RIGHT AT HOME: MODELING SUB-FEDERAL RESISTANCE AS CRIMINAL JUSTICE REFORM

TREVOR GEORGE GARDNER*

ABSTRACT

Over the past two decades, state and local governments have crippled the federal war on marijuana as well as a series of federal initiatives designed to enforce federal immigration law through city and county police departments. This Article characterizes these and similar events as sub-federal government resistance in service of criminal justice reform. In keeping with recent sub-federal criminal reform movements, it prescribes a process model of reform consisting of four stages: enforcement abstinence, enforcement nullification, mimicry, and enforcement abolition. The state and local governments that pass through each of these stages can frustrate the enforcement of federal criminal law while also challenging widely-held assumptions regarding the value of criminal surveillance and criminal sanction. In promoting sub-federal government empowerment within the framework of criminal federalism, this Article breaks from conventional theories in the criminal law literature regarding the legal and policy strategies most likely to deliver fundamental change in American criminal justice.

I. INTRODUCTION 527
II. FEDERAL AUTHORITY OVER CRIMINAL ENFORCEMENT (1968-PRESENT) 534
III. A PROCESS MODEL OF SUB-FEDERAL RESISTANCE IN PURSUIT OF CRIMINAL JUSTICE REFORM 540
A. Stage 1: Abstention 541
B. Stage 2: Nullification 548
C. Stage 3: Mimicry 550
D. Stage 4: Abolition 555
IV. INSTRUMENT OR IDEOLOGY?: SUB-FEDERAL RESISTANCE AS A MEANS TO CRIMINAL JUSTICE REFORM 561
A. A Primary Benefit of the Ideological Approach to Sub-federal Resistance: The Democratization of Threat Assessment 562
B. A Primary Cost of the Ideological Approach to Sub-Federal Resistance: Unaccountable Police and Negative Innovation 564
V. CONCLUSION 566

I. INTRODUCTION

Less than a year after the American Civil Liberties Union (ACLU) published a report[1] on racially disparate drug arrests in the nation's capital, the District of Columbia City Council passed an ordinance that

* Assistant Professor of Law, University of Washington School of Law. This Article has benefitted from the helpful comments of a number of generous readers including Sanne Knudsen, Guy Uriel-Charles, Daniel Richman, Adam Cox, David Sklansky, Jonathan Simon, Richard Myers, Stephen Lee, and Mary Whisner, and from presentation opportunities at the Duke Culp Colloquium, the Annual Meeting of the Law and Society Association, and the Comparative Law & Society Studies Workshare at the University of Washington.

1. AMERICAN CIVIL LIBERTIES UNION, BEHIND THE D.C. NUMBERS: THE WAR ON MARIJUANA IN BLACK AND WHITE (June 2013), https://www.acludc.org/sites/default/files/docs/2013/ACLU%20Marijuana%20in%20Black%20and%20White%20Behind%20the%20DC%20Numbers%207%202013.pdf [https://perma.cc/CHY2-VBHH].

decriminalized simple possession of marijuana. The penalty for marijuana possession fell from a maximum of one year in jail to a small fine less costly than a ticket for littering.[2]

Unsatisfied with the victory, the city's marijuana legalization advocates pressed on. Three months after passage of the decriminalization measure, a group called the D.C. Cannabis Campaign gathered approximately 57,000 signatures in support of a ballot initiative that would legalize the possession of up to two ounces of marijuana and the home cultivation of up to three marijuana plants. On November 4, 2014, seventy percent of D.C. voters approved the measure—Initiative 71—fully legalizing recreational use of marijuana under D.C. law.[3]

As one might expect, marijuana legalization in the nation's capital held special significance. A representative for a national marijuana legalization nonprofit described the D.C. campaign as the guiding light for an emerging movement: "The nation's capital has an exaggerated impact. If Washington, D.C., can legalize marijuana and the sky doesn't fall, things will get a lot easier in these other states."[4]

At least two U.S. congressmen seemed to share this view. Jason Chaffetz (R-UT), chairman of the House Oversight Committee, and Mark Meadows (R-NC), chairman of the Congressional Subcommittee on Government Operations, sent a letter to D.C. Mayor Muriel Bowser on the eve of Initiative 71's implementation, insisting that the law was invalid. The chairmen based their objection on the Home Rule Act—a

---

2. Mike DeBonis & Peter Hermann, *Decriminalization Arrives, and D.C. Police Prepare for Sea Change in Marijuana Laws*, WASH. POST (July 17, 2014), https://www.washingtonpost.com/local/dc-politics/decriminalization-arrives-and-dc-police-prepare-for-sea-change-in-marijuana-laws/2014/07/16/0f21a2b8-0c82-11e4-b8e5-d0de80767fc2_story.html [https://perma.cc/9VUK-VDJH].

3. Mike DeBonis, *D.C. Voters to Decide on Marijuana Use in November*, WASH. POST (Aug. 6, 2014), https://www.washingtonpost.com/local/dc-politics/dc-voters-to-decide-on-marijuana-use-in-november/2014/08/06/11e15576-1d7a-11e4-ae54-0cfe1f974f8a_story.html [https://perma.cc/FN87-M5VV]. *See also* Aaron C. Davis, *D.C. Voters Overwhelmingly Support Legalizing Marijuana, Joining Colo., Wash.*, WASH. POST (Nov. 4, 2014), https://www.washingtonpost.com/local/dc-politics/dc-voters-titling-heavily-toward-legalizing-marijuana-likely-joining-colo-wash/2014/11/04/116e83f8-60fe-11e4-9f3a-7e28799e0549_story.html?utm_term=.67cdc7c6c903 [https://perma.cc/LW5J-G87D].

4. Marc Fisher et al., *With Marijuana Legalization, Green Rush Is on in D.C.*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/local/with-marijuana-legalization-green-rush-is-on-in-dc/2015/02/25/23c3f1de-bc78-11e4-b274-e5209a3bc9a9_story.html [https://perma.cc/KC27-8C6R]. The city campaign would have been unimaginable thirty years earlier. In 1983, when First Lady Nancy Reagan launched the "Just Say No" anti-drug campaign, the federal government seemed to set the drug enforcement agenda for all levels of government, federal and otherwise. Sam Roberts, *Robert Cox, Man Behind the 'Just Say No' Antidrug Campaign, Dies at 78*, N.Y. TIMES (June 22, 2016), https://www.nytimes.com/2016/06/23/business/media/robert-cox-man-behind-the-just-say-no-antidrug-campaign-dies-at-78.html [https://perma.cc/FUG5-Z5JX].

federal statute preventing a D.C. bill from becoming law until after a period of Congressional review.[5] The letter states, in part,

> If you decide to move forward tomorrow with the legalization of marijuana in the District, you will be doing so in knowing and willful violation of the law. Please provide a response to the following by March 10, 2015:
>
> 1) A list of any District of Columbia employee who participated in any way in any action related to the enactment of Initiative 71, including the employee's salary and position, the amount of time each employee engaged in the action(s), and the action(s) taken by the employee. Please also provide a list of any employee who declined to participate in activities related to Initiative 71. . . .
>
> 3) Any document or communication related to the enactment of Initiative 71.
>
> The Committee on Oversight and Government Reform is the principal investigative committee in the U.S. House of Representatives. Pursuant to House Rule X, the committee has authority to investigate "any matter" at "any time."[6]

On the same day the chairmen sent the letter to Mayor Bowser, Chairman Chaffetz gave an interview to the *Washington Post* threatening D.C. officials with criminal penalties: "[T]here are very severe consequences for violating [the Home Rule Act]. You can go to prison for this. We're not playing a little game here."[7]

D.C. City Councilmember Brianne Nadeau responded to Chaffetz's warnings with defiance rather than deference:

> A representative from half a continent away is threatening to lock up our mayor for the crime of implementing the will of District voters . . . . I support the will of the people and I reject the whims of overreaching congressmen. If they lock up the mayor, they better take me too.[8]

---

5. Letter from Jason Chaffetz, Chairman of the Congressional Committee on Oversight and Government Reform & Mark Meadows, Chairman of the Congressional Subcommittee on Government Operations, to Washington, D.C., Mayor Muriel Bowser (Feb. 24, 2015), https://oversight.house.gov/wp-content/uploads/2015/05/Letter-to-Mayor-Bowser-022415.pdf [https://perma.cc/26K7-ZSSW].

6. *Id.*

7. Mike DeBonis & Aaron C. Davis, *Bowser: Legal Pot Possession to Take Effect at Midnight in the District*, WASH. POST (Feb. 25, 2015) (quoting Rep. Jason Chaffetz (R-Utah), https://www.washingtonpost.com/local/dc-politics/house-republicans-warn-dc-mayor-not-to-legalize-pot/2015/02/25/2f784a10-bcb0-11e4-bdfa-b8e8f594e6ee_story.html [https://perma.cc/S2AB-FVVS].

8. Benjamin Freed, *Jason Chaffetz Is Powerless to Stop DC's Marijuana Legalization*, WASHINGTONIAN (Feb. 25, 2015), https://www.washingtonian.com/2015/02/25/jason-chaffetz-is-powerless-to-stop-dcs-marijuana-legalization/ [https://perma.cc/5G9Y-UYK6].

As of this writing, Mayor Bowser and Councilmember Nadeau have managed to avoid arrest. There has been no additional scrutiny from Congress, and subsequent media reports indicate that federal officials will not challenge Initiative 71 in court.[9] Moreover, the city's legalization campaign appears to have affected the zeal with which federal police in D.C. enforce the federal marijuana prohibition on federal property in the capital. The U.S. Park Police reported 501 marijuana "incidents" in D.C. in 2013 and 41 arrests in 2014—a period spanning the vote on full legalization under city law.[10]

In the view of at least one prominent criminal law scholar, this sort of federal retreat from the field of criminal enforcement is the solution to many of the problems that plague the contemporary criminal justice system. In *The Collapse of American Criminal Justice*, William Stuntz argues that the legitimacy and efficacy of the criminal justice system has "collapsed" under the weight of federal government meddling—meddling that has come to undermine the core functions of local government and the moderating influence of local democratic politics.[11] For Stuntz, maximal local democratic accountability is the clear answer to chronic penal dysfunction, and only a radical push for greater local democratic control of police and crime policy—control wrested from both state and federal government—will bring about the reforms necessary to rehabilitate the American penal system.[12]

A number of criminal law scholars have found Stuntz's arguments both provocative and profoundly misguided.[13] Chief among them, Stephen Schulhofer insists that local democracies are in fact the primary

---

9. Jonathan Topaz, *Bowser: D.C. Won't Back Down in Chaffetz Pot Showdown*, POLITICO (Feb. 25, 2015, 2:34 PM), https://www.politico.com/story/2015/02/jason-chaffetz-and-dc-in-pot-showdown-115495 [https://perma.cc/2N4Z-EB5L].

10. Marc Fisher et al., *supra* note 4.

11. *See* WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 308-09 (Harv. Univ. Press 2013) (2011).

12. *Id.* at 7-8; *see also* DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 92 (2008) [hereinafter SKLANSKY, DEMOCRACY AND THE POLICE]; Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1834 (2015).

13. Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1079-80 (2013). For normative theories on federal intervention into local police misconduct, see Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 377-79 (2011) (arguing for additional federal policy levels in pursuit of local police reform); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3234, 3243 (2014) (arguing for a more effective system of federal prosecution of local police misconduct); Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 54-56 (2012) (arguing for a restructuring of existing federal remedies to police misconduct in order to incentivize preemptive state and local government actions in the interest of police reform).

cause of penal dysfunction.[14] Schulhofer argues that this has been the case for much of American history, given that, in his view, "[t]he worst defects in criminal justice before 1960 flowed directly from the localized politics and weak procedural protections that Stuntz seeks to restore."[15] For Schulhofer and other critics, local government empowerment in criminal justice would mean a return to this prior state of affairs—one in which municipal police misconduct and corruption go largely unchecked.

Momentarily setting aside the merits of their respective assessments, it is important to first note that both Stuntz and Schulhofer frame the relative influence of local and federal government on the penal system in dichotomous terms. Indeed, if either of these leading voices is right in his diagnosis of the source of penal dysfunction, the basic blueprint for criminal justice reform within the federalist system would be a simple matter—either a bottom-up or top-down legal and administrative campaign. However, both perspectives overlook the policy and administrative diversity at each level of government. Crime policy and corresponding enforcement at the local level, for instance, are not wholly good or bad. This should be taken as a modest claim given that there are tens of thousands of local government units.[16] The story of criminal federalism is further complicated by the multiple and varied roles the federal government plays in the modern criminal justice system. Contrary to representations in the criminal law literature, the federal government has served as a catalyst for many of the first-order problems in criminal justice—problems such as prison proliferation, overcriminalization, and over-reliance on police departments.[17] Put simply, the federal government is in many ways responsible for contemporary criminal justice dysfunction.[18] Over the past forty

14. *See generally* Schulhofer, *supra* note 13. Each year there are approximately 10.6 million admissions to "local jails." At any one time, 2.3 million persons nationwide are detained in a variety of contexts, including jails, state prisons, federal prisons, juvenile, military, immigration detention centers, and civil commitment wards. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html?c=pie&gclid=CjwKCAjw0N3nBRBvEiwAHMwvNvQuL--oV6joakHyuEWB5wMIwlpTHAcqtpKuwDYZkOuR0FyYr36rRoCv1QQAvD_BwE [https://perma.cc/NF4J-8FPH].

15. Schulhofer *supra* note 1, at 1046.

16. Press Release, U.S. Census Bureau, Census Bureau Reports There are 89,004 Local Governments in the United States (Aug. 30, 2012), https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html [https://perma.cc/B34R-BUZD].

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

18. For an in-depth study of the way in which federalism structures criminal justice policy outcomes, see *id.* at 5-6. For an alternative view of the relationship between federalism, security governance, and the pursuit of social order by way of federal mandate, see Ernest A. Young, *Welcome to the Dark Side – Liberals Rediscover Federalism in the Wake of the*

years, it has expanded the scope of criminal liability, increased the scope of criminal surveillance, and facilitated the militarization of police departments.[19]

Consider specific examples. In 2014, the U.S. Department of Justice directed the distribution of military equipment to the Ferguson, Missouri, police department while at the same time insisting that public officials in Ferguson adopt "community-oriented" policing programs in the wake of the police shooting of Ferguson resident Michael Brown.[20] In the field of immigration, the federal government has spent nearly all of the past two decades pursuing the incorporation of every state and local police department into the federal immigration enforcement

---

War on Terror, 69 BROOK. L. REV. 1277, 1277-78 (2004). *See also* Ann Althouse, *The Vigor of Anti- Commandeering Doctrine in Times of Terror,* 69 BROOK. L. REV. 1231, 1233 (2004).

19. In recent years, criminal law scholars have turned their attention to the issue of criminal federalism, documenting the evolving relationship between the federal government and sub-federal governments with respect to criminal matters. These scholars seem to be motivated by the belief that a better understanding of criminal federalism will help to alleviate criminal justice dysfunction. For a broad overview of criminal federalism as it relates to the topics discussed in this Article, see generally Malcolm M. Feeley et al., *The Role of State Planning in the Development of Criminal-Justice Federalism*, *in* PUBLIC LAW AND PUBLIC POLICY 204 (John A. Gardiner ed., 1977); *see also* MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION 1968-1978 (1980); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011); Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51 (2008); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377 (2006) [hereinafter Richman, *Past, Present, and Future*]; David A. Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012) [hereinafter Sklansky, Crime & Immigration]; Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831 (2005). Similar to this Article, the criminal justice federalism literature maintains thematic overlap with writings promoting a "new federalism." Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014). *See generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014); Cristina M. Rodriguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2097 (2014).

20. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1, 6 (2015) [hereinafter FERGUSON INVESTIGATION], http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf [https://perma.cc/P7D3-4UXG]. The Pentagon, through its Excess Property Program, supplied local police departments with $4.3 billion in military gear since 1997, with nearly half a billion in military gear provision provided in 2013 alone. Christopher Ingraham, *The Pentagon Gave Nearly Half a Billion Dollars of Military Gear to Local Law Enforcement Last Year*, WASH. POST (Aug. 14, 2014) https://www.washingtonpost.com/news/wonk/wp/2014/08/14/the-pentagon-gave-nearly-half-a-billion-dollars-of-military-gear-to-local-law-enforcement-last-year/?utm_term=.94ec1a62b0fb [https://perma.cc/ZNR5-AEPR]. The Justice Department paid for body armor, armored vehicles, and surveillance equipment for local police through grant programs, and the Department of Homeland Security had facilitated the purchase of Ferguson's Bearcat vehicle as part of a Homeland Security grant for $360,000. Julie Bosman & Matt Apuzzo, *In Wake of Clashes, Calls to Demilitarize Police*, N.Y. TIMES, Aug. 15, 2014, at A1.

system. Over the same period, it has clung to the role of chief architect of the War on Drugs despite considerable evidence of the initiative's futility.[21]

If the federal government is not the savior, but instead a frequent bad actor in the emerging narrative of criminal justice reform, reform advocates face a difficult question: who or what will reform the federal government? To credibly answer this question, criminal justice reformers must discard conventional assumptions regarding the relationship between criminal federalism and social justice. Rather than reducing state and local governments to sites of penal oppression, reformers should appreciate these sites for their capacity to function as a check against unbridled federal ambition in the field of criminal justice.[22]

This point falls in tension with certain political dogmas. Given that the most heralded political achievements in support of the socially and economically marginalized (e.g., the War on Poverty, the Civil Rights Acts, and, most recently, the Affordable Care Act) were based on federal statutes and managed by federal agencies, the notion that state and local government activism can help to deliver a more equitable and more effective system of criminal justice will strike many as misguided. But these federal achievements obscure the role that state and local governments now play in breaking the national fever for punishment. Accordingly, this Article captures the legal and administrative tools at the disposal of sub-federal governments as part of a larger toolkit provided within the framework of criminal federalism.[23] It endorses sub-federal government resistance within this framework as critical to challenging conventional penal practices and the cultural norms that sustain them.

Nevertheless, it would be a mistake to romanticize the relationship between sub-federal governments and criminal justice reform. Regressive crime policy is just as likely to be enacted by the Ferguson City Council as it is by Congress. This Article therefore endorses sub-fed-

---

21. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 89-104 (1997); Brian Stevenson, Drug Policy, Criminal Justice and Mass Incarceration (Working Paper, Global Commission on Drug Policies (January 2011)), http://fileserver.idpc.net/library/drug-policy-criminal-justice-mass-imprisonment%20(1).pdf [https://perma.cc/]. "The federal government has prioritized spending and grants for drug task forces and widespread drug interdiction efforts that often target low-level drug dealing. These highly organized and coordinated efforts have been very labor intensive for local law enforcement agencies with some unanticipated consequences for investigation of other crimes." *Id.* at 4. For a nuanced discussion of the role of the federal government vis-à-vis sub-federal governments in relation to the War on Drugs, see Mona Lynch, *Theorizing the Role of the 'War on Drugs' in US Punishment*, 16 THEORETICAL CRIMINOLOGY 175 (2012).

22. *See generally* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008); BECKETT, *supra* note 21.

23. *But see* Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 U. KAN. L. REV. 1219, 1219-20 (1997).

eral government resistance *as an instrument rather than as an ideology*—as a tool of reform rather than as a philosophy of good crime governance. It demonstrates that when deployed opportunistically, sub-federal resistance can serve as a singularly effective method of opposition to the pernicious problem of overcriminalization.

This Article's normative theory of sub-federal resistance in the interest of criminal justice reform develops in three additional parts. Part II describes the incremental growth of the federal government's influence over state and local criminal administration over the past four decades, initially through the War on Crime and more recently through the incorporation of local police departments into the domestic and national security fields. This short but compelling history provides a helpful backdrop upon which to assess the significance of recent efforts by sub-federal governments to stem the tide of overcriminalization, often despite vehement federal government opposition.

Part III presents a process model of criminal justice reform by way of state and local government resistance to federal criminal initiatives. It captures this process in four stages: 1) sub-federal government *abstention* from a federal enforcement initiative; 2) the *nullification* of the federal initiative as a result of enforcement abstinence; 3) *mimicry* of this method of resistance by other sub-federal governments;[24] and 4) the *abolition* of the federal initiative by way of repeal of the underlying policy. This model is, in part, a distillation of four sub-federal decriminalization movements that openly challenged federal crime policy: the immigrant sanctuary movement; the marijuana decriminalization movement; sub-federal government opposition to enforcement of the Patriot Act; and sub-federal opposition to the enforcement of Prohibition in the 1920s.

Part IV intervenes in the Stuntz-Schulhofer debate by establishing a distinction between *ideological* and *instrumental* sub-federal resistance in service of criminal justice reform. This Article fully endorses the latter, despite reservations about the former.

II. FEDERAL AUTHORITY OVER CRIMINAL ENFORCEMENT (1968-PRESENT)

Proponents of criminal justice reform often project the fundamental restructuring of American penal institutions as a "top-down" pro-

24. For a theoretical treatment of "mimicry" as a process within institutional fields, see generally Lauren B. Edelman & Robin Stryker, *A Sociological Approach to Law and the Economy*, *in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 527, 538 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005).

cess led by the federal government and forced upon local governments.[25] This model of reform is apparent in the Justice Department's response to police misconduct allegations in Ferguson, Missouri, in 2014, and in its broader campaign to challenge local police departments that systematically engage in constitutional rights violations.[26] However, the Justice Department's campaign to fight municipal police misconduct and other similar federal initiatives tends to obscure the federal government's role—past and present—in facilitating criminal justice dysfunction.

Prior to the 1960s, the federal government scarcely engaged in matters of crime control, and the idea of a federal police force and federal authority over state and local police struck the average American as the beginning of a descent into tyranny.[27] The norms of criminal federalism up to and through the middle of the twentieth century were essentially the inverse of the present. Even J. Edgar Hoover, who few would mistake for a critic of federal government power, objected to a centralized system of criminal justice on the grounds that it posed a "distinct danger to democratic self-government," establishing "a dominating figure or group on the distant state or national level."[28] So how did the federal government come to play a major role in criminal enforcement?

The nation shed its aversion to broad federal authority in criminal justice in the presidential election of 1964.[29] Two of the leading candidates in the election—Senator Barry Goldwater and Governor George Wallace—made criminal justice a national political issue by linking

---

25. Simmons, *supra* note 13, at 376; Rushin, *supra* note 13, at 3191-92; *see also* Harmon, *supra* note 13, at 34.

26. *See Conduct of Law Enforcement Agencies*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/spl/police.php [https://perma.cc/J7NR- F66L]. For a series of reports on police misconduct in Ferguson, New Orleans, Seattle, and Portland, respectively, see FERGUSON INVESTIGATION, *supra* note 21; U.S. DEP'T OF JUSTICE – CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (Mar. 16, 2011), http://www.justice.gov/crt/about/spl/nopd_report.pdf [https://perma.cc/XM54-BKCM]; U.S. DEP'T OF JUSTICE –CIVIL RIGHTS DIV., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT (Dec. 16, 2011), http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf [https://perma.cc/TGY6-E9VG]; Letter from Thomas E. Perez and Amanda Marshall, U.S. Dep't of Justice – Civil Rights Div. to Sam Adams, Mayor of the City of Portland, Oregon (Sept. 12, 2012), http://www.justice.gov/crt/about/spl/documents/ppb_findings_9-12-12.pdf [https://perma.cc/BQX9-P6FH].

27. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1144-45 (1995).

28. Simmons, *supra* note 13, at 377. *See also* John Edgar Hoover, *The Basis of Sound Law Enforcement*, 291 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1954); Brickey, *supra* note 27, at 1135; FEELEY & SARAT, *supra* note 19, at 39.

29. *See* BECKETT, *supra* note 21, at 31-32.

civil rights activism to rising crime rates and urban riots, identifying both as representative of a decline in social order.[30]

In advancing these politics, Wallace argued that the " 'the same Supreme Court that ordered integration and encouraged civil rights legislation,' was . . . 'bending over backwards to help criminals.' "[31] John Bell Williams, a state congressman in the Mississippi House, echoed this sentiment, linking both African-American internal migration to the North and the emerging Civil Rights Movement to rising crime rates:

> This exodus of Negroes from the South, and their influx into the great metropolitan centers of other areas of the Nation, has been accompanied by a wave of crime. . . . What has civil rights accomplished for these areas? . . . Segregation is the only answer as most Americans—not the politicians—have realized for hundreds of years.[32]

The 1964 election made crime a core feature of national politics and would serve as a predicate to the Safe Streets Act of 1968. The Safe Streets Act—a path breaking policy given the longstanding norm against federal government interference in local crime politics[33]—established federal funding streams to state and local governments in an effort to shape the quality of local criminal administration.[34] Though the Act ultimately found bi-partisan support in Congress, it had initially drawn criticism from a core group of congressional Republicans who were already alarmed at the extent to which the federal government had expanded its authority over matters traditionally left to local government.[35] Conservative skeptics feared that a national crime-control program would only serve to bolster President Johnson's legacy of revolutionizing the role of the federal government in American life, but they nevertheless supported the Act on the condition that state governments would continue to drive crime policy.[36]

---

30. *See id.* at 90.

31. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 42 (2012); FEELEY & SARAT, *supra* note 19, at 31-34 (internal quotation marks omitted).

32. ALEXANDER, *supra* note 31, at 41 (quoting U.S. House, "Northern Congressman Want Civil Rights but Their Constituents Do Not Want Negros," *Congressional Record*, 86th Cong. 2d sess. (1960) 106, pt.4: 5062-63).

33. Trevor G. Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 56 n.250 (2019) (citing Robert F. Diegelman, *Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience*, 73 J. CRIM. L. & CRIMINOLOGY 994, 997 (1982)).

34. Safe Street Act of 1968, 34 U.S.C. § 10101 (2012).

35. FEELEY & SARAT, *supra* note 19, at 40-42; Safe Street Act of 1968, 34 U.S.C. § 10101 (2012).

36. FEELEY & SARAT, *supra* note 19, at 42-43.

The Safe Streets Act's conditional funding provisions would eventually give the federal government unprecedented influence over sub-federal crime policy. The Act initially designated $100 million to fund local policing projects for fiscal year 1969.[37] Congress subsequently raised the allocation to $300 million for fiscal year 1970, and then to $1.75 billion by 1973.[38] By this time, the federal government had firmly established crime control as a national issue and that sub-federal criminal administration should be governed, at least in part, by federal policy.[39]

A national crime politics took root over the next forty years, from the initiation of the law-and-order campaign of the 1960s through the War on Drugs. One would be hard-pressed to find sustained conflict between the federal government and sub-federal governments regarding crime policy during this period. The relative harmony across the landscape of criminal federalism in the latter half of the twentieth century raises several sociological questions that fall outside the scope of this Article. For instance, how did the law-and-order movement of the 1960s take hold of a large and diverse country inherently fractured under a federalist system? Given the social devastation caused by escalating rates of incarceration, why have cities and counties only recently passed laws designed to combat the problem of overcriminalization? These questions underscore the significance of the various contemporary state and local government campaigns (profiled in Part III) that sought to limit the role of police in federal public security matters.

State and local campaigns calling for the decoupling of police from the federal domestic and national security infrastructure would have seemed unlikely in the early 2000s. The federal government's introduction of the Department of Homeland Security (DHS) in 2002 appeared to extend several decades of relative consensus across the federal government and its sub-federal counterparts regarding crime and security policy and practice. Among the Department's primary goals was the incorporation of state and local police into federal domestic and national security programming, a cooperative arrangement agency administrators thought would ensure unity of purpose, policy, and practice in the field of public security.[40] President Bush wrote an

37. *Id.* at 42-43, 47.

38. *Id.* at 47.

39. James O. Finckenauer, *Crime as a National Political Issue: 1964-76: From Law and Order to Domestic Tranquility*, 1 CRIME & DELINQ. 13, 21-22 (1978); FEELEY & SARAT, *supra* note 19, at 47.

40. The term "public security" is meant to encompass the interests of both criminal justice and national security agencies, as sub-federal police increasingly operate in both institutional fields. To acknowledge this administrative turn and the expanding purview of police, this Article uses "public security" as an umbrella concept capturing a condition that generally refers to the physical protection of the citizenry.

open letter to the American public explaining this vision as indicative of a "national" rather than a federal strategy, and as the first "comprehensive and shared vision" of how to protect the United States from terrorist attack.[41] Bush's letter called for the federal government to shift to a domestic security strategy predicated on cooperation between federal security agencies and state and local police departments.

The strategy seemed a sensible (and perhaps obvious) approach to keeping Americans safe in the post-9/11 security environment. Congress overwhelmingly approved derivative legislation just as criminal and national security scholars were laying the groundwork for a new literature on the logistics of police incorporation into federal domestic security infrastructure.[42] Some argued persuasively that the vertical integration of federal security agencies and sub-federal police departments would encourage civil rights compliance given that local police needed to maintain the trust of the local communities subject to counterterrorism investigations.[43] Matthew Waxman describes the broader normative project of police incorporation succinctly: "A prescriptive goal is to better understand in what specific contexts . . . [national security] localism should be celebrated, and how vertical intergovernmental relations might better be structured to harness it in advancing simultaneously a range of policy priorities."[44] Public-security scholars seemed to agree that the federal government should draw state and

41. OFFICE OF HOMELAND SEC., NATIONAL STRATEGY FOR HOMELAND SECURITY 3 (2002), https://www.dhs.gov/sites/default/files/publications/nat-strat-hls-2002.pdf [https://perma.cc/C6HB-NWRN]. In a letter to the nation, President Bush explained the Homeland Security model of cooperative security governance as an imperative:

> We must rally our entire society to overcome a new and very complex challenge. Homeland security is a shared responsibility. In addition to a national strategy, we need compatible, mutually supporting state, local, and private-sector strategies. Individual volunteers must channel their energy and commitment in support of the national and local strategies. My intent in publishing the *National Strategy for Homeland Security* is to help Americans achieve a shared cooperation in the area of homeland security for years to come.

Id. at 3-4.

42. For the leading example of the normative project of police incorporation, see Daniel Richman, *The Right Fight: Enlisted by the Feds, Can Police Find Sleeper Cells and Protect Civil Rights, Too?*, BOSTON REV. (Dec. 1, 2004) [hereinafter Richman, *The Right Fight*], http://bostonreview.net/forum/right-fight [https://perma.cc/LC4N-PMWY]; *see generally* Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 833, 900-02 (2015); Aziz Z. Huq, *The Social Production of National Security*, 98 CORNELL L. REV. 637, 687-88 (2013).

43. *See* Richman, *The Right Fight*, *supra* note 42.

44. Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 293 (2012).

local police into a more centralized system in renewed efforts to ensure public safety.[45]

Today, however, the idea of unified public security administration—state and local police and federal criminal and national security agents marching in lock-step—faces pointed critique. A growing contingent of scholars contend that reflexive sub-federal police participation in federal public security initiatives encourages the hasty conflation of a number of vastly different social problems. Jennifer Chacón notes, for instance, that federal security officials now situate illegal immigration, immigrant crime, and the threat of terrorism under the single rubric of "national security threat," and that this sort of conceptual entanglement allows security officials to frame the removal of individuals that pose cultural and economic competition to native groups

---

45. *See* Richman, *The Right Fight*, *supra* note 42; Akbar, *supra* note 42, at 845; Huq, *supra* note 42, at 653-54. Much of the scholarship offering normative theories of national security federalism take a critical view of the federal government or local police (or both) in terms of their ability to execute effective counterterrorism measures while upholding individual rights. Richman, *The Right Fight*, *supra* note 42; Akbar, *supra* note 42, at 900-02; Huq, *supra* note 42, at 687-88. However, few, if any, of these projects consider enforcement abstinence in crime and security governance as a legitimate option for skeptical sub-federal governments. Enforcement abstinence is typically captured anecdotally in the literature, but it has yet to be brought within a conceptual framework and considered within a larger legal context.

This oversight can be traced to the centralization of security administration (a process with profound implications for criminal administration and traditional notions of "community policing") and the federal executive's claims in contemporary society of special knowledge of the threats to the social body. Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, 1422-23 (2012). Aziz Rana writes that this claim to specialized knowledge results in the institutions with the constitutional authority to curtail the power of the executive branch ultimately deferring to the presumed expertise of the executive. *Id.* at 1424.

> What marks the present moment as distinct is an increasing repudiation of these assumptions about shared and general social knowledge [of security]. Today, the dominant approach to security presumes that conditions of modern complexity (marked by heightened bureaucracy, institutional specialization, global interdependence, and technological development) mean that while protection from external danger remains a paramount interest of ordinary citizens, these citizens rarely possess the capacity to pursue such objectives adequately. Rather than viewing security as a matter open to popular understanding and collective assessment, in ways both small and large the prevailing concept sees threat as sociologically complex and as requiring elite modes of expertise. Insulated decisionmakers in the executive branch, armed with the specialized skills of the professional military, are assumed to be best equipped to make sense of complicated and often conflicting information about safety and self-defense.

Id. at 1423-24 (footnotes omitted).

This Article suggests that state and local governments in a number of instances (e.g., immigrant sanctuary) have rejected the federal executive's claim to specialized knowledge, produced their own conception of security, and subjected federal security mechanisms to a form of democratic accountability through the practice of enforcement abstinence. This ideological and administrative rupture in the field of security governance has yet to be conceptualized.

as a public safety issue.[46] But the point here is not to critique intergovernmental cooperation in the interest of security; it is to first establish that the federal government is again, as in the 1960s, openly in pursuit of further centralization of the nation's public-security agencies.

However, many state and local governments now object to cooperative criminal enforcement, primarily on the grounds that their public security assessments differ from those of the federal government. In keeping with this objection to cooperative enforcement, these governments use the legal and administrative mechanisms of state and local government to detach from disfavored federal security policies and related enforcement initiatives.

III. A PROCESS MODEL OF SUB-FEDERAL RESISTANCE IN PURSUIT OF CRIMINAL JUSTICE REFORM

This Part presents a process model of sub-federal government resistance to federal public security initiatives. The model is informed by a series of ongoing sub-federal campaigns and builds across four discrete stages: *abstinence*, *nullification*, *mimicry*, and *abolition*.

a. A state or local government *abstains* from the enforcement of a particular federal criminal-enforcement initiative;

b. The decision to abstain *nullifies* the initiative within the abstaining jurisdiction (given federal reliance on sub-federal government resources), producing an alternative model of public security administration that is based upon an alternative theory of public security;[47]

c. Other sub-federal governments may credit the alternative theory of public security and then abstain from the disfavored federal initiative, in effect, *mimicking* the behavior of the first sub-federal government choosing to abstain;

d. The federal government, upon recognizing the scope of enforcement nullification and a corresponding challenge to its own credibility regarding the issue of public security, may choose to *abolish* the policy underlying the opposed initiative.

It is important to note the model's deficiencies. First, the start of the process does not ensure its completion. That is to say, the decision

46. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1831 (2007).

47. For a similar discussion of the production of alternative theories of security administration, see Jennifer Ridgley, *Cities of Refuge: Immigration Enforcement, Police, and the Insurgent Genealogies of Citizenship in U.S. Sanctuary Cities*, 29 URB. GEOGRAPHY 53 (2008), http://www.tandfonline.com/doi/abs/10.2747/0272-3638.29.1.53 [https://perma.cc/T74C-DFUP].

by a sub-federal government to abstain from participation in the enforcement of a federal criminal initiative will not necessarily result in the abolition of the federal initiative, in mimicry by other sub-federal governments, or in nullification of the federal initiative within abstaining jurisdictions. Second, a state government may block a local government's enforcement-abstinence policy given the supremacy of state law over municipal law.[48] Third, the federal government may be able to quash sub-federal opposition by conditioning federal funding to states and municipalities on participation in the federal criminal initiative in question.[49]

Sub-federal governments that engage in this process may, nevertheless, impact criminal justice in at least three respects. In their efforts at resistance, these governments may limit the reach of federal criminal enforcement initiatives by denying the federal government use of sub-federal resources; they may communicate an alternative theory of public security to a national audience; and they may exhibit, to the same audience, an alternative model of public-security administration.[50]

A. Stage 1: Abstention

A state or local government will abstain from a federal criminal-enforcement initiative after recognizing a discrepancy between its own

48. Several states have enacted laws that prohibit immigration sanctuary policies at the local level. Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them.*, N.Y. TIMES (July 6, 2017), https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html?_r=0 [https://perma.cc/AP2H-CWNU]. Others make uncooperative municipalities ineligible for state funds. Still others (e.g., the state of Texas) impose fines and other punishments against local governments and officials that fail to cooperate with federal immigration enforcement requests. *Id.*

49. *See* Trevor Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 73-74, nn. 354, 356 (2019). Congress has made several attempts at passing legislation that would withhold public security funding from immigrant sanctuary jurisdictions. *See, e.g.*, Carl Hulse, *Congress Prepares to Vote on Defunding 'Sanctuary Cities'*, N.Y. TIMES (Oct. 20, 2015, 6:20 AM), https://www.nytimes.com/politics/first-draft/2015/10/20/congress-prepares-to-vote-on-defunding-sanctuary-cities/ [https://perma.cc/6GVR-4ENB]. The legislation has stalled in Congress despite being framed as a critical public safety measure. *See* Mike DeBonis, *House Passes Bills to Crack Down on 'Sanctuary Cities' and Deported Criminals Who Return to U.S.*, WASH. POST (June 29, 2017), https://www.washingtonpost.com/powerpost/house-passes-bills-to-crack-down-on-sanctuary-cities-and-deported-criminals-who-return-to-us/2017/06/29/f65419c4-5cff-11e7-9fc6-c7ef4bc58d13_story.html?utm_term=.5c7f9ba2b109 [https://perma.cc/V57Q-DHJ6].

50. At present, criminal justice reform advocates often stumble into the idea of sub-federal resistance as a path to decriminalization. Few, if any, promote sub-federal resistance as an effective method of criminal administration, even with the growth of federal ambition in criminal justice in the Homeland Security era. The model of sub-federal resistance posed in this Part identifies various checks against these federal ambitions, specifically against federal attempts to utilize state and local law police for federal projects in criminal and national security enforcement.

theory of public security and that of the federal government. Sub-federal governments can abstain by way of legislation or by issuing an administrative order, either through the chief public executive or the chief police administrator.[51] In mandating enforcement abstinence, a sub-federal government asserts that it can achieve public safety within the confines of the jurisdiction without participating in the overarching federal initiative.

The sub-federal governments' option to either participate in or abstain from federal criminal enforcement derives from a series of U.S. Supreme Court rulings under the Tenth Amendment. These rulings—rarely addressed in the criminal law and crime policy literatures—bar the federal government from issuing directives to state and local government. In both *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*[52] and *New York v. United States*,[53] the Court established that Congress may not commandeer the legislative process of the states to compel their participation in federal regulatory programs. The Court affirmed Congress' power to condition federal funding to states, but it held that states have a constitutional right to abstain from federal regulatory activity.[54] This restriction came to be known as the "anti-commandeering" rule following the Court's decision in *Printz v. United States*.[55] The anti-commandeering rule is increasingly

---

51. Office of the Chief of Police, Los Angeles Police Department, Special Order No. 40 (Nov. 27, 1979), http://keepstuff.homestead.com/spec40orig.html [https://perma.cc/EUY6-A36P] (stating that in 1979, the LAPD had a policy restricting the enforcement of immigration laws in order to improve cooperation between the LAPD and the communities it served); H.J.R. Res. 22, 23rd Leg., 1st Sess. (2003) [hereinafter H.J.R. Res. 22], http://www.legis.state.ak.us/PDF/23/Bills/HJR022Z.PDF [https://perma.cc/4GBX-TRYE] (prohibiting state agencies from using state resources to enforce federal immigration matters, "which are the responsibility of the federal government"); CITY OF TAKOMA PARK, MD., ORDINANCE NO. 2007-58: AN ORDINANCE REAFFIRMING AND STRENGTHENING THE CITY OF TAKOMA PARK'S IMMIGRATION SANCTUARY LAW (2007), https://www.codepublishing.com/MD/TakomaPark/#!/TakomaPark09/TakomaPark0904.html#9.04.010 [https://perma.cc/5K6L-7AJ6]; BOARD OF SUPERVISORS, SAN FRANCISCO, RESOLUTION NO. 1087-85 (Dec. 1985), https://sfgov.org/oceia/sites/default/files/Documents/SF%20Admin%20Code%2012H-12I.pdf [https://perma.cc/4E8H-YB8B]; Richard M. Daley, Executive Order 89-6 (Equal Access to Municipal Benefits) (1989), http://chicityclerk.s3.amazonaws.com/s3fs-public/document_uploads/executive-order/1989/F89-93.pdf [https://perma.cc/LVS3-VL79]; NAT'L IMMIGRATION LAW CTR. (NILC), LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (2008) [hereinafter NILC: LAWS, RESOLUTIONS, AND POLICIES], http://www.ailadownloads.org/advo/NILCLocalLawsResolutionsAndPoliciesLimitingImmEnforcement.pdf [https://perma.cc/5U5B-ZMM3].

52. 452 U.S. 264, 288 (1981).

53. 505 U.S. 144, 167 (1992).

54. *Id.*

55. 521 U.S. 898, 925 (1997). The holding in *Printz* rendered unconstitutional a federal statute requiring state and local police to participate in the enforcement of a federal gun control provision in the Brady Act. *Id.* at 935. Justice Scalia, writing for the Court, articulated a bright-line rule against the federal conscription of state and local officials.

relevant to criminal law, policy, and administration, as it serves as the legal basis for state and local government resistance to federal criminal enforcement initiatives, particularly those intersecting with domestic and national security policy.

A state or local government's decision to abstain from a federal criminal initiative has two immediate implications: one structural, the other cultural. On an institutional level, enforcement abstinence withholds sub-federal government resources, which are often critical to a credible system of enforcement within the jurisdiction in question. At the same time, enforcement abstinence impacts social norms in that it communicates a perspective that, for the remainder of the discussion, will be referred to as an "alternative theory of public security."

Scholars have labeled the culture and policy debates associated with a clash between the federal government and sub-federal governments as "expressive federalism."[56] This Article is motivated in part by the observation that expressive federalism has been relatively scarce in criminal justice over the course of the mass incarceration era. In matters of public security, much of the United States has accepted the quaint notion that we are all "in it together," and that crime policy at all levels of government should reflect our shared interest in public safety.

In recent years, alternative theories of public security have crept into the national conversation. Government officials in immigrant sanctuary jurisdictions, for example, claim that local police participation in immigration enforcement is incompatible with effective municipal policing. The governments of immigrant sanctuary jurisdictions often assert that it is inappropriate for police to take on the responsibility of enforcing federal immigration law, or that immigrants should not face special penalties (e.g., deportation) for minor criminal offenses.[57] More generally, these governments take issue with the federal government's assessment of risk with respect to unauthorized immigration. There is a common sentiment among associated officials

---

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [N]o case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. See also JAMES B. JACOBS, CAN GUN CONTROL WORK? 77-98 (2002).

56. *See* Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309 (2000).

57. *See, e.g.*, H.J.R. Res. 22, *supra* note 51 (identifying federal immigration matters as "the responsibility of the federal government"); *see generally* Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313 (2015).

that the risk posed by the presence of unauthorized immigrants—even those in contact with the criminal justice system—is much lower than what federal officials claim.[58] Moreover, to the degree that unauthorized immigrants do pose a risk to residents of the jurisdiction, the sub-federal government's interest in eliminating that risk is a lower priority than other civic interests such as establishing trust between police and the immigrant community, multiculturalism, and adherence to civil and human rights.[59] Such sentiments about public security are routinely expressed in immigrant sanctuary policy debates and demonstrate the way in which enforcement abstinence effectively politicizes public-security theory.

Apart from policy debates in public fora, alternative theories of public security can be found in the text of enforcement-abstinence legislation. In 2007, the city of Takoma Park, Maryland, passed an ordinance broadly restricting the Takoma Park Police Department from cooperating with federal officials in the enforcement of federal immigration law.[60] The ordinance expressed that cooperative immigration enforcement would cause a "loss of cooperation with the immigrant community which would threaten the health, safety, and welfare of the entire Takoma Park Community," and, "discourage immigrant residents from reporting crime and suspicious activity and cooperating with criminal investigations."[61]

Alternative theories of public security are also evident in direct communications between sub-federal government officials and federal officials regarding a sub-federal government's decision to abstain from enforcement. A letter from the Secretary of Public Safety for Massachusetts to the Director of the ICE Secure Communities program offers another helpful illustration. The letter, dated June 3, 2011, states that Governor Deval Patrick's administration would restrict police cooperation with the ICE Secure Communities program:

> Governor Patrick and I share your public safety objective and agree that serious criminals who are here illegally should be deported. . . . However, Secure Communities, as implemented nationally, does not reflect those objectives. As stated in the [proposed

58. *See* Gardner, *supra* note 57, at 325.

59. *See id.*; *see also* Cox, *supra* note 56; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 358 (2000).

60. City of TAKOMA PARK, MD., MUN. CODE, ch. 9.04 (2018), http://www.codepublishing.com/MD/TakomaPark/#!/takomapark09/TakomaPark0904.html#9.04 [https://perma.cc/ZRS4-YALW].

61. CITY OF TAKOMA PARK, MD., ORDINANCE NO. 2007-58 (Oct. 29, 2007), https://observatoriocolef.org/_admin/documentos/takoma%20park%20ordinance%202007-58.pdf [https://perma.cc/K7HE-UAMQ].

> Memorandum of Agreement], Secure Communities "is a comprehensive ICE initiative that focuses on the identification and removal of aliens who are convicted of a serious criminal offense and are subject to removal." Yet, ICE statistics indicate that only about 1 in 4 of those deported since the inception of Boston's pilot participation in Secure Communities were convicted of a serious crime and more than half of those deported were identified as "non-criminal."
>
> The Governor and I are dubious of the Commonwealth taking on the federal role of immigration enforcement. We are even more skeptical of the potential impact that Secure Communities could have on the residents of the Commonwealth. Through the community meetings we have held around the Commonwealth, residents have expressed concerns about racial profiling as a result of the program. Some in law enforcement fear the program is overly overbroad and may deter the reporting of criminal activity[.][62]

---

62. Letter from Mary Elizabeth Heffernan, Secretary, Massachusetts Executive Office of Public Safety and Security, to Marc Rapp, Acting Director, Secure Communities Program, Immigration and Customs Enforcement Agency (June 3, 2011) (on file with author). Despite the federal government's claims that it had limited immigration enforcement to the apprehension and removal of criminal aliens, annual deportation totals rose to unprecedented levels between 2004 and 2013. The federal government deported approximately 189,000 persons in 2001, 241,000 in 2004, and 392,000 by 2009. Ana Gonzalez-Barrera & Jens Manuel-Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RES. CTR. (Oct. 2, 2014), https://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/ [https://perma.cc/3RVC-DXDC]. In 2013, the latest year in the supporting record, deportations reached a peak of just over 435,000. U.S. DEP'T OF HOMELAND SEC.., OFFICE OF IMMIGRATION STATISTICS, 2013 YEARBOOK OF IMMIGRATION STATISTICS (2014), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2013_0.pdf [https://perma.cc/9CC7-CMXC]. Immigration and Customs Enforcement Agency funding rose by eighty-seven percent within the same period and federal funding for cooperative immigration enforcement with state and local governments rose from $23 million in 2004 to $690 million in 2011. DORRIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 7 (2013), https://www.migrationpolicy.org/pubs/enforcementpillars.pdf [https://perma.cc/7W66-9X53]. By 2010, the federal government had built an immigration enforcement infrastructure consisting of approximately 250 immigrant detention facilities at a cost of approximately $5.5 million per day. Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24,2014), https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html [https://perma.cc/BNP2-QYTD] (while this article states that over $2 billion is spent on these detention facilities, that number roughly equates to around $5.5 million per day). Immigrants detained at these centers now work to maintain the facilities. Detainees clean bathrooms, cook meals, fold laundry, and restock shelves. *Id.* In 2014, the federal government employed roughly 60,000 immigrant detainees, paying each 13 cents per hour. *Id.* The employee total gave the federal government the single largest workforce in the country while also making it the largest employer of unauthorized immigrant labor. *Id.* The federal government now spends more on immigrant detention than at any point in American history. *Id.* An immigrant detainee supported the facilities internal work-program saying, "[t]hey don't feed you that much . . . but you could eat food if you worked in the kitchen." *Id.* The immigrant detention market is largely controlled by two private companies—Corrections Corporation of America and the GEO Group. *Id.*

San Francisco city officials took a more aggressive position, rejecting cooperative immigration enforcement through a public relations campaign that highlighted immigrant welfare and ethnic diversity as core city-community values. The San Francisco mayor's office advertised the city's sanctuary policy across all of northern California by purchasing ads on television, radio, billboards, and bus stops in various languages including English, Spanish, Chinese, Vietnamese, and Russian.[63] When announcing the public relations campaign, former mayor Gavin Newsom highlighted the importance of providing public services to all of the city's residents, adding that the city held a moral obligation to "protect" immigrants by abstaining from the enforcement of federal immigration law.[64] "Until we get it right in this country on immigration, until we come to grips with the reality of newcomers from around the world . . . then it is appropriate to protect our citizens, to protect our residents and to protect our families . . . ."[65]

The federal response to the San Francisco ad campaign indicates the nature of the competition between two discordant public security narratives. Soon after Newsom's announcement, ICE Assistant Secretary Julie Myers published an open letter to Newsom in which she asked San Francisco county officials to expand access to the county jail and alleged that continued adherence to the city's sanctuary policy would result in "the release of these criminal aliens back into the San Francisco community."[66] Less than a month later, ICE issued a press release with the following headline: "3-week enforcement surge results in 441 arrests in northern California."[67] The release highlighted just two of the 441 immigrants apprehended:

> Among those arrested by the Fugitive Operations Teams in northern California was a previously deported Mexican national whose criminal history includes prior convictions for transportation and

63. Cecilia M. Vega, *S.F. Promotes Services for Illegal Immigrants*, SAN FRAN. CHRON. (Apr. 3, 2008, 4:00 AM), https://www.sfchronicle.com/bayarea/article/S-F-promotes-services-for-illegal-immigrants-3219519.php [https://perma.cc/W3WC-EST8].

64. *Id.*

65. *Id.*

66. *See* Maria L. La Ganga, *'Sanctuary City' No Haven for a Family and its Grief*, L.A. TIMES (July 26, 2008), http://articles.latimes.com/2008/jul/26/local/me-sanctuary26 [https://perma.cc/RG78-EPB7]; *see also* Mike Aldax, *Feds Ask Newsom to Ease City's Sanctuary Policies*, S.F. EXAMINER (July 24, 2008, 12:00 AM), http://www.sfexaminer.com/feds-ask-newsom-to-ease-citys-sanctuary-policies/ [https://perma.cc/MH9B-J8TB]; Bay Area News Group, *Immigration Official Asks Newsom for Access to SF Jails*, EAST BAY TIMES (July 23, 2008, 10:29 PM), http://www.eastbaytimes.com/2008/07/23/immigration-official-asks-newsom-for-access-to-sf-jails/ [https://perma.cc/Z4RB-CV6T].

67. Press Release, U.S. Immigration and Customs Enf't Agency, More than 900 Arrested in ICE Operation Targeting Criminal Aliens and Illegal Alien Fugitives in California (May 23, 2008), https://www.ice.gov/news/releases/0805/080523sanfrancisco.htm [https://perma.cc/7G7U-TMPB].

> sale of heroin. Mauro [last name withheld], 31, was arrested by ICE Fugitive Operations officers at his Sacramento residence Tuesday. [He] was deported five years ago after serving time for the drug conviction, but subsequently re-entered the country illegally. [He] is being prosecuted by the United States Attorney's Office in Sacramento for felony re-entry after deportation, a violation that carries a maximum penalty of 20 years in prison. ICE officials also arrested a foreign national sex offender in Watsonville who has prior convictions for spousal rape and burglary. The 41-year-old Mexican citizen, who was taken into custody earlier this week at a restaurant where he worked, was deported last year and re-entered the country illegally.[68]

The press release's reference to the criminal histories of the two profiled immigrant detainees indicates an attempt by federal officials to discredit the theory of public security promoted by the San Francisco city government. The reference also served to pressure the San Francisco city government and other municipal governments in the region to repeal enforcement abstinence policies and partner with federal officials in the enforcement of federal immigration law.

Sanctuary policies passed in conservative areas of the country around the same time took exception with the federal security agenda in a broad sense, alleging that the agenda had extended well beyond its lawful authority.[69] An immigrant sanctuary provision passed in Sitka, Alaska, for instance, was part of a larger piece of legislation warning of the potential for "abuse of power" in the federal government's enforcement of the Patriot Act.[70] Another sanctuary provision in Butte-Silver Bow, Montana, declared, "the Patriot Act and related federal actions [in the field of security] duly infringe upon fundamental rights and liberties of citizens and visitors of the [city]."[71] Sanctuary policy rationales expressed in politically moderate and conservative jurisdictions frequently make the claim that the federal government holds exclusive responsibility for immigration enforcement and should not look to outsource this responsibility to states and municipalities.[72] Some go so far as to describe the federal government's delegation of immigration-enforcement

---

68. *Id.*

69. Alaska (3); Montana (2); New Mexico (2); Oregon (4). NILC: LAWS, RESOLUTIONS, AND POLICIES, *supra* note 51.

70. Sitka, Alaska, Res. No. 03-886 (2003) (document on file with author).

71. Butte-Silver Bow City and County, Mont., Res. No. 05-8 (2005) (document on file with author). *See generally* Mike Keefe-Feldman, *Strange Bedfellows: PATRIOT Act Resolution Finds Bipartisan Support*, MISSOULA INDEP. (Mar. 17, 2005), https://missoulanews.bigskypress.com/missoula/strange-bedfellows/Content?oid=1136322. [https://perma.cc/39WM-FV2H].

72. H.J.R. Res. 22, *supra* note 51, at 2 (prohibiting using state resources to fight immigration "which are the responsibility of the federal government").

responsibility to sub-federal police as a power grab and indicative of a constitutional crisis.[73]

The immigrant sanctuary movement demonstrates the process by which state and local governments progress from opposing the federal government's theory of public security, to enacting enforcement abstinence policy, to promoting an alternative theory of public security governance.

B. Stage 2: Nullification

Nullification occurs as a consequence of the manpower disparity between the federal government and local governments. The federal government cannot broadly enforce most of its criminal initiatives absent cooperation from state and local police. While the federal government employs 105,000 law enforcement agents across its various public security agencies,[74] state and local governments collectively employ 1.2 million.[75] The reach of a federal criminal initiative within a sub-federal jurisdiction often depends on the extent to which the associated sub-federal government allows its police officers to participate in the initiative's enforcement.

If sub-federal governments broadly decline to assist in the enforcement of federal immigration law, enforcement abstinence may translate to enforcement nullification. For example, of the estimated 11 million unauthorized immigrants residing in the United States, 2.67 million (24 percent) live in California, and of California's unauthorized immigrant population, about 814,000 (30 percent) live in Los Angeles County.[76]

In 2013, the state of California passed the Trust Act, which barred state and local police from honoring federal immigration detainers for criminal suspects unless the requested detainee had been convicted of (rather than merely arrested for) a "serious or violent felony."[77] The Act does permit California police to lawfully grant federal detainer requests in a limited number of circumstances, but cooperation is not

---

73. *Id.* (affirming Alaska's "commitment that the campaign [against terrorism] not be waged at the expense of essential civil rights and liberties of citizens of this country contained in the United States Constitution and the Bill of Rights").

74. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1464 (2009).

75. LISA JESSIE & MARY TARLETON, 2012 CENSUS OF GOVERNMENTS: EMPLOYMENT SUMMARY REPORT 4 (2014), https://www2.census.gov/govs/apes/2012_summary_report.pdf [https://perma.cc/YP3Z-JKVE].

76. Dan Walters, *California's Undocumented Immigrants Pegged at 2.67 Million*, SACRAMENTO BEE (June 30, 2015), https://www.sacbee.com/news/politics-government/capitol-alert/article25838893.html.

77. CAL. GOV'T CODE §§ 7282-7282.5 (West 2014).

required.[78] Far from it. If occurring outside of the narrow range of discretion allowed under the Act, police cooperation with federal government officials constitutes a misdemeanor criminal offense.[79]

Why is the California Trust Act a major problem for the Department of Homeland Security? In short, DHS cannot effectively enforce federal immigration law in Los Angeles County without the support municipal police.

The immigration enforcement policy clash in Los Angeles County indicates the federal government's implementation challenges across the country. DHS Secretary Jeh Johnson addressed the issue in a memorandum in 2014, announcing the termination of "Secure Communities"—one of a succession of cooperative immigration enforcement programs.[80] The letter addresses the impact of sub-federal government opposition on the viability of the program:

> The goal of Secure Communities was to more effectively identify and facilitate the removal of criminal aliens in the custody of state and local law enforcement agencies. But the reality is the program has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws. Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation.[81]

Johnson's letter captures the difficulties federal public-security officials face in enforcement-abstinence jurisdictions. Today, however, DHS officials lobby the nation's largest cities in an attempt to persuade them to drop rigid abstinence policies and refer unauthorized immigrants suspected of terrorism or convicted of gang-related crime or of aggravated felonies under the Immigration and Nationality Act.[82] Several jurisdictions, such as New York City, Philadelphia, Los Angeles, and Cook County, have resisted compliance with these requests,

---

78. *Id.*

79. *Id.*

80. Memorandum from DHS Secretary, Jeh Charles Johnson to Acting Director of U.S. Immigration and Customs Enforcement, Thomas S. Winkowski (Nov. 20, 2014) [hereinafter Memorandum from DHS Secretary, Secure Communities], https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [https://perma.cc/774B-HH4M].

81. *Id.* at 1.

82. Memorandum from DHS Secretary, Jeh Charles Johnson to Acting Director of U.S. Immigration and Customs Enforcement, Thomas S. Winkowski (Nov. 20, 2014) [hereinafter Memorandum from DHS Secretary, Policies Regarding Removal], http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/DP7P-YJ2H].

favoring near-absolute abstinence from the enforcement of federal immigration law.[83]

In a hearing before the House Judiciary Committee in July of 2015, Secretary Johnson was asked to explain why his agency opted to terminate the Secure Communities program. Johnson testified that in the past year alone, state and local police had ignored 12,000 federal immigrant-detention requests.[84] In response, the Department decided to scrap Secure Communities and market its replacement, the Priority Enforcement Program (PEP), as a tempered alternative. Under PEP, DHS officials would limit immigrant detainer requests to arrests for serious criminal offenses.[85] The federal government's modest objectives under PEP indicate the degree to which federal officials need sub-federal police. When state and local governments refuse to consent to cooperative enforcement, enforcement nullification is, in many instances, a likely outcome.

C. Stage 3: Mimicry

When a state or local government successfully nullifies federal enforcement within its jurisdictional boundaries, it produces an enforcement vacuum and, as a result, an alternative theory of public security. The appeal of this theory to other sub-federal governments will depend on security outcomes. Has public safety within the jurisdiction declined as the result of nullification? Or has nullification insulated constituents from harmful direct and collateral consequences of enforcement? Does enforcement abstinence come with meaningful cost savings? If public officials observe the alternative model exhibited by an abstaining jurisdiction and answer one or more of these questions in the affirmative, they may be inclined to mimic the abstaining jurisdiction and join an emerging group of sub-federal government dissenters by passing a rule restricting cooperative enforcement. Mimicry therefore occurs when public officials in peer jurisdictions credit an abstaining sub-federal government's alternative theory of public security and then replicate its alternative public security model.

Sub-federal government opposition to the prospect of cooperative Patriot Act enforcement illustrates the mimicry element of the process model. Congress passed the Patriot Act on October 26, 2001, with the expressed intent of improving the nation's ability to protect itself from

---

83. Jerry Markon, *DHS Deportation Program Meets with Resistance*, WASH. POST (Aug. 3, 2015), https://www.washingtonpost.com/politics/dhs-finds-resistance-to-new-program-to-deport-illegal-immigrants/2015/08/03/4af5985c-36d0-11e5-9739-170df8af8eb9_story.html [https://perma.cc/5XGL-F5SP].

84. *United States Department of Homeland Security: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 24 (July 14, 2015) (statement of Jeh Charles Johnson).

85. Memorandum from DHS Secretary, Secure Communities, *supra* note 80.

terrorism.[86] The Patriot Act's primary provisions pertain to intelligence gathering and sharing, with several establishing new intelligence-sharing channels between national security officials and police.[87] Section 908 of the Act, for instance, calls for federal, state, and local government officials to be trained to gather intelligence in the course of normal duties,[88] and it instructs the U.S. Attorney General, in coordination with the Central Intelligence Agency (CIA), to train police to identify, circulate, and use foreign intelligence information.[89]

In response to aggressive ACLU lobbying against the plan at the state and local levels, several state and municipal legislatures enacted policy restricting participation in Patriot Act enforcement.[90] ACLU leaders described their alternative vision for security as a "dual security" model, in which sub-federal governments use the degree of autonomy they hold under the Constitution to expose federal excess in public

86. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 28 U.S.C. § 509 (2012)) (also known as the "Patriot Act").

87. *Id.*

88. *Id.* § 908. The statute reads as follows:

> TRAINING OF GOVERNMENT OFFICIALS REGARDING IDENTIFICATION AND USE OF FOREIGN INTELLIGENCE.
>
> (a) PROGRAM REQUIRED—The Attorney General shall, in consultation with the Director of Central Intelligence, carry out a program to provide appropriate training to officials described in subsection (b) in order to assist such officials in—
>
> (1) identifying foreign intelligence information in the course of their duties; and
>
> (2) utilizing foreign intelligence information in the course of their duties, to the extent that the utilization of such information is appropriate for such duties.
>
> (b) OFFICIALS—The officials provided training under subsection (a) are, at the discretion of the Attorney General and the Director, the following:
>
> (1) Officials of the Federal Government who are not ordinarily engaged in the collection, dissemination, and use of foreign intelligence in the performance of their duties.
>
> (2) Officials of State and local governments who encounter, or may encounter in the course of a terrorist event, foreign intelligence in the performance of their duties.

Id.

89. *Id.* §§ 908 (a)-(b).

90. *See, e.g.*, Res. No. 03-886, *supra* note 70; Helena, Mont., Res. No. 19181 (Dec. 6, 2004) (document on file with author); Baltimore, Md., City Council Resolution, Preservation of Civil Liberties Resolution-USA Patriot Act (May 19, 2003) (document on file with author).

security administration, subsequently "flip" other sub-federal governments (by way of mimicry), and incrementally expand the reach of the nullification project.[91]

Anti-Patriot Act legislation—enacted across a cluster of New England towns and cities in the mid-2000s—indicates the dynamic driving mimicry. In the preamble of enforcement-abstinence legislation, municipalities in several states that were home to the original American colonies reflected upon the Revolutionary War and the jurisdiction's purported long-standing commitment to the defeat of "tyranny."[92] In Brewster, Massachusetts, the city council passed a resolution recalling its residents' uprising against King George, stating:

> Whereas Patriots of the town of Brewster, then the North Parish of the town of Harwich, in 1774 joined with other Cape Townsmen to block the opening of the September session of the King's Courts, Common Pleas and General Sessions, in Barnstable in the first overt resistance on Cape Cod to the Tyranny of King George III, and [w]hereas once again Cape towns are joining in resistance to Acts that can lead to Tyranny, we join here with the towns of Orleans, Eastham, Wellfleet and Provincetown to adopt a resolution to protect the civil liberties of our residents . . . .[93]

The resolution claimed that the Patriot Act, the Terrorist Information Awareness Program (T.I.P.S.), and various executive orders regarding security administration "threatened" Brewster residents.[94] It accused the U.S. Attorney General of making "threatening statements" about legal opposition to the Patriot Act and other security policies.[95] In light of its claimed findings, the city of Brewster banned par-

---

91. Norman Dorsen & Susan N. Herman, *American Federalism and the American Civil Liberties Union*, *in* WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 21, 27 (2008), https://www.law.yale.edu/system/files/documents/pdf/liman_whyTheLocalMatters.pdf [https://perma.cc/3VGT-PJYE]. The ACLU has taken an agnostic position toward the distribution of authority between the federal government and the states, which allows for the organization to be opportunistic in the civil liberties litigation that intersects with constitutional issues regarding federalism. To this day, the ACLU has not offered a general theory of American federalism that specifies the bounds of Congressional authority. *Id.* at 27.

92. OBSERVATORY OF LEGISLATION AND MIGRATORY POLICIES, RESOLUTIONS AND ORDINANCES CRITICAL OF THE USA PATRIOT ACT AND OTHER LAWS AND POLICIES THAT DIMINISH CIVIL LIBERTIES 57 (2004) [hereinafter OBSERVATORY OF LEGISLATION AND MIGRATORY POLICIES], http://observatoriocolef.org/_admin/documentos/Ordinances%20patriot%20act.pdf [https://perma.cc/N5QF-TML8].

93. *Id. See also* NILC: LAWS, RESOLUTIONS, AND POLICIES, *supra* note 51; *see generally* Thanassis Cambanis, *Resistance to Patriot Act Gaining Ground: Foes Organizing in Communities*, BOS. GLOBE (January 20, 2004), http://archive.boston.com/news/local/massachusetts/articles/2004/01/20/resistance_to_patriot_act_gaining_ground [https://perma.cc/SQ2W-2FU5].

94. OBSERVATORY OF LEGISLATION AND MIGRATORY POLICIES, *supra* note 92, at 57-58.

95. *Id.* at 57.

ticipation in or cooperation with "any inquiry, investigation, surveillance, or detention," unless Brewster police first established probable cause of past or ongoing criminal activity.[96]

Neighboring jurisdictions matched Brewster's lofty rhetoric. The city of Lexington, Massachusetts, passed a resolution barring city police from collecting national security intelligence—either independently or in collaboration with the federal government—absent reasonable suspicion of a criminal act.[97] The council also directed its library officials to ensure the "regular destruction of records that identify the name of the book borrower after the book is returned, or that identify the name of the Internet user after completion of Internet use."[98] In justifying these provisions, Lexington legislators referenced the effort of their forefathers to secure civil liberties during the Revolutionary War and identified Lexington as "the Birthplace of American Liberty."[99] Similarly, the city council of Orleans, Massachusetts, referenced Orleans' "long and distinguished history of defending the liberties of the Colonies and the Constitution of the United States[] in 1772 and 1773 . . . [by] protesting British violations of their rights and liberties," and "vowing to 'defend [independence] with [their] lives.' "[100] Orleans officials claimed that constitutional protections of the town's residents had steadily eroded after the passage of the Patriot Act, and would be further diminished with the passage of the Patriot Act II and T.I.P.S.[101]

---

96. *Id.*

97. *Id.* at 190-93.

98. *Id.* at 192.

99. *Id.* at 191.

100. *Id.* at 249.

101. *Id. See also* City of Pittsburgh, Bill No. 2004-0295 (Pa. 2004), https://observatoriocolef.org/_admin/documentos/Pittsburgh%202004.pdf [https://perma.cc/D4G4-Q9EE]. The City of Pittsburgh, Pennsylvania, passed a local resolution in April of 2004. It declares the Patriot Act to be a broad threat to the civil rights of Americans and non-citizens and announces a series of measures by which local officials can protect against the prospective violations:

> WHEREAS federal policies adopted since September 11, 2001, including provisions in the USA PATRIOT Act (Public Law 107-56), The Homeland Security Act of 2002, and related executive orders, regulations, and actions threaten fundamental rights and liberties by:
>
> (a) Authorizing the indefinite incarceration of non-citizens based on mere suspicion, and the indefinite incarceration of citizens designated by the President as "enemy combatants" without access to counsel or meaningful recourse to the federal courts;
>
> (b) Limiting the traditional authority of federal courts to curb law enforcement abuse of electronic surveillance in anti-terrorism investigations and ordinary criminal investigations;
>
> . . . .

How, then, are we to understand mimicry as a socio-legal process? How can we be sure that the sub-federal governments promoting and passing legislation intended to hamstring Patriot Act enforcement actually shaped the perspective of external public actors and political constituencies? The normative impact of a single state or local government's decision to abstain from a federal enforcement initiative can be difficult to discern; however, social theorists offer a basic framework for analyzing the relationship between culture and institutions that can be used to extend the proposed process model.

In theorizing the role of culture in social movements, cultural sociologists find that social institutions lead the processes of "cultural recoding" that facilitate structural change.[102] For a social movement to take flight, advocates must succeed in "winning the battle for symbolic encoding"[103] by propagating new cultural frames through influential institutions.

In the field of criminal administration, sub-federal governments have taken on this work of recoding and reframing in waging an ideological battle with the federal government over the precise meaning of public security. Both sides seek to establish who or what poses a risk to the public, as well as what configuration of laws, enforcement mechanisms, and enforcement priorities is needed to keep communities safe. Immigrant sanctuary jurisdictions often proclaim to have established strong public security through the trust police receive from the local immigrant community—a trust largely based on the community's understanding that its police will not participate in ICE raids and federal immigrant-removal proceedings.[104] Organizations like the ACLU do similar work in shaping the public's understanding of the meaning of and the means to public safety when promoting concepts like "dual security." The concept of "dual security" is meant to rival the concept

---

> (e) Chilling constitutionally protected speech through overbroad definitions of "terrorism";
>
> (f) Driving a wedge between immigrant communities and the police that protect them by encouraging involvement of state and local police in enforcement of federal immigration law;
>
> (g) Permitting the FBI to conduct surveillance of religious services, Internet chatrooms, political demonstrations, and other public meetings of any kind without having any evidence that a crime has been or may be committed

Id.

102. Ann Swidler, *Cultural Power and Social Movements*, *in* IV SOCIAL MOVEMENTS AND CULTURE 34 (Hank Johnston & Bert Klandermans eds., 1995).

103. *Id.*

104. For an example, see Oakland City Council Res. No. 80584 (2007), https://www.aclusocal.org/sites/default/files/oakland_resolution.pdf [https://perma.cc/7842-5VSZ].

of "national security" as an organizing principle in public security administration. To this end, the ACLU aggressively promotes the idea that sub-federal governments can and sometimes should pursue a public security agenda that conflicts with their federal counterpart.[105] As a general matter, the bigger the gap between the federal security initiative in practice and the federal theory of public security driving the initiative, the more likely it is that other sub-federal governments will take note of the conflict between the federal government and the obstinate sub-federal government and consider the relative efficacy of the contrasting models of security. Effective public security models predicated on enforcement abstinence will inspire other governments to follow suit. As the dominoes fall, momentum builds toward a sub-federal decriminalization movement.

D. Stage 4: Abolition

There is a threshold at which the number of sub-federal jurisdictions that credit an alternative theory of public security and implement an alternative model of security governance will be large enough to nullify, on a national scale, a controversial form of federal criminal enforcement. In response to this setback, the federal government may indefinitely suspend enforcement—what might be considered *de facto* abolition—or it may repeal the legislative provision upon which the enforcement initiative is based. Repeal may be the result of frustration with enforcement dysfunction, concerns about the legitimacy of the rule of law, or federal officials having ultimately credited the alternative theory of public security circulating among the dissenting sub-federal governments.

How likely is it that abolition will occur, given the federal government's interest in projecting its dominance in matters of public security? Is it realistic to think that federal officials will repeal a public security initiative in response to sub-federal resistance? The federal response to state and local marijuana decriminalization suggests that crime policy abolition is a plausible, if not likely, result of widespread enforcement abstinence.

Federal drug enforcement agents are now tasked with dismantling a marijuana sales market that includes 14.4 million marijuana users, 4 million of whom live in decriminalization states.[106] The latter number

105. *See* City of Pittsburgh, *supra* note 101. For a similar characterization of the Patriot Act as a threat to citizen security, see OBSERVATORY OF LEGISLATION AND MIGRATORY POLICIES, *supra* note 92, at 340 (addressing St. Louis City Council Res. No. 273 (2004)).

106. Mikos, *supra* note 74, at 1464. Today, twenty percent of Americans live in a state that permits recreational use of marijuana. *See* Thomas Fuller, *Californians Legalize Marijuana in Vote That Could Echo Nationally*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/09/us/politics/marijuana-legalization.html [https://perma.cc/K6ZP-TVU6].

is important as state and local police conduct most of the front-end work in drug enforcement—specifically, investigations and arrests. Federal law enforcement agents made 6,928 arrests for marijuana offenses in 2012[107]—less than one percent of the approximately 749,825 marijuana arrests that year.[108] Most of the federal government's impact on marijuana trafficking comes at the back-end of the criminal process, where federal prosecutors select a subset of state and local marijuana arrests for federal prosecution.[109] This observation helps to explain estimates placing the probability of arrest for violation of the federal marijuana prohibition within a legalization state at one in 2,000—a rate that is likely far too low to deter marijuana production and distribution in compliance with state law.[110]

The Department of Justice admitted as much in a 2013 memorandum to its line attorneys titled, "Guidance Regarding Marijuana Enforcement."[111] The memo's author, Deputy Attorney General James M. Cole, noted the federal government's limited investigative and prosecutorial resources in enforcing the Controlled Substances Act, and that federal officials had long relied upon state and local police for the street-level investigative work of the federal drug-enforcement system.[112]

> Outside of . . . [select] priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. . . .

---

107. MARK MOTIVANS, U.S. DEP'T JUSTICE, FEDERAL JUSTICE STATISTICS, 2012 - STATISTICAL TABLES (2015), https://www.bjs.gov/content/pub/pdf/fjs12st.pdf [https://perma.cc/Q6KB-RXTU].

108. *Estimated Number of Arrests*, CRIME IN THE UNITED STATES, 2012, https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/29tabledatadecpdf [https://perma.cc/J7VG-C3DZ]; *Arrests for Drug Abuse Violations*, CRIME IN THE UNITED STATES, 2012, https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/arrest_table_arrests_for_drug_abuse_violations_percent_distribution_by_regions_2012.xls [https://perma.cc/NQ2H-ZEC4].

109. Mikos, *supra* note 74, at 1464-65.

110. *See id.* at 1465.

111. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, on Guidance Regarding Marijuana Enforcement to all United States Attorneys (Aug. 29, 2013) [hereinafter Memorandum from James M. Cole], http://www.dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf [https://perma.cc/ZZ3Q-6UL6].

112. *Id.* The Controlled Substance Act establishes three criteria for a controlled substance to be categorized as Schedule 1: the controlled substance (1) "has a high potential for abuse," (2) "has no currently accepted medical use in treatment in the United States," and (3) "[t]here is a lack of accepted safety for use of the drug or other [controlled] substance under medical supervision." Controlled Substances Act, 21 U.S.C. § 812(b)(1) (2012). To be categorized as Schedule II, a controlled substance must: have (1) "a high potential for abuse," (2) an "accepted medical use in treatment in the United States," and (3) "may lead to severe psychological or physical dependence." *Id.* § 812(b)(2).

> The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana--related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.[113]

The memo advises federal prosecutors to limit marijuana enforcement within legalization states to exceptional circumstances such as trafficking to children and trafficking by criminal syndicates, all but eliminating the enforcement of the federal prohibition within decriminalization states.[114]

Outright repeal of a federal criminal initiative is less likely than suspension, though it certainly falls within the realm of realistic possibilities. As referenced above, DHS terminated a series of cooperative immigration enforcement initiatives (e.g., the Criminal Alien Program and Secure Communities) in response to the immigrant sanctuary movement, though federal authorities coupled the termination with the introduction of a more modest alternative.

The clearest case of sub-federal resistance bringing about the repeal of a federal crime-control initiative is likely the historical case of Prohibition. The ratification of the Eighteenth Amendment in 1919 ushered in the Prohibition era, and federal officials soon recognized the need for state and local police support if Prohibition was to have a reasonable chance at success.[115] The Commissioner of the Bureau of In-

---

113. *See* Memorandum from James M. Cole, *supra* note 111.

114. *Id.*

115. Emory Buckner, the U.S. Attorney for the Southern District of New York and a contemporary of Attorney General Smith, pleaded with New York state officials to provide the "machinery" necessary for effective enforcement. James C. Young, *Padlocks Close Cafes but Rum Keeps Flowing*, N.Y. TIMES, Jan. 3, 1926, at XX9 (quoting Emory R. Buckner). Buckner believed that sub-federal governments' continued abstinence posed a threat to public safety:

> A host of bootleggers, large and small, bribers, gunmen, purveyors of vice and lesser crooks flourish wherever the prohibition law is openly flouted. And that condition exists flagrantly in almost every important city. The wets of New York should look frankly upon the facts and, regardless of their opinions, join in the passage of a State enforcement measure. I will not base my appeal upon the duty of supporting the [U.S.] Constitution. That exhortation I will leave to others, however valid it may be. But the personal safety of every man and the security of property depends in large measure upon the enforcement of prohibition, and prohibition in this State can be only partly effective without State cooperation. Both safety and property are seriously jeopardized by the growing attacks upon

ternal Revenue (the agency charged with directing Prohibition enforcement) advised that effective enforcement required "the closest cooperation between the Federal officers and all other law-enforcing officers—State, county, and municipal."[116]

Many of the most populous and well-trafficked American cities and states withheld this support to the frustration of President Warren G. Harding.[117] Harding argued, in turn, that the federal government lacked the "instrumentalities" to effectively enforce Prohibition, and that the states were "disposed to abdicate their own police authority in this matter[.]"[118] Six years after Harding's critique of sub-federal government engagement, the federal Commissioner of Prohibition echoed the sentiment, referencing the Eighteenth Amendment's call for concurrent enforcement at the federal and state levels and the fact that only eighteen of the forty-eight states had allotted money for this purpose.[119] In 1926, the states collectively spent $698,855 on Prohibition enforcement—an eighth of the funding spent on enforcing fishing and gaming laws.[120]

A subsequent report based on a comprehensive federal review of the failures of Prohibition concluded that federal efforts at Prohibition enforcement would fail without direct and sustained engagement by local police departments:

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

> the institution of law, which find their mainspring in lax enforcement of prohibition and the train of evils that accompanies this condition. Organized society is sitting upon a powder keg with a lighted match.

Id.

116. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 24 (2006) (quoting 1919 COMM'R INTERNAL REVENUE ANN. REP. 62).

117. *Id.* at 25.

118. *Id.* (quoting *Dry Law To Be Enforced, With or Without States' Help, Says President; Policy Will Not Be Modified Except by Adding Strength*, WASH. POST, June 26, 1923, at 9 (internal quotation marks omitted)).

119. *Id.* at 25 n.80 (citations omitted).

120. NORMAN H. CLARK, DELIVER US FROM EVIL 163-64 (1976). In their published review of Prohibition, the Wickersham Commission auditors criticized the States as politically "dry" given the many state statutes prohibiting liquor trafficking, but "wet" in terms of liquor trafficking activity and the absence of a meaningful law enforcement response. NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, 2 REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES (1931) [hereinafter REPORT ON ENFORCEMENT], https://www.ncjrs.gov/pdffiles1/Digitization/44540NCJRS.pdf [https://perma.cc/9YXZ-47M8].

> . . . The internal policing of the states necessary to the proper enforcement of such a law as this can only be accomplished with the active cooperation of the local police force and can best be enforced by the local agencies alone where they are free from corrupt political influences.[121]

In response to federal criticism of the lackluster enforcement efforts at the state and local levels, the governor of New York, Alfred Smith, argued that Prohibition was a local issue and directed New York State's municipalities to participate in enforcement only if they had an independent inclination to do so.[122] The headline of the 1927 *New York Times* article referencing Smith's comments reads, "Smith Backs Voters' Right to Oppose The Volstead Act; Holds State Law Needless."[123] The governor of Maryland adopted the same position, claiming the absence of a legal or moral obligation for sub-federal governments to enforce.[124]

The Supreme Court reached the issue of Prohibition enforcement discretion in the *National Prohibition Cases*.[125] It held that the Prohibition amendment pertained to "all legislative bodies, courts, public officers, and individuals [within the territorial limits of the United States]" and thus invalidated every legislative act that authorized or sanctioned conduct the Eighteenth Amendment prohibited.[126] The decision barred state and local governments from passing laws that obstructed Prohibition enforcement in any respect.[127] The Court also concluded, however, that while state and local governments held a negative obligation under the Eighteenth Amendment (i.e., an obligation to refrain from obstructing the federal enforcement effort), they did not also hold a positive one.[128] Justice Van Devanter, writing for the majority, reasoned that the "concurrent power" provision in Section 2 of

---

121. *See* REPORT ON ENFORCEMENT, *supra* note 120, at 76-77. Federal officials found that lack of enforcement undermined respect for the criminal law. In a 1926 interview with *The New York Times*, the U.S. Attorney for the Southern District of New York maintained that even Prohibition abolitionists should continue to support enforcement given that nonenforcement represented a dangerous breakdown in the social order. "Both safety and property are seriously jeopardized by the growing attacks upon the institution of law, which find their mainspring in lax enforcement of prohibition and the train of evils that accompanies this condition. 'Organized society is sitting upon a powder keg with a lighted match.' " Young, *supra* note 116.

122. *Smith Backs Voters' Right to Oppose the Volstead Act; Holds State Law Needless*, N.Y. TIMES, Dec. 3, 1927, at 1.

123. *Id.* Smith argued that the 18th Amendment established an enforcement option rather than a duty for state and local governments. Post, *supra* note 116, at 33.

124. Post, *supra* note 116, at 31.

125. National Prohibition Cases, 253 U.S. 350, 386-87 (1920).

126. *Id.*

127. *Id.*

128. *Id.*

the Eighteenth Amendment did not require that the enforcement power be exercised jointly,[129] and also that the federal government's enforcement power was not contingent upon either action or inaction by sub-federal governments.[130] The quality of state and local Prohibition enforcement would therefore be determined by sub-federal administrative officials.

In the midst of the fledgling enforcement effort, Professor John William Burgess of the Columbia University Department of Political Science argued that the Prohibition movement had lost its momentum when Prohibition advocates pushed beyond the alcohol bans that had been established in state statutes throughout the country to secure a federal constitutional amendment:

> Men did not seem so much impressed by the fact that the individual was to be totally deprived of his right to determine for himself what he would drink as by the fact that the jurisdiction of the States was to be reduced. . . . The deplorable consequences of the drink habit were painted in colors so vivid as to blind the view to the questions of governmental centralization and individual immunity from governmental power.[131]

The Prohibition enforcement effort ultimately collapsed under the weight of the ambivalence of many state and local governments and, by extension, the disinterest of their respective police departments.[132] Though Prohibition was not a discrete federal initiative given constitutional language requiring concurrent enforcement at the federal and sub-federal levels, the federal government invested heavily in the enforcement effort and aggressively solicited sub-federal government support throughout the initiative's brief history.[133] The failure of this solicitation in conjunction with Prohibition's repeal in 1933 demonstrates the final stage of the process model; namely, enforcement abolition as a function of sub-federal government resistance.

---

129. U.S. CONST. amend. XVIII, § 2. "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." *Id.*

130. *National Prohibition Cases*, 253 U.S. at 387.

131. JOHN W. BURGESS, RECENT CHANGES IN AMERICAN CONSTITUTIONAL THEORY 87-88 (1923); Post, *supra* note 116, at 6, 6 n.7. President Hoover organized the Wickersham Commission in 1929 and charged its members with delivering a comprehensive assessment of the Prohibition enforcement effort. REPORT ON ENFORCEMENT, *supra* note 120, at 1. In its published findings issued in 1931, the Commission described the Prohibition initiative as, "one of the most extensive and sweeping efforts to change the social habits of an entire nation recorded in history." *Id.* at 18.

132. Post, *supra* note 116, at 68-69.

133. CLARK, *supra* note 120, at 162.

IV. INSTRUMENT OR IDEOLOGY?: SUB-FEDERAL RESISTANCE AS A MEANS TO CRIMINAL JUSTICE REFORM

One question yet to be addressed is the prospect of an *ideological* sub-federal resistance—one that is motivated by the idea that the federal government is necessarily less effective at governing public security than are state and local governments. The ideological approach to sub-federal resistance takes the process model presented in Part II as an organizing principle and an inherent good. It holds that as a general matter, local crime governance is more effective than alternative forms given that local public officials are closer to public security threats and are therefore better positioned to craft effective solutions. This orientation reflects (most often, incidentally) conservative philosophies of good governance, which maintain that local governments are less likely to regulate in excess of what is necessary to solve a given problem.

In contrast with an instrumental approach, ideological sub-federal resistance requires something along the lines of a rebuttable presumption against police cooperation in federal criminal and national security initiatives. This version of sub-federal resistance is reflected in the text of local ordinances proclaiming that crime control has traditionally been (and should remain) a local matter left to local politics and local government.[134] The sub-federal governments taking this ideological stance often denounce cooperative public security programs as a federal power grab that threatens the traditional distribution of governing authority under the federalist system.

An ideological approach to sub-federal resistance may seem radical and foolish in the Homeland Security era given terrorist threats and complex crimes. But by this point in this Article it should be apparent that anti-federal criminal justice politics has played an important role in several historic decriminalization movements. By the same token, the "dual security" model (i.e., the notion of independent sub-federal systems of public security) prescribed by activist organizations like the ACLU and scholars like Bill Stuntz, now seems a politically-viable normative vision for criminal federalism. This vision reflects the governing norms of a simpler time in the nation's history—a time when Americans generally viewed a strong federal hand in crime control as a primary threat to the security of the citizenry.[135]

In light of the criminal threats of the present moment, what is the value of an ideological approach to sub-federal resistance? What is

134. Cook County, Ill., Res. No. 07-R-240 (2007) (asserting Cook County's "home rule power . . . to regulate for the protection of the public health, safety, morals, and welfare").

135. *See supra* Part I.

gained and lost in shifting from the opportunistic version of sub-federal resistance endorsed in this Article to a presumptive resistance that transcends the crime politics of the moment?

A. A Primary Benefit of the Ideological Approach to Sub-federal Resistance: The Democratization of Threat Assessment

Criminologists have framed the problems associated with contemporary crime policy and criminal enforcement as somewhat of a broken nexus between risk and place.[136] This is to say that everyday people increasingly develop a sense of their vulnerability to criminal victimization in the abstract—from assessments made by distant, centralized government agencies and affiliated experts. They, in effect, "download" their sense of criminal threat from authorities external to the local jurisdiction in lieu of full consideration of their own experience and that of family, friends, and acquaintances.[137]

The research inspiring this theory of modern threat triage in advanced Western societies derives from ethnographic field work in the United Kingdom. In the book *Crime and Social Change in Middle England*, a group of criminologists present the results of a study of a town in north-west England that lies a good distance from the nearest city hub.[138] The authors report that despite the town being virtually crime free, residents constantly chattered about the "crime problem" and worried over the prospect of criminal victimization. The residents' anxiety was not a function of first- or second-hand experience; it grew instead from their knowledge of national and global crime fighting and from the threat narratives circulated by national agencies and global state-partners.[139] These macro narratives washed over variation across regional communities, fostering an insensitivity to "place."[140]

In other words, town residents carried a distorted sense of the probability of their own criminal victimization in light of the relative safety of their immediate surroundings—"crime and responses to it [were] constituted within the national political cultures and local 'structures of feeling.' "[141] Seemingly, local sensibilities regarding crime had less to do with local criminal activity and more to do with national crime

136. *See* EVI GIRLING ET AL., CRIME AND SOCIAL CHANGE IN MIDDLE ENGLAND 21-70 (2005).

137. Aziz Rana points out that even federal judges and lawmakers believe themselves to be lost in the fog of ambient threat, readily deferring to the executive branch's judgment despite the absence of "hard proof," "specific facts," or "specific evidence." Rana, *supra* note 45, at 1481.

138. *See* GIRLING ET AL., *supra* note 136, at 163.

139. *See id.*

140. *See id.*

141. *Id.*

politics and the criminal enforcement campaigns that flowed from these politics. The authors of the study extrapolate from the social dynamics of the town to argue that centralized governments and mass-media culture together project a collective experience across a diverse set of regional communities. These institutions lift social relations "out of localities, stretch them out across time and space, and in so doing denude 'place' of its importance as a prime source of value, meaning and security in people's lives."[142]

A healthy and consistent skepticism at the state and local levels regarding the federal public security agenda—perhaps the central feature of an ideological approach to sub-federal government resistance—can serve as a buffer against the harmful effects of national criminal threat assessments and national crime politics. Sub-federal skepticism along this line would affirm the value of immediate experience and the intimate knowledge of local residents and local public officials, while in the process giving primacy to local democratic influence.

These principles have been widely praised in the context of community-policing programs. City police departments now embrace the idea that the "community" (however imagined within the municipality) should be a critical part of the administration of criminal enforcement.[143] Few departments still claim (publicly) that the police "know best" and should therefore be left to unilaterally determine the manner in which the criminal law should be enforced. Among the core principles advanced in the modern American city is the notion that everyday people are well-suited to determine criminal enforcement priorities.[144]

Despite broad support for a shift to community policing, the philosophy faces a new challenge: federal appropriation.[145] In the Homeland Security era, federal officials aim to incorporate state and local police into federal public-security administration,[146] undermining the influ-

142. *Id.* at 161 (citation omitted).

143. *See, e.g.*, Cook County, Ill., Res., *supra* note 134 ("The protection of an individual's citizenship and immigrant status will engender trust and cooperation between law enforcement officials and immigrant communities to aid in crime prevention and solving.").

144. STUNTZ, *supra* note 11, at 283.

145. In the professional policing model, local police administrators were held up as public safety experts deserving of near-absolute deference on issues of public safety from other government officials and the general public. JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 142-43 (1993); *see* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1729 (2005) [hereinafter Sklansky, *Police and Democracy*].

146. For a robust debate on the merits of national security collaboration, see Richman, *The Right Fight*, *supra* note 42. None of this would be relevant to criminal justice if not for the emergence of national security federalism. Some describe national security federalism as federal-local collaboration on national security matters, while others, observing the same

ence of local democratic processes. For example, many of the local governments that barred or limited police participation in immigration enforcement did so after discovering unauthorized collaboration between ICE and local police.[147] City police departments have also been found to engage in the sort of counterintelligence programming traditionally left to federal security agencies without first receiving authorization from the affiliated local legislature.[148]

An ideological approach to sub-federal resistance in the field of public security would be attentive to this sort of administrative back channeling. It would insist upon more local democratic accountability and hold to the belief that this accountability would deliver fairer and more effective policing.[149] As evidenced in Stuntz's arguments similar ideas appear sporadically in the criminal law literature as a growing number of scholars concerned with criminal justice dysfunction look to local democratic accountability as part of a larger effort to eliminate the excesses of the criminal justice system.[150]

B. A Primary Cost of the Ideological Approach to Sub-Federal Resistance: Unaccountable Police and Negative Innovation

The shortcomings of ideological sub-federal resistance will be obvious to anyone with a basic sense of the history of American federalism. Anti-federal politics have been deployed with remarkable success to enable the subjugation of African-Americans—both in terms of labor exploitation and voter disenfranchisement. Similar dynamics are at play in the contemporary context. State governments across the nation have leveraged the Supreme Court's decision in *Shelby County v.*

---

phenomena, perceive the appropriation of state and local police by federal national and domestic security agencies. Whatever the case, decisions made at the federal level by anointed national security experts increasingly shape police behavior at the local level. As a result, the democratic quality of policing surely suffers. How does a pro-democracy initiative like community policing fair in a political environment in which local police seek out directives from the federal executive? *See also* David Thacher, *The Local Role in Homeland Security*, 39 LAW & SOC'Y REV. 635, 672 (2005); Memorandum from David N. Kelley, United States Attorney to Omar Jadwat, ACLU Immigrant Rights Project (July 22, 2005), https://www.scribd.com/document/31610036/Jay-Bybee-Inherent-Authority-Immigration-Memo [https://perma.cc/U29V-XGJY]; Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CAL. L. REV. 567, 572-73 (2009).

147. *See generally* Doris Marie Provine et al., *Growing Tensions Between Civic Membership and Enforcement in the Devolution of Immigration Control*, *in* PUNISHING IMMIGRANTS: POLICY, POLITICS, AND INJUSTICE (Charles E. Kubrin et al. eds., 2012).

148. *See, e.g.*, Matt Apuzzo & Joseph Goldstein, *New York Drops Unit That Spied on Muslims*, N.Y. TIMES (Apr. 15,2014), https://www.nytimes.com/2014/04/16/nyregion/police-unit-that-spied-on-muslims-is-disbanded.html [https://perma.cc/QKA9-N3VE].

149. Friedman & Ponomarenko, *supra* note 12, at 1881.

150. *See* STUNTZ, *supra* note 11, at 308-09; Sklansky, Police and Democracy, *supra* note 145, at 1809; Friedman & Ponomarenko, *supra* note 12, at 1834.

Holder to dismantle key features of the Voting Rights Act and to curtail minority access to the voting booth.[151] Ideological sub-federal resistance also figures prominently in efforts at class subjugation as business elites use the Court's decision in *Citizens United v. Federal Election Commission*[152] to take control of state governments and usher in the neoliberal agenda of regressive taxation and the systematic degradation of public institutions, public spaces, and the social safety net.[153] One might reasonably expect that within this climate a trend of sub-federal government resistance in criminal justice would make many Americans more vulnerable to police misconduct and foster local criminal justice systems more punitive than national norms.

The "negative innovation" that may result from ideological sub-federal resistance to the federal public-security agenda and national standards for criminal justice practice should not be taken lightly. This sort of innovation often flows from power and wealth inequality at the state and local levels, and for this and other reasons ideological sub-federal resistance in criminal justice will not receive an unqualified endorsement in these pages. But it is important to recognize that a reflexive practice of sub-federal resistance in the field of criminal justice would not necessarily leave local bad actors unaccountable to external authorities. A healthy skepticism within state and local governments toward federal security agencies and, likewise, federal security narratives, would not prevent the federal government from challenging local police officials engaged in systemic civil rights violation.

The Department of Justice's litigation against Sheriff Joe Arpaio in Maricopa County, Arizona, serves as a compelling example.[154] The legal challenge shows that the federal government maintains the ability to challenge civil rights violations by local police, even as other sub-federal governments use the autonomy granted to them under the Tenth Amendment to challenge—rhetorically, administratively, and legislatively—excessive criminalization by the federal government.[155] In the same political moment in which cities and counties passed immigrant sanctuary policies in an effort to aggressively oppose police participation in the enforcement of federal immigration law, the federal government successfully challenged Sheriff Arpaio in federal

151. Shelby County v. Holder, 570 U.S. 529, 557 (2013).

152. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010).

153. Nicholas Confessore, *A National Strategy Funds State Political Monopolies*, N.Y. TIMES (Jan. 11, 2014), https://www.nytimes.com/2014/01/12/us/politics/a-national-strategy-funds-state-political-monopolies.html [https://perma.cc/LTF2-PPVW].

154. *See* Richard Perez-Pena, *Former Arizona Sheriff Joe Arpaio is Convicted of Criminal Contempt*, N.Y. TIMES (July 31, 2017), https://www.nytimes.com/2017/07/31/us/sheriff-joe-arpaio-convicted-arizona.html?_r=0 [https://perma.cc/RA8P-Z2DF].

155. *Id.*

court.[156] Immigrant sanctuary and other enforcement-abstinence policies are well-protected by modern constitutional jurisprudence (specifically under the Tenth Amendment[157]), unlike Arpaio's local immigration enforcement regime.[158]

All of this is simply to say that the federal government is well-positioned to aggressively challenge police misconduct at the sub-federal level even as local governments refuse to commit the administrative machinery of sub-federal government to controversial forms of federal criminal enforcement. The trouble with much of the current analysis of sub-federal resistance in pursuit of criminal justice reform is that it equates the withdrawal of support for federal criminal initiatives with the suspension of federal oversight of state and local police departments. The Obama administration's successful efforts to crack down on police misconduct in spite of the sub-federal resistance profiled in this Article offer another piece of evidence against this claim.

Finally, with respect to the question of whether sub-federal resistance will encourage state and local criminal justice systems to adopt crime policies that are more punitive than national norms and be more inclined to expand rather than narrow the scope of criminal liability, there is no clear answer. More to the point, a sub-federal government can negatively innovate regardless of sub-federal resistance trends or the degree to which resistance becomes either an instrumental or ideological project. It might certainly be true that in the absence of a norm of ideological resistance, a local government predisposed to excessive criminalization and punishment would be somewhat more likely to follow more conventional crime policies and enforcement practices. But this reinforcement of the status quo would still leave American criminal justice in conditions so shameful they defy historical precedent. The risks posed by the preservation of national penal norms therefore seem far greater than that posed by the state and local outliers that would use a resistance climate for negative innovation.

V. CONCLUSION

At this point in the discussion, unsympathetic readers might still be stuck on the harms posed by sub-federal resistance movements in criminal justice. These readers might be asking, "why can't they all—federal, state, and local governments—get along? Why not use the levers of federal government power to pursue fundamental criminal justice reform across the fifty states?" The trouble with such an approach is that federal politicians and bureaucrats face intense pressure to set

156. *Id.*

157. Printz v. United States, 521 U.S. 898, 935 (1997).

158. Arizona v. United States, 567 U.S. 387 (2012).

and enforce crime policies that reflect the will of a national majority.[159] To achieve criminal justice reform by way of the legislative process, federal representatives must find common ground with colleagues representing constituents with vastly different values, interests, and perspectives. The basic structure of federal governance makes it unlikely that the federal government will unilaterally take the counter-majoritarian actions necessary to fundamentally transform the practice of criminal justice and the punitive culture on which it relies.[160]

Federal government interventions, like the one in Ferguson, Missouri, in the aftermath of the Michael Brown shooting, are certainly meaningful, but they have limited potential given that they grow from what might be called a "post-political" climate. In Ferguson, Justice Department officials confronted the racial biases of the Ferguson criminal justice system with the benefit of a national public that generally supported their efforts. The Justice Department did not pay a heavy political price for threatening to sue a small town in eastern Missouri found to be in open violation of the civil rights of its minority residents.[161] Conversely, the marijuana decriminalization and immigrant sanctuary movements have drawn majoritarian backlash and legal opposition from federal agencies—the latter of which only intensified under the

159. For similar analysis, see generally Bulman-Pozen & Gerken, *supra* note 19, at 1259.

160. A secondary intent of this Article is to argue against the primacy of the "bad actors" theory of criminal justice reform—the idea that reform is primarily about identifying, punishing, and removing the bad actors in the municipal police department. While this brand of reform certainly provides a degree of relief to the most vulnerable members of municipal jurisdictions, it can distract from a more fundamental problem: the pernicious quality of American criminal lawmaking. The sub-federal government that refuses participation in draconian federal public security initiatives limits the opportunity for harsh sentencing and curtails opportunity for police misconduct and criminal record proliferation.

The historical record shows the anti-commandeering rule, which grants a highly specific form of sub-federal government autonomy by way of constitutional interpretation, as important—if not critical—to the most effective efforts to solve the problem of overcriminalization. The ability of sub-federal governments to 1) prune their respective criminal codes; 2) abstain from federal criminal enforcement and security initiatives; and relatedly, 3) to challenge a politics of fear disseminated by the federal government and peer jurisdictions has served as grist for the major decriminalization of the American past and present. While issue advocates have taken advantage of sub-federal government autonomy in criminal administration, they generally do so without express acknowledgement of the role of the anti-commandeering rule. As a result, the rule has yet to be fully accounted for in scholarly discussions of criminal justice federalism or as part of the construction of theories of decriminalization in law and the social sciences. The anti-commandeering rule provides the legal basis for the use of enforcement abstinence as an administrative mechanism. *Printz*, 521 U.S. at 935. Absent the anti-commandeering rule, state and local governments would be without clear authority to withhold administrative resources from overarching federal public security initiatives and erect alternative models of public-security administration. Enforcement abstinence, as a structural mechanism, itself begets ideological contestation between the federal government and sub- federal governments regarding the means to strong security. Thus, the narratives presented in this Article reveal the interlocking legal and cultural mechanisms of a particular process of decriminalization by way of criminal federalism.

161. *See supra* note 19 and accompanying text.

leadership of Attorney General Jeff Sessions.[162] But such clashes often work in the interest of reform by transforming the national cultural sensibility through the aggressive local government defense of counter-majoritarian theories and models of public security.

None of this is to say that there is only one path to narrowing the scope of criminalization in American life. However, given that the epic quality of the failure of contemporary crime policy is rooted in conventional rather than anomalous penal theory and practice, the catalytic potential of criminal justice localism deserves far more scholarly attention than it has received up to this point. Put simply, we need far more dissent in criminal justice, and many state and local jurisdictions now appear willing and able to provide it. In recent years, local governments have come to reject federal public security initiatives predicated upon unsubstantiated threat assessments and associated fear—fear of the immigrant, the drug addict, the terrorist, the other.

162. James Higdon, *Jeff Sessions' Coming War on Legal Marijuana*, POLITICO (Dec. 5, 2016), http://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501 [https://perma.cc/ED9L-LKXA].