STATUTORY INTERPRETATION — TRAFFICKING VICTIMS PROTECTION ACT OF 2000 — SIXTH CIRCUIT DECLINES TO EXTEND FEDERAL FORCED LABOR STATUTE TO CONDUCT CRIMINALIZED UNDER STATE LAW, BASED IN PART ON FEDERALISM CONCERNS. — *United States v. Toviave*, 761 F.3d 623 (6th Cir. 2014).

In recent decades, the Supreme Court has increasingly relied on federalism principles when interpreting federal statutes,[1] requiring a clear statement from Congress before it will interpret a federal statute to encroach on a traditional area of state power.[2] An area frequently cited as being within the traditional purview of the states is the enactment and enforcement of criminal law.[3] Recently, in *United States v. Toviave*,[4] the Sixth Circuit relied on this notion of traditional state power in holding that a forced labor provision of the Trafficking Victims Protection Act of 2000[5] (TVPA) did not apply to a defendant who brought four children to the United States from Togo and used regular physical abuse to force them to do housework. Yet the assumption underlying the clear statement requirement — that Congress does not intend to disrupt the federal-state balance — is in direct tension with a burgeoning federal code that reaches increasingly far into criminal law matters typically cited by courts as being within the states' traditional domain.[6] And even if the federalism canon does not aim to describe congressional intent but rather to safeguard federalism values, these values may not always be served by this canon of interpretation. While perhaps not crucial to its ultimate holding, the *Toviave* court's reading of an implicit federalism limit into the statute unnecessarily shielded a state from a duplicative federal law that does not harm, and that may in fact benefit, the state's sovereignty.

In February 2001, Jean Claude Kodjo Toviave left Togo for the United States, seeking political asylum.[7] His request for asylum was

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[1] *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004–05 (2009).

[2] *See* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (requiring a clear statement of legislative intent before interpreting a statute "to alter the usual constitutional balance between the States and the Federal government," *id.* at 460 (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989)) (internal quotation marks omitted)).

[3] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (stating that under the system of federalism, the "States possess primary authority for defining and enforcing the criminal law" (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)) (internal quotation marks omitted)).

[4] 761 F.3d 623 (6th Cir. 2014).

[5] Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

[6] *See* DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES 8 (2014) (arguing that "the difference between the substantive reach of federal criminal law and that of state criminal law has virtually disappeared" (emphasis omitted)).

[7] Brief of Appellant Jean Claude Kodjo Toviave at 6, *Toviave*, 761 F.3d 623 (No. 13-1441).

granted in March 2002, and Toviave eventually settled in Ypsilanti, Michigan.[8] In 2006, Toviave used fraudulent immigration documents to bring his girlfriend from Togo to Michigan, along with four minor relatives — Gaelle, Kwami, Kossiwa, and Rene — whom he claimed were his own children.[9] Toviave, his girlfriend, and the four children lived together in Michigan until Toviave and his girlfriend separated in 2008, leaving the children in Toviave's sole care and custody.[10]

The children had come to the United States to receive a better education, and Toviave strongly emphasized academic work.[11] He worked two jobs to provide for the children, bought them sports equipment, and took them on family vacations.[12] However, he also put in place a litany of rules that regulated what the children were permitted to do and when they were permitted to do so.[13] When the children violated these rules, they were punished via food deprivation or physical beatings with toilet plungers, ice scrapers, broomsticks, or electric cords.[14]

Toviave used similar abuse to force the children to perform all of the housework, including cooking, cleaning, and laundry.[15] He also made them "pack up the house when the family moved . . . , serve food to his guests, iron his clothes, and clean his van."[16] If the children failed to perform these tasks, or did not perform them to Toviave's satisfaction, he would verbally and physically abuse them.[17] For example, upon discovering that Gaelle burned a pot of rice, Toviave "smacked her in the face and beat her with a toilet plunger."[18] Another time, Toviave beat Kossiwa's hands and arms with a broomstick when she left laundry on the floor.[19]

In January 2011, Michigan Child Protective Services (CPS) removed the children from Toviave's home.[20] In the course of its investigation, CPS alerted the Department of Homeland Security (DHS)

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[8] *Id.* at 6, 8.

[9] *See Toviave*, 761 F.3d at 624. The four children ranged in age from nine to seventeen years old when they arrived in the United States. Brief for the United States at 7–9, *Toviave*, 761 F.3d 623 (No. 13-1441).

[10] *See Toviave*, 761 F.3d at 624.

[11] *Id.*; Brief for the United States, *supra* note 9, at 3.

[12] *Toviave*, 761 F.3d at 624.

[13] Brief for the United States, *supra* note 9, at 4–7. For example, Toviave had rules regarding what types of paper and writing instruments could be used for homework. *Id.* at 5. He also required the children to wake up as early as five o'clock every morning to complete extra academic drills and homework that he created. *Id.* at 6.

[14] *Id.* at 4–10.

[15] *Id.* at 10–11.

[16] *Toviave*, 761 F.3d at 624.

[17] Brief for the United States, *supra* note 9, at 11.

[18] *Id.* at 7–8.

[19] *Id.* at 8.

[20] *Id.* at 15–16.

that it suspected that the children had been brought to the United States illegally.[21] DHS found the children's false immigration documents hidden in a briefcase in Toviave's home.[22] A federal grand jury indicted Toviave on charges of visa fraud, mail fraud, forced labor, and human trafficking.[23] After Toviave pleaded guilty to the charges of visa and mail fraud and the government dropped the trafficking charge,[24] the case proceeded to a jury trial in the U.S. District Court for the Eastern District of Michigan on four counts of forced labor under 18 U.S.C. § 1589.[25] The jury returned a verdict of guilty on all four counts.[26] The district judge denied Toviave's motions for acquittal and for a new trial[27] and sentenced Toviave to a prison term of 135 months.[28]

The Sixth Circuit reversed the conviction.[29] Writing for a unanimous panel, Judge Rogers[30] held that while Toviave's conduct was "deplorable,"[31] it did not constitute forced labor under § 1589.[32] The court began by identifying the three points that "compel[led]" its holding.[33] First, the court reasoned that chores performed by children are not "labor" within the meaning of the statute.[34] The court noted that parents have always been permitted to require their children to do household chores.[35] To apply § 1589 to Toviave's conduct would criminalize this "innocuous, widely accepted parental right[],"[36] which, the

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[21] *See Toviave*, 761 F.3d at 624.

[22] *See* Brief for the United States, *supra* note 9, at 18–19.

[23] *See* Indictment, United States v. Toviave, 2013 WL 474528 (E.D. Mich. Feb. 7, 2013) (No. 11-20259).

[24] *Toviave*, 761 F.3d at 625.

[25] Section 1589 provides, in relevant part, that one is guilty of forced labor if one "knowingly provides or obtains the labor or services of a person" by means of "serious harm," "physical restraint," "force," or threats of any of the aforementioned. 18 U.S.C. § 1589(a) (2012).

[26] Verdict Form, *Toviave*, 2013 WL 474528 (No. 11-20259).

[27] Order Denying Defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial at 1, *Toviave*, 2013 WL 474528 (No. 11-20259).

[28] Judgment in a Criminal Case at 3, *Toviave*, 2013 WL 474528 (No. 11-20259). The judge also ordered Toviave to pay $134,363.60 to the two children who had requested restitution. *See id.* at 6.

[29] *Toviave*, 761 F.3d at 630.

[30] Judge Rogers was joined by Judges Suhrheinrich and Sutton.

[31] *Toviave*, 761 F.3d at 624.

[32] Toviave raised several other claims on appeal — violations of his Fifth Amendment rights, improper exclusion of evidence relating to a cultural defense, and improper jury instructions, *see* Brief of Appellant Jean Claude Kodjo Toviave, *supra* note 7, at 25, 51, 55 — but the Sixth Circuit did not reach those issues because its holding on the forced labor statute was sufficient to reverse Toviave's conviction, *see Toviave*, 761 F.3d at 630.

[33] *Toviave*, 761 F.3d at 625.

[34] *Id.*

[35] *Id.* (citing MICH. COMP. LAWS ANN. § 722.2 (West 2011)). The court noted that child labor laws often do not cover domestic work done by children and that the Thirteenth Amendment's prohibition on involuntary servitude has been interpreted to not apply to parents' and guardians' rights to the custody of their minor children. *Id.* at 625–26.

[36] *Id.* at 625.

court stated, Congress "could not have . . . intended."[37] The fact that Toviave was not the victims' parent or legal guardian was not relevant because "the legality of parents' requiring their children to do chores does not depend on [whether the parents possess] parental or guardian status."[38] An individual is not immune from prosecution under § 1589 solely because he is the victim's parent, while at the same time, it is permissible for individuals other than parents (for example, temporary caretakers) to assign children chores.[39]

Second, the court reasoned that Toviave's use of force to coerce the children to perform chores did not convert the chores into "labor." The court declined to make forced labor turn on the presence of physical abuse because a parent who "brutally beats a child" to force him to behave is guilty of abuse but has forced no labor, while psychological abuse, rather than physical abuse, is often used to compel "paradigmatic forced labor, such as prostitution . . . or forced domestic service."[40]

Third, the court stated that Toviave's conduct constituted child abuse rather than forced labor and that construing the statute to extend to his conduct would result in the federal criminalization of child abuse. The court described child abuse as "quintessential local criminal activity"[41] and family relations as a "traditional area of state concern."[42] Thus, if § 1589 reached Toviave's conduct, the statute would have "[t]he harm" of "federaliz[ing]" traditional areas of state regulation[43] and thereby upset the "usual constitutional balance of federal and state powers."[44] The court concluded that for this reason it should avoid reading a criminal statute as making "traditionally local criminal conduct . . . a matter for federal enforcement"[45] "unless Congress conveys [such a] purpose clearly."[46] The court relied, in particular, on the Supreme Court's recent decision in *Bond v. United States*,[47] which "reemphasized that [courts] should be cautious in inferring Congressional intent to criminalize activity traditionally regulated by the

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[37] *Id.* at 626.

[38] *Id.*

[39] *Id.*

[40] *Id.*; *see id.* at 626–27.

[41] *Id.* at 628.

[42] *Id.* at 627 (quoting Moore v. Sims, 442 U.S. 415, 435 (1979)) (internal quotation mark omitted).

[43] *Id.*

[44] *Id.* at 628 (quoting Bond v. United States, 134 S. Ct. 2077, 2089 (2014)) (internal quotation marks omitted).

[45] *Id.* at 627 (omission in original) (quoting Jones v. United States, 529 U.S. 848, 858 (2000)) (internal quotation marks omitted).

[46] *Id.* (quoting *Jones*, 529 U.S. at 858).

[47] 134 S. Ct. 2077.

states."[48] Because § 1589 contained no sufficiently clear statement to abrogate this general canon of statutory interpretation, the *Toviave* court read the provision narrowly.[49] Thus, finding that the statute under which Toviave was convicted did not cover the coercion of mere household chores through physical violence, the court reversed his conviction.

The Sixth Circuit's decision in *Toviave* was well grounded in Supreme Court precedent, most notably *Bond*, that counsels courts to narrowly interpret federal criminal statutes in order to avoid overlap with state criminal laws. Yet this canon of statutory interpretation does not accurately reflect the actual federal-state divide, in which many federal statutes regulate local criminal activity within the states' domain and substantially overlap with state criminal laws. And as a matter of policy, the division of criminal regulation that the federalism canon safeguards not only contradicts that envisioned by the Founders but also represents an undesirable social vision. In reading an implicit federalism limit into the text of the statute, the *Toviave* court unnecessarily shielded the state from a duplicative federal law that would not have harmed state sovereignty, and may in fact have augmented it.

The federalism canon relied upon by the Sixth Circuit counsels federal courts "to be certain of Congress' intent before finding that federal law overrides"[50] "the usual constitutional balance of federal and state powers."[51] This canon was first applied in the specific context of federal criminal law in *United States v. Bass*,[52] in which the Court explained that because "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced . . . by the States,"[53] courts should avoid interpreting statutes in a way that makes "tradi-

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[48] *Toviave*, 761 F.3d at 627.

[49] *Id.* In addition to these three conclusions, the court attempted to distinguish the case from prior cases that had found violations of § 1589. *Id.* at 629–30 (citing United States v. Afolabi, 508 F. App'x 111 (3d Cir. 2013); United States v. Nnaji, 447 F. App'x 558 (5th Cir. 2011); United States v. Dann, 652 F.3d 1160 (9th Cir. 2011); United States v. Djoumessi, 538 F.3d 547 (6th Cir. 2008); United States v. Calimlim, 538 F.3d 706 (7th Cir. 2008)). The court found that these prior cases materially differed from the instant case because they all involved victims who were brought to the United States under false promises of receiving a salary, endured intolerable living conditions, were isolated from the outside world, were deprived of any education, and lacked any familial relationship with their alleged abuser. *Id.* In contrast, the children in *Toviave* "were brought to the United States to obtain an education," spent a significant amount of time on academic work, were permitted to leave the home, and were relatives of the individual alleged to have committed forced labor. *Id.* at 630.

[50] Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985)) (internal quotation mark omitted).

[51] *Id.*

[52] 404 U.S. 336 (1971).

[53] *Id.* at 349.

tionally local criminal conduct a matter for federal enforcement"[54] "unless Congress conveys [this] purpose clearly."[55] The Supreme Court employed this federalism canon in a few subsequent cases[56] and recently doubled down on these principles in *Bond*.[57] The *Bond* Court noted that because regulation of "local criminal activity" was "primarily" the responsibility of the states, the Court would "decline[] to read federal law as intruding on that responsibility, unless Congress . . . clearly indicated" that it intended for the law to have such a reach.[58]

The federalism canon may be based on an empirical belief that Congress doesn't intend to regulate in certain areas of traditional state law without a clear statement, but this belief is belied by a casual perusal of the U.S. Code.[59] A recent study estimates that the Code enumerates at least 4,450 individual federal crimes.[60] The same study also found that the growth of federal crimes has continued unabated for several decades, increasing by 500 crimes per decade, on average.[61] Further, these federal criminal laws frequently overlap with the common law crimes, typically thought of as local crimes, that are criminalized at the state level: murder, rape, robbery, burglary, and theft.[62]

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[54] *Id.* at 350. The *Bass* Court principally relied on the rule of lenity in deciding how to interpret the statute at issue, *see id.* at 347–49, but mentioned the federalism principle in further support of its interpretation, *see id.* at 349–50.

[55] *Id.* at 349.

[56] *See, e.g.*, Jones v. United States, 529 U.S. 848, 858 (2000).

[57] While *Bond* explicitly relied on precedent, *see* Bond v. United States, 134 S. Ct. 2077, 2089 (2014), some argue that the Court applied the canon more aggressively in *Bond* than it previously had, *see* Michael M. O'Hear, Bond v. United States*: SCOTUS Interprets Criminal Statute Narrowly to Preserve Federal-State Balance*, MARQ. U. L. SCH. FAC. BLOG (June 3, 2014, http://law.marquette.edu/facultyblog/2014/06/03/bond-v-united-states-scotus-interprets-criminal-statute-narrowly-to-preserve-federal-state-balance (last visited Mar. 1, 2015) [http://perma.cc/LT4S-BN3E] ("*Bond* is noteworthy for its approach to the interpretation of federal criminal statutes. . . . This interpretive principle is not a new one, but the Court applied it in an unusually aggressive fashion in *Bond*.").

[58] *Bond*, 134 S. Ct. at 2083. Accordingly, the Court concluded that the statute contained no clear statement that Congress intended it to extend to the "purely local crime" at issue in *Bond* and thus held that the statute did not apply to the defendant's conduct. *Id.*

[59] It is true that "the number and range of federal crimes was quite limited until after the Civil War," Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1133 n.24 (1997), but the number of new federal crimes began to grow during the 1900s and accelerated after 1970, *see* RICHMAN, STITH & STUNTZ, *supra* note 6, at 3.

60 John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (June 16, 2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes [http://perma.cc/NH3G-A3YM]. The study cautions that this number is only an estimate and notes several difficulties in calculating precisely how many federal crimes there are. *See id.* What is certain is that the most complete count of federal crimes, done by the U.S. Department of Justice in the early 1980s, put the number at 3,000, and the size of the federal criminal code has only increased since then. *Id.*

[61] *Id.*

[62] John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 691 (1999).

Federal laws also cover crimes such as arson,[63] drive-by shootings,[64] domestic violence,[65] and carjacking.[66] The federalization of criminal law has not gone unnoticed — rather, it is the subject of frequent comment and criticism.[67] Yet this criticism does not change the fact that federal criminal law is a vast and growing morass that frequently overlaps with state criminal law. The frequency of this overlap is in tension with the Sixth Circuit's contention that Congress would not intend for the forced labor statute to encompass child abuse simply because child abuse is already criminalized at the state level.

Moreover, Congress has continued to enact new federal criminal laws even in the face of a Supreme Court that increasingly limits the reach of those laws. For instance, in *United States v. Lopez*,[68] the Court held that a federal criminal statute prohibiting gun possession near schools was an unconstitutional exercise of Congress's Commerce Clause power because the regulated activity was insufficiently connected to interstate commerce.[69] In response, Congress simply amended the law at issue in *Lopez*, the Gun-Free School Zones Act of 1990,[70] to satisfy the Court's Commerce Clause holding. The amended law changed the offense from possessing a firearm in a school zone to possessing in a school zone a firearm "that has moved in or that otherwise affects interstate or foreign commerce."[71] Congress narrowly tailored this language to meet the constitutional infirmities of the statute identified by the Court in *Lopez*, but it did not alter the fundamental criminal act: possession of a gun in a school zone. Congress included this jurisdictional element in the criminal provision of the Violence Against Women Act of 1994[72] from the start.[73] While the Court invalidated the civil provision of the statute in *United States v. Morrison*[74] because it lacked this jurisdictional hook, the Court noted with approval that the lower courts had uniformly upheld the criminal provision as

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63 *See* 18 U.S.C. § 844 (2012).

64 *See id.* § 36.

65 *See id.* § 2261 (2012 & Supp. I 2013).

66 *See id.* § 2119 (2012).

67 *See, e.g.*, Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1172 (1995) ("Federal duplication of state criminal law unduly burdens the federal justice system, which is ill-equipped to supplant local law enforcement."); Julie Rose O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 HARV. J.L. & PUB. POL'Y 57 (2014).

68 514 U.S. 549 (1995).

69 *Id.* at 567–68.

70 Pub. L. No. 101-647, § 1702, 104 Stat. 4844 (codified as amended at 18 U.S.C. §§ 921–922).

71 Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-369 to 370 (1996) (codified as amended at 18 U.S.C. § 922(q)).

72 Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of the U.S. Code).

73 *See* 18 U.S.C. § 2261(a)(1) (2012 & Supp. I 2013); *see also* Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1551–52 (2002).

74 529 U.S. 598 (2000).

within Congress's Commerce Clause power.[75] The fact that Congress continues to enact statutes broadly criminalizing activity that is traditionally criminalized at the state level, with only slight tweaks in statutory language to meet the Court's demands, evinces clear congressional intent to criminalize such activity regardless of whether it is prohibited at the state level.

Rather than an attempt to reflect the federal-state division in reality, the federalism canon may instead represent the judiciary's attempt to safeguard federalism principles by implementing a heightened threshold before allowing federal regulation in a traditional state domain. Yet this goal is also flawed, because there is not, nor was there ever intended to be, a clear split in federal-state criminal jurisdiction. Even predating the recent explosion in federal criminal law, history undermines the notion, propounded in *Bond* and *Toviave*, that it is possible to clearly delineate a category of purely local criminal activity that is the exclusive domain of the states. The Constitution indicates that the Founders did not envision criminal law being divided into two mutually exclusive state and federal spheres because it allows for federal crimes to encompass conduct also subject to criminalization at the state level. For example, the Constitution criminalizes treason at the federal level, yet does not exclude state criminalization of the same conduct.[76] Similarly, the Fifth Amendment's Double Jeopardy Clause has long been held to permit federal and state prosecution for the same offense.[77] After ratification, the First Congress adopted statutes criminalizing activity lying beyond those federal crimes enumerated in the Constitution and overlapping with conduct already criminalized at the state level.[78] Thus, even the Founding generation eschewed the view of state and federal criminal regulation as mutually exclusive spheres and recognized that the federal and state governments may possess concurrent authority to regulate criminal activity.

Even if it were possible to clearly delineate separate federal and state spheres in criminal regulation, overlap may be beneficial rather

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[75] *See id.* at 613 n.5.

[76] Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 44 (1996) ("[B]y the rejection of the proposal that would have provided the United States with the 'sole' power over treason [at the Constitutional Convention], the states retained the power to define and punish treasonous activities . . . .").

[77] The dual sovereignty exception to the Double Jeopardy Clause allows for both state and federal prosecution for crimes arising out of the same acts. *See* Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 782 n.22 (1994); *see also* Kurland, *supra* note 76, at 45–46 (arguing that the "first seeds of a dual sovereignty exception to double jeopardy had been firmly planted" at the Constitutional Convention and that "[t]here is nothing to suggest that the subsequent inclusion of a double jeopardy provision . . . was intended to alter this state of affairs").

[78] *See* Kurland, *supra* note 76, at 56–58; *see also* United States v. Coombs, 37 U.S. (12 Pet.) 72, 81 (1838) (rejecting argument that because a defendant's crime, theft, was criminalized at the state level, it could not be the basis for a separate federal prosecution).

than harmful. The *Toviave* court may have been referring to a variety of harms when it noted "[t]he harm" that would result if Toviave's conduct were criminalized under both state and federal law.[79] First, it may have meant the harm that the federal prosecution would displace state prosecution. However, the statute at issue in *Toviave*, like most federal criminal statutes,[80] did not prevent Michigan from prosecuting Toviave's conduct; rather, federal prosecutorial power existed concurrently with that of the state.[81] Second, the court may have been referring to the danger of federal criminalization interfering with the state's prerogative to use its prosecutorial discretion to not punish violations of state criminal law. States serve an important function as laboratories of democracy that can experiment among preferred means of preventing and regulating crime,[82] and federal criminalization runs the risk of impeding this function. While this harm may exist in theory, in practice it is less likely to occur because federal prosecutions often originate through cooperation with state law enforcement.[83] *Toviave* exemplifies this: federal prosecution commenced only after the state CPS contacted the federal DHS due to suspected immigration crimes

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[79] *Toviave*, 761 F.3d at 627.

[80] *See* NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 99 (5th ed. 2010) ("The contemporary assumption is that absent an explicit statutory provision to the contrary federal criminal statutes will seldom, if ever, preempt state criminal law."). Federal criminal statutes generally do not displace state statutes unless Congress explicitly provides so in the statute or the two laws directly conflict, in which case the Supremacy Clause requires that the federal law prevail. *See* Klein, *supra* note 73, at 1552. Absent these conditions, courts have rejected claims that federal criminal law preempts a duplicative state law. *See, e.g.*, Pic-A-State PA, Inc. v. Pennsylvania, 42 F.3d 175, 180 (3d Cir. 1994) (holding that a state statute criminalizing the sale of other states' lottery tickets was not preempted by a federal statute that criminalized largely the same conduct).

[81] Michigan could have concurrently prosecuted Toviave under its own laws, and indeed, shortly after the Sixth Circuit vacated Toviave's federal conviction, Toviave was charged with three counts of first-degree child abuse under Michigan state law. Press Release, Bill Schuette, Mich. Attorney Gen., Schuette Files Child Abuse Charges Against Washtenaw Cnty. Man (Oct. 23, 2014), http://michigan.gov/ag/0,4534,7-164-46849-339836--,00.html [http://perma.cc/WKZ8-U4JB]. However, these charges only came after the federal district judge, at Toviave's resentencing, chided the state for not prosecuting the case under state child abuse law in the first place. Tresa Baldas, *Janitor Charged Anew After Child Slavery Conviction Tossed*, DETROIT FREE PRESS (Oct. 23, 2014, 8:20 AM), http://www.freep.com/story/news/local/michigan/2014/10/23/jean-claude-toviave-child-slavery-child-abuse-bill-schuette-charges-ypsilanti-u-m-janitor/17763967[http://perma.cc/KMY9-GNJ5].

[82] *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[83] *See* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 45–46 (2012) (explaining that many federal prosecutions can originate from state-federal task forces or from requests by states for federal assistance).

that implicated important federal interests.[84] Third, the court may have meant the harm to individual defendants of overpunishment due to the possibility of prosecution at both the federal and state levels. However, the risk of this harm is mitigated by the fact that federal prosecutions consistently comprise a very small percentage of all criminal prosecutions annually.[85] Further, the U.S. Attorneys' Manual instructs federal prosecutors to decline to prosecute a case if the defendant is "subject to effective prosecution in another jurisdiction."[86] The little empirical work that exists on the subject of federal prosecutorial discretion suggests that federal prosecutors follow this policy in practice, declining to bring cases when there is a state-prosecution alternative.[87] Indeed, in Toviave's case there was no duplicative prosecution: at the time of the Sixth Circuit's decision, Toviave was not being prosecuted under state law; rather, state charges were brought only after his federal sentence was vacated.

Rather than resulting in harm, there is good reason to think that concurrent state and federal criminal jurisdiction may be beneficial — in Toviave's case and others. Many scholars, perhaps most prominently Professor Heather Gerken, have lauded this "cooperative federalism" in which the federal and state governments "forge[] vibrant working relationships"[88] as they "govern shoulder-to-shoulder"[89] in an "integrated regime."[90] In the context of criminal law, this cooperative regime means that even as federal criminal law expands, the "states retain a robust and vibrant role" in criminal prosecution because the federal government "depend[s] heavily on states to implement federal policy."[91] By reading an implicit federalism limit into the TVPA, the *Toviave* court employed a canon of interpretation that does not accurately reflect reality and that may impede the benefits that flow from state and federal cooperation without furthering the values of federalism.

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[84] *Cf.* Arizona v. United States, 132 S. Ct. 2492, 2498–500 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration . . . ." *Id.* at 2498.).

[85] *See* Klein & Grobey, *supra* note 83, at 7, 91 tbl.9-A, 92 tbl.9-B, 93 tbl.10 (using empirical data to demonstrate that, since at least 1992, federal felony convictions have comprised approximately five percent of all felony convictions annually).

[86] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220 (2014).

[87] *See* MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2009 - STATISTICAL TABLES 11 tbl.2.3 (2012) (finding prosecution by another authority to be the second most common reason that federal authorities declined to prosecute over a twelve-month period from 2008 through 2009); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 263–65 (1980) (finding that prosecution by another authority was cited as a reason for declining federal prosecution in approximately twenty percent of declined cases studied).

[88] Heather K. Gerken, *The Supreme Court, 2013 Term — Comment*: *Slipping the* Bonds *of Federalism*, 128 HARV. L. REV. 85, 116 (2014).

[89] *Id.* at 114.

[90] *Id.* at 119.

[91] *Id.* at 115.