Michigan Law Review

Volume 104 | Issue 7

2006

The Political Market for Criminal Justice

Rachel E. Barkow
New York University School of Law

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Criminal Procedure Commons, Law and Economics Commons, Law Enforcement and Corrections Commons, and the State and Local Government Law Commons

Recommended Citation

Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713 (2006).
Available at: https://repository.law.umich.edu/mlr/vol104/iss7/3

This Correspondence is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE POLITICAL MARKET FOR CRIMINAL JUSTICE

*Rachel E. Barkow**

In 2004, the number of individuals incarcerated in the United States exceeded the two million mark.[1] The current incarceration rate in the United States is 726 per 100,000 residents,[2] the highest incarceration rate in the Western world[3] and a dramatic increase from just three decades ago.[4] Not only are more people serving time, but sentences have markedly lengthened.[5]

What should we make of these trends? The answer has been easy for most legal scholars: to them, the incarceration rate in the United States is too high, and reforms are necessary to lower sentences. But many political leaders and voters reach the opposite conclusion: current sentencing levels are just right or, in some cases, not tough enough.

One way to assess these competing claims would be to agree on the purpose criminal punishment is supposed to serve and then to conduct an

---

* Associate Professor, New York University School of Law. B.A. 1993, Northwestern; J.D. 1996, Harvard. —Ed. I thank Leslie Dubeck for superb research assistance.

1. At midyear 2004, there were 2,131,180 people incarcerated in prisons and jails in the United States. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2004, at 1 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf.

2. *Id.* at 2.

3. THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: GROWTH IN POPULATION CONTINUES 1 (2005), *available at* http://www.sentencingproject.org/pdfs/1044.pdf. For country incarceration rates, see ROY WALMSLEY, HOME OFFICE (U.K.), WORLD PRISON POPULATION LIST (3d ed. 2002), *available at* http://www.homeoffice.gov.uk/rds/pdfs/r166.pdf. The United States might have the highest incarceration rate in the entire world, but because reliable figures from China are hard to come by, that is uncertain.

4. In 1985, there were 313 persons held in prisons and jails per 100,000 people in the population. DARRELL K. GILLIARD & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 1997, at 2 tbl.7 (1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/pjim97.txt.

5. For example, among federal prisoners, the

> [t]ime expected to be served, on average, increased from 26.9 months for offenders admitted during 1988 to 44.4 months for offenders admitted during 2000. For drug offenses, the amount of time an incoming offender could expect to serve increased from 39.3 months to 61.6 months; for weapon offenses, expected time served increased from 32.4 months to 69.6 months.

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 2000: WITH TRENDS 1982–2000 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp00.pdf. From 1993 to 1999, the average time served by state prisoners increased from forty-six months to fifty-three months (an increase of 16 percent over six years). BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 510 tbl.6.43 (2005), *available at* http://www.albany.edu/sourcebook/pdf/t643.pdf.

empirical evaluation of how well current incarceration policies achieve that purpose. The difficulty with this approach is readily apparent. To begin, the purpose of punishment is highly contested. The purpose could be deterrence, incapacitation, retribution, rehabilitation, or some combination thereof, and neither voters nor scholars agree on the proper metric. If that alone were not a sufficient hurdle, there is also the thorny question of measuring effectiveness. Given the complexity of human behavior and social dynamics, it is not easy to assess whether a particular sentence will deter or rehabilitate offenders or whether it will cause a reduction in crime rates.

An alternative method for evaluating sentencing and incarceration policies is to analyze the institutional dynamics that produce them. If the political economy that produces sentencing laws suffers from an imbalance or defect of some kind, that could provide a reason for questioning the sentencing policy itself.[6]

The political-economy approach is the one that Doron Teichman takes in his recent article *The Market for Criminal Justice*,[7] and his piece shows the promise of this method in assessing questions of criminal justice policy. As Teichman points out, looking at criminal justice policy from this institutional perspective might reveal counterintuitive conclusions and shed new light on important questions in criminal law, such as how to divide authority among local, state, and federal jurisdictions and how to assess substantive laws and sentences. This methodology is a welcome addition to the scholarship on the federalization of crime, and it will undoubtedly produce many valuable insights. Teichman's inquiry is a prime example, for it demonstrates that there is, theoretically at least, a category of crimes for which state competition might produce a race toward more severe sentences than would be produced by a single central authority.

But Teichman's article also serves as a cautionary tale about the dangers of taking an institutional approach without careful attention to the facts on the ground. An evaluation of the political economy requires as much attention to the political as it does to the economy, particularly before drawing conclusions about how to allocate jurisdiction over crime policy between state and federal authorities. At a minimum, one must carefully consider and compare the politics of sentencing at *both* the state *and* federal levels before making a claim that either has an advantage over the other. Teichman's article, however, considers only the incentives of state actors—and only some of the incentives at that—and it is through that narrow lens that he reaches "the conclusion that, contrary to the commonly held view among legal

6. *See* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005) [hereinafter Barkow, *Federalism*] (using this methodology in comparing the political processes of the states and the federal government in setting sentencing policy); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 746–54 (2005) [hereinafter Barkow, *Administering Crime*] (explaining that a factor in the movement toward insulated sentencing commissions was a worry that the political process would not produce rational sentencing policy).

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

scholars, additional federal regulation in the area of criminal justice might be desirable to limit the inefficient harshening of that system caused by jurisdictional competition."[8]

In this Essay, I will expand on Teichman's analysis to show that, while his article offers an illuminating insight into the relationship among states and should serve as a springboard for further research on the proper allocation between state and federal authorities, his argument is incomplete: it ignores political incentives at the state level that do not involve mobile criminals and fails to consider the political economy of crime and sentencing at the federal level. These additional factors undermine the strength of Teichman's posited link between state competition and the rise in harsher sentences and call into question his argument for greater federal involvement. Indeed, while Teichman is right that criminal law scholars should pay more attention to institutional dynamics, the political-economy perspective suggests that those seeking to curtail the trend toward harsh sentences should seek to limit, not expand, federal involvement over crime. Teichman reaches a contrary conclusion only by assuming a central authority that is divorced from political pressure—an assumption that hardly describes Congress or the federal executive branch.

I. THE TENUOUS LINK BETWEEN STATE COMPETITION AND LONGER SENTENCES

One of Teichman's central insights is that jurisdictional competition may create incentives for states to raise sentences under some circumstances in order to shift criminal activity to neighboring jurisdictions. Teichman posits that this creates an "arms race"[9] that is partially responsible for the harshening of sentences in recent years.[10]

While Teichman is likely correct on his narrow claim—that state competition might be responsible for some increases in sentences—it is important to emphasize just how small this category of sentences is likely to be and how tenuous its relationship is to the incarceration boom and the trend toward longer sentences. As Teichman himself admits, jurisdictional competition will occur only under limited circumstances because "some crimes are clearly local,"[11] and the mobility of criminals is often hindered because of costs.[12] Indeed, Teichman concedes that only a handful of crimes have produced concrete examples of displacement, and those crimes are

---

8. *Id.* at 1835.

9. *Id.* at 1834, 1839–40.

10. *Id.* at 1835 (referring to the "inefficient harshening of [the criminal justice] system *caused by* jurisdictional competition") (emphasis added).

11. *Id.* at 1841; *see also* Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 85 (2003) (noting that "crime is not geographically fungible" and observing that, even when jurisdictions use geographically targeted policing, the displacement effect is limited).

12. Teichman, *supra* note 7, at 1842.

driven by profit motives.[13] Moreover, even in those limited instances, the magnitude of a displacement effect has been "relatively small."[14] Nevertheless, relatively small does not necessarily mean relatively unimportant. Teichman's article is therefore at its most valuable in alerting readers to the potential for states to set sentences for some crimes with displacement in mind.

The problem, however, is that Teichman often goes beyond his own stated boundaries for when displacement—and thus a race—is likely to occur, and that leads him to assume that jurisdictional competition is responsible for sentencing increases in areas where a race is unlikely to be the cause. A prime example of this is his claim that three-strikes laws might be an outgrowth of state competition.[15] As an initial matter, the sweep of three-strikes laws belies the claim that they are concerned with mobile crimes and criminals. Three-strikes laws do not cover only those crimes driven by profit motives; indeed, they cover a wide range of violent and nonviolent crimes.[16] Most violent crimes are impulsive and insensitive to variation among jurisdictions, as Teichman admits, and many nonviolent offenses are similarly local in nature.[17] There is no reason to believe that most crimes covered by three-strikes laws are "sensitive to the potential

13. *Id.* at 1840–41 (citing burglary, robbery, narcotics production and sales, and prostitution). Of course, even with crimes that are predominantly profit-driven, the displacement story should not be overstated. Individuals engaged in crime for profit often are committing crime to support a drug habit. For instance, in 1996, one in four (25.6 percent) convicted property offenders serving time in jail committed the offense to get money for drugs. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES 1996 (1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pji96.pdf. Offenders are often under the influence of drugs or alcohol at the time of their profit-driven offense. For example, among state prisoners serving time for a property offense in 1997, 53.2 percent reported being under the influence of alcohol or drugs at the time of the offense. Among federal prisoners serving time for a property offense in 1997, 22.6 percent reported being under the influence of alcohol or drugs at the time of the offense. Grouping all crime categories together, 51 percent of prisoners (52 percent of state and 34 percent of federal prisoners) reported being under the influence of alcohol or drugs at the time of their offense. CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, SUBSTANCE ABUSE AND TREATMENT OF STATE AND FEDERAL PRISONERS, 1997 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/satsfp97.pdf. Consequently, these offenders are not necessarily thinking rationally before they act, so they might not be sensitive to jurisdictional differences in sentencing.

14. Teichman, *supra* note 7, at 1842; *see also* David M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449, 474 n.56 (1997) ("Much research shows that displacement is seldom total and often inconsequential.").

15. Teichman, *supra* note 7, at 1847–48 ("[S]ome criminals will find it beneficial to relocate their activity from states that adopted three-strikes laws to those that did not.").

16. *See, e.g.*, IND. CODE ANN. § 35-50-2-8.5 (2004) (imposing enhancements for third serious felon and defining a serious felony to include murder, rape, dealing in cocaine, and burglary with a deadly weapon, *id.* § 35-50-2-2(b)(4)); R.I. GEN. LAWS § 12-19-21 (2002) (allowing for twenty-five-year discretionary enhancement for any third felony conviction); W. VA. CODE ANN. § 61-11-18 (LexisNexis 2005) (providing for a life sentence for any third felony conviction punishable by confinement in a penitentiary); Ewing v. California, 538 U.S. 11, 48 (2003) (Breyer, J., dissenting) (discussing the breadth of California's three-strikes law, which is triggered by a wide range of conduct).

17. Teichman, *supra* note 7, at 1841 n.55 (citing authority for the proposition that "crimes of passion tend not to be displaced").

costs and benefits of relocating," undermining the claim that jurisdictional competition was the motivating factor behind the laws.[18] Teichman's use of sex offender registration and notification laws suffers from a similar shortcoming. Sex offenses are rarely crimes motivated by profit, and Teichman's sparse anecdotal evidence fails to demonstrate that most or even many sex offenders are responsive to these laws and therefore leave jurisdictions to avoid them.[19] His invocation of laws imposing collateral consequences on convicted offenses,[20] such as the removal of some occupational licenses, falls short for the same reasons. These laws typically cover all types of felons—including those who commit impulsive crimes and who do not have much mobility.[21]

The federal government's adoption of these same laws further undermines the claim that jurisdictional competition motivated three-strikes sentencing provisions, sex-offender notice and registration laws, or laws imposing collateral punishments on convicted felons. If three-strikes laws result from a desire to push offenders to neighboring jurisdictions, why would the federal government pass similar legislation?[22] If sex-offender registration laws spring from interstate competition and lead to a race to ever-harsher requirements, what explains the fact that Congress passed one of the toughest such laws in the country and reduces federal law enforcement funding to any state that fails to enact legislation with certain notification and registration requirements?[23] If there is a race, why would the federal

18. *Id.* at 1842. Teichman's anecdotal evidence—which consists of hearsay, political posturing, and some stray quotes by state officials—is weak evidence to the contrary and offers no insights on how many individuals covered by these laws are likely to respond to them by relocating. *Id.* at 1847–48.

19. Again, Teichman's evidence consists of a few quotes and isolated incidents published in newspaper accounts. *Id.* at 1854–55 nn. 131–32.

20. *Id.* at 1853.

21. *See, e.g.*, SUSAN M. KUZMA, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996), *available at* http://www.usdoj.gov/pardon/forms/state_survey.pdf (listing several states that allow revocation of professional licenses as a result of *any* felony conviction).

22. *See, e.g.*, Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (2000) (imposing fifteen-year mandatory minimum sentence for individuals charged under § 922(g) with three prior convictions for violent felonies or serious drug offenses); Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 3559(c) (2000) (mandating life imprisonment for defendants with two prior violent felonies or more serious drug offenses); Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended at 18 U.S.C.S. § 3559(e) (LexisNexis 2005)) (two-strikes law imposing life imprisonment for child sex offenders).

23. *See* Aimee's Law, 42 U.S.C. § 13713 (2000) (punishing a state whose sentences for violent crimes are less than the national average or whose laws do not require offenders to serve at least 85 percent of their sentences by reducing the federal law enforcement assistance funds it receives if offenders sentenced in that state go on to commit certain offenses in other states); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2000) (imposing a 10 percent reduction of assistance grant funds on noncompliant states); *see also* 18 U.S.C. § 4042(c) (2000) (requiring federal authorities to notify state authorities when a federal sex offender is released or sentenced to probation); Pam Lychner Sexual Offender Tracking

government need to set a floor? And if laws imposing collateral consequences for felons were responsive to displacement, why did the federal government lead the way in enacting so many such laws?[24]

The answer to these questions seems obvious: these laws are not the byproduct of jurisdictional competition but of political pressure within a jurisdiction. Thus, while there is a political-economy story to tell about sentencing laws, it is not the one that Teichman advances. Voters and powerful interest groups demand these laws, regardless of what neighboring jurisdictions are doing, and almost no influential interests stand in the way.[25] Three-strikes laws, like other recidivist laws, respond to voter demands for tougher sentences that the public believes will incapacitate offenders and deter them from striking again or will make them pay even further for their crimes.[26] Prosecutors and those with an interest in the expansion of prisons also support these laws, as do organizations such as the National Rifle Association and victims' rights groups.[27] Sex-offender notification and registration laws likewise provide politicians with an opportunity to appear responsive to voters' concerns about crime without losing the support of any important constituency. These laws are as much about symbolism as they are about any utilitarian goal, much less one that involves jurisdictional competition. The same is true of collateral consequences. They express a social judgment that those convicted of crimes are not entitled to the same benefits as everyone else, and they enable politicians to look proactive on crime without much real effort. While Teichman recognizes that "[v]alues such as retribution and fairness obviously play a significant role in shaping criminal sanctions,"[28] he sees these values acting as checks on, rather than instigators of, the push for harsher sentences. But, in fact, the political climate today is characterized by sentiment for tougher laws in the name of retribution and just deserts.[29]

---

and Identification Act of 1996, 42 U.S.C. § 14072 (2003) (requiring registered sex offenders to notify the FBI when moving to a new state).

24. *See* OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION, *available at* http://www.usdoj.gov/pardon/collateral_consequences.pdf (last visited Mar. 19, 2006) (showing the breadth of collateral consequences imposed by the federal government); Teichman, *supra* note 7, at 1853 n.120 ("[M]any of the collateral consequences of criminal convictions were initiated by the federal government . . . .").

25. For a more detailed discussion of the politics of sentencing, see Barkow, *Administering Crime*, *supra* note 6, at 721–30. For an insightful discussion of the politics of criminal law, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

26. Indeed, Teichman's claim that legislatures passed these laws with the intent to prevent offender migration is undermined by his own anecdotal evidence. He cites a California Department of Justice study that found that the California law had the "*unintended*" consequence of prompting parolees to leave the state. Teichman, *supra* note 7, at 1847 (emphasis added).

27. Barkow, *Administering Crime*, *supra* note 6, at 729.

28. Teichman, *supra* note 7, at 1863.

29. *See* Barkow, *Federalism*, *supra* note 6, at 1278–79 & n.2; *see also* Gerard E. Lynch, *Sentencing: Learning from, and Worrying About, the States*, 105 COLUM. L. REV. 933, 933 (2005) ("The late twentieth century saw wholesale changes in sentencing philosophy and practice. The

These intrajurisdictional dynamics of voter and interest-group preferences explain why the federal government's sanctions in the areas Teichman explores are *harsher* than the respective state laws. If these laws were the outgrowth of jurisdictional competition, one would expect federal sanctions to be lower than state sanctions for similar crimes.[30] These political pressures within a jurisdiction also explain why punishments have grown harsher across the board and not just in those areas where scholars have found evidence of displacement.[31] Further, it accounts for the fact that, while the potential for state competition has existed since the formation of the Union, it is only in recent decades that we have seen the massive push toward incarceration and dramatic sentence increases. The constant of state competition cannot explain the variability of sentencing patterns. But the changing political and cultural climate within the United States as a whole does account for the recent shift.

---

conventional wisdom about the primary purpose of sentencing shifted away from rehabilitation as a dominant philosophy and toward retribution or 'just deserts.' ").

30. Teichman, *supra* note 7, at 1843 n.60. Teichman posits in a footnote that perhaps the federal sanctions are not really similar because the federal government is prosecuting more serious versions of the same crime. *Id.* Yet the composition of federal prisoners as compared to state prisoners belies that assertion. For instance, in 2000, only 10 percent of federal inmates were incarcerated for violent offenses, compared with 49 percent of state inmates. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDERS STATISTICS, http://www.ojp.usdoj.gov/bjs/crimoff.htm#inmates (last visited Feb. 13, 2006). Moreover, the trend in state prisons has been to house more violent offenders, while the trend in federal prison is to house more drug offenders. *See id.* ("Violent offenders accounted for 53% of the growth in State prisons between 1990 to 2000, drug offenders accounted for 59% of the growth in Federal prisons."). And while Teichman is correct that the federal government is not responsible as the primary regulator so it "can afford to impose the severe sanctions it chooses to impose," Teichman, *supra* note 7, at 1843 n.60, that does not explain why the federal government would choose to spend its funds on more severe sanctions instead of something else.

31. It is not just auto theft or even drug sentences that have grown longer; rather sentences for everything from domestic violence to murder to rape have increased. For example, the mean time served for murder increased from 92 to 106 months from 1990 to 1999, and time served for rape increased from 62 to 79 months over the same period. By comparison, time served for motor vehicle theft increased from twenty to twenty-five months, and time served for fraud increased from twenty to twenty-three months in that same time span. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 506 tt.637–38 (2005), *available at* http://www.albany.edu/sourcebook/pdf/t637.pdf, http://www.albany.edu/sourcebook/pdf/t638.pdf; *see also* Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 24 n.5 (1997) ("[M]ean sentence lengths across all offenses nearly doubled between 1984 and 1990 . . . ." (citing 2 U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 378–81 (1991))). Because sentences have increased across all crimes, the fact that sex-offender registration and notification laws have also grown more strict does not "validate[] the jurisdictional competition hypothesis," as Teichman claims. Teichman, *supra* note 7, at 1856. One would expect increasing severity because of the political economies *within* a jurisdiction, regardless of what neighboring states are doing. That explains why the federal government has consistently increased the punishment, notification, and registration requirement for sex offenders. *See* Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended at 18 U.S.C.S. § 3559(e) (LexisNexis 2005)); *supra* note 23.

All this is not to say that displacement does not occur in limited circumstances or that displacement might not play a minor role in producing some sentencing increases. There might be examples where crime-location decisions are made on the basis of jurisdictional differences in sentences, and states may then respond accordingly. But this is going to be the exception, not the rule, in terms of explaining the broader trend of ever-longer sentences in recent decades.

II. A CURE WORSE THAN THE DISEASE: FEDERAL AUTHORITY OVER SENTENCING

Although jurisdictional competition is unlikely to be a major factor in most state sentencing decisions, there will likely be limited areas where either real or perceived displacement plays a role in state decisions to alter sentencing policy. This can lead to a race to the top, in which state competition leads to innovations and better decisionmaking, or a race to the bottom, in which states overspend on criminal-justice resources and produce sentences that are harsher than necessary.[32] Even if one could marshal sufficient evidence that states are responding to other states in setting sentences, it would be difficult to identify whether the race is to the top or to the bottom and whether it produces sentences that are too harsh.[33] But assuming that one could identify a situation in which state sentences were "too harsh" because of displacement concerns, the next question is what to do about it.[34] More specifically, would a race to the bottom justify federal legislative intervention, as Teichman suggests?

When thinking about how to allocate authority over criminal-justice matters between state and federal jurisdictions, it is important to assess the respective strengths and weaknesses of each. To the extent that a race among states leads to inefficiently high sentences for some limited category of crimes, that is a downside to state jurisdiction that should be factored into the comparative analysis. But it is only one factor. It does not necessarily follow that federal authority is a more attractive alternative because the federal political process might have shortcomings of its own that are as bad as or worse than the harms that might follow from jurisdictional competition.

Indeed, characteristics of the federal political process make it quite likely that any intervention by Congress will yield results that are as harsh as or harsher than state sentences. The federal government faces largely the same interest group and voter pressures to appear tough on crime that the

32. Teichman, *supra* note 7, at 1859–64.

33. Teichman suggests that the race to the bottom is characterized by putting too many resources into punishment. *Id.* at 1861. But this assumes that utilitarian goals are the only ones motivating a state. States may prefer higher levels of punishment than a utilitarian calculus would yield because of the retributive or expressive value of a harsher sentence.

34. Wayne Logan provides an illuminating analysis of Teichman's other solution, interstate cooperation. *See* Wayne A. Logan, *Crime, Criminals, and Competitive Crime Control*, 104 MICH. L. REV. 1733 (2006).

states face. Moreover, unlike at the state level, there are fewer political forces pushing in the opposite direction at the federal level. Groups representing the interests of defendants are politically weak at all levels of government, but it is more likely that advocates making arguments for shorter sentences on the basis of cost concerns will have more sway at the state level. States are more sensitive to sentencing costs because they make up a larger portion of state budgets than they do of the federal budget and because states cannot carry deficits to pay for their crime policies.[35] As a result, state actors tend to see the budget in zero-sum terms, and crime expenditures are viewed with greater scrutiny because money saved on incarceration costs could be spent elsewhere.

In addition, because the states are responsible for the entire range of criminal conduct, there will be a greater disciplining effect on states than the federal government, even if states are sentencing with mobile criminals in mind. That is, because states will likely want an internally rational state code—in which, for example, murder is treated more seriously than theft—there will be a limit on how much a state will raise sentences for theft, even if those thefts involve mobile criminals. States will want to allocate their limited budgets to make the most effective use of their resources, which means that they are likely to reserve prison space for violent offenders. These concerns will act as checks on any state impulse to raise sentences because of displacement concerns, and they will also act as checks on other demands for increased sentences. And to the extent that state actors are motivated by these resource constraints and a desire for an efficient allocation of resources among all crimes, those state actors will face a political process that is more balanced than the one at the federal level.

That is because there are currently few disciplining effects on the federal process that prompt a rational look at sentencing.[36] The federal government pays little attention to the costs of sentencing because incarceration costs make up a small part of the federal budget,[37] and the full costs of a sentencing increase do not materialize until future years as the sentences are being served. Because Congress does not have to produce a fiscal note before passing legislation, those costs often go under the radar. There is little political pressure to pay more attention to them because those competing for federal resources do not view the federal budget in zero-sum terms and do

35. Barkow, *Federalism*, *supra* note 6, at 1300–03 (comparing the politics of sentencing costs at the state and federal levels).

36. For an expanded discussion of the federal politics of sentencing, see *id.* at 1299–1312.

37. *Id.* at 1301 (noting that federal spending on crime makes up just over 1 percent of the federal budget); *see also* OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: HISTORICAL TABLES FISCAL YEAR 2006, OUTLAYS BY FUNCTION AND SUBFUNCTION: 1962–2010 (2005), *available at* http://www.gpoaccess.gov/usbudget/fy06/sheets/hist03z2.xls (showing that in fiscal year 2004, federal corrections accounted for slightly less than a mere quarter of a percent of total government spending for that year).

not see federal crime expenditures as vulnerable targets in any event because they are so politically popular.[38]

Moreover, because the federal government has jurisdiction over a subset of crime, the federal political process does not experience the disciplining process that comes with the responsibility of being the front-line enforcer of most criminal laws. Because Congress has limited jurisdiction, it does not need to consider how federal offenses stack up against all other crimes. It does not need to reserve the longest sentences for the most violent crimes, such as murder and rape, because those crimes are largely handled at the state level. The federal government therefore lacks the pressure that states feel to devise a code that treats all crimes as a coherent whole.[39] And because limited jurisdiction means that the federal government maintains a smaller police force than the states, Congress may have a greater incentive than the states to use a strategy of increased sentences as opposed to increased likelihood of detection for improving deterrence.[40]

There are, then, strong incentives for federal officials to pass laws with longer sentences, and few factors that put pressure in the opposite direction. This is not just a theoretical insight. Even in the areas of alleged jurisdictional competition highlighted by Teichman, we have seen that federal intervention often involves a similarly harsh or even more severe sentence or law.[41] And to the extent that Congress seeks to promote uniformity among the states, it has passed laws that encourage the states themselves to enact more stringent laws.[42] Congress, for instance, passed the Anti Car Theft Act of 1992, which provides enticements for states to pass auto-theft-prevention laws like the ones Teichman criticizes as examples of inefficient laws produced by jurisdictional competition.[43] Similarly, Congress has passed laws that create incentives for states to adopt strict notice, registration, and sentencing requirements for sex offenders.[44] Thus, if the bottom to which states

38. Barkow, *Federalism*, *supra* note 6, at 1302.

39. This may explain why the federal code itself has ballooned so dramatically in recent years. *Compare* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 251 & n.19 (1997) (estimating more than three thousand federal offenses), *with* Stuntz, *supra* note 25, at 514–17 (listing representative state codes as having approximately five hundred offenses and noting that "[f]ederal criminal law probably covers more conduct . . . than any state criminal code").

40. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178–85 (1968).

41. *See supra* text accompanying notes 22–24.

42. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 3559(c) (2000) (providing incentive grants for states that require violent offenders to serve at least 85 percent of their sentences).

43. Teichman, *supra* note 7, at 1871 ("[T]he ACTA conditions states' eligibility for federal grants on the creation of a state ATPA much like Michigan's.").

44. *See* Aimee's Law, 42 U.S.C. § 13713 (2000) (exempting a state from reimbursement requirements for sex-offender prosecutions of its parolees in other states if it adopts certain minimum sentencing terms for sex offenders); Jacob Wetterling Crimes Against Children and Sexually

are racing, according to Teichman, consists of ever-harsher sentences when more lenient sentences would get the job done, advocating federal legislation does not appear to be the solution.

CONCLUSION

Although jurisdictional competition is not a critical impetus for the sentencing increases of the modern era, it should not be overlooked as an important dynamic. Doron Teichman therefore advances our knowledge of the political economy of crime by highlighting how state competition might operate to affect sentencing policies. More importantly, by taking a look at the institutions that produce sentencing policy and their incentives, Teichman employs a methodology that holds great promise for our understanding of the wisdom of substantive criminal law and sentencing.

But a closer look at the political economy of sentencing reveals that, contrary to Teichman's argument, the federal government is not likely to provide a solution to a state race to the bottom that produces overly harsh sentences. That is because the current federal sentencing laws are not, as Teichman asserts, the product of some kind of congressional "misunderstanding of the proper role of the federal government in designing crime-prevention policies" that could be corrected with more education.[45] Congress does not "misunderstand" its role when it passes these laws. Rather, it does not care about the externality problem because that does not win members of Congress votes. While a central planner could, in theory, correct negative externalities of state competition—to the extent they exist—Congress is not a theoretical central planner. It is a political body that responds to political pressures. Because those pressures push for more severe sentences and there is currently no political mileage to be had for forging compromises that require states to set lower sentences, federal intervention will fail to provide a correction for state competition that leads to overly-harsh sentences. In fact, federal legislative intervention could exacerbate the problem, as it has in the many areas Teichman explores.[46]

Violent Offender Registration Program, 42 U.S.C. § 14071 (2000) (conditioning federal funding on state adoption of certain minimal registration and notification requirements for sex offenders).

45. Teichman, *supra* note 7, at 1871.

46. These same criticisms do not apply to Teichman's suggestion that federal *courts* should be playing a greater role in policing sentencing under the Eighth Amendment. Teichman, *supra* note 7, at 1869–70. Greater court involvement seems to address both the shortcomings of jurisdictional competition that worry Teichman and the one-sided dynamic that pervades the federal and state politics of sentencing.