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The Upside Down Mississippi Problem: Addressing Procedural Disparity Between Federal and State Criminal Defendants in Concurrent Jurisdiction Prosecutions

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**THE UPSIDE DOWN MISSISSIPPI PROBLEM: ADDRESSING
PROCEDURAL DISPARITY BETWEEN FEDERAL AND
STATE CRIMINAL DEFENDANTS IN CONCURRENT
JURISDICTION PROSECUTIONS**

Jordan Gross^{*}

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A citizen prosecuted for a state crime is subject to a set of consequences appreciably different than one prosecuted for a federal crime at every stage, from investigation through sentencing. For a particular defendant, these consequences are sometimes better, sometimes worse, but they are nevertheless disparate. A certain amount of disparity is, of course, inherent in any human system. Whenever possible, however, we should seek to avoid introducing new sources of disparity without carefully considering the benefits and costs. In the case of federalization of the criminal law, this principle has too often been ignored.¹

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¹ A.B.A. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998) [hereinafter TASK FORCE], *available at*

I. INTRODUCTION

Since the Civil War, Congress has greatly extended federal jurisdiction over criminal conduct that previously was the exclusive domain of the states.² Rather than supplant state and local authority to prosecute crimes in these areas, many federal criminal statutes create concurrent jurisdiction with states over conduct historically prosecuted by the states.³ Along with expanding federal criminal jurisdiction, Congress standardized two important aspects of federal criminal law previously lacking national uniformity. In 1944 and 1946 Congress promulgated the Federal Rules of Criminal Procedure, which formalized and standardized process and procedure in federal criminal prosecutions.⁴ In 1984 Congress enacted the Sentencing Reform Act (SRA) to bring national uniformity to federal sentencing.⁵ Prior to these enactments, where no federal statute or case law applied, federal trial court decision-making was guided by judicial discretion and, in some instances, by state and local practice.⁶

Federal criminal procedural rules and statutes sometimes provide less protection to defendants than their state equivalents.⁷ One example of this is the federal criminal discovery rules.⁸ In some jurisdictions, state law and procedural codes impose much broader discovery obligations on state prosecutors than those placed on federal prosecutors by the federal rules.⁹ Similarly, many state courts have interpreted their states constitutions to provide criminal defendants more procedural protection than that required under the federal constitutional “floor” set by the United States Supreme Court.¹⁰ An example of this is certain aspects of search and seizure law, an area in which some state constitutions provide higher protection against law enforcement intrusions than the Fourth Amendment to the U.S. Constitution.¹¹

State constitutional rights and procedural protections, of course, can only be asserted in state criminal prosecutions. As a result, where a defendant is prosecuted in federal court for conduct over which both a state and the federal government have criminal jurisdiction, he or she may be at a distinct disadvantage simply because of the fortuity or misfortune of having

http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf.

² See *infra* note 22.

³ See *infra* note 24.

⁴ See *infra* notes 62–63.

⁵ See *infra* note 28.

⁶ See *infra* notes 51–57.

⁷ See *infra* notes 67.

⁸ See *infra* note 71.

⁹ See *infra* note 71 and accompanying text.

¹⁰ See *infra* note 47.

¹¹ See *infra* text accompanying note 47 (describing States’ approaches to searches and seizures that were later adopted by the Court).

attracted the attention of federal prosecutors.¹² And, upon conviction, a defendant will likely face a drastically harsher sentence than that which a state court would have imposed for the same conduct.¹³ The cumulative impact, therefore, of Congress's federalization, nationalization and standardization of criminal law and the U.S. Supreme Court's constitutionalization of criminal procedure has been to create categories of crimes for which a defendant could be prosecuted both federally and under state law.¹⁴ The level of procedural protection and severity of punishment the accused receives for the same conduct may vary significantly depending on which sovereign prosecutes the crime.¹⁵ It is this procedural disparity at which this article takes aim.

Part II of this article sets out a brief background of the nationalization, federalization and standardization trend that has characterized the development of federal criminal law since the Civil War.¹⁶ Part III describes the state/federal procedural disparity gap created by the lower level of criminal procedural protection available to some defendants prosecuted federally for conduct traditionally within the purview of states and over which states have concurrent jurisdiction with the federal government.¹⁷ Part IV discusses the receding tide of federalism, nationalization, and standardization in the criminal law and explains why rectifying the state/federal procedural disparity gap must be included in that recalibration process.¹⁸ Part V submits that Congress has the obligation to address this state/federal procedural disparity and proposes that Congress enact legislation requiring federal courts to apply state rules of criminal procedure in concurrent jurisdiction prosecutions where a given federal rule does not provide the same level of protection as its state counterpart.¹⁹ A failure to do so, this article asserts, perpetuates an unjustifiable state/federal procedural disparity between defendants who are prosecuted federally for conduct over which a state has a superior historical and political jurisdictional claim.²⁰

¹² See *infra* note 102.

¹³ See *infra* text accompanying note 32.

¹⁴ See *infra* note 23.

¹⁵ See *infra* note 23.

¹⁶ See *infra* Part II.

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part IV.

¹⁹ See *infra* Part V.

²⁰ The American political system, of course, consists of three separate and independent sovereigns—the federal government, the tribal nations, and the states. The disparate impact of the application of federal criminal law and procedure to defendants charged in federal court with conduct over which tribal authorities have traditionally exercised jurisdiction is experienced differently and often more acutely by citizens of Indian nations tried in federal court. Because of this different dynamic and historical experience, the impact of the federalization, nationalization, and standardization of criminal law on Native Americans tried federally for crimes committed in Indian Country is not within the scope of this article.

II. FEDERALIZATION, STANDARDIZATION, AND NATIONALIZATION OF AMERICAN CRIMINAL JUSTICE²¹

A. *Federalization and Nationalization of Substantive Criminal Law*

The contemporary federal government's prominent role in the investigation and prosecution of criminal conduct would have been unrecognizable to the Founders. The early American federal system included neither a federal police power nor federal jurisdiction over most criminal conduct, and it wasn't until after the Civil War that Congress began to expand the role of the federal government in prosecuting conduct without a clear and direct nexus to a federal concern.²² Since then, Congress has greatly extended the reach of the federal government's jurisdiction into territory originally occupied exclusively by the states.²³ Rather than supplant state and local authority to prosecute crimes in these areas, many federal criminal statutes created concurrent jurisdiction over criminal activity

See Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723 (2008).

²¹ These topics have been fully explored elsewhere in many forms. See, e.g., Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"*, 50 SYRACUSE L. REV. 1317, 1319–26 (2000) (concise history of federal criminal law prior to the 1960s). I include a brief overview of this topic to provide the reader with sufficient background to understand the federalism and historical concerns that inform the thesis of this argument. This section does not purport to be a comprehensive treatment of this broad and complex topic.

²² Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138 (1995) ("Congress's reluctance to enact expansive criminal laws may have been partly attributable to a recognition that the Founding Fathers never envisioned a national police power. Indeed, they were skeptical about general federal jurisdiction. Thus, what little criminal jurisdiction Congress invoked was often shared with the states. State courts were given concurrent, and sometimes primary, jurisdiction over designated federal crimes.") (citing Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 548–52 (1925)).

²³ Brickey, *supra* note 22, at 1329–30 ("It was not until after the Civil War that Congress enacted criminal laws that reflected concerns extending beyond direct federal interests. Newly enacted federal civil rights acts guaranteed all citizens equal rights . . . [including the right] to benefit from federal enforcement of the newly established rights to equal protection and equal privileges and immunities under the laws. In addition to imposing criminal liability for depriving any citizen of a right secured therein, one act conferred federal jurisdiction over state crimes where the affected citizens were denied their rights or where state courts would not enforce them. Thus, the federal government assumed concurrent jurisdiction over murder, assault, and a host of other state crimes.") (citations and footnotes omitted). See also Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 726 (2002) ("Driven by an increased emphasis on 'law and order' in national politics, Congress has enacted a steady stream of criminal statutes since the late 1960's. Indeed, Congress has created new federal crimes every election year since 1984. According to one study, since 1970 Congress has enacted more than 40% of the total new federal criminal provisions passed since the Civil War. Many of these provisions augment preexisting federal jurisdiction over narcotics and firearms offenses.").

historically prosecuted by the states.²⁴ By the 1930s federalization was “in full swing.”²⁵

Congress has asserted federal criminal jurisdiction over a number of crimes historically prosecuted by the states. However, the primary areas in which Congress has created concurrent jurisdiction with the states over conduct traditionally within the exclusive purview of state criminal justice systems are domestic possession and distribution of firearms and controlled substances.²⁶ Despite Congress’s incursion into the criminal justice domain of the states, the federal government still prosecutes relatively few criminal cases.²⁷ Thus, in absolute terms, the number of federal defendants prosecuted for concurrent jurisdiction crimes represents a small fraction of the overall number of criminal prosecutions in the United States.

²⁴ Maroney, *supra* note 21, at 1329–30 (“If the number of federal crimes cannot be ascertained, it is at least possible to describe the nature of federal criminal legislation today. It constitutes a reversal of the pattern that had held during the first century. That is, ‘the bulk of the federal criminal code now treats conduct that is also subject to regulation under a state’s general police powers.’ The relationship between federal and state law is also significant. While it is true that ‘the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions,’ it is also true that the new federal laws generally ‘supplement state law rather than nullifying or displacing it.’ The end result is ‘a system of dual jurisdiction, where conduct that violates both federal and state law may be prosecuted by federal authorities, state authorities, or both.’”) (citations and footnotes omitted).

²⁵ Brickey, *supra* note 22, at 1143–45 (“By the 1930s the federalization of American criminal law was in full swing. During this era Congress enacted the Lindbergh Act (prohibiting the transportation of a kidnapping victim across state lines), the Fugitive Felon Act (prohibiting inter-state flight to avoid prosecution for enumerated violent felonies), the National Firearms Act (regulating the sale of guns), the National Stolen Property Act (prohibiting the transportation of stolen property in interstate commerce), and statutes that punished robbing a national bank, extortion by telephone, telegraph or radio, and much more. These developments were critical because they transformed what had been uniquely local concerns into national ones. . . . [W]ith the advent of the omnibus crime bill, the pace at which new crimes appeared on the books accelerated. . . . Included among them are the Omnibus Crime Control and Safe Streets Act of 1968, the Organized Crime Control Act of 1970, the Comprehensive Drug Abuse Prevention and Control Act of 1970, the Crime Control Act of 1984, the Anti-Drug Abuse Acts of 1986 and 1988, the Comprehensive Crime Control Act of 1990, and the Violent Crime Control and Law Enforcement Act of 1994.”) (footnotes and statutory citations omitted).

²⁶ See Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 YALE L.J. 1374, 1401–03 (2008); O’Hear, *supra* note 23, at 723 (“[F]ederal law enforcement has dramatically expanded its reach into areas that were once a nearly exclusive preserve of local and state law enforcement, such as low-level drug and firearm offenses. Congress propelled this expansion, often referred to as the ‘federalization’ of criminal law, by passing new criminal statutes and by enhancing law enforcement budgets.”).

²⁷ O’Hear, *supra* note 23, at 726–29 (“Notwithstanding these recent increases in federal criminal jurisdiction and resources, states continue to play a dominant role in most areas of law enforcement. Overall, federal convictions represent fewer than five percent of total criminal convictions. However, recent trends create a substantially enhanced federal presence in national law enforcement. Perhaps most controversial is the federal prosecution of routine ‘street crimes,’ such as low-level gun and drug offenses, which were once a nearly exclusive preserve of state and local law enforcement.”).

B. Standardization and Nationalization of Federal Sentencing Law

In 1984 Congress passed the Sentencing Reform Act (SRA) to achieve national uniformity in sentencing in federal prosecutions.²⁸ Although the SRA was reportedly inspired by a perception that federal judges were too lenient in the treatment of federal criminal defendants, the stated goal of the SRA was to ensure consistency in federal sentencing by constraining federal judicial discretion.²⁹ Thus, the uptick in the federalization of criminal law was followed by the standardization and nationalization of federal sentencing law.³⁰ As a result of federalization, the federal government has asserted jurisdiction over criminal conduct traditionally prosecuted exclusively by the states.³¹ As a result of the standardization and increase in federal penalties for federal crimes, 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,³² producing significant sentencing disparities between state and federal sentences for the same criminal conduct.³³ Apart

²⁸ Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551–3673 (2000); 28 U.S.C. §§ 991–998 (2000)).

²⁹ Richman, *supra* note 26, at 1385 (“[T]he SRA . . . reflected the same distrust of judges and their characteristic leniency that inspired the statutory mandatory minimum provisions that began to proliferate in the late 1980s. But there is no reason to doubt Congress’s commitment to uniformity—albeit an extremely thin notion of uniformity, one that made no attempt to limit executive decisions about which cases to prosecute but simply sought to ensure that similar defendants so selected would be treated similarly.”). *See also* O’Hear, *supra* note 23, at 723 (“Congressional action in 1984 led to the promulgation of the Guidelines, which diminished judicial discretion at sentencing and imposed enhanced sentences on various categories of offenders. Congress also enacted a series of mandatory minimum sentencing laws throughout the 1980s and 1990s, which had similar effects.”) (citing 21 U.S.C. § 841(b) (1994 & Supp. V 1999) (establishing mandatory minimum sentences for certain drug offenses); 18 U.S.C. § 924(e) (1994) (establishing mandatory minimum sentences for certain repeat offenders)).

³⁰ O’Hear, *supra* note 23, at 723 (describing the “collision between two of the most notable trends that have developed in federal law enforcement during the past thirty years”—the federalization of substantive criminal law and the increase in the certainty and severity of federal sentences) (footnotes omitted).

³¹ *Id.* at 724 (“[G]rowing numbers of offenders may be prosecuted either under federal law in federal court or under state law in state court.”).

³² *Id.* at 731–32 (“Nationwide, federal sentences for drug and gun offenses result in prison time that is three times greater, on average, than comparable state sentences. Federal prison time is also longer for a broad range of other offenses, from forgery to aggravated assault. While these gross national statistics do not adjust for possible differences in the severity of offenses on state and federal dockets, they do provide support for the widespread anecdotal evidence of federal-state disparity. Moreover, recent trends towards lower state sentences suggest that such disparity may be on the rise.”) (footnotes and citations omitted); *See also* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 113–14 (2005).

³³ O’Hear, *supra* note 23, at 731 (“Ironically, federal reforms that were intended to combat sentencing disparities likely exacerbated disparities between state and federal sentences. . . . [S]tate judges generally have far more discretion than federal judges when considering mitigating aspects of the defendant’s background and personal characteristics.

from the vice of producing a facially unjust result, this dynamic has been criticized for encouraging sentencing “shopping” to maximize the potential sentence yield in concurrent jurisdiction cases.³⁴

A real, yet hard to quantify, impact of this type of visible disparity is that it undermines the legitimacy of the federal criminal justice system while denigrating the role of the states in enforcing and prosecuting criminal conduct³⁵—an intolerable outcome in a system of government that purports to defer to the expertise and supremacy of the states in matters of uniquely local concern with distinctly local impacts.³⁶ However, although nothing in the SRA prohibits federal courts from considering state/federal sentencing outcome disparities, federal courts have been decidedly unreceptive to

Similarly, state judges generally have more discretion when considering uncharged criminal conduct, which, in certain circumstances, must be used to enhance federal sentences. The scope of disparities evades easy measurement, and likely varies substantially from state to state and case to case. Anecdotal evidence, however, indicates that disparities may often be quite dramatic. . . . Perhaps most striking are the federal death penalty cases in states that do not authorize capital punishment.”) (citing Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 916–17 (2000); 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, 998–99 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 648–49 (1997)).

³⁴ O’Hear, *supra* note 23, at 724 (“Police and prosecutors may in some sense choose a forum, either through case-by-case decisions or through the adoption of general policies. The choice of forum typically carries with it foreseeable and substantial effects on sentencing. Indeed, federal and state agents often collaborate in selecting a federal forum with the specific intention of obtaining the harsher, more certain sentences available under federal law—a practice that has been decried by critics of federalization.”) (footnotes and citations omitted).

³⁵ Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 838 (2000) (quoting a state court judge as follows: “[T]he incursion of the national government subverts the authority of and the regard for the local and state governments, making it increasingly difficult for those governments to effectively and imaginatively respond to the needs of their constituents. A political culture that comes to regard the federal government as its guardian relegates the local and state governments to secondary status. The premise—articulated or not—is that these lesser governments are not capable of handling important matters. Public confidence and commitment are diminished. Ultimately, federalization obscures the boundaries of political responsibility and accountability, undermines the confidence constituents have in their officials, and erodes the authority of the local and state institutions.”); *see also* Task Force on Federalization of Criminal Law, Am. Bar Ass’n, Report on the Federalization of Criminal Law (1998) at 42–43 (“Confusion of state and federal authority can leave citizens uncertain about who bears the responsibility for dealing with crime,” noting that “[p]ublic accountability in the state and local segments of government is higher.”).

³⁶ O’Hear, *supra* note 23, at 755 (“With some notable exceptions, such as nationwide drug distribution schemes and crimes against federal agents and property, the effects of crime seem largely localized to a particular community.”); Sun Beale, *supra* note 33, at 1000–04 (explaining the disparate treatment of defendants); Clymer, *supra* note 33, at 739 (same).

arguments that federal defendants should receive downward sentencing departures to correct these types of disparities.³⁷

C. Standardization and Nationalization of Criminal Procedure

The term “criminal procedure” encompasses two different, but overlapping, bodies of law—constitutional criminal procedure and rule-based criminal procedure. While interrelated, they have distinct historical pedigrees and legal trajectories that require separate consideration.³⁸ The focus of this article is rule-based criminal procedure. But a brief consideration of the evolution of a federalized constitutional criminal procedure is necessary to fully appreciate the extent to which the Mississippi Problem has been set on its head, as this article contends.

I. Constitutional Criminal Procedure

Before the American Revolution, the federal constitution operated as a “background limitation on the power of the states” in all areas of law, including state criminal law.³⁹ Until 1925, the Bill of Rights (i.e. the first ten

³⁷ O’Hear, *supra* note 23, at 724–25 (“The federal appellate courts have categorically rejected the relevance of state sentencing practices for purposes of federal sentencing. Despite the ease with which courts have reached this conclusion, it is not expressly required by any statute or by the Guidelines themselves. Rather, courts rely on an implicit mandate they find in the structure of the Guidelines—a mandate for ‘nationwide uniformity,’ by which the courts apparently mean interdistrict uniformity among federal courts.”) (citing *United States v. Willis*, 139 F.3d 811, 812 (11th Cir. 1998) (rejecting a defendant’s argument for a downward departure on the basis of state/federal sentencing disparity); *United States v. Snyder*, 136 F.3d 65, 69–70 (1st Cir. 1998) (same); *United States v. Schulte*, 144 F.3d 1107, 1110–11 (7th Cir. 1998) (same)). For an interesting, but ultimately unsuccessful effort to extend some deference to a state court’s attempt to lessen the impact of a federal court sentence under principles of federal comity by terminating a state court sentence to enable defendant to become eligible for a federal safety valve sentence *see* *United States v. Yepez*, 652 F.3d 1182 (9th Cir. 2011), *rev’d en banc*, 704 F.3d 1087 (9th Cir. 2012) (requiring district court to consider terminated state probationary sentence in imposing a federal sentence even if it did make defendant ineligible for the federal safety valve and resulted in a disparate sentence; “granting a state court the power to determine whether a federal defendant is eligible for safety valve relief under the Federal Sentencing Guidelines is closer to abdication than comity.”).

³⁸ For example, some Federal Rules of Criminal Procedure overlap with, and are informed by, companion constitutional doctrines. Impartial jury and change of venue procedures, for example, are addressed in federal prosecutions by Federal Rule of Criminal Procedure 21, and governed by the Sixth Amendment in both state and federal prosecutions.

³⁹ Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 66–67 (1993) (Noting that the federal constitution was relevant, “primarily, though not exclusively, on the Due Process Clause of the Fourteenth Amendment” and that “[a]lthough it was federal law, and thus ‘supreme,’ the Due Process Clause left substantial room for the development and day-to-day operation of state criminal procedure doctrine. In other words, before the Revolution, federal constitutional law affected the handling of state criminal cases in much the same way that it affected other common kinds of state action, such as the regulation of property rights or the administration of public schools and universities.”).

amendments to the U.S. Constitution) was understood to constrain only the federal Congress's ability to pass laws abridging certain freedoms and granting "persons" or "the people" the right to be free from specific conduct or actions by the federal government.⁴⁰ In 1925, the Supreme Court began a process of selective incorporation of certain Bill of Rights guarantees into the Fourteenth Amendment's mandate that no "State deprive any person of life, liberty, or property, without due process of law[.]"⁴¹

The earliest incorporation cases addressed primarily the guarantees under the First Amendment.⁴² It was not until the 1960s and 1970s, during the Warren Court era, that the Court turned its attention to the criminal procedure guarantees in the Bill of Rights and began deciding whether those specific guarantees would be incorporated into the process due defendants in state criminal investigations and prosecutions under the Fourteenth Amendment.⁴³ Before the Court incorporated specific criminal procedural

⁴⁰ Before ratification of the Fourteenth Amendment in 1868 and the development of the incorporation doctrine, the Supreme Court specifically held that the Bill of Rights applied only to the federal government. *See* *Barron v. Baltimore*, 32 U.S. 243 (1833). The Supreme Court also initially rejected incorporation after ratification of the Fourteenth Amendment. *See* *United States v. Cruikshank*, 92 U.S. 542 (1875).

⁴¹ U.S. CONST. amend. XIV, § 2. An alternative argument, as yet adopted by a majority of the Court, asserts that the proper vehicle for incorporation is the privilege or immunities clause, not the due process clause, of the Fourteenth Amendment. *See* *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Black, J., concurring) (privileges or immunity clause "eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States."). *See also* U.S. CONST. amend. XIV, § 1. ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]"). A privileges or immunities approach would counsel the wholesale incorporation of the entire Bill of Rights (save those amendments that clearly only apply to the federal government), rather than the incremental, piecemeal incorporation by way of the due process clause. *See* *McDonald v. Chicago*, 561 U.S. 742 (2010) (Thomas, J., concurring) (concurring in majority holding that Second Amendment applies to states, but taking issue with majority's reliance on due process clause, rather than privileges or immunities clause, as vehicle for incorporation).

⁴² *See* *Gitlow v. New York* 268 U.S. 652 (1925) (freedom of speech) (dicta); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of press); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Everson v. Board of Education*, 330 U.S. 1 (1947) (establishment of religion); *NAACP v. Alabama*, 357 U.S. 449 (1958) (freedom of expressive association); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (petition for redress of grievances).

⁴³ The rights and guarantees applicable to criminal investigations and prosecutions are found in the Fourth, Fifth, Sixth and Eighth Amendment to the U.S. Constitution, and include the rights to be secure from unreasonable searches and seizures (U.S. CONST. amend. IV), the right to indictment by a grand jury for infamous crimes, to be free from double jeopardy, not to be compelled to be a witness against himself, or be deprived of life, liberty, or property without due process of law (U.S. CONST. amend. V), the right to a speedy and public trial, an impartial jury, to be informed of charges, to confront witnesses, to have compulsory process, to have the assistance of counsel (U.S. CONST. amend. VI), and prohibitions against excessive bail and infliction of cruel and unusual punishment (U.S. CONST. amend. VIII). Of these rights and guarantees, only the right to presentment or indictment by a Grand Jury and the right to have a jury selected from residents of the state and district where the crime occurred, and the prohibition against excessive fines have not been

protections required by the Bill of Rights, those guarantees were understood to apply only to federal court proceedings.⁴⁴ The outcome of the Warren Court's incorporation project was the systematic incorporation of most of the specific criminal procedure guarantees contained in the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution.⁴⁵

The Warren Court's reconceptualization of state autonomy vis-à-vis the federal government over state and local criminal investigations and prosecutions is often understood as the federal judicial reaction to the "Mississippi Problem"—the failure of state courts, particularly in the South, to fully protect the rights of economically and racially marginalized defendants, most often poor African Americans. The working premise of incorporation, thus, was "that the state bench was, at its worst racist and incompetent, and merely competent most of the time."⁴⁶ This is the Supreme

incorporated and applied to the states. *Hurtado v. California*, 110 U.S. 516 (1884) (grand jury right); *Caudill v. Scott*, 857 F.2d 344 (6th Cir. 1988) (right to have jury selected from residents of state and district where crime occurred); *McDonald v. Chicago*, 561 U.S. 742 (2010) (excessive fines).

⁴⁴ Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 70 (1996) ("Under the incorporation doctrine, certain rights in the Bill of Rights, originally restrictions on only the federal government, become, when 'incorporated' into the Fourteenth Amendment Due Process Clause, restrictions upon the state governments as well.") (footnotes omitted) (citing *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833) (Fifth Amendment Taking Clause, and by implication the entire Bill of Rights, restricted only the federal government) and *Duncan v. Louisiana*, 391 U.S. 145, 149 n. 14 (1968)).

⁴⁵ See *Wolf v. Colorado*, 338 U.S. 25 (1949) (unreasonable search and seizure); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant requirement); *Ker v. California*, 374 U.S. 23 (1963) (warrantless search or seizure standard), *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial), *In re Oliver*, 333 U.S. 257 (1948) (public trial); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (trial by impartial jury for non-petty offenses); *In re Oliver*, 333 U.S. 257 (1948) (informed of accusations); *Pointer v. Texas*, 380 U.S. 400 (1965) (confront witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Powell v. Alabama*, 287 U.S. 85 (1932) (assistance of counsel in capital cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (assistance of counsel in felony cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (assistance of counsel for imprisonable misdemeanors); *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment); *Baze v. Rees*, 128 S. Ct. 1520, 1529 (2008) (*dicta*) (excessive bail).

⁴⁶ Latzer, *supra* note 44 ("Incorporation was also predicated upon an assumption—a very negative assumption—about the states, and especially about state courts. The assumption was that some state courts were chronically, and virtually all state courts were occasionally, backward. Without the Supreme Court to stand over them, ready to review and reverse, the state courts would fail to provide the minimal rights that all defendants were entitled to at all times. In short, incorporation was motivated by the Mississippi Problem: the assumption that the state bench was, at its worst racist and incompetent, and merely competent most of the time."); Tracey L. Meares, *Everything Old is New Again, Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 106–07 (2005) (noting that the Warren Court's criminal procedure cases are considered a branch of "race law" because they arose in the context of federal judicial reaction to institutionalized racism in state

Court's companion piece to Congress's federalization of criminal jurisdiction and nationalization of federal sentencing law.

Following incorporation, the process due persons in most aspects of a state criminal investigation or proceeding is determined exclusively by reference to the Supreme Court's interpretation of the scope of the Bill of Rights. Thus, where the Supreme Court has incorporated a particular provision of the federal Bill of Rights into the Fourteenth Amendment, a state criminal procedure or process may not fall below what the Supreme Court has identified as the floor of protection required by the federal Constitution. Stated another way, individual state criminal processes and procedures may offer more protection to a criminal suspect or defendant.⁴⁷ But they may not offer less than what the Supreme Court has decided is the federal constitutional minimum.⁴⁸

The functional result of incorporation is that the Supreme Court has occupied virtually the entire field of constitutional criminal procedure and subjected state criminal justice systems to federal judicial regulation and management. Incorporation has produced "a detailed, national Code of Criminal Procedure" that must be followed at every level of government in the United States and that almost completely "supersedes state law."⁴⁹ True to its intent, incorporation has ensured a national baseline of criminal procedural guarantees to which all persons subject to criminal investigation and prosecution are entitled in state and federal prosecutions.

The values and virtues of consistency and uniformity in criminal procedure that were the goal of incorporation have been (at least theoretically) well-served. On the other hand, the federalization,

criminal justice systems following Reconstruction and in the context of the struggle for civil rights).

⁴⁷ Donald A. Dripps, *Does Liberal Procedure Cause Punitive Substance? Preliminary Evidence from Some Natural Experiments*, 87 S.CAL. L. REV. 459, 463, available at <http://ssrn.com/abstract=2326757> ("The Warren Court's criminal procedure revolution had three primary components; the exclusionary rule, the right to counsel, and *Miranda*. The impact of the revolution, however, was not uniform across jurisdictions. About half the states had adopted the exclusionary rule before *Mapp*, and a majority of states provided indigent felony defendants court-appointed counsel before *Gideon*. No jurisdiction anticipated *Miranda* exactly, but some jurisdictions were regulating police interrogation more rigorously than others.")

⁴⁸ Latzer, *supra* note 44, at 75 ("By its very nature, incorporation established United States Supreme Court hegemony over the state bench. As the ultimate interpreter of the federal Bill of Rights, the Supreme Court became the final authority regarding the scope and nature of its guarantees; the state courts were to be compelled to conform to national mandates established by the Supreme Court, absent more protective state procedures. In the 1960s, and for the next two decades, as criminal procedure rose to the top of the Supreme Court's agenda, the Court rendered dozens of decisions glossing the Fourth, Fifth, Sixth and Eighth Amendments. Each such decision established an imperative for state proceedings, which the state courts could enlarge, but never deny. Incorporation thus shifted the initiative for developing criminal procedure law from the state courts and state legislatures to the United States Supreme Court.")

⁴⁹ Hoffman & Stuntz, *supra* note 39, at 67.

nationalization and standardization of criminal procedural law through incorporation has also been criticized for stifling development of jurisdictionally appropriate approaches to criminal justice reform and innovation on the state and local level by requiring states to conform to a one-size-fits-all approach to criminal procedure.⁵⁰

2. Rule-Based Criminal Procedure

In contemporary practice, all federal courts follow the Federal Rules of Criminal Procedure, along with individual District or Circuit rules. The concept of a standard, national set of federal rules is probably unremarkable to most federal practitioners and jurists. However, the federal criminal and civil rules of procedure are of relatively recent vintage. Indeed, as set out below, there was no national or uniform set of federal criminal procedural rules for the first 150 years of the federal judiciary's existence.

Congress's first federal law dictating procedural requirements for the federal courts is the Judiciary Act of 1789.⁵¹ The Judiciary Act of 1789 contained a number of procedural provisions to govern the courts of the United States, including procedures relating to granting new trials, administering oaths, and punishing contempt.⁵² The Judiciary Act of 1789 further authorized the federal judiciary "to make and establish all necessary rules for the orderly conducting business in the said courts[.]"⁵³

Less than a week after passing the Judiciary Act of 1789, Congress approved the Process Act of 1789. The Process Act of 1789 took away the discretion Congress had just granted to the federal judiciary to make rules.⁵⁴

⁵⁰ Latzer, *supra* note 44, at 64–65 ("There can be little question that incorporation forced the states to adopt uniform procedures without regard to local needs. In the decades since the 1960s, when the Supreme Court 'selectively' incorporated nearly all of the criminal procedure rights in the Bill of Rights, the state courts have had little choice but to give force to these federal procedures (absent broader state rights). No matter how costly, no matter how inefficient, no matter how difficult to implement, no matter how much injustice they might cause, and no matter how inappropriate to local circumstances they might be, the state courts have had to give effect to these federal procedural rights. These disadvantages of incorporation were acknowledged even in the 1960s, but they were believed to be outweighed by one important value: equality. Whatever the disadvantages in stifling state uniqueness, independence, and freedom to experiment, the advantage of uniform treatment of defendants throughout the United States, at least with respect to the fundamental rights of the Bill of Rights, seemed to justify incorporation.") (footnotes omitted).

⁵¹ Ch. 20, § 25, 1 Stat. 73, 85 (1789) (codified as amended at 28 U.S.C. § 1257).

⁵² See Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 884–86 (2010).

⁵³ Ch. 20, § 17, 1 Stat. 73, 83. Section 17 of the Judiciary Act provided in part: "And be it further enacted, That all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States." *Id.*

⁵⁴ Ch. 21, § 2, 1 Stat. 93 (1789). The Process Act of 1789 is also sometimes referred to as the "First Conformity Act." See 4 CHARLES ALAN WRIGHT ET AL., FEDERAL

Instead, Congress instructed federal trial courts in actions at common law to adopt the “modes of process” in effect in the state courts of the state in which the federal court was situated.⁵⁵ Congress subsequently incorporated some specific criminal procedural requirements into the first federal criminal statutes enacted shortly after it passed the Judiciary and Process Acts. In 1790, for example, Congress enacted a federal treason statute that contained specific notice requirements and a self-incrimination provision.⁵⁶

Almost one hundred years later, in the civil context, Congress enacted the Conformity Act of 1872, which required federal courts to conform the practice and procedure to the procedures used by the state in which the federal court sat in like cases (other than in equity and admiralty matters).⁵⁷ In 1934 Congress enacted the Rules Enabling Act.⁵⁸ This Act authorized the federal judiciary to promulgate federal rules of civil procedure.⁵⁹ Pursuant to this authority, the Court promulgated the Federal Rules of Civil Procedure. Enacted in 1938, the Federal Rules of Civil

PRACTICE AND PROCEDURE § 1002 (3d ed. 1998) (“[T]he first Conformity Act (also called the Process Act of 1789) . . . provided that the procedure in actions at law in the federal courts should be the same in each state “as are now used or allowed in the supreme courts of the same.”) (footnotes and citations omitted).

⁵⁵ The Process Act provided, in pertinent part: “until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.” See Paul Taylor, *supra* note 52, at 885–86 (“Federal courts interpreted the Process Act to require them to follow state court rules not only in the form of the processes they issued but also in the procedures they employed. . . . and [t]hose who favored the adoption of state procedure ultimately prevailed over those who favored a standardized code of uniform federal procedure.”).

⁵⁶ See Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118 (1790) (requiring those accused of treason to receive copy of the indictment and a list of witnesses and jurors three days before trial, and providing for a two day notice requirement for all other capital cases); § 30, 1 Stat. 119 (the silence of the accused is not to be treated as a guilty plea); § 32, 1 Stat. 119 (establishing statute of limitations for prosecution).

⁵⁷ See Wright et al., *supra* note 54, at § 1002 (“The conformity required by the [First Conformity] Act of 1789 was a static conformity that forced the federal courts in the original states to apply local state practice as it existed in 1789[.] . . . [I]n 1828 [Congress enacted] a new Conformity Act applicable to states admitted after 1789, which provided that the procedure in common law suits in federal courts in such states should be the same as that ‘then’ used in the highest court of original and general jurisdiction of the state in question. Fourteen years later, a similar enactment was necessary to provide a procedure for cases arising in states admitted into the union between 1828 and 1842. With regard to states admitted between 1842 and 1872, the conformity principle was incorporated directly into the enactments granting statehood or was extended to those states by judicial construction.”) (footnotes and citations omitted).

⁵⁸ Pub. L. 73-415, 48 Stat. 1064, enacted June 19, 1934, codified as 28 U.S.C. § 2072.

⁵⁹ *Id.* Under the Rules Enabling Act, Congress retains the power to reject the Court’s proposed rules or amendments, to modify them, or to enact rules or amendments itself. See *id.*

Procedure were generally perceived as an improvement in existing procedure in federal civil cases.⁶⁰

The success of the civil rules led to support for a similar undertaking in the criminal arena. In 1940 Congress granted the Supreme Court authority to establish uniform criminal rules under the Sumners Courts Act.⁶¹ Subsequent amendments to the Rules Enabling Act authorized the federal judiciary to promulgate the Federal Rules of Criminal Procedure and other procedural rules.⁶² The Supreme Court adopted the first Federal Rules of Criminal Procedure in 1944, covering procedures up to verdict. In 1946, the Court adopted a second set of criminal rules, covering post-verdict procedures.⁶³ The full set of Criminal Rules took effect on March 21, 1946.⁶⁴

This history demonstrates a number of things. First, the process of developing a national set of criminal procedural rules has been an iterative, if slightly disorganized, one. Second, although contemporary practitioners and judges have known nothing but a set of national rules (with some local variations) as a given in the federal court system, national uniformity in this context is a relatively recent development, having come into existence as recently as the mid-1940s. And third, the concept of applying state procedural rules in federal cases is neither novel nor unprecedented.

III. THE STATE/FEDERAL PROCEDURAL DISPARITY GAP

Observers have forwarded a number of criticisms of Congress's federalization of the U.S. criminal justice system.⁶⁵ Two of those criticisms

⁶⁰ *Preface*, DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE (Madeleine J. Wilken & Nicholas Triffin, eds., 1991), p. xi ("The ensuing Federal Rules of Civil Procedure . . . were generally well received and there were many who believed that the various criminal rules in use in the District Courts should be made uniform as well. Consequently, Congress granted the Supreme Court the power to make rules of procedure for criminal cases[.]") (footnotes omitted).

⁶¹ The Sumners Courts Act of June 29, 1940, Pub. L. 76-675, 54 Stat. 688 (1940) later codified at 18 U.S.C. § 3771. Pursuant to this authority, the Supreme Court appointed an Advisory Committee for the criminal rules, which published its Preliminary Drafts for comment in 1943 and 1944. Wilken & Triffin, *supra* note 42, at xiii-xiv.

⁶² The Rules Enabling Act, then codified at 18 U.S.C. § 3771, authorized the promulgation of certain criminal rules. Congress repealed 18 U.S.C. § 3771 in 1988 and merged the criminal and civil rules enabling acts. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. IV, § 404(a)(1), 102 Stat. 4642, 4651 (1988), and incorporated authorization for the Rules under the Rules Enabling Act, now codified at 28 U.S.C. §§ 2072, 2074. In 1988, Congress unified the criminal and civil rule-making authority under one statute. *See* 28 U.S.C. §§ 2071-2077.

⁶³ 18 U.S.C. § 3771 (process prior to a verdict or guilty plea) and 3772 (post-verdict process) (repealed Pub. L. No. 100-702, tit. IV, § 404(a)(1), Nov. 19, 1988, 102 Stat. 4642, 4651).

⁶⁴ Wilken & Triffin, *supra* note 60, at p. xv.

⁶⁵ O'Hear, *supra* note 23, at 726-29 ("Academics and policy-makers often criticize federalization. They have advanced at least four major arguments. First, critics contend that federalization threatens the 'delicate balance' between the state and the federal government envisioned by the Constitution, potentially undermining the stature of state

are of particular relevance to this article. One, federalization threatens the “delicate” federal/state constitutional balance, “potentially undermining the stature of state criminal justice systems.”⁶⁶ And two, federalism may produce “disparate results for the same criminal conduct, depending on whether the conduct is prosecuted by federal or state authorities.”⁶⁷ Another concern is that federal over-involvement in criminal matters traditionally within the

criminal justice systems. Second, critics observe that federalization enhances the power of unelected federal prosecutors. Third, critics argue that federalization threatens to overwhelm federal courts with criminal cases, which may interfere with civil dockets. Finally, critics note that federalization may lead to disparate results for the same criminal conduct, depending on whether the conduct is prosecuted by federal or state authorities.”) (citing TASK FORCE, *supra* note 1, at 7). See also Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789 (1996); John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 687 (1999); Sun Beale, *supra* note 33, at 1000–04; Clymer, *supra* note 33, at 739; Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 ANN. AM. ACAD. POL. & SOC. SCI. 103 (1996); Ehrlich, *supra* note 35, at 825–26 (2000); Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing With Violent Street Crime: Principles, Questions, and Cautions*, 543 ANN. AM. ACAD. POL. & SOC. SCI. 185 (1996); Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127 (1997); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 957 (2000); Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANN. AM. ACAD. POL. & SOC. SCI. 15 (1996); William H. Rehnquist, *Remarks on the Federalization of Criminal Law*, 11 FED. SENTENCING R. 132 (1998); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANN. AM. ACAD. POL. & SOC. SCI. 39 (1996).

⁶⁶ O’Hear, *supra* note 23, at 728; see also *Malloy v. Hogan*, 378 U.S. 1, 28 (1964) (Harlan, J., dissenting) (“As the Court pointed out in *Abbate v. United States*, ‘the States under our federal system have the principal responsibility for defining and prosecuting crimes.’ The Court endangers this allocation of responsibility for the prevention of crime when it applies to the States doctrines developed in the context of federal law enforcement, without any attention to the special problems which the States as a group or particular States may face.”); Brickey, *supra* note 4, at 1166–67 (“If the federal justice system is to function effectively and continue to dispense justice, the legislative and executive branches of government must exercise restraint. In particular, Congress must show more regard for the states. In enacting death penalty provisions for dozens of crimes, for example, Congress chose to override the decisions of fourteen states and the District of Columbia to ban capital punishment.”). *Id.* at n. 172 (noting that this point is “especially true in the case of federal death penalty crimes that may be committed wholly intrastate and thus do not implicate a substantial federal interest.”) (citing Pub. L. No. 103-322, 108 Stat. 1796, 1971 (1994) (codified as amended at 18 U.S.C. § 36(b)(2)(A)) (drive-by shootings); Pub. L. No. 103-322, 108 Stat. 1969 (1994) (codified as amended at 18 U.S.C. § 2119(3)) (carjacking); Pub. L. No. 103-322, 108 Stat. 1969 (1994) (18 U.S.C. § 1959(a)(1)) (violent crimes in aid of racketeering); Pub. L. No. 103-322, 108 Stat. 1970 (1994) (18 U.S.C. § 241) (conspiracy against rights); Pub. L. No. 103-322, 108 Stat. 1970 (1994) (18 U.S.C. § 242) (deprivation of rights under color of law); Pub. L. No. 103-322, 108 Stat. 1970 (1994) (codified as amended at 18 U.S.C. § 245(b)) (federally protected activities); 18 U.S.C. § 924; Pub. L. No. 103-322, 108 Stat. 1973 (1994) (codified as amended at 18 U.S.C. § 924(i)) (gun murders during federal crimes of violence and drug trafficking crimes)).

⁶⁷ O’Hear, *supra* note 23, at 729.

purview of the states stifles innovation.⁶⁸ A related concern is that the availability of different and higher punishment or less stringent procedures in the federal system may encourage “forum shopping” by federal prosecutors in matters involving concurrent jurisdiction in order to maximize both the likelihood of conviction and the potential sentence for the conduct involved.⁶⁹

As discussed above, federal sentences under the SRA have proven to be extremely harsh as compared to state sentences for similar conduct. A significant amount of attention has been rightly devoted to the disparate results of charging and sentencing laws under state and federal law for the same conduct. Less written about, but as significant, federal criminal defendants may also be afforded less procedural protection than state court defendants in the same geographic jurisdiction.⁷⁰ Examples include the discovery rules, which are quite constrained under the Federal Rules of Criminal Procedure,⁷¹ and change of venue standards, which may be more liberal under state procedural rules.⁷²

⁶⁸ Brickey, *supra* note 22, at 1172–73 (“The federal government’s assumption of a major responsibility for maintaining local law and order is not only harmful to the federal justice system. It is also harmful to the states. When the government preempts local prosecutions in areas of overlapping jurisdiction, it interferes with a state’s ability to exercise discretion in a way that is responsive to local concerns. Excessive use of federal jurisdiction diminishes the prestige of local law enforcement authorities and thus may interfere with their development of responsibility for and capacity to handle complex matters or detract from the distinctive role states play as ‘laboratories of change.’”).

⁶⁹ O’Hear, *supra* note 23, at 732 (“Enhanced federal-state disparities, coupled with federalization, provide increased impetus for forum shopping. By choosing a federal forum, law enforcement authorities typically obtain a longer sentence than they would obtain in state court. State and federal agents have taken advantage of the growing potential for sentence shopping in a variety of ways.”) (footnote and citation omitted).

⁷⁰ O’Hear, *supra* note 23, at 761–62 (“In addition to its tendency to undercut state sentencing policy preferences, national uniformity may affect state criminal procedure policies similarly. State criminal procedures typically differ from federal procedures in several important respects, including pretrial detention, pretrial discovery, suppression of evidence, and parole. Collectively, a state’s policy decisions in these areas represent a particular way of balancing the competing interests of criminal defendants, law enforcement agents, and society at large.”).

⁷¹ See John D. Cline, *It Is Time to Fix the Federal Criminal System*, 35-SEP CHAMPION 34 (Sept. 2011) (“In some states, liberal discovery rules offset the prosecutor’s overwhelming pre-indictment information-gathering advantage. In the federal system, however, discovery is limited.”); H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1089 (1991) (“It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters.”).

⁷² See Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 360–61 (1960) (noting that some states have embodied change of venue rights in their constitutions, others (like the federal system) permit removal in specified situations delineated by statute or rule of court, while other states’ procedures provide for a change of venue as a matter of right if certain conditions are met) (footnotes omitted).

IV. THE RECEDING TIDE

The phenomenon of federalization, standardization, and nationalization of criminal law in the United States is not of design. It is an outgrowth of a multitude of era-specific concerns and political forces. In the early phases of federalization of the substantive law, concerns about states' ability to regulate and reach certain conduct in the economic arena, along with Congress's embrace of expansive federal Commerce Clause authority, set the stage for further and further incursions into the substantive criminal law.⁷³ This has culminated, as noted, in overlapping federal and state jurisdiction over a category of criminal conduct historically and traditionally subject only to state prosecution. In the criminal procedure arena, as noted, the federalization of the law was informed by the "Mississippi problem"—a federal concern that some states were either unable or unwilling to protect the federal constitutional rights of all defendants prosecuted in their courts. Federal sentencing reform, which imposed national uniformity and standardization upon federal judges, and the introduction of many mandatory minimum sentences took place against the backdrop of the war on drugs, animated by the twin objectives of increasing the potential penalties generally for federal offenses and eliminating sentencing disparities among federal trial courts by constraining federal judicial discretion in sentencing.⁷⁴

The phenomenon of federalization, nationalization, and standardization of criminal law and procedure has been a steady and complex process. But, it is a relatively recent development, and it is not a constitutionally-obvious outcome in the American federal system. Rather, it is but a chapter in the history of the development of American criminal law and procedure—not a prologue, not the entire story, and not the final chapter. Whether viewed as an overcorrection, a historical necessity, or a bold experiment, there appears to be an emerging sensibility that it is time to at least reflect on the wisdom of the federal incursion into aspects of American criminal justice traditionally dominated by the states.⁷⁵ Academics, commentators, judges and practitioners have, for some time, been issuing calls for reevaluating the current state/federal balance of authority and for

⁷³ See Brickey, *supra* note 22, at 1172–73 (“The original role of federal criminal law was auxiliary to that of the states. Federal law addressed matters of substantial federal concern that were beyond the reach of the states. The evolution of a national police power paralleled the rise of economic regulation. Increased economic regulation inspired a Congress enamored with commerce-based jurisdiction to add more and more crimes to the books. Thus, as economic regulation ascended, criminal law flourished as well. But somewhere along the line, federal criminal law lost its compass. Congress, disregarding the auxiliary nature of federal law enforcement, placed federal criminal law on an evolutionary collision course with state criminal law. Thus, instead of complementing state criminal law, federal law began competing with it. Federal duplication of state criminal law unduly burdens the federal justice system, which is ill-equipped to supplant local law enforcement.”) (footnotes and citations omitted).

⁷⁴ *Id.* at 1173.

⁷⁵ See *supra* note 65.

resuscitating some first principles of federalism in the criminal justice system.⁷⁶ And, although none of the federal branches has yet to engage in a complete about-face, recent times have seen a few indicators that a federalism renaissance may play an important, if not a dominant role, in the next phase of this ongoing story.

Further, some have argued that the impetus for the nationalization and federalization of constitutional criminal procedure, the Mississippi Problem, has evaporated, warranting reconsideration of the wisdom of incorporation, and possibly even “deincorporation” of some of the constitutional criminal mandates placed on the states by the Warren Court era decisions.⁷⁷ A secondary and related concern is that the jurisdictional redundancy currently imbedded in the system is neither sustainable nor justifiable.⁷⁸ The Court has not taken steps to roll back its incorporation revolution of the 1960s. But it has revived concepts of federalism and deference to state court procedure. In doing do, the Court has demonstrated at least a willingness to reexamine the proper balance between the states and the federal government in the criminal justice arena.⁷⁹

In the last two decades, the Supreme Court has, for the first time, reined in Congress’s nationalization and standardization of the criminal law. The most notable example has been in its reexamination of Congress’s power to federalize criminal activity under the Commerce Clause, which has been the vehicle for federal incursion in to areas of substantive criminal law

⁷⁶ See *supra* notes 65–71 and accompanying text; *infra* note 77 and accompanying text.

⁷⁷ Latzer, *supra* note 44, at 66 (asserting the “Mississippi Problem” is past and that because “state courts are no longer rights-antediluvians, . . . an entire set of assumptions underlying incorporation has eroded.”).

⁷⁸ Brickey, *supra* note 22, at 1168–69 (“Congress should heed Chief Justice Rehnquist’s warning that ‘we can no longer afford the luxury of state and federal courts that work at cross-purposes or irrationally duplicate one another.’ The state and federal justice systems are interdependent, and there is a real need to achieve a balance between their respective jurisdictions. Federal courts should be viewed as ‘distinctive forums of limited jurisdiction, meant to complement state courts rather than supplant them.’ That is true not only because of federalism principles, but also because of the strain that expansive use of federal criminal jurisdiction puts on the system.”) (footnotes and citations omitted).

⁷⁹ TIMOTHY A. BAUGHMAN, GILLESPIE MICH. CRIM. L. & PROC. SEARCH & SEIZ. § 1:2 (2d ed. 2014) (“The Warren Court years were appropriately known as the era of the ‘criminal law revolution,’ or, more accurately, the ‘criminal procedure revolution.’ . . . The end result of the revolution was the federalization of virtually every aspect of state criminal procedure. Interestingly, it now appears that the revolution has come full circle. Though the present Court has shown little inclination to pull back from the established federalization of state criminal procedure, it has revived long dormant principles of federalism in dealing with federal habeas corpus review of state convictions.”) (citing *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Teague v. Lane*, 489 U.S. 288 (1989); *Sumner v. Mata*, 455 U.S. 591 (1982); *Stone v. Powell*, 428 U.S. 465 (1976)).

previously occupied only by the states.⁸⁰ Congress's extensive reliance on the Commerce Clause to regulate and criminalize activities with distinctly local impacts went virtually unchecked by the Court until 1995 when it decided *United States v. Lopez*.⁸¹ *Lopez* struck down the Gun-Free School Zones Act of 1990, a federal statute making it a crime to carry a gun within 1000 feet of a school.⁸² This was the first time in fifty years that the Court found Congress had exceeded its powers under the Commerce Clause.

United States v. Morrison, decided in 2000, removed any doubt that the Court's reexamination of Congress's Commerce Clause power in *Lopez* was an anomaly.⁸³ *Morrison* considered the constitutionality of the Violence Against Women Act of 1994 (VAWA), which Congress passed under its power to regulate interstate commerce.⁸⁴ A critical defect in the legislation the Court considered in *Lopez* was Congress's failure to provide sufficient evidence of a nexus between the conduct it was attempting to reach and the Commerce Clause.⁸⁵ In *Morrison*, unlike *Lopez*, Congress provided a lengthy documentation of the evidence of the relationship between interstate commerce and gender-motivated violence it was relying on to enact the VAWA.⁸⁶

The question in *Morrison* was whether Congress exceeded its authority under the Commerce Clause in enacting the VAWA. The Court held that it had, finding that gender-motivated crimes are not economic crimes, dismissing Congress's documented evidence that these crimes can have a substantial effect on commerce.⁸⁷ The Court observed that if Congress

⁸⁰ Brickey, *supra* note 22, at 1142–43 (“The first part of the twentieth century brought with it the Mann Act (prohibiting transporting a woman across state lines for illicit purposes), the Dyer Act (prohibiting transporting a stolen motor vehicle across state lines), the Volstead Act (just plain Prohibition), and statutes forbidding interstate transportation of lottery tickets, inter-state transportation of obscene literature, and selling liquor through the mail. As these examples illustrate, Congress had begun to rely on the commerce power (with ever increasing regularity) to enlarge federal criminal jurisdiction. The advent of railroads, automobiles, and airplanes made state boundaries ‘increasingly porous.’ If the constitutionality of commerce-based criminal jurisdiction was ever in serious doubt, the issue was fairly short-lived.”) (citing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 71 (1994) (statutory citations omitted). Brickey, *supra* note 4, at 1168 (arguing that to be faithful to federalism “Congress should . . . refrain from tacking on marginally relevant jurisdictional elements to bring matters of primarily local interest into the federal sphere,” as it has by using “interstate commerce as a jurisdictional hook to federalize domestic abuse [and] or invoking its power to regulate controlled substances in order to federalize drive-by shootings and participation in local street gangs.”) (footnotes and citations omitted).

⁸¹ *United States v. Lopez*, 514 U.S. 549 (1995).

⁸² *Id.* at 551.

⁸³ *United States v. Morrison*, 529 U.S. 598 (2000). For a discussion of *Morrison* see Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323, 363–65 (2006).

⁸⁴ *Morrison*, 529 U.S. at 607.

⁸⁵ *Id.* at 612–14.

⁸⁶ *Id.*

⁸⁷ *Id.* at 619–20.

were permitted to rely on the Commerce Clause to regulate gender-motivated violence, it would be able to use the Commerce Clause as a vehicle to “completely obliterate the Constitution’s distinction between national and local authority.”⁸⁸ In other words, if Congress could regulate gender-related violence in the VAWA, it could regulate any crime and violent activity even though the regulation of violence and crime is a state issue.⁸⁹

The Court recently exhibited an increased solicitousness towards state authority over conduct with exclusively or primarily local impacts in *Bond v. United States*.⁹⁰ Bond attempted to seek revenge on a woman with whom her husband had an affair by placing caustic substances on objects the woman was likely to touch, including her mailbox, car, and doorknob, which caused the woman to develop an irritating rash.⁹¹ Bond was indicted for two counts of violating 18 U.S.C. § 229, which makes it a federal offense to knowingly possess or use any chemical that “can cause death, temporary incapacitation or permanent harm to humans or animals” where not intended for a “peaceful purpose.”⁹²

Congress enacted the statute at issue in *Bond* to enforce the Chemical Weapons Convention Implementation Act of 1998.⁹³ The Implementation Act, in turn, implemented provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, a treaty ratified by the United States in 1997.⁹⁴ The issue decided by the Court in *Bond* was whether the statute reached beyond the scope of the treaty and invaded an area traditionally within the exclusive domain of state and local police powers, to wit, assault by poisoning.⁹⁵ The Court, relying heavily on federalism principles, held that the statute at issue was not intended to reach this conduct.⁹⁶

⁸⁸ *Id.* at 615.

⁸⁹ Brickey, *supra* note 22, at 1167–68 (positing that “Congress should also resist the temptation to view federal crimes as interstitial gap fillers [as with the VAWA, which] punishe[d] crossing a state line with intent to injure or harass a spouse or intimate partner if the actor intentionally commits a crime of violence that injures the spouse or partner. . . . Regardless of one’s views on how expansively state law should define the crime of rape, it is highly questionable whether this reasoning is consistent with principles of federalism. It is an overt attempt to substitute the judgment of Congress for those of state legislatures and courts on a matter peculiarly within the domain of the states.”).

⁹⁰ *Bond v. United States*, 134 S. Ct. 2077 (2014).

⁹¹ *Id.* at 2083.

⁹² *Id.* at 2084; *see also* §§ 229(a), 229F(1), (7), (8).

⁹³ Pub. L. No. 105-277, 112 Stat. 2681–856 (2000), 22 U.S.C. § 6701 et seq.; 18 U.S.C. § 229 et seq.

⁹⁴ *Bond*, 134 S. Ct. at 2083.

⁹⁵ *Id.* (“The question presented by this case is whether the Implementation Act also reaches a purely local crime: an amateur attempt by a jilted wife to injure her husband’s lover, which ended up causing only a minor thumb burn readily treated by rinsing with water.”).

⁹⁶ *Id.* (“Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that

In the federal sentencing arena, the Court dealt Congress's standardization of federal sentencing a constitutional blow in 2005, when it invalidated the mandatory aspects of the federal sentencing regime in *United States v. Booker* under the Sixth Amendment.⁹⁷ In its place, the Court instructed federal trial courts to adhere to a statutory "reasonableness" standard and acknowledged that its constitutional ruling would undermine Congress's efforts at national uniformity in federal sentencing: "[w]e cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure [through mandatory Guidelines]."⁹⁸

The Supreme Court is not alone in recognizing that the federal substantive criminal law and sentencing system that has dominated our recent history has produced disparity, unfairness, and disequilibrium. On the executive level, citing the disparate impact of federal mandatory minimum laws on low income and minority communities, especially when invoked in prosecuting low-level drug crimes, Attorney General Eric Holder announced in September 2013 that the U.S. Department of Justice, as a policy matter, would reduce the use of federal charges carrying mandatory minimum sentences.⁹⁹ Further, a new political dialogue may be emerging on the issues of federal sentencing reform to address the current state/federal sentencing disparity.¹⁰⁰

V. CLOSING THE PROCEDURAL DISPARITY GAP AS THE TIDE RECEDES

This article posits that the federalization, standardization, and nationalization of American criminal law may be reaching its apex and that a systemic federalism self-correction may be underway (or at least current political conditions make it possible for the first time). As described above, areas in which both subtle and overt self-correction have manifested themselves include the Supreme Court's rejection, for the first time, that Congress's authority to regulate the criminal law under the Commerce Clause, and to impose national uniformity in sentencing by severely constraining federal judicial discretion is without limit. It also includes the recognition of the unfairness wrought by federal mandatory minimum sentences on low-income communities, particularly when invoked in low-

responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and we accordingly conclude that it does not cover the unremarkable local offense at issue here.").

⁹⁷ *United States v. Booker*, 543 U.S. 220 (2005).

⁹⁸ *Id.* at 263.

⁹⁹ *NPR Morning Edition: Holder Makes Moral Argument Against Mandatory Sentences*, NATIONAL PUBLIC RADIO (Sept. 20, 2013) (transcript available at: <http://www.npr.org/2013/09/20/224347967/holder-makes-moral-argument-against-mandatory-sentences>) (last visited Mar. 2, 2014).

¹⁰⁰ *Id.*

level drug crimes, the investigation and prosecution of which historically fell within states' exclusive jurisdiction.

This article submits that it is not enough for the federal courts to redraw the state/federal jurisdictional lines in the substantive criminal law or correct the excesses of Congress's sentencing uniformity project to right the balance of state and federal law enforcement power.¹⁰¹ Significant state/federal prosecution disparities will remain if procedural law is not brought into the recalibration process as well.

Among the evils of federalization of the criminal law, the "most troubling consequence of national uniformity" is that in instances where concurrent state/federal jurisdiction exists, "[p]rosecutors may choose a federal forum with the specific purpose of evading state procedural requirements, particularly in cases in which state police or prosecutors have violated state procedural rights."¹⁰² In those cases, a difference in the level of procedural protection afforded by state and federal law creates an unjustified and unjustifiable procedural disparity gap between state and federal court defendants that can and must be closed.¹⁰³

¹⁰¹ Rory K. Little, *Myths and Principles of Federalism*, 46 HASTINGS L.J. 1029, 1039 n. 42 (1995) ("Thus, the objection apparently is to enacting new federal crimes. This too is slightly surprising, as it can be argued that rather than the absolute number of federal crimes, it is the 'federalization' of criminal procedure that has occurred since 1960 (via the 'constitutionalization' of criminal procedure in the Warren Court and subsequent congressional legislation such as the 1970 Speedy Trial Act, more detailed Federal Rules of Criminal Procedure, and the 1987 federal Sentencing Guidelines) that has required increased judicial resources necessarily devoted to criminal cases. While surely significant, these developments are analytically separate from the number of federal criminal statutes enacted and could be addressed by procedural changes rather than complete jurisdictional bars to new federal crimes.").

¹⁰² O'Hear, *supra* note 23, at 763 ("Though such a federal prosecution may be preferable to no prosecution at all, the application of a harsher federal sentence under the circumstances seems less than fair. In effect, the defendant is penalized in federal court because his state rights were violated. Similarly objectionable would be the application of a harsh federal sentence in a federal prosecution after an acquittal in state court, which would penalize the defendant for winning the first time around. Local uniformity would eliminate such outcomes and help to preserve the integrity of state procedural protections and state verdicts."). See also Brickey, *supra* note 22, at 1164-65 (federal "[p]rosecutors may be making decisions on the basis of which jurisdiction will put the defendant in the most disadvantageous position. As noted above, penalties for state drug offenses are relatively light when compared with their sometimes draconian federal counterparts. Thus, the decision whether to retain federal jurisdiction or refer the case to the state is critical. Similarly, the government might choose to retain a case for federal prosecution because of more lenient federal standards governing the issuance of search warrants, the granting of permission to engage in electronic surveillance, and the use of informants. Furthermore, it has the tactical advantages of a nationwide subpoena power, contempt and immunity powers, and forfeiture authority.") (footnotes and citations omitted).

¹⁰³ See *United States v. Ucciferri*, 960 F.2d 953, 954 (11th Cir. 1992) (considering defendant's contention that his case had been "transferred" to federal court in order to evade more stringent state standards concerning search warrants, wire surveillance, and informants).

Even assuming there is a sound constitutional basis for closing this gap, this article does not make a constitutional “must” argument.¹⁰⁴ Although procedural disparity between the state and federal criminal prosecutions implicates aspects of judicial comity and federalism,¹⁰⁵ this article does not make a normative “should” argument for the federal courts to address it.¹⁰⁶ Rather, it is Congress’s prerogative and responsibility to address this issue as a legislative matter to restore a state/federal allocation of responsibility in the area of criminal law prosecution that has tipped wildly out of balance. This imbalance undermines the legitimacy of federal law enforcement and courts.¹⁰⁷ Federalization of the criminal law, furthermore, diverts scarce resources to the prosecution of criminal acts in federal court that might be better re-directed to state law enforcement efforts.¹⁰⁸

To address this state/federal prosecution disparity, this article advocates that Congress should enact federal legislation in the form of an amendment to the Rules Enabling Act requiring federal courts to apply state criminal procedure in federal prosecutions where application of federal procedure rules would work a disadvantage to a federal defendant prosecuted for conduct that could also be prosecuted by the state. Thus, where the federal and state governments have concurrent jurisdiction over the federal

¹⁰⁴ In the sentencing context, federal courts have rejected Equal Protection and Due Process challenges to state/federal disparities. *See, e.g.*, *United States v. Williams*, 963 F.2d 1337, 1341–42 (10th Cir. 1992) (rejecting due process claim); *United States v. Goodapple*, 958 F.2d 1402, 1410–11 (7th Cir. 1992) (same); Clymer, *supra* note 33, at 677 n. 181 (citing additional Due Process and Equal Protection cases).

¹⁰⁵ Judicial comity/federalism arguments, however, may be worthy of reconsideration in the post-*Booker* world. *See United States v. Yopez*, 652 F.3d 1182 (9th Cir. 2011) (under principles of comity federal district court imposing federal sentence could not consider probationary sentence that had been terminated by state court for purpose of enabling defendant to become eligible for federal safety valve to mandatory minimum sentence), *rev’d en banc*, 704 F.3d 1087 (9th Cir. 2012).

¹⁰⁶ *See Younger v. Harris*, 401 U.S. 37, 44 (1971) (“The concept [of comity represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, “Our Federalism,” born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”).

¹⁰⁷ *United States v. Brennan*, 468 F. Supp. 2d 400, 407–08 (E.D.N.Y. 2007) (“From the point of view of the impact of sentencing on specific and general deterrence and on reducing recidivism rates, state vertical coordination is more important than national-horizontal uniformity. The public and criminals generally consider the local federal and state courts as part of a single protective institution. Too great a disparity between state and federal prosecution and sentencing decisions will be seen by the public as creating unjustified disparities.”).

¹⁰⁸ Putting federal defendants on procedural parity with state defendants, at least with respect to concurrent jurisdiction crimes in states with procedures more favorable to the accused, I argue, would remove yet another set of incentives (as has been the case to some extent with striking down the mandatory federal sentencing guidelines) for invoking federal jurisdiction to prosecute what was traditionally and historically viewed as a state crime in the U.S. criminal justice system.

defendant's conduct and application of a federal procedure will have a substantive impact in a case, the defendant should be in no worse position than he or she would have been but for the misfortune or fortuity of ending up in federal court.

This proposal distinguishes between purely procedural rules, on one hand, and procedural rules that have substantive impacts, on the other. This is a distinction often drawn in federal civil practice, which designates purely procedural matters as the exclusive domain of federal law, even when a federal court is sitting in diversity, and identifies state substantive law as the controlling authority when a federal court sits in diversity.¹⁰⁹ As often recognized, however, simply labeling a rule "procedural" is an incomplete analysis because procedural rules often have significant substantive impacts.¹¹⁰ The disparate impact of the procedure/substantive designation can be particularly pronounced in the criminal context in instances where federal procedure does not accurately reflect public policy choices of the state jurisdiction in which the federal court sits.¹¹¹

¹⁰⁹ If a federal rule is purely procedural it will have no impact, disparate or otherwise, on federal defendants in concurrent jurisdictions prosecutions. This would include rules governing filing deadlines, motions practice, and pleading form. These are procedures that are often controlled by local federal rules, reflecting their character as purely procedural. However, if a federal rule has potentially substantive effects and/or constitutional dimensions, procedural equity would require application of its state counterpart.

¹¹⁰ See *Olympic Sports Prods., Inc. v. Universal Athletic Sales Co.*, 760 F.2d 910, 914 (9th Cir. 1985) ("[A] court should note that every procedural rule may, at some point in litigation, be outcome-determinative[.]"); *In re Parr*, 165 B.R. 677, 682–83 (Bankr. N.D. Ala. 1993) ("It is obvious that, at times, procedural rules can have substantive, even outcome-determinative, results[.]"). For an analysis of the unintended and negative consequences of the Court's heavy involvement in defining and mandating criminal procedures and of maintaining a substance/procedure divide in the criminal law see William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 54 (1997) (characterizing the substance/procedure divide as "less a careful balance than a vicious circle. Counter majoritarian criminal procedure tends to encourage legislatures to pass overbroad criminal statutes and to underfund defense counsel. These actions in turn tend to mask the costs of procedural rules, thereby encouraging courts to make more such rules. That raises legislatures' incentive to overcriminalize and underfund. So the circle goes. This is a necessary consequence of a system with extensive, judicially defined regulation of the criminal process, coupled with extensive legislative authority over everything else[.]").

¹¹¹ O'Hear, *supra* note 23, at 761–62 ("The federal Constitution, of course, establishes certain minimum procedural protections that all states must provide to defendants. As long as these minimal rights are respected, however, each state's unique procedural policy choices are entitled to the same degree of deference as its sentencing policy choices. Federal sentencing practices may undermine these procedural choices. Consider a hypothetical case arising from an investigation and arrest by state police. Assuming a substantial difference between state and federal sentences, state law enforcement may prefer a federal prosecution in order to secure a longer sentence. If federal prosecutors oblige, the defendant faces two important consequences: the risk of a longer sentence and the loss of state procedural rights, which may be more extensive than their federal counterparts. Thus, federal sentencing practices would result in circumvention of the state's procedural policy choices, without regard to any particular characteristics of the case that might make federal procedures especially appropriate.") (footnotes and citations omitted).

This article does not advocate a wholesale importation of state procedures into all federal concurrent jurisdiction prosecutions. Rather, this article proposes that federal defendants who are also subject to state court jurisdiction be afforded the same procedural protection that they would have received had they been hailed into state court for the same conduct where application of federal procedure will have substantive effects. Thus, the default would be application of federal criminal procedure even in concurrent jurisdiction prosecutions. Only where application of federal procedure in a concurrent jurisdiction prosecution has substantive impacts would the federal defendant be entitled to the application of the state procedure.¹¹²

As noted, requiring federal courts to follow uniform federal procedural rules is neither an historical imperative nor constitutionally required—before Congress enacted the Federal Rules of Criminal Procedure, federal courts applied the criminal procedure rules of the state in which a federal court was located and/or a combination of state and federal procedure.¹¹³ This article proposes returning to this original model in a discrete and narrow category of federal prosecutions.¹¹⁴ This article submits that the Rules Enabling Act is the appropriate legislative vehicle for doing so.

As currently written, the Rules Enabling Act¹¹⁵ allows the Supreme Court, following certain steps, “to prescribe general rules of practice and procedure . . . for cases in the United States district courts.”¹¹⁶ A duly adopted rule that satisfies the Rules Enabling Act supplants any pre-existing statute. The Act further provides that “[s]uch rules shall not abridge, enlarge or modify any substantive right.”¹¹⁷ Thus, an act of Congress in the form of an amendment to the Rules Enabling Act would be required to create and implement federal rules requiring the application of state procedure in federal prosecutions where concurrent state/federal jurisdiction exists.

¹¹² This proposition is framed in terms of permitting the federal defendant the benefit of state criminal procedure in concurrent jurisdiction cases. Assuming an application of state procedure would benefit the prosecution, rather than the defendant, I would argue for an across the board application of state procedure, regardless of whether it benefits or disadvantages the federal defendant. The aim of the proposal in this article is to eliminate procedural disparity in concurrent jurisdiction cases to put the federal defendant on same footing as s/he would have been had s/he been prosecuted in state court to vindicate states’ superior claim to regulate substantive outcomes in criminal cases over which it has concurrent jurisdiction as a federalism principle, not to provide some federal defendants a procedural windfall.

¹¹³ See Taylor, *supra* note 52, at 847.

¹¹⁴ O’Hear, *supra* note 23, at 773 (noting that “an across-the-board preference for national uniformity seems difficult to reconcile with normative theories of federalism, particularly in the context of routine street crime and other offenses that are primarily local in character.”).

¹¹⁵ 28 U.S.C. § 2072.

¹¹⁶ 28 U.S.C. § 2072(a).

¹¹⁷ 28 U.S.C. § 2072(b).

To be sure, this proposal is susceptible to criticism that it would prove unwieldy in practice. Complexity, I believe, is not a legitimate reason to avoid correcting a disparity so inimical to federalism that subordinates state choices regarding the appropriate balance between prosecutorial power and procedural protection of individual defendants in its jurisdiction. Nor do I accept that federal courts are incapable of applying different bodies of law in different contexts. With respect to constitutional criminal procedure, since the Warren Court era, state courts have had to cope with a constantly evolving, incredibly complex and unpredictable body of federal constitutional law in resolving federal criminal procedure claims brought in state court. To argue that federal courts are not equally capable of applying state criminal procedure is specious. Further, applying state law is a task federal courts routinely perform in federal civil cases brought in diversity.

The real complexity in the proposal lies not in federal courts' ability to apply state procedure, but in distinguishing between rules that regulate pure procedure and those that have substantive effects. "As the federal courts have said many times, the specific procedural rules employed can often dictate substantive results."¹¹⁸ This is an issue, of course, that is well-developed in the civil law context and one that federal courts are familiar with and adept at addressing. Although much of the discussion regarding the procedural/substantive divide has taken place in the civil context,¹¹⁹ the concept has been explored in the criminal law as well.¹²⁰

This article proposes that criminal cases track this civil diversity jurisdiction jurisprudence in cases of concurrent jurisdiction. The analogy in the civil context, of course, is the *Erie* doctrine,¹²¹ which rejected the federal court practice of applying federal common law rules when sitting in diversity and mandated that federal courts apply the substantive laws of the states in which they are located.¹²² The Justices in *Erie* offered a number of justifications for its rule. However, a dominant concern in *Erie*, as with the proposal in this article, was the proper balance between state and federal authority under in our federal system.¹²³ The argument made here mirrors the concerns that animated *Erie*, namely that if rights "vary according to whether

¹¹⁸ Taylor, *supra* note 52, at 884.

¹¹⁹ Jay Tidmarsh, *Foreword: Erie's Gift*, 44 AKRON L. REV. 897 (2011)

¹²⁰ Donald A. Dripps, *The Substance-Procedure Relationship in Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 409, 432 (2011).

¹²¹ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling* *Swift v. Tyson*, 41 U.S. 1 (1842).

¹²² *See Erie*, 304 U.S. at 78.

¹²³ Garrick B. Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801, 830–31 (2012) ("The Justices in *Erie* articulated several rationales for the decision, including a statutory construction holding that the federal Rules of Decision Act requires the application of state common law in diversity cases absent an applicable federal statutory or regulatory rule of decision; and a holding apparently based on one of several constitutional rationales mentioned, including federalism and equal protection concerns. . . . *Erie* at least states an indirect federalism rule—whatever the ground for decision was, it was clearly influenced by federalism considerations.").

enforcement [is] sought in the state or federal court” equal protection of the law is rendered impossible.¹²⁴ Although this is a concept more familiar in the civil context, mixing state and federal law is not unknown in the criminal law.¹²⁵

Under Supreme Court precedent, the test for distinguishing between substantive and procedural rights is whether a rule “really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”¹²⁶ The Court has resolved this issue not by “reference to any traditional or common-sense substance-procedure distinction”, but rather by evaluating whether disregarding a state rule that would control in a state court will “significantly affect the result of a litigation” in federal court.¹²⁷ The inquiry, therefore, “is not whether the rule affects a litigant’s substantive rights; most procedural rules do.”¹²⁸ Rather, “[w]hat matters is what the rule itself regulates . . . ‘the manner and the means’ by which the litigants’ rights are ‘enforced,’” or “‘the rules of decision by which [the] court will adjudicate [those] rights[.]’”¹²⁹

The question of what is purely a procedural right is one that has occupied the Supreme Court for many years in the civil context, most recently in 2010 in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*¹³⁰ The fault lines and different approaches to the substance versus procedure analysis that practitioners would need to address in the criminal context under this article’s proposal are well-illustrated in that case.

In *Shady Grove*, the defendant insurance company, Allstate, failed to pay its insured, Shady Grove, interest that had accrued on its policy claim, as

¹²⁴ *Erie*, 304 U.S. at 74–75, 78 (“*Swift* ... made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or federal court,” rendering “impossible the equal protection of the law.”).

¹²⁵ See, generally, Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U.L.R. 65 (2006),

¹²⁶ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

¹²⁷ *Hanna v. Plumer*, 380 U.S. 460, 465–66 (1965) (*Erie* “held that federal courts sitting in diversity cases, when deciding questions of ‘substantive’ law, are bound by state court decisions as well as state statutes. The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law. However, as subsequent cases sharpened the distinction between substance and procedure, the line of cases following *Erie* diverged markedly from the line construing the Enabling Act. *Guaranty Trust Co. of New York v. York*, made it clear that *Erie*-type problems were not to be solved by reference to any traditional or common-sense substance-procedure distinction: ‘And so the question is not whether a statute of limitations is deemed a matter of ‘procedure’ in some sense [sic]. The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?’”) (citations omitted).

¹²⁸ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality) (citing *Mississippi Publ’g Corp. v. Murphree*, 326 U.S. 438, 445 (1946)).

¹²⁹ *Shady Grove*, 559 U.S. at 407 (citing *Murphree*, 326 U.S. at 446).

¹³⁰ *Id.* at 393.

required by a New York statute.¹³¹ Shady Grove filed a class action in federal court.¹³² The federal district court held that it lacked diversity jurisdiction over the claim, because a different state law prohibited actions seeking the type of remedy that Shady Grove was seeking, and Shady Grove's individual claims did not meet the amount-in-controversy threshold even though Federal Rule of Civil Procedure 23 would have permitted the class action.¹³³ The Second Circuit affirmed, holding that the statute prohibiting class actions in this situation was a "substantive" state law under the *Erie* doctrine, required the federal court to apply it to Shady Grove's diversity claim.¹³⁴

No single opinion commanded a majority in *Shady Grove*.¹³⁵ Three justices joined an opinion by Justice Scalia reasoning that the Rules Enabling Act, not *Erie*, controls the validity of a federal Rule and that, as long as a rule "really regulates procedure,"¹³⁶ it is valid under the Enabling Act even if it incidentally affects a substantive right under state law. According to this approach, the question is not whether the state law can be characterized as substantive rather than procedural, but whether a rule is procedural. As Justice Scalia characterized the question: "[a] class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged."¹³⁷

Justice Stevens provided the fifth vote for the Court's ruling that the federal court could entertain Shady Grove's claim under Rule 23, notwithstanding New York law. He was unwilling to join the plurality's analysis and would find a federal rule improper under the Rules Enabling Act if it displaces a state procedural rule that functions as a part of the state's definition of a litigant's substantive rights and remedies.¹³⁸ In Justice

¹³¹ *Id.* at 396–97.

¹³² *Id.*

¹³³ *Id.* at 397.

¹³⁴ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137 (2d Cir. 2008), *rev'd*, 559 U.S. 393 (2010).

¹³⁵ Justice Scalia announced the judgment of the Court and delivered the opinion of the Court, in which Chief Justice Roberts and Justice Thomas joined and Justices Stevens and Sotomayor joined in part. Justice Stevens filed an opinion concurring in part and concurring in the judgment. Justice Ginsburg filed a dissenting opinion in which Justices Kennedy, Breyer, and Alito joined.

¹³⁶ *Shady Grove*, 559 U.S. at 411.

¹³⁷ *Id.* at 408.

¹³⁸ *Id.* at 418–19 (Stevens, J., concurring) ("Although the Enabling Act and the Rules of Decision Act 'say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law," the inquiries are not the same. The Enabling Act does not invite federal courts to engage in the 'relatively unguided *Erie* choice,' but instead instructs only that federal rules cannot 'abridge, enlarge or modify any substantive right.' The Enabling Act's limitation does not mean that federal rules cannot displace state policy judgments; it means only that federal rules cannot displace a State's definition of its own rights or remedies. Congress has thus struck a balance: '[H]ousekeeping rules for federal courts' will generally apply in diversity cases, notwithstanding that some federal rules 'will inevitably differ' from

Stevens' view, New York's bar against class actions seeking "penalties" was not a statute that was part of that state's delineation of substantive rights and remedies, rather he considered it a purely procedural rule that did not violate the Rules Enabling Act's prohibition against rules that abridge, enlarge or modify any substantive right.

The question in *Shady Grove*, of course, is not precisely the same question that would arise under this article's proposal. Depending on which opinion in *Shady Grove* framed the issue, the question was whether the federal rule at issue violated the Rules Enabling Act because it regulated more than procedure (plurality), or whether the state law displaced by federal rule at issue was substantive (Stevens).¹³⁹ This article proposes that Congress amend the Rules Enabling Act to direct federal courts to apply state procedure in concurrent jurisdiction cases where application of a procedural rule may affect the result of a criminal prosecution in federal court. To the extent that federal courts would be called on to distinguish between purely procedural rules, on one hand, and rules that alter the substantive rights of litigants in this context, however, *Shady Grove* and its predecessors will provide the road map for this analysis.

VI. CONCLUSION

Where a federal defendant is prosecuted for conduct over which a state also has criminal jurisdiction this may result in an indefensible procedural disparity in a federal system that purports to defer to the supremacy of the states in matters of distinctly local concern. Ignoring this procedural disparity undermines federalism, unjustifiably disadvantages persons over whom the state has a superior claim to bring to justice, and encourages forum shopping, all with no discernable benefit to either the

state rules. But not every federal 'rul[e] of practice or procedure,' will displace state law. To the contrary, federal rules must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies,' and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of 'the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts,' This can be a tricky balance to implement.") (citations omitted).

¹³⁹ *Shady Grove*, 559 U.S. at 410–11 (plurality) ("A few words in response to the concurrence. We understand it to accept the framework we apply—which requires first, determining whether the federal and state rules can be reconciled (because they answer different questions), and second, if they cannot, determining whether the Federal Rule runs afoul of § 2072(b). The concurrence agrees with us that Rule 23 and § 901(b) conflict, and departs from us only with respect to the second part of the test, *i.e.*, whether application of the Federal Rule violates § 2072(b). Like us, it answers no, but for a reason different from ours. The concurrence would decide this case on the basis, not that Rule 23 is procedural, but that the state law it displaces is procedural, in the sense that it does not 'function as a part of the State's definition of substantive rights and remedies.' A state procedural rule is not preempted, according to the concurrence, so long as it is 'so bound up with,' or 'sufficiently intertwined with,' a substantive state-law right or remedy 'that it defines the scope of that substantive right or remedy[.]'" (internal citations omitted).

federal or the state criminal justice systems. To address this inverted Mississippi Problem, this article proposes federal legislation requiring federal courts to apply state procedure in concurrent jurisdiction prosecutions where there application of state procedure will have substantive impacts in the prosecution.