ARTICLES

GOING FEDERAL, STAYING STATESIDE: FELONS, FIREARMS, AND THE "FEDERALIZATION" OF CRIME

JONATHAN ABEL*

Scholars have long debated the federalization of crime. Proponents assert that federal prosecutions are more likely than state prosecutions to result in convictions and severe punishments, and thus more likely to deter crime. Opponents argue that federalization leads to the arbitrary, and even racist, punishment of a few unlucky defendants plucked from a sea of similarly situated peers. Everyone seems to agree about one thing, though: the federal system outstrips the state system in effectiveness and severity. Yet, no one has obtained the state-court data needed to substantiate these comparisons. This Article fills that gap with an examination of the crime of being a felon in possession of a firearm, an offense that now accounts for nearly 10% of the federal criminal docket.

The Article makes three main contributions to the literature. First, it shows how the literature's claims about the superiority of federal prosecutions (compared to state ones) are rarely substantiated by data about actual state court prosecutions. In essence, the literature considers only the cases that went federal,

* Associate Professor, *UC Law San Francisco*. I am grateful for the support of so many colleagues and friends in working on this project: Robert Weisberg, Liora Abel, Noah Abel, Hadar Aviram, Prithika Balakrishnan, David Ball, Binyamin Blum, Ming Chen, Scott Dodson, Eric Fish, Raye Leatherwood, Jonathan Levine, Shira Levine, Joseph Lin, Rory Little, Noga Morag-Levine, Emily Murphy, Dave Owen, Zachary Price, Jodi Short, Ellen Slatkin, Radhika Rao, and Miriam Yarde. Thanks go to all my colleagues at *UC Law San Francisco* and *Santa Clara Law* who provided guidance on an earlier draft. Finally, I am indebted to the impressive platoon of law review editors who provided thoughtful, detailed, and generous work on this Article at every stage from selection, through substantive editing, and all the way up to proofreading.

not the far more numerous cases that could have gone federal yet stayed in state court. Second, using a novel case study of all the federal and state felon-in-possession prosecutions in one of the nation's largest counties—Alameda County, California—the Article tests several bedrock claims about federalization. The testing leads to surprising results regarding conviction rates, sentencing severity, and racial disparities in charging practices. Finally, the Article connects these findings to the larger problem of academia's fixation on all things federal—a fixation that comes at the expense of state and local topics.

TABLE OF CONTENTS

INTRODUCTION

Federal prosecutors' increasing focus on "street crime" prosecution is a topic of perennial academic interest. Low-level drug- and gun-possession cases were traditionally the domain of local prosecutors applying state criminal law.[1] But starting in earnest in the late 1980s and early 1990s, federal prosecutors began to charge these street crimes in federal court.[2] Scholars have used dramatic terms to describe the federalization of these crimes. It was "a radical departure from the ordinary practice," writes Sara Sun Beale.[3] This shift "dramatically expanded" federal criminal law into an area "once a nearly exclusive preserve of local and state law enforcement," according to Michael O'Hear.[4] In the words of a leading treatise, an "explosion" of cases with state-court origins struck the federal system.[5]

Arguably, no offense captures the federalization story better than the crime of being a felon in possession of a firearm. Felon-in-possession grew from a negligible slice of the federal criminal docket in the 1980s to more than 10% of all cases today.[6] It is no mystery why. Felon-in-possession is an ideal proxy crime that permits federal prosecution for any conduct that happens to involve a felon and a gun. Nationwide, codenamed initiatives like Project Exile, Project Triggerlock,

---

1. *E.g.*, Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1644–46 (2002) (discussing Congress's shift towards criminalizing certain activities under federal law pursuant to the Commerce Clause).

2. *Id.* at 1645.

3. *Id.* at 1660.

4. Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 723 (2002).

5. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 1.2(d) (4th ed. 2015) ("*The federalization 'explosion.'* Federal judges, academic commentators, occasional state enforcement officials, and some members of Congress, have characterized Congress'[s] criminal law enactments of the past several decades as having produced an unprecedented increase in the 'federalization' of traditional state crimes.—i.e., making it a federal crime to engage in core conduct that traditionally has been prosecuted under state law." (footnotes omitted)).

6. U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY21.pdf [https://perma.cc/DKH6-YZGP] (reporting 57,287 cases to the Commission, of which 7,454 involved convictions under 18 U.S.C. § 922(g)).

Project Ceasefire, and Project Safe Neighborhoods sprang up to pull felon-in-possession cases into federal court.[7] The goal was not to target gun possession as such, but rather to target violent crime by plucking defendants identified as violent criminals out of state court. The idea was to subject felons-in-possession to the full force of the federal process where, everyone assumes, these defendants face a higher likelihood of conviction, more serious sentences, and the prospect of serving prison terms in far-flung federal lockups. Billions in federal funding have been devoted to this enforcement strategy, all predicated on the belief that taking a case federal makes a difference in its expected outcome.[8]

Systemic efforts to federalize felon-in-possession caused an "extraordinary increase in gun possession prosecutions" in federal court and, according to David Patton, prompted federal prosecutors "to fundamentally change the nature of their work."[9] Daniel Richman calls the federalization of gun possession "[t]he most important change in federal-local interaction."[10] Attorney General John Ashcroft called it all "disarmingly simple: federal, state and local law enforcement officers and prosecutors working together to investigate, arrest, and prosecute criminals with guns to get the maximum penalties available under state or federal law."[11] Meanwhile, critics claimed that federalization was a "cruel lottery" that subjected a handful of unlucky defendants to exceptional federal punishments, while leaving similarly-situated defendants to be treated leniently in state court.[12] In several large jurisdictions, statistics showed shocking racial disparities, with Black defendants accounting for 80% and even

---

7. *See generally* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1011–12 (2020) (explaining how federal prosecutors use felon-in-possession prosecutions to target what used to be considered local crimes).

8. *Id.* at 1028.

9. *Id.* at 1011, 1015–16.

10. Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, *in* 34 CRIME & JUSTICE: A REVIEW OF RESEARCH 397 (Michael Tonry ed., 2006).

11. John Ashcroft, Prepared Remarks of Attorney General Ashcroft at the Project Safe Neighborhoods National Conference (Jan. 30, 2003), https://www.justice.gov/archive/ag/speeches/2003/013003agpreparedremarks.htm [https://perma.cc/7XBV-3FGG].

12. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 1003–04 (1995).

90% of federal felon-in-possession defendants.[13] This led critics to observe that the federalization efforts were downright racially discriminatory.[14]

The debate about federalization has been intense precisely because scholars on all sides seem to believe that the stakes are so high. The federal forum matters, according to both proponents and critics of federalization.[15] Indeed, across the federalization literature, there is a deep investment in the belief that sending a case from state to federal court will lead to a higher likelihood of conviction and a more serious punishment.

Look closely, however, and there is something very odd about this bedrock assumption. Scholars make broad claims about how the federal system differs from the state system, but they lack data on what actually happens to the cases that stay in state court.[16] These counterfactual cases—the ones that could "go federal" but instead stay in state court—should be essential to making any comparisons between federal and state outcomes. Yet the state data are almost entirely missing. To claim that the conviction rate is higher in the federal system, or that punishments in federal court are more severe, or that federal prosecutors racially discriminate in choosing which defendants to prosecute, we need to know something about what happens in state court. Yet the federalization literature is devoid of data on state-court cases.

In some ways, this omission is understandable. State prosecutions are harder to study than federal ones. Statistics are less accessible in state court than federal court.[17] The same is true of court records. Even

---

13. *See* Bonita R. Gardner, *Separate and Unequal: Federal Tough-On-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 317 (2007) (citing statistics from the Eastern District of Michigan, the Southern District of New York, the Southern District of Ohio, and the Eastern District of Virginia).

14. *See id.* at 308 (arguing that "Project Safe Neighborhoods is a program that operates to treat African Americans separately and unequally").

15. *Id.* at 339–41.

16. Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2238–39 (2017).

17. *E.g.*, Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. 1071, 1108 n.131, 1131–43 (2022) (noting "the relative bounty of adjudicative data in federal criminal cases, as compared to state and local ones"); Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 DAEDALUS 129, 137 (2014) (describing the data collected from state agencies regarding state courts as "data shaped by local concerns and traditions that

when the state-court records are accessible, the size of the state system is so much larger than the federal system that it is far more challenging to get one's arms around state-court issues. Ironically, and perversely, this focuses scholarly attention on the smaller, better-documented federal system, at the expense of the larger, arguably more important, state system.[18] Often, ignoring the state courts leads to studies that are merely incomplete. But in the literature on federalization, there is an inescapable comparison between the federal and state systems. The lack of data on state court proceedings means that the federalization literature's claims are not merely incomplete; they are also inaccurate. They misstate the true relationship between federal and state prosecutions.[19]

Against this backdrop, I designed a novel case study that could examine federalization not only through the cases that went federal, but also through the cases that stayed in state court. The case study follows every prosecution for felon-in-possession in one of the nation's largest counties—Alameda County, California—in the year 2020. Most of those defendants saw their cases prosecuted in state court. A small sliver of them saw their cases prosecuted in federal court. By tracking the cases that went federal and the ones that could have gone federal but stayed in state court, this case study was able to test several common claims about federalization, leading to counterintuitive results:

---

allow neither good interstate comparison nor good tracking of trends across time"); EDMUND F. MCGARRELL, NATALIE KROOVAND HIPPLE, NICHOLAS CORSARO, TIMOTHY S. BYNUM, HEATHER PEREZ, CAROL A. ZIMMERMANN & MELISSA GARMO, PROJECT SAFE NEIGHBORHOODS – A NATIONAL PROGRAM TO REDUCE GUN CRIME: FINAL PROJECT REPORT iv (2009) (noting how, in the authors' large-scale federalization study, "[t]he most common barrier to research integration was the availability of crime data," and that the "[l]ocal level prosecution data were often not available in useful form"); Daniel Richman, *Judging Untried Cases*, 156 U. PA. L. REV. ONLINE 219, 222 (2007) (noting that "the 'feds' have always attracted lay and scholarly attention far out of proportion to their relative numbers," in part because the federal government's resources "permit[] it to fund unparalleled data-collection efforts").

18. *See, e.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 189 (2017) ("[T]here has been an overemphasis on the federal system and its pathologies. Even though the federal government holds only about 12% of the nation's prisoners, its criminal justice system receives almost all of the national media and scholarly attention. Problematically, federal criminal justice outcomes look much different from those in the states.").

19. *See infra* Part I.

- Claim #1: *Federal prosecutors discriminate against Black defendants in selecting which defendants to charge*. The data show a similar and, indeed, greater proportion of Black defendants in the state pool of felon-in-possession cases than in the federal pool. This supports the inference that federal prosecutors are not creating the racial disparities in federal prosecutions. Rather, the source of the disparities is upstream in the state system.[20]

- Claim #2: *The conviction rate is higher in federal court than state court*. The data shows a conviction rate in state court that is comparable to the conviction rate in federal court, provided one accounts for the multiplicity charges *and* cases that are filed against so many state-court defendants. In the federal sample, most defendants face only the charge of felon-in-possession; in the state sample, only 5.2% of defendants are charged with felon-in-possession as a standalone crime. A different paradigm in how cases are charged in state court requires a different metric for how the conviction rate is measured.[21]

- Claim #3: *Federal prosecutions result in more severe punishments than state prosecutions*. The state data supports this claim. But the state data also show how the federal and state systems are tackling different types of conduct within the umbrella of felon-in-possession. State felon-in-possession prosecutions are more likely than federal felon-in-possession prosecutions to involve shootings, injuries, and death. Any comparison of federal and state sentencing severity must account for these differences in conduct.[22]

This case study's results pose fundamental questions for the federalization literature. If the literature's basic claims about the difference between federal and state prosecutions are incorrect, the many normative claims that rely on them are also vulnerable.

Beyond the particulars of the federalization debate, this Article contributes to the literature by demonstrating the granular case-review and data-collection methods that are required to make sense of the

20. *See infra* Sections I.C.1 and II.C.3.
21. *See infra* Sections I.C.4 and II.C.4.
22. *See infra* Sections I.C.4 and II.C.5.

state courts—methods that could be fruitfully replicated in other jurisdictions around the country.

* * *

The Article proceeds in three Parts. Part I discusses the literature on federalization, with an emphasis on the literature's unsubstantiated comparisons of the federal and state systems. This first Part provides the background on what is missing from the literature and why the case study in this Article is needed. Part II describes the case study's design and presents its findings. Part III discusses the limitations and extensions of the case study. A concluding note situates the federalization literature's shortcomings within the larger problem of academia's federal fixation. For readers who want to start with the case study and its new data, that discussion begins in Part II. A summary of the six most important conclusions from the case study can be found in Section II.D.

I. FEDERALIZATION ILLUSTRATED, DEBATED, AND UNSUBSTANTIATED

The federalization literature compares federal and state prosecutions without knowing very much about state court. This leads to a raft of unsubstantiated and, perhaps, inaccurate claims. This Part begins with an example of the federalization of one felon-in-possession case. It then surveys the various strands of the federalization literature that rely on claims about the difference between federal and state. This Part concludes by demonstrating how little the scholarship knows about the cases that stay in state court—cases that are essential for any federal-to-state comparison.

A. Federalization Illustrated

In Fiscal Year 2020–21, 7,454 people were convicted of violating 18 U.S.C. § 922(g), the federal statute barring felons and other prohibited persons from possessing guns.[23] D. York, a convicted felon,

23. U.S. SENT'G COMM'N, *supra* note 6. In addition to those convicted of felonies, § 922(g) prohibits gun possession by any person who is "a fugitive from justice," "an unlawful user of or addicted to" certain drugs, has been "adjudicated as a mental defective," is "an alien . . . illegally or unlawfully in the United States," is "subject to a court order that . . . restrains such person from harassing, stalking, or threatening an intimate partner," has been "convicted . . . of a misdemeanor crime of domestic violence," among other categories. *See* 18 U.S.C. § 922(g)(1)-(9).

was one of them.[24] York's path to federal court started on a San Francisco sidewalk.[25] On July 22, 2020, a plainclothes officer heard York say "gun" and "I want to buy."[26] The officer approached.[27] York ran, clutching a gun in his hand, until he bumped into a parked car.[28] York dropped the gun as he fell to the ground.[29] Two days later, San Francisco prosecutors charged York with violating five state gun-possession statutes: felon-in-possession; concealing a weapon on a convicted person; concealing a weapon on a person not the registered owner; being a convicted person carrying a loaded firearm; and carrying a loaded firearm by a person not the registered owner.[30] Those charges were dismissed a month and a week later. Why? The case had gone federal.[31]

In 2020, San Francisco prosecutors charged 164 defendants with violating the state felon-in-possession provision.[32] How did York wind up in federal court? Agent Gabriel Alcaraz of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is part of the story.[33] Assigned to the San Francisco Metro Field Office, Alcaraz was a "Task Force Officer,"[34] a designation given to federal or local agents who are responsible for identifying cases that might benefit from federal prosecution.[35] Gun task forces around the country enlist federal, state,

---

24. Criminal Complaint at 2, United States v. York, No. 20-CR-00479 (N.D. Cal. Aug. 27, 2020), ECF No. 1 [hereinafter York Complaint]. In this Article, I use defendants' first initials and last names. My aim was to strike a balance. By using the first initial, last name, and case number, I provide all the information needed to find the case records and check my work. In using only the first initial, rather than the full name, I hope to preserve some measure of privacy for the defendants by preventing a simple Google search from bringing up their presence in this Article.

25. *Id.* at 2–3.

26. *Id.* at 2.

27. *Id.* at 3.

28. *Id.*

29. *Id.*

30. Felony Complaint, People v. York, Super. Ct. No. 20008212 (Cal. Super. Ct. S.F. Cnty. Jul. 24, 2020) (alleging violations of CAL. PENAL CODE 29800(a)(1), 25400(a)(2) (two counts), 25850(a) (two counts)).

31. Minute Order, People v. York, Super. Ct. No. 20008212 (Cal. Super. Ct. S.F. Cnty. Aug. 28, 2020).

32. S.F. Dist. Atty's Off., Excel Sheet Listing Defendants Charged with Cal. P.C. 29800 in 2020 (2021) (on file with Author).

33. York Complaint, *supra* note 24, at 2.

34. *Id.*

35. *See* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 946 (2015) (describing role of cross-designated officers).

and local law enforcement agents and prosecutors in targeting crimes for federal prosecution.[36] They are the institutional apparatus of federalization, the bureaucratic magnet that pulls local cops' arrests into the federal venue.[37] In York's case, Alcaraz wrote out a complaint detailing York's felon-in-possession conduct, and Assistant U.S. Attorney Kevin Rubino signed off.[38]

But why, precisely, did the prosecutor and agent choose York's case to go federal? There is no requirement for prosecutors to reveal the reasoning behind their charging decisions.[39] In York's case, however, a federal judge asked the prosecutor for the case-selection criteria.[40] "There is not a rigid set of criteria," responded Assistant U.S. Attorney Kevin Rubio.[41] "There is a set of considerations, from what I understand, that are taken into account; but not a rigid set of criteria that, like, mechanically apply."[42]

York's public court file contains a few hints about these criteria. First, York's alleged gang affiliation aligns with the goal of federalization programs.[43] Second, York's criminal history—Category VI—placed him in the highest tranche in the federal system, another target of federalization initiatives.[44] Third, York's previous avoidance of significant punishment in state court was a factor, at least according to the prosecutor's sentencing memo.[45] Throughout the federalization literature, there are claims that federal prosecutors intervene when the

---

36. Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 160 (2018).

37. *Id.*

38. York Complaint, *supra* note 24, at 1.

39. Transcript of Remote Videoconference Proceedings Appearances at 41, United States v. York, No. 20-CR-00479 (N.D. Cal. Apr. 19, 2021), ECF No. 63.

40. *Id.*

41. *Id.*

42. *Id.*

43. United States' Sentencing Memorandum at 2, United States v. York, No. 20-CR-00479 (N.D. Cal. Apr. 14, 2021), ECF No. 49; MCGARRELL ET AL., *supra* note 17, at 38 (noting "extension of the [Project Safe Neighborhoods] model from gun violence to gangs and drugs"); *Project Safe Neighborhoods*, U.S. ATT'YS OFF. N. DIST. CAL., https://www.justice.gov/usao-ndca/project-safe-neighborhoods [https://perma.cc/DK6K-6Y98] (last updated Dec. 22, 2022) ("By partnering with local law enforcement . . . the U.S. Attorney's Office will continue its success in reducing gun and gang violence through the investigation and prosecution of those cases with the highest impact.").

44. United States' Sentencing Memorandum, *supra* note 43, at 4.

45. *Id.* at 2.

state system has been unable to bring a particular defendant to justice.[46] Think of it as a "backstop" theory of federalization. In York's case, the prosecutor noted York's "10 felony convictions, including two convictions for felon in possession of a firearm in 2016 and 2019," and emphasized York's alleged involvement in "a high-speed car chase through the streets of Oakland" and an incident in which "he shot and killed a man," but was acquitted of homicide charges.[47] "To say that he has been undeterred would be a gross understatement," the federal prosecutor wrote.[48]

But those may not have been the only factors that sent York to federal court. In fact, it was York and his federal public defender who identified another factor commonly associated with federalization: race. York's briefs pointed to data from the U.S. Sentencing Commission that showed Black defendants made up 57.6% of those sentenced in the Northern District of California under Guideline 2k2.1,[49] the guideline for felon-in-possession and other prohibited-possessor crimes.[50] At the same time, just 5.6% of the district's population was Black.[51] This data, according to York, demonstrated racial discrimination by federal prosecutors in deciding to take his case to federal court.[52]

Academic articles and litigation briefs around the country are full of claims about racial discrimination in the federalization of crime.[53] Usually, these claims fail to get past the threshold showing needed to order discovery. But in York's case, Judge Edward Chen ordered prosecutors to disclose the number of federal felon-in-possession defendants charged in a two-year period from June 2019 to June 2021,

---

46. *See* Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1078 (1995) ("There is, however, a principle that both explains many past federalizations that we currently accept and might realistically work to limit future federalization: demonstrated state failure. This principle would endorse the federalization of criminal conduct only when there is a demonstrated failure of state and local authorities to deal with the targeted conduct."); *infra* note 290 (describing federal prosecution where state prosecution did not satisfy prosecutorial interests).

47. United States' Sentencing Memorandum, *supra* note 43, at 2–3.

48. *Id.*

49. Sentencing Memorandum at 17, United States v. York, No. 20-CR-00479 (N.D. Cal. Apr. 7, 2021), ECF No. 50.

50. 2012 GUIDELINES MANUAL § 2K2.1 (U.S. SENT'G COMM'N 2012) (describing range of conduct, including convictions under 18 U.S.C. § 922(g)).

51. Sentencing Memorandum, *supra* note 49, at 17–18.

52. *Id.* at 15.

53. *See infra* Section II.B (collecting sources).

the number of those cases that started out with state-court charges, and the racial demographics of both sets of defendants.[54] "[I]f Black defendants have their § 922-type gun cases transferred from state to federal court more often than White defendants," Judge Chen wrote, "then absent a good explanation therefor, the disparity could foster disrespect for and instill a lack of confidence in the criminal justice system."[55]

When the prosecutors produced the requested information in discovery, the data showed that there were 244 felon-in-possession cases filed in the two-year period,[56] and 148 of those cases started out in state court.[57] The discovery further showed that the racial demographics of the cases transferred from state court were effectively the same as the racial demographics of the cases that started off in federal court: 55% of the defendants in both sets were Black.[58] Federal prosecutors pointed to this parity as a sign that racial discrimination was not driving the decision on which cases to pluck from state court for federal prosecution.[59]

But York's attorney argued that crucial information was missing: "the demographics of defendants charged in state court."[60] "Without knowing the eligible pool of individuals from which the U.S. Attorney's office could have chosen to prosecute," the defense attorney wrote, "it remains unclear whether the U.S. Attorney's office may be disproportionately selecting Black defendants for federal

54. Order Granting in Part and Denying in Part Plaintiff's Motion for Reconsideration, and Denying Defendant's Motion to Strike at 1, United States v. York, No. 20-CR-00479 (N.D. Cal. June 1, 2021), ECF No. 77.

55. *Id.* at 5–6.

56. The district includes fifteen counties, the most populous of which ring the San Francisco Bay: Alameda, Contra Costa, San Francisco, San Mateo, and Santa Clara. *Jurisdiction Map*, U.S. DIST. CT., N. DIST. OF CA., https://cand.uscourts.gov/about/jurisdiction-map [https://perma.cc/H8CH-8P9S]; *California: 2020 Census*, U.S. CENSUS BUREAU, https://www.census.gov/library/stories/state-by-state/california-population-change-between-census-decade.html [https://perma.cc/RE4J-LXH2].

57. United States' Response to Discovery Order at 4–5, United States v. York, No. 20-CR-00479 (N.D. Cal. July 2, 2021), ECF No. 81 (internal quotation marks omitted).

58. *See id.* at 5 (excluding those defendants for whom race was listed as "N/A").

59. *Id.*

60. Defendant's Reply to United States' Response to Discovery Order at 4, United States v. York, No. 20-CR-00479 (N.D. Cal. July 20, 2021), ECF No. 84.

prosecutions."[61] The defense brief further explained that York sought a list of state felon-in-possession defendants from the San Francisco District Attorney's Office, then helmed by progressive prosecutor Chesa Boudin, but that office did not turned over the data.[62] As a result, no one in federal court knew the demographics of the state defendants who could have been federally prosecuted—not the defense attorney, not the prosecutor, and not the judge. Without knowing about the pool of state-court defendants, it was impossible to know whether federal prosecutorial decisions were exacerbating, replicating, or ameliorating the existing racial disparities.

York's discrimination claim was argued and denied in the absence of this state-court data, and he was sentenced to forty-two months in prison.[63]

B. Federalization Debated

York's case went from an arrest by local police to routine charges in state court to a federal prosecution and federal prison sentence.[64] Should his case be a federal concern at all? This basic question, asked and answered in thousands of cases a year, roils the academic literature.[65]

Some scholars raise structural concerns about federalization. They fear federal encroachment on areas traditionally controlled by state courts, state legislatures, and local prosecutors.[66] A progressive

---

61. *Id.* ("More information is needed . . . to determine the root of the disparate impact on Black defendants in § 922(g) gun cases and to see whether the U.S. Attorney's office's selection of cases to prosecute from state courts unduly impacts Black individuals.").

62. *Id.* at 4 n.4 ("[T]he defense is working to obtain such information through California Public Records Act requests.").

63. Judgment in a Criminal Case at 1–2, United States v. York, No. 20-CR-00479 (N.D. Cal. July 24, 2021), ECF No. 91.

64. *See supra* notes 24–31, 63 and accompanying text.

65. *See* sources cited *infra* Section I.B.

66. *See, e.g.*, Stephen F. Smith, *Federalization's Folly*, 56 SAN DIEGO L. REV. 31, 32 (2019) (suggesting federal criminal law ought not "duplicate or countermand the efforts of state enforcers"); William Partlett, *Criminal Law and Cooperative Federalism*, 56 AM. CRIM. L. REV. 1663, 1691 (2019) (warning that the pooling of local, state, and federal prosecutorial resources to the federal level "erode[s] the ability of city voters (and their representatives) to craft their own policies in an area of traditional state police power"); Dean A. Strang, *Felons, Guns, and the Limits of Federal Power*, 39 J. MARSHALL L. REV. 385, 386 (2006) (discussing a Commerce Clause challenge); O'Hear,

prosecutor might declare an end to low-level drug or gun prosecutions only to see federal prosecutors in the district redouble efforts to prosecute those cases.[67] Or officers disgruntled with the charging decision of a local prosecutor might take the case to federal prosecutors, as Darcy Covert writes, to "break out of their bilateral monopoly with state prosecutors."[68] Other scholars complain that federalization will confuse voters about who is accountable for the successes and failures of crime policy.[69]

A very different structural critique focuses on the costs to federal prosecutors and courts. One claim is that federalization will distract federal prosecutors from white-collar crime, interstate crime, counterterrorism, and other priorities unique to the federal docket.[70] Another concern is that a glut of drug and gun-possession cases will degrade the federal judiciary by, in one judge's memorable words, transforming the federal judiciary "into a minor-grade police court."[71]

---

supra note 4, at 773 (noting that the preference for national uniformity at a federal level is "difficult to reconcile with normative theories of federalism, particularly in the context of . . . offenses that are primarily local in character"); Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 813 (1996) (urging against "the temptation to walk across the street to the federal courthouse"); Jamie S. Gorelick & Harry Litman, Keynote Address, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 968 (1995) (noting that some critics believe "recently enacted federal crimes inappropriately infringe on federalism interests by taking matters traditionally of local concern out of the hands of local officials"); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 516 (1995) ("[M]ost crime is local in nature, and consequently, the local community feels the brunt of the offense.").

67. Mona Lynch, *Regressive Prosecutors: Law and Order Politics and Practices in Trump's DOJ*, 1 HASTINGS J. CRIME & PUNISHMENT 195, 213–14 (2020).

68. Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 206 (2021).

69. *See* JAMES A. STRAZZELLA, AM. BAR ASS'N TASK FORCE ON THE FEDERALIZATION OF CRIM. L., THE FEDERALIZATION OF CRIMINAL LAW 42–43 (1998) [hereinafter ABA TASK FORCE] ("Confusion of state and federal authority can leave citizens uncertain about who bears the responsibility for dealing with crime . . . .").

70. *See, e.g.*, Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 923 (1998) (discussing resource "drain" and collecting citations).

71. Kathryn Jermann, *Project Exile and the Overfederalization of Crime*, 10 KAN. J.L. & PUB. POL'Y 332, 344 (2000).

Federal civil litigants also stand to lose out if these cases divert judicial resources away from the civil docket.[72]

The literature contains a deep vein of concern about federalization's impact on defendants, again, based on the assumption that the federal system is more likely to convict and severely punish. Sara Sun Beale, a leading author, decries the "cruel lottery" of federalization, which selects a handful of defendants from a sea of similarly situated ones for more severe federal punishment.[73] Emma Luttrell Shreefter condemns federalization as "a continuation of centuries of laws and law enforcement tactics enacted and employed to disarm Black people."[74] Benjamin Levin writes that the federalization of felon-in-possession prosecutions embodies the same "pathologies" and the "the worst elements of the War on Drugs."[75] For Bonita Gardner, author of the most comprehensive account on the racial discrimination of these programs, federalization of felon-in-possession is "an easily satisfied numbers operation" and a "narrowly-applied, reactive effort aimed at low-level criminals."[76] Gardner observes that in federal districts from Michigan to Virginia to New York, Black defendants made up between 80% and 90% of the federal felon-in-possession prosecutions—a sign that the entire enterprise is rife with racial discrimination.[77] Even the decision on which cities to target for federalization programs reeks of racial discrimination, Gardner writes.[78] Gardner observes that the thirty cities in the nation with the highest proportion of Black residents were all chosen for federalization programs.[79]

With so much attention on federalization's costs to legislatures, voters, courts, prosecutors, and defendants, there had better be some appreciable benefits. And, not surprisingly, a great deal of academic

---

72. *See* Little, *supra* note 46, at 1051 (describing and casting doubt on "myth" of civil-case delays).

73. Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 739 n.390 (1997) (quoting Beale, *supra* note 12, at 997); *see also* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 37 (2012) (same).

74. Shreefter, *supra* note 36, at 175.

75. Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2179, 2213 (2016).

76. Gardner, *supra* note 13, at 308.

77. *Id.* at 317.

78. *Id.* at 316; *see also* Patton, *supra* note 7, at 1023 ("What makes these racial disparities particularly troubling is how intentional the prosecutorial decisions are . . . . [E]ven compared to the enormous discretion prosecutors normally exercise, these decisions are highly discretionary.").

79. Gardner, *supra* note 13, at 316.

and litigation work has been devoted to articulating and measuring those benefits. From the beginning, federalization's proponents and critics have dueled over claims about federalization's effectiveness in reducing violent crime.[80] Daniel Richman provides a fascinating account of the politics of the early federalization programs—Project Exile and Project Ceasefire—which received support from both the National Rifle Association and Handgun Control, Inc., the group that later became the Brady Center to End Gun Violence.[81] Key to the support for these programs were the claims that the federalization of felon-in-possession in various cities had caused a reduction in murders and other violent crimes.[82]

Many studies attempt to measure the effect of federalization in a particular city on the rate of violent crime in particular cities.[83] Some find statistically significant correlations between the start of a federalization program and the decrease in violence.[84] Others find no

80. Patton, *supra* note 7, at 1030.

81. *See* Daniel Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 372–73 (2001). Richman notes that politicians on all sides believed federal resources should be dedicated to prosecuting "violent criminals with guns." *Id.* at 373; *see also History of Brady*, BRADY, https://www.bradyunited.org/history [https://perma.cc/A72S-MPN8] (describing evolution of Handgun Control, Inc.).

82. Richman, *supra* note 81, at 370–72. President Clinton touted Project Exile for successfully "tak[ing] serious gun criminals off the street" and reducing "gun murders . . . by a remarkable forty-one percent." *Id.* at 370–71 (internal quotations omitted). Charlton Heston, president of the National Rifle Association, also lauded Project Exile for reducing "gun homicides by one-half in just one year." *Id.* at 372 (internal quotations omitted).

83. *See* Patton, *supra* note 7, at 1020–21 (discussing four separate studies of gun-oriented federalization programs, including a nationwide study); Bryanna Fox, Scott F. Allen, & Alexander Toth, *Evaluating the Impact of Project Safe Neighborhoods (PSN) Initiative on Violence and Gun Crime in Tampa: Does It Work and Does It Last?*, 18 J. EXPERIMENTAL CRIMINOLOGY 543, 545 (2021) (discussing "considerable attention" paid to Project Safe Neighborhoods by academics).

84. *See, e.g.*, Andrew V. Papachristos, Tracey L. Meares, & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223, 223 (2007) (finding that Project Safe Neighborhood "interventions are associated with greater declines of homicide in the treatment neighborhoods compared to the control neighborhoods"); Richard Rosenfeld, Robert Fornango, & Eric Baumer, *Did* Ceasefire, Compstat, *and* Exile *Reduce Homicide?*, 4 CRIMINOLOGY & PUB. POL'Y 419, 438 (2005) (finding, in study of Project Exile in Richmond, a reason to believe in an effect, albeit one that "may have been quite small").

evidence of a correlation.[85] Economist Steven Levitt, discussing an evaluation of Project Exile in Virginia, raised a third option: even if a program were effective, "its expected impact on crime would be small enough to be undetectable with the methods employed in this [study]."[86] In these empirical studies, as throughout the literature, everyone assumes that the federal system is more likely to convict and more severe in its punishments. The debate is limited to the question of whether this federal toughness makes a difference on crime rates. No one considers the possibility that the federal system might not be as superlatively efficient or severe as the literature assumes. The unsubstantiated nature of these claims is the focus of the next Section.

C. Federalization Unsubstantiated

The literature is deeply invested in its claims about the differences between federal and state prosecutions. But very little is known about how the state system processes cases that could have gone federal yet stayed in state court.

1. Racial discrimination

The easiest place to see the absence of knowledge about the state system is in the literature on racially discriminatory case selection. Numerous authors and litigants have observed that Black defendants make up a much larger proportion of federal felon-in-possession defendants in a particular district than they do of the general population of that district.[87] This disproportionality, they argue, suggests that federal prosecutors are engaged in racial discrimination in choosing which cases to prosecute.[88] But if the claims are about federal prosecutors' decision-making, then the literature should analyze the demographics of defendants upstream in state court. This comparison would help determine whether federal prosecutors are

85. *See* Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, *in* EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 251, 276 (Jens Ludwig & Philip J. Cook eds., 2003) (finding that "federal prosecutions of such crimes does not appear to be substantially more effective than state prosecutions during this time period").

86. Steven D. Levitt, *Comment by Steven D. Levitt*, *in* EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 277, 278 (Jens Ludwig & Philip J. Cook eds., 2003).

87. See *supra* notes 73–79 and accompanying text for a discussion of the scholarly critiques of racial disparities.

88. *Id.*

exacerbating, replicating, or ameliorating the existing racial disparities.

Unfortunately, scholars and litigants lack information on state charging decisions and the demographics of state defendants. As a result, this valuable perspective from state court gets left out.

Indeed, the lack of information about the state system has come up in litigation, and not just in the *York* case discussed above.[89] In a discriminatory charging challenge from Michigan, the Sixth Circuit faulted Thorpe, the defendant, for not looking at state-court prosecutions. The Sixth Circuit referred to *United States v. Armstrong*,[90] the U.S. Supreme Court decision setting the standard for discovery in discriminatory charging cases, and stated: "[P]recisely as the Supreme Court suggested to Armstrong, we suggest that Thorpe, too, 'could have investigated whether similarly situated persons of other races were arrested and/or prosecuted by the State of Michigan and were known to federal law enforcement officers, but were not prosecuted in federal court.'"[91] The Sixth Circuit added: "Thorpe appears to have made little effort to explore state-court records that were available to him as well as to every other member of the public."[92] This same omission occurs in many discrimination challenges to federalization.[93]

---

89. *See supra* Section I.A. *See generally, e.g.*, Government Response to Request for Production of Project Safe Neighborhoods Documents 2–3, United States v. Nixon, No. 03-CR-80793 (E.D. Mich. Jun. 22, 2004), ECF No. 40 ("The United States Attorneys [sic] Office does not maintain prosecution and disposition information on cases that remain with the Wayne County Prosecutor's Office to be resolved in state court. Hence, no statistical analysis consistent with this request [for comparative data] is available.").

90. 517 U.S. 456 (1996).

91. United States v. Thorpe, 471 F.3d 652, 659 (6th Cir. 2006) (internal quotation marks and brackets omitted) (quoting *Armstrong*, 517 U.S. at 470).

92. *Id.*; *see also* United States v. Traylor, No. CR 05-00006, 2005 WL 8169285, at *1, *3 (C.D. Cal. Sept. 21, 2005) (denying Defendant's motion to dismiss and reasoning that Defendant failed to prove discriminatory intent despite the Defendant offering evidence that "92.31% of the criminal defendants sentenced . . . over the last three years for [felony possession] were African American or Latino" and that "two white felons . . . were not prosecuted under the federal scheme" on the grounds that "[w]ithout more . . . this Court cannot tell if the two white felons were similarly situated as defendant").

93. For example, in *United States v. Grimes*, 67 F. Supp. 2d 170, 172–73 (W.D.N.Y. 1999), *aff'd*, 225 F.3d 254 (2d Cir. 2000), the Court wrote: "To demonstrate that similarly-situated individuals of a different race have been treated differently, the defendant cites five cases where white gun offenders were not diverted from state court

Without the state data, there is no way to tell whether federal prosecutors are responsible for the racial disparities or whether those racial disparities are created upstream in state court. It is a prime illustration of how the analysis of federalization should require both federal and state data.

2. Frequency and infrequency

The literature assumes that federalization is a rare event, a "cruel lottery,"[94] a lightning strike.[95] But no one can say how cruel the lottery or rare the strike. It is easy to find the number of federal prosecutions for felon-in-possession. PACER, the federal courts' records portal, allows quick access to every docket in every district, and it allows users to search for all cases involving any particular charge.[96] The Transactional Records Access Clearinghouse ("TRAC") at Syracuse University provides anonymized statistical data on every charge filed in federal court, thus going even further than PACER.[97] Federal data is plentiful and accessible. The difficult part in making a federal-state

---

to federal court for prosecution, and suggests upon information and belief (without stating the sources of such information and belief), that other examples of non-African-American defendants being prosecuted in state court rather than federal court, exist." Similarly, in United States v. Venable, 666 F.3d 893, 899 (4th Cir. 2012), as amended (Feb. 15, 2012), the Court stated: "Venable introduced statistics compiled from the Circuit Courts of Chesterfield, Hanover, and Henrico counties, Virginia, and the city of Richmond, Virginia detailing the number of African American, white, and American Indian defendants who were charged with violating Va. Code § 18.2-308.2, the state law provision prohibiting felons from carrying firearms. The statistics detailed the numbers of defendants who had their charges dismissed, who were found guilty, who had their charges *nolle prossed*, and who were found not guilty, all in the years 2005 through 2007. The Supreme Court of Virginia compiled the information at the request of the Office of the Federal Public Defender. Venable offered the statistics as a representation of those white individuals who could have been prosecuted by the federal government in the Richmond Division of the United States Attorney's Office but were not."

94. Beale, *supra* note 12, at 997, 1003–04.

95. *See* Susan R. Klein, Michael Gramer, Daniel Graver & Jessica Winchell, *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006–2010*, 51 HOUS. L. REV. 1381, 1385–86 (2014) ("[M]any critics . . . claim that suffering a federal prosecution is as random as being struck by a bolt of lightning . . . .").

96. PACER, PACER USER MANUAL FOR CM/ECF COURTS 3–4 (Apr. 2022), https://pacer.uscourts.gov/sites/default/files/files/PACER-User-Manual.pdf [https://perma.cc/PPD9-ZXN4].

97. *About Us*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, https://trac.syr.edu/aboutTRACgeneral.html [https://perma.cc/GNC5-S236].

comparison is obtaining the state-court data.[98] Yet, if we want to know how frequently a case goes federal, we need to know how many state-court cases there are that could have gone federal. Quite simply, no one has this data.

In the literature, the closest to a frequency estimate is Sara Sun Beale's statement that federalization "is the practical equivalent of selecting 1 case in 100 (or 1000)" for federal prosecution.[99] Beale does not use data to support this estimate.[100] It appears to be more of a rhetorical claim about the rarity of prosecution than an empirical one.[101] Though scholars have written about federalization for decades, there is not an estimate to be found about even the order of magnitude of federalization: 1-in-100, 1-in-1,000, or 1-in-10,000. No one can guess because no one knows the state-court denominator.

3. Deterrent effect

The lack of information about state court prosecutions also undermines empirical efforts to estimate federalization's effect on violent crime. Studies examine the murder rate in a jurisdiction before and after a federalization program went into effect.[102] The treatment city or census district gets compared with similar cities or census

98. PACER, MEDIA USER GUIDE: ACCESS TO ELECTRONIC COURT RECORDS 9–11 (Oct. 2019), https://www.dcd.uscourts.gov/sites/dcd/files/Media2019.pdf [https://perma.cc/G9YJ-X6AB] (describing "Criminal Reports" search function).

99. Beale, *supra* note 12, at 1003–04.

100. *Id.*

101. A frequency estimate can be derived from an admirable senior thesis by Amanda Gavcovich. This work studied Durham County, North Carolina from June 2015 to 2016. Amanda Gavcovich, Punishing Illegal Firearm Possession in Durham (Jan. 1, 2018) (B.A. honors thesis: Duke University) (on file with Duke University), https://dukespace.lib.duke.edu/dspace/handle/10161/15999 [https://perma.cc/UM9K-BCSU]. It examined "all cases which included [a] charge for a non-violent gun offense, and did not include a charge for a violent crime such as discharging of a firearm or weapon, assault with a deadly weapon." *Id.* at 21. The study counted ninety-two non-violent gun cases, sixty-five of which involved felony charges. *Id.* at 23. Only four of these cases ended up being charged federally. *Id.* The study did not break out the figures for felon-in-possession from the other gun charges it examined, and it excluded charges from all cases in which a gun was used—thus limiting its use to my federalization study. *Id.* at 23 tbl.1, 25.

102. *E.g.*, Papachristos et al., *supra* note 84, at 224 (describing federalization programs targeting Chicago neighborhoods as resulting in a greater than 35% decrease in homicide rates in the first two years of the program); Raphael & Ludwig, *supra* note 85, at 256–60 (analyzing homicide data in Richmond, Virginia, before and after federalization program was implemented and comparing those results with homicide data from similar cities where no federalization program was implemented).

districts in which there was no federalization program.[103] But no one accounts for the parallel gun enforcement efforts in state court. It is another example of how lack of knowledge about state courts undermines the literature's claims about federalization.

For example, Andrew Papachristos, Tracey Meares, and Jeffrey Fagan compared census districts in Chicago that were targeted by the Project Safe Neighborhoods ("PSN") federalization program with census districts that were not targeted.[104] "[T]he PSN target areas did indeed experience a significant decline in homicides at a faster rate than similar control areas or the city as a whole," the authors conclude.[105] But they concede that there could be an "alternative explanation": "other police activities, major social or political changes, or other crime and community strategies" could have confounded these results.[106] In other words, there was no accounting for whatever state-court prosecutors were (or were not) doing to prosecute felon-in-possession cases; instead, that activity fell into the category of unobserved variable.[107]

Similarly, Steven Raphael and Jens Ludwig tested Project Exile's effect on violent crime in Richmond, Virginia.[108] They compared Richmond crime rates with those of similar cities around the country and found no drop in crime that could be attributable to the federalization program.[109] Again, state-court proceedings failed to register. The authors note that "[p]ossibly . . . the effect of Richmond's Project Exile is partially obscured by increased prison penalties for gun carrying and other offenses that are being imposed through state courts across the country."[110] Considering how much larger the state criminal system is than the federal, it is unfortunate to be left hoping

103. *See, e.g.*, Papachristos et al., *supra* note 84, at 239 ("Two adjacent police districts were selected as PSN [Project Safe Neighborhood] treatment districts and two others were used as near-equivalent control groups.").
104. *Id.*
105. *Id.* at 265.
106. *Id.* at 262.
107. *Id.*
108. Raphael & Ludwig, *supra* note 85, at 276.
109. *Id.* at 275–76.
110. *Id.*

that variations in state-court prosecutions have no effect on crime.[111] State-court data should be more than an unobserved variable.

4. Conviction rates and sentencing severity

Scholars believe that the federal system is more likely to convict and more severe in its punishments. This is a widely held, little-disputed belief. Here is a sampling of just some of the claims. David Patton describes federal sentences as "more severe than those a defendant faces in state court . . . . [O]ften far more severe, resulting in terms of incarceration exponentially longer than the state counterparts."[112] Andrew Papachristos and co-authors agree: "Federal gun sentences are often more severe than parallel state sanctions for the same gun offense."[113] The "decision to take a case federally can have enormous consequences," writes Harry Littman, because "the federal system generally provides longer sentences (in some instances ten to twenty times longer) than the defendant would receive in state court," especially with "federal crimes involving guns or drugs—such as the prohibition on possession of a gun by a felon."[114] "Federal prosecutors' selection decisions are made more significant by the high conviction rate in federal court," writes Steven Clymer, in a widely cited article.[115] Federal defendants, Bonita Gardner explains, "find themselves facing sentences that are almost uniformly longer than those imposed under comparable state law."[116] Daniel Richman writes: "State enforcers are well aware that their Federal counterparts can often devote more resources to a case—buy money, electronic surveillance, witness protection programs, and prosecutorial support for investigations—

111. In fiscal year 2021, there were 186,319 new felony cases filed in California. CAL. JUDICIAL COUNCIL, 2022 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS at 16 (2021). In the twelve months ending March 31, 2021, there were 61,431 new felony cases in the entire federal system. FEDERAL JUDICIAL STATISTICS tbl.D-1 (Mar. 31, 2021).

112. David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1442 (2011).

113. Papachristos et al., *supra* note 84, at 234.

114. Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1140–41 (2004) (citing Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 924, 960 (1997)); *see also* Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 812–13 (1996) ("[A] defendant prosecuted in the federal system will be subject to different procedures and much harsher sentencing under the federal sentencing guidelines.").

115. Clymer, *supra* note 73, at 676.

116. Gardner, *supra* note 13, at 308.

and that Federal prosecutions generally result in higher sentences, particularly in violent crime cases."[117] According to Michael O'Hear, "[n]ationwide, federal sentences for drug and gun offenses result in prison time that is three times greater, on average, than comparable state sentences."[118] Jordan Gross asserts that "defendants tried federally for [felon-in-possession] often end up with exponentially harsher sentences than they would have faced had they been tried in state court."[119] Lauren Ouziel argues that even when federal and state statutes permit comparable sentences for gun crimes, local officials still send cases to the federal system because they believe federal defendants are "more likely to be convicted and sentenced to a substantial incarceration term . . . notwithstanding a higher applicable penalty on the state's codebooks."[120]

These claims may or may not be correct—more on that later. In either case, they are not substantiated. The literature lacks data on state-court outcomes and, without such data, there is no responsible way to claim that the federal system is more effective or punitive in its sentences than the state system. This lack of data is not peculiar to the federalization literature. In his influential work on mass incarceration, John Pfaff notes the impossibility of obtaining nationwide data on something as seemingly simple as the number of state-court "convictions per felony case."[121] There is a "gap in data" when it comes to state-court convictions, Pfaff explains, and while "[t]here is one dataset that gathers information on convictions . . . it is the only dataset I've ever seen that comes with a warning against actually using it for empirical work."[122]

Despite the data gap, the federalization literature has deployed various strategies to claim that conviction rates and sentences are higher in federal court than in state court. Because these claims are so important to the federalization literature, it is necessary to detail ways scholars compare the federal and state systems in the absence of state

---

117. Daniel Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 CRIM. JUST. 81, 95 (2000), https://www.ncjrs.gov/criminal_justice2000/vol_2/02d2.pdf [https://perma.cc/B5BN-8AKJ].

118. O'Hear, *supra* note 4, at 731–32.

119. Jordan Gross, *The Upside Down Mississippi Problem: Addressing Procedural Disparity Between Federal and State Criminal Defendants in Concurrent Jurisdiction Prosecutions*, 38 HAMLINE L. REV. 1, 6 (2015).

120. Ouziel, *supra* note 16, at 2253.

121. PFAFF, *supra* note 18, at 73, 258 n.57.

122. *Id.*

data. The remainder of this Section discusses the different sources that scholars have used to make federal-state comparisons: (a) scholarly citations, statutory analysis, and claims of federal "advantages," (b) anecdotes, (c) case studies, and (d) statistics. I discuss them in turn.

a. Scholarly citations, statutory analysis, and federal "advantages"

One way to overcome the lack of information is to cite other authors' claims about federal superiority.[123] Scholars demonstrate that federal prosecutions are more likely to lead to convictions and higher sentences by, well, citing to previous scholars who have made the same point.[124] Yet this edifice of citation does not rest on bedrock. Nor could there be any bedrock, given that there is inadequate data on state-court outcomes.

Another line of reasoning points to the differences on the books between federal and state sentencing laws.[125] Scholars point to higher

---

123. Steven Clymer's article, *Unequal Justice: The Federalization of Criminal Law* is one of the most commonly cited for the claim about federal conviction and sentencing supremacy. Clymer, *supra* note 73. Clymer writes:

> As a result of the disparity between state and federal procedural and sentencing regimes, much is at stake when federal prosecutors determine which offenders to charge in federal court. Federal prosecutors' selection decisions are made more significant by the high conviction rate in federal court and the rigid determinative federal sentencing rules. Because of the relative certainty of conviction and harsher sentencing, from an offender's perspective, the federal prosecutor's decision to bring federal charges may be the single most important decision that any actor in the criminal justice system makes.

Id. at 676–77. He does not cite any state data, however, for the claim about the "high conviction rate" and "relative certainty of conviction" in the federal system. *Id.* (citing L. RALPH MECHAM, JUDICIAL BUSINESS OF THE U.S. COURTS: REPORT OF THE DIRECTOR, A-78 tbl.C-4 (1994); and then citing U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS at 478–79 tbl.5.29 (1995)).

124. *E.g.*, Ouziel, *supra* note 120, at 2247 n.37 (citing claims by scholars, including Steven Clymer, that federal sentences are "relatively more stringent").

125. David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2595 (2013) ("Almost invariably, our clients are shocked when we describe how much time they face—usually a Guideline range somewhere between three and seven years if they plead guilty, and more if they don't (as compared to the typical two years in state prison)."); Beale, *supra* note 12, at 997 n.70 ("[T]he precise content of state law varies between jurisdictions on many of the matters in question here," but claiming that "some generalizations may be made . . . federal sentences are generally longer than state sentences for the same conduct."). Beale cites Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 6 FED. SENT. R. 123, 123

statutory maximum sentences and the availability of higher mandatory minimum sentences in federal court as evidence that federal punishments are more severe and conviction rates are likely to be higher in federal court because of the pressure that defendants face from such punishments.[126] But these comparisons are unsatisfying. They do not say what sentences are actually handed out, nor can they account for states like California, Florida, Virginia, and others that have sentencing laws for gun crimes that equal or exceed the federal system's laws.[127]

Still, others who speak of higher conviction rates and more severe punishments cite the supposed "advantages" that federal prosecutors enjoy compared to their state counterparts.[128] According to scholars, these advantages include: wider availability of pretrial detention; jury pools drawn from large federal districts rather than smaller cities (which makes jury pools less diverse and, scholars presume, more favorable to prosecutors); investigative and prosecutorial budgets that are larger for federal authorities than state ones; substantive and procedural laws that permit easier proof for federal crimes, like conspiracy, and make it harder for defendants to suppress evidence; and prison sentences that require inmates to serve a greater proportion of their sentences.[129] In light of these federal advantages,

---

(1993), which examines state sentencing guidelines, but does not address punishments actually administered.

126. *See* Patton, *supra* note 125, at 2598 (describing pressures faced by defendants due to federal severity in punishments).

127. Ouziel, *supra* note 16, at 2250 ("And while many states' penalties for gun crimes are less severe than federal penalties, not all are. Florida, Maryland, Virginia, and New York are all examples of states whose mandatory minimum penalties for illegal firearms use or possession exceed those under applicable federal law."); Partlett, *supra* note 66, at 1675 ("[F]ederal prosecution allowed for harsher mandatory minimum sentences."); Gardner, *supra* note 13, at 309 (cataloguing "reasons for" taking cases federal, including "mandatory minimum sentences under federal law, resulting in stiff penalties").

128. Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 247 (2005) ("The literature on federalization provides a detailed description of what is called the *comparative advantage* federal prosecutors enjoy in bringing cases that could also be tried in state courts."); Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 ANNALS AM. ACAD. OF POL. & SOC. SCI. 85, 89 (1996) (describing prosecutorial "advantages" in federal court).

129. *See* Clymer, *supra* note 73, at 668–75 (discussing five features of the law that favor prosecutors more in federal than state cases); *see also* Ben Grunwald & Andrew

scholars argue that the federal system must be better at winning convictions and lengthier sentences.[130] But this amounts to assuming the conclusion the authors set out to prove. Without data on state-court outcomes, there is no way to say whether the federal advantages translate into more convictions and higher sentences.

b. Anecdotes

A common way to assert the superiority of federal prosecutions is through anecdotes. For example, Steven Clymer cites the case of a two-man marijuana operation in which one man was charged in state court and received a $1,000 fine while the other was charged in federal court and received a ten-year prison sentence.[131] Michael O'Hear points to two brothers who were charged federally with cocaine trafficking: one saw his federal case dropped and he received probation in state court, while the other was sentenced to roughly four years in federal prison.[132]

V. Papachristos, *Project Safe Neighborhoods in Chicago: Looking Back a Decade Later*, 107 J. CRIM. L. & CRIMINOLOGY 131, 136 (2017) ("Prosecuting gun offenders in federal rather than state court was thought to increase deterrence because federal prison sentences tend to be longer, federal inmates serve a minimum of 85% of their sentence, and federal prosecutions have a higher overall conviction rate." (citing Clymer, *supra* note 73, at 674–75)); Ouziel, *supra* note 16, at 2238 n.1 ("All else being equal, a defendant prosecuted in federal court is more likely to be convicted, and to receive a longer sentence of imprisonment, than if prosecuted for the same conduct in state court." (citing Clymer, *supra* note 73, at 668–69)); Richman, *supra* note 117, at 95 ("State enforcers are well aware that their Federal counterparts can often devote more resources to a case . . . and that Federal prosecutions generally result in higher sentences, particularly in violent crime cases."); John C. Jeffries Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1103 (1995) (claiming "federal prosecutors can conduct organized crime investigations more quickly, bring more charges, and win more convictions than state and local authorities," but not providing data on conviction rates).

130. *See supra* text accompanying notes 128–129.

131. Clymer, *supra* note 73, at 648–49. The federalization literature often uses gun and drug examples interchangeably to show federal toughness. *See* Beale, *supra* note 12, at 998–99 (listing examples of defendants who were subject to larger sentences in federal than state court).

132. O'Hear, *supra* note 4, at 723; *see also* Beale, *supra* note 12, at 998–99; United States v. Reyes, 966 F.2d 508, 509 (9th Cir. 1992) (noting that a defendant received a 300-day sentence in state court and a fifty-seven-month sentence in federal); United States v. Andersen, 940 F.2d 593, 596 (10th Cir. 1991), *aff'd in part and rev'd in part*, No. 00-4118, 2001 WL 950963 (10th Cir. Aug. 21, 2001) ("[D]efendant argues that under Utah law the state court could have sentenced him to no more than five years imprisonment, in contrast to the more than eighteen years he received on the federal convictions.").

Sara Sun Beale states that "[t]he sentences available in a federal prosecution are generally higher than those available in state court—often ten or even twenty times higher."[133] She supports this claim by citing four cases in which defendants were convicted in state and federal court for the same conduct and received much longer sentences in federal court.[134] Beale adds: "It is not unusual for codefendants whose conduct is identical to receive radically different sentences, depending upon whether they are prosecuted in state or federal court."[135] For this claim, she cites one additional case.[136] Lauren Ouziel uses three cases, which she describes as "extreme examples of . . . 'unequal justice'" to show the difference in severity between federal and state court.[137]

Anecdotes like these are striking. They effectively communicate the federal-state disparities that some defendants face. But such anecdotes cannot prove that the federal system is more likely to convict and more severe in its punishments. The first shortcoming of such anecdotes is that they tend to be drawn from cases that trigger mandatory-minimum

---

133. Beale, *supra* note 12, at 998–99 nn.81–85.

134. *Id.*

135. *Id.* at 999. Harry Litman relies on a citation to Steven Clymer's article, *Unequal Justice: The Federalization of Criminal Law*, to claim that the "decision to take a case federally can have enormous consequences" because "the federal system generally provides longer sentences (in some instances ten to twenty times longer) than the defendant would receive in state court," especially with "federal crimes involving guns or drugs—such as the prohibition on possession of a gun by a felon." Litman, *supra* note 114, at 1140 n.20 (citing Clymer, 70 S. CAL. L. REV. 643, 668 (1997); and then citing United States v. Armstrong, 517 U.S. 456, 479 (1996) (Steven, J., dissenting)). Litman cites to the portion of Justice Stevens's dissent where he compares the disparity in powder and crack sentences with the disparity "imposed by federal law and that impose by state law for the same conduct"—a comparison Stevens makes based on statutory maximums. *Armstrong*, 517 U.S. at 479. Litman further cites Sandra Guerra's article, *id.* at 1140 n.16. Guerra's article states that "[f]ederalization also provides harsher penalties than those available at the state level" and says, in a footnote, that "state courts usually mete out sentences that are shorter than the mandatory minimum terms or guideline ranges required by federal law." Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1167 & n.33 (1991) (citing United States v. Vilchez, 967 F.2d 1351 (9th Cir. 1992); and then Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 938 (1991)).

136. Beale, *supra* note 12, at 999 (using the example of "one defendant whose codefendant received no jail time in a state prosecution" yet the federal defendant received a ten-year federal sentence (citing United States v. Palmer, 3 F.3d 300, 305 n.3 (9th Cir. 1993)).

137. Ouziel, *supra* note 17, at 2240.

sentences or sentencing enhancement, which the literature admits are rare.[138] A second problem is that a cluster of anecdotes cannot tell us how the typical case would fare in federal court compared to state court. A third problem with such anecdotes is that they fail to contemplate the cases in which the state sentence was so severe that there was no need to bring the case to federal court. These counterfactual cases—the dogs that did not bark—must be considered in any effort to compare the federal and state systems.

c. Case studies

In parts of the federalization literature, case studies of gun-prosecution programs have been used to show that federal cases are more likely to result in conviction and federal sentences are more likely to be more severe than in state court.[139] The city of Richmond, Virginia, has been the focus of several compelling case studies. Richmond is home to Project Exile, arguably the fountainhead of efforts to federalize felon-in-possession. In 1997, federal Project Exile launched with the goal of diverting felon-in-possession cases from state court to federal court where the defendants would be more likely to face conviction, severe punishment, and "exile" in the far reaches of the federal prison system.[140] The federalization of local gun cases was seen as a resounding success in decreasing Richmond's murder rate, thus launching similar programs around the country.[141]

A few years after the federalization project began, Virginia legislators and prosecutors implemented a parallel gun-prosecution initiative in state court.[142] The initiative, Virginia Exile, increased state sentencing

---

138. Beale, *supra* note 12, at 998–99 (citing United States v. Williams, 746 F. Supp. 1076, 1078–79 (D. Utah 1990) (involving ten-year mandatory minimum under 18 U.S.C. § 841(b)(1)(A)); then citing United States v. Oakes, 11 F.3d 897, 898 (9th Cir. 1993) (involving five-year mandatory minimum sentence 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B)(vii)); and then citing United States v. Palmer, 3 F.3d 300, 305 n.3 (9th Cir. 1993) (involving ten-year mandatory minimum)); Ouziel, *supra* note 17, at 2239–40 (citing prosecution in United States v. Andrews, 270 F. App'x 5, 7 (2d Cir. 2008), involving "career offender" guideline).

139. Ouziel, *supra* note 16, at 2258–60.

140. VA. DEP'T OF CRIM. JUST. STAFF, CRIM. JUST. RSCH. CTR., EVALUATION OF THE VIRGINIA EXILE PROGRAM, FINAL REPORT 4–5 (2003) (hereinafter VIRGINIA EXILE REPORT) (describing goals of Project Exile).

141. *See* Richman, *supra* note 81, at 370–72 (detailing how praise for Project Exile by the Clinton administration and members of both parties encouraged similar programs around the nation).

142. *Id.* at 392–93.

laws for felon-in-possession (and a few other gun crimes) so that they matched the federal punishments,[143] and it funded state prosecutors specifically dedicated to prosecuting the felon-in-possession cases that federal prosecutors declined.[144]

The presence of Project Exile in federal court and Virginia Exile in state court allowed for a "natural experiment," as Lauren Ouziel described it.[145] Federal and state prosecutors took aim at the same gun offenses in the same jurisdiction under the same sentencing laws, neither one hindered by resource constraints.[146] Would there be a difference in conviction rates and sentences? Naturally, this caught the attention of prosecutors, news reporters, and academics. They looked at the conviction rates and sentences to come out of federal and state court and uniformly saw the comparative federal success as evidence of federal prosecutorial superiority declared that the federal system was tougher.[147]

Finally, it would seem, there was proof of federal superiority—proof that involved both federal and state-court outcomes. In the scholarly literature, the first to comment on the difference between Project Exile and Virginia Exile was Daniel Richman in 2001: "The conviction rate for defendants prosecuted under Virginia Exile between July 1, 1999 (when the program became law) and May 31, 2000, was forty percent, compared to an eighty percent conviction rate for the Exile cases taken to federal court."[148]

A few years later, the Virginia Department of Criminal Justice Services commissioned an in-depth study of the state program and found that just 38% of cases resulted in a conviction and mandatory-

143. VIRGINIA EXILE REPORT, *supra* note 140, at 4–5.

144. *Id.* Virginia Exile imposed mandatory-minimum sentences for defendants convicted of any of six different crimes, including felon-in-possession, violent-felon-in-possession, and possession of a firearm while possessing Schedule I or II drugs. *Id.* at 6.

145. Ouziel, *supra* note 16, at 2259 ("If Project Exile amounts to a natural experiment, it is an imperfect one.").

146. *Id.* at 2258–59. As Ouziel notes, the state program did not end up using all the funds allocated to it. *Id.* at 2259 n.74.

147. *Id.* at 2258–59.

148. Richman, *supra* note 81, at 407–08; *see also* GREGG LEE CARTER, GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 690 (2d ed. 2012) ("[T]he statewide program had only limited success. For instance, the state rate of successful prosecutions was only 40 percent compared with the federal rate of 80 percent.").

minimum sentence under Virginia Exile.[149] Lauren Ouziel picked up on this report and used its findings as evidence that federal prosecutions are more effective than state ones even when the substantive criminal law is the same in federal and state court.[150] In the federalization literature, the Richmond example was imbued with great meaning.

But dig into these case studies a bit and the difference in conviction rates between federal and state court starts to disappear. Daniel Richman's comparison of Project Exile and Virginia Exile relies on two newspaper articles.[151] In one article, a state prosecutor explains that the conviction rate for state courts should have been listed as 72%, not 36%.[152] State prosecutors had to dismiss thirty cases that police brought when prosecutors learned that the defendants were not eligible for the enhanced punishment under the Virginia Exile laws.[153] These cases, the state prosecutor said, should not count against the conviction rate.[154] Had these dismissals been properly accounted for, the prosecutor argued, the state conviction rate would have more closely resembled the federal one. This wrinkle of state-court practice never made it into the academic literature. Daniel Richman's account of the federal/state differences still relies on this data as proof that federal prosecutors are more effective than their state counterparts.[155]

A similar accounting wrinkle plagues the discussion of the report by the Virginia Department of Criminal Justice Services.[156] The ninety-eight-page report tracked all the cases handled by Virginia Exile over several years and precisely defined its methods. But when it calculated the state-court conviction rate as a paltry 38%, it was actually counting only those cases in which the "Virginia Exile charge" resulted in a conviction and the mandatory-minimum sentence was imposed.[157] This is a very significant divergence from what we would normally think of

149. VIRGINIA EXILE REPORT, *supra* note 140, at 57.

150. Ouziel, *supra* note 16, at 2258.

151. Richman, *supra* note 81, at 408 n.262.

152. Arlo Wagner, *Get-Tough Program Lowers Homicide Rate*, WASH. TIMES (Aug. 9, 2000), https://www.washingtontimes.com/news/2000/aug/9/20000809-011817-9427r [https://perma.cc/EQP9-TG22] (giving a precise breakdown of the cases that were charged, resulted in guilty pleas, went to trial, and resulted in acquittals or dismissals).

153. *Id.*

154. *Id.*

155. Richman, *supra* note 81, at 407–08.

156. VIRGINIA EXILE REPORT, *supra* note 140, at 57 fig.C.

157. *Id.* ("Number of defendants convicted of an Exile offense and sentenced to serve full mandatory minimum.").

as the conviction rate. It meant that a defendant charged with an Exile offense, like felon-in-possession, and a non-Exile offense, like robbery, would be convicted only if he was found guilty of the gun charge and the mandatory-minimum sentence was imposed.[158] By contrast, if the defendant were found guilty of the robbery, and the gun charge was dismissed, the case would not count as a conviction. (The same is true if he were convicted of the gun charge but the mandatory-minimum sentence was not imposed.) This is quite an odd way to calculate the prosecution's conviction rate, especially given that, according to the study, nearly 90% of all the cases handled by Virginia Exile also included a non-Exile charge.[159] Had the researchers tracked the outcome of all the charges in each case, the state-court conviction rate would have skyrocketed—a point I explain in more depth in my own case study.[160] Despite this accounting oddity, researchers like Lauren Ouziel have used the Richmond case study as proof that federal prosecutions are more likely to convict and severely punish.

These influential case studies from Richmond have been much-cited in the literature as examples of federal prosecutorial superiority. But they are actually examples of how little solid information there is to rely on when making federal-to-state comparisons of gun cases.[161]

---

158. *See id.* at 60 ("Unlike the Exile charges, the non-Exile charges were not specifically followed from initial charge through conviction. Therefore, we cannot categorically link charges to specific convictions for this group since some convictions may have resulted from plea agreements or charge reductions.").

159. *Id.* The Report identifies "490 Virginia Exile charges brought forth for prosecution," of which only 174 resulted in mandatory-minimum sentence under Virginia Exile. *Id.* at 57. Of the 423 total cases involving Virginia Exile charges, there were "850 non-Exile charges brought in 388 cases," and 632 of these charges were felonies. *Id.* at 57, 60–61. The state researchers explained that "of the 632 felony non-Exile charges, 549 (87%) were either equal to or more serious than an Exile charge." *Id.* This heightens concerns about evaluating the conviction rate without accounting for the multiplicity of charges. *Id.* at 61. Despite the importance of these non-Exile charges, the researchers conceded that the "non-Exile charges were not specifically followed from initial charge through conviction." *Id.* at 60. Translation: there is no way to estimate how many of the cases that did not result in Exile convictions resulted in convictions for similar or more serious offenses.

160. *See infra* Section II.C.4.

161. Two other case studies of federalization are worth mentioning, even though they focus on crimes other than gun possession. First, Mona Lynch carried out a fascinating study of the federalization of drug prosecutions in four pseudonymous federal districts. *See* MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT (2016). The book compellingly illustrates the powers that federal

d. Statistics

The final way in which the federalization literature substantiates claims about federal superiority is through statistics. Two statistical surveys provide the basis for many of the literature's claims: National Judicial Reporting Program ("NJRP") and the State Court Processing Statistics ("SCPS").[162] The NJRP operated from 1986 through 2006,

---

prosecutors bring to bear on what would otherwise be state drug cases. *Id.* As Lynch explains, previous statistical analyses of federal drug cases were insufficient because "the data could not speak to how, from the universe of potential federal defendants, those selected defendants ended up being prosecuted federally." *Id.* at 148. "This [definitional] problem is particularly notable with drug trafficking," Lynch writes, "because many of those federal cases could have been handled in state court, and conversely, many or most felony drug sales, manufacturing, and transportation cases handled in state courts could conceivably qualify for federal prosecution." *Id.*

In my study of gun-possession, it is just as important to define the universe of cases that could have gone federal. But the simplicity of the felon-in-possession offense combined with the similarity between the state and federal felon-in-possession statutes make it easier to define the cases that could have gone federal yet stayed in state court. See *infra* Section II.A for further discussion of how I determined the universe of cases that could have been charged federally as felon-in-possession.

A second thought-provoking work worth mention was carried out by Susan R. Klein and her co-authors. *See* Klein et al., *supra* note 95. They examined four years' worth of arson and robbery convictions in federal court in New York and in state court in New York. *Id.* Their "primary concern was identifying those variables that were not only common to both sets but also valuable in determining whether a particular crime was prosecuted at the federal or state level." *Id.* at 1398. In other words, the article sought to explain what factors caused a case to go federal. In its conclusion, the article uses data from the National Judicial Reporting Program and the U.S. Sentencing Commission to argue that conviction rate is higher in federal court than state court and that the federal sentences are more severe. *Id.* at 1423–25. However, the data discussed in this conclusion does not focus on any particular crime or crimes. And the study of what sends a crime to federal court is limited to arson and robbery.

162. O'Hear, *supra* note 4, at 731–32 (2002) ("Nationwide, federal sentences for drug and gun offenses result in prison time that is three times greater, on average, than comparable state sentences."); PATRICK A. LANGAN & JODI M. BROWN, U.S. DEP'T OF JUST. BUREAU OF JUST. STATS., FELONY SENTENCES IN THE UNITED STATES, 1994 10 (1997) (noting that this is a publication of the National Judicial Reporting Project); *see also* Gross, *supra* note 119, at 6 (arguing, with a citation to O'Hear, that "defendants tried federally for this conduct often end up with exponentially harsher sentences than they would have faced had they been tried in state court, producing significant sentencing disparities between state and federal sentences for the same criminal conduct"); Klein et al., *supra* note 95, at 1423 ("Conventional wisdom by all scholars and other participants . . . is that it is much worse for a criminal defendant to be hauled into federal court . . . . [B]ecause federal sentences are much longer, federal prosecutors are very skilled, and . . . [t]hus, a suspect is more likely to plead guilty or

collecting case and charge data every other year from 300 statistically representative counties.[163] The SCPS survey operated from 1988 to 2006, and again in 2009, collecting data every other May from felony cases in the seventy-five most populous counties and tracking those cases to their dispositions.[164]

The NJRP and SCPS data are as good as it gets for nationwide data on state cases, but they are not granular enough to substantiate the claims that federal felon-in-possession defendants are likely to be convicted and are more severely punished than state felon-in-possession defendants.[165] The first problem is that the surveys do not contain data specifically identifying felon-in-possession cases; rather, they lump felon-in-possession in with other crimes under the category of "weapons offense." The second problem is that the outcomes are variously sorted by the "most serious offense of conviction," the "most serious arrest charge," or the "most serious conviction offense."[166] Think back to the example of someone charged with felon-in-possession and robbery. If he is convicted of the felon-in-possession charge and the robbery charge, these NJRP and SCPS surveys will not count the case as a "weapons offenses" because that is not the most serious offense of conviction.[167] This skews the types of felon-in-

---

be found guilty by a judge or jury in the federal than the state system."); BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF STATS., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 at 24 tbl.21 (2009) https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/W4RL-98N7] (reporting on the adjudication outcome of felony defendants in 2009 in the seventy-five largest counties).

163. *National Judicial Reporting Program (NJRP)*, BUREAU OF JUST. STAT., https://bjs.ojp.gov/data-collection/national-judicial-reporting-program-njrp [https://perma.cc/H5B6-9PZU].

164. *State Court Processing Statistics (SCPS) and National Pretrial Reporting Program (NPRP)*, BUREAU OF JUST. STAT., https://bjs.ojp.gov/data-collection/state-court-processing-statistics-scps-and-national-pretrial-reporting-program-nprp [https://perma.cc/UF97-NZZA] (describing scope of the data collection).

165. Here, it is worth recalling John Pfaff's earlier comment on the State Court Processing Statistics data: "[I]t is the only dataset I've ever seen that comes with a warning against actually using it for empirical work." PFAFF, *supra* note 18, at 258 n.57.

166. *See generally* Reaves, *supra* note 162; *National Judicial Reporting Program*, *supra* note 163; *State Court Processing Statistics*, *supra* note 164.

167. The State Court Processing Statistics partially address this problem, identifying the percentage of defendants convicted of "other felony charge," not just the initial charge. The statistics also account for convictions that end up being for "misdemeanor" offenses. REAVES, *supra* note 162, at 24 fig.16. This data is provided for "[a]ll defendants," and then broken down for the "most serious arrest charge." *Id.* For

possession cases that count towards the statistics.[168] A third problem with these surveys is their inability to account for the multiple cases that may be concurrently pending against a defendant. If all charges in one case are dropped in exchange for a guilty plea in another case, these surveys would count that first case as a failure to convict, even though the two cases were resolved together.[169] These problems diminish the usefulness of this data in proving that federal prosecutions have higher conviction rates than state ones.

On the question of sentencing severity, the state statistics do a better job of substantiating the claims of federal superiority.[170] The data estimates the average sentence for weapons offenses in state court, and this average is below the average calculated for felon-in-possession convictions in federal court. Again, however, the data on state sentences are skewed by the fact the surveys calculate only the cases where the "most serious felony conviction offense" is a weapons offense.[171] This may deflate the actual sentences received by felon-in-possession defendants, because it excludes all cases in which they were

---

that reason, though, it still cannot account for the outcome of felon-in-possession charges that are adjoined to other felony charges, the situation that appears over and over in my case study. In a separate breakdown of the data, the State Court Processing Statistics survey tracks "conviction for original felony charge," "any felony conviction," and "any conviction," which again show that a substantial proportion of convictions are for offenses other than the one initially charged. *Id.* at 25 fig.18. This breakdown resembles my own conclusions about what the conviction rate looks like if one focuses only on the individual case, rather than asking whether the individual case was resolved in conjunction with other cases.

168. For a further discussion of the conduct comparability issues see *infra* notes 277–311 and accompanying text.

169. Often, these separate case numbers are actually parole or probation violations, and the punishment for these violations can be as severe as, or more severe, than a conviction for the new substantive charge. It does not appear that these studies are able to track such violations because the adjoining cases are opened under case numbers from previous years.

170. *E.g.*, O'Hear, *supra* note 4, at 731–32. O'Hear points to the American Bar Association study, which in turn relied on NJRP data, and asserts: "Nationwide, federal sentences for drug and gun offenses result in prison time that is three times greater, on average, than comparable state sentences." *Id.* (citing ABA TASK FORCE, *supra* note 69, at 30).

171. PATRICK A. LANGAN & JODI M. BROWN, U.S. DEP'T OF JUST. BUREAU OF JUST. STATS., FELONY SENTENCES IN THE UNITED STATES, 1994 7 tbl.7 (1997). For sentences in "weapons offenses" were the "most serious conviction offense," the mean federal prison sentence was ninety-one months, the mean state prison sentences was forty-seven months, the mean federal jail sentence was eight months, and the mean state jail sentence was five months.

convicted of any offense more serious than felon-in-possession. (And many, many offenses are considered more serious than felon-in-possession, as far as sentencing goes.) At the same time, the NJRP survey likely inflates the average state sentence for weapons offenses by drawing only from those cases with prison sentences. Anyone sentenced to county jail, where people typically serve shorter sentences than prison, would see their sentence excluded from the survey. The SCPS data is nimbler, breaking down the data into separate averages for prison sentences and for jail sentences.

A final flaw with the NJRP and SCPS surveys' estimates of sentencing severity is that they cannot account for the difference between two cases where the same alleged offense describes very different conduct. Think of a felon who does nothing more than possess a gun and a felon who possesses a gun and uses that gun to commit a robbery. Both could be charged with felon-in-possession, but their conduct is very different, and this difference in conduct could drive a difference in the defendants' sentences—even if they are convicted of violating the same section of the criminal code. This difference in underlying conduct would be particularly confounding for federal-to-state comparisons if the federal system is less likely to prosecute felon-in-possession cases that involve gunshots and injuries—a trend that I found in my own case study, and that I discuss later on. Similarly, the statistics cannot compare cases in which different charges describe the same conduct. For the felon who commits a robbery with a gun, the defendant might be charged in federal court with felon-in-possession alone, whereas in state court he may be charged with robbery, felon-in-possession, and other crimes. It is difficult to assess which system punishes the *charge* of felon-in-possession more severely. It is even more difficult to determine which system punishes the *conduct* more severely, because identical charges may refer to very different conduct. These commensurability issues are explored in more depth in my case study below.[172]

* * *

In sum, the literature compares the outcome of cases in the federal and state systems without knowing enough about how the state system actually works. This leads to claims about federalization that are unsubstantiated, at best, and outright incorrect, at worst. The only way to back up claims about the impact of federalization is with data on the

172. *See infra* notes 253 and accompanying text.

cases that go federal and the ones that could have gone federal but stayed in state court. Part II of this Article explains my effort to track the cases on both sides of the federal-state divide.

II. A CASE STUDY

I tracked all the felon-in-possession cases that went federal in one jurisdiction and all the felon-in-possession cases that could have gone federal yet stayed in state court. This case study allows me to test several important claims in the federalization literature. I describe the design and data collection, and then the results.

A. Design

Claims about federalization cannot be made without data on the cases that stayed in state court. I chose a county and a time period, and set out to track every case in which a defendant's conduct in that county and year led to a felon-in-possession charge being filed in either state or federal court. This design relied upon a simplifying, but reasonable, assumption that any felon with a gun could be charged in either state or federal court.[173]

Once I settled on my study design, I needed a location. The state system is so large that I had to pick just one small corner of it. I chose Alameda County, California, a large, diverse county in Northern California with a busy criminal justice system. Alameda County is not exactly a national brand, though maybe it should be. As Lawrence Friedman and Robert Percival described it in their history of the county's judicial system, "Alameda County is only part of a sprawling mega-city, whose nerve center lies in San Francisco, across the Bay."[174] At 1.6 million residents, though, it is the twentieth largest county in the country, almost twice the size of its neighbor, San Francisco.[175] Alameda is home to Oakland, Berkeley, smaller cities, large suburbs, and farmland. The population is racially diverse.[176] Its politics are decidedly Democratic, but in 2020—the year of my study—the elected

---

173. *See infra* note 221 and accompanying text.

174. LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910 20 (1981).

175. *Largest Counties in the US 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/us-counties [https://perma.cc/RWF3-EUKX].

176. *QuickFacts, Alameda County, California,* U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/alamedacountycalifornia [https://perma.cc/KXA3-T3M3]; *Cities*, ACGOV, https://www.acgov.org/about/cities.htm [https://perma.cc/3SV8-9EWM].

District Attorney was Nancy O'Malley, a mainstream, four-time incumbent, pro-death-penalty prosecutor, who had defeated a progressive prosecutor in 2018.[177]

But these were not the only selling points of Alameda County. There is a critical, but as yet underappreciated feature of the county: It's where I live. Proximity gave me access to the courthouse which, it turns out, was essential for carrying out the study. How can that be? The court records upon which I relied are considered public records. But they are made available to the public in such a limited way that it is impossible to study them without being close to a courthouse. The files are made accessible on a dozen or so computers spread out across the county's various courthouses.[178] Access is limited to the business hours of the clerk of court: 8:00 a.m. to 3 p.m., Monday through Friday. No downloading or e-mailing is permitted on these computers. When the computers were occupied by others—researchers, bail agents, pro se litigants—court rules require users to switch off every fifteen minutes. To study a year's worth of state-court cases, I had to visit the courthouse more than seventy-five times. This is critical to understanding the research into state courts—and the lack thereof. Unless you are physically close to one of the Alameda courthouses, you cannot gather the data needed to study the Alameda court system's proceedings.

B. Collection

I started my data collection with a public records request to the Alameda County District Attorney's Office. I needed to build a universe of cases that were charged in state and federal court with felon-in-possession. I asked for the defendants' names, case numbers, and all charges filed in every case in which prosecutors alleged a

---

177. Scott Morris, *Alameda County District Attorney Nancy O'Malley is Stepping Aside*, OAKLANDSIDE (July 15, 2021), https://oaklandside.org/2021/07/15/alameda-county-district-attorney-nancy-omalley-legacy-victims-rights-police-accountability [https://perma.cc/6S46-7PSP] (discussing the then District Attorney's career and reputation); *District Attorney to Seek Death Penalty for Man Accused of Killing Hayward Cop,* EAST BAY TIMES (Aug. 23, 2018), https://www.eastbaytimes.com/2018/08/23/da-will-seek-the-death-penalty-in-accused-hayward-cop-killer [https://perma.cc/6HUL-LXKA] (noting that District Attorney O'Malley has pursued the death penalty in two cases during her career).

178. Attorneys can view all the same records and more through the clerk's online portal, but I could not do so—even though I am an attorney—because the portal prohibits users from accessing the records for anything other than the direct representation of clients.

violation of the state's felon-in-possession statute, California Penal Code section 29800(1). For $83, the district attorney's office provided me with the requested information.[179] For each case, I reviewed the charging document (at the court) and the "probable cause" statement (at the court) to ensure that the conduct occurred in 2020 in Alameda County. Some cases charged in 2020 involved conduct from 2019. Some cases with 2020 conduct were not charged until 2021. I captured all of them.

Each file contained a "probable cause" statement explaining the evidence that supported probable cause for the defendant's arrest. These statements allowed me to code whether a gun had been fired and whether anyone had been injured or killed by the shot, among other data. Because the vast majority of cases were resolved by pleas, without suppression motions or other factual development, the probable cause statements were the go-to source for describing the conduct underneath each charge. In California, police reports are not subject to the public records law; the only reason I was able to access these police accounts is that they were located in the court file. The probable cause statements were also critical because they identified the race of each defendant, which was essential for my study of racial discrimination. I needed these demographic data to evaluate claims of racial discrimination in charging.

The final critical item of information from the court files was the disposition of each charge. The docket for each case provides the resolution of each charge. But reviewing each docket was insufficient, it turned out, because so many cases involved pleas that resolved multiple cases that were simultaneously pending against the defendant. The only way to determine which cases were part of that global plea deal was to review the change-of-plea transcripts and the sentencing transcripts, where the parties identified the terms of the plea. This meant that to analyze 534 felon-in-possession cases, I had to account for the disposition of another 1,000 to 2,000 orbiting cases.

Various challenges arose in studying a year's worth of state cases. Felon-in-possession cases are exceedingly common. In Alameda County, 10.2% of all felony cases involved at least one charge of felon-

179. Letter from Catherine H. Kobal, Assistant Dist. Att'y, Alameda County to Author (Mar. 29, 2022) (on file with Author) (invoice for data extraction). I later requested information on all felony and misdemeanor charges in Alameda County from June 1, 2017 to June 1, 2022. Letter from Catherine H. Kobal, Assistant Dist. Att'y, Alameda County to Author, Sept. 26, 2022 (conveying data).

in-possession.[180] Only three felony offenses were charged more frequently: receiving a stolen car,[181] unlawful driving or taking of a vehicle,[182] and burglary.[183] The ubiquity of felon-in-possession makes it a useful offense for federalization, as prosecutors can use this proxy crime to assert federal jurisdiction over a large swath of defendants.

In the vast majority of state felon-in-possession cases, however, federal prosecutors did not follow up with federal charges. These cases lived and died in the state system, where they were processed with a bureaucratic hum. Charges were alleged and plea bargains negotiated. The public court record reveals little about the arguments and reasoning behind the dealmaking. But sometimes the bureaucratic hum gave way to real frustrations. In August 2020, Judge Michael Gaffey, presiding over a plea hearing in a felon-in-possession case, noted that "our society has its head spinning but one of the things that people don't seem to like are people running around with guns and driving around with guns in their car."[184] Whatever overreaches there might be in the justice system, he seemed to say, this felon-in-possession case was not one of them. That summer, Judge Kevin Murphy reluctantly agreed to a sentence he found too lenient in a case involving the defendant's allegedly shooting at police as he fled. "We talk about it all the time about guns in Oakland and gun violence in Oakland," Judge Murphy said. "I was in a meeting last week with some people talking about how bad the situation is and then this happens. I don't know all the details [of the plea agreement]. It doesn't necessarily make an entire amount of sense."[185]

In these moments of candor, the duality of felon-in-possession came to the surface. Some felon-in-possession cases are proxy crimes, the very grist of mass incarceration; the defendant's mere status as a felon

---

180. From June 1, 2017 to June 1, 2022, there were 3,207 charges of felon-in-possession in 2,741 individual cases. In that same time period, there were 63,074 felony charges of all sorts in 26,828 individual cases. Excel Spreadsheet of All Felony and Misdemeanor Charges in Alameda County, June 1, 2017 through May 31, 2022 (narrowed to felonies, then selected all 29800(a)(1) and removed duplicates on "CaseNo.").

181. CAL. PENAL CODE § 496d(a) was charged as a felony in 3,612 cases. *See* Excel Spreadsheet of All Felony and Misdemeanor Charges in Alameda County, June 1, 2017 through May 31, 2022 (on file with Author).

182. CAL. VEHICLE CODE § 10851(a) was charged as a felony in 3,888 cases. *Id.*

183. CAL. PENAL CODE § 459 was charged as a felony in 3,136 cases. *Id.*

184. Transcript of Record at 31, People v. Suarez, No. 20-CR-010073 (Super. Ct. Alameda Cnty Aug. 18, 2020).

185. *Id.*

leads him to be punished for an action that is now a federal constitutional right of the highest order.[186] Meanwhile, other felon-in-possession cases involve indisputably violent acts, including shootings and robberies, and seem to be at the heart of efforts to address the scourge of gun violence.

On the federal side of the case study, the data gathering was much easier both because the number of cases was far smaller and because the records themselves are far more accessible. I used PACER to identify every defendant in the Northern District of California who was charged with violating 18 U.S.C. § 922(g), the felon-in-possession prohibition. I then reviewed the facts of each case to identify those that came from Alameda County in 2020. My review of the federal cases turned up twenty-two cases alleging that a defendant was a felon who possessed a gun in 2020 in Alameda County. For each case, I coded the same information as in state court. In the federal court files, I drew primarily on the complaints, instruments, sentencing memos, and judgments. I obtained the race data either from the Bureau of Prisons website[187] or from the defendants' previous arrests in Alameda County.[188]

Because my sample of twenty-two cases was so small, I used two other federal sources to buttress my findings with district-wide and nationwide data points. The first source was discovery from the *York* prosecution, discussed in Section I.A. In that case, prosecutors were ordered to disclose two years' worth of data on felon-in-possession defendants whose cases went federal, along with the race of those defendants.[189] This unusual discovery order was a rare opportunity to obtain district-wide data. The second source was a 2022 report by the U.S. Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like?*, which conducted a "25 percent random sample of cases in

186. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 70 (2022) ("The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'") (quoting McDonald v. Chicago, 561 U.S. 742, 780 (2010)).

187. *Federal Inmates by Name*, FED. BUREAU OF PRISONS, https://www.bop.gov/mobile/find_inmate/byname.jsp [https://perma.cc/VGV9-6PU2].

188. From July 2019 to March 2020, I served as an assistant federal public defender in the Northern District of California. I worked in the San Francisco office. During my time as a federal defender, I had no involvement with, or knowledge of, any of the cases that would later become part of my study.

189. *See supra* notes 54–63 and accompanying text.

which felony offenders were sentenced under § 2K2.1 in fiscal year 2021."[190] In other words, the report looked at a quarter of all cases that were sentenced in federal court under the sentencing guideline used for felon-in-possession. That amounted to 1,796.[191] For each case, the report provided detailed analysis about the conduct leading to the charges, including whether a gun had been discharged and a person injured or killed. This was a helpful and welcome nationwide data source that complemented my state-court data.

C. Results

This Section presents the findings of this study. Many of the basic claims about the federalization of felon-in-possession are not supported by the findings in my case study. Of course, a year's worth of results from a single county cannot conclusively prove that the literature is wrong about federalization. Longer studies, involving more jurisdictions, would be required to do that. But the results of an in-depth account of one jurisdiction can raise questions about the soundness of the literature's claims. In addition, it serves to illustrate what is wrong with the existing methods supporting the literature's claims—and what would be required, methodologically, to compare the federal and state systems in a broader study.

1. Charging landscape

Felon-in-possession is charged in very different ways on the federal and state sides of my case study. That is the first finding to highlight from the case study. On the federal side, nineteen of twenty-two (86%) defendants faced only a single charge: felon-in-possession.[192] And twenty-one of twenty-two defendants (95%) faced only a single federal case.[193] On the state side, by contrast, there were 534 felon-in-

190. U.S. SENT'G COMM'N, WHAT DO FEDERAL FIREARMS OFFENSES REALLY LOOK LIKE? 8 (2022) [hereinafter SENTENCING COMMISSION REPORT], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf [https://perma.cc/F5XJ-BG44].

191. *Id.* at 29–34.

192. Excel_Fed Cases With 2020 Alameda Conduct (on file with Author). In *United States v. Glenn,* the defendant faced one charge of felon-in-possession. Under a separate case number, he was also charged with violating his supervised release for the same conduct. *E.g.*, Criminal Cover Sheet at 1, United States v. Glenn, No. 21-CR-00399 (N.D. Cal. Oct. 15, 2021), ECF No. 1-1; Defendant's Sentencing Memorandum at 1, United States v. Glenn, No. 14-CR-00634 (N.D. Cal. May 2, 2022), ECF No. 57.

193. Excel_Fed Cases With 2020 Alameda Conduct (on file with Author).

possession defendants,[194] and only 5.2% of those cases involved felon-in-possession as the sole charge.[195] This means that in approximately 95% of the state cases, the felon-in-possession charge was filed alongside other charges. Table 1 shows the ten most common offenses to be charged alongside felon-in-possession. This phenomenon of joining felon-in-possession with other charges is what I refer to as a "multiplicity" of charges.

TABLE 1

Charge Joined With Felon-in-Possession	**# of Cases**	**Code**
Unlawful Possession of Ammunition	264	P.C. 30305(a)(1)
Carrying Loaded Firearm in Public	256	P.C. 25850(a)
Carrying Concealed Firearm in Vehicle	170	P.C. 25400(a)(1)
Possession of Drugs While Armed with Firearm	76	H&S 11370.1(a)
Carrying Concealed Firearm on One's Person	74	25400(a)(2)
Possession of Firearm by Felon with Prior "Violent" Felony	52	P.C. 29900
Assault with Semiautomatic Firearm	47	P.C. 245(b)
Possession of Assault Rifle	41	P.C. 30605(a)
Shooting at Inhabited Dwelling or Vehicle	29	P.C. 246
Attempted Murder	27	P.C. 664/187

There is also a "multiplicity" of cases. In 59% of the felon-in-possession cases that were resolved, the resolution of that case—typically a plea—involved two or more different cases that were

194. Of those 534 separate cases, there were twenty-five defendants who were charged with felon-in-possession for two separate cases involving 2020 conduct and one defendant who was charged with three separate cases for 2020 felon-in-possession conduct. Excel_2020 Conduct Charged in 2020, tab 6; Excel_2020 Conduct Charged in 2021, tab 7.

195. Excel_Statistics on 2020 Conduct.

concurrently pending against the defendant.[196] These other cases arose either from a different set of operative facts involving the defendant or from the allegation that the felon-in-possession conduct had violated the defendant's parole or probation conditions from a previous case. In short, state defendants face lots of charges in each case and lots of cases concurrently, which makes them unlike their counterparts in the federal system. The multiplicity of charges and cases in my state sample suggests a style of charging that is very different from my federal sample. Scholars should take account of this different charging style when calculating the conviction rate and sentencing severity of cases in state court—a topic discussed at length below.

As one illustration of the multiplicity of charges, note that six of the seven most commonly charged offenses in Table 1 involve gun possession. While only 5.2% of cases charged exclusively felon-in-possession, 39.1% of cases charged only gun-possession offenses.[197] Essentially, state prosecutors can turn a gun possession case into a suite of different gun possession charges. Take the case of J. Garrett, for example. Undercover officers saw him on the street with a gun.[198] They waited for him to get into a car with the gun and, when he did, uniformed police officers stopped his car.[199] His act of possession led to the detection of other guns in the car, and it resulted in five gun charges: felon-in-possession of a firearm; carrying a loaded weapon in public; carrying a concealed weapon in a car; unlawful possession of ammunition; and possession of an assault rifle.[200] He pled no contest to felon-in-possession, and the prosecutor dropped the rest of the charges.[201]

The takeaway is that 39.1% of cases involve no criminal conduct other than gun possession, even though they may involve an aggregation of different gun offenses. This portion of the felon-in-possession docket can seem like a symptom of over-policing and mass

196. Excel_Parallel Cases Case Study (on file with Author); Alameda 2020 Conduct in 2021_12_1_23, sheet 4 (on file with Author).

197. Gun Crime Only_12_1_23 and Alameda 2020 Conduct in 2021_12_1_23, sheet 2 (on file with Author).

198. Complaint at 1, People v. Garett, No. 20-CR-014891A (Cal. Super. Ct. Alameda Cnty. Nov. 13, 2020).

199. *Id.*

200. *Id.* at 1–2.

201. *Id.*

incarceration. While gun rights are ascendant throughout the nation, the status of these defendants as felons leads them to be prosecuted.

At the same time, felon-in-possession charges can also involve conduct that harms or kills other people. In that way, it does not look like a status crime at all. Of the felon-in-possession cases in the state sample, twenty-seven involved a robbery,[202] twenty-six murder,[203] twenty-four criminal threats,[204] twenty-two a charge of negligent discharge of a firearm,[205] And twenty-one reckless driving to elude police.[206] In 16.7% of the state felon-in-possession cases, the defendant allegedly fired a gun.[207] This aspect of the felon-in-possession cases makes them look less like over-policing and more like a tool in the fight against gun violence. Only by studying both the state and federal cases can one get a sense for the charging landscape.

2. Federalization's frequency

A second finding concerns the frequency with which cases "go federal" and, relatedly, the definition of what it means for a case to "go federal." For all that has been written about federalization, the literature has no estimate for how commonly federalization occurs. Recall that Sara Sun Beale came the closest with her claim that federalization is "the practical equivalent of selecting 1 case in 100 (or 1000)."[208]

The reason no one can say the frequency of federalization is that no one knows how many state-court cases are eligible for federal prosecution. Authors do not know how many state-court cases could have gone federal. My study provides an estimate for one county and one year. It also suggests a methodology that others could implement and improve upon elsewhere.

In my case study, there were 534 defendants charged in state court with felon-in-possession and twenty-two defendants charged in federal court with felon-in-possession. If all the 534 state cases could have been federally prosecuted, and all the twenty-two federal cases originated in

202. CAL. PENAL CODE § 211 (West 2023).
203. CAL. PENAL CODE § 187 (West 2023).
204. CAL. PENAL CODE § 422 (West 2023).
205. CAL PENAL CODE § 246.3(a) (West 2023).
206. CAL. VEH. CODE § 2800.2 (West 2023).
207. *See infra* Table 3 and note 277 and accompanying text; 2020 Conduct Charged in 2020, sheet 1; Alameda 2020 Conduct in 2021_12_1_23, sheet 2.
208. Beale, *supra* note 12, at 1003–04.

state court, the frequency of federalization would be 4.1% (22 of 534). Figure 1, below, sets up the federalization rate as a simple quotient.

FIGURE 1

$$\frac{\text{Cases Charging Federal Felon-in-Possession}}{\text{Cases that Could have Charged Federal Felon-in-Possession}} = \text{Frequency of Federalization}$$

But this is only a starting point. Both the state and the federal numbers need refinement and qualification. Indeed, one benefit of attempting to estimate the frequency of federalization is that it forces us to sharpen the definition of what counts as a federalized case.

Litigants, academics, and even Hollywood and television refer to cases that "go federal." The language implies a procedural posture like D. York's, where local police make an arrest, state prosecutors file charges, and then the case is removed to federal court.[209] But in my federal sample, only fifteen of the twenty-two cases started off with state charges at all.[210] Seven felon-in-possession cases went straight to federal court.[211] This pattern is consistent with the district-wide statistics from

209. *See supra* notes 26–49 and accompanying text.

210. Cases where 2020 felon-in-possession conduct was charged as felon-in-possession in state court: Complaint at 1–3, United States v. Moore, No. 20-CR-00187 (N.D. Cal. Apr. 21, 2020), ECF No. 1; Complaint at 1–2, United States v. Martinez, No. 20-CR-00244 (N.D. Cal. May 13, 2020), ECF No. 1; Complaint 1t 1–2, United States v. Sylvester, No. 20-CR-00256 (N.D. Cal. May 14, 2020), ECF No. 1; Complaint at 1–3, United States v. McMillan, No. 20-CR-00281 (N.D. Cal. May 7, 2020), ECF No. 1; United States v. Collins, No. 20-CR-00447 (N.D. Cal. May 7, 2020), ECF No. 6; Complaint at 1–2, United States v. Hal, No. 20-CR-00471 (N.D. Cal. Oct. 21, 2020), ECF No. 1; United States v. Bruce, No. 21-CR-00009 (N.D. Cal. Jan. 7, 2021), ECF No. 1; Complaint at 1–2, United States v. Dickens, No. 21-CR-00098 (N.D. Cal. Feb. 10, 2021), ECF No. 1; United States v. Pittman, No. 21-CR-00251 (N.D. Cal. June 15, 2021), ECF No. 1; Complaint at 1–2, United States v. Odom, No. 21-CR-00259 (N.D. Cal. Mar. 2, 2021), ECF No. 1; Complaint at 1–2, United States v. Chaidez, No. 21-CR-00377 (N.D. Cal. Feb. 19, 2021), ECF No. 1; Complaint at 1–2, United States v. Bernstine, No. 21-CR-00394 (N.D. Cal. Jan. 20, 2021), ECF No. 1; United States v. Glenn, No. 21-CR-00399 (N.D. Cal. Oct. 15, 2021), ECF No. 1. Cases where 2020 felon-in-possession conduct was charged only as a probation or parole violation in state court. Complaint at 1–5, United States v. Vee, No. 20-CR-00360 (N.D. Cal. May 13, 2020), ECF No. 1; Complaint at 1–2, United States v. Avalos, No. 21-CR-00193 (N.D. Cal. Dec. 7, 2020), ECF No. 1.

211. Complaint at 1, 3, United States v. Craft Jr., No. 20-CR-00301 (N.D. Cal. July 7, 2020), ECF No. 1; Complaint at 1–2, United States v. Murray, Jr., No. 21-CR-00032

the *York* litigation. Between June 1, 2019, and June 1, 2021, there were 244 federal felon-in-possession cases filed in the Northern District of California, and only 60% of those cases had charges filed in state court before going federal.[212] Does a case count as "going federal" if it goes directly to federal court, without any state charges filed? There is no correct answer. It really depends on what phenomenon we are trying to measure. Is it the passage of a case from a local police arrest to a federal forum or is it the passage of a case from local prosecutors' charges to a federal forum?

Another blurry line in defining federalization concerns those cases that settle in state court under threat of federal prosecution. Scholars have noted the potential for federal prosecutors to induce pleas in state court in just such a way.[213] Usually, those threats are hidden from public view, but the threats occasionally bubble to the surface. Consider the state case against L. Taylor. At Taylor's change-of-plea hearing, his attorney went on the record to explain that he was entering a plea in state court because federal prosecutors had threatened to "go forward with the prosecution of Mr. Taylor unless he pleads guilty in this state case."[214] The threat had been conveyed through the state prosecutor. The state judge noted that this had been discussed "informally off the record" and that, with the defendant's plea, the judge did not "anticipate any other jurisdictional actions to Mr. Taylor's matter."[215] Taylor's case would not generally count as having "gone federal," because no charges were filed in federal court.

(N.D. Cal. Dec. 17, 2020), ECF No. 1; Complaint at 1–2, United States v. McChristian, No. 20-CR-00258 (N.D. Cal. Feb. 24, 2020), ECF No. 1; Complaint at 1–2, United States v. Anderson IV, No. 22-CR-00084 (N.D. Cal. Jan. 12, 2021), ECF No. 1; Complaint at 1–2, United States v. Williams, No. 21-CR-00462 (N.D. Cal. May 8, 2021), ECF No. 1; United States v. Chung, No. 21-CR-00186 (N.D. Cal. May 4, 2021), ECF No. 1; Complaint at 1–2, United States v. Hewitt, No. 21-CR-00065 (N.D. Cal. Dec. 17, 2020), ECF No. 1.

212. *See supra* note 57 and accompanying text.

213. *E.g.*, Miller & Eisenstein, *supra* note 128, at 243 (noting that federal prosecutors can "use the threat of federal prosecution to leverage longer sentences in the plea-bargaining process, thus circumventing state criminal-justice policymaking decisions and rearranging relations with the local defense bar"); Gardner, *supra* note 13, at 317 (describing strategy to get state defendants to accept higher sentences in exchange for not filing federal charges).

214. Transcript of Change of Plea and Conditions of Probation Hearing at 12, People v. Taylor, No. 20-CR-004095A (Cal. Super. Ct. Alameda Co. Mar. 12, 2020).

215. *Id.*

But the threat of federal prosecution was instrumental to his plea.[216] Perhaps these types of cases should also count under the rubric of federalization? Again, there is no correct definition for federalization. Rather, the important point is that any calculation of federalization must keep in mind this type of below-the-surface federal influence. These are some of the challenges in counting the number of cases that went federal.

Difficult issues also arise in defining the universe of cases that could have gone federal yet stayed in state court. An omniscient researcher could identify every felon who possessed a gun in Alameda County in 2020. That would include people who were never caught by police, much less charged with crime. This would be the true universe of those eligible for federal felon-in-possession prosecution. But no one possesses such omniscience. A second-best method would identify every felon arrested in Alameda County for conduct in 2020 that involved possessing a gun. Such data collection is not possible, however, because arrest records are not publicly available in California. There is no way to review all of the arrests to seek out the felons who possess guns. A third-best method, still out of reach, would be to review every criminal prosecution, no matter the charge, to identify felons who possessed guns in 2020 in Alameda County. This was not a viable option for me, because it would have required reviewing the probable cause statements and charging documents in 15,956 cases filed in 2020, as well as thousands more cases stretching into 2021.[217] Even if the probable cause statements revealed the presence of the gun, there would be the problem of identifying whether the defendant was a felon. There is no public access to the rap sheets that would be required to identify all the felons in the sample.

Rather than employing any of the impossible methods above, I fashioned a workable, if imperfect, method to identify the cases that could have gone federal. I relied on the fact that felon-in-possession offenses have essentially the same elements under federal and state law: (1) being a felon and (2) possessing a gun.[218] Thus, any felon-in-

---

216. *Id.*

217. I used 15,956 as a benchmark number, because that is the figure for all the cases filed in 2020 in Alameda County. I would also have to look through cases filed in 2021 to identify 2020 conduct.

218. *Compare* 18 U.S.C. § 922(g) ("It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or

possession charge in state court could have been brought in federal court, and vice versa. This was a workable approximation that allowed me to estimate the universe of cases that could have gone federal by simply counting up all of the felon-in-possession cases alleged in state court. Admittedly, and unavoidably, this method over- and under-counts the universe of cases that could have been federally prosecuted.

Here are some of the ways my method over-counts the number of cases that could have gone federal. First, it could be that someone is charged with felon-in-possession in state court but is not actually eligible for federal prosecution. That could occur if federal prosecutors discover that the person is not a felon or did not possess a gun. Given that state prosecutors have filed charges, and that the elements themselves are very simple, I don't worry much about this type of over-counting. A second type of ineligibility might occur if the gun does not satisfy the interstate-commerce requirement of federal law nexus required for federal felon-in-possession charges. This sounds concerning at first. Maybe there are lots of guns that would fail this nexus, thus preventing federal prosecutors from ever taking the case federal. A deeper inquiry suggests that this is not likely to be a significant concern. Courts have interpreted this interstate nexus to require only a "minimal" showing.[219] If the gun was ever shipped out of state, it satisfies the federal felon-in-possession statute.[220] The only guns that would *not* satisfy the interstate-commerce nexus are those that were manufactured in California and never sold across state lines.

---

possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."), *with* CAL. PENAL CODE § 29800(a) (West 2023) ("Any person who has been convicted of a felony . . . who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony."). There is also a mens rea element that is, in rare cases, disputed. Federal law requires the government to "show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." Rehaif v. United States, 139 S. Ct. 2191, 2194, (2019). California law does not require this show. *See* People v. Snyder, 652 P.2d 42, 44 (Cal. 1982) ("In the present case, defendant was presumed to know that it is unlawful for a convicted felon to possess a concealable firearm. (Pen. Code, § 12021.) She was also charged with knowledge that the offense of which she was convicted (former Health & Saf. Code, § 11531) was, *as a matter of law*, a felony.").

219. STEPHEN P. HALLBROOKE, FIREARMS LAW DESKBOOK § 2:19 (2023) (explaining that the "prosecution must prove the minimal nexus set forth in *Scarborough* that the firearm had traveled in interstate commerce" and that the statute is satisfied where "the firearm had at any time in the past been transported in interstate commerce").

220. *Id.*

How many guns in my sample might fail the interstate-commerce nexus? The best data I could find come from 1998. Of all the guns manufactured in the United States that year, just 6.2% were manufactured in California.[221] Considering that the guns in my sample come from all over the world, not just the United States, and considering that even a California-made gun would satisfy the interstate-commerce requirement if it was ever shipped across state lines, it feels safe to assume that the vast majority of guns will satisfy the interstate-commerce nexus requirement. That reduces the risk of over-counting the number of cases that could have gone federal yet stayed in state court.

On the side of under-counting the number of cases eligible to go federal, there are several considerations. I defined the universe of eligible cases based on all those who were charged in state court with felon-in-possession. But there are, of course, felons who possess guns and are never caught or charged with anything. There are also felons who are caught in possession of guns but are charged with something instead of felon-in-possession. For example, a defendant might be charged in state court with only robbery, even though he was also a felon with a firearm. That robbery defendant could be charged in federal court, yet he would not appear in my state-court sample unless he was charged in state court with felon-in-possession. Similarly, a felon might see a parole or probation violation alleged in state court, rather than a new charge of felon-in-possession.[222] That defendant could be charged in federal court. Indeed, two of the defendants in my federal sample were charged with state parole/probation violations, rather than new state felon-in-possession cases.[223] In this way, too, my estimate

---

221. *A State-by-State Ranking of Gun Shows, Gun Retailers, Machine Guns, and Gun Manufacturers*, VIOLENCE POL'Y CTR. (1998), https://www.vpc.org/studies/gunfour.htm [https://perma.cc/G4X5-CPGB].

222. Complaint at 2, People v. Ayala, No. 20-CR-015306 (Cal. Super. Ct. Alameda Cnty. Nov. 30, 2020) (entering plea to stalking in violation of a restraining order, which produced sentence of one day with one day credit for time served; simultaneously admits felony probation violation for three years prison). I did not have a way to identify all state probation/parole violations, so I could not search for those involving guns. There was an additional federal drug prosecution that did not allege felon-in-possession in federal court, but relied on conduct that was charged as a violation of felon-in-possession and other crimes in state court. Criminal Complaint at 2–3, United States v. Racoma, No. 21-CR-00134 (N.D. Cal. Jul. 2, 2020), ECF No. 1. I reviewed § 924(c) filings on PACER and did not find any in the venue of Oakland that came from felon-in-possession conduct in 2020 in Alameda County.

223. *See supra* note 210 (discussing *Vee* and *Avalos* cases).

of all the cases that could have gone federal would be an undercount. Yet, for the reasons discussed earlier, however, it was not possible to scour all criminal charges in search of felons who possessed guns but were not charged with that possession.[224] The method I adopted was a practical, if imperfect, compromise.

3. Racial discrimination

The case study provides new insight on the issue of racial discrimination in federalization. Scholars and litigants have pointed to striking racial disparities in the pool of federal felon-in-possession defendants. Statistics show a vast overrepresentation of Black defendants compared to the Black proportion of the population.[225] This overrepresentation has been observed in the Northern District of California, where the *York* data showed that Black defendants made up 55.0% of all federal felon-in-possession defendants, but just 5.4% of the district's population.[226] The overrepresentation was also observed in the U.S. Sentencing Commission's random sampling of 25% of all prohibited-possessor convictions nationwide.[227] Black defendants made up 54% of those convicted of these crimes, while making up only 13% of the national population.[228] This has repeatedly been described as evidence of federal prosecutors engaging in racially discriminatory charging. But the state-court perspective is, again, sorely missing.

The question no one can answer is whether federal prosecutors are exacerbating, replicating, or even ameliorating the racial disparities that exist upstream in state court. By gathering data on the state-court cases, my study provides answers, at least for one year and one county. As shown in Table 2, the proportion of Black defendants in state court is higher than in federal court. It is also higher than in the district-wide data from the *York* and the nationwide data from the Sentencing Commission. This finding raises the possibility that the racial disparities observed in federal court are a function of decisions made by police officers and prosecutors in state court, a function of federal court prosecutors' decision-making.

---

224. *See supra* note 217 and accompanying text.

225. *See supra* notes 74–79 and accompanying text.

226. United States' Response to Discovery Order, *supra* note 57, at 4, 5 (internal quotation marks omitted).

227. SENTENCING COMMISSION REPORT, *supra* note 190, at 33.

228. *Id.*

TABLE 2

Race/Ethnicity	**State Study (N = 508)**[229]	**Federal Study (N = 21)**[230]	**Federal *York* (N = 229)**[231]	**Federal Sent. Comm'n (N = 1796)**
Black	330 cases (65.0%)	13 cases (61.9%)	126 cases (55.0%)[232]	54.0%
Hispanic/Latino	104 cases (20.5%)	3 cases (14.3%)	N/A[233]	25.6%
White	50 cases (9.8%)	3 cases (14.3%)	81 cases (35.4%)	17.5%
Asian and Pacific Islander	22 cases (4.3%)[234]	2 cases (9.5%)	16 cases (7.0%)	N/A
Native American	1 case (0.20%)	0 cases	4 cases (1.7%)	N/A
Other	1 case (0.20%)[235]	N/A	2 cases (0.87%)	3.0%

229. I excluded the state defendants for whom race was not available.

230. I excluded the federal defendant for whom race was not available.

231. The *York* data excludes fifteen defendants for whom race was not available. United States' Response to Discovery Order, *supra* note 57, at 5.

232. If one counts only the 148 cases that were "transferred" from state to federal court, the percentage of Black defendants stays the same. Excluding from the numerator and denominator the eight defendants for whom race was not available, seventy-seven were Black (55.0%). The percentage white decreases to 31.4% (forty-four cases), the percent Asian goes up to 10.7% (fifteen cases), and the percent Native American goes up to 2.1% (three cases), with the percent "Other/Unknown"—as distinct from "N/A"—going to 0.7% (one case). *Id.*

233. The *York* data does not track "Hispanic" or "Latino" as a group. Defendant's Reply to United States' Response to Discovery Order, *supra* note 60, at 4–5. This likely explains why white defendants in the *York* data are represented at so much higher a proportion than in the other three datasets—the category includes Hispanic/Latino defendants. *Id.*

234. The documents list the following under the race: Cambodian, Chinese, Filipino, Hawaiian, Korean, Laotian, Other Asian, Pacific Islander, and Vietnamese. I grouped these under "Asian and Pacific Islander."

235. One defendant was listed as "Asian Indian."

The state numbers do not exonerate federal prosecutors of the claim that they are engaged in racial discrimination. But the state numbers do challenge the story that scholars and litigants have told. To demonstrate that federal prosecutors are discriminating against Black defendants in choosing which cases to take federal, it would be important to show that the federal charging decisions are responsible for part of the racial skew. Instead, the data suggests that federal prosecutors charge Black defendants with felon-in-possession at approximately the same rate as state prosecutors do. This suggests that federal prosecutors are not creating the racial disparities in federal court; rather, they are replicating (and even slightly reducing) the charging disparities that exist upstream in the state system. This finding holds true whether one looks at the demographics of all federal felon-in-possession cases in the district, as shown in Table 2, or just the demographics of those prosecutions that originated in state court.[236]

The literature's claims about disparities in the federal system show the perils of analyzing only the cases that go federal without considering the ones that *could have* gone federal yet stayed stateside. Focus only on the federal cases and the racial disparities seem to be the fault of federal prosecutors. But consider the state cases upstream and other sources emerge as likely candidates for the observed racial disparities.

A few additional points of clarification are needed. First, I realize that my federal sample of twenty-one defendants is small.[237] As noted above, I buttressed my federal sample with district-wide racial data from the *York* litigation and nationwide racial data from the U.S. Sentencing Commission. But I do not have the parallel state data for the entire district or the entire nation. One problem with comparing state numbers from Alameda County with federal numbers from the entire Northern District of California is that Alameda County is 10.7% Black while the district is just 5.6% Black.[238] A similar problem arises in

---

236. *See* text accompanying *supra* note 232. In the latter point of reference—those cases that started in state court—there is no dispute that the source of the disparity was the state system. Police and other local officials investigated the cases and referred them to state prosecutors for state charges.

237. Here I used twenty-one, not twenty-two, because one defendant's race was not available.

238. *QuickFacts, Alameda County, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/alamedacountycalifornia [https://perma.cc/J4C3-QMUH]; Defense Sentencing Memo, *supra* note 49, at 13.

comparing the demographics of Alameda County defendants to those of federal defendants nationwide. But in this comparison, the racial demographics of the population are reversed. The Black population of the nation is 13.6%, compared to 10.7% in Alameda County.[239]

Second, it is worth noting that the U.S. Sentencing Commission's own report gives credence to the idea that charging disparities have their source in state court, rather than federal court. While the Commission did not track any state-court proceedings, it did code the type of police action that led to each federal prosecution. The Commission observed that 54.0% of those convicted of federal felon-in-possession offenses were Black.[240] In two categories of police actions, however, the percentage of Black defendants "deviate[s] more than ten percentage points from the overall average in the sample."[241] Specifically, the report noted that 73.0% of cases that came from "routine street patrol" and 66.9% of cases that came from "traffic stops" involved Black defendants.[242] For the Sentencing Commission, this was evidence that the origins of the federal racial disparities could be found in the actions of local police officers—a finding consistent with my own.

A third note about my study of racial disparities: my data cannot prove discrimination in the state system, despite the racial disparities in *state* charging. To prove discrimination, I would need some way to estimate the racial demographics of all felons who actually possessed guns. A winning discrimination claim would require a showing that the police were treating similarly situated defendants differently on account of their race.[243] But my data on charging and race cannot rule out nondiscriminatory explanations for the observed disparities. For example, it could be that gun enforcement is more aggressive in Oakland than in other parts of Alameda County, and Oakland has a

239. Sentencing Memorandum, *supra* note 49, at 13*; QuickFacts, United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045222 [https://perma.cc/4DP2-49A4].

240. SENTENCING COMMISSION REPORT, *supra* note 190, at 33.

241. *Id.*

242. *Id.*

243. *See* United States v. Armstrong, 517 U.S. 456, 470 (1996) (deciding that criminal defendants pursuing selective-prosecution claims must demonstrate people of other races were not prosecuted for similar crimes).

higher proportion of Black residents than the county as a whole.[244] Or it could be that widespread, systemic racial discrimination has saddled a disproportionate number of Black residents with felony convictions. The disparities in felon-in-possession charging might be more a function of who has been branded a felon than of who possesses or is caught with a gun. My goal is not to prove or disprove the presence of racial discrimination in the federalization decisions. Rather, I have attempted to show that the federalization literature's existing narrative on racial discrimination must account for the demographics upstream in state court.

Finally, and stepping away from statistics for a moment, I want to point out how the lack of information about state-court cases interferes with litigants' efforts to litigate discrimination claims. According to the U.S. Supreme Court's decision in *United States v. Armstrong*, for a Black defendant to obtain discovery on a claim of discriminatory charging, the defendant must identify "individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted."[245] In other words, even if a defendant can obtain aggregate statistics showing discrimination, that defendant cannot prevail on an equal protection claim without identifying concrete examples of similarly situated defendants.[246] Yet federal defendants struggle to find comparator cases because they have no way to systematically search for similarly situated defendants whose cases stayed in the state system.[247] Instead, they point to a newspaper article here or a court decision there as examples of similar defendants who were not charged federally.[248] But if defendants (or, really, their attorneys) had a way to navigate state-court records, they could make

244. Oakland's Black population is 22%, *QuickFacts, Oakland City, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/oaklandcitycalifornia/PST045222 [https://perma.cc/GVK5-NYN5], while Alameda County's Black population is 10.7%, *QuickFacts, Alameda County, California*, *supra* note 238.

245. *Armstrong*, 517 U.S. at 470.

246. *Id.*

247. *See supra* notes 89–93 and accompanying text; *e.g.*, United States v. Traylor, No. CR 05-00006, 2005 WL 8169285, at *1 (C.D. Cal. Sept. 21, 2005) ("To bolster his case, the defendant points to two instances where white felons under similar circumstances were charged only under the state scheme.").

248. *E.g.*, Gardner, *supra* note 13, at 321 (citing Hubbard v. United States, No. 05-74293, 2006 WL 1374047, at *2 (E.D. Mich. May 17, 2016), in which the defendant "introduced into evidence a clipping from a newspaper describing a non-African American who was arguably similarly situated to him, but who was not prosecuted federally"); *supra* notes 89–93 and accompanying text.

more robust and convincing comparisons to other cases. This is yet another illustration of the harm that comes from our blindness to the state side of federalization.

4. Conviction rate

Federal prosecutors convict felon-in-possession defendants at a higher rather than state prosecutors. That is a bedrock belief of the federalization literature. Yet that is not what I found in my case study. Of the twenty-two cases in my federal sample, twenty-one were resolved at the time of this writing, and nineteen of those twenty-one cases resulted in convictions.[249] That is a conviction rate of 90.4%. This 90%-plus conviction rate is consistent with national statistics on federal felon-in-possession cases, as illustrated by data from the Administrative Office of the Courts.[250]

Because nineteen of the twenty-two defendants faced only a single charge (felon-in-possession) and because twenty-one of the twenty-two defendants faced only a single federal case (the felon-in-possession case),[251] it did not matter whether I defined a conviction as:

(1) A conviction on the felon-in-possession charge,

(2) A conviction for some charge alleged alongside the felon-in-possession charge, or

(3) A conviction for some charge in a case that was resolved in conjunction with the felon-in-possession case.

---

249. The two cases that did not result in convictions were dismissed after defendants' successful suppression motions. Minute Entry, United States v. Williams, No. 21-CR-00462 (N.D. Cal. Apr. 20, 2022), ECF No. 66 (granting defendant's motion to suppress); Notice of Dismissal, United States v. Williams, No. 21-CR-00462 (N.D. Cal. May 4, 2022), ECF No. 71; Order, United States v. Odom, No. 21-CR-00259 (N.D. Cal. Mar. 2, 2022), ECF No. 49 (granting defendant's motion to suppress); Notice of Dismissal, United States v. Odom, No. 21-CR-00259 (N.D. Cal. July 14, 2022), ECF No. 65.

250. In the twelve months leading up to the December 31, 2020 report, it was 5,118 convictions of 5,551 defendants charged with prohibited possession, meaning a conviction rate of 92.2%. *Table D-4—U.S. District Courts–Criminal Statistical Tables For The Federal Judiciary (June 30, 2023)*, U.S. CTS. (June 30, 2023), https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2023/06/30 [https://perma.cc/RLQ9-JFZN].

251. *See supra* note 193 and accompanying text; *see also supra* note 192 (describing the sole federal defendant in the sample who was facing two separate federal cases).

Regardless of the method, the federal conviction rate came to the same place, because there was not a multiplicity of charges and cases in the federal sample.

But the definition of conviction rate matters a great deal in state court because of the multiplicity of charges and cases. In my sample, roughly 95% of state defendants faced at least one charge in addition to felon-in-possession.[252] In fact, there was an average of 4.8 charges per case.[253] And recall that of all the felon-in-possession defendants whose cases were resolved, 59% saw that resolution involve at least one other case that was pending against the defendant at the time.[254] The multiplicity of charges and cases makes it essential to define what counts as a conviction.

To see what can go wrong if a researcher fails to account for the multiplicity of charges, think back to the Project Exile/Virginia Exile literature for an example of how things can go wrong if one fails to account for such multiplicity.[255] The conviction rate was calculated solely based on what happened to the felon-in-possession charge, even if that charge was dropped in exchange for a conviction to a more serious charge, like robbery. Or consider the examples below from my state study:

- #1. C. Woods was charged with felon-in-possession and possession of a controlled substance. He entered a no contest plea to felon-in-possession and saw the other charge dismissed.[256]

- #2. J. Cunningham was charged with felon-in-possession, carrying a concealed weapon in a vehicle, and driving with reckless disregard for safety while fleeing from the police. He entered a no contest plea to the reckless driving charge, and the prosecutor dropped the felon-in-possession and concealed weapon charges.[257]

---

252. *See* Excel_Gun Crimes Only, *supra* note 195.

253. Excel_Master List_Coding Alameda Cases (on file with Author).

254. *See supra* note 196 and accompanying text.

255. *See supra* notes 158–169 and accompanying text.

256. Disposition Entry, People v. Woods, 20-CR-000277 (Cal. Super. Alameda Cnty. Ct. Jan. 16, 2020).

257. Clerk's Docket and Minutes at 1, People v. Cunningham, 20-CR-001788 (Cal. Super. Ct. Alameda Cnty. May 2, 2022).

- #3. R. Hoffman was charged with felon-in-possession, possession of a controlled substance while armed, reckless disregard for safety while fleeing from the police, and possession of ammunition by a prohibited person. All four charges in this case were dismissed. But the dismissal in this case was negotiated in exchange for Hoffman's no contest plea to burglary and felon-in-possession in another case.[258]

In my view, all three of the above cases should count as convictions for purposes of calculating the conviction rate. And when the conviction rate in my sample is calculated in this manner, the state system sees a conviction rate of 92.5%, very much comparable to the conviction rate in federal court.[259] This is an example of assessing the state system with metrics that are geared to how the state system actually works.

Let me explain in more depth. At the time of this writing, 462 cases in my state sample have been resolved by plea, trial, or dismissal. From that number, I removed the cases that were dismissed because the defendant died, because the defendant was sent to federal court or the court of another jurisdiction, because the defendant was found mentally incompetent to stand trial, or because the defendant was sent to state prison on another county's charge. I did not count these cases toward the conviction rate, because I wanted to measure state prosecutors' effectiveness in winning convictions, and these types of case-closing events were beyond the prosecutors' control. The result was 440 closed cases.[260]

I could have defined the conviction rate by looking only at the disposition of the felon-in-possession charge in each case. This is how the Virginia Exile researchers—and the scholars who embraced it—defined convictions. Had I done so, the state conviction rate would have been 48.2% (212 convictions of 440 closed cases).[261] Drawing on the three examples above, only #1 (C. Woods) would have counted as a conviction under this most-restrictive method.

---

258. Minute Order at 1–2, People v. Hoffman, 20-CR-007254 (Cal. Super. Ct. Alameda Cnty. July 16, 2020).

259. Excel_Master List_Coding Alameda Cases (on file with Author); Alameda 2020 Conduct in 2021_12_1_23, sheet 4, sheet 5.

260. Alameda 2020 Conduct in 2021_12_1_23, sheet 4, sheet 5.

261. *Id.*

A better calculation of the conviction rate might look at the felon-in-possession case and ask whether there was a conviction for the felon-in-possession charge *or* for any other charge in the case. That would result in a conviction rate of 76.6% (337 convictions of 440 closed cases).[262] This is a substantial increase in the conviction rate above the method of counting just felon-in-possession outcomes. It has the virtue of accounting for the way state prosecutors work. They bring a multiplicity of charges with the expectation that most of the charges will be dropped in exchange an agreement to enter a plea on one of the charges. Whether the defendant pleas to the felon-in-possession charge or another charge may not matter very much. Thus, it would be rather odd to count the conviction rate based only on those cases where the plea is to felon-in-possession. Returning to my three examples, this method of calculating the conviction rate would count #1 (C. Woods) and #2 (J. Cunningham) as convictions.

But one more refinement is needed to account for the multiplicity of cases. When all charges in a felon-in-possession case were dismissed, I tracked whether that dismissal was made in connection with a plea in another case. If it was, I counted that case as a conviction. This accounting method places the conviction rate at 92.0% (405 convictions of 440 closed cases).[263] I chose this method for calculating the conviction rate because, it makes little sense to count a case as a failure to convict—even when all charges are dismissed—if that dismissal is made in exchange for a plea in another case. After all, the prosecutor has secured a conviction, rather than failed to convict. The

---

262. The Bureau of Justice Statistics tracked data similarly data through its series, *State Court Processing Statistics, 1990–2009: Felony Defendants in Large Urban Counties*, BUREAU OF JUST. STAT., https://bjs.ojp.gov/data-collection/state-court-processing-statistics-scps#publications-0 [https://perma.cc/Q5QK-MPY3]. This program's last year, however, was 2009. *Id.* Among relevant findings are data on felony cases from a sample representing the seventy-five largest counties in the country. In this study, the BJS calculated conviction rates by looking at "Any conviction," "Any felony conviction" and "Conviction for original felony charge." REAVES, *supra* note 162, at 25 fig.18. However, the Codebook for the study leaves it ambiguous whether it counts convictions when the single charge of interest (the most serious one) is modified or when there is a conviction for a different charge. Nor is it clear how multiple pending cases are accounted for. U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., STATE COURT PROCESSING STATISTICS, 1990–2009: FELONY DEFENDANTS IN LARGE URBAN COUNTIES (2014), https://www.icpsr.umich.edu/web/NACJD/studies/2038/datadocumentation [https://perma.cc/2MB5-RJFW].

263. Excel_Master List_Coding Alameda Cases (on file with Author); Alameda 2020 Conduct in 2021_12_1_23.

multiplicity of cases, like the multiplicity of charges, is part of the charging culture. Returning one last time to the three example cases above, #1 (C. Woods), #2 (J. Cunningham), and #3 (R. Hoffman) would all count as convictions under this method. Or, put another way, only thirty-five of the 440 cases (8.0%) in the state sample ended without the defendant being convicted of some charge in the felon-in-possession case or a case that was tied to the felon-in-possession case through a plea.[264] Seen in this light, the conviction rate in state court closely resembles the conviction rate in federal court, despite the many claims to the contrary in the literature.

The multi-charge, multi-case calculation of the conviction rate is onerous. It cannot be done by reviewing the single file for each case. Rather, it requires looking at the change-of-plea and sentencing transcripts in each of the defendants' pending cases to determine what charges were dismissed in exchange for what pleas. This is time-intensive work, and it requires access not only to the felon-in-possession case file, but also to the defendant's other court files. Though it may be difficult to track the multiplicity of charges and cases, there is no alternative to it. If state prosecutors employ a multiplicity of charges and cases and federal prosecutors do not, the failure to account for this multiplicity will have a damaging skew on the comparison between state and federal conviction rates.[265] The larger methodological point is that we need to measure the state system by its own metrics, rather than by the federal ones.

5. Sentencing severity

Seemingly everyone agrees that the federal system punishes felon-in-possession cases more severely than the state system. My case study supports and complicates this claim.

I start with the support for the traditional claim about sentencing severity. In my federal sample, the average sentence for the nineteen defendants convicted of felon-in-possession was twenty-four months in

264. *Id.*

265. I provide more discussion about the generalizability of these different charging styles in *infra* Section III.A. *See also* Rodney F. Kingsnorth, Randall C. MacIntosh & Sandra Sutherland, *Criminal Charge or Probation Violation? Prosecutorial Discretion and Implications for Research in Criminal Court Processing*, 40 J. CRIMINOLOGY 553, 561, 574 (2002) (noting problems with "dichotomous" treatment of charges as either convictions or dismissals: "Cases rejected or dismissed, but continued by prosecutors for further action as violations of probation, should not be counted as attrition").

prison.[266] In its nationwide data, the Sentencing Commission found an average sentence of thirty-five months nationwide for those convicted without aggravating circumstances.[267] That average goes up if the defendant was found to have possessed a stolen gun, for example, or found to have used the gun in the commission of a crime.[268]

On the state side, I recorded the sentence for every closed case, but it proved difficult to average the sentences. One problem stemmed from the multiplicity of charges. For example, J. Gonzalez was convicted of felon-in-possession and sentenced to one day in jail with one day of credit for time served.[269] As part of his plea, he admitted a probation violation, in a different case, and was sentenced to 730 days in jail (with 282 days' credit).[270] Should his sentence count as zero days in jail (one day, less one day) or 448 days (730 days, less 282 days) or something else? Or consider C. Aguilar, who pled no contest to felon-in-possession.[271] He was sentenced to one day in jail with one day of credit.[272] At the same time, he admitted a probation violation, which resulted in jail sentence of 180 days with 180 days' credit.[273] How should the length of his sentence (or sentences) be calculated? The confluence of multiple charges, multiple cases, and a great deal of pre-trial custody time makes averaging state sentences unwieldy—especially since the pre-trial custody time can be driven by the

266. Chart 2_Federal defendant sentencing (on file with Author). This set includes two defendants who spent a significant amount of time in custody and were sentenced to time-served. Minute Order, United States v. McChristian, No. 20-CR-00258 (N.D. Cal. Feb. 24, 2022), ECF No. 57; Minute Order, United States v. Bernstine, No. 21-CR-00394 (N.D. Cal. Nov. 1, 2022), ECF No. 38. It also included D. Chung who was sentenced to twelve months and a day on felon-in-possession and the same time, to be served concurrently, on a wire fraud count in the same case. Minute Order, United States v. Chung, No. 21-CR-00186 (N.D. Cal. June 24, 2022), ECF No. 89.

267. SENTENCING COMMISSION REPORT, *supra* note 190, at 3.

268. *Id.* at 24–25. The Commission notes that 88.8% of the 2k2.1 defendants are "prohibited persons," and 79% of those prohibited persons are "prohibited" because they have been convicted of felonies. *Id.*

269. Sentencing, People v. Gonzalez, No. 20-CR-013081 (Cal. Super. Ct. Alameda Cnty. Mar. 14, 2022).

270. Waiver on Plea of Guilty/No Contest at 1–2, People v. Gonzalez, No. 20-CR-013081 (Cal. Super. Ct. Alameda Cnty. Mar. 14, 2022).

271. Waiver of Rights and Plea Form at 1, People v. Aguilar, No. 20-CR-010141 (Cal. Super. Ct. Alameda Cnty. Oct. 15, 2020).

272. Certified Convicted No Contest, People v. Aguilar, No. 20-CR-010141 (Cal. Super. Ct. Alameda Cnty. Oct. 15, 2020).

273. Certified Convicted No Contest, People v. Aguilar, No. 20-CR-010141 (Cal. Super. Ct. Alameda Cnty. Oct. 15, 2020).

seriousness of the other charges and cases pending against the defendant.

One way to get a rough estimate of the severity of state sentences is to focus only on cases in which felon-in-possession was the sole charge of conviction and there were no other cases pending. That left me with just seventy-nine cases. The average sentence in those cases was 159.5 days in custody and 80.6 days' credit for time served.[274] This is some approximation of the average felon-in-possession sentence. Another way to get a rough estimate on sentencing length is to use the standard plea offer: 120 days in custody.[275] Plainly, either of these methods of estimating the state sentences for felon-in-possession shows the state sentence to be far smaller than the federal sentences discussed above. And even if the average state and federal sentences were identical, the federal sentences would be longer because the state defendants will typically serve only 50% of their sentence (because of reduction for good conduct in custody) while the federal defendants will serve at least 85% of their sentences (because of fewer reductions for good conduct).[276] No one looking at the data could claim that the state system punishes felon-in-possession as severely (or more severely) than the federal system. But that may not be the right way to compare sentence severity.

Instead of comparing felon-in-possession convictions and sentences, maybe we should compare the two systems' respective treatment of the *conduct* underlying the felon-in-possession charges. As we will see, examining the underlying conduct complicates the claim that the federal system is tougher. Indeed, if we examine whether a gun was fired and whether that shot caused injury or death, we will find that the two systems punish different types of conduct. The state system is

---

274. Excel_Sentencing Calculations_Master List (on file with Author); Alameda 2020 Conduct in 2021_12_1_23, sheet 5 and sheet 6 (on file with Author).

275. In one hearing, Judge Kevin Murphy referred on the record to a "I don't want to say 'standard,' but often made, 120-day offer on gun cases where people don't have much of a record; and maybe they have a misdemeanor conviction in the background and they pick up a gun case." Sentencing Transcript at 4, People v. Estrada, No. 20-CR-011419 (Cal. Super. Ct. Alameda Cnty. Nov. 2, 2020).

276. *Compare An Overview of the First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp [https://perma.cc/V8EL-UJBC] (describing good conduct credits up to just under 15%), *with* CAL. PENAL CODE § 2933(b) (describing half-time credits for prison sentences), *and* CAL. PENAL CODE § 4019 (describing half-time credits for pre-trial and jail custody).

more inclined to take and severely punish the cases that involve *violent* felon-in-possession conduct more severely.

Using my state and federal data, along with the numbers from the Sentencing Commission's nationwide analysis, I calculated the proportion of state cases and federal that involved the discharge of a gun, a non-fatal injury from that gunshot, and a fatality from the gunshot.[277] I did this for the state and federal data. Table 3 presents the results.

277. SENTENCING COMMISSION REPORT, *supra* note 190, at 31. A note on how I interpreted the Sentencing Commission's findings. In Figure 26, the report finds that 11.0% of all cases involved the discharge of a gun by a defendant or co-participant. Figure 26 then subdivides those 11.0% of gun-discharge cases. In 18.3% of the discharge cases, someone was injured. In 4.1% of the discharge cases, someone was killed. In 3.6% of the discharge cases, there was a self-inflicted injury. In 74.1% of the discharge cases, there was no physical harm. To calculate the percentage of all federal felon-in-possession cases that involved a non-fatal injury, I multiplied 11.0% (the portion of all cases involving a gunshot) by 18.3% (the portion of all gunshot cases involving injuries). That resulted in a finding that 2.0% of all the cases involved injuries. To calculate cases involving death, I multiplied 11.0% (the portion of all cases involving a gunshot) by 4.1% (the portion of all gunshot cases involving death) to find that 0.45% of all the cases in the report involved death. The Commission treats self-inflicted injuries separately. I will note that the Commission's methods, if anything, overstate the number of cases that involve gun violence because the Commission counts cases in which the defendant or a "co-participant" fired a gun. Imagine a shooting involve three co-defendants and one gunshot. That single shot could end up counting as three gunshot cases if the Commission's one-quarter random sampling happened to pick up all three co-defendants. By contrast, in my state numbers, I calculated whether the defendant—not a co-defendant—fired a gun, and injured or killed a person.

TABLE 3

	State Cases (N = 534)	**Federal: Case Study (N = 22)**	**Federal: Sent. Comm'n. (N = 1796)**
Gunshot	16.7%[278]	9.1%	11.0%
Non-Fatal Injury from Gunshot	3.9%[279]	0.45%[280]	2.0%
Death from Gunshot	2.6%[281]	0%	0.45%

In my case study, gunshot cases make up 16.7% of the state sample compared to just 9.1% of my federal sample and 11.0% of the national sample. And gunshot-injury cases make up 3.9% of my state sample, compared to 0.45% of my federal sample and just 2.0% of the national federal sample. The disparities are even more pronounced when it

278. There were eighty-nine cases. Alameda 2020 Conduct in 2021_12_1_23, sheet 2; Gun Crimes Only_12_1_23, sheet 1.

279. There were twenty-one cases. Alameda 2020 Conduct in 2021_12_1_23, sheet 2; Gun Crimes Only_12_1_23, sheet 1.

280. In my federal sample, one case involved a gunshot that injured another person non-fatally. Complaint at 1, 7, United States v. Chaidez, 21-CR-00377 (N.D. Cal. Feb. 19, 2021), ECF No. 1. There is another case—*United States v. Anderson IV*—in which the defendant fired a gun three times at two men who attacked him in a mall parking lot, before the men fled in a car. Complaint at 1, 6, United States v. Anderson IV, No. 22-CR-00084 (N.D. Cal. Jan. 12, 2021), ECF No. 1; Government's Sentencing Memorandum at 2, United States v. Anderson IV, No. 22-CR-00084 (N.D. Cal. Nov. 24, 2023), ECF No. 71. According to the prosecutor, it is "unknown whether any of the shots Mr. Anderson fired at the vehicle struck it." Government's Sentencing Memorandum at 5, United States v. Anderson IV, No. 22-CR-00084 (N.D. Cal. Nov. 24, 2023), ECF No. 71. Thus, I did not count this case as involving a non-fatal gunshot injury to the assailants. The prosecution noted that Anderson himself was wounded by a gunshot and that "it is more likely than not that Mr. Anderson shot himself." *Id.* at 4 & n.1. The memo noted that there is "no evidence" that the attackers fired a gun at him. *Id.* Consistent with the Sentencing Commission's methods, I did not count a self-inflicted wound as a gunshot-injury case.

281. There were fourteen cases. Alameda 2020 Conduct in 2021_12_1_23, sheet 2; Gun Crimes Only_12_1_23, sheet 1.

comes to gunshot injuries that resulted in death. Those make up roughly 2.6% of my state sample, compared to 0% of my federal sample, and 0.45% of the national federal sample. This finding contributes to the literature by suggesting that state felon-in-possession cases may be qualitatively different from federal ones: they are more violent. Such a finding is consistent with others' observations about felon-in-possession cases. As noted by David Patton, a leading scholar on federalization (and a federal public defender), "the vast majority of firearms-related crime is prosecuted in state court, including nearly all such crime involving the actual use of violence."[282] My case study provides data for this claim.

This insight about the more-violent felon-in-possession cases in state court complicates the claim that the federal system punishes more severely. Here is how. The key, as always, is to keep in mind the cases that could have gone federal but ended up staying in state court. In my case study, there are sixteen sentences in state court that exceed the highest sentence in my federal sample. These top sentences are as high as fifty-five years in prison.[283] They involve convictions for murder,[284]

282. Patton, *supra* note 112, at 1464. His article does not provide citation for this claim.

283. *See infra* notes 284, 286 (discussing *People v. Robinson* and *People v. Jackson*).

284. People v. Haynes, No. 20-CR-002198A (Cal. Super. Ct. Alameda Cnty. Feb. 7, 2020) (sentencing the defendant to fifty years to life on conviction of murder, shooting into occupied dwelling or vehicle, carjacking, felon-in-possession, and carrying a loaded firearm, with credit for time served of 641 days); People v. Robinson, No. 20-CR-011984 (Cal. Super. Ct. Alameda Cnty. Sep. 9, 2020) (sentencing the defendant to fifty years for conviction of murder and possession of a firearm by a violent felon, with credit for five years' time served); People v. Paige, No. 21-CR-001324 (Cal. Super. Ct. Alameda Cnty. filed Jan. 28, 2021) (sentencing defendant to twenty-one years in prison with credit for 525 days' time served).

manslaughter,[285] attempted murder,[286] robbery,[287] and assault with a weapon.[288] All of them exceed the highest sentence given out to a federal felon-in-possession defendant in my sample. What is important to note is that federal prosecutors could have brought felon-in-possession charges—or other federal charges—against all these defendants. They could have paired felon-in-possession with other federal charges. But federal prosecutors did nothing in these cases.

---

285. People v. Walker, No. 20-CR-011345 (Cal. Super. Ct. Alameda Cnty. Aug. 24, 2020) (sentencing the defendant to twenty-five years for voluntary manslaughter conviction, less 738 days credit for time served); People v. Coleman, No. 20-CR-014011 (Cal. Super. Ct. Alameda Cnty. Oct. 22, 2020) (sentencing the defendant to twenty-one years for voluntary manslaughter conviction, less 707 days credit for time served); People v. Kirk, No. 20-CR-003244 (Cal. Super. Ct. Alameda Cnty. Feb. 26, 2020) (sentencing the defendant to 11 years for voluntary manslaughter conviction, less 3.41 years credit for time served).

286. People v. Anderson, No. 20-CR-007190A (Cal. Super. Ct. Alameda Cnty. May 14, 2020) (sentencing the defendant to 14.3 years for two counts of attempted murder, two counts of assault with a semiautomatic, one count shooting into inhabited car or dwelling, two counts felon-in-possession, less 369 days credit for time served); People v. Jackson, No. 20-CR-005810B (Cal. Super. Ct. Alameda Cnty. Apr. 20, 2020) (sentencing the defendant to seven years for attempted murder conviction, with credit for 2.77 years served).

287. People v. Martinez, No. 20-CR-005389 (Cal. Super. Ct. Alameda Cnty. Apr. 14, 2020) (sentencing the defendant to twenty-seven years total: six-year robbery conviction, doubled by strike prior, with ten-year consecutive sentence for gun enhancement and six additional years for serious prior felony enhancement, less credit for 868 days); People v. Walton, No. 20-CR-015923B (Cal. Super. Ct. Alameda Cnty. Dec. 10, 2020) (sentencing the defendant to 9.125 years on robbery conviction and gun-use enhancement, less 453 days credit); People v. Balucan, No. 20-CR-013691A (Cal. Super. Ct. Alameda Cnty. Oct. 15, 2020) (sentencing the defendant to six years for conviction on robbery with gun-use enhancement, less credit for 737 days served); People v. Girtman, No. 20-CR-015311 (Cal. Super. Ct. Alameda Cnty. Nov. 30, 2020) (sentencing the defendant to eight years for conviction on robbery, gun-use enhancement and parole violation admitted, less credit for 725 days served); People v. Vines, No. 20-CR-015187 (Cal. Super. Ct. Alameda Cnty. Nov. 24, 2020) (sentencing the defendant to six years for robbery conviction and gun-use enhancement, less 644 days served); People v. Howard, No. 21-CR-000534 (Cal. Super. Ct. Alameda Cnty. filed Jan. 14, 2021) (sentencing defendant to sixteen years in prison with credit for 564 days served).

288. People v. Wilkerson, No. 20-CR-009540 (Cal. Super. Ct. Alameda Cnty. Nov. 24, 2020) (sentencing the defendant to sixteen years for assault with a deadly weapon on a police officer, less 1,127 days credit for time served); People v. Malone, No. 20-CR-014682 (Cal. Super. Ct. Alameda Cnty. Nov. 5, 2020) (sentencing the defendant to ten years for assault with a semiautomatic weapon and gun-use and other enhancement, less credit for 2.825 years served).

Rather, they allowed the state system itself to adjudicate and sentence these defendants.

There is nothing wrong with the decision not to bring federal charges. It may even reflect an admirable conservation of scarce resources. Murder, attempted murder, robbery, and other violent cases are prioritized by even the busiest state courts. So, there may be no need for federal prosecutors to get involved in such cases. Indeed, it would be odd for a federal prosecutor to pursue a felon-in-possession case against someone charged in state court with murder. Even though we do not expect these murder cases to go federal, neither can we ignore them when we are comparing the severity of federal and state sentences. The claim that the federal system punishes more severely must account for this slice of violent, felon-in-possession cases, where the state system actually seems to punish defendants more severely. This insight complicates the claim about superior federal sentences.

Indeed, the claim about federal sentencing severity unravels in another set of cases, too. Look at felon-in-possession cases where there is some violent conduct, but the state system issues only a light sentence. A case that receives a light punishment in state court might seem like the ideal situation for a federal felon-in-possession prosecution. Indeed, scholars and practitioners routinely claim that a reason for taking a case federal is that the state system has failed to punish it severely enough.[289] And, if one looks only at the cases that go

289. *E.g.*, United States' Sentencing Memorandum, *supra* note 43, at 2–3 ("To say that he has been undeterred would be a gross understatement."); United States' Sentencing Memorandum at 5, United States v. Pittman, No. 21-CR-00251 (N.D. Cal. Nov. 15, 2022), ECF No. 22 ("[D]efendant's numerous other criminal justice contacts—including an outstanding burglary case out of Santa Clara and a December 2020 search warrant that uncovered additional firearms in a residence Pittman was also found inside—further underline the need for a Guidelines sentence of [thirty-seven] months."). The Justice Department's "Petite Policy," which sets out criteria for pursuing a federal prosecution after a state conviction, mentions a variety of interests that could justify federal prosecution, including justice where the state courts are unable to deliver it. U.S. Dep't of Just., Just. Manual 9-2.031—Dual and Successive Prosecution Policy ("Petite Policy"), https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals [https://perma.cc/HP69-XRR4] (last updated Jan. 2021). As others have noted, the Petite Policy itself applies only to potential federal prosecutions that occur *after* a state conviction or acquittal for the conduct. *See* Clymer, *supra* note 73, at 717 n.312 (discussing extent of Petite Policy and noting that "the Department of Justice has not imposed Petite-Policy-like constraints on decisions to prosecute some offenders in federal court when others who have engaged in similar criminal conduct are prosecuted in state court"). But the interests

federal, it certainly can seem like federalization plays this backstop role.[290] But, by studying all the cases, including those that stayed in state court, we may begin to question that backstop role. For example, I identified felon-in-possession cases involving allegations of gun-wielding domestic violence. Within these cases, I selected those in which the sole conviction in state court was for felon-in-possession and no federal prosecution ensued. As you read about the cases below, ask yourself why these cases did not go federal:

- S. Mitchell allegedly fired a gun several times at his ex-girlfriend and her family members during the ex-girlfriend's July 4th party.[291] He was charged with two counts of attempted murder, two counts of assault with a semiautomatic firearm, a section 12022.53(c) sentencing enhancement, shooting at an inhabited dwelling, several counts of shooting at an unoccupied vehicle, and felon-in-possession.[292] He pled no contest to felon-in-possession, saw all other charges dropped, and was sentenced to time served—117 days—and probation.[293]

---

discussed in these types of prosecutions likely inform the decision to bring federal charges in a case that is still pending in state court. *Id.*

290. *E.g.*, Briana Montalvo, *Feds File Charges After Undocumented Immigrant Found Not Guilty in Kate Steinle Case*, ABC7 NEWS (Dec. 6, 2017), https://abc7news.com/news/feds-file-charges-after-undocumented-immigrant-found-not-guilty-in-kate-steinle-case/2745547 [https://perma.cc/9S69-UY3G] (discussing federal felon-in-possession charges against a defendant who had been acquitted in a murder trial in state court); @USAttyPatrick, X (Oct. 21, 2021, 6:02 PM), https://twitter.com/USAttyPatrick/status/1319036347617783815 [https://perma.cc/M5ZY-5ANM]. U.S. Attorney Ryan Patrick explained why felon-in-possession and alien-in-possession charges were filed against a man charged in state court with capital murder for allegedly killing a Houston police officer: "I have little faith that local charges could be sufficient to hold him. Multiple times this summer filed on capital murder defendants who were realized with few conditions and were still a threat to safety or those with new law violations who were left on bond." @USAttyPatrick, X (Oct. 21, 2021, 6:34 PM), https://twitter.com/usattypatrick/status/1319044364170154029 [https://perma.cc/EZX8-3XMK].

291. Probable Cause for Warrantless Arrest at 1, People v. Mitchell, No. 20-CR-009996 (Cal. Super. Ct. Alameda Cnty. July 17, 2020).

292. Complaint at 1–2, People v. Mitchell, No. 20-CR-009996 (Cal. Super. Ct. Alameda Cnty. July 17, 2020).

293. Sentencing and Report, People v. Mitchell, No. 20-CR-009996 (Cal. Super. Ct. Alameda Cnty. Jan. 27, 2021).

- R. Thomas allegedly abused his pregnant wife. The arrest report said that he "picked the victim up by her neck and slammed her on the floor which caused her to lose consciousness."[294] Three days later, Thomas came to the sheriff's office to retrieve his belongings.[295] Deputies attempted to arrest him, but he resisted, the report said.[296] Because Thomas was on probation, police were permitted to search his car where they found an AK-47, an AR-15, and a baton.[297] Thomas was charged with domestic violence, misdemeanor resisting arrest, felon-in-possession, possession of an assault weapon, possession of ammunition, and misdemeanor possession of a leaded cane or club.[298] He was sentenced to 120 days in county jail, with seventy-two days credit for time served.[299]

- Morales allegedly came to his ex-wife's house before 7:00 AM and demanded to be let inside.[300] When his ex-wife allowed him to enter, Morales "physically assaulted" her "by pulling her by the hair and taking her to the ground," according to the police report.[301] Morales then struck her and threatened her with a gun, saying "If you call the police[,] I will kill you!"[302] Morales was charged in state court with the felonies of criminal threats, domestic violence, felon-in-possession, and possession of ammunition by a prohibited person.[303] He entered a no contest plea to felon-in-possession and a no contest plea to vehicle theft in another case. He was sentenced to 112 days in custody with credit for 112 days served.[304]

---

294. Probable Cause for Warrantless Arrest at 1, People v. Thomas, No. 20-CR-007255 (Cal. Super. Ct. Alameda Cnty. May 19, 2020).
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. Sentencing Order, People v. Thomas, No. 20-CR-007255 (Cal. Super. Ct. Alameda Cnty. May 15, 2020).
300. Probable Cause for Warrantless Arrest, People v. Morales, No. 20-CR-014169 (Cal. Super. Ct. Alameda Cnty. Oct. 27, 2020).
301. *Id.*
302. *Id.*
303. *Id.*
304. People v. Morales, No. 20-CR-014169 (Cal. Super. Ct. Alameda Cnty. filed Dec. 16, 2020).

And these are just some of the domestic violence episodes involving guns that failed to trigger federal prosecution.[305]

Given that these defendants received roughly the standard sentence for felon-in-possession, 120 days,[306] these cases might seem well-suited for federal prosecution. And it would not be hard to articulate a federal interest in prosecuting domestic violence cases, especially considering statistics on the increased deadliness of domestic violence when the abuser possesses a gun.[307] Indeed, federal law prohibits those convicted of even misdemeanor domestic violence from possessing guns because of the interest in stemming domestic violence.[308] And early federalization programs, like Project Exile, specifically targeted cases involving domestic violence.[309] Looking over the twenty-two federal cases in my study, only one of them involved an allegation of domestic violence.[310] The lack of focus on domestic violence is consistent with the U.S. Sentencing Commission's findings that only 2.5% of federal gun-possession convictions began with an arrest for domestic violence.[311] Nor is domestic violence the only type of potential federal interest that was ignored by federal prosecutors.

My goal is not to argue for more cases to go federal (or for fewer to go federal). Rather, I want to surface the types of policy questions that we could ask of federalization programs if only we knew more about the cases that could have gone federal yet stayed in state court. As it stands, there is no accountability for federalization decisions.

---

305. *See, e.g.*, People v. Scallions, No. 20-CR-004086A (Cal. Super. Ct. Alameda Cnty. Mar. 9, 2020); People v. Pearson, No. 20-CR-011024 (Cal. Super. Ct. Alameda Cnty. Aug. 14, 2020); People v. Hernandez, No. 20-CR-005297 (Cal. Super. Ct. Alameda Cnty. Apr. 9, 2020); People v. Cruz, No. 20-CR-006965 (Cal. Super. Ct. Alameda Cnty. May 11, 2020).

306. Sentencing Transcript at 3–5, People v. Estrada, No. 20-CR-011419 (Cal. Super. Ct. Alameda Cnty. Aug. 25, 2020).

307. *Domestic Violence and Firearms*, JOHNS HOPKINS CTR. GUN VIOLENCE SOLUTIONS, https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms [https://perma.cc/L7E6-BKZD] (last updated July 2020) (citing research that "a woman is five times more likely to be murdered when her abuser has access to a gun").

308. 18 U.S.C. § 922(g)(9).

309. Raphael & Ludwig, *supra* note 85, at 254.

310. Criminal Complaint at 3 n.1, 6 n.3, United States v. Chaidez, No. 21-CR-00377 (N.D. Cal. Feb. 19, 2021), ECF No. 1.

311. SENTENCING COMMISSION REPORT, *supra* note 190, at 33.

Prosecutors do not reveal their criteria for choosing cases,[312] and outsiders who guess about the criteria do so only by considering the sliver of cases that go federal. By examining the cases that satisfy a federal interest, yet stay in state court, we can better evaluate the literature's claims about what makes a case go federal.

In addition, studying the cases that stay stateside raises normative questions about federal prosecutors' decisions on when to federalize cases. Why *not* domestic violence? Why not other types of crimes? These questions cannot come to the surface until we can identify the cases that could have been federally prosecuted yet were not.

D. Summary of the Results

The case study reaches several new and counterintuitive findings about the federalization of crime. It does so by examining not only the cases that went federal, but also the cases that could have gone federal yet stayed in state court. Each result is presented in more depth above, but this short redux gathers them in one place for ease of reference:

- *Frequency*. The case study provides an estimate of the frequency with which cases go federal. In my study, roughly 4% of the eligible cases ended up being federally prosecuted.[313]

- *Federalization: pathways and definitions*. The case study documents the different paths to federal court. The study also documents the blurry edges of federalization. Which cases could have gone federal and which cases did go federal? Does it count as federalization when a defendant pleads guilty in state court under threat that he will be federally prosecuted if he fights the state case? These and other definitional issues come into focus only when one attends to the details of the flow of cases from state to federal court.[314]

- *Racial discrimination*. The case study challenges the claim that the racial disparities among federal defendants result from federal prosecutors' case-selection decisions. The study finds that the proportion of Black defendants in the state court pool

312. Transcript of Remote Videoconference Proceedings Appearances, *supra* note 39, at 41–42.

313. *See supra* notes 208–211 and accompanying text.

314. *See supra* notes 212–224 and accompanying text.

is slightly higher than the proportion in the federal pool. This suggests the racial disparities in federal court may have their origin upstream in state court.[315]

- *Conviction rates*. The case study takes on the claim that federal prosecutors convict at a higher rate than state prosecutors. If one accounts for the multiplicity of charges and the multiplicity of cases, the state conviction rate rivals (and slightly exceeds) the federal conviction rate. This finding shows the importance of analyzing the state system according to its own paradigms, rather than according to a federal one.[316]

- *Sentencing severity*. The case study supports the conventional wisdom that sentences for felon-in-possession are significantly higher in the federal system than the state system. However, the case study complicates the broader claims about federal sentencing severity. It does so by comparing cases based on their *conduct*. The most violent felon-in-possession conduct is more likely to be punished in the state system—and punished more severely in the state system—than to find its way into the federal system. This is a function of federal prosecutors taking on felon-in-possession cases that are less violent than the cases that state prosecutors take on—less likely to involve gunshots, injuries, or deaths. This comparison requires caution in asserting that the federal system is tougher than the state system.[317]

- *Case selection*. An analysis of the cases that could have gone federal but didn't, in turn, raises questions about the criteria for taking cases federal. Without knowing which cases federal prosecutors passed up—think, here, domestic violence—it is impossible to evaluate the normative desirability of the prosecutors' federalization decisions.[318]

---

315. *See supra* notes 225–248 and accompanying text.
316. *See supra* notes 249–265 and accompanying text.
317. *See supra* notes 266–281 and accompanying text.
318. *See supra* notes 282–312 and accompanying text.

III. EXTENSIONS, LIMITATIONS, AND IMPLICATIONS

Can the study of a single charge, in a single county, in a single year provide insight on the federalization of crime nationally? This final Part describes the extensions and limitations of the case study, as well as its implications for the literature.

A. Limitations and Extensions

State court proceedings are essential to the federalization story. But there is no mega-dataset that can be used to study all state courts, even for just a single charge. To study the state system in any depth, it becomes necessary to focus on a small corner of it. For me, that was Alameda County in 2020. The downside of digging into just one year and one county is that the findings from the study might not carry over to other counties or other years. I acknowledge that risk. Yet there is good reason to believe that the dynamics I observed in my case study would be found in other busy, urban jurisdictions around the country. Let me explain why.

1. Location: Limitations and extensions

The multiplicity of charges and cases that I observed in Alameda County is resonant with other scholars' descriptions of how urban criminal justice systems operate. While the federalization literature has not factored in this multiplicity into its analysis of conviction rates and sentencing severity, the plea bargaining literature has long discussed this dynamic. The idea behind charge bargaining is that prosecutors allege numerous offenses against a defendant, and they expect that the defendant will plead guilty to one charge, in exchange for dismissing the rest of the charges.[319] This understanding, in turn, creates a going

319. In their historical study of Alameda County criminal justice, Lawrence Friedman and Robert Percival noted: "Nowadays, it is common practice in Alameda County to charge a defendant with a whole barrage of 'counts'; then, as part of the bargain, the prosecution drops all but one or two. This was not the practice in our period." FRIEDMAN & PERCIVAL, *supra* note 174, at 176 n.68. In discussions of "charge bargaining," scholars have noted that prosecutors bring cases with multiple charges at once, and prominent scholars have argued that conviction rates should account for this practice. *See, e.g.*, Ouziel, *supra* note 16, at 2254–55 n.57; Ouziel, *supra* note 17, at 1111–12; Richard Lorren Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. REV. 1047, 1082 (2021). In a statewide study of gun charges in Illinois, from 2009 to 2019, researchers found that "illegal gun possession arrest events included an average of 2.75 total arrest charges." LOYOLA CTR. FOR CRIM.

rate for different types of conduct, and seasoned actors in the system seem to know what a case is worth. This is essentially what I have observed in my case study. Given this charge-bargaining framework, and its multiplicity of charges and cases, researchers must account for all the charges and cases in calculating the conviction rate.[320] Failure to account for this multiplicity will improperly deflate the conviction rate in state court. I suspect this key finding would be reproduced in any jurisdiction that engages in charge bargaining.

But don't just take my word for it. The State Court Processing Statistics (SCPS) survey, which examined dispositions in state courts around the country, confirmed the need to account for the multiplicity of charges in calculating the conviction rate.[321] In reporting conviction rates in state court from 1990 through 2009, the SCPS puts the conviction rate at 40–50% if one focuses on the outcome of the "original felony charge,"[322] 50–60% range if one focuses on whether there was "any felony conviction,"[323] and 65–75% range if one counts cases that resulted in "any conviction," even misdemeanors.[324] Each refinement of the SCPS's conviction rate to include more charges and more cases appears to increase the efficacy of state prosecutors—just as in my study. Had the SCPS's data tracked the multiplicity of cases, the conviction rate would likely be even higher. This leads me to believe that similar measurement methods in other counties would lead to a similar rise in the state-court conviction rate.

JUST. RSCH., POL'Y & PRACT., ARRESTS IN ILLINOIS FOR ILLEGAL POSSESSION OF A FIREARM 7 (2020), https://loyolaccj.org/IllinoisGunPosessionArrestBulletinjuly2020[9718].pdf [https://perma.cc/PTP5-YVF2]. The researchers found, similar to my study, that 37% of illegal gun-possession arrests include no "non-gun charges." *Id.*

320. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 35, 114 (2002) (urging attention not to the "'conviction rate' but rather the 'as charged conviction rate'" and arguing that whether a conviction occurred "as charged . . . best captures for public debate the virtues of a system that makes its charging decisions consistently and in full public view"); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 873 (1995) (suggesting that prosecutors be incentivized to "obtain[] convictions either by trial or by plea under the condition that the defendant is convicted on the same charge or charges that the prosecutor pursues at the outset of the case").

321. REAVES, *supra* note 162, at 2, 4 tbl.2, 24 tbl.21.

322. *Id.* at 25 fig.18.

323. *Id.*

324. *Id.*

The sentencing severity story in my case study also seems likely to be repeated around the country. Comparing federal convictions for felon-in-possession with state convictions for felon-in-possession, all the evidence points to federal sentences being significantly more severe. But when we compare the severity of sentences in light of the different types of conduct that each system handles, we see that there are certain types of conduct for which the state system will seem more severe. I do not have state-court data on the numbers of gun-firing felon-in-possession cases in other state courts. Others, including David Patton, have noted that "the vast majority of firearms-related crime is prosecuted in state court, *including nearly all such crime involving the actual use of violence*."[325] This suggests that my findings that state felon-in-possession cases are more violent than federal ones is a finding that could be replicated elsewhere. Indeed, the Sentencing Commission's nationwide study has found that just a small percentage of federal felon-in-possession convictions nationwide involve gunshots, gun injuries, and gun deaths.[326] I believe it is reasonable to conclude that murders, attempted murders, and other violent gun crimes—committed by felons—are being prosecuted primarily in state courts—and not just in Alameda County.

The above paragraphs suggest why my findings in Alameda County could be generalizable to other large, urban counties. Here, I address the concern that federal prosecutors I studied are not representative of federal prosecutors as a whole. A skeptical reader, spurred on by the Bay Area's reputation for liberal politics, might wonder whether the federal prosecutors in this case study are unusually soft on crime. Maybe federal prosecutors in other jurisdictions would take cases federal more frequently or would charge more (and more severe) offenses in those cases. Perhaps federal prosecutors in another district might take on a greater proportion of the gun-firing felon-in-possession cases, thus changing the dynamic observed in this case study. This skeptical reader might point out that the average sentence in my federal sample—twenty-four months in prison—was well below the national average of thirty-five months, as measured by the Sentencing Commission.[327] Indeed, a particularly concerned observer might point out that none of the felon-in-possession cases in my federal sample involved the vaunted charging of 18 U.S.C. § 924(c), an offense

325. Patton, *supra* note 112, at 1464 (emphasis added).
326. SENTENCING COMMISSION REPORT, *supra* note 190, at 31.
327. *See supra* notes 264–265 and accompanying text.

that imposes a consecutive sentence of five, seven, or ten years onto any crime where the defendant possessed, brandished, or discharged, a gun during "a crime of violence or drug trafficking crime."[328] Surely, this is a sign that the federal prosecutors in the Northern District of California, and specifically those bringing cases from Alameda County were aberrantly soft on crime.

These are reasonable concerns. To address them, I gathered some additional federal data. PACER gives complete access to all federal court filings from every district. The Administrative Office of the Courts publishes comprehensive counts of each district's cases and conviction rates. But neither one of these publicly available sources gives statistical data on charging. To obtain federal charging data from across the country, I turned to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University. TRAC provided me with anonymized data on every federal charge in every federal district going back to FY2004.[329] This data allowed me to consider whether prosecutors in the Northern District of California behaved in an unusual way in their handling of felon-in-possession cases.

The first thing I did was to calculate the number of felon-in-possession cases in each district as a proportion of that district's felony docket. Next, I calculated the number of felon-in-possession cases for every 100,000 in population. I used charges filed in 2020. These calculations allowed me to check whether the Northern District of California was charging unusually few felon-in-possession cases. As a comparison group, I selected the eleven most-populous federal districts in the country—the Northern District of California and ten others. I did not count border districts because those districts have such a high proportion of immigration-related criminal prosecutions that those prosecutions shrink the rest of the criminal docket seem miniscule. For readers unfamiliar with the federal districts, I label them by the most recognizable city in the district.

328. 18 U.S.C. § 924(c)(1)(A).

329. I was able to access this data thanks to my position as a TRAC Fellow.

TABLE 4

TABLE 4A

District	§ 922(g)(1) Cases as % of Felony Docket
D.N.J.	19.5
N.D. Ill. (Chicago)	17.29
N.D. Tex (Dallas)	16.96
E.D. Cal. (Sacramento)	12.74
E.D.N.Y. (Brooklyn)	11.19
C.D. Cal. (Los Angeles)	10.7
D. Mass.	9.29
N.D. Cal. (San Francisco)	9.22
N.D. Ga. (Atlanta)	9.18
S.D. Fla. (Miami)	7.67
M.D. Fla. (Tampa)	6.9

TABLE 4B

District	§ 922(g)(1) Cases per 100,000 Pop.
N.D. Tex (Dallas)	5.24
N.D. Ill. (Chicago)	3.16
D.N.J.	2.9
S.D. Fla. (Miami)	1.53
M.D. Fla. (Tampa)	1.44
N.D. Cal. (San Francisco)	1.35
N.D. Ga. (Atlanta)	1.33
E.D.N.Y. (Brooklyn)	1.14
E.D. Cal. (Sacramento)	1.09
C.D. Cal. (Los Angeles)	1.01
D. Mass	0.96

Tables 4a and 4b show that prosecutors in the Northern District of California charge felon-in-possession cases at a rate similar to federal prosecutors in other large districts. Prosecutors in some of districts charge felon-in-possession much more often. But the prosecutors in the Northern District of California are right there in the mix with other big-city districts. This provides some basis for believing that the prosecutors I studied are not unusually hesitant to file gun charges.

It should be noted, of course, that we would need state-court data from all of these jurisdictions to make any claims about how aggressively the federal prosecutors take cases federal. Maybe, in some

of the federal jurisdictions that charge felon-in-possession much more frequently, the state-court prosecutors are also charging felon-in-possession much more frequently. It could be that differences in state-court prosecutions account for the apparent district-to-district differences in federal prosecutions. Further research on state-court charging practices in each of these jurisdictions would be necessary to isolate the role that federal decision-making plays in the differences that we see in Tables 4a and 4b. But, in the absence of that state-court data, the federal numbers above provide some comfort that the federal prosecutors I studied are charging felon-in-possession cases in line with their peers elsewhere.

The data from TRAC data can also address concerns that the prosecutors I studied are under-charging the federalized cases. Recall that in nineteen of the twenty-two cases I studied, prosecutors charged only a single count of felon-in-possession.[330] This practice of "standalone" charging differed dramatically from state court, where the prosecutors I studied almost always charged felon-in-possession alongside other crimes.

Table 5 shows the percentage of "standalone" felon-in-possession cases each in each district. For every case involving felon-in-possession in each district, I calculated whether there were other charges brought under that same case number. If not, I deemed the case to be a standalone offense.

330. *See supra* note 192 and accompanying text for description of standalone charges. Using charging data from TRAC, I examined all charges filed in 2020. I identified all cases that had at least one charge of § 922(g) filed. Using the "Participant ID" field to match cases, I then identified all the § 922(g) cases that had at least one charge other than § 922(g), § 924(a), § 924(d), or 28 U.S.C. § 2461. Then I removed duplicates so that I was counting the number of cases, not charges. That resulted in 9,618 cases that alleged only § 922(g) and 5,332 cases that alleged § 922(g) in addition to some other charge. Excel_ Charge_Nationwide_2020 date_922 standalone.

TABLE 5

District	"Standalone" § 922(g) Cases as % of All § 922(g) Cases
N.D. Cal. (San Francisco)	86.2
E.D.N.Y. (Brooklyn)	83.3
N.D. Ill. (Chicago)	81.5
E.D. Cal. (Sacramento)	77.7
D.N.J.	74.7
N.D. Tex. (Dallas)	73.2
M.D. Fla. (Tampa)	70.9
D. Mass.	69.9
N.D. Ga. (Atlanta)	64.7
C.D. Cal. (Los Angeles)	61.1
S.D. Fla. (Miami)	58.7

Table 5 shows that Northern District of California prosecutors charged a higher proportion of standalone felon-in-possession cases than any other comparator district. This charging profile was followed closely by federal prosecutors in the Eastern District of New York (Brooklyn) and the Northern District of Illinois (Chicago).[331] In other districts, as Table 5 shows, a much smaller proportion of felon-in-possession cases involved "standalone" charges.

This could be a sign that Northern District of California prosecutors are more lenient than some of their peers. Maybe each "standalone" felon-in-possession case is an example of failing to add additional charges. In that case, the prosecutors I studied, like federal prosecutors in Brooklyn and Chicago, are charging felon-in-possession cases significantly more leniently than federal prosecutors in Los Angeles and Miami. But the frequency of standalone charges could also be a sign of aggressive charging, if prosecutors are reaching out with standalone charges to charge defendants whose only crime is gun possession. Perhaps prosecutors in the Central District of California (Los Angeles) are focused primarily on drug trafficking or other

331. Charge_Nationwide_2020 instrument (on file with Author).

priorities and add on felon-in-possession as an afterthought, thus leading to a smaller slice of standalone felon-in-possession cases, while prosecutors in the Northern District of California are targeting cases that do not involve any federal crime except drug possession. If that is the case, it would not really be accurate to see the "standalone" offenses as a sign of charging leniency. Here, again, it would be imperative to know about the state cases that the prosecutors in each federal district are choosing to pass up.

The TRAC data also addresses the idea that the prosecutors I studied are unusually lenient because they did not file § 924(c).[332] Table 6 calculates the number of § 924(c) as a percentage of all the felon-in-possession cases for that district.

TABLE 6

DISTRICT	**PERCENT OF § 922(G)(1) CASES WITH § 924(C) CHARGE**
C.D. Cal. (Los Angeles)	22.7
S.D. Fla. (Miami)	17.5
D.N.J.	17.0
N.D. Ga. (Atlanta)	14.7
M.D. Fla. (Tampa)	13.2
D. Mass.	11.8
N.D. Tex. (Dallas)	10.9
E.D.N.Y. (Brooklyn)	9.6
N.D. Ill. (Chicago)	8.5
E.D. Cal. (Sacramento)	4.5
N.D. Cal. (San Francisco)	1.5

The Northern District of California alleges § 924(c) in a smaller proportion of felon-in-possession cases than any of the comparator districts. This could support an inference that the prosecutors I studied are more lenient than their peers when it comes to asking for this severe mandatory-minimum sentence.[333] This data could also support the inference that the prosecutors I studied are particularly wary of taking on cases involving gun violence. After all, § 924(c) covers situations in which the defendant possesses, brandishes, or uses a gun

332. 18 U.S.C. § 924(c).
333. *Id.*

in "a crime of violence or drug trafficking crime."[334] Alternatively, it could show that when they take such felon-in-possession cases, they do not charge section 924(c) violations because they do not want to impose the five-, seven-, or ten-year consecutive sentence.[335] Or it could reflect some mix of case selection and charging preferences. Again, more data is needed to understand why a far smaller proportion of felon-in-possession cases carry § 924(c) charges in the Northern District of California than elsewhere.

But here is why I do not read too much significance into this data on § 924(c) charging. First, charging decisions are cheap. The fact that some district has alleged § 924(c) does not mean that the defendants are being convicted of this charge. According to the Sentencing Commission's nationwide data, § 924(c) convictions are found in only 4.8% of all convictions under the sentencing guideline for felon-possession.[336] This suggests that, regardless of what federal prosecutors are doing in charging, the number of § 924(c) convictions remains very low. That counsels against seeing this data as a sign of leniency in the Northern District of California. The other reason not to read too much into the § 924(c) data is that we already have a detailed, nationwide estimate for how many felon-in-possession cases involve gunshots, non-fatal-injuries, or death. The Sentencing Commission reports those percentages as 11.0%, 2.0%, 0.45%, respectively.[337] For those who worry that some federal prosecutors' offices are taking a much higher proportion of violent felon-in-possession cases, the Sentencing Commission's data shows that, overwhelmingly, federal prosecutors are not taking felon-in-possession cases that involve gunshots, injuries, or deaths. The dynamic I have observed in my case study—federal prosecutors avoiding the more violent felon-in-possession cases—likely extends to other jurisdictions, at least according to the Sentencing Commission's data.

Are the findings of my case study representative of federalization nationwide? More data would be required from federal *and* state courts to answer this question. And, as the Article has argued throughout, such state-court data is extremely difficult to obtain. Ultimately, the best I can do is explain why I believe the findings in my study would have resonance beyond Alameda County and flag some of the reasons

334. § 924(c)(1)(A).
335. § 924(c)(1)(A)(i)–(iii).
336. U.S. SENT. COMM'N., *supra* note 6.
337. SENTENCING COMMISSION REPORT, *supra* note 190, at 31.

they may not. This is all in service of the larger argument: Researchers ought not compare two systems—federal and state—without first gathering data on both.

2. Timing: Limitations and extensions

The timing of my case study presents another dimension in which my findings might fail to generalize.

I began working on this project at the very end of 2021. I chose to study conduct from 2020 because I needed a year that was recent enough to be relevant, but far enough in the past that the cases would have reached resolution.[338] To analyze case outcomes, I needed to give each case the time to be litigated all the way to a conclusion. This lag time was also essential for giving the cases time to go federal. Some cases crawl through state court for six months or longer before federal prosecutors step in. Furthermore, the year 2020 was also attractive because it allowed me to leverage the district-wide data produced in the *York* litigation.

At the same time, the use of 2020 for my case study also created several challenges. In 2020, the pandemic disrupted nearly every aspect of life. The court system in Alameda County—like so many other places—was enormously impacted. Hearings went online. For a time, state prisons stopped accepting new admissions.[339] The courts and the sheriff moved to reduce the jail population to stem the spread of disease.[340] Defendants received "COVID deals" in plea negotiation that would not have been offered in normal times.[341] Beyond the

338. At the time of this writing, roughly 15% of the state cases are still pending.

339. Kerry Crowley, *Coronavirus: Newsom Halts State Prison Intake for Next 30 Days, Changes Parole Process*, MERCURY NEWS, https://www.mercurynews.com/2020/03/24/coronavirus-newsom-halts-state-prison-intake-for-next-30-days-changes-parole-process [https://perma.cc/M4NW-CFJF] (last updated Mar. 25, 2020, 2:26 AM).

340. Bay City News, *Sheriff Releases 314 Inmates to Reduce Coronavirus Risk at Alameda County Jail*, NBC: BAY AREA (Mar. 19, 2020, 3:51 PM), https://www.nbcbayarea.com/news/coronavirus/sheriff-releases-314-inmates-to-reduce-coronavirus-risk-at-alameda-county-jail/2258026 [https://perma.cc/BSU7-LFGU].

341. Sentencing Transcript at 4, People v. Manzano, No. 20-CR-006577 (Cal. Super. Ct. Alameda Cnty. June 24, 2020). "[T]here is no question, I think, that but that this qualifies as what we might call a COVID deal. And under the circumstances, they don't stand for much if I don't follow them, except in unusual circumstances," said Judge Nixon. *Id.* "I will warn people in advance, there will be times when I am not going to go along with the deal, whether it's a COVID deal or not." *Id.* The issue came up again later that day in *People v. Porche*. Sentencing Transcript at 4, People v. Porche, No. 20-

pandemic, 2020 saw the murder of George Floyd and the ensuing civil unrest, which affected the politics of the criminal system in ways that defy recent comparison. Nationally, the presidential election scrambled the world of policing and prosecutions. And locally, 2020 scorched Northern California with horrific wildfires that turned Alameda County's skies black and then apocalyptically orange.

Given these factors, 2020 might seem like the worst possible year to choose for a case study. But I've come to see it the opposite way. The year 2020 was a time of crisis for the Alameda County courts. Institutions in crisis jettison all the luxuries, niceties, and distractions. They focus on what they deem to be essential functions. And felon-in-possession was deemed essential in every way. Although some aspects of law enforcement and prosecution slowed in 2020, felon-in-possession charges in Alameda County were slightly higher in 2020 than in the two years previous, and they were higher still in 2021.[342] This is a sign that, even in a time of crisis, the court system spent resources on felon-in-possession. A further sign of felon-in-possession's essential function can be seen in the courts' "emergency bail schedule." For numerous crimes, defendants were no longer required to post any bail. But, felon-in-possession was exempted from that order, along with other serious crimes.[343] In federal court, felon-in-possession prosecutions declined in 2020, and then rebounded somewhat in

---

CR-006556A (Cal. Super. Ct. Alameda Cnty. June 24, 2020). "Many of these offers that are made and the pleas that are entered into are COVID offers," said Judge Nixon. *Id.* "If we see this back again, nothing like this is going to happen again. Do you understand?" *Id.*

342. *Compare* Five Years of 29800 Charges Alameda County (2018: 498 defendants; 2019: 478 defendants; 2020: 522 defendants; 2021: 642 defendants); *with* Five Years of PACER § 922(g) filings in ND CAL_Criminal Cases Report (showing federal § 922(g) filings across the entire Northern District of California dropped between 2019 and 2020: FY 2018: 122 defendants; FY 2019: 129 defendants; FY 2020: 76 defendants; FY 2021: 89 defendants; FY 2022: 80 defendants) *and* filings in ND CAL_Criminal Cases Report Oakland Venue (limiting the federal cases to those that were charged in the Oakland federal courthouse—a limitation that could include cases from anywhere in the district but primarily draws from Alameda County and neighboring Contra Costa County—we see a decline in FY2020, an increase in FY2021; FY 2018: 46 defendants; FY 2019: 42 defendants; FY 2020: 29 defendants; FY 2021: 46 defendants; FY 2022: 28 defendants). Nationwide data from Syracuse's TRAC database confirms a similar drop. *Weapons Prosecutions for 2022*, TRAC REPS., https://tracfed.syr.edu/results/9x7063ddf1328e.html [https://perma.cc/RQ2C-TYYM].

343. Loc. R. of Super. Ct. Alameda Cnty. 4.115(a)(19).

2021.[344] Even there, however, felon-in-possession was important enough to the function of the judicial system that the pandemic could not wipe it away. This dynamic helps make 2020 a reasonable year for the case study.[345]

To be sure, a study of another year could have yielded different results. Maybe state prosecutors or federal prosecutors would have demanded more in the plea negotiations, or sought higher sentences from judges, or even charged more (or different) cases in some other year. I would welcome research about an earlier time frame. But thinking about it from a practical perspective, the pandemic's disruption was so enormous that it could not so easily be selected around. Had I chosen to study 2018 or 2019, a significant number of the cases would still have been pending in 2020 and, thus, impacted by the pandemic. They would just be in a later stage of gestation. And had I picked a post-pandemic year—if it can even be said that we are post-pandemic—I would still be waiting for a great number of the cases to resolve.

As throughout this study, I made a practical, administrable, and admittedly imperfect decision when I chose 2020.

B. A Source of Limitations: Access to State Records

There is a good reason that the federalization literature has not considered the cases that could have gone federal yet stayed in state court: state-court records are more difficult to obtain than federal ones. I tackled this problem head-on by locating my case study in a jurisdiction where I would have fulsome access to state-court records.

---

344. I will also point out that my federal cases are not drawn exclusively from 2020 federal filing dates. Rather, they are any federal filing that charges 2020 conduct. If you look down the filing dates of my cases, 9 were filed in 2020, 12 were filed in 2021, and 1 was filed in 2022. That means that the setup of my study would capture federal prosecutions, even though the federal prosecutors (and courts) declined in 2020. Whenever prosecutors came around to filing these cases, the cases would be captured in my sample.

345. I collected additional data on the number of felony cases filed and the number of "informations" filed. An "information" is a finding by a judge that there is probable cause to proceed to trial on a charge. Those numbers are: June 2017 through December 2017: 3,575 felony cases, 424 cases with an information filed; 2018: 5,425 felony cases, 684 cases with an information filed; 2019: 5,435 felony cases, 702 cases with an information filed; 2020: 5,231 felony cases, 546 cases with an information filed; 2021: 5,106 felony cases, 430 cases with an information filed; January through May 2022: 2,059 felony cases filed, 189 cases with an information filed. *See* Data on Cases and Informations July 2017 through May 2022 (on file with Author).

That access was a function of my physical proximity to Alameda County and of the clerk of the court's relatively liberal access policies. But these factors that made it possible for me to access records in Alameda County also prevented me from accessing records in other jurisdictions. This issue of access is inextricably linked to the issue of representativeness, discussed above in Section III.A. Any effort to study local courts inherently limits the researchers' options of which courts to study. It might help to explain a bit more about the data-access challenges, especially for readers who may be uneasy about my choice of Alameda County.

Back in 2021, I started my case study in San Francisco County, not Alameda County. I had become interested in the *York* litigation and its claims that federal prosecutors were engaged in racial discrimination in choosing which cases to take federal. As a researcher, I was particularly surprised that no one could determine the demographics of the state-court defendants whose cases could have gone federal yet did not. No one—not the federal defender's office, not the U.S. Attorney's Office, and not the federal district judge on the case—could answer the fundamental question about what was happening in state court. Even a public records request to the local (progressive) prosecutor's office could not unearth the demographic data on state felon-in-possession cases.

I decided to give it a try myself. I submitted a public records request to the San Francisco District Attorney's Office asking for the names and case numbers of everyone charged in state court in San Francisco during 2020 with felon-in-possession of a firearm.[346] A month later, after a few follow-ups on my part, the office provided me with a list of 164 cases.[347] The list contained the case number of everyone charged with felon-in-possession, along with a description of every other charge filed in those cases. But the list had no names. That is because the District Attorney's Office in San Francisco treats defendants' names as confidential "criminal history" information.[348] My initial plan had been to cross-reference the names of state court defendants with the names of federal defendants—obtained from PACER—to identify the

346. E-mail from Author to Districtattorney@sfgov.org (Nov. 29, 2021) (on file with Author).

347. E-mail from SFDA.PublicRecords@sfgov.org to Author (Dec. 30, 2021) (on file with Author).

348. In Alameda County, there was no such prohibition, even though the state law governing criminal histories is exactly the same.

federalized cases. Such cross-referencing was a nonstarter without the names of those charged in state court. Not to worry, the district attorney's public records custodian told me, I could just get the defendants' names by searching the case numbers at the county court.

That sounded like a promising plan until I learned that the clerk's case index does not allow users to search by case number. To find a case, members of the public need the defendant's name. But if you have a case number and want the name, you cannot get that information from the clerk's index.

I contacted the clerk's office to find out how I might review the 164 cases on the prosecutor's list, plus a few dozen other case numbers that I had come across. Over a series of conversations with employees in the clerk's office, I was told that: no one had ever requested to see hundreds of cases; I would have to fax or mail a separate request form for every case I wanted to see; I would need to make an appointment to review the cases when they became ready; the appointment would be limited to thirty minutes at a time; and I would have to pay $6 per case for retrieving any filings from archives. One clerk offered that I could just send a check for a $40 down payment, per case, to obtain photocopies. These time, money, and logistical constraints were going to be prohibitively difficult. I politely complained to various managers. A month later, the clerk's office provided an accommodation: I would fax in a form for every case I wanted to review, along with a promise to pay retrieval costs, and I could come into the clerk's office during business hours to review the cases as they arrived.

In the spring of 2022, I sent in the required forms for an initial batch of fifty cases. Within a week or so, I received a call that the first few files were ready to review. At the appointment, a clerk sat a few feet away from me, gently monitoring which files I reviewed and what I did with them, while simultaneously doing computer work. I was permitted to photograph any document I wanted, and I could stay for as long as I wanted, during business hours, unless other members of the public needed access. I repeated this procedure over a few more visits and then gave up.

As it turned out, the logistical hurdles could be overcome. The insurmountable problem was the lack of information in the public file. First, in San Francisco Superior Court, the public case files do not contain probable cause statements or narrative accounts of the alleged crimes. This meant I would not be able to describe the conduct leading up to the felon-in-possession arrest. Without a narrative of the events, I could not ensure that a state felon-in-possession involving the

defendant concerned the same incident as a federal felon-in-possession case against that same defendant. And, because these cases rarely resulted in suppression motions, much less contested hearings, there was no way to describe the conduct in many of the cases. Second, the San Francisco case files also lacked racial identifiers. A defendant might mention his race as part of a bail application, for example, but there was no consistently available document that would identify the defendant's race. Without race data, I would be unable to compare the demographics of the defendants charged in federal and state court. Third, the San Francisco court files did not contain hearing transcripts. This meant that I had no way of identifying which cases were part of any plea deal.[349] If all charges in a case were dismissed, I could not tell whether that was an outright dismissal or part of a deal to plead guilty in another case.

I gave up in San Francisco, but I did not give up on my project. Rather, I headed over to Alameda County where all the documents that were missing in San Francisco were available to me at the local courthouse. The difference in records access between the two courts is notable. After all, San Francisco County and Alameda County are neighbors. They are governed by the same statewide court rules and the same Court of Appeal district. Both San Francisco and Alameda boast sophisticated, well-funded criminal court systems. Yet one of them gives computerized public access to its court records, and the other does not.

There is nothing untoward about the lack of access to records in San Francisco. Courts and clerks maintain broad discretion in how they make their public records accessible to the public. But these small differences in access matter in terms of the ability to study state courts. These barriers simply do not exist in the federal system. From the comfort of my home office, I could have broad and deep access to federal filings from anywhere in the country.

The limited access to state-court records creates a significant barrier to studying the cases that stay in state court. The unfortunate result for the federalization literature, as for many other areas of legal scholarship, is a systematic under-examination of one of the most important legal institutions in the country: the state courts.[350]

---

349. Other counties in the Northern District of California were even less accessible.

350. As Justin Weinstein-Tull noted, "if the federal system is the self, then local courts are our unconscious id: vast but hidden, unsupervised, unstructured, chaotic.

A CONCLUDING NOTE

Beyond data access, beyond federalization, beyond even criminal law and criminal procedure, this Article speaks to a problem that afflicts legal scholarship of all forms. I call it the "federal fixation": State courts account for the majority of all cases, but scholars give the federal courts the lion's share of the attention. This problem has been remarked upon by scholars of criminal procedure,[351] civil procedure,[352] torts,[353]

Like the id, local courts are also obscured—behind unpublished decisions, miniscule appeal rates, and federal courts doctrines." Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1101 (2020) (footnotes omitted)*; see infra* note 358 (discussing in more depth the lack of access to state records).

351. *E.g.*, Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 225, 231 (2007) (urging law schools to place more emphasis on studying state constitutional criminal procedure); Itay Ravid, *Judging by the Cover: On the Relationship Between Media Coverage on Crime and Harshness in Sentencing*, 93 S. CAL. L. REV. 1121, 1132–33 (2020) ("[S]cholarship in the U.S. tends to focus on federal courts, most dominantly the Supreme Court or, to a lesser extent, on state Supreme Courts. It thus overlooks the media-judiciary relationship in the state court setting, despite the fact that these courts play a major role in the American justice system and deal with more than 90% of felony (and civil) cases."); *see infra* notes 362–363 and accompanying text.

352. *See, e.g.*, Norman W. Spaulding, *Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249, 2251–52 (2017) ("[P]roceduralists focus intensely and almost exclusively on the bare fraction of civil cases decided in federal courts, leaving largely unexamined the norms and rules governing the tens of millions of cases affecting the lives of ordinary Americans in state courts and state and federal agencies.").

353. *See, e.g.*, Theodore Eisenberg, *Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals*, 19 LAW & SOC. INQUIRY 275, 278 (1994) (noting that researchers know "much more about tort cases filed in federal court than we do about such cases in state court").

administrative law,[354] constitutional law,[355] and statutory interpretation,[356] to name just a few. Everyone has a theory about the factors that cause this federal fixation. One might place those theories into two clumps: theories about why federal accounts are easier to tell and theories about why federal accounts are easier to sell.

In explaining why federal stories are easier to tell, some scholars suggest that federal topics get more attention because the federal system is more homogenous and, thus, easier to study.[357] Other scholars note that the relative ease of accessing and interpreting federal records (and statistics) makes the federal stories easier to

354. *See, e.g.*, Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1541–42 (2019) (discussing the lack of scholarship on issues surrounding the independence of *state* agencies compared to equivalent scholarship on *federal* agencies); Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1464–66 (2020) (noting that scholars have paid much attention to federal transparency laws, but little attention to state transparency laws); Prentiss Cox, *Fractured Justice: An Experimental Study of Pretrial Judicial Decision-Making*, 88 U. CIN. L. REV. 365, 369 (2019) ("State courts are less frequently studied . . . ."); Thomas J. Miles, Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 835 n.17 (2008) (explaining how "state courts are a fertile place to study" because they have been the focus of much less scholarship than federal courts).

355. *See, e.g.*, JEFFREY S. SUTTON, WHO DECIDES: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 1 (2021) (discussing the importance of and need for scholarship on how state governments and constitutions approach individual rights); Goodwin Liu, *Book Review, State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1309 (2019) (emphasizing the "often overlooked" role of state courts and constitutions in protecting individual rights and highlighting the need for more scholarship on the subject).

356. *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1753 (2010) ("The vast majority of statutory interpretation theory is based on a strikingly small slice of American jurisprudence, the mere two percent of litigation that takes place in our federal courts—and, really, only the less-than-one percent of that litigation that the U.S. Supreme Court decides. The remaining ninety-eight percent of cases are heard in the netherworld of the American legal system, the state courts.").

357. *See* Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 178 (2017) (noting that federal prosecutors are easier to study "especially with tools of data collection and analysis"); Meares, *supra* note 320, at 852 n.4 (providing reasons for the article's focus on the federal system, rather than the state system, because, among other reasons: "The sheer numbers involved in the state criminal justice systems make it difficult to generalize predictions about the efficacy of the model of financial incentives I propose in this Article").

analyze.[358] Some scholars suggest that state and local laws are often themselves modeled on federal law—or controlled by federal law—thus making it more valuable to study the federal-law-source, rather than the state-law derivative.[359]

---

358. *See, e.g.*, Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077, 1140 (2017) (proposing solutions to federal criminal enforcement that take advantage of the homogeneity and data availability within the federal system); Yeazell, *supra* note 17, at 136–37 (discussing how state data is more difficult to study than federal data because there is little uniformity between how the states collect and maintain data); Richman, *supra* note 17, at 222 (noting that the federal government's vast resources allow it to collect much better data than state governments can); Alexander G.P. Goldenberg, *Interested, but Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants*, 62 N.Y.U. ANN. SURV. AM. L. 745, 746 n.12 (2007) ("I have chosen to focus on federal cases, despite the fact that they represent a small fraction of criminal litigation in the United States. The split among federal courts on this issue provides a helpful framework for analysis with a diverse, though manageable, set of decisions. Like federal courts, states have also split on the propriety of singling out a defendant's testimony."); Marc L. Miller, *A Map of Sentencing and A Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1357 (2005) ("While state commissions have developed good working relationships and there is a national association of state sentencing commissions, there is no indication that, either on their own or as a group, the state sentencing commissions have tried to develop common research projects. Their many excellent reports are written for internal (state-specific) audiences. The limited access to information and a paucity of efforts to craft a larger pool of knowledge or an active sentencing reform dialogue best explain the undue focus by scholars and policymakers on the failed federal reforms over far more positive state sentencing reform experience." (footnotes omitted)).

359. *See* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 706 (2016) ("Federal law is a Piper's song that captivates the states."); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1987 (2016) ("The scholarly focus on FRE 609 has obscured the variety of rules in those states that permit impeachment of criminal defendants with their convictions."); Nancy Gertner, *Neuroscience and Sentencing*, 85 FORDHAM L. REV. 533, 534 n.4 (2016) ("I focus on federal sentencing first because it is the system with which I am most familiar but also because of the significance of federal sentencing practices on state systems. Although state courts account for the vast majority of criminal prosecutions, federal law had an outsized impact on their work."); Jeffrey A. Modisett, *Discovering the Impact of the "New Federalism" on State Policy Makers: A State Attorney General's Perspective*, 32 IND. L. REV. 141, 150 (1998) ("[E]ven after independent state constitutional analysis, Indiana courts largely follow federal constitutional analysis concerning the rights of the accused."); *cf.* Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1403 (2018) ("The following discussion focuses on federal criminal procedure, but similar issues arise in analogous state statutes."); Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE

In explaining why federal stories are easier to sell, scholars point out that law school casebooks, syllabi, and curricula rely on federal sources, thus cultivating an affinity for the federal among faculty and students.[360] According to other scholars, the greater prestige of federal opinions, judges, clerkships, and other federal jobs feeds an outsized appetite for scholarship about federal topics.[361] It is also possible that academic journals desire topics of the broadest interest—geographical and otherwise—and federal topics seem to have broader appeal than state or county topics, even when a study examines just a single federal district.

In my own field of criminal procedure, the federal fixation has been so pronounced for so long that articles on federal topics now come

---

DAME L. REV. 283, 286 n.6 (1999) ("While litigation confidentiality is as (if not more) pressing an issue in state courts today . . . this Article focuses primarily upon secrecy orders in the federal courts. Given that a majority of states have adopted the Federal Rules of Civil Procedure, however, this federal focus can nevertheless instruct the broader confidentiality debate.").

360. *See* Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 803 (2003) (discussing why legal education focuses on federal courts); Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior*, 2011 U. ILL. L. REV. 1753, 1755 (2011) (noting how "the overwhelming majority" of legal education and scholarship focuses on federal courts); Honorable J. Anthony Kline, Comment, *The Politicalization of Crime*, 46 HASTINGS L.J. 1087, 1094 (1995) (calling for more academic focus on state courts).

361. *See, e.g.*, Lee Rosenthal, Christopher L. Dodson & Scott Dodson, *The Zooming of Federal Civil Practice A Look at Using Videoconferencing Technology Going Forward*, 84 TEX. B.J. 450, 452 n.1 (2021) ("We focus on federal practice because its uniformity offers easier and cleaner assessment."); Dodson, *supra* note 359, at 739 ("[F]ederal law gets attention because it is viewed as more prestigious. News agencies cover federal law. Legal academics focus on federal law, to the scholarly impoverishment of state law. State judges position themselves for appointment to the federal bench. State legislators run for Congress. Governors hope to be President. Practitioner prestige centers around big, interstate firms with national practices. Law students prefer federal clerkships to state clerkships. Today, in virtually every legal position, state-focused lawyers look to move *up* to federal-focused positions."); David Ball, *Criminal Law Professors Should Think Globally But Write Locally*, WASH. MONTHLY (Aug. 4, 2015), https://washingtonmonthly.com/2016/08/04/criminal-law-professors-should-think-globally-but-write-locally [https://perma.cc/V8NP-ZD3Y] ("Many law professors (including me) clerked at the federal level, so it's the system with which they're most familiar. There aren't as many state court clerkships, nor are they as prestigious as federal ones. The second-year law students who make many of the publication decisions are doubtless also focused on obtaining federal clerkships, which might bias them against state and local scholarship. It is also true that there are great articles written about the federal system, and the federal system could, in theory, be held up as a model . . . .").

with a de facto disclaimer justifying the choice to study a federal topic.[362] And scholars implore each other to focus more on state and local issues and less on federal ones.[363] As Andrew Manuel Crespo put

362. *See, e.g.*, Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1823 (2022) ("The federal supervision system is a good example because it is one of the ten largest in the country and 'inevitably acts as a model, both positive and negative, for developments in the states.'" (quoting Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1320 (2005))); Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 678–79 (2022) (noting developments in state law, after explaining that "[o]ur focus in this Article is on the trajectory of *federal* firearms crimes"); Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1574 (2022) (focusing on federal felon-in-possession laws because, the author explains, they are "a centerpiece" of gun laws in the United States); Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1267 (2021) ("In a study such as this one, which focuses on federal criminal defendants, it is important to note that the majority of criminal defendants in the United States are prosecuted in state courts and held in state carceral facilities. The federal criminal system, however, is both an important and useful setting to study pretrial detention disparity."); Jolly & Prescott, *supra* note 319, at 1056 ("We focus our discussion mostly on bargaining in federal courts for the sake of exposition . . . ."); Benjamin E. Rosenberg, *Indictments, Grand Juries, and Criminal Justice Reform*, 48 AM. J. CRIM. L. 81, 87 (2020) ("This article focuses on federal rules and doctrines, whereas many of the problems in criminal justice arise in state and local prosecutions. Federal rules and doctrines are relevant to all prosecutors, however, because study of them allows for thorough analyses of the issues in any prosecutorial system."); Mona Lynch & Marisa Omori, *Crack as Proxy: Aggressive Federal Drug Prosecutions and the Production of Black-White Racial Inequality*, 52 LAW & SOC'Y REV. 773, 783 (2018) ("We focus on federal crack prosecutions for two reasons . . . ."); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 542 (2012) ("[T]he discussion of overcriminalization in this article focuses on federal criminal law . . . overcriminalization may be even more entrenched at the state level . . . ."); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 231 (2007) ("While many complaints about overcriminalization point to state codes, much critical literature focuses on federal criminal law . . . ."); Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 926 (1996) ("This article, rather than also consider state and local prosecutors, focuses on federal prosecutors because of their increasingly active role in investigations . . . .").

363. *See, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1837 (2020) (discussing local abolitionist experiment and noting that the "emphasis on the local presents a challenge for legal scholarship, which tends to focus on the federal and the constitutional"); Laura I Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579, 621 (2018) ("Despite our continual focus on federal crime and punishment, criminal justice is a largely local process, with primarily local effects."); Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1132 (2016) ("[T]he singular focus on federal courts highlights CIR's"—

it, the goal is to resist "the distorting gravitational pull that federal law routinely exerts on criminal justice scholarship."[364] For all the urgings, however, the federal fixation remains very much affixed.

It is against this background that the federalization literature should be judged. For years, the literature discussed the federalization of crime from an exclusively federal perspective. It made comparison between federal- and state-court outcomes, without being able to substantiate the state-court claims. In some sense, this is just another example of legal academia's larger problem with its federal fixation. But arguably the federal fixation is even more pernicious in the federalization literature than elsewhere. In many studies, the fixation on the federal means that the study's findings are merely incomplete. But in the federalization literature, the fixation on the federal side of the story leads to conclusions that may actually be inaccurate. The literature portrays federal prosecutors as more efficient and effective at winning convictions and securing severe punishments. The literature talks about the racial discrimination caused by federal

---

corporate institutional reform's—"limitations. State judges and legislatures possess far greater capacity to affect corporate governance norms than the individual Article III judge."); MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION: CASES, STATUTES, AND EXECUTIVE MATERIALS, xxxv (3d. ed. 2007); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1327 (2012) ("[M]ost criminal law is state law, not federal law, despite the scholarly and popular focus on federal law enforcement"); Michael Kades, *Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin Department of Justice*, 25 AM. J. CRIM. L. 115, 119 (1997) ("Because most of the work on white-collar crime focuses on federal prosecutions, a study of state prosecutors' discretion adds another dimension to the debate about white-collar crime."); John MacDonald, Jeremy Arkes, Mancy Nicosia & Rosalie Liccardo Pacula, *Decomposing Racial Disparities in Prison and Drug Treatment Commitments for Criminal Offenders in California*, 43 J. LEGAL STUDS. 155, 162 (2014) ("Only a handful of recent studies have specifically modeled what the outcomes from criminal courts would look like if Blacks had similar charges and criminal backgrounds as Whites. These studies have specifically focused on federal criminal cases . . . ."); Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. 1935, 1937 (2014) ("Virtually all the discussion of overcriminalization has focused on the federal government, even though the vast majority of criminal prosecutions in the United States happen in state courts."); *see also* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) (explaining that it is difficult to quantify the impact of the misdemeanor system, in part, because national information regarding state by state misdemeanor laws is not readily available).

364. Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1310 n.21 (2018).

prosecutors' case selection. These claims inherently depend on some knowledge of the state system's operations. But my examination of the state side of the equation, albeit in one jurisdiction, raises questions about the sturdiness of those claims.

Additional research would be required in other jurisdictions and other time periods to test the broader claims about federalization's virtues and vices. But what my study shows is that we cannot responsibly talk about federalization without accounting for the cases that stay in state court. These counterfactual cases are difficult to study. And when they are studied, they may lead to results that can be difficult to generalize. But any effort to analyze federalization without this state data risks distorting the true relationship between the federal and state systems. Correctly understanding this relationship is essential, both for academic and practical purposes. Does society benefit when a case goes federal? No one can say without thinking about the alternative: keeping the case in state court.