# PROSECUTORIAL DISCRETION AND PROSECUTION GUIDELINES: A CASE STUDY IN CONTROLLING FEDERALIZATION

MICHAEL A. SIMONS*

*In this Article, Michael Simons examines the ways in which the federalization of crime can be controlled. Simons argues that prosecutorial discretion is the most important variable in the federalization process and that controlling prosecutorial discretion is the key to controlling federalization. He presents the Child Support Recovery Act as a model for how prosecution guidelines for federal criminal statutes can provide such control. Federalization of criminal child support enforcement has been successful because federal prosecutors have exercised discretion in a manner consistent with the concerns expressed by the bench and the academy about federalization. Simons concludes by exploring how such guidelines would prevent the implementation of other criminal statutes from usurping state authority, overwhelming the federal courts, and treating individual defendants unfairly.*



* Assistant Professor of Law, St. John's University, Assistant United States Attorney, Southern District of New York, 1995-1998. B.A., 1986, College of the Holy Cross; J.D., 1989, Harvard University. I owe thanks to John Barrett, Paul Kirgis, Gerard Lynch, Mary Lyndon, Michael Perino, David Sklansky, Susan Stabile, Brian Tamanaha, David Wilkins, and the participants in the faculty writing workshop at St. John's University School of Law for their helpful comments on earlier versions of this Article; to Irene Mazun, Jamie O'Grady, John Rondello, and Andrea Wienert for research assistance; and to the Summer Research Program at St. John's for financial support.

## INTRODUCTION

Timothy McVeigh planted the bomb that blew up the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people, many of them federal employees.[1] Rita Gluzman killed her husband with an ax after he took up with another woman.[2] John Gotti ran the Gambino crime family, overseeing an extensive loan-sharking and extortion racket and ordering at least a half-dozen murders.[3] Leroy Carolina robbed a gas station of $144 and stole a car to make his getaway.[4] Martin Frankel is accused of masterminding a fraud and money-laundering scheme that stole hundreds of millions of dollars from insurance companies in five different states.[5] Gary Johnson failed to pay $6,813.90 in child support.[6]

The one thing these defendants have in common is that each was prosecuted in federal court. That McVeigh, Gotti, and Frankel were prosecuted by federal authorities should not be surprising. McVeigh's

[1] See United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998).

[2] See United States v. Gluzman, 154 F.3d 49, 50 (2d Cir. 1998).

[3] See United States v. Locascio, 6 F.3d 924, 929 (2d Cir. 1993).

[4] See United States v. Carolina, 61 F.3d 917 (10th Cir. 1995) (mem.); Plaintiff-Appellee's Brief at 4, *Carolina* (No. 94-6439) (on file with the *New York University Law Review*).

[5] See Timothy R. Brown, Five States Sue Financier Frankel, A.P., Online, May 9, 2000, available in 2000 WL 20906886; Leslie Wayne, U.S. Indicts a Financier Held in Germany on 36 Counts of Fraud, N.Y. Times, Oct. 8, 1999, at C1.

[6] See United States v. Johnson, 114 F.3d 476, 478-79 (4th Cir. 1997).

act of terrorism struck directly at the federal government. Organized crime rackets like Gotti's have long been the target of federal law enforcement. And Frankel's alleged fraud was complex and extensive, with his victims spread around the nation.

But it may be surprising—indeed, to some, distressing—that Gluzman, Carolina, and Johnson found themselves in federal court. Murder, robbery, car theft, and failure to pay child support are among the many crimes that have traditionally been prosecuted in state court. They are also among the many crimes that have now been "federalized."[7]

This federalization[8] of crime has been subjected to sharp criticism—criticism that has increased in the past few years. In his 1998 year-end report on the federal judiciary, Chief Justice Rehnquist decried Congress's record of federalization in the 1990s, arguing that "[t]he trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system."[9] Rehnquist's concerns are shared widely. In December 1998, an American Bar Association Task Force composed of

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[7] See, e.g., Child Support Recovery Act of 1992 (CSRA), 18 U.S.C. § 228 (Supp. IV 1998); Hobbs Act, 18 U.S.C. § 1951 (1994) (robbery); Anti-Car Theft Act, 18 U.S.C. § 2119 (1994 & Supp. IV 1998) (carjacking); Violence Against Women Act, 18 U.S.C. § 2261 (1994 & Supp. IV 1998) (domestic violence). Of these four federal statutes, only the Hobbs Act was enacted before 1992. See Sara Sun Beale, Federalizing Crime: Assessing the Impact on the Federal Courts, 543 Annals Am. Acad. Pol. & Soc. Sci. 39, 43 (1996) (discussing federalization in 1980s and 1990s); see also Task Force on Federalization of Crim. Law, American Bar Ass'n, The Federalization of Criminal Law 7 n.9 (1998) [hereinafter ABA Task Force] (noting that more than 25% of federal criminal laws enacted since Civil War have been enacted since 1980).

[8] The term "federalization" usually describes the legislative process of enacting federal criminal laws that cover conduct that is already criminal under state law. See Rory K. Little, Myths and Principles of Federalization, 46 Hastings L.J. 1029, 1030 n.2 (1995) (discussing "federalization" as term of art). In some important ways, this conception of federalization is unduly narrow. For one, as will become apparent from the thesis of this Article, Congress is not the only participant in the process of extending federal law to cover conduct usually prosecuted by states—prosecutors and judges also play important roles in that process. See infra Parts II.A, II.C. In addition, the creation of new federal crimes is not the only way in which Congress expands the scope of federal criminal law. The allocation of federal resources through congressional budgets has as much, if not more, effect on the make-up of the federal criminal docket as do the laws on the books. See Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. Rev. 757, 793-99 (1999) (describing influence of Congress's power of purse over criminal enforcement decisionmaking). Although this "federalization by appropriation" is, in many respects, more significant than the creation of new federal crimes, it is the new crimes that have attracted the most attention and around which the federalization debate has revolved. Thus, my argument is primarily directed at new federal crimes, and the ways in which that kind of federalization can or should be controlled.

[9] William H. Rehnquist, The 1998 Year-End Report of the Federal Judiciary, Third Branch, Jan. 1999, at 2 [hereinafter Rehnquist, 1998 Report]; accord William H. Rehnquist,

federal and state judges, prosecutors, and defense attorneys, as well as academics, concluded that "inappropriate federalization" causes "long-range damage to real crime control and to the nation's structure."[10]

Law reviews, too, have been filled with articles complaining about the adverse affects of increasing federalization. Some complain that federalization offends the basic principles of federalism and division of governmental powers that underlie the Constitution.[11] Others claim that federalization has caused a workload crisis that threatens both the character and the quality of the federal courts.[12] Still others argue that overlapping federal and state criminal juris-

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Remarks on the Federalization of Criminal Law, Address Before the American Law Institute (May 11, 1998), in 11 Fed. Sentencing Rep. 132 (1998).

[10] ABA Task Force, supra note 7, at 56. See generally James A. Strazella, Assessing the Impact of Federalization: The ABA Report, 11 Fed. Sentencing Rep. 137 (1998) (summarizing ABA Task Force report).

[11] See, e.g., Gerald G. Ashdown, Federalism, Federalization, and the Politics of Crime, 98 W. Va. L. Rev. 789, 813 (1996) ("Wholesale federal criminalization and enforcement of local crime heads the country in the direction that the framers of the Constitution wanted to avoid—the creation of a strong and pervasive national police and criminal justice system."); Sara Sun Beale, Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law, 46 Hastings L.J. 1277, 1277 (1995) [hereinafter Beale, Reporter's Draft] (noting that participants in "Three-Branch Roundtable," which included federal and state judges, legislators, and prosecutors, as well as scholars, agreed that "the increasing federalization of crime has the potential to cause an unplanned but nonetheless fundamental change in the relationship between the federal government and the states and in the character of the federal courts"); Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 993 (1995) [hereinafter Beale, New Principles] ("The current increase in federal criminal jurisdiction is in fundamental tension with the values of decentralization promoted by federalism.").

[12] See, e.g., Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 Hastings L.J. 1135, 1165 (1995) (arguing that federalization has caused "impending crisis in the federal justice system"). Not surprisingly, the federal judges themselves have been the most vocal proponents of this view. See, e.g., Rehnquist, 1998 Report, supra note 9, at 3 ("The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system."); Robert E. Cowen, Federalization of State Law Questions: Upheaval Ahead, 47 Rutgers L. Rev. 1371, 1372 (1995) (arguing that increased caseload has "increasingly transformed federal judges into administrators and managers no different than any other bureaucrat"); Sam J. Ervin, III, The Federalization of State Crimes: Some Observations and Reflections, 98 W. Va. L. Rev. 761, 761 (1996) (arguing that Congress's trend toward federalizing crime could "drastically alter the role of the federal courts in our nation"); Roger J. Miner, Crime and Punishment in the Federal Courts, 43 Syracuse L. Rev. 681, 686 (1992) ("In many districts throughout the country, judges are unable to get to their civil calendars because of the huge numbers of criminal cases that they must dispose of."). But see Little, supra note 8, at 1030, 1034-55 (arguing that, despite seeming unanimity of federal judges in criticizing federalization of crime, workload crisis is overstated).

diction creates an arbitrary lottery, with the losers ending up in federal court.[13]

These objections to federalization have merit. There is no doubt that the federal criminal law is expansive and growing. By one estimate, there are more than 3000 federal crimes.[14] There is no doubt that many federal criminal statutes cover conduct that is usually (and has traditionally been) prosecuted by state and local authorities.[15] And there is little dispute that many, if not most, criminal defendants fare worse in federal court than in state court.[16] Nevertheless, even the harshest critics of federalization agree that the federal government has a role to play in criminal law enforcement. The question then becomes how—or, more appropriately, by whom—federalization should be controlled.

Blame for the federalization boom usually falls on Congress,[17] and to the extent that crime has been over-federalized, Congress no

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[13] See, e.g., Beale, New Principles, supra note 11, at 981-82 (arguing that federalization is "deeply problematic because it is increasingly clear that similarly situated offenders now receive radically different sentences in federal and state court"); Steven D. Clymer, Unequal Justice: The Federalization of Criminal Law, 70 S. Cal. L. Rev. 643, 668-69 (1997) (arguing that "the disparity between federal and state prosecution is a hallmark of federalization" and that "defendants typically fare considerably worse when prosecuted in federal court"); see also Robert Heller, Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion, 145 U. Pa. L. Rev. 1309, 1309, 1312 (1997) (arguing that "irrational" reasons may underlie decisions to prosecute drug crimes in federal court).

[14] The frequently cited figure of 3000 crimes is usually attributed to Judge Roger Miner, although Judge Miner did not cite a source for his estimate. See Miner, supra note 12, at 681; cf. ABA Task Force, supra note 7, at 9 n.11 (noting that "an exact count of the present 'number' of federal crimes . . . is difficult" and that "helpful estimate" of 3000 federal crimes "is now surely outdated").

[15] See ABA Task Force, supra note 7, at 10 ("[I]t is clear that the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades.").

[16] See Beale, New Principles, supra note 11, at 997-99 (focusing on sentencing disparities); Clymer, supra note 13, at 668-75 (noting disparities in bail determinations, pretrial discovery, suppression of evidence, sentence lengths, and parole decisions); see also John C. Jeffries & John Gleeson, The Federalization of Organized Crime: Advantages of Federal Prosecution, 46 Hastings L.J. 1095, 1103 (1995) (discussing advantages of prosecuting organized crime at federal level).

[17] Chief Justice Rehnquist claimed that "Congress has contributed significantly to the rising caseload by continuing to federalize crimes already covered by state laws." Rehnquist, 1998 Report, supra note 9, at 2. The ABA Task Force was created "in response to widespread concern about the number of new federal crimes being created annually by Congress." ABA Task Force, supra note 7, at 1. Similarly, Congress is the usual suspect in academic criticisms of federalization. For example, a 1995 symposium issue of the *Hastings Law Journal* devoted to federalization began with the following sentence: "In recent years, Congress has reacted to the nation's concern about crime by legislating traditionally state crimes into federal courts." Viviana Waisman, Foreword, 46 Hastings L.J. xi, xi (1995). Another symposium on federalism and federalization characterized the problem as "the phenomenon of the multiplication of federal criminal statutes." Gerald G. Ashdown, In-

doubt deserves much of the blame. Creating a new federal crime provides an easy and attention-getting way for federal politicians to appear "tough on crime." From a public choice perspective, interest group support for new criminal legislation often makes federalization irresistible to federal lawmakers.[18] Moreover, Congress can create new federal crimes without appropriating any specific money for enforcement, thereby avoiding the hard political choices attending the allocation of scarce resources.[19]

Most critics of federalization, believing that Congress is the problem, also look to Congress for the solution. The ABA Task Force recommended five steps, ranging from restraint in enacting new statutes to increased funding of state and local law enforcement, that Congress should take to limit inappropriate federalization.[20] Chief Justice Rehnquist urged Congress to restrict new federal criminal laws to five specified categories of "clearly defined and justified national interests."[21] Others have urged that Congress restrict new federal statutes to those areas where federal involvement is necessary to remedy "demonstrated state failure."[22]

Like the complaints about Congress, the proposals to reform Congress also have merit. So far, however, they have fallen on deaf ears. Although Congress occasionally exhibits some sensitivity to federalization concerns, the pace of federalization has not diminished.[23] Congress may be the problem, but it is unlikely to be the solution.

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troduction: Macro and Micro Evaluation of the Federalization of Crime, 98 W. Va. L. Rev. 757, 757 (1996).

18 See infra notes 73-75, 146-49 and accompanying text.

19 See Beale, New Principles, supra note 11, at 981 ("When Congress has chosen to legislate by adding new federal crimes, it has neither preempted state law as a formal matter nor provided sufficient resources to supplant state enforcement as a practical matter."); Deadbeat Dad Enforcement: DOJ on Tightrope, DOJ Alert, Jan. 2-16, 1985, available in Westlaw, DOJALT database (noting complaints by Department of Justice (DOJ) officials that Congress had "not appropriated even a small fraction of the funds needed" to enforce Child Support Recovery Act); Regs Due Soon on "Deadbeat" Dads, DOJ Alert, Mar. 1993, available in Westlaw, DOJALT database (noting that FBI had not received any additional funding to enforce Child Support Recovery Act).

20 See ABA Task Force, supra note 7, at 51-55 (recommending following five steps: (1) recognizing how best to fight crime within federal system; (2) focusing consideration on true federal interests in crime control and risks of federalization of local crime; (3) using institutional mechanisms to foster restraint on further federalization; (4) using sunset provisions; and (5) responding to public safety concerns with federal support for state and local crime control efforts).

21 Rehnquist, 1998 Report, supra note 9, at 3 (citing recommendations made by Judicial Conference of United States); see also infra note 152 and accompanying text (listing recommendations).

22 See, e.g., Little, supra note 8, at 1078-79.

23 For example, in 1998, Congress enacted new laws punishing sexual abuse of children, see Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105-314, 112

Yet Congress is not the only participant in the federalization process. Overlooked in much of the debate about federalization is the central role that prosecutors play in the federalization of crime—and the important role they can play in controlling federalization. Congress may write the laws, but it is the charging decisions of hundreds of federal prosecutors that ultimately determine which cases end up in federal court and which cases end up in state court. In this Article, I argue that, so long as Congress remains unable to resist creating new federal crimes, the key to controlling federalization is the responsible exercise of prosecutorial discretion.

Discretion, of course, is synonymous with unchecked power. How can we be confident that prosecutors will exercise discretion in ways sensitive to federalization concerns? In many cases, a federal prosecutor's normal incentives will result in charging decisions that are consistent with federalization concerns. But sometimes a prosecutor in the field will feel pressure to bring federal charges against a defendant who could be prosecuted effectively in state court. In those cases, prosecution guidelines can provide the necessary check on prosecutorial discretion. To be effective in controlling federalization, such guidelines should be detailed, statute-specific, widely disseminated, and centrally monitored.

To explore these arguments, I examine one of the more notorious of the recent federalization statutes: the Child Support Recovery Act (CSRA) enacted in 1992.[24] The CSRA makes it a federal crime to fail to pay court-ordered child support for a child living in another state.[25] The CSRA is frequently cited as a prime example of the kind of ram-

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Stat. 2974 (codified at 18 U.S.C. § 1028 (Supp. IV 1998)), identity theft, see Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (codified in scattered sections of 18 U.S.C.), telemarketing fraud, see Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, 112 Stat. 520 (codified in scattered sections of 18 U.S.C.), and theft of cellular phone services, see Wireless Telephone Protection Act, Pub. L. No. 105-172, 112 Stat. 53 (1998) (codified at 18 U.S.C. § 1029 (Supp. IV 1998)). In 1996, Congress added laws punishing drug-induced rape, see Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, 110 Stat. 3807 (codified in scattered sections of 21 U.S.C.), and church arsons, see Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (codified at 18 U.S.C. § 247, 42 U.S.C. § 10602 (Supp. IV 1998)).

[24] Pub. L. No. 102-521, 106 Stat. 3403 (1992), amended by Pub. L. No. 105-187, 112 Stat. 618 (1998) (codified at 18 U.S.C. § 228 (Supp. IV 1998)).

[25] The CSRA, in its entirety, provides as follows:

> (a) Offense.—Any person who—
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> (1) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000;
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> (2) travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; or

pant and unprincipled federalization that threatens the character and quality of the federal courts and unnecessarily infringes on the prerogatives of the states.[26] But a closer examination reveals that the

> (3) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000;
>
> shall be punished as provided in subsection (c).
>
> (b) Presumption.—The existence of a support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period.
>
> (c) Punishment.—The punishment for an offense under this section is—
>
> (1) in the case of a first offense under subsection (a)(1), a fine under this title, imprisonment for not more than 6 months, or both; and
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> (2) in the case of an offense under paragraph (2) or (3) of subsection (a), or a second or subsequent offense under subsection (a)(1), a fine under this title, imprisonment for not more than 2 years, or both.
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> (d) Mandatory restitution.—Upon a conviction under this section, the court shall order restitution under section 3663A in an amount equal to the total unpaid support obligation as it exists at the time of sentencing.
>
> (e) Venue.—With respect to an offense under this section, an action may be inquired of and prosecuted in a district court of the United States for—
>
> (1) the district in which the child who is the subject of the support obligation involved resided during a period during which a person described in subsection (a) (referred to in this subsection as an "obliger") failed to meet that support obligation;
>
> (2) the district in which the obliger resided during a period described in paragraph (1); or
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> (3) any other district with jurisdiction otherwise provided for by law.
>
> (f) Definitions.—As used in this section—
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> (1) the term "Indian tribe" has the meaning given that term in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. [§] 479a);
>
> (2) the term "State" includes any State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and
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> (3) the term "support obligation" means any amount determined under a court order or an order of an administrative process pursuant to the law of a State or of an Indian tribe to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living.

18 U.S.C. § 228 (Supp. IV 1998). Subsections (a)(2), (a)(3), and (b) were added in 1998. See Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618.

[26] See, e.g., Ashdown, supra note 11, at 793; Cowen, supra note 12, at 1371-72; Edwin Meese, III, Big Brother on the Beat: The Expanding Federalization of Crime, 1 Tex. Rev. L. & Pol. 1, 3 (1997); Thomas M. Mengler, The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime, 43 U. Kan. L. Rev. 503, 504 (1995); Rehnquist, 1998 Report, supra note 9, at 2; Otto G. Obermaier & Ronald R. Rossi, Too Many Federalized Crimes?, N.Y. L.J., July 6, 1998, at 9; Letter from J. Clifford Wallace, Chief Judge, U.S. Court of Appeals for the Ninth Circuit (Mar. 29, 1993) (describing crisis of federal judiciary in letter to "all three branches of government"), reprinted in William P. Marshall, Federalization: A Critical Overview, 44 DePaul L. Rev. 719 app. A (1995).

CSRA, as it has been implemented, is consistent with almost any of the "principles of federalization" that have been proposed. Crucial to that implementation has been a set of detailed prosecution guidelines issued by the Attorney General to govern the allocation of child support cases between federal and state courts.[27]

Not surprisingly, prosecutors guard their discretionary power jealously, and the Department of Justice (Department or DOJ) is often reluctant to commit itself publicly to specific prosecution guidelines. In that respect, the CSRA is an unusual statute. The CSRA guidelines were necessary, however, because neither federal prosecutors nor federal law enforcement agencies had any experience with child support cases. The lesson of the CSRA's implementation is broad: The benefits prosecution guidelines bring in controlling federalization far outweigh any costs imposed by restricting prosecutorial discretion.

This Article proceeds in four parts. Part I summarizes the history of federalization and the arguments that have been marshaled against it. In Part II, I consider which branch of the government, if any, has either the inclination or the ability to control federalization. That part concludes that the judiciary, which has the strongest incentive to control federalization, has the least ability to do so, while Congress and federal prosecutors, who are most able to control federalization, often have too little incentive to do so. In Part III, I turn to an in-depth examination of the CSRA, examining the problems with interstate child support enforcement that prompted Congress to enact the statute, the (ultimately unsuccessful) efforts of the judiciary to strike down the statute, and the ways in which the Department of Justice has implemented the statute. In Part IV, I explore whether the lessons of the CSRA—particularly the effect of prosecution guidelines on federalization concerns—can be extended to other statutes.

My aim is not to defend federalization, though I do think some of federalization's ill effects have been overstated.[28] Rather, my goal is to explore ways in which federalization can be controlled. I do not contend that prosecution guidelines are the panacea for all the ills that federalization has caused, but they can help. Of all the participants in the criminal justice process, prosecutors are in the best position to control federalization. Prosecution guidelines, therefore, can provide an effective check, both practical and symbolic, on the exercise of prosecutorial discretion that determines which defendants end up in federal court.

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[27] See infra Part III.D.1.

[28] See infra Part I.B.2.

# I

# THE FEDERALIZATION CONTROVERSY: AN OVERVIEW

## A. A Brief History of Federalization

Congress has been in the criminal law business for over 200 years. The Crimes Act of 1790, enacted by the first Congress, established seventeen federal crimes, ranging from treason and counterfeiting to perjury and receiving stolen goods.[29] The federal criminal law has expanded, in fits and starts, ever since.[30]

Federalization as we know it, however, did not truly begin until the Reconstruction period. Before the Civil War, federal criminal laws usually addressed uniquely federal concerns, such as crimes against the federal government itself (e.g., treason) or crimes committed within federal territorial jurisdiction.[31] The Civil War, of course, fundamentally changed the role of the federal government, and so too did it change the role of the federal criminal law. Two statutes enacted shortly after the Civil War exemplify this changing role. First, skeptical of southern states' willingness to protect the new citizens created by the Thirteenth Amendment, Congress made it a federal crime to deprive any person of civil rights under color of law.[32] Sec-

[29] See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112, 112-119 (codified as amended in scattered sections of 18 U.S.C.). The punishment for treason and counterfeiting was death; the punishment for perjury was three years in prison, an $800 fine, and one hour in the pillory; the punishment for receiving stolen goods was a fine of up to four times the value of the property and public whipping "not exceeding thirty-nine stripes." Id. §§ 1, 14, 16-18, 1 Stat. at 112, 115-16. One of the more arcane of these new federal crimes was theft of a body intended for dissection, a misdemeanor punishable by one year in prison. See id. § 5, 1 Stat. at 113. The Crimes Act of 1790 was not even Congress's first foray into the criminal law. In the first month of its existence, Congress had passed laws criminalizing bribery and false statements. See Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46.

[30] For more detailed discussions of the history of federalization, see Lawrence M. Friedman, Crime and Punishment in American History 71-73, 134-39, 261-76, 339-41 (1993); Dwight F. Henderson, Congress, Courts, and Criminals: The Development of Federal Criminal Law, 1801-1829 passim (1985); John S. Baker, Jr., Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?, 16 Rutgers L.J. 495, 502, 513-18 (1985); Sara Sun Beale, Federal Criminal Jurisdiction, in 2 Encyclopedia of Crime and Justice 775-79 (Sanford H. Kadish ed., 1983); Beale, Reporter's Draft, supra note 11, at 1278-82; Brickey, supra note 12, at 1137-45; Daniel C. Richman, The Changing Boundaries Between Federal and Local Law Enforcement, in Boundary Changes in Criminal Justice Organizations 81, 83-91 (Charles M. Friel ed., 2000).

[31] For example, the Crimes Act of 1825 criminalized extortion by a federal official and embezzlement by an employee of the Bank of the United States. See Act of Mar. 3, 1825, ch. 65, §§ 12, 16, 4 Stat. 115, 118-19 (codified as amended at 18 U.S.C. §§ 656, 872 (1994)). The Act also included the first provision for assimilative crimes (applying state criminal law to offenses committed in federal enclaves). See id. § 3, 4 Stat. at 115 (codified as amended at 18 U.S.C. § 13 (1994)).

[32] See Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242 (1994)); see also United States v. Price, 383 U.S. 787, 801-06 (1966) (discussing legislative history of civil rights acts); W.E.B. DuBois, Black Reconstruction in

ond, recognizing the increasingly multistate character of fraud offenses, Congress enacted the Post Office Act of 1872, the predecessor to today's mail fraud statute.[33] These two laws, which extended federal criminal jurisdiction into areas that traditionally had been the province of the states, were motivated by concerns that continue to drive federalization today: the unwillingness of the states (despite their ability) to prosecute offenses against minorities and the inability of the states (despite their willingness) to prosecute multistate offenses.[34]

The late nineteenth and early twentieth centuries also saw the federal government's initial forays into regulating morals through the criminal law.[35] The Comstock Law of 1873 made it a federal crime to use the mails to distribute any "publication of an indecent character" or "any article or thing designed or intended for the prevention of conception or procuring of abortion."[36] The Mann Act of 1910—the infamously named "White-slave traffic Act"—made it a federal crime to transport across state lines "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[37] And the Harrison Narcotic Drug Act of 1914 was an early shot in the

America 270-71 (Touchstone 1995) (1935) (quoting bill's sponsor, Sen. Trumbull of Illinois); Arthur Meier Schlesinger, The Rise of Modern America 1865-1951, at 10 (4th ed. 1951); Brickey, supra note 12, at 1139-40.

33 See Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (codified as amended at 18 U.S.C. § 1341 (1994)); Beale, Reporter's Draft, supra note 11, at 1278-79; Brickey, supra note 12, at 1140. Congress had criminalized actual theft from the mails—an offense against the federal government itself—decades earlier. See Act of Apr. 30, 1810, ch. 37, § 19, 2 Stat. 592, 598 (codified as amended at 18 U.S.C. § 2114 (1994)).

34 The Post Office Act of 1872 was only the first of many federal criminal laws aimed at so-called "crimes of mobility." See Friedman, supra note 30, at 12-14, 193-95. Other early laws of this type included the Animal Industry Act of 1884, ch. 60, § 6, 23 Stat. 31, 32 (codified as amended at 18 U.S.C. § 42 (1994)) (interstate shipment of diseased livestock); the Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)); the Anti-Lottery Act of 1890, ch. 908, 26 Stat. 465 (codified as amended at 18 U.S.C. § 1302 (1994)) (mailing of lottery tickets); the Lottery Act of 1895, ch. 191, 28 Stat. 963 (codified as amended at 18 U.S.C. § 1301 (1994)) (interstate transportation of lottery tickets); the Pure Food and Drug Act of 1906, ch. 3915, § 10, 34 Stat. 768, 771 (codified as amended in scattered sections of 21 U.S.C. (1994)) (adulterated or misbranded food or drugs); and the National Motor Vehicle Theft Act of 1919 (Dyer Act), ch. 89, 41 Stat. 324 (codified as amended at 18 U.S.C. § 2119 (1994 & Supp. IV 1998)).

35 See Friedman, supra note 30, at 135, 324-28, 339-41 (discussing "societies for the 'suppression of vice'" in 1870s, crackdown on gambling and sexual immorality in early 1900s, and Prohibition movement in 1920s).

36 Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 598, 599 (codified as amended at 18 U.S.C. § 1461 (1994)).

37 Act of June 25, 1910, ch. 395, 36 Stat. 825 (codified as amended at 18 U.S.C. §§ 2421-2424 (1994 & Supp. IV 1998)).

federal government's "war on drugs."[38] This federalization of vice law was partly justified by the increasing mobility of American society in the twentieth century.[39] But more often than not, these federal vice laws were simply a reaction to public outcry, without regard for whether any particular federal interest was at stake or whether the states were unwilling or unable to address the problem.[40]

The federalization of vice law reached its high point with the Volstead Act of 1919, which implemented the Eighteenth Amendment's ban on liquor.[41] Prohibition did not simply expand federal criminal jurisdiction to include a new set of crimes; it fundamentally altered the scope of federal prosecutions. In the span of fifteen years, federal prosecutions increased more than fourfold.[42]

Fifteen years of Prohibition created both a thriving organized crime underworld and a massive federal law enforcement apparatus.[43] When Prohibition ended, neither organized crime nor federal law enforcement went away. Thus, in 1934, Congress turned its attention to the nonbootlegging activities of organized crime. That year saw congressional enactments directed at extortion,[44] kidnapping,[45] bank rob-

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[38] See Act of Dec. 17, 1914, ch. 1, 38 Stat. 785 (superseded by Internal Revenue Code of 1939). The Harrison Act was not primarily a criminal statute. It sought to restrict trafficking in opium and cocaine through the imposition of taxes. Failure to pay the taxes, of course, was a federal crime. See id. § 9, 38 Stat. at 789.

[39] See Friedman, supra note 30, at 265 (discussing Brooks v. United States, 267 U.S. 432, 438 (1925), in which Court recognized "radical change in transportation" brought about by automobile); Brickey, supra note 12, at 1141 ("The rise of federal regulatory crimes in the late-nineteenth century was inextricably intertwined with the emergence of a 'culture of mobility.'").

[40] See Friedman, supra note 30, at 135, 325-28 (noting "[e]xaggeration and hysteria" in campaign against "white slavery").

[41] See National Prohibition Act, ch. 85, 41 Stat. 305 (1919) (repealed 1935); Friedman, supra note 30, at 339 ("[B]eyond a doubt, the jewel in the crown of the morals revolution was national Prohibition.").

[42] See infra notes 81-83 and accompanying text.

[43] See Friedman, supra note 30, at 265-66, 340. In 1917, DOJ spent $650,185 running its prosecutors' offices. By 1934, that figure had increased almost fourfold, to $2,493,941. See 1917 Att'y Gen. Ann. Rep. 309; 1934 Att'y Gen. Ann. Rep. 191.

[44] See Act of May 18, 1934, ch. 300, 48 Stat. 781 (codified as amended at 18 U.S.C. § 875 (1994)) (prohibiting sending threats through interstate commerce by any means). An earlier law, the Extortion Act of 1932, had prohibited sending threats through the mail. See Act of July 8, 1932, ch. 464, 47 Stat. 649 (codified as amended at 18 U.S.C. §§ 876-877 (1994)).

[45] See Act of May 18, 1934, ch. 301, 48 Stat. 781 (codified as amended at 18 U.S.C. § 1201 (1994 & Supp. IV 1998)) (imposing death penalty for interstate kidnapping and establishing presumption after seven days that victim had been transported in interstate commerce). The original federal kidnapping law, the Lindbergh Law of 1932, is a prime example of "public outcry" federalization. The law was enacted just weeks after the infamous kidnapping of Charles Lindbergh's baby. See Act of June 22, 1932, ch. 271, 47 Stat. 326 (codified as amended at 18 U.S.C. § 1201 (1994 & Supp. IV 1998)); Horace L. Bomar, Jr., The Lindbergh Law, 1 Law & Contemp. Probs. 435, 436 (1934) ("Public sentiment

bery,[46] theft,[47] kickbacks,[48] racketeering,[49] and firearms possession.[50] The same Congress also made it a federal crime to cross state lines to avoid prosecution in state court for murder and other violent crimes.[51] Federalization flourished in the 1930s because crime had become a national issue,[52] and the public expected Congress to "do something" about it.[53]

Federalization continued only modestly through the middle part of the twentieth century,[54] but picked up with renewed vigor in the

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having been aroused by this atrocious deed, there was an instant demand that Congress 'do something' about it.").

46 See Act of May 18, 1934, ch. 304, §§ 1-3, 48 Stat. 783, 783 (codified as amended at 18 U.S.C. § 2113 (1994 & Supp. IV 1998)) (setting punishments for taking anything of value from bank by force and enhanced punishments for committing assault or murder in course of doing so).

47 See Act of May 22, 1934, ch. 333, §§ 1, 3, 6, 48 Stat. 794, 794-95 (codified as amended at 18 U.S.C. § 2314 (1994)) (extending National Motor Vehicle Theft Act to cover interstate transportation of other stolen articles).

48 See Act of June 13, 1934, ch. 482, § 1, 48 Stat. 948, 948 (codified as amended at 18 U.S.C. § 874 (1994)) (prohibiting kickbacks in any building project involving federal money).

49 See Act of June 18, 1934 (Anti-Racketeering Act), ch. 569, 48 Stat. 979 (codified as amended at 18 U.S.C. § 1951 (1994)) (prohibiting interference with commerce by threats of violence).

50 See National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 18 U.S.C. § 922 (1994 & Supp. IV 1998)) (prohibiting unlicensed possession in interstate commerce of machine guns, "sawed-off" shotguns and rifles, and silencers).

51 See Act of May 18, 1934, ch. 302, 48 Stat. 782 (codified as amended at 18 U.S.C. § 1073 (1994 & Supp. IV 1998)). The statute also applied to witnesses who crossed state lines to avoid testifying in felony criminal proceedings. For a contemporary (and favorable) review of the spate of federal criminal laws passed in 1934, see Symposium, Extending Federal Powers over Crime, 1 Law & Contemp. Probs. 399 (1934).

52 In 1929, Herbert Hoover became the first president to include the "crime problem" in his inaugural address. See Friedman, supra note 30, at 273.

53 One contemporary commentator attributed the 1934 enactments to the rise of organized crime and "modern methods of transportation":

> Normally society will react slowly to a change in conditions which impairs the efficacy of its laws. But so dramatic have been the recent depredations of organized criminal bands, enabled by modern methods of transportation to operate over wide territories, that action has been relatively prompt in forthcoming. The aid of the federal government has first been besought—in part because with respect to certain offenses it alone is competent to act, in part because to appeal to Washington affords an outlet for the urge for action without requiring a painstaking—and politically painful—reorganization of state and local law enforcing agencies.

David F. Cavers, Foreword to Symposium on Extending Federal Powers over Crime, 1 Law & Contemp. Probs. 399, 399 (1934).

54 See, e.g., Hobbs Act, ch. 645, 62 Stat. 683, 793 (1948) (codified as amended at 18 U.S.C. § 1951 (1994)) (extortion); Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 711, 722 (codified as amended at 18 U.S.C. § 1343 (1994)) (wire fraud); Act of July 14, 1956, ch. 595, § 1, 70 Stat. 538, 538-40 (codified as amended at 18 U.S.C. § 32 (1994 & Supp. IV 1998)) (aircraft and aircraft facility sabotage); Act of Sept. 13, 1961, Pub. L. No. 87-218, § 1, 75 Stat. 492, 492 (codified as amended at 18 U.S.C. § 1302 (1994)) (interstate transportation of

late 1960s. "Law and order" had become a volatile campaign issue,[55] and Congress responded in 1968 with the Omnibus Crime Control and Safe Streets Act.[56] Among other things, the 1968 Act created a host of new federal firearms offenses.[57] The same Congress also enacted the Consumer Credit Protection Act, which made "loan sharking" a federal crime.[58] The next national election year saw the enactment of the Organized Crime Control Act of 1970, which brought us RICO, as well as federal penalties for conducting an "illegal gambling business" and for trafficking in explosives,[59] and the Comprehensive Drug Abuse Prevention and Control Act of 1970, which created the panoply of federal crimes that later became the "war on drugs."[60]

The political forces that turned "law and order" into a campaign issue in the late 1960s continue to drive federalization today. Since 1984, every national election year has seen the creation of new federal crimes.[61] Many of those laws expanded the already wide array of fed-

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wagering paraphernalia); Travel Act, Pub. L. No. 87-228, 75 Stat. 498 (1961) (codified as amended at 18 U.S.C. § 1952 (1994)) (racketeering).

55 "Law and order" as a campaign issue was pushed to national prominence by Barry Goldwater in 1964. Not to be outdone, President Johnson followed with his "War on Crime." The year 1968 brought assassinations, race riots, and a presidential campaign in which Richard Nixon regularly (and successfully) criticized the Supreme Court for "coddling" criminals. See Friedman, supra note 30, at 274.

56 Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended in scattered sections of 18 U.S.C.).

57 See id. § 902, 82 Stat. at 226-35 (codified as amended at 18 U.S.C. § 921 (1994 & Supp. IV 1998)). In addition to imposing criminal penalties for the unlicensed sale or shipment of firearms, the 1968 Act made it a federal crime to possess a stolen firearm, to possess a firearm with an obliterated serial number, and to possess a firearm after being convicted of a felony. In the years since, Congress has added many more federal firearms offenses. See, e.g., Firearms Owners' Protection Act, Pub. L. No. 99-308, §§ 102(9), 104(a)(2), 100 Stat. 449, 452-53, 456-57 (1986) (codified at 18 U.S.C. § 922(c), (o) (1994)) (possession of machine gun or any firearm in furtherance of crime of violence or drug trafficking crime); Undetectable Firearms Act of 1988, Pub. L. No. 100-649, § (2)(a), 102 Stat. 3816 (codified at 18 U.S.C. § 922(p) (1994)) (possession of firearm altered to evade detection by metal detector or x-ray machine); Crime Control Act of 1990, Pub. L. No. 101-647, § 1702(b)(1), 104 Stat. 4789, 4844-45 (codified at 18 U.S.C. § 922(q) (Supp. IV 1998)) (possession of firearm near school); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110,102(a), 108 Stat. 1796, 1996-97 (codified at 18 U.S.C. § 922(v) (1994)) (possession of semiautomatic assault weapon).

58 Pub. L. No. 90-321, § 202, 82 Stat. 146 (1968) (codified as amended at 18 U.S.C. § 891 (1994)).

59 See Pub. L. No. 91-452, §§ 803, 901, 1101, 84 Stat. 922, 937, 941-48, 953-55 (1970) (codified as amended in scattered sections of 18 U.S.C.).

60 See Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended in scattered sections of 21 U.S.C.).

61 See Comprehensive Crime Control Act of 1984, Pub L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984) (codified as amended in scattered sections of 18 U.S.C.); Anti-Drug Abuse Act of 1986, Pub L. No. 99-570, 110 Stat. 3207 (Oct. 27, 1986) (codified as amended in scattered sections of 21 U.S.C.); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988) (codified as amended in scattered sections of 21 U.S.C.); Crime

eral narcotics and firearms offenses.[62] In addition, Congress extended federal criminal jurisdiction over such wide-ranging conduct as drug-induced rape, sexual abuse of children, identity theft, telemarketing fraud, theft of cellular phone services, interstate domestic violence, carjacking, and, of course, failure to pay interstate child support.[63]

### *B. Federalization's Critics*

Criticism of federalization is nothing new.[64] The current objections fall into three broad categories: political objections, institutional objections, and fairness objections.

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Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (Nov. 29, 1990) (codified as amended in scattered sections of 18 U.S.C.); Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (Oct. 25, 1992) (codified as amended at 18 U.S.C. § 228 (Supp. IV 1998)); Anti-Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (Oct. 25, 1992) (codified as amended at 18 U.S.C. §§ 2119, 2322 (1994 & Supp. 1998)); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994) (codified as amended in scattered sections of 18 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (codified as amended in scattered sections of 18 U.S.C.); Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, 110 Stat. 3807 (Oct. 13, 1996) (codified in scattered sections of 21 U.S.C.); Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (Oct. 30, 1998) (codified in scattered sections of 18 U.S.C.); Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (Oct. 30, 1998) (codified at 18 U.S.C. § 1028 (1994 & Supp. IV 1998)). It is, of course, no accident that most of these new federal crimes were created in October.

[62] See, e.g., Comprehensive Crime Control Act of 1984; Anti-Drug Abuse Act of 1986; Anti-Drug Abuse Act of 1988.

[63] See supra notes 23, 61; see also Beale, supra note 7, at 43 (discussing Congress's enactment in 1980s and 1990s of numerous federal laws directed at "crimes of violence" and "a variety of other social ills").

[64] Although the offending statutes have changed, the complaints are largely the same. For example, in 1948, one commentator lamented:

> To enlist the federal power in the battle against obscenity, lotteries, theft, alcoholism, and prostitution is not to protect federal prestige but to hazard it; it does not solve federal administrative problems but creates new ones; it does not vindicate federal authority in matters of distinctively national concern against possible local obstruction, but steps into local issues.

L.B. Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law & Contemp. Probs. 64, 70 (1948); see also, e.g., Felix Frankfurter & James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 251 (1927) (lamenting "transfer" to federal courts of "fields of social control which heretofore have been in the keeping of the states" and summarizing workload concerns expressed by federal judges in 1923); Charles Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 545, 547-55 (1925) (documenting debates in first Congress about appropriate scope of federal judicial power and decrying "[t]he present congested condition of the dockets of the Federal Courts and the small prospect of any relief to the heavily burdened Federal Judiciary, so long as Congress continues, every year, to expand the scope of the body of Federal crimes"). Interestingly, the first symposium on federalization, published in 1934, was uniformly uncritical of the creation of new federal crimes. See Symposium, supra note 51; see also Clymer, supra note 13, at 645 n.3 (citing four recent symposia and dozens of additional articles on federalization).

### 1. *The Political Objections to Federalization*

The political objections to federalization may be summarized by the generally accepted view that federalism is good jurisprudence, and that some of the benefits of federalism are undercut by the federalization of criminal laws.[65] There are at least three benefits of a federal system: (1) The division of powers between separate governments preserves individual liberty;[66] (2) Local decisionmakers are more likely than centralized ones to be attuned to local concerns and responsive to the local electorate;[67] and (3) The states, because they may approach problems differently, may serve as "laboratories of experimentation" that help identify the most effective laws.[68]

Ironically, few local lawmakers or prosecutors are heard complaining about federalization.[69] As Dan Richman has noted, federal

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[65] See Beale, New Principles, supra note 11, at 993-96 (arguing that "values promoted by federalism, . . . are threatened by the seemingly inexorable expansion of federal criminal law"); see also The Federalist No. 17 (Alexander Hamilton) (arguing that criminal justice system, which is "the most powerful, most universal and most attractive source of popular obedience and attachment," should be reserved to states because citizens will feel stronger bias and affection toward their individual states).

[66] See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty . . . ."); The Federalist No. 51 (James Madison) (arguing that federalism provides "double security to the rights of the people").

[67] See Ashdown, supra note 11, at 812 (noting that state and local prosecutors and judges are more attuned to local problems); Beale, New Principles, supra note 11, at 994 (noting that state and local prosecutors are intimately familiar with local conditions and politically accountable to constituencies); Geraldine Szott Moohr, The Federal Interest in Criminal Law, 47 Syracuse L. Rev. 1127, 1132-33 (1997) ("Because the harm of criminal conduct is localized, the states . . . have a more immediate interest in defining crime and in enforcing state criminal statutes.").

[68] See United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (noting that "theory and utility of our federalism" allow states to "perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); see also Beale, New Principles, supra note 11, at 994 (noting that federalism "permits desirable experimentation"); Jenna Bednar & William N. Eskridge, Jr., Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism, 68 S. Cal. L. Rev. 1447, 1467-81 (1995) (presenting rational choice defense of "experimentation" argument for federalism). The "market experimentation" defense of federalism loses much of its force when applied to federalization. Because federal criminal laws rarely replace state criminal laws, federalization actually enhances the diversity benefits of federalism. One more "laboratory" is added to the 50 others.

[69] Indeed, state prosecutors may be more likely to complain about an absence of federalization. For example, local prosecutors in Texas counties that border Mexico have complained about the large number of small drug cases referred to them by federal authorities. One district attorney refused to accept any more such cases. See John Council, Prosecutors Want More Money and Control to Handle Border Drug Cases, Crim. Just. Wkly., Aug. 10, 1999, at 246, 246-47.

prosecution of federalized crimes is "a form of aid-in-kind to state enforcers."[70] This assistance works directly, by sparing state prosecutors the expense of prosecuting those cases brought in federal court, and indirectly, by enabling state prosecutors to use the threat of a federal prosecution as leverage to induce guilty pleas.[71] The same silence prevails at the federal level, largely because those politicians most committed to federalist notions of states' rights are also the most committed to the "tough on crime" message of federalization.[72]

Despite the silence of those affected by the issue, the political critique of federalization has undeniable force. According to the "political-support-maximization" model of public choice theory, an elected official will support those laws that maximize the personal benefit to the official, whether that benefit comes as votes, indirect political support, campaign contributions, or outright bribes.[73] As Jonathan Macey has explained, because the fifty states "differ dramatically in history, demography, economic orientation, and natural endowment[,] . . . patterns of interest-group behavior [also] differ significantly from state to state."[74] The result of this preference variation is that the political-support-maximizing legislation in one state will differ from the political-support-maximizing legislation in another state. Moreover, when interest groups operate nationally (i.e., when preferences are aggregated), the political-support-maximizing legislation for Congress may be significantly different from the political-support-maximizing legislation that would have resulted in many, if not most, of the fifty states.[75] Stated more simply, laws enacted by a par-

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70 Richman, supra note 8, at 786.

71 See id. at 783. In one Pennsylvania case, the defendant turned down a four year plea offer in state court and was later prosecuted in federal court and sentenced to life imprisonment without parole. A press release issued by the United States Attorney for the Eastern District of Pennsylvania proclaimed that the purpose of the federal prosecution and harsh federal sentence was to encourage other defendants to plead guilty in state court. See Beale, New Principles, supra note 11, at 1000-01.

72 See Little, supra note 8, at 1065-66.

73 See Jonathan R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 Va. L. Rev. 265, 269-74 (1990) ("Under the economic theory of regulation, politicians can obtain payments (which may come in the form of honoraria, campaign contributions, indirect political support, and, of course, outright bribes) from interest groups in exchange for regulation."); see also Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. Econ. 371 (1983); Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873, 925 (1987) (noting that private "interest groups threaten to push the political process in the direction of a self-interested search for economic gain").

74 Macey, supra note 73, at 281.

75 See id. (citing gun control legislation as example).

ticular state are more likely to account for the interests of that state's citizens than laws enacted by Congress.

### 2. *Institutional Objections to Federalization*

Although politicians have remained mostly silent about the effects of federalization, federal judges have been noticeably vocal.[76] Federal courts are overworked, we are told, largely because Congress insists on creating ever more federal crimes. When federal judges are forced to spend all their time overseeing criminal prosecutions, the argument goes, the quality of justice available to federal litigants suffers. In particular, federal judges will become unable to fulfill their traditional role as adjudicators of complex cases and protectors of constitutional rights.[77]

There are two problems with this institutional critique of federalization. First, the apparent workload "crisis," when viewed in historical context, cannot be explained simply by examining the number of criminal cases assigned to each judge, because that number has been steadily declining. Second, to the extent that other factors (such as, for example, the Sentencing Guidelines) have increased the criminal workload of federal judges, the creation of new federal crimes is not to blame.

In the early years of the republic, federal prosecutions averaged fewer than one hundred each year.[78] By 1889, after a century of nationwide criminal jurisdiction, federal prosecutions had grown to almost 15,000 annually.[79] This level remained more or less constant until World War I, when prosecutions under the Selective Draft Act caused the federal criminal docket to double.[80] But it was not until

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[76] See, e.g., Cowen, supra note 12, at 1372-89; Ervin, supra note 12, at 761; Miner, supra note 12, at 686; Rehnquist, 1998 Report, supra note 9, at 2-3; William W. Schwarzer & Russell R. Wheeler, On the Federalization of the Administration of Civil and Criminal Justice, 23 Stetson L. Rev. 651, 651-55 (1994); see also Little, supra note 8, at 1030 (noting seeming unanimity of federal judges in their criticism of federalization).

[77] See Miner, supra note 12, at 686.

[78] From 1801 through 1824, federal criminal prosecutions ranged from a low of 10 in 1802 to a high of 208 in 1820. The average number of prosecutions over that 24-year period was 66. See Henderson, supra note 30, at 214.

[79] See 1889 Att'y Gen. Ann. Rep. 6-7 ex. B2. The Attorney General's reports for the late 1800s provide the number of prosecutions terminated (14,588 in 1889) rather than prosecutions commenced. See, e.g., id. Many of the prosecutions in 1889 (5648 cases) were internal revenue cases—most likely violations of liquor taxation laws. Interestingly, although the Civil Rights Act of 1866 had fundamentally altered the scope of federal criminal jurisdiction, those new federal crimes had little practical impact on the scope of federal prosecutions. Of the nearly 15,000 federal prosecutions completed in 1889, only 12 were civil rights cases. See id.; Friedman, supra note 30, at 262.

[80] In fiscal year 1917 (June 30, 1916 to June 30, 1917), new federal prosecutions numbered 19,628. See 1917 Att'y Gen. Ann. Rep. 125 ex. 2. In 1918, federal prosecutors

Prohibition that the number of federal criminal prosecutions skyrocketed. In 1920, federal prosecutors brought more than 7000 prosecutions under the National Prohibition Act.[81] By 1921, that number had climbed to almost 30,000.[82] This phenomenal growth in the federal criminal docket reached its height in 1932, when Prohibition prosecutions numbered above 65,000 and the total number of cases filed by federal prosecutors was more than 90,000—a sixfold increase in just over twenty years.[83]

When Prohibition ended in 1933, the number of federal prosecutions dropped, but never to pre-Prohibition levels.[84] From 1934 through 1970, the number of new federal prosecutions each year generally ranged between 30,000 and 40,000.[85] Since then, the federal criminal docket has seen three periods of sustained growth. First, during the early 1970s, Vietnam-era draft prosecutions brought annual criminal filings to almost 50,000 cases. This increase was temporary, as new criminal filings dropped back to 30,000 by the end of the decade. In the 1980s, however, new filings began to increase steadily, largely, though not entirely, as a result of the increase in federal drug prosecutions. This growth peaked in 1989, when new filings neared 49,000. After several years of declining numbers,[86] federal prosecutions began increasing again in the late 1990s, mostly because of the

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brought 35,096 cases, 11,809 of which were brought under the Selective Draft Act. See 1918 Att'y Gen. Ann. Rep. 156 ex. 2. In 1919, total new prosecutions numbered 47,443 and included 15,262 draft prosecutions. See 1919 Att'y Gen. Ann. Rep. 120 ex. 2. In 1920, the same year that Prohibition prosecutions began, Selective Draft Act prosecutions alone numbered 19,790 (more than the entire federal criminal docket for 1917). See 1920 Att'y Gen. Ann. Rep. 201 ex. 2.

[81] See 1920 Att'y Gen. Ann. Rep. 201 ex. 2.

[82] See 1921 Att'y Gen. Ann. Rep. 151 ex. 2.

[83] Compare 1932 Att'y Gen. Ann. Rep. 2 (92,174 total prosecutions), and id. at 8 (65,960 Prohibition prosecutions), with 1911 Att'y Gen. Ann. Rep. 98 app. 1 (15,057 total prosecutions).

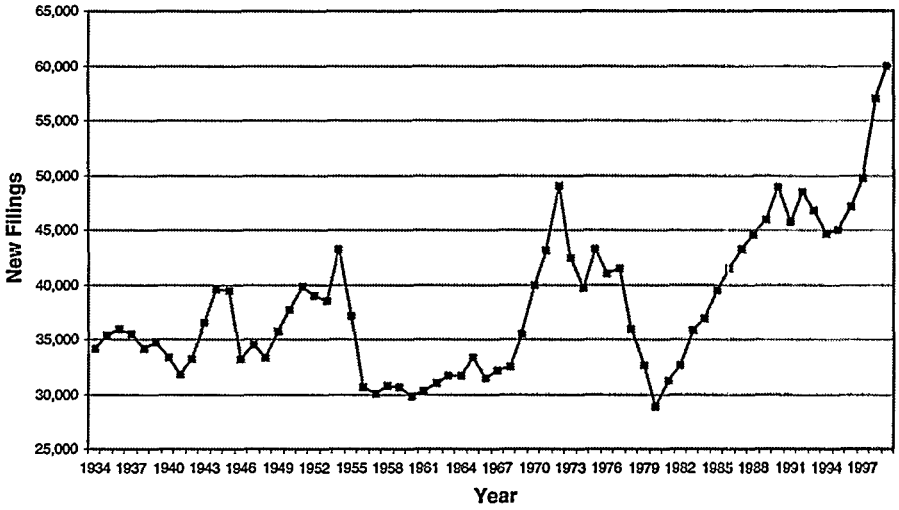
[84] Federal criminal filings from 1934 through 1999 are listed in the Appendix and depicted graphically in Figure 1. The number of new criminal filings per year was taken from the annual reports of the Attorney General of the United States (for the years 1934-1940) and from the annual reports of the Director of the Administrative Office of the United States Courts (for the years 1940-1993) as reported in Richard A. Posner, The Federal Courts: Challenge and Reform 54 n.1, 391-93 tbl.A2 (1996); see also Administrative Office of the United States Courts, Judicial Business of the United States Courts 21 tbl.3 (1998) [hereinafter Judicial Business] (for the years 1994-1998); William H. Rehnquist, The 1999 Year-End Report on the Federal Judiciary, Third Branch, Jan. 2000, at 4.

[85] The only two exceptions were 1954, when 43,196 cases were filed, and 1960, when 29,828 cases were filed.

[86] This decrease partly may have been caused by a hiring freeze for new Assistant United States Attorneys from April 1993 through December 1994. See Administrative Office of the United States Courts, Federal Judicial Caseload: A Five-Year Retrospective 9 (1998) [hereinafter Five-Year Retrospective].

"Southwest Border Initiative"—a crackdown on illegal immigration along the Mexican border.[87]

FIGURE 1
CRIMINAL CASES FILED (1934-1999)



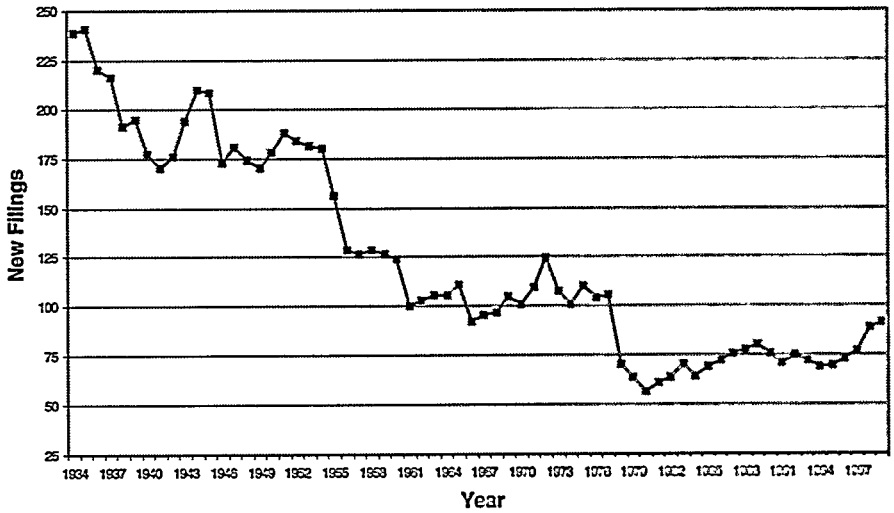

More notable than the total criminal caseload is the number of criminal cases per federal judge.[88] From 1934 through 1970, when the total number of prosecutions was relatively constant, the number of federal district judges more than doubled, reducing the number of

[87] In his year-end reports for 1996, 1997, and 1998, Chief Justice Rehnquist noted that the increasing criminal caseload was primarily due to immigration and drug filings in the districts along the border with Mexico. See William H. Rehnquist, 1996 Year-End Report on the Federal Judiciary, Third Branch, Jan. 1997, at 3 [hereinafter Rehnquist, 1996 Report]; William H. Rehnquist, 1997 Year-End Report of the Federal Judiciary, Third Branch, Jan. 1998, at 4 [hereinafter Rehnquist, 1997 Report]; Rehnquist, 1998 Report, supra note 9, at 5; see also Five-Year Retrospective, supra note 86, at 10; Judicial Business, supra note 84, at 20-21, 21 tbl.3, 210-12 tbl.D-2 (reporting that from 1994 to 1998, immigration prosecutions increased almost 360%, from 2595 to 9339 annually, and that narcotics prosecutions also increased at greater rates along southwest border).

[88] Federal criminal filings per district judge from 1934 through 1999 are listed in the Appendix and depicted graphically in Figure 2. The number of authorized judgeships per year was obtained from Administrative Office of the United States Courts, History of Federal Judgeships tbl.k (1998) <http://www.uscourts.gov/history/tablek.pdf>, and from Rehnquist, supra note 84, at 4. Using "authorized judgeships" (i.e., congressionally authorized positions) rather than actual sitting judges both understates and overstates the number of district court judges hearing criminal cases. On one hand, "authorized judgeships" do not account for vacancies, which have been significant in recent years. On the other hand, "authorized judgeships" do not account for senior judges, many of whom carry significant criminal caseloads. By way of example, in 1997, 11% of the authorized district court judgeships were vacant, while senior judges handled 17% of the courts' total docket (criminal and civil cases). See Five-Year Retrospective, supra note 86, at 12.

new filings per judge from 239 per judge in 1934 to 101 per judge in 1970. By 1980, the number of cases per judge had fallen to 57. Since that time, the number of cases per judge has risen gradually, reaching 91 cases per judge in 1999. Thus, while the average number of criminal cases heard by a particular federal judge has been increasing in recent years, that number is still far below past levels.

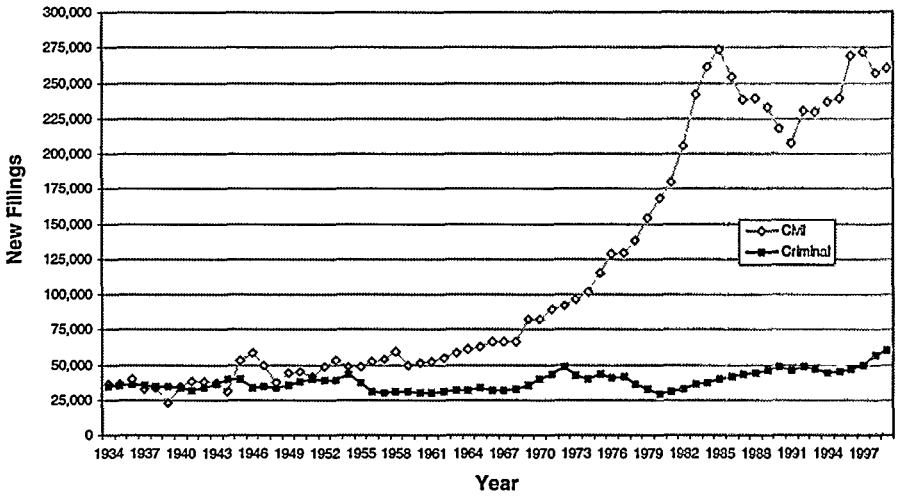
FIGURE 2
CRIMINAL CASES FILED PER AUTHORIZED JUDGESHIP
(1934-1999)




The federal civil docket, on the other hand, has expanded at a far greater rate than the criminal docket. In 1934, when new federal criminal prosecutions numbered 34,152, new federal civil cases numbered a comparable 35,959.[89] By 1999, however, when new federal criminal cases had increased approximately seventy-five percent to 59,923, new federal civil cases had increased over six-hundred percent to 260,271.

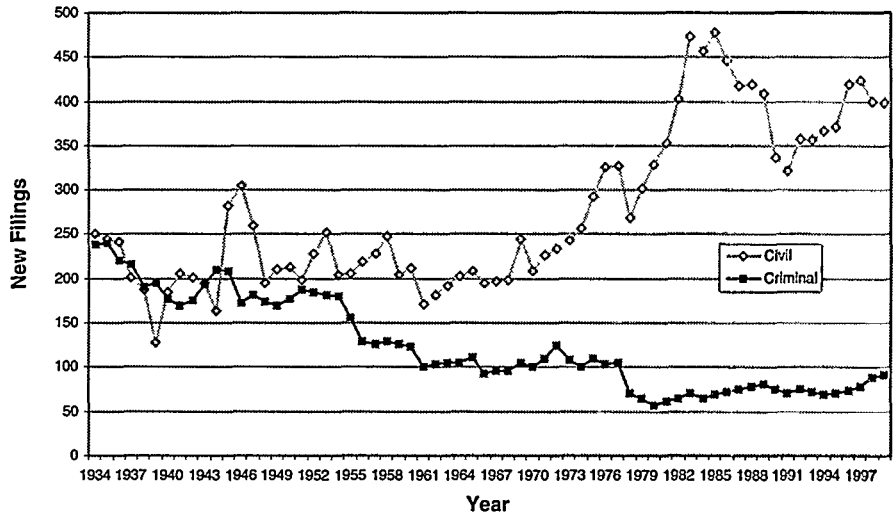
[89] Federal civil filings from 1934 through 1999 are listed in the Appendix and depicted graphically in Figure 3. The number of new federal civil cases was taken from the annual reports of the Attorney General of the United States (for the years 1934-1940), from the annual reports of the Director of the Administrative Office of the United States Courts (for the years 1940-1995), as reported in Posner, supra note 84, at 54 n.1, 391-93, and from the Year-End Reports of the Chief Justice (for the years 1996-1999), see Rehnquist, 1996 Report, supra note 87, at 3; Rehnquist, 1997 Report, supra note 87, at 4; Rehnquist, 1998 Report, supra note 9, at 5; Rehnquist, supra note 84, at 4.

FIGURE 3
CIVIL AND CRIMINAL CASES FILED (1934-1999)




Thus, while the number of new criminal cases per district judge has decreased from 239 in 1934 to 91 in 1999, the number of new civil cases per judge has risen from 251 to 397.

FIGURE 4
CRIMINAL AND CIVIL CASES FILED PER AUTHORIZED JUDGESHIP (1934-1999)




These statistics suggest three conclusions. First, the current criminal caseload is not unprecedented. Indeed, the number of criminal

cases per judge, while up in recent years, still is almost fifty percent lower than it was fifty years ago and is almost twenty percent lower than it was twenty-five years ago. Second, increases in the federal criminal workload that have occurred in the past thirty years have not necessarily resulted from the creation of new federal crimes. Draft-dodging—a uniquely federal offense—has been a federal crime since at least 1917.[90] The narcotics prosecutions that swelled the courts' dockets in the 1980s resulted not from the creation of new federal crimes, but from the enhancement of sentences for existing drug crimes and a corresponding expenditure of massive resources on law enforcement, prosecutions, and prisons.[91] And the recent increases from the Southwest Border Initiative resulted not from a federalization of conduct covered by state law, but from increased resources directed at the uniquely federal problem of immigration crimes. Third, increases in federal judges' workloads are far more attributable to increases in the civil docket than to increases in the criminal docket.

Numbers, of course, do not tell the whole story, and judges legitimately point out that their criminal workload has increased even though the total number of cases has not. Judges contend that criminal cases tend to be more complex and trials tend to be lengthier than they were twenty or thirty years ago.[92] In addition, the Sentencing Guidelines have required judges to devote far more time to resolving disputed issues at sentencing and to considering appeals from sentences.[93] But again, the increasing complexity of federal prosecutions in general and sentencing in particular is not caused by the crea-

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[90] See Selective Draft Act of 1917, ch. 15, § 5, 40 Stat. 76, 80 (expired at conclusion of World War I in accordance with provisions of Act of June 15, 1917, ch. 29, § 4, 40 Stat. 182, 217).

[91] See supra note 62; see also Office of Management and Budget, Historical Tables: Budget of the United States Government, Fiscal Year 1999, at 63-64 tbl.3.2 (1998) (documenting substantial budget increases throughout 1990s for federal law enforcement activities); A. Morgan Cloud, III, Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy, 42 Vand. L. Rev. 725, 731 n.22 (1989) (discussing increasing federal law enforcement resources dedicated to combating drug trafficking). Unlike draft-dodging and immigration prosecutions, narcotics prosecutions are not uniquely federal. Indeed, many of the standard federal drug crimes were federalized in 1970. See supra note 60. In some respects, the entire debate about federalization—at least insofar as it involves institutional concerns—is a thinly disguised debate about the federal government's national drug enforcement policy. While that debate is an important one, it is beyond the scope of this Article.

[92] See, e.g., Beale, Reporter's Draft, supra note 11, at 1285 (noting that criminal docket in 1972 included significantly higher percentage of relatively simple Selective Service, auto theft, forgery, and counterfeiting cases).

[93] See Posner, supra note 84, at 97; Beale, Reporter's Draft, supra note 11, at 1287 (noting that Federal Judicial Center time study concluded that Sentencing Guidelines increased judicial time devoted to sentencing by 25%).

tion of new federal crimes.[94] To the extent that federal judges have legitimate workload complaints about criminal cases—and I have no doubt that they do[95]—their complaint is less with the federalization of state crime and more with the resources Congress has allocated to federal law enforcement agencies and to federal prosecutors.[96]

### 3. *The Fairness Objections to Federalization*

The third objection to federalization is based upon notions of fairness and equality. Defendants who are prosecuted in federal court often fare far worse than similarly situated defendants who are prosecuted in state court. Much of the "comparative advantage" enjoyed by federal prosecutors is procedural.[97] But the most important difference between federal and state prosecution is often a substantive one: the severity of the resulting sentence. In many cases, federal sentences far exceed state sentences for comparable conduct.[98] For example, a defendant who is convicted in federal court of possessing one-and-one-half kilograms of crack cocaine (worth approximately $30,000)[99] with the intent to sell it would be subject to a federal sen-

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[94] Indeed, using the federal courts to prosecute more complex crimes is generally consistent with the principles of federalization propounded by the federal judges. See infra note 152.

[95] See Little, supra note 8, at 1046 ("Complaints about workload are born of high ideals, not sloth; no one disputes that federal judges today work extremely hard. They are properly concerned about the quality of justice their workloads permit them to render.").

[96] Although it is not my aim in this Article to defend the government's national drug enforcement policy, it is worth noting that many judges complain less about the total number of criminal cases and more about the character of those cases. As Rory Little has noted, behind judges' objections to federal jurisdiction for "'ordinary' street crimes," id. at 1055, is "an implied elitist and self-protectionist . . . message that seems entirely illegitimate," id. at 1061; accord Harry Litman & Mark D. Greenberg, Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes, 47 Case W. Res. L. Rev. 921, 974 (1997) ("Indeed, one may question whether it is a coincidence that the cases that the federal courts insist should be their main staple are precisely those that are most interesting, complex, and prestigious.").

[97] See Clymer, supra note 13, at 668-73 (arguing that defendants in federal court are often more likely to be subject to pretrial detention, less able to obtain pretrial discovery, and less able to suppress evidence); Jeffries & Gleeson, supra note 16, at 1104-17 (noting advantages such as use of uncorroborated accomplice testimony, use of hearsay in grand jury, and availability of limited immunity for grand jury witnesses).

[98] See Beale, New Principles, supra note 11, at 997-99 (discussing disparities between state and federal sentencing); Clymer, supra note 13, at 674-75 (same). These harsher federal sentences, when combined with the rigid Sentencing Guidelines and mandatory minimum sentences, give federal prosecutors another advantage: an abundance of defendants who want to cooperate with prosecutors. See Jeffries & Gleeson, supra note 16, at 1117-25 (discussing how Sentencing Guidelines have empowered prosecutors by turning "cooperation bargaining" into "investigative tool").

[99] See, e.g., United States v. Thomas, 120 F.3d 564, 569 (5th Cir. 1997) (discussing wholesale value of crack cocaine).

tence of approximately twenty years' imprisonment.[100] A defendant convicted of the same offense in California would receive a sentence of no more than five years.[101] Similarly, a defendant convicted in federal court of laundering one million dollars for a loan sharking operation likely would receive a sentence of approximately seven years in prison.[102] A defendant convicted of the same offense in New York likely would receive an indeterminate sentence of one to three years in prison.[103]

As Sara Sun Beale has argued, it is fundamentally unfair to single out a few offenders for prosecution in federal court (with often harsher results) while other similarly situated offenders are prosecuted in state court.[104] Extending this argument further, Steven Clymer has argued that this disparate treatment violates equal protection, at least in the absence of a rational basis to distinguish the defendants prosecuted in federal court from those prosecuted in state court.[105]

There is, of course, some theoretical disagreement about the primacy of equality as a normative goal.[106] There is also a plausible economic argument that disparate (harsher) treatment of a few offenders maximizes efficiency (at least as to general deterrence).[107] Nevertheless, actual cases of vastly different sentences for like offenders are (and should be) troubling. For example, Clymer describes the case of

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100 See U.S. Sentencing Guidelines Manual § 2D1.1(c)(1) (1998) (showing that first-time offender convicted after trial would likely have offense level of 38 and guidelines range of 235 to 293 months).

101 Cal. Health & Safety Code § 11,351.5 (West 1999) (stating that penalty for first-time offender for possession of cocaine base for sale is imprisonment for three, four, or five years).

102 See U.S. Sentencing Guidelines Manual § 2S1.1 (1998) (showing that first-time offender convicted after trial would likely have offense level of 28 and guidelines range of 78 to 97 months).

103 See N.Y. Penal Law § 470.10 (Consol. 1998 & Supp. 2000) (money laundering in the second degree); id. § 70.00 (sentencing scheme for Class E felony). Such a defendant would be eligible for parole after one year. See id. § 70.40.

104 See Beale, New Principles, supra note 11, at 996-1001.

105 See Clymer, supra note 13, at 651.

106 See Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 542 (1982) (arguing that equality "is an idea that should be banished from moral and legal discourse as an explanatory norm"). For a critique of Professor Westen's view, see Christopher J. Peters, Equality Revisited, 110 Harv. L. Rev. 1210 (1997) (discounting value of concept of equality in moral discourse for different reasons).

107 See, e.g., Richard A. Posner, Economic Analysis of Law 249 (5th ed. 1998) (considering economic efficiency of apprehending few offenders and giving each harsh sentences, as opposed to sentencing most offenders but giving milder sentences). This notion of deterrence maximization is what animated then-U.S. Attorney Rudolph Giuliani's "federal day" program, at least in theory. See Beale, New Principles, supra note 11, at 1000 (describing Giuliani's program, in which street-level drug dealers arrested in New York City on one randomly chosen day each week were prosecuted in federal court, where sentences were significantly harsher).

Mark Palmer, who, along with his partner Jack Roberts, was arrested for growing marijuana in the basement of his home.[108] Roberts was prosecuted in state court, where his only punishment was a $1,000 fine. Palmer, Roberts's equal partner in the operation, was prosecuted in federal court and received the mandatory minimum sentence of ten years in prison.[109] Beale also notes numerous cases in which defendants prosecuted in federal court were sentenced ten or even twenty times more severely than comparable defendants prosecuted in state court.[110]

Notwithstanding the philosophical or economic defenses of inequality, the principle that similarly situated offenders should receive similar sentences is generally accepted both by those who write the sentencing laws and by those who apply them. Indeed, as Beale has noted, eliminating sentencing disparities among like offenders is the core purpose of the federal sentencing guidelines.[111] And there is little doubt that federalization—when combined with the severe sentences mandated by the Sentencing Guidelines—increases the occurrence of such sentencing disparities.[112]

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108 See Clymer, supra note 13, at 648-49; see also United States v. Palmer, 3 F.3d 300 (9th Cir. 1993).

109 See *Palmer*, 3 F.3d at 305 n.3. According to the federal prosecutor, Roberts was not prosecuted in federal court because the police officer who arrested Roberts told him that if he cooperated against Palmer (which he did), the police officer would try to keep Roberts out of federal court. See Clymer, supra note 13, at 648 nn.16-17. The *Palmer* court noted that the prosecutor's charging decision was "troubling," but refused to provide Palmer with any relief. See *Palmer*, 3 F.3d at 305 n.3.

110 See Beale, New Principles, supra note 11, at 998-99 nn.82-84 (citing United States v. Oakes, 11 F.3d 897, 898 (9th Cir. 1993) (federal defendant received 5-year minimum when state equivalent would have been 0 to 90 days); United States v. Woodard, 927 F.2d 433, 434-35 (8th Cir. 1991) (defendant who had received 2 years probation in state court received 63 month sentence in federal court); United States v. Hollins, 863 F. Supp. 563, 564, 570 (N.D. Ohio 1994) (defendant who had been required by state to participate in 30-day drug rehabilitation program was sentenced to 1 year's incarceration at community sanctions center)).

111 See Beale, New Principles, supra note 11, at 1002-04 (noting that legislative history of Guidelines aimed at ending sentencing disparity); Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 104 (1998) ("Reduction of 'unwarranted sentencing disparities' was a—probably *the*—goal of the Sentencing Reform Act of 1984.").

112 In many respects, the disparity between federal and state sentences that exists in many districts is a manifestation of the variable effects of interest group preferences when applied at the local level as opposed to aggregated at the national level. Because interest group preferences will vary from state to state, it is not surprising that sentences in some states will differ from sentences in other states. Similarly, given that federal judges and federal prosecutors are usually drawn from the local community and can be expected, on some level, to reflect the views of the senators behind their appointments, it is not surprising that federal sentences (before the Guidelines) varied across the country. By imposing a rigid nationwide sentencing regime on the federal courts, the Guidelines have simply replaced one type of variation with another. Before the Guidelines, it was not unusual for

Although the political, institutional, and fairness objections to federalization can be overstated, they all have obvious merit. Generally, a diversity of law to match a diversity of citizenry is a good thing; federal courts' resources are not limitless; and vastly disparate sentences for like offenders is troubling. Yet despite these objections, federalization continues its torrid pace.[113] The question then becomes how—or by whom—federalization can be controlled.

## II
## CONTROLLING FEDERALIZATION

### *A. The Judiciary's Role in Controlling Federalization*

Of the three branches of government, the judiciary is the most hostile to federalization.[114] Nevertheless, the Supreme Court's Commerce Clause jurisprudence over the past one hundred years has left the judiciary largely powerless to control federalization.[115]

Since federalization began in earnest after the Civil War, the Supreme Court has, for the most part, left undisturbed federal criminal laws enacted pursuant to Congress's Commerce Clause power. This deference prevailed even during the first third of the twentieth century, when the Supreme Court was overtly hostile to other exercises of the Commerce Clause power. Thus, at the same time that the Supreme Court was striking down numerous congressional attempts to

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a defendant prosecuted in federal court in New York to receive a sentence different from that of a defendant prosecuted in federal court in Texas. Now, because the Guidelines greatly reduce regional variations in federal sentences, it is more likely that the defendant prosecuted in federal court in New York will receive a sentence different from that of a defendant prosecuted in state court in New York.

113 See supra note 23.

114 See supra note 12.

115 Of course, restricting Congress's authority to enact criminal laws is only the most direct way for the judiciary to control federalization. The judiciary also could control federalization indirectly by adopting narrower readings of federal criminal laws, see Dan M. Kahan, Three Conceptions of Federal Criminal-Lawmaking, 1 Buff. Crim. L. Rev. 5, 6-16 (1997) (arguing that by enacting broad statutes, Congress has ceded power to define scope of criminal laws to judiciary); Alan C. Michaels, "Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism, 100 Colum. L. Rev. 54, 72, 84 (2000) (arguing that judges can and should infuse broad criminal statutes with moral content through a common law process of "judgmental descriptivism" which, among other things, would limit "arbitrariness and bias in decisionmaking by prosecutors"); Note, Mens Rea in Federal Criminal Law, 111 Harv. L. Rev. 2402, 2402 (1998) (arguing that Supreme Court should construe mens rea requirements in federal criminal cases narrowly "because of the dangers of excessive federalization"), or by restricting prosecutors' ability to charge defendants in federal court, see Clymer, supra note 13, at 739 (arguing that courts should be less deferential to prosecutorial charging decisions when reviewing equal protection challenges to those decisions).

regulate the national economy,[116] the Court upheld federal criminal laws prohibiting the interstate transportation of diseased livestock,[117] lottery tickets,[118] adulterated and misbranded food,[119] women (for immoral purposes),[120] liquor,[121] stolen motor vehicles,[122] and kidnapped persons.[123] In each of these cases, the criminal statute prohibited the actual movement of articles across state lines.[124]

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116 See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (National Industrial Recovery Act of 1933); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (Railroad Retirement Act of 1934); Hammer v. Dagenhart, 247 U.S. 251 (1918) (interstate shipment of goods manufactured with child labor); The Employers' Liability Cases, 207 U.S. 463 (1908) (employer liability for employee injuries). See generally John E. Nowak & Ronald D. Rotunda, Constitutional Law § 4.6, at 148 (5th ed. 1995) (noting that "Justices' special wrath was reserved for laws that interfered with employer-employee relationships").

117 See Reid v. Colorado, 187 U.S. 137 (1902) (noting that Act of May 29, 1884, which prohibited interstate transportation of diseased livestock, was valid exercise of Commerce Clause power).

118 See Champion v. Ames, 188 U.S. 321, 363-64 (1903) (Lottery Act of 1895).

119 See Hipolite Egg Co. v. United States, 220 U.S. 45, 58 (1911) (Pure Food and Drug Act of 1906).

120 See Hoke v. United States, 227 U.S. 308, 323 (1913) (Mann Act of 1910); see also Caminetti v. United States, 242 U.S. 470, 491-92 (1917) (holding that "immoral purpose" need not be commercial one).

121 See United States v. Hill, 248 U.S. 420, 427 (1919) (Act of Mar. 3, 1917, 39 Stat. 1058, which prohibited bringing of liquor into "dry" state).

122 See Brooks v. United States, 267 U.S. 432, 439 (1925) (National Motor Vehicle Theft Act (Dyer Act) of 1919).

123 See Gooch v. United States, 297 U.S. 124, 129 (1936) (Federal Kidnapping Act (Lindbergh Law) of 1932).

124 By 1937, the Supreme Court could remark that it was well settled that Congress could restrict the movement of goods across state lines when that movement was "'to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin.'" Kentucky Whip & Collar Co. v. Illinois Cent. R.R. Co., 299 U.S. 334, 347, 352-53 (1937) (quoting *Brooks*, 267 U.S. at 436, and upholding Ashurst-Sumners Act of 1935, which prohibited bringing of convict-made goods into state that prohibited manufacture or sale of such goods). Authority for federal criminal statutes that were not directed at the movement of goods or people across state lines had to be found someplace other than in the Commerce Clause. For example, the Post Office Act of 1872 (prohibiting mail fraud) and the Comstock Law of 1873 (prohibiting mailing of obscene material) were upheld as valid exercises of Congress's authority to establish post offices. See Ex parte Jackson, 96 U.S. 727, 736-37 (1877). The Civil Rights Act of 1866 (prohibiting the deprivation of civil rights under the color of state law) was found to be authorized by the Fourteenth Amendment, see The Civil Rights Cases, 109 U.S. 3, 16-17 (1883), and the Harrison Narcotic Act of 1914 was found to be a valid exercise of Congress's taxing authority under Article I, Section 8 of the Constitution, see Nigro v. United States, 276 U.S. 332, 353-54 (1928).

By contrast, the Civil Rights Act of 1875, which prohibited any individual from denying public accommodations to another citizen, was found to be beyond Congress's authority under the Fourteenth Amendment, see The Civil Rights Cases, 109 U.S. at 14, and a law that prohibited the harboring of alien women for the purposes of prostitution was held not to be authorized by Congress's authority to control immigration, see Keller v. United States, 213 U.S. 138, 147 (1909). In neither of these cases did the Court seriously consider

The Court's view of the Commerce Clause began to expand after 1937, when the Court abandoned the rigid distinction between interstate and intrastate commercial activities that had previously defined its Commerce Clause jurisprudence.[125] In the years following, the Court approved federal criminal laws prohibiting racketeering, extortion, and loan sharking, even when the conduct at issue did not involve the crossing of state lines.[126] Equally importantly, the Court gave more and more deference to Congress's determinations of whether particular intrastate activity sufficiently affected interstate commerce to implicate the Commerce Clause.[127]

The Supreme Court's expansive reading of the Commerce Clause, coupled with the deference it afforded to legislative determinations, left Congress nearly unfettered in its ability to enact new federal crimes. Indeed, for over sixty years, no federal criminal law was struck down as beyond Congress's Commerce Clause power. Then, in 1995, amid increasing concerns about federalization,[128] the Supreme Court decided *United States v. Lopez*.[129] In *Lopez*, the Court struck down the Gun-Free School Zones Act,[130] which made it a federal crime to possess a gun within 1,000 feet of a school. The Court ruled that the statute was beyond Congress's Commerce Clause power because the Act did not regulate commercial activity, did not contain a specific interstate nexus (there was no requirement, for example, that the gun have traveled in interstate commerce),[131] and was not based on legislative findings that gun possession near schools substantially affected interstate commerce.[132]

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whether the statute was authorized by the Commerce Clause, although decades later the Court found that the Civil Rights Act of 1964, which also prohibited discrimination in public accommodations, was authorized by the Commerce Clause. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (noting "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse").

125 See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding that Congress could regulate intrastate activities that had "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstruction"); 3 Chester James Antieau & William J. Rich, Modern Constitutional Law § 44.09 (2d ed. 1997); Nowak & Rotunda, supra note 116, §§ 4.7-4.9.

126 See Perez v. United States, 402 U.S. 146, 156-57 (1971) (Consumer Credit Protection Act); United States v. Green, 350 U.S. 415, 420 (1956) (Hobbs Act).

127 See Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."); Antieau & Rich, supra note 125, § 44.09.

128 See supra notes 11-13 and accompanying text; supra notes 26, 76.

129 514 U.S. 549 (1995).

130 Gun-Free Schools Act of 1994, Pub. L. No. 103-382, § 14,601-14,603, 108 Stat. 3518, 3907-08; *Lopez*, 514 U.S. at 551.

131 See *Lopez*, 514 U.S. at 561.

132 See id. at 563.

When it was handed down in 1995, *Lopez* was heralded as "'one of the opening cannonades in the coming constitutional revolution.'"[133] To be sure, *Lopez* was, as Justice Stevens characterized it, an "extraordinary" decision.[134] For the first time since the New Deal, the Court limited Congress's regulatory authority under the Commerce Clause.[135] At a minimum, *Lopez* indicated that the Supreme Court would not blindly defer to congressional determinations that particular activities affect interstate commerce.[136]

Whether *Lopez* was "radical," as Justice Stevens also characterized it,[137] is less sure. The foundation of the Court's decision was the uncontroversial premise that the Commerce Clause does not authorize a general federal police power.[138] But even under *Lopez*, the Commerce Clause requirements are minimal. *Lopez* poses no problem for any statute that contains an explicit jurisdictional nexus or that is directed at commercial activity.[139] Thus, it is not surprising that *Lopez*'s practical effect on existing criminal law has been less than radical.[140] In the years since *Lopez* was decided, few federal criminal

133 Stuart Taylor Jr., Judging with Pinpoint Accuracy, The Recorder, May 8, 1995, at 10 (quoting Bruce Ackerman), available in Lexis, News Library, Recorder file.

134 *Lopez*, 514 U.S. at 602 (Stevens, J., dissenting).

135 The last congressional enactment struck down by the Supreme Court as beyond the Commerce Clause power had been the Bituminous Coal Conservation Act of 1935. See Carter v. Carter Coal Co., 298 U.S. 238, 316 (1936).

136 See Russell L. Weaver, *Lopez* and the Federalization of Criminal Law, 98 W. Va. L. Rev. 815, 851-52 (1996) (noting that *Lopez* signals end of "an era of almost complete deference to legislative decisions as manifested by the rational basis test").

137 *Lopez*, 514 U.S. at 602 (Stevens, J., dissenting).

138 See id. at 566.

139 The limited effect of *Lopez* is most clearly illustrated by the fate of the Gun-Free School Zones Act itself, which, after some minor congressional tinkering, is once again the law of the land. The statute now includes the express jurisdictional requirement that the Supreme Court found fatally lacking. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009-369 (codified at 18 U.S.C. § 922(q)(2) (Supp. IV 1998)) (outlawing possession, within 1000 feet of school, of gun "that has moved in or that otherwise affects interstate or foreign commerce"). While this amendment most likely brings the statute safely within Congress's Commerce Clause power, see United States v. Danks, No. 98-4147, 1999 WL 33101242, at *2 (8th Cir. Aug. 13, 1999) (per curiam) (rejecting *Lopez* challenge to revised Gun-Free School Zones Act in cursory opinion), it hardly narrows the scope of the law because almost all guns have moved in commerce before they could be possessed near a school, see William J. Clinton, Message to the Congress Transmitting Proposed Legislation to Amend the Gun-Free School Zones Act of 1990, 1 Pub. Papers 678 (1995) ("The Attorney General reported to me that this proposal would have little, if any, impact on the ability of prosecutors to charge this offense, for the vast majority of firearms have 'moved in . . . commerce' before reaching their eventual possessor.").

140 *Lopez*'s limited effect on existing criminal law was highlighted most recently by the Supreme Court's decision in United States v. Morrison, 120 S. Ct. 1740 (2000). In *Morrison*, the Court struck down a provision of the Violence Against Women Act that allowed a woman to sue her attacker in federal court. The Court made explicit what it had hinted at

statutes have escaped Commerce Clause challenges, but almost all of these challenges have been unsuccessful.[141]

Even though *Lopez*'s impact on existing criminal law may be minimal, the Court's opinion demonstrates the anti-federalization sentiments that are common in the federal judiciary. Each of the three opinions written by Justices in the majority expressed strong reservations about federal criminal law encroaching on areas traditionally left to the states. Writing for the Court, Chief Justice Rehnquist complained that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive

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in *Lopez*: Congress may not regulate "noneconomic, violent criminal conduct based *solely* on that conduct's aggregate effect on interstate commerce." Id. at 1754 (emphasis added). Unlike the civil remedy struck down in *Morrison*, however, the criminal provisions of the Violence Against Women Act require that the defendant cross state lines during the commission of the crime. See 18 U.S.C. § 2261(a)(1) (1994). As the *Morrison* court noted with apparent approval, because of this explicit jurisdictional nexus, the Courts of Appeals have "uniformly upheld" the constitutionality of the federal crime created by the Violence Against Women Act. See *Morrison*, 120 S. Ct. at 1752 n.5 (citing United States v. Lankford, 196 F.3d 563, 571-72 (5th Cir. 1999)).

Of course, this is not to say that *Lopez* (and *Morrison*) did not signal an important shift in the Supreme Court's vision of the relationship between the federal government and the states. Indeed, the same five justices who decided *Lopez* and *Morrison* also struck down congressional enactments in Printz v. United States, 521 U.S. 898 (1997) (finding Brady Act, which required state law enforcement officials to conduct background checks of gun buyers, to offend principles of state sovereignty), and Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (holding Patent and Plant Variety Protection Remedy Clarification Act to be beyond Congress's authority under Fourteenth Amendment). See also Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 650 (1999) (holding that states cannot be sued under federal Age Discrimination in Employment Act).

[141] See, e.g., United States v. Weslin, 156 F.3d 292, 294 (2d Cir. 1998) (per curiam) (Freedom of Access to Clinic Entrances Act), cert. denied, 525 U.S. 1071 (1999); United States v. Von Foelkel, 136 F.3d 339, 340 (2d Cir. 1998) (per curiam) (Violence Against Women Act); United States v. Trupin, 117 F.3d 678, 685 (2d Cir. 1997) (possession of stolen property); United States v. Kirk, 105 F.3d 997, 998 (5th Cir. 1997) (per curiam) (machine guns); United States v. Hawkins, 104 F.3d 437, 440 (D.C. Cir. 1997) (Drug-Free School Zones Act); United States v. Wall, 92 F.3d 1444, 1452 (6th Cir. 1996) (gambling); United States v. Sirois, 87 F.3d 34, 40 (2d Cir. 1996) (Protection of Children Against Sexual Exploitation Act); United States v. Lee, 72 F.3d 55, 58-59 (7th Cir. 1995) (possession of firearm by felon); United States v. Diaz-Martinez, 71 F.3d 946, 953 (1st Cir. 1995) (possession of firearm with obliterated serial number); United States v. Jensen, 69 F.3d 906, 910 n.5 (8th Cir. 1995) (money laundering); United States v. Bolton, 68 F.3d 396, 399 (10th Cir. 1995) (Hobbs Act); United States v. Bishop, 66 F.3d 569, 588 (3d Cir. 1995) (carjacking); United States v. Leshuk, 65 F.3d 1105, 1112 (4th Cir. 1995) (possession, distribution, and sale of narcotics); United States v. Martin, 63 F.3d 1422, 1428 (7th Cir. 1995) (arson); United States v. Oliver, 60 F.3d 547, 550 (9th Cir. 1995) (carjacking), rev'd on other grounds sub nom. Jones v. United States, 526 U.S. 227 (1999); United States v. Mosby, 60 F.3d 454, 456 (8th Cir. 1995) (possession of ammunition by felon). See generally Antony Barone Kolenc, Note, Commerce Clause Challenges After *United States v. Lopez*, 50 Fla. L. Rev. 867 (1998) (collecting cases).

relation between federal and state criminal jurisdiction.'"[142] Justice Kennedy, joined by Justice O'Connor, was even more explicit about the strains that federalization puts on the "federal and state balance." The Gun-Free School Zones Act was ill-advised in Justice Kennedy's view because it offended a basic premise of federalism—that the various states may be laboratories of experimentation.[143]

In the end, however, Justice Kennedy admitted that the judiciary's role in "preserving the federal balance" was "tenuous."[144] He resorted to pleading with the other branches of the government to do their part to control federalization:

> [I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.[145]

Unfortunately for the judiciary, the political branches have not always been up to the job.

### *B. Congress's Role in Controlling Federalization*

At least since the 1930s, when crime first became a national issue and the public demanded that Congress "do something" about it,[146] federalization has been driven by powerful political forces. In the language of public choice theory, the political-support-maximization legislation for members of Congress will almost always be legislation favoring the interests of potential victims of crime, particularly the potential victims of crimes typically prosecuted by states.[147] Put differently, "deadbeat dads," wife-beaters, and drug dealers do not have particularly powerful Washington lobbies, and many federalization

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142 *Lopez*, 514 U.S. at 561 n.3 (quoting United States v. Enmons, 410 U.S. 396, 411-12 (1973) (quoting United States v. Bass, 404 U.S. 336, 349 (1971))).

143 See id. at 581 (Kennedy, J., concurring).

144 Id. at 575 (Kennedy, J., concurring). Justice Thomas, who authored the other concurring opinion, advocated a reconceptualization of the Court's Commerce Clause jurisprudence that would have radically restricted federal criminal jurisdiction. See id. at 584-602 (Thomas, J., concurring).

145 Id. at 577-78 (Kennedy, J., concurring).

146 See supra notes 43-53 and accompanying text.

147 See Macey, supra note 73, at 281-82. Interest groups often have powerful incentives to seek nationwide legislation. First, it might "cost" less to influence one set of legislators rather than legislators in 50 different states. Second, the interest group might be unable to obtain the result it seeks in some states. Third, "federal law is harder for adversely affected parties to avoid than is state law." See id. at 271-73. Finally, the interest group may place a high value on the symbolic effect of federal legislation. See Marshall, supra note 26, at 723 (noting that interest groups may seek "imprimatur of federal law" to "emphasize the importance of the issue involved").

projects therefore encounter little or no political resistance.[148] At the same time, the ordinary political forces that often result in moderation and compromise disappear when the issue is criminal law. Not only can few politicians afford to be labeled "soft on crime," but those politicians who are most likely to oppose federal intervention in local affairs are also the most likely to be particularly "tough on crime."[149]

Particularly because elected legislators have little incentive to resist federalization, judges and academics have proposed various systematic principles to govern (and to restrain) federalization by Congress. Although the various proposals are numerous, they divide roughly into two types, what I will call the "judicial model" and the "prosecutorial model." The judicial model of federalization, put forth

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148 See Donald A. Dripps, Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?, 44 Syracuse L. Rev. 1079, 1089 (1993) (suggesting that "legislators undervalue the rights of the accused [because] . . . a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant"). Of course, not all potential prosecution targets are without political clout. For example, the National Rifle Association (NRA) has been able to generate enough political support to stem the federalization of certain gun crimes. In 1991, the Senate passed a bill that would have federalized almost any offense committed with a gun. See Violent Crime Control Act of 1991, S. 1241, 102d Cong. § 1213. After heavy lobbying from the NRA, that portion of the bill was defeated in committee in the House. See Joan Biskupic, Crime Bill Faces House Fight over Penalties, Appeals, 49 Cong. Q. Wkly. Rep. 1898 (1991); Joan Biskupic, House Panel OK's Crime Bill, Extends Death Penalty, 49 Cong. Q. Wkly. Rep. 2172 (1991).

149 See Little, supra note 8, at 1065. For example, the Republican Party's 1994 "Contract with America," which was premised on the idea that the federal government "is too big and spends too much," also advocated the federalization of child pornography prosecutions. See Contract with America: The Bold Plan by Rep. Newt Gingrich, Rep. Dick Armey, and the House Republicans to Change the Nation 10, 17, 82 (Ed Gillespie & Bob Schellhas eds., 1994). For a cogent summary of the political forces that drive Congress to draft ever broader and more inclusive criminal statutes, see Richman, supra note 8, at 770-88 (arguing that Congress's seemingly excessive delegation of enforcement authority to prosecutors may, in part, be strategic effort to decentralize executive power).

There is some indication that Congress may be taking federalization concerns to heart. In May, 1999, in the wake of the 1998 ABA Task Force report criticizing federalization, see ABA Task Force, supra note 7, the Senate Governmental Affairs Committee held hearings on federalism and crime control. See Federalism and Crime Control: Hearings Before the Senate Comm. on Gov't Affairs, 106th Cong. 58 (1999) (statement of Sen. Thompson) ("There is growing consensus across the criminal justice system that the increasing tendency to federalize crime is not only unnecessary and unwise, but also has harmful implications for crime control."); see also Patrick Leahy, Restraining Congressional Impulse to Federalize More Local Crime Laws, 145 Cong. Rec. S2069 (daily ed. Mar. 2, 1999) (endorsing ABA Task Force Report and urging fellow senators to "resist" impulse to federalize crime); Rehnquist, supra note 84, at 2 (commending Senator Thompson for conducting hearings). On the other hand, at the same time that those hearings were taking place, the full Senate was considering a bill that would create several new federal crimes, including recruiting a person to join a criminal street gang and using a minor in committing a crime of violence. See Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999, S. 254, 106th Cong. §§ 201, 203. The bill passed the Senate on May 20, 1999.

most consistently by federal judges, emphasizes the efficient use of Article III resources. According to the judicial model, federal criminal jurisdiction must be limited to maintain the unique character of the federal courts and the federal judiciary.[150] By contrast, the prosecutorial model of federalization emphasizes the efficient use of federal (and state) crime-fighting resources. Rather than focusing on what a federal judge's docket "should" look like, this perspective emphasizes how a federal judge can be used most effectively to combat crime.[151]

The clearest articulation of the judicial model comes from federal judges themselves. In its Long Range Plan for the Federal Courts, the Judicial Conference recommended the following limitations on the federalization of crime:

> In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount. Congress should be encouraged to allocate criminal jurisdiction to the federal courts only in relation to the following five types of offenses:
>
> [1] The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity. . . .
>
> [2] The proscribed activity involves substantial multistate or international aspects. . . .
>
> [3] The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by use of federal resources or expertise. When the states have obtained sufficient resources and expertise to adequately control this type of crime, this criterion should be reconsidered. . . .

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150 See, e.g., Judicial Conference of the United States, Long Range Plan for the Federal Courts 24-25 (1995) [hereinafter Long Range Plan]; see also Beale, Reporter's Draft, supra note 11, at 1296-97 (describing criteria proposed by federal judge Stanley Marcus); Cowen, supra note 12, at 1378 ("Opening federal courts to the usual litigation of state courts turns [the] concept of limited jurisdiction on its head."); Jon O. Newman, Litigation Reforms and the Dangers of Growth of the Federal Judiciary, 70 Temp. L. Rev. 1125, 1128 (1997) (arguing that unchecked increases in number of federal judges pose serious risks to "the quality of federal justice and the fair and efficient functioning of the federal litigation system").

151 See, e.g., Jamie S. Gorelick & Harry Litman, Prosecutorial Discretion and the Federalization Debate, 46 Hastings L.J. 967, 969 (1995) (arguing that it is "vital to identify where the potential lies for a distinctively federal contribution to the fight against crime"); see also Little, supra note 8, at 1078-81 (introducing "demonstrated state failure as a guide to principled federalization").

> [4] The proscribed activity involves serious, high-level, or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter. . . .
> [5] The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system.[152]

This "categorical approach" seeks to limit the federal docket by defining as narrowly as possible those subject areas where federal interests are "paramount" or state jurisdiction is "inappropriate."[153]

The prosecutorial model, on the other hand, focuses not on which categories of crimes are somehow uniquely federal, but rather on which crimes are most effectively prosecuted federally. The prosecutorial model of federalization has been articulated most clearly by former Deputy Attorney General Jamie Gorelick and a current United States Attorney, Harry Litman.[154] Under their proposal, federalization is appropriate where:

> (1) there is a pressing problem of national concern;
> (2) state criminal jurisdiction is inadequate to solve significant aspects of the problem; and
> (3) the federal government—by virtue of its investigative, prosecutorial, or legal resources—is positioned to make a qualita-

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152 Long Range Plan, supra note 150, at 24-25. For a similar (if slightly narrower) articulation of the judicial perspective, see Beale, Reporter's Draft, supra note 11, at 1296 (setting forth following criteria proposed by federal judge Stanley Marcus: (1) crimes against United States itself; (2) criminal enterprises that by virtue of their scope and magnitude spill across interstate and/or international lines; (3) crimes that are essentially intrastate, but of such magnitude as to justify federal resources and concurrent jurisdiction; (4) enforcement of rights of insular minorities; and (5) systematic and pervasive corruption of local system).

153 See Ervin, supra note 12, at 768. The first category would encompass such traditional federal crimes as espionage, theft of government funds or services, and violent crimes committed on federal land. The second category would include multistate organized crime activities, international narcotics trafficking, and, as I shall argue below, nonpayment of interstate child support. The third category would encompass complex white-collar crimes, like insider trading, that were nevertheless confined to one state. The fourth and fifth categories would allow federal prosecution to vindicate concerns about whether state courts could be fair; for example, the Operation Greylord corruption prosecutions in Chicago in the 1980s, see United States v. Murphy, 768 F.2d 1518, 1524-28 (7th Cir. 1985) (summarizing Operation Greylord investigation), or the civil rights prosecutions in the South in the 1960s, see, e.g., United States v. Price, 383 U.S. 787, 789-90 (1966) (involving federal prosecution of 18 Mississippi men for causing deaths of civil rights workers Michael Henry Schwerner, James Earl Chaney, and Andrew Goodman).

154 At the time their article was written, Gorelick was Deputy Attorney General and Litman was a Deputy Assistant Attorney General for the Office of Policy Development. In 1998, Litman was appointed United States Attorney for the Western District of Pennsylvania.

> tive difference to the solution of the problem, *i.e.*, a difference that could not be produced by the state's dedicating a similar amount of resources to the problem.[155]

The distinguishing characteristic of the prosecutorial model is its flexibility.[156] Because the relevant consideration is the most efficient way to respond to pressing crime problems, Congress would not be bound by preconceived notions of what are "appropriate" federal crimes.

Despite their difference in emphasis, the two models reach similar results on most questions of federalization,[157] and both models can be useful in evaluating the advisability of particular federal criminal laws.[158] As tools for controlling federalization, however, the models suffer from two flaws. First, and most obviously, members of Congress will support federalization when they perceive it to be in their interest (which, given the politics of crime, is usually the case). Because the proposed models of congressional restraint do nothing to change legislators' incentives, there is little reason to expect the models to affect legislative behavior.

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155 Gorelick & Litman, supra note 151, at 972. Rory Little has proposed a test that is similar in perspective to Gorelick's and Litman's, although without the requirement that the problem addressed be a "pressing" one. Under Little's test, federalization would be justified whenever there is a "demonstrated state failure" to respond to a crime problem. Such failures would include both those recognized by the states and those disputed by the states. See Little, supra note 8, at 1078-79.

156 See Ervin, supra note 12, at 768.

157 Not surprisingly, the two models diverge over federal prosecutions of ordinary street crime. Under the prosecutorial model, if the states were unable to prosecute drug crimes effectively, federal legislation would be appropriate. Under the judicial model, the inability of states to prosecute interstate activity would warrant federal intervention only when the activity involved a "complex commercial or institutional enterprise." Long Range Plan, supra note 150, at 25. For a criticism of this distinction between white-collar and street crime as unprincipled and elitist, see Little, supra note 8, at 1055-61. Similarly, Justice Department officials Harry Litman and Mark Greenberg have argued that the judiciary—undemocratic, life-appointed, and self-interested—is particularly unsuited to make decisions about allocation of resources:

> [H]ow to allocate scarce and valuable resources is fundamentally a political decision, best suited to the political branches of government. Such decisions should be made in a way that generally maximizes the satisfaction of people's preferences or welfare, and made by decision-makers who are positioned to investigate and respond to popular preferences and needs.

Litman & Greenberg, supra note 96, at 974.

158 The federal carjacking statute, see 18 U.S.C. § 2119 (1994 & Supp. IV 1998), enacted in 1992, is a good example of the kind of federalization that fails to meet the criteria for congressional action under either model. The carjacking statute was enacted after a particularly brutal carjacking in which a Maryland woman was dragged to her death. See Brickey, supra note 12, at 1162 n.154. Although Congress plainly wanted to "do something" about carjackings, there was no indication that state and local governments were either unable or unwilling to enforce their own laws against such conduct. Indeed, in the Maryland case, the carjackers were successfully prosecuted by the local authorities and sentenced to life imprisonment. See id.

Second, even if Congress were committed to passing only legislation fitting within the proposed models, the effects on federalization would be negligible. The problem is one of unavoidable overbreadth. Even when a new federal law is justified by a legitimate need for federal intervention—for example, a demonstrated state failure to combat extensive organized crime—the law itself is likely to cover far more than the specific undesirable conduct to which the statute is directed. For example, the judicial model would restrict federal fraud statutes to conduct that involved "substantial multistate or international aspects" or "a complex commercial or institutional enterprise."[159] But the limits of language make it difficult to draft a law that converts those general aims into a specific statute that is not both overinclusive and underinclusive. In other cases, flexibility is itself an important part of a statute. Thus, while the judicial model seeks to encompass civil rights violations within the category of crimes that raise "highly sensitive issues in the local community"[160] that could be more objectively prosecuted in federal court, it would be nearly impossible for Congress to draft an actual statute that covers only such crimes, particularly since local sensitivities vary from state to state.

Even if it were possible to draft a statute detailed and specific enough to cover only the precise conduct warranting federalization, the opportunity costs involved in such an effort and the difficulty in reaching agreement on the exact goals of the legislation remain formidable barriers. As Dan Kahan has explained, the time legislators spend enacting detailed criminal legislation (which benefits the public at large) could be more profitably spent enacting specific legislation that will benefit more powerful interest groups.[161] Similarly, the more detailed a criminal statute is, the more difficult it will be to obtain a legislative consensus on the policy underlying the statute.[162] Consequently, Congress typically enacts broad criminal statutes that satisfy the public's desire to "do something" about crime yet avoid the hard political choices that more specificity implicates.[163]

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159 Long Range Plan, supra note 150, at 24-25. These restrictions would not apply to frauds committed against the federal government.

160 Id. at 25.

161 See Kahan, supra note 115, at 10.

162 Kahan cites the controversy over attempts to define "organized crime" in the RICO statute, 18 U.S.C. §§ 1961-1968 (1994 & Supp. IV 1998), and Congress's resulting use of the general (and ultimately far broader) term "enterprise." See Kahan, supra note 115, at 9-10 (citing H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 246-47 (1989) (detailing debate over scope of RICO statute)).

163 See Kahan, supra note 115, at 9-11. Kahan argues that Congress thus effectively is transferring lawmaking responsibility to the courts, who must give meaning to such general terms as "fraud," "thing of value," and "enterprise." See id. at 9. In a similar vein, Dan Richman argues that Congress's lack of specificity in drafting criminal laws effectively del-

The end result is that Congress paints with a broad brush, establishing only the minimum criteria for a crime. By doing so, Congress delegates much of the responsibility for applying the principles of federalization to prosecutors.[164] The question thus becomes whether prosecutors are able and willing to apply those principles.

### C. *The Prosecutor's Role in Controlling Federalization*

Of the three branches of government, the Executive Branch is the best equipped to control federalization. The judiciary is limited by the expansive nature of the Commerce Clause. Congress is limited by the practical realities of statute drafting and by the political incentives of its members. But prosecutors enjoy wide, almost unfettered, discretion in making charging decisions—that is, whom to charge and what charges to bring.[165] For federal prosecutors, this broad discretion necessarily includes deciding which defendants should be charged in federal court and which should be charged in state court.[166] That decision, more than any new criminal law passed by Congress, deter-

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egates lawmaking responsibility to prosecutors, who must decide which of the many potential violators should be prosecuted. The benefit to Congress is that it can appear "tough on crime," while prosecutors must make the (sometimes politically difficult) decisions about who should be prosecuted. See Richman, supra note 8, at 770-88.

164 See Barbara S. Jones et al., Panel Discussion: The Prosecutor's Role in Light of Expanding Federal Criminal Jurisdiction, 26 Fordham Urb. L.J. 657, 682 (1999) (comments of Gerard E. Lynch) (noting that Congress has effectively "delegated the task of making substantive criminal law to federal prosecutors"); Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, 2136-37 (1998) ("So long as our criminal codes contain too many prohibitions, the contents of which are left to be defined by their implementation, . . . prosecutors must exercise judgment about which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment.").

165 See Kenneth Culp Davis, Discretionary Justice 188 (1969) (arguing that while "[t]he affirmative power to prosecute is enormous . . . the negative power to withhold prosecutions may be even greater, because it is less protected against abuse"); Robert H. Jackson, The Federal Prosecutor, 31 J. Crim. L. & Criminology 3, 3 (1940) ("The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."); James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1522 (1981) ("There is a broad and rather casual acceptance of the fact that prosecutors often exercise greater control over the administration of criminal justice than do other officials."); see also Clymer, supra note 13, at 717-18 (noting that federal courts have almost unanimously refused even to impose rationality requirement on prosecutorial decisionmaking). Although the most obvious exercise of prosecutorial discretion is in the charging decision, discretion is also important in plea bargaining and in dismissing charges. See generally Abraham S. Goldstein, The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea (1981). The benefits from such broad discretion lie primarily in preserving flexibility, while the corresponding costs are uncertainty and inconsistency, if not arbitrariness.

166 State prosecutors can exercise a similar discretion by deciding whether or not to request their federal counterparts to take over a particular prosecution. See Jones et al., supra note 157, at 663-64 (comments of Philip Heymann). Of course, the ultimate decision

mines the division of prosecutorial responsibility between federal and state courts, the workload placed on the federal courts, and the impact on individual defendants.

The Department of Justice claims to be sensitive to federalization concerns,[167] and this claim is credible. Given the relative scarcity of federal crime-fighting resources, DOJ simply cannot assume primary responsibility for the vast array of ordinary crimes that occupy state and local prosecutors.[168] The Department thus has an interest in limiting public expectations for federal crime-fighting. When Congress expands the Department's authority to fight local crime, it also expands the Department's responsibility to fight local crime.[169] The political risks attendant in that increased responsibility have often led the federal law enforcement community to resist congressional efforts at federalization.[170]

In addition, much of the pressure that prosecutors face to federalize crime comes from individual cases in the field. In the same way that a notorious crime puts pressure on Congress to "do something" about it (i.e., make it a federal crime),[171] a notorious crime puts pressure on federal prosecutors to "do something" about it (i.e., make it a federal case). These pressures are not evenly distributed, however. They are felt most strongly by federal prosecutors located in the af-

about whether to charge a particular defendant in federal court is made by the federal prosecutor (with the approval of the grand jury).

167 See, e.g., Gorelick & Litman, supra note 151, at 969 ("Adding criminal cases indiscriminately to the dockets of the federal courts would squander a valuable resource that, if wisely deployed, could make a significant difference in the nation's struggle with crime."); Renée M. Landers, Federalization of State Law: Enhancing Opportunities for Three-Branch and Federal-State Cooperation, 44 DePaul L. Rev. 811, 813, 815-18 (1995) (comments of then-Deputy Assistant Attorney General in the Office of Policy Development); Renée M. Landers, Prosecutorial Limits on Overlapping Federal and State Jurisdiction, 543 Annals Am. Acad. Pol. & Soc. Sci. 64, 70-71 (1996) (same).

168 See Gorelick & Litman, supra note 151, at 969 (noting that well over 95% of criminal prosecutions take place in state courts).

169 As Dan Richman has argued, just as Congress delegates broad enforcement authority to prosecutors as a strategy to avoid political responsibility for the hard choices prosecutors must make about whom to prosecute, prosecutors have a similar incentive to resist that authority and the political responsibility it brings. See Richman, supra note 8, at 765-66, 770-88 (noting that federal law enforcement officials have "worked hard to maintain this balance between authority and responsibility").

170 See id. at 766-67 (noting Attorney General Mitchell's opposition to expansion of federal kidnapping law in 1930s, J. Edgar Hoover's consistent opposition to congressional efforts to expand FBI's jurisdiction, and FBI Director Louis Freeh's opposition to amendment to 1994 Crime Bill that would have federalized all gun crimes); Anthony Lewis, Federalizing the Fight Against Crime, News & Rec. (Greensboro, N.C.), May 25, 1994, at A11 (noting Department of Justice's opposition to 1994 Crime Bill amendment federalizing gun crimes).

171 See supra note 158.

fected communities.[172] Further removed from the pressures, the law enforcement bureaucracy in Washington can afford to be more sensitive to the institutional and political costs of federalization.[173]

Federal prosecutors in the field,[174] however, often have incentives that operate against restraining federalization. Even if we assume (as we should) that federal prosecutors primarily are motivated by a desire to fight crime conscientiously and effectively, many other factors undoubtedly influence the charging policies and decisions of particular federal prosecutors. One such factor is the common (though by no means universal) desire of prosecutors to prosecute highly publicized cases.[175] This competition for the limelight may lead federal prosecutors to compete with local prosecutors for high-profile cases, without regard for whether the case is more appropriately brought in federal or state court.[176] Another factor—perhaps less obvious but, from a federalization perspective, more insidious—is the competition among the ninety-four United States Attorney's Offices for Department of Justice resources. Whether or not it is Department of Justice practice, it is at least the perception in United States Attorney's Offices that those offices that bring increasing numbers of prosecutions will be "rewarded" with increasing allocations of resources (i.e., more positions for prosecutors, investigators, and support staff) and that those offices that bring decreasing numbers of prosecutions will be "penal-

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172 See James Eisenstein, Counsel for the United States: U.S. Attorneys in the Political and Legal Systems 198-206 (1978) (discussing ways in which "direct and indirect pressures from the district" affect U.S. Attorneys' behavior); Richman, supra note 30, at 92 (noting that involvement of individual members of Congress in appointment of U.S. Attorneys makes it likely that U.S. Attorneys will be quite responsive to local political concerns).

173 See Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 496-500 (1996) (noting that bureaucrats in Washington are removed from local pressures felt by many U.S. Attorneys). Of course, being removed from local political pressures does not always protect DOJ from federalization pressure, particularly when the President responds to national political pressure by adopting policies that call for federal intervention in local crime. See Brickey, supra note 12, at 1165 (describing "Project Triggerlock," which was nationwide effort to use federal firearms laws against "'violent offenders typically prosecuted in State court'" (quoting 1991 Att'y Gen. Ann. Rep. 19 (1991))).

174 By "prosecutors in the field," I mean to include not only United States Attorneys, but (perhaps more importantly) any Assistant United States Attorney responsible for making charging decisions.

175 There is, in my view, nothing improper about a prosecutor placing a greater value on a highly publicized case. Publicity is an essential component of effective general deterrence. Disagreements about *which* prosecutors should handle such highly publicized cases, however, usually have more to do with ambition than general deterrence. See Kahan, supra note 173, at 486 ("U.S. Attorneys are extraordinarily ambitious and frequently enter electoral politics after leaving office.").

176 See, e.g., Benjamin Weiser, Dispute Escalates Between Two Top Prosecutors in Manhattan, N.Y. Times, Dec. 5, 1997, at B3 (detailing unusually public squabbling between federal and state prosecutors in Manhattan over insider trading case); Benjamin Weiser, Two Prosecutors, State and U.S., Fight Over Plea, N.Y. Times, Dec. 4, 1997, at A1.

ized" by the Department of Justice through corresponding reductions in resources.[177] This competition for "statistics" creates incentives for federal prosecutors to bring federal charges against defendants who could be prosecuted effectively in state court. Finally, prosecutors in the field feel pressure to maintain good working relationships with federal law enforcement agencies, even if that means accepting cases that could be brought more appropriately in state court.[178]

Because the prosecutors in the field who make charging decisions often lack sufficient incentives to apply the principles of federalization,[179] prosecutorial discretion can exacerbate the political, institutional, and fairness problems inherent in federalization. The question then becomes how best to control prosecutorial discretion. Judicial control of prosecutorial discretion is impractical, for both institutional and constitutional reasons.[180] Bureaucratic control of charging deci-

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177 See Clymer, supra note 13, at 706 n.277. In my experience as an Assistant United States Attorney, this competition for resources manifested itself in two obvious ways. First, with the end of each fiscal year there was a concerted push for indictments so that the "statistics" would not be lower than the year before. Second, all Assistant United States Attorneys are required to fill out a form indicating the number of hours worked each week. Occasionally (presumably when prosecutors were falling behind in completing the forms), we were reminded that the forms were important because they were used by the Department of Justice to allocate resources. This timekeeping system has recently become the subject of a class action suit by prosecutors seeking overtime pay. See David Johnston, Overtime Policy Earns Date with Law for Justice Dept., N.Y. Times, Aug. 25, 1999, at A1 (describing "two sets of books" kept by Department of Justice; one set, which showed that prosecutors worked 40 hours each week, was used for payroll purposes, while another, which showed actual overtime hours, was "used by superiors to measure their lawyers' effort, [and] to ask Congress for bigger budgets").

178 See generally Eisenstein, supra note 172, at 150-69 (describing federal prosecutors' relationships with federal law enforcement agencies in their districts and noting that federal prosecutors sometimes accept "relatively minor but numerous violations like Dyer Acts [car thefts], embezzlement of small amounts from banks, and minor thefts from interstate shipments," id. at 169, as way of satisfying law enforcement agency's interest in generating its own "statistics").

179 Of course, in many instances, the federal prosecutor's self-interest will lead to a decision consistent with federalization concerns. For example, cases involving complex interstate criminal enterprises (and thus appropriate for federal prosecution) may also be high publicity cases (and thus sought after by federal prosecutors). This correlation, however, is an indirect (and exceedingly inexact) way to apply federalization principles to prosecutorial discretion.

180 See Clymer, supra note 13, at 719-39 (discussing doctrinal, evidentiary, and political obstacles to judicial review of charging decisions). Although some commentators have called for increased judicial review of prosecutorial discretion, even those proposals are fairly limited. See, e.g., id. (calling for equal protection "rationality review" of unguided charging decisions); Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, 67 Fordham L. Rev. 13, 60-61 (1998) (arguing for use of racial impact studies of prosecutorial charging decisions to, among other things, support selective prosecution claims); Heller, supra note 13, at 1344-57 (arguing for lower burden on defendants seeking discovery to support claims of selective prosecution).

sions, on the other hand, while often resisted by field prosecutors, can be both practical and effective.

DOJ has, in fact, promulgated numerous prosecution guidelines, including both general guidelines to govern all federal prosecutions and specific guidelines for individual statutes. The existing guidelines, however, suffer from three defects. First, although the general guidelines mention federalization concerns, they provide little real guidance in this regard to prosecutors. Second, by explicitly encouraging prosecutors to consider the availability of harsher federal sentences, the general guidelines are insensitive (if not hostile) to federalization concerns.[181] Third, most of the specific guidelines for individual statutes simply do not address federalization concerns.

As a general matter, all federal prosecutors are guided by the Principles of Federal Prosecution, a general set of guidelines first promulgated in 1980.[182] While the creation and publication of the Principles was an important step in bringing prosecutorial charging decisions into the sunshine,[183] at bottom the Principles of Federal Prosecution are so vague as to be meaningless.[184] The Principles provide that a federal prosecutor should commence or recommend a federal prosecution whenever there is sufficient evidence of a federal criminal offense, unless: (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate noncriminal alternative to prosecution.[185]

These general and vague criteria raise obvious questions: What is a "substantial federal interest"? When is prosecution in another jurisdiction "effective"? When is a noncriminal alternative "adequate"? The Principles do not answer these questions. Instead, the guidelines

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181 A further defect in the existing general guidelines—inaccessibility—is rapidly being cured by the Internet. Both the United States Attorneys' Manual and the more obscure Criminal Resource Manual are available at the Department of Justice's web site, <http://www.usdoj.gov>. Nevertheless, as indicated by the current exclusion of the Attorney General's CSRA guidelines from the Criminal Resource Manual, see infra note 257, these resources remain incomplete.

182 U.S. Dep't of Justice, Principles of Federal Prosecution, in United States Attorneys' Manual § 9-27 (1997) [hereinafter Principles of Federal Prosecution]; see Vorenberg, supra note 165, at 1544.

183 See Norman Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 UCLA L. Rev. 1, 26-27 (1971) (noting benefits of making prosecutorial policy public).

184 See Clymer, supra note 13, at 697-700 (arguing that Principles of Federal Prosecution do not provide any guidance regarding cases that federal prosecutors should review in first place); Vorenberg, supra note 165, at 1530 n.32 (noting that, Principles of Federal Prosecution notwithstanding, federal prosecutor's decision to bring case in federal court is generally made without "any systematic standards or goals to guide it").

185 See Principles of Federal Prosecution, supra note 182, §§ 9-27.230, .240, .250.

simply instruct federal prosecutors to "weigh all relevant considerations" and list examples of relevant considerations. In determining whether a substantial federal interest would be served by prosecution, the listed relevant considerations include (1) federal law enforcement priorities, (2) the nature and seriousness of the offense, (3) the deterrent effect of prosecution, (4) the person's culpability in connection with the offense, (5) the person's history with respect to criminal activity, (6) the person's willingness to cooperate in the investigation or prosecution of others, and (7) the probable sentence or other consequences if the person is convicted.[186] In determining whether prosecution in another jurisdiction would be "effective," the listed relevant considerations include (1) the strength of the other jurisdiction's interest in prosecution, (2) the other jurisdiction's ability and willingness to prosecute effectively, and (3) the probable sentence or other consequences if the person is convicted in the other jurisdiction.[187]

These "relevant considerations" provide little, if any, direction to federal prosecutors deciding which cases should be prosecuted in federal court and which should be prosecuted in state court.[188] Indeed, by instructing federal prosecutors to consider the "probable sentence" in the other jurisdiction, the Principles may actually exacerbate the federalism and fairness problems inherent in federalization.[189]

The Principles of Federal Prosecution are not the only source of guidance for charging decisions made by federal prosecutors. The United States Attorneys' Manual and its supplement, the Criminal Resource Manual, contain chapters discussing most federal criminal statutes. But little of that discussion addresses federalization concerns. For example, the chapters on bank fraud, computer fraud, and credit card fraud contain absolutely no guidance about which cases should be prosecuted federally and which should be left to state authorities.[190] The chapter on the Mann Act[191] states that federal prose-

186 See id. § 9-27.230.

187 See id. § 9-27.240. The Principles also include a list of impermissible considerations in charging decisions: (1) the person's race, religion, sex, national origin, or political association, activities, or beliefs; (2) the prosecutor's own personal feeling concerning the person; and (3) the effect of the decision on the prosecutor's own professional or personal circumstances. See id. § 9-27.260.

188 Although the Principles of Federal Prosecution also include a supplemental commentary, these additional notes do nothing to make the general principles more specific. See id. §§ 9-27.200 to -27.750 and accompanying comments.

189 See infra text accompanying notes 305-11.

190 See United States Attorneys' Manual, §§ 9-40, -48 to -49 (1997). The chapter on mail and wire fraud is only marginally better. It states that fraud involving "isolated transactions between individuals" should ordinarily be left to state authorities, while "serious consideration" should be given to federal prosecution of frauds directed at "a class of persons, or the general public, with a substantial pattern of conduct." Id. § 9-43.100.

cutions should ordinarily be limited to "persons engaged in commercial prostitution activities,"[192] but provides no guidance on how to divide commercial prostitution cases between federal and state authorities. Other chapters pay lip service to federalization concerns, but provide no real guidance. For example, in carjacking cases, federal prosecutors are instructed to "cooperate with State and local officials to investigate carjacking, and, when appropriate and consistent with prosecutorial discretion and resources, prosecute violators in Federal court."[193] Similarly, the chapter on the Violence Against Women Act[194] stresses the importance of "coordination with and education of State and local officials," but contains no discussion of which interstate domestic violence cases should be prosecuted federally.[195] Most strikingly, the United States Attorneys' Manual does not contain *any* guidelines for narcotics prosecutions, which make up more than one-quarter of the federal criminal docket.[196]

## III
## A Case Study in Controlled Federalization: The CSRA

The dynamics of judicial, legislative, and executive efforts to control federalization, and the impact of prosecutorial discretion on federalization, can be illustrated best by examining a particular statute. I have chosen the Child Support Recovery Act[197] for two reasons. First, the CSRA is cited frequently as a prime example of "bad" federalization.[198] Second, the Department of Justice has promulgated a detailed set of guidelines to assist prosecutors in deciding which child

191 18 U.S.C. 2421 (Supp. IV 1998) (forbidding transportation of women across state lines for prostitution purposes).

192 See United States Attorneys' Manual, supra note 190, § 9-79.100. Commerciality is not an element of a Mann Act offense. See Cleveland v. United States, 329 U.S. 14, 17-18 (1946); Caminetti v. United States, 242 U.S. 470, 478 (1917).

193 See United States Attorneys' Manual, supra note 190, § 9-60.1010.

194 42 U.S.C. §§ 13,931-14,040 (1994) (creating federal statutes to prosecute interstate domestic violence against women).

195 See United States Attorneys' Manual, supra note 190, § 9-60.1100; see also Nora V. Demleitner, The Federalization of Crime and Sentencing, 11 Fed. Sentencing Rep. 123, 126 (1998) (noting "limited guidance" in U.S. Attorneys' Manual as to which interstate domestic violence cases should be prosecuted federally, and resulting unfairness to defendant who is exposed to "substantially longer incarcerative sentence").

196 See United States Attorneys' Manual, supra note 190, § 9-100; Five-Year Retrospective, supra note 86, at 16. At one time, the United States Attorneys' Manual did contain a section providing specific guidance on selecting drug cases for federal prosecution. See Brickey, supra note 12, at 1163 n.155 (quoting former § 9-101.200). That section has now been removed from the manual.

197 18 U.S.C. § 228 (Supp. IV 1998). For the full text of the CSRA, see supra note 25.

198 See supra note 26.

support cases should be charged in federal court. In this Part, I first will examine the problems with interstate child support that led Congress to enact the CSRA. I then will consider the statute itself and whether it fits within the principles of federalization proposed by various commentators to limit new federal crimes. Having concluded that it does, I will then examine the judiciary's (ultimately unsuccessful) efforts to strike down the CSRA and the Department of Justice's (ultimately successful) efforts to enforce the statute in ways consistent with federalization concerns.

### *A. The Problem of Interstate Child Support*

#### *1. The Statistical Evidence*

When Congress enacted the CSRA in 1992, it had before it an impressive array of statistics demonstrating the "problem" of nonpayment of child support, particularly interstate child support. Consider the following:

- In 1989, $16.3 billion in child support was due, but only $11.2 billion was paid, leaving an annual deficit of over $5 billion.[199]
- Approximately one-third of all child support cases involve children whose noncustodial parent lives out-of-state.[200]
- 57% of custodial parents in interstate cases report receiving child support "occasionally, seldom, or never."[201]
- Of noncustodial parents required to pay court-ordered child support, over 80% of in-state parents pay something, while only 65% of out-of-state parents pay anything.[202]
- Although interstate cases represent 35% of the total child support caseload, those cases yield only 6% of the collections.[203]

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199 See H.R. Rep. No. 102-771, at 6 (1992); see also Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support: Hearing on H.R. 1241 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 102d Cong. 94 (1992) [hereinafter House Hearing] (testimony of economist Robert I. Lerman) (noting that annual child support deficits remained constant throughout 1980s).

200 See H.R. Rep. No. 102-771, at 5 (citing General Accounting Office, GAO/HRD-92-39FS, Interstate Child Support: Mothers Report Receiving Less Support from Out-of-State Fathers (1992)).

201 Id.

202 See House Hearing, supra note 199, at 95 (testimony of economist Robert I. Lerman); see also Gordon Lester, U.S. Bureau of the Census, Child Support and Alimony: 1989 (Current Population Reports, Series P-60, No. 173, 1991).

203 See House Hearing, supra note 199, at 28 (testimony of Harry W. Wiggins, Director of Child Support Enforcement, Virginia Department of Social Services); see also Margaret Campbell Haynes, Supporting Our Children: A Blueprint for Reform, 27 Fam. L.Q. 7, 7 (1993) ("Interstate child support cases represent approximately 30 percent of the total child support caseload yet only $1 of every $10 collected is from an interstate case.").

These statistics lead to two obvious conclusions. First, from a national perspective, the total amount of annual unpaid child support—$5 billion—is economically significant, even in an economy the size of the United States'. Second, child support is less likely to be paid when the noncustodial parent and the child live in different states.[204]

### 2. *The Anecdotal Evidence*

Statistics are dry and disembodied. The more viscerally compelling evidence of the problem of interstate child support enforcement comes from the war stories of custodial parents—women who chased their children's deadbeat dads from state to state and court to court in a quest for enforcement that was expensive and time-consuming, and often ineffectual and degrading.[205]

Let me tell one such story to illustrate the problems with interstate child support enforcement. Jeffrey and Marilyn Nichols married in 1969.[206] By the mid-1980s, the couple had three children, and Jeffrey Nichols had become a successful investment advisor making hundreds of thousands of dollars each year. In 1985, when the couple separated, Marilyn Nichols continued caring for the couple's three children, and Jeffrey Nichols continued paying the family's bills. By 1989, however, Jeffrey Nichols had begun resisting paying child support. That year, the New York judge handling the Nichols' divorce

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[204] See infra notes 209-17 and accompanying text; see also Mary Ann Glendon, Abortion and Divorce in Western Law 88 (1987) ("The obstacles encountered by support creditors when the support debtor defaults, especially if [the debtor] is located in another state, have often proved practically insurmountable."); Kathleen A. Burdette, Making Parents Pay: Interstate Child Support Enforcement After *United States v. Lopez*, 144 U. Pa. L. Rev. 1469, 1481-1500 (1996) (describing failures of state enforcement schemes in interstate cases); Janelle T. Calhoun, Interstate Child Support Enforcement System: Juggernaut of Bureaucracy, 46 Mercer L. Rev. 921 (1995) (same); U.S. Comm'n on Interstate Child Support, Supporting Our Children: A Blueprint for Reform (1992) [hereinafter Blueprint for Reform], partially reprinted in United States Comm'n on Interstate Child Support, Official Recommendations of the United States Commission on Interstate Child Support, 27 Fam. L.Q. 31, 61 (1993) (recommending numerous changes to federal law, including creation of federal criminal offense, to improve collection of interstate child support).

[205] For example, the House subcommittee that originated the CSRA heard testimony from seven witnesses, including three who were "victims of child support delinquency." H.R. Rep. No. 102-1085, at 191 (1992). Although some deadbeat parents are women, see, e.g., Robert Kessler & Ken Moritsugu, Alleged 'Deadbeat Mom' Arraigned: Officials Believe LI Case Is a First, Newsday, Oct. 29, 1999, at A8, Congress recognized that most deadbeat parents are men, see House Hearing, supra note 199, at 12-27; 138 Cong. Rec. 21,401 (1992) (statement of Rep. Schumer) (stating that most of testimony during hearings regarded deadbeat husbands).

[206] The information in this paragraph and the next comes from United States v. Nichols, 928 F. Supp. 302, 304 (S.D.N.Y. 1996), aff'd mem., 113 F.3d 1230 (2d Cir. 1997), and Karen S. Schneider et al., Daddy Meanest, People, Sept. 4, 1995, at 40, 40-45. I should note that I served as the lead prosecutor in Nichols's federal prosecution.

ordered Nichols to pay thousands of dollars of support to his family each month. Nichols didn't pay. Instead, he cleaned out his bank accounts and left New York. In 1990, the judge found him in contempt and issued an arrest warrant, but by then Nichols was already in Canada.

Marilyn Nichols then embarked on a five-year odyssey to make her ex-husband pay child support. First, she tracked him down in Canada. When Canadian courts ordered Nichols to pay, he left Canada for Florida. In Florida, Nichols tried a new tack—he denied paternity of his three children. When that claim was rejected by the Florida court in 1993, Nichols simply moved again, this time to Vermont. Marilyn Nichols tracked him down once more and brought him to court in Vermont, where a judge eventually ruled that Nichols owed over $500,000 in child support. Still, Nichols resisted payment.[207] As outrageous as Nichols's conduct seems, his recalcitrance is not an aberration.[208]

### 3. *State Enforcement Mechanisms*

Although the statistics and the anecdotes demonstrate the breadth and depth of the problem of interstate child support, they do not illuminate the cause. For that we must examine the state remedies for interstate child support enforcement. Although the state enforce-

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[207] See *Nichols*, 928 F. Supp. at 304; Schneider et al., supra note 206, at 44.

[208] In the floor debate on the CSRA, Congressman Schumer remarked: "At our hearings we heard instance after instance where spouses, usually husbands, did not want to pay, went to another State, waited just until the legal process was able to catch up with him, and then went to another State and started the procedure all over again." 138 Cong. Rec. 21,401 (1992). Subsequent CSRA prosecutions have netted many defendants like Nichols. See, e.g., Federal Crackdown Nets Deadbeat Dad, Patriot Ledger (Quincy, Mass.), July 20, 1995, at 25, available in 1995 WL 8202468 (father refused to pay child support for his two children, including one born with spina bifida, despite orders being issued by courts in four different states) (CSRA prosecution reported in United States v. Sage, 92 F.3d 101, 103 (2d Cir. 1996)); Lynda Troutt Murphy, A Long Hard Struggle to Collect Child-Support Payments, Roanoke Times & World News (Va.), Aug. 17, 1996, at A9, available in 1996 WL 6055356 (father avoided paying child support for 12 years by moving from Texas to Florida to New York and back to Florida) (CSRA prosecution reported in United States v. Murphy, 117 F.3d 137, 138-39 (4th Cir. 1997)); Philip P. Pan, Maryland Child Support Case Leads to Man in Texas: Prosecutors Say Horse Trainer Owes $33,000, Wash. Post, Oct. 3, 1996, at B5 (father avoided paying child support for years and eluded police by moving from state to state and avoiding keeping credit cards in his own name); Judy Rakowsky, Surgeon Sent to Prison in Child-Support Case, Boston Globe, Nov. 2, 1995, at 36 (surgeon earning $200,000 per year was able to avoid paying child support because he had moved to Michigan) (CSRA prosecution reported at United States v. Bongiorno, 106 F.3d 1027, 1029-30 (1st Cir. 1997)); Denny Walsh, Suspect Held in Support Case: Ex-Roseville Carpenter Arrested at Reno Construction Site, Sacramento Bee, Dec. 21, 1996, at B3 (mother forced to raise two teenage daughters on welfare because father was willing to work for cash and to move frequently, including across state lines, to frustrate her collection efforts).

ment mechanisms are complicated, it is not hard to see why they are ineffectual.

The primary enforcement tool is a series of uniform laws adopted by the states for the interstate enforcement of child support. Under the uniform laws in effect at the time the CSRA was enacted, a custodial parent who was seeking to enforce a child support judgment against a parent living in another state was required to commence a new civil action in the nonpaying parent's state and then convince the new court—after discovery, motions, and a trial—that the obligation was actually owed and not paid.[209] The inefficiency of this system is clearly illustrated by Marilyn Nichols's experience.[210] And although the civil enforcement mechanisms have improved somewhat since 1992,[211] the basic problem has not changed. A custodial parent seek-

[209] In 1992, interstate child support enforcement was governed by the Uniform Reciprocal Enforcement of Support Act (URESA). See Revised Unif. Reciprocal Enforcement of Support Act (amended 1968), 9 U.L.A., pt. IB, 381 (1999). URESA generally provided that a child support order issued by a court in one state ("the initiating state") may be registered in or certified to the courts of the state where the noncustodial parent was residing ("the responding state"). See URESA, §§ 14, 18, 9 U.L.A., pt. IB, 450, 461. The responding state's court then would conduct a separate civil proceeding to determine whether the noncustodial parent in fact owed child support and, if so, whether that support had been paid. In addition, many courts would also consider whether the noncustodial parent had the ability to pay the original award and whether the existing order should be modified. For fuller discussions of URESA enforcement proceedings, see Burdette, supra note 204, at 1485-87 (discussing mechanics of two-state proceedings through which custodial parent may enforce support obligation); Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America 286-87 (1985) (discussing cost associated with securing child support awards).

[210] Even though the New York court had ordered child support, had found that Nichols willfully had not paid the child support, had found Nichols in contempt, and had ordered his arrest, and even though Marilyn Nichols had tracked her ex-husband down in Florida, the New York court's order could not be enforced against Nichols until a Florida court had conducted a separate civil proceeding and trial. And even though the Florida court eventually concluded, after trial, that Jeffrey Nichols was a perjurer and that he owed over $400,000 in back support, Marilyn Nichols could do nothing to collect because, by then, Jeffrey Nichols (and his assets) had moved to Vermont. In Vermont, even though two courts previously had found Jeffrey Nichols in arrears, Marilyn Nichols was forced to start all over again—with a new judge, new procedural rules, more discovery, and more opposition by Jeffrey Nichols. So long as Jeffrey Nichols was willing to keep moving, the URESA process could have continued indefinitely. See generally *Nichols*, 928 F. Supp. at 304; Schneider et al., supra note 206.

[211] In 1996, Congress required all states to adopt the Uniform Interstate Family Support Act (UIFSA), 9 U.L.A., pt. IB, 235 (1999), by January 1998, or forego substantial federal aid for child support enforcement. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 321, 110 Stat. 2105, 2221 (codified as amended in 42 U.S.C. 666 (Supp. IV 1998)). UIFSA has improved interstate enforcement in two ways. First, only one court at a time (usually the originating court) has jurisdiction to modify a child support order; second, long-arm jurisdiction over distant parents has been increased. See UIFSA §§ 201, 205, 9 U.L.A., pt. IB, 275, 284-85 (stating bases for personal jurisdiction); Burdette, supra note 204, at 1487-89 (discussing changes made by

ing to enforce a child support order in another state must still endure the expense and delay of a separate civil proceeding in a distant state before any judgment can be collected.[212]

### 4. *State Criminal Statutes*

In addition to civil enforcement remedies, all fifty states have enacted criminal sanctions of one form or another for failure to pay child support.[213] Those sanctions range from a misdemeanor punishable by ninety days in jail[214] to a felony punishable by up to fourteen years in

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UIFSA that are likely to improve interstate support enforcement). Thus, a custodial parent can often obtain a judgment for child support arrearages against a distant parent without leaving her home state. Nevertheless, the custodial parent must still go to a court in the distant state to enforce the judgment against the debtor.

212 For example, under UIFSA, Marilyn Nichols could have obtained a judgment for arrearages from the New York court that issued the original order. She then would have been able to enforce that order against Jeffrey Nichols in Florida without having to go through a new trial. Nevertheless, the New York judgment would be worthless unless Marilyn Nichols could find Jeffrey Nichols, find his assets, and convince the Florida court to seize the assets. And if Jeffrey Nichols moved again (say, to Vermont), Marilyn Nichols would have to track down his assets and start all over. See Burdette, supra note 204, at 1487-88 (noting that UIFSA's reforms "neither strengthen the extradition powers of the states nor adopt uniform civil or criminal sanctions, thus ignoring the importance of providing the states with the power to coerce obligors to pay their obligations").

213 Ala. Code § 13A-13-4 (1994); Alaska Stat. § 11.51.120 (Lexis 1998); Ariz. Rev. Stat. Ann. § 12-2458 (West 1994); Ark. Code Ann. § 5-26-401 (Michie 1997); Cal. Penal Code § 270 (West 1999); Colo. Rev. Stat. § 14-6-101 (1999); Conn. Gen. Stat. Ann. §§ 53-304, 53-308 (West 1994); Del. Code Ann. tit. 11, § 1113 (1999); Fla. Stat. Ann. § 827.06 (West 1994); Ga. Code Ann. § 19-10-1 (Lexis 1999); Haw. Rev. Stat. §§ 709-902 to -903 (1993); Idaho Code § 18-401 (Michie 1997); 750 Ill. Comp. Stat. Ann. 5/505 (West 1999); Ind. Code Ann. § 35-46-1-5 (West 1998); Iowa Code Ann. § 726.5 (West 1993); Kan. Stat. Ann. § 21-3605 (1995); Ky. Rev. Stat. Ann. § 530.050 (Michie 1999); La. Rev. Stat. Ann. § 14:74 (West 2000); Me. Rev. Stat. Ann. tit. 17-A, § 552 (West 1983); Md. Code Ann., Fam. Law § 10-203 (1999); Mass. Gen. Laws Ann. ch. 273, § 1 (West 1999); Mich. Comp. Laws Ann. § 750.161 (West 1991); Minn. Stat. Ann. § 609.375 (West 1987); Miss. Code Ann. § 97-5-3 (1999); Mo. Ann. Stat. § 568.040 (West 1999); Mont. Code Ann. § 45-5-621 (1999); Neb. Rev. Stat. § 28-706 (1995); Nev. Rev. Stat. § 201.020 (1999); N.H. Rev. Stat. Ann. § 639:4 (1999); N.J. Stat. Ann. § 2C:24-5 (West 1995); N.M. Stat. Ann. § 30-6-2 (Michie 1999); N.Y. Penal Law §§ 260.05-.06 (Consol. 2000); N.C. Gen. Stat. § 49-2 (1999); N.D. Cent. Code § 14-07-15 (1997); Ohio Rev. Code Ann. § 2919.21 (West 1999); Okla. Stat. Ann. tit. 21, § 851 (West 1997); Or. Rev. Stat. § 163.555 (1999); 23 Pa. Cons. Stat. Ann. § 4354 (West 1991); R.I. Gen. Laws § 11-2-1 (1999); S.C. Code Ann. §§ 20-7-40, 20-7-90 (Law Co-op 1985); S.D. Codified Laws §§ 25-7-16 to -17 (Lexis 1999); Tenn. Code Ann. § 39-15-101 (1997); Tex. Penal Code Ann. § 25.05 (West 1994); Utah Code Ann. § 76-7-201 (1999); Vt. Stat. Ann. tit. 15, § 202 (1989); Va. Code Ann. § 20-61 (Michie 1995); Wash. Rev. Code Ann. §§ 26.20.030 to -.035 (West 1997); W. Va. Code Ann. § 61-5-29 (Michie 1997); Wis. Stat. § 948.22 (1998); Wyo. Stat. Ann. § 20-3-101 (Lexis 1999). Note, however, that the District of Columbia has no criminal sanction, and that many of the existing state laws are designed to cover abandonment or desertion of a child that leaves the child destitute, and not simply failure to comply with court-ordered child support.

214 See Pa. Stat. Ann. tit. 18, § 1105 (West 2000); Pa. Stat. Ann. tit. 23, § 4354 (West 2000).

jail.[215] Not surprisingly, those laws are of little practical use when the offending parent has left the state. To prosecute an out-of-state parent, the state must conduct an out-of-state investigation, first to locate the offending parent and then to determine whether the parent's failure to pay has been willful (i.e., whether the parent in fact has the ability to pay). For a state prosecutor, whose investigative resources are concentrated locally and whose extraterritorial powers are limited, such an investigation would be costly and inefficient. And even if the state prosecutor were to succeed in finding and making a case against an out-of-state deadbeat, the prosecution could not go forward unless the deadbeat could be arrested and extradited. Interstate extradition is complicated, time-consuming, and costly—so much so that state prosecutors are often unwilling to seek extradition for misdemeanors.[216] For these reasons, Congress rationally concluded that "the ability of [the] states to enforce such laws outside their own boundaries is severely limited."[217]

### *B. Congress's Response: The CSRA*

#### *1. The Political Forces*

The CSRA evolved from a recommendation by the United States Commission on Interstate Child Support, a bipartisan commission created by Congress in 1988.[218] The bill was championed by Representative Henry Hyde and ultimately received widespread bipartisan support.[219] Although the CSRA did receive some support from particular interest groups,[220] the real appeal of the bill to legislators was the opportunity to "do something" about an issue with obvious public appeal. Even those legislators who claimed to be against federalization supported the bill.[221]

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215 See Idaho Code § 18-401 (Michie 1997).

216 See H.R. Rep. No. 102-771, at 6 (1992) (noting that interstate extradition is "tedious, cumbersome and slow"). For a detailed explanation of the lengthy procedures required for interstate extradition, see Leslie W. Abramson, Extradition in America: Of Uniform Acts and Governmental Discretion, 33 Baylor L. Rev. 793 (1981).

217 H.R. Rep. No. 102-771, at 6.

218 See Blueprint for Reform, supra note 204.

219 See 138 Cong. Rec. 21,401 (1992) (statements of Reps. Schumer and Hyde).

220 See id. (statement of Rep. Schumer) (noting involvement of child support advocacy group in "moving" legislation through Congress). From a public choice perspective, such interest groups would not be expected to be particularly powerful. More important (though hardly surprising) is the complete absence of interest groups opposing the bill.

221 See id. at 21,402-03 (statements of Reps. Schiff and Hoagland). In the hearings before the House subcommittee that originated the CSRA, Representative Hyde noted the judiciary's resistance to excessive federalization, but concluded that federal action was necessary because existing state remedies were ineffective. See House Hearing, supra note 199, at 12-27.

*2. The Statute*

The CSRA became law in October 1992.[222] The elements of the statute are simple: It is a federal crime "willfully [to] fail[ ] to pay a past due support obligation with respect to a child who resides in another state."[223] The term "past due support obligation" is defined as any court-ordered support[224] that "has remained unpaid for a period longer than one year or is greater than $5,000."[225] Although the phrase "willfully fails to pay" is not defined in the statute, the legislative history indicates that the phrase was borrowed from the tax statutes that make willful failure to pay taxes a federal crime.[226] Thus, to establish willfulness, the Government must prove that the noncustodial parent either had the ability to pay or that the inability to pay "was created by (or was the result of) a voluntary and intentional act without justification in view of all the [noncustodial parent's] financial circumstances."[227] Notably, the statute does not require that the deadbeat parent have crossed state lines for the express purpose of avoiding child support obligations. Indeed, because the only requirement is that the noncustodial parent and the child reside in different states, the deadbeat parent may violate the statute without ever crossing state lines (for example, if the child moves to another state).[228]

A first violation of the Act is a class B misdemeanor punishable by up to six months imprisonment and a $5,000 fine; a second violation is a felony punishable by up to two years imprisonment and a $250,000 fine.[229]

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222 See Pub. L. No. 102-521, § 2(a), 106 Stat. 3403 (1992) (codified as amended at 18 U.S.C. § 228 (Supp. IV 1998)); see also Faith Keenan, Bush Signs Pair of Anti-Crime Bills, S.F. Examiner, Oct. 26, 1992, at A11, available in 1992 WL 7590071.

223 18 U.S.C. § 228(a).

224 The CSRA also applies to "an order of an administrative process pursuant to the law of a State." Id. § 228(d)(1)(A).

225 Id. § 228(d)(1)(B).

226 See H.R. Rep. No. 102-771, at 6 (1992).

227 Id. (citing United States v. Poll, 521 F.2d 329, 333 (9th Cir. 1975)); see also Sharon L. Davies, The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance, 48 Duke L.J. 341, 345 (1998) (noting that knowledge of illegality has been required to establish willfulness for several federal crimes).

228 See, e.g., United States v. Hopper, 899 F. Supp. 389 (S.D. Ind. 1995) (upholding CSRA conviction of Indiana man who never left Indiana). A narrower version of the CSRA—one which limited violations to those deadbeats who "flee" across state lines—would not have accomplished Congress's purpose. For one, proving the reason for a parent's move would often be difficult. More fundamentally, a *federal* law was needed, not because deadbeat parents who cross state lines are somehow more culpable than deadbeat parents who stay in one state, but rather because of the difficulty in enforcing interstate obligations—a difficulty that arises regardless of which parent moves.

229 See 18 U.S.C. §§ 228(c), 3559(a)(7), 3571(b)(3), 3571(b)(6) (1994 & Supp. IV 1998).

In 1998, Congress amended the CSRA[230] to provide enhanced penalties for those parents who intentionally cross state lines for the purpose of evading child support obligations[231] and for those parents whose unpaid obligations exceed $10,000 or remain unpaid for more than two years.[232] For those parents, a first violation is a felony punishable by up to two years imprisonment and/or a $250,000 fine. In all cases, restitution is mandatory upon conviction.[233]

### 3. *The CSRA and the Principles of Federalization*

The CSRA, which thrust federal law enforcement into the traditionally state-regulated area of domestic relations, raises obvious federalization questions.[234] Yet, under either the judicial or the prosecutorial model of federalization, the CSRA is an appropriate exercise of federal criminal jurisdiction.

The judicial model of federalization, as articulated in the Long Range Plan, contains both a general premise—that federal criminal jurisdiction should be exercised only where state court prosecution is "not appropriate" or "where federal interests are paramount"—and five specified categories of offenses.[235] As to the general premise, the CSRA satisfies the first prong of the test: State prosecutions of interstate child support cases are "not appropriate" because they are, if not impossible, at least impractical. Almost by definition, the target of a CSRA prosecution will not be residing in the state where the harm lies, making investigation, arrest, and prosecution extremely difficult.[236]

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230 See Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (codified at 18 U.S.C. § 228 (Supp. IV 1998)).

231 See 18 U.S.C. § 228(a)(2).

232 See id. § 228(a)(3).

233 See id. § 228(d).

234 Although the CSRA is the only federal criminal statute to address the problem of interstate child support enforcement, Congress has enacted numerous other laws designed to strengthen civil enforcement. See, e.g., Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended in scattered sections of 26, 42 U.S.C.) (establishing Federal Office of Child Support Enforcement and requiring that states adopt certain enforcement standards and procedures); Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 5, 26, 42 U.S.C.) (establishing United States Commission on Interstate Child Support, which in 1992 recommended making nonpayment of interstate child support federal crime); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 321, 110 Stat. 2105, 2221 (codified as amended in 42 U.S.C. § 666 (Supp. IV 1998)) (requiring that states adopt UIFSA by January 1998 to be eligible for federal child support enforcement funds).

235 Long Range Plan, supra note 150, at 24.

236 See supra text accompanying notes 213-17.

The CSRA also fits squarely within the second of the Long Range Plan's five specified categories of offenses because it proscribes activity that "involves substantial multistate or international aspects."[237] That the "multistate aspects" of the CSRA are "substantial" is self-evident. For many existing federal criminal statutes, the interstate aspects of the crime are nothing more than a jurisdictional hook to bring the offense within Congress's Commerce Clause power. For example, under the Hobbs Act, whether or not the robbery of a corner store is a federal crime turns not upon the victim, the robber, or any aspect of the robbery itself, but rather upon whether some of the goods on the store's shelves had moved in interstate commerce.[238] The CSRA, on the other hand, is directed at interstate activity *because* it is interstate activity. It is the interstate aspect of the crime that renders state enforcement ineffectual. For the CSRA, the interstate nexus is not a jurisdictional hook; it is the essence of the crime itself.[239]

With respect to the prosecutorial model, the CSRA also meets the criteria for federalization as articulated by former Deputy Attorney General Gorelick and current United States Attorney Litman. First, the nonpayment of child support in general—and interstate child support in particular—is a pressing problem of national concern involving billions of dollars and victimizing millions of children.[240] Second, state criminal (and civil) jurisdiction is inadequate to solve significant aspects of the problem.[241] Third, the federal government is positioned to make a qualitative difference in solving the problem on

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237 Long Range Plan, supra note 150, at 24.

238 See 18 U.S.C. § 1951 (1994); United States v. Bolton, 68 F.3d 396, 398-99 (10th Cir. 1995). Similarly, under the post-*Lopez* Gun-Free School Zones Act, whether gun possession near a school is a federal crime turns not upon what interests the gun possession is harming, but rather upon whether the gun had ever crossed state lines. See supra note 139.

239 Federal Judge Stanley Marcus has proposed his own variation on the judicial perspective, see supra note 152. Although Judge Marcus's categories largely track those of the Long Range Plan, he would limit federal criminal jurisdiction that was based upon interstate aspects of the offense to "criminal enterprises that *by virtue of their scope and magnitude* spill across interstate and/or international boundaries." Beale, Reporter's Draft, supra note 11, at 1296 (emphasis added). Unlike the Long Range Plan, which looks to whether the interstate aspects of the crime are substantial, Judge Marcus's criteria would look to whether the interstate criminal enterprise is substantial. See id. at 1296-97. Thus, under Judge Marcus's approach, the interstate aspects of the crimes are incidental to federal jurisdiction; the determining factor is the scope and magnitude of the crime. See id. The problem with Judge Marcus's approach is that it amounts to little more than saying, "big crimes should be federal, small crimes should be state," without regard to which crimes (big or small) are more effectively prosecuted in federal courts. The implicit elitism in this sentiment has not escaped criticism. See supra note 96.

240 See supra text accompanying notes 199-204.

241 See supra text accompanying notes 209-17.

several levels. The federal government is better able to investigate cases across state lines, better able to find defendants in other states,[242] better able to return defendants to the state where the victim resides,[243] and better able to reap maximum deterrence benefits from exemplary prosecutions.[244]

That the CSRA on its face fits within the principles of federalization hardly answers the question of whether it is a wise expansion of federal criminal jurisdiction. Like most federal statutes, the CSRA is drafted broadly and covers far more conduct than ever could be prosecuted in federal court. By some estimates, 500,000 recalcitrant parents may be in violation of the CSRA.[245] Nothing in the statute as drafted by Congress prevents the federal government from prosecuting each of those half-million deadbeat parents in federal court. Yet, if all violators of the CSRA were prosecuted in federal court, the federal government would be assuming control of a vast segment of the country's child support cases. Politically, such a usurpation of state power over domestic relations would offend basic principles of federalism. Institutionally, if even ten percent of CSRA violators were prosecuted, the federal courts would be overwhelmed beyond federal judges' worst nightmares.

Similarly, nothing in the statute prevents federal prosecutors from singling out for prosecution a handful of the many offenders who otherwise would not be subject to criminal sanctions. By not ensuring that only the most egregious of the 500,000 CSRA offenders are prosecuted, the statute, as written by Congress, unfairly allows similarly situated offenders to be subjected to vastly disparate treatment.

The inability of the judicial and prosecutorial models of federalization to account for the political, institutional, and fairness objections

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242 Because a state prosecution is usually initiated by the state in which the victim lives (and hence where the harm lies), an investigator in that state would need to enlist the assistance of investigators from other (often uninterested) states to find the deadbeat parent. The FBI, with offices in every state, does not face such difficulties.

243 The FBI may arrest a defendant in any state and, simply upon proving his identity, may return him to the district in which he is charged. See Fed. R. Crim. P. 40. A state prosecutor, on the other hand, first would have to convince law enforcement authorities in another state to arrest the deadbeat parent and then would have to go through cumbersome extradition proceedings before the deadbeat parent could be returned to the victim's state for prosecution. See supra text accompanying notes 213-17.

244 Although the novelty may wear off, CSRA prosecutions have typically received more public attention than comparable state proceedings. See, e.g., news reports cited supra note 208.

245 See Margaret Campbell Haynes, Child Support and the Courts in the Year 2000, 17 Am. J. Trial Advoc. 693, 707 (1994) (citing statistics for 1992 from federal Office of Child Support Enforcement). This statistic may overstate the actual number of CSRA violators by including noncustodial parents who are involuntarily indigent (and thus not "willfully" in arrears).

to federalization reflects not so much a weakness of the models but the limits of legislative responses to crime.[246] The question is not simply whether Congress has written a statute consistent with the principles of federalization, but, perhaps more importantly, whether prosecutors have implemented the statute in a way that is consistent with federalization principles.

Before turning to the implementation of the CSRA, I briefly want to consider the judiciary's response to the statute.

### *C. The Judiciary's Response: Constitutional Challenges to the CSRA*

In the wake of *Lopez*, the CSRA, like dozens of other federal criminal laws, was challenged as beyond Congress's Commerce Clause authority.[247] Unlike most other federal criminal laws, however, the CSRA was declared unconstitutional (at least temporarily). In July 1995, just three months after *Lopez* was decided, a federal district judge in Arizona declared that the CSRA unconstitutionally offended principles of federalism and comity.[248] Two months later, district courts in Pennsylvania and Texas also found that the CSRA exceeded Congress's Commerce Clause authority.[249]

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246 See supra text accompanying notes 157-64.

247 See supra note 141.

248 See United States v. Mussari, 894 F. Supp. 1360, 1363-65, 1367 (D. Ariz.), reconsideration denied, 912 F. Supp. 1248 (D. Ariz. 1995), rev'd, 95 F.3d 787 (9th Cir. 1996), cert. denied, 520 U.S. 1203 (1997); United States v. Schroeder, 894 F. Supp. 360, 364-65, 367-68 (D. Ariz.), reconsideration denied, 912 F. Supp. 1240 (D. Ariz. 1995), rev'd, 95 F.3d 787 (9th Cir. 1996), cert. denied, 520 U.S. 1203 (1997). Those rulings prompted a sharp outcry from the President and a swift challenge from the Department of Justice. See Michael J. Sniffen, President Defends "Deadbeat Parent" Law, Tries to Stave Off Constitutional Challenge in Court, S.F. Examiner, Aug. 29, 1995, at A10, available in 1995 WL 4943298; Brent Whiting, U.S. Fights to Enforce Child Support, Judge Is Asked to Revisit Ruling Neutering Law, Ariz. Republic, Aug. 29, 1995, at B2.

249 See United States v. Parker, 911 F. Supp. 830, 834-35, 837-39 (E.D. Pa. 1995), rev'd, 108 F.3d 28 (3d Cir.), cert. denied, 522 U.S. 837 (1997); United States v. Bailey, 902 F. Supp. 727, 730 (W.D. Tex. 1995), rev'd, 115 F.3d 1222 (5th Cir. 1997), cert. denied, 522 U.S. 1082 (1998). The CSRA is one of the few criminal statutes to be struck down (albeit temporarily) on *Lopez* grounds. The other criminal statutes to be declared unconstitutional on *Lopez* grounds are the federal carjacking statute, see United States v. Mallory, 884 F. Supp. 496, 499 (S.D. Fla. 1995), and the Freedom of Access to Clinic Entrances Act (FACE), see Hoffman v. Hunt, 923 F. Supp. 791, 807 (W.D.N.C. 1996). Like the CSRA, neither of these statutes appears to be in serious constitutional jeopardy. See United States v. McHenry, 97 F.3d 125, 126 (6th Cir. 1996) (upholding carjacking statute); United States v. Bishop, 66 F.3d 569, 576 (3d Cir. 1995) (same); United States v. Wilson, 73 F.3d 675, 677 (7th Cir. 1995) (finding FACE constitutional); Cheffer v. Reno, 55 F.3d 1517, 1519 (11th Cir. 1995) (same). In addition, other statutes, while not struck down, have had their interstate jurisdictional elements construed more narrowly in light of *Lopez*. See, e.g., Jones v. United States, 120 S. Ct. 1904, 1908 (2000) (holding that "an owner-occupied resi-

By mid-1997, each of the district court opinions invalidating the CSRA had been reversed. In all, nine courts of appeals have thus far upheld the CSRA as a valid exercise of Congress's commerce power, and the Supreme Court has so far refused to review those rulings.[250] The reason for this unanimity of opinion is simple: The CSRA is within Congress's Commerce Clause power because the statute regulates the payment (or nonpayment) of money *across state lines*. In other words, the CSRA contains the explicit interstate jurisdictional nexus that the Gun-Free School Zones Act lacked.[251]

Although the district court opinions that struck down the CSRA have all been reversed, those opinions, like *Lopez* itself, provide a window into the frustration that many federal judges feel when confronted with a seemingly endless array of new federal crimes. For example, in *United States v. Bailey*,[252] the district court argued that the nonpayment of child support was traditionally a state matter and should remain so: "The CSRA . . . sounds, walks, and looks like a domestic relations statute and aims the central government down a slippery slope where it should not be."[253] With an unconvincing disclaimer, the court also implicitly criticized the CSRA as a waste of federal resources:

> Nor is this a public policy debate about using limited federal law enforcement and judicial resources as a debt collection agency; for as a practical matter defendants convicted under 18 U.S.C. § 228 would more often than not be put on probation and ordered to make child support payments. One might reasonably argue, however, those limited resources can be used in better ways.[254]

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dence not used for any commercial purpose does not qualify as property 'used in' commerce" for purposes of federal arson statute).

250 See United States v. Black, 125 F.3d 454 (7th Cir. 1997), cert. denied, 523 U.S. 1033 (1998); United States v. Williams, 121 F.3d 615 (11th Cir. 1997), cert. denied, 523 U.S. 1065 (1998); United States v. Crawford, 115 F.3d 1397 (8th Cir. 1997); United States v. Bailey, 115 F.3d 1222 (5th Cir. 1997), cert. denied, 522 U.S. 1082 (1998); United States v. Johnson, 114 F.3d 476 (4th Cir. 1997); United States v. Parker, 108 F.3d 28 (3d Cir. 1997); United States v. Bongiorno, 106 F.3d 1027, reh'g denied, 110 F.3d 132 (1st Cir. 1997); United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996); United States v. Mussari, 95 F.3d 787 (9th Cir. 1996); United States v. Sage, 92 F.3d 101 (2d Cir. 1996).

251 See *Sage*, 92 F.3d at 106-07.

252 902 F. Supp. 727, 730 (W.D. Tex. 1995), rev'd, 115 F.3d 1222 (5th Cir. 1997), cert. denied, 522 U.S. 1082 (1998).

253 Id. at 730; see also id. at 729-30 (citing numerous remedies provided to custodial parents under Texas law).

254 Id. at 728. Not only did the district judge apparently object to Congress's allocation of federal resources to criminal child support enforcement, but the overall tone of the opinion in *Bailey* also betrayed the court's disdain for Congress's judgment that willful nonpayment of child support is a crime that deserves punishment. The district court's opinion begins with the following paragraph:

The other district court opinions striking down the CSRA expressed similar reservations about federalization.[255]

In the end, courts can do little to control such federalization, whatever judges may think of the wisdom of new criminal laws like the CSRA. The question thus arises whether prosecutors are up to the task.

### *D. The Department of Justice's Response: Implementation of the CSRA*

#### *1. CSRA Prosecutions and the Attorney General's Guidelines*

Because the CSRA forced federal prosecutors and investigators to confront the unfamiliar world of domestic relations, and because potential violators of the statute numbered in the hundreds of thousands,[256] Attorney General Janet Reno issued guidelines to the United States Attorneys responsible for enforcing the statute.[257] The

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> Once upon a time, Keith and Lisa Bailey were, or at least thought they were, in love. The courtship culminated in marriage and the birth of a child. Alas, the ardor cooled and divorce ensued, with custody of the child being placed with Ms. Bailey. Believing custodial parents like Ms. Bailey needed additional means to collect unpaid child support payments, in 1992 Congress passed 18 U.S.C. § 228 . . . . Though the record reflects Ms. Bailey availed herself successfully of at least one of numerous other state remedies for collecting child support, she nevertheless also sought criminal punishment of Mr. Bailey pursuant to 18 U.S.C. § 228. The Court assumes the Baileys' once tender feelings for one another are now more akin to ashes than embers.

Id. at 727-28. It is hard to imagine the same language being used to describe a crime where the victim was not typically a woman: "Even though all the money was eventually recovered, the bank nevertheless insisted that the bank robbers be criminally prosecuted." Cf. Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682, 1698 (1991) (arguing that "disowning of family law" by federal courts is result of gender bias and "nineteenth-century images").

255 For instance, one district judge opined:

> Those who make our laws sometimes succumb in desperation and even frustration to the socially appealing temptation to exact swift and remedial justice through what may be the only available means, the federal criminal laws. . . . In its effort to solve the problem being experienced by many states in collecting unpaid child support, Congress, though well-intentioned, exceeded its authority and invaded the realm of sovereignty carefully reserved to the states.

United States v. Parker, 911 F. Supp. 830, 843 (E.D. Pa. 1995), rev'd, 108 F.3d 28 (3d Cir. 1997); accord United States v. Mussari, 894 F. Supp. 1360, 1364 (D. Ariz. 1995) ("[T]he fact that [the CSRA] is a criminal statute aimed at an area of activity which has already been addressed by the States supports this court's finding that the CSRA is not substantially related to interstate commerce, and thus is unconstitutional."), rev'd, 95 F.3d 787 (9th Cir. 1996).

256 See supra note 245.

257 See Office of the Attorney General, Prosecutive Guidelines and Procedures for the Child Support Recovery Act of 1992 (rev. Feb. 25, 1997) [hereinafter Attorney General's CSRA Guidelines] <http://www.usdoj.gov/ag/readingroom/childspt2.htm>. First issued in July 1993, the CSRA guidelines were reissued (with nonpertinent revisions) in February

stated purpose of the Attorney General's CSRA guidelines, which were developed after consultation with the FBI,[258] is to focus prosecutorial resources on the most "egregious cases which states are unable to handle because of the interstate nature of the case."[259] As a general principle, the guidelines recommend that cases be accepted for prosecution only after "all *reasonable* available remedies have been exhausted."[260] Once it is determined that further collection efforts will be futile, a case becomes eligible for prosecution. Among such cases, priority is given to those that meet one or more of the following "Prosecutive Screening Criteria":

> [1] a pattern of flight from state to state to avoid payment *or* flight after service of process for contempt or contempt hearings; or
>
> [2] a pattern of deception to avoid payment, such as changing employment, concealing assets or location, or using false names and/or social security numbers; or
>
> [3] failure to make support payments after being held in contempt; or
>
> [4] there exist particular circumstances which dictate the need for immediate federal intervention, such as where the custodial parent and/or child have special medical needs which are going unmet, where the custodial parent and/or child is handicapped, or where the custodial family is in danger of eviction and homelessness; or
>
> [5] when the failure to make child support payments has a nexus to other potential federal charges, such as bankruptcy fraud (i.e., concealing assets), bank fraud (i.e., false statements to a bank), federal income tax charges (i.e., false statement or tax evasion) or other related criminal conduct.[261]

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1997. Until June 1998, the guidelines were publicly available in the Criminal Resource Manual. See U.S. Dep't of Justice, Criminal Resource Manual § 1574 (1998) (on file with the *New York University Law Review*) (current version available at <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam>). Although no longer part of the Criminal Resource Manual, the guidelines remain available on the Department's web site.

258 See Regs Due Soon on "Deadbeat" Dads, supra note 19. Interestingly, even Congress weighed in on the guidelines. Senator Richard Shelby and Representative Henry Hyde, two of the CSRA's sponsors, wrote a detailed letter to President Clinton, urging that the guidelines not impose undue barriers to CSRA prosecutions. See id.

259 See Attorney General's CSRA Guidelines, supra note 257.

260 Id. at 3. Available remedies specifically noted in the guidelines include (1) state long-arm actions to enforce support, (2) URESA actions, (3) direct civil actions in the obligor's home state, (4) interstate wage withholding, (5) tax refund interception, (6) IRS full collection actions, (7) state criminal prosecutions, (8) federal prosecutions for unlawful flight to avoid prosecution, (9) denial, suspension, and/or revocation of licenses and passports, (10) voiding of fraudulent transfers to third parties, (11) personal and real property liens, and (12) reporting of arrearages to credit bureaus. See id. at app. 4.

261 Id. The guidelines also mention that priority should be given to cases where the children are still minors. See id.

The guidelines also provide that the primary source of referrals for CSRA prosecutions should be the state agencies responsible for collecting child support.[262]

Enforcement of the CSRA started slowly. By mid-1994—one year after the CSRA guidelines were issued and twenty-one months after the statute was passed—federal prosecutors had brought only a handful of prosecutions.[263] That record led the Senate, in July 1994, formally to urge the Attorney General to step up enforcement of the CSRA.[264] The Department of Justice responded in December 1994 by charging twenty-eight deadbeat parents in thirteen different states. At that time, the Attorney General announced that the Department had issued prosecution guidelines to assist federal prosecutors in identifying "the most egregious child support cases in a uniform and fair manner," that each United States Attorney's Office had designated a child support enforcement coordinator, and that the Department had launched a comprehensive training program on criminal child support enforcement for federal prosecutors, federal investigators, and state social service officials.[265]

Since then, federal prosecutions have gradually increased. Federal prosecutors brought 82 CSRA cases in fiscal year 1995, 140 in 1996, 201 in 1997, and 249 in 1998.[266] The Department's announced

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262 See id. Under Title IV-D of the Social Services Amendment of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-58 (codified as amended in 42 U.S.C. §§ 651-660 (1994 & Supp. IV 1998)), each state is required to create an agency (known as a IV-D agency) to pursue child support on behalf of custodial parents who receive public assistance, as well as other custodial parents who request the state's assistance. The Department of Justice has taken other steps to coordinate its child support enforcement efforts with state agencies and state prosecutors. In 1996, in response to a directive from President Clinton, the Attorney General convened the Criminal Child Support Enforcement Task Force. Made up of federal, state, and local prosecutors, as well as representatives of the Department of Health and Human Services and various state agencies responsible for child support enforcement, the task force was charged with considering (1) measures to improve referrals of appropriate cases for federal, state, or local criminal enforcement, (2) the adequacy of all applicable federal and state laws, (3) the availability and appropriate allocation of resources, and (4) ways to coordinate federal, state, and local efforts to make enforcement most effective. See Attorney General of the United States, Criminal Child Support Enforcement: The Attorney General's Progress Report to the President 1 (1996) (unpublished document, on file with the *New York University Law Review*).

263 See Jennifer Dixon, Lawmakers Rap Justice for Not Finding Child-Support Cheats, Associated Press, July 21, 1994, available in 1994 WL 10143966 (quoting Sen. Richard Shelby).

264 See 140 Cong. Rec. 17,539 (1994); Dixon, supra note 263 (discussing Senate amendment to DOJ appropriations bill, passed by vote of 100-0, criticizing Department for failing to enforce CSRA aggressively).

265 See U.S. Dep't of Justice, Press Release, Attorney General Reno Announces Plan to Crack Down on Dead-Beat Parents Who Fail to Pay Child Support (Dec. 22, 1994) <http://www.usdoj.gov/opa/pr/Pre_96/December94/720.txt.html>.

266 See 1997 Att'y Gen. Ann. Rep. 41; 1998 Att'y Gen. Ann. Rep. II-12.

goal for CSRA prosecutions is between two and three hundred cases each year.[267]

### 2. *CSRA Prosecutions and the Principles of Federalization*

The CSRA provides a good example of how federalization can work when prosecutors are effectively guided in the exercise of their discretion. On its face, the CSRA is broad enough to raise serious political, institutional, and fairness concerns. Yet, the CSRA has been implemented in a way that offends none of the concerns raised by federalization.

The political question is whether the CSRA has offended federalism by usurping state authorities. The answer is no, largely because the Attorney General's CSRA guidelines direct that a federal prosecution be brought only after all available state remedies have been exhausted.[268] In addition, the CSRA guidelines direct that the primary source for CSRA referrals should be the state agency responsible for child support enforcement.[269]

The institutional question is whether the CSRA has overwhelmed the federal courts, and here too the answer is no. Although there are an estimated half-million violators of the statute,[270] CSRA prosecutions have averaged fewer than one for every district per year. Stated another way, in the first six years of the law's existence, federal prosecutors brought fewer than 500 cases—fewer than one per federal district court judge.[271]

The fairness question is whether the CSRA has offended principles of equal protection by arbitrarily singling out some offenders for harsher treatment. The answer again is no, because the Attorney General's CSRA guidelines ensure that CSRA prosecutions are brought against only the most egregious offenders, and because pun-

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267 See Landers, supra note 167, at 69 (comments of then-Deputy Assistant Attorney General in Office of Policy Development). For Jeffrey Nichols, the CSRA brought an end to his ability to evade his child support obligation. In August 1995, Nichols was charged in federal court with violating the CSRA. See United States v. Nichols, 928 F. Supp. 302, 304 (S.D.N.Y. 1996), aff'd mem., 113 F.3d 1230 (2d Cir. 1997). Nichols was arrested in Vermont by the FBI and brought back to New York, where he promptly was jailed by the state court judge on the still outstanding 1990 contempt warrant. After spending four months in jail, Nichols agreed to a comprehensive settlement with his ex-wife. See id. at 304-05. In 1996, Nichols pleaded guilty to the federal charges against him. He was sentenced to six months in jail and ordered to pay over $600,000 in restitution. See Michele Calcedo, Deadbeat Gets Max, Newsday, Nov. 7, 1996, at A71.

268 See supra text accompanying notes 259-62.

269 See supra note 262.

270 See supra note 245 and accompanying text.

271 See supra text accompanying notes 266-67.

ishment for the federal offense is generally not more severe than punishment for the comparable state offense.[272]

I have attributed much of the credit for the successful implementation of the CSRA to the prosecutive screening criteria in the Attorney General's guidelines, which ensure that only the most egregious offenders are prosecuted in federal court. Of course, the guidelines can be credited for the way in which the CSRA has been implemented only to the extent that federal prosecutors are actually aware of and follow the guidelines. Although there may be some doubt about whether federal prosecutors generally pay attention to guidelines issued by "Main Justice,"[273] there is good reason to believe that the CSRA guidelines have been far more influential than most guidelines are. For one, they have received unusual attention in the press,[274] in Congress,[275] and in the academic literature.[276] In addition, the guide-

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272 For most CSRA defendants, the maximum penalty is six months' imprisonment. Even for those defendants convicted of a felony violation (and therefore sentenced under the federal sentencing guidelines), the required sentence is likely to be modest and jail time is unlikely to be mandatory.

However, defendants whose arrearages are unusually high could face sentences significantly higher than those available in state criminal prosecutions. For example, if Jeffrey Nichols had been sentenced under the Sentencing Guidelines, he would likely have received a sentence of at least 18 months' imprisonment. See U.S. Sentencing Guidelines Manual § 2F1.1 (1998) (base offense level of 18 for offense involving "more than minimal planning" and "loss" exceeding $500,000); id. § 3E1.1 (three-level decrease for "acceptance of responsibility"); id., ch. 5, pt. A (sentencing range of 18-24 months for defendant with offense level of 15 and no criminal history). By contrast, the maximum sentence available for the comparable offense in New York state is one year in jail. See N.Y. Penal Law §§ 70, 260.05 (Consol. 1999). Although this sentencing differential is not particularly significant, a CSRA defendant with millions of dollars of arrearages could face a federal guidelines sentence of several years. See, e.g., "Deadbeat King" Faces $4-Million Support Judgment, Chi. Trib., Feb. 23, 1997, at 18. Thus, the creation of new felony CSRA offenses in 1998, and the corresponding application of the federal sentencing guidelines to felony offenders, could lead to the kind of "structural inequality" that federalization's critics rightly decry. See Beale, New Principles, supra note 11, at 996-1002. This problem could be solved by amending the Sentencing Guidelines to cap the offense level for a CSRA violation. In any event, the problem is likely to arise in very few cases (for example, the three individuals on the Department of Justice's list of "Most Wanted Deadbeat Parents" in June 1999 owed amounts ranging from a low of $56,000 to a high of only $123,000). See U.S. Dep't of Justice, Criminal Division, Child Support Recovery Act Most Wanted Deadbeat Parents (visited June 15, 1999) <http://www.usdoj.gov/criminal/ceos/csra.html>.

273 See Eisenstein, supra note 172, at 67 (suggesting that for some U.S. Attorneys, ignorance of United States Attorneys' Manual is source of pride).

274 See, e.g., Regs Due Soon on "Deadbeat" Dads, supra note 19; Reno Issues Child Support Guidelines, DOJ Alert, Aug. 1993, available in Westlaw, DOJALT database; Mark Rollenhagen, 1992 Support Law Gets Slow Response, The Plain Dealer (Cleveland), July 22, 1994, at 1B; U.S. Dep't of Justice, Press Release, supra note 265; Mary Jo White, Collecting Child Support Is a Federal Matter, N.Y. Times, Aug. 14, 1995, at A15.

275 See supra note 258.

276 See, e.g., Litman & Greenberg, supra note 96, at 971 n.129; Ronald S. Kornreich, Note, The Constitutionality of Punishing Deadbeat Parents: The Child Support Recovery

lines were distributed widely to the state child support agencies that refer cases to federal prosecutors.[277] Finally, while this evidence is admittedly anecdotal, as someone who both participated in the Department of Justice's training program and prosecuted CSRA cases, I can attest that the guidelines played a central role in the training program and were consulted regularly by prosecutors making charging decisions.[278]

Not only are prosecutors aware of and following the guidelines, but the guidelines also counteract the incentives prosecutors have to act in ways that offend federalization concerns. The first danger is that the rush to the limelight[279] will encourage needless CSRA prosecutions. Child support prosecutions often attract significant media attention, particularly when the amount owed is large or the defendant is famous,[280] but the amount of the loss or the notoriety of the defendant does not, by itself, warrant federal intervention. The Attorney General's guidelines make clear that the "egregious" cases for federal purposes are those in which the deadbeat actively has frustrated state enforcement efforts, and those are the cases to which the guidelines direct federal prosecutors.[281]

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Act of 1992 After *United States v. Lopez*, 64 Fordham L. Rev. 1089, 1098-99 (1995); Robyn Shields, Comment, Can the Feds Put Deadbeat Parents in Jail?: A Look at the Constitutionality of the Child Support Recovery Act, 60 Alb. L. Rev. 1409, 1420-22 (1997).

277 See, e.g., Letter from Robert C. Harris, Acting Deputy Director, Office of Child Support Enforcement, Department of Health and Human Services, to "All State IV-D Directors" (Aug. 25, 1993) <http://www.acf.dhhs.gov/programs/cse/pol/dcl9339.htm> (transmitting guidelines).

278 The CSRA guidelines may well be unusual in this respect. Because federal prosecutors in the field were initially intimidated by the prospect of being dragged into domestic relations disputes, they may have been more open than usual to external guidance about how to limit the number of cases accepted for prosecution.

279 See supra notes 174-76 and accompanying text.

280 For example, Jeffrey Nichols's prosecution was featured on *60 Minutes*, see 60 Minutes: Deadbeat Dad (CBS News television broadcast, Oct. 29, 1995), transcript available in LEXIS, News Library, Script file; on the cover of *People* magazine, see Schneider et al., supra note 206; and in newspapers across the country and around the world, see, e.g., Deadbeat Dad Sent to Jail, Toronto Sun, June 22, 1996, at 4, available in 1996 WL 17018519; Beth J. Harpaz, Top Deadbeat Dad Owes Over Half-Million in Support, Seattle Times, Aug. 14, 1995, at A8; George James, Wife the Hero as "Deadbeat" Dad Goes Down, The Guardian (Manchester), Sept. 12, 1995, at 13; James Langton, Nuclear Family Blows Out Dad, Sunday Telegraph (London), Mar. 24, 1996, at 5, available in 1996 WL 3937375. For press accounts of other CSRA cases, see supra note 208 and infra note 281.

281 Of course, when selecting among the "egregious" cases that fit within the guidelines, prosecutors likely will—and probably should—prefer those cases that are likely to attract public attention. General deterrence, after all, depends upon public dissemination. This quest to maximize deterrence through high-profile prosecutions presumably accounts for federal prosecutors' apparent penchant for charging professional football players with CSRA violations. See, e.g., Karen Abbott, Jury Indicts Former Bronco Thornton, Rocky Mtn. News (Denver), Aug, 18, 1999, at 20A, available in 1999 WL 6658008 (regarding former Denver Bronco and current professional wrestler Randy Thornton); "Dr. Death"

The second danger is that U.S. Attorneys will come to see CSRA prosecutions as an easy way to increase the total number of prosecutions brought by their office;[282] although some CSRA cases involve difficult-to-find defendants, and others involve complicated financial investigations, many CSRA cases are easy to bring and easy to resolve.[283] The guidelines, however, by limiting CSRA prosecutions to those cases in which state enforcement efforts have been exhausted, greatly restrict the number of such "easy" cases, and thus counteract much of the temptation prosecutors might feel to use CSRA prosecutions to pad their statistics.[284]

The third danger is that federal prosecutors will be inundated with referrals and will feel pressure (from the public, the victim, or the referring agency) to bring charges even if federal involvement is not necessary.[285] The guidelines ameliorate this risk by providing federal law enforcement agencies and state child support agencies with detailed advance notice of the criteria prosecutors will use to screen CSRA cases. In effect, the guidelines delegate the initial responsibility for screening to the state child support agencies that make referrals for criminal prosecutions, and this delegation is fundamentally consistent with federalism.[286]

In short, the CSRA has worked in practice because the Attorney General's federalization-sensitive guidelines have ensured that a limited number of cases have been brought, that those cases have been brought only after state enforcement mechanisms have failed, and that defendants selected for federal prosecutions have been the most egregious offenders.

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Answers Charges in Federal Child Support Case, Baton Rouge Advoc. (La.), Sept. 17, 1999, at 4B, available in 1999 WL 6116202 (regarding former University of Oklahoma football player and current professional wrestler Steve Williams); Former Star Sims Sentenced to Jail, Baltimore Sun, Jan. 14, 1998, at 6D (regarding Heisman Trophy winner and former Detroit Lion Billy Sims); Keith Morelli, Former Bucs Player Charged with Not Paying Child Support, Tampa Trib. (Fla.), Nov. 25, 1998, at 3, available in 1998 WL 13784820 (regarding former Tampa Bay Buccaneer Hugh Green); Richard Willing, Feds Get Tough on Deadbeat Dads, Detroit News, Dec. 23, 1994, at 6A (first wave of CSRA prosecutions included Minnesota Viking Roosevelt Nix).

282 See supra note 177 and accompanying text.

283 Early CSRA cases were also complicated by defendants' *Lopez*-based Commerce Clause challenges. Those constitutional issues are now largely settled. See supra note 250.

284 In other words, the cases that are "easy" to investigate and charge are those cases involving deadbeats whose bodies and assets are easy to find. Those are also the cases in which state enforcement mechanisms are more likely to be effective.

285 See supra note 178 and accompanying text.

286 See supra note 262 and accompanying text.

## IV

## A PROPOSAL FOR FEDERALIZATION GUIDELINES

The case for publicly articulated prosecution guidelines was made by Norman Abrams almost thirty years ago and by James Vorenberg almost twenty years ago.[287] Guidelines promote consistent decision-making and allow for some centralized control of discretion. Publicly available guidelines facilitate a dialogue between prosecutors and those affected by prosecutorial charging decisions, including law enforcement agencies, judges, defense counsel, putative defendants, and the public. These general benefits apply with particular force to federalization concerns.[288]

The Department of Justice claims to be sensitive to concerns about overfederalization.[289] Given that the most effective check on overfederalization is the responsible exercise of prosecutorial discretion, the Department must ensure that charging decisions made by prosecutors in the field are consistent with the principles of federalization espoused by the Department. The most effective way to ensure that general federalization principles are translated into specific action by field prosecutors is to articulate federalization-sensitive prosecution guidelines.

Prosecution guidelines come in two forms: general guidelines like the Principles of Federal Prosecution, and statute-specific guidelines like the Attorney General's guidelines for CSRA prosecutions. To truly implement its proclaimed federalization policy, DOJ needs both general and specific federalization guidelines.

As a first step, the Department should amend the Principles of Federal Prosecution specifically to include the Department's stated position on federalization. In its current form, the Principles of Federal Prosecution direct prosecutors to consider whether a defendant is "subject to effective prosecution in another jurisdiction" by looking to such factors as (1) the "strength of the other jurisdiction's interest in

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287 See Abrams, supra note 183; Vorenberg, supra note 165, at 1562-65. For other calls for prosecution guidelines, see Davis, supra note 165, at 225 (proposing that prosecutors "be required to make and to announce rules that will guide their choices, stating as far as practicable what will and what will not be prosecuted, and [that] they should be required otherwise to structure their discretion"); see also Schwartz, supra note 64, at 77 (arguing, in 1948, that "[t]he Attorney General can do much to allay the suspicion which inevitably clouds areas of large executive discretion, by articulating in a public and formal fashion the criteria which guide him in exercising this discretion"); David A. Sklansky, Starr, *Singleton*, and the Prosecutor's Role, 26 Fordham Urb. L.J. 509, 536-37 (1999) (advocating formal prosecutorial policies).

288 For calls for prosecution guidelines relating specifically to federalization concerns, see Long Range Plan, supra note 150, at 87-88; Beale, New Principles, supra note 11, at 1017; Clymer, supra note 13, at 717; Little, supra note 8, at 1081-83.

289 See supra note 167.

prosecution," (2) the "other jurisdiction's ability and willingness to prosecute effectively," and (3) the "probable sentence or other consequences if the person is convicted in the other jurisdiction."[290] If the Department expects its prosecutors in the field to take federalization concerns seriously, its policy should be stated more affirmatively and forcefully. For example:

> Federal prosecution is only appropriate (1) if no other jurisdiction has an interest in the prosecution that outweighs the federal interest in the prosecution; or (2) if the other jurisdiction with an interest in the prosecution does not have the ability or the willingness to bring the prosecution effectively.

This proposed language is fully consistent with the Department of Justice's federalization policy and would change the Principles of Federal Prosecution more in tone than in substance.[291]

The second step—and the real challenge—is to convert these general principles into detailed, statute-specific guidelines. The Attorney General's guidelines for CSRA prosecutions ably translate the general federalization principles into specific screening criteria to ensure that a federal prosecution is brought only when necessary to compensate for inadequacies in state law enforcement.[292] Many of these screening criteria would be appropriate as applied to a host of other statutes. For example, federal prosecution is generally appropriate when the complex nature of a crime or the evidence exceeds the expertise or ability of state law enforcement.[293] Similarly, federal prose-

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290 Principles of Federal Prosecution, supra note 182, § 9-27.240.

291 For example, in discussing the "strength of the other jurisdiction's interest in [the] prosecution," the commentary to the Principles states: "[W]hen it appears that the Federal interest in prosecution is less substantial than the interest of state or local authorities, consideration should be given to referring the case to those authorities rather than commencing or recommending a Federal prosecution." Principles of Federal Prosecution, supra note 182, § 9-27.240(B)(1).

292 The CSRA is not the only federal statute for which the Department of Justice has articulated federalization-sensitive prosecution guidelines. For example, the chapter of the United States Attorneys' Manual relating to Dyer Act prosecutions ("Motor Vehicle and Aircraft Theft") provides that investigations of organized car-theft rings should be conducted in coordination and cooperation with state and local authorities and that federal prosecution should be commenced only if the state or local authorities are "unable to prosecute the jointly investigated cases." United States Attorneys' Manual, supra note 190, § 9-61.111. For individual motor vehicle theft cases, the Manual states that federal prosecution may be considered only in exceptional circumstances, lists specific examples of exceptional circumstances, and lists specific types of cases in which federal prosecution is never appropriate. See id.

293 "Ability" here does not refer simply to a lack of resources, which could be remedied through allocations (such as joint investigative task forces) instead of federal prosecution. Rather, federal prosecution is appropriate when the federal government can "make a qualitative difference . . . that could not be produced by the state's dedicating a similar amount of resources to the problem." Gorelick & Litman, supra note 151, at 972.

cution is also frequently appropriate when the harm from a crime (say, a fraud scheme) is spread among multiple states, leaving no particular state with sufficient incentive to prosecute the offenders.[294] Or, in cases in which the harm is centered in one state, federal prosecution might still be appropriate if the perpetrator (and the evidence) is located in another state.[295]

To be most effective, the guidelines must strike a balance between centralized uniformity and localized flexibility. Drafted ex ante by Washington bureaucrats, the guidelines should be attuned more to nationwide concerns about federalization policy and less concerned with local political pressures and individual political ambitions.[296] At the same time, the guidelines must leave room for individual United States Attorney's Offices to craft their own guidelines, consistent with the Department's screening criteria, to respond to local problems. The systematic creation (and publication) of localized federalization guidelines would bring the added benefits of forcing line assistants (or intake supervisors) to internalize federalization principles and of encouraging systematic cooperation with local authorities.[297]

As the Department's experience with the CSRA demonstrates, specific federalization guidelines can ameliorate the political, institutional, and fairness problems inherent in federalization. A comprehensive set of federalization guidelines for all federal statutes would bring with it additional benefits. First, translating the vague federalization principles espoused by the Department[298] and reflected in the Principles of Federal Prosecution[299] into specific prosecutive screening criteria would force Department-wide consideration of federalization issues, identification of law enforcement priorities, and coordination

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294 Cf. Posner, supra note 107, at 697 ("Much of federal criminal law . . . is explicable as a response to the problem of interstate externalities.").

295 The CSRA is one example. Here, the state in which the harm is located (i.e., where the custodial parent and child live) may have sufficient incentive to prosecute the crime, but not sufficient ability to gather evidence and to investigate a defendant located in a remote state. By the same token, the state in which the evidence is located (i.e., where the deadbeat parent has moved) may not have sufficient incentive to bring a prosecution when that state has suffered no harm (particularly if the deadbeat parent is an otherwise productive tax-paying citizen).

296 See Kahan, supra note 173, at 497 (arguing that "[d]istant and largely invisible bureaucrats within the Justice Department" lack incentives that individual U.S. Attorneys have to pander to local interests and are more likely to internalize national costs of policy decisions).

297 Many United States Attorney's Offices already have such guidelines (either formally or informally), but they are rarely publicized. See Beale, New Principles, supra note 11, at 1000; Clymer, supra note 13, at 705 n.274 (citing anecdotal reports of individual U.S. Attorney's Office guidelines).

298 See supra text accompanying notes 154-56.

299 See supra note 182.

with state and local authorities. The attendant self-conscious reflection would be a benefit in itself.[300]

Second, specific federalization-sensitive screening criteria would put all federal and state law enforcement agencies on notice as to which cases should be presented for prosecution and, more importantly, which cases should be investigated. For many, if not most, criminal cases that are brought in federal court, no federal prosecutor was involved in the decision to initiate the investigation. The decision to investigate is most often made by the law enforcement agency conducting the investigation. Of course, simply because an investigation is conducted by a federal agency, the ensuing criminal charges need not necessarily be brought in federal court. Nevertheless, given the close working relationships between federal prosecutors and federal law enforcement agencies, the investigating agents expect that their cases will be charged in federal court and federal prosecutors feel some pressure to meet that expectation.[301] Thus, it is particularly important that federal law enforcement agencies receive detailed guidance—before commencing an investigation—about which cases federal prosecutors feel should be brought in federal court.

Third, written and publicized guidelines would create a framework for discussions among the Department of Justice, individual United States Attorneys, state and local authorities, the judiciary, and defense attorneys both about general charging policies and about individual charging decisions.[302]

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300 See Jones et al., supra note 164, at 675 (comments of David A. Sklansky) (noting that one main advantage of prosecution guidelines is that "they can spur self-consciousness in the people who develop them"). Administratively, the creation of statute-specific federalization guidelines would not be an extraordinary undertaking. For most statutes, all that would be required is the addition of one section to the existing chapter in the United States Attorneys' Manual spelling out prosecutive screening criteria. In many cases, such guidelines exist informally, either in the Department of Justice or in individual United States Attorney's Offices. Obviously, creating guidelines from scratch would require resources, but those resources would be well spent.

301 In many respects, the relationship between federal law enforcement agencies and federal prosecutors is like the relationship between a client and an attorney. Federal prosecutors depend upon the investigating agencies to bring them cases—both the quantity of cases that will bring increasing allocation of resources, see supra note 177, and the quality of cases that will bring increasing attention to the particular prosecutor's office, see supra note 176. As with attorneys in private practice, those clients with repeat business are particularly valuable. So federal prosecutors have an interest in preserving their relationships with federal law enforcement agencies so that those agencies do not start bringing their cases elsewhere. The resulting pressure that federal prosecutors feel to accept cases brought to them by federal agencies makes it particularly important that the agencies receive guidance before commencing an investigation.

302 See Jones et al., supra note 164, at 665 (comments of David A. Sklansky) ("One of the many advantages to prosecutors being more self-conscious about exercising their authority is that it can facilitate a dialogue with people outside of the Department of Justice

Fourth, and perhaps most significantly, the guidelines—and internal Department of Justice review of compliance—would create incentives for the various United States Attorney's Offices to be faithful to federalization principles.[303] To the extent that the Department of Justice allocates resources based upon workload, individual United States Attorney's Offices see themselves as competing with each other for pieces of the Department's budgetary pie.[304] This competition can lead federal prosecutors to accept cases for prosecution simply to boost their office's statistics. Centralized review of compliance with federalization guidelines could counteract any incentives that prosecutors have to accept cases for prosecution simply for budgetary reasons.

Beyond these basic principles, federalization guidelines raise two difficult issues. First, to what extent, if at all, should sentencing advantages justify federal prosecution? And second, to what extent, if at all, should federalization guidelines create enforceable rights for defendants?

As noted above, defendants who are prosecuted in federal court often fare far worse than similarly situated defendants who are prosecuted in state court—particularly with respect to sentencing.[305] Although some of this disparity is attributable to the determinate sentencing scheme established by the federal sentencing guidelines, much of it is attributable to specific political judgments made by Congress about the appropriate punishment for particular criminal conduct.[306] Thus, it is not surprising that the Principles of Federal Prosecution direct federal prosecutors who are considering whether a

about in what instances the federal interest should override the state's."); Sklansky, supra note 287, at 536 (noting that "[t]he role that formal policies can play in facilitating dialog with scholars is one more reason for prosecutors to write such policies").

303 The Executive Office of United States Attorneys, a division of DOJ in Washington, coordinates one-week "evaluations" of each United States Attorney's Office every few years. The purpose of the evaluations, which are conducted by a team of senior prosecutors from other districts, is to enable the Department to evaluate the performance of the Offices of the United States Attorneys, to make appropriate reports, and to take corrective actions if necessary. See United States Attorneys' Manual, supra note 190, § 3-3.000; 28 C.F.R. § 0.22(a)(1) (1999). Significantly, these evaluations serve to ensure that field offices are complying with Department policies and procedures.

304 See supra note 177.

305 See supra notes 97-110 and accompanying text.

306 For example, some of the widest disparities between federal and state sentences exist with respect to offenses involving crack cocaine. See supra notes 99-101 and accompanying text. The harsh federal sentences for crack offenses, though ultimately set by the United States Sentencing Commission's guidelines, are actually driven by the mandatory minimum penalties established by Congress. See 21 U.S.C. § 841(b)(1) (1994). Indeed, Congress, keenly attuned to the politics of this issue, has rebuffed efforts by the Sentencing Commission to ease the harshness of federal crack sentences. See, e.g., Harvey Berkman, Congress Keeps Tough Crack Penalty, Nat'l L.J., Nov. 6, 1995, at A14.

federal interest would be served by a particular prosecution to consider "the probable sentence" that a defendant would receive in state court. The fairness problem arises when the stiffer federal sentence is the *sole* reason for federal prosecution. Of course, if *all* defendants who commit a particular offense (for example, drug dealing) are charged in federal court, the sentencing disparity disappears. But given the federal government's limited investigative, prosecutorial, and judicial resources, defendants prosecuted in federal court typically represent a fraction of the eligible offenders. The important question, then, is how some offenders (but not others) are selected for the harsher federal punishment. If the stiffer federal sentence is the sole factor, the decision is essentially unguided, and the risk that the selection will be arbitrary or, even worse, based upon impermissible factors is high.[307]

The problem solves itself, however, when prosecutorial charging decisions are made pursuant to specific federalization guidelines. Thus, while stiffer federal sentences might be a valid factor in identifying classes of offenders to consider for federal prosecution, the ultimate decision must be based upon more specific factors that logically and fairly distinguish among those defendants within a particular class who are selected for federal prosecution and those who are not. Alternatively, if the stiffer federal sentence available for a particular offense is the sole relevant factor, the entire class of offenders should be selected for federal prosecution to avoid unwarranted disparities.[308] For example, if the Department of Justice sought to implement Congress's judgment that crack possessors should be punished particularly severely, it should either identify *which* crack possessors will be prosecuted federally (based, for example, on the quantity of the drug possessed or the prior record of the offender) or seek to prosecute *all*

307 Random selection, while not necessarily illogical, should be politically unacceptable. Although randomly disparate sentences may have some deterrence utility, see Beale, New Principles, supra note 11, at 1003; Posner, supra note 107, at 230, and have been used by some federal prosecutors, see Beale, New Principles, supra note 11, at 1000 (discussing former U.S. Attorney Rudolph Giuliani's "federal day" program, in which street-level drug dealers arrested in New York City on one randomly chosen day each week were prosecuted in federal court), explicitly treating criminal punishment like a lottery offends deep-rooted notions of equality and fairness. More concretely, as Sara Sun Beale has noted, disparate treatment of like offenders is inconsistent with the fundamental premise of the federal Sentencing Guidelines: that similarly situated defendants should receive the same sentence. See id. at 1002-04.

308 See Beale, New Principles, supra note 11, at 1016 (arguing that federal criminal jurisdiction, when exercised, should be on "a class basis, rather than an ad hoc basis" to eliminate inequality).

crack possessors federally.[309] Thus, to ensure that defendants are not selected for harsher punishment arbitrarily or discriminatorily, the Principles of Federal Prosecution also should be amended to include the following provision:

> One relevant consideration in weighing the federal interest in a prosecution against another jurisdiction's interest in the prosecution is the probable sentence if the person is convicted in each jurisdiction. The availability of a more severe federal sentence, however, shall not, by itself, be a sufficient reason to commence a federal prosecution.[310]

Although this provision is inconsistent with current Department of Justice practice,[311] it actually would change Department policy very little. Once specific federalization guidelines are drafted for each federal statute, prosecutors will have a rational basis to distinguish between those defendants who are selected for federal prosecution (and the corresponding harsher federal sentence) and those defendants who are left to be prosecuted by other jurisdictions.

The second difficult question is whether defendants (or victims) ever should be entitled to sue to enforce prosecution guidelines. Under existing law, internal prosecution guidelines are not externally enforceable.[312] That, in the end, is the only workable system. If prosecution guidelines were to create enforceable rights, they simply would not be drafted at all.[313] Alternatively, if they were drafted, the guidelines would be drafted so broadly as to provide no meaningful guidance.[314]

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309 Although such a de facto preemption of state and local prosecutions obviously would be unworkable for drug prosecutions, it is practical (indeed, it is the practice) for many offenses that directly implicate distinctively federal interests (e.g., theft from the mails, assaults on federal officers, currency counterfeiting, and espionage).

310 The Judicial Conference has proposed a similar limitation. See Long Range Plan, supra note 150, at 27.

311 See, e.g., supra note 71; supra text accompanying note 189.

312 See, e.g., United States v. Paternostro, 966 F.2d 907, 912 (5th Cir. 1992) (holding that Department of Justice's internal policy on successive prosecutions (viz., *Petite* policy) does not create any substantive rights for defendants).

313 See Beale, New Principles, supra note 11, at 1017 n.143 ("Perhaps the greatest cost of judicial review [of charging decisions] would be political: the opposition to judicial review may be so substantial that it would prevent the adoption of prosecutorial guidelines in the first place."). The more substantive (but ultimately unpersuasive) objection to judicial enforcement of prosecution guidelines is the cost of the ensuing litigation. See Abrams, supra note 183, at 52.

314 Steven D. Clymer has argued that prosecution guidelines actually could save charging decisions from judicial review. See Clymer, supra note 13, at 717 (arguing that, in absence of formal basis to ensure that charging decisions are rational, equal protection requires some judicial review of charging decisions).

Although enforceable guidelines perhaps would be a more effective check on federalization, unenforceable guidelines would not be meaningless. As discussed above, the mere existence of the guidelines would force articulation and consideration of federalization issues, would provide essential guidance to law enforcement agencies, and would create incentives for individual United States Attorneys that would counter pressure to generate prosecution "statistics."[315] And the guidelines would not be entirely meaningless to defendants either. For one, guidelines would provide ammunition for defense counsel to use during internal appeals of charging decisions.[316] Moreover, the guidelines would provide some ammunition for a defendant pressing an equal protection or a selective prosecution claim. In other words, although the violation of a prosecutorial guideline would not, by itself, warrant dismissal of the charges, it could be considered evidence of improper motive or bias to support a constitutional challenge.

## CONCLUSION

If prosecutors are, as Steven Clymer has aptly described them, the "footsoldiers of federalization,"[317] then those footsoldiers need marching orders. With the judiciary unable and Congress unwilling to stem the tide of new federal statutes, prosecutors—and the responsible exercise of prosecutorial discretion—provide the best hope for controlling federalization.

The CSRA and, more importantly, the Attorney General's guidelines that govern its implementation, demonstrate that federalization can be accomplished without offending core principles of federalism, without overburdening the federal courts, and without offending basic notions of fairness and equity.

The lesson of the CSRA is that properly guided prosecutorial discretion can control federalization. That lesson should be applied to all federal statutes. More than any other participants in the federal criminal justice system, federal prosecutors have the ability—and the responsibility—to control federalization. In doing so, prosecutors can take a leading role in preserving the delicate balance between federal and state power that is a foundation of our Constitution.

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315 See supra text accompanying notes 301-04.

316 Cf. Lynch, supra note 164, at 2148 (noting that "[i]n the best prosecutorial agencies, defense attorneys have customary access to supervisory prosecutors to address the merits of charging and plea bargaining decisions").

317 Clymer, supra note 13, at 675.

## APPENDIX
## FEDERAL CASES FILED 1934-1999

| Year | Cases Filed | | Authorized Judgeships | Filings Per District Judge | |
|---|---|---|---|---|---|
| | Criminal | Civil | | Criminal | Civil |
| 1934 | 34,152 | 35,959 | 143 | 239 | 251 |
| 1935 | 35,365 | 36,082 | 147 | 241 | 245 |
| 1936 | 35,920 | 39,391 | 163 | 220 | 242 |
| 1937 | 35,475 | 32,899 | 164 | 216 | 201 |
| 1938 | 34,202 | 33,591 | 179 | 191 | 188 |
| 1939 | 34,808 | 22,810 | 179 | 194 | 127 |
| 1940 | 33,401 | 34,734 | 188 | 178 | 185 |
| 1941 | 31,823 | 38,477 | 187 | 170 | 206 |
| 1942 | 33,294 | 38,140 | 189 | 176 | 202 |
| 1943 | 36,588 | 36,789 | 189 | 194 | 195 |
| 1944 | 39,621 | 30,896 | 189 | 210 | 163 |
| 1945 | 39,429 | 53,236 | 189 | 209 | 282 |
| 1946 | 33,203 | 58,454 | 192 | 173 | 304 |
| 1947 | 34,563 | 49,606 | 191 | 181 | 260 |
| 1948 | 33,300 | 37,420 | 191 | 174 | 196 |
| 1949 | 35,686 | 44,037 | 210 | 170 | 210 |
| 1950 | 37,720 | 45,085 | 212 | 178 | 213 |
| 1951 | 39,830 | 41,938 | 212 | 188 | 198 |
| 1952 | 39,022 | 48,442 | 212 | 184 | 229 |
| 1953 | 38,504 | 53,469 | 212 | 182 | 252 |
| 1954 | 43,196 | 49,058 | 240 | 180 | 204 |
| 1955 | 37,123 | 49,056 | 238 | 156 | 206 |
| 1956 | 30,653 | 52,174 | 238 | 129 | 219 |
| 1957 | 30,078 | 54,143 | 238 | 126 | 227 |
| 1958 | 30,737 | 59,308 | 239 | 129 | 248 |
| 1959 | 30,653 | 49,586 | 242 | 127 | 205 |
| 1960 | 29,828 | 51,063 | 241 | 124 | 212 |
| 1961 | 30,268 | 51,885 | 303 | 100 | 171 |
| 1962 | 31,017 | 54,615 | 301 | 103 | 181 |
| 1963 | 31,746 | 58,028 | 301 | 105 | 193 |
| 1964 | 31,733 | 61,093 | 301 | 105 | 203 |
| 1965 | 33,334 | 62,670 | 301 | 111 | 208 |
| 1966 | 31,494 | 66,144 | 340 | 93 | 195 |
| 1967 | 32,207 | 66,197 | 337 | 96 | 196 |
| 1968 | 32,571 | 66,740 | 337 | 97 | 198 |
| 1969 | 35,413 | 82,504 | 337 | 105 | 245 |
| 1970 | 39,959 | 82,665 | 395 | 101 | 209 |
| 1971 | 43,157 | 89,318 | 394 | 110 | 227 |

| | | | | | |
|---|---|---|---|---|---|
| 1972 | 49,054 | 92,385 | 394 | 125 | 234 |
| 1973 | 42,434 | 96,056 | 394 | 108 | 244 |
| 1974 | 39,754 | 101,343 | 394 | 101 | 257 |
| 1975 | 43,282 | 115,098 | 394 | 110 | 292 |
| 1976 | 41,020 | 128,361 | 394 | 104 | 326 |
| 1977 | 41,464 | 128,899 | 394 | 105 | 327 |
| 1978 | 35,983 | 137,707 | 511 | 70 | 269 |
| 1979 | 32,688 | 153,552 | 510 | 64 | 301 |
| 1980 | 28,921 | 167,871 | 510 | 57 | 329 |
| 1981 | 31,287 | 179,803 | 510 | 61 | 353 |
| 1982 | 32,681 | 205,525 | 510 | 64 | 403 |
| 1983 | 35,872 | 241,159 | 510 | 70 | 473 |
| 1984 | 36,845 | 260,785 | 571 | 65 | 457 |
| 1985 | 39,500 | 273,056 | 571 | 69 | 478 |
| 1986 | 41,490 | 254,249 | 571 | 73 | 445 |
| 1987 | 43,292 | 238,394 | 571 | 76 | 418 |
| 1988 | 44,585 | 239,010 | 571 | 78 | 419 |
| 1989 | 45,995 | 232,921 | 571 | 81 | 408 |
| 1990 | 48,904 | 217,421 | 645 | 76 | 337 |
| 1991 | 45,735 | 207,094 | 645 | 71 | 321 |
| 1992 | 48,366 | 230,212 | 645 | 75 | 357 |
| 1993 | 46,786 | 229,440 | 645 | 73 | 356 |
| 1994 | 44,678 | 236,149 | 645 | 69 | 366 |
| 1995 | 45,053 | 238,764 | 645 | 70 | 370 |
| 1996 | 47,146 | 269,100 | 643 | 73 | 419 |
| 1997 | 49,655 | 272,027 | 642 | 77 | 424 |
| 1998 | 57,023 | 256,787 | 642 | 89 | 400 |
| 1999 | 59,923 | 260,271 | 655 | 91 | 397 |

Sources: See supra notes 83, 87, 88.