

# Enforcing State Law in Congress's Shadow

Robert A. Mikos

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# ENFORCING STATE LAW IN CONGRESS'S SHADOW

Robert A. Mikos†

*Congress imposes a variety of sanctions on individuals who have been convicted of state crimes. This Article argues that these sanctions may distort the enforcement of state law. By raising the stakes involved in state cases, the federal sanctions may cause defendants to contest state charges more vigorously, thereby producing one of two unintended consequences. First, the sanctions make it more costly to enforce state laws. Second, due to resource constraints or dislike of the federal sanctions, states may attempt to circumvent the sanctions by manipulating charging decisions. In the process, however, states may have to reduce their own sanctions as well, thereby undermining deterrence and the fair application of both state and federal law. The Article theorizes that the severity of the sanctions and the emphasis they place upon state outcomes, among other factors, determine how much the sanctions will distort state proceedings. The Article then substantiates the theory with five in-depth case studies of federal sanctions. It suggests ways to ameliorate the concerns raised herein. It concludes by demonstrating that the analytical framework can be applied more broadly to sanctions imposed and determinations made by any two separate parties.*

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INTRODUCTION

Congress imposes a variety of sanctions on individuals who have been convicted of *state* crimes. For example, federal law prohibits convicted domestic abusers from possessing firearms; it denies federal benefits to convicted drug offenders; and it requires the deportation of aliens convicted of crimes ranging from shoplifting to sexual assault.<sup>1</sup> The sanctions Congress imposes supplement the punishment levied by the states, and are thus referred to as federal supplemental sanctions.<sup>2</sup>

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<sup>1</sup> Some federal laws also attach a sanction to a determination the states themselves do not consider to be a conviction, such as a no-contest plea accompanied by a suspended sentence. See *infra* notes 137–139 and accompanying text.

<sup>2</sup> Supplemental sanctions are a type of collateral sanction. The key distinguishing feature of these collateral sanctions is that they are imposed by one sovereign based upon convictions obtained by another. For a recent descriptive study of collateral sanctions, see Kevin G. Buckler & Lawrence F. Travis III, *Reanalyzing the Prevalence and Social Context of Collateral Consequence Statutes*, 31 J. CRIM. JUST. 435 (2003). For an earlier study, see Walter

Hundreds of thousands of state criminal cases must be resolved in the shadow of these federal sanctions every year. In 2003 alone, nearly 80,000 aliens were deported for being convicted of assorted crimes, and most of these crimes were prosecuted by the states.<sup>3</sup> That same year, more than 35,000 applicants were denied federal student financial aid because of prior drug convictions, again, most of which had been obtained by state prosecutors.<sup>4</sup> Every year, federal law permanently strips hundreds of thousands of convicted domestic abusers of their right to possess firearms, many of whom will lose their jobs as a result.<sup>5</sup> What is more, there is evidence the shadow over state law enforcement is growing. Until two decades ago, the federal government was deporting fewer than 2,000 criminal aliens each year.<sup>6</sup> Recent amendments to federal immigration law have subjected many more criminal aliens to deportation and have rendered most of them ineligible for waivers, thereby making deportation a nearly automatic consequence of a qualifying state conviction.<sup>7</sup> Many other federal laws imposing significant supplemental sanctions were passed between 1996 and 1998.<sup>8</sup>

Despite the widespread use of federal supplemental sanctions, they have received scant attention from either courts or scholars, and their potential impact on the enforcement of *state* law has gone unnoticed.<sup>9</sup> This Article provides the first analysis of federal supplemental

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Matthews Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

<sup>3</sup> OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 150 (2004), available at <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf>. The government tracks deportations by crime type, but not by jurisdiction of conviction. For a discussion of how to apportion the number of deportations triggered by state, as opposed to federal, convictions, see *infra* note 94.

<sup>4</sup> See E-mail from Dan Madzellan, Office of Postsecondary Educ., U.S. Dep't of Educ. (July 2, 2004) (forwarded to author on Aug. 10, 2004) (on file with author). We may infer that most denials of student financial aid were occasioned by state convictions since the states handle the vast majority of drug cases. See MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, NCJ 206916, FELONY SENTENCES IN STATE COURTS, 2002, at 3 tbl. (2004) (reporting 340,340 felony drug convictions in state courts in 2002, compared to only 26,234 felony drug convictions in federal courts), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf>.

<sup>5</sup> See *infra* notes 172–174 and accompanying text.

<sup>6</sup> IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 171 (1997) (reporting that the deportation of criminal aliens has “increased greatly” since 1986, when the INS removed 1,978 criminal aliens).

<sup>7</sup> See *infra* Part II.A.

<sup>8</sup> See *infra* Part II.B–C.

<sup>9</sup> See, e.g., *United States v. Meade*, 175 F.3d 215, 225 (1st Cir. 1999) (dismissing the claim that a federal firearms ban triggered by a state restraining order interferes with the operation of state law: “Nothing in the state court proceeding changes on account of, or is in any way affected by, the operation of the federal law.” (emphasis added)); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1893 (2000) (criticizing the deportation of criminal aliens on fairness

sanctions as a distinct form of federal regulation. The Article presents a theory of how the sanctions affect the enforcement of state law. It argues that many sanctions make it more costly for states to enforce their own laws, draining state budgets and undercutting the deterrent effect and the consistent application of both federal and state law.<sup>10</sup>

Federal supplemental sanctions are intended to serve a variety of purposes. By increasing the total sanction levied for violating state law, the sanctions may deter people from committing crimes in the first instance. Some sanctions may also incapacitate individuals who, by reason of their state conviction, have demonstrated that they pose a continuing threat to society; the Lautenberg firearms ban, which takes guns out of the hands of convicted domestic abusers, is typical.<sup>11</sup> Or Congress may have in mind a distinctly federal purpose unrelated to the traditional goals of the criminal law; for example, Congress might order the deportation of criminal aliens in order to maintain public support of federal immigration policies.<sup>12</sup>

Whatever the intended purpose, tying federal sanctions to determinations made by state officials is attractive to Congress for a simple reason: since the states determine who is subject to the sanctions, Congress avoids the costs of making that determination itself, thus conserving federal resources. In essence, Congress free rides on the efforts of state law enforcement agencies. Because federal supplemental sanctions are considered to be regulatory as opposed to criminal sanctions, they do not trigger the constitutional safeguards attending

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grounds, but conceding that the practice constitutes "efficient" crime control policy); Annette M. Toews, *Citizenship Considerations in Minnesota Criminal Justice and the Supremacy of Federal Immigration Law*, 25 WM. MITCHELL L. REV. 1245, 1302 (1999) ("Whether a non-citizen incurs immigration consequences because of their criminal activities and convictions is a concern for the federal, not state, government.").

<sup>10</sup> On a more general level, this Article contributes to a larger, established body of scholarship examining the perverse effects of severe or rigid sentencing policies. For a sampling of the relevant literature, see FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001) (concluding that California's three strikes law has dramatically increased the prison population and undermined proportionality and uniformity in sentencing, but has only slightly reduced crime in the state); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (concluding that holding corporations criminally liable may cause firms to reduce their own expenditures on detecting and deterring wrongdoing); Arun S. Malik, *Avoidance, Screening and Optimum Enforcement*, 21 RAND J. ECON. 341 (1990) (showing that it may not be optimal to impose the maximum fine when offenders can engage in activities that reduce the probability of being caught and fined); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284 (1997) (surveying the effect of harsher penalties under the Sentencing Guidelines on plea negotiations).

<sup>11</sup> See 18 U.S.C. § 922(g)(9) (2000).

<sup>12</sup> For a discussion of the purposes that supplemental sanctions might serve, see *infra* Part I.A.

criminal punishment.<sup>13</sup> Indeed, because they often involve the *denial* of some benefit, rather than the imposition of imprisonment or other expensive punitive measures, supplemental sanctions are usually quite cheap for Congress to impose.

For the sanctions to work as Congress intends, it is essential that they not disturb how the states enforce their laws. This Article argues, however, that some federal sanctions cast a dark shadow over pending state criminal cases. The sanctions raise the stakes involved in state cases and thereby cause defendants to contest state charges more vigorously. On the one hand, states may have to take more cases to trial. Defendants will be less willing to plead when doing so triggers a stiff federal sanction. The costs of meeting the added resistance, what this Article calls the “implementation costs” of the sanctions, are borne primarily by the states and *not* by the federal government.

On the other hand, a state may try to skirt the federal sanctions, either to minimize the costs of enforcing its own laws or to thwart federal policies with which the state or its agents disagree. The state can, for example, charge bargain with a defendant, offering a plea involving a crime that does not trigger the federal sanction. The new bargain, however, may carry a lower state sanction as well, and this may undermine the traditional objectives of the criminal law, such as deterrence or retribution. This distortion produces what this Article calls the “circumvention costs” of supplemental sanctions.

Due to their reliance on state law enforcement, federal supplemental sanctions also impose substantial fairness costs. For one thing, the sanctions undermine a state’s ability to enforce its own laws consistently. For example, a state prosecutor might drop certain charges against an alien but not a citizen, because the alien faces deportation if convicted. The sanctions are also applied inconsistently across states, because the states define crimes differently.

Aside from elaborating on these efficiency and fairness concerns, the Article also suggests why inefficient and unfair supplemental sanctions are apt to be adopted and maintained. In particular, it argues that no safeguard exists to ensure the benefits of the sanctions justify their costs.<sup>14</sup> Congress has little incentive to lift or moderate its sanctions, since the costs of imposing them are borne by the states. (For the same reason, Congress may not even be aware of these costs.) By

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<sup>13</sup> The test for distinguishing between regulatory and punitive sanctions is laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

<sup>14</sup> See *infra* note 36 and accompanying text. For recent works discussing coordination of sanctions, see generally Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 J. LEG. STUD. 401 (2001) (courts and private citizens), and Nuno Garoupa & Fernando Gomez-Pomar, *Punish Once or Punish Twice: A Theory on the Use of Criminal Sanctions in Addition to Regulatory Penalties*, 6 AM. L. & ECON. REV. 410 (2004) (courts and administrative agencies).

contrast, a state is likely to moderate its own sanctions when they prove costly to impose.<sup>15</sup>

The Article proceeds as follows. Part I sets out the core theoretical contributions of the Article. It begins by explaining how and why Congress uses state convictions to trigger federal sanctions. Using a simple hypothetical, it then demonstrates how the sanctions affect the state cases that trigger them. After identifying three hidden costs the sanctions may impose, Part I concludes by exploring several factors that make these costs more or less likely to appear. Part II examines five federal supplemental sanctions in great detail: the criminal alien deportation provisions of the Immigration and Naturalization Act, the Lautenberg Amendment to the Gun Control Act, and federal laws banning convicted drug offenders from receiving federal welfare, public housing, and student financial aid benefits. These case studies lend strong empirical support to the theories developed in Part I. Part III suggests actions that Congress and the states might take to ameliorate the policy harms created by the sanctions. Finally, Part IV considers some logical extensions of the analysis.

## I

### THE SHADOW OF FEDERAL SUPPLEMENTAL SANCTIONS

This Part contains the core theoretical insights of the Article. It begins by defining supplemental sanctions with more precision and elaborating upon how they work and what purposes they serve. It proceeds to use a simple numerical example to demonstrate how the sanctions affect state proceedings. It then reflects upon the example to illuminate three hidden costs associated with the sanctions. The final section concludes by identifying a variety of factors that explain when these costs will arise.

#### A. What They Are, Why They Are Used, and How They Work

When a state official determines that a state law has been violated, federal supplemental sanctions are the consequences that follow by operation of federal law. The sanctions are civil in nature and thus do not include imprisonment, fines, or other forms of “punishment” in the constitutional sense. From the perspective of the one who is sanctioned, however, they inflict losses that are just as real as and that add to any penalty the state itself might impose. Supplemental sanctions are usually triggered by a state court conviction, but they could, in theory, attach to any action taken by a state, such as the entry

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<sup>15</sup> See, e.g., Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1 (noting that concern over costs of incarceration spurred twenty-five states to reduce or eliminate mandatory sentences for some crimes in the prior year).

of a no-contest plea that does not count as a conviction under state law.

State convictions provide Congress with free information it can use to serve its own purposes.<sup>16</sup> Foremost among these purposes is protecting the public safety. The federal government reasons that individuals who have been convicted of certain state crimes pose a continuing threat to society.<sup>17</sup> The Lautenberg Amendment to the Federal Gun Control Act, for example, takes firearms out of the hands of convicted domestic abusers who might otherwise kill their victims in a fit of rage.<sup>18</sup>

By increasing the total sanction levied for violating state law, supplemental sanctions may also deter potential offenders from committing the crimes that trigger the sanctions. The Lautenberg firearms ban, for example, may deter some potential abusers from committing acts of domestic violence, particularly those who value access to firearms most. The federal welfare ban, which prohibits anyone convicted of a state (or federal) drug felony from receiving federal welfare benefits, likewise might deter drug use among the poor.<sup>19</sup>

However, it is unclear that supplemental sanctions are effective as a deterrent. If potential offenders are unaware of the supplemental sanctions when they commit their crimes, then the sanctions cannot deter them. Supplemental sanctions, like other collateral consequences of a conviction, are less visible to potential offenders than are the primary sanctions for the crime, such as incarceration, probation, and fines.<sup>20</sup> Defendants frequently discover the sanctions only after

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<sup>16</sup> For a discussion of the purposes behind collateral consequence laws more generally, see Buckler & Travis, *supra* note 2, at 436–39 (identifying four such purposes, including maintaining public confidence in the effective operation of government, protecting individuals from harm, punishing criminals, and a variety of pragmatic ends, such as facilitating the adoption of the children of inmates).

<sup>17</sup> See *id.* at 437–38; *cf.* Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 120 (1983) (“Congress . . . use[s] state convictions to trigger [firearms] disabilities . . . not because Congress wanted to tie those disabilities to the intricacies of state law, but because such convictions provide a convenient, although somewhat inexact, way of identifying ‘especially risky people.’” (quoting *United States v. Bass*, 404 U.S. 336, 345 (1971))).

<sup>18</sup> See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 (1996) (codified at 18 U.S.C. § 922(g)(9) (2000)).

<sup>19</sup> See 21 U.S.C. § 862a(a) (2000).

<sup>20</sup> See *United States v. Wilson*, 159 F.3d 280, 295 (7th Cir. 1998) (Posner, C.J., dissenting) (decrying the lack of notice given to those who are subject to the Lautenberg firearms ban, and concluding that when a law is kept a secret, it is “not a deterrent. It is a trap.”); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 161 (1999) (“[T]he relatively low visibility of collateral consequences makes them unlikely deterrents to crime.”); Grant et al., *supra* note 2, at 1224 (arguing that the “difficulty of determining the disabilities imposed in any state, coupled with widespread public ignorance of criminal penalties, makes the deterrent function of civil disability laws highly questionable”).



they have been charged with a state crime, when it is too late to deter them, but not too late to affect state proceedings.<sup>21</sup>

Indeed, supplemental sanctions may actually undermine deterrence of state crimes by reducing the total sanction imposed for violating state law. As explained below, the sanctions sometimes reduce the likelihood that an offender will be charged and convicted of a state crime that triggers them. This could in turn affect the behavior of criminals *ex ante*. For example, knowing that a state prosecutor is reluctant to charge any offense that triggers a federal sanction, potential criminals may be emboldened to commit more of these crimes.

In addition to incapacitating and deterring the dangerous, Congress may use state determinations in making decisions about the allocation of scarce public resources, such as welfare benefits or public housing units. The federal government may believe that, all things being equal, convicted drug felons are less deserving of federal welfare benefits, public housing, or student loans than their law-abiding counterparts.<sup>22</sup> State convictions may thus serve as a proxy for "unworthiness."

Using state judgments to impose federal sanctions has enormous practical appeal. Making federal determinations about who is dangerous or unworthy—which might involve federalizing a wide range of crimes—would require the employment of additional federal investigators, prosecutors, and courts. The off-the-shelf information provided by the states may not fit federal aims perfectly—states, after all, may decline to prosecute some individuals the federal government would prefer to sanction, and may prosecute some individuals the federal government would prefer to exempt—but Congress apparently thinks it does the job reasonably well and save the federal government considerable expense.<sup>23</sup>

The federal government must incur some costs to execute these sanctions. But once the state has decided who will be sanctioned, the

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<sup>21</sup> See sources cited *infra* notes 129 & 160–62 and accompanying text.

<sup>22</sup> *E.g.*, President's Remarks Announcing the "One Strike and You're Out" Initiative in Public Housing, 32 WEEKLY COMP. PRES. DOC. 582, 583 (Mar. 28, 1996) [hereinafter President's Remarks] ("The only people who deserve to live in public housing are those who live responsibly there and those who honor the rule of law.").

<sup>23</sup> The benefit to the federal government is similar to the benefit enjoyed by litigants who successfully invoke collateral estoppel in civil cases. The doctrine of collateral estoppel provides that when an issue is actually litigated and decided, and the decision is essential to the judgment in the case, the decision is conclusive in a subsequent action involving the same or a different claim. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4464 (2002) (noting that the traditional role of mutuality has been largely abandoned, and that only the party against whom preclusion is advanced need have been a party—or in privity with a party—to the original proceeding). The doctrine thereby saves a party the expense of having to relitigate an issue that has already been decided.

federal government's remaining tasks are comparatively easy and inexpensive to perform. Following a state conviction, the federal government executes its sanctions in one of three ways, requiring varying degrees of administrative effort.

Some sanctions apply automatically without requiring the federal government to take any steps. That is, carrying out the sanction is nearly costless for Congress. The Lautenberg firearms ban is a typical self-executing sanction. When convicted of a misdemeanor crime of domestic violence, a gun owner is required to surrender possession of his firearms immediately. The federal government makes no effort to even inform the convict of the sanction, and compliance with the sanction is entirely the responsibility of the party subject to it. To be sure, not everyone will obey the law without some additional threat. Hence, Congress has made violation of the Lautenberg firearms ban a federal crime, punishable by up to ten years in prison and a \$250,000 fine.<sup>24</sup> Punishing those who violate the ban obviously costs something, but the amount pales in comparison to the amount spent prosecuting the hundreds of thousands of cases annually that trigger the ban.

Other sanctions are executed when a party convicted of a triggering offense applies for a government benefit. These sanctions make such persons ineligible to receive the benefit. For instance, when a college student applies for federal financial aid, she must indicate whether she has been convicted of a covered drug offense.<sup>25</sup> If she answers yes, she will be denied the aid. Since the federal government already screens applicants for other reasons—need, degree sought, etc.—the costs attributable to this sanction—adding a criminal history question to the application and punishing false answers—are comparatively small.<sup>26</sup> The more difficult and expensive task—determining whether an applicant has done something criminal—is again performed by the state.

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<sup>24</sup> 18 U.S.C. §§ 924(a)(2), 3571 (2000).

<sup>25</sup> U.S. DEP'T OF EDUC., OMB No. 1845-0001, 2005-2006 FREE APPLICATION FOR FEDERAL STUDENT AID 3 [hereinafter FAFSA], available at [http://studentaid.ed.gov/students/attachments/siteresources/2005-06\\_FAFSA\\_app\\_form.pdf](http://studentaid.ed.gov/students/attachments/siteresources/2005-06_FAFSA_app_form.pdf).

<sup>26</sup> Verifying the truthfulness of responses is a tricky task for the federal government, but it is not necessary to create a fool-proof verification system for the sanction to be effective. Despite the fact that the government currently has no way of verifying answers to the drug conviction questions on the FAFSA, for example, many students admit to having disqualifying drug convictions. See Peter Kempner, *One Strike, You're Out; Drug War Takes Aim at Students with New Financial Aid Question*, FULTON COUNTY DAILY REP., Nov. 6, 2000 ("The government does not have the capability at this time to background check all applicants' records in order to determine if they have a drug conviction. We are relying on the students to use good judgment when answering. . . ." (quoting an official with the Department of Education)); E-mail from Dan Madzellan, *supra* note 4 (more than 35,000 applicants for financial aid acknowledged drug convictions that made them ineligible for aid in 2003-04).

Finally, some sanctions require the government (federal or sometimes state) to take more elaborate steps prior to imposing them. The U.S. Immigration and Customs Enforcement (ICE, the successor to the Immigration and Naturalization Service) must find and detain aliens who are convicted of deportable offenses, and then, in many cases, must provide these aliens a hearing before transporting them out of the country.<sup>27</sup> Likewise, when the government seeks to take away a benefit it has already bestowed, say, food stamps or cash assistance, it must give the recipient notice and the opportunity to be heard before suspending the entitlement.<sup>28</sup> The cost of the hearing will vary depending on the extent to which the sanction is made discretionary; if the government recognizes few defenses or exceptions to the imposition of the sanction, for example, the proceeding should be short and simple.

### B. How the Sanctions Affect Incentives

Ultimately, the sanctions may not work as Congress intends. The sanctions alter the incentives of defendants and state prosecutors. For defendants, the sanctions reduce the advantage of accepting a guilty plea versus standing trial. For prosecutors, the sanctions create a dilemma: take more cases to trial, which is costly, or else modify the charges involved in plea deals, which may require treating some crimes more leniently as a matter of state law. This section uses a simple hypothetical to illustrate the ways defendants and prosecutors in state criminal cases react to federal sanctions.<sup>29</sup> The next section examines more closely the costs that are incurred as a result.

Suppose Jack, a citizen of the United States with no prior criminal record, threatens a store clerk and takes \$1,000 worth of merchandise. State police later arrest him. The state prosecutor could reasonably charge Jack with one of three crimes. Robbery, a felony punishable by a fine of \$25,000 under state law, is the most serious charge fitting the facts. Theft is also a felony, but carries a lesser fine of \$10,000. Shoplifting, the most lenient charge, is a misdemeanor carrying a fine of only \$1,000. These fines are mandatory and non-

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<sup>27</sup> See Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 389-92 (1999) (discussing removal procedures).

<sup>28</sup> The government must not deny property, including welfare payments, without due process of law. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970). The sort of hearing that is required is determined by the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which include the importance of the interest to the individual, the degree to which the desired procedure will make a difference in the outcome, and the cost to the government.

<sup>29</sup> The illustration is simplified to highlight certain points. The case studies in Part II, however, demonstrate that the conclusions drawn from this illustration hold up under more realistic conditions.

negotiable under the state's sentencing guidelines. In addition to the fine imposed by the state, Jack must also bear his attorneys fees in the case, which would be \$10,000 if he stands trial or \$1,000 if he instead accepts a plea bargain with the prosecutor. The prosecutor's cost structure is similar. In the event of trial, the jury would consider only the charged crime (and no lesser offenses) and each side is equally likely to prevail.

The prosecutor, not terribly concerned with this first-time offender and desiring to devote her scarce time to investigating more serious crimes, gives Jack two options: stand trial and be charged with Robbery, or plead guilty to Theft. The total cost of the Theft plea to Jack is \$11,000 (\$10,000 in fines plus \$1,000 in legal fees) and is less than the expected cost of trial of \$22,500 (\$12,500 in expected fines plus \$10,000 in legal fees). Therefore, like most other defendants facing criminal charges, Jack will accept the Theft plea. Not only does it avoid the added expense of going to trial, it also removes the risk of paying a higher fine if he were convicted of the more serious Robbery offense.

Now, suppose Jack is not a United States citizen, but a legal alien residing in this country, and that Congress will deport Jack if he is convicted of any felony, including Robbery or Theft, but not a misdemeanor, like Shoplifting. Jack has no desire to return to his home country and values his continued presence in the United States at \$50,000. The expected costs of each of Jack's options under both scenarios are summarized below in Table 1.

TABLE 1: DEFENDANT'S TOTAL COSTS<sup>30</sup>

Plea charge offered by prosecutor	No federal sanction		Federal sanction	
	Accept Plea	Stand Trial	Accept Plea	Stand Trial
Robbery	\$26,000	<b>\$22,500</b>	\$76,000	<b>\$47,500</b>
Theft	<b>\$11,000</b>	\$22,500	\$61,000	<b>\$47,500</b>
Shoplifting	<b>\$2,000</b>	\$22,500	<b>\$ 2,000</b>	\$47,500

The prosecutor will again offer Jack a Theft plea, but this time Jack will not accept it. The federal sanction makes the total cost of

<sup>30</sup> Bold-faced cells indicate Jack's preferred (lowest-cost) strategy, plead or stand trial, given the plea offered by the prosecutor. Barring any federal sanction, the total cost of each plea includes the state sanction plus the lawyer's fee for negotiating the bargain (\$1,000, regardless of the charge). The costs of trial include the lawyer's fee (a fixed \$10,000) plus the state sanction that would be imposed for Robbery (\$25,000) discounted by the probability of acquittal (here, 50%). When the federal sanction is included, the calculation is done similarly, only now the cost of the supplemental sanction (\$50,000) is added to the cost of the plea for Robbery and Theft, but not Shoplifting, which does not trigger it. The federal sanction is also added to the costs of trial, again discounted by the probability of acquittal.

that plea (\$61,000) exceed the expected cost of standing trial (\$47,500), even on the more serious Robbery charge. Instead, Jack will counter with this ultimatum: either reduce the charge to Shoplifting—to which Jack would gladly plead guilty—or take him to trial. Jack's threat of taking the case to trial is credible. Trial is still a costly option for Jack, but it gives him the chance to avoid the federal sanction.

The prosecutor faces a dilemma in how to respond to Jack's counteroffer. If the prosecutor accepts the offer, the total sanction imposed on Jack would be reduced from \$11,000 (outside the shadow of the federal sanction) to only \$2,000. If the prosecutor instead proceeds to trial on the Robbery charge, the total expected cost to Jack increases to \$47,500, but the prosecutor's costs of handling Jack's case increase as well, from \$1,000 to \$10,000. Furthermore, the prosecutor may not think that Jack deserves the additional federal sanction that the Robbery conviction would trigger, and though this incentive is hard to quantify, it no doubt affects the prosecutor's charging decisions in some cases.

This simple illustration demonstrates the ways in which federal sanctions alter the incentives of defendants and prosecutors in state criminal cases. When plea agreements trigger federal sanctions, the sanctions make trials appear relatively more attractive to the defendant. The prosecutor must choose between charging the defendant with a different (and often lesser) crime to get him to plead and taking the defendant to trial. The next two sections explore the hidden costs imposed on the states and examine particular features of the federal sanctions and state regimes that affect those costs.

### C. The Hidden Costs of Federal Supplemental Sanctions

As shown above, some federal sanctions put states in a no-win situation. The sanctions make it more costly for states to obtain convictions on sanction-triggering charges because defendants will contest such charges more vigorously. To relieve the burden on state prosecutors or to spare defendants from sanctions it deems unjust, the state may try to skirt the federal sanctions by offering plea bargains that do not trigger them. These new bargains, however, may trigger lower state sanctions as well, and may thereby compromise the deterrent effect and the consistent application of state law. Each of these possible costs is explored below.

#### 1. *Implementation Costs*

Increasing the sanction for a given crime may raise the costs of prosecuting that crime. The additional cost of prosecuting state crimes in the shadow of supplemental sanctions is what this Article

calls the “implementation costs” of the sanctions. Because supplemental sanctions raise the stakes involved in state criminal cases, they give defendants added incentive to contest state charges at every stage of the state’s case: upon arrest, at preliminary hearings, in plea negotiations, at trial, through final appeal, and even in collateral attacks.<sup>31</sup> Consider Jack the defendant from our earlier hypothetical. Jack would plead guilty to the crime of Theft if it carried only the state sanction of \$10,000, but he would refuse the same plea when the \$50,000 federal deportation sanction is added to the mix.<sup>32</sup> In the shadow of the threat of deportation, the state must now take him to trial if it wants to convict Jack of Theft (or Robbery).

Taking a defendant to trial, however, is far more costly than negotiating a plea.<sup>33</sup> Trials consume more of the prosecutor’s time and energy; she must carefully assemble the case against the defendant, respond to the defendant’s discovery requests, help select a jury, file and respond to evidentiary motions, make opening and closing statements, examine witnesses, and, if successful, recommend a sentence and respond to appeals and collateral attacks. Thus, even when fed-

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<sup>31</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 663 (5th ed. 1998) (observing that “[i]f the case is very important to the defendant, he may spend heavily on its defense”).

<sup>32</sup> Defendants responded in similar fashion when the state of California dramatically increased state-imposed sentences for repeat offenders. California’s three strikes law mandates a sentence of twenty-five years to life for the third strike. CAL. PENAL CODE § 667(d) (West 1999). After the law was adopted in 1994, trial rates rose significantly in third-strike cases compared to non-strike cases. In the second half of 1995, for example, courts reported that 41% of third-strike cases went to trial, versus only 4% of non-strike cases. See ADMIN. OFFICE OF THE COURTS, *THE IMPACT OF THREE STRIKES LAW ON SUPERIOR AND MUNICIPAL COURTS SURVEY #2 JULY-DECEMBER 1995*, at 2 (1996), available at <http://www.courtinfo.ca.gov/reference/documents/3strikes.pdf> (also finding that defendants sought preliminary hearings in a comparatively high portion of third-strike cases); see also BD. OF CORR., *THREE STRIKES, YOU’RE OUT: IMPACT ON CALIFORNIA’S CRIMINAL JUSTICE SYSTEM AND OPTIONS FOR ONGOING MONITORING* 8, 16 (1996) (reporting that police have encountered more resistance from three-strikes defendants and public defenders’ workloads have increased significantly).

<sup>33</sup> See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1921 (1992) (“The prosecutor gains something very valuable when she avoids trial. It is hardly surprising that she will pay handsomely for it.”).

State officials (prosecutors, public defenders, and judges) must also invest in learning how the sanctions work in conjunction with state law, putting even more burden on the state fisc. Cf. Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 276 (1997) (noting that “as immigration concerns become closely intertwined with crime and punishment, aliens may be entitled to more expansive procedural rights; effective defense representation will likely require counsel on immigration matters; and the ethical obligations of all criminal justice practitioners will likely broaden to encompass immigration-related concerns”).

eral sanctions cause only a few additional cases to go to trial, they add substantially to a state's cost of enforcing its laws.<sup>34</sup>

Jack's case is hardly atypical. The shadow of federal sanctions looms over hundreds of thousands of state criminal cases every year. Each year, tens of thousands of immigrants are deported because they have been convicted of a state crime; hundreds of thousands of persons are barred from possessing firearms because they have been convicted of a misdemeanor crime of domestic violence in a state court; and tens of thousands more are denied federal benefits like welfare, public housing, and student financial aid because of state drug convictions.<sup>35</sup> Further, these figures do not capture the cases in which defendants were able to escape the sanctions in the end, either because they were acquitted of the state charges or because they negotiated around the sanctions.

Ultimately, the problem with federal supplemental sanctions is not just that they add to the cost of enforcing state law, for the sanctions have some offsetting benefits, too. They deter criminal conduct and incapacitate dangerous individuals, at least when they are imposed as Congress intended. The bigger problem is that there is no way to be sure these benefits exceed the added costs. Since the implementation costs are borne by the states, Congress has too little incentive to consider them when deciding upon legislation imposing sanctions. This means Congress might impose excessive sanctions, something it would be less likely to do if the sanctions loomed over federal criminal cases instead.<sup>36</sup>

## 2. *Circumvention Costs*

Rather than take a defendant to trial, the state prosecutor may instead elect to offer the defendant a more palatable plea bargain, one which does not trigger the federal sanction. But circumventing

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<sup>34</sup> See *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

<sup>35</sup> See *supra* notes 3–5; *infra* Part II.

<sup>36</sup> As Professor Deborah Merritt has argued, regarding federal motor voter registration laws,

The point is not that motor voter registration [which commandeers state officials to register voters when they apply for drivers licenses] is a bad idea—it may prove to be an excellent idea. The point is that the legislative body adopting this legislation had no incentive to probe the costs of the bill because someone else was going to pay the tab. That is not responsible lawmaking.

Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1570 (1994); see also Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 893–900 (1998) (arguing that federal commandeering of state officials is inefficient because the federal government fails to internalize the costs of the state services).

federal sanctions often means charging defendants with lesser crimes or simply dismissing state charges altogether, both of which lower the average (state and total) sanction imposed.<sup>37</sup> Lowering average sanctions in turn undermines deterrence and the other traditional goals of the criminal law. The reduction in deterrence attributable to efforts to evade federal sanctions is what this Article calls the “circumvention costs” of the sanctions.

There are two main reasons a state prosecutor would be willing to circumvent federal supplemental sanctions, even though doing so requires reducing the state sanction as well. First, the prosecutor may not be able to afford to take the defendant’s case to trial. Defendants have tremendous bargaining power when prosecutorial budgets are fixed, particularly when they *know* that the prosecutorial resources are limited:

[T]he individual defendant has, in effect, a call on the prosecutor’s time. Each defendant can call on the prosecutor to try the case, forcing her to use time and effort that would otherwise be spent processing other cases. For the prosecutor, the opportunity cost of a failure to purchase this call from any individual defendant substantially exceeds the transaction costs of negotiating an individualized contract.<sup>38</sup>

When the prosecutor has a fixed budget, she may have no choice but to accept a plea suggested by the defendant, one that does not trigger the federal sanction.

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<sup>37</sup> The tendency is for such bargains to *lower* total average sanctions. The reason is that *federal sanctions are normally triggered by more serious crimes*. To circumvent the sanctions, prosecutors must therefore *reduce* charges, sometimes considerably. See, e.g., Gene Schabath, *Teen May Face Deportation; Immigration Officials Refuse to Guarantee They Won’t Send Boy in Incest Case to India*, DETROIT NEWS, Aug. 30, 1998, at 5B (prosecutor agreed to reduce charge against teenager who molested his sister from first degree criminal sexual conduct, punishable by life in prison, to fourth degree criminal sexual conduct, a misdemeanor carrying a maximum sentence of two years, in an attempt to prevent the teen’s deportation).

In theory, given an infinite array of options, the prosecutor would charge the defendant with a crime that carries the same state sanction as before but which does not trigger the federal sanction. However, this is unrealistic for at least two reasons. First, state prosecutors do not have an infinite choice of charges to fit each case. In addition, federal sanctions are often triggered by a broad range of charges meeting some threshold criteria (crimes of moral turpitude, crimes that could be punished by more than one year in prison, any misdemeanor that has as an element the use or attempted use of force, etc.), making it difficult for the prosecutor to sidestep the sanction without agreeing to reduce the charge. See *infra* Part I.D.1.c.

<sup>38</sup> Scott & Stuntz, *supra* note 33, at 1924; see also *id.* at 1941 (“[A]djudication costs are both high and disproportionately allocated to prosecutors. Prosecutors bear the burden of proof and therefore must invest more in digging out and presenting evidence. Defendants have a lesser burden of producing evidence; moreover, they often do not internalize their own cost of legal representation.” (footnotes omitted)).



Recall the hypothetical example described above.<sup>39</sup> Now suppose the state prosecutor has a fixed budget of \$20,000 and that, as before, a plea costs \$1,000, while a trial costs \$10,000. The police have presented the prosecutor with twenty individuals whom they suspect have committed separate acts of Theft. Ignoring any federal sanction, and assuming the defendants cannot collude with one another, the prosecutor should be able to secure twenty Theft pleas from these suspects. At \$1,000 each, the negotiations would exhaust the prosecutor's entire budget. Sanctions total \$220,000 for all defendants combined, including \$20,000 in legal fees.

Now assume Congress imposes an additional \$50,000 federal sanction (in the form of deportation, a firearms ban, a benefits ban, etc.) on any individual convicted of a felony, including Theft or Robbery. As demonstrated above in Part II.B, the suspects will no longer accept the Theft plea, so the prosecutor has three options: secure twenty Shoplifting pleas, thereby imposing a total combined sanction of \$40,000; secure Shoplifting pleas from ten defendants and take one additional defendant to trial on a Robbery charge (with an equally likely chance of conviction as of acquittal), dismissing the charges against the remaining nine offenders, for a total expected sanction of \$67,500; or take two defendants to trial on the Robbery charge, dismissing the charges against the remaining eighteen, for a total expected sanction of \$95,000. In the shadow of supplemental sanctions and fixed prosecutorial budgets, total sanctions will ironically *drop* by more than half, from \$220,000 to \$95,000 (at most).

Even if the prosecutor had an unlimited budget, she would have another reason to help a defendant evade the federal sanction: She may think the sanction does not fit the defendant's crime.<sup>40</sup> The prosecutor may object to deporting a petty criminal, taking away firearms from a domestic abuser (who also happens to be a police officer she frequently collaborates with on other cases), or denying welfare benefits to a needy mother who commits her first drug offense. Indeed, prosecutors are not bound to pursue the most serious charges that are supported by the evidence. The American Bar Association encourages prosecutors "to seek justice, not merely to convict."<sup>41</sup> The prose-

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<sup>39</sup> In the hypothetical, Theft and Robbery are both felonies. Theft carries a \$10,000 fine while Robbery carries a \$25,000 fine. Shoplifting is a misdemeanor that triggers a \$1,000 fine.

<sup>40</sup> Cf. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988 (1992) (noting that state prosecutor's interests are often not perfectly aligned with those of the public, causing less than optimal plea bargains from the public's perspective, usually in "the form of unduly lenient sentence offers").

<sup>41</sup> STANDARDS FOR CRIMINAL JUSTICE 3-1.2(c) (3d ed. 1993), available at WL SCJ 3-1.2; see also NATIONAL PROSECUTION STANDARDS §§ 43.6, 44.4, 68.1 (Nat'l Dist. Attorneys Ass'n, 2d ed. 1991) (encouraging prosecutors to consider the collateral consequences of conviction when making charging decisions).

cutor in our hypothetical may think that imposing an expected cost of \$47,500 (including legal fees) on a defendant accused of Theft is unwarranted. The prosecutor may thus be willing to accept a Shoplifting plea from the defendant instead. The \$2,000 sanction it carries is lower than what she would prefer, but it may be much closer to what she feels is *deserved*. The sanctions levied against all defendants add up to \$40,000, which may be even less than when the prosecutor faced a limited budget.

The prosecutor is not the only person who may be willing to help a defendant circumvent harsh federal sanctions. Jurors may refuse to convict on state charges triggering deportation and other sanctions they think are just too harsh. Studies have shown that juries are reluctant to convict on charges that trigger the death penalty,<sup>42</sup> despite various efforts made to keep jurors from voting their consciences.<sup>43</sup> For similar reasons, victims of crime may not press charges, particularly when they would bear some of the hardship caused by the federal sanctions.<sup>44</sup>

### 3. Fairness Costs

The previous two sections demonstrated that federal supplemental sanctions may be inefficient by making state prosecutions more costly or by diluting deterrence. This section aims to demonstrate

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<sup>42</sup> Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1210–11 (1981) (discussing evidence that increased use of death penalty—particularly the mandatory death penalty—reduces the chance of conviction by juries because of reluctance to execute and that this might seriously undermine any deterrent effect of capital punishment).

<sup>43</sup> The general rule in both state and federal courts is that neither the judge nor the attorneys in a case may inform the jury of the sentencing consequences of a guilty verdict. Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1242 (1995). Indeed, a court may even instruct the jury *not* to consider punishment in reaching its verdict. *Id.* Moreover, although juries possess a nullification power, in most jurisdictions neither attorneys nor judges may inform them of that power. See Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2041, 2045 (1996).

<sup>44</sup> E.g., *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1525–26 (1993) [hereinafter *Legal Responses to Domestic Violence*] (noting that prosecution for domestic violence offenses may impose financial hardship on victims and thus may make them less willing to press charges); Jo Becker et al., *Crimes Often Don't Cost Guards Their Jobs*, ST. PETERSBURG TIMES, Aug. 29, 1999, at 1A (“We began having problems getting wives or girlfriends to go forward with prosecutions [because of the Lautenberg firearms ban]. . . . Many of them live on state property, so if the wife testifies against a husband, not only are they losing an income, they are losing their home.” (quoting Florida State Attorney Rod Smith)); see also Robin Gaby Fisher, *Domestic Violence Group Criticized Newark Police*, STAR-LEDGER (N.J.), Mar. 2, 1999, at 13 (noting that, in 1998, there were only thirty domestic violence complaints against officers on the Newark police force, compared to forty-seven in 1997, when the Lautenberg firearms ban was still relatively new).

that supplemental sanctions may also be unfair because they are often triggered unevenly.<sup>45</sup>

Justice demands treating like cases alike.<sup>46</sup> Disparities in sanctions should not be arbitrary; they should serve only legitimate government purposes, such as deterrence, retribution, and incapacitation.<sup>47</sup> The fairness of federal sanctions is called into doubt when they are triggered by some, but not all, similar cases.

To some extent, the uneven application of the sanctions merely reflects preexisting disparities in the application of state law. When a state fails to treat like cases alike, the attendant federal sanctions will not be applied equitably either. By choosing to base federal sanctions on state convictions, Congress has in effect delegated to the states primary responsibility for ensuring the fair application of those sanctions. The problem is that the states have fallen short of providing truly equal treatment under their own laws.<sup>48</sup> Until they do, the fairness of federal sanctions will remain suspect as well.

Rather than repeat claims already made about criminal justice in the states, the main purpose of this section is to identify overlooked intrastate and interstate disparities in the application of federal sanctions; these are disparities that do not simply mirror any preexisting arbitrariness in the application of any one state's criminal law. First, because federal sanctions affect the way a state handles its criminal cases, they make it even more likely that similar cases will be treated differently by the state. Second, by allowing the states to decide which crimes will trigger federal sanctions, Congress has greatly increased the likelihood that the sanctions will not be applied evenly across states. While these issues are important and salient enough to warrant

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<sup>45</sup> This section does not argue that supplemental sanctions (particularly deportation) are unfair because they are excessive or because they are applied retroactively. For discussions of those fairness concerns, see Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771, 773-74 (2000) (claiming that deportation constitutes excessive "punishment" in some cases), and Anjali Parekh Prakash, Note, *Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420, 1459-60 (1997) (arguing that constitutional considerations and fairness concerns counsel against the retroactive application of amendments to deportation law).

<sup>46</sup> E.g., *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (stating that the defendant's "punishment must be tailored to his personal responsibility and moral guilt" and should not be identical to that of his co-defendants who were not similarly situated).

<sup>47</sup> See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004) [hereinafter GUIDELINES MANUAL], available at <http://www.ussc.gov/2004guid/TABCON04.htm>.

<sup>48</sup> There is an extensive literature addressing the existence and injustice of disparities within individual state criminal justice systems. See, e.g., WILLARD GAYLIN, *PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING* (1974); SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990* (1993); ZIMRING ET AL., *supra* note 10. Part of the problem is that state prosecutors operate largely unchecked. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506-12 (2001) (pointing out that prosecutors have broad discretion in charging decisions, which has the effect of creating great disparities in the application of substantive criminal law).

brief discussion here, this is not meant to be a definitive or comprehensive treatment of either matter.

a. *Intrastate Disparities*

Congress must take state determinations as it finds them, so that whatever disparities exist under state law will be replicated in the imposition of federal supplemental sanctions as well. But federal sanctions may do more than replicate state disparities; the sanctions may exacerbate them by affecting the way state determinations are made. In some cases, state prosecutors will make decisions without regard to the federal sanctions or the costs that accompany them. In other cases, however, prosecutors will adjust their charging practices to circumvent the sanctions.<sup>49</sup> There is no mechanism in place to ensure that similar cases will be treated similarly in the shadow of federal law. State prosecutors are neither subject to federal controls, nor are they trained to handle federal sanctions. They respond to them in an ad hoc fashion, thus compounding the lack of uniformity in state criminal proceedings.

To illustrate, consider this simple hypothetical. Able and Baker are both aliens and each solicits a prostitute for sex in a state that criminalizes prostitution. For the moment, suppose Congress does not consider solicitation of prostitution a deportable offense. The two men are both charged with solicitation, agree to plead guilty, and are sentenced to one year of probation. Within the state, they have been treated equitably. However, consider what might have happened had Congress declared solicitation to be grounds for deportation. Both men are charged with the crime of solicitation. This time, however, only Able pleads guilty to it; he is sentenced to one year of probation, as before, and he is then deported by ICE. Baker, under these new facts, bargains with the prosecutor and cops a loitering plea instead; he is sentenced to six months probation, but he gets to remain in the country because, unlike solicitation of prostitution, loitering is not considered a deportable offense.

Congress has chosen to rely on state prosecutors to determine whom it shall sanction. In the hypothetical, the prosecutor exercised her discretion and gave Baker a better deal than Able, resulting in a disparity in both the state and federal sanction. Perhaps the prosecutor had more time on her hands to handle Able's case, or perhaps she failed to discover that the solicitation of prostitution conviction would get Able deported in time to do anything about it. Or perhaps Baker could afford to take his case to trial, if necessary, whereas Able could

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<sup>49</sup> Which path a particular case will follow depends on a variety of factors discussed in detail in the next section.

not, and so on. Such facts could explain how the disparity came to be, but they do not make it less unfair. Able and Baker committed identical acts in the same state; they could hardly be more similarly situated. No goal of either state criminal law or of federal immigration law would seem to justify the disparate outcomes that arise as a result of the federal sanction.

b. *Interstate Disparities*

Aside from exacerbating the disparities common within any state, federal sanctions create peculiar disparities between factually similar cases arising in different states.<sup>50</sup> Return to the version of the hypothetical just given, in which Congress considers soliciting a prostitute a deportable offense. Suppose that each of our two aliens, Able and Baker, hires a prostitute for sex, but Able does so in California where prostitution is a crime, and Baker does so in Nevada where it is not. Able is apprehended, charged, convicted, and sentenced by state authorities to one year of probation before being deported by ICE. However, neither Nevada, nor the federal government, takes any action against Baker.

In this hypothetical, the sanctions levied by the two state governments differ, but this disparity is easily justified. Under our federal system, states have wide latitude to define crimes and their consequences to suit local tastes, subject to certain constitutional limits that do not apply here. It should thus come as no surprise that the criminal law differs substantively from state to state. When assessing the fairness of a sanction a state has imposed in a particular case, it makes sense to compare that sanction to others the *same* state has imposed in other cases. To say otherwise, that Nevada must punish Baker, for example, or that California must not punish Able, so that both men are treated the same as a matter of state law, is to deny the premise of federalism (that each state is autonomous) and one of its most important values (the diversity such autonomy entails).<sup>51</sup>

The interstate disparity in the federal sanction raises more serious concerns. We expect national laws to have the same meaning and to be enforced similarly across the nation,<sup>52</sup> but that cannot happen

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<sup>50</sup> Another disparity exists because Congress has chosen to limit the sanction to non-citizen offenders. Suppose Able gets deported because he is an alien, but Baker is not deported because he is a citizen. There is a discrepancy in the outcomes under federal law, but Able arguably has not been treated unfairly as a result. The two men may have committed identical acts, but they are not similarly situated for purposes of immigration law, the *raison d' être* of which is to regulate aliens and not citizens.

<sup>51</sup> See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 401-02 (1997).

<sup>52</sup> Indeed, this was one of the reasons that the Framers created the federal court system and refused to leave federal law entirely in the hands of state judges. See THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The mere necessity of uniformity in the interpretation of national laws, decides the question. Thirteen

when Congress incorporates state law into the federal code. (It also cannot happen when Congress relies upon state officials to help enforce federal law, as demonstrated above.) State laws differ, and those differences will carry over to congressional statutes that refer to them.<sup>53</sup> For example, aliens may be deported for having sex with minors in some states, but not in others;<sup>54</sup> drug felons lose their federal welfare benefits in Alabama, but not in Michigan;<sup>55</sup> and domestic abusers who participate in pretrial counseling are still subject to prosecution (and hence the Lautenberg firearms ban) in Arizona, but not in Connecticut.<sup>56</sup> The effect is that Congress treats the same act differently, depending on where it occurs.

The geographic disparity in our hypothetical appears arbitrary at first, but it may yet serve one of the purposes behind deportation. In essence, Congress has chosen to tie deportation to what the states have criminalized, as opposed to what aliens have done. For crimes that are *malum prohibitum*, that is, evil only because prohibited, the emphasis on whether a given state criminalizes the behavior makes perfect sense. A goal of deportation is to remove dangerous aliens from the country. The fact that Able hired a prostitute knowing it was illegal to do so in California indicates that he is dangerous—in the sense that he is willing to defy the law, regardless of whether his action

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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.”).

For judicial decisions extolling the virtues of national uniformity, see, for example, *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111–12 (1983) (“Whether one has been ‘convicted’ within the language of the [federal] gun control statutes is necessarily . . . a question of federal, not state, law. . . . This makes for desirable national uniformity unaffected by varying state laws, procedures, and definitions of ‘conviction.’”), and *Garcia-Gonzales v. INS*, 344 F.2d 804, 810 (9th Cir. 1965) (“It is hardly to be supposed that Congress intended, in providing for the deportation of aliens convicted of narcotic violations, to extend preferential treatment to those convicted in the few jurisdictions, which, like California, provide for the expungement of a record of conviction upon the termination of probation.” (quoting *In re A-F-*, 8 I. & N. Dec. 429, 446 (BIA 1959))).

<sup>53</sup> There are many examples of federal law referencing or relying upon state law provisions (as opposed to state determinations). See, e.g., *Kabn v. INS*, 36 F.3d 1412, 1416–17 (9th Cir. 1994) (Kozinski, J., dissenting) (noting that “federal law frequently relies on” state law, citing the bankruptcy code’s reliance on state law for determination of rights in a bankrupt’s estate, federal tax law’s reliance on state law property systems, and the social security system’s reliance on state law definitions of marriage).

<sup>54</sup> Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions*, 74 N.Y.U. L. REV. 1696, 1720–24 (1999) (noting that statutory rape is a deportable offense in some states, but not even criminal in others).

<sup>55</sup> See PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 3 tbl.1 (2002), at <http://www.sentencingproject.org/pdfs/9088.pdf>; *infra* text accompanying notes 195–198.

<sup>56</sup> Compare CONN. GEN. STAT. § 46b-38c(g) (2004) (providing that charges will be dismissed when the batterer completes a counseling program) with ARIZ. REV. STAT. ANN. § 13-3601(I) (West 2004) (authorizing only pretrial release, and not the dismissal of charges, when the batterer participates in a counseling program).

was in itself dangerous. The fact that Baker hired a prostitute does not permit the same inference because he did so in a state that had not criminalized prostitution.

But for crimes that are *malum in se*, that is, intrinsically evil, how a given state characterizes the act is beside the point. Performing the act itself demonstrates dangerousness, regardless of whether the state chooses to call the act a crime. If prostitution is *malum in se*, the purposes of immigration law do not justify the disparate outcomes in the two cases. Congress would want to deport Baker, even though technically he has not committed a crime under Nevada law.

It may be that Congress has chosen to sacrifice equal treatment in such cases to serve other goals. One such goal is respecting states' rights. To apply federal sanctions uniformly, Congress might need to federalize all the crimes that trigger the sanctions, an obvious affront to state power. The problem with this reasoning, however, is that Congress need not make prostitution or anything else a federal crime to deport aliens who solicit or engage in it. Deportation like other supplemental sanctions is not punishment.<sup>57</sup> A state criminal conviction is just a piece of information, a convenient way of identifying whom to sanction. Congress could ferret out the same information through a federal administrative hearing instead. In any event, Congress's recent actions belie any intent to sacrifice uniformity at the altar of states' rights, at least when it comes to immigration law.<sup>58</sup>

It is more likely that Congress has incorporated state law out of parsimony or convenience.<sup>59</sup> Recall that one of the main reasons Congress ties its sanctions to state determinations is that it saves the federal government the expense of making those determinations itself. To guarantee that all aliens who have committed certain bad acts are deported, Congress would first need to specify those acts in a federal code. The executive branch would then have to enforce the law. All of this would be at tremendous expense to the federal government.

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<sup>57</sup> *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) ("While the consequences of deportation may assuredly be grave, they are not imposed as punishment." (citation omitted)).

<sup>58</sup> For example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) clarified that "conviction" is to be defined by federal and not state law for purposes of deportation. See Pub. L. No. 104-208, § 322(a)(1), 110 Stat. 3009-546, 3009-628 (1996) [hereinafter IIRIRA] (codified as amended at 8 U.S.C. § 1101(a)(48)(A) (1999)). By contrast, Congress continues to allow the states to define "conviction" for purposes of federal gun bans, rejecting a Supreme Court decision that held to the contrary. See 18 U.S.C. § 921 (2000) ("What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."); *infra* note 169.

<sup>59</sup> Cf. Ronald J. Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289, 291 (1969) (observing that "it seems quite natural for our two legal systems [state and federal] to borrow from one another, simply as a matter of convenience").

The point of this section is simply to call attention to the way that supplemental sanctions are imposed unevenly and cause state sanctions to be imposed unevenly as well. The consequent unfairness is another cost of the sanctions, but it does not follow that we can or must do anything about it. To say the least, making federal determinations about who is deportable, who should not carry a firearm, and so on—without considering any actions taken by the states—would be costly.

#### D. Factors Influencing the Net Effect on State Proceedings

This section clarifies when federal sanctions will be imposed and when they will be circumvented, and also suggests when they will reduce, enhance, or leave unchanged the state sanction imposed for violation of state law. It isolates those characteristics of the sanctions, state legal systems, and defendants that play a role in determining what the ultimate effect of any given supplemental sanction will be. For sake of simplicity, but without loss of generality, the analysis will focus on how these factors affect plea bargaining. To be sure, sanctions may affect other stages of state criminal proceedings as well.<sup>60</sup> Nonetheless, many cases end in pleas, and as a practical matter, whether a federal sanction is imposed or not is determined at this stage.

It is no surprise that so many criminal cases end in pleas. In the usual case, negotiating a plea costs much less than standing trial and triggers a sanction that, while certain to be imposed, is often lower than the sanction the defendant would face if he were to stand trial instead and lose.<sup>61</sup> The benefit of the plea bargain to the defendant equals the difference between the certain punishment triggered by the plea and the expected punishment triggered by trial, as well as the difference between the costs of negotiating the plea and standing trial. The defendant who accepts a plea bargain has presumably done his math and determined that the plea is the superior option, all things considered.

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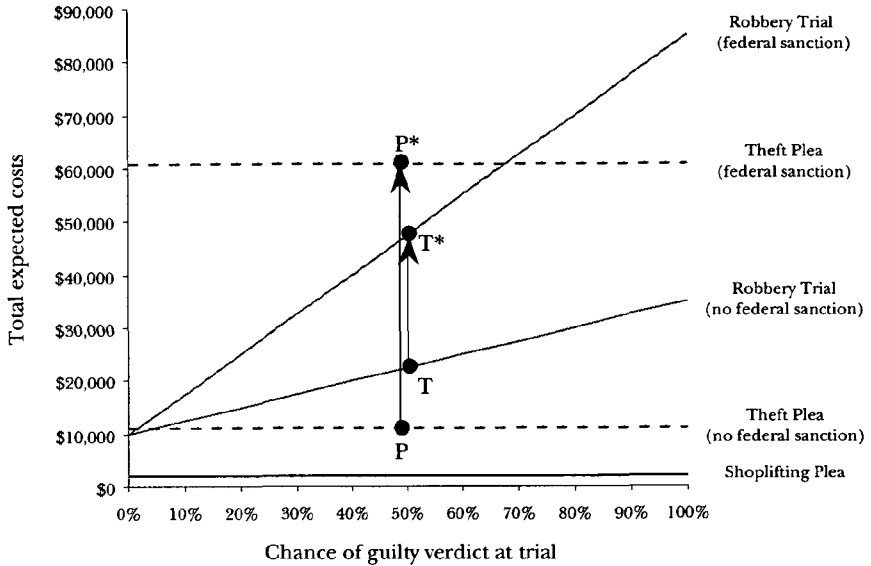
<sup>60</sup> For example, federal sanctions may give a defendant the incentive to increase spending *at trial*, e.g., by hiring a better lawyer or pressing more issues (admissibility of evidence, etc.). Putting up a more vigorous defense at trial will burden the state. In rare cases, the federal sanction might convince a defendant *not* to stand trial and to accept the first plea offered by the state instead. This might happen when the charge that would be brought at trial would trigger the sanction, but the charge contained in the plea would not. Cases like this are rare, however, because only a small fraction of defendants currently prefer to stand trial; most already accept the plea offered by the state. See *supra* Part I.B. Hence, the states are unlikely to see a *drop* in trials following adoption of federal sanctions.

<sup>61</sup> See WALKER, *supra* note 48, at 107 (noting that defendants often stand trial on charges that are more serious than the ones that are offered in plea deals).



Federal sanctions affect defendants' choice of strategy because they alter the relative attractiveness of accepting pleas or standing trial. The graph below illustrates this point, using figures from the earlier hypothetical involving Jack.

FIGURE 1: EXPECTED COSTS OF TRIAL AND PLEA



When a federal sanction such as deportation would be triggered by either plea or trial, it makes trial a relatively more attractive option for the defendant. The plea still offers a lower state sanction and lower legal expenses, but it offers no advantage when it comes to the federal sanction; trial affords the defendant his only chance of escaping that sanction. As shown on the graph, the federal sanction shifts the cost of the Theft plea upward by a constant amount of \$50,000, regardless of the probability a jury would find Jack guilty of the crime. If instead Jack stands trial, the federal sanction is only probabilistic: as long as Jack has some chance of acquittal, the expected cost of the Robbery trial will increase by less than \$50,000.<sup>62</sup> Hence, even a Robbery trial is more appealing than the Theft plea, as long as Jack has some chance—here, at least 30%—of being acquitted by the jury. Only when Jack's probability of being convicted reaches 70% does the

<sup>62</sup> Figure 1 illustrates the disparity in the effect of the sanction when the probability of conviction at trial is 50%. At that point on the horizontal axis, the federal sanction increases the cost of the Theft plea by \$50,000 from P to P\* and increases the cost of the Robbery trial by a lesser amount, \$25,000, from T to T\*. To keep the graph clear, none of the points are exactly above the 50% point on the axis.

total cost of the Robbery trial exceed that of the Theft plea. The federal sanctions will not always tip the scales in favor of going to trial, but in some cases, the sanctions will eliminate the benefits of the plea bargain (lower state sanction and lower legal fees) that the state would prefer to offer.

1. *Federal Factors Bearing on the Net Effect of Supplemental Sanctions*
  - a. *Magnitude of the Federal Sanction*

Simply put, the more severe the supplemental sanction, the more resistance it is likely to provoke. Threatening to deport a defendant accused of theft, for example, will spark considerably more marginal resistance from that defendant than would, say, imposing an additional fine of \$100. It makes little sense to spend large sums on legal services to avoid such petty consequences. Deportation is another matter altogether.

To be more precise, it is the *relative* magnitude of the federal sanction that matters most. The federal sanction must be compared to both the cost of an additional unit of resistance and the size of the sanction the state itself will impose. The federal sanction will not provoke more resistance unless the cost of such resistance is less than its expected benefits. To illustrate, Jack from the earlier hypothetical must spend \$9,000 more on legal services to take his case to trial. In addition, the state's threat to charge him with a more serious crime at trial adds an expected \$7,500 to the cost of that option. But spending \$16,500 on a 50% chance at acquittal still makes sense for Jack when deportation costs more than twice that amount. But if Congress were to reduce its sanction, say, by shortening the term before which Jack may reenter the country, going to trial may no longer make sense for him. Suppose Jack now considers deportation the equivalent of a \$5,000 fine as opposed to a \$50,000 fine. This smaller fine is not significant enough to make him press his luck at trial. To be sure, the cost of accepting a plea to Theft has gone up by \$5,000 (to \$16,000 total), but it is still lower than the total cost of going to trial, \$25,000. In theory, even a small increase in the sanction should result in some (marginal) increase in spending on defense. In practice, however, spending on defense may come in large lumps, thereby requiring significant increases in the sanction for additional spending to make sense.

The federal sanction must be compared to the state sanction as well. One reason this comparison matters is that a defendant who faces grave state charges (e.g., murder) might exhaust his wealth to avoid the state sanction alone. For example, threatening to strip a convicted felon of the right to possess a firearm is unlikely to change

the posture of a defendant facing capital murder charges in a state proceeding. The firearms ban certainly adds to the overall sanction, but such a defendant would have already committed himself to doing everything possible to reduce his chance of conviction. Or suppose that Jack in our hypothetical is suspected of Rape, and not Theft or Robbery. Rape, like the other crimes, triggers the deportation sanction, but the rape charge carries a much more severe state penalty of \$50,000, compared to \$10,000 for Theft and \$25,000 for Robbery. The federal sanction would not change Jack's strategy. He would proceed to trial regardless because the state sanction by itself is of sufficient magnitude to justify the expense of trial (assuming he still has a 50% chance of acquittal).

The discrepancy between the federal and state sanction is also important because it determines whether the state can offset the federal sanction through sentence bargaining. In theory, the state could offer to reduce its own sanction up to the amount of the federal sanction, and thereby cancel out any effect the federal sanction might have on the defendant's bargaining position. Suppose that deportation would cost Jack only \$25,000. Further suppose that the state sanctions remain the same as in the original version of the hypothetical, only now those sanctions are only guidelines and are not binding upon the state courts. The federal sanction still makes Jack prefer trial over a plea to either Theft or Robbery. But to avoid trial, the state could offer to waive the state sanction of \$10,000, leaving Jack worse off than he was before the federal sanction yet still preferring to plead.<sup>63</sup> Nonetheless, in practice, sentence bargaining of this sort is not a viable option for the states. For one thing, the federal sanction often far exceeds the state one, meaning the state can mitigate but not eliminate the impact of the supplemental sanction. Further, many jurisdictions have mandatory sentencing policies that prohibit sentence bargaining of this sort.<sup>64</sup> In any event, state politicians (including district attorneys, who are elected) may balk at reducing state sanctions out of fear of appearing soft on crime to their constituents. In the voters' minds, the fact that someone else is punishing state criminals does not relieve the state of its responsibility to do so as well.

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<sup>63</sup> In this variation of the hypothetical, the Robbery trial would cost Jack an expected \$35,000 ( $.5 * [\$25,000 + \$25,000] + \$10,000$ ), but the Theft plea would cost him \$36,000 without the state's concession on penalties ( $\$25,000 + \$10,000 + \$1,000$ ). Including the state's concession on its own sanction, the total cost of the Theft plea is only \$26,000 ( $\$25,000 + \$1,000$ ), which is more than the total sanction that would have been imposed without any federal sanction, \$11,000, but still less than the cost of going to trial.

<sup>64</sup> See Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 11 (1999) (reporting that "every state . . . has some type of mandatory sentencing law").

State prosecutors may also be unwilling to help the federal government execute a sanction they feel is unduly harsh. When the federal sanction is significantly larger than what state prosecutors are used to imposing for a given crime, they will be more inclined to consider it unjust. As discussed above, prosecutors are bound to seek justice, not convictions; they may feel justice is better served by letting a defendant off the hook entirely rather than by making him suffer out of proportion to his crime.

Many of the federal supplemental sanctions that exist today greatly exceed the punishment that may be inflicted under state law. Deportation is a compelling example, with devastating consequences for many deported aliens.<sup>65</sup> Aside from losing the lives they have made for themselves in this country, deported aliens may be forced to return to a country that is entirely unfamiliar to them or where they may face oppression and torture, as well as the more mundane obstacles of repatriation. All of these hardships can be triggered by committing crimes that are often treated leniently (perhaps too much so) by the states.<sup>66</sup> The Lautenberg firearms ban may strike some as inconsequential, but it is a particularly severe sanction for convicted domestic abusers whose jobs require possession of a firearm, including police officers, prison guards, and military personnel.<sup>67</sup> There is no work-related exception to the ban, so for these people it amounts to the loss of a career as well.<sup>68</sup> Like deportation, the federal ban is severe in comparison to the relatively light sanction that is often imposed by states in domestic abuse cases.<sup>69</sup> We will see below in the detailed case studies of five federal sanctions that the most severe ones do, in fact, have the most deleterious effect on state proceedings.

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<sup>65</sup> See, e.g., Pilcher, *supra* note 33, at 333. For a detailed discussion of the deportation sanction, see *infra* Part II.A.

<sup>66</sup> Cases involving drastic disparities in the sanctions are not difficult to find. E.g., Michael Sangiacomo, *Immigrant Contesting Deportation; Spouse Abuse Plea Could Return Him to Yemen*, PLAIN DEALER (Cleveland), Oct. 17, 1999, at I-B (discussing an immigrant who was ordered deported to Yemen, where he would be separated from his American wife and two children, because of a no-contest plea to a domestic violence charge); Patrick Smikle, INTER PRESS SERV., *Rights-U.S.: Immigrants Face Deportation for Minor Offenses* (Apr. 29, 1999) (describing the story of a Nigerian immigrant who was ordered deported after pleading guilty to shoplifting \$14.99 in baby clothes, a crime for which the state had imposed a one-year suspended sentence and a fine of \$360).

<sup>67</sup> See Kerri Fredheim, Comment, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. §922(g)(9)*, 19 PACE L. REV. 445, 504 (1999).

<sup>68</sup> See 18 U.S.C. § 925 (2000).

<sup>69</sup> See 142 CONG. REC. S11,876 (daily ed. Sept. 30, 1996) (statement of Sen. Frank Lautenberg) (noting that most domestic violence offenders plead down to a misdemeanor and get away with only a "slap on the wrist").

b. *Emphasis on State Determinations*

The expected cost to the defendant also depends upon the likelihood a federal sanction will be imposed, given a state determination.<sup>70</sup> Congress could make the imposition of a federal sanction depend on a multitude of considerations, a state conviction being only one of them. Putting more emphasis upon the state conviction—for example, by making it, standing alone, sufficient to trigger a sanction—naturally draws more attention to the state's criminal proceedings. The more emphasis that is placed on the state proceeding, the more resources the defendant will commit to that proceeding.<sup>71</sup>

To illustrate how the emphasis on state convictions affects the defendant's strategy in the state case, return to the original hypothetical involving Jack. In it, we assumed Jack had no opportunity to escape deportation if convicted of a felony such as Theft or Robbery. Jack thus insisted on trial or a plea deal to Shoplifting. Now suppose instead that Congress has ordered that immigration judges must consider one other fact besides conviction—call it the defendant's "life story"—in deciding whether to deport an alien. An alien never knows for certain whether his life story will be sufficiently compelling to convince the judge not to order deportation, but he does know that a certain fraction of criminal aliens escape deportation this way. For this hypothetical, let us suppose that fraction is two-thirds. Jack will plead guilty to Theft and take his chances before the immigration judge. The nominal sanction has not changed from the original hypothetical, but now there is only a chance it will be triggered if Jack accepts the Theft plea. The total expected cost of the plea is \$27,667, which is less than the total expected cost if Jack were instead to go to trial and then tell his story to the judge if convicted, \$30,833.<sup>72</sup>

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<sup>70</sup> It also depends upon the probability of conviction if the defendant stands trial, as discussed below in Part I.D.3.

<sup>71</sup> See Pilcher, *supra* note 33, at 288 (noting that, by mandating automatic deportation for aliens convicted of certain crimes and by narrowing the opportunities to appeal a deportation order, federal immigration law shifts all attention to the criminal proceedings). It is worth noting, however, that incorporating a state law into the federal code does not burden states in the same way. For example, when the federal government makes it a federal crime to violate a state law, it also assumes some of the burden of enforcing the law, and thus confers a benefit on the state. Cf. Samuel Merrill, "Cooperative Federalism" Again: *State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements*: I, 57 YALE L.J. 1, 2 n.5 (1947) (noting that state efforts to prosecute violators of federal law in state court—under state laws incorporating federal law—save the federal government the expense of prosecuting such violators itself).

<sup>72</sup> The cost of the plea includes the deportation sanction discounted by the probability of leniency ( $1/3 * \$50,000$ ), in addition to the state sanction for Theft (\$10,000) and the cost of negotiating the plea (\$1,000). The cost of going to trial includes the deportation sanction discounted by both the probability of acquittal and the probability of leniency ( $1/2 * 1/3 * \$50,000$ ), in addition to the state sanction for Robbery

Today, federal sanctions frequently attach automatically as a result of a state conviction.<sup>73</sup> That is, there is no fact other than the existence of a state conviction the federal government must prove to execute the sanction. For example, the Lautenberg firearms ban attaches immediately upon conviction for a misdemeanor crime of domestic violence, and there is nothing that the convicted abuser can do outside the state system to lift the ban.<sup>74</sup> Likewise, an alien has very little chance of escaping deportation once he is convicted of a deportable offense. While ICE must still give some criminal aliens a hearing before deporting them, its authority to grant reprieve has been narrowly circumscribed.<sup>75</sup> The hearing, in other words, is a formality. A student convicted of a drug offense becomes ineligible to receive federal financial aid for at least one year.<sup>76</sup> While she may regain her eligibility earlier by completing a rehabilitation program, it would often make more sense to simply wait out the ban.<sup>77</sup>

It is hardly necessary to make the imposition of a federal sanction hinge upon the fact of conviction and nothing else. There are alternatives. Congress urges federally funded public housing authorities to consider all the circumstances, and not just a criminal conviction, before deciding to evict a tenant.<sup>78</sup> Prior to 1990, state judges could bar the Immigration and Naturalization Service (INS) from deporting an alien on the basis of a state criminal conviction.<sup>79</sup> Prior to 1996, the attorney general could waive deportation for criminal aliens under section 212(c) of the Immigration and Naturalization Act, based on a variety of considerations, including the seriousness of the offense, evidence of postconviction rehabilitation, duration of the alien's residence, impact of deportation on the alien's family, and service in the U.S. Armed Forces.<sup>80</sup> Similarly, Congress has authorized the Treasury Department to grant waivers from federal firearms bans, though it has never provided the necessary funding to execute the

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discounted by the probability of acquittal ( $1/2 * \$25,000$ ) and the cost of litigating the case (\$10,000).

<sup>73</sup> It does not follow that these federal sanctions will be imposed following every qualifying conviction. Ensuring that all criminal aliens are deported, that all convicted abusers relinquish their firearms, and that all drug offenders are denied federal aid can be a tricky task. There are ways to defeat federal sanctions without troubling the state. For example, students can simply deny prior drug convictions on their FAFSA forms. See *supra* note 26.

<sup>74</sup> See *infra* notes 158–159.

<sup>75</sup> For a thorough discussion of the prospects of evading the deportation sanction postconviction, see *infra* notes 122–27 and accompanying text.

<sup>76</sup> 20 U.S.C. § 1091(r)(1) (2000).

<sup>77</sup> See *id.* § 1091(r)(2).

<sup>78</sup> See 24 C.F.R. § 966.4(d)(5)(vii) (2004).

<sup>79</sup> See *infra* note 122.

<sup>80</sup> See *infra* notes 145–46 and accompanying text.

authority.<sup>81</sup> The point is that Congress need not focus exclusively on the existence of state convictions in levying its sanctions.

To be sure, there is an obvious reason that Congress prefers a simpler approach. Expanding the range of facts to consider before executing a sanction can be costly if the federal government must do the considering. Requiring an immigration judge to consider a criminal alien's life story adds complexity and cost to the otherwise simple deportation hearing. However, the amount Congress saves by simplifying the sanctions could easily be eclipsed by the costs that automatic sanctions impose on the states. The cost savings to Congress are, in a sense, illusory.

### c. *Breadth of the Federal Sanction*

The relative magnitude of a federal sanction and the probability that it will be imposed given a state conviction help determine how the defendant will respond to a particular state charge. The breadth of the sanction determines how difficult it will be for the prosecutor to circumvent it.<sup>82</sup> For example, when Congress specifies that conviction of "any felony" will trigger deportation, the prosecutor must charge a defendant with a misdemeanor or otherwise stop short of convicting him to avoid imposition of the sanction. The federal sanction would be narrower if it applied to some felonies, such as Robbery, but not others, such as Theft. In that case, Jack would plead guilty to Theft and his state case would not be affected by the additional sanction. Conversely, the federal sanction would be broader still if it applied to "any offense having as an element the taking of property without the owner's consent," regardless of whether the state considered it to be a felony or a misdemeanor. Under this regime, even if he were given the opportunity to enter a Shoplifting plea, Jack would prefer to stand trial instead, because the plea no longer shields him from the federal sanction.

Generally speaking, federal supplemental sanctions are quite broad. For example, the Lautenberg firearms ban is triggered by a conviction of a misdemeanor crime of domestic violence, which includes any offense that has as an element the use or threatened use of physical force against a spouse, child, or someone similarly situated.<sup>83</sup> Thus, charges ranging from simple battery to stalking will trigger the

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<sup>81</sup> See *infra* notes 158–59.

<sup>82</sup> A sanction is broad when a wide range of crimes or outcomes trigger it. Broad sanctions cost more for the prosecutor to circumvent using charge bargaining and similar tactics, and hence carry higher circumvention costs. The effect of breadth on the probability of circumvention is less certain. Prosecutors facing limited budgets may have no choice but to circumvent, while those with more resources may be less inclined to circumvent when the costs are high.

<sup>83</sup> 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9) (2000).

ban. In immigration law, a wide range of offenses could trigger deportation, including, among others, aggravated felonies, crimes of moral turpitude, and almost any drug offense.<sup>84</sup> Further, deportation is triggered by a wide range of outcomes that fall short of what the state might consider to be a conviction. An alien may be deported if the record of his state case reveals facts sufficient to support a finding of guilty of a deportable offense, whether or not the state has actually found him guilty of such an offense.<sup>85</sup>

The allure of broad sanctions is apparent. Because the federal government cannot control state prosecutors directly, it must find another way to ensure that states do not thwart congressional aims by circumventing the sanctions. Broadening the sanctions makes them more difficult to avoid. Hence, Congress thought it could stop state prosecutors from skirting the Gun Control Act in domestic abuse cases by extending the firearms prohibition to misdemeanor crimes as well as felonies.<sup>86</sup> Of course, making it more difficult for states to circumvent a sanction does not necessarily stop them from doing so. Indeed, if the ploy does not work—that is, if states continue to circumvent the sanctions after they are broadened—it will only magnify circumvention costs, since states will have to make even bigger concessions with defendants to get around the federal sanctions. Moreover, broader sanctions are bound to be imposed upon some individuals whom Congress might prefer not to sanction, all things considered.

## 2. State Factors

The actions of state officials trigger federal sanctions; thus, the characteristics of those officials and the legal systems in which they operate influence how they will respond to the sanctions. The most important of these attributes is the amount of resources state prosecutors have to respond to the aggressive tactics used by defendants wishing to avoid the federal consequences of state convictions. The more resources a prosecutor has to devote to a case, the greater her bargaining power. She may stand pat and refuse to compromise the state charge, even if it means taking the case to trial. Implementation costs will be high, but circumvention costs will generally be low. By comparison, a prosecutor with limited resources cannot afford even a modest increase in trials. She has less bargaining power and must compromise with a defendant who refuses to accept any plea that triggers the

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<sup>84</sup> See *infra* note 93 and accompanying text.

<sup>85</sup> See 8 U.S.C. § 1101(a)(48)(A) (1999).

<sup>86</sup> 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) (“This amendment would close this dangerous loophole and keep guns away from violent individuals who threaten their own families. . .”).



federal sanction. In sum, a prosecutor cannot avoid the costs of supplemental sanctions altogether; however, depending on the amount of resources she has at her disposal, she can determine whether those costs come in the form of more trials (implementations costs) or reduced deterrence and consistency in sanctioning (circumvention and fairness costs).

The flexibility of the state legal system also influences the effect of federal sanctions. Flexibility is the state law analog to the breadth of federal sanctions. In this context, it refers to the ability of prosecutors to charge a variety of crimes to punish a certain act.<sup>87</sup> For example, if the conduct at issue violates several state laws carrying identical state sanctions, it may be possible (depending on the breadth of the federal sanction) for the state prosecutor to charge a defendant with a crime that does not trigger the federal sanction, without compromising the state sanction in the process. The federal sanction would thus affect only the nomenclature of the charge brought by the state and not the sanction imposed by it. However, some federal sanctions are so broad that they make circumvention difficult, no matter how flexible the state system. Further, state "no-drop arrest" and mandatory sentencing policies restrict flexibility and interfere with the ability of prosecutors to negotiate around federal as well as state sanctions.

The last state factor can best be described as the attitudes held by various participants in the criminal justice system, including police, prosecutors, judges, juries, witnesses, and even crime victims. This concept includes the empathy these parties might feel towards defendants facing federal sanctions that appear out of proportion to the crime involved. A police officer might overlook the marijuana he finds in a student's backpack because the student could lose his college aid eligibility; a prosecutor might reduce charges against a cop accused of beating his wife because he might otherwise lose his job; or a jury might refuse to convict an immigrant of a crime that will get him deported and separate him from his family.<sup>88</sup> But this concept also encompasses the biases that make state officials reluctant to pur-

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<sup>87</sup> Professor Stuntz suggests that prosecutors have enough flexibility to reach their preferred outcomes in most criminal cases, but he does not consider collateral consequences in his analysis. See Stuntz, *supra* note 48, at 507-11.

<sup>88</sup> In one case, a Michigan prosecutor agreed to offer a young immigrant who had raped his twelve-year-old sister a lesser charge to stave off deportation and keep his entire family in the U.S. See Schabath, *supra* note 37.

In California, juries have refused to convict defendants charged with minor crimes that will put them away for life because of the state's three-strikes law. See *Three-Strikes Law Makes Some Juries Reluctant to Convict*, OREGONIAN, May 26, 1996, at A21 (reporting that a mistrial was declared when jurors recanted a guilty verdict after hearing that the defendant would be sentenced to 25 years to life for possessing .07 grams of cocaine); see also Lempert, *supra* note 42 (discussing evidence that juries are less likely to convict when the sentence is death).

sue some crimes, such as domestic violence.<sup>89</sup> Federal sanctions like the Lautenberg firearms ban merely treat the symptoms of such biases, a strategy that may backfire when the biases remain to help thwart the sanctions.<sup>90</sup>

### 3. *Defendant Factors*

Each of the foregoing factors affects the attractiveness of the defendant's options (accepting a plea, going to trial, etc.) and may transform an otherwise inferior strategy into a superior one. How the defendant actually responds to federal sanctions will also depend upon his wealth and the strength of his case. More than any other characteristic of the defendant, his wealth determines how much he will contest the state's case against him. Wealth here includes not only the defendant's personal fortune, but also any free legal representation to which he may have access by grace or right. Wealth matters because trials are costly affairs.<sup>91</sup> The defendant must be able to afford trial before he can walk away from a plea bargain. In our original hypothetical, trial makes sense for Jack. The benefits exceed the costs, even though they are large. If he can afford trial, Jack can refuse the Theft plea and put pressure on the prosecutor to make a better offer. But if Jack cannot muster \$9,000, he must throw himself on the mercy of the prosecutor or else take the Theft plea.<sup>92</sup> We will see below in Part II.C that federal sanctions that routinely apply to financially strapped persons are seldom fought in state criminal cases.

The strength of the government's case against the defendant also affects the attractiveness of trial. A rational defendant with no chance of being exonerated at trial has no reason to press his case there. Doing so only wastes money and possibly adds to the state sanction since the state may press more serious charges against a recalcitrant defen-

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<sup>89</sup> See *United States v. Morrison*, 529 U.S. 598, 620 (2000) (noting the government's argument that a pervasive bias in state justice systems leads to "unacceptably lenient punishments for those who are actually convicted of gender-motivated violence").

<sup>90</sup> Cf. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 629-40 (2000) (noting that bold law reforms tend to be resisted by the actors who implement them, whereas modest reforms are more likely to change underlying attitudes over time). The Lautenberg firearms ban, for example, makes police even more reluctant to charge their own ranks with domestic violence. See Shirley Ragsdale, *Domestic Abuse Punishable Especially if It's a Policeman*, ARGUS LEADER (SIOUX FALLS, S.D.), Feb. 27, 2000, at 14B ("The Lautenberg Act upped the ante—giving officers and departments another reason to keep the dirty secret.").

<sup>91</sup> Nonetheless, even a poor defendant who cannot afford to press his case at trial might be able to take a few other, less costly steps to reduce his chances of conviction (such as filing a motion to dismiss the charge).

<sup>92</sup> Jack could get a public defender to go to trial for him (he cannot be forced to accept the plea), but the public defender may be unwilling or unable to give Jack's case the same attention a well-paid private attorney might. See generally Robert J. Aalberts et al., *Public Defender's Conundrum: Signaling Professionalism and Quality in the Absence of Price*, 39 SAN DIEGO L. REV. 525, 528-31 (2002) (discussing client perceptions of public defenders).

dant. However, the higher the defendant's chances of succeeding at trial, the more likely he is to seek trial and the better the bargain he will be able to strike with the prosecutor.

Predicting the precise effects of any specific supplemental sanction is beyond the scope of this Article. The main point of this analysis is to show that it is naïve to think that the federal sanctions will always be imposed while leaving state determinations unaffected. The federal sanctions may not be imposed and the state sanction may be reduced in some cases. Or the sanctions may be imposed but the state may incur additional expenses in enforcing its laws. The states have some control over the effects of the federal sanctions, but that control is limited by the design of the federal sanctions, the substance of state law, state spending, and the attitudes of various participants in the state legal systems. The next Part develops case studies of five supplemental sanction regimes and draws upon evidence of their effects to test the theories put forth above.

## II

### FIVE FEDERAL CONSEQUENCES OF STATE CONVICTION

This Part applies the foregoing analysis to five real-world examples of supplemental sanctions: the criminal alien deportation provisions of the Immigration and Naturalization Act; the Lautenberg Amendment to the Gun Control Act; and federal laws restricting eligibility to receive welfare benefits, public housing, and student financial aid. These laws demonstrate several of the key points made in the prior Part and, because they were all recently enacted or modified, they allow for comparisons to be made between the pre- and post-sanction regimes. Each case study begins by providing background information regarding how the federal sanction works and the purposes behind it. It then draws from the arguments put forth above to evaluate the actual effects of the sanction.

#### A. The Deportation Provisions of the Immigration and Naturalization Act

Under the Immigration and Naturalization Act, aliens may be deported for a wide range of crimes frequently prosecuted by state authorities, including drug crimes, crimes of moral turpitude, aggravated felonies, crimes of domestic violence, and firearms offenses.<sup>93</sup> In 2003 alone, more than 67,000 aliens were deported for

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<sup>93</sup> 8 U.S.C. § 1227(a)(2) (1999). The definitions of the offense types overlap to a degree, such that a given crime could fall into more than one category. The INA was amended by The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, and IIRIRA, *supra* note 58. These amendments made more types of state dispositions count as "convictions" for deportation purposes, increased the number of

having committed one or more of these five types of crimes, and the bulk of these cases were undoubtedly handled by the states.<sup>94</sup> Figure 2 below depicts all criminal alien deportations by year.<sup>95</sup>

crimes triggering deportation, applied the changes to cases that predated the amendments, and eliminated most statutory means of relief. See Michael D. Patrick, *The Consequences of Criminal Behavior*, N.Y.L.J., July 27, 1998, at 3.

<sup>94</sup> The government tracks deportations by categories that correspond roughly to these crime types. In fiscal year 2003, the government deported a total of 79,395 criminal aliens. OFFICE OF IMMIGRATION STATISTICS, *supra* note 3, at 150. Of these, 11,413 deportations were triggered by violations of immigration laws, *id.*, and were omitted from the total given in the text above because they were presumably handled by federal authorities. Another 31,352 aliens were deported for drug crimes, and 22,167 aliens were deported for crimes that qualify as either aggravated felonies or crimes of moral turpitude: assault, burglary, robbery, larceny, vehicle theft, sexual assault, and other sex offenses. See *id.* Crimes of domestic violence accounted for 2,238 deportations. See *id.* The remaining 12,225 deportations were not categorized by crime type in 2003, *id.*, but they would likely be considered aggravated felonies or crimes of moral turpitude based on statistics available in earlier years. See sources cited *infra* note 95.

Given that so many deportations are triggered by crimes primarily—if not exclusively—handled by the states, we may infer that most deportations are likewise triggered by state, as opposed to federal, criminal prosecutions. See DUROSE & LANGAN, *supra* note 4, at 3 tbl. (reporting that only 5.7% of all felony convictions occurred in federal courts in 2002). Table 2 below compares felony convictions in state and federal courts for 2002 by offense type (the same data are not available for misdemeanor convictions).

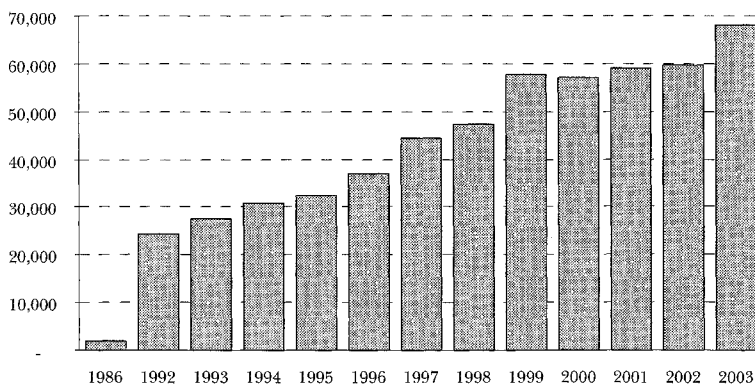
TABLE 2: FELONY CONVICTIONS IN STATE AND FEDERAL COURTS, 2002

Offense of conviction	Felony convictions		Federal as percent of total
	State	Federal	
Violent offenses	197,030	2,577	1.3%
Murder	8,990	274	3.0%
Sexual assault	35,500	313	0.9%
Robbery	38,430	1,591	4.0%
Aggravated assault	95,600	271	0.3%
Other violent offense	18,510	128	0.7%
Property offenses	325,200	12,686	3.8%
Burglary	100,640	49	0.0%
Larceny	124,320	1,530	1.2%
Fraud	100,240	11,107	10.0%
Drug offenses	340,330	26,234	7.2%
Weapon offenses	32,470	5,563	14.6%
Other offenses	155,970	16,157	9.4%
All offenses	1,051,000	63,217	5.7%

*Id.* Further evidence that the states handle a large portion of the cases triggering deportation comes from the fact that nearly 100,000 deportable criminal aliens were being held in state prisons in 1997, and thus, presumably, had been convicted of state crimes, whereas less than 30,000 deportable criminal aliens were being held in federal prisons. See Schuck & Williams, *supra* note 27, at 381 tbl.1.

<sup>95</sup> The statistics are provided by the INS and the Office of Immigration Statistics within the Department of Homeland Security. OFFICE OF IMMIGRATION STATISTICS, *supra*

FIGURE 2: CRIMINAL ALIENS DEPORTED FOR NON-IMMIGRATION CRIMES



\* Data for 1996 and prior years include deportations for immigration crimes as well.

The first three offense categories account for the vast majority of those deportations.

Drug crimes alone account for nearly half of all criminal alien deportations.<sup>96</sup> Conviction for almost any drug crime, no matter how minor, is grounds for deportation. Indeed, the only drug crime which will not trigger deportation is the possession of thirty grams or less of marijuana for personal use.<sup>97</sup>

Crimes of moral turpitude are crimes which are “per se morally reprehensible and intrinsically wrong, or malum in se,”<sup>98</sup> and for which a sentence of one year or longer may be imposed.<sup>99</sup> While the definition obviously includes many serious crimes, even minor offenses like jumping a turnstile on the New York City subway system or passing a bad check in Georgia are considered crimes of moral turpitude.<sup>100</sup> The INA does not distinguish among cases involving the

note 3, at 150; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS 177 (2003); IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 236 (2003); IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 235 (2002); IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 204 (2002); IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 203–04 (2000); IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 167 (1999); IMMIGRATION & NATURALIZATION SERV., *supra* note 6, at 171.

<sup>96</sup> OFFICE OF IMMIGRATION STATISTICS, *supra* note 3, at 150 (reporting 31,352 deportations based on drug convictions out of 79,395 total criminal deportations in 2003).

<sup>97</sup> See 8 U.S.C. § 1227 (a)(2)(B).

<sup>98</sup> *In re Fualaau*, 21 I. & N. Dec. 475, 477 (BIA 1996).

<sup>99</sup> 8 U.S.C. § 1227 (a)(2)(A)(i).

<sup>100</sup> See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1941 (2000) (jumping a turnstile);

same offense type, even though the state might; as long as the state *could* punish a given crime with one year or more of prison time, every conviction constitutes a deportable offense subject to one of two conditions. Conviction for just one crime of moral turpitude is grounds for deportation if it occurs within five years of the alien's last entry into the United States; otherwise, two unrelated convictions are required.<sup>101</sup>

The definition of aggravated felony covers many of the same offenses, like murder; rape; sexual abuse of a minor; crimes of violence, theft, or burglary when a one-year prison term has been imposed; and fraud or deceit when the loss exceeds \$10,000.<sup>102</sup> It also captures some crimes one might not consider "intrinsically wrong," like shoplifting, simple battery, petty larceny,<sup>103</sup> and (until recently) driving under the influence.<sup>104</sup> Deportation is virtually assured following conviction for an aggravated felony because aggravated felons are precluded from seeking almost every form of discretionary relief, such as cancellation of removal.<sup>105</sup>

Crimes of domestic violence include violent crimes perpetrated against a spouse or child or anyone similarly situated, as well as related crimes such as stalking and violation of a protective order.<sup>106</sup> A deportable firearms offense is any crime involving the purchase, sale, exchange, possession, use, ownership, or carrying of any firearm.<sup>107</sup> This includes, for example, negligently discharging a firearm in violation of the California state penal code.<sup>108</sup> Commission of just one domestic violence or firearms offense renders an alien deportable.<sup>109</sup>

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Pilcher, *supra* note 33, at 312–13 (passing bad checks). For a detailed description of "crimes involving moral turpitude," see DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 6.2–6 (Ann Block, updating ed., 2004).

<sup>101</sup> 8 U.S.C. § 1227 (a)(2)(A)(i)–(ii).

<sup>102</sup> *See id.* § 1101(a)(43).

<sup>103</sup> *See id.* § 1101(a)(43)(F) (stating that any crime of violence—one that involves physical force—carrying a one-year sentence is an aggravated felony); *United States v. Graham*, 169 F.3d 787, 791–93 (3d Cir. 1999) (concluding that misdemeanor petty theft with a one-year sentence is an aggravated felony); Morawetz, *supra* note 100, at 1939 (“[A] conviction for simple battery or for shoplifting . . . can be deemed an aggravated felony.” (footnotes omitted)).

<sup>104</sup> *Leocal v. Ashcroft*, 543 U.S. \_\_\_, \_\_\_, 125 S. Ct. 377, 383–84 (2004) (abrogating *Le v. U.S. Attorney General*, 196 F.3d 1352, 1354 (11th Cir. 1999), which had held that “driving under the influence with serious bodily injury” was a crime of violence and hence an aggravated felony).

<sup>105</sup> *See* 8 U.S.C. § 1227(a)(2)(A)(v) (authorizing waiver only for presidential or gubernatorial pardons); *see also* KESSELBRENNER & ROSENBERG, *supra* note 100, at § 9.13 (discussing cancellation of removal generally).

<sup>106</sup> *See* 8 U.S.C. § 1227 (a)(2)(E).

<sup>107</sup> *Id.* at § 1227 (a)(2)(C).

<sup>108</sup> *See* KESSELBRENNER & ROSENBERG, *supra* note 100, § 7.47.

<sup>109</sup> *See supra* notes 106–108.

Congress has ordered the deportation of aliens who commit such crimes for two distinct reasons. First, deportation might serve to maintain public support for immigration more generally.<sup>110</sup> Second, some claim Congress uses deportation to deter immigrants from committing crimes and to incapacitate the ones who cannot be deterred.<sup>111</sup> In other words, deportation might have more to do with crime control than with immigration policy. Certainly, the mere threat of deportation must deter some aliens from committing deportable offenses. After all, deportation is a heavy price to pay for breaking the law. The problem is that many aliens do not realize that committing certain crimes will get them deported.<sup>112</sup> This lack of awareness stems from language barriers, lack of familiarity with the U.S. legal system, the complexity of immigration law, variations in state law, lack of training among state prosecutors and defense attorneys, and surprise that such a severe sanction could be imposed for some relatively minor crimes like shoplifting or check fraud. While it may not deter many aliens from committing crimes, deportation does at least prevent criminal aliens from committing more crimes in this country. The idea is that criminal aliens are dangerous, but if they can be removed from this country, they will “no longer [be a] part of our crime problem.”<sup>113</sup> When the United States deports criminal aliens, this country no longer bears the costs of recidivism, and the states no longer bear the costs of investigating, prosecuting, and incarcerating repeat alien offenders.<sup>114</sup>

Deportation is such a severe sanction that it often overshadows the punishment the states threaten to impose. Many criminal aliens have lived here for years, and when they are removed from this country, they lose their jobs, are separated from friends and family who remain behind, and sometimes face oppression and torture in their

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<sup>110</sup> See Kanstroom, *supra* note 9, at 1892.

<sup>111</sup> See *id.*

<sup>112</sup> We know this because so many aliens seek to withdraw guilty pleas made in state criminal cases on the grounds that they were unaware the plea would trigger deportation. See cases cited *infra* note 129.

<sup>113</sup> Kanstroom, *supra* note 9, at 1893. Indeed, the agency responsible for removing aliens considers incapacitation to be its primary mission. See Office of Detention & Removal, U.S. Dep't of Homeland Sec., *Detention and Removal Operations* (defining mission as promoting public safety and national security through deportation of removable aliens), at <http://www.ice.gov/graphics/dro/index.htm> (last modified May 5, 2005).

<sup>114</sup> Some commentators estimate that it costs \$6.5 billion annually to prosecute and incarcerate all the aliens who commit crimes in the U.S. See Schuck & Williams, *supra* note 27, at 383.

homelands.<sup>115</sup> In the words of Justice Felix Frankfurter, deportation can “deprive a man ‘of all that makes life worth living.’”<sup>116</sup>

Depending on the crime for which the alien is charged, the disparity in the federal and state sanctions could be enormous.<sup>117</sup> For example, in one case, a Nigerian immigrant was ordered deported for shoplifting \$14.99 worth of baby clothes. The mother of two had been given a one-year suspended sentence and fined \$360 by the state. The INS, however, considered this an aggravated felony.<sup>118</sup> State courts readily acknowledge the significant role deportation plays in criminal cases, for it is relevant in deciding whether guilty pleas entered by aliens are truly informed. As the Comments to the Minnesota Rules of Criminal Procedure point out, “The consequences of [immigration] proceedings will often be more severe and more important to the non-citizen defendant than the consequences of the criminal proceedings.”<sup>119</sup> Whether a state *should* treat a given crime more seriously is beside the point. For present purposes, what matters is how states actually treat the crime. When they treat it leniently, for example, by imposing light or deferred sentences, and the federal government nonetheless deports the alien, the threat of deportation will loom large over the states’ cases.

Once an alien is convicted, deportation is virtually certain to follow. The federal government will detain the alien upon learning of the conviction or once the alien has finished serving his sentence.<sup>120</sup>

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<sup>115</sup> As Professor Pilcher writes:

Consider, for example, the alien who arrived in the United States as an infant. Commission of a single criminal offense may mean permanent separation from his home and family, and banishment to a country where he does not speak the language and has no real connections. The law provides no means by which he may earn an opportunity to return. Or consider the alien who will, upon deportation, face certain physical torture on account of his religious beliefs, or whose U.S. citizen daughter will be deprived of access to medical care for a life-threatening illness.

Pilcher, *supra* note 33, at 281; *see also* Morawetz, *supra* note 100, at 1938 (“Congress has mandated the deportation of persons whose family members may all reside in this country, who may have grown up here, who may be needed for the emotional and financial support of minor children or elderly parents, or who may present other compelling equities that counsel against deportation.”).

<sup>116</sup> *Galvan v. Press*, 347 U.S. 522, 530 (1954) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

<sup>117</sup> *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 162 (1996) (“Deportation has a far harsher impact on most resident aliens than many conceded ‘punishment[s].’”), *quoted in* *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 498 (1999) (Ginsburg, J., concurring).

<sup>118</sup> Smikle, *supra* note 66; *see also* Sangiacomo, *supra* note 66 (discussing an immigrant who was ordered deported to Yemen, where he would be separated from his American wife and two children, because of a no-contest plea to a domestic violence charge).

<sup>119</sup> MINN. R. CRIM. P. 15 cmt.

<sup>120</sup> Federal law makes certain that criminal aliens are detained upon conviction or upon their release from prison. Since 1990, Congress has required states to promptly notify the INS (now ICE) of the criminal conviction of a noncitizen in order to receive federal



The alien may be given a removal hearing and the opportunity for appeal,<sup>121</sup> but the Office of Detention and Removal has very little authority to stop the deportation.<sup>122</sup> As mentioned previously, aggravated felons are ineligible for all forms of relief, except a pardon from a governor (or the President, in the case of a federal conviction).<sup>123</sup> With few exceptions, all other convicted aliens qualify for cancellation of removal only if they meet three stringent conditions: (1) continuous presence in the United States for ten years or more, (2) good moral character during that time, and (3) removal would result in "extremely unusual hardship" to a spouse, child, or parent who is a

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funds under the Drug Control and System Improvement Grant Program. Immigration Act of 1990, Pub. L. No. 101-649, § 507(a), 104 Stat. 4978, 5050 (codified as amended at 42 U.S.C. § 3753(a)(11) (2003)). In 1996, Congress prohibited the states from barring any state official or agency from sending information to the INS regarding the citizenship or immigration status of any individual, something certain cities, such as New York and San Francisco, had done to thwart deportation of aliens within their jurisdictions. See IIRIRA, *supra* note 58, § 642, at 3009-707 (codified at 8 U.S.C. § 1373 (1999)); Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 51-52 (1994). It also created a criminal alien identification system to assist authorities in identifying aliens who may be eligible for deportation because of conviction for an aggravated felony, and budgeted \$5 million annually for the system. IIRIRA, *supra* note 58, §§ 326-27, at 3009-630. Even before the 9/11 attacks, Congress significantly boosted the INS's enforcement capacity, so that a large portion of criminal aliens would be apprehended. See Schuck & Williams, *supra* note 27, at 374 ("[The] INS budget has increased more than five-fold since 1985 and has more than doubled since 1994. As a result, the INS is now the largest law enforcement agency in the country."). And since its inception, ICE has made its public mission to remove *all* criminal aliens from the country. See Office of Detention & Removal, *supra* note 113.

<sup>121</sup> See Schuck & Williams, *supra* note 27, at 389-92.

<sup>122</sup> See David Shepardson, *New Laws See More in State Deported; Immigrant-Felons forced out of U.S. Under Tough Laws*, DETROIT NEWS, June 12, 2000, at 1A ("We have almost no discretion in most cases." (quoting the general counsel for the INS in Detroit)); see also Kanstroom, *supra* note 9, at 1891 ("Deportation is now often a virtually automatic consequence of criminal conviction."); Schuck & Williams, *supra* note 27, at 396-97 (noting that the only group of aliens "retaining any real possibility of avoiding removal after a criminal conviction . . . is small indeed"); Chris Hedges, *Condemned Again for Old Crimes; Deportation Law Descends Sternly, and Often by Surprise*, N.Y. TIMES, Aug. 30, 2000, at B1 ("[T]he I.N.S. commissioner cannot order law enforcement officers not to enforce the law." (quoting Representative Barney Frank)).

In the past, criminal aliens had many more options for seeking relief from deportation. Prior to 1990, for example, state judges could block the INS from deporting an alien because of a state conviction:

The provisions . . . respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported . . . .

8 U.S.C. § 1251(b)(2) (1990). However, the Judicial Recommendation Against Deportation procedure was eliminated by section 505 of the Immigration Act of 1990. Pub. L. No. 101-649, 104 Stat. 4978, 5050 (1990).

<sup>123</sup> 8 U.S.C. § 1227(a)(2)(A)(v) (1999).

citizen or legal permanent resident (and not just the alien).<sup>124</sup> Further, even when an alien is able to satisfy these demanding requirements, two additional hurdles remain. Relief from deportation is discretionary and a conviction “will always weigh heavily, although not conclusively against the granting of relief.”<sup>125</sup> In addition, federal law caps the number of aliens who may be spared deportation in any given year at 4,000.<sup>126</sup> Once all appeals have been exhausted and the alien is physically removed from the country, she must wait between five and twenty years to apply for reentry, and this assumes that she was not convicted of an aggravated felony, for which she would be permanently barred from returning to the United States.<sup>127</sup>

By limiting the avenues for postconviction relief, the INA focuses an alien’s attention almost exclusively on the pending state criminal case.<sup>128</sup> The state provides an alien who is suspected of committing a deportable offense her best, and perhaps only, hope of avoiding deportation. Aliens will thus contest state charges more vigorously. We know that many aliens have sought to withdraw guilty pleas made in ignorance of deportation and instead stand trial.<sup>129</sup> Simply put, but

<sup>124</sup> *Id.* § 1229b(b). Aliens convicted of a crime of moral turpitude, a drug offense, or certain other offenses are not eligible for this exception. *Id.* § 1229b(b)(1)(C). The law makes another narrow exception for aliens whose life or liberty would be jeopardized by deportation. *See id.* § 1231(b)(3)(A) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”). *See also* KESSELBRENNER & ROSENBERG, *supra* note 100, § 9.14 (discussing asylum and withholding of removal). Some aliens can also avoid deportation by voluntarily departing the country, though IIRIRA dramatically limited the availability of this form of relief. *Id.* § 9.13.

<sup>125</sup> Pilcher, *supra* note 33, at 292.

<sup>126</sup> 8 U.S.C. § 1229b(e).

<sup>127</sup> *Id.* § 1182(a)(9)(A).

<sup>128</sup> *See* Pilcher, *supra* note 33, at 300 (“As the result of increased determinacy in the immigration law, actors in the criminal justice system—prosecutors, defense counsel, and judges—have tremendous power to control (or substantially affect) the outcome of a future immigration proceeding when the criminal defendant is an alien.”). An alien is not likely to seek any postconviction relief from the state unless it challenges the validity of the conviction. The reason is that a conviction expunged or vacated by a state for “rehabilitative reasons” usually remains a conviction for purposes of federal immigration law, regardless of how the state might treat it. *See Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1128–29 (10th Cir. 2005) (surveying cases). In other words, relief that is granted just to suspend the collateral consequences of a conviction will not stave off deportation (even though it might restore other civil rights).

<sup>129</sup> *E.g.*, *Rollins v. Georgia*, 591 S.E.2d 796 (Ga. 2004) (alien may withdraw ten-year-old guilty plea to cocaine offense because she was never informed of the deportation consequences); *Gonzalez v. State*, 83 P.3d 921 (Or. Ct. App. 2004) (alien may withdraw plea to drug offenses because trial counsel should have told him he would be deported); *Machado v. State*, 839 A.2d 509 (R.I. 2003) (alien may withdraw plea to felony breaking and entering charge because trial court failed to adequately advise him of the deportation consequences of the plea); *State v. Rojas-Martinez*, 73 P.3d 967 (Utah Ct. App. 2003) (alien may withdraw plea to sexual battery because counsel had misrepresented the deportation consequences of the plea); *State v. Douangmala*, 646 N.W.2d 1 (Wis. 2002) (alien may withdraw plea

for the threat of deportation, these aliens would have been satisfied pleading guilty. In one case, for example, an immigrant who pled no-contest to a deportable state crime was confronted by INS officials only minutes after he made his plea. He immediately rushed back to the court to change his plea and force the state to go to trial.<sup>130</sup> He could have fought the state charge earlier, but it is telling that he chose not to until faced with the additional federal sanction. In another case, an alien put up his house just so that he could afford to withdraw his guilty plea and take his case to trial, all to avoid deportation.<sup>131</sup> Criminal defense manuals also instruct defense attorneys to take a case to trial rather than accept a plea to a deportable offense.<sup>132</sup>

The Supreme Court has acknowledged the effect deportation may have on the decision to go to trial, noting that avoiding the collateral consequence of deportation is likely to be "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial."<sup>133</sup> States also recognize that deportation is often the most important consideration for an alien charged with a state crime. At least seventeen states and the District of Columbia require their courts to advise criminal defendants that a guilty plea may trigger deportation before allowing the defendant to accept such a plea.<sup>134</sup> In eight of these states, failure to give this warning is auto-

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because trial court failed to adequately advise him regarding the deportation consequences of the plea); Doug Crow, *Anoka Court Ruling Answers Prayers; Judge Allows Man to Withdraw Guilty Plea to Avoid Deportation*, STAR TRIB. (Minneapolis), Jan. 18, 1998, at B2 (alien may withdraw plea and stand trial because of harsh deportation sanction); Alan Kohn, *Alien Allowed to Withdraw Criminal Plea*, N.Y.L.J., Mar. 30, 1993, at 1 (alien may withdraw plea and stand trial on manslaughter charge to stave off deportation); Michael Sangiacomo, *Immigrant Contesting Deportation: Spouse Abuse Plea Could Return Him to Yemen*, PLAIN DEALER (Cleveland, OH), Oct. 17, 1999 (wife of immigrant who pleaded no contest to beating her claimed: "If either of us realized that by pleading no contest that the life that we have known would end, he would not have [pleaded guilty]."). For a discussion of the grounds on which an alien may seek to set aside the plea, see *infra* notes 134-35 and accompanying text. Regardless of whether these claims are successful, the fact that they are being made suggests that aliens who know that pleading guilty will get them deported sometimes opt for trial instead.

<sup>130</sup> See Wayne L. Brown, *Former Presque Isle Doctor Nixes No-Contest Pleas*, BANGOR DAILY NEWS, June 30, 1999, at B4.

<sup>131</sup> See Shepardson, *supra* note 122.

<sup>132</sup> See Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 LAW & INEQ. 567, 623 (1999); see also Patrick A. Tuite, *Supervision Sometimes Is Too Good to be True Relief*, CHI. DAILY L. BULL., May 17, 2000, at 5 (warning defense attorneys to "be very cautious before entering any plea of guilty where the client is an alien, for the ramifications may be very drastic and may ruin that person's life").

<sup>133</sup> *INS v. St. Cyr*, 533 U.S. 289, 323 (2001); see also *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) ("That an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented.")

<sup>134</sup> These states include California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oregon, Rhode

matic grounds for vacating the conviction, thereby permitting the alien to enter a new plea.<sup>135</sup> It is noteworthy that in some of these states there is no similar rule requiring the courts or the defense bar to inform defendants of the other collateral consequences stemming from a guilty plea, an indication of just how uniquely important the deportation sanction is.

How large is the cost to the states when aliens chose to go to trial rather than accept a plea? Since 1992, the federal government has removed more than 500,000 criminal aliens from this country.<sup>136</sup> Not every one of these cases went to trial because of the threat of deportation (for the reasons discussed above in Part I.D), but the figures—including nearly 68,000 deportations in 2003 alone that easily could have stemmed from state cases—reveal tremendous potential ramifications. If even a small percentage of these cases go to trial, the states' additional cost will be substantial.

Rather than ending in trial, many criminal cases involving aliens may take a different route. The defendant and the prosecutor may attempt to bargain around the sanction. But because so many crimes

Island, Texas, Washington, and Wisconsin. CAL. PENAL CODE § 1016.5(a) (West 1985), CONN. GEN. STAT. § 54-1j(a) (2004); D.C. CODE ANN. § 16-713(a) (2001); HAW. REV. STAT. § 802E-2 (1993); 725 ILL. COMP. STAT. 5/113-8 (2004 Supp.); MD. R. CRIM. P. 4-242; MASS. GEN. LAWS ch. 278, § 29D (1992); MINN. R. CRIM. P. 15.01(10)(d); MONT. CODE ANN. § 46-12-210(f) (2003); NEB. REV. STAT. § 29-1819.02(1) (2004 Supp.); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2004); N.C. GEN. STAT. § 15A-1022(a)(7) (2001); OHIO REV. CODE ANN. § 2943.031(A) (Anderson 2003); OR. REV. STAT. § 135.385(2)(d) (2003); R.I. GEN. LAWS § 12-12-22(b) (2002); TEX. CRIM. PROC. ANN. art. 26.13(a)(4) (Vernon 1989); WASH. REV. CODE § 10.40.200(2) (2002); WIS. STAT. ANN. § 971.08(1)(c) (West 1999). California's warning is representative:

If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

CAL. PENAL CODE § 1016.5(a).

<sup>135</sup> CAL. PENAL CODE § 1016.5(b); CONN. GEN. STAT. § 54-1j(c); D.C. CODE ANN. § 16-713(b); MASS. GEN. LAWS ch. 278, § 29D; OHIO REV. CODE ANN. § 2943.031(D); R.I. GEN. LAWS § 12-12-22(c); WASH. REV. CODE § 10.40.200(2); WIS. STAT. ANN. § 971.08(2). Six of these states go so far as to presume that the court, absent a record to the contrary, never gave the warning. CAL. PENAL CODE § 1016.5(b); D.C. CODE ANN. § 16-713(b); MASS. GEN. LAWS ch. 278, § 29D; OHIO REV. CODE ANN. § 2943.031(E); R.I. GEN. LAWS § 12-12-22(c); WASH. REV. CODE § 10.40.200(2). In addition to warning aliens about deportation, at least seven states actively encourage them to rethink plea deals that trigger deportation, by, e.g., advising them to take time to rethink such agreements. CAL. PENAL CODE § 1016.5(d); CONN. GEN. STAT. § 54-1j(a); D.C. CODE ANN. § 16-713(b); HAW. REV. STAT. § 823E-1; NEB. REV. STAT. § 29-1819.03; OHIO REV. CODE ANN. § 2943.031(A); R.I. GEN. LAWS § 12-12-22(b). Finally, at least nine states attempt to protect aliens from deportation, at least in the short term, by not requiring them to divulge their legal status during the state court proceedings. CAL. PENAL CODE § 1016.5(d); CONN. GEN. STAT. § 54-1j(b); HAW. REV. STAT. § 823E-1; MD. R. CRIM. P. 4-242 advisory committee's note; MASS. GEN. LAWS ch. 278, § 29D; NEB. REV. STAT. § 29-1819.03; OHIO REV. CODE ANN. § 2943.031(C); R.I. GEN. LAWS § 12-12-22(d); WASH. REV. CODE § 10.40.200(1).

<sup>136</sup> See sources cited *supra* note 95.

and so many dispositions trigger deportation, circumventing the sanctions is no easy task. The INA defines "conviction" broadly to cover many dispositions that the states themselves do not consider convictions for purposes of state law. In addition to formal judgments of guilt entered by a court, the federal definition of conviction encompasses cases in which the judgment of guilt has been withheld, so long as the alien "has admitted sufficient facts to warrant a finding of guilt, and . . . the judge has ordered some form of punishment," even if it has been suspended.<sup>137</sup> Congress intended to close what it considered loopholes created by state law that permitted "aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered 'convicted'" to escape deportation.<sup>138</sup> For example, a state might dismiss a domestic abuse charge against an alien once he completes a required counseling program. The state might not consider this to be a conviction, but the alien would still be convicted in the eyes of ICE if he admitted his guilt at any time during the state proceedings.<sup>139</sup> Federalizing the definition of conviction thereby prevents states from bargaining around deportation merely by manipulating the state's characterization of the disposition.

Many alien defendants nonetheless try to avoid deportation by negotiating a plea for a noncovered offense, which is usually, though not always, a less serious offense as well.<sup>140</sup> Indeed, prosecutors have acknowledged manipulating state charges to circumvent federal deportation. For example, in one case, a Michigan prosecutor admitted charging a young immigrant boy with a lesser offense in order to stave off deportation and keep his family in the United States. The change in charge was quite dramatic: the initial charged offense was first degree criminal sexual conduct (the boy had raped and impregnated his twelve-year-old sister), punishable by life in prison, whereas the ultimate offense of conviction was fourth degree criminal sexual conduct,

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<sup>137</sup> 8 U.S.C. § 1101(a)(48) (1999). The 1996 amendments to the INA federalized the meaning of conviction in the immigration context. See IIRIRA, *supra* note 58; H.R. REP. NO. 104-879, at 123 (1997) (noting that the purpose of § 101(a)(48)(A) of IIRIRA is to "broaden the definition of 'conviction' for immigration law purposes . . . [to] make it easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudication or suspension of sentences").

This definition of conviction differs from the one used for purposes of the federal firearms ban. The Gun Control Act relies more heavily upon how a state treats a particular determination in deciding whether that determination constitutes a "conviction" for purposes of federal law. See discussion *infra* notes 168-169 and accompanying text.

<sup>138</sup> H.R. CONF. REP. NO. 104-828, at 224 (1996).

<sup>139</sup> See Pilcher, *supra* note 33, at 321-22 (describing state diversion programs as convictions under the INA regardless of state treatment).

<sup>140</sup> See *id.* at 300 ("Charging decisions and plea discussions . . . offer the greatest opportunities for practitioners to account for immigration impacts in their decisionmaking processes.").

a misdemeanor carrying a maximum sentence of two years.<sup>141</sup> Commenting on the case, the prosecutor criticized the INS, saying it left him in an untenable position: “‘They are basically telling me that I either should not charge a 17-year-old alleged rapist, or I should have the victim of the crime deported to India along with her brother and parents. . . . Neither solution is acceptable.’”<sup>142</sup> Similar stories of plea deals to avoid hardship abound.<sup>143</sup> Likewise, criminal defense manuals openly suggest plea manipulation strategies to avoid deportation by negotiating for a noncovered offense.<sup>144</sup>

Because of the breadth of crimes and dispositions triggering deportation, it is difficult for the state prosecutor to thwart deportation without compromising state objectives. Yet in the shadow of the deportation sanction, state prosecutors are willing to offer pleas to lesser charges for two main reasons. First, flexibility in plea negotiations helps avoid the costs of going to trial. Indeed, given a fixed budget, the prosecutor may not even be able to afford handling additional trials.

Second, the prosecutor may sympathize with the alien defendants because of the extreme hardship attending deportation. Past experience suggests that state prosecutors will face a large number of compelling hardship cases. Prior to 1996, the Attorney General had discretionary authority to grant relief from deportation under section 212(c) of the INA, but IIRIRA significantly narrowed that authority.<sup>145</sup> The *St. Cyr* Court noted that, before IIRIRA, “the class of aliens whose continued residence in this country has depended on their eligibility

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<sup>141</sup> Schabath, *supra* note 37. While the effort may have ultimately proven futile—even the lesser charge may have subjected the boy to deportation—it shows the lengths to which prosecutors will go to help certain aliens escape deportation.

<sup>142</sup> *Id.*

<sup>143</sup> *E.g.*, Sue Carlton, *Immigration Nightmare Has a Happy End, This Time*, ST. PETERSBURG TIMES, Sept. 21, 1997, at B1 (describing how an Austrian immigrant, facing deportation after being convicted for stealing from a family while babysitting in 1979 and then for shoplifting in 1983, was able to circumvent the deportation with the assistance of the judge and prosecutor by dropping one of the old convictions and reducing the other); Richard Liebson & Jorge Fitz-Gibbon, *1996 Immigration Act Keeps Woman in Prison*, JOURNAL NEWS (Westchester, N.Y.), Jan. 22, 2001, at 1A (reporting that a Queens prosecutor agreed to accept a plea to disorderly conduct—rather than prostitution and loitering—because doing so would permit an alien to avoid deportation).

<sup>144</sup> *E.g.*, Baldini-Potermine, *supra* note 132. *See also* Tuite, *supra* note 132, noting that: If you have a case in which the charges are such that a plea of guilty to those charges will mean automatic or probable deportation you should sit down with the prosecutor and/or the judge (in the state system) to explain the ramifications of a finding of guilty or pleading guilty to the charges. Maybe, if you have the right client or climate, the prosecutors would agree to a plea or a finding to something that would not cause deportation.

<sup>145</sup> *See* Immigration & Nationality Act of 1952 § 212(c), 8 U.S.C. § 1182(c), *repealed by* IIRIRA, *supra* note 58, § 240B(b), at 3009-597; *see also* IIRIRA § 240A(b) (codified at 8 U.S.C. § 1229b(b) (1999)) (barring relief for aggravated felonies, drug-based convictions, certain weapons offenses, and multiple convictions of crimes of moral turpitude).

for § 212(c) relief is extremely large,” and that from 1989 to 1995, over 10,000 aliens—more than one-half of those who sought relief—were granted relief under that provision.<sup>146</sup> In other words, in nearly one-half of cases prior to 1996, federal immigration officials had determined that deportation was not warranted, based on a variety of factors including the seriousness of the offense, evidence of rehabilitation, duration of the alien’s residence, impact of deportation on the alien’s family, and service in the U.S. Armed Forces.<sup>147</sup> The federal government now considers none of these factors.<sup>148</sup> If they are to play any role in determining whether an alien is deported, it must be in state plea negotiations.

The deportation provisions of the INA may deter some crimes committed by aliens, assuming aliens are aware of the deportation consequences *ex ante*. At the very least, deportation saves the states the cost of prosecuting and imprisoning some aliens who would have committed additional crimes had they remained in the country. Deporting aliens on the basis of state convictions, however, may be more costly than Congress realizes. Attaching virtually automatic deportation consequences to certain state convictions dramatically increases the stakes involved in the underlying state proceedings. Not surprisingly, alien defendants often resist these state charges more fiercely, forcing more trials and appeals. (If even a small portion of these aliens resist state charges more fiercely because of the threat of deportation, the burden on the states will be quite large.) The states must either bear these implementation costs or else circumvent deportation, which often requires reducing the sanction the states impose. Thus, while the net effects of the federal law are impossible to assess with precision, it is likely that the federal sanction is imposed less often (or less consistently) than Congress might expect, and it is possible the deportation sanction may actually reduce the total sanction levied on certain alien defendants.

#### B. The Lautenberg Amendment to the Gun Control Act

The 1996 Lautenberg Amendment to the Gun Control Act prohibits any individual who has been convicted of a misdemeanor crime of domestic violence from purchasing, transporting, or possessing firearms.<sup>149</sup> A misdemeanor crime of domestic violence is any offense

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<sup>146</sup> *INS v. St. Cyr*, 533 U.S. 289, 295–96 & n.5, 326 (2001) (also holding that the repeal of § 212(c) relief did not apply retroactively to an alien who had pleaded guilty before the Act was passed).

<sup>147</sup> *See id.* at 296 n.5.

<sup>148</sup> *See* 8 U.S.C. § 1229b(b).

<sup>149</sup> Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 (1996) (codified at 18 U.S.C. § 922(g)(9) (2000)). The firearm must have been transported in interstate commerce. *Id.*

under federal or (more likely) state law that has as an element "the use or attempted use of physical force, or the threatened use of a deadly weapon" against a spouse or child, or a person similarly situated.<sup>150</sup> Violations of the ban are punishable by up to ten years imprisonment and a fine.<sup>151</sup>

The firearms ban is designed to prevent the escalation of violence in domestic situations by taking firearms out of the hands of abusers. As Senator Frank Lautenberg, the sponsor of the measure, noted, "[A]ll too often, the difference between a battered woman and a dead woman is the presence of a gun."<sup>152</sup> Congress was frustrated by the way states were handling domestic violence cases, finding that states treated domestic abusers too leniently.<sup>153</sup> Since most domestic abusers were being charged with misdemeanors, they escaped the reach of existing gun control regulations, which then applied only to convicted felons.<sup>154</sup>

The significance of the firearms ban varies from case to case, depending on the value the convicted abuser attaches to the privilege of purchasing, possessing, and transporting firearms. The ban is a particularly severe sanction for anyone who must handle a firearm on the job, such as police officers, prison guards, active duty soldiers, reservists, and gun dealers. These people will lose their jobs if the ban is triggered.<sup>155</sup> For them, the federal firearms ban will overshadow all

A related provision bars anyone subject to a court restraining order from possessing a firearm. 18 U.S.C. § 922 (g)(8).

<sup>150</sup> *Id.* § 921(a)(33)(A).

<sup>151</sup> *Id.* § 924(a)(2).

<sup>152</sup> 142 CONG. REC. S11,226 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg) (noting study showing the risk of murder increases threefold when a gun is present).

<sup>153</sup> *See, e.g.*, 142 CONG. REC. S11,876 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (noting that most domestic violence offenders plead down to a misdemeanor and get away with only a "slap on the wrist"); 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) ("The fact is that in many places domestic violence is not taken as seriously as other forms of brutal behavior.").

<sup>154</sup> 142 CONG. REC. H10,434 (daily ed. Sept. 17, 1996) (statement of Rep. Schroeder) (Our biggest problem is many States have not lifted domestic violence convictions to the level of a felony. They consider them a misdemeanor. Other States have allowed people, even though it is considered a felony, to plead guilty to a lesser crime. Therefore, . . . an awful lot of people who have been convicted of domestic violence problems are able to escape [the Gun Control Act].); 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) ("This amendment would close this dangerous loophole and keep guns away from violent individuals who threaten their own families. . ."). Previously, domestic abuse only triggered the federal firearms ban if it was prosecuted as a felony, defined as "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

<sup>155</sup> Unlike other sections of the Gun Control Act, the Lautenberg Amendment does not exempt public employees from its coverage. *See* 18 U.S.C. § 925(a)(1) (exempting from the prohibition all firearms issued for the use of any government agent, except for those convicted of misdemeanor crimes of domestic violence); *Amend Section 658 of the Fiscal Year 1997 Omnibus Appropriations Act: Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence: Hearing on H.R. 26 and H.R. 445 Before the Subcomm. on Crime of the*



other considerations, particularly the "slap on the wrist" they can expect from the state.<sup>156</sup>

A state conviction automatically triggers the firearms ban. Upon conviction, the owner of a firearm must immediately relinquish possession, though no one is designated to inform him of the requirement. The federally mandated background check for firearms sales should also prevent convicted abusers from obtaining new weapons. The background questionnaire asks a prospective buyer whether he has ever been convicted of a misdemeanor crime of domestic violence, and if the buyer acknowledges such a conviction, the sale will be blocked.<sup>157</sup> Once the conviction occurs, there is no federal procedure by which the offender can have the ban lifted. While the Gun Control Act authorizes the Attorney General to issue waivers to persons meeting certain criteria,<sup>158</sup> Congress has forbidden the exercise of this authority.<sup>159</sup>

What have been the effects of the ban? Deterrence is one possibility. The threat of losing a job or a lifelong hobby may deter some gun users from committing acts of violence covered by the statute. However, many domestic abusers are unaware of the ban, that is, until *after* they have already committed acts of domestic violence.<sup>160</sup> Chief

*House Comm. on the Judiciary*, 105th Cong. 40 (1997) [hereinafter *Gun Ban Hearing*] (testimony of Bernard H. Teodorski, National Vice President, Grand Lodge, Fraternal Order of Police) ("For the first time in the history of gun control, the Lautenberg Amendment to the Gun Control Act of 1968 applies to law enforcement officers and other 'government entities.'").

<sup>156</sup> Of course, one would not expect the federal ban to affect criminal cases in states that have a similar state firearms ban. However, few states have adopted bans that are as stringent as the Lautenberg ban. See Melanie L. Mecka, Note, *Seizing the Ammunition From Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 RUTGERS L.J. 607, 628 n.116, 629 (1998) (reporting over twenty-five state statutes that in some way restrict the gun ownership of domestic abusers, but noting that only four of these states have bans that are nearly as strict as the federal ban). California law, for example, prohibits individuals who have been convicted of misdemeanor domestic violence offenses from possessing firearms for ten years beyond the date of conviction, but permits sentencing courts to lift the ban for law enforcement officers. CAL. PENAL CODE § 12021(c)(1)-(2) (West 1999).

<sup>157</sup> See 18 U.S.C. § 922(s)(3)(B)(1).

<sup>158</sup> *Id.* § 925(c) (providing that an individual who is prohibited from possessing firearms may apply for relief to the Attorney General, who may grant such relief if "the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest").

<sup>159</sup> Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. 102-393, 106 Stat. 1729, 1732 (1992); see also *United States v. Bean*, 537 U.S. 71, 74-76 (2002) (holding that courts have no independent authority to grant a waiver).

<sup>160</sup> See cases cited *infra* note 165, in which defendants petition to withdraw guilty pleas to crimes of domestic violence because they were unaware of the ban at the time they made the pleas. Senator Lautenberg, in fact, admitted that few offenders would be aware of the ban until they were denied a firearms purchase. 142 CONG. REC. S11,363 (daily ed. Sept. 26, 1996) (statement of Sen. Lautenberg) ("As a practical matter, most abusers are unlikely to get . . . advance notice [of the ban]."); see also *United States v. Bass*, 404 U.S. 336, 348

Judge Richard Posner suggests that the firearms ban is “*malum prohibitum*, not *malum in se*; that is, it is not the kind of law that a lay person would intuit exist because the conduct it forbade was contrary to the moral code of his society.”<sup>161</sup> Simply put, the ban cannot deter the unwary.<sup>162</sup>

The ban may have had more success at incapacitating domestic abusers (i.e., taking away their firearms) than at deterring them. Licenses for thousands of firearms purchases have been denied because of the ban.<sup>163</sup> Keeping guns away from domestic abusers is an unquestionably good idea. Unfortunately, this is not easily done. The reason is that abusers contest domestic violence charges more vigorously because of the ban and often find ways to evade it.

The Lautenberg ban gives a suspected abuser a compelling reason to refuse any plea to a crime of domestic violence and take his case to trial. As one defense attorney explained, “A week in jail is worth the risk [of trial] to a guy who considers hunting an important part of his life. . . . You have to remember, this ban is forever.”<sup>164</sup> Many convicted domestic abusers have sought to withdraw their guilty pleas, claiming they would have opted for trial had they known about the firearms ban.<sup>165</sup> We can infer from these cases that the

n.15 (1971) (noting that in states without their own firearms ban defendants are unlikely to be on notice that they cannot possess firearms).

<sup>161</sup> United States v. Wilson, 159 F.3d 280, 294 (7th Cir. 1998) (Posner, C.J., dissenting).

<sup>162</sup> See *id.* at 295 (“The purpose of criminal laws is to bring about compliance with desired norms of behavior. In the present case it is to reduce domestic violence by getting guns out of the hands of people who are behaving menacingly toward . . . an estranged or former spouse. This purpose is ill served by keeping the law a secret. . . . In such circumstances the law is not a deterrent. It is a trap.” (citation omitted)).

*Ex ante* ignorance of the ban limits the ban’s deterrent effect but not its potential to disrupt the prosecution of misdemeanor crimes of domestic violence. Just because an abuser was ignorant of the ban when he committed his offense does not mean that he will remain in the dark once he is facing criminal charges. An abuser may discover the ban—his attorney may inform him of it, for example—in time to change his approach to the state’s criminal case against him. And even an offender who remains ignorant of the ban until after he is convicted might later attempt to withdraw his guilty plea or petition for an expungement when he finally discovers it—when he attempts to purchase a firearm, for example.

<sup>163</sup> *Violence Against Women Act of 1999, Stalking Prevention and Victim Protection Act of 1999: Hearing on H.R. 1248 and H.R. 1869 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. 25 (1999) (testimony of Bonnie Campbell, Director, Violence Against Women Office, U.S. Dep’t of Justice) (noting that 7,700 handgun sales hocked through background checks in 1997 were denied because of a domestic violence conviction or restraining order).

<sup>164</sup> Jason Wolfe, *Gun Ban to Deter Abusers Draws Fire*, PORTLAND PRESS HERALD (Maine), Feb. 7, 1997, at 1A.

<sup>165</sup> *E.g.*, Commonwealth v. Indelicato, 667 N.E.2d 300, 301 (Mass. App. Ct., 1996); State v. Tollefson, No. C1-98-1712, 1999 WL 366577, at \*1 (Minn. Ct. App. June 8, 1999); State v. Kosina, 595 N.W.2d 464, 465 (Wis. Ct. App. 1999); State v. Molzner, Nos. 99-0311-CR, 99-0312-CR, 1999 WL 497161, at \*5 (Wis. Ct. App. July 15, 1999); see also *Officer Could Lose Job Because of New Federal Gun Law*, A.P. POL. SERVICE, Dec. 20, 1996.

Lautenberg ban has made standing trial more attractive in comparison to pleading guilty. Further, defense attorneys have noted a rise in trial rates for domestic violence cases since the Lautenberg Amendment was enacted.<sup>166</sup>

Of course, many defendants would prefer to circumvent the Lautenberg firearms ban through charge bargaining. Trial may be more attractive than a plea triggering the ban, but it is still a last resort. Compared to deportation, Lautenberg is easy to circumvent. Some defendants avoid the Lautenberg ban by pleading to a noncovered offense. For example, a defendant could plead to a crime that does not have as an element the use or attempted use of force, such as disorderly conduct as opposed to assault and battery.<sup>167</sup> But non-violent offenses like disorderly conduct typically carry less severe state sentences and social stigma than violent offenses like assault and battery.

Another way to skirt the Lautenberg ban is to negotiate for a disposition the federal law does not consider to be a conviction. For example, a defendant could enter a no-contest plea to a violent misdemeanor, accompanied by a light sentence.<sup>168</sup> If the state does not consider such an arrangement to be a conviction for state law purposes, it is not a conviction for purposes of the federal firearms ban either.<sup>169</sup> (Contrast this with the definition of conviction for purposes

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<sup>166</sup> See, e.g., Wolfe, *supra* note 164 (“Defense lawyers in Portland courts say many defendants who in the past were willing to negotiate a plea now are opting to risk a jury trial after they are advised about the [Lautenberg] gun ban.”).

<sup>167</sup> See Laura A. Przybylinski Finn, *Those Convicted of Domestic Violence Cannot Possess Firearms*, 72 WIS. LAW. 57, 58 (1999) (noting that many disorderly conduct convictions will not meet the requirements of § 921(a)(33) because the government is not required to prove that the defendant used force). For a list of charges that police typically file against domestic abusers, see *People v. Singleton*, 532 N.Y.S.2d 208, 209 (N.Y. Crim. Ct. 1988).

<sup>168</sup> Jonathan D. Rockoff, *Domestic-Assault Plea Lets Officer Keep Gun, Job*, PROVIDENCE J.-BULL., May 29, 1998, at A1 (noting that an officer who entered a no-contest plea to charge of domestic assault and was sentenced to court costs and counseling was not “convicted” under Rhode Island law). Similarly, many states have diversion laws, which allow defendants to avoid conviction. See, e.g., CONN. GEN. STAT. § 46b-38c(g) (2004) (allowing for the dismissal of charges if a batterer successfully completes a counseling program).

<sup>169</sup> In the Firearms Owners’ Protection Act, Congress rejected the Court’s decision in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), which held that federal law determines what constitutes a conviction, and reaffirmed its desire not “to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms.” Pub. L. No. 99-308, § 1(b)(2), 100 Stat. 449, 450 (1986) (quoting the Gun Control Act of 1968). Accordingly, for purposes of 18 U.S.C. § 921:

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any 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 for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

of deportation discussed above.) State prosecutors have acknowledged that they reduce state charges to help some defendants avoid Lautenberg consequences. For example, one Florida State Attorney acknowledged giving corrections officers accused of domestic violence preferential treatment because of the firearms ban; the State Attorney defers prosecution and promises to drop the charges later if the officer attends anger management classes or fulfills some other condition.<sup>170</sup> Avoiding a conviction not only undermines the congressional aims behind the firearms ban, it may dilute the state sanctions as well. When defendants are put through pretrial diversion programs, for example, they may not be punished at all for their actions—by either the state or Congress. One commentary explains the ramifications:

[D]iversion may not have a strong deterrent effect because it permits the batterer to avoid criminal punishment, and *pre-trial* diversion allows him to escape prosecution and trial as well. As such, diversion may communicate a message that domestic violence is not as serious as assault between strangers, especially if the jurisdiction does not employ diversion for other offenses.<sup>171</sup>

It is obvious why defendants would demand new plea arrangements post-Lautenberg: The law has raised the costs of their previous bargain. But why would prosecutors ever cooperate? Despite the obvious harm done to state law, state prosecutors are likely to treat domestic violence cases even more leniently in the wake of Lautenberg for three reasons. First, reducing or dropping charges saves the prosecutor from having to take many of these cases to trial. The number of cases likely to be affected by the firearms ban is staggering: Police already spend more time on domestic violence cases than all other major violent felonies combined, and such cases require tremendous prosecutorial and judicial resources as well.<sup>172</sup> Estimates of the annual number of domestic violence incidents range from two to four million.<sup>173</sup> Many of these cases will involve offenders who will seek to evade the firearms ban, such as police officers and soldiers, not to

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*Id.* § 101; see also Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Dep't of Justice, *Misdemeanor Crime of Domestic Violence: Questions and Answers*, at <http://www.atf.treas.gov/firearms/domestic/qa.htm> (Apr. 28, 1997).

<sup>170</sup> See Becker et al., *supra* note 44. Judges, too, have helped some abusers skirt the federal firearms ban. See, e.g., Matt Lait, *L.A. Police Panel Reviews Its Watchdog's Action Dispute*, L.A. TIMES, Nov. 7, 1997, at B1 (noting that a judge allowed a L.A. police officer to modify his domestic violence plea to a lesser disturbing the peace plea in order to save his job).

<sup>171</sup> *Legal Responses to Domestic Violence*, *supra* note 44, at 1543.

<sup>172</sup> See *id.* at 1501–02.

<sup>173</sup> See 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg); *Legal Responses to Domestic Violence*, *supra* note 44, at 1501.

mention avid hunters.<sup>174</sup> Since many prosecutors do not consider domestic violence a high priority, they are unlikely to divert scarce resources away from other cases; they will reduce or dismiss charges instead.<sup>175</sup>

A second reason that prosecutors treat defendants more leniently in the shadow of the Lautenberg ban is that many of them do not consider domestic violence to be a serious crime.<sup>176</sup> This bias is rooted in beliefs that domestic violence is a family matter, that victims provoke the abuse, and that victims can easily leave abusive relationships.<sup>177</sup> The Lautenberg ban did nothing to change these underlying attitudes. Instead it gave prosecutors (and other state officials) cause to treat domestic violence cases even more leniently.<sup>178</sup> After lamenting the lack of punishment meted out to police officers accused of domestic violence before the ban, one commentator surmised that Lautenberg only "upped the ante—giving officers and departments another reason to keep the dirty secret."<sup>179</sup>

The third reason a prosecutor may compromise is because the firearms ban has weakened her case. Victims of domestic violence may be less willing to pursue charges when their abusers have more to

<sup>174</sup> When Congress passed the Amendment, some estimates indicated that up to 60,000 police officers could lose their jobs because of the firearms ban, apparently assuming no circumvention. See *Gun Ban Hearing*, *supra* note 155, at 76 (testimony of Donna F. Edwards, Executive Director, National Network to End Domestic Violence).

<sup>175</sup> See *Legal Responses to Domestic Violence*, *supra* note 44, at 1540 ("Faced with limited time, personnel, and resources . . . prosecutors often give domestic violence cases low priority and sometimes even try to persuade battered women not to prosecute.").

<sup>176</sup> See, e.g., Brief for the United States at 10, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) ("[D]eeply ingrained attitudes often cause police, prosecutors, judges, and other court personnel to treat domestic violence less severely than other sorts of violence.").

<sup>177</sup> See *Legal Responses to Domestic Violence*, *supra* note 44, at 1502-03.

<sup>178</sup> See, e.g., Chris Graves, *Officer Gets Gun Back; Returns to Work After Court Ruling*, STAR TRIB. (Minneapolis), Jan. 7, 1997, at 1B (noting that a prosecutor did not object to allowing a police officer to withdraw his guilty plea to domestic violence, because the state and the officer's family would suffer if the ban were applied to him).

In states with domestic violence firearms laws, state officials are often unwilling to enforce them. For example, in Utah, judges have declined to order domestic abusers to surrender their firearms pursuant to a 1995 state law. See Jim Stungl, *Abuse Suspects Keeping Guns: Law in Domestic Violence Cases Mostly Ignored*, MILWAUKEE J. SENTINEL, Oct. 11, 1996, at 1. Some state judges in Wisconsin have returned firearms to men covered by a state domestic violence firearms ban so the men could go hunting. *Id.*

<sup>179</sup> Ragsdale, *supra* note 90. The National Coalition Against Domestic Violence, which opposes lifting the ban as applied to government officials, argued before Congress that: [P]olice officers and other law enforcement personnel already have too many advantages. Women seeking to prosecute law enforcement personnel face many barriers in a criminal justice system where police officers have important connections to prosecutors, court personnel, and their friends on the force who will be the first to respond to domestic violence reports.

*Gun Ban Hearing*, *supra* note 155 (written testimony of the National Coalition Against Domestic Violence).

lose.<sup>180</sup> Without the support of the victim's testimony, the prosecutor may have little hope of convincing a jury to convict.<sup>181</sup> Thus, even if the prosecutor is willing and able to go to trial, settling the case and inflicting *some* sanction on the defendant, no matter how small, may better serve state goals.

Even if these pretrial tactics fail and the state ultimately convicts the defendant at trial, the defendant has one more opportunity to avoid the Lautenberg sanction. A defendant who has been convicted by the state can have the firearms ban lifted by having the conviction expunged under state law.<sup>182</sup> Expungement removes the conviction from the person's criminal record and thereby restores whatever rights had been forfeit because of it.<sup>183</sup>

The Lautenberg ban has made it even more likely that domestic abusers will have their convictions expunged. First, the Lautenberg Amendment makes it more worthwhile to seek an expungement. Second, it may increase the odds of receiving one, since courts may sympathize more with persons convicted of domestic violence offenses that subject them to the federal sanction. In one case, a California judge granted a police officer an expungement so he could keep his firearm and his job, despite the fact he had brutally and repeatedly raped his estranged wife.<sup>184</sup> "[I]nstead of taking away the guns," one commentator suggests, "the courts have taken away the convictions."<sup>185</sup>

Notably, thousands of convicted domestic abusers have had their records expunged since 1996, including many who would not have qualified for or sought an expungement prior to the passage of the Lautenberg Amendment.<sup>186</sup> In Rhode Island, for example, state

<sup>180</sup> See, e.g., *Legal Responses to Domestic Violence*, *supra* note 44, at 1526 (noting that prosecution for domestic violence offenses may impose financial hardship on victims and thus make them less willing to press charges); Becker et al., *supra* note 44 ("We began having problems getting wives or girlfriends to go forward with prosecutions [after the Lautenberg Amendment was passed]. . . . Many of them live on state property, so if the wife testifies against a husband, not only are they losing an income, they are losing their home.") (quoting Florida State Attorney Rod Smith)).

<sup>181</sup> See *Legal Responses to Domestic Violence*, *supra* note 44, at 1540.

<sup>182</sup> 18 U.S.C. § 921(a)(33)(B)(ii) (2000) ("A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged . . . unless the . . . expungement . . . expressly provides that the person may not . . . possess . . . firearms.").

<sup>183</sup> Grant et al., *supra* note 2, 1149–50 (reviewing the legal effect of states' expungement statutes).

<sup>184</sup> See Hector Tobar, *Officer's Expunged Conviction Angers Ex-Wife*, L.A. TIMES, May 26, 1997, at B1; see also Graves, *supra* note 178 (noting that four out of the five Minneapolis police officers affected by the law in 1996 had their records cleared within one month).

<sup>185</sup> *California Abusers Find Way to Shirt Gun Law*, CHARLESTON DAILY MAIL, May 27, 1997, at A1.

<sup>186</sup> See, e.g., Maria C. Hunt, *New Gun Law For Batterers Comes Armed With Loophole*, SAN DIEGO UNION TRIB., Jan. 20, 1997, at A1 (noting that hundreds of police officers in San

courts expunged over 1,300 domestic assault convictions and nolo pleas obtained in the five years following passage of the Lautenberg Amendment (1997–2001), compared to fewer than 350 in the previous five years (1992–1996).<sup>187</sup> Other states have experienced similar trends.<sup>188</sup>

Like reducing charges or dismissing cases altogether, expunging a criminal record lowers the total sanction imposed on domestic abusers. An expungement eliminates most, if not all, of the lingering consequences associated with a criminal conviction. Thus, when a court grants a defendant an expungement to relieve him of the firearms ban, it may also relieve him of any other consequences that stem from the conviction, such as sentencing enhancements that are triggered by second or third convictions.<sup>189</sup> In other contexts, state and federal law enforcement officials have opposed the granting of expungements on the grounds they

hamper law enforcement [since] . . . past history is vital to police in assessing whether there is 'probable cause' to believe a suspect was involved in a crime; to prosecutors, in deciding how tough a charge to bring; and to judges, in deciding whether cash bail should be required at the outset, and in sentencing later on.<sup>190</sup>

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Diego were expected to utilize the California expungement statute as a result of the firearms ban); Ragsdale, *supra* note 90 ("Shortly after the consequences of the Lautenberg Act became known, there was a scramble by police officers to have their records expunged.").

<sup>187</sup> E-mail from Michael Tenney, Sr. Oracle Developer, Rhode Island Supreme Court Judicial Technology Center, to author (Feb. 11, 2004) (on file with author) (providing raw data on expungements in Rhode Island by offense type); *see also* Katherine Gregg, *R.I. Courts Expunged Thousands of Records*, PROVIDENCE SUNDAY J., April 25, 1999, A1 (noting the increase in expungements granted by Rhode Island courts and telling the stories of some who sought to expunge convictions). The totals given include crimes explicitly labeled crimes of domestic violence (e.g., domestic assault), as well as a few crimes that may or may not involve a domestic situation or violence (e.g., simple battery, domestic vandalism). There were more instances of the former than the latter in the dataset. *See* E-mail from Michael Tenney, *supra*.

<sup>188</sup> Unfortunately, not all states track expungements the way Rhode Island does. Three other states that grant expungements were able to provide useful data. *See* E-mail from Suzanne R. Briscoe, Utah Bureau of Criminal Identification, to author (Mar. 24, 2004) (on file with author) (reporting that total misdemeanor expungements in Utah rose from 513 in 1995 to 904 in 2001); E-mail from Paul Perrone, Chief of Research & Statistics, CPJA Division, Hawaii State Department of the Attorney General, to author (Dec. 17, 2003) (on file with author) (reporting that between 1993 and 1996, Hawaii expunged only one conviction for abuse of a family member, and that ten such convictions were expunged between 1997 and 1998 before the law authorizing the expungements was repealed); Fax from Willene White-Smith, Manager, Georgia Uniform Crime Reporting Program (June 28, 2004) (on file with author) (total expungements in Georgia rose from 292 in 1995 to 700 in 2001).

<sup>189</sup> *See generally* Kimberly J. Winbush, Annotation, *Pardoned or Expunged Conviction as "Prior Offense" Under State Statute or Regulation Enhancing Punishment for Subsequent Conviction*, 97 A.L.R.5th 293 (2002).

<sup>190</sup> Gregg, *supra* note 187.

The net effect of the Lautenberg Amendment, and whether its benefits outweigh its costs, is far from clear. By taking guns away from thousands of convicted abusers, the ban may have prevented violence from escalating in many homes. That would be a commendable accomplishment. However, as predicted by the theory in Part I, many abusers have been able to thwart the ban in state criminal justice systems. If the only flaw in the Lautenberg Amendment was that it failed to take guns away from even more of these abusers, we could still applaud it. Unfortunately, the problems run deeper than this. The ban has changed the incentives of defendants and prosecutors alike. By raising the stakes of plea and trial by varying amounts (at least when a defendant has some chance of acquittal at trial), the ban has made certain defendants less willing to plead to domestic abuse. To obtain a domestic violence conviction, states must now take more cases to trial at great cost. But prosecutors may be unwilling to go to trial and may instead oblige defendant requests to negotiate around the ban. It now appears that, because of the changes wrought by Lautenberg, some state prosecutors are treating domestic abuse cases even more leniently than before the law was passed. Cases have been dismissed and charges have been reduced. And even if a defendant is convicted, courts may still expunge the conviction to relieve the hardships that follow from this supplemental sanction. Clearly Congress never considered these costs. Part III will examine ways to reduce them.

### C. Laws Denying Federal Benefits

The next three laws share a common theme: They deny federal benefits—welfare, public housing, and student financial aid—to those caught breaking state or federal drug laws. These laws were adopted between 1988 and 1998, and they all appear to be designed in some measure to deter drug use or eliminate drug-related crime.

The threatened loss of federal benefits might deter drug use, or the sanction might motivate recipients to contest drug charges more vigorously. However, these laws differ in two key respects from the deportation and firearms ban sanctions discussed above, making them less likely to play a major role in state criminal proceedings. First, the beneficiaries are by definition needy and may not have access to the resources necessary to put up a more vigorous defense against the state. Second, even when they could afford to do so, these defendants may not find it worthwhile to contest the criminal charges any more aggressively, because these sanctions—while harsh to some—are not as severe as the ones considered previously. A brief examination of these laws helps to show why, as predicted by the theory set forth in Part I, not all federal sanctions disrupt the enforcement of state law to the same degree.



## 1. *Welfare*

Congress overhauled the welfare system in 1996, and the cornerstone of the reforms was the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>191</sup> The Act replaced Aid to Families with Dependent Children (AFDC) with Temporary Assistance for Needy Families (TANF). Under TANF, the federal government gives states block grants to help finance aid to poor families.<sup>192</sup> It also gives the states flexibility in deciding how to distribute these funds.

One of the more controversial provisions of the Act, section 115(a), imposes a lifetime ban on federally funded cash assistance and food stamps for anyone convicted of a state or federal drug-related felony.<sup>193</sup> The measure was intended to deter drug use among welfare recipients.<sup>194</sup> Like other supplemental sanctions, the welfare ban adds to the total sanction levied upon those who are convicted of serious drug crimes.

However, the welfare ban differs in important respects from the sanctions discussed earlier. In keeping with the Act's devolution of authority to the states, the Act gives states permission to modify or completely opt out of the ban.<sup>195</sup> In other words, states can tailor the sanction as they see fit to minimize the burden it imposes on the criminal justice system. As of 2001, eight states had completely opted out of the system.<sup>196</sup> Thus, drug convictions do not necessarily affect eligibility to receive federal welfare benefits in these states. Twenty other states have softened the ban in various ways. These states limit the duration of the ban, apply it only to the most serious offenses, deny only one form of aid (but not both), permit disqualified individuals to regain eligibility by completing drug treatment, or recognize exemptions for those who would be hardest hit by the ban (pregnant women, mothers with infants, and victims of domestic violence, for

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<sup>191</sup> Pub. L. No. 104-193, 110 Stat. 2105.

<sup>192</sup> See 42 U.S.C. § 603(a)(1) (Supp. 2004).

<sup>193</sup> 21 U.S.C. § 862a(a) (2000).

<sup>194</sup> See H.R. REP. NO. 104-651, at 6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2187 ("The plan also combats substance abuse by allowing States to sanction welfare recipients who test positive for illicit drug use."); 142 CONG. REC. S8498 (daily ed. July 23, 1996) (statement of Sen. Gramm) ("[I]f we are serious about our drug laws, we ought not to give people welfare benefits who are violating the Nation's drug laws."); 142 CONG. REC. S9337-38 (daily ed. Aug. 1, 1996) (statement of Sen. Bond) (citing need to "punish" welfare recipients who use drugs).

<sup>195</sup> 21 U.S.C. § 862a(d)(1)(A)-(B) ("A State may . . . exempt any or all individuals domiciled in the State from the application of subsection (a). . . . A State may . . . limit the period for which subsection (a) of this section shall apply to any or all individuals domiciled in the State.")

<sup>196</sup> ALLARD, *supra* note 55, at 2.

example).<sup>197</sup> The remaining twenty-two states have decided to enforce the ban in full.<sup>198</sup>

To be sure, the welfare ban is a “potentially serious sanction”<sup>199</sup> in the states that have chosen to enforce it in whole or in part. More than 90,000 women are now ineligible to receive welfare because of the ban.<sup>200</sup> Those affected by the ban stand to lose on average \$84 per month in federally funded food stamps<sup>201</sup> and another \$153 per month in TANF benefits.<sup>202</sup> Recipients of such aid are by definition poor, and the loss of the aid may make it more difficult for some to raise their children, afford housing, or successfully complete drug rehabilitation.<sup>203</sup>

Nevertheless, the welfare ban appears unlikely to affect state or federal criminal proceedings in those states that have elected to keep it. For one thing, the persons affected by the ban probably cannot afford to wage a protracted fight against the drug charges. Further, not to trivialize the importance of welfare benefits, but the magnitude of the loss appears small, at least in comparison to a sanction such as deportation, for example.<sup>204</sup> First, the ban is limited in duration. While opponents characterize it as a lifetime ban, under the terms of the 1996 welfare reforms individuals may not receive federal welfare benefits for more than five years anyway.<sup>205</sup> Second, the ban does not

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<sup>197</sup> See *id.* These states have thus modified the features of the sanction—including its severity, the breadth of crimes triggering it, and its emphasis on convictions at the expense of other considerations—that have the greatest potential to distort criminal cases involving welfare recipients. See *supra* Part I.D.1.

<sup>198</sup> See *id.* The California statute is typical:

An individual shall be ineligible for aid under this chapter if the individual has been convicted in state or federal court after December 31, 1997, including any plea of guilty or nolo contendere, of a felony that has as an element the possession, use, or distribution of a controlled substance. . . .

CAL. WELF. & INST. § 11251.3(a) (West 1999).

<sup>199</sup> *Turner v. Glickman*, 207 F.3d 419, 425 (7th Cir. 2000).

<sup>200</sup> ALLARD, *supra* note 55, at 4 (reporting that as of 2002, 92,000 women in twenty-three states had permanently lost their eligibility to receive welfare benefits because of a felony drug conviction). No data is available for the number of men affected by the ban or the number of women affected by the ban in other states.

<sup>201</sup> This figure dates from 2003. Food and Nutrition Serv., U.S. Dep't of Agric., *Food Stamp Program: Average Monthly Benefit per Person* (Mar. 24, 2005), at <http://www.fns.usda.gov/pd/fsfybft.htm>.

<sup>202</sup> TANF figure dates from 2001. See OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM (TANF): FIFTH ANNUAL REPORT TO CONGRESS II-49 tbl.2:7:b (2003), available at <http://www.acf.hhs.gov/programs/ofa/annualreport5/>.

<sup>203</sup> See ALLARD, *supra* note 55, at 8 (discussing the repercussions of the ban and explaining that by forcing former welfare recipients to get a job, the ban reduces their odds of successfully completing drug treatment).

<sup>204</sup> The ban is also not certain to apply when the recipient is convicted because the recipient could move from a state which has adopted the ban to one which has not.

<sup>205</sup> 42 U.S.C. § 608(a)(7) (2003).

affect the welfare eligibility of other family members.<sup>206</sup> It simply does not make sense for welfare beneficiaries to invest more of their time and money for a chance to skirt this particular sanction. Besides, in the end, eluding conviction may not be enough. The Act permits states to subject welfare recipients to drug tests and to deny them benefits if they test positive, whether or not they have been convicted of a drug crime.<sup>207</sup> For these reasons, this particular supplemental sanction appears to have had relatively little affect on state proceedings.<sup>208</sup>

## 2. *Public Housing*

Congress has also sought to deny public housing benefits to drug offenders and other criminals. Under federal law, all federally assisted public housing agencies must include in their leases a provision stating that

any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.<sup>209</sup>

In other words, when any member or guest of a tenant household engages in criminal activity, the entire household may be evicted for violating the lease. Under Department of Housing and Urban Development (HUD) regulations, eviction is mandatory when a member of the household has been convicted of manufacturing methamphetamine on housing grounds.<sup>210</sup> Otherwise eviction is discretionary,<sup>211</sup> and the regulations encourage the housing authority to consider all of the circumstances, including the seriousness of the offense, the interests of other household members, contrition, and rehabilitation, before taking any action.<sup>212</sup> These eviction policies are

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<sup>206</sup> See 21 U.S.C. § 862a(b) (2000). Another noteworthy aspect of this law is that, contrary to Lautenberg and some provisions of the INA discussed above, it is not retroactive in effect. *Id.* § 862a(d) (2). This means welfare recipients do not have a reason to reopen cases and convictions that predate the statute.

<sup>207</sup> *Id.* § 862b.

<sup>208</sup> A comprehensive search of state and federal case law, news sources, and legal periodicals failed to uncover *any* documented cases in which the welfare han had affected a state criminal case.

<sup>209</sup> 42 U.S.C. § 1437d(l)(6).

<sup>210</sup> 24 C.F.R. § 966.4(l)(5)(i)(A) (2004). The rules for eviction generally apply to the decision whether to admit the household as well. See *id.* § 960.204. The rules governing public housing authorities, federally assisted housing, and private landlords who accept Section 8 housing vouchers are virtually identical. See *id.* §§ 5.850–5.903, 982.310.

<sup>211</sup> See *id.* § 966.4(l)(5)(i)–(ii).

<sup>212</sup> *Id.* § 966.4(l)(5)(vii).

intended to control crime in public housing communities by removing criminals from them.<sup>213</sup>

On the one hand, the stakes of the public housing ban are much higher than the stakes of the welfare ban. The welfare ban applies only to convicted drug offenders, and it does not affect the eligibility of dependents or other parties. By contrast, the public housing ban can be used to expel an entire household from a public housing community based upon the criminal activity of just one of its members.<sup>214</sup>

Families obviously have a strong interest in retaining their leases, but once again, the details of the ban and the characteristics of those it affects limit its impact on state criminal proceedings. As with welfare beneficiaries, most public housing tenants cannot afford extensive legal representation in criminal cases. Even if they could afford such representation, a protracted legal battle would do them little good. First, unlike the welfare ban, this ban can be triggered by mere criminal activity, and not just by criminal conviction. A housing authority may evict tenants based on its own determination that relevant criminal activity has taken place.<sup>215</sup> Second, eviction is not mandatory in most cases.<sup>216</sup> Hardship cases can be screened out during the eviction process itself, rather than during the criminal case.<sup>217</sup> Indeed, thousands of tenant families have reached settlements with HUD that permit them to stay in their apartments in return for excluding the particular family members or guests who had caused the problems, or by taking other measures short of exclusion.<sup>218</sup> For all of these reasons, this particular federal sanction has not played a major documented role in state or federal criminal cases.

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<sup>213</sup> See President's Remarks, *supra* note 22, at 582–83 (announcing one strike policy to help “restore the rule of law to public housing”).

<sup>214</sup> The Supreme Court has upheld lease terms permitting housing authorities to evict so-called “innocent parties” on the basis of criminal activity undertaken by persons under their control. See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130 (2002).

<sup>215</sup> 24 C.F.R. § 966.4(l)(5)(iii).

<sup>216</sup> In March 1996, however, President Clinton pledged to enforce lease terms more strictly, announcing a policy that housing authorities may evict tenants at the first sign of trouble. See Karen Gullo, *Housing Policy Brings Evictions of Troublemakers*, ASSOCIATED PRESS, Dec. 9, 1997. A survey of only half of the nation's housing authorities indicated that they evicted 3,847 tenants in the first six months following announcement of the policy. *Id.*

<sup>217</sup> To evict a tenant household, the housing authority must usually file a court or administrative action and give the tenants the opportunity to contest the accuracy or relevance of the grounds for eviction. See 24 C.F.R. § 966.4(l)(4); see also *Hous. Auth. v. Keys*, 761 N.E.2d 338, 341–42, 344 (Ill. App. Ct. 2001) (finding that a tenant was not in control of her grandson—who shot a man in the tenant's unit—where she was unaware of the criminal activity on the premises, and upholding the lower court's denial of the housing authority's request to evict the tenant).

<sup>218</sup> See Gullo, *supra* note 216.

### 3. Student Financial Aid

Section 483 of the Higher Education Amendments of 1998 (HEA) bars any student who has been convicted of certain drug offenses from obtaining federal financial aid, including grants, loans, and work-study.<sup>219</sup> The ban's duration depends on the number of convictions and the nature of each offense. A student is ineligible to receive federal aid for one year following the first conviction for mere possession of a controlled substance, and for two years following the first conviction for trafficking in a controlled substance.<sup>220</sup> The HEA imposes longer terms of ineligibility for subsequent convictions of each type of offense.<sup>221</sup> According to the law's sponsor, Representative Mark Souder of Indiana, the drug disqualification provision is intended to deter students from using or trafficking in drugs, to prevent students from using federal funds to buy drugs, and to encourage students who use drugs to seek treatment.<sup>222</sup> To achieve the latter goal, the HEA provides that convicted students who undergo a qualified drug treatment program may regain aid eligibility.<sup>223</sup>

The ban is executed when a student with a disqualifying conviction applies for financial aid. The Free Application for Federal Student Aid (FAFSA) form queries students about prior drug convictions.<sup>224</sup> Since the law took effect in July 2000, more than 128,000 applicants have acknowledged a drug conviction on the FAFSA and have been denied aid as a result.<sup>225</sup> Figure 3 below depicts the law's impact since inception:

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<sup>219</sup> Higher Education Amendments of 1998, Pub. L. No. 105-244, § 483(f), 112 Stat. 1581, 1736-37 (codified as amended at 20 U.S.C. § 1091(r) (2000)). Convictions obtained before the student's eighteenth birthday do not trigger the ban, unless the student was tried as an adult. See U.S. DEP'T OF EDUC., 2004-2005 FREE APPLICATION FOR FEDERAL STUDENT AID (FAFSA); WORKSHEET FOR QUESTION 31 [hereinafter FAFSA WORKSHEET], available at <http://www.fafsa.ed.gov/q31wksht.pdf>.

<sup>220</sup> 20 U.S.C. § 1091(r)(1).

<sup>221</sup> The student is denied aid for two years following the second possession offense, and indefinitely following any subsequent possession offense or a second trafficking-related offense. *Id.*

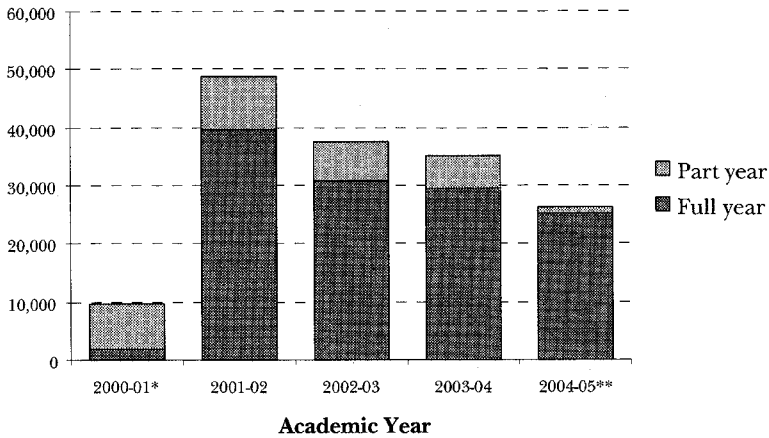
<sup>222</sup> Mark Souder, *Actions Have Consequences: Opposing View: Federal Student Aid is a Privilege that Drug Abuse Can Jeopardize*, USA TODAY, June 13, 2000, at 16A.

<sup>223</sup> 20 U.S.C. § 1091(r)(2).

<sup>224</sup> See FAFSA, *supra* note 25.

<sup>225</sup> See E-mail from Dan Madzellan, *supra* note 4.

FIGURE 3: APPLICANTS DECLARED INELIGIBLE FOR AID BECAUSE OF DRUG CONVICTION



\* In 2000-01, students who failed to complete the drug question were not counted as having disqualifying convictions.

\*\* Data for 2004-05 incomplete

These figures probably do not depict the law's full impact, as they do not include students who may have been dissuaded from applying for aid in the first instance because of the drug disqualification provision.<sup>226</sup>

The ban is surely a significant penalty for those students who cannot afford college out of pocket and do not have access to other forms of financing. For most drug crimes, however, the ban is short-lived; thus, it seems as though the aforementioned figures overstate the law's impact on students seeking aid. But for some students, even a short-term ban on aid could be life-altering. Putting off college even for one year may mean never attending college at all, and students who are forced to postpone or interrupt their college education are less likely to complete their studies and graduate.<sup>227</sup>

In many cases, the HEA's sanction is out of proportion to the nature of the student's offense. Consider that the law distinguishes only between trafficking and possession, and between first, second, and subsequent offenses. The law does not consider the particular circumstances of an individual case, such as the type or quantity of

<sup>226</sup> On the other hand, it should be noted that some portion of the 128,000 who were not qualified to receive aid may have failed to satisfy other criteria as well and therefore would not have been eligible anyway; and some students may have been double-counted if they re-applied for aid before regaining eligibility.

<sup>227</sup> See, e.g., Letter from the Coalition for Higher Education Act Reform to the House Education and Workforce Committee (May 3, 2002), available at <http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=10314&c=20>.

drug involved. The Coalition for Higher Education Act Reform contends that the "vast majority of young people convicted of drug offenses are convicted of simple, nonviolent possession."<sup>228</sup>

Simply put, the sanction can be harsh and thus give students an added incentive to contest the enforcement of state drug laws. Nevertheless, this sanction is unlikely to result in more trials, because those who stand to lose most from the ban are those who are least able to do anything about it. Students needing financial aid generally cannot afford adequate trial representation.<sup>229</sup> In any event, one must ask whether taking a case to trial would cost any less than would simply waiting out the ban. Standing trial is a costly way to save a few thousand dollars in aid, particularly since the student is by no means assured of winning.

Even so, the student could still ask for mercy. It costs the student very little to ask a prosecutor for a plea that does not jeopardize her financial aid. For the prosecutor who is queasy about the federal consequences of a minor drug infraction, it does not cost much to honor such a request. Compared to deportation, the ban is much easier to circumvent because the HEA (apparently) uses a much narrower definition of "conviction."<sup>230</sup> Thus, for example, the state court could defer judgment and dismiss the charges against the student after she completed a probationary term or treatment program, and the ban would not be triggered as long as the state did not consider this to be a conviction.

Several communities have indicated a willingness to help students retain their aid eligibility. In Madison, Wisconsin, for example, city leaders have urged local police to issue city citations rather than press criminal charges for marijuana possession. Under the city code, citations are not part of the public record, and even if they are considered convictions, they could not be found by federal aid administrators trying to enforce the ban.<sup>231</sup> The Eugene, Oregon, City Council, decided to give individuals caught in possession of marijuana the opportunity to enroll in a diversion program (taking one all-day class) that would also permit them to avoid the federal financial aid ban.<sup>232</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> The Coalition for Higher Education Act Reform adds that the vast majority of students denied aid have family incomes of \$30,000 or less. *Id.* Compared to students from wealthier families, these students are much less likely to be adequately represented by counsel. *Id.*

<sup>230</sup> See FAFSA WORKSHEET, *supra* note 219; *supra* notes 137–39 and accompanying text.

<sup>231</sup> See Judith Davidoff, *Olson: Let Medical Users Grow Pot*, CAPITAL TIMES (Madison, Wis.) Aug. 20, 2002, at 1B.

<sup>232</sup> See Jeff Wright, *Council Increases Marijuana Fine*, REGISTER-GUARD (Eugene, Or.), Feb. 11, 2003, at D1. Citizens in Columbia, Missouri, voted on an unsuccessful proposal that would have softened penalties for marijuana possession. See *Columbia Marijuana Proposition Worries Law Enforcement*, POST-TRIB. (Jefferson City, Mo.), Apr. 1, 2003, at 3. Under

The HEA drug ban might also lead students to alter their interactions with police to avoid the sanction. Many minor drug cases stem from searches of personal belongings (backpacks, cars, etc.) to which the students have voluntarily consented. With the adoption of the HEA, students now have added motivation to withhold their consent when approached by the police. Speakers at college campuses have encouraged students to vigorously assert their civil rights when confronted by police by refusing consent to warrant-less searches and by refusing to speak to police without first speaking to a lawyer.<sup>233</sup>

There are a number of other ways a student can keep her financial aid even if she is convicted of a covered drug offense. One possibility is to have the conviction removed from the student's record. Unlike the INA, which gives no effect to expungements, the HEA instructs students not to count convictions "that have been removed from your record" when filling out the FAFSA.<sup>234</sup> In states that grant expungements for drug crimes, this option might be the most cost-effective way to circumvent the sanction.<sup>235</sup>

Although the drug conviction question is not optional, as a blank response is treated as a conviction,<sup>236</sup> a student could deny the conviction on the FAFSA to retain her aid eligibility. Of course, doing so is a crime, and if the student is caught in the lie, she will have to repay any aid received and could face a \$20,000 fine and prison time.<sup>237</sup> Nevertheless, the chances of being caught violating the HEA are exceedingly slim. Lisa Cain, from the Office of Student Financial Assistance Programs, Department of Education, has candidly admitted that "[t]he government does not have the capability at this time to background check all applicants' records in order to determine if they have a drug conviction. We are relying on the students to use good judgment when answering [the drug conviction question]."<sup>238</sup> Of

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the proposal, misdemeanor marijuana possession offenses would have been punishable only by fines and hence would not become part of a person's state criminal record. *Id.* A student who wished to help other students avoid the loss of aid under federal law formulated the proposition. *Id.*

<sup>233</sup> See, e.g., Katie Will, *Experts Advise on Drug Policy*, DAILY CARDINAL (Madison, Wis.), Apr. 17, 2003, at <http://www.dailycardinal.com/news/2003/04/17/News/Experts.Advise.On.Drug.Policy-420183.shtml>.

<sup>234</sup> FAFSA WORKSHEET, *supra* note 219; see also 20 U.S.C. §1091(r)(2)(B) (2000) (noting that a student may resume eligibility if the conviction is "reversed, set aside, or otherwise rendered nugatory").

<sup>235</sup> Rhode Island once again provides useful data for a case study. The state expunged 582 convictions and nolo contendere pleas for simple possession of marijuana in 2000, the year the HEA provision first took effect, compared to only 161 the year before. E-mail from Michael Tenney, *supra* note 187. The state expunged another 573 convictions and nolo pleas in 2001. *Id.*

<sup>236</sup> See E-mail from Dan Madzellan, *supra* note 4.

<sup>237</sup> See FAFSA, *supra* note 25.

<sup>238</sup> Kempner, *supra* note 26.



course, the fact that 128,000 applicants have nonetheless admitted a drug history indicates that lying is not a palatable option for many students.

A student who has been denied aid due to a drug conviction may also regain her eligibility by completing an approved drug treatment program,<sup>239</sup> or the student may seek other aid to compensate for the loss of federal support. The John W. Perry Fund, for example, awards scholarships to students who have been denied federal support because of HEA.<sup>240</sup> In addition, at least four colleges (Hampshire, Swarthmore, Yale, and Western Washington) have promised to replace federal aid that was denied because of a drug conviction.<sup>241</sup> While these last two options are of less practical significance, they help to reduce the emphasis on state drug cases and the likelihood that HEA will have any effect upon them.

The foregoing discussions have shown that each of these bans on federal benefits has only muted effects on state criminal proceedings. This is consistent with the theory developed in Part I: The benefits bans apply to individuals who are unable to aggressively contest state criminal charges and are also designed quite differently from the sanctions that were shown earlier to cast dark shadows over state criminal cases. Each of the bans is, for example, limited in duration or arguably less severe than deportation or the loss of a career. While this is not an endorsement of these benefits bans, it is a reminder not to condemn every federal supplemental sanction on efficiency or fairness grounds.

### III

#### LIFTING THE SHADOW

Whether deporting criminal aliens, taking guns away from domestic abusers, or denying public assistance to drug offenders are desirable policies in the abstract is beyond the scope of this Article. The focus throughout has been on the means Congress has chosen to execute these sanctions, a topic that commentators have thus far neglected. Part I explained how using state convictions to levy the sanctions carries hidden costs. Part II demonstrated that the theory comports with reality; some, but not all, of the federal supplemental sanctions do in fact affect the handling and outcomes of state criminal

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<sup>239</sup> 20 U.S.C. § 1091(r)(2). A problem is, the treatment program may last nearly as long as the ban itself.

<sup>240</sup> See Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER, RACE & JUSTICE 61, 85 n.119 (2002).

<sup>241</sup> See Yilu Zhao, *Yale's Policy Makes Stand on Drug Law*, N.Y. TIMES, Apr. 13, 2002, at B2. Yale, for example, has promised to reimburse students for federal financial aid lost because of a drug conviction so long as they agree to undergo rehabilitation, which is covered by student health insurance. *Id.*

cases. This Part suggests ways for Congress and the states to address these concerns.

### A. Congress

Congress has unmatched ability to mitigate the effect its sanctions have on the states. Congress could start by giving parties a meaningful opportunity to contest the imposition of a federal sanction after they have been convicted of a qualifying state offense. For example, Congress could offer convicts a way to petition the federal government to suspend a sanction on equitable grounds.<sup>242</sup> Indeed, until very recently, it was not unusual for Congress to give sanctionable parties the opportunity to contest a sanction postconviction. As discussed in Part II.A above, prior to the 1996 amendments to immigration law, the Attorney General had discretionary authority to waive deportation under section 212(c). While Congress would have to pick up the tab, it would gain more control over the dispensation of discretionary relief. Alternatively, Congress could give the states the choice whether to impose a sanction in a given case. This is not without precedent. Recall that prior to 1990, Congress authorized state judges to suspend deportation when they deemed it disproportionate to the crime committed by an alien.<sup>243</sup> And today, state legislatures remain free to decide whether to adopt or modify the federal welfare benefits ban.

Deemphasizing state convictions would not eliminate all of the problems associated with supplemental sanctions. Anyone who could not satisfy the standards for equitable relief from the federal government would focus his energies on the state's criminal case instead. Nothing short of lifting the sanctions altogether would eliminate the resulting implementation costs. Even so, formal postconviction relief could be a cheaper alternative to more trials and circumvention through other means. What is more, formalizing relief might promote fairness and consistency across the system.

Congress could also reduce the severity of the sanctions. For example, Congress could bar domestic abusers from possessing firearms in the home, when they are most likely be used against a spouse or partner, but not on the job. (Public employees are currently exempt from every provision of the Gun Control Act except the Lautenberg

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<sup>242</sup> Recall that Congress encourages public housing authorities to consider the totality of the circumstances before evicting a tenant convicted of a drug offense. See *supra* note 212 and accompanying text. For a discussion of proposals to make collateral sanctions more flexible, see generally ABA STANDARDS FOR CRIMINAL JUSTICE (THIRD EDITION): COLLATERAL SANCTIONS AND DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.5 (2003) [hereinafter ABA] (recommending authorization for courts to waive or modify the collateral consequences of a criminal conviction), available at <http://www.abanet.org/leaderShip/recommendations03/103A.pdf>.

<sup>243</sup> See *supra* note 122.

Amendment.<sup>244</sup>) The ban would be less severe if it did not occasion the loss of a job—and therefore much less likely to provoke resistance—but arguably no less effective in achieving its primary objective of incapacitation.

Aside from reducing the emphasis on state convictions and the severity of the sanctions, Congress could compensate the states for the added cost of enforcing state law. For example, it could give the states grants to hire more police and prosecutors to work on cases triggering federal supplemental sanctions.<sup>245</sup> Such grants would offset the implementation costs of the sanctions, and they would make circumvention less likely by eliminating prosecutorial budget constraints. It would also force Congress to consider more carefully the true costs of its sanctions.

Congress should broaden the reach of its sanctions only as a last resort. Congress has used this tactic in the past to thwart the circumvention of its sanctions. For example, it made more crimes and dispositions deportable under the INA and extended the federal firearms ban to misdemeanor crimes of domestic violence. Broadening the reach of the sanctions does make them more difficult for state prosecutors to circumvent. But this tactic standing alone is troubling for two reasons. First, it does not address the reasons states circumvent federal sanctions in the first instance: limited law enforcement budgets and moral objections to the sanctions. Second, sanctions that apply broadly are ipso facto more likely to be unfair than sanctions that apply narrowly. Deporting murderers and rapists, for example, raises fewer proportionality concerns than deporting murderers, rapists, and shoplifters.

## B. The States

We have already seen how states have responded to federal supplemental sanctions. State officials treat some cases no differently in the shadow of the sanctions, despite the added costs. Commonly, however, these officials thwart the sanctions by charging nonqualifying crimes in place of qualifying ones, expunging prior convictions, and refusing to assist federal authorities in tracking down state offenders who are subject to the sanctions. These reactions are far from

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<sup>244</sup> See 18 U.S.C. § 925(a)(1) (2000).

<sup>245</sup> In fact, Congress has already provided grants to help states enforce domestic abuse laws. See, e.g., Federal Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40231, 108 Stat. 1796, 1932 (codified at 42 U.S.C. § 3789hh (2003)) (authorizing the Attorney General to make \$120 million in grants to states from 1996–98 to encourage them to treat domestic violence as a “serious violation of the criminal law” by implementing mandatory arrest programs, educating police and judges on how to handle domestic violence cases, and creating specialized units for responding to domestic violence).

optimal. Though there may be little else state officials can do, this section suggests a few other modest measures for states to consider.

On the one hand, a state could try to make it easier for its officials to circumvent the federal sanctions without diluting deterrence. One way to do this would be to automatically expunge criminal convictions that trigger federal sanctions.<sup>246</sup> This would lift the federal shadow over criminal cases, though it would also eliminate any state collateral sanctions stemming from the conviction. To compensate, the state could increase the criminal punishment it imposes.<sup>247</sup> In this way, the state could step out of the shadow of federal sanctions while maintaining the level of punishment it deems optimal for the crime. This strategy will not work, of course, if Congress ordains that an expungement shall not clear a conviction for purposes of federal law, as it did with the INA.

Then again, the states could exploit the federal sanctions for state purposes. Recall that one shortcoming of federal supplemental sanctions is that potential perpetrators are not aware of them. The *ex ante* lack of awareness of the sanctions undermines their deterrence value. To enhance the deterrent effect, the states could advertise the sanctions more prominently.<sup>248</sup> The benefit of increased deterrence might exceed the cost of the publicity campaign and possibly even the implementation costs of the sanctions.

#### IV

#### THE SHADOW OF OTHER SANCTIONS

Until now, this Article has focused exclusively on sanctions levied by the federal government and based on determinations made by the states. But the framework used to analyze federal supplemental sanctions can be applied to sanctions imposed and determinations made by any two parties. The core insight of the Article is that when one party attaches new consequences to determinations made by a second party, it may distort the way those determinations are made. In theory, those determinations could be made by the federal government or even private parties, rather than the states. Likewise, it might be the states or private parties, rather than the federal government, who

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<sup>246</sup> See, e.g., Demleitner, *supra* note 20, at 162 (advocating states automatically expunge criminal records after a certain period of time).

<sup>247</sup> The ABA standards on collateral sanctions recommend that courts consider collateral sanctions at sentencing. See ABA, *supra* note 242, Standard 19-2.4.

<sup>248</sup> See, e.g., *Project Exile: The Safe Streets and Neighborhoods Act of 2000: Hearing on H.R. 4051 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. 73 (2000) (testimony of Michael T. McCaul, Special Assistant to the Texas Attorney General) (describing Texas's use of advertisements on billboards, public transportation, and television and radio to raise awareness of added prison time for gun crimes).

use the determination for their own purposes. This Part briefly discusses these other types of supplemental sanctions.

#### A. Private Supplements to Public Determinations

Private citizens may impose their own sanctions on individuals whom the government has labeled as "criminals." For example, a victim of a violent crime may sue her attacker in tort, an employer may terminate or refuse to hire someone with a criminal record, and the public may scorn a sex offender living in the community. Each of these private sanctions goes above and beyond whatever sanction has been imposed by the government.

A victim of violent crime often may sue in tort to recover compensatory and punitive damages from the assailant. Recovery in tort may greatly exceed any restitution ordered by a criminal court as part of sentencing, and thus adds to the direct sanction imposed by the government at the conclusion of a criminal proceeding.<sup>249</sup> To be sure, a tort action is not dependent upon a successful criminal prosecution. A victim may file suit regardless of the outcome of a criminal prosecution or even if the government took no action at all against her attacker.<sup>250</sup> But a criminal conviction would still be useful for the plaintiff-victim; it would conclusively establish certain facts essential to her tort suit, and a defendant would want to avoid conviction for this reason (among others).<sup>251</sup> Even so, the threat of a pending tort action is not likely to affect criminal prosecutions in any significant way.<sup>252</sup> Victims are more likely to file tort actions in egregious cases,

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<sup>249</sup> See generally George Blum, Annotation, *Measure and Elements of Restitution to Which Victim is Entitled Under State Criminal Statute*, 15 A.L.R.5th 391, § 2 (1993) (noting that many states do not allow sentencing courts to order restitution for pain and suffering and other nonfinancial losses); GUIDELINES MANUAL, *supra* note 47, at § 5E1.1 (court may order restitution in the amount of the victim's actual loss).

<sup>250</sup> The O.J. Simpson case illustrates the point. Simpson was found civilly liable—for the amount of \$33.25 million—for the deaths of Ron Goldman and his ex-wife Nicole Brown Simpson, despite the fact that he had been acquitted of their murders by a jury in the state's criminal case against him. *Date Set for Auction of Simpson Memorabilia*, L.A. TIMES, Jan. 14, 1999, at B4.

Private RICO actions provide another example. A private plaintiff may prevail on a civil RICO claim whether or not the defendant has been convicted of a criminal RICO violation or even the predicate acts of such a violation. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.9, 493 (1985) (recognizing that harring a plaintiff from pursuing a civil RICO claim after a defendant has been acquitted of a criminal RICO charge would "create peculiar incentives for plea bargaining to non-predicate-act offenses so as to ensure immunity from a later civil suit").

<sup>251</sup> See discussion of collateral estoppel, *supra* note 23. But an acquittal in the criminal case does not shield the defendant from tort liability the way it shields him from federal supplemental sanctions, for the victim-plaintiff may prevail on her claim by satisfying a lower evidentiary standard than the government must meet.

<sup>252</sup> If anything, it seems much more likely that the criminal proceeding could have an adverse effect on the civil one. A defendant in a civil case who fears subsequent criminal prosecution may refuse to testify at the civil trial, citing her Fifth Amendment right against

which as a general matter also trigger steeper government sanctions. In theory, the threat of tort liability will not overshadow criminal punishment in these cases. It will of course give a defendant added reason to contest state charges, but in many cases, the defendant will not need any additional incentive to spend freely on his defense; the punishment threatened by the state alone will provide enough of an inducement. Consider the O.J. Simpson case. It seems reasonable to suppose that Simpson would have hired the same pricey "legal dream team" in the state's case even if there was no possibility the family of one of his victims would later sue him in tort (and recover \$33.25 million). The prospect of facing life in prison standing alone should have been enough to convince him to finance every last gambit that might reduce his odds of conviction.

Sanctions levied by employers may affect a larger number of criminal cases. Many employers refuse to hire applicants with criminal records. A recent study indicated that about 80% of large companies and nearly 70% of smaller businesses conduct criminal background checks on job applicants.<sup>253</sup> For some crimes, lost earning potential due to conviction may overshadow the sentence imposed by the state.<sup>254</sup> Moreover, employers rely heavily upon state conviction records in screening employees; that is, few of them attempt to evaluate employee dangerousness *de novo*, thus placing heavy emphasis on the outcomes of state criminal proceedings.<sup>255</sup>

Society imposes its own sanctions on criminals as well, often labeled as shame sanctions. Consider the harsh treatment often accorded registered sex offenders. Once they complete their sentences, many convicted sex offenders are prevented from resuming "normal" lives—living, working, or socializing where they please. Neighbors shun contact with them, picket their houses, and resort to even more

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self-incrimination. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 77 (1964) (rejecting a "rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction"). This may make it more difficult for the private plaintiff to prevail on her tort claim.

<sup>253</sup> See Ann Zimmerman, *Wal-Mart Toughens Job Screening*, WALL ST. J., Aug. 12, 2004, at A3 (noting that the figures are rising, as employers respond to a rise in lawsuits against them by victims of crimes committed by their employees on the job); see also Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIOLOGY 937, 960 (2003) (reporting that offenders are one-third or one-half as likely as non-offenders to be considered by employers for jobs).

<sup>254</sup> See e.g., John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual's Reputation*, 21 J. LEG. STUD. 159, 160-61 (1992) (estimating that a large portion of the financial penalty for various crimes is attributable to loss in postconviction earnings).

<sup>255</sup> Zimmerman, *supra* note 253. Some dismiss the possibility that convicts may avoid this private sanction by lying to employers. In addition to overestimating the chances they would be caught in the lie during a background check, convicts also fear being revealed by their parole officers who frequently call employers to check up on their wards. Pager, *supra* note 253, at 963.

extreme measures to drive sex offenders from their communities.<sup>256</sup> The threat of shame sanctions could thus distort sex crime prosecutions, particularly if shame is applied indiscriminately to all sex crimes—from child molestation to indecent exposure—regardless of the seriousness of the individual offense.<sup>257</sup>

But private sanctions like tort suits, adverse employment actions, and shame differ from federal supplemental sanctions in one critical respect: States can in theory block private parties from using convictions to inflict these sanctions, thus lifting the shadows these sanctions may cast. Both federal and state law already limit when employers may use convictions in hiring and firing decisions. Under Title VII of the Civil Rights Act, for example, employers may only deny employment to a convicted offender if the conviction is relevant to the job.<sup>258</sup> States may restrict the public's access to sex offender registries, thereby making it more difficult for the public to find and shame sex offenders. States may also limit tort damages in cases in which the defendant has been convicted by the state. By contrast, states cannot prohibit the federal government from using state criminal determinations, nor even withhold conviction records from it.<sup>259</sup> This is not to say that private sanctions never affect state determinations; in fact, they almost certainly do.<sup>260</sup> Rather, the point is that states have it in their power to do more to limit the use of their convictions by private parties, should they find a need to do so.

## B. State Supplements to Federal Determinations

The states also sanction individuals whom the federal government determines have committed crimes. States disenfranchise, bar from public employment, prohibit from jury service, deny licenses to, and restrict the firearms rights of parties convicted of various crimes, regardless of the jurisdiction of conviction.<sup>261</sup> One might expect

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<sup>256</sup> See, e.g., Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. (forthcoming 2005) (discussing cases).

<sup>257</sup> For an interesting analysis of the effect of nonlegal (namely, shaming) sanctions on the prosecution of sex offenders, see *id.*

<sup>258</sup> The Equal Employment Opportunity Commission (EEOC) has interpreted Title VII of the Civil Rights Act to limit the use of conviction records by employers. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL, § 604 app. A (1993), available at WL EEOCCM App. 604. Many states have similar laws. See, e.g., WIS. STAT. ANN. § 111.321 (West 1998).

<sup>259</sup> See, e.g., *supra* note 120.

<sup>260</sup> See, e.g., Brett Barrouquere, *Menard Rescinds Plea in Sex Case*, SARASOTA HERALD-TRIB. . Sept. 9, 1999, at 3B (discussing case of thirty-five-year old man who withdrew his guilty plea to lewd and lascivious acts on a child for seducing a fourteen-year-old girl, after he discovered the plea would require him to register as a sex offender in Florida).

<sup>261</sup> See sources cited *supra* note 2.

these state sanctions to loom over federal proceedings much the same way federal sanctions loom over state proceedings.

Nonetheless, state use of federal determinations is unlikely to distort federal criminal prosecutions for three reasons. First, Congress arguably may preempt any state sanction predicated upon a federal conviction, something states cannot do when the federal government uses their determinations.<sup>262</sup> Second, if a state decides to sanction an individual convicted of a federal offense in federal court, that person could circumvent the state sanction by moving to another state, rather than by contesting the federal charge more vigorously.<sup>263</sup> With the exception of the welfare ban, federal sanctions apply in all fifty states once triggered; their shadow follows the convict wherever he might go. Third, while states do levy some supplemental sanctions, few if any can be considered as serious or as harsh as the federal sanctions considered in Part II above. For all of these reasons, state sanctions are not likely to cast much of a shadow over criminal cases brought by the federal government.

### C. Public Supplements to Private Determinations

A third variety of supplemental sanction involves government-imposed penalties triggered by private legal actions, like civil suits. Punitive damages in tort law are a prime example. To illustrate, suppose only one out of every five tort victims is compensated for harms suffered. To ensure the tort system adequately deters tortfeasors, the government may provide that every tortfeasor who is found liable shall pay punitive damages of four times the amount of compensatory damages involved in that particular case.<sup>264</sup> Suppose further that the government “decouples” the damages award to ensure the multiplier does not encourage the filing of too many suits; in the simplest case,

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<sup>262</sup> See *Aetna Health v. Davila*, 542 U.S. 200, \_\_\_, 124 S. Ct. 2488, 2495 (2004) (holding that “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted”); see also Ronald J. Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289, 300 (1969) (noting that “not every federal regulatory statute states a policy which Congress would wish to have reinforced by additional remedies” provided by the states, and thereby could be preempted by congressional legislation). Interestingly, the Supreme Court seems aware of the problems states might cause the federal government were they given the opportunity to “supplement” federal regulatory regimes in the same way Congress supplements state regulations. See *Aetna Health*, 542 U.S. at \_\_\_, 124 S. Ct. at 2495.

<sup>263</sup> The same logic suggests that sanctions imposed by one state based on convictions obtained in another state will not affect the enforcement of the other state’s criminal laws.

<sup>264</sup> See generally A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (discussing theory behind and examples of damages multipliers).



the plaintiff keeps only the compensatory damages award, while the government keeps the rest.<sup>265</sup>

The punitive damages award adds to, or supplements, the compensatory damages award. Like any other supplemental sanction, it may affect the way a defendant responds to the claim against him. The defendant will try to circumvent the sanction, and if he fails he may spend more heavily on his defense. In this case, however, the total sanction imposed may *increase* when the parties bargain around the punitive award. The reason is that parties can circumvent the sanction without reducing the compensatory award: The settlement agreement will not trigger the sanction, no matter the amount of damages paid. (By contrast, recall that guilty pleas typically trigger the same supplemental sanctions as guilty verdicts, meaning the state must often reduce the plea charge to entice a defendant to accept a plea agreement.)<sup>266</sup> Since the defendant would be willing to pay a premium to avoid this supplemental sanction, we might expect more cases to settle and average settlement amounts to increase in the shadow of punitive damages awards.

Of course, if the case does not settle, the threat of the punitive damages award gives a defendant an incentive to fight the tort suit all the more aggressively and thereby makes it more costly for private plaintiffs to litigate their claims.<sup>267</sup> Imagine, for example, that a private citizen files a tort suit seeking compensatory damages of \$100,000 and the case fails to settle. The plaintiff will litigate the suit as though it were worth a maximum of \$100,000 and spend no more than \$100,000 discounted by the probability she will prevail, but the defendant will treat the claim as though it were worth \$500,000 if successful; the defendant may be willing to outspend the plaintiff to the point at which the plaintiff will no longer find it worthwhile to bring the claim. Some plaintiffs in essence are forced to sue on behalf of other victims who contribute nothing to the effort to hold a defendant accountable, at least when the exemplary damages are pocketed by the govern-

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<sup>265</sup> See generally A. Mitchell Polinsky, *Detrebbling versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 GEO. L.J. 1231, 1231-36 (1986) (demonstrating that there is no equilibrium in which a multiplier provides both optimal deterrence to the defendant and optimal enforcement incentives to the plaintiff, but failing to recognize that the damages multiplier may increase a defendant's incentive to spend on its defense).

<sup>266</sup> *Supra* notes 37 and 60.

<sup>267</sup> Choi and Sanchirico suggest that, by raising the stakes of civil litigation, punitive damages may cause defendants to devote more resources to their defense, thereby making it less attractive for plaintiffs to file civil suits in the first instance. Albert Choi & Chris William Sanchirico, *Should Plaintiffs Win What Defendants Lose? Litigation Stakes, Litigation Effort, and the Benefits of Decoupling*, 33 J. LEG. STUD. 323, 327 (2004). They conclude that punitive damages may be welfare reducing. *Id.* at 328. They also claim that settlement does not avoid the problem altogether. The fact that the defendant would be willing to outspend the plaintiff at trial reduces the plaintiff's bargaining power, resulting in lower settlement payouts. *Id.* at 341-44.

ment. Though their suits have become more difficult to prosecute, these plaintiffs are not compensated for the additional burden they bear.

Predicting how these two processes—one suggesting more settlements and larger payouts and the other suggesting more expensive trials and fewer filings—will affect total sanctions is beyond the scope of this Article. The point is simply that supplemental sanctions which are easy to circumvent may not reduce the average total sanction imposed; they may even have the desired effect of increasing total sanctions, though not by the amount or in the manner that was originally intended.

### CONCLUSION

This Article has examined an important yet overlooked form of federal regulation implicating both efficiency and fairness concerns: federal statutes that impose sanctions when state officials determine that a state law has been violated. The Article argues that federal supplemental sanctions distort the enforcement of state law. By raising the stakes involved in state cases, the sanctions give defendants added incentive to contest state charges and hence raise the cost of enforcing state laws. To avoid burdening state budgets or to spare defendants from sanctions they deem unjust, state prosecutors may bargain around the sanctions in plea negotiations. In the process, however, these prosecutors may be required to compromise other state objectives, such as the deterrence of sanction-triggering crimes and the fair application of state law. Further, even if they do not affect how the states apply their own laws, federal supplemental sanctions may nonetheless be applied unfairly *across* states, given variations in how the states define crime.

The Article proceeded to isolate the features of federal supplemental sanctions, state legal systems, and criminal defendants that determine what the ultimate effect of any given sanction will be. The Article theorized that severe and automatic sanctions will provoke more resistance from defendants, as long as they can afford the cost of waging a more vigorous legal battle with the state and doing so reduces sufficiently their odds of conviction. The resources state prosecutors have at their disposal determine whether they can meet the defendant's challenge or whether they must instead help a defendant find a way around the sanction. The breadth of the sanction and the latitude state prosecutors have in making charging decisions determine how much the states will have to compromise state objectives to circumvent the federal sanction. Finally, the attitudes of the participants in the states' criminal justice systems play a role in many aspects

of the process, from bolstering defendants' chances of being acquitted to softening prosecutors' approaches to handling certain crimes.

The Article substantiated the theory with five in-depth case studies of federal supplemental sanctions. As predicted, the deportation of criminal aliens and the Lautenberg firearms ban, two severe sanctions that flow automatically from a state conviction, dramatically influence state criminal cases that trigger them. By contrast, bans on the receipt of various federal benefits have had a negligible effect on state criminal cases, due in part to the less severe nature of such bans and the limited wealth of defendants who face them. The Article also suggested a variety of steps Congress and the states could take to reduce the hidden costs of sanctions or to enhance their benefits. Congress could lift the shadow its sanctions cast by, for example, giving defendants an opportunity to contest the imposition of a federal sanction postconviction. For their part, the states could use the sanctions to better serve state objectives like deterrence by, for example, raising awareness of the sanctions before crimes are committed.

Given that Congress lacks an adequate incentive to address these problems, however, it is tempting to think the Supreme Court should step in to restrict Congress's use of state determinations. The sanctions do raise federalism concerns—for example, they shift costs onto the states—but the laws imposing the sanctions transcend no recognized limitation on congressional power. Congress has not exceeded its substantive powers under Article I, as presently defined; it may deport lawless aliens, bar domestic abusers from possessing firearms that that have moved in interstate commerce, and deny federal benefits to drug users and drug pushers.<sup>268</sup> Nor has it ordered state officers to help administer the sanctions;<sup>269</sup> in theory, states remain free to decide whether to prosecute domestic abuse, drug crimes, crimes committed by aliens, and so on. Restricting Congress's use of state determinations would thus require the Court to extend recent holdings. The Court could, for example, prohibit federal laws that in practical effect, though not in word, compel the states to help implement federal supplemental sanctions.<sup>270</sup>

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<sup>268</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 561–62 (1995) (affirming Congress's power to regulate possession of firearms that move in or affect interstate commerce); *Marshall v. United States*, 414 U.S. 417, 427 (1974) (affirming Congress's power to deny certain benefits to drug offenders); *Fong Yue Ting v. United States*, 149 U.S. 698, 706–07 (1893) (holding that Congress's power to deport aliens is virtually absolute).

<sup>269</sup> See *Printz v. United States*, 521 U.S. 898, 925 (1997) (affirming that Congress may not command state officers to administer or enforce a federal regulatory program); see also *New York v. United States*, 505 U.S. 144, 149 (1992) (establishing that Congress may not direct state legislatures to address particular problems).

<sup>270</sup> Cf. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (recognizing that some federal grants could be so coercive as to constitute compulsion).

Much more could be said on this topic. For now, suffice it to say that the difficulty of devising a rule by which to evaluate the sanctions counsels against judicial review. Consider the problems attending two different tests the Court could adopt. One is a rule prohibiting all supplemental sanctions. Such a rule would be simple to apply, but it would sweep too broadly. Recall that not all supplemental sanctions burden the states. There is no good reason, as a matter of law or policy, to stop Congress from using state determinations when doing so does not distort the enforcement of state law. A second rule would require the courts to balance the congressional interests in using state determinations against the harm done to the states. Such a rule would spare efficient sanctions, but it would be difficult, if not impossible, for courts to administer. The precise effects of any given sanction depend on a multitude of factors, some of which the courts are ill-equipped to analyze. Congress is much better able to evaluate the practical effects of its sanctions. It also has more options at its disposal for fixing any problems with the sanctions. Congress might even be inclined to address the problems if it were only made aware of them; after all, the distortion caused by the sanctions impairs congressional aims as well. In sum, this particular federalism problem should be left to the political branches, as imperfect as they are at protecting state interests.

The Article has broader relevance as well. The core insight is that attaching additional consequences to determinations made by another party may result in less than optimal total sanctions: Determinations become more costly to obtain and may no longer serve well the policies of the party making them or the party using them. For example, public shaming of convicted sex offenders may affect the way states handle sex crimes, and the imposition of punitive damages may discourage the filing of private tort actions. Sanctions imposed and determinations made by any pair of distinct parties could be usefully analyzed using the framework developed here.

