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How Federalism Built the FBI, Sustained Local Police, and Left Out the States

Daniel C. Richman
Columbia Law School, drichm@law.columbia.edu

Sarah Seo
Columbia Law School, sarah.seo@law.columbia.edu

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**How Federalism Built the FBI, Sustained Local Police,
and Left Out the States**

Daniel Richman and Sarah A. Seo¹

ABSTRACT. This Article examines the endurance of police localism amid the improbable growth of the FBI in the early twentieth century when the prospect of a centralized law enforcement agency was anathema to the ideals of American democracy. It argues that doctrinal accounts of federalism do not explain these paradoxical developments. By analyzing how the Bureau made itself indispensable to local police departments rather than encroaching on their turf, the Article elucidates an operational, or collaborative, federalism that not only enlarged the Bureau’s capacity and authority but also strengthened local autonomy at the expense of the states. Collaborative federalism is crucial for understanding why the police have gone for so long without meaningful state or federal oversight, with consequences still confronting the country today. This history highlights how structural impediments to institutional accountability have been set over time and also identifies a path not taken, but one that can still be pursued, to expand the states’ supervisory role over local police.

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Introduction

George Floyd’s death at the hands of a police officer in May 2020 may have set off protests throughout the country, but a long history of police abuse and violence that continues to this day kept the demonstrations going throughout the summer. So too has the inadequacy of mechanisms for holding responsible officers and police departments accountable. Federalism is often blamed for this failure. Law enforcement has been a local matter since the colonial era and, still today, police departments remain largely resistant to federal oversight, especially on matters concerning racial justice. For its part, the US Justice Department’s infrequent use of its statutory authority to open investigations of police agencies that engage in a “pattern or practice” of constitutional violations or to use conditional grants to push police reform reveals a lack of political will to encroach on local domains.²

Yet, federalism doesn’t explain why the states themselves have not supervised the police more. While federal control of police officers violates the constitutional system of dual sovereignty according to *Printz v. United States*, states do have the power to regulate the police but, for the most part, have chosen not to.³ The limited, too often lacking, responses of governors to police shootings make this point all too clear. Moreover, doctrinal accounts of federalism that maintain clear boundaries between local and federal spheres do not explain a paradoxical development in American law enforcement over the twentieth century: the remarkable growth of the Federal Bureau of Investigation (FBI or Bureau⁴) amid the persistence of localism. This history is especially puzzling given that, during the Bureau’s first fifty years or so, from 1908 to 1960, the national agency and local departments devoted a significant portion—in many years a lion’s share—of their caseload to investigating one particular crime: auto theft.⁵ What were the implications of the federal government’s sustained involvement in the pursuit of theft, a traditionally local matter?

This Article argues that formal notions of federalism do not capture the relationship between the Bureau and police departments. By examining the actual, on-the-ground workings of American law enforcement and focusing specifically on the joint pursuit of auto theft, this Article elucidates an operational, or collaborative, federalism that explains how the Bureau became an integral part of the criminal justice ecosystem⁶ while preserving local autonomy and sidelining the states in the policing realm.⁷ This account is crucial for understanding how the police have gone without either state or federal oversight for so long, with consequences still confronting the country

² 34 U.S.C. § 12601.

³ *Printz v. United States*, 521 U.S. 898, 918-922 (1997).

⁴ For narrative ease, we use “Bureau” to refer to the agency variously called the “Division of Investigation,” the “Bureau of Investigation,” and the “Federal Bureau of Investigation” (from 1934 on).

⁵ See Part II.A and tables.

⁶ We use “ecosystem” to capture the multiple actors and institutions engaged in policing work, with various degrees of interaction. See Sara Mayeux, *The Idea of the Criminal Justice System*, 45 *Am. J. Crim. L.* 55 (2018); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 *J. Legal Stud.* 419 (2018).

⁷ Our historical account provides further support for what Heather Gerken has called the “nationalist school of federalism,” which highlights how federalism can actually advance nationalist ends. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *Yale L.J.* 1889, 1906 (2014); see also Alison L. LaCroix, *The Shadow Powers of Article I*, 123 *Yale L.J.* 2044, 2093 (2014) (“Federalism ... has always been the United States’ distinctive species of nationalism.”).

today. It helps to explain why racially-inflected police practices, such as civil forfeiture and excessive criminal fines and fees, have proliferated without significant scrutiny until only recently.⁸ By highlighting how structural impediments to institutional accountability have been set over time, this history can also identify ways of clearing those obstacles, which will better inform our efforts to transform law enforcement to be more just and equitable.

This historical account proceeds in three parts. Part I begins in the first two decades of the twentieth century, a period of immense social changes that created new law enforcement imperatives. Before then, police obtained information about crimes and criminals by patrolling and talking with citizens in their beat.⁹ But at the turn of the century, especially when mass-produced automobiles gave individuals, and criminals, unprecedented mobility, local law enforcement increasingly needed information from outside their jurisdictions. This compelled police reformers to seek national solutions to crime and persuaded Congress to enact laws criminalizing traditionally local crimes that crossed state boundaries. The newly formed but resource-strapped Bureau as well as jurisdictionally-constrained police departments needed information-sharing arrangements to bring their cases, and Part II examines how this shared necessity facilitated collaborations by focusing on the enforcement of the Dyer Act, one of the new federal laws, which criminalized the transportation of stolen vehicles across state lines. Part II also examines the National Division of Identification and Information, which served as a centralized clearinghouse for crime-related information, to further illustrate the Bureau's collaborative relationship with local police. Finally, Part III explores the federalism implications of our story. The working relationship of mutual exchange, or collaborative federalism, rendered the federal government largely unwilling to hold the police accountable for how they performed their jobs. It also allowed local police departments to retain considerable independence from state governments. Ultimately, collaborative federalism, which is missing in formal accounts of federalism that subsume local agency into state authority, facilitated the Bureau's growth by privileging its local counterparties. While this Article does not attempt to offer a complete account of why police have been largely free from state or federal oversight, it identifies a critical historical moment when the result could have been different. By pointing out a road not taken, this history suggests that it is not too late to seek that path today.

I. Towards National Solutions to Crime in an (Auto)Mobile Society

Profound transformations in American society at the turn of the century necessitated national solutions to crime, which had always been handled locally. Part I.A examines the efforts of reforming police chiefs, and Part I.B turns to Congress and the creation of the Bureau in 1908. Because the country was not yet ready to set aside its ideological opposition to a centralized police force, law enforcement adaptations during the years straddling the turn of the century reflected

⁸ See U.S. Dept. Justice Civil Rights Div. Investigation of the Ferguson Police Department, 2 (2015); Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* (2018); Beth A. Colgan, *Fines, fees, and forfeiture*, 205, in vol. 4 *Reforming criminal justice: A report of the Academy for Justice on bridging the gap between scholarship and reform* (Eric Luna ed. 2017); *Developments, Policing and Profit*, 128 *Harv. L. Rev.* 1723 (2015).

⁹ Christopher Thale, *The Informal World of Police Patrol*, 33 *J. Urban Hist.* 183 (2007); Raymond B. Fosdick, *American Police Systems* (1920); Roger Lane, *Urban Police and Crime in Nineteenth-Century America*, 1, in 15 *Crime & Justice: Modern Policing* (1992).

Martha Derthick's observation that Americans have "moved paradoxically both to centralize and decentralize."¹⁰

A. Police Chiefs Seek Federal Assistance

Since the colonial era, crime control in the United States was a local matter and often prosecuted privately.¹¹ Victims—either the individuals themselves or their insurance companies who were on the hook for reimbursing stolen goods—investigated and pursued charges against perpetrators, who often could not flee very far before the advent of motorized vehicles and better roads. Certainly, train travel enabled jurisdiction skipping, but at a frequency and scale that hired investigators could manage.

Beginning in the last decades of the nineteenth century, both aspects of crime control—local and private enforcement—were changing. By the 1880s, all of the major US cities had established municipal police forces that were slowly but increasingly focusing on crime prevention.¹² These officers sought to proactively stop criminals before they could commit their misdeeds rather than wait for a privately sworn arrest warrant or for a crime to unfold in their presence before taking action. Such preventive policing required knowledge not just of illicit plans, but also of potential criminals, which, in turn, depended on knowledge of their identities and histories.¹³

At the same time, Americans' increased mobility, aided first by locomotive trains and then mass-produced cars, made it difficult for local police departments to keep track of habitual offenders. (Auto)mobility also expanded the scope of criminal activities, and towns and cities throughout the country were experiencing the limits of local law enforcement.¹⁴ Train travel made it increasingly possible, for instance, for residents of a dry locale to buy alcohol from a neighboring

¹⁰ Martha Derthick, *Keeping the Compound Republic: Essays on American Federalism* 11 (2001). See also Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* 93 (2015) (describing the "improvisational" nature of America's state-building in response to the "governing challenges of the industrial age.").

¹¹ J. Edgar Hoover reminisced in 1925 (although not from much personal experience):

In times past (and not so far distant past) crime or the criminal was a more or less local issue. Our local or neighborhood criminal was known, his haunts could be watched, his associates shadowed, the method and nature of the crime often bore within itself the recognizable identity of the criminal. He could often be captured on the scene of the crime, the fastest means of locomotion being either human or equine. Then, too, his means of travel, which were limited, could be traced with comparative ease. Should he escape to some other community, the danger of his capture was still imminent. Every stranger was a marked man, every newcomer aroused suspicion.

1925 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1921-1925*, vol. 4 at 49 (New York, 1971); see also 1926 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1926-1930*, vol. 5, 56 (New York, 1971) ("Crime of yesterday, accordingly, was an entirely local matter—a Main street affair.").

¹² John A. Fairlie, *Police Administration*, 16 *Pol. Sci. Quarterly* 1, 7-8 (1901); Raymond B. Fosdick, *American Police Systems*, 58-117 (1920); Roger Lane, *Urban Police and Crime in Nineteenth-Century America*, 1, in 15 *Crime & Justice: Modern Policing* (1992).

¹³ See Sankar diss., 125-35.

¹⁴ See Erik Larson, *Devil in the White City: Murder, Magic, and Madness at the Fair That Changed America* (2004).

wet jurisdiction, prompting reformers to impose prohibition first at the state level and then nationally.¹⁵ The automotive revolution in transportation—Henry Ford perfected the Model T’s moving assembly line in 1914—magnified the challenges to law enforcement.¹⁶ From 1895 to 1929, the number of cars exploded from the single digits to more than 23 million. The automobile boom contributed to an increase in crime as the getaway facilitated the commission of age-old crimes like bank robberies, kidnapping, and murder.

Cars also created a new crime: auto theft. The prominent criminal law scholar Jerome Hall may have found it “quite extraordinary that theft of automobiles should be of particular importance,” but he recognized that the phenomenon “loom[ed] up in unique importance.”¹⁷ Striking the same note, a congressman from Missouri declared in 1919 that there was “no class of criminal enjoying more lucrative gain as a reward for their industry than the automobile thieves of the country.”¹⁸ Although mass production made cars much more affordable to a wider class of consumers, they were still among the most valuable assets for the average family. Motor cars were expensive enough and sufficiently necessary in many parts of the country to support a thriving market for secondhand cars. Standardized cars with standardized parts facilitated this secondary market, as did the automobile manufacturers’ disinclination to develop either locking devices or ways of identifying cars and confirming ownership.

Crossing county, state, and even national boundaries became more frequent, and for some, a daily passage from home to work and back. Sophisticated auto theft rings took advantage of the variegated landscape in a federal system of government. They would steal cars in one state and sell them in another, where there was no record of the thefts.¹⁹ Operations near the Mexican or Canadian border were especially cunning. During National Prohibition, for example, bootleggers would steal a car in New York, drive to Canada, and sell it there. They could use the proceeds of the sale to purchase liquor in Canada, then steal another car, and transport the illicit goods back to the States, where they could sell the alcohol and the stolen car and make a tidy profit.²⁰ A more recreational pattern, decried in California, was the “great spring drive”; according to the *Los Angeles Times*, thieves stole “the cars they intend to drive East with the coming of the first warm weather” and sold them when they got there.²¹ In 1926, the *Chicago Daily Tribune* noted these developments: while crime used to be “a local affair” when criminals “operated locally and disposed of their loot locally,” “[t]oday crime is a national affair, run on interstate lines, made so by the railroads and the automobile, principally the latter.”²²

¹⁵ See Richard Hamm, *Shaping the Eighteenth*.

¹⁶ See Seo, *Policing the Open Road*.

¹⁷ Jerome Hall, *Theft, Law, and Society*, 230-31 (1935); see *United States v. Turley*, 352 U.S. 407, 413 (1957) (citing Hall when interpreting what “stolen” means under the Dyer Act). On Jerome Hall, see Sarah A. Seo, *Democratic Policing before the Due Process Revolution*, 127 *Yale L.J.* 1246 (2019).

¹⁸ C.R. House 5474.

¹⁹ As Hoover reported in 1926, “We have bands of automobile thieves who steal machines in one state and pass them over to another band in another state to sell them.” 1926 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1926-1930*, vol. 5 (New York, 1971), 56.

²⁰ Sauter, *The Origin*, 5.

²¹ “Plan to Stop Car Stealing: Auto Club Considering Several Recommendations,” *L.A. Times*, Feb. 29, 1920, at VI1 (noting that “[l]iberal jail sentences” “make auto thieving a pastime here”).

²² “The Interstate Commerce of Crime,” *Chicago Daily Tribune*, June 17, 1926.

Notwithstanding these changes, crime control remained mostly local during the automobile's early years. Even in the first decades of the twentieth century, private groups took on most criminal investigations. When a vehicle was stolen, hapless owners would contact local authorities. But they also posted a reward for the recovery of their cars or, if they had auto theft insurance, had their insurers post it. Citizens and businesses soon came together in common cause. As Congressman Newman of Missouri observed, “[s]o frightful has this menace [auto theft] become that automobile clubs and automobile protective associations have been formed, and they have been joined by chambers of commerce and commercial clubs all over the country in an effort to stamp out this lawless industry.”²³

During this period of transition, citizens and private associations, as well as state and local governments, were quickly discovering their limits in a multi-jurisdictional country. Law officers whose authority covered only a single jurisdiction could not pursue bootleggers and highway robbers. The mobility of criminals also gave rise to the need to share information about runaways, fugitives, arrestees, prisoners, and the recently released.²⁴ As one police chief observed, “professional thieves are constantly moving from one locality to another, one city to another, one State to another. These professionals make circuits and become national characters, traveling and depredating here, there, and everywhere.”²⁵

These social changes brought about by the mass production of the automobile prompted forty-seven progressive police chiefs to form the National Chiefs of Police Union in 1893 with the goal of improving “the detection and prevention of crime in the United States.”²⁶ As its president explained in 1895, the organization arose from the “constant telegraphic correspondence” among “the police departments of the larger cities,” whose leaders recognized that “the effectiveness of one department depends upon the police system of other cities.”²⁷ In an increasingly mobile world, they realized, local knowledge that remained local stymied investigations and preventive policing.

One of the Union's first agenda items was to create “the National Police Bureau” for “the practical exchange of ideas and information pertaining to police business.”²⁸ In the beginning, that information focused on the identities of perpetrators based on the Bertillon system, developed in the 1880s and relying on measurements from head to toe “based on the principle that no two adult creatures are alike.”²⁹ By the early 1900s, the organization, renamed the International Association of Chiefs of Police (IACP), in recognition of the need to communicate with police agencies in foreign countries as well, set up a “bureau of criminal identification” and began collecting fingerprints.³⁰ But the dues, about \$25 a year, gathered from 200 departments were insufficient to pay for the

²³ C.R. House 5474.

²⁴ 1924 Congressional hearing, 6 (NYC police commissioner explaining how a fugitive could commit crimes in several states without each state being aware of it).

²⁵ A Bill for the Creation of a National Bureau of Criminal Identification, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1893-1905*, vol. 1 (New York, 1971), 20.

²⁶ “Chiefs of Police Coming,” *The Wash. Post*, Feb. 11, 1895. See also Sankar diss., 124-125.

²⁷ 1895 Proceedings, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1893-1905*, vol. 1 (New York, 1971), 9.

²⁸ “Chiefs of Police Coming.”

²⁹ 1902 Proceedings, 18.

³⁰ 1924 Congressional hearing, 33.

distribution of that information.³¹ Also, without a critical mass of participating police departments or a central database available to law enforcement throughout the country, the effectiveness of the IACP's bureau was limited.

One possible solution was to establish information-sharing arrangements among the states, but that proved difficult in a federal system. The lack of state-to-state cooperation even where constitutionally mandated by the Extradition Clause and the commons problem of state funding for such arrangements presented nearly insurmountable obstacles. The fact that public and private institutions at the municipal or county levels were the real sites of criminal enforcement didn't help either. Indeed, the IACP never approached the states for help in creating an infrastructure for the exchange of crime-related information.

Instead, in 1901, local police chiefs asked the federal government for assistance in solving the coordination and funding problems; clearly, formal federalism considerations did not concern them as much as their practical needs. The IACP drafted a bill for Congress to establish "a National Bureau of Criminal Identification in connection with the Department of Justice" that would collect "plates, photographs, outline pictures, descriptions, information, and measurements of all persons who have been or may be convicted and imprisoned" for violating any laws of the United States and its "several States and Territories, or the [] municipalities thereof."³² To convince Congress to pay for the new DOJ bureau, the IACP pledged that "the Government would receive a full reciprocal amount of aid and information" on federal crimes from local departments.³³ "The whole arrangement," it envisioned, "would constitute one great web which the malefactor could not elude, and bring the authorities everywhere, Government and State, into full sympathy and co-operation, the Government being amply repaid for the small expenditure."³⁴

Congress, however, needed more persuading.³⁵ To be sure, many congressmen supported the idea. The House Judiciary Committee reported favorably on the bill; it lifted phrases directly from the IACP's bill to conclude that not only would the creation of "one great web which the malefactor could not elude" benefit the states, but that the federal government could also be "amply repaid for the small expenditure."³⁶ Indeed, the report pointed out that with identification information, police authorities throughout the country could help find military deserters. Moreover, the heads of the Secret Service, the Post Office, and the federal penitentiaries all gave "favorable and unqualified indorsement [*sic*]" because such a national bureau would place them "in closer touch with the police authorities, and a thorough cooperation [would] follow."³⁷

³¹ Id. at 7, 21, 24, 67.

³² 1902 IACP Proceedings, at 14-15; see also 35 Cong. Rec. 5870 (May 23, 1902) (H. R. 100068). See also Letter from Richard Sylvester, Mayor and Superintendent of the Metropolitan Police Department, Urging Legislation Looking to the Establishment in Washington City of a Bureau to be Known as the National Bureau of Criminal Identification, to Senator George G. Vest (December 13, 1900), Document No. 43, 56th Congress 2d Session.

³³ Id. at 19.

³⁴ Id.

³⁵ See Mary M. Stolberg, Policing the Twilight Zone: Federalizing Crime Fighting during the New Deal, 7 J. of Policy Hist. 393, 395-396 (1995), on opposition to Bureau creation.

³⁶ Mr. Jenkins, Committee on the Judiciary, Report on National Bureau of Criminal Identification, Report No. 429, 57th Congress, 1st Session (February 7, 1902), 3.

³⁷ Id.

But those in opposition prevailed. The Senate Judiciary Committee “reported adversely” on the bill, which was thereafter “postponed indefinitely.”³⁸ The absence of a report keeps us from knowing its reasoning. But the House’s report, which insisted defensively that it was “not proposed that the bureau shall be a detective agency,” provides some clues.³⁹ A federal agency with the authority to compile and distribute criminal identification information would, some feared, come too close to a national police force, an abomination to Americans. And so for another two decades, the proposal would languish, and the IACP would continue to maintain its own voluntary network of information sharing.

B. Congress Creates the Bureau and New Federal Crimes

When Congress rejected the bill for a new DOJ bureau to take over the responsibilities of the IACP’s National Police Bureau, the federal government did not have a general criminal investigative force. It did not have many criminal laws either.⁴⁰ The Justice Department, not created until 1870, was responsible for the prosecution of a relatively narrow range of cases that came mostly from the Department of Treasury and Post Office.⁴¹ Investigations, to the extent they occurred, were pursued by private detectives or Secret Service agents borrowed from the Treasury Department.⁴²

In 1907, Attorney General Charles Bonaparte (the Emperor’s grand-nephew) called on Congress to remedy this “anomaly” and to establish a “permanent detective force.”⁴³ But Congress balked at the proposal. The objection was framed as a matter of principle: the United States never had a general police system that spied on its citizens because it was antithetical to American freedom.⁴⁴ As the debates over the IACP’s bill indicate, centralized police forces were anathema. Federal criminal interventions were also politically fraught, especially in the South, where concerns that the feds would undermine Jim Crow ran deep.⁴⁵ Not only did Congress reject Bonaparte’s proposal, but so strong was its fear of a political police force that it also moved to preclude the

³⁸ Cong. Rec. 1226, February 3, 1902.

³⁹ House Judiciary Committee report, 4.

⁴⁰ See Daniel C. Richman, Kate Stith & William J. Stuntz, *Defining Federal Crimes* (2d ed. 2019).

⁴¹ See, e.g. Annual Report of the Attorney General, 1905, at 114-121.

⁴² Annual Report of the Attorney General, 1906, at 92..

⁴³ Annual Report of the Attorney General of the United States for the Year 1907, at 10 (1907).

⁴⁴ Lowenthal, 3-4.

⁴⁵ Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876* (2005); Robert M. Goldman, *A Free Ballot and a Fair Count: The Department of Justice and the Enforcement of Voting Rights in the South, 1877–1893* (2001); Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870-90*, 53 *J. Southern Hist.* 421 (1987); Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth Century America*, 26 *L. & Hist. Rev.* 1 (2008); Scott C. James & Brian L. Lawson, “The Political Economy of Voting Rights Enforcement in America’s Gilded Age: Electoral College Competition, Partisan Commitment, and the Federal Election Law,” 93 *Am. Pol. Sci. Rev.* 115 (1999); Wilbur R. Miller, *The Revenue: Federal Law Enforcement in the Mountain South, 1870-1900*, 55 *J. South. Hist.* 195 (1989); Jonathan Obert, *A Fragmented Force, The Evolution of Federal Law Enforcement in the United States, 1870-1900*, 29 *J. Policy Hist.* 640 (2017).

Department's use of Secret Service agents. US Attorney for the Southern District of New York Henry Stimson worried that this move could destroy the "fighting power of his office."⁴⁶

After Congress adjourned for the summer, Bonaparte, encouraged by President Theodore Roosevelt, reached into DOJ funds and quietly created an investigative unit.⁴⁷ The following year, in 1909, Congress post facto authorized the Bureau of Investigation after its members were shamed for opposing a federal law enforcement agency in the middle of an unfolding congressional scandal.⁴⁸ But it received promises that the Bureau would not become a spy force and would simply support the rather narrow criminal mission of the Justice Department.⁴⁹ As Bonaparte told Congress, "the detective force which minds its own business, and attends to that, and does nothing else, is more effective as a means of suppressing crime than one which is used for any extraneous purpose."⁵⁰ Given that the Bureau lacked arrest powers, its ancillary status could not have been clearer.

Although the Bureau was created when federal criminal laws were few in number, the exigencies of an (auto)mobile society soon led to a spate of criminal legislation. In 1910, Congress passed the Mann Act, which criminalized the interstate transportation of any "woman or girl" for "prostitution or debauchery, or for any other immoral purpose."⁵¹ Four years later in 1914 came the Harrison Anti-Narcotics Act and another five years later, in 1919, the National Motor Vehicle Theft Act (the Dyer Act), which criminalized the interstate transportation of stolen vehicles.⁵² That same year, the nation ratified the Eighteenth Amendment to end the production, shipment, and sale of alcohol and, in 1920, the Volstead Act put National Prohibition into effect.⁵³ These new laws stretched long-established bounds of federalism by involving the national government in conventionally local matters, a development made necessary by an increasingly mobile world.⁵⁴

⁴⁶ Cummings and McFarland, *Federal Justice*, 377.

⁴⁷ Annual Report of the Attorney General of the United States for the Year 1909, at 8-10 (1909); see also

John Allen Noakes, "Enforcing Domestic Tranquility: State Building and the Origin of the (Federal) Bureau of Investigation, 1908-1920," at 72-85 (1993 U. Penn Ph.D. Sociology dissertation); David Joseph Williams, "Without Understanding: The FBI and Political Surveillance, 1908-1941," at 32 (Ph.D. dissertation, Univ. of New Hamp. 1981) (maintaining that "at no time" did congressional critics "advance their proposals to protect themselves from possible criminal investigation?").

⁴⁸ Lowenthal, **; see also Cummings and McFarland, *Federal Justice*, 380; Noakes, at 80-85.

⁴⁹ Fears that the Bureau would become a roving spy force, like the Pinkerton National Detective Agency, at the service of the powerful likely loomed large. See David A. Sklansky, *The Private Police*, 46 *UCLA L. Rev.* 1165, 1213-16 (1999) (describing hostility to Pinkertons in Congress and elsewhere during the 1890s); see also Robert P. Weiss, *Private Detective Agencies and Labour Discipline in the United States, 1855-1946*, 29 *Hist. J.* 87 (1986); Charles K. Hyde, *Undercover and Underground: Labor Spies and Mine Management in the Early Twentieth Century*, 60 *Bus. Hist. Rev.* 1 (1986).

⁵⁰ Stockham at 57 (quoting Hearings before Subcommittee of House Committee on Appropriations, Sundry Civil Appropriation Bill for 1910, 1003 (Washington, D.C.: United States Government Printing Office, 1909)).

⁵¹ Mann Act.

⁵² Harrison Act; Dyer Act.

⁵³ Volstead Act.

⁵⁴ The new federal criminal laws also showed how notions of racial threat that generally reinforced Southern hostility to federal power could be deployed to counsel just such authority—so long as it would be mediated by local officials. While a long effort by the NAACP for anti-lynching legislation never got past the Senate, nativist concerns about immigrant prostitutes was crucial in passing the Mann Act. See Megan Ming Francis, *Civil Rights and the Making*

Criminal laws, however, don't enforce themselves. Congress appropriated more money to federal agencies, especially the Justice Department, to enforce the new statutes, but it was never enough. As a result, the DOJ and its Bureau could pursue their assignments only with collaborations with state and local agencies and with the help of citizens and private organizations. The American Protective League (APL) is a well-known example of a voluntary association that aided federal law enforcement.⁵⁵ Its members reported subversive activities and enforced alien registration during World War I, and their "slacker raids" resulted in the detention of tens of thousands of draft-age citizens, often at bayonet point.⁵⁶ President Woodrow Wilson had reservations about the APL's involvement, but his attorney general persuaded him "that the assistance of APL volunteers was the only way the Bureau could meet the rush of war-time work without adding unduly to the permanent federal bureaucracy."⁵⁷ This was so even with soaring congressional appropriations from 1916 to 1919.⁵⁸ Historian Lisa McGirr has also documented how a volunteer army, which included the Ku Klux Klan, took up the enforcement of National Prohibition. Even though the Prohibition Bureau was more than four times the size of the Bureau of Investigation,⁵⁹ its head declared that his Prohibition agents could fulfill their task only with "the closest cooperation between the Federal officers and all other law-enforcing officers—State, county, and municipal."⁶⁰

of the Modern American State (2014); Jeffrey A. Jenkins, Justin Peck, and Vesla Weaver, *Between Reconstructions: Congressional Action on Civil Rights, 1891-1940*, 24 *Stud. Am. Pol. Dev.* 57, 66-77 (2010); George C. Rable, *The South and the Politics of Antilynching Legislation*, 51 *J. Southern Hist.* 201 (1985). Critical aspects of the Bill—which included a five-year mandatory minimum for state or municipal officials who conspired in the lynching of a prisoner in his custody, H.R. 13 (Dyer Bill), 67th Congress—were technically covered by an existing statute that was not enforced, which only highlights Southern antipathy to the measure. Later, Attorney General Biddle rejected the notion that "existing statutes were totally impotent to deal with lynching of prisoners in state custody" and advised President Roosevelt on July 21, 1942, that "many lynchings, upon investigation, would prove to involve violations of existing federal statutes." Frank Coleman, *Freedom from Fear on the Home Front*, 29 *Iowa L. Rev.* 415, 425 (1944); see John T. Elliff, *The United States Department of Justice and Individual Rights, 1937-1962*, Harvard Gov. Ph.D. dissertation, 93-111 (1967) (on Civil Rights Section's 1940 reconsideration of existing statutory authority to prosecute civil rights crimes). But these cases often ended in acquittals. See Coleman, *supra* __, at 423 (noting "acquittals in addition to those resulting from failure of proof, can be expected where the federal government seeks to prosecute for crimes traditionally deemed the sole concern of the state or local community"). On the Mann Act, see Pliley, *Policing Sexuality*, 65-70.

To get the critical votes of Southern Democrats for the Harrison Act, State Department officials strategically (and disingenuously) stressed how cocaine peculiarly affected African-Americans and thus posed a special threat to whites. See David F. Musto, *The American Disease: Origins of Narcotic Control* 43-44 (3d ed. 1999); Michael M. Cohen, *Jim Crow's Drug War: Race, Coca Cola, and the Southern Origins of Drug Prohibition*, 12 *Southern Cultures* 55, 76-77 (2006). See also Rufus G. King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 *Yale L.J.* 736, 736 (1953) (explaining that the Harrison Act, although ostensibly required by a treaty obligation, was intended "mainly to aid the states in combatting a local police problem which had gotten somewhat out of hand").

Similarly, support of Prohibition in the South depended on its framing as "the solution to black savagery." Joe L. Coker, *Liquor in Land of the Lost Cause: Southern White Evangelicals and the Prohibition Movement*, 124 (2007).

⁵⁵ Pliley, *Policing Sexuality*, 125; Noakes, "Domestic Tranquility," 160-161.

⁵⁶ David M. Kennedy, *Over Here: The First World War and American Society* 165-166 (2004); Schmidt, 84; Williams, *Without Understanding*, 95-97; Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (2010)

⁵⁷ Noakes, "Domestic Tranquility," 168.

⁵⁸ Noakes, "Domestic Tranquility," 159.

⁵⁹ Lisa McGirr, *War on Alcohol*, 208.

⁶⁰ Commissioner of Internal Revenue, quoted in Post, "Prohibition," 24.

Without cooperation from local partners, not only would the federal government's enforcement efforts be limited, but the very legitimacy of the federal laws could be compromised. National Prohibition offered a cautionary tale.⁶¹ In the face of local intransigence, President Coolidge argued that the Eighteenth Amendment put "a concurrent duty on the States."⁶² The Commissioner of Prohibition likewise insisted that there was "no doubt" that states were required "to exercise in their appropriate sphere of action the full police powers of the State, in order to properly discharge their obligations under the Eighteenth Amendment."⁶³ But many states and local governments, particularly in large cities, ignored these claims. New York City police, many from ethnic, working-class communities that viewed Prohibition as an indictment against their way of life, neither cared to assist the feds nor were inclined to obey the law themselves.⁶⁴ Even after the Anti-Saloon League, another voluntarist organization, successfully lobbied for the Mullan-Gage Enforcement Law in New York, which squarely obliged the police to participate in the Prohibition project,⁶⁵ many officers still dragged their feet or took bribes. Without state and local participation, Prohibition was doomed to failure.⁶⁶ The New York example foreshadowed what might happen throughout the country.⁶⁷ In 1922, New Yorkers voted out Governor Nathan Miller, who had given them the Mullan-Gage Law, and replaced him with Al Smith, a committed "wet."⁶⁸ The new governor quickly won repeal of the state's Prohibition enforcement statute, describing the Eighteenth Amendment as "not a command but an option."⁶⁹

By contrast, enforcement of the Mann Act provided an example of a fruitful relationship between federal and local actors. Stanley Finch, the Bureau's first chief, who became the special commissioner for the Mann Act in 1912, established a vast network of local, part-time, and minimally compensated white-slave officers, usually local lawyers.⁷⁰ Together, they obtained more than 300 convictions between September 1912 and September 1913 alone.⁷¹ Local support also rebutted claims that the federal government was meddling in a presumptively local matter. An early challenge, which "condemn[ed the Mann Act] as a subterfuge and an attempt to interfere with the

⁶¹ Some locales cooperated. Indeed, the Supreme Court's first Prohibition car-search case, *Carroll v. United States*, came out of a joint investigation by federal agents and an officer from Michigan's Department of Public Safety. See *Carroll*; see also Seo, *Policing the Open Road*, at 113-15.

⁶² Calvin Coolidge, Third Annual Message (Dec. 8, 1925).

⁶³ James M. Doran, quoted in Post, "Prohibition," 31.

⁶⁴ Michael A. Lerner, *Dry Manhattan: Prohibition in the City* 72-75 (2007).

⁶⁵ *Id.* at 76-77.

⁶⁶ See Arthur C. Millspaugh, *Crime Control by the National Government* 54 (1937) ("Certain of the states failed to assume their share of the task and shifted the distasteful burden to the broad but slightly stooping shoulders of Uncle Sam. Prohibition leaders, misled by unwarranted faith in the omnipotence of federal enforcement, abandoned the localized methods which had gradually created a substantial temperance sentiment.").

⁶⁷ See Julien Comte, "Let the Federal Men Raid": Bootlegging and Prohibition in Pittsburgh, 77 *Penn. Hist.* 166, 174 (2010) (on police refusal to assist prohibition agents in Pittsburgh).

⁶⁸ Lerner, *Dry Manhattan*, 239-240.

⁶⁹ Alfred E. Smith, "The Governor's Statement," *New York Times*, June 2, 1923. See also Lerner, *Dry Manhattan*, 239-240.

⁷⁰ 1912 AG Report, 48; Pliley, *White Slave Division*, 221, 230; Pliley, *Policing Sexuality*, 89; Langum, *Crossing*, 55-56.

⁷¹ 1913 AG Report, 50.

police power of the states to regulate the morals of their citizens,” lost in the Supreme Court.⁷² The police themselves saw no troubling intrusion, just an opportunity for collaboration. At the 1913 IACP convention, President Richard H. Sylvester touted the extensive cooperation between the Bureau and locals. Police chiefs brought information about houses of “ill-repute” to Finch’s attention, then the feds took action. He noted that in his own jurisdiction of Washington, DC, “several” cases had been “disposed of by the United States authorities and the police have been foremost in bringing them to the front.”⁷³

Scholars have pointed to the Mann Act or the Volstead Act as turning points in the federalization of law enforcement.⁷⁴ Yet one should avoid conflating legislation with enforcement. In fact, the enforcement of these new laws actually highlights federal dependency. A perennially resource-strapped federal agency, by depending on support from citizens, paid a price when it came to the control of its agenda. Without a sufficient force of its own, Finch’s team depended on whatever information they received about potential Mann Act violations. Notwithstanding the Bureau’s desire to focus on commercial prostitution and to avoid policing morals, complaints of sexual misbehavior streaming from individual citizens and moral reformers necessarily determined the Bureau’s caseload.⁷⁵ Women seeking redress against lovers who spurned them, parents wanting to control daughters, and judgmental neighbors all saw the Mann Act as their tool. Given the drumbeat of these civilian complaints and calls from reformers demanding prosecution, it is not surprising that Mann Act cases skewed toward immoral behavior and less toward interstate prostitution rings that were harder to investigate.⁷⁶ Dependence on others for information deprived the Bureau of agenda control, but the corollary was support for that agenda and for the Bureau itself. When this collaboration was not forthcoming, as Prohibition authorities discovered, no

⁷² *Hoke v. United States*, 227 U.S. 308, 321 (1913).

⁷³ Proceedings of the Annual Conventions of the Int’l Ass’n of Chiefs of Police, 1913-1920, vol. III (reprinted 1971; June 1, 1913).

⁷⁴ See Stephen F. Smith, Proportionality and Federalization, 91 Va. L. Rev. 879, 897 (2005); Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 Hastings L.J. 1135, 1142 (1995).

⁷⁵ On the Bureau’s desired focus on commercial prostitution, see Pliley, Policing Sexuality, 99. On private complaints, see Pliley, Policing Sexuality, 99. In her analysis of Mann Act casefiles, Pliley found that private citizens, usually complaining about “their own familial catastrophes and marital calamities,” initiated most of the noncommercial cases. Hoover himself suggested figures between 50 and 70 percent. Pliley, Sexuality, 132. Noncommercial cases dominated the docket. McCoy’s review of every available Mann Act case prosecuted in the Western United States from 1910 to the 1930s—about 1,200—found that “a large proportion of cases came to the attention of authorities because family members, friends, and neighbors turned in people who behaved in what they saw as an ‘immoral’ fashion.” Kelli Ann McCoy, “Claiming Victims: The Mann Act, Gender, and Class in the American West, 1910-1930s,” at 22 (PhD diss., Univ. of Cal., San Diego, 2010); see id. at 117; see also Kelli Ann McCoy, “Regulating Respectable Manliness in the American West: Race, Class, and the Mann Act, 1910-1940,” 28 Western Legal Hist. 1 (2015).

⁷⁶ McCoy, Claiming Victims, 207 (“between 1910 and 1917, prosecutions progressed slowly and inconsistently along the path from commercial prosecutions—those cases most closely resembling ‘white slavery’—to noncommercial prosecutions.”); see also Langum, Crossing, 68 (noting pressure from “the public, zealous prosecutors, and the courts themselves” to expand prosecutions to include noncommercial violations involving consenting adults).

The now infamous targeting of boxer Jack Johnson in 1913 “was, undoubtedly, part of a concerted effort to establish a particular racial and gender order in the United States,” but was not representative of the Mann Act cases brought. See Kelli Ann McCoy, Claiming Victims: The Mann Act, Gender, and Class in the American West, 1910-1930s, at 157 (PhD diss., Univ. of Cal. San Diego, 2010). The Bureau also turned to the Mann Act when targeting a central figure in the 1920 Ku Klux Klan resurgence. Fred Cook, *The FBI Nobody Knows*, 124-26 (1964).

realistically conceivable amount of federal funding could have supported the agencies tasked with enforcement.

Neither could the passions of a discrete contingent of crusaders sustain the Bureau's growth over a longer period. It quietly kept its distance from Prohibition enforcement and, once the white-slavery scare dissipated, the Bureau's appropriations stagnated.⁷⁷ National security work was similarly cyclical; in fact, the Red Scare actually demonstrates its double-edged nature. On the one hand, helping the war effort and going after radicals made the Bureau seem indispensable to key national goals. On the other, the Bureau would regularly find that political commitment to its national-security portfolio ebbed and flowed.⁷⁸ The Armistice put an end to the Bureau's reliance on the APL and was about to lead to a considerable reduction in its force until a series of bombing attempts targeted administration officials, including the new Attorney General Palmer.⁷⁹ Notwithstanding the resulting hysteria, much of it manufactured, the Bureau remained small.⁸⁰ From 1919 to 1920, staff at headquarters numbered only thirty-one, and just sixty-one special agents worked in the field full-time on radical activities.⁸¹ Given their paltry numbers, they had to rely on local police forces in its many raids on strikers, anarchists, and communists.⁸² By fall of 1920, Republican President-elect Harding would declare that "too much has been said about Bolshevism in America," and budget strings were tightened.⁸³ Given the fickleness of political winds and congressional ambivalence about the Bureau's work, especially during the civil-liberties backlash over the excesses of the slacker raids,⁸⁴ the Bureau's longevity—and appropriations—would have to be based on a steadier stream of work that not only mattered to everyday life for ordinary citizens but also transcended politics *du jour*.⁸⁵

II. Collaborative Federalism in Action

As the divergent experiences with the Mann Act and the Volstead Act demonstrated, working together with local actors was indispensable to federal law enforcement. The Bureau's Dyer Act cases, which provided a steady line of business justifying the fledgling agency's existence, also depended on relationships of mutual exchange, or "collaborative federalism." Part II.A explains how

⁷⁷ Noakes, "Domestic Tranquility," 136.

⁷⁸ At the height of the Red Scare, the US Attorney in Western Washington asked Attorney General Palmer "to stop pursuing futile cases [against labor radicals] and concentrate on 'the humdrum work developing and returning to this office evidence in the various criminal cases here prosecuted.'" Noakes, "Domestic Tranquility," 168.

⁷⁹ Regin Schmidt, *Red Scare: FBI and the Origins of Anticommunism in the United States, 1919-1943*, 84n5, 149; see also Beverly Gage, *The Day Wall Street Exploded: The Story of America in its First Age of Terror*, 179-178, 211-212 (2009) (on Palmer's background and reaction to the bombing of his home, and on Bureau theories).

⁸⁰ Theoharis & Cox, *The Boss*, at 55-57.

⁸¹ Schmidt, 159.

⁸² Williams, *Without Understanding*, at 122 & n185.

⁸³ Schmidt at 156, 300-01; Theoharis & Cox, *The Boss* at 68 ("Hoover, lacking any independent political base, was forced for the time being to abandon the field of public antiradicalism.").

⁸⁴ Noakes, "Domestic Tranquility," 201. Laura Weinrib, *The Taming of Free Speech: America's Civil Liberties Compromise* (2016). Noakes, "Domestic Tranquility," 223-224.

⁸⁵ See Richard Gid Powers, *Secrecy and Power* at 164 (noting that under Presidents Coolidge and Hoover, J.E. Hoover "probably would have been happy to join an attack on radicals if someone else with a strong political base had volunteered to lead it, but neither then nor after was he interested in leading an anti-Communist crusade all by himself").

the Bureau's work on the Dyer Act offered police and insurance companies a solution to the problem of gathering criminal information in the automotive age and what the Bureau received in exchange. Part II.B then examines the parallel story of other information-sharing projects that the Bureau pursued, which further illustrates collaborative federalism in action. By fostering cooperative alliances with local partners with these projects, the Bureau was able to expand its capacity beyond its small size and to pursue the high-profile cases that the American public increasingly expected the federal government to solve. They also solidified the role of local police departments as indispensable federal interlocutors.

A. Enforcing the Dyer Act

i. What Locals Needed

Mass-produced cars appeared on Main Streets and interstate highways just as reforming police chiefs were beginning to coordinate their activities. The decentralized organization of law enforcement was ill-suited to pursue motorists who could flee their jurisdiction on a moment's notice. City or county governments were reluctant to spend money enlarging their police departments to go hunting for criminals who might not fall entirely within their purview. It also did not make sense for municipalities to spend more money as long as the pursuit and prosecution of crime was largely a private responsibility. As a result, insurance companies were at the front lines of fighting auto theft. Their main strategy was to post reward notices within a certain geographic range, usually within a radius of 150 miles or so from the point of theft since early cars on bad roads could travel only so far.⁸⁶

By 1912, a group of insurers decided to economize their efforts by forming the American Protective and Information Bureau (APIB), which circulated a single report for all the stolen vehicles they insured and served as an information clearinghouse.⁸⁷ Then in 1918, APIB manager E. L. Rickards and Michael Doyle, director of the American Automobile Insurance Company in St. Louis, Missouri, came up with the idea of a national law criminalizing the transportation of stolen vehicles in interstate traffic, believing that "Federal level involvement" would make a difference in combating the problem.⁸⁸ Conveniently, Doyle knew his congressman, Leonidas Dyer. The following year in 1919, Dyer introduced a bill "to punish the transportation of stolen motor vehicles in interstate or foreign commerce."⁸⁹

The House's discussion of the bill centered on the question: "How can a Federal law punish a man for stealing an automobile?"⁹⁰ After all, theft was a local matter and already criminalized under local laws. The IACP, unsure whether Congress had the power to criminalize auto theft, instead suggested that the solution might be for all states to enact a uniform law, a common solution to

⁸⁶ NATB, 75th Anniversary, 6.

⁸⁷ Sauter, *The Origin*, 2-3; see also 1920-1921 APIB Annual Report, 3. The APIB was one of those national associations that, as historian Brian Balogh explains, soon came to "overlay" the federal structure, "thickening the opportunities for" cooperation beyond the local or regional and "ultimately changing the very shape of federalism." Brian Balogh, *The Associational State: American Governance in the Twentieth Century*, 31-32 (2015).

⁸⁸ NICB Anniversary Book, 24; see APIB, 1920-1921 Annual Report, 3.

⁸⁹ C.R. House 5470.

⁹⁰ C.R. House 5473 (Rep. Reavis).

interstate problems during this period.⁹¹ But in the era of the Mann Act and National Prohibition—within three weeks of the House’s debate, Congress would pass the Volstead Act to enforce the Eighteenth Amendment—it did not take much to convince most national legislators that the federal government had the authority to criminalize the transport of stolen cars across state lines.⁹² One congressman argued by analogy that “[i]f the transportation of a woman from one State to another, by means of an automobile, for prostitution, constitutes interstate commerce, then how can it be argued, with any show of color, that the driving of a stolen automobile from one State to another for profit is not interstate commerce?”⁹³ Several of his colleagues also pointed out that the “favorite place for such thefts is near a State line.”⁹⁴ Dyer maintained that auto thefts were “particularly” common in the “cities of the Middle West,” especially in his home state Missouri, and that “State laws upon the subject have been inadequate to meet the evil.”⁹⁵ Chief Justice Taft would repeat these arguments in 1924 to uphold the Dyer Act, writing that “[t]he quick passage of the machines”—as cars were often called then—“into another state helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safe place in which to dispose of the booty at a good price. This is a gross misuse of interstate commerce.”⁹⁶

Dyer and Newton also argued that the new bill fell comfortably within interstate commerce in the more traditional sense by invoking the interests of the insurance industry. In the face of a high risk of loss, “almost every owner in the land [held] a larceny policy.”⁹⁷ But this was also why providing insurance against auto theft proved to be a losing business proposition. “One of the reasons why this legislation is needed so badly,” Dyer pointed out, was because “automobile theft insurance has advanced in the past year over 100 per cent on cars costing from \$500 to \$900.”⁹⁸ The economics of this situation especially affected ordinary citizens, for “cheaper cars are stolen,” making it “almost impossible for the owners of these cheaper cars to obtain at any rate automobile theft insurance.”⁹⁹ Given the recent precedents of the Mann Act and the Volstead Act, as well as the

⁹¹ 1918 Proceedings, in Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1893-1905, vol. 3 (New York, 1971), 29-31.

⁹² See C.R. House 5471 (“The power of the Congress to enact this law and to punish the theft of automobiles in one State and the removing of them into another State can not [sic] be questioned, in view of laws of similar nature heretofore enacted by Congress and the decisions of the Supreme Court of the United States touching same.”).

⁹³ C.R. House 5476.

⁹⁴ C.R. Senate 6433; see also C.R. House 5474.

⁹⁵ C.R. House 5470, 5471.

⁹⁶ Brooks v. United States, 267 U.S. 432, 438-439 (1924). See also Kelly v. United States, 277 Fed. 405 (4th Cir. 1921); Whitaker v. Hitt, 285 Fed. 797 (D.C. Cir. 1922); Katz v. United States, 281 Fed. 129 (6th Cir. 1922); United States v. Winkler, 299 Fed. 832 (W.D. Tex. 1924); Hughes v. United States, 4 F. 2d 387 (8th Cir. 1925).

⁹⁷ C.R. House 5475.

⁹⁸ C.R. House 5472. Lest one be tempted to attribute his efforts solely to solicitude for propertied interests and not, say, an expansive vision of the federal role in criminal enforcement, we note that Dyer—who represented a district that “included many African-American survivors from the violent East St. Louis race riot in 1917”—was also “the strongest advocate of a federal anti-lynching program in Congress and the institutional voice for the NAACP.” Megan Ming Francis, *Civil Rights and the Making of the Modern American State* 101 (2014); see Jeffrey A. Jenkins, Justin Peck, and Vesla Weaver, *Between Reconstructions: Congressional Action on Civil Rights, 1891-1940*, 24 *Stud. Am. Pol. Dev.* 57, 67 (2010).

⁹⁹ *Id.*

broad reach of auto theft on the material lives of many citizens, it took just one month for Dyer's bill to become the National Motor Vehicle Theft Act, or the Dyer Act, on October 29, 1919.

Congress, however, gave no thought to how the new law would be enforced. The closest that legislators came to such a discussion was when Representative Newton noted that with the new law, "the Federal grand jury is empowered to investigate such larcenies."¹⁰⁰ Once the Dyer Act was passed, its enforcement appears to have been an open question. Two months after enactment, the Automobile Underwriters Detective Bureau wrote to the attorney general inquiring "how a peace officer should proceed in making an arrest and prosecuting under this Act."¹⁰¹ Another insurance man wrote to the DOJ, "desirous of being sworn in as a special agent ... to serve without compensation for the purpose of running down ... thieves who have been ... transporting cars from one state to another."¹⁰² On the APIB's part, its leaders were under the misapprehension that US Marshals were supposed to be pursuing Dyer Act cases, and so were dismayed at the "laxity" that "existed on the part of the Federal Authorities in the enforcement" of the new law.¹⁰³

To make the most of their lobbying efforts, APIB manager Rickards and an official from the Chicago Crime Commission met with Bureau Chief William Burns and his assistant J. Edgar Hoover in 1921 "to discuss methods of closer co-operation between the Department of Justice Agents and the Association [and] more effectual enforcement of the National Motor Vehicle Theft Act."¹⁰⁴ Out of that meeting came clarification of the roles of the various stakeholders in Dyer Act cases.¹⁰⁵ For its part, the APIB would serve as "a clearinghouse for information in connection with stolen automobiles" and provide expertise on investigatory methods.¹⁰⁶ For instance, it published the "Reference Book" that catalogued all the factory numbers and "secret identification numbers" stamped on different car makes and models.¹⁰⁷ The insurance cohort would also pass on reports of stolen vehicles from their claimholders to law enforcement. This role was to be shared with local police departments whose officers discovered potential Dyer Act violations during their routine patrols.

For their part, the police did not hesitate to involve the feds. Prosecutions were much easier to bring under the Dyer Act than under state larceny laws, which required proof of intent "to permanently deprive the owner of his car" and, as a result, did not cover joyriding.¹⁰⁸ Dyer Act

¹⁰⁰ C.R. House 5475.

¹⁰¹ H. M. Shedd to Attorney General (letter, January 29, 1920), RG 60, Class 26, Box 1, NARA.

¹⁰² Frederick Lambert (Mutual Automobile Association) to DOJ (letter, January 24, 1920), RG 60, Class 26, Box 1, NARA.

¹⁰³ APIB, 1920-1921 Annual Report, 1. [pdf p 76]

¹⁰⁴ William Burns to Attorney General (memo, June 3, 1921), RG 60, Class 26, Box 1, NARA; see also APIB, 1920-1921 Annual Report, 1 ("arrangements were made for an intensified drive by the Federal Special Agents against the automobile thief").

¹⁰⁵ The APIB's activities on auto theft cases offers an example of how associations during this period of "New Federalism," as political scientist Kimberley Johnson calls it, "bridged the divide between bureaucrats and interest groups." Kimberley S. Johnson, *supra* at 6.

¹⁰⁶ APIB, 1920-1921 Annual Report, 2.

¹⁰⁷ Burns to Attorney General, June 3, 1921.

¹⁰⁸ Leonard D. Savitz, *Automobile Theft*, 50 *J. Crim. L. & Criminology* 132, 132 (1959), citing *Impson v. State*, 47 *Ariz.* 573 (1930). About 17.5 percent of those convicted under the Dyer Act were eighteen or under and charged with joyriding. Representative Dyer was so troubled when he learned of "mere cases of joy-rides by young men" that he

violations were also easier to prove than accompanying state crimes like robbery, and local officials were more than happy to pass along any case involving a car that crossed a state border.¹⁰⁹ But the Dyer Act's main value lay in coordinating law enforcement efforts among jurisdictions, when police in one locality apprehended someone with a car stolen from another locality, or when police in a theft victim's state needed help from the recovering state. As Hoover explained, even simple Dyer Act investigations generally required "interstate inquiries, which the Bureau makes through its various field offices."¹¹⁰ He continued:

The state authorities would be extremely handicapped ... by lack of investigative authority extending from one locality to another, by lack of funds requisite to subpoena witnesses from one locality to another, by the necessity of resorting to a complicated system of removal hearings, extradition writs and other legal necessities which it would be necessary to invoke and by what I feel sure would be a very positive disinclination on the part of various local authorities to incur the expense and trouble to properly enforce the Act where local individuals or individuals of local prominence were not involved.¹¹¹

Given the challenges that Hoover described, the Bureau's role in Dyer Act cases often amounted to "packaging" information across jurisdictions and then "gifting" the cases back to local authorities to prosecute. Hoover noted in 1929 that "in some instances we find that prosecution is instituted in State Courts under local Statutes, particularly where the case holds some local interest or where important witnesses are readily available without the State incurring a large expenditure."¹¹² Regardless of whether the prosecution was ultimately brought in state or federal court, the Bureau's involvement in auto theft cases presented a solution to local police departments' coordination problem. Federal facilitation via the Dyer Act substituted for interstate information sharing and clunky extradition procedures.¹¹³

In 1935, a columnist close to Hoover described this "service" aspect of the Dyer Act in the following way:

introduced a bill in 1930 to repeal his namesake law. Buel W. Patch, (1932). Proposed expansions of federal police activity. Editorial research reports 1932, vol. 1 (Washington, DC: CQ Press), retrieved from <http://library.cqpress.com/cqresearcher/cqresrre1932040100> Federal Experience Under Dyer Stolen Automobile Act <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1932040100#H2>; AG memo to USAs.

¹⁰⁹ See, e.g., "Kansas Bandit Slain," St. Joseph New-Press, July 20, 1931, <https://news.google.com/newspapers?id=z0tkAAAAIABAJ&sjid=TnUNAAAAIABAJ&pg=3101,4406166&dq=lemuel-hawkins&hl=en>.

¹¹⁰ Hoover to Asst. Atty. Gen. Luhring (memo, December 18, 1929), RG 60, Class 26, Box 2, NARA [pdf 73/129].

¹¹¹ Id.

¹¹² [?] to Luhring (memo, January 29, 1930), RG 60, Class 26, NARA [pdf v.2 p.71/129].

¹¹³ See John H. Jackson, "What's Happening to the Car Stealing Racket?," 7 J. Am. Insur. 7, 7 (1930) ("Theoretically, the apprehension of automobile thieves is a state matter, but by making the transportation of a stolen car over a state line a federal crime, and thereby putting the matter in the hands of federal officials, the necessity of co-operation between local police and of extraditing the criminal who has been arrested in a foreign state has been eliminated.").

Before the passage of this act, the run of bureau cases was tied tightly to the business of the Federal Government: there was little opportunity to be of assistance to State and local law-enforcement agencies. The new law widened tremendously the scope of activities. True, if a man robbed a bank, that was not the bureau's business since the robbery of even a national bank [] was not a Federal crime until less than two years ago. But if that robber stole a car during that holdup and crossed a State line, he then became a fugitive from Federal justice. ... A Federal chase for a violator of the national vehicle theft act has often led to the solution of a local mystery. A motivating crime is found, the theft of the car being the act of the moment, impelled by something quite different—usually the desire to escape from some other law violation. The Federal agency therefore frequently becomes an assisting agency to the enforcement bodies of the Nation, later withdrawing from the case if the State charge is the more serious.¹¹⁴

In this account, the Bureau applied the new federal criminal laws in order to help, not to encroach, local domains. Even diligent police chiefs sometimes found themselves relying on the feds given the coordination challenges. At an IACP conference in 1927, Chief J. W. Higgins of Buffalo, New York, complained that “other cities are not co-operating with us to the extent we co-operate with them.”¹¹⁵ Fortunately, the Bureau could step in to help.

In time, local protocols instructing officers to reach out to the feds whenever they recovered an out-of-state stolen car became common.¹¹⁶ When, in 1927, a Martinsburg, West Virginia, constable found an abandoned car with Florida plates, he scribbled a note to the Justice Department, which got passed to Hoover, who, in turn, assured the assistant attorney general for the Criminal Division that the matter would receive the Bureau's full attention.¹¹⁷ The constable appears to have found that car by himself, but Justice Department correspondence indicates that local recoveries were often spearheaded by insurance company representatives accompanied by local

¹¹⁴ Courtney Ryley Cooper, “10,000 Public Enemies: Chapter VI. Chief of the Man-Hunters,” *Wash. Post*, July 20, 1935, at 24. For Cooper's relationship with Hoover, see Powers at 196-200.

¹¹⁵ J. W. Higgins, *The Theft and Recovery of Automobiles*, 34 *Procs. Annual Conventions of IACP* 83, 85 (1927).

¹¹⁶ “State Joins U.S. Dept. in Auto Theft Cases,” *Hartford Courant*, July 28, 1921 (reporting that state motor vehicle commissioner committed to notify the federal bureau of investigation “whenever an arrest is made in Connecticut for the theft of a motor vehicle in another state and federal agent will be assigned to the case.”).

Not all states passed the buck. In 1926, explaining why no Dyer Act prisoners came from certain states, the superintendent of prisons noted, “That means only this, gentlemen, not that there are no motor vehicles being stolen, but that the State of Massachusetts, for instance, is rigidly enforcing its local law, and, therefore, we get no prisoners under the national motor vehicle theft law.” *Appropriations Bill for 1927, Sixty-Ninth Congress, First Session, January 1926*, at 287 (testimony of Luther C. White, superintendent of prisons). Other states trumpeted their own efforts. A 1929 magazine article commented, “One reason why Milwaukee recovers ninety-five per cent of all its stolen automobiles is because it maintains exhaustive records of such stolen property in the Identification Bureau as well as in the traffic department.” *Ruel McDaniel, Wisconsin Gets Her Men*, *North Amer. Rev.* 744, 746 (June 1929).

¹¹⁷ Correspondence involving Constable Harmon, Assistant AG Luhring, and Hoover between May 23, 1927, and June 14, 1927, RG 60, Class 26, NARA.

police, who then passed the case on to the feds.¹¹⁸ In fact, just about all Dyer Act cases came from local officials. And there were many; according to one insurance agent, out of the 10,505,660 cars in the country in 1921, 60,145 had been stolen, and 43,664 had been recovered.¹¹⁹ Far from intruding on local matters, Dyer Act cases amounted to the federal collection and packaging of information for the benefit of all concerned. Significantly, it was the feds, not the states, that were able to provide this service, and it was the feds, not the states, to whom local police departments were obliged.

ii. What the Bureau Got in Return

Auto theft cases made up a significant portion of the Bureau's docket. For example, in 1922, Dyer Act prosecutions comprised 43.74 percent of the Bureau's total convictions (see Table 1). That year, Chief Burns testified at a House appropriations hearing that the increasing number of Dyer Act cases reflected "a marked tendency on the part of State authorities to shift [] responsibility on[to] Federal authorities."¹²⁰ The next Bureau chief, J. Edgar Hoover, embraced the tendency even more enthusiastically. After Burns' resignation in 1924, the APIB's annual report noted that it "received excellent co-operation from Mr. Wm. J. Burns, Former Director, but the present Director, Mr. J. E. Hoover, is more intensely interested in the enforcement of the National Motor Vehicle Theft Act and fully realizes the effect of automobile thievery on general crime conditions."¹²¹ By 1929, the 2,123 Dyer Act convictions constituted more than half of the 3,950 Justice Department convictions (another 457 were under the Mann Act).¹²² After reading the Bureau's annual report for 1937-1938, the celebrated newspaperman Damon Runyon remarked, "What interests us as much as anything else is the way those G-fellows go after automobile thieves."¹²³

¹¹⁸ William De Groot (EDNY U.S. Attorney) to Attorney General (letter, October 14, 1926), RG 60, Class 26, NARA [23/136].

¹¹⁹ E. L. Rickards to John Crim (Assistant Attorney General) (letter, June 3, 1921), RG 60, Class 26, Box 1, NARA.

¹²⁰ Appropriations Bill for 1923, Sixty-Seventh Congress, Second Session, March 1922, at 128 (testimony of Director Burns); see also *id.* at 262 (Asst. Atty. Gen. Holland notes, "as Federal laws are extended, so that offenses which were formerly punishable by the States are punishable under Federal law, it is very noticeable that State officials sidestep their responsibility and put such responsibility on the Federal Government.").

¹²¹ APIB, 1923-1924 Annual Report, [pdf p26].

¹²² Attorney General Annual Report, 1929.

¹²³ Damon Runyon, *The Brighter Side*, Apr. 4, 1939, at 19.

Table 1. Breakdown of Total Bureau Convictions.¹²⁴

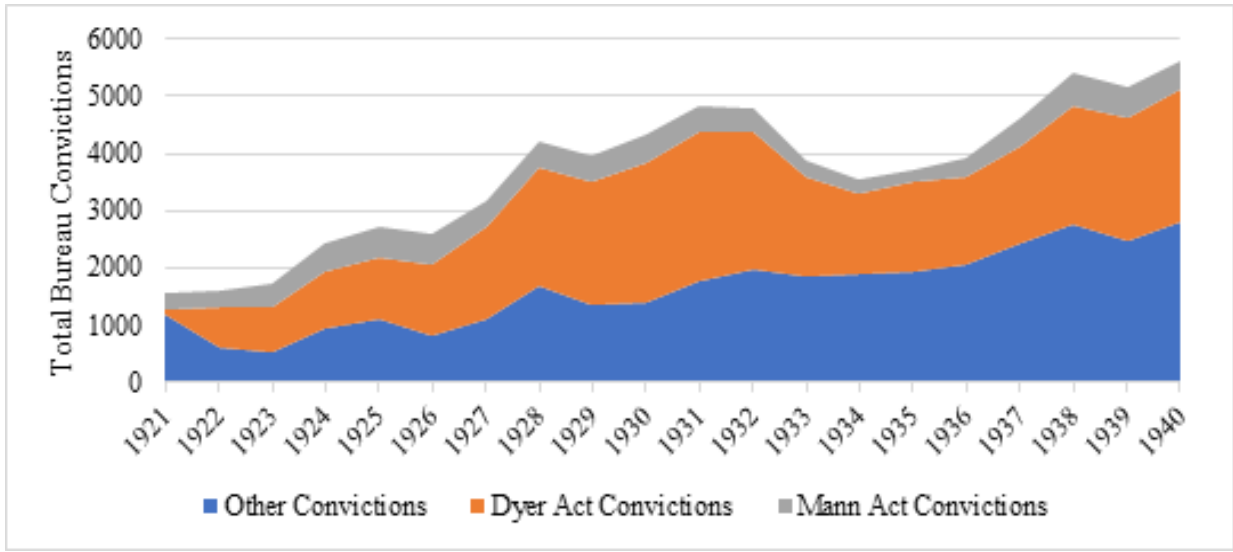
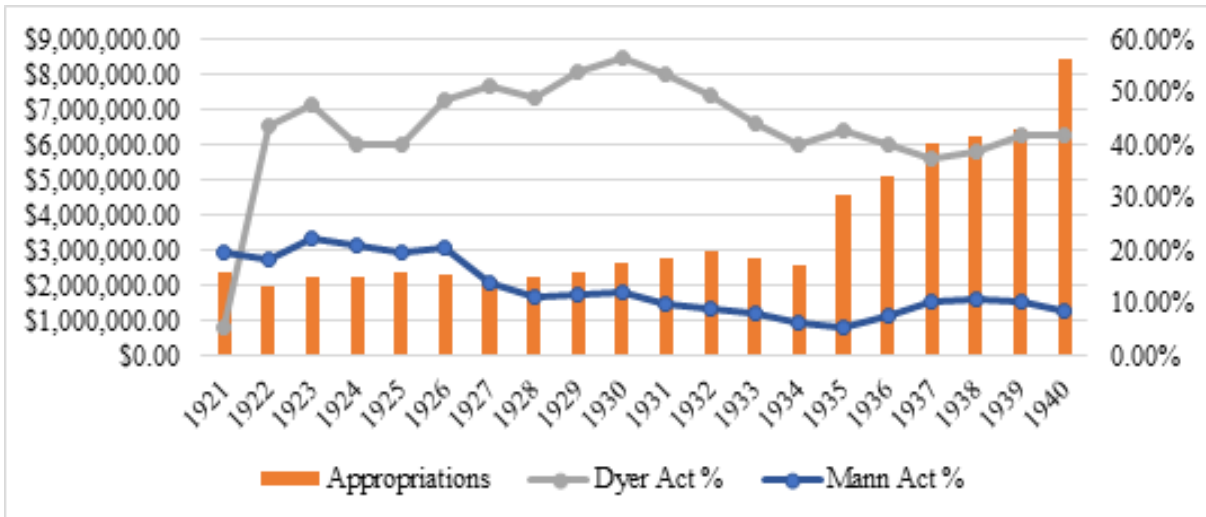


Table 2. Bureau Appropriations Compared to Percentage of Dyer and Mann Act Convictions.¹²⁵



It wasn't that the Bureau lacked other matters crying out for its investigative attention. As David Grann recounts in *Killers of the Flower Moon*, in the spring of 1923, when the Osage Tribal Council appealed to the Justice Department to investigate a growing spate of murders targeting its members, Chief Burns dispatched agents to pursue desultory inquiries largely at the tribe's

¹²⁴ Data was taken from Attorney General Annual Reports 1921–1940. For years before 1928, the Bureau reported convictions by sentence amounts imposed rather than numbers convicted. Conviction numbers for years 1921–1927 were therefore taken from statements in appropriation bills or by calculating a sentences imposed-to-conviction ratio from future years.

¹²⁵ For conviction numbers see supra note ***. Appropriation amounts were taken from Attorney General Annual Reports 1921–1940.

expense.¹²⁶ Hoover, on becoming director, continued the investigation, but with an inadequacy that Grann makes clear in sad detail. Because local white officials were complicit in the Osage murders, these cases did not offer the Bureau the upside of Dyer Act cases: the opportunity to pursue easier cases that forged collaborative relationships.

Hoover collaborated not simply because locals sought federal help. He also understood the benefit to the Bureau. Most foundationally, its work on Dyer Act cases justified the agency's existence. Testifying at a House appropriations hearing in 1926, Hoover mentioned having "just received" an annual report from the Theft Committee of the National Automobile Underwriters Conference, which highlighted how the most recent fine and recovery data "prove conclusively that the Department of Justice, Bureau of Investigation, is enforcing the national motor vehicle theft act and your committee firmly believes that this arm of the Government is serving the public 100 percent."¹²⁷ Hoover was not shy about deploying this broad-based industry support—and the steady stream of statistics—during congressional appropriations hearings. Nor was he even original. Attorney General Daugherty in 1922 had touted both "the value of the stolen motor vehicles recovered by the Bureau of Investigation" and the "[e]xcellent cooperation" between DOJ agents, "peace officers throughout the United States," and "the insurance companies writing auto theft insurance."¹²⁸

In appreciation for the Bureau's assistance in auto theft cases, local departments often reciprocated when the Bureau needed their help. An assistant director noted in 1930 that "the bureau's representatives in various sections of the country are dependent in very many instances upon the good will of sheriffs' offices and other law-enforcement officials for cooperative support in the conduct of investigations."¹²⁹ Hoover further explained to Congress how the Bureau's close relationships with local police saved money; instead of sending an agent from Dallas all the way to the Panhandle to check out a subject as part of a routine investigation, an agent could simply wire the police chief or sheriff who would do it for the Bureau "without any cost to us."¹³⁰ It was thus through the Bureau's service to commercial interests and local law enforcement that the fledgling agency was able to expand its capacity beyond its small size and limited funds.¹³¹

Local assistance was also crucial to the Bureau's ability to pursue its own investigations and to demonstrate its effectiveness to a public that was increasingly calling for federal action in cases

¹²⁶ David Grann, *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI* (2017).

¹²⁷ Appropriations Bill for 1927, Sixty-Ninth Congress, First Session, January 1926, at 108. See also "Dyer Law Nips 272 Prisoners in a Year," *Detroit Free Press*, January 20, 1921 (federal achievements in first year of Dyer Act touted in report submitted to the directors of the National Automobile Dealers' Association in Chicago).

¹²⁸ Attorney General Annual Report, 1922, at 70-71.

The relationship between Bureau officials, insurance companies, and congressional overseers soon looked a lot like the "iron triangles" that would develop in other regulatory spaces that supported agencies and shaped their work. Francis E. Rourke, *American Bureaucracy in a Changing Political System*, 1 *J. Pub. Admin. Res. & Theory* 111, 118 (1991).

¹²⁹ H. Nathan (Asst. Dir., Bureau of Investigations) to Director (Bureau of Prisons) (letter, August 9, 1930), in Appropriations Bill for 1932 [check], Seventy-First Congress, Third Session, December 1930, at 179-180.

¹³⁰ Hearing on Appropriations Bill for 1934, at 92 (1932).

¹³¹ In 1929, the Bureau employed 136 people at headquarters (not including the Identification Division), and had a field force (scattered in 30 field offices) of 460, of which 285 were agents and 73 accountants. Albert Langeluttig, *Federal Police*, 146 *Annals Am. Acad. Pol. & Soc. Sci.* 41, 42, 52 (1929).

involving jurisdiction-crossing gangsters, bank robbers, and kidnapers.¹³² Even President Herbert Hoover, stalwart defender of local rule, could not ignore these demands. In 1930, he announced that the federal government would provide reinforcements in “an intensified cooperative drive against racketeering in Chicago and elsewhere.”¹³³ This announcement prompted newspapers to report that “the nation wars on racketeering,” indeed, it was “more than a war, it is a revolution ... against gangster and hoodlum rule.”¹³⁴ Anxieties about crime reached fever pitch in 1932, when Charles Lindbergh’s twenty-month-old son was kidnapped from his own home.¹³⁵ When the baby’s body was found two months after the kidnapping, the public demanded a national response.¹³⁶

Congress promptly considered a bill to make the transportation of kidnapped persons across state lines a federal offense.¹³⁷ Despite the new law, banner headlines continued during Roosevelt’s first year in office, in 1933. In the June “Kansas City massacre,” a group of notorious gangsters ambushed law enforcement officers and left an agent and three police officers dead during an attempt to free one of their own in federal custody.¹³⁸ In July, “Machine Gun” Kelly kidnapped an oil tycoon for ransom.¹³⁹ Later that year, John Dillinger and his crew killed the Lima, Ohio, sheriff during a jailbreak, launching a nationwide manhunt for the outlaw.¹⁴⁰ Responding to this breakdown in law and order, Roosevelt’s attorney general, Homer Cummings, rolled out a “twelve point plan for crime prevention” as part of the new administration’s “war on crime.”¹⁴¹

Although the Roosevelt administration, unlike its predecessor, envisioned a robust national state to tackle the problems of modern society,¹⁴² Congress did not match the Bureau’s growing jurisdiction with commensurate appropriations. With insufficient agents in the field, the Bureau’s collaborative relationships with local departments, cultivated through its “service” cases under the Dyer Act, came in handy. Not only did local assistance extend the Bureau’s reach, it also allowed the Bureau to project an outsized image of its capacity, offering reassurance to a public that was increasingly expecting the feds to fight crime.

¹³² Louis M. Howe, “Uncle Sam Starts after Crime,” *Saturday Evening Post*, July 29, 1933; see also Kathleen Frydl, “Kidnapping and State Development in the United States,” 20 *Stud. in Am. Pol. Dev.* 18, 24 (2006).

¹³³ “Topics of the Day: The Nation Aroused to Smash the Racketeer,” *Literary Digest*, December 6, 1930.

¹³⁴ *Id.*

¹³⁵ See Kathleen Frydl, *supra* note __ at 24.

¹³⁶ See R. L. Duffus, “Kidnapping: A Rising Menace to the Nation,” *New York Times*, March 6, 1932, XX1; Buel W. Patch, “Proposed Expansions of Federal Police Activity,” 1 *Editorial Research Reports* 231, 231 (1932).

¹³⁷ See Patch, “Proposed Expansions,” 232-233.

¹³⁸ Potter, 2; see Robert Unger, *The Union Station Massacre: The Original Sin of J. Edgar Hoover’s FBI* (1997) (finding massive holes in the standard FBI account of the ambush and arguing that the agent was likely killed by friendly fire).

¹³⁹ Kathleen J. Frydl, *Kidnapping and State Development in the United States*, *Stud. in Am. Pol. Dev.* 18, 23-24 (2006).

¹⁴⁰ S.F. Cowley, Memorandum for the Director, *Murder of Sheriff Jesse Barber*, Oct. 24, 1933, *Dillinger Gang* pt. 1 of 30, p. 43.

¹⁴¹ “Attorney General Cummings Outlines Crime Prevention Program Over CBS,” *Columbia Broadcasting System*, April 19, 1934, at 2.

¹⁴² See Frydl, “Kidnapping,” 16 (“It is worth noting the coterminous advance of the social welfare state with the security state; the threat of economic peril alongside perceived or real threats to basic security provided a shared rhetorical context that legitimized and extended the case for federal power in general.”).

The cooperative nature of Dyer Act cases also neutralized any potential disruption to the Bureau's relationship with locals when it swooped in to take over higher profile cases.¹⁴³ The Bureau pursued some noted Bad Guys and, to the extent possible, maintained control over those cases, both to ensure success and to credibly claim credit. *To the extent possible* is a critical caveat, for the Bureau could make its cases only with considerable cooperation from the same local authorities it wanted in the shadows. The Bureau's assiduous work on auto theft cases would more than offset these informational and resource "withdrawals" from its local counterparts.¹⁴⁴

The pursuit of the infamous gangster John Dillinger, who had committed multiple Dyer Act violations (a fact always noted in the Bureau's case files), illustrates the fine line that Hoover had to walk between showcasing the Bureau's effectiveness and appeasing locals. When Tucson, Arizona, police apprehended Dillinger in January 1934, Hoover publicly praised the work of the city and county peace offices.¹⁴⁵ But in private, he allowed others to give credit to the Bureau. When the president of a "scientific protection firm" congratulated Hoover on the success of "your men" and voiced his "suspicion" that Hoover had directed "the credit" to the local police, Hoover was careful not to correct the writer's misimpression.¹⁴⁶ The writer added, "I'm sure this will pay you many times in securing the co-operation of the local police departments with your men." Hoover agreed that "this practice on the part of newspapers will aid materially in securing the cooperation of the local and Federal authorities."¹⁴⁷

Maintaining tight Bureau control over the Dillinger manhunt while not aggrieving state and local police could be challenging. IACP's president quietly chided Hoover's media-hogging, noting press reports of Hoover's "constant and devoted search for Dillinger."¹⁴⁸ "While your faithful agents are making every effort to apprehend this man," he allowed, "we likewise are making a similar effort," he pointed out. He ended the letter by guaranteeing that the "entire force" of the IACP would be "at YOUR disposal."¹⁴⁹ For its part, the Bureau took pains to shoot down a press report

¹⁴³ Robert Alvin Waters & Zack C. Waters, *The Kidnapping and Murder of Little Skeegee Cash: J. Edgar Hoover and Florida's Lindbergh Case*, 16 (2014) (noting that the Bureau "alienat[ed] many local cops by always taking full credit for any successful case and blaming local police for any failures.").

¹⁴⁴ Also offset were the Bureau's occasional investigatory forays into vice and corruption that implicated local police and raised the hackles of their congressional protectors, or, after 1940, into civil rights violations committed by police officers. See Dept. of Justice Appropriation Bill for 1941, Hrgs. Subcom. of Comm. on Appropriations, 66th Cong., 3d Sess. 167-168 (1940) (Hoover explaining to a somewhat hostile Florida Representative Millard Caldwell (soon to be governor) that the Bureau was investigating actual federal crimes when it scrutinized Miami Beach conditions and found that certain police agencies "were not interested or sincere in the enforcement of law."); Elliff, at 66-67, 142 (Hoover cautioning against a civil rights inquiry into a police brutality case); Richard Gid Powers, at 327 (Hoover cautioning agents not to comment disfavorably on their civil rights investigations of police); Fred J. Cook, *The FBI Nobody Knows*, 23 (1964) (on efforts within the Bureau in the 1960s to "go easy on local police because of the need for their cooperation in other Bureau matters").

¹⁴⁵ J. Edgar Hoover Lauds Work of Police, Jan. 26, 1934 Tucson Daily Citizen, clip in FBI files, fbi.vault Gang pt. 3 p. 49.

¹⁴⁶ Letter, President of Federal Laboratories, to Director Hoover, Jan. 26, 1934, vault.fbi Dillinger Gang, pt. 3, p. 15.

¹⁴⁷ Letter, Director Hoover to John Young, Pres. of Federal Laboratories, Feb. 2, 1934, vault.fbi, Gang pt. 3, p. 16.

¹⁴⁸ Letter from Chas. A. Wheeler, Pres. IACP, to Dir. Hoover, April 6, 1934, fbi.vault Dillinger Gang pt 10, p. 146.

¹⁴⁹ Id.

“to the effect that this Division has not cooperated with [local] law enforcement officials” because it had “caused considerable embarrassment particularly because it is not true . . . and secondarily because it has caused collaborators of the Division to feel offended and hurt.”¹⁵⁰

After Dillinger escaped from the Crown Point County Jail in Indiana with help from corrupt local officials in March and a failed attempt to capture him in April, Hoover demanded that “Public Enemy #1” be given priority over all other matters.¹⁵¹ When Special Agent Melvin Purvis asked headquarters whether “he should solicit the assistance of local law enforcement” when conducting raids in the case, Hoover sent instructions that “such raids should be conducted by Division Agents exclusively whenever possible,” with outreach to locals only if “absolutely necessary.”¹⁵² All the while, managing intergovernmental relations remained critical to the effort. When Indiana Governor McNutt told a Bureau official that his “chief desire is to have a member of the State Police present when Dillinger was captured,” the official assured him that the Bureau would call “whenever possible.” But the official took care to substitute the state director of public safety, whom the Bureau knew and trusted, for the high-profile state police captain whom the governor had suggested.¹⁵³ Ultimately, it was another Indiana force, the East Chicago police, that provided the critical information. They had an informant in contact with Dillinger, and two officers were eager to help if they could “work with” the Bureau.¹⁵⁴ Dillinger was ambushed at the Biograph Theater days later.¹⁵⁵ As this turn of events illustrates, while the Bureau could handle its relationships with state police agencies, dependence on local police was virtually non-negotiable. Even with thirty-eight agents assigned full-time,¹⁵⁶ the Bureau would not have been able to track Dillinger without considerable assistance from local police.

This reliance on locals explains why the Bureau did not pause its work on Dyer Act cases even during wartime; more than ever, it needed to keep cultivating the exchange of mutual benefit. It also needed to appease Congress, and Hoover continued to feature Dyer Act recovery figures as justification for the Bureau’s appropriations.¹⁵⁷ After the war, the Bureau ramped up its internal

¹⁵⁰ S.P. Cowley, Memorandum for the Director, Apr. 26, 1934, Dillinger Gang pt. 21, p. 45.

¹⁵¹ Potter at 145; Burroughs, at 292-322; Telegrams from Hoover, Apr. 30, 1934, to New York and Chicago offices, Dillinger Gang pt. 22, at 139-41.

¹⁵² Memorandum to the Director, S.P. Cowley, Mar. 7, 1934, fbi.vault Gang at p. 4, p. 95.

¹⁵³ Office of Director, Memorandum, May 4, 1934, Dillinger Gang pt. 25 at 198; see Burrough at 94-97 (on Matt Leach); Fred Cook at 181 (on how Captain Leach “found himself completely frozen out” of a pursuit in which the Bureau’s refusal to coordinate with local police nearly led to a shootout between them).

¹⁵⁴ Potter sees this as part of a pattern during this period, with the Bureau “competing with local police to get information first and providing local officers with incentives to circumvent their own commanders and report directly to federal agents.” Potter, at 179-80.

¹⁵⁵ Burrough, *supra* note ___, recounts the story in wonderful detail. See also Dillinger Slain in Chicago, N.Y. Times, July 23, 1934, at 1.

¹⁵⁶ Burrough, at 347 n.*.

¹⁵⁷ In a 1942 appropriations hearing, he noted a “slight decline” in convictions, from 2,340 in 1941 to 2,282 in 1942. Hearing for Appropriations Bill for 1943, Seventy-Seventh Congress, Second Session, January 1942 at 118-119 (also noting that were Congress to enact a proposal to make “the theft of automobile tires a Federal offense” the Bureau would need “additional funds”). Another drop, the following year, was attributed to the “fact that there are not so many automobiles for sale, but principally and probably because of gasoline rationing and the difficulty of getting tires.” Hearings for Appropriations Bill for 1945, Seventy-Eighth Congress, First Session, December 1943 [295] (testimony of Director of the Bureau of Prison).

security operations and belatedly began to focus on organized crime and civil rights violations.¹⁵⁸ Even amid these forays, however, Dyer Act cases continued to provide a ground bass, a steady source of easily obtained statistics justifying appropriations for legislators skeptical of the Bureau's other work.¹⁵⁹ Indeed, as the war ended, Hoover was quick to note that auto thefts were starting to spike.¹⁶⁰ In 1946, when Hoover asked for an additional 3,000 agents, he noted that each agent was currently handling an average of 19.09 cases and reported that Dyer Act cases (among others) were bound to increase. These ritual supplications before Congress, with Bureau officials citing its service to local departments, continued until the late 1960s.

B. The National Identification and Information Division

Even as Bureau agents spent an outsized proportion of their time on Dyer Act cases, the agency became even more directly involved in the collection of criminal information through its management of identification data and crime statistics, the latter ultimately becoming the Uniform Crime Reporting system used today. The management of both datasets not only gave the Bureau another opportunity to serve local departments, but it also put the agency at the forefront of a larger effort to gather information about crime and criminals (and many non-criminals, too).¹⁶¹

In 1941, when Senator Norris criticized the Bureau for arresting members of the Abraham Lincoln Brigade, one Representative responded that “when the FBI returns almost \$8 for every dollar it spends, through collection of fines and the restoration of property, we, as Members of Congress, should think carefully before we hastily criticize such a great law-enforcement agency of the Federal Government.” *Congressional Record v. 86, 76th. Cong., 3rd. Sess.: 3 January 1940-3 January 1941, at 2443.* (Stockham at 159).

Bureau officials continued to cite Dyer Act statistics during appropriations hearings, even when others did most of the legwork in bringing auto theft cases. See William C. Sullivan, *The Bureau: My Thirty Years in Hoover's FBI* 118 (1970) (“What the senators never knew was that most (if not all) of the real work involved in investigating the kinds of crimes that made for Hoover's blockbuster statistics, juvenile car theft and the like, was done by the local police, not the FBI.”); James Q. Wilson, *The Investigators: Managing FBI and Narcotics Agents* 98 (1978) (noting how agents “would call up local police departments in search of recovered cars, which, if it could be shown they had come from out of state were listed as ‘FBI recoveries’”); Tom Wicker, *What Have They Done Since They Shot Dillinger?*, *N.Y. Times*, Dec. 28, 1969, at SM4 (observing that even if it was local police, not FBI agents, that chased down stolen cars that crossed state lines, the Bureau still “[took] the recovered automobiles, add[ed] their value to its statistics, prosecute[d] the thief if possible, and count[ed] him as another arrest and conviction”); Louis M. Kohlmeier, *Hoover Loses Immunity to Criticism Despite “Law-and-Order” Mood*, *Wall St. J.*, Oct. 10, 1968, at 1 (noting that “[s]ome crime experts question the significance” of Hoover's oft-touted statistics about recoveries and fugitives located, since “[l]ocal police often help capture fugitives and recover cars”).

¹⁵⁸ See, e.g. *Annual Report of the Attorney General, 1965-66*, at 345-63.

¹⁵⁹ See *Hearings on Appropriations Bill for 1955, Eighty-Third Congress, Second Session, December 1953* [167-168] (testifying at a 1953 appropriations hearing, Hoover noted, “[d]uring the past year 13,886 stolen automobiles were recovered in cases investigated by the Bureau, an all-time high,” and called auto theft “one of the most aggravated criminal problems we are faced with in this country”).

¹⁶⁰ *Hearings for Appropriations Bill for 1947, Seventy-Ninth Congress, Second Session, January 1946* at 155 (noting uptick in auto thefts after war: 27% more automobile thefts between November 1944 and November 1945. 74% increase in auto theft violations from October 1940 to January 1946. 62% of car thefts committed by persons under age 21.).

¹⁶¹ The Bureau's leadership in this endeavor gave it a central role in a larger “legibility” process—to use James Scott's term about a state's commitment to “map” its terrain and people—that enhanced its nationwide status and was foundational to the state-building project during this period. James Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998).

The power that came with control over information began not with any grand schemes of J. Edgar Hoover but with local police departments. In 1921, twenty years after it unsuccessfully proposed “a National Bureau of Criminal Identification” to Congress, the IACP tried again, this time with the Bureau’s assistance. After meeting with IACP representatives, Chief William Burns announced his intention to establish a national fingerprint registry.¹⁶² Two years later, the IACP “unanimously adopted” resolutions to transfer its records, all 138,000 of them, to the DOJ before Congress had even authorized the federal agency to collect them.¹⁶³ Burns, also impatient with congressional inaction, unilaterally ordered all records from the federal prison in Leavenworth to be transferred to Washington.¹⁶⁴ FBI critic Max Lowenthal would later claim that the Bureau had taken over the IACP and Leavenworth fingerprint registries to “eliminate competition,” but the Bureau’s “customers” were fully complicit.¹⁶⁵ These moves also forced Congress’s hand, resulting in hearings on the matter the following year.

Concerns about centralized policing continued to loom large during the 1924 hearings. A national criminal identification database seemed too similar to the registration of citizens maintained by centralized states in Europe.¹⁶⁶ Several members of Congress asked whether the project would lead to a national police force and how it would affect the federal-state relationship on law enforcement matters, particularly at a time when National Prohibition was straining that relationship. House members also considered under what authority the federal government could “compel the chiefs of police commissioners to furnish this information to [a federal] official.”¹⁶⁷ It seemed necessary, according to one representative, to connect the “constitutional grant of power” to “the purpose of obtaining information” for an existing federal department fulfilling its duties under federal laws.¹⁶⁸ This was where the passage of time and intervening events made a difference. In 1901, when the IACP first proposed the bill, the Mann Act was nearly a decade away.¹⁶⁹ By 1924, when Congress reconsidered the bill, the federal government had not only the Mann Act but also the Volstead Act and the Dyer Act. Chief Burns testified that in the year since the IACP handed over its information bureau to the DOJ, it was already proving to be effective in solving federal crimes, such as “stealing automobiles, the Mann Act, [and] impersonations.”¹⁷⁰ Convinced, Congress

¹⁶² Lowenthal, 370.

¹⁶³ 1924 Congressional Hearing, 27, 35.

¹⁶⁴ Lowenthal, 372-373.

¹⁶⁵ Lowenthal, 370.

¹⁶⁶ Lowenthal, 370. Tocqueville once contrasted the lack of surveillance systems in the United States with France’s system of internal passports and residential registrations, as well as a centralized reporting system of criminal convictions. Sankar diss., 118-119 (citing Tocqueville, *The Old Regime and the French Revolution* (New York 1951), p.61).

¹⁶⁷ Wickersham Report on Criminal Statistics, 6 (Rep. Dyer).

¹⁶⁸ Id.

¹⁶⁹ In 1900, when the IACP president approached the attorney general for his support for a national criminal identification bureau, the DOJ head responded that he did not believe that such a project was “so closely connected with this department as to call for my official support or particular recommendation.” Attorney General Griggs quote in Sankar diss., 258 (citing Misc. Letter Book, No. 45, Letter from AG Griggs to Richard Sylvester).

¹⁷⁰ Id. at 78.

established the National Identification Division in July 1924 and housed it in the Bureau of Investigation.¹⁷¹

Although the federal government's own needs helped persuade a wary Congress, the needs of local governments were more critical to sustaining congressional support. An important part of the Bureau's appropriations strategy was to mobilize local enforcers who had sway with Congress. Even after congressional authorization, the IACP continued to remind its members to "enlighten Senators and Representatives in Congress from their respective districts regarding the success and value of the Division of Information and Identification, that they may readily comprehend its worth and assist in its upbuilding."¹⁷² Hoover himself encouraged the locals to take pride and ownership over the criminal registry system, telling IACP members at its 1925 convention that the "Division of Identification is your child."¹⁷³ Congressional support for federal law enforcement projects would come and go, but legislators' support for the police departments primarily responsible for protecting their constituents was an enduring feature of the political landscape.

The mutuality of benefits was precisely why the Identification Division proved so successful. Just two years after Congress authorized it, Hoover announced that he could "now say that we have achieved a practically [sic] unanimity of support for the National Division of Identification of all the Chiefs of Police of all the cities in the United States and Canada of large size."¹⁷⁴ He was particularly pleased to report that even New York and Chicago—the two cities that had the most fractious relationship with federal authorities because of National Prohibition—had come around and "developed a close relationship of mutual interest and cooperation" with the Bureau.¹⁷⁵ Moving forward, the goal was now "to secur[e] every possible extension of the scope, influence and value of the National Division of Identification" by entering "into continued relations with the sheriffs of every county, in each state of the country."¹⁷⁶

Managing the Identification Division extended "the scope, influence and value" of the Bureau as well. Police departments grateful for its services returned the favor by gathering information for the Bureau when needed. As one pundit put it, "When the local officials are puzzled the national bureau clears up the doubt. When Uncle Sam is puzzled, he can call on any of the local officials for information."¹⁷⁷ As historian Richard Powers puts it, the collaboration placed Hoover "at the head of a law enforcement community drawn into a cooperative network."¹⁷⁸

The Bureau soon expanded the sorts of data it was collecting beyond criminal identification. When IACP leaders testified before Congress in 1924, they suggested that the Identification Division might also keep track of "daily lists of stolen automobiles, names, numbers, and data that

¹⁷¹ 1926 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1926-1930*, vol. 5 (New York, 1971), 50. The division was created "under the provisions of an Appropriation Act which had been passed by the Congress of the United States covering the general expenses of the Bureau of Investigation of the Department of Justice." *Id.*

¹⁷² *Id.* at 65.

¹⁷³ *Id.* at 50.

¹⁷⁴ 1926 Proceeding, at 111.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 58.

¹⁷⁸ Powers, 157.

might lead to recovery,” and more generally, “reports of crimes,” “reports of threatened or contemplated depredations by enemies of State,” and “names and descriptions of outlaw organizations and of persons belonging to bomb gangs.”¹⁷⁹ Congress agreed, and legislators began studying the feasibility of receiving “crime statistics and other subjects germane to the division under the law, all to be afforded enforcing offices as information for the prevention, suppression and detection of crime.”¹⁸⁰

In fact, by the 1920s, calls for better and more statistical data on all things crime related were heard from a diverse array of constituents, from law enforcement to census wonks, from lawyers to social scientists.¹⁸¹ The Wickersham Commission, in its extensive survey of what went wrong with the Prohibition experiment, also touted the importance of data, noting “[s]tatistics are needed to tell us, or at least to help us tell us, what we have to do now, how we are doing it, and how far what we are doing responds to what we have to do.”¹⁸² The commissioners deplored that “no such data can be had for the country as a whole” and proposed that data collection and analysis should be centralized under one federal agency.¹⁸³

The Commission was adamant that the Bureau ought not to be selected for the task, lest it marshal criminal statistics to justify its expanding authority. “It takes but little experience,” the Wickersham Report explained, “to convince that a serious abuse exists in compiling [criminal statistics] as a basis for requesting appropriations or for justifying the existence of or urging expanded powers and equipment for the agency in question rather than for the purposes which criminal statistics are designed to further.”¹⁸⁴ By the time the Wickersham Commission issued its report in 1931, however, Congress had already selected the Bureau on the recommendation of the IACP.¹⁸⁵ In 1928, the association had suggested that “the Identification Division of the Department of Justice might be a very logical place in which to assemble statistics on crime” because all fingerprints were already going to the Bureau.¹⁸⁶ It did make sense; the project required the voluntary participation of local police, which had the criminal information that would furnish the statistics in the first place, and the Bureau had already nurtured collaborative relationships with them.

In addition to Dyer Act prosecutions and the Identification and Information Division, the Bureau’s further fostered its relationship with locals through the FBI Laboratory, which was set up in 1932 and provided forensic assistance to departments throughout the country.¹⁸⁷ In 1935, the

¹⁷⁹ 1924 Congressional Hearing, 69.

¹⁸⁰ *Id.*

¹⁸¹ See Louis N. Robinson, *History of Criminal Statistics*, 24 *Am. Inst. Crim. L. & Criminology* 125 (1933); Beverly Gage, *Counting Crime: J. Edgar Hoover, the Wickersham Commission, and the Problem of Criminal Statistics*, 96 *Marq. L. Rev.* 1109, 1113 (2013); Lawrence Rosen, *The Creation of the Uniform Crime Report: The Role of Social Science*, 19 *Soc. Sci. Hist.* 215, 221 (1995).

¹⁸² Wickersham Report on Criminal Statistics, 3.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 5-6. See also Gage, *Counting Crime*, 1117.

¹⁸⁵ Act of Congress, June 11, 1930; see also *Uniform Crime Reports* 1, no. 1 (August 1930), p.1.

¹⁸⁶ Appropriations Bill for 1928, Sixty-Ninth Congress, Second Session, December 1926-January 1927, p. 58 (testimony of Hoover).

¹⁸⁷ Hoover would later boast:

Bureau also established the National Academy to train police officers and, in the process, create a cadre of willing collaborators in Bureau operations. During his 1937 appropriations testimony, Hoover noted that the Academy “remove[d] the argument for the establishment of a national police force” because it “bridge[d] over that gap between local and Federal law-enforcement officers” by “eliminat[ing] the jealousies that sometimes exist and help[ing] to do away with friction which may develop.”¹⁸⁸ By 1940, he would proclaim the Academy the “West Point of Law Enforcement” and its graduates a “‘reserve force’ that could ‘be mustered into the service of the FBI.’”¹⁸⁹

To make sure that the American public, and not just the local police, understood the Bureau’s role, Hoover allowed Universal Pictures to shoot a short documentary about the FBI, titled *You Can’t Get Away With It*, showcasing the agency’s work.¹⁹⁰ Released in 1936, the film explained how violations of the Dyer Act “put the G-men” on the trail of notorious criminals. It recorded the Identification Division’s cache of fingerprints and system of matching them to suspects, as well as the Crime Lab where experts analyzed fingerprints, handwriting, and bullet patterns; created mouldage impressions to compare teeth marks, footprints, and other body parts; and used newfangled scientific tools so that “there was no crime that cannot be solved.” The documentary even showed agents practicing their marksmanship at the Academy. *You Can’t Get Away With It* closed with Hoover looking straight into the camera, declaring that the FBI “belongs to you.” The film captures both strands of the Bureau’s strategy: an avowal of service, deeply rooted in its relationships with state and local authorities, and a barely implicit declaration of its centrality to crime-fighting throughout the nation.¹⁹¹

III. Collaborative Federalism Implications

The Bureau’s work on Dyer Act cases, its administration of the National Identification and Information Division, and its operation of the Crime Lab and the National Academy, not only expanded its capacity and authority but also, as Part III.A argues, sustained local police autonomy. Significantly, these projects left little space for state governments in the policing realm. Part III.B next explores a policy path not taken, which could have given states more programmatic control over law enforcement matters. Finally, Part III.C examines the consequences of collaborative

all a law enforcement agency need do is invest in the price of a postage stamp, and it has available the entire resources, talents and experience of the FBI Laboratory. A small sheriff’s office or police department -not financially able to maintain a criminal laboratory- has at its disposal the latest developments of science. Surely, this is a wondrous accomplishment-an accomplishment which occurs not occasionally, but many times every day.

John Edgar Hoover, *Cooperation: The Key to Effective Law Enforcement in America*, 12 *Syr. L. Rev.* 1, 8 (1960).

¹⁸⁸ Appropriations Bill for 1937, Seventy-Fifth Congress, First Session, January 1937, at 81-82.

¹⁸⁹ Maria Ponomarenko, at 177 (quoting J. Edgar Hoover, “M-Day for the FBI,” *The Atlanta Constitution*, August 11, 1940, p. B4).

¹⁹⁰ Available at <https://www.youtube.com/watch?v=ni2SP6GAA1o&feature=youtu.be>.

¹⁹¹ The Bureau’s data collection duties were sometimes in tension with its high profile police work. See Spenser D. Parrett, *How Effective Is a Police Department*, 199 *Annals of Am. Acad. Pol. & Soc. Sci.* 153, 158 (1938) (noting: “The unfortunate animosity between the Bureau of Investigation and many local police departments, based upon the relatively favorable publicity obtained by the Bureau in competition with local officers for public approbation, complicates the capacity of the Bureau ‘trouble shooters’ to obtain local cooperation” in collecting UCR statistics).

federalism, namely, how it impeded the development of state and federal oversight mechanisms of local policing, and concludes with a proposal for reform in light of this history.

A. Sustaining Local Police at the Expense of State Authority

Tech entrepreneurs today would be familiar with what the Bureau did: it essentially created a platform for the exchange of criminal information. As Lina Khan illustrated with Amazon, the firm controlling a platform can eventually gain competitive advantage when it also pursues the same sorts of business as its platform users.¹⁹² But unlike the Amazon story, the Bureau was unlikely to replace or take over the locals. Regardless of new criminal statutes or presidential orders that expanded its jurisdiction, and despite the Bureau's efforts to burnish its national status by making Big Cases on the backs of locals, its size and structure precluded significant displacement of their authority.¹⁹³ In any case, the Bureau showed no inclination in doing so and instead fostered the autonomy of local departments, which came, crucially, at the expense of state authority.

Legal scholars and historians, however, have overlooked the Bureau's embrace of localism when assessing the federal government's growing role in law enforcement. Jurisprudential debates on whether a formal "anti-commandeering" doctrine mediates the relationship between federal and local agencies, and whether the Rehnquist Court created that doctrine out of whole cloth in *New York v. United States* (1992) and *Printz v. United States* (1997), are merely academic.¹⁹⁴ Operational or cooperative federalism has guaranteed that principle. Cops don't work for free, and neither do their departments. Throughout the twentieth century, locals were able to negotiate their relationships with the feds from a position of informational strength.¹⁹⁵ Their monopoly over local knowledge that the feds needed to go after high-profile priorities served as much as a guarantee against unwanted federal intervention as the political and doctrinal safeguards that have been the subject of much scholarly discussion.¹⁹⁶

Historians, meanwhile, have pointed to the Roosevelt administration as a major turning point in the federal government's involvement in the traditionally local sphere of crime and punishment.¹⁹⁷ Certainly, there were a busy few years. In 1934, Congress passed nine crime bills, built Alcatraz prison and, for the first time, authorized Bureau agents to carry guns and make arrests.

¹⁹² Lina M. Khan, *Amazon's Antitrust Paradox*, 126 *Yale L.J.* 710, 783 (2017); see also Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 *Berkeley Tech. L.J.* 1051, 1087 (2017) (on risk that a platform will "leverag[e] its market position unfairly to establish a dominant position in other markets").

¹⁹³ At the outbreak of World War II, President Roosevelt issued an order—drafted by Hoover after hearing that the New York Police Department intended to create a substantial "special sabotage squad"—authorizing the Bureau "to take charge of investigative work in matters relating to espionage, sabotage, and violations of the neutrality regulations." The order directed local police to "promptly turn over" to the Bureau any information relating to these matters. Theoharis & Cox, at 179-80.

¹⁹⁴ See Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, *Annals*, 574 *Amer. Acad. Pol. Soc. Sci.* 158 (2001); Erik M. Jensen & Jonathan L. Entin, *Commandeering, The Tenth Amendment and the Federal Requisition Power*, 15 *Consti. Comment.* 353 (1998).

¹⁹⁵ Richman, *Violent Crime Federalism*; Trevor Gardiner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 19 *Colum. L. Rev.* 1 (2019).

¹⁹⁶ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543 (1954); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215 (2000).

¹⁹⁷ See, e.g., Frydl, "Kidnapping and State Development in the United States."

Moreover, the war on crime enlarged the Bureau's domain and did result in an increase in manpower.¹⁹⁸ To further demonstrate the federal government's attention to the crime problem, national lawmakers rechristened the "Division of Investigation" in 1935. It became the *Federal Bureau of Investigation*.¹⁹⁹

But the collaborative relationship that the Bureau had forged with locals remained indispensable and was reaffirmed at the 1934 Attorney General's Conference on Crime, the Roosevelt administration's big event to demonstrate its seriousness about the war on crime. One of the main agendas at the conference was to clarify the national government's role in criminal enforcement. According to Attorney General Cummings's opening remarks, "Just how far the work of the federal department should go and just what the form of interrelation between the agencies representing the state and federal governments should be, is, of course, one of the crucial questions which faces us in this Conference."²⁰⁰ One attendee, Earl Warren, then district attorney of Alameda City, California, maintained that "there must be an integration of all law enforcement activities" and that he wished "to see this done, not by transferring our local police powers to the Federal Government nor by shifting the responsibility for maintaining law and order to Washington, D.C. but by bringing about a degree of cooperation and coordination of activity."²⁰¹ Bureau Director Hoover could not agree more. The "best and only kind of a National Police which America will tolerate," he insisted, was "local officers with a knowledge of local conditions and local criminals" who performed their duties with "the support of the Federal Government."²⁰² To be sure, the US Attorney for the Southern District of New York called for an end to local autonomy, but his call was limited to the prosecuting function. He sought "the creation of genuine state departments of justice" with appointed leaders to supersede local, elected prosecutors.²⁰³ No one questioned the norm of local police autonomy.²⁰⁴

Neither did those in FDR's orbit. Columbia law professor Raymond Moley, whom Roosevelt tasked with devising a comprehensive criminal justice policy, noted in his 1934 report to the president that "it is very important not to permit the citizen or his local government to get the idea that the suppression of crime will be entirely assumed by Federal enforcement machinery."²⁰⁵ As Moley described the administration's crime program, the goal was not "that the United States

¹⁹⁸ Hoover informed the attorney general that he would need an additional 200 special agents and 70 accountants, which would nearly double the Bureau's count. But that was far less than the additional 1,000 that presidential advisor Raymond Moley recommended. Stockham, 142; Moley report.

¹⁹⁹ See Stolberg, *Twilight Zone*, 394; Kathleen J. Frydl, *supra* at 20; Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *Crime and Justice* 377, 387-388 (2006).

²⁰⁰ Procs. AG's Conference on Crime, Dec. 10-13, 1934 at 4 (Cummings).

²⁰¹ Earl Warren, 322.

²⁰² 1934 Conf. Procs. at 25-26.

²⁰³ *Id.* at 186 (noting that he was echoing recent American Bar Association recommendations).

²⁰⁴ See Earl H. De Long, *Powers and Duties of the State Attorney-General in Criminal Prosecution*, 25 *J. Crim. L. & Criminology* 358, 393 (1934) (noting absence of proposals "for the centralization of police control in the state government").

²⁰⁵ "Moley's Report to Roosevelt on Law Enforcement Measures," *New York Times*, May 23, 1934. Howe, while favoring an "American Scotland Yard," nonetheless recognized "the broad bar of a fundamental constitutional provision in regard to police powers." He explained that a national police force presented "one of the ways in which the Federal Government can help, not by usurping any of the state police powers, but coming ... upon the invitation of the local authorities." Howe, "Uncle Sam," 71; see also Stolberg, *Twilight Zone*, 399.

Government should supersede State authorities,” but only “to give Federal authorities the power to cooperate with local forces when necessary.”²⁰⁶ In addition, Attorney General Cummings justified FDR’s crime bills by focusing on the “twilight zone,” the area in “between the jurisdictions of the Federal and State Governments” where “the predatory criminal takes hopeful refuge.”²⁰⁷ Assuring those wary of federal overreach, Cummings avowed that the “Federal Government has no desire to extend its jurisdiction beyond cases in which, due to the nature of the crime itself, it is impossible for the States adequately to protect themselves.”²⁰⁸

To be sure, the desire to strengthen the role of states also figured prominently in the Administration’s program. To underscore its commitment to keep the national government’s role as limited as possible, one of its “twelve point plan for crime prevention” included a provision giving blanket congressional consent to interstate compacts “for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies.”²⁰⁹ This proposal was first introduced in 1932 during the tenure of President Hoover, a staunch localist. Introducing the bill, Representative Sumners had pointed out that there was “just one of two things” that the federal government could do in response to crimes carried out across state lines: either send criminal functions “back to the States” or “reconcile ourselves to be governed by a great Federal bureaucracy.”²¹⁰ He sought to do the former by giving “two sovereign States the privilege of entering into any agreement they want to, to protect their citizens against people who ought to be shot on sight.”²¹¹ A critical part of FDR’s legislative package was thus a measure to contain the federal law enforcement apparatus by encouraging coordination among the states.²¹²

After the passage of the Crime Control Compact Consent Act of 1934, the states got to work. In 1935, they established the Interstate Commission on Crime, and delegates to its inaugural conference met “to discuss ways and means of overcoming loopholes in the criminal laws [and] in our law-enforcement structure”—the “twilight zone” that Cummings had identified.²¹³ They came together to draft interstate compacts as well as uniform laws that would standardize the handling of cases with a multi-state aspect. The Interstate Commission recommended model legislation on extradition, the rendition of witnesses, the supervision of parolees who frequently moved from one state to another, and more. Significantly, none of the uniform laws sought to interfere with local law enforcement. The closest that the Commission came to stepping on local functions was its consideration of crime prevention, where it recognized that most causes of crime stemmed from

²⁰⁶ Moley report.

²⁰⁷ “Attorney General Cummings Outlines Crime Prevention Program Over CBS,” Columbia Broadcasting System, April 19, 1934, at 2.

²⁰⁸ *Id.* at 3. True to his commitment that crime fighting would have to remain primarily a local responsibility, Cummings promptly demanded the resignation of the chief of the criminal division who had publicly proposed a plan to place all municipal and state law enforcement officers under the US Justice Department. See Stolberg, *Twilight Zone*, 400-402; Bengé, 458.

²⁰⁹ *Id.* Cf. Article 1 of U.S. Constitution.

²¹⁰ Sumners statement, 75 Cong. Rec. 8423 (1932).

²¹¹ *Id.*

²¹² 48 Stat. L. 909, Crime Control Compact Consent Act of 1934 (now 4 U.S.C. § 112 (2003)). The 1935 Attorney General’s Report, at 57 (1936), noted that while this legislation “is of sole concern to the State governments,” the Department “has had occasion to cooperate, in an unofficial manner, with State authorities anxious to take advantage of its provisions.”

²¹³ Interstate Crime Commission Handbook at 11 (1940).

breakdowns in the family or neighborhood unit and, accordingly, that solutions to the problem would be local as well.²¹⁴ Still, the Commission refrained from getting too involved, and the only role it saw for itself, as a body representing the states, was to serve as a “clearing house for the gathering and dissemination” of information on successful community programs, such as juvenile courts and juvenile training institutions.²¹⁵ While the Commission also endorsed the creation of “protective police” dedicated to “the needs and habits of youth,” it stopped short of recommending any action on the part of the states.²¹⁶ Ultimately, interstate compacts and uniform laws left local police agencies alone.

B. A Policy Path Not Taken

Even if no one contemplated that states would take over some local responsibilities, it could have happened indirectly had the Roosevelt administration’s promotion of interstate compacts come with financial grants-in-aid that would have given states more programmatic control over policing.²¹⁷ This was a significant road not taken. As Jon Teaford observed, the federal government can empower states within a policy space by making them, not localities, the recipients of federal funding.²¹⁸ For example, the Federal-Aid Road Act of 1916 strengthened the control of state administrators over local highway construction and maintenance by funneling grants through the states.²¹⁹ Thanks to federal money, by 1940, most states had assumed complete responsibility for primary highways and, in some states, for all highway systems.²²⁰ And Karen Tani has shown how federal aid fostered similar dynamics during the New Deal with respect to welfare policy, another

²¹⁴ *Id.* at 118-27.

²¹⁵ *Id.* at 127.

²¹⁶ *Id.* at 125.

²¹⁷ See Arthur C. Millsbaugh, *Crime Control by the National Government*, 49-50 (1937) (Brookings Institution Report) (noting that the “federal government has not yet made use of financial grants-in-aid to assist the states in their criminal-law enforcement work, but has sought by other means to strengthen, co-ordinate, and supplement state effort.”); Donald C. Stone, *Reorganization for Police Protection*, 1 *Law & Contemp. Probs.* 451, 456-57 (1934) (suggesting that a federal grant-in-aid system might be developed but counseling against leaving standard setting to the more “political” state governments); Potter at 187 (suggesting Hoover helped kill grant proposals); see also Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *Yale L. J.* 685, 690 (1925). (“Following the English device of grants-in-aid, the Federal government has latterly sought to stimulate through financial assistance State action in matters subject to State control but involving an interest common to the whole country.”).

²¹⁸ Jon Teaford, *The Rise of the States* 7-8 (2002).

²¹⁹ *Id.* at 34; see also *id.* at 100 (noting that as a result of the 1916 Act and the Federal Highway Act of 1921, “the states were in charge of constructing the highways of the automobile age”).

²²⁰ M. Harry Satterfield, *County Government and Administration in the Tennessee Valley States* at 55 (Tennessee Valley Authority, 1940); see also V.O. Key, *The Administration of Federal Grants to States*, 34-42 (1937).

traditionally local matter.²²¹ As Martha Derthick wrote of federal policy for highways and poor relief in this period, “Grant-in-aid conditions were above all delocalizing—quite deliberately so.”²²²

Yet, the converse played out for criminal law enforcement. No parallel effort materialized to erode “the bedrock of localism,” as Derthick put it, even though the federal government could have put serious money on the table, for instance, to assist states in facilitating their own extradition arrangements.²²³ Even though the Constitution’s Extradition Clause already provided for the return of fugitives from one state to another, it was largely defunct because of the “asylum” state’s oft-abused discretion in refusing extradition requests, the inefficiencies of extradition processes, and lack of funds.²²⁴ The Interstate Commission tried to overcome these difficulties with the Uniform Extradition Act and even drafted standardized forms that states could use. But the sensitive matter of determining which state, the requesting or the receiving one, would pay for transferring arrestees continued to hinder interstate coordination.²²⁵

The Roosevelt administration not only failed to materially promote state-coordinated extraditions, but it also likely undermined state efforts with the Fugitive Felon Act, another part of its 1934 legislative package. The new law provided a substitute for extradition that essentially adopted the mechanisms of the Bureau’s informational platform and cut out state actors.²²⁶ Under

²²¹ Karen M Tani, *States of Dependency* (2016); see also John J. Wallis & Wallace Oates, *The Impact of the New Deal on American Federalism* 155, 170-71, in *The Defining Moment: The Great Depression and the American Economy in the Twentieth Century* (Michael D. Bordo, Claudia Goldin & Eugene N. White, eds., 1998) (“Not only were New Deal programs administered at the state level, but state governments in particular possessed real decision-making power.”).

²²² Martha Derthick, *How Many Communities?* 9, 15 in *Keeping the Compound Republic: Essays on American Federalism* (2001).

²²³ See Martha Derthick, at 17 (noting how “[n]othing that had occurred before midcentury diminished the localism of police departments or [] schools” neither of which had been “the beneficiary (or victim) of federal aid”).

²²⁴ U.S. Const., Art. IV, sec 2; Handbook at 20-21. See Henry S. Toy & Edmund Shepherd, *The Problem of Fugitive Felons and Witnesses*, 1 *Law & Contemp. Probs.* 415, 419 (1934); see also William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 *Cornell L.Q.* 337, 339-40 (1938-1939) (noting that because of the discretionary authority allowed to governors under current extradition procedures, “there is a temptation to ignore its requirements and forcibly return the fugitive to the offended state, frequently with the open connivance of the officers of the state where he is found”); *United States v. Miller*, 17 F. Supp. 65, 67 (W.D. Ky. 1936) (in upholding Fugitive Felon Act against constitutional attack, the court noted: “It is now possible, and crime is often committed in one state and the participants within a few hours are entirely out of reach of state authorities. The right of extradition guaranteed to the states by the federal government becomes too slow as a vehicle for swift punishment of criminals, and oftentimes any punishment at all.”).

²²⁵ Section 24 of the Uniform Extradition Act, on “costs and expenses”—more specifically, on who would pay the costs and expenses and how much—was the only provision of the act that the drafters put in brackets to indicate that it would necessarily “vary with the different states.” Handbook at 25.

²²⁶ Attorney General Cumming testified:

One of the most difficult problems which local law-enforcement agencies have to deal with today is the ease with which criminals are able to flee from the State to avoid prosecution.... The [Fugitive Felon Act] is considered the most satisfactory solution to this problem, which the States have never been able to solve effectively. This [Act] . . . will not prevent the States from obtaining extradition of roving criminals, but the complicated process of extradition has proved to be very inefficient.

H.R. Rep. No. 1458, 73rd Cong., 2d Sess. (1934); S. Rep. No. 2253, 73rd Cong., 2d Sess. (1934), quoted in Samuel L. Bare, III, *Federal Assistance in the Enforcement of State Criminal Law*, 17 *Wash. & Lee L. Rev.* 161 (1960); see also

the new regime, the Bureau would use federal charges to obtain jurisdiction over fleeing felons and then turn them over to the local authorities seeking them. The Bureau having played its keystone role, federal charges would then be dismissed.²²⁷ The law was first used against two sisters who fled to avoid testifying against their brother in his trial for the murder of one sister's husband.²²⁸ Hoover soon touted the Bureau's ability "to render extensive assistance to local authorities by making available its Nation-wide facilities in searches for fugitives" who had committed local offenses.²²⁹ The important takeaway here is that it was the feds, not the states, to whom locals were indebted.

The Fugitive Felon Act was well received, even by those who otherwise might have been opposed to federal intervention. The Interstate Commission's "Handbook," which compiled all the uniform laws and interstate compacts, also included an essay by the US attorney general's assistant that celebrated the new law, even as the Commission encouraged states to adopt the Uniform Extradition Act.²³⁰ Southerners also appreciated how the law would allow them to circumvent the sensibilities of a rendering jurisdiction, at least when the feds were willing. For instance, it enabled a county sheriff in Georgia to obtain custody of an African American who fled to New York to avoid being lynched, despite New York Governor Lehman's refusal to "even entertain" an extradition request unless charges against the man were reduced.²³¹ Issues of gubernatorial discretion continued to dog the interstate rendition process in later years, but the availability of federal circumvention made cooperative resolution among the states unnecessary.²³²

In time, federal block grants under the Law Enforcement Assistance Act of 1965 and the Safe Street Acts of 1968 would pour money into both state and local law enforcement efforts, which had the potential to expand the criminal justice bureaucracy at the state level.²³³ But governors have generally stayed out of the planning process.²³⁴ The separation of centralized "formal law-making

Brevard E. Cribfield & Mitchell Wendell, *Crime Control and the Uniformity of Criminal Laws*, 42 *J. Crim. L. & Crim.* 571, 574 (1952).

²²⁷ Bare, *supra* at 164-65.

²²⁸ *Fugitive Sisters Jailed by New Law*, *N.Y. Times*, June 22, 1935, at 32.

²²⁹ *Annual Report of the Attorney General, 1936*, at 129 (1937) (report of Director Hoover).

²³⁰ Gordon Dean, *Recent Extensions of Federal Criminal Law*, 111, 113, in *Interstate Comm'n on Crime, The Handbook on Interstate Crime Control* (1938).

²³¹ *Lindbergh Law Invoked to Win Extradition of Lynching Fugitive*, *N.Y. Times*, Mar. 10, 1939, at 21; *Georgia Calls on Lindbergh Law to Extradite Lynching Fugitive*, *N.Y. Herald Tribune*, Mar. 10, 1939, at 21A (noting role of sheriff). Echoes of the Fugitive Slave Act are hard to miss here.

²³² See Note, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 *Yale L.J.* 97, \113 (1956)

²³³ Vesla M. Weaver, *The Significance of Policy Failures: The Law Enforcement Assistance Administration and the Growth of the Carceral State*, 221, 228, in *Living Legislation: Durability, Change, and the Politics of American Lawmaking* (Jeffrey A. Jenkins & Eric Patashnik, eds. 2012).

²³⁴ A report from the Advisory Commission on Intergovernmental Relations noted:

The Governor . . . is often not in a position to respond to public expectations because so much of law enforcement is handled locally, and because of the dispersion of State responsibility among the attorney general-usually separately elected-the courts, and the legislature. Even such basically executive functions as are found in corrections and State police or highway patrol may not always be under the Governor's effective control because of constitutional or statutory provisions.

Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System*, 251 (1971); see Robert F. Diegelman, *Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience*, 73 *J. Crim.*

agencies”—legislatures and state court systems—from locally controlled “police enforcement processes” remained undisturbed.²³⁵ As Michael Campbell concluded, “no wholesale rethinking of how to organize and coordinate state and local criminal justice systems occurred in most states,” and local jurisdictions were left “with ample leeway in determining how to enforce the law.”²³⁶

What explains the failure to promote state authority with federal aid? Perhaps the states’ relatively small role was overdetermined. Criminal information is usually gathered locally, which tends to pull authority down to the lowest levels even in the most centralized policing regimes.²³⁷ In addition, Americans’ commitment to localized criminal justice ran deep, and ideological concerns about centralized police also applied to state police. According to one study, only five states had some form of state police in 1905.²³⁸ As a result, state police forces were underdeveloped latecomers in the 1930s, when most states finally established them to enforce traffic and highway safety laws and not to perform general police functions.²³⁹ In the South, unease that governors, likely more attentive to the state’s reputation beyond, would unduly intrude on local norms of white supremacy only reinforced resistance to state centralization.²⁴⁰

And while portrayals of J. Edgar Hoover as the indomitable bureaucratic warrior may be overstated, he could not have been pleased when commentators heralding interstate compacts further envisioned that states might even “establish a joint crime detection laboratory and fingerprint bureau, or even a joint police force.”²⁴¹ Were state authorities to replace the feds as the critical interlocutors with local police departments, the Bureau’s standing would indeed have been affected. Hoover took this risk quite seriously. According to former assistant director William Sullivan, the agency

maintained a blacklist of police departments euphemistically called the ‘Restricted List.’ A law enforcement agency placed on the Restricted List may find itself completely cut off from the services of the FBI Lab. The quickest and surest way for a local department to be placed on the

L. & Criminology 994,1002-03 (1982); ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, SAFE STREETS RECONSIDERED: THE BLOCK GRANT EXPERIENCE 1968-1975, at 60 (1976).

²³⁵ Parrett, *How Effective Is a Police Department*, supra note ___, at 155.

²³⁶ Michael C. Campbell, *Varieties of Mass Incarceration: What We Learn from State Histories*, 1 *Annu. Rev. Criminal*, 219, 227 (2018); see Malcolm M. Feeley & Austin D. Sarat, *The Policy Dilemma: Federal Crime Policy and the Law Enforcement Assistance Administration* (1980).

²³⁷ See Otwin Marenin, *Police Performance and State Rule: Control and Autonomy in the Exercise of Coercion*, 18 *Comparative Politics* 101,107- 09 (1985) (on the “work of policing”). / or cite as See supra note 14.

²³⁸ Sarah Seo, *Policing the Open Road* 78 (2019).

²³⁹ Id.; H. Kenneth Bechtel, *State Police in the United States: A Socio-Historical Analysis* (1995); Lynn G. Adams, *The State Police*, 146 *Annals Amer. Acad. Pol. & Soc. Sci* 34 (1929).

²⁴⁰ See Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 *Yale J.L. & Feminism* 31, 41 (1995) (noting how after Alabama Governor Bibb Graves used the State Law Enforcement Department to investigate and prevent lynchings between 1926 and 1930, the Department became an issue in the 1930 gubernatorial election; Graves lost, and his successor abolished the Department).

²⁴¹ *The Federal Government and Organized Crime*, CQ Researcher, Aug. 10, 1934, available at <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1934081000>

Restricted list was to criticize the efficiency of the FBI or to encourage the establishment of independent regional labs.²⁴²

The Bureau continued to cement its position within the national law enforcement system by removing potential competition, just as it had once eliminated competing fingerprint registries by acquiring the IACP's and Leavenworth's databases.²⁴³

For all of these reasons, and perhaps also path dependency, federal criminal legislation remained the default solution to interstate coordination problems throughout the twentieth century.²⁴⁴ A recent example is the 1992 Child Support Recovery Act, which solved the interstate problem of "deadbeat dads" who reside outside the jurisdiction of a state seeking to recover child support.²⁴⁵ Unlike auto thefts, child support cases didn't fill the federal docket, but the nature of the response was similar to the Dyer Act and the Fugitive Felon Act. These laws relieved states from having to fashion coordination strategies and gave localities the means to surmount jurisdictional challenges without any state mediation, all the while building federal capacity.

C. The Consequences of Collaborative Federalism and Possible Reforms

Federal criminal laws and resources that fostered collaborative relations with locals came with troubling structural consequences that are front and center today. One was the federal government's reluctance to interfere with local law enforcement. Even where the Bureau had the legislative authority to act, it often exercised its discretion not to when cases touched on racial matters sensitive to local politics.²⁴⁶ When the NAACP appealed to Roosevelt to use the federal kidnapping law to prosecute two southern lynchings in which the victims had been transported over state lines, Attorney General Cummings advised the president that doing so would be inappropriate absent more authority from Congress.²⁴⁷ But Cummings, committed to keeping southern support

²⁴² William C. Sullivan, *The Bureau: My Thirty Years in Hoover's FBI* 98 (1970).

²⁴³ Thomas F. Cotter, *The Essential Facilities Doctrine*. *Antitrust Law and Economics*, (Keith N. Hylton, et al. eds., 2008).

²⁴⁴ See Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, 51, 64, in *15 Crime & Justice (Modern Policing)* (1992) ("Pressures toward consolidation, coordination, and integration of local law enforcement encounter substantial resistance as they run counter to the prevailing ideals of local government in the United States. The decentralization of power, authority, and decision making within organizations conforms to the ideals of democratic government and remains the dominant ideology in law enforcement.").

²⁴⁵ Child Support Recovery Act, Pub. L. No. 102-521, § 228(a), 106 Stat. 3403 (1992) (codified as amended at 18 U.S.C. § 228) (reflecting 1998 upgrade of offense from a misdemeanor to a felony). See also Catherine Wimberly, *Deadbeat Dads, Welfare Mom, and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families*, 53 *Stan. L. Rev.* 729, 766 (2000) (arguing for elimination of federal criminal enforcement regime because "states are more than capable and are ultimately more effective in catching and convicting the most hard-core of child-support evaders").

²⁴⁶ Roosevelt advisor Raymond Moley recognized that the new federal criminal laws "practically assumes [federal] jurisdiction in all cases of bank robbery or burglary" and that this was "a very considerable extension of Federal responsibility." He acknowledged that ensuring the proper division of local and federal responsibilities would have to "be found in an attempt to operate the bill" and "depend upon the wisdom with which its enforcement is attended." That "wisdom" would be the discretion of Hoover and the Bureau, sometimes with guidance from the attorney general, to determine when to intervene and which cases to leave to the locals. See Moley report.

²⁴⁷ Elliff, at 69-70; see also Michal R. Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South* 19 (1987). Eventually, in 1951, the Civil Rights Section revisited its

for the war on crime, also pointedly refused to push for an anti-lynching law, explaining that “lynching was a local matter.”²⁴⁸ Similarly, in 1946, when Justice Department officials pushed the Bureau to investigate the lynching of four African Americans in Monroe, Georgia, Director Hoover balked, citing overload from other cases and the limits of his statutory authority.²⁴⁹

DOJ and its Bureau were indeed well aware of local pressure points. When, in 1959, the Eisenhower Administration tried to extend the Fugitive Felon Act to cover those wanted for school and church bombings that were a violent part of the massive resistance to desegregation decrees, DOJ officials took pains to reassure legislators that local, not federal, authorities would pursue these atrocities. As Attorney General Rogers emphasized, the Bureau would assist, “not supersede local law enforcement agencies.”²⁵⁰ For good measure, he also pointed out that of the 947 fugitives that the Bureau had located in fiscal year 1957, only nine faced charges in federal court.²⁵¹ Although the 1959 effort failed, the Kennedy Administration was able to obtain an even broader extension of the Act in 1961. Still, Congress, not content to rely on the executive branch’s assurances, explicitly required that fugitives would not be prosecuted federally absent exceptional circumstances.²⁵² This limiting provision was unnecessary, for the Bureau’s operational reliance on locals ensured that the civil rights probes that it did launch were episodic and exceptional. Ultimately, the Bureau’s commitment to local agencies overshadowed any interest in monitoring the police.

In time, the Bureau, spurred by changing national priorities, would develop more of a civil rights agenda and, at least in the most egregious cases, overcome its structural reluctance to investigate police violence.²⁵³ But because the Bureau’s primary focus has been on crime control and only secondarily on constitutional and equitable policing, the federal role in promoting the latter has been limited. Certainly, the Bureau has not been the only federal interlocutor with local departments, and federal funding programs administered by other agencies might have been used to spur police reform. But as Rachel Harmon has noted, “[b]eyond the usual requirements for monitoring

constrained reading of the kidnapping act and successfully used it against Carolina Klan members who kidnapped two African Americans. Elliff, at 302; *United States v. Brooks*, 199 F.2d 336 (4th Cir. 1952).

²⁴⁸ Elliff, at 67-68; see also Jeffrey A. Jenkins, Justin Peck, and Vesla Weaver, *Between Reconstructions: Congressional Action on Civil Rights, 1891-1940*, 24 *Stud. Am. Pol. Dev.* 57, 79-82 (2010) (on efforts by Northern Democrats to pass anti-lynching legislation in 1934).

²⁴⁹ Elliff, at 223-35.

²⁵⁰ Hearings on S. 435, 456, 499, *Proposals to Secure, Protect and Strengthen Civil Rights of Persons under the Constitution and Laws of the United States*, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary Pt. 1, Mar. 20, 1959, at 190 (testimony of Attorney General William P. Rogers).

²⁵¹ By this point, the feds could not be counted on to mindlessly deploy their authority to reinforce white supremacy. In 1955, South Carolina Governor Bell Timmerman, Jr., condemned Attorney General Brownell’s “discriminat[ory]” refusal to use the Fugitive Felon Act against civil rights leader Reverend J.A. DeLaine, who had fled the state after defending his house against night raiders. Brownell, the Governor complained, was “using the integration issue to promote his Republican politics.” *U.S. Won’t Arrest Carolina Pastor*, *N.Y. Times*, Nov. 4, 1955, at 20; see Sue Anne Pressley, *After 45 Years, S.C. Pioneer Of Civil Rights Is Cleared*, *Wash. Post* Oct. 11, 2000.

²⁵² Pub. L. 87-368 62 Stat. 755 (Oct. 4, 1961).

²⁵³ Paul J. Watford, *Screws v. United States and the Birth of Federal Civil Rights Enforcement*, 98 *Marq. L. Rev.* 465 (2014); Daniel C. Richman, Kate Stith & Bill Stuntz, *Defining Federal Crimes* 442-44; 448-51 (2019) (noting relative infrequency of federal civil rights prosecutions of police).

spending and complying with federal antidiscrimination law, federal public safety programs do little to promote lawfulness, accountability, or fairness in policing.”²⁵⁴

What little that the federal government did, however, paled in consequence with what the states did not do. The Bureau’s direct relationships with police departments and the still paltry federal resources put towards constraining local police autonomy undermined state influence and undercut any state oversight that might have developed. This history helps explain why, to this day, governors and other state-level actors still lack authority over policing, or, if they have it, are slow to use it.²⁵⁵ To be sure, states are involved in penal matters like prison construction and decriminalization.²⁵⁶ But that involvement has rarely extended directly to criminal enforcement operations. While states provide penal laws and prisons, counties and municipalities still manage the rest of the criminal justice system, from deciding who gets prosecuted for what, to how criminal suspects and defendants are treated, to how police and prosecutors interact with the communities they serve.²⁵⁷ Cogent calls for statewide administrative supervision are regularly heard but to little avail.²⁵⁸

As a result, local police practices have largely developed over the decades without any significant state or federal oversight, with destructive consequences on communities of color.²⁵⁹ Take, for instance, the Ferguson Police Department, which preyed on the poorest, most disadvantaged members of the community in search of fines, fees, and forfeitures to subsidize

²⁵⁴ Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 890 (2015); see Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 St. Louis U. Pub. L. Rev. 33, 55–56 (2012).

²⁵⁵ Other factors are at work too. See Eliot H. Lumbard, *State and Local Government Crime Control*, 43 Notre Dame L. Rev. 889, 895 (1968) (“By and large, state governments minimized their crime control responsibilities until the past five years or so.”). The lack of state centralization was still observed in 1978 (ten years later). See Daniel L. Skoler, *Criminal Justice Organization, Financing, and Structure: Essays and Explorations* 75 (1978) (“Direct consolidation or centralized supervision of criminal justice functions has largely been ignored as a coordinating mechanism, partly because of the constitutional separation of powers, partly because of the fractionalization of law enforcement between state, county and local government, partly because of legitimate needs for autonomy of certain components vis-a-vis others, and partly because recent consolidation of state government functions has tended to place criminal justice units in other governmental service’ groupings.”).

²⁵⁶ Cf. Miriam Seifter, *Gubernatorial Administration*, 131 Harv. L. Rev. 483 (2017); see Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, 51, 64, in 15 *Crime & Justice (Modern Policing)* (1992) (“Coordination is largely voluntary with only occasional formal arrangements among local governments through the institution of contract policing, the setting of minimum standards for policing, or the institution of state-mandated training.”).

²⁵⁷ There are noteworthy exceptions, including the Baltimore City Police Department, which remains a state agency. See Luke Broadwater, *Bill to end state control of Baltimore police won't pass this year after opposition from city senators*, Balt. Sun, Apr. 5, 2019; George Nilson, *Baltimore Police Under State Control for Good Reason*, Balt. Sun, Feb. 28, 2017. See also Editorial, *Why doesn't KC control its own police department? It's past time to tackle this issue*, Kansas City Star, Nov. 18, 2018 (noting that although Missouri legislature finally returned Kansas City police department to local control in 2013, control remains in hands of commission (including the mayor) appointed by the governor).

²⁵⁸ See Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543, 588-89 (1960) (calling for a state-wide Policy Appraisal and Review Board, and noting prior proposals).

²⁵⁹ As Richard Briffault has noted, “Localism reflects territorial economic and social inequalities and reinforces them with political power.” Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990).

municipal coffers.²⁶⁰ Officials in St. Louis defended the patchwork of sixty different police departments against proposals to consolidate, claiming that “keeping it local” ensured that each community’s needs were heard and addressed.²⁶¹ But a report by a police reform group observed that “some of these departments were the same ones where community policing is neglected in favor of revenue generation, and where many residents do not trust the police.”²⁶² The report also highlighted the lack of state oversight, noting that Missouri had underfunded and understaffed a state program intended to avoid the “muni shuffle,” which refers to the reassignment of problem officers to different departments, usually to those “in the poorest, often high-crime communities.”²⁶³ These problems are not limited to Ferguson, as reports of other cities and counties make clear.²⁶⁴ Many local governments throughout the country have been relying on traffic fines and court fees disproportionately exacted on the poor and people of color to fund their police departments. Moreover, the problem of the “wandering officer”—substandard, even dangerous, officers bounced from department to department—endures.²⁶⁵

To be sure, the federal government has, at least until the Trump Administration, made some efforts to constrain local autonomy, but these have been limited.²⁶⁶ In the mid-1990s after the police beating of Rodney King, Congress authorized the Justice Department to pursue institutional change in departments with “patterns or practices” of unconstitutional conduct.²⁶⁷ But backsliding remains an issue, and the sustainability of court-ordered reforms over the long term is an open question.²⁶⁸ A road not taken in the 1930s—federal support for state-based criminal databases—was to some

²⁶⁰ U.S. Dept. Justice Civil Rights Div. Investigation of the Ferguson Police Department, 2 (2015) (finding “Ferguson’s law enforcement practices are shaped by the City’s focus on revenue rather than by public safety needs”). See Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* (2018); Beth A. Colgan, Fines, fees, and forfeiture, 205, in vol. 4 *Reforming criminal justice: A report of the Academy for Justice on bridging the gap between scholarship and reform* (Eric Luna ed. 2017); *Developments, Policing and Profit*, 128 *Harv. L. Rev.* 1723 (2015).

²⁶¹ Police Executive Research Forum, *Overcoming the Challenges and Creating a Regional Approach to Policing in St. Louis City and County* at 40, 42 (Apr. 30, 2015).

²⁶² *Id.* at 42.

²⁶³ *Id.* at 45; see Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *Yale L.J.* 2054, 2137 (2017) (noting that “[p]oor communities . . . are more likely to hire ‘gypsy cops’ . . . because their resource constraints make it more difficult for them to discriminate between good and bad officers”);

²⁶⁴ See, e.g., Brennan Center for Justice, *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties*, by Matthew Menendez et al. (Nov. 21, 2019), available at <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>; Detroit Justice Center, *Highway Robbery: How Metro Detroit Cops and Courts Steer Segregation and Drive Incarceration*, by Jade Chowning et al. (March 2020), available at <https://www.detroitjustice.org/highwayrobbery>.

²⁶⁵ Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 *Yale L. J.* 1676 (2020).

²⁶⁶ Harmon, *Fed Programs*, at 872; Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (2016); see also Jeremy Stahl, *How the Trump Administration Undid Obama’s Response to Ferguson*, *Slate* June 2, 2020.

²⁶⁷ See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *Fordham L. Rev.* 3189 (2014); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 *Stan. L. Rev.* 1, 3 (2009); 42 U.S.C. § 14141.

²⁶⁸ See, e.g., Samuel Walker, *Twenty Years of DOJ “Pattern or Practice” Investigations of Local Police: Achievements, Limitations, and Questions* (unpublished manuscript, Feb. 2017), available at <https://samuelwalker.net/wp-content/uploads/2017/02/DOJ-PP-Program-Feb24.pdf>.

extent taken after 9/11 with intelligence fusion centers established around the country,²⁶⁹ and state governments have created their own DNA databases that are not governed by the strict restrictions of the CODIS system that the FBI controls.²⁷⁰ But, perversely, local police have pointed to the availability of state-provided infrastructure and centralized services to justify their continued independence.²⁷¹ For their part, states have done comparatively little to address racialized and unequal policing.

But that may be changing.²⁷² Although top-down initiatives may not have been as effective as activists would like, grassroots political movements may make more of a difference by pushing states to assume responsibilities that have long been rejected or unrecognized. Most recently, the Minnesota attorney general took over the prosecution of the officers charged with the murder of George Floyd, which had set off a worldwide protest, at the behest of the state's governor, legislators, and members of the victim's family.²⁷³ In the wake of that killing, New York and Iowa have empowered their attorneys general to investigate police-involved deaths.²⁷⁴ Colorado set limits on police use of force and mandated data collection to crack down on wandering officers.²⁷⁵ Responding to the furor over Ferguson, the Missouri legislature, supported by the governor, reduced the cap on general operating revenue that a municipality could collect from traffic tickets, from 30 percent to 20 percent, in an effort to rein in abusive local practices.²⁷⁶ Connecticut recently barred local police forces from hiring officers dismissed for misconduct by other state agencies, as well as those who resigned to avoid dismissal.²⁷⁷ The Trump administration's withdrawal from the

²⁶⁹ See Daniel Richman, *The Right Fight*; see also Danielle Keats Citron & Frank A. Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 *Hastings L.J.* 1441 (2011); Torin Monahan, *The Murky World of Fusion Centers*, 75 *Criminal Justice Matters* 20 (2009); Torin Monahan & Neal A. Palmer, *The Emerging Politics of DHS Fusion Centers*, 40 *Security Dialogue* 617 (2009).

²⁷⁰ Jason Kreag, *Going Local: The Fragmentation of Genetic Surveillance*, 95 *B.U. L. Rev.* 1491(2015). Worth noting, however, is the FBI's continued reluctance when deploying its facial recognition system "to set accuracy standards" for the systems used by other contributing agencies, state and federal. Gov't Acct. Office, *Statement of Gretta L. Goodwin, Face Recognition Technology: DOJ and FBI Have Taken Some Actions in Response to GAO Recommendations to Ensure Privacy and Accuracy, But Additional Work Remains*, 18 (June 4, 2019).

²⁷¹ See John M. Gleason, *Policing the Smaller Cities*, 291 *Annals Am. Acad. Pol. & Soc. Sci.* 14, 14 (1954) (Greenwich, CT, police chief notes: "a basic pattern of local police systems can remain and be effective and elastic enough to meet current changes if present or expanded central services are used").

²⁷² For a sense of state activity on this issue, see National Conference of State Legislatures, *Law Enforcement Overview* (2018); Ram Subramanian and Leah Skrzypiec, *To Protect and Serve: New Trends in State-Level Policing Reform, 2015-2016* (Vera Ins. Justice Apr. 2017).

²⁷³ Minnesota Attorney General to Lead Prosecutions Related to George Floyd, *New York Times*, June 1, 2020; Alex Johnson, *Minnesota Attorney General to Take Over Prosecutions in George Floyd's Death*, *nbcnews.com* (May 31, 2020).

²⁷⁴ Luis Ferré-Sadurní and Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, *N.Y. Times*, June 12, 2020.

²⁷⁵ Saja Hindi, *Colorado among first in U.S. to pass historic police reforms following protests*, *Denver Post*, June 13, 2020; Jesse Paul and Jennifer Brown, *Colorado Governor Signs Sweeping Police Accountability Bill into Law*, *The Colorado Sun*, June 19, 2020.

²⁷⁶ Mitch Smith, *Missouri Lawmakers Limit Revenue From Traffic Fines in St. Louis Area*, *N.Y. Times*, May 8, 2015. A specific provision targeting St. Louis County and its municipalities that limited them to 12.5 percent, as well as requiring them to have accredited police departments, was later struck down by the Missouri Supreme Court as violating the rule against special legislation. *City of Normandy v. Greitens*, 518 S.W.3d 183 (Mo. en banc, 2017).

²⁷⁷ Grunwald & Rappaport, *supra* note ___, at 1770-71; CONN. GEN. STAT. § 7-291c(a) (2019).

already limited federal oversight has itself spurred some state governments to step up to embrace structural reform.²⁷⁸ In California, the state attorney general is now overseeing the reform of the San Francisco Police Department and has statutory authority to bring other “pattern or practice” cases.²⁷⁹

Importantly, as the historical account told in this Article suggests, all of these efforts can be further aided with federal funding given directly to the states and tied to local compliance with minimum policing standards. State governments surely don’t have a monopoly on virtue. But they have, or could develop, powerful mechanisms for overcoming local police pathologies and at least catalyzing change.

It remains to be seen whether the states or the federal government under a different administration can overcome the discrimination and inequality that will always be the “dark side” of local autonomy.²⁸⁰ Left to their own devices, governors and legislators may be reluctant to change historical expectations and take on accountability for local policing.²⁸¹ Indeed, they have often declined to do so by caving to anti-reform police union lobbying.²⁸² The political risks can change however.²⁸³ If recent events offer any indication, local protest movements may be the necessary, even if not sufficient, factor in countering the endurance, and pathologies, of localism. This Article suggests that reformers may find it far more efficient, and perhaps even more effective, to target their efforts at federal and state authorities even as they continue efforts to hold local officials to account. As Patrick Joyce and Chandra Mukerji have urged, we should see “the state not as a thing but as a shape-shifting assemblage of people and things.”²⁸⁴ Far from being a unitary actor, it is “at heart a communication complex and territorial entity, one that keeps reweaving the fabric of

²⁷⁸ Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 *Duke L.J.* 999, 1072 (2020) (suggesting that Congress and the state legislatures confer standing upon state attorneys general to bring cases against police departments in federal court).

²⁷⁹ Mark Berman, *San Francisco’s Police Force Will Be Under State Oversight after Justice Dept. Rolls Back Federal Program*, *Wash. Post*, Feb. 6, 2018; Candice Norwood, *Why California Is a Case Study for Monitoring Police Misconduct*, *The Atlantic*, May 24, 2017. *Cal. Civ. Code Sec. 52.3* (2017) (effective January 1, 2001).

²⁸⁰ Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 *Yale L.J.* 954, 978 (2019). Richard Briffault notes: “The local government system may be efficient, but if the amelioration of inequality is to remain an important value in our legal and political culture, then economic localism cannot provide a sufficient normative basis for protecting, let alone extending, local autonomy.” Richard Briffault, *Our Localism: Part II – Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 425 (1990). On state-federal interaction, see Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 *Va. L. Rev.* 953 (2016).

²⁸¹ Decades ago, Richard Briffault called for new ideas “to encourage state governments to take a state-wide perspective on local problems, to strengthen the states’ role in overriding parochial actions, and to increase state accountability for local functions and for ameliorating interlocal wealth differences.” Briffault, *Our Localism*, *supra* note.

²⁸² See Kate Levine, *Police Suspects*, 116 *Colum. L. Rev.* 1197 (2016) (describing Law Enforcement Officers’ Bills of Rights enacted in 16 states and elsewhere). For explorations of the role of police unions as impediments to police reform, particularly at the state level, see Stephen Rushin, *S.* (2019). *Unions and Police Reform*, 533-544 in *The Cambridge Handbook of Policing in the United States* (T. Lave & E. Miller, eds. 2019); Ben Levin, *What’s Wrong with Police Unions*, 120 *Colum. L. Rev.* 1, 16 (2020) (draft); Catherine Fisk & L. Song Richardson, 85 *Geo. Wash. L. Rev.* 712, 744-47 (2017).

²⁸³ In the wake of George Floyd’s killing, New York finally changed a law, which police unions had long fought to maintain, protecting police disciplinary records from disclosure. Luis Ferré-Sadurní and Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, *N.Y. Times*, June 12, 2020.

²⁸⁴ Patrick Joyce & Chandra Mukerji, *The State of Things: State History and Theory Reconfigured*, 46 *Theory & Society* 1, 15 (2017).

government with changing lines of communication and different ways of managing problems of distance.” While police forces may be a permanent fixture of law enforcement,²⁸⁵ protestors and progressive state governments can reweave the fabric of government by claiming their positions in the criminal justice system.

²⁸⁵ Even calls to defund the police do not mean outright elimination of the police. See, e.g., Christy E. Lopez, Defund the Police? Here’s what the Really Means, Op-Ed, Washington Post, June 7, 2020 (“Defunding the police means shrinking the scope of police responsibilities and shifting most of what government does to keep us safe to entities that are better equipped to meet that need.”); Astead W. Herndon, How a Pledge to Dismantle the Minneapolis Police Collapsed, N.Y. Times, Sept. 26, 2020.