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Transforming the Allocation of Deal Risk Through Reverse Termination Fees

Afra Afsharipour

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Erie and Federal Criminal Courts

Wayne A. Logan

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Today, low-level state and local criminal provisions figure critically in federal prosecutions, serving as the initial bases for police seizures that yield evidence leading to more serious federal charges (usually involving drugs or firearms). While police resort to such laws as pretexts to seize individuals has been the subject of extensive commentary, this Article provides the first discussion of how federal courts actually interpret and apply the laws. In doing so, it reveals a surprising reality, long dismissed as a doctrinal impossibility: federal judicial use of the analytic framework of Erie Railroad Co. v. Tompkins in criminal cases.

As this Article explains, as Erie has migrated so too have its analytic difficulties, complicated by a variety of issues unique to criminal prosecutions. Federal outcomes result not in civil liability but rather deprivations of physical liberty and have significant implications for federalism and separation of powers, affecting the historic police power authority of state and local governments. The Article, in short, examines the impact of the “Erie megadoctrine” in federal criminal courts, which given the increasing cooperative efforts of state and federal law enforcement promises to have ever-greater significance in the years to come.

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INTRODUCTION

State and federal courts have long engaged in intersystemic adjudication,¹ interpreting and applying the constitutions,² laws,³ and regulations⁴ of one another's governments. Perhaps the best known instance in the civil litigation realm occurs with federal diversity jurisdiction,⁵ where, as a result of *Erie Railroad Co. v. Tompkins*,⁶ federal courts resolve federal civil claims on the basis of state substantive laws.

With criminal laws, however, the phenomenon has been and remains less apparent. This is in significant part due to the principle that such laws embody sovereign normative preferences,⁷ susceptible to neither enforcement⁸ nor jurisprudential control⁹ by other

1. See Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399, 1400 (2005) (defining phenomenon as "the interpretation by a court operating within one political system of laws of another political system").

2. See Susan N. Herman, *Beyond Parity: Section 1983 and State Courts*, 54 BROOK. L. REV. 1057 (1989) (discussing role of state courts in adjudicating federal constitutional claims under 42 U.S.C. § 1983); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in Federal Courts*, 87 CAL. L. REV. 1409 (1999) (noting federal judicial interpretations of state constitutional provisions).

3. See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[W]e have consistently held that state courts have inherent authority . . . to adjudicate claims arising under the laws of the United States."); *Purvis v. Williams*, 73 P.3d 740, 745 (Kan. 2003) (acknowledging state court authority to interpret federal statutes).

4. See, e.g., *Arkansas v. EPA*, 503 U.S. 91, 110–11 (1992) (interpreting Oklahoma water quality regulations); *Chrisdiana v. Dep't. of Cmty. Health*, 754 N.W.2d 533, 536 (Mich. Ct. App. 2008) (noting state court authority to interpret federal regulations).

5. See 28 U.S.C. § 1332 (2008) (establishing criteria for diversity jurisdiction). Recent data indicate that diversity of citizenship claims account for almost one-third of federal judicial caseloads. See 13E CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3601, n.77 (3d ed. 2008).

6. 304 U.S. 64 (1938).

7. See, e.g., *Heath v. Alabama*, 474 U.S. 82, 93 (1985) (identifying "the power to create and enforce a criminal code" as a "foremost" and "exclusive" prerogative of sovereignty); *State v. Langlands*, 583 S.E.2d 18, 20 n.4 (Ga. 2003) (observing that "[w]hen a state defines conduct as criminal . . . it is conveying in the clearest possible terms its view of public policy") (citation omitted). On the unique sovereignty issues attending the creation and enforcement of police power authority more generally, see Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2032–33 (2003) (tracing history to Hobbes).

8. See Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 193 (1932) (discussing limited extraterritorial enforcement of penal claims); MODEL PENAL CODE § 1.03 explanatory note (2001) ("[I]t has long been a maxim of American jurisprudence that a state will not enforce the penal laws of another state."). For more on the history and rationales of the policy see Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 959–63, 978–82 (2006).

9. See, e.g., *United States v. Reid*, 53 U.S. (12 How.) 361, 363 (1851) (holding that Rules of Decision Act warrants application of state civil but not criminal law in federal cases on the

governments. Nevertheless, some degree of interaction has always been in evidence. Indeed, during the nation's formative years, states at times exercised concurrent jurisdiction over federal criminal matters,¹⁰ and while federal jurisdiction is exclusive today, the prospect of concurrent criminal jurisdiction persists.¹¹ Moreover, state criminal laws can figure in federal criminal prosecutions. Under the Assimilative Crimes Act ("ACA"), for instance, since 1825 state laws have provided the bases for federal prosecutions when misconduct in federal enclaves is not expressly addressed by the U.S. Code.¹² In such situations, the federal government "assimilates" state criminal law, in effect adopting it as federal law.¹³

Much more commonly today, however, federal courts apply state and local criminal laws without express congressional authority. They do so when the laws serve as initial bases for stops or arrests of individuals, very often motorists,¹⁴ typically by state or local police,¹⁵

rationale that a contrary outcome would "place the criminal jurisprudence of one sovereignty under the control of another.").

10. See Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 545 (1925) (discussing early era state court jurisdiction over federal criminal matters). Such jurisdiction was permissive, not mandatory, with Congress lacking power to force jurisdiction on a state court. *Id.* at 564; see also Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 45 (1995) (same).

11. See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 27 (1995) (proposing that "federal prosecutions of local drug activity and some violent crime take place in state court, either by the U.S. Attorney's Office (by cross-designation) or the state's attorneys"); see also 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, 1010-15 (1995) (discussing the prospect of concurrent jurisdiction); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 535-40 (1995) (same).

12. 18 U.S.C. § 13(a) (2008).

13. See *Puerto Rico v. Shell Oil Co.*, 302 U.S. 253, 266 (1937) (noting that prosecutions under the ACA "are not to enforce the laws of the state . . . but to enforce the federal law, the details of which . . . are adopted by reference"); *United States v. Kilz*, 694 F.2d 628, 629 (9th Cir. 1982) (noting that the "assimilated state law, in effect, becomes a federal statute").

14. Vehicle-related laws are customarily deemed criminal by federal courts. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (Texas law requiring that auto seat belts be worn); *United States v. Simpson*, 520 F.3d 531, 541 (6th Cir. 2008) (Tennessee law requiring that license plates be "clearly legible"); *United States v. Tibbets*, 396 F.3d 1132, 1138 (10th Cir. 2005) (Utah "mud flap" law); *United States v. Miller* 146 F.3d 274, 278 (5th Cir. 1998) (Texas turn signal law); see also Kim Forde-Marzui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1514 & n.90 (2007) (noting that most states regard at least some traffic offenses as criminal in nature); cf. 18 U.S.C. § 13(a) (incorporating *malum prohibitum* state and local criminal laws into the ACA); *United States v. Carlson*, 714 F. Supp. 428, 433-37 (D. Haw. 1989) (deeming Hawaii's auto speeding law as criminal and thus subject to ACA incorporation). Also, it is not uncommon for traffic offenses to be explicitly classed as misdemeanors. See, e.g., *United States v. Fleming*, 201 F. Supp. 2d 770, 775 (E.D. Mich. 2002) (Michigan law requiring display of registration plate on a vehicle, classified as misdemeanor).

leading to discovery of contraband or information triggering more serious federal prosecutions (usually involving illegal drugs or firearms). Federal courts, when presented with such cases, must resolve a federal constitutional question that, while predicated on state or local law, is of threshold significance to the federal criminal case. They must decide whether the behavior prompting the particular stop or arrest potentially violates the substantive law of the state or locality, a prerequisite for Fourth Amendment reasonableness and hence avoidance of the exclusionary rule.¹⁶ In such circumstances, state and local criminal laws are not adopted as federal law. Rather, they retain their nonfederal status while being applied by Article III courts, much as occurs in federal civil diversity cases.

The discussion here examines this unique instance of intersystemic adjudication, for the first time highlighting its existence and exploring its ramifications.¹⁷ Focusing on the phenomenon itself reveals an unexpected reality: the invocation by federal courts of the analytic framework of *Erie v. Tompkins*, long the benchmark of federal

In addition, outside the auto context, more serious misconduct can serve as an initial basis for stop or arrest, resulting in federal criminal prosecution and judicial interpretation. *See, e.g.*, *United States v. Struckman*, 603 F.3d 731, 740–41 (9th Cir. 2010) (Oregon burglary law, a felony, and second degree criminal trespass, a misdemeanor); *United States v. Brown*, 550 F.3d 724, 727 (8th Cir. 2008) (Missouri law prohibiting minors from carrying concealed weapon, a potential felony); *United States v. Jones*, 432 F.3d 34, 41–42 (1st Cir. 2005) (Massachusetts law prohibiting possession of firearm without a license, a felony); *United States v. Goines*, 604 F. Supp. 2d 533, 542–43 (E.D.N.Y. 2009) (New York law on resisting arrest, a misdemeanor); *United States v. Garner*, 108 F. Supp. 2d 796, 800 (N.D. Ohio 2000) (Ohio law regarding failure to comply with lawful police order, a misdemeanor). Finally, it is not uncommon for low-level offenses to lack explicit classification, which results in their being deemed misdemeanors by default. *See, e.g.*, *United States v. Shultz*, No. 08–20020, 2008 WL 4756028, at *5 (E.D. Mich. 2008) (noting same under Michigan law).

15. *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 786–87 (2006) (noting the several-fold greater number of state and local law enforcement officers compared to federal agents).

16. *See, e.g.*, *United States v. Eckhart*, 569 F.3d 1263, 1271 (10th Cir. 2009) (noting that the Fourth Amendment focus is upon whether a “particular motorist violated ‘any one of the multitude of applicable traffic and equipment regulations’ of the jurisdiction”) (citation omitted).

17. Of course, with constitutional challenges and habeas corpus sufficiency of the evidence claims, federal courts have long deferred to state court constructions of state statutes. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 355–56 (1983) (observing that when interpreting state statute in due process vagueness challenge federal court must heed any limiting constructions of state court); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (noting that in due process challenges to state law that the Court “repeatedly has held that state courts are the ultimate expositors of state law and that we are bound by their constructions”); *Sabeti v. Dipaolo*, 16 F.3d 16, 19 (1st Cir. 1994) (Breyer, J.) (noting in federal habeas challenge to Massachusetts law that a federal court must defer to construction of Supreme Judicial Court). Here, on the other hand, federal courts must interpret and apply state (and local) laws in the first instance, very often in the absence of determinative state precedent. As discussed *infra*, the enterprise implicates distinct federalism questions concerning the allocation of state-federal judicial authority and separation of powers, much as in the *Erie* context.

civil diversity cases, to resolve federal criminal cases. Despite confident representations to the contrary over the years,¹⁸ *Erie* most definitely has relevance in criminal law matters.¹⁹ And it does so in a most unexpected context: the interpretation and application of state and local laws targeting *malum prohibitum* misconduct, laws otherwise typically addressed in summary fashion by nonrecord lowly state or municipal trial courts. Today, august Article III courts regularly grapple with laws governing such matters as use of vehicle mudflaps and drivers' respect for road "fog lines" and render extended exegeses on the questions, finding themselves drawn into what Frankfurter and Landis dismissively termed "police court work."²⁰

The undertaking, aside from being at odds with traditional understandings of the federal judicial enterprise,²¹ has major practical and doctrinal importance. In terms of the former, federal criminal court outcomes, like those in the civil diversity context, directly affect the lives of individual litigants.²² But here, rather than mere civil liability, federal deprivations of physical liberty loom—often for very substantial periods of time, without the possibility of parole.²³ The systemic consequences of federal recourse to state and local criminal laws are equally significant. Police—typically employed by state or local governments and invoking their own laws—stop over 23 million motorists annually. While a precise figure for pedestrians is not

18. See, e.g., *United States v. Powers*, 482 F.2d 941, 943 (8th Cir. 1973) ("*Erie* has no application whatsoever to federal criminal prosecutions."); *Robinson v. United States*, 144 F.2d 392, 406 (6th Cir. 1941) ("It has not been decided that the holding in *Erie R.R. Co. v. Tompkins* is applicable in a criminal case."); see also Peter Westen & Jeffery S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 313 & n.9 (1980) (asserting that "*Erie* has no meaning for cases outside diversity jurisdiction," citing other sources in support).

19. For the sole scholarly recognition to date of *Erie*'s relevance in the criminal law context see Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 56 n.214 (2006) (citing *Powers* and briefly condemning typical disregard of *Erie* among criminal law courses and scholars). Professor Clermont proceeds to assert, however, that instances of federal application of state criminal laws are rare, see *id.*, an assessment belied by the evidence presented here.

20. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 HARV. L. REV. 431, 465 (1927).

21. See Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CAL. L. REV. 95, 141 (2009) (observing that "[i]n contemporary legal culture, federal court is the place where important matters are decided by important people for important people"). On the historic perceived preeminence of federal courts more generally see Judith Resnick, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 968–69 (2000).

22. See Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 901 (1989) (observing that federal diversity "alters results in real cases for real people").

23. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 875 n.18 (2009) (noting that in 2005 the average federal sentence for drug trafficking was 81.7 months).

known, the number is likely higher still.²⁴ As the federal government continues to enlist state and local police help in areas such as homeland security, immigration, and drug and weapon interdiction efforts,²⁵ state-federal criminal law interactions can be expected to occur with even greater frequency. This is so despite persistent criticism of what is seen as federal cooptation of menial state and local criminal laws as pretexts for federal prosecutions,²⁶ aggravating concern that the laws serve as tools to facilitate questionable police profiling efforts.²⁷

Doctrinally, the phenomenon has an array of important consequences. Federal adjudication of state and local criminal law claims raises fundamental questions over the allocation and reach of federal judicial power. Federal courts refine and very often redefine the work of state and local political bodies and judiciaries, on a subject—police power authority—historically outside the bailiwick of Congress. And they do so showing little trace of the reticence otherwise exhibited by federal courts tasked with resolving state and

24. Stuntz, *supra* note 15, at 795. See also MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 1 (April 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp05.pdf> (noting that in 2005 roughly forty percent of all police-citizen contacts arose out of traffic stops).

25. See, e.g., *United States v. Delfin-Colina*, 464 F.3d 392, 394 (3d Cir. 2006) (noting Department of Homeland Security Overtime Program, which requires state and local police to zealously enforce traffic laws); Phillip Shenon & Don Van Natta, Jr., *U.S. Says Detainees May Be Tied to Hijackings*, N.Y. TIMES, Nov. 1, 2001, at A1 (discussing federal government's "spitting on the sidewalk" policy, under which "immigrants suspected of terrorist ties are apprehended for minor, unrelated charges"); *Operations Pipeline and Convoy*, U.S. DRUG ENFORCEMENT ADMINISTRATION, <http://www.usdoj.gov/dea/programs/pipecon.htm> (last visited Sept. 2, 2010) (describing "Operation Pipeline," a federal drug interdiction effort depending on state and local enforcement support). The U.S. has also provided training and financial incentives to use traffic-related stops and arrests in the federal "war on drugs." See *Course Catalog*, NAT'L TRAINING CTR., FED. MOTOR CARRIER SAFETY ADMIN., <http://www.fmcsa.dot.gov/NTC/Course> (last visited Sept. 1, 2010) (describing training offered by the Department of Transportation).

26. See, e.g., *United States v. Goodwin*, No. 98-6415, 2000 WL 64972, at *3 (6th Cir. 2000) (noting concern that "police officers are using the state law in this Circuit as carte blanche permission to stop and search . . . vehicles for drugs.") (citation omitted). As noted by Professor LaFave:

In recent years more Fourth Amendment battles have been fought about police activities incident to a stop for a traffic infraction, what the courts call a "routine traffic stop," than in any other context. There is a reason why this is so, and it is *not* that police have taken an intense interest in such matters . . . Rather, the renewed interest of the police in traffic enforcement is attributable to a federally-sponsored initiative related to the "war on drugs."

WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3 (4th ed. 2009) (emphasis in original); see also *id.* (noting that "police have co-opted our traffic codes as a weapon to be used in the 'war on drugs'").

27. See, e.g., *United States v. Freeman*, 209 F.3d 464, 467-69 (6th Cir. 2000) (Clay, J., concurring) (noting "troubling pattern or practice" of county sheriff's office use of such laws as "tools" to illegally stop vehicles in order to conduct searches, citing cases in support).

local legal questions more generally,²⁸ despite the fact that their decisions escape review by state courts, and, very likely, the U.S. Supreme Court.²⁹ These decisions, in turn, have significant horizontal federalism implications. Just as *Erie* results in interstate variations in federal civil diversity outcomes,³⁰ judicial resort to state and local criminal laws results in varied federal criminal justice outcomes.³¹

This Article, which marks the first effort to examine the effects and implications of the “*Erie* megadoctrine”³² in federal criminal cases, proceeds as follows. Part I examines federal courts’ application of state and local laws more generally. After a brief overview of the phenomenon in federal civil litigation, attention shifts to criminal litigation, in particular federal courts’ treatment of state and local criminal laws utilized by police as bases to stop and arrest individuals.

Part II surveys the various ways in which federal courts interpret and apply such laws, which can pose distinct challenges when, as is common, their definitional parameters are uncertain. Like federal courts sitting in civil diversity cases, most courts attempt to predict how the laws would be understood by state courts of last resort, yet differ significantly in their solicitude and methods of divination. More troubling, others still disregard the reality that they are being asked to interpret and apply criminal laws of other governments, ignoring or giving short shrift altogether to the latter’s possible preferences.

28. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997) (averring that “[f]ederal courts lack competence to rule definitively on the meaning of state legislation”); *Michigan v. Long*, 463 U.S. 1032, 1039–40 (1983) (“The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar.”); *United States v. Eastland*, 989 F.2d 760, 767 (5th Cir. 1993) (expressing concern over making “difficult interpretations of state statutory and constitutional law”). See also Kenneth J. Melilli, *Exclusion of Evidence in Federal Prosecutions on the Basis of State Law*, 22 GA. L. REV. 667, 738 (1988) (referring to “extremely onerous task of determining state law without any available state precedent”).

29. See *O’Sullivan v. Boerckel*, 526 U.S. 838, 859 (1999) (“We ordinarily defer to a federal court of appeals’ interpretation of state-law questions.”); *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996) (per curiam) (noting that “we do not normally grant petitions for certiorari solely to review what purports to be an application of state law”); *Bishop v. Wood*, 426 U.S. 341, 346 (1976) (“[T]his Court has accepted the interpretation of state law in which the District Court and Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.”).

30. See Clermont, *supra* note 19, at 50 (discussing variable horizontal legal effects of *Erie*).

31. See Wayne A. Logan, *Horizontal Federalism in an Era of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 258–60 (2005) (surveying variations in state and local criminal laws).

32. Clermont, *supra* note 19, at 50; see also BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 272 n.4 (1977) (referring to *Erie* as a “star of the first magnitude in the legal universe”).

Whatever the approach embraced, the stakes of federal adjudication are high. Federal interpretations determine whether evidence can be used to deprive individuals of liberty and can, in the absence of a subsequent authoritative state court pronouncement, endure as *the* reigning interpretive outcome. And even if a state court renders a different interpretation, the adverse criminal justice consequence endures for the convicted party. Meanwhile, another similarly situated individual, whose case is litigated in state court, might prevail on the interpretive question and retain his liberty, raising disparate treatment concerns. Finally, jurisprudentially, the federal interpretation retains influence in the interim, possibly affecting other criminal cases, even in other jurisdictions, with federal courts relying on one another's decisions and rationales.

Part III considers the parallels of *Erie's* use in federal civil diversity and criminal trials. In both contexts, federal courts must interpret and apply nonfederal substantive laws to resolve federal claims; the governing substantive law is on loan as it were, retaining its otherness. Likewise, both contexts potentially raise forum shopping concerns: just as filing decisions before *Erie* were affected by variations in state and federal civil law, today differences in state and federal criminal law and procedures affect prosecutors' charging decisions.³³ Federal judicial interpretive proclivities determine critically important Fourth Amendment exclusionary rule decisions, on which larger federal criminal prosecutions often depend. Finally, even more than in diversity cases, federal judicial interpretation and application of state and local criminal law have fundamental implications for the equitable administration of justice, comparative institutional competence, democratic accountability, federalism, and separation of powers.

Part IV concludes with a discussion of several potential solutions to the difficulties facing federal criminal courts in such cases. Given the array of sensitive intergovernmental issues involved, certification of questions to state high courts should be the option of first resort. However, the delays typically associated with certification, especially problematic in the criminal justice context, would very likely preclude widespread use of certification. The Article then

33. See, e.g., *United States v. Coleman*, 162 F. Supp. 2d 582, 589 (N.D. Tex. 2001) (observing that “[f]orum shopping is not a myth”). As discussed later, in the many instances in which concurrent state-federal criminal jurisdiction exists—especially relative to gun and drug crimes—the federal system promises major prosecutorial benefits, including the possibility of harsher punishments and evidentiary and procedural rule advantages, compared to state courts. See *infra* notes 165–170 and accompanying text (discussing benefits of federal jurisdiction from perspective of prosecution).

considers the viability of an executive branch rule limiting the filing discretion of federal prosecutors, requiring that they demur to state authorities when faced with uncertain state and local laws. Despite its appeal, such a policy is even less likely to succeed because it would face strong resistance from federal prosecutors who are well aware of the benefits flowing from the use of state and local *malum prohibitum* laws. Finally, in the absence of realistic alternatives, the Article offers an interpretive rubric for federal courts to employ, one based on the traditions of *Erie* and its progeny, yet molded with sensitivity to the penal nature of the laws at issue and state interpretive traditions.

I. FEDERAL APPLICATION OF STATE AND LOCAL LAW

As discussed at the outset, today state-federal interaction is common, blurring the lines of legal authority and necessitating frequent intergovernmental application of laws.³⁴ “[T]he simple fact,” Kevin Clermont has observed, “is that every question of law posed to every actor in a federal system such as ours is preceded by the choice of law problem of whether the legal question is a matter of federal or state law.”³⁵

In the civil justice realm, diversity of citizenship has long required that federal courts entertain claims based on state statutory and common law.³⁶ For decades, however, the role of state law in diversity actions remained unclear. While the Court’s 1842 decision in *Swift v. Tyson*³⁷ required that federal courts apply state civil statutes in diversity actions,³⁸ they often resisted doing so.³⁹ Not until 1938,

34. See *supra* notes 1–6, 12–16 and accompanying text (discussing intergovernmental application of laws); see also Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1537 (1987) (“It is unavoidable that states will apply federal law and federal courts will apply state law. A federal system is not one in which each ‘sovereign’ interprets only its own law.”); Jonathan Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1870 (2008) (“Federal courts are often called upon to decide cases that include matters of state law, while state courts often are called upon to decide cases that raise matters of both federal and state law.”).

35. Clermont, *supra* note 19, at 48.

36. See U.S. CONST. art. III, § 2 (extending federal judicial jurisdiction to cases “between citizens of different states”); 28 U.S.C. § 1332(a) (2006) (allowing for federal diversity jurisdiction).

37. 41 U.S. 1 (1842).

38. See *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 74–75 (1937) (noting same). See also Phillip B. Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 204 (1957) (“The obligations of the federal courts to determine and apply state law did not originate with the decision in the *Erie* case.”).

39. See EDWARD PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 60 (1992) (observing leeway enjoyed by federal courts in applying state law).

with *Erie Railroad Co. v. Tompkins*,⁴⁰ did the Supreme Court make clear that both state statutory and common law applied in diversity actions.⁴¹ Writing for the majority, Justice Brandeis declared that, “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”⁴² “[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.”⁴³ As a result of *Erie*, federal courts sitting in diversity cases must look to the substantive content of state statutes and judicial decisions when adjudicating civil claims.⁴⁴

Federal application of state and local criminal laws has been less common. Recent federal law enforcement initiatives, however, have elevated the importance of such laws, invoked by police to justify stops and arrests of individuals. The seizures on which the laws are based provide police opportunities to (i) elicit incriminating information and/or (ii) discover evidence or contraband as a result of a frisk, authorized by *Terry v. Ohio*,⁴⁵ or a full-blown search, based on voluntary consent provided by the suspect⁴⁶ or search incident to arrest authority.⁴⁷ Each scenario can and often does lead to a more serious federal criminal prosecution, usually based on federal gun or drug laws.

40. 304 U.S. 64 (1938).

41. See 19 WRIGHT ET AL., *supra* note 5, § 4507 (noting that *Erie* “broadened the contexts in which federal courts were bound to follow state law and, in general, commanded a new respect for the integrity of state law whenever applicable in federal courts”).

42. *Erie*, 304 U.S. at 78.

43. *Id.* As often noted, *Erie* did not proscribe all federal common law—only federal “general” common law. Indeed, the Court stated as much on the day that *Erie* itself was decided. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (“For whether the water of an interstate stream must be apportioned between the two States is a question of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.”). There have always been and remain “enclaves” of federal common law. See Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 594 (2006) (describing the traditional enclaves of federal common law).

44. See generally 19 WRIGHT ET AL., *supra* note 5, § 4507 (describing the methods used by federal courts in *Erie* cases).

45. 392 U.S. 1, 30–31 (1968).

46. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (recognizing established rule that a warrant and probable cause are not necessary for a search where the suspect gives voluntary consent).

47. See *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009) (reaffirming police authority to search interior of autos and containers therein incident to arrest); *Chimel v. California*, 395 U.S. 752, 763 (1969) (granting police authority to search the bodies of arrestees and the area “into which an arrestee might reach in order to grab a weapon or evidentiary items”).

In such circumstances, federal courts must assess whether the stop or arrest was objectively reasonable for Fourth Amendment purposes. While the factual-legal question of whether the police action was supported by reasonable suspicion (for a stop) or probable cause (for an arrest) is a federal constitutional question,⁴⁸ the Fourth Amendment reasonableness of a seizure itself depends on whether the behavior alleged qualified as a violation of state or local substantive law.⁴⁹ If not, the seizure is constitutionally unreasonable and the evidence, contraband, or information secured by the police is subject to the exclusionary rule.⁵⁰

Thus, the federal judiciary's understanding of the substantive contours of state and local criminal laws figures centrally in federal criminal cases. Such understanding determines whether key evidence can be used by the federal government, which can be determinative of whether the more serious federal prosecution evolving from police invocation of the state local law can proceed.

II. *ERIE* IN FEDERAL CRIMINAL COURTS

Despite the absence of express Supreme Court precedent or statutory command, such as animates the civil diversity context,⁵¹ federal criminal courts have gravitated toward the interpretive tools used in diversity cases, embodied in *Erie* and its progeny. This section examines how they have done so. After providing an overview of the various methods used by courts in federal civil diversity claims, the discussion turns to *Erie's* place in federal criminal cases.

A. *Erie's Analytics*

Despite being in existence for over seventy years, the analytic contours of *Erie* remain remarkably unsettled.⁵² To be sure, the *Erie*

48. See, e.g., *United States v. Lopez*, 777 F.2d 543, 550–51 (10th Cir. 1985) (“The validity of the New Mexico police officers’ search and seizure of Lopez’s vehicle . . . depends on whether they had probable cause under Federal Law.”).

49. See, e.g., *Ryan v. City of DuPage*, 45 F.3d 1090, 1093 (7th Cir. 1995) (observing that reasonableness depends on state law because “there must be probable cause that a state crime has been committed.”).

50. See *infra* notes 79–107 and accompanying text (discussing various applications of the exclusionary rule).

51. See 4 WRIGHT ET AL., *supra* note 5, § 1030 (discussing influence of *Erie* and the Rules Enabling Act).

52. See Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 709 (1995) (“The *Erie* Court takes federal judges as its audience and instructs them to apply state, rather than federal, law in diversity cases. But it says almost nothing about how to ascertain state law.”); Benjamin C. Glassman, *Making Law in Federal Court*, 41 GONZ. L. REV. 237, 263 (2006)

Court unequivocally declared that state substantive law governs claims in federal civil diversity actions, whether the law is declared by the state's "[l]egislature in a statute or by its highest court in a decision."⁵³ Furthermore, when interpreting a statute, a state high court's holding is binding unless the court "has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted."⁵⁴

The Supreme Court, however, has failed to say what federal courts are to do when presented with a textually uncertain law that has yet to be clarified by a state high court. They are merely told to "ascertain from all the relevant data what the state law is."⁵⁵ These data can include holdings of state intermediate appellate courts, which are "not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise,"⁵⁶ yet which can create interpretive problems when reaching varied results.⁵⁷ Other "relevant data" can include rules announced by state lower courts, which are entitled to "some weight"⁵⁸ and might "cast[] a shadow" upon the continued precedential force of earlier state high court decisions.⁵⁹

Thus, without definitive pronouncement from a state high court, the tools used to interpret uncertain state laws in diversity cases remain open-ended. Federal trial and appellate courts variously look to treatises,⁶⁰ restatements of law,⁶¹ law review articles (with an emphasis on in-state schools),⁶² judicial decisions from other jurisdictions,⁶³ "notions of common sense,"⁶⁴ "decisions in other

("Despite the long amount of time since the Supreme Court last spoke on ascertaining state law, the federal circuit courts of appeals have not developed a consensus approach to the sources of state law, nor have they truly demonstrated consistent command of the principles involved.")

53. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

54. *West v. AT&T Co.*, 311 U.S. 223, 236 (1940).

55. *Id.* at 237.

56. *Id.* at 236–37; *see, e.g., Stoner v. N. Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940) (noting that federal courts "must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently").

57. *See* Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DEPAUL L. REV. 1, 29–40 (1988) (noting confusion among federal courts in this regard); *see also* Rekhi v. Wildwood Indus., Inc., 61 F.3d 1313, 1317 (7th Cir. 1995) (noting difficulty presented in such situations).

58. *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 160–61 (1948).

59. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 205 (1956).

60. *Vasquez v. N. Cnty. Transit Dist.*, 292 F.3d 1049, 1054 (9th Cir. 2002).

61. *Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002); *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 662–63 (3d Cir. 1980).

62. *McKenna*, 622 F.2d at 662–63.

63. *Gravquick A/S v. Trimble Navigation Int'l Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003); *Gibbs-Alfano v. Burton*, 281 F.3d 12, 19 (2d Cir. 2002).

jurisdictions on the same or analogous issues,”⁶⁵ and “broad policies” and “doctrinal trends.”⁶⁶

At least as important, federal courts sitting in diversity differ on how to use the data amassed.⁶⁷ Although not expressly authorized by *Erie* or its progeny, most federal courts today use a predictive method,⁶⁸ obliging them to predict how a state high court would decide a particular legal issue.⁶⁹

B. *Erie in Criminal Prosecutions*

1. Federal Application of Determinate Laws

Federal courts, without always expressly referencing *Erie*, as a matter of course typically invoke the substantive requirements of state or local law to measure the Fourth Amendment reasonableness of seizures by police. Like federal civil diversity courts, federal criminal courts unreservedly apply state and local law when the relevant law is clear and admits of ready application,⁷⁰ or any existing uncertainty has been clarified by state courts.⁷¹ Assuming that a

64. *Ind. Ins. Co. v. Pana Cmty. Unit Sch. Dist. No. 8*, 314 F.3d 895, 903 (7th Cir. 2002).

65. *Gibbs-Alfano*, 281 F.3d at 19.

66. *McKenna*, 622 F.2d at 662.

67. See Glassman, *supra* note 52, at 292 (noting that the Supreme Court has not provided a “hierarchy of state-law sources or a decision tree for selecting among conflicting state precedents. Nor have the federal courts of appeal settled on any uniform method for doing so.”).

68. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1466 (1997) (noting that “most federal courts attempt to predict how the state’s highest court would decide the particular question and then apply the resulting rule of decision to the case at bar.”); Jonathan Nash, *Resuscitating Deference to Lower Federal Court Judges’ Interpretations of State Law*, 77 S. CAL. L. REV. 975, 997 (2004) (“Federal courts must attempt to resolve the state law issues as they believe the relevant state high court would resolve them.”).

69. See, e.g., *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239 (1991) (characterizing enterprise as “reasoned divination”); *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d Cir. 1994) (“Where the substantive law of the forum state is uncertain or ambiguous, the job of the federal courts is carefully to predict how the highest court of the forum state would resolve the uncertainty or ambiguity.”).

70. See, e.g., *United States v. Gross*, 550 F.3d 578, 583 (6th Cir. 2008) (Tennessee law); *United States v. Miller*, 146 F.3d 274, 278 (5th Cir. 1998) (Texas law); *United States v. Garner*, 108 F. Supp. 2d 796, 800 (N.D. Ohio 2000) (Ohio law); *United States v. Hartwell*, 67 F. Supp. 2d 784, 789–91 (E.D. Mich. 1999) (Michigan law).

71. See, e.g., *United States v. Lopez*, 567 F.3d 755, 757 (6th Cir. 2009) (Kentucky law, relying on *Huff v. Commonwealth*, 406 S.W.2d 831 (Ky. 1966)); *United States v. Lucas*, 322 F. App’x. 326, 328 (4th Cir. 2009) (North Carolina law, relying on *State v. Stone*, 634 S.E.2d 244 (N.C. Ct. App. 2006)); *United States v. Lopez-Valdez*, 178 F.3d 282, 285 (5th Cir. 1999) (Texas law, relying on *Vicknair v. State*, 751 S.W.2d 180, 187 (Tex. Crim. App. 1986)); *United States v. Gregory*, 79 F.3d 973, 978 (10th Cir. 1996) (Utah law, relying on *State v. Bello*, 871 P.2d 584, 586 (Utah Ct. App. 1994)); *United States v. West*, 615 F. Supp. 2d 957, 961 (S.D. Iowa 2009) (Iowa

substantive legal pronouncement can ever be “clear,”⁷² such scenarios make for comparatively straightforward cases.

2. Federal Application of Indeterminate Laws

However, as in the diversity realm, the enterprise becomes more problematic when state and local laws are substantively uncertain and no authoritative state interpretation is available. Such a dearth of authority is especially common with the low-level criminal laws at issue here, which very often have not been addressed by state or local courts of record.⁷³

Like federal courts sitting in civil diversity cases, federal criminal courts have procedural tools at their disposal to resolve such uncertainties: abstention⁷⁴ and certification.⁷⁵ To date, however, these possibilities have been largely theoretical. There appear to be no instances of abstention⁷⁶ and only a handful of instances in which certification was sought (each rebuffed).⁷⁷ Instead, federal courts use a variety of methods to resolve uncertainties, a process that, while still evolving because such cases only recently have made their way into federal court in significant numbers, is now taking shape.

law, relying on *Hedges v. Conder*, 166 N.W.2d 844, 853 (Iowa 1969)); *United States v. Goines*, 604 F. Supp. 2d 533, 543 (E.D.N.Y. 2009) (New York law, relying on *People v. Felton*, 581 N.E.2d 1344 (N.Y. 1991)).

72. As Third Circuit Judge Dolores Sloviter has noted in the context of civil diversity actions, “[e]ven when there is a state supreme court decision on point, the direction is not always crystal clear.” Dolores Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1676 (1992).

73. See *United States v. Simpson*, 520 F.3d 531, 535 n.4 (6th Cir. 2008) (noting same).

74. See *infra* notes 219–222 and accompanying text.

75. See *infra* notes 223–243 and accompanying text. Today, with the exception of North Carolina, all states and the District of Columbia permit certification to some extent. See Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 DUKE L.J. 69, 71 n.13 (2008).

76. Abstention, it is worth noting, has been employed by federal courts in the context of section 1983 actions when asked to interpret state criminal laws allegedly raising First Amendment concern. See, e.g., *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep’t*, 533 F.3d 780 (9th Cir. 2008); *Lim v. Andrukiewicz*, 360 F. Supp. 1077 (D.R.I. 1973).

77. See *United States v. Burkley*, 513 F.3d 1183, 1187 (10th Cir. 2008) (rejecting defense request to certify a question to the Oklahoma Supreme Court concerning auto turn signal law, invoking precedent disfavoring certification when the issue was adversely decided below); *United States v. Jones*, 512 F. Supp. 2d 1193, 1194–95 (D. Kan. 2007) (denying certification on requirement that auto be “driven as nearly as practicable entirely within a single lane” and shall move only “with safety”); *United States v. Martinez*, No. 06–40080–01–RDR, 2006 U.S. Dist. LEXIS 73181, at *14–15 (D. Kan. Oct. 6, 2006) (denying certification on whether license plate must be decipherable at distance of fifty feet); *United States v. Ruiz-Lopez*, No. 05–40060–01–JAR, 2006 U.S. Dist. LEXIS 30543, at *4 (D. Kan. Mar. 9, 2006) (denying certification of same question and whether a temporary tag can be placed in a car rear window).

a. Federal Deference

Today, federal criminal courts typically proclaim that they are duty-bound to predict interpretive outcomes likely to be reached by state high courts.⁷⁸ A difference lies, however, in the range of data they consider and the weight they attach to the data points.

In *United States v. Colin*,⁷⁹ for instance, a California Highway Patrol officer pulled over the vehicle in which Colin was riding because the driver allegedly violated a state law prohibiting “lane straddling.” The law required that “[a] vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety.”⁸⁰ After being stopped, Colin and the driver consented to a vehicle search that resulted in a federal drug prosecution.⁸¹

The Ninth Circuit noted at the outset that it was “bound to follow the decisions of the California Supreme Court” when interpreting the lane-straddling statute. The court added, however, that in the absence of state high court clarification, it must predict how that court would “interpret the code in light of California appellate court opinions, decisions from other jurisdictions, statutes, and treatises.”⁸²

The Ninth Circuit first was faced with resolving the scope of the statute—in particular, whether it imposed separate duties to (i) drive as nearly as practical within a lane and (ii) not move from the lane until the move could be made with reasonable safety. Because the California Supreme Court had not directly addressed the question, the Ninth Circuit considered a prior decision of the Los Angeles Superior

78. Such efforts can involve some rather novel circumstances, such as when the Seventh Circuit in Chicago invoked Utah's *Driver's Handbook*, as had the trial court in the Eastern District of Wisconsin, to divine the meaning of a Utah statute invoked by Utah police. See *United States v. Powell*, 929 F.2d 1190, 1194 (7th Cir. 1991) (stating that “[f]or want of a better guide to the application of the statute to the facts in this case, we defer to the Handbook, which presents the views of the administrative agency charged with enforcing Utah's traffic laws”). The issue in *Powell* was whether Utah law required that motorists use their turn signal lights when merging from an on-ramp onto another street. *Id.* at 1193. Fifteen years later, the Tenth Circuit found the same Utah statute not to be uncertain, eschewed reliance on the Utah *Handbook*, and concluded that the statute required that a signal be provided. See *United States v. Gregoire*, 425 F.3d 872, 878 (10th Cir. 2005). See also, e.g., *United States v. Gold*, 77 F. Supp. 2d 936, 941–42 (S.D. Ind. 1999) (citing *Powell* and interpreting the *Indiana Driver's Manual* to interpret an unclear Indiana statute).

79. 314 F.3d 439 (9th Cir. 2002).

80. *Id.* at 443 (quoting CAL. VEH. CODE § 21658(a) (West 2009)).

81. *Id.* at 441–42.

82. *Id.* at 443.

Court, Appellate Department, previously cited with approval by the state supreme court as dictum, which held that the duties were distinct.⁸³ As a consequence, the Ninth Circuit reasoned, the California Supreme Court was “likely to agree” that the statute prescribed two separate affirmative duties.⁸⁴

Having so decided, the Ninth Circuit concluded that the stop was not justified under California law because the government had not alleged that defendants violated either expectation. While California courts had not addressed whether the statute required that a vehicle’s tires actually “cross over” a pavement line for a violation to occur, other state and federal courts interpreting the same or similar statutes in other jurisdictions had held that “touching the line is not enough to constitute straddling.”⁸⁵ While defendants’ vehicle touched the lane boundary line for approximately ten seconds, it did not cross the line.⁸⁶ Thus, the stop was legally unjustified, resulting in suppression of the drugs discovered by police during the stop.⁸⁷

More recently, in *United States v. DeGasso*,⁸⁸ the Tenth Circuit, citing *Colin*, similarly looked beyond the state enacting the law in question (Oklahoma) to divine the law’s reach. In *DeGasso*, a state trooper pulled over a vehicle registered in Chihuahua, Mexico, based on his belief that its license plate, mounted in such a way as to obscure the lettering at the bottom of the tag, violated Oklahoma law requiring license plates to be “‘clearly visible at all times.’”⁸⁹ After the stop, DeGasso’s co-defendant consented to a search of the vehicle,

83. *Id.* (citing *People v. Skinner*, 704 P.2d 752, 758 (Cal. 1985); *People v. Butler*, 146 Cal. Rptr. 856 (1978)).

84. *Id.* at 443–44. According to the California Supreme Court, “the inadvertent use of ‘and’ where the purpose or intent of a statute seems clearly to require ‘or’ is a familiar example of a drafting error which may properly be rectified by judicial construction.” *Id.* at 433 (quoting *Skinner*, 704. P.2d at 758).

85. *Id.* at 444 (citing *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996); *United States v. Guevara-Martinez*, No. 8:00CR47, 2000 WL 33593291 (D. Neb. May 26, 2000); *Crooks v. State*, 710 So. 2d 1041 (Fla. Dist. Ct. App. 1998); *Rowe v. State*, 769 A.2d 879 (Md. 2001); *State v. Caron*, 534 A.2d 978 (Me. 1987); *State v. Tarvin*, 972 S.W.2d 910 (Tex. App. 1998)).

86. *Id.* at 446.

87. *Id.* The Ninth Circuit also rejected the government’s alternate basis for the stop: that the vehicle’s driver was under the influence of alcohol. Citing California precedent that such a stop is justified only upon proof of “pronounced weaving within a lane” for a “substantial distance,” the court found that justification for this basis for the stop was similarly lacking. *See id.* at 445–46 (citation omitted). For support of its view that pronounced weaving was lacking, the court cited decisions from Maine and Utah. *Id.* at 446 (citations omitted). For support of its view that the defendants’ vehicle weaving for 30–45 seconds did not satisfy the “substantial distance” standard, the court cited a Tenth Circuit decision. *Id.* (citing *United States v. Lyons*, 7 F.3d 973, *rev’d on other grounds*, *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995)).

88. 369 F.3d 1139 (10th Cir. 2004).

89. *Id.* at 1145 (citing OKLA. STAT. tit. 47, § 1113.A.2 (2010)).

leading to the discovery of cocaine and the prosecution of defendants on federal drug, conspiracy, and racketeering charges.⁹⁰ The question before the Tenth Circuit was whether the Oklahoma law applied to vehicles from other jurisdictions (or, indeed, nations).

After acknowledging that “[i]t is axiomatic that state courts are the final arbiters of state law,”⁹¹ the Tenth Circuit noted that it must predict how the Oklahoma Supreme Court would decide the issue, following the “rules of statutory construction of criminal statutes embraced by the Oklahoma judiciary.”⁹² The *DeGasso* court, however, proceeded to invoke a decision by the Kansas Court of Appeals interpreting Kansas’s similar law as applying to vehicles registered in other states,⁹³ as well as decisions of other state courts, noting that “none has interpreted its statutory scheme to allow out-of-state cars to be driven with obscured license plates.”⁹⁴

Its decision, the Tenth Circuit wrote, was “far more than a ‘guess’ about what the Oklahoma Legislature intended” with its license plate law. The law contained no express limit to Oklahoma-registered vehicles; other states had interpreted their own similar statutes to cover vehicles registered elsewhere; and the overall statutory purpose would be defeated by inferring such a limit, which would be “highly implausible and undermine public safety,” as the Kansas court concluded of its own statute.⁹⁵ As a result, the stop was valid for Fourth Amendment purposes, allowing the drugs and incriminating statements of defendants to be used by the prosecution.

In a 2008 decision, *United States v. Simpson*,⁹⁶ the Sixth Circuit engaged in a similar analysis. In *Simpson*, a Tennessee state trooper detained a car with Ohio license plates based on his belief that the expiration date on the plates was not “clearly legible,” as required by Tennessee law.⁹⁷ Upon approaching the vehicle, the trooper observed that the plates, while weathered, discolored, and torn, actually had not expired but were in fact valid for one more day. The

90. *Id.* at 1141.

91. *Id.* at 1145.

92. *Id.* at 1146. The majority rejected the dissent’s assertion that “the obligation of a federal court . . . to predict what the state’s highest court would do[] applies only in ‘civil diversity cases’ and not in ‘the criminal context.’” *Id.* at 1145 n.5.

93. *Id.* at 1148 (citing *State v. Hayes*, 660 P.2d 1387 (Kan. Ct. App. 1983)).

94. *Id.* (citing *Nelson v. State*, 544 S.E.2d 189 (Ga. Ct. App. 2001); *People v. Miller*, 611 N.E.2d 11 (Ill. App. Ct. 1993)).

95. *Id.* at 1150.

96. 520 F.3d 531 (6th Cir. 2008).

97. *Id.* at 533 (citing TENN. CODE ANN. § 55–4–110(b) (2010)). The officer initially also noticed the vehicle’s “extremely dark” window tinting. Tennessee, however, exempted out-of-state vehicles from its window tinting laws. *Id.* (citing § 55–9–107).

trooper detected, however, the smell of marijuana emanating from the passenger compartment. A canine unit at the scene then alerted to the vehicle, and a search revealed cocaine in the trunk.⁹⁸

The question before the Sixth Circuit, much like that before the Tenth Circuit in *DeGasso*, was whether state law, itself not yet interpreted by the state's highest court,⁹⁹ applied to out-of-state motorists.¹⁰⁰ The Sixth Circuit, citing Tennessee precedent, identified its goal as being "to ascertain and give effect to the intent or purpose of the legislature as expressed in the statute . . . [and] consider the 'natural and ordinary meaning of the language used.'"¹⁰¹

The court thereupon launched into an extended analysis of the Tennessee license plate legibility law, focusing in particular on its application to "[e]very registration plate."¹⁰² After examining decisions from other states construing similar provisions, as well as related Tennessee statutory law, including that concerning the authority of the motor vehicles commissioner to reciprocally honor other states' registration laws, the court concluded that, while the Ohio-registered vehicle did not violate Ohio law, it did violate Tennessee law, justifying the stop.¹⁰³

Taken together, *Colin*, *DeGasso*, and *Simpson* highlight federal judicial sensitivity to the unique intersystemic interpretive enterprise at hand, expressly averring the need to divine the content of uncertain state laws. In doing so, however, they evince a decided willingness to consider data extrinsic to the jurisdictions whose laws are under consideration.

An example of a more restrained approach is found in the Seventh Circuit's decision in *United States v. McDonald*.¹⁰⁴ There, local police stopped McDonald due to his alleged violation of an Illinois turn signal law. The law required that signals be used to indicate intent to turn, change lanes, or merge from a parallel position, yet McDonald was stopped when he used his signal at a curve on a road

98. *Id.*

99. The plate legibility law previously had been considered by the Middle District of Tennessee. See *id.* at 535 (citing *United States v. Walton*, No. 1:03-00014, 2004 WL 3460842, at *4 (M.D. Tenn. Nov. 12, 2004) (denying motion to suppress when license plate frame obscured the word "Texas," the state of registration)).

100. Before addressing the question, the court noted that "a federal court must predict how the state's highest court would interpret the statute," and "[a]lthough more generally cited in the context of civil diversity cases, this rule is equally applicable in criminal matters." *Id.* at 535-36.

101. *Id.* at 536 (citations omitted).

102. *Id.* at 535 (citation omitted).

103. *Id.* at 544-45.

104. 453 F.3d 958 (7th Cir. 2006).

where it changed names.¹⁰⁵ The Seventh Circuit, noting that no Illinois precedent existed on the question, invoked the state supreme court's "primary rule for statutory construction": to " 'give effect' to the intent of the legislature, and the best evidence of that intent is the plain meaning of the [statutory] language."¹⁰⁶ The court observed that the statutory text did not require that a motorist turn onto a different road once a signal was activated, and the government failed to adduce any evidence of legislative intent supporting its position.¹⁰⁷ As a result, the police lacked probable cause for the stop, resulting in suppression of the firearm discovered during the search.

b. Federal Dismissiveness

In contrast to the foregoing examples, the caselaw contains numerous instances of federal courts showing outright disregard for the reality that it is the substantive law of state and local governments (not the United States) that they must interpret and apply. These courts regard the question at hand as being federal in nature, without regard for possible state interpretive preferences.

In *United States v. Herrera-Gonzalez*,¹⁰⁸ for instance, the Eighth Circuit addressed Iowa's "fog line" statute. After first noting decisions of other federal circuits interpreting other states' laws, the court offered that a prior Iowa Supreme Court decision interpreting the statute "*bears some relevance . . . because a state's judicial interpretation of a state statute can aid in determining whether an officer's actions had some basis in state law.*"¹⁰⁹ The Eighth Circuit thereafter distinguished the case at bar from the Iowa precedent on factual grounds, deeming the county deputy sheriff's stop a reasonable one for Fourth Amendment purposes and allowing cocaine seized during the stop to serve as the basis for federal prosecution.¹¹⁰

An even more striking example of federal unilateralism is found in *United States v. Dimas*.¹¹¹ In *Dimas*, a motorist was stopped

105. *Id.* at 959.

106. *Id.* at 960 (citation omitted).

107. *Id.* at 960–61; see also *United States v. Davis*, 692 F. Supp. 2d 594, 598–99 (E.D. Va. 2010) (invoking Virginia rules of statutory construction to invalidate stop based on law prohibiting pedestrians from stepping into a roadway); cf. *Giron v. City of Alexander*, 693 F. Supp. 2d 904, 947 (E.D. Ark. 2010) (noting in federal civil rights action alleging racial profiling by local police invoking state laws to stop motorists that "[t]he Court starts by predicting how the Arkansas Supreme Court would construe these statutes").

108. 474 F.3d 1105 (8th Cir. 2007).

109. *Id.* at 1109–10 (emphasis added).

110. *Id.* at 1110–11.

111. 418 F. Supp. 2d 737 (W.D. Pa. 2005).

by a Pennsylvania state trooper for an alleged violation of state law requiring that a vehicle be driven “as nearly as practicable within a single lane,”¹¹² similar to the lane-straddling laws discussed earlier. The *Dimas* court explicitly ignored state supreme court precedent interpreting the law,¹¹³ stating that “this Court is not bound by what a Pennsylvania court would have done under its own law and precedent, but rather must conduct its own independent analysis to determine whether [the state trooper’s] actions complied with federal law.”¹¹⁴ The court, finding no Third Circuit caselaw on point, proceeded to cite and rely upon decisions of the Sixth, Eighth, and Eleventh Circuits interpreting state laws within their circuits, all finding probable cause under the circumstances.¹¹⁵ Even though there was “some question” whether *Dimas* violated Pennsylvania law, as understood by Pennsylvania courts, the court adopted a broad construction of the law and found the seizure of *Dimas* legally justified.¹¹⁶

Similarly, in *United States v. Fleming*,¹¹⁷ the federal trial court addressed a Michigan law providing that individuals “shall not operate” a vehicle without a valid registration plate, punishable as a misdemeanor.¹¹⁸ Observing that Michigan courts had not rendered a definitive pronouncement on the meaning of “operate” in the particular context, the court reasoned that the uncertainty was of no moment. “More importantly,” the court wrote, “because the Court’s inquiry in considering a motion to suppress evidence is governed by federal law, not state law, the fact that the officers’ suspicion may not be supported by a narrow interpretation of state law does not render that suspicion valueless in the context of a federal suppression analysis.”¹¹⁹

To the *Fleming* court, the definitional reach of state law was really not so important given the generous reasonable suspicion standard prescribed by federal law: “The fact that a post-hoc narrow interpretation of a statute may not have put the Defendant’s conduct within the zone of legal culpability does not mean that the officers’

112. *Id.* at 739 (citing 75 PA. CONS. STAT. § 3309(1) (2010)).

113. *Id.* at 741 (citing *Commonwealth v. Gleason*, 785 A.2d 983 (Pa. 2001)).

114. *Id.* at 742.

115. *Id.* (citing *Gaddis v. Redford Twp.*, 364 F.3d 763 (6th Cir. 2004); *United States v. Ozbirn*, 189 F.3d 1194 (10th Cir. 1999); *United States v. Palomino*, 100 F.3d 446 (6th Cir. 1996); *United States v. Barahona*, 990 F.2d 412 (8th Cir. 1993); *United States v. Harris*, 928 F.2d 1113 (11th Cir. 1991)).

116. *Id.* at 743.

117. 201 F. Supp. 2d 760 (E.D. Mich. 2002).

118. *Id.* at 765 (citing MICH. COMP. LAWS § 257.255(1)–(2) (2010)).

119. *Id.* at 767.

suspicion was not reasonable. Here, the officers had a reasonable, articulable suspicion that Defendant *had operated* a motor vehicle”¹²⁰ The court offered this assessment even though the Michigan law expressly contained only the present tense of the term, “operate.” According to the court, “even if [the arrest] would not have been lawful under Michigan law . . . it does not render [defendant’s] arrest unlawful under the Fourth Amendment.”¹²¹

Less dismissive, yet still failing to heed state preference, is *United States v. Edgerton*,¹²² wherein the Tenth Circuit considered whether a Colorado-registered vehicle violated a Kansas law requiring that license plates be located “in a place and position to be clearly visible, and shall be maintained free from foreign materials and in a condition to be clearly legible.”¹²³ A Kansas state trooper stopped Edgerton’s vehicle because her temporary license plate was positioned in the right rear window, as permitted by Colorado law and not expressly prohibited by Kansas law.¹²⁴ A subsequent consent-based search revealed the presence of cocaine in the car’s trunk.¹²⁵ The Tenth Circuit concluded that the stop was justified under Kansas law because the temporary plate was not readily apparent to the trooper, based upon a prior decision by the Kansas Court of Appeals construing the license plate statute.¹²⁶

Edgerton, however, raised the additional issue of whether Kansas law allowed the continued detention of the driver once the trooper approached the vehicle and determined that the license plate was in fact “clearly legible.” To determine this, the court asked whether the Kansas license plate law or Kansas’s reciprocity law¹²⁷ governed resolution of the matter. The panel, however, did not feel obliged to answer the choice of law question because it thought the laws of Kansas and Colorado were “virtually identical,”¹²⁸ in that both required “plates to be ‘in a place and position to be clearly visible.’”¹²⁹ Because Kansas courts had never addressed the issue, the panel relied on a prior Colorado Supreme Court decision regarding its license plate

120. *Id.*

121. *Id.* at 768–69.

122. 438 F.3d 1043 (10th Cir. 2006).

123. *Id.* at 1046 (citing KAN. STAT. ANN. § 8–133 (2010)).

124. *Id.* at 1045.

125. *Id.* at 1046.

126. *Id.* at 1048 (citing *State v. Hayes*, 660 P.2d 1387, 1388 (Kan. Ct. App. 1983) (relying on section 8–133 to uphold the stop of an out-of-state vehicle with a partially obscured license plate)).

127. *Id.* at 1049 (citing KAN. STAT. ANN. § 8–138a).

128. *Id.*

129. *Id.* (citing KAN. STAT. ANN. § 8–133; COLO. REV. STAT. § 42–3–202(2)(a) (2010)).

statute, which expressly permitted placement of temporary plates in rear windows.¹³⁰ The panel offered that it had “no reason to doubt that the language of [the Kansas law] has the same meaning as its Colorado counterpart.”¹³¹

Thus, the panel, rather than attempting to discern how Kansas courts would decide the issue, in effect incorporated Colorado law into Kansas law by inserting into the latter Colorado’s exception for placement of temporary tags in rear windows.¹³² It did so even though the Kansas statute’s plain language and consideration of the broader Kansas vehicle regulatory scheme, as required by Kansas statutory construction tradition,¹³³ would have dictated a contrary result.¹³⁴

Other decisions reflect approaches that, while not quite so overtly dismissive of states, nonetheless raise concern. For instance, despite the Supreme Court’s insistence on the significance of state intermediate appellate court decisions,¹³⁵ one sees an uneven fealty to such precedent.¹³⁶ Still other courts, oblivious to possible state

130. *Id.* at 1050 (citing *People v. Redinger*, 906 P.2d 81, 82–84 (Colo. 1995)). Indeed, according to a Kansas federal district court, Colorado’s statutory authorization, and accompanying requirement that license plates be visible for a distance of 200 feet (versus 50 feet under Kansas law), was the sole basis for the decision of the Colorado Supreme Court in *Redinger*. See *United States v. Rubio-Sanchez*, No. 05–40081–01–SAC, 2006 U.S. Dist. LEXIS 21230, at *15 n.6 (D. Kan. Apr. 17, 2006).

131. *Edgerton*, 438 F.3d at 1050.

132. See David J. Stuckey, Comment, *The Tenth Circuit’s Obscure Vision: Losing Sight of the Importance of Clearly Visible License Plates*, 46 WASHBURN L.J. 633, 650 (2007) (“Because both states’ broader statutes require that license plates be illuminated and legible at a distance of fifty feet, Colorado’s specific regulation authorizing a driver to place a temporary tag in a vehicle’s rear window serves as a narrow exception to this general rule. The Kansas Legislature has not adopted this exception. Instead, Kansas issues temporary tags similar in design to permanent plates and intended for placement on the rear bracketed location of the vehicle.”) Indeed, it is plausible, as a Kansas federal district court inferred, that the Kansas Legislature considered the benefits and detriments of allowing a temporary tag to be posted in vehicle rear windows and rejected the option. See *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *18 n.9 (D. Kan. Apr. 17, 2006).

133. See Stuckey, *supra* note 132, at 649.

134. See *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *20 (asserting that the *Edgerton* court did not qualify as “an effort to interpret Kansas law”).

135. See *supra* notes 56–57 and accompanying text; see also *United States v. Escalante*, 239 F.3d 678, 681 (5th Cir. 2001) (citing *Erie* precedent and stating that “[w]e interpret the state statute the way we believe the state Supreme Court would” and “[i]f a state’s highest court has not spoken to the issue, we look to the intermediate appellate courts for guidance”).

136. Compare, e.g., *United States v. Valadez-Valadez*, 525 F.3d 987, 993 (10th Cir. 2008) (rejecting without reason New Mexico Court of Appeals), and *United States v. Jones*, 501 F. Supp. 2d 1284 (D. Kan. 2007) (rejecting Kansas Court of Appeals in deference to Tenth Circuit precedent), with *United States v. Orduna-Martinez*, 561 F.3d 1134, 1138 (10th Cir. 2009) (deferring to Kansas Court of Appeals), *United States v. Brown*, 234 F. App’x 838, 844–45 (10th Cir. 2007) (same), and *United States v. Gregory*, 79 F.3d 973, 978 (10th Cir. 1996) (deferring to Utah Court of Appeals).

interpretive preferences, unreservedly engage in unilateral statutory interpretation of substantively uncertain provisions,¹³⁷ or merely add as an afterthought that their outcome likely aligns with predicted state preferences.¹³⁸

3. Summary

As the foregoing makes clear, federal courts exhibit considerable variation in their interpretative approaches to state and local criminal laws. Most courts, as in the civil diversity context, lend controlling effect to the laws and seek to predict how any substantive uncertainties would be resolved by the home state's highest court.¹³⁹ The data points and methods of prediction differ, however, with federal criminal courts (again like their civil counterparts¹⁴⁰), exhibiting considerable variability in their interpretative approaches, including reliance on rulings of state and federal courts nationwide. Other federal courts show no sensitivity whatsoever for state preferences, ignoring that they are engaged in the unusual enterprise of interpreting and applying the law of another government. To them, the vertical choice of law question is really no choice at all. They do not purport to find and apply state and local law; rather, they freely declare and apply it through a federal lens.

137. See, e.g., *United States v. Martinez*, 244 F. App'x. 187 (10th Cir. 2007) (Wyoming law on proper display of license plates); *United States v. King*, 244 F.3d 736 (9th Cir. 2001) (Anchorage, Alaska ordinance prohibiting material obstruction "upon" front car windshields); *United States v. Rojas-Millan*, 234 F.3d 464 (9th Cir. 2000) (Nevada law barring display of fictitious license plates); *United States v. Freeman*, 209 F.3d 464 (6th Cir. 2000) (Tennessee law requiring that a vehicle "shall be driven as nearly as practicable entirely within a single lane"); *United States v. Smith*, No. 2:08-CR-00306, 2009 WL 3165486 (D. Nev. Sept. 25, 2009) (City of North Las Vegas "open container" law).

138. See, e.g., *United States v. Sanford*, 476 F.3d 391 (6th Cir. 2007) (Tennessee law); *United States v. Mariscal*, 285 F.3d 1127, 1132 (9th Cir. 2002) (Arizona law); *United States v. Freeman*, 209 F.3d 464, 466 (6th Cir. 2000) (Tennessee law); *United States v. Gonzales-Quinonez*, 287 F. Supp. 2d 1032, 1036 (D. Ariz. 2003) (Arizona law).

139. It bears mention that the predictive approach also dominates analysis in civil rights actions under section 1983, including false arrest claims based on the Fourth Amendment. See, e.g., *Johnson v. Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002) (using predictive approach with Utah shoplifting statute); *Bowden v. Town of Speedway*, 539 F. Supp. 2d 1092, 1104 (S.D. Ind. 2008) (using predictive approach with Indiana resisting arrest statute); see also *Center for Bioethical Reform, Inc. v. Los Angeles Cnty. Sherriff Dep't*, 533 F.3d 780, 794 (9th Cir. 2008) (First Amendment challenge predicting how California court would construe statute barring school disruptions); cf. *United States v. Cobb*, 975 F.2d 152, 156 (5th Cir. 1992) (noting with respect to Texas law permitting warrantless searches of auto salvage dealerships that "[t]he district court was obligated to interpret the Texas statute as a Texas court would have interpreted it").

140. See, e.g., Jonathan Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339 (2005) (discussing major variability in statutory interpretation methods used by federal courts).

The net impact of such efforts can be to enlarge or constrict the coverage of state or local law,¹⁴¹ with outcomes influencing subsequent federal cases within¹⁴² and outside the circuit.¹⁴³ This is so even though substantively identical or similar laws lack consistent state interpretation¹⁴⁴ and despite the reality that nonauthoritative¹⁴⁵ federal court constructions can (as in civil diversity cases¹⁴⁶) conflict with those later rendered by state high courts.¹⁴⁷ Much like the “federal general common law” condemned in *Erie*, federal courts treat state and local criminal laws as fungible objects,¹⁴⁸ in disregard of and possibly divorced from particular state and local preferences.¹⁴⁹

141. See, e.g., *United States v. Burks*, 290 F. App'x 488, 492 (3d Cir. 2008) (Ambro, J., dissenting) (observing that the majority “add[ed] a requirement of its own making to Pennsylvania law”).

142. See, e.g., *United States v. Vazquez*, 555 F.3d 923, 928 (10th Cir. 2009); *United States v. Hernandez-Rivas*, 513 F.3d 753, 759 (7th Cir. 2008); *United States v. Alvarado*, 430 F.3d 1305, 1038 (10th Cir. 2005); *United States v. Randall*, 62 F. App'x 96 (6th Cir. 2003); *United States v. Lopez*, No. 3:06cr283, 2007 WL 1851058 at *2 (D. Conn. June 26, 2007); *United States v. Ruiz-Lopez*, No. 05-40060-01-JAR, 2006 WL 1128702, at *3 (D. Kan. Apr. 26, 2006).

143. See, e.g., *United States v. Simpson*, 520 F.3d 531, 536 (6th Cir. 2008) (relying on the Tenth Circuit's *DeGasso* decision interpreting Oklahoma law when interpreting Tennessee law); *United States v. Colin*, 314 F.3d 439, 444 (9th Cir. 2002) (relying on Tenth Circuit's *Gregory* decision interpreting Nebraska law when interpreting California law).

144. See, e.g., *United States v. Gross*, 550 F.3d 578, 583–84 (6th Cir. 2008) (noting varied interpretations of law requiring that vehicles remain in their lane “as nearly as practical”); *United States v. Delgado-Hernandez*, 283 F. App'x 493, 498 (9th Cir. 2008) (noting variations on whether “fog line” laws permit stops based on momentary drifting from traffic lane); cf. *People v. Mott*, 906 N.E.2d 159, 166 (Ill. Ct. App. 2009) (noting three approaches adopted by states relative to laws prohibiting visual obstructions placed on rearview mirrors); *State v. Wolfer*, 780 N.W.2d 650, 652–53 (N.D. 2010) (discussing “varying standards and interpretations” among jurisdictions regarding laws requiring that vehicles be driven as nearly as “practicable” within a single lane).

145. As others have noted, to characterize the federal decision as “wrong” presupposes the existence of clear authoritative law to the contrary, which of course is not in existence at the time of the initial federal decision. See, e.g., Schapiro, *supra* note 1, at 1427–28.

146. See Jonathan Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1674 & n.3 (2003) (noting high error rates of federal decisions and the extended delays occurring before such errors are corrected); Sloviter, *supra* note 72, at 1677–79 (noting frequency of federal mistaken predictions of state civil law).

147. See, e.g., *State v. Marx*, 215 P.3d 601, 674 (Kan. 2009) (rejecting Tenth Circuit constructions of Kansas law requiring that vehicles be driven “as nearly as practicable” within a lane). With apparent false modesty, the Kansas Supreme Court began its analysis by stating that “although great respect is accorded the decisions of the federal jurists in the Tenth Circuit, the ultimate responsibility for interpreting the laws of the State of Kansas falls squarely on our shoulders. Accordingly, we humbly strike out on our own to intuit the most logical meaning to ascribe to [the] legislative language.” *Id.* at 610. Federal court divinations, however, do not always prove to be off-base; a state high court may ultimately agree. See, e.g., *People v. Saunders*, 136 P.3d 859, 863 (Cal. 2006) (agreeing with result reached in *United States v. Ramstad*, 308 F.3d 1139 (10th Cir. 2002), that California law requires passenger vehicles to display both license plates).

148. See, e.g., *United States v. Pulido-Vasquez*, 311 F. App'x 140, 143 (10th Cir. 2009) (deferring to prior “fog line” Circuit precedent based on “the Kansas statute or similar laws of

Even though ultimate interpretive authority remains with state judiciaries,¹⁵⁰ federal judicial outcomes thus have major significance. They determine whether individual prosecutions will proceed, and their interpretations can endure as *the* reigning interpretive outcome in federal cases, given the likely absence of authoritative state precedent¹⁵¹ and the U.S. Supreme Court's customary avoidance of state law issues.¹⁵² And even if a state high court later renders a contrary ruling, the adverse criminal justice consequences for individuals endure.¹⁵³

III. *ERIE'S* RELEVANCE

Intuitively, invocation of *Erie* principles seems sensible given that federal civil diversity and criminal courts alike are asked to apply the substantive laws of nonfederal governments to adjudicate claims. The question remains, however, whether this symmetry is anything more than superficial. This section considers whether the animating

other states"); *United States v. Monje-Contreras*, 245 F. App'x 738, 742 (10th Cir. 2007) (deferring to its prior opinion in *United States v. Ledesma*, 447 F.3d 1307 (10th Cir. 2006), which "reviewed Tenth Circuit law on the general subject of 'obscured' license tags that were not 'clearly visible'"); *United States v. Gastellum*, 927 F. Supp. 2d 1386, 1393 (D. Colo. 1996) (stating that *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996) (Utah law), "controls my analysis").

149. See *United States v. City of Las Cruces*, 289 F.3d 1170, 1186 (10th Cir. 2002) ("The reluctance to create common law is a core feature of federal criminal court jurisprudence. Federal courts should only fashion common law in a 'few and restricted' circumstances. Moreover, federal common law exists only when 'state law cannot be used.'" (citations omitted).

150. See Brian Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1239–40 (2004) ("No matter how clever, original, or even persuasive a federal court's interpretation of a state law is, it is not authoritative."); see also Althouse, *supra* note 34, at 1512 (noting that "unauthoritative federal court decisions of state law may be even more problematic than state court opinions of federal law" because "state courts never review any federal court decisions of state law to correct erroneous interpretations").

151. See Robert Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 310 (2005) ("[A] federal court ruling on the state claim risks impairing the uniformity of state law Eventually, the state's highest court will issue an interpretation, which will bind both state and federal courts, but a case presenting the opportunity for such definitive clarification may not arise for some time. In the mean time, uncertainty will result.").

152. See *supra* note 29 and accompanying text.

153. Cf. *Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 194 F.3d 922, 925 (8th Cir. 1999) ("[T]here is nothing in the *Erie* doctrine that requires federal courts to sacrifice the finality of their judgments because state courts subsequently interpret state law differently than the federal courts have done."); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1273–74 (2d Cir. 1994) ("The very nature of diversity jurisdiction leaves open the possibility that a state court will subsequently disagree with a federal court's interpretation of state law. However, this aspect of our dual justice system does not mean that all diversity judgments are subject to revision once a state court later addresses the litigated issues.").

purposes and theoretical justifications of *Erie* actually warrant extension to the criminal law realm.

A. *Erie as a Non Sequitur?*

Perhaps the strongest argument in favor of exclusive federal interpretive prerogative, and the irrelevance of *Erie* doctrine, might be that the state and local laws in question merely play an antecedent role in federal criminal prosecutions.¹⁵⁴ Federal courts must answer a core federal constitutional question: whether a stop or arrest by police was reasonable under the Fourth Amendment.¹⁵⁵ As one commentator noted of antecedent laws more generally:

When [a] federal right depends . . . on an issue of state law, federal courts have the ability and the duty to decide what impact the state law will have on the federal law. That impact is actually a federal question, and not really an interpretation of state law at all, even though the federal-court analysis may look as if the federal court is interpreting the state law.¹⁵⁶

The characterization arguably has appeal here. The role of state and local law in federal criminal prosecutions might be seen as akin to that when federal courts must determine whether a federal right, based on such laws, warrants due process recognition or protection under the Fourteenth Amendment, indisputably a job for the federal judiciary.¹⁵⁷

The appeal, however, is superficial. Federal courts need not decide what impact their interpretation of state or local law will have on the applicability of a federal constitutional provision, as occurs when such laws play an antecedent role. Rather, the laws themselves, as interpreted by the federal court, serve as the substantive benchmarks for constitutional analysis. If a defendant's behavior was lawful, based on a court's substantive law construction, the

154. State law is antecedent to a federal issue when the "existence, application or implementation of a federal right turns on resolution of a logically antecedent issue of state law." Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1054 (1977); see also Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80 (2002) (surveying the rationales and justifications for Supreme Court review of state court state law-related decisions).

155. See *Virginia v. Moore*, 553 U.S. 164, 164–65 (2008).

156. Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1179 (2007) (citing Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1925–26 (2003)).

157. See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *Bishop v. Wood*, 426 U.S. 341 (1976).

unreasonableness of an officer's stop or arrest is concomitantly established, without additional judicial mediation.

As in the *Erie* context, the laws retain their state and local character and provenance, essentially being on loan to federal courts in their Fourth Amendment reasonableness assessments; the mere existence of federal jurisdiction over a case does not per force entail the power to expound on substantive legal standards.¹⁵⁸ State and local laws warrant interpretation and application *ex proprio vigore*. The setting thus differs from perhaps the most analogous context, where the federal government expressly adopts state or local law, such as the Assimilative Crimes Act, mentioned at the outset,¹⁵⁹ and where federal courts are free to disregard state interpretive preferences.¹⁶⁰ Just as they properly adhere to the “beautifully simple” paradigm of deferring to state civil law interpretive preferences,¹⁶¹ federal courts should defer to such preferences in the criminal law domain. The nature of the laws at issue, relating to the historic police power of states,¹⁶² adds significant force to such a conclusion.¹⁶³

158. See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981) (“The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law”); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 922–23 (1986) (noting that *Erie*, “whether based on constitution or statute, clearly rejects the proposition that a court can make federal common law merely because it has jurisdiction”).

159. See *supra* notes 12–13 and accompanying text.

160. See *United States v. White*, 145 F. App'x 786, 789 (3d Cir. 2005); *United States v. Collazo*, 117 F.3d 793, 795 (5th Cir. 1997); *United States v. Dotwon*, 34 F.3d 882, 883 (9th Cir. 1994); *United States v. Sain*, 795 F.2d 888, 891 (10th Cir. 1986); *United States v. Kilz*, 694 F.2d 628, 629 (9th Cir. 1982). *But see* *United States v. Smith*, 965 F. Supp. 756, 761–62 (E.D. Va. 1997) (adopting contrary view based on inferences drawn from Fourth Circuit opinions).

161. Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 422 (1964); see also Althouse, *supra* note 34, at 1504 (noting Supreme Court's policy of “‘mutual integrity’—that federal courts should not expound state law and state courts should not expound federal law”); Phillip B. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1960) (“I start with the principle that the federal courts are the primary experts on National Law just as the State courts are the final expositors of the laws of their respective jurisdictions.”).

162. See *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (“Under our federal system, the States possess primary authority for defining and enforcing the criminal law.”); *Powell v. Texas*, 392 U.S. 514, 536 (1968) (observing that the criminal law “has always been thought to be the province of the States”); see also Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 747–48 (2006) (observing that “American federalism cannot be fully understood without reference to the police power, for . . . ‘police power’ was the name Americans chose in order to designate the whole range of legislative power not delegated to the federal government and retained by the states”).

163. See LARRY W. YACKLE, *RECLAIMING THE FEDERAL COURTS* 130 (1994) (“Powerful state interests are reflected in substantive criminal law The federal courts should not upset the making and enforcement of criminal law policy.”); cf. *Arizona v. Manypenny*, 451 U.S. 232, 243 (1981) (“Because the regulation of crime is preeminently a matter for the States, we have

Were the outcome otherwise, and federal courts enjoyed unfettered judicial primacy, concerns akin to those arising in the civil diversity realm would be created, in particular forum shopping and the inequitable administration of justice.¹⁶⁴ As for the former, prosecutorial filing decisions, like lawsuit filing decisions by civil plaintiffs, are known to be highly jurisdiction-sensitive.¹⁶⁵ The U.S. Government frequently uses its concurrent jurisdictional authority over narcotics and firearms offenses in particular to commandeer prosecutorial control over what historically have been state criminal court matters.¹⁶⁶ From a law enforcement perspective, when a case “goes federal,” manifold benefits are secured, including more government-friendly rules of evidence and procedure,¹⁶⁷ and the chance to avoid more defendant-friendly state constitutional protections¹⁶⁸ and procedural limits.¹⁶⁹ In addition, the higher penalties allowed under federal law afford major leverage during plea bargaining negotiations.¹⁷⁰

identified ‘a strong judicial policy against federal interference with state criminal proceedings.’...A State’s interest in enforcing its criminal laws merits comparable judicial respect when pursued in the federal courts.” (citation omitted); *Younger v. Harris*, 401 U.S. 37 (1971) (noting that special intergovernmental concerns arise with criminal prosecutions, obliging federal courts to refrain from interfering with state prosecutions); *United States v. Reid*, 53 U.S. (12 How.) 361, 363 (1851) (holding that the Rules of Decision Act warrants application of state civil but not criminal law in federal cases because contrary outcome would “place the criminal jurisprudence of one sovereignty under the control of another.”).

164. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (describing the twin aims of *Erie* as being the “discouragement of forum-shopping and avoidance of inequitable administration of the laws”).

165. See generally Adam N. Steinman, *What is the Erie Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 274–82 (2008) (surveying procedural variations in state and federal courts contributing to parties’ strategic filing and removal decisions). Criminal defendants, of course, not only typically wish to avoid federal prosecution but also lack the capacity to seek remand to state courts. More than any party to a civil suit, as Justice Blackmun once put it in a habeas case, “[t]he criminal defendant is an involuntary litigant.” *Allen v. McCurry*, 449 U.S. 90, 116 (1980) (Blackmun, J., dissenting).

166. See, e.g., Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 732–35 (2002); see also Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 244 (2005) (noting that “only about 5% of all federal criminal cases involved federal statutes with no local or state counterpart”).

167. See Stephen P. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); Michael O’Hear, *Federalism and Drug Control Policy*, 57 VAND. L. REV. 783 (2004).

168. See James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 247–53 (1996).

169. See Clymer, *supra* note 167, at 700–05.

170. See *id.* at 674–75.

Economic realities also significantly militate in favor of federal jurisdiction. Not only will convicted individuals be housed in the federal correctional system, as opposed to overcrowded state or local prisons and jails,¹⁷¹ but federal asset forfeiture provisions, which promise superior and more direct monetary returns, motivate state and local police to seek out and work with federal prosecutors.¹⁷²

It remains an empirical question, of course, whether such incentives are affected by federal judicial interpretive behaviors. That prosecutorial decisionmaking is influenced gains strong logical support, however, from the critically important consequence of the choice, which can determine if the government's case proceeds or falls prey to the Fourth Amendment's exclusionary rule. Whether a particular federal tribunal will seek to identify and defer to the interpretive will of a state or local government or decide the matter on its own is thus a question of threshold critical importance, which logically could well bear upon prosecutorial decisionmaking.

The prospect of federal interpretative primacy assumes even greater significance in light of the fact that the Supreme Court has made clear that state and local laws of a procedural nature, including those limiting search and seizure authority, lack federal constitutional significance.¹⁷³ Much as civil diversity doctrine requires that federal courts employ federal procedures,¹⁷⁴ state and local laws deemed procedural have been separated from their cognate substantive criminal laws, notwithstanding the pitfalls that attend such decoupling.¹⁷⁵ With state and local procedural limits rendered

171. See Kevin Johnson, *To Save on Prisons, States Take Softer Stance*, USA TODAY, Mar. 19, 2009, at 1A (noting state prison overcrowding and state efforts to decrease populations).

172. See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998); David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679, 715–20 (2003); see also Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 930 (1998) (quoting Richmond, Virginia police captain explaining his jurisdictional choice as “like buying a car: we’re going to the place we feel we can get the best deal”).

173. See *Virginia v. Moore*, 553 U.S. 164, 176 (2008) (upholding warrantless arrest, and search incident to the arrest, executed in violation of Virginia statute limiting arrest authority under the circumstances); see also *United States v. Bruce*, 550 F.3d 668, 671–72 (7th Cir. 2008) (upholding use of confession secured by police in violation of state law requiring recording of confessions).

174. See *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) (noting same and describing the line-drawing as “a challenging enterprise”); *Guar. Trust Co. v. New York*, 326 U.S. 99, 109 (1945) (enunciating the “outcome-determinative” test relative to the substance-procedure dichotomy).

175. See Wayne A. Logan, *Contingent Constitutionalism: The Role of State and Local Criminal Law in the Application of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 166 (2009); see also WAYNE R. LAFAVE & JEROLD ISRAEL, *CRIMINAL PROCEDURE*, § 1.2 (1st ed. 1984) (noting in discussion of federalism that “[j]ust as each state can shape its substantive

constitutionally irrelevant, governmental prerogative relative to their substantive criminal laws has been correspondingly elevated.

Ultimately, while the motivational dynamic does not present the explicit concern over bias against out-of-state litigants that has driven civil diversity (criminal defendants need not hail from elsewhere),¹⁷⁶ much of *Erie's* motivational structure is in evidence. Indeed, without federal solicitude of state interpretive prerogative, longstanding concerns over federal-state law enforcement collusion to evade nonfederal legal and constitutional norms--manifest, for instance, in efforts to end the "silver platter" doctrine¹⁷⁷--would be reinforced. Today, as before *Erie*, federal courts have become (or at least are perceived as being) more conservative.¹⁷⁸ As a result of sustained waves of conservative appointees to the federal bench,¹⁷⁹ state courts, if anywhere, hold greater promise of evenhanded results for civil plaintiffs (and perhaps, by logical extension, criminal defendants).¹⁸⁰

Finally, the threat of unequal treatment is of greater significance here than in the civil diversity context of *Erie*. Individuals engaging in the same acts or omissions, charged pursuant to identical state or local criminal laws, can face substantially different outcomes

criminal code to fit the value judgments and traditions shared by its people, each can also shape the procedures that will be used in enforcing that code"); Herbert Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 603 (1963) ("The problems of administration are inseparable from the problem of what is or ought to be the substance of what is being administered. . . . It is in the context of a given set of tasks allotted to the criminal law that we are forced to ask . . . what powers of arrest . . . the police should possess.").

176. See 13E WRIGHT ET AL., *supra* note 5, § 3601.

177. The first and most significant effort came in *Elkins v. United States*, 364 U.S. 206 (1960), where the Court held that to avoid frustration of federal and state policies, promote comity, and protect judicial integrity, federal courts should deny admission of unconstitutionally seized evidence regardless of whether the search in question was conducted by state or federal agents. *Id.* at 221.

178. The successful effort by conservatives to enact the Class Action Fairness Act of 2005, intended to channel cases away from state courts and into federal courts, is emblematic of this sensibility. See generally Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647 (2008).

179. See, e.g., Robert A. Carp et al., *Right On: The Decision-Making Behavior of George W. Bush's Judicial Appointees*, 92 JUDICATURE 312 (May-June 2009) (reporting data showing markedly more conservative tilt of federal courts as a result of Republican presidential appointees, including with respect to criminal justice issues).

180. See, e.g., Max Schanzenbach & Emerson Tiller, *Strategic Judging under the United States Sentencing Guidelines*, 23 J. L. ECON. & ORG. 24 (2007) (finding that Democratic district judges impose lower sentences than Republican judges, and that the effect is larger in predominantly Democratic circuits); Joshua B. Fischman & Max Schanzenbach, *Do Standards of Review Really Matter? The Case of Federal Criminal Sentencing* (Va. Pub. Law and Legal Theory, Research Paper No. 2010-23, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434123 (finding substantial differences in federal sentencing outcomes among judges appointed by Democratic and Republican presidents).

depending on whether they are in state or federal court, or indeed another federal court.¹⁸¹ These varied outcomes, moreover, ultimately result not in civil liability, but rather in significant deprivations of physical liberty.¹⁸²

B. Erie's Doctrinal Parallels

1. Institutional Competence and Democratic Accountability

According to the traditional parity argument, federal judges are best equipped as a result of superior education, experience, temperament, and political insularity (based on life tenure status) to render optimal judicial outcomes.¹⁸³ The question, as in *Erie* civil diversity cases, however, is not whether “better” outcomes are achieved, purely as a matter of judicial interpretive prowess; rather, it is whether and how federal tribunals can serve as expositors of state laws. The federal judiciary’s posited superiority, centering mainly as it has on the effectuation of federal constitutional rights, lacks persuasive force in this context. Indeed, it is here (“police court work”), lowly as it is, that federal jurists are least likely to have had meaningful professional experience, even if they previously practiced in the forum state.¹⁸⁴ Federal judges, working far from the trenches of

181. See, e.g., *United States v. Gregoire*, 425 F.3d 872, 878 (10th Cir. 2005) (disagreeing with prior conclusion in *United States v. Powell*, 929 F.2d 1190, 1194 (7th Cir. 1991), with regard to whether Utah law requires that motorists use their signal lights when merging from an on-ramp onto another street).

182. As with *Erie* itself, the disparate outcomes do not raise equal protection concerns, in the strict constitutional sense. See Jed I. Bergman, Note, *Putting Precedence in Its Place: State Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 981 (1996) (noting that *Erie* used the phrase “equal protection of the law” to describe the situation, although not in its constitutional sense); cf. Logan, *supra* note 31, at 311–14 (noting how varied state criminal justice outcomes raise equal treatment yet not constitutional equal protection concerns).

183. For the classic exposition of this view, in the context of federal statutory law and constitutional rights, see Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

184. For many years deference was shown to the interpretive expertise of federal trial courts sitting in states whose law was the subject of federal interpretation. See, e.g., *United States v. Hohri*, 482 U.S. 64, 74 n.6 (1987) (“[L]ocal federal district judges . . . are likely to be familiar with the applicable state law. Indeed, a district judge’s determination of a state-law question usually is reviewed with great deference.”). The tradition was discontinued in *Salve Regina College v. Russell*, with the Court criticizing interpretive deference to federal trial courts as being “founded fatally on overbroad generalizations.” 499 U.S. 225, 238 (1991); see also *id.* at 239 (“[W]e can see no sense in which a district judge’s prior exposure or nonexposure to the state judiciary can be said to facilitate the rule of reason.”).

Deference to circuit courts remains somewhat more in force, with the Court in *Town of Castle Rock v. Gonzales* writing that circuit interpretations of state laws enjoy a “presumption of deference.” 545 U.S. 748, 757 (2005) (citation omitted). Such a presumption can be overcome, as in *Castle Rock*, when the circuit “did not draw upon a deep well of state-specific expertise.” *Id.* Geographic deference is also manifest at the circuit level with some circuits deferring to state

state and local criminal justice, lack the political and social proximity that their colleagues on the state bench enjoy.¹⁸⁵

Moreover, while it has been posited that federal interpretive input can benefit states jurisprudentially,¹⁸⁶ such benefit is far less certain here. The questions presented are rarely ripe for federal courts' "reconciling or distinguishing existing precedent . . . and analyzing state law," in any meaningful sense.¹⁸⁷ Indeed, as noted earlier, the menial offense statutory provisions typically do not become the subject of state appellate attention.¹⁸⁸ Federal courts in this context have emerged as a prime expositor of such laws, with state and local courts having only infrequent occasion to consult federal judicial work product.¹⁸⁹

As a consequence, what Barry Friedman has called a "perverse relationship" might well be at play: The greater the extent of the federal judges' "contribution," the greater the chance that state high courts will not reach the same decision when given the chance. If this is the case, then cases simply will be decided wrongly by federal courts, not only in a way that affects the litigants in that case, but

law interpretations of fellow circuits with jurisdiction over the state laws in question. *See, e.g.*, *Charter Oil Co. v. Am. Emp'rs Ins. Co.*, 69 F.3d 1160, 1164 (D.C. Cir. 1995) (noting that home circuit judges are likely to have experience with the state law within their circuit); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 281 (2d Cir. 1981) (stating that the court of appeals should give weight to state law rulings made by district judges who are familiar with the law of the state in which their districts are located). *But see, e.g.*, *Peters v. Ashcroft*, 383 F.3d 302, 306 (5th Cir. 2004) (concluding that Ninth Circuit's interpretation of Arizona law was not binding on its analysis).

185. As Third Circuit Judge Dolores Sloviter has noted, a federal judge "is certainly not likely to be as attuned as a state judge is to the nuances of that state's history, policies, and local issues." Sloviter, *supra* note 72, at 1682; *see also* Michael Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 325 (1988) ("In cases where the substantive rule is not clear and the trial court must construe it, or where the substantive rule must be applied to a set of facts . . . the attitudinal difference[s] [between state and federal courts] may prove critical."). This deficit, it bears mention, is not mitigated by the vocational background of federal judicial appointees, which while showing geographic variation since the early 1950s, has never risen to more than 40 percent of persons with state judicial experience. *See* Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 JUDICATURE 140, 141 (2010) (discussing the prior experience of U.S. district judges).

186. For arguments to this effect, *see, for example*, Althouse, *supra* note 34, at 1505–06, and Robert M. Cover & T. Alexander Aleinkoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1050 (1977).

187. David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 325–26 (1977).

188. *See supra* note 73 and accompanying text.

189. For a rare example, *see People v. Saunders*, 136 P.3d 859, 863–64 (Cal. 2006) (agreeing with prior Tenth Circuit decision in *United States v. Ramstad*, 308 F.3d 1139 (10th Cir. 2002), that California law required vehicles to display front and rear license plates).

with an impact on all who adhere to the precedent—not just courts, but other actors as well—until such time as it is reversed.¹⁹⁰

Finally, Article III courts, unlike state courts, whose members are typically subject to election,¹⁹¹ are politically insulated.¹⁹² As Judge Doris Sloviter put it, “[w]hen federal judges make state law—and we do, by whatever euphemism one chooses to call it—judges who are not selected under the state’s system and who are not answerable to its constituency are undertaking an inherent state court function.”¹⁹³

Such insularity is especially problematic given the nature of the laws primarily in question here—commonly committed, low-level *malum prohibitum* provisions. Even though the cases ultimately concern defendants facing serious federal criminal sentences, a context unlikely to garner much political sympathy, the fact remains that the overwhelming proportion of stops and arrests out of which such serious cases arise remain in state and local systems (in which, it bears mention, prosecutors are electorally accountable),¹⁹⁴ and do not result in the discovery of contraband.¹⁹⁵ Individuals stopped or arrested for such offenses, especially those with political influence and power, while perhaps not the predominant targets of pretextual enforcement,¹⁹⁶ thus have a stake in how the laws are interpreted.¹⁹⁷

190. Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1240 n.73 (2004). A counterweight to this tendency might lie in Judge Calabresi’s suggestion of a modified certification procedure whereby federal courts would draft a proposed opinion interpreting the law in question and state courts would be free to reject the request unless the interpretation was thought incorrect. See Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301–02 (2003). As Professor Nash has observed, however, while the approach might better promote dialogue between state and federal courts, it risks having the federal judiciary render advisory opinions. See Nash, *supra* note 34, at 1926 n.226.

191. See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004) (noting that nearly ninety percent of U.S. state and local judges are elected).

192. Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2154 (2006).

193. Sloviter, *supra* note 72, at 1687.

194. See STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2005, app. (2006), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1124> (noting that all but three states and the District of Columbia elect their chief prosecutors). This is not to say, however, that prosecutor elections necessarily engage voters with discussion of substantive issues; indeed, the available evidence suggests the contrary. See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592–606 (2009).

195. See Stuntz, *supra* note 15, at 795 (discussing data showing common occurrence of suspects being stopped by the police when not guilty of any infraction).

196. See, e.g., I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 62–71 (2009) (surveying research highlighting disproportionate targeting of racial minorities by police for minor offenses).

As a result, there is reason to think that anti-criminal defendant bias, well established in the judicial electoral context,¹⁹⁸ might not be so pronounced, mitigating concern over what has been termed the “majoritarian difficulty.”¹⁹⁹ Yet even if this is not the case, prime responsibility for elucidation of the laws should lie with state and local courts, which are more closely connected and accountable to voters,²⁰⁰ not with possibly geographically distant and politically unaccountable federal courts.²⁰¹

2. Federalism and Separation of Powers

While the federalism²⁰² and separation of powers²⁰³ justifications of *Erie* have long been debated, no such uncertainty exists here. Federalism is unavoidably implicated when federal courts interpret and apply state and local criminal laws, which derive from the historic police power authority of state and local governments.²⁰⁴ Despite significant expansion in the federal exercise of criminal law-making authority of late, as crimes have increasingly been

197. Cf. Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395, 1406–09 (2002) (discussing public outrage over police “speed traps”).

198. See, e.g., Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 255 (2004) (discussing political influence in judicial decisions in criminal cases); Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 204–06 (2004) (same); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 287 (2008) (same).

199. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995) (borrowing from Alexander Bickel’s famous phrase to describe a situation in which elected judges apply laws consistent with their constituents’ preferences, perhaps at the expense of rule of law and constitutional norms).

200. See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1063, 1064 & n.4 (2010) (noting that “elected judges face more political pressure and reach legal results more in keeping with local public opinion than appointed judges do,” citing studies in support).

201. See Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1622 (2001) (observing that “[s]tate courts are . . . players in an arena in which policy, power, politics, and law can be difficult or impossible to distinguish”); cf. Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 973–84 (1997) (discussing how Supreme Court review of state judicial decisions distances the latter from political accountability).

202. See, e.g., ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* 18–19 (2008) (asserting that federalism and Tenth Amendment concerns were central to *Erie*’s outcome and analysis); Craig Green, *Repressing Erie’s Myth*, 96 CAL. L. REV. 595, 607–14 (2008) (disputing *Erie*’s federalism underpinnings).

203. See Green, *supra* note 202, at 615–22 (surveying separation of powers arguments and counterarguments among commentators).

204. See *supra* notes 7–9 and accompanying text.

“federalized,”²⁰⁵ Congress has not concerned itself with *malum prohibitum* offenses (nor can it, absent a jurisdictional basis).²⁰⁶ Federal law has always been, and remains, interstitial in character,²⁰⁷ a structural distinction animating the *Erie* Court.²⁰⁸ When federal courts freely interpret laws such as those implicated here, without regard for state or local preferences, the distinction is undercut.

Concern for separation of powers equally compels federal deference. If “federal general common law” is unjustified in the civil law realm, it is even more unjustified in the criminal law context. All courts—not only federal courts—are obliged to show restraint in the interpretation and application of criminal codes. The criminal law has long been subject to legislative codification, not judicial definition,²⁰⁹ and constitutional limits specifically imposed on the judiciary’s power to define and expand criminal laws²¹⁰ highlight the unique need for constraint in this domain. Allowing the federal judiciary to declare, not merely apply, state and local criminal laws risks betrayal of this basic organizing principle.

IV. A PROPOSAL

As discussed in Part II, the *modus operandi* of federal courts today in applying state and local criminal laws is problematic, reflecting a distinct lack of doctrinal foundation and consistency and, worse yet, at times an outright disregard for the sensitive process of intersystemic adjudication. While troubling, the current state of affairs perhaps should come as no surprise, for it parallels experience

205. See WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* 103–07, 160–61 (2009) (surveying recent federalization of crime).

206. Evidence of this is found in the ACA, which adopts menial state and local criminal laws to serve as the substantive bases for federal prosecutions for wrongdoing on federal enclaves. See *supra* notes 12–13 and accompanying text.

207. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 525 (1954) (noting same); Paul J. Mishkin, *The Variousness of “Federal Law”:* *Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 811 (1957) (same).

208. See *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) (noting that *Erie* protects “state authority in matters of local interest and state control” and that federal common law properly only extends to matters “vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings”).

209. See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 337–45 (2005) (surveying reasons supporting the abolition of common law penal rules).

210. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964) (barring retroactive judicial expansion of criminal liability on due process grounds).

in federal civil diversity cases. Reflecting on modern diversity litigation, Judge Posner recently observed that “[t]he growing apart of state and federal courts in the decision of questions of state law suggests that the problems of legal uncertainty and federal judicial usurpation that characterized the era of *Swift v. Tyson* may have returned.”²¹¹ To the minds of some, concern is unwarranted on the reasoning that federal courts need not, indeed should not, serve as the “ventriloquist’s dummy” of states²¹² or even their “faithful agent.”²¹³ A federal court, as colorfully expressed by Professor Arthur Corbin not long after *Erie*, “must use its judicial brains, not a pair of scissors and a paste pot.”²¹⁴

Whatever the persuasive appeal of federal unilateralism in the civil diversity realm, criminal litigation raises particular concern, not only for federalism and separation of powers reasons, but also because of the public law quality of the provisions at issue, which embody democratic normative preferences. If one accepts that federal courts should not go it alone in their interpretation and application of state and local laws, the question naturally arises: What is the best method for them to use in the enterprise?

A. Judicial Avoidance

Ideally, federal courts should approach their work armed with a clear and authoritative understanding of the definitional parameters of the law in question. Obtaining state guidance makes efficiency sense given that state judiciaries have the final say on the meaning and scope of the laws at issue. In addition to avoiding needless governmental conflict,²¹⁵ the input would promote comity, for as Ann Althouse has observed, “[a] state has an ongoing interest in how the

211. RICHARD A. POSNER, *FEDERAL COURTS: CHALLENGE AND REFORM* 219 (1996).

212. *Richardson v. Comm’r*, 126 F.2d 562, 567 (2d Cir. 1942).

213. Nash, *supra* note 34, at 1905.

214. Arthur L. Corbin, *The Laws of the Several States*, 50 *YALE L.J.* 762, 775 (1941). Professor Corbin more fully offered that:

Our judicial process is not mere syllogistic deduction, except at its worst. At its best, it is the wise and experienced use of many sources in combination—statutes, judicial opinions, treatises, prevailing mores, custom, business practices; it is history and economics and sociology, and logic, both inductive and deductive. Shall a litigant, by the accident of diversity of citizenship, be deprived of the advantages of this judicial process?

Id. For more recent arguments in this spirit, see, for example, Glassman, *supra* note 52, at 303–04; Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 *ARK. L. REV.* 305, 336–37 (1994).

215. See *Elkins v. United States*, 364 U.S. 206, 221 (1960) (“The very essence of a healthy federalism depends on the avoidance of needless conflict between state and federal courts.”).

law it creates is applied, which is an aspect of its power to legislate.”²¹⁶ The argument, again, has particular resonance with criminal laws, given the unique province of state and local governments in their creation and application, and their direct impact on the liberty of individuals.

Federal criminal courts, like those sitting in civil diversity cases, do have some procedural options available. For one, they might craft a jurisdictional exception from interpreting and applying state and local criminal laws. An exception has long existed in diversity cases concerning the kindred state-centric areas of probate and domestic relations.²¹⁷ Both exceptions, however, have been narrowed in recent years,²¹⁸ and the close connection of the laws to the resolution of broader federal criminal litigation makes the creation of such an exception unlikely.

Second, abstention doctrine might hold promise. Under the *Pullman* doctrine,²¹⁹ federal courts can abstain from resolution of a case to allow state courts to first interpret a state law when doing so might result in a limiting construction that would permit avoidance of a federal constitutional question. Similarly, *Thibodaux* abstention²²⁰ authorizes federal courts in diversity cases to abstain when an “unclear state law” is at issue that pertains to an area “intimately involved with the sovereign prerogative” (there, eminent domain). Given the threshold importance of the Fourth Amendment inquiry here, combined with the police power character of the laws at issue, abstention could be thought warranted.²²¹ However, the significant delay typically associated with abstention—entailing fully litigating substantive legal claims in state courts—long a major concern with civil cases,²²² has even greater weight with federal criminal prosecutions (constitutional speedy-trial concerns aside).

216. *Althouse*, *supra* note 34, at 1523.

217. 13E WRIGHT ET AL., *supra* note 5, §3609.

218. *Id.*; see also *Marshall v. Marshall*, 547 U.S. 293, 298 (1996) (expressing reservations over probate exception).

219. See *R.R. Comm'n of Tex. v. Pullman*, 312 U.S. 496, 501 (1941) (discussing general federal abstention).

220. See *La. Power & Light Co. v. Thibodaux*, 360 U.S. 25, 32 (1959) (discussing federal abstention in context of “unclear state law” under particular circumstances).

221. The narrow application of several of its progeny, however, would likely doom any effort to successfully invoke *Pullman*. Most significantly, *Meredith v. City of Winterhaven*, 320 U.S. 228 (1943) is commonly cited by federal courts to justify rejection of abstention in instances of unclear state law. See 17A WRIGHT ET AL., *supra* note 5, § 4246.

222. See Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 591 (1991) (observing that “[t]he delay and expense inherent in the abstention procedure are legendary, and have caused some judges and commentators to bemoan the doctrine from the outset”).

Certification of questions by federal courts to state high courts, on the other hand, has significant appeal. The procedure has been advocated by the Supreme Court²²³ and commentators,²²⁴ and federal courts have certified questions in cases where federal criminal law is based on a state criminal law definition, such as with RICO,²²⁵ as well as habeas corpus cases.²²⁶ As the Supreme Court has recognized, “no matter how seasoned the judgment of the [federal] court may be, it cannot escape being a forecast rather than a determination.”²²⁷ This forecast, moreover, often conflicts with later authoritative holdings of state high courts,²²⁸ which in criminal cases not only results in possibly “bad law” but also deprivations of physical liberty.²²⁹

Beyond this fundamental point, certification promotes the broader systemic considerations discussed above. Compared to federal judicial unilateralism, it is respectful of comity and state interests,²³⁰

223. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76–77 (1997) (criticizing lower courts for failing to employ certification and urging its use in any case involving “unsettled questions of state law”); *Lehman Bros. v. Schien*, 416 U.S. 386, 391 (1974) (asserting that certification “save[s] time, energy, and resources and helps build a cooperative judicial federalism”).

224. See, e.g., *Calabresi*, *supra* note 190, at 1301 (arguing that when there is a question of state law in doubt, the federal courts should certify the question to a state’s highest court for resolution); *Clark*, *supra* note 68, at 1564 (same).

225. See, e.g., *United States v. Cissell*, 700 F.2d 338, 340 (6th Cir. 1983) (reversing RICO conviction based on Kentucky bribery law as a result of response from the Kentucky Supreme Court); cf. *United States v. Sharp*, 179 P.3d 1059, 1060–61 (Idaho 2008) (concluding, based on question certified by Utah federal district court relative to a federal felon-in-possession case, that a guilty plea qualifies as a conviction in Idaho).

226. While typically such instances involve questions relating to application of procedural bars to relief, on occasion substantive law matters are at issue. See, e.g., *Adams v. Murphy*, 394 So. 2d 411, 414 (Fla. 1981) (concluding that crime of attempted perjury did not exist in state); see also *Fiore v. White*, 528 U.S. 23, 25 (1999) (stating that the Pennsylvania Supreme Court’s answer would “help determine the proper state-law predicate for the [Court’s] determination of the federal constitutional questions raised in [the] case.”).

227. *La. Power & Light Co. v. Thibodaux*, 360 U.S. 25, 27 (1959); see also *R.R. Comm’n of Tex. v. Pullman*, 312 U.S. 496, 500 (1941) (noting that “[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is . . . supplanted by a controlling decision of a state court”).

228. See *Judith S. Kaye & Kenneth I. Weissman, Interactive Judicial Federalism: Certified Questions in New York*, 69 *FORDHAM L. REV.* 373, 378 (2000) (noting state court disagreements with prior federal rulings); *Sloviter*, *supra* note 72, at 1679 (same).

229. In this respect, one of the chief arguments against certification, articulated by Judge Bruce Selya, is off-base. According to Judge Selya, a litigant who loses on a state law issue in federal court “is no more greatly disadvantaged than a litigant who loses in lower state court and is thereafter denied discretionary review, only to have the state’s high court decide the issue favorably in some other case at a later date.” Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 *SUFFOLK U. L. REV.* 677, 690 (1995).

230. See *JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE* 66 (1995) (reporting American Judicature Society survey results showing overwhelming degree of agreement among state and federal judges that certification “helps improve federal-state comity”).

affording state courts a threshold chance to render an authoritative interpretation.²³¹ State judges (often elected), not their federal counterparts, will be held to account for their resort to policy preferences, which frequently find judicial expression in instances of statutory uncertainty.²³²

Certification also promotes federalism interests, ensuring that the interpretation of laws remains anchored in their government of origin. Given the public law nature of the provisions at issue, such concern again has particular force. State governments enacted the laws invoked by federal prosecutors, and their judiciaries, not unelected federal judges, should resolve any interpretive uncertainties arising out of the laws. If the certified answer conflicts with legislative desires, state legislatures, known to monitor their courts more closely than Congress does the federal courts, will be in a position to abrogate the ruling and redefine the law.²³³

Finally, certification would promote jurisprudential consistency. The interpretation rendered by a state court would enjoy precedential force in the state itself,²³⁴ providing substantive guidance in future state and federal cases alike. Furthermore, a definitive pronouncement from a state court would lessen the likelihood that federal courts, including circuit courts of appeal, will variously interpret state and local laws and reach different Fourth Amendment outcomes.²³⁵

Over the years, a variety of practical and principled objections have been raised over certification, most of which lack persuasive force here.²³⁶ One objection warranting concern, however, relates to

231. This opportunity, it warrants mention, contrasts with the situation arising in federal habeas cases, where federal courts have been amenable to certifying questions to state courts. See *supra* note 226. There, oddly enough, questions are certified to the very state court that approved of the conviction challenged by the state prisoner in the first instance.

232. See, e.g., Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67, 84–87 (2008) (discussing influence of policy preferences in federal statutory interpretation cases).

233. See, e.g., Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislatures and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1046 (1991) (surveying close judicial-legislative interaction in states); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 10 (1995) (same).

234. See, e.g., *Wolner v. Mahaska Indus.*, 325 N.W.2d 39, 41 (Minn. 1982) (noting that certified answer is binding unless state high court overrules decision).

235. See, e.g., *United States v. Gregoire*, 425 F.3d 872, 878 (10th Cir. 2005) (deeming Utah turn signal law clear and validating stop by officer); *United States v. Powell*, 929 F.2d 1190, 1194 (7th Cir. 1991) (deeming same Utah law unclear and invalidating stop by officer).

236. For instance, it has been argued that certification constitutes an abdication of federal jurisdiction. See, e.g., Nash, *supra* note 146, at 1676 (“Certification is inconsistent with the statutory jurisdiction conferred upon the federal courts by Congress to the extent that it

delay. While more expeditious than abstention, with the certified question going directly to a state high court, certification is still time-consuming. Time periods for certification vary but twelve-month delays are not uncommon,²³⁷ with study results potentially being understated because they fail to account for the added time entailed in litigating the propriety of certification itself.²³⁸ Such delay, again, presents particular concern with prosecutions, which likely accounts for the fact that to date no certification request has successfully made it to a state court.²³⁹

Additionally, certification of questions to the legislative branch, advocated by several scholars in recent years,²⁴⁰ holds little prospect of success. Legislative amendment of the criminal law presents basic constitutional concern, based on the federal prohibition of ex post facto laws²⁴¹ and bills of attainder,²⁴² and/or state retroactivity prohibitions.²⁴³ Moreover, even if a state legislature elects to amend the provision in question in a manner favoring defendants, the cumbersome legislative process likely dooms the prospect of direct legislative certification.

improperly allows state courts to hear cases that fall within the statutory grant.”). Unlike diversity cases, here no statutory or other duty compels federal courts to resolve the state or local substantive law issues.

237. See, e.g., Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 217 (2003) (discussing data from Ohio indicating almost twelve month delay between certification and state court resolution).

238. Yonover, *supra* note 214, at 333–34.

239. See *supra* note 77 and accompanying text. By contrast, federal habeas litigation, taking place after the state criminal conviction has become final, presents less in the way of such time pressure, likely accounting for the greater use of certification in that context. See *supra* note 226 and accompanying text.

240. See, e.g., Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 2 (2007) (arguing in favor of federal court certification of issues to Congress for determination); Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 173 (1992) (same).

241. U.S. CONST. art. I, § 10, cl. 1 (providing that “[n]o State shall...pass any...ex post facto Law...”); see also *Collins v. Youngblood*, 497 U.S. 37, 38 (1990) (noting with respect to ex post facto prohibitions that “[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts”).

242. U.S. CONST. art. I, § 10, cl. 1 (providing that “[n]o State shall...pass any Bill of Attainder...”); see also *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 468 (1977) (noting that bill of attainder bar prohibits state and federal governments from passing “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.”).

243. See 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 41:3 (7th ed. 2010) (citing and discussing examples).

B. Executive Avoidance

If not in judicial avoidance, recourse possibly lies in the realm of executive actors. Police, who serve as gatekeepers of the criminal justice process by virtue of their stop and arrest authority, afford an obvious initial institutional focus. State, local, and federal police alike, however, have long been permitted to channel their cases to federal (as opposed to state) courts,²⁴⁴ and today they have particular institutional motivations for doing so.²⁴⁵ At the same time, the Supreme Court has refused to prohibit police from using their discretionary authority to detain individuals for minor offenses, such as mainly pertain here.²⁴⁶ Attention must thus be directed toward federal prosecutors, the other pivotal actors in the intersystemic drama.

It has long been recognized that prosecutors enjoy enormous discretion in their daily work, deciding who will be charged, which crimes will be pursued, and whether plea bargains will be entertained.²⁴⁷ Courts typically have refused to constrain this authority,²⁴⁸ prompting those wishing to see limits on prosecutorial discretion to urge adoption of guidelines.²⁴⁹ The efforts have achieved a measure of success. The U.S. Attorney's Manual, for instance, contains criteria for offices deciding whether to file federal charges against individuals previously prosecuted by a state for the same crime (the "Petite Policy").²⁵⁰ The manual also provides guidance for

244. See *supra* notes 14–16 and accompanying text.

245. See *supra* notes 165–172 and accompanying text.

246. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (upholding warrantless arrest for a fine-only offense and refusing to tie Fourth Amendment reasonableness to seriousness of offense); *Whren v. United States*, 517 U.S. 806 (1996) (holding that officers' subjective motivations for stop, even if pretextual, are constitutionally irrelevant).

247. For classic treatments of the issue, see, for example, KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 176–80 (1969); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981). For a decidedly less classic but hopefully still helpful discussion, focusing in particular on the power to decline prosecution, see Wayne A. Logan, Comment, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695 (1990).

248. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871–72 (2009) ("Despite the arguments of scholars for greater judicial supervision, federal judges continue to rubber stamp cooperation, charging, and plea decisions.").

249. See, e.g., Beale, *supra* note 11, at 1017; Clymer, *supra* note 167, at 717; Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893 (2000).

250. See U.S. ATTORNEY'S MANUAL § 9–2.031 (2009), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031. The policy, which arose out of

deciding whether, in instances of concurrent jurisdiction, to file federal charges when an alleged offense would also be subject to state prosecution (the “Principles of Federal Prosecution”).²⁵¹

One could envisage a federal policy that would similarly require federal prosecutors to consider, before filing federal charges, whether the state or local law invoked by police as an initial basis to justify a stop or arrest raises certainty concerns. In the event of substantive uncertainty, federal prosecutors would demur, allowing the alleged wrongdoing and any other criminal misconduct (presuming the existence of concurrent jurisdiction) to be prosecuted by state authorities. Ideally, such a policy would emanate from Main Justice, both to signal the national importance of the issue and to mitigate the likelihood of disparity among circuits on what amount to choice of law decisions.²⁵²

Adoption of such a policy would have several important institutional benefits. In addition to ensuring that the laws are addressed in the first instance by tribunals of their place of origin, the policy would allow for state prosecutorial (not merely judicial) democratic and institutional accountability.²⁵³ Hopefully, the policy also would foster increased transparency and order in the exercise of federal prosecutorial discretion, especially relative to the critically important yet largely opaque state-federal jurisdictional “sorting” process.²⁵⁴ U.S. Attorney offices would come to have greater awareness

Petite v. United States, 361 U.S. 529 (1960), “precludes the initiation or continuation of a federal prosecution, following a prior state . . . prosecution based on substantially the same act(s) or transaction(s).” U.S. ATTORNEY’S MANUAL § 9–2.031.

251. U.S. ATTORNEY’S MANUAL § 9–27.000.

252. On efforts by Main Justice to centralize prosecutorial decision-making more generally see Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1440–43 (2008).

253. See *supra* note 194 and accompanying text. The electoral accountability of state and local prosecutors, it bears mention, raises an array of interesting political economy issues. The fines generated by successful prosecution of *malum prohibitum* offenses, whatever the negative political fallout associated with aggressive enforcement, has positive budgetary effect for local governments. If the offenses result in more serious, felony-level convictions, based on evidence secured by police, then the state will experience negative budgetary effects as a result of costs associated with imprisonment (paid by the state). In the latter instance, as discussed, state officials could well be predisposed to favor “going federal” (if concurrent jurisdiction exists).

254. For a rare recognition and quite helpful overview of the phenomenon, see Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, 21 CRIM. JUST. 16 (2006). Cf. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. (forthcoming 2010) (surveying how state and local governments allocate prosecutorial responsibilities to gain insight into preferable approaches in instances of concurrent state-federal jurisdiction).

of the unique intersystemic dynamic at issue,²⁵⁵ perhaps serving to discourage the increasingly criticized federal use of low-level state and local laws to effectuate federal prosecutorial policies.²⁵⁶ Finally, formal federal acknowledgement of such laws might also have the salutary effect of alerting state and local legislative bodies to the need for greater substantive clarity relative to particular laws and their law-making efforts more generally.²⁵⁷

Despite its appeal, and relative simplicity of use compared to similar federal efforts,²⁵⁸ such a policy would not likely enjoy adoption. Prosecutorial refusals to comply not only would escape judicial review or enforcement, but any policy would very likely be subject to stiff prosecutorial resistance in principle²⁵⁹ and honored in the breach.²⁶⁰ Federal prosecutors would be influenced heavily by a strong institutional incentives favoring retention of the cases, including the need to satisfy volume-based demands²⁶¹ and office priorities such as gun and drug cases.²⁶²

C. Judicial Interpretive Tools

Assuming the aforementioned avoidance tools will not be utilized, the question remains how federal courts can best discharge their obligation to resolve uncertainties in state and local laws. The predictive method, which today serves as the dominant method in civil

255. See Barbara S. Jones et al., Panel, *The Prosecutor's Role in Light of Expanding Federal Criminal Jurisdiction*, 26 *FORDHAM URB. L.J.* 657, 675 (1999) (comments of David Sklansky) (observing that a chief benefit of guidelines is that "they can spur self-consciousness in the people who develop them").

256. See *supra* notes 26-27 and accompanying text.

257. Cf. Logan, *supra* note 175, at 173 (discussing unjustified tendency of judiciary to impute conscious deliberative quality to criminal laws enacted by political bodies).

258. See, e.g., Simons, *supra* note 249, at 934 (regarding the federal Principles of Prosecution as "so vague as to be meaningless").

259. See Barkow, *supra* note 248, at 912 (noting same and offering reasons for the aversion); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 *COLUM. L. REV.* 1010, 1019-22 (2005) (noting same).

260. See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 *U. PA. L. REV.* 959, 1006-07 (2009) (noting sparse federal compliance with federal death penalty charging decision policy); O'Hear, *supra* note 166, at 734 (noting widespread violations of "Federal Principles"); Ellen Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice"*, 13 *CORNELL J.L. & PUB. POL'Y* 167 (2004) (noting broad array of unenforced guidelines, including the Petite Policy); Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 *TEX. L. REV.* 2055, 2068-69 (2006) (surveying variety of failed attempts at federal guideline promulgation and enforcement).

261. See Simons, *supra* note 249, at 932-33 (describing volume and other federal prosecutorial incentives).

262. See, e.g., O'Hear, *supra* note 166, at 732-33 (describing several federal prosecutorial initiatives targeting gun and drug crimes, based on arrests by state and local authorities).

diversity and criminal cases alike, unavoidably suffers from the risk of any act of divination: it can yield results that conflict with subsequent authoritative rulings of state courts. Such errors raise particular concern in criminal cases, given that deprivations of liberty hang in the balance. Furthermore, even if a federal prediction is ultimately backed by a state high court, prediction raises the array of significant concerns discussed earlier, including federalism and separation of powers. As Professor Brad Clark has observed, “[e]ven if the rule in question is embraced by the state’s highest court at a later date, it remains true that the rule applied in federal court did not in fact constitute a sovereign command of the state at the time the federal court rendered its decision.”²⁶³ Finally, judicial prediction is especially problematic in the criminal law context, with its historic concerns for notice and legislative primacy.²⁶⁴

However, as the second-best option to certification, federal prediction has justifiably come to enjoy allegiance in federal criminal courts.²⁶⁵ Presuming the absence of an actionable vagueness claim, which would result in the constitutional invalidation of the law in question,²⁶⁶ the law at issue must be interpreted and applied. This section offers an overview of the form such a method could take.

First and foremost, as with *Erie*, in the absence of definitive state high court substantive clarification,²⁶⁷ federal criminal courts should defer to any state intermediate appellate court ruling on the

263. Clark, *supra* note 68, at 1505.

264. Just such a concern inspired a spirited dissent from Judge Baldock in *United States v. DeGasso*, 369 F.3d 1139 (10th Cir. 2004), who wrote that “[d]ue process does not permit a court to simply ‘predict the outcome,’ lest courts construe a vague or ambiguous penal statute in favor of the Government. Rather, reasonable notice to the accused that his or her conduct is unlawful is the benchmark.” *Id.* at 1155 (Baldock, J., dissenting). “This case is not about ‘predicting’ how Oklahoma’s highest court *might* interpret [the statute]. This case is about due process of law which requires fair warning—warning Defendants did not receive.” *Id.* at 1156.

265. The appeal of the predictive approach, turning in significant part on the unavoidable need to identify what state law “is,” should not obscure the paradox created relative to *Erie* itself. Despite *Erie*’s disdain for the notion that law is a “brooding omnipresence” to be discovered, rather than that articulated by courts and legislatures, the predictive approach requires federal courts to “find” state law. See Glassman, *supra* note 52, at 244 (noting that “this very undertaking presumes that the state’s law is out there, somewhere, and that it is discoverable”).

266. See Ted Sampson-Jones, *Reviving Saucier: Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725, 755 (2007) (noting that “an impermissibly vague statute is struck down, while an impermissibly ambiguous statute is read narrowly”). Despite its major practical significance, the distinction between vagueness and ambiguity itself remains troublingly unclear. See *id.* (citing authorities).

267. Of course, it certainly can be argued that the threshold determination of whether a law is substantively unclear is itself an act of judicial construction. See Farnsworth, *supra* note 232, at 99 (“We are confronted with a familiar gap—an incompleteness—that the law can’t close: it can give instructions about what to do with ambiguity, but judges are on their own in deciding whether ambiguity is present in the first place.”).

law in question.²⁶⁸ As discussed, however, precedent from state intermediate (indeed, even recorded trial) courts on the laws at issue here is often not available,²⁶⁹ and even when available, federal fealty to it has been uneven.²⁷⁰

In the absence of such precedent, federal courts should identify and apply any statutory interpretive rules or methods adopted by the state whose law is at issue. Such directives can of course come from state courts.²⁷¹ At least as important, state legislatures today commonly prescribe interpretive canons, conditioning the delegation to courts naturally entailed in enactments²⁷² and providing a democratically authoritative lens for their interpretation.²⁷³ Federal judicial failure to heed such legislated preferences in particular, while contemporaneously assuming interpretive dominion over state laws, doubly disserves states. Such deference, it warrants emphasis, should occur regardless of the distributive consequences for defendants. Not all jurisdictions today, for example, subscribe to a strict rule of lenity, which redounds to the benefit of criminal defendants.²⁷⁴ Furthermore, some state legislatures have specified that particular interpretive

268. See *Fid. Union Trust Co. v. Field*, 311 U.S. 169, 177–78 (1940) (“An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.”).

269. See *supra* note 73 and accompanying text.

270. See *supra* note 136 and accompanying text.

271. See, e.g., *Portland Gen. Elec. Co. v. Bureau of Labor Indus.*, 859 P.2d 1143, 1146 (Or. 1993); *State ex rel. Kalal Circuit Court*, 681 N.W.2d 110, 122–26 (Wis. 2004).

272. See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 3–5 (2009) (discussing interpretive authority inhering in delegations).

273. See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 349 (2010) (surveying common practice of state legislative codification of interpretive rules and methods and noting that with codification “legislatures seek to instruct judges on how legislatures operate and to govern the sources and methods of statutory interpretation”). This is not to say of course that canons, especially in the absence of legislative specification, do not potentially conflict with the traditional conceptualization of the judiciary as the faithful agent of legislative will. On this tension more generally see Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

274. See, e.g., *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) (noting that in Utah “criminal statutes are not to be construed strictly, but rather according to their fair import ‘to promote justice and to effect the objects of the law and general purposes’”) (citing UTAH CODE ANN. § 76–1–106 (2010)); see also CAL. PENAL CODE § 4 (West 2008) (“The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.”); N.Y. PENAL LAW § 5.00 (McKinney 2008) (“The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of law.”). On the more general modern-day modification of the lenity rule see Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 901–06 (2004) (noting that a majority of U.S. jurisdictions have either abolished or narrowed the rule’s application).

principles attach to individual laws,²⁷⁵ which can benefit either government or defendants.²⁷⁶

Nor should the interpretive preference of other states necessarily hold sway, as is now often the case. Whatever the appeal of majoritarianism in the civil diversity context,²⁷⁷ other states' preferences should be taken into account only if directed by the state itself. It is not enough that one interpretation is "more likely" than another, based on how laws of other jurisdictions have been interpreted.²⁷⁸ At the same time, prior federal rulings, including from other circuits, on the law in question should not enjoy precedential influence.²⁷⁹ Federal criminal courts, in short, should adhere to the "interpretive regime" of the government whose law they must apply.²⁸⁰

It remains the case, however, that such a regime might be lacking, whether due to the absence of state interpretative command, a split in intermediate appellate courts, or a suspect state supreme or intermediate court opinion. Under such circumstances, as evidenced

275. In Nevada, for instance, the legislature has directed that state traffic laws be interpreted in a manner "to minimize the differences between the traffic laws of the State of Nevada and those of other states." NEV. REV. STAT. § 484A.005(2) (2009). The directive was invoked by the Ninth Circuit in *United States v. Delgado-Hernandez*, 283 F. App'x 493, 499 (9th Cir. 2008), which cited Maryland law to uphold a stop based on an alleged violation of Nevada's "fog line" law. *Id.*

276. Cf. Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 777-81 (2008) (discussing influence of statutory interpretation methods on substantive outcomes).

277. See, e.g., *Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644 (7th Cir. 2002) ("When state law on a question is unclear . . . the best guess is that the state's highest court, should it ever be presented with the issues, will line up with a majority of the states.").

278. See, e.g., *United States v. DeGasso*, 369 F.3d 1139, 1146 (10th Cir. 2004) (interpreting Oklahoma law).

279. In the civil context, the precedential effect of federal circuit decisions remains a matter of dispute. Compare, e.g., *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004) (condemning trial court's failure to give precedential effect to prior Seventh Circuit decision on state law) and *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir. 1981) (stating that panel owed binding deference to the Sixth Circuit's prediction of Tennessee law), with *In re E. & S. Dists. Asbestos Lit.*, 772 F. Supp. 1380, 1409 (E.D.N.Y. 1991) (stating that "a decision by the Second Circuit is not binding on this court in determining a question of state law"). For more on the current uncertainty see Colin Wrabley, *Contrasting Approaches to Applying Court of Appeals' Law Holdings and Erie State Law Predictions*, 3 SETON HALL CIRCUIT REV. 1, 4-16 (2006).

280. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term*, 108 HARV. L. REV. 26, 66 (1994) ("[An interpretive regime is] a system of background norms and conventions against which the Court will read statutes. An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to a statute's [sic] scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities.").

even in jurisdictions that have formally disavowed the rule of lenity,²⁸¹ the federal mission should be guided by sensitivity to the penal nature of the laws in question, especially the core criminal law principle of legality, embodied in the tenet “no crime without law, no punishment without law.”²⁸² Consistent with this emphasis, what has been called the static approach in *Erie* jurisprudence has instructive benefit.²⁸³ Courts employing the static method incline toward limiting liability when confronted with “two opposing, yet equally plausible interpretations of state law.”²⁸⁴ As one commentator has said of the static approach:

Applying a rule that results in liability where state law might be understood to result in no liability. . . purports to set forth the command of a sovereign state at a time when it has not spoken definitively. Restricting liability, on the other hand, is not problematic because of the background presumption that all actions are permissible until the government declares otherwise.²⁸⁵

It could be that use of the static approach, as in the civil realm, “may lead federal courts to continue to apply existing rules of decision even after state courts are prepared to abandon them” and thus possibly allow for the “perpet[uation of] outmoded principles of state law.”²⁸⁶ Such a possibility, however, is in keeping with the conservative modus operandi of the criminal law itself, with its foundational concern for notice,²⁸⁷ especially at play in the realm of

281. See Lawrence Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 122–28 (1998) (discussing same and concluding that the “bottom line is that courts sometimes do not know what to do when asked to interpret a statute. Lenity best promotes deeply held values when that situation arises.”).

282. See generally Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937).

283. See Clark, *supra* note 68, at 1535–44. In the *Erie* literature, the static approach stands in contrast to the future-oriented predictive approach whereby a court “attempts to forecast the development of state law by asking what rule of decision the state’s highest court is likely to adopt in the future.” *Id.* at 1497. The latter approach, which bears greater relevance in the civil common law context, affords federal courts latitude to predict state adoption of as-yet unrecognized causes of action and defenses and the overturning of state law precedent. *Id.* at 1502–16.

284. *S. Ill. Riverboat Casino Cruises, Inc. v. Triangle Insulation & Sheet Metal Co.*, 302 F.3d 667, 676 (7th Cir. 2002); see also *Combs v. Int’l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004) (“When given a choice between an interpretation of state law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path.”); *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 680 (3d Cir. 2002) (“[I]f we are torn between two competing yet sensible interpretations of Pennsylvania law . . . we should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of Pennsylvania decides differently.”).

285. Glassman, *supra* note 52, at 286.

286. Clark, *supra* note 68, at 1541–42.

287. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (“[F]air warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line

malum prohibitum offenses.²⁸⁸ It also comports with the accepted modern-day preference for legislative, not judicial, criminal law-making, with its superior prospect for democratic accountability.²⁸⁹

Finally, systematic adoption of an *ex ante* interpretive method, whether by means of federal judicial or legislative directive,²⁹⁰ is important because it promises to lend a degree of order to the vitally important state-federal case sorting process. If federal prosecutors know that federal courts will presumptively follow state precedent and interpretive preferences, and otherwise default to the conservative tenets of criminal law interpretation more generally, the strategic calculus of filing decisions could be affected.²⁹¹ It may be that circumstances support a prosecutorial expectation that police satisfied state or local law, which would favor federal jurisdiction. But then again, the expectation might be to the contrary, favoring federal declination and the channeling of the case to state court.²⁹² Under either scenario, the interpretation (if not exclusively the application)

should be clear.”); *see also* George P. Fletcher, *Truth in Codification*, 31 U.C. DAVIS L. REV. 745, 752 (1998) (“Citizens need to know what is prohibited . . . in order to avoid the risk of liability.”).

288. Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421 (2006). For evidence of the venerable pedigree of this view see, for example, *The Adventure*, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (No. 93) (Marshall, C.J., sitting as Circuit Justice) (noting that in such instances “the act to be punished is in itself indifferent, and is to be rendered culpable only by the positive law. In such a case, to enlarge the meaning of the word[s] would be . . . to punish, not by the authority of the legislature, but by the judge”).

289. *See* Thomas W. Merrill, *The Disposing Power of the Legislature*, 119 COLUM. L. REV. 452, 456–61 (2010) (discussing structural and political reasons supporting legislative exclusivity in criminal law-making); Robinson, *supra* note 209, at 340–41 (noting modern preference for legislative, not judicial, prescriptions). For these reasons, adoption of a dynamic default rule, such as encouraging the judiciary to resolve uncertainty by seeking to maximize “enactable legislative preferences,” including by a legislature other than that enacting the criminal law in question, as recently advocated by Professor Elhauge, is inapt. *See* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 9 (2008) (noting that “an approach of maximizing political satisfaction often dictates adopting statutory default rules that do *not* reflect the enactors’ most likely meaning or preferences”).

290. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 833–35, 842–46 (2008) (discussing various manifestations and power sources of judicial and legislative authority to prescribe federal judicial rules).

291. *Cf.* ELHAUGE, *supra* note 289, at 235 (asserting that default rules of construction would decrease “legal uncertainty and . . . control discretionary choices by lower courts”).

292. The approach, it warrants mention, holds greater practical appeal than the alternate option of Congress limiting federal court jurisdiction over such laws, as has been suggested by Judge Dolores Sloviter in the context of federal diversity jurisdiction. *See* Sloviter, *supra* note 72, at 1687. If nothing else, the enormous political appeal of tough federal anti-crime initiatives, especially vis-à-vis drugs, in which state and local laws and police play a central role, will discourage congressional interest in such a jurisdictional limit. *Cf.* Michael O’Neil, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1441 (2004) (discussing rare instance of Congress acting to require adoption of prosecutorial guidelines under the PROTECT Act, intended to limit use of downward sentence departures).

of state and local laws will remain, as it should, anchored in its jurisdiction of origin.

CONCLUSION

In a federalist system, it is inevitable that the state and national governments will have occasion to interpret and apply one another's laws. This Article has focused upon a particular instance of this occurrence: federal criminal prosecutions in which state and local criminal laws, typically of a menial nature and invoked by state and local police, serve as the substantive basis for determining whether information or contraband secured by police can be used to establish more serious federal criminal liability. While police resort to such laws has been the target of sharp criticism,²⁹³ the discussion here has addressed the underlying but surely no less significant issue of *how* federal courts interpret and apply the laws.

The empirical examination has revealed an unexpected phenomenon. Contrary to accepted wisdom positing the irrelevance of *Erie Railroad v. Tompkins* to federal criminal litigation²⁹⁴ and the perceived impermeable line separating civil and criminal litigation,²⁹⁵ federal courts in fact regularly invoke civil diversity's *Erie* doctrine as they grapple with state and local criminal laws. And, unlike the early years after *Erie*, marked by federal reluctance to interpret state civil laws,²⁹⁶ today federal criminal courts unreservedly sally forth, exhibiting no aversion to the lowly "police court work."²⁹⁷ Their doing so raises fundamental questions over the appropriate reach of federal judicial power and the allocation of state-federal authority more generally.

293. See *supra* notes 26-27 and accompanying text.

294. See *supra* note 18 and accompanying text.

295. See David A. Sklansky & Stephen C. Yeazell, *Comparative Law without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 684 (2006) ("Civil litigation and criminal litigation in the contemporary United States occupy separate worlds."); see also Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 385 (2007) (discussing distinctiveness of civil and criminal adjudication models).

296. See David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 107 (2003) (noting early federal judicial reluctance in the face of unclear state law).

297. See *supra* note 20 and accompanying text. The lack of resistance stands in marked contrast to earlier times. Beginning in the Prohibition Era and throughout much of the mid-twentieth century, concern over the perceived indignity of requiring federal courts to adjudicate petty offenses prompted efforts to limit federal jurisdiction. See generally George Doub & Lionel Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need And Constitutionality*, 107 U. PA. L. REV. 443 (1959); Mary C. Warner, Note, *The Trials and Tribulations of Petty Offenses in the Federal Courts*, 79 N.Y.U. L. REV. 2417 (2004).

Rather than being an obsolete judicial chestnut, *Erie* thus remains vital. It not only controls federal civil diversity litigation,²⁹⁸ and figures in bankruptcy²⁹⁹ and tax³⁰⁰ proceedings and international law,³⁰¹ but also plays a lynchpin role in the unprecedented volume of criminal cases flooding federal courts in recent years,³⁰² especially involving illegal drugs and firearms.³⁰³ Yet, as *Erie* has migrated, so too have its methodological and analytic difficulties, made all the more problematic by the failure of federal criminal courts to heed the sovereign character of the laws at issue. By freely declaring, not merely applying, the substantive content of state and local criminal provisions, federal courts regularly act in defiance of *Erie*'s prohibition of "federal general common law," rendering nonauthoritative rulings that evade state and U.S. Supreme Court review and directly affect physical liberty. If nothing else, it is hoped, the discussion here will inspire a new consciousness and constraint among federal courts as they undertake the unique job of assessing police compliance with state and local criminal laws in the context of federal criminal prosecutions.

298. See *supra* notes 40–44 and accompanying text.

299. Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 633 (2004).

300. Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation: Bosch, Erie, and Beyond*, 71 OR. L. REV. 781, 781 (1992).

301. Curtis A. Bradley et al., Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 869 (2007); cf. Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 NW. U. L. REV. 997 (2007) (urging application of *Erie* principles in federal administrative law context based on federal courts' solicitation of and deference to agency views). The broadening use of *Erie* summons to mind Judge Friendly's long-ago observation that *Erie*'s sole application in federal diversity cases is an "oft-encountered heresy." Friendly, *supra* note 161, at 408 n.122.

302. See ADMIN. OFFICE OF U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2009 ANNUAL REPORT 12 (Mar. 2010), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf> (noting that in 2009 federal criminal case filings reached their highest level since 1932, the year before Prohibition was discontinued); see also Susan H. Herman, *Federal Criminal Litigation in 20/20 Vision*, 13 LEWIS & CLARK L. REV. 461, 462 (2009) (noting that the number of federal criminal prosecutions in 2008 was about four and one half times that of 1968 and three and a half times that of 1988).

303. See U.S. SENTENCING COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.A (2006) available at <http://www.ussc.gov/annrpt/2006/sbtoc06.htm> (noting that 35.5 percent of federal criminal docket concerns narcotics and 11.7 percent firearms offenses).

The Puzzle of Brandeis, Privacy, and Speech

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Most courts and scholarship assume that privacy and free speech are always in conflict, even though each of these traditions can be traced back to writings by Louis D. Brandeis—his 1890 Harvard Law Review article The Right to Privacy and his 1927 concurrence in Whitney v. California. How can modern notions of privacy and speech be so fundamentally opposed if Brandeis played a major role in crafting both? And how, if at all, did Brandeis recognize or address these tensions? These questions have been neglected by scholars of First Amendment law, privacy, and Brandeis. In this Article, I argue that the puzzle of Brandeis's views on privacy and speech can be resolved in a surprising and useful way.

My basic claim is that Brandeis's mature views on privacy and its relationships to free speech were more complex and interesting than the simplistic tort theory of privacy he expounded in The Right to Privacy. As a young lawyer, Brandeis envisioned privacy as a tort action remedying emotional injury caused by the revelation of embarrassing private facts by the press. But Brandeis's ideas evolved over his life. He soon came to believe strongly in a contrary idea he called "the duty of publicity." This is the notion that disclosure of most kinds of fraud and wrongdoing are in the public interest; that as he famously put it, "sunlight is the best disinfectant." When Brandeis came to think through First Amendment issues after the First World War, tort privacy could no longer consistently fit into his influential theories of civil liberty.

But while Brandeis changed his mind about tort privacy, what he replaced it with is even more interesting. In his Olmstead dissent and free speech writings, Brandeis identified a second conception of privacy that I call "intellectual privacy." Brandeis reminds us that the generation of new ideas requires a certain measure of privacy to succeed, and that in this way intellectual privacy and free speech are mutually supportive. I conclude by suggesting some modern implications of Brandeis's ambivalence about tort privacy and his linkage of intellectual privacy with free speech.
