Subsidiarity, Federalism, and Federal Prosecution of Street Crime

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John F. Stinneford*

[A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.1

The Constitution . . . withhold[s] from Congress a plenary police power . . . 2

Introduction

You are walking down a Chicago street one day with a 9 millimeter semi-automatic pistol in your pocket, when a police officer approaches you and asks you to stop. You have just spent a year in jail for selling marijuana to an undercover officer, and you do not particularly want to go back – so you run. But you are on foot, and the police have cars. They catch you, frisk you and find the gun.

What happens to you? Illinois, like every other state,3 has made it a crime for a felon to possess a firearm.4 But then again, so has the federal government.5 And you have violated both laws.

* Visiting Assistant Professor of Law, University of St. Thomas School of Law. I wish to thank Dean Mark Sargent and the editors of the Journal of Catholic Social Thought for organizing the symposium from which this essay sprang, and for their great work (and patience) in helping me put this article together. Three of my fellow presenters, Phil Pucillo, Michael Lower, and particularly Rob Vischer, gave helpful comments and direction both before and after the symposium. I wish to thank the friends and colleagues who gave comments on various drafts of this essay, particularly Fr. James Heft, S.M., Susan Brenner, Richard Saphire and Ramzi Nasser. Finally, thanks to Lindsay Cox, who gave valuable research assistance.

3 See, e.g., Brent E. Newton, Felons, Firearms, and Federalism: Reconsidering Scarborough in Light of Lopez, 3 J. APP. PRAC. & PROCESS 671, 673 (“virtually every state . . . criminalize[s] the possession of firearms by felons.”).
5 18 U.S.C. § 922(g)(1)(2004). The only real difference between the state and federal statutes is that the federal statute requires the defendant to possess the firearm “in or affecting commerce.” Id. As is discussed more fully below, the “affecting commerce” language in this statute has been interpreted to cover any firearm that has ever moved across state lines during its existence. See, e.g., Scarborough v. United States, 431 U.S. 563, 575 (1977) (finding as a matter of statutory interpretation that Congress intended federal felon in possession statute to require only “the minimal nexus that the firearm have been, at some time, in interstate commerce”); United States v. Bass, 325 F.3d 847, 849 (7th Cir. 2003) (jurisdictional element of federal felon in possession statute satisfies Commerce Clause). Since 98% of all domestic firearms manufacturers are located outside of Illinois, the vast majority of felons found with a firearm in Illinois have likely committed a federal as well as a state crime. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Firearms Commerce in the United States, 2001/2002, Exhibit 11, available at http://www.atf.gov/pub/fire-explo_pub/firearmscommerce/exhibits.pdf (last visited Feb. 5, 2005).
In ninety-five percent of all cases, the local state’s attorney will prosecute you.\(^6\) If this happens, you will probably be released on bond before trial.\(^7\) You stand a better than 40% chance that the prosecution will dismiss your case or allow you to plead to a misdemeanor and a 50% chance of being acquitted if your case goes to trial.\(^8\) If convicted, your nominal sentence will be between three and fourteen years.\(^9\) With credit for good behavior, however, you will only serve about a year-and-a-half in prison.\(^10\) You will serve this sentence at a prison in Illinois, and will be accessible to friends and family who want to visit you.\(^11\)

Five percent of the time, however, you will be prosecuted by the federal government.\(^12\) You will probably be denied bail and will spend about four months waiting for trial in prison, often in another state.\(^13\) There is small chance that the prosecution will dismiss your case or allow you to plead to a misdemeanor, and only a 20% chance that you will be acquitted if your case goes to trial.\(^14\) If convicted at trial, your minimum sentence under the Federal Sentencing Guidelines will be a little more than five years,\(^15\) of which you will spend at least four-and-a-half

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\(^6\) See James A. Strazzella, Reporter, Report on the Federalization of Criminal Law, 1998 A.B.A. SEC CRIM. J. 19 [hereinafter \emph{ABA Report}] (“[F]ederal prosecutions comprise less than 5% of all the prosecutions in the nation. The other 95% are state and local prosecutions.”).

\(^7\) In large urban counties, approximately 70% of defendants in weapons cases were released prior to case disposition. U.S. Dept. of Justice, Felony Defendants in Large Urban Counties, 2000 (Dec. 2003, NCJ 202021) at p. 16, table 13.

\(^8\) See id. at p. 24, table 23. In a study of all felony cases filed in May, 2000 in 40 of the 75 largest urban counties in the United States, the U.S. Department of Justice found that a felony conviction was obtained in 56% of weapons cases. Most other cases were dismissed, or resulted in a guilty plea to a misdemeanor charge.

\(^9\) 720 ILL. COMP. STAT. 5/24-1.1(e)(2004) (possession of a firearm by a felon who is still on probation is a Class 2 felony, calling for a sentence of 3 to 14 years).


\(^11\) The locations of prison facilities operated by the Illinois Department of Corrections are listed at http://www.idoc.state.il.us/subsections/facilities/default.shtml.

\(^12\) See ABA Report, supra note 6, at 19.

\(^13\) In the federal system, approximately 43% of defendants in weapons cases were released prior to case disposition. U.S. Dept. of Justice, Compendium of Federal Justice Statistics, 2002 (Sept. 2004, NCJ 205368) [hereinafter Compendium of Federal Justice Statistics]. Federal defendants arrested in Chicago face the additional risk of being shipped to a pretrial detention facility in Wisconsin or downstate Illinois, due to overcrowding at the federal facility in Chicago. See Jerry Crimmins, MCC Overloaded: Counsel must drive hours to see clients, CHIC. DAILY L. BULLETIN, Apr. 2, 2002. See also Compendium of Federal Justice Statistics, supra, at p. 50, table 3.11 (showing that drug trafficking defendants who are detained pending trial spend an average of 130.7 days in detention, and defendants in weapons cases spend an average of 118.4 days in detention).

\(^14\) From October 1, 2001 to September 30, 2002 (the most recent year for which there is data) the overall federal conviction rate was 92.4% for drug offenses, and 89% for weapons offenses. In cases that went to trial, the conviction rate was 84.4% for drug trafficking offenses, 80.3% for offenses classified as “possession and other drug offenses,” and 79.2% for weapons offenses. Compendium of Federal Justice Statistics, supra note 13, at p. 58, table 4.2.

\(^15\) See U. S. SENTENCING GUIDELINES MANUAL §§ 2K2.1, 4A1.1 (2004). In United States v. Booker, 125 S.Ct. 738 (2005), the Supreme Court held the provisions of the Sentencing Guidelines that required mandatory imposition of a sentence in accordance with the Guidelines violated defendants’ Sixth Amendment right to a jury trial; the Guidelines remain valid, however, as an advisory resource in a discretionary sentencing system.
years in prison. In other words, your time in prison will be tripled if the federal government prosecutes you instead of the state. Furthermore, rather than serving your sentence in Illinois, you may serve it more than two thousand miles away from your home and loved ones.

This example illustrates two facts about the American criminal justice system. First, in recent decades, Congress has expanded the reach of federal criminal law to the point where it substantially overlaps with state law. Many defendants who commit essentially local crimes—felons who are caught with firearms in their possession, for instance—face exposure to prosecution not only from the state, but also from the federal government. Second, defendants who are prosecuted in the federal system typically face greater procedural disadvantages, higher conviction rates and longer sentences than those prosecuted for the same conduct in state court.

As the area of federal-state overlap has increased, the federal government has not developed uniform standards for determining which cases should be prosecuted by the federal government and which by the state. Rather, this decision has largely been left to the discretion of individual United States Attorneys. This lack of guidelines creates two problems, one obvious, and the other slightly less so.

The more obvious problem is that of random disparity. If there are no guidelines to determine which cases are appropriate for federal prosecution and which are not, then the decision to take a case into federal court may result from factors that are completely extraneous to the crime itself: the caseload of the local United States Attorney’s office; the desire of a federal prosecutor to appear “tough on street crime;” and even the personal relationship between a line prosecutor and the police officer who calls in the case. If we accept the idea that random disparity is a bad thing, that a defendant’s sentence should not be tripled for reasons completely unrelated to his or her conduct, the lack of guidelines is troubling.

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16 U.S. Dept. of Justice, Bureau of Justice Statistics, Time Served in Prison by Federal Offenders, 1986-97 (June 1999) at pp. 1-2 (noting that federal truth in sentencing law requires federal convicts to spend at least 87% of the time specified in their sentence in prison) [hereinafter Time Served in Prison by Federal Offenders].
17 For example, a federal prisoner from Chicago may be designated to the federal prison facility in Lompoc, California, over 2150 miles away. Title 18 U.S.C.A. § 3621 (2004) states:

The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable.

18 For a discussion of the overlap of federal and state criminal laws, see infra notes 43-59 and accompanying text.
19 For a discussion of the disadvantages confronting federal defendants, see infra notes 72-107 and accompanying text.
20 The Department of Justice’s United States Attorneys Manual contains a document called “Principles of Federal Prosecution,” which guides the exercise of prosecutorial discretion in a number of ways. As discussed in Section IV.B, infra, however, this document fails to deal adequately with the problems of disparity that arise from federal duplication of state criminal law.
The less obvious – but even more serious – problem is that of intentional disparity. The lack of consistent guidelines creates a strong temptation for law enforcement to move cases into federal court specifically to take advantage of the disparities between the federal and state systems. If the prosecution faces procedural or evidentiary problems under state law, or wants to avoid local juries that may be hostile to certain types of cases, or simply wants to impose a longer sentence on the defendant than is available under state law, the temptation is simply to move the case into federal court. As we will see below, this phenomenon occurs with some regularity. The result is that those defendants who may have the best defense under state law end up getting prosecuted federally, and serving much longer sentences than their counterparts who remain in the state system.

What is needed, then, is a principle for limiting the scope of the federal government’s power to enact criminal laws that merely duplicate state law, and for guiding the exercise of prosecutorial discretion where such duplication exists. The essay that follows will argue that the best source for such a standard is the principle of subsidiarity: the principle that higher order institutions (such as the federal government) should avoid taking over the functions or disrupting the internal life of lower order institutions (such as state and local government), but should provide assistance to such institutions where necessary. The principle of subsidiarity has deep roots in Western thought, and has been described as the normative foundation for American federalism. This principle requires us to ask, whenever the federal government seeks to intervene in a criminal matter traditionally handled by the states, whether the matter involves an area of unique federal competence. That is, does the federal government enjoy some inherent advantage in prosecuting a given case, by virtue of its nature as a national government? If so, federal intervention may be desirable and legitimate. But if federal intervention is motivated merely by a disagreement with the policy choices made by state and local government, and by a desire to nullify or make an end-run around those policy choices, such intervention should be avoided.

The essay that follows will set forth the problems created by the increasing federal duplication of state law, and explore the ways in which a subsidiarity-informed federalism may solve these problems without hindering the federal government in the legitimate exercise of its authority. Section I will describe the rapid growth of federal law over the last few decades into areas of traditional state concern. It will argue that the Supreme Court paved the way for federal duplication of state law by adopting an unduly expansive reading of the scope of Congress’ Commerce power. Over the past thirty-five years, Congress and federal law enforcement have taken advantage of this power to vastly expand the reach of federal criminal law deeply into

[I]t is difficult to justify the fairness of the significant differences between the sentences of those prosecuted in the federal system and those prosecuted for the same conduct in the state system, particularly when the issue of reducing sentencing disparity was one of the primary justifications for the adoption of the [federal] Sentencing Guidelines.

Id.

22 For a discussion of the “forum-shopping effect” of federal duplication of state criminal law, see infra notes 72-107 and accompanying text.

23 For a more complete discussion of the relationship between the principles of subsidiarity and federalism, see notes 116-121, infra, and accompanying text.
areas traditionally covered by state law. Section II will set forth some of the disparities created by the federal duplication of state law, as well as the incentives these disparities create for law enforcement to engage in “forum shopping” by referring cases to federal court to avoid state law enforcement policies that are disadvantageous to the prosecution. Section III will argue that the principle of subsidiarity may provide a useful standard for limiting the scope of federal criminal jurisdiction and guiding the exercise of prosecutorial discretion. Specifically, this section of the essay will argue, the purposes of the criminal law may best be served by prosecution within the lowest level community that may competently handle the matter. Finally, Section IV will examine the implications of the principle of subsidiarity for the Supreme Court’s emerging Commerce Clause jurisprudence, which is starting to set limits, for the first time, on Congress’ ability to enact criminal laws governing essentially local conduct. It will also examine ways in which the Department of Justice may use the principle of subsidiarity to draft uniform guidelines to restrain federal prosecutorial discretion when state and federal law overlap, and particularly to forbid the initiation of federal prosecution for the purpose of taking advantage of the inevitable disparities between state and local law.

I. Federal Duplication of State Criminal Law

The past thirty-five years have seen a vast expansion of federal criminal law into areas of traditional state concern. Prior to 1970, federal criminal law was directed largely at crimes against the federal government, and crimes with an interstate component that made investigation and prosecution by any one state difficult. Although a number of federal statutes prohibited conduct also covered by state law, the requirement of a nexus to interstate commerce prevented wholesale duplication of state law. Today, by contrast, a substantial proportion of federal criminal law encompasses precisely the same conduct as state law, even where the conduct occurs within a single state and has no direct nexus to interstate commerce. As a result, there is no longer any clear standard for determining which cases should be prosecuted by the federal government, and which by the state.

This section of the essay will describe how the current situation came to be. In the 1970s, the Supreme Court paved the way for federal duplication of state criminal law by virtually eliminating the “interstate commerce” requirement for criminal laws enacted under the Commerce Clause. At the same time, Congress enacted a bewildering number of new criminal laws, many of which duplicated pre-existing state criminal statutes. Finally, the Department of Justice made the prosecution of some of these new federal crimes – particularly drug and gun crimes – a top federal priority, and utilized state and local law enforcement to develop and prosecute these cases under federal law. The decision as to which cases should be prosecuted by the federal government and which by the state has been left to the almost unfettered discretion of local federal prosecutors, in conjunction with the law enforcement agents who investigated the case. As will be discussed below, this unfettered discretion makes it extremely likely that federal duplication of state criminal law will result in disparities in the treatment of criminal defendants that are contrary to most common-sense notions of justice.
A. Federal Criminal Law in the Interstices

At the founding, there were very few federal criminal laws. The Constitution did not clearly define the proper scope of federal criminal jurisdiction, and made little reference to any actual crimes.24 Prior to the Civil War, federal criminal laws generally covered only crimes directed against specific federal interests, or committed within a special sphere of federal authority, such as a military fort or a federal territory.25 But as the needs of society changed over time, so too did the scope of federal criminal law. After the Civil War, for example, Congress enacted laws to enable the federal government to secure the federal civil rights of its citizens through criminal enforcement.26 And as American society became more mobile through the end of the 19th century and the first half of the 20th century, Congress utilized its power under the Commerce Clause to punish criminals who crossed state lines in committing crimes that were otherwise within the traditional province of state law.27

Although these expansions marked a significant increase in the scope of federal jurisdiction, federal law still did not generally duplicate state criminal law.28 Indeed, until the 1960s, the federal criminal statutes the Supreme Court upheld under the Commerce Clause uniformly included, as an element of the offense, the crossing of state lines (or the intent to do so), the use of the instrumentalities of interstate commerce, or actual interference with interstate commerce.29 Thus, the purpose and effect of most federal criminal laws enacted prior to the late

24 The Constitution defines the crime of treason, and grants Congress the power to define the appropriate punishment for it. See U.S. Const. art. III, § 3. It also explicitly grants Congress the power to enact statutes to punish “counterfeiting the Securities and current Coin of the United States” and “Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” Id. at art. I, § 8. It is otherwise silent as to the appropriate subject matter for federal criminal law.
25 See Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 Hastings L.J. 1135, 1138 (1995) (noting that the Crimes Act of 1790 “punished murder and other crimes committed in a fort or other place controlled by the federal government, crimes committed outside the jurisdiction of any state, forgery of United States certificates and other public securities, perjury in federal court, treason, piracy, and committing acts of violence against an ambassador”). See Beale, Working Group on Principles, supra note 21, at 1278 (noting before the Civil War, “[f]ederal crimes were limited to those necessary to prevent injury to or interference with the federal government itself or its programs”).
26 See Brickey, supra note 25, at 1139-40.
27 Id. at 1142-44.
28 The major exception to this rule arose out of prohibition. Under the Volstead Act, Congress gave federal and state law enforcement concurrent jurisdiction for prosecution of liquor control violations. See, e.g., id. at 1142; Thomas J. Maroney, Fifty Years of Federalization of Criminal Law: Sounding the Alarm or “Crying Wolf?”, 50 Syracuse L. Rev. 1317, 1324-25 (2000).
29 See, e.g., Champion v. Ames, 188 U.S. 321 (1903) (upholding constitutionality of “Lottery Act,” which made it a crime to bring lottery tickets into the United States, to transport them across state lines, or to deposit them in the United States mails); Hoke v. United States, 227 U.S. 308 (1913) (upholding constitutionality of the Mann Act, which prohibited inducing or assisting a woman to cross state lines for immoral purposes); Brooks v. United States, 267 U.S. 432, 438-439 (1925) (upholding constitutionality of act prohibiting the transportation of stolen motor vehicles across state lines, because “quick passage of the machines into another state helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safer place in which to dispose of the booty at a good price”); United States v. Darby, 312 U.S. 100, 125-126 (1941) (upholding portion of Fair Labor Standards Act that made it a crime for an employer to “employ[] persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines”); Stirone v. United States, 361 U.S. 212, 218 (1960) (under the Hobbs Act, “[t]he charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference”). Cf. Yee Hem v. United States, 268 U.S. 178 (1925) (statute outlawing knowing concealment of illegally imported opium did
1960s was to provide legal protection where state and local governments were unwilling or unable to do so. The civil rights statutes enabled the federal government to secure the rights of citizens in the face of hostile or indifferent state governments. The early Commerce Clause statutes enabled the federal government to step in where the interstate character of the criminal activity or organization prevented the states from effectively enforcing their own laws.

B. The Commerce Clause and Federal Duplication of State Criminal Law

In two cases decided in the 1970s, the Supreme Court permitted Congress to outlaw, under the Commerce Clause, purely intrastate conduct that involved neither the crossing of state lines nor the use of the instrumentalities of state commerce. As we will see below, these decisions coincided with a sustained congressional push to expand the scope of federal criminal law to cover much of the area traditionally occupied by state law.

First, in *Perez v. United States* the Supreme Court held that a defendant could constitutionally be prosecuted under the federal loan-sharking statute, even where the defendant had not crossed state lines in committing the crime, had no ties to an interstate criminal organization, and had not affected anyone in another state. According to the Court, the question was not whether the defendant’s conduct had any connection to interstate commerce; rather, the question was whether this conduct fell within a class of activities that was subject to federal regulation under the Commerce Clause. Congressional findings indicated that loan-sharking, considered in the aggregate, had an impact on the national economy. Therefore, Congress had the power to outlaw loan-sharking, and the courts were not empowered to exempt those “trivial, individual instances” where the defendant committed the crime within a single state, and did not affect interstate commerce by his actions.

\[\text{not violate due process, despite statutory presumption that anyone found in possession of opium had knowledge that it was illegally imported). This limitation did much to ensure that federal law did not merely duplicate state law.\]\\n\[30\text{ 402 U.S. 146 (1971).}\]\\n\[31\text{ See Perez, 402 U.S. at 146-47.}\]\\n\[32\text{ See id. at 154.}\]\\n\[33\text{ See id. at 155-56.}\]\\n\[34\text{ Id. at 154 (quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968)). The “aggregation principle” had previously been employed outside the criminal context in Wickard v. Filburn, 317 U.S. 111 (1942). The Court’s reasoning in Perez was based largely upon Wickard, which is often described as the most expansive Commerce Clause decision in the Court’s history. In Wickard, the Court upheld application of a statute regulating wheat production to a farmer who grew wheat for home consumption, because an individual might “forestall resort to the market by producing to meet his own needs” and thus indirectly affect interstate commerce.}\]\\n\[35\text{ In a strongly worded dissent, Justice Stewart argued that the majority’s reasoning would permit Congress to federalize all local crime, because all crime, considered in the aggregate, may be characterized as affecting interstate commerce. He stated:}\]\\n\[\text{[T]he Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws. . . . [I]t is not enough to say that loan-sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan-sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan-sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.}\]\\n\[\text{Id. at 157-58.}\]
Similarly, in *Scarborough v. United States*, the Court held that a defendant could be prosecuted under the federal statute forbidding felons from possessing firearms “in or affecting commerce,” as long as the firearm had crossed state lines at some point in its existence. The defendant in *Scarborough* was found in possession of several guns after he had been convicted of a felony in state court. Although the guns had been manufactured in a different state, there was no evidence that the defendant himself had ever crossed state lines with the guns. The defendant challenged his conviction on the ground that his possession of the firearms did not “affect commerce” within the meaning of the statute. The Supreme Court rejected this argument, holding that Congress’ use of the term “affecting commerce” indicated that it intended to exercise its “full Commerce Clause power.” Therefore, the Court held, the government could establish federal jurisdiction merely by showing “the minimal nexus that the firearm [had] been, at some time, in interstate commerce.”

Taken together, *Perez* and *Scarborough* expanded the scope of federal criminal jurisdiction under the Commerce Clause to the point where the federal government could criminalize virtually all local criminal conduct. Under *Perez*, the federal government could outlaw any criminal conduct that has a demonstrable connection to commerce, however minor, on the ground that this class of crime has an aggregate effect on interstate commerce. For example, a landlord who unsuccessfully tries to burn down his own two-unit rental building can be prosecuted under the federal arson statute, because commercial real estate, considered in the aggregate, “affects interstate commerce.” Under the *Scarborough* “minimal nexus” test, the federal government can outlaw local criminal conduct that has no connection to commerce, so long as some physical item connected to the crime has crossed state lines at some point in time. Thus, a person found in possession of child pornography can be federally prosecuted, if any of the materials used to produce the pornography (the camera, the film, the ink in the printer, etc.) has ever crossed state lines.

As will be discussed below, recent Supreme Court cases have narrowed the scope of federal criminal jurisdiction under the Commerce Clause. Although these cases call into question the basic framework set up by *Perez* and *Scarborough*, *Perez* and *Scarborough* remain valid law and have not been reversed. The federal government is still empowered to prosecute all crimes that either have a tie to commerce, or have a minimal jurisdictional “hook.”

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37 See id. at 565.
38 See id. at 571 (quoting United States v. American Bldg. Maintenance Industries, 422 U.S. 271, 280 (1975)).
39 Id. at 577.
40 18 U.S.C. § 844(i) (2004) (outlawing arson against any building used in a manner that “affects interstate commerce”). See also Russell v. United States, 471 U.S. 858, 862 (1985) (holding that an owner could be convicted under the federal arson statute for unsuccessfully trying to burn down his two-unit apartment building because “the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class.”).
41 See 18 U.S.C. § 2252(a)(4)(B) (2004). For recent cases discussing the continued validity of this jurisdictional element in light of recent Supreme Court decisions, see infra note 161 and accompanying text.
42 See infra Section IV.
C. The Federalization of Street Crime

As described above, federal criminal law prior to the 1960s generally covered only crimes directed against the federal government or a federal program, or crimes that had a fairly direct tie to interstate commerce. But as crime rates rose in the 1960s and 1970s, Congress began to feel pressure to “get tough” on street crime – particularly crimes involving guns and drugs. It responded with an unprecedented series of legislative enactments, called “omnibus crime control bills” that redefined and vastly expanded the scope of federal criminal law. Starting with the Omnibus Crime Control and Safe Streets Act of 1968, Congress passed nine separate “omnibus” crime bills between 1968 and 2001. Each was up to several hundred pages long. Collectively, they have defined numerous new federal crimes, revised existing crimes, created entire new federal agencies (such as the Drug Enforcement Administration), and funded a bewildering array of projects related to law enforcement. In addition to these omnibus bills, miscellaneous criminal provisions have been added throughout the statutory and regulatory codes, so that no one can now say for sure how many federal crimes there are. As of 1998, it was thought that 40% of all federal criminal laws since the Civil War had been enacted between 1970 and 1996, and that 25% had been enacted in the sixteen-year period between 1980 and 1996. Indeed, the pace of federalization seems to keep increasing.

As a result of these numerous legislative enactments, “[t]he bulk of the federal criminal code now treats conduct that is also subject to regulation under the states’ general police powers.” It is now a federal offense to commit a carjacking or a drive-by shooting, to commit arson and various forms of theft, to manufacture or possess child pornography, to solicit another person to commit a crime of violence. It is a federal crime not only to traffic in

44 See Brickey, supra note 25, at 1145.
45 See ABA Report, supra note 6, at 93-94 (noting that as of 1989, it was estimated that there were approximately 3,000 federal criminal laws, and that the number of federal criminal laws by 1998 was “unquestionably larger” than this estimate).
46 Id. at 7 n. 9, and accompanying text.
47 See id. at n.11 and n.15 (noting that, according to the Congressional Research Service, the 105th Congress had introduced about 1,000 bills dealing with criminal statutes by July 1998).
48 Sara Sun Beale, Federalizing Crime: Assessing the Impact on the Federal Courts, 543 ANNALS AM. ACAD. POL. & SCI. 39, 44 (1996). It has also been reported that in 1997, only 5% of federal prosecutions involved federal statutes that did not duplicate state statutes. See John S. Baker, Jr., State Police Powers and the Federalization of Local Crime, 72 TEMP. L. REV. 673,678 (citing ABA Report, supra note 6, at 23, chart 6).
narcotics, but also simply to possess them. Federal law prohibits the possession of firearms by felons, fugitives, drug addicts, "mental defectives," those who have been convicted of misdemeanor domestic abuse, and those who are subject to a restraining order not to stalk, harass or threaten an "intimate partner." It is a federal offense to use or carry a firearm during and in relation to a crime of violence or a drug trafficking crime, or to possess a firearm in furtherance of such crime. In short, with respect to local crime, if federal criminal law does not yet occupy the field, it is certainly well over the fifty-yard line.

D. Federal and Local Interaction in the Prosecution of Street Crime

It is one thing to enact thousands of new criminal laws; it is another thing to enforce them. The vast majority of federal criminal laws are rarely enforced – including high-profile laws like the federal “carjacking” and “drive-by shooting” statutes. But the Department of Justice has made the prosecution of street crime – at least, street crime involving guns and drugs – a top priority for federal law enforcement. Since 1980, federal prosecution of drug crimes has increased by 332%, almost four times faster than the overall federal prosecution rate. Drug prosecutions now constitute about 35% of the federal docket. Federal prosecution for drug offenses involving possession (as opposed to trafficking) increased almost 1000% between 1994 and 2001. Federal gun prosecutions have more than doubled in just the last five years.

How have these increases been accomplished? The federal government does not have the resources to put a large number of agents on the streets to identify and arrest lower level drug traffickers and possessors of firearms. Only state and local law enforcement has such resources. Thus, in many instances, the federal government prosecutes “street crime” cases that are referred

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59 For the most comprehensive list of federal criminal statutes available, see ABA Report, supra note 6, at App. C, pp. 95-260.
60 See id. at 87.
62 See Dept. of Justice, Bureau of Justice Statistics, Drugs and Crime Facts (noting further the federal drug control budget has doubled since 1996, from $6,274,100,000 to $12,648,600,000).
63 See Federal Criminal Case Processing, supra note 61 (noting that between 1994 and 2001, drug cases defined as “possession or other” increased from 163 to 1726, a 959% increase).
65 See Michael M. O’Hear, Federalism and Drug Control, 57 VAND. L. REV. 783, 811-812 (2004) (“[O]ne of the great weaknesses of federal law enforcement lies in the lack of personnel at the street level; federal agents do not, as a rule, walk a beat.”).
to it after local police have already made an arrest. In such cases, the federal government is not going out and apprehending criminals who would otherwise escape the state system; rather, it is providing an alternative forum for local law enforcement, in cases where law enforcement may prefer the federal system over the state system.66

By what mechanism are cases referred from local law enforcement to the federal government for prosecution? In some instances, federal prosecutors review virtually every local arrest for a certain type of crime, and prosecute nearly every case that federal law will permit. For example, under “Project Exile,” the Richmond United States Attorney’s office in the mid-1990s reviewed every gun arrest in the city of Richmond, and prosecuted most of these in federal court.67 Similarly, in the 1980’s, the United States Attorney in Manhattan instituted a weekly “federal day,” wherein the federal government would prosecute every drug case, however small, that came into a given police district on a given day.68 In many instances, the federal government encourages police departments, or even individual police officers, to refer certain types of case to the federal government. For example, under Project Exile, police officers were encouraged to page an ATF agent any time they found a gun in the course of their duties. If the circumstances indicated that a federal statute applied, federal prosecution would be initiated.69 Similarly, to assist in identifying potential drug defendants, the federal government has created a large number of “multi-jurisdictional task forces,” composed mainly of local police officers working with a smaller number of “supervising” federal officers. Such task forces investigate and arrest drug offenders, and refer them for prosecution either to the state or federal government.70

How has the federal government handled the increased caseload associated with prosecuting large numbers of drug and gun crimes? Some urban jurisdictions designate state prosecutors as “Special Assistant United States Attorneys,” whose duty is to conduct federal drug and gun prosecutions referred by state and local law enforcement authorities.71

In essence, then, many federal drug and gun cases involve investigations and arrests by local law enforcement, and prosecution by a local state’s attorney, but in federal court and under federal law. The only thing the federal government provides is the federal forum, and all the attendant advantages to law enforcement that go with it.

66 As will be discussed in Section III, infra, this “forum shopping” effect is one of the most harmful results of the federal duplication of state criminal law.
68 See O’Hear, supra note 65, at 862.
69 See Richman, supra note 67, at 379.
70 These task forces are funded in part by federal grants, in part from the state or local budget, and in part from the proceeds from property and cash seized under federal forfeiture laws. Some commentators have expressed the concern that the availability of funds from property seized under federal forfeiture laws have made these task forces semi-autonomous, and unaccountable to the state officials who nominally supervise them. See, e.g., O’Hear, supra note 65, at 815-820, and sources cited therein.
II. Federal-State Duplication and Forum Shopping

As was discussed above, the existence of federal laws that substantially duplicate state law creates a number of disparities in the way defendants are treated for the same criminal conduct. This section of the essay will discuss some of these disparities in more detail, and set forth some of the ways in which law enforcement can (and does) use them to gain strategic advantage in essentially local criminal cases. In many instances, cases involving street crime are moved from state to federal court in order to: (1) avoid local juries; (2) obtain various procedural advantages not available in state court; (3) avoid penalties for police conduct that violates state law; and (4) obtain longer sentences than are available under state law. I will describe each of these in turn.

A. Avoidance of Local Juries

One effect of moving cases from state to federal court is to change the composition of the jury pool. Whereas local prosecutions generally draw jurors from the local municipality or county, federal prosecutions may draw jurors from the entire federal district. Thus, moving a case into federal court can drastically change the economic and racial composition of the jury, particularly when the crime occurs in a racially diverse urban jurisdiction surrounded by more affluent suburbs.

There is evidence that street crime cases have been moved into the federal system specifically to avoid local juries, sometimes on a systematic basis. For example, in United States v. Jones, the District Court considered a challenge to “Project Exile,” the most prominent federal gun crime prosecution program of the 1990s, on the ground that it was racially discriminatory. Under Project Exile, every arrest in the City of Richmond involving the illegal possession or use of a firearm was reviewed for prosecution by the federal government. At a bench-bar conference discussing Project Exile, an Assistant United States Attorney involved in the program stated that a purpose of the program was to “avoid Richmond juries.” A second prosecutor had made the same admission during a separate Project Exile prosecution. The evidence before the court indicated that Richmond jury pools were 75% black, whereas the jury pool for the federal Eastern District of Virginia was only 10% black. Up to 90% of the defendants charged under Project Exile were African American. The court agreed that “[e]vidence that the Commonwealth's Attorney and the United States Attorney desire to avoid

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72 For example, jurors for cases tried by local prosecutors in Chicago are drawn solely from Cook County. See 705 ILL. COMP. STAT. 305/2 (2004) (requiring that jurors be “inhabitants of the county” where they will serve). By contrast, federal juries in Chicago are drawn from an eight county area, including Cook, DuPage, Grundy, Kane, Kendall, Lake, LaSalle and Will counties. See 28 U.S.C.A. § 1863 (2004); 28 U.S.C. § 93 (2004).

73 See, e.g., Baker, supra note 48, at 710-11 (“[B]y moving a state case to federal court, the jury may not be one drawn from the county in which the crime occurred. That obviously can greatly alter the demographic composition of the jury pool and therefore can affect plea bargaining or the outcome of the trial.”).


75 See Richman, supra note 67.

76 See Jones, 36 F.Supp.2d at 307.

77 Id. at 309.

78 See id.

79 See id. at 307-308.

80 See id. 307.
Richmond juries in cases such as this is evidence which suggests discriminatory motivation in the initiation and pursuit of Project Exile. Nonetheless, the court upheld the prosecutions under this program, primarily because of the “presumption of regularity” afforded to federal prosecutions.

Project Exile spawned a number of similar prosecutorial programs in other federal jurisdictions throughout the 1990s. It also served as a primary model for Project Safe Neighborhoods, a nationwide program initiated by the Department of Justice to aggressively prosecute gun crimes. Under Project Safe Neighborhoods, the number of federal firearm prosecutions has doubled from around 6,700 in 1999 to over 13,000 in 2003. To the extent this increase in federal gun crime prosecutions derives from a desire to avoid local juries – particularly racially diverse juries from the community where the crime occurred – this trend is troubling.

B. Obtaining Procedural Advantages Not Available Under State Law

Law enforcement also moves cases from state to federal court to obtain procedural advantages not available in state court. Indeed, the Department of Justice actually markets the federal forum to local law enforcement as a more attractive alternative to state court. For example, in a recent publication regarding “Federal-Local Collaboration,” the Department of Justice lists a series of “advantages” to bringing cases in federal court. These include the fact that federal standards for obtaining search warrants are “generally lower than those of most states.” Most states also impose a “higher burden of proof for wiretaps” than does the federal government. Federal law provides for “preventive detention” of many defendants awaiting trial, whereas “[s]tate laws do not have such provisions.” Federal rules permit conviction based on an “accomplice’s uncorroborated testimony,” whereas “[s]tate rules generally do not.” Finally, in the federal system, the defense has no right to receive a government witness list or to interview government witnesses before trial, or to obtain prior witness statements until after the witness has testified; whereas “[m]ost state rules provide otherwise.”

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81 Id. at 313.
82 Id.
83 See Richman, supra note 67.
85 Between 1992 and 1999, an average of 6700 defendants were charged by the federal government with gun crimes annually. See Federal Firearms Offenders, supra note 64. From FY 2000 to FY 2003, federal firearms prosecutions increased by 68%, from 6300 to 10,500 – the highest number ever recorded by the Department. In a single year – from 2002 to 2003 – the number of defendants charged with federal gun crimes rose from approximately 10,600 to over 13,000, a record increase of almost 23%. See Project Safe Neighborhoods Press Release, supra note 64.
87 Id.
88 Id.
89 Id.
90 Id.
91 Fighting Urban Crime, supra note 86.
These procedural advantages can often make the difference between winning and losing a case, and they are a substantial reason that law enforcement moves cases into federal court. 92

C. Avoidance of Penalties for Violations of Defendants’ Rights Under State Law

A third reason for moving “street crime” cases from state to federal court is to avoid the suppression of evidence seized in violation of state, but not federal, law. A number of states provide greater protection against illegal arrests, searches and seizures than does the federal constitution. Because federal courts look only to federal law, law enforcement can avoid the suppression of evidence police seized in violation of state law by moving the case to federal court. 93 Indeed, it appears that many state and federal prosecutors have an informal policy of moving state cases to federal court specifically to avoid the suppression of evidence resulting from police violations of state law. 94

The practice of bringing federal prosecutions that appear to be motivated, at least in part, by a desire to get around unfavorable state law has generated a certain degree of animosity in the courts, many of which see such cases as being a waste of federal resources. For example, in United States v. Santa, 95 local police arrested the defendant based upon a warrant that had previously been vacated, but had mistakenly been left in the state’s computer system. In the course of the arrest, they found less than three grams of crack cocaine on the defendant’s person. 96 Under New York law, this arrest was illegal, and the evidence would have been

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92 See Beale, Working Group on Principles, supra note 21, at 1301 (“[S]tate prosecutors spoke of the need to take cases to federal court to gain the advantage of federal laws authorizing wiretaps, limiting discovery, permitting the joinder of multiple defendants to enhance efficiency, and authorizing and enforcing long sentences for extremely dangerous offenders.”).

93 See, e.g., United States v. Le, 173 F.3d 1258, 1264-1265 (10th Cir. 1999) (“It is . . . well established in this circuit that ‘in federal prosecutions the test of reasonableness in relation to the Fourth Amendment protected rights must be determined by Federal law even though the police actions are those of state police officers.’”) (quoting United States v. Miller, 452 F.2d 731, 733 (10th Cir. 1971)); United States v. Bell, 54 F.3d 502, 504 (8th Cir. 1995) (“[A] federal court must decide whether to exclude evidence obtained through an arrest, search, or seizure by state officers, the appropriate inquiry is whether the arrest, search, or seizure violated the Federal Constitution, not whether the arrest, search, or seizure violated state law.”); United States v. Wright, 16 F.3d 1429, 1434 (6th Cir. 1994) (“A state may impose a rule for searches and seizures that is more restrictive than the Fourth Amendment; that is, the state may exclude evidence in state trials that would not be excluded by application of the Fourth Amendment alone. However, the state rule does not have to be applied in federal court.”); United States v. Clyburn, 24 F.3d 613, 616-617 (4th Cir. 1994) (“the Fourth Amendment provides the only proper standard for determining whether evidence seized by state officials pursuant to a state warrant is admissible in federal court”); United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir.1987) (“evidence admissible under federal law cannot be excluded because it would be inadmissible under state law”). But see United States v. Mota, 982 F.2d 1384, 1387-1388 (9th Cir. 1993) (search incident to arrest only valid under federal law if arrest by state officer legal under state law).

94 See, e.g., Baker, supra note 48, at 706-707 (asserting that the U.S. Attorney’s Office in Philadelphia has a policy of “prosecuting state cases involving searches that are valid under federal constitutional law, but not under state constitutional law”); Beale, Working Group on Principles, supra note 21, at 1304 (Both state and federal prosecutors participating in roundtable discussion on the proper relationship of state and federal criminal law admitted that they “often” move cases from the state to the federal system for tactical reasons, including cases where federal law is “advantageous on procedural matters.”).

95 180 F.3d 20, 30-31 (2d Cir. 1999).

96 See id. at 30 (Newman, J., concurring).
suppressed had the case been brought in state court. In order to “circumvent this state law prohibition, federal authorities elected to use the limited prosecutorial and judicial resources of the federal government to charge and convict the defendant.” The Second Circuit affirmed the conviction. But Judge Newman, who saw the case as an example of the increasing waste of federal resources on relatively minor “street crimes,” wrote a separate concurring opinion taking federal prosecutors to task for “using the federal forum to enable state officials to avoid state law restrictions.” Similarly, Chief Justice Rehnquist has warned on several occasions that federal courts are being increasingly overloaded with criminal cases that would be more appropriately brought in state court.

D. Sentencing Advantages to Law Enforcement

Finally, some cases are moved from state to federal court to obtain the advantage of the longer sentences imposed under federal law for certain types of crime. Federal sentencing laws have become much stricter over the last twenty years, and often dictate much lengthier sentences than are available under state law. Specifically, the federal Sentencing Reform Act of 1984 made sweeping changes to the ways in which sentences are given and prison time is served. First, it called for the creation of the United States Sentencing Guidelines, which have greatly reduced sentencing disparity within the federal system, but have also greatly reduced judicial discretion, increased prosecutorial power, lengthened the average sentence given for many types of crime, and often created greater disparities between state and federal sentences given for similar offenses. The Sentencing Reform Act also eliminated parole, and required that prisoners must serve more than 85% of their sentences before release. Congress has also enacted mandatory minimum sentences for some crimes (particularly drug and gun crimes), and increased the maximum sentence for several more.

These new sentencing laws have had a profound effect on the amount of time typical prisoners spend in federal prison. Between 1986 and 1997, the average sentence given in a

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97 See id.
98 Id.
99 Id. at 31.
102 As noted above, the Supreme Court ruled this year that the portions of the Guidelines that made them mandatory were unconstitutional, but the Guidelines themselves remain valid so long as courts treat them merely as “advisory” principles. See supra note 15.
103 See 18 U.S.C. § 3624. See also Breyer, supra note 101, at 4 (asserting that one of the primary purposes of the Sentencing Reform Act was to promote “honesty in sentencing”).
105 For example, the current version of the “felon in possession of a firearm” statute has a maximum penalty of ten years. See 18 U.S.C. §§ 922(g)(1), 924(a)(2) (2004). By contrast, the original version of this statute, 18 U.S.C. App. § 1202(a), permitted a maximum penalty of two years when it was enacted in 1968. See United States v. Batchelder, 442 U.S. 114, 117 (1979). See also Beale, Unintended Consequences, supra note 71, at 1660-1661 (2002). See id. at 1668 (noting that “Congress has repeatedly ratcheted up” the penalties for violating 18 U.S.C. § 924(c), which forbids possession of a firearm during and in relation to a drug crime or a crime of violence).
federal case increased 38%, from thirty-nine months to fifty-four months. During the same time period, the average proportion of the sentence actually served in prison increased from 58% to 87%. These two factors have worked together to create a 124% increase in the average time actually served in prison, from twenty-one months to forty-seven months. For weapons offenses, the average time served has increased by an even more dramatic 226%, from twenty-three to seventy-five months. During this time period, the federal prison population increased 159%, from 38,156 to 98,944.¹⁰⁶

These dramatic increases in incarceration time have made federal prosecution more attractive than state prosecution, particularly in cases involving violent offenders whose criminal history is not weighted as heavily in the state system as the federal system.¹⁰⁷

III. Subsidiarity and the Prosecution of Street Crime

A. Addressing the Problem of Federal-State Disparity: Preemption v. Subsidiarity-Based Federalism

The simplest way to eliminate the disparate treatment received by defendants in state and federal court would be for Congress to preempt all state criminal law and federalize all crime. This would eliminate disparities, not only between the state and federal systems, but also disparities among the states. But federal preemption of state law would be a radical departure from the American legal tradition. It would violate the fundamental principles of federalism that underlie the United States Constitution: the idea that the federal government is a limited government with enumerated powers;¹⁰⁸ that the general police power resides with the states rather than the federal government;¹⁰⁹ and that Congress may not criminalize conduct that falls outside the scope of its enumerated powers.¹¹⁰ Indeed, the creation of a national police force to

¹⁰⁶ See Time Served in Prison by Federal Offenders, supra note 16. See also Project Safe Neighborhoods Press Release, supra note 64 (noting that in fiscal year 2003, 93% of convicted defendants charged with federal firearms offenses were sentenced to some prison time, 72% received a sentence greater than three years in prison, and over 50% received a sentence greater than 5 years).
¹⁰⁷ See Beale, Working Group on Principles, supra note 21, at 1301 (noting that state prosecutors often seek to move cases into federal court because of federal laws "authorizing and enforcing long sentences for extremely dangerous offenders").
¹⁰⁸ See, e.g., Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. Chi. L. Rev. 429, 439-40 (2002) (federalist principles hold that "the national government was designed to be one of limited powers, with central responsibilities retained for the states"); Geoffrey R. Stone et al., Constitutional Law 149 (4th ed. 2001) (defining federalism as a "system that distributes governmental authority between state and nation"); Ronald D. Rotunda, The Commerce Clause, the Political Question Doctrine, and Morrison, 18 Const. Comment. 319, 321 (2001) ("The Framers sought to protect liberty by creating a central government of enumerated powers. They divided power between the state and federal governments, and they further divided power within the federal government by splitting it among the three branches of government, and they further divided the legislative power (the power that the Framers most feared) by splitting it between two Houses of Congress.").
¹¹⁰ See McCulloch v. Maryland, 17 U.S. 316, 405 (1819) (The federal government is "one of enumerated powers" that "can exercise only the powers granted to it."). Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").
enforce an all-encompassing federal criminal law has long been considered a threat to individual liberty that would outweigh any gains in uniformity and predictability.⁷¹¹

Put another way, federal preemption of state criminal law would have the effect of moving criminal prosecutions further away from the community that actually suffers the harm imposed by the crime. As will be discussed below, this move would harm both the community and individual defendants.⁷¹² The community would lose the ability to address the injury committed against it, even in the vast majority of cases that are perfectly within the competence of the local community to handle.⁷¹³ Similarly, the defendant would face prosecution by a more distant tribunal, with less connection to the defendant and the community where the crime was committed.⁷¹⁴ Both the community and the defendant would be alienated from the system that renders judgment, and the bonds of community would be weakened.

The better solution is to identify a standard for determining which criminal cases may appropriately be prosecuted by the federal government, and which should be prosecuted by the state. The best source of this standard is the principle of subsidiarity.

The principle of subsidiarity holds that “each social and political group should help smaller or more local ones accomplish their ends without, however, arrogating those tasks unto itself.”⁷¹⁵ Subsidiarity has been called “the guiding principle of federalism in the United States.”⁷¹⁶ Indeed, as Professor Currie has convincingly argued, the federal government’s enumerated powers, listed in Article I, Section 8 of the United States Constitution, are a “concretization” of the subsidiarity principle. This is reflected in the following resolution, introduced to the Constitutional Convention by Edmond Randolph as part of the “Virginia Plan”:

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¹¹¹ See, e.g., 18 U.S.C.A. § 1385 (2004) (making it a federal crime to use “any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws”) Cf. Stephen B. Presser, Should Ideology of Judicial Nominees Matter?: Is the Senate’s Current Reconsideration of the Confirmation Process Justified?, 6 TEX. REV. L. & POL. 245, 273 (expressing the concern that the over-federalization of criminal law could lead the federal government to “implement national police forces in a way that would obliterate not only our system of dual sovereignty but also American liberty itself”).

¹¹² See infra Section III.D.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Paolo G. Carozza, Subsidiarity as a Structural Principle of Human Rights Law, 97 AM. J. INT’L. L. 38 n.1 (2003). Pope Pius XI gave the classic definition of subsidiarity in the encyclical Quadragesimo Anno, when he stated:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

POPE PIUS XI, QUADRAGESIMO ANNO ¶ 79 (1931).

¹¹⁶ David P. Currie, Subsidiarity, 1 GREEN BAG 2d 359, 359-360 (1998). See also James L. Huffman, The Impact of Regulation on Small and Emerging Businesses, 4 J. SMALL & EMERGING BUS. L. 307, 316 -317 (“Subsidiarity is the principle that certain functions are better performed at the subsidiary or local government level than by a superior or central government. It is an aspect of the original theory of American federalism which held that state governments will be more responsive than the national government to the public will, better informed about local circumstances, and together will constitute a marvelous laboratory for the testing of regulatory alternatives.”).
Resolved ... that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the several States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.\textsuperscript{117}

This resolution, in amended form, was sent to the Committee on Detail, which “reduced Randolph's principle to a list of enumerated powers representing the committee's judgment as to which areas of legislation the states could not effectively handle.”\textsuperscript{118} These enumerated powers, after further debate and revision, became Article I, Section 8.\textsuperscript{119}

The enumerated powers doctrine, therefore, can be seen to embody both the positive and the negative aspects of the principle of subsidiarity, stated above. Article I, Section 8 gives the federal congress enumerated powers to legislate in specific areas that are beyond the competence of individual states. On the other hand, it withholds from congress the authority to intervene in matters that the states can adequately handle on their own. To make this latter point absolutely clear, the Tenth Amendment, which holds that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people,”\textsuperscript{120} was added to the Constitution at the time of ratification.\textsuperscript{121}

At a minimum, then, a subsidiarity-based federalism would hold that the federal government should not take over criminal prosecutions in areas where the federal government has no inherent advantage over the states. How this principle plays out in practice will be discussed in more detail below, after I sketch out the parameters of the principle of subsidiarity more fully.

\textbf{B. Subsidiarity and the Social Order}

Although the principle of subsidiarity has roots deep in Western thought, its implications have been most fully developed in Catholic social thought over the past century. This portion of the essay will sketch out some of the parameters of subsidiarity as developed in Catholic social thought, particularly in the encyclical \textit{Centesimus Annus}.

The principle of subsidiarity holds that “[a] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities

\begin{footnotesize}
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\item \textsuperscript{117} Max Farrand, \textit{1 RECORDS OF THE FEDERAL CONVENTION} 21 (Yale, rev. ed. 1937) (quoted in Currie, \textit{supra} note 116, at 359-360).
\item \textsuperscript{118} Currie, \textit{supra} note 116, at 360.
\item \textsuperscript{119} See id.
\item \textsuperscript{120} U.S. \textit{CONST.} amend. X.
\item \textsuperscript{121} Although subsidiarity and federalism are related concepts, a number of scholars have noted that subsidiarity is a more comprehensive principle than federalism, at least as the latter has played out over the course of the past century. See, e.g., Richard W. Garnett, \textit{Once More into the Maze: United States v. Lopez, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country}, \textit{72 N.D. L. REV.} 433, 479-480 (1996) (“Subsidiarity, in a sense, goes beyond federalism; under subsidiarity, not only is power diffused, but there is a systemic preference--indeed, a moral preference--for decision making at the local level.”).
\end{itemize}
\end{footnotesize}
of the rest of society, always with a view to the common good.”122 This principle starts with an insight into the nature of the human person. It holds that each person possesses inherent, inalienable and “incomparable dignity.”123 This dignity is reflected in the status of human beings as free and rational beings capable of moral choice. Unlike any other animal, each human person has the capacity to understand her own nature and to participate in its fulfillment through free choice.124 Human beings are capable of giving and receiving love, and of rejecting love. Because of the fundamental and inalienable dignity inherent in human nature, each individual is “ontologically and morally prior to the state.”125 Human dignity is therefore the fundamental source of human rights – for the state exists to serve the needs of each human person; people do not exist to serve the needs of the state.126

Subsidiarity is also built upon the insight that human beings are inherently social. Each person fulfills his nature in and through relationships to others, starting with family, friendships and communities of work, and spreading outward to civic associations and broader political life.127 Through these relationships, individuals learn to love, give of themselves, and orient themselves toward the common good of society.128

Since “lower level” communities such as the family and other intimate associations are essential to the development of the human person, they, too, are prior to the state.129 Indeed, the very function of the state is to promote the common good by protecting the rights of individuals and the integrity of their intimate associations.130

Because the purpose of society is to create the conditions that will assist each person in fulfilling his own nature, and because human nature is fulfilled through intimate relationships of love and self-giving, the principle of subsidiarity holds that the state has both a positive and a negative responsibility. The state is affirmatively obligated to protect the integrity of lower level

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122 Centesimus Annus, supra note 1, ¶ 48.
123 Id. ¶ 11.
124 See id. ¶ 13 (describing free choice as “the unique and exclusive responsibility which [the human person] exercises in the face of good or evil”).
125 Carozza, supra note 115, at 42.
126 See Centesimus Annus, supra note 1, ¶ 11.
127 See id. ¶ 13 (“[T]he social nature of man is not completely fulfilled in the State, but is realized in various intermediary groups, beginning with the family and including economic, social, political and cultural groups which stem from human nature itself and have their own autonomy, always with a view to the common good.”).
128 See id. ¶ 41 (“Man cannot give himself to a purely human plan for reality, to an abstract ideal or to a false utopia. As a person, he can give himself to another person or to other persons, and ultimately to God, who is the author of his being and who alone can fully accept his gift.”). The common good is defined as the social conditions necessary to permit each person to seek to fulfill her nature as a human person with relative ease, through the exercise of genuine freedom.
129 See id. ¶ 11 (“[T]he individual, the family and society are prior to the State, and inasmuch as the State exists in order to protect their rights and not stifle them.”).
130 See Second Vatican Council, Gaudium et spes ¶ 74 (1965) (“The political community exists . . . for the sake of the common good, in which it finds its full justification and significance, and the source of its inherent legitimacy. Indeed, the common good embraces the sum of those conditions of the social life whereby men, families and associations more adequately and readily may attain their own perfection.”). See also Richard W. Garnett, American Conversations With(in) Catholicism, 102 Mich. L. Rev. 1191, 1213 (arguing that the principle of subsidiarity “aims ultimately not at the good of the state, or at the greatest good for the greatest number, but at the ‘common good’ of persons”).
communities, helping them to achieve what they cannot achieve on their own, and redressing wrongs committed against them that they cannot redress themselves. On the other hand, the state also has an obligation to refrain from intervention where the lower level community can handle a matter on its own, or where the intervention will cause undue disruption to the relationships between the members of the lower order community. These twin obligations hold true at each level of society. The state should assist the family where necessary, but should avoid disrupting the relationships among family members. The federal government should assist the states, but should not take over their legitimate functions, or disrupt their relationships with lower order communities and individuals.

C. Subsidiarity and Alienation

One of the key functions of subsidiarity is to combat alienation – the relentless pursuit of self-interest that causes one to treat others as means rather than ends. Alienation can take hold in a person, and in a society. A person is alienated when he “does not recognize in himself and in others the value and grandeur of the human person,” but sees people as objects, and is thus unable to establish authentic human bonds of community. A society is alienated when its “forms of social organization” make it more difficult for people to establish or maintain these bonds.

Alienation leads inevitably to exploitation. If one does not recognize the “grandeur” and “incomparable dignity” of others and oneself – if people are merely commodities, means of gratification, objects of consumption – then one will inevitably use them to satisfy one’s own desires. For example, drug abuse and the consumption of pornography are both behaviors rooted in the idea that bodies – our own and those of others – are commodities, mere vehicles for sensation that can be bought and sold on the open market. More generally, rape, theft, drug

131 See CENTESIMUS ANNUS, supra note 1, ¶ 48.
132 See id. See also Robert K. Vischer, Subsidiarity as a Principle of Governance: Beyond Devolution, 35 IND. L. REV. 103 (The principle of subsidiarity “holds that where families, neighborhoods, churches, or community groups can effectively address a given problem, they should. Where they cannot, municipal or state governments should intervene. Only when the lower bodies prove ineffective should the federal government become involved.”); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 146-47 (1980) (defining subsidiarity to mean that "larger associations should not assume functions which can be performed efficiently by smaller associations"); Friedrich Schneider and Alexander F. Wagner, Subsidiarity, Federalism and Direct Democracy, in RULES & REASON: PERSPECTIVES ON CONSTITUTIONAL POLITICAL ECONOMY 296 (Ram Mudambi et al. eds., 2001) (Subsidiarity “demands that the political authority be always located at the lowest possible level, that is as close as possible to the citizens, the ultimate sovereign.”).
133 John Paul II has characterized alienation as “self-love carried to the point of contempt for God and neighbor, a self-love which leads to an unbridled affirmation of self-interest and which refuses to be limited by any demand of justice.” CENTESIMUS ANNUS, supra note 1, ¶ 17.
134 Id. ¶ 41.
135 Id.
136 Id. ¶ 41.
137 Id. ¶ 11.
138 See CENTESIMUS ANNUS, supra note 1, ¶ 36.
dealing, assault, murder – a whole laundry list of crime – spring from the willingness to treat others as means to satisfy our own ends. 139

Alienation can be overcome through relationships of love and self-giving, through friendship, parenthood, and spousal love. In our most intimate relationships we develop a "capacity for self-control, personal sacrifice, solidarity and readiness to promote the common good." 140 By loving those around us, we may come to see the inherent dignity in all human people, and in ourselves.

These relationships, in turn, are best protected by a society that is ordered in a manner consistent with the principle of subsidiarity – where the larger community protects the integrity of smaller communities, but does not interfere with, destroy, or attempt to replace them.

D. Subsidiarity and the Federalization of Street Crime

With respect to criminal law, the principle of subsidiarity holds that the lowest level community that can prosecute a given crime competently and effectively should do so. More specifically, crimes that primarily affect the local community should be prosecuted within the local community whenever possible. Street crime – that is, crimes involving the “street level” use of guns, drugs, or violence – is above all else a crime against the community. A street level drug dealer primarily harms his own neighbors and the neighborhood in which he sells. A felon who carries a firearm endangers the local residents with whom he comes in contact. An arsonist who burns down a storefront property primarily harms the owner of the property and the community in which it is located. Although the effects of drug dealing, weapon possession and arson can no doubt be aggregated to demonstrate an effect on interstate commerce; and although a high level of street crime in one jurisdiction doubtless imposes externalities on surrounding jurisdictions; nonetheless, the harm is primarily local. Therefore, insofar as possible, the local community should act to correct the harm.

Put another way, street crime disrupts the internal life of the local community, by alienating people from each other and from the community. Indeed, the alienation caused by street crime has a ripple effect. The drug dealer is willing to sell drugs to addicts, despite the fact that the drugs destroy their lives, because he sees them as sources of income, not as individuals worthy of respect and care. The addicts, in turn, often turn to some form of crime (prostitution, theft, drug dealing) to support their own addictions. An entire community can be poisoned by this cycle of alienation, whereby people transform themselves and others into commodities for exploitation, rather than individuals with inherent dignity, worthy of love and respect.

Because such crime injures the community directly, the community itself should address the injury where possible. Local law enforcement should make the arrest, a local prosecutor should try the case before a local judge, and above all, a jury drawn from the local community should render judgment according to the legal standards governing the local community. By

139 Alienation is also reflected in some aspects of the consumer culture that so dominates Western society. Consumerism encourages the individual to seek happiness through possession: through having something (money, possessions, status, prestige) rather than being something (a loving parent, a loyal friend, a faithful employee). Id.
140 Id. ¶ 51.
preserving this mode of prosecution, the local community is best able to heal its own injuries by its own means. In this manner, criminal prosecution can actually strengthen the bonds that hold the community together. Similarly, when the criminal defendant receives judgment directly from the community he has harmed, he is more likely to accept the punishment as a means of redressing the wrongs he has done, and may be spurred toward rehabilitation.141

When prosecutions are unnecessarily moved from the local to the federal level, the divisions within the community can be further aggravated. Moving a case into the federal system means that it will not be tried before a jury drawn solely from the local community; federal rules, not state rules, will govern disposition of the case; federal rather than state sentencing laws will apply; and the convicted defendant will be put into a federal prison system that could send him thousands of miles away from friends and family, converting incarceration into something more like exile. At each stage of the process, unnecessary federalization takes key decisions about the prosecution of crime away from the local community that has suffered the harm. This process tends to disrupt not only the relationship of the defendant to the community, but also – and perhaps more importantly – the relationship between law enforcement and the communities it serves. The availability of the federal forum for prosecution of essentially local cases permits local law enforcement to evade state policy judgments concerning police conduct and criminal procedure, and to avoid directly addressing problems in its relationship to the local community that may result in local juries that are hostile to certain types of case.

E. Conclusions Regarding Subsidiarity and Forum-Shopping

As noted in Section III, above, law enforcement moves many cases from state to federal court to obtain tactical advantages that result from disparities between the state and federal system. Specifically, cases are moved into federal court to avoid local juries, to obtain procedural advantages, to avoid the suppression of evidence obtained illegally under state law, and to obtain longer sentences than are available under state law. Each of these reasons contravenes the principle of subsidiarity. The state government has the competence to determine the appropriate procedural rules, the appropriate sentence for a given crime and whether to confer greater rights on criminal defendants than required by the United States Constitution.142 Local juries are perfectly competent to judge local cases. The federal government enjoys no special advantage in

141 In the Catholic tradition, the four purposes of criminal punishment are “rehabilitation, defense against the criminal, deterrence, and retribution.” Avery Dulles, Catholicism and Capital Punishment, FIRST THINGS 30 (Apr. 2001).

142 Indeed, one of the great advantages of the federal system is that states are free to experiment with sentencing laws to determine what is most effective. See, e.g., Beale, Working Group on Principles, supra note 21, at 1295 (“Many of the most promising trends in criminal law enforcement began at the state and local level, including specialized drug courts, community policing, boot camps, and sentencing guidelines. A number of state participants in the Roundtable noted that there is, as yet, no evidence that federal approaches are superior to those adopted by various states on matters such as sentencing policy.”). Nonetheless, the federal government in recent years has used its spending power to influence state judgments about the appropriate sentences to impose in criminal cases. For example, in the 1994 Crime Bill, Congress authorized grants to build state prisons in states that adopted “Truth in Sentencing,” that is, the requirement that violent offenders serve at least 85% of their sentence in prison. Four states had adopted this requirement prior to 1994. By 1998, 27 states had adopted “Truth in Sentencing.” See U.S. Dept. of Justice, Bureau of Justice Statistics, Special Report: Truth in Sentencing in State Prisons (Jan. 1999). This practice of trying to impose top-down sentencing uniformity on state systems raises obvious concerns from the perspective of subsidiarity.
any of these areas by virtue of its larger size. By permitting, and indeed, encouraging, law enforcement to engage in federal forum shopping, the federal government is not providing necessary assistance to local communities, but rather is inappropriately interfering with their internal life.

The availability of federal forum shopping enables local law enforcement to untether itself from the community immediately above it (state government) by bringing cases into federal court whenever state-imposed rules regarding police conduct, pretrial procedure, or sentencing are not to its liking. This deprives state government of the ability to give effect to its judgments. Moreover, the availability of a federal “safety valve” may mask real problems in the state system, by permitting local law enforcement to avoid the most serious consequences of these problems. If state sentencing laws do not sufficiently take into account the violent criminal history of the defendant, for example, the matter should be brought before the state legislature and the laws should be reformed. But if law enforcement can move cases involving the worst offenders into federal court, the state government may never become aware of the problem at all.143

Federal forum shopping also permits law enforcement to avoid confronting problems in its relationship to the community immediately below it (the people it protects) by allowing it to avoid local juries. If local juries are reluctant to convict defendants in certain types of cases (cases that depend solely on uncorroborated police testimony, for example), this indicates a deep fissure in the relationship between the local community and the police. A distrust of the police may manifest itself most publicly in high acquittal rates from local juries, but will also certainly lead to a lack of cooperation in investigating crimes, and will thus undermine law enforcement’s ability to do its job. If local law enforcement can avoid the public manifestation of this problem by bringing risky cases into federal court, it will have less incentive to confront the much more difficult (and important) problem of its relationship to the community it serves.

Finally, when cases are moved into the federal system unnecessarily, the potential for spurring the defendant’s rehabilitation is reduced. When the jury that renders judgment is composed of people who are not from the local community the defendant has harmed and who may also come from vastly different racial and economic backgrounds, the defendant is less likely to recognize and regret the harm he has caused. The defendant’s alienation from the judgment will be increased by the knowledge that he has been singled out for a much longer sentence than he would have received had his case been tried in state court. Finally, federal imprisonment is more likely than state imprisonment to send the defendant hundreds, or even thousands, of miles away from friends and family. The complete severing of these bonds of love and self-giving will further exacerbate the defendant’s alienation from society.144

143 See, e.g., Beale, Working on Principles, supra note 21, at 1304 (“One federal prosecutor observed that cherry picking a few cases may enhance the safety of the community and set a high-profile example for state officials, but it also takes the pressure off state officials to reform their own laws and procedures.”).
144 See id. at 1294. Beale states:

State corrections programs also have built-in advantages. Since state corrections institutions are located closer to offenders’ home communities, they facilitate contact with family and reintegration into the community. Federal institutions, in contrast, draw their inmate populations from a nationwide base, and inmates may be housed hundreds or even thousands of miles from their friends and families. Sustaining
IV. Subsidiarity as a Limiting Principle

The problems identified in the preceding sections can be ameliorated (if not completely resolved) in two ways, both of which depend upon the principle of subsidiarity. First, the Supreme Court should more strictly limit federal jurisdiction to crimes that states truly lack competence to address. As will be discussed below, this process has already begun in a series of Commerce Clause cases decided over the past ten years; but the implications of these cases have not yet been carried through to their logical conclusion. Second, the Department of Justice should issue national prosecutorial guidelines expressly prohibiting “forum shopping” of the kind described in Section II. Adoption of these two reforms will do much to eliminate the random and intentional disparity that exists in the current system, and restore the proper relationship of state and federal law enforcement.

A. Limiting Federal Jurisdiction Under the Commerce Clause

As described in Section I above, the Supreme Court in Perez and Scarborough interpreted the Commerce Clause to give extremely broad scope to the federal government’s power to criminalize local conduct. Under these cases, the federal government appeared to have power to assert criminal jurisdiction over any conduct that had an “aggregate effect” on interstate commerce, or that involved a physical object that had crossed state lines at some point in its existence.

In two recent cases, United States v. Lopez,145 and United States v. Morrison,146 the Supreme Court has called the Perez/Scarborough framework into question – though it has not yet dismantled it entirely. The Lopez Court struck down a federal law that made it a crime to possess a firearm in a school zone. Similarly, the Morrison Court struck down a law permitting victims of “crimes of violence motivated by gender” to bring suit under federal law. In these two cases, the Court set forth new ground rules for justifying criminal laws enacted under the Commerce Clause. The baseline is this: the states “possess primary authority for defining and enforcing” the criminal law, and federal criminal law should not be extended so far as to usurp this authority.147 Thus, if a crime does not involve the crossing of state lines or the use of the instrumentalities of interstate commerce, the law will only be upheld if the crime has a “substantial effect” on interstate commerce.148 For crimes with a direct tie to economic activity, the government can meet the “substantial effect” requirement by demonstrating that this type of crime has an “aggregate effect” on interstate commerce. For crimes without such a connection, however, the federal statute must contain a “jurisdictional element” that would enable courts to

146 529 U.S. 598 (2000).
147 Lopez, 514 U.S. at 561 n.3.
148 See id. at 558-559.
“ensure, through case-by-case inquiry, that the [crime] in question affects interstate commerce.” The federal government may not justify the enactment of non-economic criminal laws by showing a mere “aggregate effect” on interstate commerce. Because Lopez and Morrison involved non-economic crimes, and had no jurisdictional element limiting prosecution to those cases that actually affect interstate commerce, they could not be justified under the Commerce Clause.

In Lopez and Morrison, the Supreme Court has changed the Perez/Scarborough framework in two ways. First, the Perez “aggregate effects” doctrine is now limited to crimes with a direct tie to economic activity. Thus, for example, the Supreme Court in Jones v. United States interpreted the federal arson statute to cover only arson committed against commercial buildings, because it was doubtful that the effect of arson against residential buildings could be aggregated to justify prosecution under the Commerce Clause. Second, the Court has implicitly called into question the viability of the Scarborough “minimal nexus” test. The “jurisdictional element” required for non-economic crimes under Lopez and Morrison must be sufficient to enable courts to determine that the specific crime being prosecuted has affected interstate commerce. The mere showing that a gun crossed state lines some time after it was manufactured would not seem sufficient to met this standard.

The biggest unresolved issue after Lopez and Morrison concerns the status of federal “possession” crimes: simple possession of illegal narcotics, illegal possession of a firearm, and possession of child pornography, to name but three. The narcotics possession statute regulates non-economic intrastate activity, and has no jurisdictional element. The child pornography statute explicitly requires only that some item used in manufacturing the pornography have crossed state lines at some point in the past. Finally, the “felon in possession of a firearm” statute has a jurisdictional element requiring that the possession “affect commerce.”

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149 Id. at 561.
150 Morrison, 529 U.S. at 618-619 (“We . . . reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”).
The narcotics possession statute seems clearly unconstitutional under *Lopez* and *Morrison*, for it involves a non-economic crime and has no jurisdictional element. Nonetheless, it currently remains on the books. 159 Similarly, the statute outlawing possession of child pornography appears unconstitutional, for its jurisdictional element – the mere requirement that some physical item used in connection with the crime have crossed state lines at some point in time – appears insufficient to limit prosecution to only those cases that actually affect interstate commerce. Indeed, some courts have started entertaining “as applied” challenges to the statute on this basis. 160 Finally, the federal statute forbidding felons from possessing firearms, as interpreted in *Scarborough*, seems unconstitutional for the same reasons as the federal child pornography statutes. The mere showing that a firearm has crossed state lines at some point in time should not be sufficient to show that the defendant’s subsequent possession of the firearm affects interstate commerce. Nonetheless, every Court of Appeals that has heard a challenge to this statute has thus far upheld it. 161

In short, if *Lopez* and *Morrison* are carried to their logical conclusion, the scope of the overlap between federal and state criminal jurisdiction will be significantly reduced in a manner that will limit the scope of Congress’ power to enact criminal laws that merely duplicate state

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159 The statute forbidding simple possession of narcotics has previously been upheld on the ground that Congress had made findings that the possession of narcotics had an aggregate effect on interstate commerce. See, e.g., United State v. Watson, 942 F. Supp. 1378 (D. Kan. 1996). This rationale appears no longer to be valid in light of the *Morrison* Court’s holding that aggregation cannot be used to show that non-economic crimes substantially affect interstate commerce. Strangely, no federal court seems to have considered a post- *Morrison* challenge to the simple possession statute. In a related context, however, the Ninth Circuit Court of Appeals has upheld an injunction against the enforcement of the Controlled Substances Act against users and growers of “medicinal marijuana.” *See* Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), cert. granted, __ U.S. __, 124 S.Ct. 2909 (2004). The Supreme Court will decide this issue later this term.

160 See, e.g., United States v. McCoy, 323 F.3d 1114, 1126 (9th Cir. 2003) (the use of a camera and film made out of state to take obscene photographs of child insufficient to confer federal jurisdiction under Commerce Clause); United States v. Rodia, 194 F.3d 465, 473 (3d Cir. 1999) (noting that “the limiting jurisdictional factor” in the child pornography statute “is almost useless . . . since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce and will therefore fall within the sweep of the statute”); United States v. Angle, 234 F.3d 326, 337 (7th Cir. 2000) (upholding child pornography statute, but expressing “doubts” as to whether jurisdictional element is sufficient to show a substantial effect on interstate commerce). *But see*, e.g., United States v. Bausch, 140 F.3d 739, 741 (8th Cir. 1998) (holding that the jurisdictional element is sufficient to "ensure[] through a case-by-case inquiry, that each defendant's pornography possession affected interstate commerce"); United States v. Robinson, 137 F.3d 652, 656 (1st Cir. 1998) (same).

161 See, e.g., United States v. Cardoza, 129 F.3d 6, 11 (1st Cir. 1997); United States v. Santiago, 238 F.3d 213, 216 (2d Cir. 2001); United States v. Singletary, 268 F.3d 196, 205 (3d Cir. 2001); United States v. Bostic, 168 F.3d 718, 723 (4th Cir. 1999); United States v. Darrington, 351 F.3d 632, 634 (5th Cir. 2003); United States v. Napier, 233 F.3d 394, 401-02 (6th Cir. 2000); United States v. Wilson, 159 F.3d 280, 286 (7th Cir. 1998); United States v. Stuckey, 255 F.3d 528, 530 (8th Cir. 2001); United States v. Jones, 231 F.3d 508, 514-15 (9th Cir. 2000); United States v. Bayles, 310 F.3d 1302, 1308 (10th Cir. 2002); United States v. Dupree, 258 F.3d 1258, (11th Cir. 2001). *See also* Baker, *supra* note 48, at 675 (noting that “the lower federal courts have . . . nearly unanimously refused to apply *Lopez* to invalidate federal criminal laws”); Andrew St. Laurent, *Reconstituting United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM. J. L. & SOC. PROBS. 61, 105 (noting that since *Lopez*, “courts have found the presence of a jurisdictional element, some part or prop involved in the crime which related to interstate commerce, to be sufficient for the statute to pass constitutional scrutiny”); Marcus Green, *Guns, Drugs, and Federalism: Rethinking Commerce-Enabled Regulation of Mere Possession*, 72 FORDHAM L. REV. 2543, 2576-2577 (2004) (arguing that the automatic acceptance of the “jurisdictional element” in the felon in possession statute reflects “confusion resulting from the failure to distinguish between substantial effects doctrine and Congress's traditional power to directly regulate the channels of, and things in, interstate commerce”).
laws. Intrastate “possession” crimes and crimes of violence will be reserved to the states, for the most part, and federal criminal prosecution will focus more strongly on cases that are truly beyond the competence of state government. To this extent, the relationship of federal and state criminal law will be brought in closer accord with the principle of subsidiarity.

B. Guidelines to Limit Prosecutorial Discretion

Even if the Lopez and Morrison decisions are carried to their logical conclusion, the overlap between federal and state criminal law will still be substantial, as will the disparities that go with it.\textsuperscript{162} Therefore, it is necessary to develop principles to guide the decision of federal prosecutors as to whether to take cases that involve violations of both state and federal law.

The Department of Justice has published a comprehensive set of standards, called the “Principles of Federal Prosecution,” ("Principles") which are “intended to promote the reasoned exercise of prosecutorial discretion” in criminal matters ranging from initiating prosecution to participating in sentencing matters.\textsuperscript{163} The Principles of Federal Prosecution direct that the prosecutor should weigh the following factors in deciding whether to bring charges in a given case: (1) whether there is a “substantial federal interest” in bringing the case; (2) whether the person is “subject to effective prosecution in another jurisdiction;” and (3) whether there exists “an adequate non-criminal alternative to prosecution.”\textsuperscript{164}

At first glance, these factors, and particularly the first two, appear to comport perfectly with the principle of subsidiarity. Purely local instances of street crime – arson, small-time drug dealing, weapons possession – seemingly involve no “substantial federal interest,” and are generally subject to “effective” local prosecution. Thus, one would assume, the Principles of Federal Prosecution would cause federal prosecutors to filter out most of these cases.

But a closer look at these Principles reveals that they provide much less guidance on the question of federal versus state prosecution than first appears. For example, in deciding whether there is a “substantial federal interest” in bringing a case, the Principles direct federal prosecutors to look at a variety of generic factors that have little to do with whether the case falls within an area of unique federal competence: the “nature and seriousness of the offense;” the “deterrent effect of prosecution;” the defendant’s “culpability;” the defendant’s criminal history; the defendant’s “willingness to cooperate;” and “the probable sentence or other consequences if the person is convicted.”\textsuperscript{165} All of these are obviously valid considerations, but they apply equally to both local and federal prosecutors. They help determine whether there is a substantial law enforcement interest in bringing a case, but not a specifically federal interest.

\textsuperscript{162} Indeed, the Supreme Court has recently approved Congress’ use of the Spending Power (as opposed to the Commerce Clause) as another means of expanding federal criminal jurisdiction. In Sabri v. United States, 541 U.S. 600, 124 S. Ct. 1941 (2004), the Supreme Court upheld the constitutionality of 18 U.S.C. § 666(a)(2), which outlaws bribery of state and local officials who work for an agency or unit of government that receives more than $10,000 in federal program funds in a given year, despite the fact that the statute requires no nexus between the bribery and the federal funds. For a powerful critique of the constitutionality of this statute, see Richard W. Garnett, The New Federalism, the Spending Power, and Federal Criminal Law, 89 CORNELL L. REV. 1 (2003).

\textsuperscript{163} United States Attorneys Manual § 9-27.110.

\textsuperscript{164} Id. § 9-27.220.

\textsuperscript{165} See id. §9-27.230.
Only one of the factors prosecutors are supposed to use in determining the existence of a “substantial federal interest” has anything to do with whether a case appropriately belongs in federal, as opposed to state court. The Principles direct federal prosecutors to consider whether a given case meets “federal law enforcement priorities.” But of course, this factor is entirely circular: a case involves a “substantial federal interest” if it meets “federal law enforcement priorities.” But what are those priorities? How are they derived? Do they involve federal prosecution of essentially local criminal cases? On these matters, the Principles of Federal Prosecution are silent.

Similarly, the requirement that prosecutors consider whether a case is subject to “effective prosecution in another jurisdiction” provides far less guidance than appears at first glance, and some of this guidance tends to encourage the use of the federal forum to exploit disparities between the federal and state systems. In determining whether a case is subject to effective prosecution in another jurisdiction, the Principles direct federal prosecutors to consider the “strength of the other jurisdiction's interest in prosecution;” the “other jurisdiction’s ability and willingness to prosecute effectively;” and the “probable sentence or other consequences if the person is convicted in the other jurisdiction.”

As with the “substantial federal interest factor,” this factor does not ask prosecutors to consider whether the case falls within an area of unique federal competence. Rather, it asks prosecutors to focus on the likely effect of initiating or declining prosecution on the generic law enforcement interest in punishing wrongdoers. If a case is of “particularly strong interest to the authorities of the state,” federal prosecutors should consider declining the case, because state authorities are likely to handle it well. But if it appears that letting the state handle the case will lead to dissatisfactory results – whether because of “legal or evidentiary problems” under state law, or because state sentencing practices will not lead to sufficient punishment – federal prosecutors should consider bringing charges.

In short, the Principles of Federal Prosecution are mostly silent on the question of whether a federal prosecutor should bring a case involving an essentially local street crime. Moreover, to the extent they address the issue at all, the Principles encourage federal prosecutors to bring cases to allow law enforcement to avoid the consequences of state policy choices that create “legal or evidentiary problems” for a local prosecution, or provide for sentencing that federal prosecutors consider to be inadequate.

The Principles of Federal Prosecution should be revised to ensure that the federal duplication of state criminal law does not result in the random or intentional imposition of disparate penalties on criminal defendants. Specifically, the Principles should direct prosecutors to consider, before initiating prosecution, whether a given case involves the violation of both state and federal law. If so, the federal prosecution should ask the following questions: (1) Does the case involve some area of specific federal competence? That is, does the federal government

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166 See id.
167 See id.§ 9-27.240.
168 See id.
169 See id.
possess some inherent advantage, by virtue of its nature as a national government that makes federal prosecution more desirable or effective than state prosecution? (2) Does the case involve vindication of some specifically federal interest? For example, was the offense committed on federal property, or was the perpetrator or victim a federal employee acting in the course of their duties? (3) Is the case directly ancillary to a case involving unique federal competence or the vindication of federal interests? For example, is prosecution of this particular street-level drug dealer likely to lead to charges against a higher-level drug trafficker?

If the answer to any of these three questions is yes, then federal prosecution may be appropriate and desirable. If not, then the case should probably be left to state authorities.

Similarly, the Principles of Federal Prosecution should specify that certain considerations are impermissible for federal prosecutors to use in determining whether a case truly belongs in state or federal court. Prosecutors should not take otherwise local cases into federal court specifically to avoid local juries who are perceived to be hostile to law enforcement. Nor should cases be brought into federal court to obtain procedural advantages, or to avoid the suppression of evidence resulting from police violations of state law. Also, cases should not be brought into federal court specifically to obtain longer sentences. As discussed above, each of these considerations involves the intentional exploitation of disparities between the state and federal systems, and the intentional evasion of state policy decisions. Reliance on such considerations involves the intentional violation of the principle of subsidiarity, and should be expressly forbidden by the Principles of Federal Prosecution.

By insisting that every federal case involve an area of unique federal competence or the vindication of federal interests, and by forbidding federal prosecutions motivated by the desire to exploit disparities between the federal and state systems, the Principles of Federal Prosecution can bring federal criminal law enforcement back into alignment with the Principle of Subsidiarity. Federal prosecutors will provide needed assistance to state and local authorities, without taking over or nullifying their functions. And society will be better for it.