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JURISDICTIONAL COMPETITION IN CRIMINAL JUSTICE: HOW MUCH DOES IT REALLY HAPPEN?

Samuel R. Gross*

It's a familiar image from American fiction: the bad guy ridden out of town on a rail¹ or beaten up by the sheriff and dumped on the next train out.² Where do they go? Banishment is an age-old form of punishment. In America, where an atomized criminal justice system has survived into the twenty-first century, we can continue to try to dump our criminals on our near neighbors, and—as Doron Teichman points out in his interesting article—that is not the only way that American states, counties, and cities can try to reduce their own crime rates by exporting crime elsewhere.³ They can also adopt policies that encourage criminals to commit their crimes over the border or to move away entirely.

It makes sense that in a federal system—or for that matter in a global economy—jurisdictions might compete to become comparatively less attractive to criminals. And it makes sense—as Teichman explains—that they might do so in ways that primarily *displace* crimes as well as in ways that primarily *reduce* criminal behavior. Teichman discusses several examples: the spread of “Auto Theft Prevention Authorities” (“ATPAs”) in the Midwest in the late 1980s and early 1990s after the first one was introduced in Michigan in 1986;⁴ the possibility that “three-strikes” habitual-criminal statutes in California and elsewhere drive ex-convicts to move to other states;⁵ and recent discussions of a possible domino effect across states in the regulation of the sale of pseudoephedrine, a legitimate over-the-counter decongestant that is a precursor chemical in the manufacture of methamphetamine.⁶ I will not describe these examples or the structure of Teichman’s argument in detail. There is no point in trying to summarize the article. It is well written and informative; you should read it.

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1. MARK TWAIN, *ADVENTURES OF HUCKLEBERRY FINN* 270 (Susan Harris ed., Houghton Mifflin Company 2000) (1884).

2. *UNFORGIVEN* (Warner Bros. 1992).

3. Doron Teichman, *The Market for Criminal Justice: Federalism, Crime, Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831 (2005).

4. Teichman, *supra* note 3, at 1843–47.

5. *Id.* at 1847–48.

6. *Id.* at 1848–49.

My only quarrel with Teichman is over the scope of the phenomenon he describes.⁷ In particular, Teichman offers this practice—the “arms race between local communities attempting to drive crime to their neighbors”⁸—as a possible explanation for an extremely important change: the extraordinary increase in incarceration in the United States between 1980 and 2002.⁹ No evidence is offered to support this claim; on the contrary, the evidence Teichman discusses points in the opposite direction. I will focus on the increase in the rate of imprisonment. It is not the only indicator of the status of the criminal justice system that Teichman discusses, but it is the most important.

Let me start with a concrete example of interjurisdictional disparities in law enforcement as they operate on the ground in the United States. One of the distinctive characteristics of criminal justice in the United States is the use of ordinary citizens as judicial officers, as trial jurors and as grand jurors. Professor Phyllis Crocker of the Cleveland–Marshall College of Law has written a useful and informative article about her personal experiences as the foreperson of a Cuyahoga County grand jury in Cleveland, Ohio—a temporary, part-time, appointive position.¹⁰ Among other issues, Crocker describes the reactions of her two predecessors to the treatment of a low-level drug offense, possession of a crack cocaine pipe with cocaine residue: “One foreperson was concerned that it appeared that the City of Cleveland prosecuted these cases as felonies, while the suburbs processed them as

7. Well, not quite my only quarrel. On matters other than his main argument, Teichman sometimes makes sweeping statements based on thin citations, and some of these statements are questionable. For example, he says that “in recent years we have witnessed a constant decline in the procedural safeguards granted to criminal defendants by courts in the United States . . .” *Id.* at 1832. One source cited—an article by Michael Tonry—does say something similar, but offers no support for the claim. Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 CRIME & DELINQUENCY 419, 419 (1999) (“Only in the United States are constitutional and other safeguards of criminal defendants systematically being reduced . . .”). The other source cited includes the observation that “judges have virtually gone out of the business of actually policing the voluntariness of confessions . . .” Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENT. 207, 209 (1995). However, (i) this is the only item in the article on which Seidman makes what appears to be a historical comparison—that is not Seidman’s point; (ii) the time period for the change Seidman describes—before and after the *Miranda* decision in 1967—is not the same as the one Teichman focuses on; and (iii) in the last several years there has been a noticeable trend in the opposite direction: some American courts have become more skeptical of confessions and more likely to exclude them. *See, e.g.*, Barbara Grzincic, *MD. Court of Special Appeals Reverses Manslaughter Conviction*, DAILY RECORD (Baltimore, MD), Aug. 17, 2005.

If a recent erosion of procedural rights has had an effect on the phenomena Teichman addresses, the main determinant—the factor that would affect the fate and behavior of most defendants—would almost certainly be the decrease in the resources available for criminal defense; that more than anything determines what safeguards are in fact “granted to criminal defendants.” Teichman, *supra* note 3, at 1832. I am no fan of recent trends in American criminal procedure, especially at the constitutional level, but I am not persuaded that in actual practice matters have gotten systematically worse in the past twenty years. They were not very good to begin with.

I hasten to add that overstatements of this sort, and worse, grace the pages of many law review articles, including many good ones, such as Teichman’s.

8. Teichman, *supra* note 3, at 1834.

9. *Id.* at 1832–35.

10. Phyllis L. Crocker, *Appointed but (Nearly) Prevented from Serving: My Experiences as a Grand Jury Foreperson*, 2 OHIO STATE J. OF CRIM. L. 289 (2004).

misdemeanors. The other was disturbed by the apparent racial bias of this practice.”¹¹ In a footnote, Crocker explains that “primarily African-Americans face felony indictments in low-level drug possession cases in Cleveland, while primarily whites face misdemeanor charges for the same offense in the suburbs.”¹²

This small vignette suggests several issues that bear on Teichman’s thesis:¹³

First, of course, the practice in question—prosecuting the lowest level of a personal-use drug offense as a felony—is the sort of policy that increases incarceration rates. Indeed, the cumulative effect of policies like this around the country could be huge. By way of context, the greatest increase in the national incarceration rate between 1980 and 2000 was in incarceration for drug crimes.¹⁴

Second, the disparity at issue was not generated by differences in the statutes that govern the use of crack cocaine—both Cleveland and its suburbs are subject to the same Ohio state laws—but by differences in the exercise of administrative (in this case prosecutorial) discretion. The same is also true, for example, of the ATPA movement. As Teichman describes it, the creation of ATPAs did not involve any statutory reform in auto-theft penalties but rather a set of policies to enhance prevention and make auto theft a higher priority for police officers and prosecutors.

Third, the disparity here is between neighboring local jurisdictions rather than between states. That too is the most common and important set of disparities in the American system of criminal justice, for obvious reasons. There are fifty states in the United States, but over 3000 counties¹⁵ and more than 18,000 separate police forces and sheriff’s departments.¹⁶ As always, we tend to compare ourselves to our near neighbors; I doubt if it would have occurred to a Cleveland grand jury foreperson to compare Cleveland’s drug-enforcement policy to that in Cincinnati, let alone Seattle. But the differences in practice from one city or county to the next may be huge. Similarly, to the extent that differences in policy might cause criminals to relocate, we expect them to travel as little as possible.

Fourth, the behavior at issue here—smoking crack cocaine—is not one that is likely to be relocated because of local interjurisdictional differences in law-enforcement policy. It’s hard to imagine that black crack users from Cleveland have responded to the policy of the Cuyahoga County prosecutor

11. *Id.* at 290–91.

12. *Id.* at 291 n.6.

13. For the most part, Teichman is aware of these issues.

14. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NUMBER OF PERSONS IN CUSTODY OF STATE CORRECTIONAL AUTHORITIES BY MOST SERIOUS OFFENSE, 1980–2002, <http://www.ojp.usdoj.gov/bjs/glance/tables/corttyptab.htm> (last visited Apr. 2, 2006).

15. See U.S. CENSUS BUREAU, USA COUNTIES 1990, <http://censtats.census.gov/usa/usainfo.shtml> (last visited Apr. 2, 2006).

16. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, LAW ENFORCEMENT STATISTICS, <http://www.ojp.usdoj.gov/bjs/lawenf.htm> (last visited Apr. 2, 2006).

by driving over the border, smoking crack in the nearly all-white suburbs, and leaving their residue-laden pipes there—or by moving to the white suburbs altogether. Teichman, of course, recognizes that some types of criminal conduct are not likely to be affected by the phenomenon he describes,¹⁷ and this example is clearly in that category. We will return to this issue later.

Last, consider the policy objections that were raised by the two forepersons whom Crocker describes. As Teichman points out, debates over criminal penalties are frequently framed in terms of justice rather than deterrence or prevention, let alone displacement of criminal behavior.¹⁸ That was certainly true here. The two objections that Crocker mentions reflect two of the most important and common issues that come up in such debates: horizontal equity—especially within a jurisdiction or between close neighbors—and race, the elephant in the room in any discussion of criminal justice in the United States. It's hardly news that race is a central issue to any discussion of the criminal justice system in the United States, but a quick check on the magnitude of the impact of race is in order. At the end of 2003, non-Hispanic African Americans—who represent about 12% of the general population¹⁹—made up 44% of the over 1,300,000 prisoners in state and federal prisons;²⁰ Hispanics were 19%, and non-Hispanic whites, who make up 67% of the general population,²¹ were 35% of the prison population.²² Nearly 13% of African-American men between the ages of twenty-five and twenty-nine were in jail or prison on June 30, 2004—a shocking figure—compared to about 1.7% of white men in that age range.

The local politics and racial dynamics of criminal justice in the United States can push policies in various directions. The crack epidemic in the late 1980s hit black communities very hard. In response, some black leaders supported strong punitive measures to combat the use of crack cocaine, despite the fact that the affected defendants were mostly black.²³ In most other contexts, however, African Americans are likely to be less punitive in their attitudes toward crime, and more skeptical of law enforcement than white Americans. At least part of the reason is that they are much more likely than whites to be on the receiving end of the law. Members of the law-abiding majority of African Americans are much more likely than law-abiding whites to have friends and relatives who have been arrested and imprisoned.

17. Teichman, *supra* note 3, at 1841–42.

18. *Id.* at 1838–39.

19. Calculated from U.S. CENSUS BUREAU, TABLE 4: ANNUAL ESTIMATES OF THE POPULATION BY RACE ALONE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES AND STATES: JULY 1, 2004, at 1–2 (2005), available at <http://www.census.gov/popest/states/asrh/SC-EST2004-04.html>.

20. Paige M. Harrison & Allen J. Beck, *Prisoners in 2003*, BUREAU OF JUSTICE STATISTICS BULLETIN, Nov. 2004, at 1, 9, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>.

21. U.S. CENSUS BUREAU, *supra* note 19.

22. Harrison & Beck, *supra* note 20, at 9.

23. See, e.g., Gary Gately, *On City Street Corners, Night of Antidrug Vigils*, N.Y. TIMES, July 22, 1986, at B1; Peter Kerr, *Rising Concern on Drugs Stirs Public to Activism*, N.Y. TIMES, Aug. 10, 1986, § 1, at 1.

As a result, they are much more likely to be aware of the excesses and injustices our police and courts mete out. Thus, African Americans—who are far more likely than whites to be victimized by homicide—are nonetheless much less likely to support the death penalty.²⁴ This difference in attitudes can produce equally large differences in policy. For example, the likelihood of facing the death penalty is about thirteen times higher for a murder in the white suburbs of Baltimore County than for a comparable killing in the predominantly black City of Baltimore.²⁵

Clearly the Cleveland crack-pipe policy that Crocker describes was not designed to drive urban crack smokers to the Cleveland suburbs, any more than the Baltimore murder policy was designed to drive downtown killers to Baltimore suburbs. But was the policy of the Baltimore suburbs designed to export homicides from the suburbs to the city or to keep them pent up there? It's possible that the goal of the policy was to relocate homicides, of course, but there is no evidence of it. There is certainly no evidence of a "race" between local jurisdictions to displace homicides in Maryland by increasing the likelihood of a death sentence; Baltimore City's lenient death-penalty policy is the standout in the state, and that appears to have been true over time. In other words, all indications suggest that this local disparity has nothing to do with crime displacement. Of course counties and cities do sometimes try to prevent their neighbors from crossing their borders to commit crimes, but the common method of choice is more direct: racial profiling. They have their cops stop cars with minority drivers who cross into their territory, and question, cite, search, or even arrest the occupants.²⁶

Teichman's argument is most persuasive as applied to crimes undertaken as part of a concerted pattern of illegal economic activity—as he notes.²⁷ His most convincing examples are in this category: the spread of Auto Theft Prevention Authorities in response to organized car-theft rings, and the recent spate of regulation of the sale of pseudoephedrine in response to the proliferation of laboratories that produce illegal methamphetamine. Most prisoners in American prisons, however, are not there for organized economic crimes. In 2001, 49% of the 1.2 million American prisoners in state prisons were serving terms for crimes of violence, primarily homicide (15%), robbery (13%), sexual assault (10%), and other assaults (10%).²⁸ It's

24. See, e.g., Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. OF SOC. ISSUES, Summer 1994, at 19, 20–21; Computer-Assisted Survey Methods Program, Quick Table: GSS 1972–2004 Cumulative Datafile, <http://sda.berkeley.edu:8080/quicktables/quicksetoptions.do?reportKey=gss04%3A5> (last visited Apr. 10, 2006) (data from the General Social Survey, conducted periodically by the National Opinion Research Center).

25. RAYMOND PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION: EXECUTIVE SUMMARY 25 (2003), <http://www.newsdesk.umd.edu/pdf/exec.pdf>.

26. Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1433 n.78 (2002).

27. Teichman, *supra* note 3, at 1845.

28. Paige M. Harrison & Allen J. Beck, *Prisoners in 2002*, BUREAU OF JUSTICE STATISTICS BULLETIN, Aug. 2003, at 1, 10, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf>.

hard to believe that any noticeable fraction of these crimes could conceivably be displaced by any of the policies Teichman discusses. The same applies to most of the 20% of prisoners serving time for property crimes—a majority of whom were convicted of burglary (9%) or larceny (4%)—and to the 11% convicted of “public-order” offenses, a category that includes drunk driving, court offenses, and morals and decency violations.²⁹ Moreover, this proportional distribution of state prisoners was roughly the same in 1980, when there were merely 296,000 state prisoners, with one very important exception: the percentage of prisoners convicted of drug crimes rose from 6% in 1980 to 20% in 2001.³⁰ We will return to this issue shortly.

One of Teichman’s chief examples does concern violent crime: California’s “three-strike” habitual-criminal statute. The evidence that this law actually does cause career criminals to migrate to other states is weak—as Teichman puts it, “anecdotal”³¹—but that does not matter to his argument. If legislatures believe that this regime will drive criminals away, they may enact three-strikes statutes for that purpose whether or not they truly have that effect. That qualification, however, cuts both ways. Teichman cites a study that describes this forced migration as an “*unintended* but positive consequence” of California’s three-strike law.³² To the extent that this is true, the *unintended* displacement of criminals—if any—could not have been a move in an interjurisdictional race, to the bottom or to the top.

More important, the adoption of three-strikes laws, whatever their intended purposes, could not have been a major driving force behind the horrific run-up in the rate of imprisonment in the United States over the past two-and-a-half decades. Teichman reports that “[b]etween 1993 and 1995, twenty-four states enacted some type of three-strike legislation.”³³ And indeed, from 1995 through 2003, the prison population of the United States did increase steadily, at an average annual rate of 3.4%.³⁴ But from 1980 through 1994—before this spate of legislation could have had any noticeable effect—the prison population increased much faster, at a staggering average annual rate of 8.7%, 2.6 times faster than after 1994.³⁵ This illustrates the central problem in Teichman’s claim that interjurisdictional competition to get rid of criminals was a cause of the increased rate of imprisonment: the empirical evidence he discusses does not support the claim and suggests the opposite. Of course, it’s *possible* that the spate of new three-strikes laws contributed to the build up in our prison population after 1995 (assuming as well that those laws were in fact motivated by interjuris-

29. *Id.*

30. *Id.*; Allen J. Beck & Darrell K. Gilliard, *Prisoners in 1994*, BUREAU OF JUSTICE STATISTICS BULLETIN, Aug. 1995, at 1, 11, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pi94.pdf>.

31. Teichman, *supra* note 3, at 1847.

32. *Id.* (emphasis added).

33. *Id.* at 1848 n.91.

34. Harrison & Beck, *supra* note 20, at 2.

35. Beck & Gilliard, *supra* note 30, at 1.

dictional competition), but why would anyone jump to that conclusion when the rate of increase went *down* rather than *up* after they were enacted?

What about drugs? Drug dealing is an elaborately planned economic activity, and at least some of it—at the manufacture, importation, and wholesale distribution levels—might well be movable from one jurisdiction to another. In recent years, drug offenders have also constituted the fastest-growing segment of the prison population, as noted. If policies aimed at displacement of criminal behavior have contributed to the vast increase in the rate of imprisonment, we would expect a significant portion of that contribution to consist of imprisoned drug defendants. But Teichman does not mention drug crimes as a possible context for interjurisdictional competition that might increase the prison population; I assume this is because he found no evidence to support that contention.³⁶ In fact, the evidence suggests the opposite. Between 1980 and 2001 the number of drug offenders in *state* prisons increased enormously, by a factor of thirteen.³⁷ But the number of drug offenders in *federal* custody increased even more rapidly, by a factor of sixteen,³⁸ despite the fact that the federal system, under a unitary national government, is not subject to this sort of interjurisdictional competition—a point Teichman discusses at length.

In fact, Teichman devotes a great deal of attention to the implications of his thesis for federal criminal justice policy.³⁹ He describes the national government as the body that could control the damaging tendencies he ascribes to competition between local jurisdictions, and he decries the fact that current federal policy is likely, if anything, to make those tendencies worse. These are normative arguments, and interesting ones. But Teichman overlooks a fundamental empirical point: The history of federal policy in the past twenty-some years suggests that interjurisdictional competition was *not* a major factor in the draconian revolution in the American system of criminal justice. Consider: from 1980 through 2001 the total population of prisoners in state custody increased by about 300%⁴⁰—a huge jump—but the population of prisoners in federal custody grew even faster, by about 630%.⁴¹ Since interjurisdictional competitions could not have contributed to the federal surge, why would anyone think it was a major factor in the

36. Teichman does briefly mention studies that show that police patrol and enforcement activities can displace a variety of crimes from one location to another nearby—retail-drug dealing and marijuana growing, as well as prostitution, burglary, and robbery. See Teichman, *supra* note 3, at 1840–41 nn.49–53 and accompanying text. This sort of displacement, however, does not increase the rate of imprisonment.

37. There were 19,000 drug offenders in state prisons in 1980, Beck & Gilliard, *supra* note 30, at 11. There were 246,100 in 2001. Paige M. Harrison & Allen J. Beck, *Prisoners in 2001*, BUREAU OF JUSTICE STATISTICS BULLETIN, July 2002, at 1, 10, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf>.

38. There were 4900 drug offenders in federal prisons in 1980, Beck & Gilliard, *supra* note 30, at 10. There were 78,501 in 2001. Harrison & Beck, *supra* note 28, at 11.

39. Teichman, *supra* note 3, at 1866–74.

40. See *supra* note 37.

41. See *supra* note 38.

contemporaneous but less extreme state buildup? Isn't it more plausible that some of the same political and social forces that caused the federal government to lock up more than seven times as many people in 2001 as in 1980—despite the absence of interjurisdictional competition—also caused the states to lock up about four times as many?

Teichman ends his article with a question: “Is the American criminal justice system engaged in a race to the top or a race to the bottom?”⁴² The answer surely is “No.” Given all the other pressures that bear on criminal justice policy, interjurisdictional competition to displace crime does not appear to be a major force that shapes the system. But that does not detract from the value of Teichman's article. Interjurisdictional competition does occur, at least in pockets. It is an interesting and important issue; it could become more important in the future, and Teichman does a good job of exploring it. I have made no attempt to summarize or repeat the many interesting points he has made better than I could. Even a good law review article does not have to be—and is not likely to be—a Theory of Everything.

42. Teichman, *supra* note 3, at 1876.