note 221, at 451.

227. *Id.*

228. *Id.*

important obvious considerations would prevent any such solution of the problem.”²²⁹

The FBI Director’s comments speak to prior understandings of the authority the federal government could exercise over police in accordance with the Constitution, an understanding now firmly established in constitutional jurisprudence by *Printz*. But Hoover’s mention of “other important obvious considerations” speaks more broadly to his own sense of the customs of police federalism and the institutional orthodoxy central to this Article’s thesis. This reading is further supported in an academic article Hoover wrote for the *Annals of the American Academy of Political and Social Science*.²³⁰ In the wake of the federal vice and violent-crime campaigns, and just a decade before President Johnson’s War on Crime, Hoover again affirmed police autonomy, this time entirely as a matter of ethical rather than legal principle. The article, titled “The Basis of Sound Law Enforcement,” opens with a strong normative claim:

Is a national police force necessary or advisable? Is there need for further centralization of law enforcement in a state or federal agency?

My answer to both of these questions is an unequivocal “No!” Nor should we, I maintain, take any steps which could feasibly lead to the ultimate consolidation of police power.

. . .

Our decentralized police system in America is a direct and necessary product of our historical development as a nation. The two are indissolubly intertwined. Both are born of the same mother—skepticism of concentrated power.²³¹

In the following section of the article, under the heading “Dangers of Centralized Police Power,” Hoover indicates the depth of his conviction: “I am unalterably opposed to a national police force. I have consistently opposed any plan leading to a consolidation of police power, regardless of the source from which it originated.”²³²

Hoover also advances the claim that centralized police administration tends to undermine the authority of local police and would threaten the American system of self-governance.²³³ Additionally, in a genuine analytical contribution to the study of the structure of police governance in the United States, Hoover distinguishes “co-ordination” between the federal government and police (via selective formal and informal partnerships) from the “centralization” of police authority (that is, police

229. *Id.*

230. John Edgar Hoover, *The Basis of Sound Law Enforcement*, 291 *Annals Am. Acad. Pol. & Soc. Sci.* 39 (1954).

231. *Id.* at 39.

232. *Id.* at 40.

233. *Id.*

consolidation).²³⁴ The latter, in his view, represented a sharp turn away from the nation's democratic traditions.²³⁵

The *American Academy* article leaves the clear impression that Hoover found the prospect of police consolidation new and alarming. The seven-page document reads as more than a community-policing manifesto (though, strangely, it is exactly that). It registers as a plea that the future of police federalism comport with its past, when police had never been subordinate, legally or otherwise, to federal government authority.

As students of criminal justice history are well aware, Hoover was not known for his sensitivity to the liberal use of federal government power. Hoover began as FBI Director in 1924 and completed his tenure at the moment of his death in 1972.²³⁶ Over the course of nearly a half century as head of the nation's premier law enforcement agency, Hoover developed a national reputation as an amoral enforcement zealot. He was rumored to have blackmailed political dissidents and Presidents alike, violating legal and ethical codes in his pursuit of public order, as he imagined it.²³⁷ All of this makes Hoover's synthesis of the history of police federalism and denunciation of police consolidation a historical shocker: Consolidation would have extended the powers of this man who was widely known as the nation's chief bully. Accordingly, legal historians argue that Hoover opposed police consolidation not because of his opposition to the concentration of law enforcement power at the federal level, but out of concern that consolidation would bring additional federal oversight to clandestine FBI collaborations with local police.²³⁸ Irrespective of his true motives, it seems clear that, at the very least, Hoover's position on the subject of police federalism was informed by an accurate view of both the history of police federalism and its conventions at the time of his article's publication in 1954. In his fight to block police consolidation, Hoover made sure to note that he had the orthodoxy of police autonomy in his corner.²³⁹

234. *Id.* at 42.

235. *Id.* Hoover's position seemed to be motivated by two concerns: (1) abuse of state power under a consolidated police system and (2) federal oversight over local police in keeping with police-reform movements. See *id.*

236. Fred P. Graham, *J. Edgar Hoover Dies; Will Lie in State in Capitol*, N.Y. Times (May 3, 1972), <https://www.nytimes.com/1972/05/03/archives/j-edgar-hoover-77-dies-will-lie-in-state-in-capitol-j-edgar-hoover.html> (on file with the *Columbia Law Review*).

237. See generally Curt Gentry, *J. Edgar Hoover: The Man and the Secrets* 413–14, 689–90 (2001) (detailing Hoover's blackmailing tendencies).

238. See Gest, *supra* note 13, at 18. For an alternative explanation of the FBI's motivation for opposing police consolidation, see Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 765–66 (1998) (“[The] resource limitations [of federal criminal-enforcement agencies] generally allow them to avoid taking responsibility for crime on any particular ‘beat,’ but, at the same time, they can be confident that they will have a criminal statute to fit any antisocial conduct they choose to pursue . . .”).

239. See *supra* notes 230–235 and accompanying text.

A final reference point for the police federalism of the first half of the twentieth century mentions Hoover in passing, but at the intersection of criminal and national security federalism. In a historical essay promoting the practice of intelligence gathering by local police in service of national security—an arrangement characterized as “epistemic federalism”²⁴⁰—national security scholar Samuel Rascoff shares an anecdote about the Roosevelt Administration’s troubles with metropolitan police departments in the buildup to World War II.²⁴¹ In the late 1930s, many big-city police departments ran local intelligence programs in an effort to systematically gather information related to hostile foreign actors and activists.²⁴² The Roosevelt Administration did not object to police collecting foreign intelligence but to the fact that these local operations existed “in a governance vacuum”²⁴³ given that police administrators often refused to share their findings with federal counterparts.²⁴⁴ Seeking access to these information channels, Hoover appealed to U.S. Attorney General Frank Murphy who, in turn, reached out to President Roosevelt.²⁴⁵ Roosevelt issued a formal request that state and local police departments turn over all collected information regarding international espionage to the FBI.²⁴⁶

That many big-city police departments collected foreign intelligence without providing for systematic disclosure to federal law enforcement speaks to a federal–subfederal law enforcement binary that held relatively stable through the first half of the twentieth century. Given cultural and political norms, the federal government was in no position to dictate police activity to subfederal governments or to coerce police into executing aspects of the national security agenda.

IV. POLICE AS FEDERAL PARTNERS (1968–2004)

When the federal government began to play a meaningful role in crime governance in the late 1930s it was still almost entirely removed from state and local criminal administration.²⁴⁷ This structural arrangement

240. Samuel J. Rascoff, *The Law of Homegrown (Counter) Terrorism*, 88 *Tex. L. Rev.* 1715, 1720 (2010) (defining “epistemic federalism” as the “ability of local officials to ‘see’ the threat [of homegrown terrorism] in terms of local phenomena”).

241. See *id.* at 1715.

242. See *id.*

243. See *id.* at 1723.

244. See *id.* at 1715.

245. See *id.*

246. Franklin D. Roosevelt, *Statement Placing the Federal Bureau of Investigation in Charge of Espionage Investigation* (Sept. 6, 1939), <https://www.presidency.ucsb.edu/node/209999> [<https://perma.cc/MTX2-W92C>]. Rascoff mistakenly reads this request, made in the polite tone of a federal official keenly aware of the norms of traditional police federalism, as a demand. See Rascoff, *supra* note 240, at 1715 n.4 (noting the “commandeering logic behind the directive”).

247. See *supra* notes 204–205, 221–224 and accompanying text.

held until President Johnson's War on Crime in the 1960s. Two bills in particular—the Law Enforcement Assistance Act (LEAA) of 1965²⁴⁸ and the Safe Streets Act of 1968²⁴⁹—ushered in a new paradigm for criminal federalism in which the federal executive would channel funds to state and local criminal justice systems, primarily for the development of police infrastructure (namely, training, data collection, and equipment).²⁵⁰ This Part briefly explains the LEAA and the Safe Streets Act as a turn from the federal–subfederal binary in criminal justice, but argues that even as the federal government looked to improve the general quality of state and local police departments, it took care to avoid even the perception that it would look to dictate state and local police activity. State and local police received the federal funding as partners (having interests that happened to coincide with the federal government) rather than proxies slated to assist the enforcement of federal law in keeping with the federal public security agenda. This Part demonstrates that the “old normal” of police federalism (in which federal officials refrained from issuing directives to state and local police) ultimately withstood the administrative innovations of the War on Crime.

The national public shed its aversion to a federal role in subfederal criminal administration by the late 1960s in response to a number of dynamic social events and trends including assassination attempts, the Civil Rights Movement, a string of urban riots, and a rising violent-crime rate.²⁵¹ The cultural and political elements had finally fallen into place for the federal government to broadly influence the quality of state and local criminal enforcement. The historical criminology literature characterizes this moment as a tipping point, holding that, collectively, the period's pervasive social unease had finally “legitimized” the position that the federal government should provide financial assistance for state and local law enforcement operations.²⁵² This was the opening moment

248. Law Enforcement Assistance Act of 1965, Pub. L. No. 89-197, 79 Stat. 828 (repealed 1968).

249. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of 47 U.S.C.). The Safe Streets Act also established the “LEAA” in the form of the Law Enforcement Assistance Administration. *Id.* This Article's LEAA references are to the 1965 Act.

250. Robert F. Diegelman, Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience, 73 *J. Crim. L. & Criminology* 994, 997 (1982) (listing the four main goals of the LEAA program).

251. See *id.* at 994–96; see also Murakawa, *supra* note 121, at 69–72 (explaining how the Omnibus Crime Control and Safe Streets Act was “enacted in this context of crime [and] uprisings” in the late 1960s); Elizabeth Hinton, “A War Within Our Own Boundaries”: Lyndon Johnson's Great Society and the Rise of the Carceral State, 102 *J. Am. Hist.* 100, 103 (2015) (detailing the increase in federal social programs during the Johnson and Nixon Administrations in response to a wave of rioting); Weaver, *supra* note 24, at 233 (noting Republican discontent at the Johnson Administration's use of “Federal money and Federal controls” in response to rioting and increased violent crime).

252. See Murakawa, *supra* note 121, at 72–73; Hinton, *supra* note 251, at 109; Weaver, *supra* note 24, at 239–40.

of the “law and order” politics that would hold sway across the American polity for several generations.²⁵³

The LEAA won nearly unanimous support from Congress within this unique political environment.²⁵⁴ The legislation had been marketed as a small-scale grant program administered by the Justice Department that would target local criminal justice systems for infrastructure development.²⁵⁵ Acting on the law’s core mandate, Attorney General Nicholas Katzenbach created the Office of Law Enforcement Administration (OLEA) as a subsidiary to the Department of Justice (DOJ) to distribute the allotted funds to both public and private organizations.²⁵⁶

The OLEA would ultimately serve as a placeholder in its three-year run between 1965 and 1968. President Johnson organized the Commission on Law Enforcement and Administration of Justice the same year he signed the LEAA,²⁵⁷ making the modest request that the Commission’s members advise the administration on how to bring crime under control and then “root out [its] cause.”²⁵⁸ The various task forces under the commission presented more than 200 conclusions and recommendations. Among them was a proposal that the federal government begin

253. Law-and-order rhetoric and ideology has served as a lynchpin of American culture and politics since the 1960s. See Beckett, *supra* note 47, at 8–10 (discussing how the “conservative campaign for ‘law and order’ has been more relevant to the ideological and policy shift to the right on crime-related issues” since the 1960s); Simon, *supra* note 30, at 96–101 (describing how Johnson “offer[ed] law enforcement as an answer to the community beset by crime and fear of crime”). See generally Michael W. Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* 2–11 (2005) (describing the “amorphous quality” of law-and-order ideology proffered by conservatives during the 1960s).

254. See Murakawa, *supra* note 121, at 79.

255. See Diegelman, *supra* note 250, at 997–98 (describing the LEAA as an innovative program meant to provide block grants to the states to encourage criminal justice improvements).

256. See Feeley & Sarat, *supra* note 56, at 36 (detailing the creation of OLEA by the Attorney General to administer the grants authorized by the LEAA). OLEA distributed \$20 million in grants to state and local governments over the three-year period from 1966 through 1968, “concentrating heavily, although not exclusively, on projects designed to aid” law enforcement in the District of Columbia, “an announced interest of President Johnson.” *Id.*

257. See President’s Comm’n on Law Enf’t & Admin. of Justice, *The Challenge of Crime in a Free Society*, at iv (1967).

258. See Lyndon B. Johnson, *Remarks to the Members of the President’s Commission on Law Enforcement and Administration of Justice* (Sept. 8, 1965), reprinted in 1 *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965*, at 982–83; see also Feeley & Sarat, *supra* note 56, at 37. Earlier that year, Johnson had contextualized the Commission’s mandate against the history of criminal federalism, arguing that no American agency had ever “undertaken [a] probe so fully and deeply into the problems of crime in our nation.” Lyndon B. Johnson, *Special Message to the Congress on Law Enforcement and the Administration of Justice* (Mar. 8, 1965), reprinted in 2 *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965*, at 263–64, 269.

to send funding to state and local governments to enhance the quality of subfederal policing.²⁵⁹

The Safe Streets Act of 1968, a sequel to the LEAA bill, distributed federal funds to state governments in keeping with the Commission's recommendation.²⁶⁰ An amendment to the original bill, supported by a coalition of Republicans and Southern Democrats, required that the federal funds be issued in block grants to state governments, who would then use their discretion in channeling the funds to internal municipalities.²⁶¹ The split mapped onto a rural–urban politics. It would, in theory, give state legislators from rural areas more influence over the policing of cities.²⁶²

The newly established federal funding stream certainly reformulated the relationship between the federal government and police—but did the LEAA and the Safe Streets Act signify the end of the orthodoxy of police autonomy? In short, no. Under the definition established early in this Article, the orthodoxy of police autonomy is indicated by a reflexive skepticism toward the prospect of police subordination to the federal

259. See President's Comm'n on Law Enf't & Admin. of Justice, *supra* note 257, at 281 (“The most urgent need of the agencies of criminal justice in the States and cities is money with which to finance the multitude of improvements they must make. . . . But even more essential is an increase in State support.”); Diegelman, *supra* note 250, at 997.

260. Murakawa, *supra* note 121, at 85 (“The Safe Streets Act of 1968 . . . proposed funding local law enforcement for training police, getting better equipment, and coordinating between agencies.”).

261. The Johnson Administration had initially proposed that the funds be divided into categories and distributed directly to city and county governments, where the vast majority of criminal investigations have always taken place. Murakawa, *supra* note 121, at 86 (“Beyond changing location from local to state, the change was also from categorical grants to block grants.”). The state block grant contingent ultimately won out over this and other proposals, with 80% of support coming from Southern legislators. *Id.* There is evidence that this concession to criminal justice conservatives incentivized the expansion of state monitoring of municipal criminal administration and made it more likely that the Safe Streets Act money would be spent on punitive rather than rehabilitative measures. See *id.* (recounting that the conservative coalition reprioritized “funding away from innovative rehabilitation efforts . . . and toward selective funding for police preparedness for riot control and organized crime”).

262. See *id.* (describing opposition to block grants by Democrats fearing such grants would “undercut cities in the ‘continuing urban-rural and partisan political controversies’” (quoting Harry McPherson, *A Political Education: A Washington Memoir* 280 (1995))). Under the Law Enforcement Assistance Administration, federal block grants to states fell into four categories: grants for the comprehensive planning of state criminal justice systems, grants to improve police technologies, grants for research, and grants to improve police technique and training. See Diegelman, *supra* note 250, at 997. It is important to note that, despite sending several billion dollars to states before the program's termination in 1982, the funding ultimately represented around only 5% of the state criminal justice budget. *Id.* at 996 & n.16, 1001. The Safe Streets Act also represented the first in what is now a long tradition of “omnibus” crime bills. Congress stuffs these hefty pieces of legislation with policies reflective of traditional and modern criminal federalism: new federal crimes, revisions to old federal crimes, appropriations for the federal criminal justice system, and federal financing of state and local criminal justice systems. *Id.*

government. And while the Safe Streets Act required state governments to direct federal funds to municipalities, for the most part, it did not lean on state and local governments to enforce its favored crime policy initiatives. The Johnson Administration advanced the LEAA and the Safe Streets Act to develop state and local law enforcement infrastructure in a manner to be determined largely by state rather than federal officials.²⁶³

The Safe Streets Act certainly made police administration more centralized as states receiving funds under the Act had to account for the state of municipal policing. But this was not the introduction of “national police,” or the police consolidation that J. Edgar Hoover had vigorously opposed in the 1950s. The Safe Streets Act had centralized police governance under the states by way of federal block grants, breaking down the federal–subfederal binary. In the same moment, however, federal officials were intent on steering clear of initiatives that might suggest the federal government’s intent to appropriate subfederal police departments.

In 1982—the year that President Reagan phased out the federal agency charged under the LEAA with distributing criminal justice funding to subfederal governments—then Acting Director of the Office of Justice Assistance, Research and Statistics for the Justice Department Robert F. Diegelman published *Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience*.²⁶⁴ In the article, Diegelman reflected upon the legacy of both the 1968 Safe Streets Act, passed fourteen years earlier, and the Law Enforcement Assistance Administration. His boss, President Reagan, had shuttered the agency in the midst of a national crime wave that had failed to inspire a repeat of the federal interventions of the 1960s.²⁶⁵ Diegelman notes that political support for the Law Enforcement Assistance Administration had dried up for obvious reasons.²⁶⁶ In the decade since the passage of the Safe Streets Act, the federal government had spent roughly \$6.6 billion to bolster local law enforcement while

263. See Feeley & Sarat, *supra* note 56, at 47–48 (“The Safe Streets Act embodied a procedure for distributing federal funds rather than a coherent definition of and attack upon the crime problem.”); Murakawa, *supra* note 121, at 89 (“At the level of implementation [of the Safe Streets Act], state planning agencies had difficulty influencing entrenched local law enforcement.”); Weaver, *supra* note 24, at 158–60 (describing efforts by Republicans and Southern Democrats to channel money from the LEAA and Safe Streets Act through the state level in order to ensure the legislation “wouldn’t get into the hands of those sympathetic to civil rights”).

264. See Diegelman, *supra* note 250. In his article, Diegelman specifically discusses the Law Enforcement Assistance Administration, established in 1968 by the Safe Streets Act, and not the 1965 Act.

265. Richman, *The Past, Present, and Future*, *supra* note 101, at 392 (“[F]rom the perspective of state and local enforcement agencies eager for federal dollars without federal mandates, the LEAA was a success . . . Its budget kept increasing, at least until 1977. . . . [But LEAA] soon fell out of favor in Washington . . . and [was] finally phased out by Ronald Reagan in 1982.”).

266. See Diegelman, *supra* note 250, at 1004 (“In sum, the LEAA program ran afoul of unrealistic expectations, wasteful uses of funds, mounting red tape, and uncertain direction.”).

crime had risen 54% over the same period.²⁶⁷ Having witnessed the elimination of the Law Enforcement Assistance Administration as a leading Justice Department official, Diegelman was committed to figuring out what had gone wrong. In his review of the work of President Johnson's crime commission and the moments leading up to the passage of the Safe Streets Act, Diegelman captured the influence of police-autonomy orthodoxy:

It was clear that something had to be done to improve crime control efforts. It also was clear that local law enforcement was not effective and that greater resources, including those of the federal government, had to be applied to the problem. As the primary responsibility for law enforcement traditionally rests with state and local government, any suggested federal role had to avoid even the slightest appearance that local authority for crime control was being usurped by the federal government.²⁶⁸

Diegelman's account suggests that under President Johnson, the federal government had walked a fine line politically. Federal officials hoped to provide material support for local police without giving the impression that they were controlling police administrators and officers from Washington. Other historical assessments of the War-on-Crime era present similar accounts of a "hands-on-hands-off" federal posture.²⁶⁹ Diegelman goes on to write that given these politics, Congress intentionally limited its support for police by way of the Safe Streets Act to the provision of supplementary resources.²⁷⁰ There was little if anything in the LEAA and Safe Streets Act that encroached, even nominally, upon local control of police activity.²⁷¹

The preservation of the "old normal" in police federalism through the initial stages of the War on Crime was further exhibited by President Johnson in a speech delivered to a group of governors in October 1966, two years before the passage of his signature crime bill.²⁷² After arguing that crime should be characterized as a national problem and thus

267. Brickey, *supra* note 43, at 1145 n.71. The total cost of the LEAA program over thirteen years was approximately \$7.5 billion. Diegelman, *supra* note 250, at 1001.

268. Diegelman, *supra* note 250, at 997.

269. See, e.g., Feeley & Sarat, *supra* note 56, at 36 (describing a 1960s Justice Department grant program that "provide[d] a visible, if small-scale, response to the politics of crime, one which committed the federal government to action without dramatically increasing federal 'control' over state and local law enforcement").

In one example of the delicate politics of the moment, a Kansas representative wrote to President Johnson, concerned that Johnson's crime package had not included a proposal to improve crime-reporting standards of state and local police. See Weaver, *supra* note 24, at 258. An Assistant Attorney General responded to the representative in writing, claiming that the Safe Streets Act barred the federal government from dictating how the funds should be spent. *Id.*

270. See Diegelman, *supra* note 250, at 997-99.

271. See *id.*

272. Lyndon B. Johnson, Statement by the President at a Meeting with a Group of Governors on Problems of Crime and Law Enforcement (Sept. 29, 1966), <https://www.presidency.ucsb.edu/node/238424> [<https://perma.cc/23CP-NB45>].

addressed by the federal government, Johnson insisted that the new federal role would not involve systematic interference with state and local police.²⁷³ Though he described the contemporaneous landscape of American criminal administration as “archaic” and “fragmented in function and geography,” the centralization of police authority was simply not an option given the nation’s customs:

Our nation has long prided itself on a tradition of local responsibility in the principal domains of law enforcement. The thought of a national police force—a Gestapo—repels us.

For ours is a federal society. Responsibility is shared. . . .

And yet there is a driving and creative role for the Federal Government to play in partnership with State and local officials.²⁷⁴

In the context of the War on Crime, the federal government achieved two complementary objectives: It developed local police infrastructure while simultaneously carving out a greater role for state government in the management of municipal criminal administration. The federal government would send funds only to states that had established credible planning agencies that could effectively distribute them.²⁷⁵ By any reasonable measure, this shift in executive criminal federalism further centralized police governance. But the more things changed in the field of criminal federalism, the more they remained the same in terms of police autonomy. The federal government had normalized its expanded role in criminal justice and established a funding mechanism to bolster state and local criminal justice infrastructure. Yet federal officials did not dare request that subfederal police systematically enforce federal law. They did not introduce public safety initiatives premised on the participation of subfederal police absent a corresponding state or local legislative mandate. In fact, the opposite is true. The federal officials orchestrating the War on Crime were determined to avoid the perception that the federal government would make specific demands of police.

V. POLICE AS FEDERAL PROXY (2008 TO PRESENT)

This Part builds on the prior historical chapters by arguing that while the War on Terror affirmed the orthodoxy of police autonomy, the War on Immigration has breached the historical norms of police federalism. In the War on Terror, the federal government provided funding, training, and data to state and local police to lend support to their respective counterterrorism efforts. In this respect, the federal government sought to bolster counterterrorism infrastructure by acting as a sponsor or patron to its subfederal government counterparts. The ongoing War on Immigration is a different sort of administrative animal.

273. See *id.*

274. *Id.*

275. See Feeley & Sarat, *supra* note 56, at 41.

Contemporary immigration enforcement is premised on a single, overarching administrative system designed by the federal government to enforce federal immigration law. It is top-down and highly centralized, and it presumes the universal participation of state and local police departments. It has no credible precedent in American history. This Part establishes support for this historical claim. It subsequently argues that the War on Immigration, in its introduction of a proxy model of police federalism, represents a new stage of police federalism and the most credible representation of the “police state” feared by American history’s police-autonomy proponents.

TABLE 4: ORTHODOXY IN THE FIELD OF POLICE FEDERALISM
(1789 TO PRESENT)

Years	Stage	Field Orthodoxy
1789–1918	—	Autonomy
1909–1931	Vice-Crime Federalism	Autonomy
1932–1967	Violent-Crime Federalism	Autonomy
1968–2004	The War on Crime	Autonomy
2004–2008	The War on Terror	Autonomy
2008–Present	The War on Immigration	In Flux

A. *Counterterrorism, Homeland Security, and Preservation of the Partnership Model*

Given the cliché that the attacks of 9/11 “changed everything,” one would assume that the attacks radically transformed police federalism. Yet close study of the post-2001 relationship between the federal government and police in matters of counterterrorism suggests that this may not be the case. The empirical reality is that the federal government continued to adhere to the partnership model of police federalism even as it developed counterterrorism infrastructure across the various levels of American government. For example, after 9/11 the DOJ and DHS engaged state and local police in a manner remarkably similar to the LEAA by way of the Office for State and Local Law Enforcement.²⁷⁶ To support police participation in counterterrorism, the two agencies arranged for data sharing with subfederal police, police training, and selective federal–subfederal enforcement partnering through “fusion

276. The Office, created on the recommendation of the 9/11 Commission, was responsible for coordinating with local, state, and tribal law enforcement agencies. See Office for State and Local Law Enforcement, Dep’t of Homeland Sec., <https://www.dhs.gov/office-state-and-local-law-enforcement> [<https://perma.cc/G7LQ-98KE>] (last visited Sept. 11, 2018); see also *supra* Part IV (discussing the administrative innovations of the Safe Streets Act within the framework of criminal federalism).

centers” operated by the DOJ.²⁷⁷ Putting the efficacy of these collaborations aside,²⁷⁸ the bilateral quality of the federal government’s engagement of subfederal police after 2001 seems fairly clear. The varied inter-jurisdictional programs that sprung up during the early years of the War on Terror do not match the hierarchal, one-size-fits-all model of collaborative enforcement advanced by the federal government in its War on Immigration. DOJ and DHS federal security officials now expect subfederal police departments to fall in line as institutional agents of a nationwide deportation program.

Two memos issued by Attorney General John Ashcroft to United States Attorneys on November 13, 2001, describe the cooperative method by which the federal law enforcement officials sought to fight domestic terrorism. In the first, titled “Cooperation with State and Local Officials in the Fight Against Terrorism,” Ashcroft began with the premise that law enforcement officials at all levels of government should work together to prevent future attacks.²⁷⁹ The Attorney General then issued two mandates. He required first that each Office of the United States Attorney designate a “Chief Information Officer” to “centralize the process by which information relevant to the investigation and prosecution of terrorists can be shared with state and local officials.”²⁸⁰ The Chief Information Officer was to be charged with developing “information sharing structures” (that is, intelligence-communication channels) with state and local governments based on input gleaned from state and local officials.²⁸¹

The second memo, “Training in Counter-Terrorism,” proposed police training as a second method of partnership. Under Ashcroft, the Justice Department would establish Anti-Terrorism Task Forces with specific municipal departments.²⁸² Each participating department would

277. See Office of Homeland Sec., National Strategy, *supra* note 63, at 25–26 (recommending increased data sharing and coordination between federal and state and local law enforcement); Amna Akbar, Policing “Radicalization,” 3 U.C. Irvine L. Rev. 809, 845 n.128 (2013) (“[T]he related growth of cross-governmental collaboration through Joint Terrorism Task Forces, fusion centers, shared databases like eGuardian, and federal-state-local enforcement has created exponential growth in the information and enforcement power available to the government.”).

278. For a theoretical analysis of the conceptual underpinnings of intergovernmental counterterrorism initiatives, see generally Akbar, *supra* note 277, at 846–54.

279. Memorandum from John Ashcroft, U.S. Att’y Gen., to All U.S. Att’y’s, Cooperation with State and Local Officials in the Fight Against Terrorism 1 (Nov. 13, 2001) [hereinafter Ashcroft, Cooperation with State and Local Officials], <https://fas.org/irp/agency/doj/agdirective5.pdf> [<https://perma.cc/7GVT-UT5F>].

280. *Id.*

281. *Id.* at 1–2.

282. See Memorandum from John Ashcroft, U.S. Att’y Gen., to the Assistant Att’y Gen. for the Office of Justice Programs, U.S. Dep’t of Justice, the Dirs. of the Office of Cmty. Oriented Policing Servs. and the Office of Intergovernmental Affairs & All U.S. Att’y’s, Training in Counter-Terrorism: Federal, State, and Local Coordination 2 (Nov. 13, 2001)

select a subset of officers to be trained for counterterrorism activity at the National Advocacy Training Center in Columbia, South Carolina, or through remote training at their local offices.²⁸³ Similar to measures established through the Safe Streets Act, the federal government intended for these task forces to elevate the knowledge base, skill level, and performance of first responders (namely, police and firefighters) who would utilize the training within their respective public security systems.²⁸⁴ The program would not subject them to direct federal commands and, unlike the Safe Streets Act, DOJ's counterterrorism program engaged a limited range of first responders, likely those working in jurisdictions with high-value targets or special vulnerabilities.²⁸⁵ Moreover, DOJ officials did not expect its counterterrorism police graduates to execute a predetermined set of field instructions.²⁸⁶

Together, the memos show that the federal government narrowly tailored counterterrorism programming between 2001 and 2008. These programs remain unevenly distributed across the country given that the vast majority of Americans face little risk of terror victimization of the sort that occurred on 9/11.²⁸⁷

Other federal reports from this period confirm that federal security officials were sensitive to the line between solicited police cooperation and coercion. In the first publication of the *National Strategy for Homeland Security*, President George W. Bush described Homeland Security as a national rather than a federal responsibility, stating that the national strategy driving the Homeland Security model was based on "principles of cooperation and partnership."²⁸⁸ In a subsection of the publication titled "American Federalism and Homeland Security," the report affirmed federalism as fundamental to American democracy: "American democracy is rooted in the precepts of federalism—a system in which our state governments share power with federal institutions."²⁸⁹ The report acknowledged the Tenth Amendment and the associated limitations on federal power: "The Tenth Amendment reserves to the states and to the

[hereinafter Ashcroft, Training in Counter-Terrorism], <https://fas.org/irp/agency/doj/agdirective4.pdf> [<https://perma.cc/B2BG-CMP2>].

283. *Id.* The program aimed to ensure that federal, state, and local law enforcement were "properly trained to mobilize all available resources and deploy all appropriate weapons to win this war." *Id.* at 1. For an example of the partnership model apart from counterterrorism and before the introduction of the Homeland Security model, see Daniel Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 *Ariz. L. Rev.* 369, 370 (2001).

284. See Bush, National Strategy Preface, *supra* note 2, at iv.

285. See Matthew Waxman, Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11, 3 *J. Nat'l Sec. L. & Pol'y* 377, 389 (2009).

286. See Ashcroft, Cooperation with State and Local Officials, *supra* note 279; Ashcroft, Training in Counter-Terrorism, *supra* note 282.

287. Waxman, National Security Federalism, *supra* note 19, at 342–43.

288. Bush, National Strategy Preface, *supra* note 2, at iv.

289. Office of Homeland Sec., National Strategy, *supra* note 63, at 11–12.

people all power not specifically delegated to the federal government.”²⁹⁰ Those federal principles served in the report as the preamble to three objectives for the Homeland Security agency. The agency would (i) prevent terrorist attacks within the United States, (ii) reduce U.S. vulnerability to terrorism, and (iii) minimize the damage and maximize the recovery from attacks that do occur.²⁹¹ To meet these objectives, the report called for roughly eighty new security initiatives, none of which would have established a centralized system of enforcement encompassing the nation’s police departments.²⁹²

To be clear, police figured prominently in the Homeland Security model. They were identified in the *National Strategy* report as first responders and as occasional counterterrorism agents. But it would be difficult to argue that, within the Homeland Security model proposed in 2002, police were to serve as federal proxies. The *National Strategy for Homeland Security* did not suggest that police should carry out instructions or directives issued by federal security officials. Security partnerships under the model were a function of independent law enforcement systems periodically working together. Homeland Security’s chief architects appear to have aspired to develop “complementary systems,” rather than to make state and local police departments subordinate to federal security agencies within a single, consolidated administrative framework.²⁹³ To this end, the first edition of the *National Strategy* report communicated both a healthy regard for the autonomy of subfederal systems of security and a wariness about Homeland Security programming premised on police consolidation. The document appears to even embrace the nation’s patchwork system of security governance as a potential strength, acknowledging in the “State and Local Governments” subsection that in the months after 9/11 many states and cities had helpfully (and unilaterally) developed idiosyncratic infrastructure programs to strengthen *local* domestic security:

Since September 11, every state and many cities and counties are addressing homeland security issues either through an existing office or through a newly created office. Many have established anti-terrorism task forces. Many have also published or are preparing homeland security strategies, some based on existing plans for dealing with natural disasters. . . . The federal government must seek to utilize state and local knowledge about their communities and then share relevant information with state and local entities positioned to act on it.²⁹⁴

290. *Id.*

291. *Id.* at 3.

292. *Id.* at 11–12.

293. See *id.*; see also Danielle Keats Citron & Frank Pasquale, Network Accountability for the Domestic Intelligence Apparatus, 62 *Hastings L.J.* 1441, 1453–55 (2011).

294. See Office of Homeland Sec., *National Strategy*, *supra* note 63, at 12.

This and similar passages from the report demonstrate that, like the DOJ, the DHS did not intend to sweep all American police departments into a single administrative framework for domestic security.

This is not to say that police consolidation in furtherance of domestic security was not seriously considered. In fact, administrative consolidation was considered at various stages, only to be rejected as antithetical to longstanding principles of police federalism. In 2003, the White House considered but rejected the idea of a domestic intelligence agency thought to be similar to Britain's MI5.²⁹⁵ The agency, as proposed, would have incorporated state and local police into a broad system of domestic spying that would operate independent of the FBI and the CIA.²⁹⁶ The 9/11 Commission advised against the idea, arguing that it would be difficult to develop an effective oversight mechanism for a new, standalone federal security agency of this sort.²⁹⁷

The same proposal was resurrected only a few years later by Judge Richard Posner in an editorial in the *Washington Post*.²⁹⁸ Posner condemned the FBI as having failed in intelligence gathering and other related functions necessary for an effective counterterrorism program. He argued that these and other missteps demonstrated that the FBI was "incapable" of effective counterterrorism operations and proposed a new domestic intelligence agency in which "the nation's hundreds of thousands of local police" would be "knitted into a comprehensive system of domestic intelligence collection."²⁹⁹ This would have been the first and long-feared step toward the consolidation of law enforcement—an advance beyond the selective administrative partnering that served as the basis for the Homeland Security model. Posner left no doubt as to the reach of the security program he envisioned: "We need an agency that will integrate local police and other information gatherers . . . into a comprehensive national intelligence network, as MI5 has done in Britain—and as the FBI has failed to do here."³⁰⁰

Writing in response, former FBI Director Louis Freeh deemed Posner's proposal "a spectacularly bad idea" for a variety of reasons, not

295. Ronald Kessler, No to an American MI5, *Wash. Post* (Jan. 5, 2003), <https://www.washingtonpost.com/archive/opinions/2003/01/05/no-to-an-american-mi5/7c9f8c64-bf57-4d55-a478-26cb55c4e96e/> [<https://perma.cc/JCX3-4J4P>].

296. Nat'l Comm'n on Terrorist Attacks upon the U.S., *The 9/11 Commission Report* 423 (2004), <http://govinfo.library.unt.edu/911/report/911Report.pdf> [<https://perma.cc/8TLD-5CB4>].

297. See *id.* at 423–25. The Committee seemed to anticipate that augmented domestic intelligence gathering would lead to civil liberties abuses but that these abuses would be less egregious and presumably more quickly accounted for and remedied if committed by the FBI as a subsidiary of the Justice Department. *Id.*

298. Richard A. Posner, Commentary, Time to Rethink the FBI, *Wall St. J.* (Mar. 19, 2007), <https://www.wsj.com/articles/SB117425948221240904> (on file with the *Columbia Law Review*).

299. *Id.*

300. *Id.*

the least of which was the nation’s tradition regarding police federalism.³⁰¹ Freeh’s editorial synthesizes the core arguments forming the basis of this Article, at one point making a nearly identical historical claim: “[F]or over 200 years, Americans have thoroughly rejected the notion of a national police force.”³⁰² He then outlines the philosophies rooting the orthodoxy of police autonomy in the American way of life:

The inefficiency of having over 800,000 state and local law-enforcement officers and dozens of sometimes-overlapping federal agencies in terms of jurisdiction is not a happenstance. Rather, it is a strong and perpetual decision by Americans to limit the authority of those who protect—and determine—their most precious liberties. For this very wise and critical reason, law and order in America is mostly local, controlled by mayors, town-hall gatherings and citizens to be as transparent as possible. Our federal law-enforcement and security agencies have been given certain enumerated authorities designed to protect the country but not to amass excessive power in any one agency.³⁰³

The former director ultimately dismisses Posner’s administrative blueprint for domestic intelligence gathering as “a dangerous and dumb idea”—a “knucklehead plan.”³⁰⁴

The point of referencing this sharp exchange in detail is not to pick a side but to indicate, again, the deep regard for police federalism even during the reformulation of domestic security administration in the decade after the attacks of 9/11. The now-worn claim that “everything changed” after 2001 tends to obscure the evidence in the historical record showing that many things did not. The notion of police as partners rather than as an arm of the federal security state continued to animate domestic security planning within the federal executive and public discourse about the appropriate posture of the federal executive in its counterterrorism efforts. The latest iteration of the War on Immigration is therefore not only a break from the history of police federalism, it is also in tension with the initial modeling of Homeland Security.

B. *The War on Immigration*

This Article began with the argument that immigrant-sanctuary policy³⁰⁵ aligns with the nation’s history of police federalism and has argued further that the contemporary practice of immigration enforcement

301. See Louis J. Freeh, Letter to the Editor, Former FBI Director Says U.S. Doesn’t Need a National Police Force, *Wall St. J.* (Mar. 31, 2007), <https://www.wsj.com/articles/SB117529284571255075> (on file with the *Columbia Law Review*).

302. *Id.*

303. *Id.*

304. *Id.*

305. See *supra* note 3.

abruptly turned this history on its head. The reformulation of immigration enforcement after 2001 initially reflected the Homeland Security model and thus the partnership model. As a subsidiary of DHS, ICE established discrete partnerships with state and local governments through formal written agreements signed by officials on either side.³⁰⁶ However, through a series of technological innovations in 2008, packaged for the public as the “Secure Communities” program, the federal government would transform its bilateral immigration-enforcement system from an elective partnership system to an automated system that managed to encompass all of subfederal law enforcement.³⁰⁷

The structure of immigration enforcement changed primarily by way of three successive federal programs advanced by ICE: the 287(g) partnership in 2002, the Criminal Alien Program (CAP) in 2006, and Secure Communities in 2008.³⁰⁸

The legislation authorizing each of these bilateral programs had passed in 1996 in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (an amendment to the Immigration and Nationality Act)³⁰⁹ and the Anti-Terrorism and Effective Death Penalty Act (AEDPA).³¹⁰ A provision in the IIRIRA (popularly known as 287(g)) provides that the U.S. Attorney General may authorize police to

306. Rodríguez et al., *supra* note 61.

307. For details regarding the logistics and efficacy of the Secure Communities program, see generally Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 *J.L. & Econ.* 937 (2014) [hereinafter Miles & Cox, *Immigration Enforcement*]; Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 *Am. U. L. Rev.* 1259 (2015).

308. See Rodríguez et al., *supra* note 61. For a matching historical timeline of the federal policy progression leading to a primary role for subfederal police in immigration enforcement, see Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 *J. Crim. L. & Criminology* 613 (2012) [hereinafter Chacón, *Overcriminalizing Immigration*].

309. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).

310. Pub. L. No. 104-132, 110 Stat. 1214 (1996); see also Aarti Kohli et al., *The Chief Justice Earl Warren Inst. on Law & Soc. Policy, Secure Communities by the Numbers: An Analysis of Demographics and Due Process* 3-4 (2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf [<https://perma.cc/PT7J-DM5E>]. The two bills required the mandatory detention of immigrants for a variety of criminal offenses and within a year the number of detained immigrants doubled from 8,500 in 1996 to 16,000 in 1998. See *Analysis of Immigration Detention Policies*, ACLU, <https://www.aclu.org/other/analysis-immigration-detention-policies> [<https://perma.cc/DJY3-E7KS>] (last visited Feb. 26, 2018). The United States now has the world's largest immigrant detention system, with 441,000 people detained in 2013 in 200 federal immigrant detention facilities. ACLU, *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-Up 1* (2014), https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf [<https://perma.cc/93H7-4H54>]; John F. Simanski, Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2013*, at 1 (2014), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2013.pdf [<https://perma.cc/5KX3-8NT2>].

interrogate and arrest persons suspected of being in violation of federal civil immigration law.³¹¹ The provision lay dormant between 1996 and 2003, at which point ICE began to establish immigration-enforcement partnerships with state and local police.³¹² These partnerships came in three forms: the jail model, in which jail officials were “cross-deputized” by federal officials to perform some aspect of immigration enforcement; the task force model, in which police were to enforce federal immigration law in the field; and the hybrid model, which allowed for both jail and field immigration-enforcement functions by state or local law enforcement.³¹³ The Florida Department of Law Enforcement signed onto the first 287(g) partnership in 2002 in a Memorandum of Agreement (MOA).³¹⁴ Alabama was the only state or local government to sign the following year.³¹⁵ There were a total of eight 287(g) partnerships by the end of 2006, an additional twenty-seven were signed in 2007, and another thirty were added in 2008.³¹⁶ ICE secured seventy-one active MOAs by the close of 2009.³¹⁷

The CAP did not appear to be substantially different from the 287(g) initiative as it facilitated removal proceedings for criminal detainees suspected of violating federal civil immigration law.³¹⁸ But unlike the 287(g) system, which assigned enforcement responsibilities to police, the Criminal Alien Program gave ICE officials in-person access to local jails and state prisons.³¹⁹ Under CAP, ICE established outposts at large metropolitan jails such as Rikers Island in New York City,³²⁰ visited other criminal detention facilities for in-person interviews with criminal detainees upon receiving a referral from police, or conducted the interviews via video teleconference from a central remote processing

311. 8 U.S.C. § 1357(g) (2012).

312. See Rodríguez et al., *supra* note 61, at 5–6.

313. *Id.* at 5.

314. *Id.* at 3.

315. *Id.* at 6.

316. *Id.* at 6–8.

317. *Id.* at 5 n.9.

318. See Criminal Alien Program, U.S. Immigration & Customs Enf’t, <https://www.ice.gov/criminal-alien-program> [<https://perma.cc/AW2C-NQF7>] (last updated Jan. 3, 2018).

319. Regarding the Increasing Role that New York City Agencies Play in Facilitating the Detention and Deportation of Immigrants, N.Y. Civil Liberties Union (Nov. 10, 2010), <https://www.nyclu.org/en/publications/regarding-increasing-role-new-york-city-agencies-play-facilitating-detention-and> [<https://perma.cc/7S5H-WKTP>].

320. *Id.* The New York Civil Liberties Union reports that ICE “had a presence” at Rikers Island since 2003 and in November 2010 operated an office at the New York City facility staffed by fifteen federal agents that interviewed jail detainees on a daily basis. *Id.* According to the report, the N.Y.U. Law School Immigration Clinic found that ICE officials interview Rikers inmates within twenty-four hours of their arrival at the facility, sometimes appearing in plain clothes, presumably as a tactic to elicit compromising statements from inmates regarding their immigration status. See *id.* Thirteen thousand Rikers inmates were placed in deportation proceedings between 2004 and 2009 as a result of the Criminal Alien Program. *Id.*

center in Chicago, Illinois, using a technology identified as the Detention Enforcement and Processing Offenders by Remote Technology (DEPORT).³²¹ This latter innovation is reported to have streamlined the processing of referred criminal detainees and expanded the scope of coverage at subfederal jails.³²² The Criminal Alien Program covered 10% of U.S. jails by 2008.³²³

Secure Communities transformed immigration enforcement from an elective system—established through partnership agreements between ICE and subfederal officials—to an automated system of referral triggered by a local official’s search of the FBI’s national criminal records databases.³²⁴ The technology enabling this notification is of special relevance to police federalism. Regardless of whether a subfederal law enforcement official is working within an immigrant-sanctuary jurisdiction, a jurisdiction without a formal immigration-enforcement policy, or a jurisdiction with a cooperative immigration-enforcement partnership with ICE, the decision to check a criminal detainee’s criminal records through the FBI’s national criminal records database flags the compromised immigration status of the criminal detainee for both the subfederal police officer and ICE.³²⁵ So while CAP qualifies as a program in keeping with the partnership model given its relatively narrow scope and the negotiated terms of its vertical partnerships, Secure Communities, as an automated system of referral, does not.

At jail and prison facilities, law enforcement officials routinely submit biometric data to the FBI, which immediately sends the data to DHS.³²⁶ The two federal agencies process the data and return the detainee’s national criminal history and immigration record.³²⁷ The Automatic Biometric Identification System (IDENT), a database used by DHS, contains biometric and biographic information for ninety-one million individuals, many of whom are foreigners, applicants for immigration benefits,

321. Trevor Gardner II & Aarti Kohli, *The Chief Justice Earl Warren Inst. on Race, Ethnicity & Diversity, The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program 2* (2009), https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf [<https://perma.cc/2XGB-S3AJ>].

322. *Id.* at 3.

323. U.S. Immigration & Customs Enf’t, U.S. Dep’t of Homeland Sec., *Fact Sheet: Secure Communities 5* (2008) [hereinafter *ICE, 2008 Fact Sheet*], <https://www.aila.org/File/DownloadEmbeddedFile/51483> (on file with the *Columbia Law Review*).

324. *Id.*

325. See Michele Waslin, *Immigration Policy Ctr., The Secure Communities Program 2* (2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/SComm_Exec_Summary_112911.pdf (on file with the *Columbia Law Review*); see also Sullivan, *supra* note 4, at 583–91 (noting the process by which interjurisdictional data technologies erode the protections of immigrant-sanctuary policies).

326. See Waslin, *supra* note 325, at 2.

327. Gardner & Kohli, *supra* note 321, at 1–2; Waslin, *supra* note 325, at 2.

and immigrants in violation of federal civil immigration laws.³²⁸ Homeland Security provides identical information for police operating in the field through the National Crime Information Center (NCIC), which the FBI describes as an “electronic clearinghouse of crime data” and the “lifeline of law enforcement,” accessible at all times.³²⁹

ICE officials issue an “immigration detainer” to further investigate a criminal detainee’s immigration status or to initiate removal proceedings.³³⁰ The detainer is merely a federal request of subfederal police, though federal officials have previously cast immigration detainers as legally binding orders.³³¹

328. Gardner & Kohli, *supra* note 321, at 1–2; see also U.S. Dep’t of Homeland Sec., Privacy Impact Assessment for the Automated Biometric Identification System (IDENT) 12–15 (2012), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-ident-06252013.pdf> (on file with the *Columbia Law Review*) (giving an overview of organizations that provide information to the IDENT program and the types of individuals whose information they collect).

329. National Crime Information Center (NCIC), FBI, <https://www.fbi.gov/services/cjis/ncic> [<https://perma.cc/MW9L-6ECG>] (last visited Mar. 5, 2018). When the NCIC was launched in 1967, it offered law enforcement 356,784 records. *Id.* It now contains 12 million active records and averages 12.6 million transactions per day. *Id.*

330. An immigration detainer is a notice issued by DHS to state and local law enforcement agencies providing notice of the Department’s intent to assume custody of an individual in local police custody. ICE Detainers: Frequently Asked Questions, U.S. Immigration & Customs Enf’t, <https://www.ice.gov/ice-detainers-frequently-asked-questions> [<https://perma.cc/7L9K-FFK4>] [hereinafter Detainers: FAQs] (last updated June 2, 2017). When an alien has been “arrested on local criminal charges” and “ICE possesses probable cause to believe that they are removable from the United States,” ICE will issue an immigration detainer on the alien. Immigration Enforcement: Detainer Policy, U.S. Immigration & Customs Enf’t, <https://www.ice.gov/detainer-policy> [<https://perma.cc/J4WS-RK GK>] (last updated Mar. 29, 2017).

When ICE immigration officers establish probable cause to believe an alien is removable from the United States, they will issue Form I-247A (Immigration Detainer—Notice of Action) accompanied by either Form I-200 (Warrant for Arrest of Alien) or Form I-205 (Warrant of Removal/Deportation). U.S. Immigration & Customs Enf’t, Policy No. 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers 4 (2017) [hereinafter Policy No. 10074.2], <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf> [<https://perma.cc/C76V-H9YT>]. Form I-247A informs law enforcement agencies that DHS has probable cause to believe that an alien is removable, asks that agencies maintain custody of the alien for up to forty-eight hours past when the alien would have been released, and requests that they notify DHS before the alien is released. U.S. Dep’t of Homeland Sec., Immigration Detainer—Notice of Action (2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> [<https://perma.cc/9Z8D-6NLS>].

Upon receiving an immigration detainer, state and local law enforcement agencies may choose to honor the request or decline to do so. If an agency declines to honor the request, they are not required to take any affirmative steps. However, the issuing ICE immigration officer must “document the declined detainer in the ENFORCE Alien Removal Module.” Policy No. 10074.2, *supra*, at 5.

331. See ACLU, What ICE Isn’t Telling You About Detainers 1 (Oct. 2012), https://www.aclu.org/files/assets/issue_brief_-_what_ice_isnt_telling_you_about_detainers.pdf [<https://perma.cc/R3EU-LHLH>] (“An ICE detainer request is just that: a request.”);

As a universal, automated system of police referral, the Secure Communities program has no precedent in the history of police federalism. It cannot credibly be considered a partnership program for a variety of reasons, chief among them the fact that ICE officials do not offer subfederal governments an opportunity to opt in.³³² Quite the contrary, ICE officials initially claimed that subfederal police could not opt out.³³³ The claim was later shown to be false in terms of both law and administrative logistics,³³⁴ but the lack of an opt-in and the initial ICE denial of an opt-out demonstrate the program's divergence from the customs of police federalism and ICE administrators' total disregard for the same.

Immigrant rights groups fiercely protest the Secure Communities program. Among other criticisms, they maintain that the program incentivizes racial profiling by police, making it more likely that police will arrest immigrants (and citizens thought to be immigrants) for petty offenses in the hope of triggering removal proceedings for perceived undesirables.³³⁵ But criticism of the Secure Communities program rarely if ever characterizes the program as a radical break from historical norms regarding the federal government's relationship with police. Police organizations like the International Association of Chiefs of Police do spend time and resources detailing the challenges Secure Communities poses to effective municipal policing.³³⁶ The IACP contends that police

Laurence Benenson, *The Trouble with Immigration Detainers*, Nat'l Immigration Forum Blog (May 24, 2016), <http://immigrationforum.org/blog/the-trouble-with-immigration-detainers/> [<https://perma.cc/7YKT-T54A>] (describing how some of the immigration detainer regulation's text suggests mandatory compliance); see also Chen, *supra* note 3, at 22 n.32 (describing sources that document deceptive tactics used by ICE in its effort to incorporate police into its enforcement arm); Jennifer Medina, *Fearing Lawsuits, Sheriffs Balk at U.S. Request to Hold Noncitizens for Extra Time*, N.Y. Times (July 5, 2014), <https://www.nytimes.com/2014/07/06/us/politics/fearing-lawsuits-sheriffs-balk-at-us-request-to-detain-noncitizens-for-extra-time.html> (on file with the *Columbia Law Review*) ("Federal officials initially described the program as voluntary, then later implied that all local law enforcement agencies were required to comply.").

332. See ICE, 2008 Fact Sheet, *supra* note 323, at 1–2 (noting that ICE alluded to a strong partnership with local governments without offering the opportunity to opt in); Waslin, *supra* note 325, at 2 ("[I]n August 2011, ICE rescinded all signed MOAs [entered into with states] and announced that no signed agreement was necessary for data sharing to take place, and that the program is mandatory for all jurisdictions.").

333. See *infra* note 355 and accompanying text (describing how the Sanctuary Cities Executive Order threatened subfederal officials with funding penalties for noncompliance and recounting the ensuing litigation).

334. See *infra* note 355 (describing cases in which courts have enjoined the Sanctuary Cities Executive Order on both legal and logistical bases, such as the cost of implementation).

335. For a detailed discussion of objections to the Secure Communities by the immigrant rights community, see Secure Communities ("S-Comm"), ACLU, <https://www.aclu.org/other/secure-communities-s-comm> [<https://perma.cc/QX6H-PCVR>] (last visited Feb. 26, 2018).

336. See Statement by the International Association of Chiefs of Police on United States Immigration Enforcement Policy and Sanctions, Official Blog of the Int'l Ass'n of Chiefs of Police (Mar. 27, 2017), <https://theiacpblog.org/2017/03/27/statement-by-the->

departments have too many civic duties to take on this additional responsibility the federal government has rather aggressively outsourced.³³⁷ The organization argues, additionally, that the program tends to drive a wedge between police and immigrant communities due to a growing fear that reports of criminal victimization might trigger removal proceedings.³³⁸ But neither police organizations nor immigrant-advocacy groups nor scholars critical of Secure Communities have adequately addressed the relevance of the structure of police federalism (past and present) independent of immigration-enforcement matters.³³⁹

VI. RECONSIDERING THE “RADICALISM” OF IMMIGRANT SANCTUARY

The federal government’s historical relationship with police reveals immigrant sanctuary as the “old normal,” aligned with traditional norms, public law, and jurisprudence limiting federal influence in the field of public security governance. But if immigrant sanctuary is the old normal, what are the norms of the police federalism of the present? Has a “new normal” buried the orthodoxy of police autonomy in favor of enforcement projects based on police consolidation and the centralization of police governance? This Part advances the argument that the norms of police federalism are currently in flux, with the philosophy of police autonomy competing with new and evolving police consolidation models framed by political and bureaucratic elites as enforcement “cooperation” and “partnership.” Putting aside the question of whether such models

international-association-of-chiefs-of-police-on-united-states-immigration-enforcement-policy-and-sanctions/ [https://perma.cc/JF9Y-R6Z8] (noting that withholding funding from law enforcement agencies hinders law enforcement safety efforts). See generally Int’l Ass’n of Chiefs of Police, *Police Chiefs Guide to Immigration Issues* (2007), <http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf> [https://perma.cc/5JLF-9T7L] (detailing the issues surrounding immigrant communities and local law enforcement).

337. See Int’l Ass’n of Chiefs of Police, *supra* note 336, at 23–24 (describing local police’s resource limitations and various other responsibilities, such as forming connections with the community).

338. The fact that many police now serve as a proxy for federal immigration agents has prompted some in the legal academy to call for immigrants to abstain from cooperation with police on any matter given how easily banal police engagement can result in the initiation of deportation proceedings. See, e.g., Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 *Mich. J. Race & L.* 119, 122 (2011).

339. For exceptions to the rule, see Chacón, *Transformation*, *supra* note 56, at 581–82; Eagly, *Criminal Justice for Noncitizens*, *supra* note 56, at 1135–36; Motomura, *supra* note 56, at 1822–23. Incidentally, objections by Secure Communities opponents proved ineffective as Secure Communities became an administrative juggernaut. With the vast majority of the nation’s police departments automatically incorporated into the augmented system, ICE deportation totals rose from 281,000 in 2006 to 391,000 in 2009 (a 39% increase), reaching a peak of 435,000 in 2013. Ana Gonzalez-Barrera & Mark Hugo Lopez, *U.S. Immigrant Deportations Fall to Lowest Level Since 2007*, *Pew Research Ctr.* (Dec. 16, 2016), <http://www.pewresearch.org/fact-tank/2016/12/16/u-s-immigrant-deportations-fall-to-lowest-level-since-2007/> [https://perma.cc/AM5P-4GNX].

are necessary or efficacious, it is important to recognize that police consolidation projects like Secure Communities are, in the nomenclature of field theory, plainly heretical when placed in the light of American history.

A. *The Prospect of a New Normal in Criminal Administration*

In tracking the federalization of criminal justice, scholars generally fail to draw a clear distinction between (i) growth of the federal criminal justice system (specifically, the extension of federal criminal law and the expansion of the ranks of federal law enforcement officers), and (ii) federal government power (that is, influence or leverage) over state and local criminal justice systems.³⁴⁰ The first type of federalization concerns a small portion of the nation's full-time sworn law enforcement officers (currently 10% of law enforcement operating across the country³⁴¹). The second concerns the remainder: all state and local police.³⁴² The first power grows with each additional federal criminal prohibition, the christening of new federal criminal justice agencies and subsidiaries, and the hiring of federal law enforcement officers. The second power, it bears repeating, is far more subtle. Its comprehension requires careful evaluation of the statutory and cultural mechanisms the federal government deploys to overcome Tenth Amendment restrictions and extend its control over the contemporary practice of subfederal criminal justice.³⁴³

Despite the astonishing growth of federal criminal administration in the twentieth century and beyond, the federal government has remained a minor player in criminal enforcement in relation to the aggregate of state criminal investigation and processing, and this is not by coincidence. Americans have been loath to broadly centralize criminal enforcement by way of federal agencies.³⁴⁴ Perhaps ironically (perhaps not), this sentiment crystallized during the federal government's attempt to enforce the Prohibition amendment. Public support for the amendment eroded with federal officials' desperate attempts to align federal law enforcement agencies with state and local police to effectively prosecute the War on Alcohol.³⁴⁵ In the wake of Prohibition's failure, Congress passed a series of federal vice and violent-crime statutes that offered a type of moralist intervention that has continued largely unabated through the present moment.³⁴⁶ Since vice-crime federalism took hold in the United States, those hoping to keep the federal government out of the business of naming deviance, criminalizing deviance, and investigating and

340. See *supra* notes 43–48 and accompanying text.

341. See *supra* note 58 and accompanying text.

342. See *supra* notes 58–61 and accompanying text.

343. See *supra* notes 55–58 and accompanying text.

344. See Gest, *supra* note 13, at 68; *supra* Parts III–V.

345. See *supra* section III.B.

346. See *supra* Part III; Tables 3 & 4.

prosecuting associated criminal acts are rarely given a seat at the policy table. For a variety of reasons, the contention that the federal government should not be in the criminal justice business has become an anachronism of American criminal justice. An expansive federal criminal jurisdiction is surely here to stay.

This realization says very little, however, about federal power within state and local criminal jurisdictions, where the vast majority of law enforcement officers operate and where the vast majority of criminal processing takes place.³⁴⁷ The War on Immigration is now the site of a normative battle over this second field of criminal justice federalization. What will be the orthodoxy of police federalism moving forward? And what will be the corresponding institutional habitus or patterned institutional behavior in the field? Contrary to much of what has been asserted in the movement to implement the Homeland Security model, the centralization of subfederal police administration is not yet orthodoxy.

The Trump Administration would certainly like to make it so. The executive order that President Trump signed just a few days after his election characterizes immigrant sanctuaries as being responsible for an administrative rupture, tearing open the national security umbrella: “Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.”³⁴⁸

Section 9 of the order establishes a working framework for the Administration’s antisantuary public relations campaign. It orders the Secretary of DHS to issue a “Declined Detainer Outcome Report” on a weekly basis for the purpose of publicizing “a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.”³⁴⁹ This sort of public shaming of state and local governments for “enforcement abstinence”³⁵⁰ has little precedent in the past one hundred years apart from similar clashes that mark the enforcement dysfunction of Prohibition. Section 9 bears a striking resemblance to the federal Prohibition accounting effort, specifically the fine-grained assessments of whether local judges, prosecutors, sheriffs, and even juries allied with or obstructed federal enforcement efforts.³⁵¹ This was the federal government

347. See Gest, *supra* note 13, at 63–64. Professor Jennifer Chacón makes a similar point regarding the subtlety of federal government power over subfederal counterparts in the field of immigration enforcement. See Chacón, *Overcriminalizing Immigration*, *supra* note 308, at 617.

348. *Sanctuary Cities E.O.*, *supra* note 5, § 1.

349. *Id.* § 9(b).

350. See Gardner, *Right at Home*, *supra* note 20, at 7.

351. See *supra* notes 147–152 and accompanying text (discussing the Prohibition accounting method).

in effect surveilling state and local police activity, creating something along the lines of an intragovernment panopticon.³⁵²

The War on Immigration now shows similar qualities. DOJ officials threaten abstinent subfederals with funding penalties,³⁵³ legal prosecution by the Attorney General,³⁵⁴ and public relations campaigns charging associated officials with security malfeasance.³⁵⁵ President Trump's immigrant-sanctuary order makes clear that, with respect to the enforcement of federal immigration law, the federal executive, commandeering rule or not, is demanding rather than requesting compliance. By way of the Justice Department, the Trump Administration has insisted that subfederal government participation is required both under federal law and under new DOJ policies established under Trump's executive order.³⁵⁶ The latter claim is articulated in substantial detail in a DOJ memorandum requiring that state and local governments permit Homeland Security personnel to access criminal detention facilities to "meet with [criminal detainees] and inquire as to [the criminal detainees'] right to be or remain in the United States" in order to be eligible for Byrne grants,³⁵⁷ the largest source of federal criminal justice funding to state

352. See generally Michel Foucault, *Discipline and Punish: The Birth of the Prison 195–98* (Alan Sheridan trans., 1977) (discussing panopticism and the surveillance involved with such a system).

353. The Executive Order states: "The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction." Sanctuary Cities E.O., *supra* note 5, § 9(c).

354. *Id.* § 9(a).

355. Executive Order 13,768 was first challenged by Santa Clara County and San Francisco, two jurisdictions with immigrant-sanctuary policies prohibiting the use of government resources to aid in enforcement and limiting the circumstances in which they would honor ICE detainers. See *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 511–12 (N.D. Cal. 2017). On April 25, 2017, a federal district court judge granted a nationwide preliminary injunction, enjoining the government from enforcing section 9(a) of the Executive Order. See *id.* at 540.

Two months later, Attorney General Jeff Sessions issued a memorandum interpreting the Executive Order, and the government filed a motion for reconsideration of the preliminary injunction and moved to dismiss the plaintiffs' claims. See *County of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1206–07 (N.D. Cal. 2017). The court upheld its preliminary injunction and denied the government's motion to dismiss. *Id.* at 1218.

On summary judgment, the court permanently enjoined Section 9(a) of the Executive Order in November 2017. See *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017).

Similar litigation is ongoing in Washington, *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144 (W.D. Wash. Oct. 19, 2017), and has concluded in Pennsylvania, *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017). In *City of Seattle v. Trump*, the court has requested briefing on the merits. See 2017 WL 4700144, at *22. In *City of Philadelphia v. Sessions*, the court enjoined the Attorney General from denying Philadelphia's Byrne Justice Assistance Grant for 2017. See 280 F. Supp. 3d at 658–59.

356. See Sanctuary Cities E.O., *supra* note 5, § 1.

357. Complaint for Injunctive & Declaratory Relief at 20, *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (No. 17 C 5720) [hereinafter Chicago Complaint]

and local government.³⁵⁸ Such policy statements bring helpful clarity to the normative orientation of the federal executive. In the Trump White House, the idea of a centralized police authority bears none of its prior stigma and subfederal police autonomy is no longer settled orthodoxy in the field of police federalism.

It would be hasty, however, to declare centralized police authority the “new normal.” There is no other federal initiative quite like Secure Communities, with unauthorized backdoor sharing of state and local police data and near-mandates of state and local police compliance with federal requests for the transfer of immigrant detainees into federal custody.³⁵⁹ Moreover, the Secure Communities program is being hotly contested by towns, cities, counties, and states, with some subfederal jurisdictions going so far as to subject police to criminal penalties for participating in the program in violation of the specific terms of immigrant-sanctuary law.³⁶⁰ California, estimated to be the largest subfederal sanctuary jurisdiction given the size of its unauthorized immigrant population,³⁶¹ has passed two “sanctuary state” bills.³⁶²

In addition to placing or endorsing restraints on police participation in immigration enforcement, many subfederal officials—particularly those leading global American cities—publicly respond to federal chastisements and threats with an equal amount of righteous indignation. In Chicago, Mayor Rahm Emanuel found himself debating Attorney General Jeff Sessions in the national media regarding principles of public safety³⁶³ after suing Sessions over the Justice Department’s attempt to

(internal quotation marks omitted) (quoting U.S. Dep’t of Justice, Edward Byrne Memorial Justice Assistance Grant Program: FY 2017 Local Solicitation 30 (2017), <https://www.bja.gov/Funding/JAGLocal17.pdf> [<https://perma.cc/3QTT-DT63>]); see also *City of Chicago v. Sessions*, 888 F.3d 272, 278 (7th Cir. 2018).

358. Bureau of Justice Assistance, Edward Byrne Memorial Justice Assistance Grant Program, BJA, <https://www.bja.gov/jag/> [<https://perma.cc/QP4N-SZR8>] (last visited Mar. 1, 2018).

359. See Miles & Cox, *Immigration Enforcement*, *supra* note 307, at 938–39.

360. See Cal. Gov’t Code §§ 7282–7282.5 (2018) (providing that California law enforcement may “cooperate with immigration authorities” only if doing so is permitted by the California Values Act). For a detailed analysis of other legal and administrative forms of subfederal resistance to Secure Communities, see Christine N. Camini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 *Conn. L. Rev.* 101, 131–34 (2014).

361. U.S. Unauthorized Immigration Population Estimates, Pew Research Ctr. (Nov. 3, 2016), <http://www.pewhispanic.org/interactives/unauthorized-immigrants/> [<https://perma.cc/9GAJ-TNJT>].

362. See Cal. Gov’t Code §§ 7282–7282.5, 7284–7284.12.

363. See Daniella Diaz & Laura Jarrett, *Chicago Mayor Defends Lawsuit Against DOJ over Sanctuary City Status*, CNN Politics (Aug. 7, 2017), <https://www.cnn.com/2017/08/07/politics/rahm-emanuel-doj-sanctuary-city-cnntv/index.html> [<https://perma.cc/YG2J-4R26>].

Professor Angélica Cházaro documents and deconstructs the federal government’s attempts to launder mass deportation through both the criminal system and the “criminal

withhold criminal justice funding to the city pursuant to Trump's executive order.³⁶⁴ The city of Chicago argued that the conditions imposed by Sessions were unconstitutional based on the principle of separation of powers, the requirements of the Spending Clause, and the Tenth Amendment's prohibition of commandeering.³⁶⁵ In a speech announcing the suit, Emanuel flagged the issue of police independence, saying, "Chicago will not let our police officers become political pawns in a debate," and adding, "Our principle of public safety is based on the principle of community policing."³⁶⁶ For Emanuel, the practice of

alien" trope. See Angélica Cházaro, Challenging the "Criminal Alien" Paradigm, 63 *UCLA L. Rev.* 594, 597, 597–99 (2016). The criminal-alien trope became the centerpiece of the Virginia gubernatorial race between Republican candidate Ed Gillespie and Democratic Lieutenant Governor Ralph Northam. David M. Drucker, New Ed Gillespie Ad Focuses on Opposition to Sanctuary Cities, *Wash. Examiner* (Aug. 30, 2017), <http://www.washingtonexaminer.com/new-ed-gillespie-ad-focuses-on-opposition-to-sanctuary-cities/article/2632970> [<https://perma.cc/7VN5-GWKX>].

364. Pursuant to Executive Order 13,768, Attorney General Sessions imposed three additional conditions on the Edward Byrne Memorial Justice Assistance Grant. See Sanctuary Cities E.O., *supra* note 5, at 8801; Chicago Complaint, *supra* note 357, at 2–3. In order to be eligible to receive the Byrne Grant, cities must (1) certify that they are in compliance with 8 U.S.C. § 1373, a federal statute prohibiting "local governments from restricting the sharing of immigration status information with federal immigration agents," Chicago Complaint, *supra* note 357, at 2–3, (2) comply with immigration-detainer requests by providing the federal government forty-eight hours' notice prior to an arrestee's release, *id.* at 20, and (3) give federal immigration officials unlimited access to local detention facilities where they may "interrogate any suspected non-citizen held there," *id.* at 2–3. Seeking declaratory and injunctive relief, the city of Chicago challenged Sessions's actions as unauthorized, unconstitutional, and procedurally deficient. *Id.* at 26–44. When Congress established the Byrne Grant program, it did not authorize the DOJ to impose additional conditions on Byrne Grants. The Attorney General is authorized only to specify the manner in which cities may apply. *Id.* at 26–27.

365. See Chicago Complaint, *supra* note 357, at 29–40. Chicago argued that by altering the criteria for determining Byrne Grant eligibility, Sessions, a member of the Executive Branch, was exercising the spending power that is reserved for Congress, thus implicating separation of powers concerns. *Id.* at 29–30. Even if Sessions were authorized to exercise Congress's spending power, the exercise was improper due to constitutional limitations on the spending power. *Id.* at 30. First, the immigration-related conditions are not relevant to the federal interest in the Byrne Grant program. *Id.* at 30–32. Second, the notice and access conditions would induce Chicago to engage in activities that would violate arrestees' Fourth Amendment rights. *Id.* at 32–34. Third, the three immigration-related conditions are constitutionally invalid due to ambiguity. *Id.* at 35–37. Finally, the imposition of the three immigration-related conditions is unconstitutionally coercive. *Id.* at 37.

The city of Chicago also challenged the immigration-related conditions based on procedural defects, namely, failure to use the notice-and-comment rulemaking procedures required by the Administrative Procedure Act and failure to satisfy the requirements of the Paperwork Reduction Act. *Id.* at 43–44.

366. Mayor Emanuel Announces Lawsuit Against Trump Justice Department, *Chi. Trib.* (Aug. 6, 2017), <http://www.chicagotribune.com/news/media/94273200-132.html> (on file with the *Columbia Law Review*); see also Hal Dardick, As Emanuel Sues Trump Justice Department, Immigrant Sanctuary Debate Comes to Fore, *Chi. Trib.* (Aug. 7, 2017),

community policing required that the city build and maintain “bonds of trust” between police departments and the diverse collection of communities throughout the city of Chicago, the immigrant community certainly being prominent among them.³⁶⁷ As invoked in policy debates regarding national and domestic security federalism, community policing often serves as a reformulation of police autonomy politics—municipal police are to be controlled by the communities of the municipality.³⁶⁸ Here, the “community” is certainly a malleable social construct shaped by the politics of the moment. But virtually every remotely credible conception of community policing makes police subject to local democratic influence rather than to officials, institutions, and populations external to the municipality.³⁶⁹ Identical to the orthodoxy of police autonomy, community policing reflexively rejects administrative programming that leaves police subordinate to external authority.³⁷⁰

There is evidence, moreover, of local actors seeking to extend the autonomy principle beyond police to other areas of the criminal justice system. In 2017, an ICE arrest of a Jamaican immigrant in Queens, New York, prompted immigrant-welfare advocates to insist that New York City’s immigrant-sanctuary policy extend to the city’s courthouses.³⁷¹ ICE sought to arrest the Jamaican national Najee Antonio Clarke after his criminal detention in New York for driving with a suspended license and evading police.³⁷² The criminal arrest had likely triggered the immigration

<http://www.chicagotribune.com/news/local/politics/ct-rahm-emanuel-donald-trump-lawsuit-met-0808-2-20170807-story.html> (on file with the *Columbia Law Review*).

367. See Dardick, *supra* note 366; Press Release, Mayor Emanuel Announces Task Force on Police Accountability, Off. of the Mayor, City of Chi. (Dec. 1, 2015), <https://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2015/December/12.1.15PoliceAccountability.pdf> [<https://perma.cc/5B6F-G4MA>] (announcing a 2015 task force to review and recommend reforms on the accountability, oversight, and training of Chicago police officers).

368. See Dubal, *supra* note 91, at 53 (describing the history of community policing in relation to police reform); David Thacher, *The Local Role in Homeland Security*, 39 *Law & Soc’y Rev.* 635, 636 (2005).

369. Dubal, *supra* note 91, at 53–54; Friedman & Ponomarenko, *supra* note 91, at 1832.

370. See *supra* notes 90–91 and accompanying text.

371. Dean Meminger, *Distraught Mother, Whose Son Was Arrested by Immigration Agents at Traffic Court, Fights for His Release*, *Spectrum News* (June 30, 2017), <http://www.nyl.com/nyc/queens/news/2017/06/29/distraught-mother-whose-son-was-arrested-by-immigration-agents-at-traffic-court-fights-for-his-release.html> [<https://perma.cc/W587-QPK3>].

372. Anthony O’Reilly, *ICE: Jamaican Native Outstayed Welcome*, *Queens Chron.* (July 13, 2017), http://www.qchron.com/editions/queenswide/ice-jamaican-native-outstayed-welcome/article_97466eac-ab7d-53b0-83ba-4869154812ce.html [<https://perma.cc/5DH6-NYNJ>]; U.S. Immigration Agents Arrest Jamaican Released on Active Detainer, *Jam. Observer* (July 6, 2017), http://www.jamaicaobserver.com/latestnews/us_immigration_agents_arrest_jamaican_released_on_active_detainer [<https://perma.cc/94KZ-NBCH>]. An ICE news release alleges that the person in question faced unspecified felony charges in New York. See ICE Arrests Jamaican National Released on an Active Detainer, U.S.

check revealing a B-2 visa that had expired several years earlier. ICE agents executed the immigration arrest outside the Queens courthouse immediately following Clarke's court hearing at which he paid the fine for the underlying traffic infraction.³⁷³ City news reports indicate that court officers had shared the hearing information with ICE officers.³⁷⁴ Seizing on media coverage of ICE arrests at city courthouses, immigrant advocates asked the New York City Council to pass a measure that would bar court employees from assisting ICE agents seeking to arrest immigrants charged with nonfelony offenses.³⁷⁵

This request of the City Council proposed to extend autonomy orthodoxy from police departments to courthouses. It is one piece of evidence indicating that despite federal efforts at police consolidation under Secure Communities, the spirit of autonomy continues to animate the broader field of criminal justice federalism of which police federalism is merely one part.

B. *The Heretical Quality of Contemporary Immigration Enforcement*

The heretical quality of contemporary immigration enforcement quickly becomes apparent when we consider the historical relationship between the federal government and police. Police have never been broadly subordinate to the federal government, either under law or norm. As reported above, history suggests the opposite—for various reasons, Americans of many stripes have denounced the centralization of police administration at the federal level and likewise insisted on the principle that subfederal police should not serve as an arm of the federal government.

Pursuant to this principle, the nation has repeatedly rejected proposals for police consolidation under the federal government. The nation's aversion to consolidation is evident in the Constitution, which does not assign a police power (not specific to police, but certainly encompassing the institution) to the federal government, by default leaving this power for the states.³⁷⁶ It is evident in the history of Prohibition, which shows the federal government soliciting police for cooperative enforcement

Immigration & Customs Enf't: News Releases (July 5, 2017), <https://www.ice.gov/news/releases/ice-arrests-jamaican-national-released-active-detainer> [<https://perma.cc/2BRX-FGBT>].

373. Meminger, *supra* note 371.

374. *Id.*

375. Stephen Rex Brown, Give ICE Cold Shoulder in Courts, Dozens of Groups Urge Top Judge, N.Y. Daily News (Dec. 20, 2017), <http://www.nydailynews.com/new-york/give-ice-cold-shoulder-courts-dozens-groups-urge-top-judge-article-1.3710553> [<https://perma.cc/B9XS-KXM5>]; see also Shayna Jacobs & Stephen Rex Brown, NYPD Alerts Feds to Criminal Court Appearances of Immigrants Facing Deportation Despite 'Sanctuary' Vow, N.Y. Daily News (Apr. 2, 2017), <http://www.nydailynews.com/new-york/nypd-alerts-feds-court-appearances-immigrants-article-1.3016935> [<https://perma.cc/NC9E-APZ5>].

376. See U.S. Const. amend. X; see also Freund, *supra* note 38, at 62.

of the Eighteenth Amendment rather than commandeering them, and in the public backlash to this federal solicitation, which some historians consider a primary cause of Prohibition’s demise.³⁷⁷ Finally, it is evident in the history of the federal criminal justice system, which began in earnest in the early twentieth century and for several decades had little bearing on the routine practices of police officers.³⁷⁸

Notwithstanding the American preoccupation with police autonomy, police consolidation under Secure Communities has its own origin story within the field of police federalism. Two crime policy innovations in the past half century will likely be considered as critical precedents for contemporary immigration enforcement: the conditional federal spending mechanism initiated through the Safe Streets Act of 1968³⁷⁹ and the Homeland Security movement launched in 2002.³⁸⁰ But both innovations can and should be distinguished from the administrative ambition of Secure Communities. Though undeniably important to the relationship among the various criminal justice systems in the United States, both show clear regard for the orthodoxy of police autonomy. First and foremost, conditional federal funding measures and the original Homeland Security model and affiliated initiatives are based on “opt-in” mechanisms of enforcement collaboration.³⁸¹ This is to say that state and local governments by and large choose to participate in these federal initiatives in order to receive specific benefits, be they financial, material, or logistical. For example, a state may decide against participating in a federal juvenile sex offender registry and lose out on associated federal criminal justice funding.³⁸² A municipality may opt to send its police officers to participate in a Justice Department first-responder security-training program, or it may choose to train its first responders based on

377. See *supra* section III.B.

378. See *supra* Part III.

379. See Feeley & Sarat, *supra* note 56 (“The Safe Streets Act of 1968 was surely a major policy innovation in the area of crime and criminal justice.”); Murakawa, *supra* note 121, at 71 (calling the Safe Streets Act a “watershed legislation”).

380. See Bush, National Strategy Preface, *supra* note 2, at iii–iv (calling for “bold and necessary steps” and a comprehensive plan for Homeland Security).

381. See *supra* notes 276–278 and accompanying text.

382. In 2006, Congress passed the Adam Walsh Child Protection and Safety Act, which requires the registration of sex offenders in the state where they committed the sexual offense. Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901–16991 (2012). The registration requirements of the Act apply to juveniles age fourteen and older and the triggering offenses include indecent exposure and public urination. Eric Berkowitz, Opinion, Punishment that Doesn’t Fit the Crime, N.Y. Times (July 30, 2016), <https://www.nytimes.com/2016/07/31/opinion/sunday/punishment-that-doesnt-fit-the-crime.html> (on file with the *Columbia Law Review*). States may opt out of the program; however, noncompliance with the Sex Offender Registration and Notification Act (SORNA) provisions of the Adam Walsh Child Protection and Safety Act results in a “ten percent loss of Byrne/JAG funds.” Nat’l Conference of State Legislatures, SORNA Noncompliance Penalties 1, <http://www.ncsl.org/Portals/1/documents/cj/jagstatedollars.pdf> [https://perma.cc/TG4U-DWXH].

tried and true methods developed among local public institutions over the course of generations.³⁸³ In either case, police remain autonomous in the sense that they can reject a proposed partnership with the federal government. The federal government offers partnership and the subfederal government may accept or it may not.

Immigration enforcement under Secure Communities is qualitatively different. It is an “opt-out” program, designed in part to shoehorn disinclined subfederal governments into the federal enforcement apparatus.³⁸⁴ More radical still were the representations of ICE officials upon launch of the Secure Communities program in 2008. When leery subfederal government officials contacted ICE to ask whether participation in Secure Communities was mandatory, ICE spokespersons told these officials that they could not abstain and were obligated to honor federal detainer requests.³⁸⁵ As a factual matter, states held the legal right to abstain either by refusing to send the fingerprint data of new criminal detainees to the FBI as part of the routine background check of criminal detainees, or by refusing to honor ICE detainer requests (as is the practice in immigrant-sanctuary jurisdictions).³⁸⁶ In retrospect, it appears that ICE aimed to obscure these two options for abstention by simply claiming that subfederal governments could not exit the program. In all likelihood, ICE was obliquely referring to the inability of subfederal governments to prevent the routine FBI criminal records check of local detainees from triggering a corresponding immigration check of a DHS database.³⁸⁷ But it is this sort of subterfuge that distinguishes the federal government’s current posture toward police participation in the

383. See *supra* text accompanying notes 283–286 (describing Anti-Terrorism Task Forces, which did not subject first responders to direct federal commands).

384. See *supra* notes 325–335 and accompanying text (describing Secure Communities’ automated system of referral and divergence from the customs of police federalism).

385. Paloma Esquivel, *Federal Immigration Enforcement Is Mandatory*, *Memo Says*, L.A. Times (Jan. 8, 2012), <http://articles.latimes.com/2012/jan/08/local/la-me-ice-foia-20120109> [<https://perma.cc/389Y-DTJP>]; Julia Preston & Kirk Semple, *Taking a Hard Line: Immigrants and Crime*, N.Y. Times (Feb. 17, 2011), <https://www.nytimes.com/2011/02/18/us/18immigration.html> (on file with the *Columbia Law Review*); Kirk Semple, *Confusion over Program to Spot Illegal Immigrants*, N.Y. Times (Nov. 9, 2010), <https://www.nytimes.com/2010/11/10/nyregion/10secure.html> (on file with the *Columbia Law Review*); see also Alia Al-Khatib, *Comment, Putting a Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 *Am. U. L. Rev.* 109, 127–28 (2014); Gretchen Gavett, *Controversial “Secure Communities” Immigration Program Will Be Mandatory by 2013*, PBS (Jan. 9, 2012), <https://www.pbs.org/wgbh/frontline/article/controversial-secure-communities-immigration-program-will-be-mandatory-by-2013/> [<https://perma.cc/E3EX-U28V>].

386. See Semple, *supra* note 385.

387. A statement by ICE spokeswoman Virginia Kice in January 2012 lends support to this view: “ICE did not change its position on the mandatory nature of Secure Communities As the legal memo explains, once a state or local government voluntarily submits fingerprint information to federal law enforcement officials, it cannot dictate how this information is shared to protect public safety.” Esquivel, *supra* note 385 (internal quotation marks omitted).

enforcement of federal immigration law to virtually all collaborative law enforcement efforts of the past.

Contemporary immigration enforcement distinguishes itself in other important respects. There is the DHS pivot from the formal immigration-enforcement partnerships of the early 2000s, memorialized in written bilateral agreements, to the appropriation of subfederal government crime data within the Secure Communities program; the end run around local democratic institutions given the unauthorized use of this data; the recent demands by Trump Administration officials that federal immigration-detainer requests be honored; and a related claim that jurisdictions that ignore the demands mean to usher in an era of lawlessness.³⁸⁸ These and other similar phenomena show contemporary immigration enforcement to be a historical anomaly in the field of police federalism and immigrant-sanctuary policy as neatly aligned with the nation’s traditions regarding federal government power over police departments.

CONCLUSION

Immigration hawks and various public security bureaucrats in the federal executive demand police participation in immigration enforcement under the premise that federal, state, and local law enforcement must present a unified front in order to keep Americans safe. Immigrant sanctuary, the thinking goes, is therefore a deviant and destructive practice that the federal government should confront and eliminate with haste; and every instance of immigrant violence in an immigrant-sanctuary jurisdiction should be taken by the public as a sign of the audacity of the state and local governments that choose to police immigrants in the criminal justice system rather than through the federal immigration system.

But the charge that immigrant sanctuary represents a radical digression from institutional norms in the field of law enforcement is ahistorical and deeply ironic. This Article introduces two concepts to the literature—police federalism and field theory—in an effort to situate contemporary immigration enforcement and the practice of immigrant sanctuary in historical context. Police federalism frames the relationship between the executive branch of the federal government and state and local police. Field theory, in turn, guides the inquiry into the history of police federalism. It ultimately reveals this history as well aligned with the practice of immigrant sanctuary and in profound tension with an immigration-enforcement apparatus predicated upon the subordination of all police departments to the federal government.

388. See Statement on Sanctuary Cities Ruling, *supra* note 6.

