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## Crime, Criminals, and Competitive Crime Control

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# CRIME, CRIMINALS, AND COMPETITIVE CRIME CONTROL

Wayne A. Logan\*

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## INTRODUCTION

Given the negative consequences of crime, it should come as no surprise that states will endeavor to make their dominions less hospitable to potential criminal actors. This predisposition, when played out on a national stage, would appear ripe for a dynamic in which states will seek to “out-tough” one another, leading to a spiral of detrimental competitiveness.

Doron Teichman, in an article recently appearing in these pages,<sup>1</sup> advances just such a view. Teichman posits that the decentralized structure of America’s federalist system provides states with “an incentive to increasingly harshen” their crime control efforts,<sup>2</sup> with the net result being excessive penalties and inefficient over-expenditures in state crime control efforts.<sup>3</sup> He reaches this conclusion by wedding two distinct literatures: jurisdictional competition, based on the seminal work of Charles Tiebout,<sup>4</sup> and

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

2. *Id.* at 1832.

3. *Id.* at 1861.

4. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

crime displacement and spillover, a focus of theoretical criminology.<sup>5</sup> Even more provocative is Teichman's prescription for change. Running against a heavy tide of commentary condemning increased federal involvement in criminal justice,<sup>6</sup> Teichman urges that the federal government serve as a "regulator" of the states so that they can "achieve uniformity"<sup>7</sup> and thereby avoid "inefficient harshening."<sup>8</sup>

Although not the first commentator to tie crime spillover effects to race-to-the-bottom concerns,<sup>9</sup> Teichman provides perhaps the most developed treatment of the thesis to date. In the limited space available here, I will not seek to dispute the theoretical verity of Teichman's jurisdictional competition model more generally and the largely anecdotal evidence he advances in support. Rather, I wish to highlight two specific areas of criminal justice policy where such competition is absent—sex offender registration and recidivist enhancement laws—and discuss the effects of state-state interconnection.

According to Teichman, the capacity of ex-offenders to move from one state to another presents the risk that they will naturally seek out new residences with more lenient criminal justice policies, prompting states wishing to discourage such emigration to adopt harsher policies than they otherwise might. One possible cure for this race-to-the-bottom dynamic, Teichman reasons, is to remove travel incentives by ensuring that the criminal justice policies of emigrants' erstwhile state residences follow them into their new states. Teichman notes that sex offender registration laws in several states currently contain such features,<sup>10</sup> and he lauds such laws as a "sensible way to prevent race to the bottom" problems with registration.<sup>11</sup> In the following

5. See, e.g., CRIME DISPLACEMENT: THE OTHER SIDE OF PREVENTION (Robert P. McNamara ed., 1994); CRIME SPILLOVER (Simon Hakim & George F. Rengert eds., 1981).

6. See, e.g., John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673 (1999); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995).

7. Teichman, *supra* note 1, at 1867.

8. *Id.* at 1835.

9. Compare Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 180 (1996) ("[E]ach individual state has a strong incentive to prevent local crime, knowing that it could go elsewhere."), with Kevin R. Reitz, *The Federal Role in Sentencing Law and Policy*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 125 (1996) ("[T]here is little indication that states seek to disadvantage one another through their systems of criminal punishment."). See also Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 302 n.223 (1997) (noting negative externalities created when not all states had enacted sex offender community notification laws and urging a "nationally uniform notification requirement").

10. Teichman, *supra* note 1, at 1856–57.

11. *Id.* at 1873. Teichman also considers the proliferation of "three strikes" recidivist enhancement laws as proof of state desires to combat ex-offender migration but characterizes the laws as strategies to "displac[e] crime," not "displac[e] criminals," as is the case with sex offender registration laws. *Id.* at 1847. Teichman, however, does not discuss how recidivist laws can, like their registration counterparts, defer to out-of-state convictions in forum-state recidivist enhancement determinations.

pages, I contest Teichman's supposition that increased coordination among states will mitigate the harshening he identifies and question the advisability of his proposed federal remedy.

The discussion proceeds as follows. Part I surveys the nature and extent of current state registration and recidivist enhancement laws that permit criminal justice policies to "travel" with ex-offenders. Part II questions the purported benefits Teichman sees in such laws, highlighting an array of negative consequences that Teichman fails to acknowledge, including the very harshening of criminal justice policies he seeks to avoid. Finally, in light of these pitfalls, Part III challenges Teichman's broader normative prescription for federal governmental intervention as an agent of positive change.

## I. INTERCONNECTION

While historically states had little regard for how their fellow sovereigns handled criminal offenders,<sup>12</sup> in recent decades they have shown increasing awareness of the criminal justice policies of their sister states. Today, this recognition is evidenced in two central methods of social control: criminal recidivist sentence enhancement laws and sex offender registration laws. Both types of laws have been in effect in some form for decades<sup>13</sup> and have evolved over time to accommodate ex-offenders, who, if free of parole- or probation-related restrictions,<sup>14</sup> can and do freely change state residences.<sup>15</sup> States have achieved this accommodation by using prior out-of-state convictions to trigger application of registration requirements and enhance prison sentences for recidivists in the same manner as the offender's former state residence (the "foreign" state), irrespective of how the conviction would affect offenders in the new state residence (the "forum" state). These laws may be aptly characterized as "external" in nature because they defer to the laws and outcomes of foreign states. This contrasts with the "internal" approach, which

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12. Writing in 1934, for instance, the Georgia Supreme Court evinced this disregard in deciding to eschew, for purposes of sentencing consideration, a prior out-of-state conviction of an offender: "The courts of Georgia do not take judicial cognizance of the laws of these foreign jurisdictions, and therefore cannot attribute to our General Assembly an intention to give equal dignity to proof of a conviction in another jurisdiction to that which properly inheres in those of our own state . . ." *Lowe v. State*, 177 S.E. 240, 240 (Ga. 1934).

13. On the history of criminal recidivist laws, see Wayne A. Logan, *Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime*, 74 U. CIN. L. REV. 1609, 1618-24 (2005). On the history of registration laws, see Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 158-67 (2000) [hereinafter Logan, *Federal Habeas*].

14. See *Smith v. Doe*, 538 U.S. 84, 101 (2003) (distinguishing between ex-offenders under community supervision and those not under supervision, noting that the latter "are free to move where they wish and work as other citizens").

15. See *City of Chicago v. Morales*, 527 U.S. 41, 53-54 (1999) ("We have expressly identified this 'right to remove from one place to another according to inclination' as 'an attribute of personal liberty' protected by the Constitution." (quoting *Williams v. Fears*, 179 U.S. 270, 274 (1900))).

ignores the qualifying criteria of foreign law and focuses instead solely upon whether the forum state's own criteria are satisfied.<sup>16</sup>

Today, the registration laws of sixteen U.S. jurisdictions use an external approach.<sup>17</sup> These states, in addition to specifying particular offenses warranting registration, also require registration if the foreign state where the conviction occurred required registration.<sup>18</sup> This is so regardless of whether the foreign predicate conviction would warrant registration in the forum.<sup>19</sup> Moreover, in several other states the external approach is used with particular ex-offenders—for instance, temporary visitors as a result of educational or work arrangements.<sup>20</sup>

As for recidivists, twenty-two jurisdictions employ an external approach when making sentence enhancement decisions.<sup>21</sup> Sentencing courts in these states focus on whether the foreign conviction resulted in sufficient punishment to trigger the forum's recidivist offender law—typically a one-year term in prison, equating with felony status—not whether the underlying behavior was criminalized in the forum, or, if criminalized, would warrant felony status and thus enhancement viability there. Under this regime, as noted by the Idaho Court of Appeals, foreign predicates need only be “felonies under the laws of the state where the conviction was entered. . . . [I]t [is] immaterial . . . whether the convictions in other states were for crimes that would also have been felonies under Idaho law, so long as they were felonies where the offenses occurred.”<sup>22</sup>

In sum, considerable evidence now exists of states deferring to one another's criminal justice outcomes, providing the opportunity for a natural

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16. See generally Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 269–78, 284–88 (2005) (distinguishing respective approaches to recidivist enhancement and sex offender registration laws).

17. *Id.* at 287. The remaining thirty-five jurisdictions use an internal approach. See, e.g., ARIZ. REV. STAT. ANN. § 13-3821(A) (2001 & Supp. 2005) (requiring registration only if foreign conviction “would” trigger registration in Arizona).

18. See, e.g., S.C. CODE ANN. § 23-3-430(A) (Supp. 2004) (“Any person . . . who has been convicted of . . . an offense for which the person was required to register in the state where the conviction or plea occurred, shall be required to register.”).

19. See, e.g., NEV. REV. STAT. ANN. § 179D.410(19) (LexisNexis Supp. 2001) (deeming registerable offense as one “of a sexual nature committed in another jurisdiction, whether or not the offense would be an offense listed in this section, if the person . . . has been required by the laws of that jurisdiction to register”); OR. REV. STAT. § 181.597(1)(2)(c) (2003) (applying registration laws to “a person required to register in another state for having committed a sex offense in that state regardless of whether the crime would constitute a sex crime in this state”).

20. See, e.g., MD. CODE ANN., CRIM. PROC. § 11-704(a)(7) (LexisNexis 2001) (applying external approach to workers and students).

21. Logan, *supra* note 16, at 276. The remaining twenty-nine jurisdictions use an internal approach. See, e.g., FLA. STAT. ANN. § 775.084(1)(c), (e) (West 2005) (requiring that foreign conviction be “substantially similar in elements and penalties”).

22. *State v. Williams*, 651 P.2d 569, 580 (Idaho 1982); see also *Gunderson v. State*, 925 P.2d 1300, 1305 (Wyo. 1996) (“The fact that the previous convictions were felonies in the rendering states but may not have been felonies in Wyoming is immaterial. The convictions were still felony convictions.”).

test of Teichman's contention that such interconnection holds promise to neutralize interstate competition and remedy its undesirable effects. As the next Part highlights, however, state interconnection has a broad array of negative consequences that call into question its advisability, including, perhaps most notably, the tendency to incorporate and thus expand the same criminal justice excesses of concern to Teichman.

## II. RAMIFICATIONS

To Teichman, the external approach holds substantial promise to curtail the states' natural competitive instincts and the race-to-the-bottom consequences they engender. By permitting registration eligibility to turn on both legal criteria indigenous to the forum state and that of offenders' former state residences, Teichman reasons, state laws will become more uniform, thereby discouraging adoption of ever-harsher registration requirements.<sup>23</sup> Moreover, according to Teichman, the external approach ultimately inures to the benefit of criminal offenders "as a group since [it] will allow jurisdictions to adopt more lenient registration requirements."<sup>24</sup> As discussed in this Part, however, empirical support for Teichman's case is not in evidence.

### A. Practical Effects

#### 1. Replication and Augmentation

Despite Teichman's claim to the contrary, no evidence exists that the external approach lessens state penalty, in either a quantitative or qualitative sense. While the approach has efficiency benefits,<sup>25</sup> it functions to compound the aggregate scope of social control by supplementing forum state eligibility criteria with that of other states. While Teichman might well be correct in his belief that jurisdictions will not feel the need to legislate anew "to 'keep up' with harsh conditions adopted by other states,"<sup>26</sup> this is only because the external approach reflexively permits foreign laws to be annexed by forum states.

Because this aggregate increase is comprised of the normative positions of individual states, it has an ineluctable qualitative dimension as well.<sup>27</sup>

23. Teichman, *supra* note 1, at 1873 ("Once a state adopts such a provision, it in effect removes itself from the jurisdictional race and is free to adopt any registration policy that best reflects its values, with no need to 'keep up' with harsh conditions adopted by other states.")

24. *Id.*

25. See Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138 (1996) (noting that uniform laws can reduce "inconsistency costs").

26. Teichman, *supra* note 1, at 1873.

27. See *People v. Parker*, 359 N.E.2d 348, 350 (N.Y. 1976) ("[C]rimes committed in other jurisdictions . . . with differing social mores and standards of conduct take on added significance in our highly mobile society.")

State registration laws, for instance, sweep up an enormous variety of behaviors, a tendency that the external approach honors. For example, Alabama targets public display of obscene bumper stickers;<sup>28</sup> Kansas, adultery if one party is less than eighteen years of age;<sup>29</sup> South Dakota, bestiality and indecent exposure;<sup>30</sup> South Carolina, peeping, voyeurism, buggery, and indecent exposure;<sup>31</sup> and Connecticut, consensual sex between minors.<sup>32</sup> Child pornography, short of its production, is also frequently targeted.<sup>33</sup> Furthermore, some states require registration for non-sexual offense convictions—for example, involuntary manslaughter (Kansas)<sup>34</sup> or homicide and aggravated assault (Montana)<sup>35</sup>—and do not limit registerable offenses to felonies.<sup>36</sup> Finally, at least twenty-eight states require juveniles to register.<sup>37</sup>

In addition to absorbing the specified predicates of other states, the external approach gives effect to the broad generalized criteria often found in state registration laws. Minnesota, for example, mandates registration upon conviction of an array of enumerated felony offenses, yet also permits registration when a conviction “aris[es] out of the same set of circumstances” as an enumerated offense.<sup>38</sup> As a result, so long as an enumerated offense is charged and a conviction for some offense results (even a misdemeanor), registration can be required by a court.<sup>39</sup> Other states require registration upon conviction for a nonenumerated offense when the underlying behavior is “sexually motivated,” committed with a “sexual purpose” or for “sexual gratification,” or constitutes a form of “sexual perversion.”<sup>40</sup> Ultimately, the

28. ALA. CODE § 13A-12-131 (Supp. 2005).

29. KAN. STAT. ANN. § 22-4902(a)(5)(A) (Supp. 2004).

30. S.D. CODIFIED LAWS § 22-22-30(11), (14) (2004).

31. S.C. CODE ANN. § 23-3-430(C), (10), (12), (14) (Supp. 2004).

32. CONN. GEN. STAT. ANN. §§ 53a-73a, 54-250(5), 54-251(a) (West 2001 & Supp. 2005).

33. See, e.g., MO. ANN. STAT. § 589.400(1)(2) (West Supp. 2005) (possessing child pornography); TEX. PENAL CODE ANN. § 62.01(5)(B) (Vernon 2005) (same).

34. KAN. STAT. ANN. § 22-4902(d)(5) (Supp. 2004).

35. MONT. CODE ANN. § 46-23-502(9)(a) (2005).

36. See, e.g., ALASKA STAT. § 12.63.100(6)(C)(ii) (2004) (requiring registration for specified Class A misdemeanor convictions); N.D. CENT. CODE § 12.1-32-15(2)(b) (Supp. 2005) (requiring registration for specified misdemeanor convictions).

37. Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration Laws to Juveniles*, 91 CAL. L. REV. 163, 177–78 (2003).

38. See MINN. STAT. ANN. § 243.166 Subd. 1b(a)(1) (West Supp. 2005).

39. *Boutin v. LaFleur*, 591 N.W.2d 711, 715–16 (Minn. 1999).

40. See, e.g., ALA. CODE § 13A-11-200 (1994) (requiring registration for “generally any act of sexual perversion involving a member of the same or the opposite sex”); CONN. GEN. STAT. ANN. § 54-254(a) (West Supp. 2005) (requiring registration for “any felony the court finds was committed for a sexual purpose”); KAN. STAT. ANN. § 22-4902(b)(14) (Supp. 2004) (requiring registration for “sexually motivated” crimes); WASH. REV. CODE ANN. §§ 9A.44.130, 9.94A.030(41)–(42) (West 2005) (requiring registration for crimes committed for the purpose of “sexual gratification”).

external approach allows these broad criteria, effectuated by individual foreign state trial courts, to infuse the registration standards of forum states.

Similar effects are seen with recidivist laws, as the convictions on which they are based also turn on the diverse normative views of states.<sup>41</sup> One sees disagreement on such basic matters as whether behavior should be criminalized,<sup>42</sup> the definitions of particular crimes,<sup>43</sup> and the availability of defenses.<sup>44</sup> Moreover, even in areas of substantive agreement, enormous variation exists in punishments prescribed.<sup>45</sup> With the external approach, these variations are reflexively incorporated into the recidivist enhancement laws of forum states.

In sum, by replicating the normative preferences of individual states, the external approach increases the reach of registration and recidivist enhancement laws in both quantitative and qualitative ways. These constituent state preferences, of course, are part and parcel of the decentralized, autonomous quality of federalism itself. As Lynn Baker has observed, “[t]he freedom of sub-national political communities to choose their own visions of the good society, like any other form of ‘diversity,’ predictably results in a mixed bag of results.”<sup>46</sup> The external approach, however, disavows this local prerogative, and, by infusing forum state law with that of other states, permits the “mixed”—typically crime-control-oriented decisions of such other states—to have effect far beyond their borders.<sup>47</sup>

## 2. Fairness

This systemic effect, in turn, has fairness-related consequences for individuals. With respect to registration, for instance, if an individual moves

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41. See *Rochin v. California*, 342 U.S. 165, 168 (1952) (“[C]rimes in the United States are what the laws of the individual States make them.”).

42. See, e.g., Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 836 (2004) (noting varied state views on criminalizing marijuana possession); Amy C. Radosevich, Note, *Thwarting the Stalker: Are Anti-Stalking Measures Keeping Pace with Today’s Stalker?*, 2000 U. ILL. L. REV. 1371, 1380–90 (noting varied state views on criminalization of stalking).

43. See, e.g., Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions*, 74 N.Y.U. L. REV. 1696, 1724–29 (1999) (discussing variations in state definitions of statutory rape, assault and battery, petty theft, driving under the influence, and obstruction of justice).

44. See, e.g., PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* §§ 173–194 (1984 & Supp. 2005) (surveying state variations in excuse-related defenses).

45. As the Supreme Court has noted, “the classification of state crimes differs wildly among the States.” *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984). For an overview of such differences, see NATIONAL SURVEY OF STATE LAWS 75–240 (Richard A. Leiter ed., 5th ed. 2005).

46. Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 448 (2002).

47. According to Madison, federalism was created with such potentialities in mind, allowing extreme laws to remain localized. See THE FEDERALIST NO. 10, at 52 (James Madison) (Clinton Rossiter ed., 1991) (“The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. . . . In the extent and proper structure of the Union . . . we behold a republican remedy for the diseases most incident to republican government.”).



from South Carolina to one of the fifteen other states using an external approach, the Palmetto State's broad gamut of registerable offenses will come into play.<sup>48</sup> Similar scenarios result if one moves from any number of other states with unusual registration criteria.<sup>49</sup>

Under such circumstances, the external approach results in two possible kinds of unfairness. The first involves emigrants from states with narrower registration eligibility criteria; they, unlike the emigrant from say South Carolina, will not be subject to registration in the forum because it was not required by the foreign state. The second arises when an indigenous offender is not required to register when convicted of a particular offense yet an emigrant is so required, based upon the terms of the foreign registration law. In both such situations, registration, with its direct<sup>50</sup> and collateral burdens—including possibly community notification, with its litany of negative consequences<sup>51</sup>—is driven by the happenstance of where the foreign conviction occurred, leading to unequal outcomes.

With respect to recidivist laws, foreign jurisdiction decisions can compel that a conviction be counted, even when the conviction would not trigger recidivist status in the forum. As a result, sentences are determined not on the basis of the normative views of the forum, but rather pursuant to where the prior out-of-state conviction occurred.<sup>52</sup> Similarly, variations in the treatment of juveniles and pleas of *nolo contendere* can lead to unequal treatment when the forum defers to a foreign state's use of such dispositions, yet ignores them *vis-à-vis* its indigenous offenders.<sup>53</sup>

Finally, with both registration and recidivist laws, the external approach permits the varied procedural rules and rights of states to have extraterritorial significance. Variations relative to such basic matters as jury size and unanimity<sup>54</sup> and application of the Fourth Amendment's exclusionary rule,<sup>55</sup> as well as

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48. See *supra* note 31 and accompanying text.

49. See *supra* notes 28–37 and accompanying text.

50. See Logan, *Federal Habeas*, *supra* note 13, at 183–86 (noting, among other things, in-person registration requirements and name-change prohibitions).

51. See *id.* (noting, among other things, the threat of vigilantism and difficulties finding housing and employment).

52. See *State v. Bush*, 9 P.3d 219, 222 (Wash. Ct. App. 2000) (adopting internal—not external—approach in order “to ensure that defendants with equivalent prior convictions are treated the same way regardless of whether those prior convictions were incurred in Washington or elsewhere”).

53. See, e.g., *State v. Vizcaino-Roque*, 800 S.W.2d 22 (Mo. Ct. App. 1990) (making use of prior Florida *nolo*-based conviction that would not be recognized in Missouri).

54. See Robert H. Miller, Comment, *Six of One Is Not a Half Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Grand Juries*, 146 U. PA. L. REV. 621, 629 (1998) (discussing the increasing use of petit juries comprised of fewer than twelve jurors and experimentation with nonunanimous juries).

55. Compare *State v. Duntz*, 613 A.2d 224 (Conn. 1992) (rejecting “good faith” exception), with *Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992) (embracing exception).

more particularized state procedures,<sup>56</sup> can influence criminal justice outcomes, and hence differentially affect individual-level recidivist enhancement and registration-eligibility decisions.

## B. Doctrinal Implications

Beyond its practical effects, the external approach has significant doctrinal implications.

### 1. Democratic Representativeness

First, and perhaps foremost, the external approach undercuts the democratic representativeness of the criminal law. Contrary to Teichman's assertion that the external approach frees a jurisdiction "to adopt any registration policy that best reflects its values,"<sup>57</sup> it actually negates such values. By bootstrapping value judgments of other states, the approach flouts the premise that state criminal laws reflect the normative views of the jurisdictions enacting them,<sup>58</sup> what the Anti-Federalists lauded as state "individuality."<sup>59</sup>

By creating a legal landscape in which it becomes difficult to ascribe value judgments with geopolitical accuracy, the external approach also functions to undermine governmental transparency and political accountability.<sup>60</sup> By deferring to the laws of other sovereigns, forum state officials become free-riders: they avoid any possible negative political consequences that might attend enactment of such laws in the first instance in the forum.<sup>61</sup> For instance, a state with an external approach registration law can effectively

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56. See, e.g., *People v. Johnson*, 285 Cal. Rptr. 394 (Ct. App. 1991) (counting prior Nevada conviction even though it was secured without the same procedural protections that California would afford).

57. Teichman, *supra* note 1, at 1873.

58. See *Atkins v. Virginia*, 536 U.S. 304, 313 (2003) ("[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))); *State v. Langlands*, 583 S.E.2d 18, 20 n.4 (Ga. 2003) ("A state cannot express its public policy more strongly than through its penal code. When a state defines conduct as criminal and sets the punishment for the offender, it is conveying in the clearest possible terms its view of public policy.'" (quoting *New Mexico v. Edmondson*, 818 P.2d 855, 860 (N.M. Ct. App. 1991))).

59. See SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 239 (1993) (quoting Dr. Johnson of Connecticut who observed that the Anti-Federalists saw the states as "so many political societies, each with its individuality" while the Federalists saw the states as "districts of people composing one political Society").

60. Cf. *New York v. United States*, 505 U.S. 144, 183 (1992) (invalidating Congress's attempt to commandeer New York to dispose of low-level radioactive waste within its borders, and noting that when governmental responsibility is obscured "federalism is hardly being advanced").

61. However, the legerdemain ultimately has (nonpolitical) consequences: the financial expenditures associated with effectuating registration—plus perhaps community notification—and enhancing prison terms, which have costs that must be borne by the forum state alone. Moreover, defendants faced with enhancement in the forum might well be less likely to plead guilty and may instead pursue trials, which have their own associated costs.

codify indecent exposure (South Dakota) or involuntary manslaughter (Kansas) as convictions requiring registration, even though the state might be politically wary of adopting the requirements via the formal legislative process.<sup>62</sup> The external approach thus permits a kind of stealth legislation: laws are applied by the forum without having been subject to the debate and compromise common to the legislative process, depriving the public of an important occasion for norm identification and support.<sup>63</sup> While it might be the case that the imported value judgment parallels that of the forum, this is not necessarily so, and the furtive quality of the approach undercuts the democratically approved discretion a formal law embodies.<sup>64</sup>

The external approach thus forsakes what Professors Baker and Young have called the “negative freedom” of federalism—the right of states to act autonomously and independently, free of the constraining authority of other governmental units.<sup>65</sup> Convictions secured pursuant to foreign laws are permitted to serve more than a mere evidentiary function, that is, signaling a prior unwillingness to obey the law. They are used to effectuate the criminal justice system of the forum state, in the process gainsaying a central animating value of federalism.<sup>66</sup>

## 2. *Pluralism and Competition*

In a related sense, the external approach impairs the pluralism and competition ideally fostered by autonomous state rule. By bootstrapping the laws and outcomes of other states, the approach ultimately constricts the range of normative choices available to individuals, diminishing what Alexander Hamilton regarded as the salutary competition for the people’s affection.<sup>67</sup> This competition, Hamilton reasoned, has particular resonance with respect to the administration of justice, “the most powerful, most uni-

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62. This also serves to provide political cover for judges and prosecutors, especially when they must stand for reelection.

63. As Paul Robinson has noted, the legislative process provides “an occasion for public debate that can help build norms, with the conclusion of the debate announced by legislative action, or inaction.” Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1867 (2000).

64. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404–05 (1958) (describing criminal laws as embodying the “formal and solemn pronouncement of the moral condemnation of the community”).

65. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 134 (2001); see also Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 52 (2004) (“[S]tate governments cannot provide fora for political participation and competition unless meaningful decisions are being made in those fora.”).

66. See 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, 993–94 (1995) (“A decentralized federal system is efficient; it permits criminal justice policy to be tailored to local conditions and policy preferences, and it furthers political accountability.”).

67. THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

versal and most attractive source of popular . . . attachment” because it is “the immediate and visible guardian of life and property.”<sup>68</sup>

Because the external approach makes prior convictions indelible matters of record, negatively affecting recidivism and registration decisions regardless of the eligibility criteria of other states, individuals with such records naturally will be less inclined to move.<sup>69</sup> This of course is a central objective of proponents of the external approach—to increase the reach of social control and discourage ex-offenders from moving into their states. Nonetheless, by in effect making laws more uniform, the external approach discourages exit rights<sup>70</sup> and limits freedom of movement, an accepted constitutional good.<sup>71</sup> Ex-offenders, in effect, atavistically become tribe-like members of the state in which their conviction occurred,<sup>72</sup> contrary to the free movement ideals of the nation’s federalist republic.<sup>73</sup>

The approach also ultimately chills the experimentation that ideally results from democratic competition and diversity. Depending on one’s perspective, it might well be that a “courageous” state<sup>74</sup> is one that elects not to embrace a particular crime or sentence outcome in its registration law or

68. *Id.*

69. This presumes, of course—as does Teichman’s rational-choice model—that ex-offenders are aware of the provisions of the state to which they might move. Tiebout himself acknowledged that his analytic model artificially presumed adequate legal knowledge of such comparative differences. Tiebout, *supra* note 4, at 419. Ex-offenders perhaps have greater incentive to self-educate because their liberty is imperiled, yet despite the anecdotal evidence provided by Teichman, there is, given the disadvantaged backgrounds of many ex-offenders, no reason to think that they actually would be any better equipped to do so. Cf. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420–21 (1990) (noting that mobility is constrained by “economic and social factors that tend to affect poorer people more than affluent ones” and that “investors of capital and owners of businesses, rather than residents, are the prime beneficiaries” of relocation options).

70. See Ribstein & Kobayashi, *supra* note 25, at 140 (“[U]niform state laws tend to decrease exit opportunities.” (emphasis omitted)).

71. See *supra* note 15 and accompanying text; see also JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 178–79 (1980) (asserting that the right to travel is important because it protects an individual’s capacity to leave an “oppressive” community); Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 501 (2004) (asserting that individuals “suffer an externality when any state adopts regulations that render it an undesirable place to reside”).

72. As Seth Kreimer has noted, state-based identification is a relic of antebellum thought: “At the time of the Civil War, Robert E. Lee resigned his federal commission, and renounced his oath of allegiance because as a ‘Virginian’ he could not bear to honor that oath. It is hard today to find a citizen of the United States who conceives of her primary identity as a ‘Virginian’ or a ‘Pennsylvanian’ . . .” Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 984 (2003).

73. As Douglas Laycock has observed, “There are other ways to organize, but we did not choose them. An American state is not like a nomadic tribe, with membership based on kinship. . . . The state may be created for the good of its people, but it is defined by its territory, and ‘its people’ are defined by the territory in which they live.” Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 316–17 (1992); see also *Lemmon v. People*, 20 N.Y. 562, 609 (1860) (“The position that a citizen carries with him, into every State into which he may go, the legal institutions of the one in which he was born, cannot be supported.”).

74. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

recidivist regime. However, the external approach, by reflexively incorporating another state's contrary view, makes the public policy efficacy of any such decision more difficult to discern.<sup>75</sup> As a result, another foremost posited benefit of federalism—experimentalism—is sacrificed.

### 3. *Race to the Bottom*

Finally, despite Teichman's advocacy of the external approach as a "sensible way to prevent a race to the bottom,"<sup>76</sup> the approach actually fosters just such an outcome. This is because, as Teichman's thesis itself attests, criminal justice matters are subject to uniquely potent political pressures.<sup>77</sup> No politician relishes the prospect of being cast as a coddler of criminals, especially sex offenders<sup>78</sup> and recidivists.<sup>79</sup> In such a climate, the external approach, whereby the harshly idiosyncratic views of states are exported, can have particular resonance.<sup>80</sup> For instance, before *Lawrence v. Texas*<sup>81</sup> invalidated state laws criminalizing consensual homosexual sodomy, the external approach would compel recognition of such convictions for purposes of registration.<sup>82</sup> This reflexive incorporation of oppressive law,<sup>83</sup> in addition to replicating the initial injustice, could ultimately foster a familiarity and comfort in forum states with the foreign value judgment, bringing

75. For instance, with registration laws, the external approach obscures whether it is sensible to require registration of persons convicted of particular predicate offenses (for example, peeping) because the control set is excluded.

76. Teichman, *supra* note 1, at 1873.

77. As William Stuntz has observed, "[i]f there is any sphere in which politicians have an incentive simply to please the majority of voters, it's criminal law." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–30 (2001); see also Wayne A. Logan, "Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of *Ex Post Facto* Claims in State Courts, 12 WM. & MARY BILL RTS. J. 439, 468, 495 (2004) (surveying extensive public choice commentary addressing political resistance to criminal offenders). Importantly, the political impotence of criminal defendants is apt to be particularly pronounced among emigrant ex-offenders, whose newcomer status makes them even less likely to succeed in influencing political change.

78. See Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 320–21 (2003) (noting the wave of harsh laws targeting sex offenders rapidly enacted in the 1990s, including registration and community-notification provisions).

79. See, e.g., FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001).

80. Importantly, by definition the external approach operates only in one direction: to systematically import laws of a harsher nature, despite the forum state's more permissive law (that is, failing to count the behavior for registration or recidivist purposes).

81. 539 U.S. 558 (2003).

82. For examples of state laws requiring registration for consensual sodomy convictions, see, for instance, ALA. CODE § 13A-11-200 (1994); IDAHO CODE ANN. § 18-8304(1)(a) (Cum. Supp. 2002); MISS. CODE ANN. § 45-33-21 (Lexis 2003).

83. See *Lawrence*, 539 U.S. at 579 ("[L]aws once thought necessary and proper [can] in fact serve only to oppress.").

political pressure to formally recognize the policy via the legislative process, with the result being a proliferation of harshness.

### C. Summary

The preceding discussion makes clear that even if one accepts Teichman's thesis of jurisdictional competition and spillover effects, there is reason to doubt that his proposed uniformity-based remedy will result in a less draconian regime of social control. Indeed, the evidence suggests quite the opposite. In addition, as discussed, laws compelling uniformity have a broad array of negative practical and doctrinal consequences, which should give pause to policymakers perhaps inclined to adopt Teichman's prescribed course of action.

### III. THE FEDERAL GOVERNMENT AS "CENTRAL PLANNER"

In addition to failing to recognize the serious problems posed by the external approach, Teichman's advocacy of federal involvement requires brief discussion. As Teichman concedes, the U.S. government has a dismal track record when it comes to criminal justice, very often manifesting an irrational "'tough on crime' attitude" irrespective of legislative context.<sup>84</sup> He therefore attaches a major caveat at the end of his article, noting that if this proclivity persists there may be "little to gain, and perhaps even much to lose, from additional federal regulation."<sup>85</sup> This caveat, supported by a wealth of available evidence, plainly risks undercutting Teichman's argument altogether. But even so, and even if one were to somehow reconcile the obvious federalism concerns associated with having the federal government determine state criminal justice policy,<sup>86</sup> reason exists to be dubious of federal efforts to make state law more uniform.

Consideration of the federal role vis-à-vis registration and community notification laws highlights why this is so. According to Teichman, federal involvement can alleviate the negative externalities created by state competition by maintaining current federal law imposing minimum registration eligibility requirements.<sup>87</sup> This is because, Teichman maintains,<sup>88</sup> positive externalities are generated with enhanced registration requirements,

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84. Teichman, *supra* note 1, at 1874.

85. *Id.*

86. See *Lopez v. United States*, 514 U.S. 549, 561 n.3 (1995) (stressing the preeminent autonomous role of states in criminal justice matters).

87. See 42 U.S.C. § 14071(a)(3)(A), (B) (2000). States must satisfy these minima if they wish to remain eligible to receive federal law enforcement grants. See *Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2042 (1994) (codified as amended at 42 U.S.C. § 14071(g)(2)(A) (2000)); *Megan's Law*, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amending 42 U.S.C. § 14071(d) (1994)).

88. Teichman, *supra* note 1, at 1871 n.202. Such positive externalities come in the form of "a comprehensive data set that can serve all states," which Teichman regards as especially true in the

and states need federal minima to encourage them to be more ambitious because registration information benefits the entire nation, and not just local communities.<sup>89</sup> At the same time, Teichman asserts, the states lack no such incentives to aggressively pursue community notification, which Teichman suggests more significantly promotes sex offender interstate migration and hence competitiveness.<sup>90</sup> In light of these circumstances, state notification efforts must be collared by adoption of a “unified federal framework that has maximum standards.”<sup>91</sup>

Again, there is reason to question the accuracy of the dynamic portrayed by Teichman. As made clear above, states are not lacking in their ardor to impose registration requirements, and, despite Teichman’s contrary assertion, registration serves primarily the state and local—not national—community, thus naturally encouraging imposition of broad requirements. This is especially so in light of the low cost of registration itself, compared to notification, and the major “get tough” political benefits new registration requirements have for state officials. As a result, assuming the propriety of a federal role, maximum standards would appear just as needed with registration, which while not as personally burdensome as community notification, has negative effects of its own.<sup>92</sup>

Second, Teichman’s backing of federal maxima for notification, while permitting continued federal minima for registration, raises concern for a related practical reason. Because registration itself is always prerequisite to notification, registration criteria inevitably affect notification outcomes. This is especially so in the many states that, rather than undertaking individualized risk determinations of all registrants before subjecting them to notification,<sup>93</sup> instead automatically subject all registrants to notification,<sup>94</sup> an approach condoned by the U.S. Supreme Court.<sup>95</sup> The two sanctions are thus inextricably tied, a reality further complicated with increasing use of the external approach: the expansive registration criteria of states, permitted by the lack of federal maxima, can drive notification, leading to the same inflationary concern troubling Teichman.

Third, political process concerns call into question the advisability of federally imposed maximum community notification criteria. Such criteria

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wake of new federal legislation requiring the creation of a federal sex offender database. *Id.* (citing 42 U.S.C. § 14072 (2000)).

89. *Id.*

90. *Id.* at 1871.

91. *Id.* (emphasis omitted).

92. *See, e.g., Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998) (“[R]egistration . . . place[s] a ‘tangible burden’ on [individuals] potentially for the rest of their lives.”); *Doe v. Dep’t of Pub. Safety*, 92 P.3d 398, 409 (Alaska 2004) (discussing burdens associated with registration alone).

93. *See, e.g., MINN. STAT. ANN.* § 244.052(2) (West 2003); *N.J. STAT. ANN.* § 2C:7–8d(1) (West 2005); *N.Y. CORRECT. LAW* § 168-f (McKinney 2003).

94. *See, e.g., ALA. CODE* § 15-20-21 (1995); *ALASKA STAT.* §§ 18.65.087, 12.63.010 (2004); *KAN. STAT. ANN.* § 22-4904 (Supp. 2004); *TENN. CODE ANN.* §§ 40-39-102, 40-39-103 (2003).

95. *See Conn. Dep’t Pub. Safety v. Doe*, 538 U.S. 1, 7–8 (2003).

would, if Teichman's competitiveness model holds true, provide states positive incentives to expand their laws. Politicians invariably feel pressure to achieve any anticrime goals put before them, whatever the countervailing indigenous sentiment toward lenience that might exist. This natural impulse, in turn, is significantly increased in instances when the federal government exercises its conditional spending power authority, as seen with registration and community notification laws themselves.<sup>96</sup> The result, again: the very harshening of the criminal justice system that Teichman seeks to avoid.<sup>97</sup>

## CONCLUSION

Doron Teichman has provided an engaging, thought-provoking discussion of the competition-based difficulties potentially presented by America's decentralized system of criminal justice and the largely ignored matter of the benefits possibly attending public cooperation in crime control.<sup>98</sup> To Teichman, the atomized nature of the system carries great risk: states will create negative externalities in their natural competitive zeal to repel and expel criminal offenders.<sup>99</sup> Because this self-destructive dynamic ultimately stems from a collective action problem, Teichman reasons, the situation is ripe for mediation and cooperation. Teichman's proposed remedy lies in greater interstate reliance and uniformity in criminal justice policies, as well as possible intervention by the federal government as a rational "central planner."

Here, I have attempted to highlight the empirical reality that, despite the compelling quality of Teichman's theoretical model, increased state cooperation presents an array of practical and doctrinal difficulties. Furthermore, Teichman's suggested federal role, for reasons he does acknowledge, as well as for several others he does not, holds little realistic promise for optimism.

For better or worse, America's system of decentralized governance, including its crime control efforts, permits states significant latitude to pursue

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96. See, e.g., *State v. Chun*, 76 P.3d 935, 940 (Haw. 2003) (citing legislative statements indicating that changes to Hawaii's registration and notification law were prompted by concern that the state would forfeit federal funding).

97. For instance, given the Supreme Court's position that individualized risk determinations need not occur before undertaking notification, see *Conn. Dep't Pub. Safety*, 538 U.S. 1 (2003), it is highly unlikely that Congress would impose such a requirement despite the sound practical and policy reasons favoring individualization. See Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 *BUFF. CRIM. L. REV.* 593, 636–37 (2000).

98. See Simon Hakim & George F. Rengert, *Introduction*, in *CRIME SPILLOVER*, *supra* note 5, at 1, 13 ("[W]e know little about the relative merits of public cooperation versus competition in crime control."); Reitz, *supra* note 9, at 120 ("[L]ittle thought has been given to appropriate inter-governmental roles [in sanctioning offenders].").

99. With criminal justice, there is, in effect, no "Delaware"—no individual state calls the shots with respect to crime control policies, creating a climate in which competition (to the extent it exists) is perhaps keener than in the corporate law realm, where Delaware's preeminence has been theorized to undercut competition. For a discussion of this point in the context of real property law, see Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 *YALE L.J.* 72, 93–94 (2005).



their independent interests. To be sure, this very independence can foster inefficiencies and less than optimal social outcomes. A “single courageous State”<sup>100</sup> can experiment, and this experiment, if ill-advised and copied by others, can aggregate into increasingly suboptimal outcomes.<sup>101</sup> However, as the discussion here makes clear, Teichman’s proposed cures—fusing state laws or allowing Congress to micromanage states—are likely worse than the disease.

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100. *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

101. See G. Lana Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, 31 *PUBLIUS: J. FEDERALISM* 37, 40-41 (2001) (discussing the need to limit experiments undertaken by states).