

2-2006

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CREATING A “HYDRA IN GOVERNMENT”: FEDERAL RECOURSE TO STATE LAW IN CRIME FIGHTING

WAYNE A. LOGAN*

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INTRODUCTION

From its earliest origins, America’s federalist system has bred tensions: “the People” referenced in the Constitution have found themselves subject to the governing authority of both their states of residence and the federal government. To alleviate these tensions, early American lawmakers endeavored to maintain the preeminent legal authority of states¹ and afforded state courts a degree of concurrent authority over federal civil² and criminal laws.³ This latter measure, in particular, prompted concern that federal

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¹ See THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”).

² See Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647, 695 (1995) (discussing concurrent state-federal authority over civil suits pursuant to the Judiciary Act of 1789).

³ See *infra* notes 20-23 and accompanying text.

(national) law would be inconsistently applied by individual states. To Alexander Hamilton, such variability risked creation of a “hydra in government.”⁴

Over the years, as federal inclinations toward jurisdictional restraint diminished, concerns about such inconsistency have subsided, only to be replaced by worries over federal usurpation of state legal authority. Federal encroachment has been especially controversial with respect to the criminal law, a traditional bailiwick of the states,⁵ which has inspired a welter of critical commentary⁶ and judicial attention.⁷ The intense, decades-long debate over the “federalization” of crime has, however, obscured a parallel development of greater practical significance: the federal government’s use of state criminal laws and outcomes as it implements its ever-growing criminal law authority.

Given the efficiency and fairness benefits associated with uniform application of federal criminal law⁸ and the manifest desire of the federal government to impose its will upon the states,⁹ one might think that the U.S. Government would look exclusively to its own law. However, as this Article

⁴ THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 1, at 476 (“Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.”).

⁵ See THE FEDERALIST NO. 45 (James Madison), *supra* note 1, at 292-93 (asserting that “[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people”).

⁶ For a representative sample of this expansive body of work see, e.g., John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673 (1999); Kathleen Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997).

⁷ See, e.g., *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating a federal law prohibiting possession of a firearm in or near a school because the law lacked a sufficient nexus to federal authority under the Commerce Clause); *cf. United States v. Morrison*, 529 U.S. 598, 602 (2000) (invalidating a federal law allowing for civil damages for victims of gender-motivated violence).

⁸ As observed by the Supreme Court, it is presumed that “‘when Congress enacts a statute[,] . . . it does not intend to make its application dependent on state law.’ This is because the application of federal legislation is nationwide.” *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983) (quoting *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 603 (1971)); see also, e.g., *United States v. Lender*, 985 F.2d 151, 157 (4th Cir. 1993) (acknowledging “that a preference exists for determining the meaning of federal criminal legislation without reliance on diverse state laws”).

⁹ See, e.g., *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005) (affirming U.S. authority to prosecute violations of federal laws prohibiting cultivation and use of marijuana in the face of a state decriminalization effort); *cf. Glenn H. Reynolds & Brannon P. Denning, Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 370-71 (discussing cases supporting the view that the Court’s effort in *Lopez* to limit federal intrusions on the police power of states has had little practical effect among lower federal courts).

discusses, in a variety of criminal justice contexts federal practice defies this expectation. Just as the U.S. relied on states to implement its criminal laws during the first decades of the Republic, when its jurisdiction was comparatively meager, today it looks to the states to help effectuate its burgeoning criminal justice authority. As a result of this interaction, state-federal relations assume a distinct dynamic and character, which has gone unaddressed by commentators. Rather than supplanting state authority, as occurs with the reigning federalization model, the U.S. actually uses state laws and outcomes, and in doing so infuses federal law with the normative judgments of the respective states.¹⁰

This Article has three parts. Part I provides a brief overview of the dynamic nature of American federalism, which, contrary to commonly held notions of rigid isolation and zealous sovereign independence, has been marked since the framing era by pragmatic, politically sensitized interactions between the U.S. and individual states. Today, as in the past, examples of interaction abound, including in the criminal justice arena. Part II examines three examples of this interaction, occurring when the federal government uses: state substantive criminal law in the prosecution of individuals for offenses committed in federal enclaves under the Assimilative Crimes Act;¹¹ prior state convictions to tabulate the criminal history scores of individuals convicted of federal offenses under the U.S. Sentencing Guidelines;¹² and prior state convictions to prosecute individuals for violation of federal firearms laws under the U.S. “felon-in-possession” statute.¹³ In addition to surveying the ways in which these laws operate, Part II focuses on the major individual and systemic-level inconsistencies created by federal deference to state criminal laws and outcomes and the highly variegated policy judgments they embody.

Part III examines the broader implications of federal deference to state criminal laws and outcomes. While federal deference provides the U.S. with a useful 50-state pool of substantive law and offender conviction information, it nonetheless has a number of negative effects. These include the lessening of democratic pluralism and experimentation, resulting from the attendant lack of direct congressional input; the blurring of federal political accountability; and the injection of a large measure of arbitrariness into the federal criminal justice

¹⁰ For discussion of the phenomenon of states using one another’s prior convictions to effectuate their own criminal justice goals, see generally Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005). While the two contexts share many similarities, federal-state relations entail a more complex constellation of concerns. Unlike in the state-state context, where two sovereigns must grapple with the naturally occurring normative differences embodied in their respective criminal laws, the federal-state interaction requires the accommodation of the normative diversity of the individual states as a whole.

¹¹ 18 U.S.C. § 13(a) (2000).

¹² U.S. SENTENCING GUIDELINES MANUAL §§ 4A.1, 4A.2 (2004) [hereinafter SENTENCING GUIDELINES].

¹³ 18 U.S.C. § 922 (2000).

system. More pragmatically, deference functions to augment the reach and effect of U.S. law, amplifying the overall crime control apparatus of government, itself a development of questionable benefit in an era of ever more draconian criminal justice policies. Part III concludes by emphasizing the unique nature of the phenomenon examined, compared to conventional models of federalism – highlighting its cooperative (not competitive) nature and multi- (not two-) dimensional quality – and discusses the important ramifications of this recognition for possible changes in the federal criminal justice system itself.

I. THE PRAGMATIC QUALITY OF AMERICAN FEDERALISM

Today, federal-state relations are commonly conceived in starkly dualistic terms, with the U.S. and individual state governments wielding separate and distinct sovereign powers.¹⁴ The dominance of this accepted paradigm is perhaps nowhere more evident than in the dual sovereignty doctrine, which, despite the strictures of the Double Jeopardy Clause, permits the state and federal governments to prosecute a defendant for the same crime.¹⁵ Double prosecution is permissible, the Supreme Court has reasoned, because the respective governments are “two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory.”¹⁶

Such rigid notions of dual federalism, however, share more with myth than reality. The actual historic practice of American federalism has always been “interactive”¹⁷ and “polyphonic”¹⁸ in nature. As Martin Redish has observed, “[c]ooperative interchange has been, and continues to be, the central tenet of American federalism, which primarily constitutes a synergistic, symbiotic, and dynamic interaction of state and federal governments.”¹⁹

¹⁴ See, e.g., DANIEL ELAZAR, *THE AMERICAN PARTNERSHIP* 22 (1962) (describing a system in which “each of the two sovereignties has its own exclusive area of authority and jurisdiction, with few powers held concurrently”); Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 820 (2004) (observing the “dominant tendency” to view “the projects of federal and state governance as essentially distinct”).

¹⁵ See *Bartkus v. Illinois*, 359 U.S. 121, 128-29 (1959).

¹⁶ *United States v. Lanza*, 260 U.S. 377, 382 (1922).

¹⁷ Martin H. Redish, *Supreme Court Review of State Court “Federal” Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 864 (1985) (describing an “interactive” system as “one which contains simultaneously ‘cooperative’ and ‘combative’ elements”).

¹⁸ Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1411 (1999).

¹⁹ Redish, *supra* note 17, at 864; see also Daniel J. Elazar, *Theory of Federalism*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1006 (Leonard W. Levy & Kenneth L. Karst eds., 2000) (commenting that the American “pattern of federalism has been cooperative since its beginnings”); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1148-78 (1995)

During the first decades of the nation’s history, this tendency manifested itself in Congressional conferral on state courts of jurisdictional authority over certain federal crimes,²⁰ avoiding the need to create “a vast army of . . . federal courts.”²¹ Such state involvement persisted until 1874, when Congress reposed in federal courts exclusive authority over U.S. criminal law,²² reasserting the jurisdictional apportionment initially prescribed by the Judiciary Act of 1789.²³

Although today states no longer enjoy direct jurisdictional authority over federal law, they continue to play a critically important role in the federal criminal justice mission. State law enforcement personnel frequently collaborate with federal agents to mount federal narcotics prosecutions,²⁴ and they figure prominently in federal prosecutions of repeat and violent offenders

(surveying various instances of cooperative federalism throughout history).

²⁰ See Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 545 (1925). Warren explains that

Congress, in the first fifty years, left to the State Courts concurrent jurisdiction with the Federal Courts over certain offenses against the criminal . . . statutes of the United States, and trial in the State Courts of such violations of Federal criminal law was regarded by Congress as . . . desirable.

Id. Federal law permitted state court jurisdiction, but did not mandate it. *Id.* at 546 (stating that Congress “has no power to *force* jurisdiction upon a State Court”). Even though bestowing federal jurisdiction was meant to complement state court prowess and was intended to allay state concerns, in the mid-nineteenth century states came to view their jurisdiction over federal criminal matters as an expression of federal hegemonic designs. See Harold D. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 306-07 (1989) (discussing how “as the federal government continued to grow, many who had first championed concurrent jurisdiction as a means of checking the power of the federal judiciary began to fear federal encroachment upon the independence of the states”); Warren, *supra*, at 581 (discussing how “a form of legislation enacted by Congress, out of a desire to . . . reduce Federal power, became regarded by the States as an undue assumption of Federal power and an infringement on the sovereignty of the States”).

²¹ Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1027 (1995).

²² 18 U.S.C. § 3231 (2000); see also EDWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 115 (1987) (observing the creation of exclusive federal authority in 1874).

²³ Bourguignon, *supra* note 2, at 682 (explaining that the Act gave lower federal courts exclusive jurisdiction over federal crimes).

²⁴ See Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1182-92 (1995) (discussing how “cooperation of law enforcement at all levels of government” helps bring “state and local agents into the federal fold”); Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 843-52 (2004) (describing the many ways in which state and local actors help in implementing federal drug control policy). Similarly, in the civil justice arena, states have played a key role in the execution of a broad array of federal laws. See Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1350-52 (2005).

and those illegally possessing firearms.²⁵ Moreover, states play a significant (albeit less direct) substantive part in facilitating federal criminal justice policy and goals. Because states conduct the lion's share of criminal prosecutions,²⁶ the U.S. looks to them to provide criminal history information, which the U.S. employs in federal prosecutions.²⁷ In other instances, the U.S. profits from its borrowing of actual state criminal laws,²⁸ much as it does pursuant to *Erie Railroad v. Tompkins* in civil diversity of citizenship cases²⁹ and actions filed under the Federal Tort Claims Act.³⁰

U.S. deference to state criminal laws and outcomes, however, has a variety of important practical and doctrinal ramifications, distinct from those arising in analogous civil law contexts. It is to these ramifications that the discussion now turns.

II. FEDERAL DEFERENCE AND ITS PRACTICAL RAMIFICATIONS

By virtue of the Supremacy Clause, the federal government effectively operates as a super-sovereign with regard to criminal justice.³¹ So long as it satisfies relevant constitutional strictures, such as the Commerce Clause,³² it can occupy fields of substantive criminal law as it sees fit. Moreover, because

²⁵ See Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 374-78 (2001) (discussing cooperative operations such as "Project Triggerlock," targeting repeat and violent offenders who use guns; "Operation Achilles Heel," targeting the "nation's most violent criminals;" and "Project Exile," targeting defendants found to possess guns). Mindful of the increasing combined efforts of state and federal agents, and wary that the U.S. would use evidence wrongly obtained by state agents in federal prosecutions, the Court long ago rejected the so-called "silver platter" doctrine, which permitted the practice. See *Elkins v. United States*, 364 U.S. 206, 208 (1960).

²⁶ See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.2(b) (4th ed. 2004) (observing that the federal criminal justice system annually accounts for less than two percent of the total criminal prosecutions in the United States).

²⁷ See *infra* Parts II.B. and II.C.

²⁸ See *infra* Part II.A.

²⁹ 304 U.S. 64, 65 (1938).

³⁰ 28 U.S.C. § 1346(b) (2000) (incorporating state tort law in the Federal Tort Claims Act); see also, e.g., Outer Continental Shelf Lands Act, *Id.* § 1333(a)(2)(A) (specifying that the "civil and criminal laws of each adjacent State . . . are declared to be the law of the United States"); *Kahn v. INS*, 36 F.3d 1412, 1416-19 (9th Cir. 1994) (Kozinski, J., dissenting) (observing that the U.S. Bankruptcy Code relies on state law for determination of a bankrupt's assets; U.S. tax law relies on state property law; and U.S. Social Security relies upon state law definitions of marriage).

³¹ U.S. CONST. art. VI, cl. 2 (providing that "this Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby").

³² U.S. CONST. art. I, § 8 (empowering Congress to "[t]o regulate Commerce with foreign Nations, and among the several States").

there exists no constitutional provision compelling uniform federal law in the area, such as with bankruptcy,³³ naturalization,³⁴ and taxation,³⁵ the U.S. is free to use state criminal laws and outcomes in implementing its own criminal justice policies. This Part examines three principal areas where the federal government has exercised this prerogative and then discusses the many ramifications.

A. *Assimilative Crimes Act*

Enacted under the sponsorship of Representative Daniel Webster,³⁶ the Assimilative Crimes Act (ACA) is one of a handful of U.S. Code provisions that tie federal criminal outcomes to violations of state substantive criminal law. The ACA authorizes use of state criminal law in federal enclaves when an offense is not covered by federal law and it subjects offenders to “a like [state] punishment.”³⁷ The law serves as a “gap-filling criminal code for federal enclaves,”³⁸ and relieves Congress of the need to legislate in accord with the peculiar needs of localities.³⁹ In doing so, the ACA is thought to serve federalism values by permitting U.S. law to reflect local conditions⁴⁰ and

³³ U.S. CONST. art. I, § 8, cl. 4.

³⁴ *Id.*

³⁵ U.S. CONST. art. I, § 8, cl. 1.

³⁶ See *Williams v. United States*, 327 U.S. 711, 721 (1946) (identifying Daniel Webster as the bill’s sponsor); see also Note, *The Federal Assimilative Crimes Act*, 70 HARV. L. REV. 685, 685 (1957).

³⁷ 18 U.S.C. § 13(a) (2000). The ACA provides in pertinent part:

Whoever [in a federal enclave] . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Id.

³⁸ *United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982). Examples of such enclaves include national parks, U.S. military installations, and Indian reservations. See U.S. CONST. art. I, § 8, cl. 17 (conferring on the U.S. exclusive jurisdiction within federal enclaves). For an interesting discussion of the ACA’s uncertain application in Yellowstone National Park, which straddles the federal districts (and states) of Wyoming, Idaho, and Montana, see Brian C. Kalt, *The Perfect Crime*, 93 GEO. L.J. 675 (2005). In a curious jurisdictional twist, Congress elected to repose the entire expanse of the park in the District of Wyoming, yet the ACA requires that the criminal law of any one of the three states be applied, depending on where precisely in the park the offense was committed. *Id.* at 677 n.17.

³⁹ See *United States v. Press Pub. Co.*, 219 U.S. 1, 12-13 (1911) (quoting Representative Webster’s argument during floor debate over the ACA that “it must be obvious that, where the jurisdiction of a small place, containing only a few hundreds of people (a navy yard, for instance), was ceded to the United States, some provision was required for the punishment of offenses”) (citation omitted).

⁴⁰ *United States v. Sharpnack*, 355 U.S. 286, 293 (1958) (inferring that Congress desired that “to the extent that offenses are not pre-empted by congressional enactments, there shall

minimizing federal interference with state authority over crimes within state boundaries.⁴¹

True to the ACA's gap-filling mission, if federal and state laws proscribe "approximately" the same misconduct, state law is not assimilated.⁴² On the other hand, if U.S. law is silent or if a "substantial difference" exists in the kind of misconduct targeted, then state law will ordinarily apply.⁴³ In addition to (or perhaps more accurately, notwithstanding) these technical criteria, federal courts commonly adopt state criminal law pursuant to the ACA when Congress has broadly addressed a variety of misconduct, yet a more specific state law affords federal prosecutors a strategic advantage.⁴⁴

If the ACA applies, a legal metamorphosis occurs, transforming "a crime against the state into a crime against the federal government."⁴⁵ Upon conviction, the sentence imposed by the federal court is not to "exceed any

be complete current conformity with the criminal laws of the respective States in which the [federal] enclaves are situated").

⁴¹ See *Press Pub. Co.*, 219 U.S. at 9 (remarking that Congress had "the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the states on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation"); see also *Sharpnack*, 355 U.S. at 294 (concluding that the ACA is a "practical accommodation of the mechanics of the legislative functions of the State and Nation in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform to that already established by the State").

⁴² *United States v. Lewis*, 523 U.S. 155, 165 (1998).

⁴³ *Id.* State law will apply unless "Congress through the comprehensiveness of its regulation or through language revealing a conflicting policy indicates to the contrary in a particular case." *Id.* at 165-66.

⁴⁴ See, e.g., *United States v. Sasnett*, 925 F.2d 392, 396 (11th Cir. 1991) (assimilating state offense of causing death while driving under the influence despite the existence of a federal involuntary manslaughter statute); *United States v. Kaufman*, 862 F.2d 236, 237-38 (9th Cir. 1988) (assimilating state offense prohibiting pointing a loaded firearm at another despite the existence of a federal assault statute); *United States v. Fesler*, 781 F.2d 384, 390-91 (5th Cir. 1986) (assimilating state child abuse statute despite the existence of a federal involuntary manslaughter statute); *United States v. Brown*, 608 F.2d 551, 553-54 (5th Cir. 1979) (assimilating state child abuse statute despite the existence of a federal assault statute); *United States v. Smith*, 574 F.2d 988, 990-91 (9th Cir. 1978) (assimilating state law proscribing sodomy despite the existence of a federal rape statute).

⁴⁵ *United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982). For a rare instance of state authorities enforcing a state criminal law in federal court, see Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 *YALE L.J.* 2195, 2203-06 (2003) (discussing the use of a state involuntary manslaughter law in a state prosecution of a federal official in federal court, based on a federal removal provision); see also John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 *U. CHI. L. REV.* 203, 232-47 (1997) (making historical case for the view that Article III permits federal court prosecutions based on state criminal law).

maximum sentence and may not fall below any mandatory minimum sentence that is required under the law of the state in which the crimes occur."⁴⁶ The court must also defer to any applicable state-prescribed mandatory minimum sentences and recidivist provisions, despite any contrary sentence possibly dictated by U.S. law.⁴⁷ As a result of such deference, sentences imposed on federal defendants can either be more⁴⁸ or less⁴⁹ than those which would be imposed under the U.S. Sentencing Guidelines for analogous misconduct if U.S. law were to apply.⁵⁰

Such deference to local will, however, extends (as with *Erie*) only to state substantive law and punishment, not state procedures, constitutional expectations, or rules of evidence.⁵¹ As a result, even though a state might

⁴⁶ *United States v. Garcia*, 893 F.2d 250, 251-52 (10th Cir. 1989). This maximum, however, is exclusive of any applicable federal term of supervised release, which federal courts are free to impose. See *United States v. Pierce*, 75 F.3d 173, 178 (4th Cir. 1996) (observing that "supervised release is not considered to be a part of the incarceration portion of a sentence and therefore is not limited by the statutory maximum term of incarceration"); *United States v. Reyes*, 48 F.3d 435, 439 (9th Cir. 1995) (concluding that defendant could be sentenced to supervised release, pursuant to federal law, even though Hawaii law did not provide for the sanction). Furthermore, any allowance under state law for parole eligibility is disregarded. See *United States v. Leake*, 908 F.2d 550, 552 (9th Cir. 1990). Such exceptions are justified in order to ensure the orderly administration of federal prisons. "To hold otherwise would impose a set of restrictions on [ACA] prisoners different from the rules affecting all other federal prisoners." *United States v. Vaughn*, 682 F.2d 290, 294 (2d Cir. 1982).

⁴⁷ See, e.g., *United States v. Kanekua*, 105 F.3d 463, 466 (9th Cir. 1997) (upholding application of Hawaii's Repeat Offender Statute that prescribed a minimum term of forty months, despite the U.S. Sentencing Guidelines, which prescribed a term of twenty-four to thirty months for an analogous offense). When a statutorily required state minimum sentence exceeds the Guidelines-based punishment, the court is obliged to impose the statutory minimum. SENTENCING GUIDELINES, *supra* note 12, § 5G1.1(b).

⁴⁸ See, e.g., *Kanekua*, 105 F.3d at 466 (upholding a ten-month increase).

⁴⁹ See, e.g., *United States v. Martinez*, 274 F.3d 897, 909 (5th Cir. 2001) (upholding a lesser sentence imposed as a result of a state law limiting the length of all concurrent sentences imposed, resulting in a ten-year sentence as opposed to the thirty-two years authorized by federal law).

⁵⁰ See SENTENCING GUIDELINES, *supra* note 12, § 2X5.1 (providing that when the instant offense is a crime for which no guideline has been promulgated, a court is to "apply the most analogous offense guideline"); see also 18 U.S.C. § 3553(b) (2000) (providing that "in the absence of an applicable sentencing guideline . . . the court shall have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to applicable policy statements of the Sentencing Commission").

⁵¹ See *United States v. Pluff*, 253 F.3d 490, 494 (9th Cir. 2001) (observing that the ACA was meant to fill a jurisdictional gap and does not extend to all reaches of criminal and constitutional law within the state (citing *Smadya v. United States*, 352 F.2d 251, 253 (9th Cir. 1965))).

make available a particular procedural right, such as a jury trial for a petty offense, the federal government need not.⁵² Further, it remains an open question whether the U.S., in ACA-based prosecutions, is bound by state court interpretations of their indigenous criminal law provisions.⁵³

Despite its functional benefits, the ACA creates significant disparities. By incorporating by reference state substantive laws and sanctions, the ACA ties federal prosecutions to the vagaries of state normative judgments. While it is not unusual for federal law itself to be applied in a disparate fashion,⁵⁴ the ACA creates disparity in different federal jurisdictions (themselves demarcated by states)⁵⁵ where none would exist if congressionally created substantive law were exclusively and uniformly applied.

In addition, even though the ACA is intended to avoid *intrastate* disparity,⁵⁶ such disparity in fact results. This is because while the same criminal laws and punishments apply to state residents both inside and outside the federal enclave, federal ACA defendants are not provided the same procedural and constitutional rights enjoyed by state-prosecuted defendants.⁵⁷ Ultimately, this substitution, and the consequent divorcing of state substantive law from its procedural moorings,⁵⁸ creates disparate individual-level effects identical to those arising when the U.S. elbows aside state authorities in instances of

⁵² See, e.g., *United States v. Sain*, 795 F.2d 888, 891 (10th Cir. 1986) (indicating that there is no right to a jury trial for petty offenses under the Constitution and thus contradictory state law does not need to be assimilated); see also *Alabama v. Shelton*, 535 U.S. 654, 668 (2002) (observing that the majority of states are more generous than the federal government in extending to indigents the right to counsel).

⁵³ Compare *Sain*, 795 F.2d at 891 (rejecting state court's interpretation "because the prosecution is for enforcement of federal law, rather than state law") with *United States v. Smith*, 965 F. Supp. 2d 756, 761 (E.D. Va. 1997) (concluding that assimilation includes the state's "substantive criminal caselaw").

⁵⁴ See Michael Goldsmith & Marcus Porter, *Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures*, 69 GEO. WASH. L. REV. 57, 57 (2000) (discussing the various causes of circuit conflicts and sentence disparity among federal prosecutions); Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 280-82 (1999).

⁵⁵ See 28 U.S.C. §§ 81-132 (2000). For an interesting discussion of historical exceptions to this standard state-based jurisdictional parameter, see Peter Nicolas, *American Style Justice in No-Man's Land*, 36 GA. L. REV. 895, 897 (2002) (discussing, *inter alia*, an Act of Congress in the 1880s that gave the U.S. District Court for the Eastern District of Texas jurisdiction over land outside the State of Texas).

⁵⁶ See *United States v. Garcia*, 893 F.2d 250, 253 (10th Cir. 1989) (observing that it is impossible to promote intrastate uniformity by means of the ACA while simultaneously preserving interstate uniformity, and that the ACA represents a deliberate choice of the former goal).

⁵⁷ See *supra* notes 51-52 and accompanying text.

⁵⁸ For an insightful discussion of the analogous scenario of federal decoupling of state civil laws from their accompanying procedures, see Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 993-96 (2001).

concurrent jurisdiction, an occurrence widely condemned by commentators.⁵⁹

B. *Criminal Histories Under the Guidelines*

Another prominent area of federal deference relates to the use of state criminal convictions in calculating sentences for federal defendants under the U.S. Sentencing Guidelines. Authorized by Congress in 1984, and implemented in 1987,⁶⁰ the Guidelines determine federal criminal sentences based on two factors. The first factor, the severity of the federal crime of conviction, is determined by the Guidelines Commission, and constitutes a vertical axis in the tables used to determine sentences.⁶¹ The second factor, the offender's criminal history, is based on the length of the maximum sentences imposed for any prior convictions,⁶² and occupies the horizontal axis in the sentencing table.⁶³ For defendants previously convicted of state offenses,

⁵⁹ See, e.g., O'Hear, *supra* note 24, at 862-65 (surveying various ways in which state rights and procedures are more generous than their federal counterparts and criticizing how they are circumvented when the U.S. prosecutes an offense also covered by state law).

⁶⁰ For discussion of the Guidelines' origins and the work of the Commission, see generally KATE STITH & JOSE CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

⁶¹ SENTENCING GUIDELINES, *supra* note 12, § 2.

⁶² In the wake of *United States v. Booker*, 125 S. Ct. 738 (2005), the continued vitality of the Guidelines as a whole has been called into question. *Booker*, however, found fault with the mandatory nature of the Guidelines' regime, *id.* at 749-50, and not the criminal history provision itself, which continues to be applied in advisory fashion by federal courts. See, e.g., *United States v. Paine*, 407 F.3d 958, 966 (8th Cir. 2005) (upholding a sentence calculated using the Guidelines after *Booker*). Moreover, even in the event that Congress revisits the federal sentencing apparatus, which it almost certainly will in the wake of *Booker*, state convictions will without question continue to play a predominant role.

⁶³ See SENTENCING GUIDELINES, *supra* note 12, §§ 4A1.1, 4A1.2. The Guidelines assign between one and three points for the maximum sentence imposed for each prior conviction: three points for sentences exceeding one year and one month; two points for sentences of at least sixty days; and one point for sentences not within the aforementioned categories. *Id.* §§ 4A1.1(a)-(c); 4A1.2(b)(1). Sentences for all prior felony convictions as well as misdemeanor and petty offenses are counted, with some specified offenses (e.g., prostitution, providing false information to an officer, and gambling) in the latter categories excepted unless the sentence involved a probation term of at least one year or imprisonment for at least thirty days, or the prior offense was "similar" to the instant offense. *Id.* §§ 4A1.2(c)(1), 4A1.2(o). Assignment of points is based on the judgment pronounced by the court, not the amount of time actually served by the individual. *Id.* § 4A1.2 cmt. n.2; see also, e.g., *United States v. Holbert*, 285 F.3d 1257, 1263 (10th Cir. 2002) (upholding assignment of two criminal history points because defendant was sentenced to ninety days, even though he only served forty-five days). Ultimately, a defendant's score, which also can be increased by factors such as whether the crime was committed while under probation or parole supervision, see SENTENCING GUIDELINES, *supra* note 12, § 4A1.1(d)-(e), determines the criminal history category (0-6) in which the defendant is placed. See *id.* § 5A (sentencing table).

federal sentences are thus directly tied to the prior normative determinations of states, allowing them to significantly affect individual federal sentencing outcomes.⁶⁴

Beyond its individual-level effects, the Commission's decision to tie federal sentencing outcomes to prior state convictions has two significant institutional consequences. First and foremost, it engrafts manifold state policy variations onto federal law,⁶⁵ reflecting differences on such basic questions as (1) whether to criminalize particular conduct;⁶⁶ (2) the substantive legal definitions

For more on the workings of the criminal history provisions, see Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. REV. 291, 301-09 (2001); Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 589 (2003).

⁶⁴ See Rappaport, *supra* note 63, at 589 n.102 (observing that "[t]he criminal history score makes a significant contribution to the ultimate sentence" and illustrating the mechanics of sentence tabulation).

⁶⁵ See *Rochin v. California*, 342 U.S. 165, 168 (1951) (observing that "crimes in the United States are what the laws of the individual States make them"). This diversity, in turn, is augmented by political subunits of state governments, municipalities, which also have the power to enact criminal provisions. See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1421-38 (2001) (discussing municipalities' authority to enact criminal provisions as an exercise of their home rule powers). While the Guidelines expressly exclude "local ordinance violations," except those that "are also criminal offenses under state law," see SENTENCING GUIDELINES, *supra* note 12, § 4A1.2(c)(1), municipalities regularly law make concurrently with states, refining state substantive laws and punishments. See Logan, *supra*, at 1429-35 (citing examples); see also *United States v. Lopez-Pastrana*, 244 F.3d 1025, 1026 n.1 (9th Cir. 2001) ("The fact that Nevada's state statute criminalizing theft does not track the exact language of the Reno Municipal Code creating the offense of shoplifting is of no legal significance."); *United States v. Redding*, 104 F.3d 96, 98 (7th Cir. 1996) (counting a conviction imposed pursuant to a drunk driving ordinance of a Wisconsin municipality and observing that "the Guidelines are not simply concerned with the labels placed upon conduct . . . but also with the conduct itself").

⁶⁶ See, e.g., Sally F. Goldfarb, *The Supreme Court, The Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 70-71 & n.72 (2002) (discussing varied state views on the criminalization of marital sexual assault); O'Hear, *supra* note 24, at 836 & n.303 (discussing varied state views on the criminalization of marijuana possession); Amy C. Radosevich, Note, *Thwarting the Stalker: Are Anti-Stalking Measures Keeping Pace With Today's Stalker?*, 2000 U. ILL. L. REV. 1371, 1381-85 (2000) (discussing varied state views on the criminalization of stalking).

Laws relating to firearms provide a telling example of this variation and attest to the sometimes stark regional effects at work. While northeastern states often harshly sanction firearms violations, rural and southern states are apt to impose far less punishment or refuse to regulate certain types of firearms altogether. See JAMES B. JACOBS, *CAN GUN CONTROL WORK?* 32-34 (2002) ("[T]he states' firearms policies in our diverse nation differ widely."). As noted by U.S. District Judge Vincent Broderick, "[p]ossession of a firearm by a felon will be viewed markedly differently in Wyoming, where hunting is a way of life, and in the

of crimes;⁶⁷ and (3) authorized punishments.⁶⁸ State variations in constitutional and procedural protections for defendants are also swept up, insofar as such protections can influence criminal case outcomes (for example, the availability of the "good faith" exception to the exclusionary rule⁶⁹ or the availability of appointed counsel⁷⁰). Finally, because criminal histories depend on state court convictions, they invariably reflect local prosecutorial policies,

South Bronx, where a felon with a firearm is a threat to the community." Vincent L. Broderick, *Local Factors in Sentencing*, 5 FED. SENT. REP. 314, 314 (1993); cf. *In re Hart*, 626 A.2d 483, 488 (N.J. Super. Ct. Law Div. 1993) (stating that "New Jersey need not observe the lowest common denominator of gun control among the various states").

⁶⁷ See, e.g., RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 2, 44-46 (1996) (surveying variations in U.S. sexual assault laws and referring to them as a "crazy quilt" of prohibitions); Iris Bennett, Comment, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U.L. REV. 1696, 1724-29 (1999) (discussing substantive variations in state definitions of statutory rape, assault and battery, petty theft, driving under the influence, and obstruction of justice). State variation also extends to defenses. See PAUL H. ROBINSON, CRIMINAL LAW DEFENSES §§ 173-194 (1984 & Supp. 2000) (surveying state variations in excuse-related defenses); Bennett, *supra*, at 1723 (discussing variations in age of consent and mistake of age defenses in statutory rape law); John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 177 (2001) (observing variations in availability of self-defense).

⁶⁸ As the Supreme Court has remarked, "the classification of state crimes [as misdemeanors and felonies] differs widely among the states." *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984); see also *Harmelin v. Michigan*, 501 U.S. 957, 987 (1991) (pointing out the "enormous variation" in state penalties); compare, e.g., MINN. STAT. ANN. §§ 152.027(4), 152.01(16) (West 2004) (punishing possession of more than ounce of marijuana as a petty misdemeanor) with N.D. CENT. CODE § 19-03.1-23(6) (2005) (punishing such possession as a felony). For a comprehensive overview of the dramatically different views of states on the punishment of drug crimes, see THE GALE GROUP, NATIONAL SURVEY OF STATE LAWS 173-210 (Richard A. Leiter ed., 5th ed. 2005); see also ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 26 (2003):

In New York State possessing slightly less than an ounce of marijuana brings a \$100 fine, if it's a first offense. In Louisiana possessing the same amount of pot could lead to a prison sentence of twenty years. In Montana selling a pound of marijuana, first offense, could lead to a life sentence, whereas in New Mexico selling 10,000 pounds of marijuana, first offense, could be punished by a term of no more than three years.

⁶⁹ Compare, e.g., *State v. Duntz*, 613 A.2d 224, 228 (Conn. 1992) (rejecting the "good faith" exception to the Fourth Amendment's exclusionary rule) with *Crayton v. Commonwealth*, 846 S.W.2d 684, 688 (Ky. 1992) (embracing the exception).

⁷⁰ Compare, e.g., *Campa v. Fleming*, 656 P.2d 619, 621 (Ariz. Ct. App. 1982) (holding that the defendant had no right to counsel because he was not imprisoned and remarking that "there is no authority holding that Arizona has standards which are more strict in this area than the U.S. Constitution") with *Olevsky v. District of Columbia*, 548 A.2d 78, 85 (D.C. 1988) (interpreting D.C. law to require appointment of counsel for all offenses authorizing imprisonment).

which differ from their federal counterpart.⁷¹

Federal deference thus creates major systemic inconsistencies, which compound disparities within states themselves⁷² and ultimately serve to exacerbate enduring sentencing inequities in the federal system as a whole.⁷³ As a result, the federal government's commitment to fairness, predicated on uniform outcomes for similarly situated defendants,⁷⁴ is significantly undermined.

The second institutional consequence relates to equal treatment of perhaps otherwise similarly situated federal defendants. Because states vary considerably in their substantive criminal laws, punishments, and procedures, criminal histories – and thus federal sentences – vary in direct accord. Deprivations of physical liberty in the federal system are thus determined not by the consolidated deliberation of the federal authorities, but by the happenstance of the state government where the prior conviction(s) occurred.⁷⁵ This variability risks both under-inclusiveness (failing to increase the criminal history scores of defendants who previously engaged in misconduct in lenient states) and over-inclusiveness (increasing the scores of defendants who happened to engage in misconduct in comparatively punitive states).

C. *Firearms Possession*

A third and final example of U.S. deference arises in the context of federal firearm regulations. Since the Safe Streets Act of 1968,⁷⁶ federal law has

⁷¹ See Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1139-41 (2004) (observing the “fundamentally different model” governing state versus federal prosecutorial decision making).

⁷² See, e.g., Joshua Bowers, Note, “*The Integrity of the Game Is Everything*”: *The Problem of Geographic Disparity in Three Strikes*, 76 N.Y.U. L. REV. 1164, 1180-87 (2001) (discussing inconsistencies in the application of California’s “three strikes” recidivist law).

⁷³ See, e.g., Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 96-1006 (2005) (surveying persistent disparities in Guidelines’ sentences based on the influence of individual judges; geographic regions; and race, ethnicity and gender); Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1135 (2001) (suggesting that “disparities among judges in different regions and districts have markedly increased since the advent of the Guidelines in 1987”); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 569 (1998) (“Ten years after the Guidelines went into effect . . . many critics believe that they have failed to achieve an appropriate degree of uniformity in sentencing.”).

⁷⁴ See *United States v. Newsom*, 428 F.3d 685, 689 (7th Cir. 2005) (observing that “the Guidelines were intended to create national uniformity and . . . this goal remains important post-*Booker*”).

⁷⁵ For further discussion of this occurrence and its doctrinal implications, see *infra* notes 1167- 141 and accompanying text.

⁷⁶ Pub. L. No. 90-618, 82 Stat. 1213 (codified in scattered sections of 18 U.S.C. and 26

prohibited a variety of ex-offenders from owning or possessing firearms,⁷⁷ subjecting violators to a maximum of ten years imprisonment, a \$250,000 fine, or both.⁷⁸ While colloquially known as the federal “felon-in-possession” (FIP) law, the provision actually applies to felons and a select sub-group of misdemeanants as well. Predicate state convictions include offenses “punishable by imprisonment for a term exceeding one year,”⁷⁹ misdemeanors punishable by over two years’ imprisonment,⁸⁰ and misdemeanor domestic abuse offenses.⁸¹ State substantive law also serves as the basis for determining whether a “conviction” occurred, sufficient to trigger the FIP law.⁸² Finally,

U.S.C.).

⁷⁷ 18 U.S.C. § 922(g) (1), (9) (2000).

⁷⁸ *Id.* § 924(a)(2) (2000).

⁷⁹ *Id.* § 922(g)(1). Congress expressly excluded from this category a variety of business-related crimes (e.g., antitrust, unfair trade). *Id.* § 921(20)(A) (2000).

⁸⁰ *Id.* § 921(a)(20)(B) (including any “crime punishable by imprisonment for a term exceeding one year,” but excluding misdemeanors “punishable by a term of imprisonment of two years or less”).

⁸¹ *Id.* § 922(g)(9) (including anyone “who has been convicted in any court of a misdemeanor crime of domestic violence”). Frustrated by state failures to punish domestic violence in a sufficiently harsh manner, Congress provided that the ban can be triggered by misdemeanor domestic violence convictions, not merely felonies. *See* 142 CONG. REC. S11878-79 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (commenting that because domestic abusers were often charged with misdemeanors they fell outside existing federal gun limits applicable only to felons).

⁸² *See* 18 U.S.C. § 921(a)(20) (stating that “[w]hat constitutes a conviction . . . shall be determined in accordance with the law of the jurisdiction in which the proceedings were held”). The law adds that any prior conviction

which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction . . . , unless such pardon, expungement [sic], or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Id.; *see also* S. REP. NO. 98-583, at 7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 8523, 8527 (stating that “[s]ince the Federal prohibition is keyed to the state’s conviction, state law should govern” the definition of conviction); H.R. REP. NO. 99-495, at 20 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1346 (stating that “the peculiar laws of each State” shall determine whether a conviction counts for federal purposes).

The current version of the law reflects an express rejection of *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), which concluded that “whether one has been ‘convicted’ within the language of . . . [federal] statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State.” *Id.* at 111-112. The *Dickerson* majority reasoned that in light of the greatly varied state laws on expunction of convictions, its holding achieved “a desirable national uniformity unaffected by varying state laws, procedures, and definitions of ‘conviction.’” *Id.* at 112.

Congressional deference to state laws thus achieved intergovernmental comity, avoiding what Judge Kozinski termed a situation in which “the policies of the two governments are at loggerheads: The state wishes to give the defendant a clean slate, yet

the FIP law imposes no temporal restriction on eligible state convictions triggering the ban.⁸³

Because state convictions serve as predicates, FIP prosecutions create fairness and equality concerns akin to criminal history tabulations under the Guidelines, discussed above.⁸⁴ The effects, however, are even stronger in the FIP context, because unlike the Guidelines⁸⁵ the FIP law imposes no restriction on the number of years back into an individual's criminal history the law can extend.⁸⁶ Moreover, unlike the Guidelines, which merely provide an evidentiary basis for *post hoc* increases to federal sentences, the FIP law provides an independent *ex ante* basis for federal felony-level prosecutions and convictions. And it does so without regard for the nature of the past crime. "The predicate crime," as the First Circuit has noted, "is significant only to demonstrate status . . ."⁸⁷ Prior convictions, according to the Supreme Court, are used to "provide a convenient . . . way of identifying 'especially risky people.'"⁸⁸

The law's heuristic use of prior convictions, however, is of questionable accuracy given the broad qualifying criteria of the FIP law, which indiscriminately sweep up state convictions regardless of their manifestation of dangerousness.⁸⁹ In addition, such uncertainty is increased by the FIP law's

federal law makes the record indelible." *United States v. Tallmadge*, 829 F.2d 767, 782 (9th Cir. 1987) (Kozinski, J., dissenting). As a result, individuals convicted under state law can now avoid the potential trap of thinking that their state record, having been wiped clean, would present no basis for a federal prosecution. *United States v. Sherbondy*, 865 F.2d 996, 1005 (9th Cir. 1988) (expressing the same concern).

⁸³ See *United States v. Hudson*, 53 F.3d 744, 747 (6th Cir. 1995) (stating that § 922(g) "places no age limit on the felonies which may be used to support a felon in possession charge").

⁸⁴ See *supra* notes 60-75 and accompanying text.

⁸⁵ See SENTENCING GUIDELINES, *supra* note 12, § 4A1.2(e)(1) (specifying that prior sentences in excess of thirteen months must have been imposed within fifteen years of the instant offense or have resulted in incarceration during any part of the fifteen-year period). Prior sentences of thirteen months or less must have been imposed within ten years of the commencement of the instant offense. *Id.* § 4A1.2(e)(2).

⁸⁶ See *supra* note 83.

⁸⁷ *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994).

⁸⁸ *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 120 (1983) (quoting *United States v. Bass*, 404 U.S. 336, 345 (1971)).

⁸⁹ See, e.g., David Holthouse, *Living in Exile: Federal Prisons Are Filling Up with People Whose Only Crime Is the Possession of a Gun*, WESTWORD, Mar. 21, 2002, available at http://www.westword.com/Issues/2002-03-21/news/feature_print.html (stating that sentences imposed on almost one-fourth of persons prosecuted in the District of Colorado were based on state predicates involving drug possession). For discussion of the utility and accuracy of heuristics more generally, see, for example, HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556 (2004) (arguing that "moral heuristics play a pervasive role in moral, political, and legal judgments, and . . . they

focus on the extent to which state law makes the predicate “punishable” (not actually “punished”) under then-applicable law.⁹⁰ With this focus, individual judicial determinations in actual cases warranting lesser sentences are systematically ignored,⁹¹ notwithstanding the common tendency of legislatures to set punishments at an extreme, knowing that judges will only rarely impose the maximum sanction.⁹²

This indeterminacy, in turn, raises notice concerns. This is because, despite its moniker, the FIP law actually targets felons and non-felons alike⁹³ and functions as a strict liability offense.⁹⁴ As eligibility turns on whether the

produce serious mistakes”).

⁹⁰ See *United States v. Minnick*, 949 F.2d 8, 9 (9th Cir. 1991) (observing that FIP jurisdiction turns on whether the “sentencing court had *discretion* to impose a term of incarceration of more than one year”) (emphasis added).

⁹¹ See, e.g., *United States v. Marks*, 379 F.3d 1114, 1116 (9th Cir. 2004) (affirming FIP conviction because Washington statutory law authorized a punishment of ten years, even though defendant was sentenced to only six months imprisonment); *Minnick*, 949 F.2d at 9-10 (affirming FIP conviction despite New Jersey statutory presumption against imprisonment for predicate because court had power to impose prison term in excess of one year); *United States v. Place*, 561 F.2d 213, 215 (10th Cir. 1977) (affirming FIP conviction even though the defendant was sentenced to one year in a county jail because California law authorized ten years’ imprisonment; the relevant inquiry was whether the court “could have . . . imposed” a longer sentence (quoting *McMullen v. United States*, 349 F. Supp. 1348, 1351 (C.D. Cal. 1972), *aff’d*, 504 F.2d 1108 (9th Cir. 1974))); see also *United States v. Jones*, 195 F.3d 205, 207 (4th Cir. 1999) (explaining that under FIP law “‘punishable’ is an adjective used to describe ‘crime.’ As such, it is more closely linked to the conduct, the crime, than it is to the individual convicted of the conduct” (quoting the district court opinion)).

In the wake of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), the constitutionality of basing FIP jurisdiction on the statutory maximum sentence might be questionable when the statutory maximum exceeds the sentence authorized under state sentencing guidelines. To date, however, the constitutional argument has not met with success. See, e.g., *United States v. Murillo*, 422 F.3d 1152, 1154 (9th Cir. 2005) (holding that “*Blakely* did not change the definition of what constitutes a maximum sentence under state law . . . : the maximum sentence is the statutory maximum sentence for the offense, not the maximum sentence available in the particular case under the sentencing guidelines”); *id.* at 1155 (stating that the “categorization of offenses” in the present case “faces none of the Sixth Amendment concerns that prompted the *Apprendi* and *Blakely* decisions, and thus those cases have no bearing on the question whether the indictment . . . in the present case . . . violated [defendant’s] Sixth Amendment rights.”).

⁹² See *Ewing v. California*, 538 U.S. 11, 43 (2003) (Breyer, J., dissenting) (arguing that “[s]entencing statutes often shed little light upon real prison time. . . . [T]he statutory maximum is rarely the sentence imposed, and the sentence imposed is rarely the sentence that is served.”).

⁹³ See *supra* notes 79-81 and accompanying text.

⁹⁴ *United States v. Capps*, 77 F.3d 350, 353 (10th Cir. 1996) (explaining that “‘knowingly’ . . . modifies only defendant’s possession of the firearm”).

predicate offense is punishable by over a year in prison (or, if a designated misdemeanor, by over two years of incarceration) individuals actually receiving more lenient punishment can be caught unaware, not unlike with criminal history tabulations under the Guidelines.⁹⁵ Similarly, individuals convicted of domestic violence, which can be categorized as a misdemeanor, are also subject to the law,⁹⁶ even when the provision on which the particular predicate conviction is based is not explicitly related to domestic violence.⁹⁷ To complicate matters further still, predicates are eligible for use even if secured by constitutionally invalid means.⁹⁸ This is because the “federal gun laws . . . focus not on reliability, but on the mere fact of conviction . . . in order to keep firearms away from potentially dangerous persons.”⁹⁹

Finally, uncertainty is enhanced by evidentiary rules potentially at play in FIP prosecutions. Under *Old Chief v. United States*,¹⁰⁰ even if a defendant’s

⁹⁵ As noted above, the Guidelines determine criminal history points in terms of sentences imposed, not actually served. See *supra* note 62. This discrepancy can at times be quite significant and thus can create notice concerns similar to those raised by the FIP law. See, e.g., *United States v. Levenite*, 277 F.3d 454, 468 (4th Cir. 2002) (increasing defendant’s criminal history by three points because he was sentenced to twenty-three months yet served only two days); *United States v. Valdez-Valdez*, 143 F.3d 196, 202-03 (5th Cir. 1998) (increasing defendant’s criminal history score by two points because he was sentenced to 180 days, even though he had served no sentence due to a deferral). However, in the FIP context such concern is exacerbated given that prior state convictions serve as a basis for independent prosecution, not merely a basis for recidivist sentence enhancement.

⁹⁶ See, e.g., *United States v. Mitchell*, 209 F.3d 319, 323 (4th Cir. 2000) (holding that defendant’s “conduct in assaulting his wife – the act that led to his misdemeanor domestic violence conviction – put [defendant] on sufficient notice” that his possession of a firearm was prohibited).

⁹⁷ See, e.g., *United States v. Chavez*, 204 F.3d 1305, 1313 (11th Cir. 2000) (subjecting defendant convicted under generic battery statute to FIP law); *United States v. Meade*, 175 F.3d 215, 218 (1st Cir. 1999) (subjecting defendant convicted under generic assault and battery statute to FIP law); *United States v. Smith*, 171 F.3d 617, 619-21 (8th Cir. 1999) (subjecting defendant convicted under generic disorderly conduct statute to FIP law).

⁹⁸ *Lewis v. United States*, 445 U.S. 55, 64-65 (1980) (explaining that the existence of a valid constitutional ground to attack a prior conviction on a collateral basis is irrelevant to the FIP analysis).

⁹⁹ *Id.* at 67. Any successful constitutional argument, the Court held, must result in a lifting of the ban “before obtaining a firearm.” *Id.* at 64-65. The only exception to this standard involves the “failure to appoint counsel for an indigent defendant.” *Custis v. United States*, 511 U.S. 485, 496 (1994). Another section of the FIP law – that which targets individuals convicted of state domestic abuse offenses classified as misdemeanors – expressly requires that the state predicate conviction be secured consistent with Sixth Amendment rights to counsel and trial by jury (or that a valid waiver have occurred). 18 U.S.C. § 921(a)(33)(B) (2000). *But cf.* *United States v. Chavez*, 204 F.3d 1305, 1314 (11th Cir. 2000) (holding that a prior domestic violence conviction can serve as a FIP predicate when no jury trial right was provided by state law).

¹⁰⁰ 519 U.S. 172, 174 (1997) (holding that a court may not refuse a defendant’s offer to

state conviction is an “extremely old [one] for a relatively minor felony,”¹⁰¹ juries are left to speculate, freeing them to think the worst.¹⁰² This speculation creates the added risk that jurors will indulge prejudices based on race, gender, and socio-economic status.¹⁰³ As Professor Daniel Richman has observed, “[p]resented with a young black male, for example, and told that he has been convicted of some unspecified crime, jurors will be far more likely to decide that the prior crime was, say, robbery or drug dealing, as opposed to fraud.”¹⁰⁴

D. Summary

As the preceding discussion makes clear, states play a significant role in the operation of the federal criminal justice system. Given the paramount role played by states as criminal law norm setters and enforcers,¹⁰⁵ convenience and a desire to secure the most complete information possible support the federal government’s deference to state laws and outcomes. Moreover, as was the case with the vesting of federal authority in state courts in the early decades of the Republic,¹⁰⁶ deference today lessens the federal reach into the criminal law¹⁰⁷ and underscores U.S. confidence in its constituent state sovereigns.¹⁰⁸

stipulate to a prior conviction in order to avoid disclosure of the nature of the crime, when “the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction”).

¹⁰¹ *Id.* at 185 n.8; *see also* Scarborough v. United States, 431 U.S. 563, 579-80 n.1 (1977) (Stewart, J., dissenting) (offering the example of a bookkeeper who retains possession of a rifle after being convicted of embezzlement).

¹⁰² The law, of course, is triggered by federal convictions as well, which can also be based on idiosyncratic U.S. criminal provisions and excessive punishments. *See id.* at 190 (stating that the FIP law could be triggered by a federal law making possession of “short lobsters” a felony (quoting United States v. Tavares, 21 F.3d 1, 4 (1st Cir. 1994)). However, because state convictions overwhelmingly constitute the basis for federal prosecutions under the FIP law, the concern is more theoretical than real.

¹⁰³ Daniel C. Richman, Old Chief v. United States: *Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 951 (1997) (positing that such classifications are particularly “dangerous because of their systematic impact”).

¹⁰⁴ *Id.* As Professor Richman notes, “[o]nce a juror decides what a defendant’s prior felony must have been, the details of that crime will quickly come to mind, even (or perhaps particularly) in the absence of any evidence.” *Id.* at 951 n.46 (citing studies in support); *see also id.* at 951-52 (adding that, meanwhile, “the past transgression of a middle-aged middle-class white defendant can be presumed to be quite benign (albeit technically illegal”).

¹⁰⁵ *See supra* note 26 and accompanying text.

¹⁰⁶ *See supra* notes 20-22 and accompanying text.

¹⁰⁷ *Cf.* United States v. Sherbondy, 865 F.2d 996, 1010 (9th Cir. 1988) (observing that Congress limited the expanse of predicate state crimes triggering enhancement under the Armed Career Criminal Act in order to “avoid ‘federalizing’ a broad range of state crimes”).

¹⁰⁸ This confidence is underscored by the contrasting federal eschewal of criminal justice outcomes in foreign nations and Indian Country. *See* SENTENCING GUIDELINES, *supra* note

Nevertheless, as discussed, federal deference has significant consequences for the federal criminal justice system and the thousands of individuals it processes annually. With it, federal law is infused with the variegated normative positions of states, which in the process creates significant individual and systemic-level disuniformity in the application of national law.

III. THE DOCTRINAL IMPLICATIONS OF FEDERAL DEFERENCE

In addition to its practical ramifications, federal deference has an array of important doctrinal implications for “our federalism,”¹⁰⁹ the nature and extent of the federal crime control apparatus, and current understandings of federal-state relations in criminal justice. This Part examines these implications.

A. *Federalism Implications*

1. One Less “Lab”

While there is no mistaking that federal deference promotes state autonomy and its associated diversity,¹¹⁰ it nonetheless disserves another of federalism’s core values: the Brandeisian ideal of democratic experimentalism and pluralism.¹¹¹ Under the Assimilative Crimes Act, for instance, Congress’s input on the criminal nature of behavior, the substantive definition of offenses, and the sanctions they merit is forsaken because state law is substituted.¹¹² As a result of federal deference, there is one less “lab” (the U.S. government) that can be used to address perceived anti-social behavior.¹¹³

12, §§ 4A1.2(h)-(i), 4A1.3(a) (excluding such sentences from the computation of criminal histories). Noting that the tribal exclusion largely stems from federal concerns over the legal legitimacy of tribal courts, Professor Washburn asserts that exclusion sends a “demoralizing message” to tribal courts and “undermines the[ir] authority . . . within tribal communities.” Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 442 (2004).

¹⁰⁹ *United States v. Lopez*, 514 U.S. 549, 581 (1995) (lauding the “theory and utility of our federalism”); *see also* *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (propounding the benefits of a federal system).

¹¹⁰ Caminker, *supra* note 21, at 1074 (observing that federalism permits a “greater local tailoring and aggregate diversity of policies throughout the nation”); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (identifying as a central benefit of federalism its capacity to give legal effect to local needs and desires).

¹¹¹ *See* *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (lauding capacity of individual states to serve as “laborator[ies],” with the freedom to undertake “experiments without risk to the rest of the country”); *see also* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 434 (1998) (asserting that the diversity of state and federal views ideally promotes a beneficial “experimentalist collaboration”).

¹¹² *See* *supra* note 37 and accompanying text.

¹¹³ *See* Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A*

A similar stultification occurs with federal use of state convictions. The U.S. government uses state criminal law outcomes in "one-shot" deals, without any pretense of analysis or prospect for formal legislative emulation. Consequently, unlike in *Erie* cases (where the federal system also defers to the states),¹¹⁴ no federal-state dialogue is created and no jurisprudential "cross-fertilization" occurs.¹¹⁵ Yet at the same time, by tying federal outcomes to state legal judgments, federal deference creates the same interstate disparities fostered by *Erie*.¹¹⁶

2. Abdication of Authority

Second, federal deference skews the political processes normally associated with the enactment of criminal laws. By utilizing state laws and outcomes to achieve its own policy ends, the U.S. abdicates its criminal lawmaking authority in deference to individual states. While the laws discussed here do not augment state power in any direct sense, they unmistakably give states the ability to affect U.S. law and policy,¹¹⁷ undercutting what has been traditionally viewed as a "foremost" and "exclusive" prerogative of sovereignty: "the power to create and enforce a criminal code."¹¹⁸ As a result, federal officials ultimately become free-riders, undermining U.S. political transparency and democratic accountability.¹¹⁹

Case Study in Controlling Federalism, 75 N.Y.U. L. REV. 893, 908 n.68 (2000) (asserting that "federalization actually enhances the diversity benefits of federalism. One more 'laboratory' is added to the 50 others").

¹¹⁴ See *supra* note 29 and accompanying text.

¹¹⁵ Cf. Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1239-40 (2004) (surveying scholarship on "cross-fertilization"). With both the FIP law and criminal history provision, federal courts look only to outcomes, without interpreting state laws. The Assimilative Crimes Act holds greater promise because, as with *Erie*, the U.S. construes and applies state law. However, because federal courts often eschew reliance on state court interpretations of state substantive laws, the relationship is decidedly one-way. See *supra* note 53 and accompanying text; cf. Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399, 1426-29 (2005) (advocating a more active role for federal courts in interpreting state law).

¹¹⁶ See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 10-11 (1991) (observing that *Erie* replaced federal-state substantive law disparity with a state-state substantive law disparity).

¹¹⁷ See *State v. Langlands*, 583 S.E.2d 18, 20 n.4 (Ga. 2003) (observing that "[a] state cannot express its public policy more strongly than through its penal code. When a state defines conduct as criminal and sets the punishment . . . it is conveying in the clearest possible terms its view of public policy" (quoting *New Mexico v. Edmondson*, 818 P.2d 855, 860-61 (N.M. 1991))).

¹¹⁸ *Heath v. Alabama*, 474 U.S. 82, 93 (1985).

¹¹⁹ Just such a concern inspired the Supreme Court in *New York v. United States*, 505 U.S. 144 (1992), to invalidate Congress's attempt to commandeer New York to dispose of

Again, this is most evident with the Assimilative Crimes Act, which superimposes the policy decisions of states on federal proceedings, without individualized input from the national legislative body. While ACA-based prosecutions are instituted by and in the name of the U.S. government, state law and punishment decisions govern.¹²⁰ As a result, customary democratic processes are circumvented: federal authority is imposed as a result of state law, without the debate and deliberation typically attending a U.S.-enacted law.¹²¹ As the Supreme Court observed in *United States v. Sharpnack*, the ACA permits Congress to proceed “on a wholesale basis. Its reason for adopting local laws is not so much because Congress has examined them individually as it is because the laws are already in force throughout the State in which the enclave is situated.”¹²² With the ACA, as Justice Douglas wrote in his *Sharpnack* dissent, “[f]ederal laws grow like mushrooms without Congress passing a bill.”¹²³ Moreover, the incorporation is dynamic and prospective: the ACA ties U.S. law to changes in state laws as they evolve,¹²⁴

low-level radioactive waste within its borders. Writing for the Court, Justice O’Connor noted that

where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when . . . elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id. at 169; *see also id.* at 183 (asserting that when governments combine their efforts to disguise responsibility, “federalism is hardly being advanced”).

¹²⁰ *See supra* note 37 and accompanying text.

¹²¹ *See United States v. Lopez*, 514 U.S. 549, 576 (1995) (observing that federalism requires “two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States”).

¹²² 355 U.S. 286, 293 (1958).

¹²³ *Id.* at 299 (Douglas, J., dissenting). Writing for himself and Justice Black, Justice Douglas elaborated:

Here it is a sex crime on which Congress has never legislated. Tomorrow it may be a blue law, a law governing usury, or even a law requiring segregation of the races on buses and in restaurants. It may be a law that could never command a majority in the Congress or that in no sense reflected its will. It is no answer to say that the citizen would have a defense under the Fifth and Sixth Amendments to unconstitutional applications of these federal laws or the procedures under them. He is entitled to the considered judgment of Congress whether the law applied to him fits the federal policy. That is what federal lawmaking is.

Id.; *cf.* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 55 n.1 (1973) (asserting that “[i]f the [offenses] are too minor to warrant federal court jurisdiction, they should not be federal crimes”).

¹²⁴ *See Sharpnack*, 355 U.S. at 293-94 (observing with approval that the ACA is a “deliberate continuing adoption by Congress” of state laws and punishments). In *Franklin v. United States*, 216 U.S. 559, 568-70 (1910), the Court upheld the earlier version of the ACA, which limited its scope to state laws in effect at the time of the ACA’s enactment (and

outside the direct controlling influence of Congress.¹²⁵ Importantly, however, this incorporation is only halfway because the substantive law of states, reflecting their legislated views on misconduct, are embraced, yet state-originated rights and procedures, which also (perhaps more so) reflect indigenous values, are eschewed.¹²⁶

Similarly, with criminal history tabulations and FIP prosecutions, federal outcomes are predicated on state policies never formally approved by Congress, and the nationally representative character of federal law is undermined. A New Yorker, of course, has no direct electoral say in what the Texas Legislature deems worthy of criminalization, or, in instances of agreement, the punishment warranted. Nevertheless, when an erstwhile Texan is prosecuted in the Southern District of New York, his Texas conviction record is invoked in the name of the U.S. Government and all its citizens. As a result, he will suffer a deprivation of physical liberty in accord with what the Texas Legislature prescribed, without regard for what legislators in other states (such as New York) or Congress might think.¹²⁷

With all three provisions, moreover, not only are the formal views of states incorporated into U.S. law, the political economies that drive them are unavoidably incorporated as well. It is widely understood that state and federal

re-enactment over the years). In *Sharpnack*, the Court endorsed the current version of the ACA, which makes it a federal crime to commit an act violating state criminal law “at the time of such act.” 355 U.S. at 297 (addressing 18 U.S.C. § 13).

¹²⁵ Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1369-70 (1996) (stressing that “[t]he concern here is that Congress has allowed the States to bind it without any control over what the States may do”). For discussion of the point that federal incorporation under the ACA is not tantamount to Congressional delegation in a strict sense, insofar as the ACA only empowers states to enact laws that Congress could enact, and does not function to validate criminal laws states themselves lack authority to enact, see Norman W. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 231-32 (2005).

¹²⁶ See *supra* notes 51-52 and accompanying text.

¹²⁷ Cf. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17, at 364 (2d ed. 1988) (asserting that federal delegation is predicated on the “supposed consent of the governed” and that such consent presumes the ability to trace public law to a choice made by those “politically and legally responsible” to the governed); Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 276 (1997) (asserting with respect to direct delegations that “Congress must provide substantial normative justifications for *effectively* excluding out-of-state citizens from federal policy formation and implementation”). But see Lynn A. Baker, *They the People”: A Comment on U.S. Term Limits, Inc. v. Thornton*, 38 ARIZ. L. REV. 859, 864-65 (1996) (demonstrating that the structure of Congress permits federal law to be enacted with the backing of as little as thirty-one percent of the national electorate and stating that “in the realm of federal lawmaking, We the People of this nation do not exist in any meaningful way”).

legislatures alike are subject to “pathologies”¹²⁸ that affect the development of criminal laws¹²⁹ and sentencing policies.¹³⁰ Federal deference thus creates a layer cake of pathology, reflecting at a macro level the distinct institutional concerns of state governments more generally, and at a micro level the unique political dynamics of individual states.¹³¹

Finally, deference to state value judgments raises accuracy concerns, based again on the varied political sensibilities of the state and federal governments. For instance, before *Lawrence v. Texas* invalidated the criminalization of consensual sodomy,¹³² the thirteen states having such laws (including four states targeting only homosexual sodomy)¹³³ would be permitted to affect federal outcomes, despite the absence of any express decision by the U.S. Congress prohibiting the behavior.¹³⁴ A similar outcome arises with federal deference to state sentencing mores. State punishments, as a general rule, are less severe than their federal counterparts, and these sentences are directly reflected in the criminal history tabulations of federal defendants under the

¹²⁸ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507-12 (2001).

¹²⁹ On the idiosyncratic workings of state legislatures in their criminal lawmaking, see, for example, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704-11 (2005); Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 170-173 (2003). For an examination of the federal criminal lawmaking process, see generally Sara Sun Beale, *What's Law Got to Do With It: The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997).

¹³⁰ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 798-812 (2005) (reviewing the varied political influences at work in the sentencing policies of Congress and the states); see also Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 258 n.158 (2004) (noting that “[t]he competition between corrections and other government spending is not so keen in the federal system”); cf. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 281-84 (1990) (examining distinct state and federal interest group analyses at work in the creation of civil law).

¹³¹ The discussion of necessity focuses on states, not the District of Columbia, which (while also providing laws and outcomes to the U.S.) is subject to Congressional oversight and hence does not raise the same political process concerns that arise with states.

¹³² 539 U.S. 558, 579 (2003).

¹³³ *Id.* at 559.

¹³⁴ While in many of these states consenting adults would be subject to misdemeanor liability, several states imposed felony liability on defendants. See, e.g., IDAHO CODE ANN. § 18-6605 (1997) (setting a punishment not to exceed five years); MISS. CODE ANN. § 97-29-59 (1999) (setting a punishment not to exceed ten years); N.C. GEN. STAT. § 14-177 (1999) (classifying sodomy as a class “I” felony); VA. CODE ANN. § 18.2-361 (1996) (declaring sodomy a class “6” felony).

U.S. Sentencing Guidelines.¹³⁵ As a result, federal sentences incorporate a state-based “discount,” leading to possible sub-optimal externalities,¹³⁶ which Congressional representatives might be inclined to reject if directly asked.

Of course, the foregoing observations are susceptible to an alternate view: that federal deference actually enhances sensitivity to democratic norms by tying U.S. law to decisions of “the People” of individual states. Such an assessment, however, misses the essential point that what is lacking is *federal* decision-making input,¹³⁷ which ideally reflects collective national interests and values.¹³⁸ State laws naturally reflect the distinct positions of state legislators, who are not held accountable to, and need not accommodate the interests of, the nation as a whole.¹³⁹

In sum, by deferring to state laws and outcomes the U.S. allocates to states the power to define the content and application of federal law. In so doing, it in effect atavistically embraces the antebellum view that individuals are tribe-like members of the states in which their misconduct occurred,¹⁴⁰ not national

¹³⁵ See *supra* note 63 (discussing the Guidelines’ criminal history tabulation methodology).

¹³⁶ Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1311-12 & n.164 (2005) (observing that state budget constraints affecting sentencing policies might lead to “suboptimal sentences”).

¹³⁷ As Paul Robinson has noted, the legislative process “provide[s] an occasion for public debate that can help build norms, with the conclusion of the debate announced by legislative action, or inaction.” Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1868 (2000).

¹³⁸ See *Gonzales v. Raich*, 125 S. Ct. 2195, 2215 (2005) (stressing that the distinct “democratic process” allows citizens’ voices to be “heard in the halls of Congress”). This is not to say, of course, that the federal legislative process is necessarily any more enlightened than its state counterparts, contrary to Madison’s surmise. See THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 83-84 (asserting a preference for national leaders who will more likely have “enlightened views and virtuous sentiments [that] render them superior to local prejudices and to schemes of injustice”).

¹³⁹ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803-05 (1995) (declaring that “in th[e] National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation. . . . Representatives and Senators are as much officers of the entire Union as is the President”). For additional voicing of this sentiment, from the earliest days of the Republic, see ROY SWANSTROM, THE UNITED STATES SENATE 1787-1801: A DISSERTATION ON THE FIRST FOURTEEN YEARS OF THE UPPER LEGISLATIVE BODY, S. DOC. NO. 99-19, at 154-74 (1st Sess. 1985) (citing numerous examples).

¹⁴⁰ See Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 984 (2003) (stating that “[a]t the time of the Civil War, Robert E. Lee resigned his federal commission, and renounced his oath of allegiance because as a ‘Virginian’ he could not bear to honor that oath. It is hard today to find a citizen of the United States who conceives of her primary identity as a ‘Virginian’ or a ‘Pennsylvanian’”); see also James E. Hickey, Jr., *Localism, History and the Articles of Confederation: Some Observations About the Beginning of U.S. Federalism*, IUS GENTIUM

citizens of a larger federal republic.¹⁴¹

3. Arbitrariness

Third, as suggested, deference unavoidably injects an element of arbitrariness into the federal criminal justice system. Federal decisions affecting the physical liberty of individuals are driven not by a unitary federal decision-making apparatus, but rather by individual states, permitting nationally applicable law to assume different meanings and to be enforced differently across the land. This contingent variation, while perhaps not warranting constitutional concern *per se*,¹⁴² nonetheless presents doctrinal difficulty in an ostensibly cohesive federal system.

Variability of course is a direct, indeed desired, byproduct of the U.S. political structure. In authorizing the Guidelines, for instance, Congress did not seek to divest the federal system of all variation – rather, only “unwarranted” disparity¹⁴³ that created “an unjustifiably wide range of sentences [imposed on] offenders with similar histories, convicted of similar crimes, committed under similar circumstances.”¹⁴⁴ The exclusive focus of

Fall 2003, at 11 (pointing out that in the Confederation era “it would have been odd and uncomfortable for the people of America to say they were ‘Americans.’ Rather, they were ‘Virginians,’ ‘Marylanders,’ and ‘New Yorkers.’ Their country was their state, not the ‘U.S.A.’”); *cf.* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 316-17 (1992) (“There are other ways to organize, but we did not choose them. An American state is not like a nomadic tribe, with membership based on kinship.”).

¹⁴¹ *Cf.* *Edwards v. California*, 314 U.S. 169, 182 (1941) (Jackson, J., concurring) (regarding “United States citizenship [as] the dominant and paramount allegiance among us”).

¹⁴² *See* *United States v. Lender*, 985 F.2d 151, 156 n.* (4th Cir. 1993) (rejecting the claim that “incorporation of state definitions into the federal [criminal law] violates the Equal Protection Clause by conditioning sentence enhancement on the ‘arbitrary criteria’ of where certain predicate offenses were committed. Congress is not constitutionally prohibited from leaving some aspects of federal statutes to the judgment of individual states”); *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1977) (rejecting an equal protection challenge based on U.S. deference to state-prescribed punishments under FIP law, and asserting that “[i]t was entirely rational for Congress” to defer to states and that “there is no requirement of national uniformity” (quoting *United States v. Burton*, 475 F.2d 469, 471 (8th Cir. 1973))); *United States v. Barre*, 324 F. Supp. 2d 1173, 1175 (D. Colo. 2004) (stating with respect to federal incorporation of state laws, and specifically the inclusion of state variations as to criminalization, that “[t]he United States Supreme Court does not consider such a lack of uniformity between the states a constitutional impediment”).

¹⁴³ *See* S. REP. NO. 98-225, at 52 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235 (acknowledging that “[a] primary goal of sentencing reform is the elimination of unwarranted sentencing disparity”).

¹⁴⁴ *Id.* at 38, *reprinted in* 1984 U.S.C.C.A.N. 3183, 322-29; *see also* 28 U.S.C. § 991(b)(1)(B) (specifying a goal of providing certainty and fairness in sentencing and

Congressional concern was on sentencing disparities among federal courts,¹⁴⁵ even though state variations play a significant role in creating such disparities.¹⁴⁶ As the First Circuit stated: “The Sentencing Commission fully recognized that the seriousness of any particular state offense in a defendant’s record might be viewed differently across jurisdictional lines [A]ny such lack of uniformity is the consequence of a deliberate policy by Congress and the Commission.”¹⁴⁷

This view, however, contrasts sharply with federal concern over state-level variations in other legal areas. For instance, U.S. immigration¹⁴⁸ and capital

avoiding sentencing disparities); SENTENCING GUIDELINES, *supra* note 12, § 1A1.1 (identifying federal goals as including, *inter alia*, “uniformity in sentencing”). For discussion of the socially corrosive effects of case-level disparities, with a focus on those generated by federal courts in the pre-Guidelines era, see S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3182-3565, at 45-46 (finding that “[s]entencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public”).

¹⁴⁵ SENTENCING GUIDELINES, *supra* note 12, § 1A1.1 (“Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders.”). For discussion of Congress’s acute concern for intercourt outcome disparities more generally, see Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 273 (2005) (detailing the legislative history behind the Sentencing Reform Act of 1984).

¹⁴⁶ See SENTENCING GUIDELINES, *supra* note 12, § 4A1.1, cmt. background (acknowledging that criminal histories reflect “jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement”); *cf.* Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997) (observing that “disparity is not a self-defining concept”).

¹⁴⁷ *United States v. Restrepo-Aguilar*, 74 F.3d 361, 366 (1st Cir. 1996); *cf. Lender*, 985 F.2d at 156 n.* (asserting that “[i]t is not irrational for Congress to defer to state law with regard to the characteristics of a prior offense, and doing so is no more intentionally arbitrary than our system of federalism itself”).

¹⁴⁸ Under the Immigration and Nationality Act (INA), for example, noncitizens are subject to deportation if they are convicted of an “aggravated felony,” an expansive category that includes, *inter alia*, state convictions for drug trafficking crimes. See 8 U.S.C. § 1101(a)(43)(B) (2000) (listing various offenses constituting an “aggravated felony”). Federal circuits applying the provision typically require that state laws track federal law in material ways, insisting that state offenses contain a trafficking element or, if not, are punishable as a felony under an analogous federal law (a “hypothetical federal felony”). See, e.g., *Cazarez v. Guiterrez*, 382 F.3d 905, 916 (9th Cir. 2004) (concluding that “there is absolutely no evidence that Congress intended to incorporate state variations . . . into the INA”). As a result, the locus of prior conviction does not determine immigration outcomes; it is an “irrelevant and fortuitous factor[.]” *Id.* at 914 (citation omitted); see also *id.* at 917 (arguing that otherwise “aliens lucky enough to have been convicted in a state that punishes drug offenses leniently will have much less serious consequences for their offenses”). In short, deportation is not permitted to turn on an “accident of geography.” See *Nemetz v. INS*, 647 F.2d 432, 435 (4th Cir. 1981) (declaring that an alternative holding would be “incongruous with common sense”).

punishment laws¹⁴⁹ adopt a federal-centric approach, tempering and at times disavowing altogether (with regard to the death penalty)¹⁵⁰ the effects of individual state laws. Likewise, in instances of concurrent jurisdiction, the U.S. staunchly refuses to account for often drastically lesser state criminal penalties,¹⁵¹ and rebuffs defense efforts to secure downward departures on the basis of such disparities.¹⁵² As the Second Circuit stated in rejecting one such

Consistent with this view, in contrast to the FIP law, whether a “conviction” was secured by state authorities is determined by federal not state law. *See* 8 U.S.C. § 1101(a)(48)(A) (2000) (defining “conviction” with respect to aliens); *see also* United States v. Altieri, 275 F. Supp. 2d 10, 12-13 (D. Maine 2003) (citing Senate Report acknowledging that states would determine which individuals will be subject to FIP prosecution, but not deportation); *cf.* Murillo-Espinoza v. INS, 261 F.3d 771, 774 (9th Cir. 2001) (stating that deportation should not occur based on whether “criminals [were] fortunate enough to violate the law in a state where rehabilitation is achieved through the expungement [sic] of records”) (citation omitted).

¹⁴⁹ According to the U.S. Attorneys’ Manual, a state’s opposition to the death penalty does not merit specific consideration when contemplating a federal capital charge, and indeed might militate in favor of U.S. jurisdiction. The Manual provides that a state’s “relative ability and willingness” to prosecute a death-eligible case “effectively” must be considered in weighing whether the U.S. has a “substantial” interest in assuming jurisdiction. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-10.070 (2004) (listing factors federal prosecutors should consider in issuing a federal indictment when concurrent jurisdiction exists). In an even more patent affront to comity, U.S. law provides that, in the event a state does not authorize capital punishment, the federal “court shall designate another State, the law of which does provide the implementation of a sentence of death, and the [death] sentence shall be implemented in the latter State in the manner prescribed by [such State’s] law.” 18 U.S.C. § 3596(a) (2000); *see also* United States v. Sampson, 300 F. Supp. 2d 278, 280 (D. Mass. 2004) (imposing death on Massachusetts resident and designating that execution shall take place in New Hampshire).

¹⁵⁰ *See* Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1336-38, 1345 (2002) (observing that thirteen of fifty-one U.S. jurisdictions prohibit capital punishment and discussing increasing concern among jurisdictions over its use).

¹⁵¹ On these disparities more generally, *see* Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730-32 (2002); Greg Hollon, Note, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499, 503-05, 527 (1996). For discussion of the forum shopping concerns raised by state-U.S. sentencing disparity in particular, *see*, for example, Robert Heller, *Selective Prosecution and the Federalization of the Criminal Law: The Need for Meaningful Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1313 (1997).

¹⁵² *See, e.g.*, United States v. Williams, 282 F.3d 679, 683 (9th Cir. 2002) (deeming it improper for a sentencing court to depart downward on the basis of disparity between sentences authorized by state and federal law in instances of concurrent jurisdiction); United States v. Gallegos, 129 F.3d 1140, 1143-44 (10th Cir. 1997) (reversing downward departure based on disparity of sentences imposed upon co-defendants prosecuted in state and federal courts).

claim, oblivious to the uniformity issues raised by concomitant deference to state sentences in the tabulation of criminal histories under the Sentencing Guidelines:

Allowing departure [from the Guidelines] because a defendant might have been subjected to different penalties had he been prosecuted in state court would make federal sentences dependent on the law of the state in which the sentencing court was located, resulting in federal sentencing that would vary from state to state. To adopt this rationale for departure would surely undermine Congress' [sic] stated goal of uniformity in sentencing.¹⁵³

Federal-centrism is also evident in the application of particular federal sentencing provisions. For instance, the federal "Three Strikes"¹⁵⁴ and "Armed Career Criminal"¹⁵⁵ laws, as well as various recidivist enhancement provisions of the Sentencing Guidelines,¹⁵⁶ can turn exclusively on federal law, using the "categorical" test adopted in *Taylor v. United States*.¹⁵⁷ Under *Taylor*, when assessing whether a defendant convicted under the FIP law has been previously convicted of a "violent felony," triggering a mandatory fifteen year minimum under the Armed Career Criminal Act (ACCA) and the Guidelines,¹⁵⁸ a federal court can only consider "the fact of conviction and the statutory definition of the prior offense."¹⁵⁹ If the state law criminalizes conduct that would not qualify for enhancement under federal law, the state conviction cannot serve as

¹⁵³ *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993); *see also United States v. Snyder*, 136 F.3d 65, 69 (1st Cir. 1998):

If the guidelines' goal is to promote uniformity among federal courts when imposing sentences for federal crimes, then departures aimed at alleviating federal/state sentencing disparity are flatly incompatible with it. Endeavoring to make a federal sentence more closely approximate that which a state court might impose for similar criminal activity would recreate the location-based sentencing swings that Congress sought to minimize when it opted for a guideline paradigm.

¹⁵⁴ 18 U.S.C. § 3559(c)(1)(A)(i)-(ii) (2000) (requiring sentence of life imprisonment when defendant is convicted of serious violent felony and has been previously convicted of "2 or more serious violent felonies" or "one or more serious violent felonies and one or more serious drug offenses").

¹⁵⁵ *Id.* § 924(e)(1) (2000) (imposing fifteen-year enhancement upon individuals convicted of being a felon in possession of a firearm when such persons have three prior convictions for a "violent felony" or "serious drug offense").

¹⁵⁶ *See, e.g.,* SENTENCING GUIDELINES, *supra* note 12, § 4B1.4 (enhancing sentences of "career offenders" based on finding of prior felony "crime of violence" or "controlled substance offense"); *id.* at § 2K2.1(a)(4)(A) (enhancing sentence for firearms possession based on finding of prior "crime of violence").

¹⁵⁷ 495 U.S. 575 (1990).

¹⁵⁸ *See* SENTENCING GUIDELINES, *supra* note 12, § 4B1.4 cmt. n.1 (explaining the relationship between the Sentencing Guidelines and the ACCA).

¹⁵⁹ *Taylor*, 495 U.S. at 602 (construing 18 U.S.C. § 924(e)).

an enhancement basis.¹⁶⁰ Federal courts, rather than deferring to particular state definitions, must ask whether the state predicate crime jibes with the “generic” definition used “in the criminal codes of most states.”¹⁶¹ If the particular state definition supporting the conviction is broader, the conviction will not be counted as a “violent felony.”¹⁶²

Such an approach, the *Taylor* Court reasoned, creates a more uniform, national definitional benchmark, thereby promoting the avowed consistency goals of federal sentencing law.¹⁶³ The Court deemed it “implausible” that Congress, in enhancing sentences of recidivist felons convicted of possessing firearms, intended for enhancements “to depend on the definition adopted by the State of conviction.”¹⁶⁴ Ignoring the fact that the federal FIP law (which itself triggers the ACCA enhancement) turns on state laws and outcomes,¹⁶⁵ the *Taylor* Court opined that having the ACCA depend on the letter of state law “would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct ‘burglary.’”¹⁶⁶

Finally, federal-centrism is evidenced in the federal government’s eschewal

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 598.

¹⁶² *Id.* at 591 (holding that the same crime should not be considered a “violent felony” in one state if it is not considered a “violent felony” in another).

¹⁶³ *Id.* at 590-92 (analyzing Congress’s intent in passing § 924(e) and illustrating the disparities that could occur if the ACCA depended solely on state law).

¹⁶⁴ *Id.* at 590.

¹⁶⁵ *See* 18 U.S.C. § 924(e)(1) (2000) (imposing a mandatory fifteen-year minimum sentence on persons convicted under FIP law and having three prior convictions for a “violent felony”).

¹⁶⁶ *Taylor*, 495 U.S. at 590-91; *see also id.* at 592 (“We think that ‘burglary’ . . . must have some uniform definition independent of the labels employed by the various States’ criminal codes.”). According to Michael O’Neill, a former member of the Sentencing Commission, the Commission opted to use maximum sentences imposed as a proxy for offense seriousness due to the practical difficulties associated with securing defendants’ state conviction history records. *See* O’Neill, *supra* note 63, at 325-26 (arguing that “this practical consideration was critical” and that the policy decision resulted in a “more realistic method because of its field scoring reliability”). These same archival difficulties, however, are of course also present in U.S. efforts to assess prior state predicates in the ACCA context. As Professor O’Neill observes, the “current federal system is thus something of a hybrid in that it uses both sentence length and offense type to ascertain a criminal history score.” *Id.* at 325. Moreover, inconsistency reigns even within the Sentencing Guidelines’ criminal history provision itself inasmuch as Section 4A1.2(c) requires courts to evaluate whether a prior conviction is “similar” to enumerated minor offenses “by whatever name they are known,” requiring that the conviction and sentence be disregarded for criminal history purposes. *See, e.g.,* *United States v. Lopez-Pastrana*, 244 F.3d 1025, 1026-28 (9th Cir. 2001) (analyzing whether a prior Reno, Nevada conviction for shoplifting is similar to the enumerated offense of “insufficient funds check”).

of foreign nation convictions. Congress has expressly excluded such convictions from criminal history tabulations¹⁶⁷ and, as a result of *United States v. Small*,¹⁶⁸ they cannot now serve as predicates for FIP prosecutions. The *Small* Court, while acknowledging that “one convicted of a serious crime abroad may well be as dangerous as one convicted of a similar crime in the United States,”¹⁶⁹ cited several reasons in support of its conclusion that foreign convictions did not deserve deference. First, foreign convictions “may include a conviction for conduct that domestic laws would permit.”¹⁷⁰ Second, they might originate in nations with legal protections “inconsistent with an American understanding of fairness.”¹⁷¹ Third, consideration of foreign convictions could entail deference to punishments for “conduct that domestic law punishes far less severely.”¹⁷²

The outcome in *Small*, in addition to being at odds with the Court’s recent deference to international norms in its constitutional jurisprudence more generally,¹⁷³ is strikingly out of step with federal tolerance for the domestic discrepancies highlighted here. Domestic criminal laws, not unlike their foreign counterparts, are highly variable. These variations arise not just in substantive legal definitions¹⁷⁴ but also in the conduct such laws criminalize.¹⁷⁵

¹⁶⁷ SENTENCING GUIDELINES, *supra* note 12, § 4A1.2(h). The same aversion is evident with tribal court convictions. *See supra* note 108 (discussing federal disregard of prior tribal court convictions due to concerns over their legitimacy). Both types of convictions at times can, however, be used to justify an upward departure from the otherwise applicable (“heartland”) punishment. *See* SENTENCING GUIDELINES, *supra* note 12, § 4A1.3(a) (allowing an enhanced sentence if the criminal history does not adequately illustrate the defendant’s criminality).

¹⁶⁸ 125 S. Ct. 1752, 1756 (2005).

¹⁶⁹ *Id.* at 1758; *see also id.* at 1763 (Thomas, J., dissenting) (deeming it “eminently reasonable for Congress to use convictions punishable by imprisonment for more than one year – foreign no less than domestic – as a proxy for dangerousness”); *United States v. Winson*, 793 F.2d 754, 758 (6th Cir. 1986) (“We can perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States.”).

¹⁷⁰ *Small*, 125 S. Ct. at 1755 (citing Soviet-era laws criminalizing private entrepreneurial activity, as well as Cuban laws criminalizing particular speech).

¹⁷¹ *Id.* (citing Congressional report noting procedural unfairness in foreign nations).

¹⁷² *Id.* at 1756 (citing Singapore law punishing vandalism by a prison term of up to three years).

¹⁷³ *See Roper v. Simmons*, 125 S. Ct. 1183, 1198-1200 (2005) (citing international norms in deciding to invalidate a state law permitting execution of juveniles on Eighth Amendment grounds); *Lawrence v. Texas*, 539 U.S. 558, 573, 576-77 (2003) (citing international norms in deciding to invalidate state law criminalizing consensual homosexual sodomy); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing international norms in deciding to invalidate state law permitting execution of mentally retarded defendants).

¹⁷⁴ *See supra* note 67 and accompanying text.

¹⁷⁵ *See supra* note 66 and accompanying text.

Moreover, states, like nations, differ markedly in the severity of the punishments they impose,¹⁷⁶ and while state procedures cannot fall below U.S. constitutional standards,¹⁷⁷ and hence do not raise the same degree of concern as their foreign counterparts, they differ significantly from one another – and the federal government – in ways that can be outcome determinative.¹⁷⁸

In sum, the U.S., when it sees fit to do so, has a ready capacity to neutralize state diversity and achieve conformity,¹⁷⁹ despite the negative effects on comity and significant resource costs that can attend exclusive reliance on federal law.¹⁸⁰ Its failure (indeed, refusal) to do so in the three prominent areas discussed above highlights the existence of a major inconsistency that creates substantial variability, and arbitrariness, in the federal criminal justice system.

4. Federal Aggrandizement

Finally, federal deference has important consequences for the scope, content, and effect of federal criminal law itself. While greatly enlarged beyond the bounds originally prescribed by the Constitution,¹⁸¹ federal criminal law remains “interstitial” in character.¹⁸² By deferring to individual state laws and outcomes, the U.S. secures a critically important, fifty-state pool of substantive law and conviction information.

This growth is most explicit with the Assimilative Crimes Act, which allows the U.S. to adopt state criminal laws as its own.¹⁸³ As a result of the ACA,

¹⁷⁶ See *supra* note 68 and accompanying text.

¹⁷⁷ See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 149 (2001) (observing that state experimentation with constitutional rights “is limited by a ‘floor’ of basic, federal constitutional guarantees”).

¹⁷⁸ See *supra* notes 69-70 and accompanying text.

¹⁷⁹ See *United States v. Lender*, 985 F.2d 151, 157 (4th Cir. 1993) (citing *United States v. Taylor*, 495 U.S. 575 (1990), and finding that “[t]he cases make clear that in the absence of a specific indication [from Congress] to incorporate the differing rules of the states, federal criminal sanctions should be applied with uniform standards and definitions”).

¹⁸⁰ For instance, the “categorical” test of *Taylor* comes at a distinct efficiency cost: it requires federal courts to engage in case-by-case analyses of whether state law-based convictions qualify for acceptance under U.S. law. As a consequence, it is at variance with the accepted view that uniform laws promote efficiency interests. See Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138 (1996) (asserting that uniform laws and their application can reduce inconsistency costs).

¹⁸¹ See Alistar E. Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana After United States v. Lopez*, 88 CAL. L. REV. 1575, 1582-83 (2000) (observing that the Constitution expressly grants U.S. criminal law authority with respect to only counterfeiting, piracy, military crimes, and treason).

¹⁸² See PAUL M. BATOR ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 533-34 (3d ed. 1998).

¹⁸³ See *supra* notes 36-41 and accompanying text (illustrating how the Assimilative Crimes Act ties federal criminal outcomes to state substantive law). Not coincidentally, the

federal prosecutions are permitted when an absence of applicable federal law would otherwise act as a bar.¹⁸⁴ Moreover, state-legislated crimes assimilated under the ACA can serve as the basis for federal sentencing enhancements.¹⁸⁵ This is because "[a] defendant charged with violating a statute adopted through the ACA is charged with a federal crime."¹⁸⁶ Finally, even in the event a conviction does not result, the specter of state law being applied (even when state authorities would be disinclined to prosecute) affords federal prosecutors yet another tool in their already expansive charging and plea-bargaining arsenal.¹⁸⁷

Federal use of state convictions similarly contributes to federal growth, doing so in a manner that is at once more pervasive and less overt.¹⁸⁸ Criminal history tabulations of federal defendants are directly influenced by state convictions, enabling the U.S. to better achieve its penal goals of retribution, deterrence and incapacitation vis-à-vis individual federal defendants.¹⁸⁹ The FIP law uses state convictions to mount independent federal prosecutions at the felony level,¹⁹⁰ an undertaking with widespread political support.¹⁹¹ And, even

ACA itself was part of an early expansion of U.S. enumerated criminal law authority, contained in the Federal Crimes Act of March 3, 1825. *See Williams v. United States*, 327 U.S. 711, 720-21 n.19 (1946).

¹⁸⁴ *See, e.g., United States v. Griffith*, 864 F.2d 421, 424 (6th Cir. 1980) (assimilating state assault law which, unlike federal law, permitted conviction based on a mens rea of recklessness). Assimilation also has a subtle yet important institutional consequence. Because state criminal laws (especially regarding sexual assault) are often crafted with greater specificity than their federal counterparts, the tendency of Congress to enact unduly broad laws is increased. *See Dan M. Kahan, Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 6-16 (1997) (describing Congress's tendency to enact broad laws, and asserting that this tendency functions to cede power to define the scope of criminal laws to the judiciary); Stuntz, *supra* note 128, at 533-39 (arguing that prosecutors have incentives to lobby for broad laws that make it easier for them to charge and secure convictions).

¹⁸⁵ *See, e.g., United States v. Terry*, 131 F.3d 138 (4th Cir. 1997), No. 96-4743, 1997 U.S. App. LEXIS 34424 (unpublished opinion) (upholding a conviction for malicious shooting into an occupied vehicle, a crime under Virginia law, as affected by 18 U.S.C. § 924(c)(1), which authorizes a ten-year enhancement).

¹⁸⁶ *Terry*, 1997 U.S. App. LEXIS 34424, at *5; *see also United States v. Minger*, 976 F.2d 185, 187 (4th Cir. 1992) ("When a state law is assimilated under the ACA, the ACA transforms the state law into a federal law for purposes of prosecution, and any violation of the state law becomes a crime against the United States.").

¹⁸⁷ *See Blakely v. Washington*, 542 U.S. 296, 311 (2004) (finding that there is "no shortage of *in terrorem* tools at prosecutors' disposal").

¹⁸⁸ *Cf. Wendy E. Parmet, Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 65 (1999) (discussing how federal regulation of state court procedures can "covertly" operate to "slyly federalize tort law without inviting or even permitting public recognition or consideration of what is occurring").

¹⁸⁹ *See* 18 U.S.C. § 3553(a) (2000) (specifying federal sentencing goals).

¹⁹⁰ *See supra* note 77-78 and accompanying text.

when such prosecutions do not ensue, the FIP law itself, like the ACA,¹⁹² ultimately serves to augment the plea bargaining capacity of federal prosecutors.

Beyond its immediate practical impact, federal aggrandizement has an important corollary political consequence. Because it is organically tied to state laws and outcomes, aggrandizement functions to amplify their application and effect: the crime control strategies and normative views of states, rather than being cabined in their jurisdictions of origin, as the Framers envisioned,¹⁹³ are reflexively spread across the land. As a result, state criminal justice “experiments” are not permitted to be undertaken in isolation, “without risk to the rest of the country,” as Justice Brandeis hoped,¹⁹⁴ but instead are allowed to ripple through the national criminal justice system as a whole.

Importantly, this embedding of state preferences into the federal criminal law does not occur in a historic vacuum; rather, it is temporally contingent, and can have a retrograde character. This effect is most pronounced with the FIP law and the Guidelines’ criminal history provision, which can encompass state convictions dating back fifteen years or more,¹⁹⁵ allowing them to be insulated against the naturally occurring normative evolution of criminal laws and policies.¹⁹⁶ Convictions for offenses once defined differently,¹⁹⁷ no longer

¹⁹¹ See Richman, *supra* note 103, at 980-81 (observing “[t]hat federal prosecutors will bring a sizable number of § 922(g)(1) cases is virtually certain. One of the few areas of common ground in the often bitter gun control debate is a consensus that the felon-in-possession law should be vigorously enforced”); see also Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1668 (2002) (observing that Congress has repeatedly increased FIP penalties since 1968).

¹⁹² See *supra* note 187 and accompanying text.

¹⁹³ According to Madison, federalism was created with such potentialities for state extremism in mind. Rather than nullifying such laws, federalism allowed them to remain localized to specific states:

The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. . . . A rage for paper money, for an abolition of debts . . . or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government.

THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 84.

¹⁹⁴ *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

¹⁹⁵ See *supra* notes 85-86 and accompanying text.

¹⁹⁶ See Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 35-36 (1995) (observing that “[p]ublic perception of the magnitude of any given social harm is likely to shift over time in response to the changing social context”); cf. V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868*, at 7 (1994) (surveying the history of the English “bloody code,” which contained over 200 capital crimes).

¹⁹⁷ See, e.g., *State v. Sandoval*, 89 P.3d 92, 94 (N.M. Ct. App. 2004) (acknowledging a

widely used or repealed,¹⁹⁸ or perhaps reflecting discriminatory prosecutorial impulses (e.g., racial discrimination¹⁹⁹ or homophobia²⁰⁰), are preserved and given contemporary force.²⁰¹ A similar effect is seen with the punishments imposed for past offenses. Because the FIP law and the Guidelines' criminal history provision focus on the applicable punishment at the time of the individual's former conviction,²⁰² the laws can resist progressive change in sentencing mores. Consequently, even though many states are now rethinking the draconian sentences imposed in past decades and instituting more lenient penal policies,²⁰³ the provisions can function to perpetuate past harshness and

statutory change in the definition of criminal trespass to include a "knowing" element).

¹⁹⁸ See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 34-37 (1996) (observing the occurrence of desuetude and discussing its effects).

¹⁹⁹ See generally CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* (1993) (surveying historic and contemporary laws that target particular minority populations); cf. RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 84-85 (1997) (discussing post-Civil War "Black Codes" permitting African-Americans to be singled out for prosecution). For discussion of the ongoing racially disparate effect of sentencing more generally, see DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); Symposium, *The New Data: Over-representation of Minorities in the Criminal Justice System*, 66 LAW & CONTEMP. PROBS., Summer 2003, at 1.

²⁰⁰ See generally William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007 (1997) (discussing biased enforcement of criminal laws against non-heterosexuals); Robert L. Jacobson, Note, "Megan's Laws" Reinforcing Old Patterns of Anti-Gay Police Harassment, 87 GEO. L.J. 2431 (1999) (examining use of criminal laws and sex offender registration statutes to unfairly target gay men).

²⁰¹ Again, before *Lawrence v. Texas*, 539 U.S. 558 (2003), invalidated laws criminalizing adult consensual sodomy, see *supra* notes 132-134 and accompanying text, U.S. law would have reflexively embedded the sentiments of such states in federal outcomes, despite the fact that judicial and legislative rescissions of sodomy laws in the preceding several decades highlighted an increasing aversion to the prohibition. See *Lawrence*, 539 U.S. at 570 (finding that "[o]ver the course of the last decades, States with same-sex prohibitions have moved toward abolishing them"); see also *id.* at 579 (observing that "laws once thought necessary and proper [can] in fact serve only to oppress").

²⁰² See *supra* notes 63, 79 and accompanying text.

²⁰³ Among the most notable examples is New York's decision to mitigate its draconian "Rockefeller drug laws." Joe Mahoney & Tracy Connor, *State KOs Toughest Drug Laws*, N.Y. DAILY NEWS, Dec. 8, 2004, at 4 (observing that the "bill passed by the Senate and Assembly guts the most draconian penalties on the books but stops short of a full repeal of statutes"); see also Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, 15 FED. SENT'G. REP. 41, 45, Fig.2 (2002) (surveying recent state efforts to mitigate sentences); Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1 (surveying state efforts to eliminate mandatory minimums and restore parole).

For an examination of harsh criminal law-related measures enacted in recent years, which will one day be reflected in criminal histories, see Wayne A. Logan, "Democratic

give it ongoing effect.²⁰⁴

Despite the foregoing concerns, it is unlikely that the federal growth described here will diminish any time soon, at least as a result of pressure from the only likely institutional catalysts for change – the states themselves. This is so for several reasons. First, the states will not likely notice (and hence be alarmed by) the growth because the borrowing of their law in federal enclave prosecutions (ACA) and the secondary use of state convictions (FIP and criminal histories) occur off the radar of the daily operation of state criminal justice systems.²⁰⁵ Second and more important, even if apparent, the federal growth results in no net loss to state sovereign authority,²⁰⁶ and indeed can be said to enhance and fortify it,²⁰⁷ making it unlikely that states will complain.²⁰⁸

Despotism” and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts, 12 WM. & MARY BILL RTS. J. 439, 468-75 (2004) (discussing the “broad gamut of crime-related legislative activity during the study period [1992-2002], a time when crime control and draconian criminal law measures enjoyed high political salience”). For an overview of the shifting tides of penal theory and sentencing policy more generally, see Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233 (2005).

²⁰⁴ While federal law often outstrips its state counterparts in terms of harshness, and hence its comparative role might provide no tempering effect, it is equally true that states account for some notable instances of asymmetry. See, e.g., *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 917-18 (9th Cir. 2004) (citing examples).

²⁰⁵ See, e.g., *United States v. Meade*, 175 F.3d 215, 225 (1st Cir. 1999) (observing that with the FIP law “[n]othing in the state court proceeding changes, or is in any way affected by, the operation of federal law”).

²⁰⁶ See, e.g., *id.* (observing that the FIP law “does not in any way intrude upon . . . the authority of a state or its agents to administer their domestic relations laws in the manner they see fit”).

²⁰⁷ It does so in two chief ways: by allowing use of state criminal law when U.S. law would otherwise reign supreme (with the ACA) and by heightening the consequences of the violation of state law (with criminal histories and the FIP law). See discussion *supra* Part II (discussing the interplay of federal and state law through the ACA, FIP law, and criminal history provision). Although the focus of analysis here is the impact on federal authority, the effect on states should not go unmentioned. Why, indeed, should the states themselves not be able to decide the effect of their laws and convictions? With respect to convictions, the states may not wish the effects of their independently enacted laws to be magnified in the federal system. The use of state substantive law under the ACA by federal prosecutors, who typically are less constrained by resource limits and have different priorities than their state counterparts, could very well be at odds with the views of state legislators and citizens. For instance, a state legislator might not endorse a law if she knew that it would be unfairly applied against Native Americans, as a result of the ACA’s application to tribal lands. See *supra* note 38. For discussion of the disparate impact of federal law in Indian Country more generally, see Charles B. Kormmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 FED. SENT’G. REP. 71 (2000) (arguing that federal sentencing guidelines “should recognize the tremendous differences that exist between Indian Country and the rest of America [O]ne must keep in mind that Congress enacts statutes, very likely with little, if any, thoughts as to how severely they

Ultimately, while the specter of subsequent federal use of state convictions might at the margins adversely affect states (e.g., by discouraging pleas²⁰⁹ or even arrests in the first instance²¹⁰), in practical reality there is no institutional reason why federal aggrandizement, based on state criminal laws and outcomes, will not continue to flourish.

B. *Another Breed of Federalism*

Taken together, the three instances of federal deference examined here highlight the existence of a previously unrecognized aspect of federal-state criminal justice relations. Under the traditional view, dominated by concern over the U.S. duplicating or supplanting state criminal laws with attendant usurpation of state jurisdiction,²¹¹ debate has centered on normative and political considerations of the appropriate allocations of power between the federal government and the states. More recently, Susan Klein has helpfully identified a variant two-dimensional model, what she calls “independent norm” federalism. Under this model, the federal government criminalizes behavior not the subject of criminal prohibition by states,²¹² again invading the normative prerogative of states.²¹³

This Article highlights the existence of a third type of federal-state relationship. Unlike its two counterparts, the federal *modus operandi* examined here is multi (not two)-dimensional in nature, involving the federal

impact Native Americans”).

²⁰⁸ Cf. Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 793-94 (1996) (observing state silence in the face of increasing federalization and attributing it to overburdened state criminal justice systems); Simons, *supra* note 113, at 908 (remarking that “few local lawmakers or prosecutors are heard complaining about federalization”).

²⁰⁹ See, e.g., *State v. Kosina*, 595 N.W.2d 464, 466 (Wis. Ct. App. 1999) (rejecting appeal of defendant seeking to withdraw plea after learning that he would be subject to lifetime firearm ban under FIP law); cf. *INS v. St. Cyr*, 533 U.S. 289, 323 (2001) (observing that avoiding the collateral consequence of deportation is often “one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead proceed to trial”).

²¹⁰ See, e.g., Shirley Ragsdale, *Domestic Abuse Punishable Especially if It's a Policeman*, SIOUX FALLS ARGUS LEADER, Feb. 27, 2000, at 14B (discussing the reluctance of police to arrest domestic abusers in their ranks because of the FIP law and its limit on firearm possession); see also Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 2-3 (2005) (discussing tendency of state court judges to employ procedures to avoid subsequent application of FIP ban to domestic abuse defendants).

²¹¹ See *supra* notes 6-7 and accompanying text.

²¹² Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541 (2002). According to Professor Klein, this federal intrusion targets “generally victimless behavior that local and state governments have determined is blameless.” *Id.* at 1542-43.

²¹³ *Id.* at 1543.

government and the fifty individual states, and is distinctive because it entails no diminution of state authority. Indeed, it can be said to actually enhance the legal influence of the states,²¹⁴ while at the same time permitting the U.S. to broaden the scope, content, and effect of its own crime control efforts.²¹⁵

Recognition of this third form of federalism has both empirical and doctrinal significance. With respect to the former, it adds to our understanding of federal-state criminal justice relations, making clear that the relationship has more working parts and broader ramifications than previously recognized. A brief examination of the ongoing controversy in the “federalization” debate highlights this point. Michael O’Hear, for instance, urges that state-prescribed punishments be deferred to in sentencing federal defendants because deference best serves the goals of transparency and fairness.²¹⁶ To Professor O’Hear, “local uniformity” should normally override concerns of “national uniformity.”²¹⁷ He observes that

[t]he national uniformity principle insists that all similarly situated federal defendants receive similar sentences. In contrast, the local uniformity principle insists that similarly situated defendants within the same locality receive similar sentences, whether prosecuted in state or federal court. Local uniformity is as valid an objective as national uniformity for a rational sentencing scheme. Indeed, one of the central objectives of sentencing reform, the minimization of arbitrariness, provides as much support for local as for national uniformity.²¹⁸

Whether or not one agrees with this assessment, the discussion here makes clear that the customary two-dimensional model of normative diversity undershoots the mark. With criminal histories and FIP prosecutions, in particular, federal outcomes are allowed to turn on factors of possibly multidimensional origin: any (or several) of the nation’s fifty sentencing (and substantive) laws can be at play, skewing outcomes to even greater effect. Similarly, with the ACA, federal criminal law is permitted to assume polymorphous form, changing in accord with the state in which it is applied. In short, as Professor Stephen Smith recently observed in a related context, the

²¹⁴ See *supra* note 207 and accompanying text.

²¹⁵ See *supra* notes 181-210 and accompanying text.

²¹⁶ See O’Hear, *supra* note 151, at 753-758 (arguing that state-prescribed sentences should be deferred to in order to decrease arbitrariness and because of the preference for locally prescribed lawmaking). Professor O’Hear is at pains to emphasize, however, that federally prescribed sentences should prevail in situations involving “spillover” and “race to the bottom” – i.e., when state laws and law enforcement cannot adequately address particular criminal activity. *Id.* at 751-52.

²¹⁷ *Id.* at 725.

²¹⁸ *Id.*; see also Reena Raggi, *Local Concerns, Local Insights: Further Reasons for More Flexibility in Guideline Sentencing*, 5 FED. SENT’G. REP. 306, 308 (1993) (urging, as a U.S. District Judge herself, that “[d]istrict judges should enjoy more discretion – indeed they should be encouraged – to depart from the guidelines to reflect local concerns”).

growth in federal criminal law authority not only has a quantitative dimension, turning on absolute increases in the quantum of federal laws, but a qualitative dimension as well,²¹⁹ which to date has largely eluded the attention of commentators.

The doctrinal implications of this third form of federalism are equally if not more important, as they have relevance for potential changes to the federal criminal justice system. In particular, in the event the U.S. Sentencing Guidelines are recast, as seems likely,²²⁰ Congress should, for reasons discussed, reconsider its decision to tie federal criminal histories directly to authorized state punishments. Similarly, consideration should be given to the significant variations in state criminal laws that can lead to FIP prosecutions. In both instances, new provisions that have a capacity to accommodate and adjust for interstate variations should be entertained. As the majority of states currently do when assessing prior out-of-state convictions for recidivist enhancement purposes,²²¹ federal law might be used as a baseline, focusing less on the idiosyncratic quality of state substantive laws and punishments and more on the nature of prior offenses.²²²

Finally, with regard to the ACA, the discussion here makes clear that the time might be at hand to rethink the law. While it continues to serve a variety of practical purposes, it nevertheless endures as an anachronism in a time of dramatically expanded federal willingness and capacity to enact criminal laws.²²³ The concerns raised here lend further support to pursuit of a

²¹⁹ See Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 881 (2005) (asserting that growth in federal punitiveness is attributable to both the increasing number of federal criminal laws and the tendency of federal courts to interpret such laws expansively).

²²⁰ See, e.g., Frank O. Bowman, III, Symposium, *Panel Four: The Institutional Concerns Inherent in Sentencing Regimes: The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1317-20 (2005) (discussing the “ongoing debate about the state of sentencing in America” in light of *United States v. Booker*, 125 S. Ct. 738 (2005), and concluding that “the basic structure of the federal guidelines system is flawed in ways that cannot be corrected without fundamental change”).

²²¹ See Logan, *supra* note 10, at 269 & n.54 (discussing laws in majority of states that tie sentence enhancements to the question of whether the out-of-state conviction would warrant enhancement in the forum state).

²²² In a 1996 survey, a significant majority (almost ninety percent) of federal judges endorsed the view that criminal history points should depend to a greater extent on the nature of a given prior conviction and not solely the prescribed punishment. O’Neill, *supra* note 63, at 340 (citing MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, *THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER’S 1996 SURVEY* 23, 95-97 (1997), available at [http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/\\$File/gssurvey.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$File/gssurvey.pdf)).

²²³ See Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 CRIMINAL JUSTICE 2000, at 81, 91 (2000), available at http://www.ncjrs.org/criminal_justice2000/vol_2/02d2.pdf (observing that the substantive overlap of state and federal criminal codes appears “virtually complete”).

reinvigorated effort to promulgate a more consistent and comprehensive U.S. Criminal Code, picking up where the Brown Commission left off over thirty years ago.²²⁴ In so doing, substantive law reform can complement sentencing law reform – a process short-circuited by the creation of the Guidelines themselves²²⁵ – allowing for the possibility of a long overdue and much needed comprehensive overhaul of federal criminal law.

CONCLUSION

Contrary to popular wisdom, the state and federal criminal justice systems are not hermetically sealed from one another, processing criminal offenders without regard for each other's laws and outcomes. As this Article has demonstrated, states play a critically important role in effectuating the U.S. criminal justice system. Although they no longer enjoy authority to directly interpret and apply federal criminal law, as they did at the dawn of the Republic,²²⁶ states today provide the U.S. Government with a wealth of substantive law and conviction information that it uses to deprive individual (federal) citizens of their physical liberty.

Ultimately, the question of whether federal deference to state laws and outcomes is on balance advantageous does not admit of ready answer. To be sure, deference has benefits. Most significantly, comity and federalism values are served when federal criminal dispositions are tied to local norms. Deference also lessens the U.S. need to enact and directly enforce criminal laws, thereby mitigating historic fears of federal hegemony and centralization.²²⁷ Finally, deference has efficiency benefits: it allows the U.S. to make use of laws and conviction information reposed in the states, capitalizing on already expended state resources.²²⁸

²²⁴ See NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (1971); see also Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 92-111 (1998) (discussing criminal law reform efforts undertaken by the Brown Commission). I am indebted to Professor Richard Frase for this observation and suggestion.

²²⁵ Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 4-5 (2005).

²²⁶ See *supra* notes 20-21 and accompanying text.

²²⁷ See Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 103, 108 (1996) (observing that “[t]he fear of a single national police, such as many modern democracies have, has always been deep in the United States”).

²²⁸ See Ronald J. Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289, 291 (1969) (stating that “it seems quite natural for our two legal systems [state and federal] to borrow from one another, simply as a matter of convenience”); 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) (observing that when the U.S. resorts to state law “the essential incomplete and interstitial nature of federal law is most conspicuously revealed.” This pattern reflects deep values of our federal system – not

Just as assuredly, however, federal deference has troublesome consequences. By creating what in effect serves as a legal endoskeleton consisting of the policy decisions of individual states, the U.S. disserves Brandeisian values of experimentation; creates temporally and geographically contingent arbitrariness; diminishes democratic representativeness; and, in a subtle yet important sense, expands the reach and effect of U.S. criminal law.

The phenomenon discussed here thus highlights an enduring tension in the American federalist system: the need to balance localism, and the diversity it naturally entails, with the desire to apply the nation's laws in a uniform, predictable manner.²²⁹ This tension is of course reflected in variant understandings of the doctrine of federalism itself,²³⁰ and is manifest in the complex interrelations between criminal justice systems in the state-state,²³¹ state-municipality,²³² U.S.-foreign nation,²³³ and U.S.-tribal government²³⁴ contexts. Nor is it unique to criminal justice; similar tensions arise in numerous other areas, including legal ethics,²³⁵ the rules of civil procedure,²³⁶

that action of the central government represents an intrusion upon an otherwise perfect system, but rather that Congress legislates against a background of existing state law") (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 525 (1954)).

²²⁹ As Kevin Clermont recently observed more generally, "the simple fact 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 state or federal law." Kevin M. Clermont, *Reverse-Erie* 44-45, (Cornell Legal Studies Research Paper No. 05-021, 2005), available at <http://ssrn.com/abstract=785124>.

²³⁰ Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502 (1994) (remarking that "[t]here are, after all, two sides to federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable").

²³¹ See Logan, *supra* note 10 (discussing challenges faced by states in their efforts to utilize prior conviction information of fellow states).

²³² See Logan, *supra* note 65, at 1425-31 (discussing the interplay of state and local authority with respect to criminal law provisions).

²³³ See, e.g., *United States v. Small*, 125 S. Ct. 1752, 1755-56 (2005) (discussing challenges faced by the federal government in construing and using foreign nation convictions).

²³⁴ See Jon M. Sands & Jane L. McClellan, *Commentary: Policy Meets Practice: Why Tribal Court Convictions should not be Counted*, 17 FED. SENT'G. REP. 215 (2005) (discussing challenges faced by U.S. courts in using prior tribal court convictions in criminal history determinations).

²³⁵ See H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 84-101 (1997) (discussing the "balkanization" of legal ethics, based on local norms, and the challenges this presents for the ethical oversight of lawyers).

²³⁶ See Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757, 759 (1995) (critiquing "the movement to localism in [federal practice] rulemaking," given that the Federal Rules of Civil Procedure represented a

and the practice of medicine.²³⁷

To date, however, federal use of state criminal laws and outcomes has eluded systematic analysis, overshadowed by heated debates over the federalization of crime and the accepted zero-sum-oriented power dynamic of federal-state relations. This Article makes clear that federal-state criminal justice relations, in addition to being multi- (not merely two-) dimensional, are also marked by sharing and borrowing (not merely competition), with the U.S. using state criminal laws and outcomes to implement and expand its own authority. Although this state influence is anterior in nature, its pervasive impact on the federal system demonstrably eclipses that of direct federal criminal lawmaking, which, despite its comparatively limited real-world impact,²³⁸ continues to dominate federal criminal justice policy debates.

In the final analysis, there is no mistaking that federal use of state criminal laws and outcomes lies with the grain of broader shifts in understandings of federal-state relations. While for years rigid notions of dual federalism dominated thinking, the relationship is now recognized as being far more interactive and pragmatic.²³⁹ This evolution, to the historically minded, should invite a strong sense of *déjà vu*, harkening back to the synergistic criminal justice efforts of the U.S. and the states in the nation's early history,²⁴⁰ a time when America's federalist system was thought to enhance freedom through a double layer of security.²⁴¹ For reasons discussed in this Article, however,

"triumph of uniformity over localism" at their inception).

²³⁷ Lars Noah, *Ambivalent Commitments to Federalism in Controlling the Practice of Medicine*, 53 U. KAN. L. REV. 149, 154 (2004) (evaluating "the extent to which the federal government may regulate the practice of medicine," a traditional province of state control).

²³⁸ Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUST. L. REP. 53 (observing that "new waves of federal statutes often stand only as symbolic book prohibitions with few actual prosecutions"). This is not to say, however, that the addition of federal criminal laws lacks practical consequences for the federal system itself. Even though a new criminal statute might not be used to indict, it provides considerable strategic value to the U.S., for example by providing bases for searches and seizures and enhancing prosecutorial leverage. See John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 552 (2005). If actually used to indict, the statutes significantly affect the charging and plea-bargaining dynamic, chilling defendants' willingness to resist prosecution because they recognize that they can be "clipped" for something. *Id.* at 553.

²³⁹ See *supra* notes 17-19 and accompanying text; see also Redish, *supra* note 17, at 880 (coining the phrase "interactive federalism," which "recognizes the inevitable intertwining of the state and federal systems as they both go about the business of governing").

²⁴⁰ See *supra* notes 20-21 and accompanying text; see also Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 93 (1996) (observing that "[h]istory teaches us that federal criminal jurisdiction and its relationship to state criminal jurisdiction was never clear and coherent").

²⁴¹ See THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 323 ("In the compound republic of America . . . a double security arises to the rights of the people. The different

whether this synergy is desirable in modern times, when the criminal laws and crime control apparatuses of the state and federal governments alike are far better developed, is a critically important question that warrants continued scrutiny and debate in the years to come.

governments will control each other, at the same time that each will be controlled by itself."); *see also United States v. Lopez*, 514 U.S. 549, 576 (1994) (Kennedy, J., concurring) ("Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.").