ARTICLES

INDEMNIFICATION AS AN ALTERNATIVE TO NULLIFICATION

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The federalization of criminal law arguably poses a threat to the states' traditional police powers.[1] Congress has created thousands of distinct federal crimes,[2] and the "amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades."[3] Though not all of these federal criminal statutes necessarily upset the careful regulatory choices the states have made, many of them likely do. For example, Congress has criminalized activities the states now permit; it has denied federal criminal defendants many of the special procedural rights they would enjoy if prosecuted in state criminal justice systems; and it has imposed punishments on convicted offenders that

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1. The Supreme Court has repeatedly recognized that the "[s]tates possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982); *see also Bond v. U.S.*, 134 S. Ct. 2077, 2089 (2014) ("Perhaps the clearest example of traditional state authority is the punishment of local criminal activity.").

2. *See* Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 9 n. 11 http://perma.cc/MFH9-P3KP (http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf) (ABA 1998) [hereinafter Task Force Report] (acknowledging the difficulty posed by tallying the number of distinct federal crimes but suggesting that 3,000 might be a lower bound estimate); Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1, 3 (2012) (suggesting there are 4,500 federal criminal laws).

3. Task Force Report, *supra* n. 2, at 10.

vary both in degree and kind from the punishments imposed by state law for comparable offenses.[4] In many instances, Congress's decision to supplant the policy choices made by the states seems unjustified by any legitimate federal interest.[5]

The conventional wisdom suggests there is very little the states themselves can do to stop the federalization of criminal law and the resultant diminution of state prerogatives. The states, of course, have no authority to nullify federal law, nor can they interfere with the enforcement of federal law. At most, the states can petition the federal courts, Congress, and the President to respect state authority, but it seems unlikely they will find a receptive audience in any of the three branches of the national government. The federal courts have done little to stem the tide of federalization; Congress lacks the incentive to abstain from criminal legislation and has repeatedly passed over proposals to comprehensively reform federal criminal law; and while the President has discouraged enforcement of certain federal criminal statutes, the President's willingness and ability to do so are limited in important respects.[6]

But the conventional wisdom has overlooked a tactic that the states could adopt—and at least once *did* adopt—to take some of the bite out of federal criminal laws they deem objectionable. Namely, the states could indemnify the legal expenses of residents caught in the crosshairs of federal law enforcement agents. Indemnification could lessen the federal government's appetite for and success at enforcing certain federal criminal laws. It is no panacea, of course, for there is nothing the states can do to eliminate the threat of objectionable federal prosecutions. But indemnification might help to blunt the impact of federal criminal laws and thereby restore some of the prerogatives the states have lost in the criminal justice realm.

Indemnifying the legal costs of persons facing legal actions instigated by another sovereign is not without precedent.[7] Congress, for example, currently helps to pay for legal representation of convicted offenders in some *state* clemency proceedings.[8] And the states once returned the favor. Some northern states provided counsel for alleged runaway slaves facing legal

4. *See infra* Part I.

5. For a discussion of Congress's motivations in passing criminal legislation, see *infra* notes 17 and 65–68 and accompanying text.

6. *See infra* Part I.

7. Private organizations have also helped to subsidize the legal costs of criminal defendants. For example, Koch Industries recently announced that it had awarded a grant to the National Association of Criminal Defense Lawyers to help train defense lawyers for indigent defendants throughout the country. *See* Press Release from Nat'l Ass'n of Crim. Def. Lawyers, *NACDL Selected to Receive Significant Grant from Koch Industries, Inc. to Address Nation's Profound Indigent Defense Crisis* http://perma.cc/G6KK-V75D (http://www.nacdl.org/NewsReleases.aspx?id=34848) (Oct. 21, 2014).

8. 18 U.S.C. § 3599 (2012); *Harbison v. Bell*, 556 U.S. 180 (2009) (holding that § 3599 authorizes federal payment of legal representation for defendants in state clemency proceedings).

proceedings under the federal Fugitive Slave Act.[9] Similarly, states commonly submit amicus briefs on behalf of defendants facing federal criminal charges. In *United States v. Lopez*,[10] for example, the National Conference of State Legislatures filed a brief on behalf of Alfonso Lopez urging the Supreme Court to narrow Congress's authority to legislate in the criminal law domain.[11]

This Essay briefly discusses how and why state indemnification could help protect state prerogatives across a variety of issues ranging from marijuana to abortion to gambling to firearms.

I. BACKGROUND

The rise of federal criminal law in the past few decades has eroded the states' long-standing control over the domain.[12] At present count, Congress has created more than 4,500 federal crimes.[13] Many of these federal crimes address legitimate federal concerns—think of laws proscribing inter-state smuggling of cigarettes, the assassination of federal officials, or counterfeiting of U.S. currency—and thus pose little threat to the proper balance of the federal system. But many federal criminal laws seem only loosely connected to any recognized federal interest—think of laws proscribing robbery,[14] arson,[15] or even simple possession of drugs.[16] Such laws seem more geared toward protecting the health, safety, and morals of the population—concerns more traditionally the purview of the states—than protecting the

9. *See* Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850–1860* 181 (U. of N.C. Press 1970). To be sure, it is not clear whether state indemnification covered the costs of representation in federal FSA proceedings or was limited only to state proceedings. The Supreme Court held those state proceedings, which were designed to thwart enforcement of the FSA, invalid in *Ableman v. Booth*, 62 U.S. 506 (1858), discussed *infra* notes 45–46 and accompanying text.

10. 514 U.S. 549 (1995).

11. Br. of the Nat'l Conf. of St. Legis., Nat'l Governors' Ass'n, Nat'l League of Cities, Nat'l Ass'n of Cos., Int'l City/Co. Mgt. Ass'n, and Nat'l Inst. of Mun. Law Officers, Joined by the Nat'l Sch. Bds. Ass'n, as Amici Curiae in Support of Respt., *U.S. v. Lopez*, 1994 WL 16007619 (No. 93-1260, 514 U.S. 549 (1994)).

12. *E.g.* Task Force Report, *supra* n. 2, at 43 (arguing that federalization threatens to undermine "the careful decentralization of criminal law authority that has worked well for all of our constitutional history"). *But see* Klein & Grobey, *supra* n. 2 (arguing that the passage of federal criminal statutes standing alone does not necessarily undermine state prerogatives, since many federal statutes are seldom enforced). For a helpful bibliography of commentaries discussing the federalization of criminal law, see *id.* at nn. 1–9.

13. *See* Klein & Grobey, *supra* n. 2, at 3.

14. 18 U.S.C. § 1951 ("Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . shall be fined under this title or imprisoned not more than twenty years, or both.").

15. *Id.* at § 844(i) (making it a federal crime to destroy by means of "fire . . . any property used in interstate . . . commerce or in any activity affecting interstate commerce").

16. 21 U.S.C. § 844 ("It shall be unlawful for any person knowingly or intentionally to possess a controlled substance.").

flow of interstate commerce, the functioning of the federal government, the value of federal currency, or some other legitimate federal interest.[17]

To be sure, the federal government's encroachment on the states' traditional police powers is not entirely harmful to the states. After all, with more than 100,000 law enforcement agents and 4,000 prosecutors in its employ,[18] the federal government can help states shoulder some of the financial burden of combating crime. But the states do not always welcome federal assistance, especially when state and federal laws diverge, as they commonly do.

First, and perhaps most importantly, federal law proscribes some activities that the states allow. The distribution and possession of marijuana is just one example.[19] As of this writing, more than twenty states have legalized marijuana for medical or even recreational purposes.[20] To these states, marijuana has the potential to alleviate the suffering of some residents—or the budgetary woes of state lawmakers.[21] Yet the federal government continues to ban marijuana outright, and federal law enforcement agents have brought criminal prosecutions and forfeiture proceedings against persons the states treat more like prophets than pariahs.[22] There is a similar gap between federal and state law governing other activities as well, including

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17. *See e.g.* Task Force Report, *supra* n. 2, at 55 (lamenting that much of the federal criminal law has been enacted "in the absence of a demonstrated and distinctive federal justification").

Numerous commentators attribute the passage of federal criminal legislation to a desire to appear to constituents as "tough on crime." *E.g.* John S. Baker, Jr., U.S. v. Morrison *and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. Rev. 1191, 1193–1194 (2000); Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 Hastings L.J. 1277, 1293 (1995); Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. Rev. 1293, 1296 (2003); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893, 924–925 (2000) (surmising that "'deadbeat dads,' wife-beaters, and drug dealers do not have particularly powerful Washington lobbies, and many federalization projects therefore encounter little or no political resistance.").

18. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1464 (2009) ("The federal government employs about 105,000 law enforcement agents.") [hereinafter Mikos, *On the Limits of Supremacy*].

19. *See id.* at 1425–1426 (discussing other examples where state and federal criminal laws starkly diverge).

20. Governing.com, *State Marijuana Laws Map* http://perma.cc/Y8NF-H4ZJ (http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html) (accessed Jan. 20, 2015) (detailing marijuana legalization in the states).

21. Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. Chi. Leg. F. 222, 222–223 (explaining that promises of new tax revenue have helped fuel the drive for marijuana legalization in the states).

22. Mikos, *On the Limits of Supremacy*, *supra* n. 18, at 1433 (discussing federal government's rejection of claims that marijuana has medical value).

the possession of firearms,[23] the provision of abortion procedures,[24] and gambling on sporting events,[25] to name a few.

In each of these cases, federal criminal law threatens to displace state policy choices and undermine the values commonly attributed to federalism. The concern is that federal criminal bans will discourage people from engaging in behaviors the states support—the use of marijuana for medical purposes, the possession of certain firearms, the provision of controversial abortion services, and gambling on sporting events (particularly in tax-paying casinos). To be sure, this will not always happen—some federal bans lack teeth, even if they look tough on paper. The federal ban on medical marijuana is a good example. The federal government simply does not have the resources needed to effectively crack down on use of this drug (for medical or other purposes).[26] But even when these federal laws fail to discourage most instances of a prohibited behavior, they are not wholly irrelevant. For example, until very recently, the federal government continued to enforce its marijuana ban against persons who were, arguably, acting within the limits of state law,[27]and in the process, likely deterred at least some people from taking advantage of the protections afforded by state law.

Second, federal law sometimes affords persons facing investigation and criminal prosecution weaker procedural protections.[28] The U.S. Consti-

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23. Bureau of Alcohol, Tobacco, and Firearms, State Laws and Published Ordinances–Firearms (31st ed. 2011) (compiling state laws pertaining to firearms, including state laws that do not ban the possession and transfer of certain machine guns proscribed by federal law).

24. *See* Guttmacher Institute, *State Policies in Brief: Bans on "Partial-Birth" Abortion*, http://perma.cc/9G89-XS9J(http://www.guttmacher.org/statecenter/spibs/spib_BPBA.pdf) (Dec. 1, 2014) (comparing and contrasting state and federal policy toward partial birth abortion procedures).

25. *See e.g. Nat'l Collegiate Athletic Ass'n v. Gov. of N.J.*, 730 F.3d 208 (3d Cir. 2013) (discussing the conflict between New Jersey's Sports Wagering Law and the federal Professional and Amateur Sports Protection Act).

26. *See* Mikos, *On the Limits of Supremacy*, *supra* n. 18, at 1424 ("[T]he federal government lacks the resources needed to enforce its own [marijuana] ban vigorously").

27. *See* Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 Denv. U. L. Rev. 997, 1008 (2012) ("[S]ome individuals have been and will continue to be prosecuted under the federal [marijuana] ban. To the extent the federal ban represents a usurpation of state power, these prosecutions will seem unjust in our constitutional system. And even if they are infrequent, the prosecutions may seem all the more arbitrary and unjust due to their infrequency."). Recent spending legislation may have put an end to federal enforcement efforts, at least *temporarily*. *See* Pub. L. No. 113-235, 128 Stat. 2130 § 538 (2014) (the Consolidated and Further Continuing Appropriations Act, 2015. Instructing that "[n]one of the funds made available in this Act to the Department of Justice may be used . . . to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana").

28. *See* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 647–648 (1997) ("Because of differences between federal and state criminal justice systems, an offender will often fare worse if prosecuted in federal court rather than state court. He may be detained pending trial when he would have been released if charged in state court, denied discovery allowable in state court, and confronted with evidence that would have been suppressed in state court. If convicted, a federally prosecuted defendant is likely to receive a longer sentence and to serve far more

tution, of course, sets limits on investigative and prosecutorial tactics that both federal *and* state law enforcement officials must abide—no coerced confessions, no warrantless searches, and so on. But state constitutions commonly go beyond the minimum protections required by the federal constitution.[29] For example, some states prohibit their own law enforcement agencies from using electronic recordings even when otherwise permitted by the U.S. Constitution, demonstrating a greater respect for privacy than is shown by the U.S. Constitution.[30] But the same rules do not govern federal law enforcement agencies,[31] for whom wiretapping has seemingly become standard practice in certain types of criminal investigation, notwithstanding the obvious privacy concerns raised thereby.[32] Hence, even when federal and state law are substantively identical—*i.e.*, they prohibit the same conduct—federal law can undermine important policy choices made by the states concerning the way such crimes should be investigated and prosecuted.

Third, federal law commonly imposes harsher punishments on crimes than are provided for by state law. That is, a suspect who could be charged with violating identical state and federal criminal laws might face a tougher sentence if prosecuted and convicted under the latter.[33] A state might object to the nature or severity of federal sanctions in a given case, even if it does

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of that sentence than he would if sentenced in state court.") (internal citations omitted); Julie R. O'Sullivan, *The Federal Criminal 'Code' is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 643–648 (2006).

29. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?* 55 Md. L. Rev. 223 (1996).

30. *E.g. Vt. v. Geraw*, 795 A.2d 1219 (Vt. 2002) (barring police from using surreptitious recording made in defendant's home).

31. *See* Randall T. Shepard, *In a Federal Case, Is the State Constitution Something Important or Just Another Piece of Paper?* 46 Wm. & Mary L. Rev. 1437, 1445 (2005) ("The nearly universal conclusion of federal courts is that violations of a defendant's state constitutional rights are irrelevant if the defendant is charged in a federal forum."); *see also* John. B. Corr, *State Searches, Federal Cases, and Choice of Law: Just a Little Respect*, 23 Pepp. L. Rev. 31, 34 (1995); Kenneth J. Melilli, *Exclusion of Evidence in Federal Prosecutions on the Basis of State Law*, 22 Ga. L. Rev. 667, n. 182 (1988) (surveying cases in which federal courts have admitted evidence seized illegally under state law).

32. For data on the number of wiretap requests made by federal law enforcement agents, see Administrative Office of the U.S. Courts, *Wiretap Report* 2013, http://perma.cc/SC6M-KJXV (http://www.uscourts.gov/Statistics/WiretapReports/wiretap-report-2013.aspx) (accessed Nov. 16, 2014) (reporting that federal judges had authorized 1,476 wiretaps in 2013). To be sure, many states also employ wiretaps. The Administrative Office, for example, reports that state judges authorized 2,100 wiretaps in 2013. *Id.* But over half of those authorizations—1,103—came from two states (California and New York). *Id.* at Table 1. Moreover, it appears that six states have not even authorized wiretaps for use in criminal investigations and another seventeen states did not utilize such authority during 2013 (or at least, had not reported doing so). *Id.*

33. Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 Iowa L. Rev. 721 (2002); Stephen F. Smith, *Proportionality and Federalism*, 91 Va. L. Rev. 879 (2000).

not object (*per se*) to punishing the defendant. *United States v. Pleau*[34] illustrates the point. Jason Pleau was indicted by federal authorities for the robbery and murder of a gas station manager in Woonsocket, Rhode Island.[35] Under federal law, Pleau could have faced the death penalty. At the time of the indictment, however, Pleau was in state custody, so the federal government had to request that Rhode Island hand him over—and the Governor of Rhode Island adamantly refused. Pleau was hardly a sympathetic character—he was already serving an eighteen-year state sentence on unrelated charges—but the Governor resisted the federal government's demand because the state of Rhode Island opposes the death penalty. He wanted assurances from the Attorney General that Pleau would not be executed (assurances the federal government was at the time unwilling to give).[36]

Justice Kennedy has cogently explained how federal criminal law can undermine the values of federalism, even when the state and federal governments agree that a given behavior is undesirable and should be discouraged. In *Lopez*, the case challenging the federal government's ban on gun possession on school grounds, he opined:

> While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.
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> If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.
>
> Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are charged with maintaining. These might include inducements to inform on violators where the information leads to arrests or confiscation of the guns, programs to encourage the voluntary surrender of guns with some provision for amnesty, penalties imposed on parents or guardians for failure to supervise the child, laws providing for suspension or expulsion of gun-toting students, or programs for expulsion with assignment to special facilities.

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34. 680 F. 3d 1 (1st Cir. 2012).

35. *Id.* at 3.

36. *Id.*

> The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise . . . .[37]

Although states have ample reasons to object to the federalization of criminal law, it is commonly thought that there is nothing they can do to stop the phenomenon. Most importantly, it is settled wisdom that states cannot nullify federal law. Nullification is the

> theory that each individual state is fully "sovereign" and as such the final judge of its own constitutional rights and obligations; that consequently it may legitimately rule that any federal act—law, regulation, judicial decision, executive action, or treaty—is unconstitutional; and, most important, that it may act on this judgment by blocking the implementation of that federal act within the state's boundaries.[38]

Almost since the Framing, states have attempted to nullify objectionable federal laws by declaring them void within their own jurisdictions and by threatening to block their enforcement through various means (say, by hanging federal law enforcement agents).[39] But nullification flies in the face of express federal supremacy,[40] not to mention common sense, and has been rightly been dismissed and derided by the Supreme Court,[41] (most) politicians,[42] and scholars alike.[43] Notably, even the head of the Cato Institute rejects the theory of nullification[44]—a clear indication of just how far from mainstream the theory of nullification strays.

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37. *Lopez*, 514 U.S. at 581–582 (Kennedy & O'Connor, JJ., concurring) (internal citations omitted).

38. James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, 1 Am. Political Thought 263, 268 (U. Chi. Press 2012).

39. *Id.* at 278–292 (discussing historical episodes of nullification); Sanford Levinson, *The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments To Be Wrestled With?* 67 Ark. L. Rev. 17, 36–49 (2014).

40. U.S. Const. art. VI, cl. 2.

41. *Cooper v. Aaron*, 358 U.S. 1 (1958) (denouncing state attempts to nullify the Supreme Court's holding in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

42. *E.g.* Ernest A. Young, *Modern-Day Nullification*, 65 Case W. Res. L. Rev. __ (forthcoming 2015) (discussing President Jackson's denouncement of South Carolina nullification resolutions) (on file with author).

43. *E.g.* Levinson, *supra* n. 39, at 31–32 ("If we are full-throated Holmesians, then we can say with absolute confidence that any suggestion of so-called 'sovereign states' having the power to 'nullify' federal law is utter nonsense. No federal judge (or, for that matter, all but the most deviant state counterpart) is going to uphold state authority against the Supremacy Clause in Article VI, which clearly and unequivocally gives all laws passed pursuant to the Constitution the power to negate any state laws—or, indeed, state constitutions—to the contrary."); Read & Allen, *supra* n. 38, at 268 ("Nullification finds little support in either constitutional text or the framers' intentions, but the same might be said about many other constitutional doctrines (including some embraced by the court at one time or another.")).

44. Robert A. Levy, N.Y. Times, *The Limits of Nullification*, http://perma.cc/X35S-4YWT (http://www.nytimes.com/2013/09/04/opinion/the-limits-of-nullification.html) (Sept. 4, 2013) ("[W]hile states are not powerless in the face of federal law, there are limits to what they can do to prevent enforcement of constitutionally valid regulation.").

A logical corollary is that the states also may not interfere with federal investigations or prosecutions. Two notable cases illustrate the point. In *Ableman v. Booth*,[45] the Supreme Court invalidated a writ issued by a Wisconsin state court that ordered a federal court to release a prisoner being held under the federal Fugitive Slave Act, finding that state courts had no such authority over federal officials.[46] And in *United States v. Pleau*, discussed above, the First Circuit ordered the Rhode Island Governor to hand his prisoner over to federal authorities for trial, opining that "[s]tate interposition to defeat federal authority vanished with the Civil War."[47]

Because states have no authority to block federal law, their only remaining option is to persuade the federal courts, the President, or Congress to stop the federalization of criminal law. But none of these three pillars of the federal government has proven a receptive audience to their pleas. The federal courts have not put much of a dent in Congress's constitutional authority to enact federal criminal legislation. In *Lopez*, of course, the Court did find that Congress had exceeded its constitutional authority when it adopted a federal ban on the simple possession of firearms on school grounds.[48] And in *United States v. Morrison*,[49] the Court similarly found Congress had exceeded its authority by creating a federal tort cause of action to redress gender-motivated violence.[50] But the feat accomplished in *Lopez* (1995) and *Morrison* (2000) has not been repeated since. Indeed, *Gonzales v. Raich*[51] presented a prime opportunity to extend *Lopez*'s holding and further limit federal criminal law, but the Court balked; instead, it upheld Congress's power to ban the possession, cultivation, and distribution of marijuana, even when those activities take place entirely within one state.[52] Indeed, Professor Michael Simons has bluntly surmised that "the Supreme Court's Commerce Clause jurisprudence over the past one hundred years has left the judiciary largely powerless to control federalization."[53]

To be sure, the federal courts have shown more willingness to limit the reach of federal criminal law via statutory interpretation. In *Jones v. United States*,[54] for example, the Supreme Court interpreted the federal arson statute not to reach the destruction of an owner-occupied residence.[55] Noting

45. 62 U.S. 506 (1858).
46. *Id.* at 525–526.
47. *Pleau*, 680 F.3d at 6.
48. 514 U.S. at 552.
49. 529 U.S. 598 (2000).
50. *Id.* at 626–627.
51. 545 U.S. 1 (2005).
52. *Id.* at 33.
53. Simons, *supra* n. 217, at 919.
54. 529 U.S. 848 (2000).
55. *Id.*

that its ruling in *Lopez* had raised some doubts about the constitutionality of applying the federal arson statute to such facts, the Court decided to avoid those doubts by reading the statute narrowly (*i.e.*, not to cover the facts of the case at hand).[56] Likewise, in *Bond v. United States*,[57] the Court narrowly construed the Chemical Weapons Convention Implementation Act of 1998 to avoid constitutional doubts about Congress's ability to proscribe assaults stemming from a love-triangle.[58] There are other decisions in the same mold,[59] but all told these decisions still leave thousands of broad federal criminal provisions largely untouched, including federal laws banning gambling on sports,[60] possessing or distributing marijuana,[61] possessing machineguns,[62] providing certain abortion procedures,[63] and so on.[64]

For its part, Congress has seldom sought to repeal or narrow the reach of federal criminal law, to harmonize federal and state criminal procedure, or to reduce the disparities in federal and state criminal sentences. It has repeatedly passed over proposals to comprehensively reform federal criminal law.[65] And it has even eschewed more modest reforms targeted at particular federal criminal statutes. For example, members of Congress have

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56. *Id.* at 848–849.

57. 134 S. Ct. 2077 (2014).

58. *Id.* at 2081–2082.

59. *E.g. U.S. v. Bass*, 404 U.S. 336, 349–350 (1971) (suggesting that the Court "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction").

60. 28 U.S.C. § 3702 makes it a federal crime for:

> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
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> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

61. 21 U.S.C § 841 ("[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."); 21 U.S.C. § 844 ("It shall be unlawful for any person knowingly or intentionally to possess a controlled substance.").

62. 18. U.S.C. § 922 (o)(1) & (o)(2)(B) ("[I]t shall be unlawful for any person to transfer or possession a machinegun" except a machinegun "that was lawfully possessed before the date this subsection takes effect.").

63. 18 U.S.C. § 1531(a) ("Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.").

64. For commentary on other broad federal criminal statutes that have escaped judicial scrutiny largely unscathed, *see e.g.* Richard Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 Cornell L. Rev. 1 (2003) (criticizing Congress's invocation of the spending power to federalize run-of-the mill bribery cases).

65. *See generally* Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 45 (1998) (detailing prior failed attempts to reform federal criminal law and the obstacles confronting reform proposals).

recently introduced a variety of measures designed to limit the federal marijuana ban, but none seems likely to pass anytime in the near future.[66] Instead, Congress appears content to temporarily bar the Department of Justice (DOJ) from using funds to prevent the states from implementing their medical marijuana laws (whatever that might mean).[67] In any event, as a practical matter, Congress might be unable to draft narrower statutes that serve legitimate federal interests. As Professor Simons explains, "[e]ven when a new federal law is justified by a legitimate need for federal intervention—for example, a demonstrated state failure to combat extensive organized crime—the law itself is likely to cover far more than the specific undesirable conduct to which the statute is directed."[68]

That leaves the President. As the nation's Chief Executive, the President too can play a role in safeguarding state prerogatives from federal encroachment.[69] The President must decide how to allocate limited federal law enforcement resources. In so doing, the President could prioritize cases that trigger legitimate and substantial federal interests and de-emphasize cases that implicate countervailing state interests. Indeed, the DOJ has issued several memoranda to United States Attorneys urging them not to expend federal resources pursuing legal action against marijuana users and traffickers who are acting in compliance with state law and who do not otherwise implicate defined federal interests.[70]

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66. N.Y. Times Editorial Bd., *Repeal Prohibition, Again*, http://perma.cc/A8KK-M2RK (http://www.nytimes.com/interactive/2014/07/27/opinion/sunday/high-time-marijuana-legalization.html) (Jul. 27, 2014) (urging Congress to legalize marijuana, but acknowledging that "this Congress is as unlikely to take action on marijuana as it has been on other big issues").

67. *See* Pub. L. No. 113-235, 128 Stat. 2130, § 538 (2014) (the Consolidated and Further Continuing Appropriations Act, 2015. Instructing that "[n]one of the funds made available in this Act to the Department of Justice may be used . . . to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana"). For an insightful discussion of Congress's power over the Executive Branch's allocation of enforcement resources, *see* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 44 U.C.L.A. L. Rev. 757 (1999).

68. Simons, *supra* n. 17, at 929.

69. *See* Mikos, *supra* n. 27, at 1006–1009 (explaining how the exercise of federal enforcement discretion could help protect state prerogatives in the criminal law realm); David S. Schwartz, *Presidential Politics as a Safeguard of Federalism: The Case of Marijuana Legalization*, 62 Buff. L. Rev. 599, 601 (2014) (arguing that "presidential electoral politics—the strategic and tactical decisions that presidential aspirants make to win critical swing state electoral votes in closely-contested presidential elections—can under certain conditions provide powerful protection to federalism"); Simons, *supra* n. 17, at 930 ("Of the three branches of government, the Executive Branch is the best equipped to control federalization.").

70. For the latest memorandum, see Memo. from James M. Cole, Deputy Attorney General, to All United States Attorneys, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013) (available at http://perma.cc/KA8G-WV98 (http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf)). The latest memo appears to address some of the shortcomings of previous enforcement memoranda, discussed in Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 Stan. L. & Policy Rev. 633 (2011).

But the President's ability to protect the states by channeling the enforcement of federal criminal law is limited. For one thing, such guidance cannot stop a future President from changing course and re-emphasizing enforcement of previously dormant federal criminal statutes; indeed, DOJ guidance does not even bind the Administration that wrote it. As I have explained elsewhere,

> [A non-enforcement policy] does not create any legally enforceable rights that a court could use to dismiss a criminal prosecution brought by non-conforming federal agents. [Moreover, such policy] will not necessarily deter federal agents from pursuing such prosecutions, because the DOJ's power to detect and sanction non-compliance with its own policy is quite limited.[71]

In any event, the President seems least likely to issue such assurances of non-enforcement when they are needed the most—namely, when the federal government most strongly disagrees with the way that a state is handling a given behavior. For all of these reasons, while non-enforcement holds some promise for protecting state prerogatives against the federal government, it is far from a panacea.

In sum, federal criminal law poses a threat to state prerogatives. The states cannot address this threat by blocking the operation of federal law. They must work within the constitutional architecture that makes the federal government supreme. But to date, they have had only limited success petitioning the federal courts, Congress, and the President to limit the impact of federalization in the criminal law domain.

II. INDEMNIFICATION

So far, I have painted a fairly grim picture for the states. But I want to propose a partial solution to the problems outlined above. Though my proposal is modest, it has the virtue of working within existing legal constraints—in other words, it would not require a revolutionary change in federal law (constitutional or statutory) to be effective. Nor would my proposal require the active support of any of the three branches of the federal government. In a nutshell, I propose that the states pay to vigorously defend the targets of federal criminal prosecutions the states deem objectionable.[72] In other words, the states would promise to indemnify the legal expenses of residents they believe should not be investigated, indicted, or prosecuted by the federal government.

To illustrate, a state could announce that it will pay all of the legal expenses necessary to vigorously defend any resident who distributes medical marijuana in compliance with state law against any legal action brought

71. Mikos, *supra* n. 70, at 640.

72. States could not, of course, force any private citizen to accept the assistance, though one would expect most citizens to do so.

by the federal government stemming from such distribution. Such indemnification could cover the costs of legal representation at every stage of a federal criminal case, including the costs of negotiating with federal prosecutors, filing evidentiary motions, screening potential jurors, hiring expert witnesses, challenging the constitutionality of federal statutes, preparing sentencing recommendations, filing appeals, and so on.

Indemnification could blunt the impact of federal criminal law in three ways. First, in many cases, it would greatly increase the amount of resources that could be devoted to contesting federal charges. As it stands, most criminal defendants in the federal system are represented by attorneys provided by the federal government.[73] These federal defenders do *excellent* work, but they operate under increasingly tight budget constraints. For example, federal defenders are given only small allowances to cover the litany of expenses that might be incurred in preparing a client's case.[74] Further, recent federal budget cuts have only worsened these constraints[75] and exacerbated the resource disparities that exist between federal defenders and federal prosecutors.[76]

Though they are by no means guaranteed to do so, additional resources provided by the state could generate better outcomes for criminal defend-

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73. Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* Table 1 (Nat'l Bureau of Econ. Research, Working Paper No. 13187, June 2007).

All criminal defendants, of course, are entitled to effective assistance of counsel, whether or not they can pay for it out of pocket. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."); *Strickland v. Washington*, 466 U.S. 668, 669 (1984) (delineating standards for effective assistance of counsel). In the federal system, indigent representation is provided by the federal public defender—attorneys employed by the federal courts; by community organizations; or by panels of private attorneys appointed by the courts. *See Id.* (discussing the different types of indigent defense in federal system and their performance).

74. The Criminal Justice Act (CJA) establishes the system for assigning and compensating attorneys who represent financially eligible defendants in federal criminal cases. 18 U.S.C. § 3006A(d)–(e).

75. *E.g.* Donna Lee Elm & Richard S. Dellinger, *Dismantling Gideon's Legacy: Sequestration's Impact on Public Defender Services*, 60 Fed. Law. 11, 11–12 (July 2013) (arguing that recent federal budget cuts are "eviscerating the [federal defender] program"); Paul L. Friedman & Reggie B. Walton, *Public Defenders Offices Shouldn't Suffer under Sequestration*, Wash. Post (Apr. 18, 2013), http://perma.cc/8SWR-WHQA (http://www.washingtonpost.com/opinions/public-defenders-offices-shouldnt-suffer-under-sequestration/2013/04/18/c861b464-a619-11e2-a8e2-5b98cb59187f_story.html) ("Federal public defender offices throughout the country stand to have their already tight budgets reduced significantly.").

76. *E.g.* ABA, *ABA President Rails against Budget Cuts to Federal Public Defender Program* (Aug. 23, 2013), http://perma.cc/BE3A-PSSV (http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/aba_president_rails.html) ("In our best day, in our best budget years, we are vastly outgunned. . . . We do not have parity in our system.") (quoting David Patton, Executive Director of the Federal Defenders of New York); Dennis E. Curtis, *Comment: Congressional Powers and Federal Judicial Burdens*, 46 Hastings L.J. 1019, 1028 (1995) ("For the period 1979–1990, the percentage change in direct expenditures for federal public defense purposes was 68.9%, while that for prosecution and legal services was 470.4%. For the period covering 1985–1990, the respective percentages are 18.2% and 88.9%.").

ants.[77] More specifically, as Professor Daryl Brown explains, "[p]arties with greater resources can more thoroughly investigate and present evidence and challenge opposing evidence, and that changes outcomes."[78] Even in cases where the evidence against a defendant is overwhelming, a well-funded defense team might still find opportunities to contest the prosecution, say, by filing non-frivolous motions challenging the constitutionality of federal legislation.

Second, and relatedly, indemnification could even discourage federal officials from bringing some prosecutions in the first instance. Federal prosecutors simply cannot pursue "every alleged offense over which [f]ederal jurisdiction exists."[79] This is one reason why they have "wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of [f]ederal criminal law."[80] In deciding which cases to bring, a federal prosecutor might think twice before charging someone who has the financial backing of the state, *i.e.*, a case she knows will consume comparatively more of her own scarce resources.

Third, for persons who currently must pay for legal representation out-of-pocket,[81] indemnification will lessen the financial blow of being indicted by the federal government. The costs of legal representation add to the effective sanction imposed for violations of the law, even though these costs normally must be paid regardless of one's guilt or innocence.

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77. Justice Brennan recognized the "harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring); *see also* James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 Yale L.J. 154, 159 (2012) ("Compared to appointed counsel, public defenders in Philadelphia reduce their clients' murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%. These results suggest that defense counsel makes an enormous difference in the outcomes of cases, even in the most serious cases where one might hope that the particular type of defense lawyer would matter least."); *Id.* at 188 ("We find that, in general, appointed counsel have comparatively few resources, face more difficult incentives, and are more isolated than public defenders."); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 Iowa L. Rev. 219, 221 (2004) ("Although there are genuine debates about the most efficient ways to organize criminal defense work, money can improve any chosen method of delivering defense services.").

78. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1604 (2005).

79. U.S. Dep't of Just., *United States Attorneys' Manual* § 9-27.230(B)(1) (available at 1997 WL 1944702) (Jan. 1, 2009).

80. *Id.* at § 9-27.110(B).

81. A defendant qualifies for representation by the federal defender "if the person's net financial resources and income are insufficient to obtain qualified counsel." *Guide to Judiciary Policy: Defender Services*, vol. 7, ch. 2, § 210.40.30(a) (last revised Feb. 28, 2014) (available at http://perma.cc/J6LS-4UJN (http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter2.aspx#210_40)).

For each of these reasons, indemnification against legal expenses could mitigate the impact of federal criminal law. In other words, a resident might prove more willing to flout federal law—say, by participating in a state's medical marijuana program—if she knows that the state will provide her vigorous legal representation free of charge. To be sure, the resident might be prosecuted, convicted, and punished anyway; but that risk will be diminished—and perhaps greatly diminished—if the state throws its substantial weight behind her cause. For some defendants, the states' beneficence might also lessen the stigma associated with being investigated, prosecuted, and even convicted by the federal government.[82]

Importantly, Congress likely could not stop states from subsidizing the legal expenses of federal criminal defendants. Doing so would arguably run afoul of a defendant's Sixth Amendment right to choose her own representation.[83] But a state presumably could not go beyond funding legal counsel, experts, etc. For example, a state could not indemnify the fines imposed by the federal government on convicted offenders. Indemnification of such fines would almost certainly be preempted because it would encourage the commission of federal offenses without simultaneously implicating a defendant's Sixth Amendment rights. As Professor Miriam Baer explains, the "strongest argument against insurance [against fines] will be the fear of moral hazard. In other words, if insurance buffets the consequences of bad behavior, insureds engage in more of that behavior."[84] To be sure, as I have suggested, indemnification of legal expenses is also likely to encourage the

82. *See* Mikos, *On the Limits of Supremacy*, *supra* n. 18, at 1478 ("[E]ven if they cannot shield people from federal legal sanctions or change federal law in the short term, states can make people feel secure from social sanctions by credibly signaling public approval of once taboo conduct.").

83. *See e.g. U.S. v. Laura*, 607 F.2d 52, 55–56 (3d Cir. 1979) ("[T]he sixth amendment generally protects a defendant's decision to select a particular attorney to aid him in his efforts to cope with what would otherwise be an incomprehensible and overpowering governmental authority. While the right to select a particular person as counsel is not an absolute right, the arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel."); *U.S. v. Stein*, 435 F. Supp. 2d 330, 357 (S.D.N.Y. 2006) ("A defendant is guaranteed also 'the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire—in other words, to use his or her own assets to defend the case, free of government regulation. Nor may the government interfere at will with a defendant's choice of counsel, as the Constitution 'protect[s] . . . the defendant's free choice independent of concern for the objective fairness of the proceedings.'") (internal citations omitted).

84. Miriam Hechler Baer, *Insuring Corporate Crime*, 83 Ind. L.J. 1035, 1083 (2008); *see also* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 Md. L. Rev. 409 (2005) (discussing consensus view that insurance against criminal fines is against public policy); *N.W. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 440 (5th Cir. 1962) ("Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent."); *Tedesco v. Md. Cas. Co.*, 18 A.2d 357, 359 (Conn. 1941) ("A policy which permitted an insured to recover from the insurer fines imposed for a violation of a criminal law would certainly be against public policy.").

flouting of federal law. But access to legal counsel, unlike access to funds needed to pay fines, is a right protected by the Constitution. And courts that have found it against public policy for an insurance company to indemnify the costs of damages resulting from illegal or intentional conduct have nonetheless allowed companies to indemnify the costs of defending against allegations of such conduct.[85]

In addition to blunting the impact of federal criminal law, indemnification could also help spur compliance with *state* law. In the illustration above, for example, the state has made indemnification contingent on the marijuana supplier's full compliance with state marijuana regulations. In many states, this would mean the supplier would have to obtain a license from the state, prevent sales to minors, and so on, to qualify for indemnification.[86] To the extent such indemnification holds value to persons who could face federal criminal prosecution, it would help entice them to comply with state law.

The provision of legal defense in federal cases will, of course, come at a cost to the states. The states will have to budget funds for lawyers, experts, and so on to wage a vigorous and effective campaign. But requiring states to have some skin in the game is not necessarily a bad thing. The investment required should encourage states to focus their attention on the federal cases that matter most and to avoid making disingenuous attacks on federal law, a far too common phenomenon in the world of politics, where talk is cheap. In any event, the states' investments might pay for themselves. Some of the behaviors states could seek to encourage—say, the licensed distribution of marijuana—might generate tax revenues down the road that would cover in part or whole the states' indemnification policies. In July 2014 alone, for example, Colorado collected nearly $8 million in tax revenue from legalized marijuana.[87]

In short, providing indemnification of legal expenses could help to mitigate the risks of federal legal actions the states find objectionable.

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85. *Burnham Shoes, Inc. v. W. Am. Ins. Co.*, 813 F.2d 328, 331 (11th Cir. 1987) ("[W]e fail to perceive how requiring an insurer to meet its contractual obligation to provide a defense to claims alleging intentional acts violates the public policy of this state.").

86. *E.g.*, 1 Colo. Code Regs. § 212-2 (2013) (detailing regulations governing retail marijuana distributors).

87. Christopher Ingraham, *Colorado Marijuana Tax Revenues Surge as Recreational Sales Surpass Medical for the First Time*, Wash. Post: Workblog (Sept. 11, 2014), http://perma.cc/6E95-RJRF (http://www.washingtonpost.com/blogs/wonkblog/wp/2014/09/11/colorado-marijuana-tax-revenues-surge-as-recreational-sales-surpass-medical-for-the-first-time/).

III. Conclusion

Nullification is a discredited tactic the states should disavow. But that does not mean the states must sit idly by as the federal government asserts control over the criminal justice system. To lessen the impact of the federalization of substantive criminal law, procedural criminal law, and sentencing law, the states could indemnify the legal expenses of residents facing objectionable federal prosecutions. Such indemnification could help mitigate the impact of federalization in a diverse array of substantive fields. Importantly, it would not require the support of Congress, the President, or the federal courts to be effective.