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Federalism, Crime Control and
Jurisdictional Competition

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THE MARKET FOR CRIMINAL JUSTICE: FEDERALISM, CRIME CONTROL, AND JURISDICTIONAL COMPETITION

BY

DORON TEICHMAN*

I. INTRODUCTION

In the last few decades the United States has been engaged in an escalating war against crime. Between 1982 and 2001, the resources dedicated by American taxpayers to the justice system have more than quadrupled.¹ Discounting for inflation, this number continues to reflect a 165% real increase in this expenditure,² as well as a rise in the part of the American Gross Domestic Product dedicated to the justice system.³ At the same time, criminal sanctions in the United States have also been on the rise. The incarceration rate has more than tripled, from 139 per 100,000 residents in 1980 to a staggering 476 per

* Humphrey Fellow in Law and Economic Policy, The University of Michigan Law School. For helpful comments, I thank Oren Bar-Gil, Omri Ben-Shahar, Jenna Bednar, Daniel Halberstam, Alon Harel, Aaron Goodman, Vik Khanna, Jim Krier, Rob Mikos, Barak Orbach, Kim Thomas and participants at the 2004 meeting of the Israeli Law and Economics Association. I gratefully acknowledge the financial support provided by the Olin Center for Law and Economics at the University of Michigan.

¹ Bureau of Justice Statistics, *Justice Expenditure and Employment in the United States*, 2001, 2 (2004) (hereinafter *Justice Expenditure Report*). It should be noted that these figures include all of the costs of upholding the court system and therefore include costs associated with civil litigation as well. Nonetheless, unless there has been a disproportionate rise in the expenditure dedicated to the civil elements of the justice system these figures should give a general indication as to the trends of the expenditures on the criminal aspects of the justice system.

² *Id.* at 1.

³ *Id.* at 3. (noting that while in 1982 1.10% of the American GDP was dedicated to the justice system, in 2001 this number grew to 1.66%). These figures also reflect a 271% increase in the per capita expenses on the justice system. *Id.* at 2.

100,000 residents in 2002.⁴ This rate of increase is in sharp contrast to other Western countries.⁵ Finally, in recent years we have witnessed a constant decline in the procedural safeguards granted to criminal defendants by courts in the United States, which again is in contrast to foreign countries.⁶

The systematic harshening of the American criminal justice system⁷ is a complex phenomenon lacking a single explanation. Rather, it relates to American attitudes towards crime, local crime rates, and the partisan politics surrounding criminal law.⁸ This Article aims to add another piece to this puzzle and points out how the decentralized structure of the American criminal justice system creates a dynamic process in which local communities have an incentive to increasingly harshen that system's standards. This argument builds on the insights of two parallel lines of literature that have thus far not been combined in a complete fashion.⁹ The first is the jurisdictional competition

⁴ Incarceration Rate Trends, Bureau of Justice Statistics, *available at* <http://www.ojp.usdoj.gov/bjs/glance/tables/incrttab.htm> (last visited May 14, 2004). *See also* David C. Leven, *Curing America's Addiction to Prisons*, 20 *FORDHAM URB. L. J.* 641, 642-43 (pointing out the rise of the prison population in the United States in recent decades).

⁵ Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 *CRIME & DELINQUENCY* 419, 419 (1999). As noted by Professor Luban in 1993 the United States had the highest incarceration rate in the world - higher than pre-Glasnost Soviet Union, post-Tiananmen Square China, and pre-de Klerk South Africa. *See* David Luban, *Are Criminal Defendants Different?*, 91 *MICH. L. REV.* 1729, 1749-50 (1997).

⁶ Tonry *Id.* at 419-20. *See also* Louis Michel Seidman, *Criminal Procedure as the Servant of Politics*, 12 *CONST. COMM.* 207, 209 (1995) (stating that "judges have virtually gone out of the business of actually policing the voluntariness of confessions and regularly sanction the sort of coercive tactics that would have led to the suppression of the evidence a half century ago").

⁷ A terminological comment should be made at this point regarding the term 'criminal justice system'. For the purposes of this Article this term is used in order to encompass all policy tools that a government can use in order to regulate criminal behavior. The most obvious of these tools is the criminal code which defines which acts are criminal and what are the sanctions that are attached to these acts. Yet this term includes additional tools such as the expenditures made by the government in order to finance law enforcement agencies, the rules of evidence governing criminal trials, and the rules of criminal procedure.

⁸ *See generally* Tonry, *supra* note 5.

⁹ For an exception *see* Richard Epstein, *Constitutional Faith and the Commerce Clause*, 71 *NOTRE DAME L. REV.* 167, 180 (1996).

literature. This line of literature demonstrated that under a stylised set of assumptions, competition among local governments might lead to efficient levels of taxation and of supply of public goods.¹⁰ In the past few decades this literature has covered a wide array of legal fields including corporate law,¹¹ environmental law,¹² taxation,¹³ bankruptcy,¹⁴ trusts,¹⁵ and family law.¹⁶ The common characteristic of these studies is the treatment of the different units creating a decentralized government as actors who compete among themselves to attract desirable types of activity and repel unwanted types of activity.

The second line of literature my argument builds upon is the crime displacement literature.¹⁷ This literature treats the decision of profit driven criminals (*e.g.*, car thieves,

¹⁰ The initial contribution to this literature should be attributed to Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

¹¹ See, *e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251; Daniel R. Fischel, *The Race to the Bottom Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. L. REV. 913 (1982); Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992).

¹² See, *e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Scott R. Saleska & Kirsten H. Engel, *"Facts are Stubborn Things": An Empirical Reality Check in the Theoretical Debate Over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 CORNELL J. L. & PUB. POL'Y 55 (1998).

¹³ See, *e.g.*, Louis Kaplow, *Fiscal Federalism and the Deductibility of State and Local Taxes under the Federal Income Tax*, 82 VA. L. REV. 413, 458-61 (1996).

¹⁴ See, *e.g.*, David A Skeel, *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom"*, 54 VAND. L. REV. 231 (2001).

¹⁵ Stewart E. Sterk, *Asset Protection Trusts: Trusts Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000).

¹⁶ See, *e.g.*, Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995).

¹⁷ Significant early contributions to the study of crime displacement were made by Thomas A. Reppetto, *Crime Prevention and the Displacement Phenomenon*, 22 CRIME & DELINQUENCY 166 (1976); Simon Hakim et al., *Interjurisdictional Spillover of Crime and Police Expenditures*, 55 LAND ECON. 200 (1979).

drug dealers) as to *where* to commit a crime as a rational decision in which criminals aim to maximize their expected payoff from crime. Thus, this literature has pointed out that both public measures such as additional police activity, and private measures such as building fences, may simply cause crime to move from one place to the other.

Combining the insights of jurisdictional competition and crime displacement points out that the goal of encouraging crime migration might drive local communities to gradually harshen their criminal justice system. A jurisdiction raising the price of committing a crime within it either by raising the sanction or the probability of detection makes neighbouring jurisdictions more attractive crime targets. This, in turn, will cause these neighbouring jurisdictions to adjust their sanctions and probabilities of detection in order to prevent criminal activity from moving to them. Over time, these dynamics will cause a decentralized criminal justice system to shift towards harsher standards. In other words, while some commentators have argued that we are witnessing an arms race between law enforcement agencies and criminals,¹⁸ what we might actually be witnessing is an arms race between local communities attempting to drive crime to their neighbors.

From a doctrinal perspective, the analysis presented in the Article is closely related to the debate triggered by the Supreme Court's rulings in *U.S. v. Lopez*¹⁹ regarding the role of the federal government in the realm of criminal law.²⁰ Thus far, this

For reviews of the topic *see, e.g.*, CRIME SPILLOVER (Simon Hakim and George F. Rengert eds., 1981); CRIME DISPLACEMENT (Robert P. McNamara ed., 1994); RATIONAL CHOICE AND SITUATIONAL CRIME PREVENTION (Grame Newman, Ronald V. Clarke and S. Giora Shoham eds., 1997).

¹⁸ Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1523 (2000).

¹⁹ 514 U.S. 549 (1995).

²⁰ In *Lopez* the Supreme Court struck down the federal Gun Free School Zones Act of 1990 after finding that it exceeded Congress's power under the commerce clause.

discussion has mainly focused on issues such as the historical limits of congressional authority,²¹ the relative advantages of the federal and state criminal justice systems,²² the burden imposed upon the federal judiciary,²³ the potential effects of the federalization of criminal law on individual rights,²⁴ and the importance of normative diversity in criminal law.²⁵ The Article adds to this debate in the sense that it uses a political economy perspective to point out the potential advantages and disadvantages in allowing local communities to control criminal justice policies. In this context, the theoretical argument presented in the Article leads to the conclusion that contrary to the commonly held view among legal scholars,²⁶ additional federal regulation in the area of criminal justice might be desirable in order to limit the inefficient harshening of that system caused by jurisdictional competition. Furthermore, unlike scholars who argue that federal intervention should focus on areas in which local jurisdictions *fail* to deal with crime,²⁷

²¹ See, e.g., Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L. J. 1135 (1994).

²² James S. Gorelick and Harry Littman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L. J. 967, 973 (1995) (pointing out the efficiency of having a centralized agency which specializes in certain aspects of investigation); John C. Jeffries, Jr., and John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L. J. 1095, 1103-25 (1995) (pointing out some of the functional advantages of the federal prosecutorial system).

²³ Sara Sun Beale, *Too Many and Yet Too Few: New Principals to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L. J. 979, 983-96 (1994) (arguing that the creation of additional federal crimes is undesirable because it over burdens the federal judiciary). *But see* Tom Stacy and Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J. L. & PUB. POL'Y. 247, 251-61 (1997) (arguing that additional criminal litigation is not creating an excessive burden on federal courts).

²⁴ Beale, *id.* at 995 (arguing that a national police force might threaten individual liberty).

²⁵ Brickey, *supra* note 21 at 1138-39. *See also* K Coleman S. Strump and Felix Oberholzer-Gee, *Endogenous Policy Decentralization: Testing the Central Tenet of Economic Federalism*, 110 J. POL. ECON. 1 (2002) (analyzing the diversity of alcohol regulation in the United States).

²⁶ Stacy & Dayton, *supra* note 23 at 247-48 n1 (reviewing the literature on the issue).

²⁷ Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L. J. 1029, 1077-81 (1995).

the Article makes the counter intuitive argument that in the context of criminal justice, federal intervention might be necessary when states are *successful* at reducing crime.

The Article is organized as follows: Section II will introduce the concepts of jurisdictional competition and crime displacement and will argue that as a positive matter, a decentralized criminal justice system is expected to create a competitive process among the different units composing it, in which each such unit attempts to divert crime to neighbouring communities. Section III will then turn to evaluate the normative aspects of jurisdictional competition in the area of criminal justice. In this context it will be shown that competition can have both advantages and disadvantages. On one hand, the forces of competition might drive jurisdictions to fight crime efficiently, since any jurisdiction that functions inefficiently will suffer from a rise in its crime rate as a result of crime displacement. On the other hand, jurisdictions might face a collective action problem in which they are spending increasingly high resources on their criminal justice system simply to deflect crime to their neighbours. In such a case, everyone's interests would be served if jurisdictions were able to commit themselves not to compete in the area of criminal justice. The second half of Section III will examine more closely the problem of inefficient competition in the realm of criminal justice, and will explore different ways to deal with these inefficiencies. Finally, Section IV offers concluding remarks as well as suggestions for future research.

II. JURISDICTIONAL COMPETITION AND CRIMINAL JUSTICE

For the most part, the United States has a decentralized criminal justice system. State legislatures define the majority of crimes and set out the punishments for those crimes.²⁸ In addition, the enforcement of criminal laws lies, in most cases, in the hands of local law enforcement agencies.²⁹ Furthermore, the officials controlling such local agencies are often elected directly by the communities they serve. This, in turn, promises the development of policies that will be attuned to the preferences of local communities.³⁰ Employing the tools of positive public choice theory, this Section will evaluate the decision-making process that units of a decentralized system of government face when they design their criminal justice policies.

1. Jurisdictional Competition

In order to develop a model of the behavior of the different units within a decentralized system of government, one must initially develop a concept of the decisions made by these units. In recent years positive public choice theory has led us to understand that we can view local units in a decentralized system as players aiming to maximize

²⁸ *Lopez* 514 U.S. at 561n.3; *Engle v. Isaac* 456 U.S. 107, 128 (1982) (the States possess primary authority for defining the criminal law).

²⁹ *Engle, id.* Justice Expenditure Report, *supra* note 1 at 2-3 (presenting data on federal state and local expenditures).

³⁰ This structure should be contrasted with the structure of the criminal system in other countries that is centralized. In Israel, for instance, the bulk of criminal offences and their punishments are defined by a national criminal code. In addition, the enforcement of these laws is conducted by a national police force that is controlled by the central government. See David Weisburd, Orit Shalev, and Menachem Amir, *Community Policing in Israel, Resistance and Change*, 25 POLICING 80, 82 (2002).

their own welfare.³¹ Thus, the interactions among these units can be categorized as competitive in nature and the tools of game theory can be employed in order to model the expected equilibrium they will lead to.

The jurisdictional competition literature can be traced back to Charles Tiebout's article on the topic,³² in which he demonstrated that under a stylised set of assumptions,³³ competition among local governments might lead to efficient levels of taxation and of supply of public goods.³⁴ While the normative aspect of this model (*i.e.* state competition is efficient) can be seen as controversial, its positive aspect (*i.e.* competitive incentives drive state policies) is mostly uncontested. Since the publication of Tiebout's article, the jurisdictional competition literature has spread to a wide variety of legal fields.³⁵ Two illustrative examples that reflect reverse incentives can be found in the areas of corporate law and welfare benefits. In the context of corporate law, states have an incentive to *attract* corporations to incorporate within their jurisdiction in order to enlarge their tax revenues.³⁶ Given the high mobility of corporations associated with the relatively low

³¹ For some general examples of this line of literature *see, e.g.*, Paul E. Peterson, Barry G. Rabe and Kenneth K. Wong, *WHEN FEDERALISM WORKS* (1986); *THE NEW FEDERALISM* (John Ferejohn and Barry R. Weingast eds., 1997); David L. Shapiro, *FEDERALISM* (1995).

³² Tiebout, *supra* note 10.

³³ Tiebout makes several assumptions within his model (*id.* at 419). First, there exist a large number of communities. Second, there are no costs associated with moving from one jurisdiction to the other. Thus individuals can choose their jurisdiction based on the taxes they will need to pay and the public goods (such as police, public schools, etc.) that are provided within the jurisdiction. Third, individuals hold perfect information as to the level of taxation and the level of public goods supplied in all jurisdictions. Fourth, all jurisdictions are in optimal size, which means that they have the number of member at which the bundle of services can be produced at the minimal average cost. Fifth, communities that are below the optimal size seek to attract new residents in order to reach the optimal size. Sixth, there are no spill over effects or externalities.

³⁴ *Id.* at 421-24.

³⁵ *See supra* notes 11-16.

³⁶ *See generally* sources cited in note 11 *supra*.

costs of reincorporation, corporations will tend to reincorporate in states offer them a set of corporate governance laws maximizing their value. Thus, states wishing to enlarge their tax revenues are expected to attempt to offer corporations the most attractive set of corporate governance rules. In the context of welfare policies, on the other hand, the interaction among jurisdictions leads to different results.³⁷ Welfare policies are based on the redistribution of wealth from the rich to the poor. Thus, a state adopting such policies is expected to encourage migration of poor people from states that do not have such policies. Yet, states generally wish to *discourage* the migration of poor people because such movement decreases the welfare of the state's current residents. Hence, the prospect of poor migration is expected to cause states to be reluctant to adopt generous welfare policies that they would have been willing to adopt in the absence of such migration.

The competitive process in the context of criminal law builds upon the same insights as the existing jurisdiction competition literature. Crime is a negative social phenomenon that imposes several costs on the community within which it is committed. First, crime imposes direct costs to the victim.³⁸ These costs can be born by the individual victims of the crime or by the community through insurance contracts in which case members of the community will receive an accurate monetary measurement of the cost of crime in their community. Second, crime affects the location decision of potential investors.³⁹ Communities with low crime rates attract economic investments that raise

³⁷ For a recent review of the literature on jurisdiction competition in the area of welfare policies see generally Craig Volden, *Entrusting the States with Welfare Reform*, in *THE NEW FEDERALISM* 65 (John Ferejohn and Barry R. Weingast eds., 1997).

³⁸ Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Crimes to Victims*, 22 *L. & SOC'Y REV.* 537 (1998) (measuring the costs imposed by crime on individuals).

employment, generate additional tax revenues, and enhance welfare. Finally, crime rates affect the value of properties in the area in which they are committed. Generally, communities suffering from high crime rates will suffer a depreciation in their property values and a decrease in wealth.⁴⁰ The final point might be of greater importance in the context of jurisdictional competition because a significant portion of the tax revenue of localities in the United States is tied to the value of local properties.⁴¹

Given the costs of crime, local communities have an incentive to lower their crime rates by adopting policies that will “export” this problem to neighbouring communities.⁴² This is not to say that policies are necessarily tailored with this goal in mind (though as we shall see, in some cases it is), rather, jurisdictions facing increased crime rates might adopt policies aimed towards reducing it, not realizing that as a result,

³⁹ See, e.g., Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753, 759 (1996-1997) (noting that high crime rates in inner cities deter firms from locating in those communities); Douglas R. Porter, *Reforming Growth management in the 21st Century: The metropolitan Imperative*, 12 U. FLA. J. L. & PUB. POL’Y 335, 339 (2001) (pointing out the connection between lower crime rates and the shift of economic development to suburban and rural areas). In fact, it is quite common for both states and smaller communities to point out their low crime rates when they attempt to draw investors. See, e.g., <http://www.hawaii.gov/dbedt/advantages.html> (Hawaii’s Business Resource Site, last visited May 20, 2004); <http://www.stedf.org/aboutsttammany.htm> (St. Tammany Economic Development Foundation Site, last visited May 20, 2004).

⁴⁰ Richard Thaler, *A Note on the Value of Crime Control: Evidence from the Property Market*, 5 J. URBAN ECON. 137 (1978); Daryl A. Hellman and Joel L. Naroff, *The Impact of Crime on Urban Residential Property Values*, 16 URBAN STUDIES 105 (1979).

⁴¹ See, e.g., Nina J. Crimm, *Why All is not Quiet on the “Home Front” for Charitable Organizations*, 29 N. M. L. REV. 1 (1999) (pointing out that “the property tax has been and continues to be the single largest source of revenue for local governmental units”); Sharon N. Humble, Comment, *The Federal Government’s Machiavellian Impediment of the States’ Collection of Property Taxes Through the FDIC’S Regulation of Failed Financial Institutions: Does the End Justify the Liens?*, 25 ST. MARY’S L. J. 493, 502-3 (1993) (noting that in Texas most local governments rely primarily on property taxes); Lee R. Epstein, *Where Yards are Wide: Have Land Use Planning and Law Gone Astray?*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 345, 374 n100 (1999) (noting that in Maryland most local governments rely primarily on property taxes).

⁴² Ronald McKinnon and Thomas Nechyba, *Competition in Federal Systems*, in *THE NEW FEDERALISM* 3, 6 (John Ferejohn and Barry R. Weingsat eds., 1997) (noting that generally states have an incentive to export social problems to neighboring states).

they divert crime to neighbouring jurisdictions. The policies I will analyze in this Article can be categorized into two types. The first aims to raise the cost of committing crimes in the jurisdiction in order to make it less attractive. The second attempts to expel from the jurisdiction individuals who demonstrated that they have a high propensity to commit future crimes. In the next two subsections I will evaluate these two methods to displace crime more closely.⁴³

2. Displacing Crime

The first way in which jurisdictions may cause criminals to shift their activity to neighboring jurisdictions is by affecting their ex-ante decision as to where to commit their crimes. Economists view the decision criminals make to commit a certain crime as a rational cost benefit analysis.⁴⁴ According to this line of thought, criminals evaluate the

⁴³ In this Article I will treat crime as a purely negative social phenomenon from the perspective of local jurisdictions. This description seems reasonable given the harms of crime presented in the text above. In addition, to the extent that crimes such as property crimes are efficient in the sense that they transfer property to individuals that derive a higher marginal utility from it, these transfers will in most cases be from individuals who are represented in the political system to individuals who are not represented in the political system. Thus, from a public choice perspective such crimes will continue to be seen as a negative social phenomenon. Nonetheless, there might be certain types of criminal activity that could be viewed as beneficial from the perspective of jurisdictions. One reason for this might be because of the positive nature of some types of criminals. For example, white collar criminals might generate a substantial amount of tax revenues and as a result jurisdictions might want to adopt policies that will attract this type of individuals. A second reason might be associated with benefits created by crimes themselves. For example, lenient enforcement of laws regulating the sale of alcohol to underaged individuals might generate additional profits for local businesses and additional tax revenue of local governments. A closely related category are crimes that border on positive types of activities that a jurisdiction wish to encourage. For instance, corporate criminal activity might be at times closely related to legitimate economic activity. If a jurisdiction sanctions such activity too heavily it might discourage individuals fearing of mistakenly crossing the criminal line from doing business in that jurisdiction. Finally, some jurisdictions might differ as to the concept of what a “harm” is. For instance, if some units in a decentralized criminal system enact sodomy laws that cause members of the LGBT community to migrate to jurisdictions that did not enact such statutes the later jurisdictions are not suffering from a “negative externality” since they do not see this activity as negative. On normative diversity and criminal law *see* sources cited in note 25 *supra*.

⁴⁴ *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. (1968) 169, 176-79 (1968) (presenting an analysis of the supply of crime). For a more contemporary treatment of the

potential gains and costs of a crime and commit the crime only if it has a positive expected value. The costs of crime to criminals include the opportunity cost of not engaging in legal activities, the time and effort dedicated to committing crime, and the expected sanction the criminal justice system generates. This expected sanction is composed of the probability of detection and the sanction applied to those criminals who are actually detected. Generally, as the expected sanction rises, the net value of committing a crime diminishes and criminals are deterred.

An additional dimension of the decision potential criminals make concerns *where* to commit their crimes. Arguably, there is a diverse set of targets criminals might choose from that differ in the expected loot value, the cost of reaching them, the expected sanction associated with them, and other factors. Potential criminals are expected to internalize all of these factors and choose the target with the highest expected value.⁴⁵ In other words, holding everything else equal, criminals are expected to choose to commit their crimes in the area with the lowest expected sanction.

Building on this theoretical framework, economists have modeled different aspects of the geography of criminal activity and the precautions taken by crime victims.⁴⁶ At the same time, criminologists have studied the effects of measures taken

issue *see* Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSPECTIVES 43 (1996).

⁴⁵ Joseph Deutsch, Simon Hakim and J. Weinblatt, *Interjurisdictional Criminal Mobility: A Theoretical Perspective*, 21 URBAN STUD. 451, 451 (1984) (noting that “[a] rational criminal chooses the various locations in which to operate in order to maximize his expected utility”).

⁴⁶ Deutsch, Hakim & Weinblatt, *id.* (modeling the spatial decision of criminals); Joseph Deutsch, Simon Hakim, and J. Weinblatt, *A Micro Model of the Criminal’s Location Choice*, 22 J. URBAN ECON. 198 (1987) (same); Steven Shavell, *Individual Precautions to Prevent Theft: Private Versus Socially Optimal Behavior*, 11 INT’L REV. L. & ECON. 123 (1991) (evaluating the precaution decision potential crime victims make); Koo Hui-wen and I. P. L. Png, *Private Security: Deterrent or Diversion?*, 14 INT’L REV. L. & ECON. 87 (1994) (presenting a model of crime displacement); Scott Freeman, *The Spatial Concentration of Crime*, 40 J. URBAN ECON. 216 (1996) (presenting a model explaining the spatial concentration of crime).

both by public and private actors aimed at lowering the expected payoffs of crime by “hardening” potential crime targets.⁴⁷ Examples of such measures include police patrols, fences, street lighting, and the like. These studies demonstrated that in many cases such measures end up displacing crime to areas where these measures are not used. Concrete examples of crime displacement can be found with respect to burglary,⁴⁸ robbery,⁴⁹ sales of illegal narcotics,⁵⁰ growing of illegal narcotics,⁵¹ and prostitution.⁵²

It should be noted that although the economic and criminological studies cited above are consistent with a concept of a rational choice criminals make as to the location of their crimes, their evaluation implicitly focuses on criminals’ short term decisions. In other words, these studies accept criminals’ place of residence as a given and evaluate how their decisions are affected by specific measures made in order to lower crime

⁴⁷ See generally sources cited in note 17 *supra*.

⁴⁸ Stephen L. Mehay, *Burglary Spillover in Los Angeles*, in CRIME SPILLOVER (Simon Hakim and George F. Regent eds., 1981) 67.

⁴⁹ Chrisban Grandjean, Bank Robberies and Physical Security in Switzerland: A Case Study of the Escalabon and Displacement Phenomena, 1 SECURITY J. 155 (1990). *But see* Anthony A. Braga et al., *Problem Oriented Policing in Violent Crime Places: A Randomized Controlled Experiment*, 37 CRIMINOLOGY 541,567-69 (1999).

⁵⁰ John E. Eck, *The Threat of Crime Displacement*, in CRIME DISPLACEMENT (Robert P. McNamara ed., 1994) 103, 111-12 (reviewing the literature on displacement and drug enforcement); Rick Curtis and Michele Sviridoff, *The Social Organization of Street-Level Drug Markets and its Impact on the Displacement Effect*, in CRIME DISPLACEMENT (Robert P. McNamara ed., 1994) 155 (presenting a case study of the displacement of drug dealers in Brooklyn). *But see* Braga et al., *id*.

⁵¹ John R. Fuller and James R. O’Malley, *Enforcement and Displacement: The Case of Marijuana Growing*, in CRIME DISPLACEMENT (Robert P. McNamara ed., 1994) 137.

⁵² J. Lowman, *Prostitution in Vancouver: Some Notes on the Genesis of a Social Problem*, 28 CANADIAN J. OF CRIMINOLOGY 1 (1986); Roger Mathews, *Developing More Effective Strategies for Curbing Prostitution*, 1 SECURITY J. 182 (1990); Robert P. McNamara, *Crime Displacement and Male Prostitution in Times Square*, in CRIME DISPLACEMENT (Robert P. McNamara ed., 1994) 121; Phil Hubbard, *Community Action and the Displacement of Street Prostitution: Evidence from British Cities*, 29 GEOFORUM 269 (1998).

rates.⁵³ Given the methodological difficulties of measuring crime displacement, that criminologists have chosen to focus on the short term effects of this phenomenon should come as no surprise. Nonetheless, from an analytical perspective one can expect long term residence decisions made by criminals to be generally consistent with a rational choice model as well. Accordingly, given long term expected payoffs criminals will shift their permanent place of residence to the area that maximizes that payoff.

To be sure, two clarifications should be made regarding potential criminals' geographic decisions. First, some crimes are clearly local in nature and have little to do with criminals shopping around for communities with the lowest expected sanction. For instance, one could not reasonably argue that an abusive husband chooses the place in which he commits his crimes according to the analysis presented here.⁵⁴ The focus of this subsection, rather, is on criminal activity driven by monetary profits such as the trade in illegal narcotics, prostitution, and theft, and therefore should be sensitive to the potential costs and benefits of relocating. Second, shifting criminal activity from one place to another is a costly endeavor that is expected to create some rigidity in the crime market and prevent criminals from moving to more profitable crime zones. A criminal shifting activity to another area has to learn the specific law enforcement practices in that area, the location of the potential victims, useful escape paths, and connections to other tiers of the criminal world. Such costs might, in many cases, create a substantial barrier to crime

⁵³ Some studies have taken criminals place of residence as a given explicitly and measured different aspects of crime with respect to this given place of residence. *See, e.g.,* T. S. Smith *Inverse Distance Variations for the Flow of Crime in Urban Areas*, 56 *SOCIAL FORCES* 802 (1976) (half of the offenders committed their crimes within 2 miles of their homes); S. Turner, *Delinquency and Distance*, in *DELINQUENCY: SELECTED STUDIES* 11 (T. Sellin and M. E. Wolfgang eds., 1969) (three quarters of juvenile offenders committed crimes within one mile of their home).

⁵⁴ *See, e.g.,* John P. McIver, *Criminal Mobility*, in *CRIME SPILLOVER* 20, 36 (Simon Hakim and George F. Rengert eds., 1981) (pointing out that crimes of passion tend not to be displaced).

displacement.⁵⁵ For example, drug dealers who are highly dependant on their clientele might be deterred from moving to other areas by competing dealers who control those areas, or by the fact that they are unfamiliar with police enforcement tactics in those areas.⁵⁶ Thus, it is not surprising that studies finding a statistically significant displacement effect also find that the magnitude of this effect is relatively small.⁵⁷

The concepts of jurisdictional competition and crime displacement point out a potential competitive process jurisdictions might engage in when designing key elements of their criminal justice system such as the size of the sanctions they impose on offenders and the amount of resources they dedicate to detecting criminals. Traditional models of the political economics of criminal sanctions have focused on what can be termed an island economy.⁵⁸ In other words, policymakers in such an economy are not affected by the criminal sanctions created in neighboring communities, and can design an optimal sanctioning regime given the unique cost of deterring crime and the harm caused by crime in their specific jurisdiction. Yet once we incorporate into this analysis the insight that the relative size of sanctions in neighboring jurisdictions affects criminals' location decisions, the existing models cannot continue to describe the actual decision policymakers face. Rather, the ability to displace crime by raising criminal sanctions creates the potential for a competition among jurisdictions wishing to become the least "crime friendly" jurisdiction. Over time, this process can evolve into a competitive cycle

⁵⁵ See, e.g., Repetto, *supra* note 17 at 175; René Hesseling, *Theft from Cars: Reduced or Displaced?*, 3 EURO. J. ON CRIMINAL POLICY & RESEARCH 79, 87-8.

⁵⁶ Curtis & Sviridoff, *supra* note 50 at 164-67 (discussing the lack of displacement in the face of additional enforcement efforts in Flatbush given the specific supply conditions in that neighborhood).

⁵⁷ See, e.g., Mehay, *supra* note 48 at 78.

⁵⁸ See, e.g., Becker, *supra* note 44 at 180-85 (deriving the conditions for optimal crime prevention policies).

in which jurisdictions impose increasingly harsher sanctions and spend increasingly larger resources on policing in order to enlarge the probability of detection.⁵⁹

A concrete and useful example of the process described here can be found in the context of policies adopted by local governments to deal with auto theft. This example is useful because of the characteristics both of auto thieves and of the harm created by auto theft. Auto thieves can be divided into two distinct types. The first steal cars in order to actually use them either for simple joy rides or to get from one place to another. The second steal cars in order to resell them either as a vehicle or to chop-shops, which dismantle them into spare parts. While the first type of auto theft is local in nature and should not be dramatically displaced, the second type of auto theft functions much more like a professional industry and, over time, should shift to the geographic area in which the profits of crime are maximized. Two characteristics of the harms caused by auto theft place political pressure on local governments to prevent auto theft, even at the cost of crime displacement. First, auto theft is a rather common crime and therefore many constituents will care about it while making their voting decisions. Second, auto insurance premiums create an explicit price tag that allow residents to compare the ability of different jurisdictions to prevent this type of crime.

⁵⁹ Given the argument made in the text one would expect that state sanctions will be higher than federal sanctions for similar crimes. The reason for this is that unlike the states the federal government is expected to internalize crime across states and not have a preference to drive crime across state lines. Nevertheless, it is quite clear that generally federal punishments are more severe than state punishments for similar crimes. *See* Beale, *supra* note 23 at 998. Yet this phenomenon should not be viewed as evidence contradicting the argument presented here. In cases of concurrent jurisdiction the federal government tends to exercise its power over a very small subset of cases. *See* Beale, *id.* at 981. Thus, the federal government does not design its criminal sanctions in these cases as if it were the sole regulator of behavior, but rather realizes that the brunt of the responsibility will be carried out by the states. Because of this structure the federal government can afford to impose the severe sanctions it chooses to impose.

During the mid 1980s auto theft was on the rise in the United States.⁶⁰ This rise was especially felt in Michigan, which held the unfortunate title of the state with the highest auto theft rate in the nation.⁶¹ The increasing inconvenience and rise in insurance premiums eventually led the Michigan legislature to act, and in 1986 it created the Michigan Auto Theft Prevention Authority (ATPA).⁶² The Michigan ATPA includes representatives of law enforcement, auto insurance purchasers, and the auto insurance industry.⁶³ Its goal is to fight auto theft in the state by funding police, prosecutorial, judicial, and private initiatives aimed toward the reduction of auto theft.⁶⁴ The activities of the Michigan ATPA are funded by a \$1 surcharge added to the price of auto insurance policies in the state.⁶⁵

The creation of the Michigan ATPA gave law enforcement agencies in Michigan a boost in their war against auto theft from two perspectives. First, additional resources were allocated to fighting auto theft, which helped raise the probability of detection and the ability to prosecute additional car thieves. Second, the authority allowed some law enforcement agents across the state to deal exclusively with auto theft. This, in turn, allowed these agents to specialize in the field and become more effective in auto theft prevention. These advantages brought a sharp decline in the Michigan auto theft rate in the years following the creation of the state's ATPA, despite a continued rise in the

⁶⁰ Michael R. Rand, James P. Lynch, and David Cantor, U.S. Department of Justice, Bureau of Justice Statistics, *Criminal Victimization, 1973-95* at 4 (1997).

⁶¹ Michigan Auto Theft Prevention Authority 2003 Annual Report at 4 (hereinafter Michigan 2003 Report).

⁶² Mich law – Chapter 500. Insurance Code. Sec. 6103.

⁶³ Sec. 6103(3).

⁶⁴ Sec. 6107(3).

⁶⁵ Sec. 6107(1).

national level of auto theft.⁶⁶ Yet at least part of the success of the Michigan ATPA can be explained by crime displacement. Local car thieves facing an enhanced expected sanction in Michigan chose to shift their activity to neighboring states “like cockroaches fleeing a fumigated home.”⁶⁷ Neighboring states, facing a rise in their auto theft rates,⁶⁸ either adopted similar measures or felt the consequences of becoming more attractive crime targets.⁶⁹ As one Milwaukee police detective put it, “[w]e’ve seen auto theft decrease in Michigan after they passed a new bill. Then we saw it decrease in Illinois later when they passed a bill ...What we have are professional thieves moving to different states from Michigan to Illinois to Wisconsin.”⁷⁰ The same phenomenon seems to have taken place in other parts of the country.⁷¹ Thus, we can see how one state’s

⁶⁶ In each one of the five years following the creation of the Michigan ATPA Michigan experienced a decline in auto theft while in each of these years the national amount of auto theft increased. *See* Michigan 2003 Report, *supra* note 61 at 11. Between the years 1986 and 2002 auto thefts in Michigan decreased by 32% while the national thefts increased by 2%. *Id.*

⁶⁷ Vicki Contavespi, *Auto Suggestions*, FORBES, Dec. 19, 1994 (quoting Rene Monforton, the director of claim services for AAA Michigan). *See also* Tom Held, *Auto Thefts Soar in Wisconsin, State Called Haven for Chop Shops*, MILWAUKEE SENTINEL, June 5, 1993 at 1A (pointing out that the aggressive anti theft programs in neighboring states drove thieves to Wisconsin); Neil D. Rosenberg, *2 Similar Plans Fight Auto Theft, Each Other*, THE MILWAUKEE JOURNAL, July 12, 1993, at B1 (same); *Michigan Authority Helps Clamp Down on Auto Thefts*, MIAMI HERALD, Apr. 7, 1994, at 9B (reporting that tough auto theft laws in Michigan and Illinois are driving auto thieves to Indiana).

⁶⁸ Illinois State Police, *Crime in Illinois 1998* at 13 (noting that auto theft in Illinois peaked in 1990); Wisconsin Office of Justice Assistance, *Crime and Arrests in Wisconsin 1998* at 64 (showing that motor vehicle theft in Wisconsin rose during the late 1980s and peaked around 1991-92).

⁶⁹ In 1991 Illinois created the Illinois Motor Vehicle Theft Prevention Council. *See* 20 Illinois Comp. Stat. 4005.

⁷⁰ Kevin Harrington, *Auto Theft Up 25% as Thieves Strike 40 Times a Day*, THE MILWAUKEE J., April 16, 1992 at A1 (quoting Milwaukee Police Detective Peter Simet).

⁷¹ The market for stolen cars in the south west part of the nation is unique since a large part of it relies on transporting the stolen cars to Mexico. From that perspective states such as Texas, Arizona and California are competing over deterring away this type of unique auto thieves. Initially, Arizona under-funded this effort and did not fund its auto theft prevention authority with mandatory surcharges. *See infra* notes 80-82. This, in turn, led to the displacement of auto theft activity to Arizona. *See, e.g.,* Miriam Davidson, *Arizona Auto Theft Moves Into Fast Lane*, CHRISTIAN SCIENCE MONITOR, July 24, 1995 at 3 (reporting that “car thieves are flocking to Arizona from neighboring California, which has cracked down on car theft);

initiative eventually drove other states across the country to adopt similar (costly) programs.

Several additional points should be noted when viewing the dynamics surrounding the competition among states in the context of auto theft prevention. First, some legislatures seem to be especially attuned to the possibility of crime displacement and require their ATPA to deal mainly with the type of auto theft that can be displaced to other states, namely, auto theft driven by economic incentives. For instance, out of the six potential activities for the states' ATPA enumerated by the Michigan legislature, the top four deal exclusively with "economic automobile theft."⁷² Second, while it is difficult to point out increases in the legislated sanction for auto theft, one can point out a rise in the effective sanction auto thieves faced.⁷³ In the past, the prosecution of auto thieves was of relatively low priority.⁷⁴ Thus, these thieves faced a low, if not nonexistent, effective

Howard Fischer, *State at Top of Stolen Car List, Crackdowns Pushing Thieves to Arizona*, THE ARIZONA DAILY STAR, June 13, 1995 at 1A (noting that crackdowns in California and in Texas have left Arizona as the only viable border state left for auto thieves); *Arizona Soars to 4th in Auto Thefts*, THE ARIZONA DAILY STAR, Feb. 9, 1995 at 3B (same). Eventually, these trends forced the Arizona legislature to provide for larger funding for the state's ATPA. *See infra* note 82. *See also* Deborah Sharp, *Crackdown is Making a Dent in Car Thefts*, USA TODAY, Aug. 26, 1997 at 4A (reporting that the crackdown on auto theft in large metro areas "created a boomlet of stolen cars in states such as Utah"); Guillermo Contreras, *Duke City Auto Thefts Set Record*, ALBUQUERQUE J., June 27, 1998 at A1 (El Paso police recognizing that its aggressive attack on auto thieves squeezed some of them elsewhere).

⁷² Sec. 6107(3)(b). *See also* Vernon's Ann Texas Civ. St. Art. 4413(37) Sec. 8 (focusing on economic auto theft); California (same). *But see* Illinois (no distinction between economic auto theft and other types of auto theft); Arizona, A.R.S. §41-3451 (same); Pennsylvania (same).

⁷³ The term effective sanction refers to the actual sanction auto thieves face. It should be noted that the problem of crime displacement did at least create public debate regarding the desired level of sanctioning for auto thieves. *See, e.g.*, Contreras, *supra* note 71 (quoting deputy district Attorney Richard Bowman stating that the penalties for swiping vehicles are not strict enough); Sheba R. Wheeler, *Colorado Auto Theft Leaps 24%*, DENVER POST, Nov. 15 2002 (noting that "authorities say they can't combat the crime without tougher penalties"); Wayne Thompson, *Every 30 Minutes*, PORTLAND OREGONIAN, June 12, 1994 at G1 (pointing out the low sanction for auto theft in Oregon as one of the causes of high theft rates); Rosenberg, *supra* note 67 (reporting on a suggested bill to increase the penalties on auto theft in Wisconsin).

⁷⁴ *See, e.g.*, Maryland Vehicle Theft Prevention Council 2002 Annual Report at 9 (hereinafter Maryland 2002 Report) ("[i]n the past, the prosecution of vehicle theft cases had relatively low priority").

sanction. In order to change this situation and deter auto thieves, ATPAs began funding prosecutors dedicated exclusively to the prosecution of auto thieves.⁷⁵ The activity of these prosecutors increased the number of auto thieves actually charged and convicted.⁷⁶ Other ATPAs attempted to deal with this issue by assisting the judicial branch. In Tarrant County, Texas, local authorities created a specialized impact court to deal exclusively with auto theft cases.⁷⁷ The creation of this court ensured that auto thieves would actually be punished and thus assisted in deterring auto theft.⁷⁸ Over time, the impact court was so effective in deterring auto theft that its services were no longer needed.⁷⁹ Finally, one can see the competitive nature of the decision states make as to the funding of their ATPAs. In Arizona, the ATPA was initially funded on a voluntary basis, without the mandatory surcharges like in nearby California and Texas.⁸⁰ This, in turn, put Arizona at a competitive disadvantage in its effort to deter auto theft.⁸¹ Yet by 1997, the movement of

⁷⁵ See, e.g., Maryland 2002 Report, *id.*; Arizona Automobile Theft Authority 2003 Annual Report at 17 (hereinafter Arizona 2003 Report).

⁷⁶ See, e.g., Arizona 2003 Report, *id.* at 18 (pointing out that due to the activity of specialized prosecutors in 2003 the amount of auto theft cases filed rose from 304 to 558 and the number of convictions rose from 221 to 319).

⁷⁷ See Generally John Council, *Tarrant Judges Hijack Prized Auto Theft Impact Court*, 12 TEXAS LAWYER July 22, 1996. See also Wheeler, *supra* note 73. (noting that auto theft charges have been filed in the municipal court where they expect harsher sanctions).

⁷⁸ Renee C. Lee, *Officers Honored for Curbing Tarrant County Auto Thefts*, THE FORT WORTH STAR TELEGRAM, Aug 18, 1994 at 21 (noting that shifting auto theft prosecution to the Tarrant County impact court raised the sanctions auto thieves faced); Council, *id.* (quoting the commander of the local auto theft task force stating that the sanctions created by the impact court were a big factor in the reduction of auto theft in the area); Jack Douglas Jr., *Commissioners Seek Grant to Keep Auto Theft Court*, THE FORT WORTH STAR TELEGRAM, May 29, 1996 at 8 (noting that local police and district attorney attribute the decline in auto theft in the area to the activity of the impact court).

⁷⁹ Council, *id.*

⁸⁰ Cal. Ann. Ins. Code §1872.8 (a) (imposing a \$1 annual fee); Texas Stat. Ann. § 4413(37) Sec. 10 (same).

⁸¹ Davidson, *supra* note 71 (noting the lack of funding for the local ATPA as one of the reasons for the rising auto theft rate)

car thieves to Arizona drove the state's legislature to adopt a surcharge scheme.⁸² On the other hand, in Maryland, a cut in the funding of the local ATPA brought about a significant increase in the auto theft rate.⁸³ This, in turn, led to public pressure to raise the amount of resources dedicated to the state's ATPA.⁸⁴

A second example of deterring crime away can be found in the context of three-strike laws. In general, under these laws offenders convicted for the third time of certain crimes are subject to harsh mandatory sanctions.⁸⁵ Adoption of these laws created of a large discrepancy in sanctions between different states. An offender who already has two strikes faces the high third strike sanction in a state that adopted such a law, while he faces a relatively minor sanction if he commits the same crime in a state that does not have a three-strike regime. Thus, some criminals are expected to find it beneficial to relocate their activity from states that adopted three-strike laws to those that did not.

Anecdotal evidence supports the displacement hypothesis with respect to three-strike laws.⁸⁶ For example, a study conducted by the California Department of Justice

⁸² AZ Revised Statutes 41-3451 Section J (creating a mandatory surcharge of 50 cents).

⁸³ See Maryland 2002 Report, *supra* note 74 at 1.

⁸⁴ See, e.g., Editorial, *Fully Restore Theft Program Budget Cut: State Shouldn't Retreat From Its Cross-Jurisdictional Effort to Reduce Auto Theft*, THE BALTIMORE SUN, June 21, 2001 at 16A; Del Quentin Wilber, *Grant Cuts Concern Police, Auto Theft Programs Affected by State's Reduced Funding*, THE BALTIMORE SUN, Aug. 9, 2001 at 1B; Jo Becker, *Auto Theft Fund Cut Decried in Maryland; Executives Petition to Keep Programs*, WASH. POST, June 12, 2001 at B1.

⁸⁵ For a comparative description of these laws see John Clark, James Austin, and D. Alan Henry, "Three-strikes and You're Out": A Review of State Legislation, U.S. Dept. of Justice, national Institute of Justice, 6-12 (1997).

⁸⁶ See, e.g., Janiskee & Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three-strikes Law*, 39 DUQUESNE L. REV. 43, 45-46 (2000) ("Prosecutors in Los Angeles routinely report that 'felons tell them they are moving out of the state because they fear getting a second or third strike for a nonviolent offense' " (quoting Sanchez, *A Movement Builds Against "Three-strikes" Law*, WASHINGTON POST, Feb. 18, 2000, at A3)); John Painter, *Prosecutors Antsy Over 'Three-strikes'*, PORTLAND OREGONIAN Sept. 16, 1994 at B2 (noting that offenders facing their third strike might be

found that the state's three-strike law had the "unintended but positive consequence" of causing parolees to leave the state.⁸⁷ Furthermore, several public figures have explicitly indicated that they support three-strike laws because of their displacement effect.⁸⁸ For instance, David LaCourse, one of the initiators of Washington's three-strike law, pointed out as one of the advantages of the law that, "[s]everal criminals from other states have said they decided not to move [to Washington] after being told of the law."⁸⁹ Hence, it would seem that at least one of the reasons that three-strike laws were adopted by many states as quickly as they were is that states were compelled to adopt this type of legislation in order to prevent offender migration.⁹⁰

leaving the state); Terry McCarthy, *L.A. Gangs are Back*, TIME MAGAZINE, Sept. 3, 2001 at 46 (noting that "[t]o avoid the mandatory 25 years to life sentence under California's three-strikes-and-you're-out law, gang members with two convictions have been moving out of state"); David LaCourse, *Editorial, Viewpoint: '3 Strikes, You're Out' Law Proving to be Efficient Crime Fighter*, THE NEWS TRIBUNE TACOMA, WA, Apr. 3, 1997 at A9 (head of the Seattle Police sex offender detail reporting that as a result of the state's three-strike law seventeen two strike offenders fled from Seattle to other states).

⁸⁷ Cal. Dept. of Justice, Office of the Attorney General, "Three-strikes and You're Out": It's Implications on the California Criminal Justice System After Four Years, 10 (1998).

⁸⁸ See, e.g., David Bloom, *Wilson Cites '3 Strikes' Results Law has Cost State Millions but has Lowered Crime Rate*, L.A. DAILY NEWS, March 7, 1996 (California Governor, Pete Wilson, indicating that one of the reasons he supported the state's three-strike law was the fact that it caused a decline in the number of parolees from other states moving to California).

⁸⁹ LaCourse, *supra* note 86.

⁹⁰ Between 1993 and 1995 24 states enacted some type of three-strike legislation. Clark, Austin & Henry, *supra* note 85 at 1. To be sure, there might be other reasons for the quick adoption of three-strike laws by the different states. For example, these laws might be a useful tool to incapacitate and deter dangerous individuals and therefore once states learned of this useful tool they rushed to adopt it. See J. R. Ramirez and W. D. Crano, *Deterrence and Incapacitation: An Interrupted Time-series Analysis of California's Three-Strikes Law*, 33 J. APPLIED SOC. PSYCH. 110 (2003) (measuring the potential deterrence and incapacitation value of the California three-strike law). But see Stolzenberg L, Dalessio SJ, "Three-strikes and You're Out": The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates, 43 CRIME & DELINQUENCY 457 (1997) (measuring a limited deterrence effect of California's three-strike law).

3. Displacing Criminals

Thus far, the analysis has focused on creating *ex-ante* incentives for potential criminals to conduct their activity in neighboring areas. A second means for jurisdictions to lower their crime rates is by physically removing individuals who have a higher propensity to commit future crimes. More specifically, to the extent that a community believes that past criminal activity can serve as a reliable proxy for future criminal activity, the community might wish to expel individuals with criminal records.⁹¹ Expulsion can be achieved either by outright forbidding certain individuals from living within a defined geographical area, or by creating a hostile environment that will eventually drive these individuals away. In this context, just as was the case with respect to criminal sanctions, we can expect to see a dynamic process in which jurisdictions adopt increasingly harsh policies aimed towards driving these individuals away in order to keep up with policies adopted by other jurisdictions. Viewed from this perspective, such laws and policies are another example of what has become to be known as “Not In My Back Yard” (NIMBY) legislation, which aims to remove unwanted activities to other jurisdictions.⁹²

An example of a policy that aims towards removing criminals from jurisdictions is banishment. Historically, banishment has been used by jurisdictions in order to remove

⁹¹ There exists an abundance of studies pointing out that individuals that committed certain types of offences are more likely to engage in future criminal activity. *See* Patrick A. Langan and David J. Levin, Bureau of Justice Statistics Special Report, *Recidivism of Prisoners Released in 1994* (2002) (measuring high recidivism rates among released offenders); Allen J. Beck and Bernard E. Shipley, Bureau of Justice Statistics Special Report, *Recidivism of Prisoners Released in 1983* (1989) (same).

⁹² *See generally*, Barry G. Rabe, *BEYOND NIMBY: HAZARDOUS WASTE SITING IN CANADA AND THE UNITED STATES* (1994).

unwanted individuals such as sex offenders.⁹³ For instance, in ancient India under the Laws of Manu the crime of rape was punished by banishment,⁹⁴ and the Hammurabi Code provided this punishment to those convicted of incest.⁹⁵ Aristotle noted that “the incurably bad should be banished.”⁹⁶ During the eighteenth century, the British employed this sanction on a large scale basis by banishing criminals to America and Australia.⁹⁷ The British eventually abandoned this form of punishment only when the communities to which the criminals were transported had the political power to avoid this type of negative externality imposed upon them.⁹⁸

While one might think of banishment as a thing of the distant past with little relation to modern crime prevention, in reality, banishment is very much a part of the criminal justice system in the United States. One way in which courts currently impose banishment on felons is by adding it as a probation condition. For instance, Georgia courts use a punishment known as “158 county banishment” under which offenders are

⁹³ See Jason S. Alloy, Note, “158-County Banishment” in *Georgia: Constitutional Implications Under the State Constitution and the Federal Right to Travel*, 36 GA. L. REV. 1083, 1085 (2002) (reviewing the history of banishment and noting that it was reserved for “persistent troublemakers”). This is not to say that the sole goal of banishment is prevention. Clearly, uprooting an individual from his community reflects a painful punishment that creates a deterrent effect. See James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29, 47 (1996) (pointing out the effects of banishment on individuals in ancient times).

⁹⁴ Israel Drapkin, CRIME AND PUNISHMENT IN THE ANCIENT WORLD 131 (1989).

⁹⁵ Lindgren, *supra* note 93 at 48.

⁹⁶ THE NICHOMACHEAN ETHICS OF ARISTOTLE 271 (W.D. Ross trans., 1986).

⁹⁷ The British referred to the punishment as Transportation. See generally A. Roger Ekirch, BOUND FOR AMERICA. THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718-1775, 2-3 (1987) (noting that the main goal of transportation was to rid Britain from dangerous offenders).

⁹⁸ See, e.g., Benjamin Balak & Jonathan M. Lave, *The Dismal Science of Punishment: The Legal-Economy of Convict Transportation to the American Colonies*, 18 J. L. & POL. 879, 911-12 (2002) (describing the fall of banishment to America following the Declaration of Independence in 1776). Interestingly even during the 19th century several European countries (mainly Germany) continued to transport their dangerous criminals to the United States in subvert ways. See Richard J. Evans, *Germany’s Convict Exports*, 47 (11) HISTORY TODAY (1997).

banished from 158 out of the state's 159 counties, giving them an option either to move to a remote county or to leave the state.⁹⁹ According to one Georgia prosecutor, he was personally involved with over two hundred cases in which defendants were banished to Echols County.¹⁰⁰ Though banishment might not be the punishment of choice in most criminal cases in the United States, an abundance of cases demonstrate that courts in other jurisdictions use it as well.¹⁰¹

Banishment is also making its way into legislation enacted by jurisdictions. The city of Cicero Illinois, for example, recently enacted a gang free zones ordinance according to which individuals who engage in gang related activities can be banished from the city.¹⁰² The Cicero Ordinance also sets out a procedure for the application of the sanction, which is less stringent than typical criminal procedure, as it allows the admission of hearsay testimony, and requires proof only by the preponderance of the

⁹⁹ See Alloy, *supra* note 93 at 1083-85. The reason courts banish these individuals from only 158 counties is that the Georgia Constitution forbids the use of banishment from the state as a form of punishment. See GA. CONST. art. I, § 1 ¶ 21 (stating that "neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for a crime").

¹⁰⁰ *Id.*

¹⁰¹ See Wm Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 465-75 (1998) (reviewing banishment litigation in the different states). It should be noted that in many cases banishment is imposed with the consent of the defendant through the use of a plea agreements. Such cases will for the most part not manifest themselves in case law. See Alloy, *id.* at 1103.

¹⁰² Stephanie Smith, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements*, 67 U. CHI. L. REV. 1461, 1465-66 (2000). It should be noted that the Cicero gang ordinance was passed as a civil rather than a criminal remedy. Since the goal of this legislation is to deal with criminal activity I view it as part of the criminal justice system as I define it in note 7 *supra*. Similar policies were adopted in California in which localities used public nuisance injunctions in order to force gang members out of certain areas. See Matthew Mickle Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409 (1999). The use of these injunctions led over time to the displacement of gang activity from one area to the other. Werdegar, *id.* at 439-42 (reviewing an ACLU study measuring the displacement effects of the injunctions).

evidence rather than beyond a reasonable doubt.¹⁰³ Reportedly, soon after the Ordinance's enactment, gang members in Cicero began to migrate out of the city.¹⁰⁴ In addition, the enactment caught the attention of neighboring communities that considered adopting such measures themselves.¹⁰⁵

A closely related topic demonstrating communities' desire to explicitly expel unwanted individuals can be seen with respect to the transfer of prison inmates between states. In recent years a market for inmates has developed in the United States. States with an insufficient amount of prison beds buy additional incarceration capacity by shipping their criminals to states that have a surplus of prison beds. The transfer of prison inmates creates two main problems for the communities receiving them from the perspective analyzed in this Article. First, when inmates succeed to escape from prison they create a risk to residents in the immediate vicinity. Second, inmates might decide upon their release to stay in the state of their incarceration. Not surprisingly, importing prison inmates often raises fierce public debates in the communities to where the inmates are imported.¹⁰⁶ One can even see specific legislation proposals that are aimed towards protecting the interests of communities that agree to host prison inmates. For instance, in Louisiana, a local legislature proposed to mandate that any out of state inmate hosted by

¹⁰³ Smith, *Id.*

¹⁰⁴ *Id.* at 1467.

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., Phil Manzano, *Prison Means Ticket Out of Oregon for Many*, PORTLAND OREGONIAN, Sept. 20, 1996 at B1 (reporting of outrage in Texas following the escape of an inmate from Oregon); Noah Bierman, *Private Prisons might Import Inmates*, PALM BEACH POST, Apr. 14, 2000 at 1A.

Louisiana be removed from the state prior to his release.¹⁰⁷ As he put it, “[i]f their first day of freedom is walking around the streets of Louisiana, then they might want to stay here, and I don’t think we want to recruit prisoners.”¹⁰⁸

A second and more nuanced way jurisdictions can remove unwanted individuals is by creating a hostile environment that will cause these individuals to leave voluntarily. This goal can be achieved by imposing restrictions on the lives of convicted offenders in areas such as housing, employment, and welfare benefits. Over time, lowering the expected quality of life of offenders will cause them to move to jurisdictions that do not have such restrictions. This, in turn, could lead to a competitive process in which other jurisdictions adopt such restrictions simply to prevent offender migration. In fact, one can observe a general trend among states to impose a wide array of restrictions on convicted offenders that encompass the most meaningful aspects of their lives.¹⁰⁹ For instance, states routinely use their authority to require occupational licenses to limit the employment ability of convicted offenders.¹¹⁰ This general picture is consistent with the

¹⁰⁷ Capital Bureau, *Law Could Ensure Convicts Return Trip: Politician Fears they would remain in La.*, TIMES-PICAYUNE, Aug 14, 2001 at 02. See also Jacqueline Charles, *Florida Lawmakers Aim to Bar Prison Operators from Importing Inmates*, KRTBN KNIGHT-RIDER TRIBUNE BUSINESS NEWS, Apr. 13, 2000 (reporting on an initiative that would prevent any out of state inmates from being imported into Florida).

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., Bruce E. May, *Real World Reflection: The Character Component of Occupational Licensing Law; A Continuing Barrier to Ex-Felon’s Employment Opportunities*, 71 N. D. L. REV. 187 (1995) (reviewing employment limitations); Nora V. Demleitner, *“Collateral Damage”: No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1033-47 (reviewing collateral consequences of convictions in different states); Avi Brisman, *Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment*, 28 WM & MARY ENVTL. L. & POL’Y REV. 423, 432-448 (2004) (same).

¹¹⁰ See May, *id.* at 193-206; Brisman, *id.* at 432-35. While some limitations, such as limiting the ability of convicted felons to work in accounting, pharmacy, and private investigation, can be seen as rational preventative measures, barring offenders from practices such as billiard room operator, junk dealer, and engineering seems to have little to do with the prevention of future crimes. Brisman, *id.* at 433 (listing limitations on employment of convicted offenders).

hypothesis that states are attempting to displace individuals that have demonstrated a high propensity to commit future crimes.¹¹¹

A concrete example of policies that can be used in order to encourage offender migration can be found in the context of Sex Offender Registration and Notifications Laws (SORNLs), commonly known as Megan's Laws. SORNLs were initially enacted to help deal with the recidivism of sex offenders by creating sex offender registries and by notifying the public about released sex offenders who reside within a given community.¹¹² The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act,¹¹³ which describes the minimal required registration and notification provisions that each state must enact in order not to lose federal law enforcement grants, sets forth the federal framework for SORNLs.¹¹⁴ Currently, all fifty states and the District of Columbia have enacted some form of such a law.¹¹⁵

SORNLs create a series of adverse effects on the lives of released sex offenders. First, some of these laws include legal limitations on the lives of offenders in areas such as housing and labor opportunities.¹¹⁶ In addition, the notification aspects of SORNLs

¹¹¹ To be sure, many of the collateral consequences of criminal convictions were initiated by the federal government, and in that sense do not reflect policies aimed at displacement. Nonetheless, states continue to participate in this process and use their authority in those areas in which the federal government is not active.

¹¹² According to a recent study of the Bureau of Justice Statistics sex offenders have a substantially higher chance to be re-arrested for a new violent sex offense. See Lawrence A. Greenfeld, *Sixty Percent of Convicted Sex Offenders Are on Parole or Probation*, Bureau of Justice Statistics News Release, Feb. 2, 1997, available at 1997 WL 53093 (D.O.J.).

¹¹³ 42 U.S.C. § 14071 [hereinafter: the Jacob Wetterling Act].

¹¹⁴ 42 U.S.C. § 14071(g).

¹¹⁵ *Smith v. Doe*, 538 U.S. 84, 90 (U.S. 2003).

¹¹⁶ See OKLA. ST. ANN. § 589 (prohibiting offenders from working in business that provide service to children and schools); ALA CODE § 15-20-26(a) (prohibiting offenders from working within 2,000 feet of a

subject sex offenders to a wide array of nonlegal sanctions ranging from embarrassment to extreme acts of violence.¹¹⁷ States can control, to some degree, the level of these sanctions by the type of public notification they adopt. For instance, states that choose to conduct public notification by using a state website might be able to enhance the adverse effects of notification. Viewed from this perspective, SORNs can be used by states to create an adverse environment for sex offenders that will drive at least some of them out of the state (or will prevent offenders residing in neighboring states from choosing to migrate into the state).

Anecdotal evidence regarding the enactment and application of SORNs suggests the validity of the analysis presented here. First, one can see a process in which sex offenders tend to migrate to those states with more lenient laws. Some law enforcement officials have been reporting that sex offenders engage in “jurisdiction shopping”, looking for states that have less strict registration and notification requirements. For example, the official responsible for Oregon’s registration program in 1997 reported that “[w]e ... get calls and letters from sex offenders in other states wanting to know about sex offender registration in Oregon ... The express purpose is they’re looking for a state where they don’t have to register.”¹¹⁸ Similar anecdotal information gathered from

school or a child care facility), MINN. STAT. ANN. § 244.052 (subd 4a) (b) (prohibiting property owners from knowingly renting a room to level three sex offenders if that owner has an agreement with an agency that provides shelter to victims of domestic abuse); OKLA. ST. ANN. § 590 (prohibiting offenders from residing within a two thousand foot radius of any school or educational institution); ALA CODE § 15-20-26 (establishing a list of limitations on the places in which sex offenders may reside). It should be noted that in some cases housing limitations can be used as *de-facto* banishment punishments. *See Doe v. Miller*, 298 F.Supp.2d 844, 851-52 (2004) (analyzing the effects of the Iowa housing limitation).

¹¹⁷ For a review of these sanctions *see* Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan’s Laws* (2004).

¹¹⁸ Jennifer Bjorhus, ‘Megan’s Law’ May Have Loopholes, PORTLAND OREGONIAN Dec. 7, 1997 at B01. *See also* Brian Coddington, *Plan Brands Sex Offenders Legislation Seeks to Name Names, Confine Worst Offenders Indefinitely*, THE SPOKESMAN REV., Dec. 12, 1997 at B1 (reporting that it is common “for

offenders indicates that they do in fact choose to move to jurisdictions that offer them a more lenient registration regime. For instance, a convicted sex offender from Michigan reportedly moved to New Mexico because its registration laws were less harsh than those of other states at the time.¹¹⁹

Second, comments made by lawmakers during the debates regarding the enactment of SORNLS show that a desire to deter sex offenders from choosing to reside within their jurisdictions motivated at least some of the legislatures enacting these laws. For example, a New York Assemblyman stated during a discussion on the New York SORNLS that “the result of this [legislation] ... is the fact that a sex offender who is going to come out after serving his time might rethink as to where he is going to relocate, and I think that one of the results of this legislation might be that this guy is going to go out of town, out of state, and that’s very good for us.”¹²⁰ Similarly, in Tennessee the Senate sponsor of the local SORNLS, Senator Crow, stated that “we’ll see sex offenders leaving

inmates confined in other states to call Idaho asking about sex offender registration requirements”); Ed Vogel, *State Trying to Locate, Evaluate Sex Offenders in County*, THE LAS VEGAS REV. – J., Nov. 4, 1997 at 4b (reporting that an administrator of the Nevada Criminal History Records Repository received numerous calls inquiring about the state’s enforcement of its SORNLS and that he suspected that these calls were made by offenders who were shopping for a state with lenient notification policies).

¹¹⁹ Bob Schwartz, *From Mottos to Molesters*, ALBUQUERQUE J., Nov. 2, 2002 at E1 (reporting on the case of David Siebers). See also Bjorhus, *id.* (reporting on the case of Ralph D. Webb, an offender who committed his offenses as a juvenile and chose to move to Alaska in order to avoid registration since Alaska did not require juvenile offenders to register); Jenny A. Montana, *An Inefficient Weapon in the Fight Against Child Sexual Abuse: New Jersey’s Megan’s Law*, 3 J. L. & POL’Y 569, 582 note 56 (1995) (reporting on the case of Joseph Gallardo, an offender who moved from Washington to New Mexico, a state that did not engage in public notification at the time); Elizabeth Kelley Cierzniak, *There Goes the Neighborhood: Notifying the Public When a Convicted Child Molester is Released into the Community*, 28 IND. L. REV. 715, 720 (1995) (reporting on the case of an offender who chose to move from Arkansas to Kentucky because the later did not have a registration requirement at the time).

¹²⁰ *Doe v. Pataki*, 940 F. Supp. 603, 621-22 (1996) (quoting N.Y. Assembly Minutes, at 388-89). Yet another New York legislature commented that sex offenders are the “human equivalent of toxic waste”. See Pataki, *id.* at 622 (quoting New York Assembly Minutes, at 417). This comment makes the connection between SORNLS and environmental NIMBY regulation self evident.

Tennessee and you won't see them coming in."¹²¹ In Idaho, the Attorney General who promoted the adoption of the local SORN said, "what these individuals [sex offenders] were doing was shopping around to see what states did not have sex offender registration."¹²²

Third, the actual content of the different SORNs also validates the jurisdictional competition hypothesis. As a general matter, the hypothesis predicts that over time, states will increasingly harshen their SORNs. Indeed, a survey of pending and new legislation in 12 states, in 1998, indicated that states mostly adjust their SORNs to make them stricter.¹²³ States have adopted harsher penalties for failing to register, have enlarged the scope of notification, and have decided to apply their legislation in a retroactive manner.¹²⁴ Minnesota provides a concrete example. Since 1995, the Minnesota legislature has been debating the issue of community notification.¹²⁵ Generally, the debate has been much more vibrant than that of other legislatures and a number of the proposals made have even been rejected.¹²⁶ Nevertheless, by 2001, the Minnesota legislature realized that

¹²¹ See brief filed on behalf of petitioner in *Cutshall v. Tennessee*, 120 S.Ct 1554 (2000).

¹²² Coddington, *supra* note 118. See also, Cierzniak *supra* note 119 at 720 (noting that the co-chairman of the Kentucky Attorney General's Task Force on Child Sexual Abuse was quoted saying, "There's a lot of things we want our state known for. A safe haven for sex offenders isn't one of them"); Joe Darby, *Sex Offenders Must Tell Neighbors: Texas Man Ordered to Comply or Leave LA*, NEW ORLEANS TIMES-PICAYUNE, Feb. 6, 1996 at B1 (quoting a Louisiana prosecutor stating that had out of state offenders not been forced to register in Louisiana "it could have made Louisiana a haven for convicted sex criminals from other states").

¹²³ See THE NAT'L CRIM. JUST. ASS'N, SEX OFFENDER REGISTRATION AND NOTIFICATION: PROBLEM AVOIDANCE & BARRIERS TO IMPLEMENTATION, & SEX OFFENDER REGISTRATION & NOTIFICATION COSTS SURVEY RESULTS 67-9 (1999).

¹²⁴ *Id.*

¹²⁵ For a review of the legislative process in Minnesota with respect to notification legislation see Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1296-1315 (2003).

since the maximum period of registration required under its SORNL was ten years, offenders required to register for life in other jurisdictions were moving to Minnesota.¹²⁷ To deal with this, the Minnesota legislature amended its SORNL and required certain types of offenders to register for life.¹²⁸ In addition, one can see the concern of legislatures over the movement of sex offenders in the registration requirements of some states. In most states, registration is triggered by a conviction – in a state court or a court of another state – of one of the offenses enumerated in its SORNL.¹²⁹ Yet some states have begun requiring offenders moving from other states to register as sex offenders, even if they do not fall within the registration requirements of that state, if the offender was required to register under the SORNL of the state from whence he came.¹³⁰ Requiring individuals to register, for the sole reason that they moved from a different state, demonstrates that states tailor their SORNLS to deal with offender migration.

Finally, one can see that local law enforcement officials are using community notification in order to remove sex offenders from their communities. For example, it has been reported that in Monrovia, California, the local police department attempted to drive a sex offender out of town by distributing flyers with information about the offender.¹³¹

¹²⁶ *Id.*

¹²⁷ *Id.* at 1316.

¹²⁸ MINN. STAT. §243.166 subd 1(b)(3) (2001) and subd 6(d) (2001). In addition, this legislation was likely driven by the minimal requirements set by the Jacob Wetterling Act with respect to the duration of registration. *See* 42 U.S.C. § 14071 (b)(6)(B) (requiring life time registration for certain types of offenders).

¹²⁹ *See, e.g.* ALASKA STAT. §12.63.100(5) (defining sex offender); ARIZ. REV. STAT. §13-3821A (defining the people required to register under the act); Miss. Code §45-33-25 (defining registration requirements); N.J. Stat. §2C:7-2 (defining registration requirements); 57 Okla. Stat. §582 (defining the applicability of the act).

¹³⁰ ME. STAT. §11223; MICH. COMP. LAWS ANN. §28.723(1)(d).

The flyers sparked public demonstrations that only managed to force the offender to relocate within the town. Then, the police department moved to a more proactive method, and raised money from a private donor and purchased for the offender a one-way plane ticket out of town. This case is not an isolated incident.¹³²

III. REGULATING THE MARKET FOR CRIMINAL JUSTICE

In the previous Section, I explained the existence of a competitive market for criminal justice which is driven by attempts to displace crime to neighboring communities. This descriptive insight raises the normative question of how the criminal justice system should be structured. In this Section, I will point out the potential benefits and problems associated with a competitive decentralized criminal justice system. That done, I will turn to focus on the problems that might be created by such a system and suggest several policy tools to remedy them.

1. A Race to the Bottom or a Race to the Top?

The debate over the efficiency of jurisdictional competition is a long standing one in the federalism literature.¹³³ On one side of the debate are those who argue that

¹³¹ See Michael Dear and Django Sibley, *The One-Way Strategy for Sex Offenders makes Nobody Safe*, L.A. TIMES, Oct. 1, 2000 at M6.

¹³² See Bob Schwartz, *From Mottos to Molesters*, ALBUQUERQUE J., Nov. 2, 2002 at E1 (reporting that the police in Toledo, Ohio, furnished a sex offender with a bus ticket out of town). It would seem that local judges are also willing to take steps to remove sex offenders from their communities. See Richard Cockle, *Offender May Return to Oregon Hometown*, PORTLAND OREGONIAN C02, Jan. 14 2000 (reporting that a Judge in Nebraska ordered a sex offender to leave the state).

¹³³ For a review of this debate see, e.g. William W. Bratton and Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second Best World*, 86 GEO. L. J. 201 (1997).

competition among jurisdictions, much like other forms of competition, drives them to an efficient outcome.¹³⁴ These commentators view jurisdictions as producers of a product, namely, public goods such as law, and potential residents (be they real persons or corporations) as consumers of the product.¹³⁵ The need to attract satisfied tax paying residents drives jurisdictions to meet the preferences of their consumers in an optimal fashion.¹³⁶ In addition, proponents of jurisdictional competition point out that such competition may lead to more innovation with respect to public policies.¹³⁷ According to this line of thought, local jurisdictions can function as “experimental laboratories” for the development of beneficial social policies.¹³⁸ Thus, these commentators conclude that jurisdictions engage in a “race to the top” that benefits society as a whole. The following conclusion is that just as other well functioning competitive markets should not be regulated, neither should the jurisdictional one.

¹³⁴ See, e.g., Tiebout, *supra* note 10. The Tiebout model was later refined in Truman F. Bewley, *A Critique of Tiebout's Theory of Local Public Expenditures*, 49 *ECONOMETRICA* 713 (1981) and in Pierre Pestieau, *The Optimality Limits of the Tiebout Model*, in *THE POLITICAL ECONOMY OF FISCAL FEDERALISM* 173 (Wallace E. Oates ed., 1977). For a more contemporary treatment of this line of thought see Revesz, *supra* note 12 at 1233-44; and Thomas R. Dye, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990).

¹³⁵ Tiebout, *id.* at 422 (“Just as the consumer may be visualized as walking to a private market to buy his goods, the prices of which are set, we place him in the position of walking to a community where prices (taxes) of community services are set”).

¹³⁶ *Id.* at 424.

¹³⁷ See, e.g., Volden, *supra* note 37 at 78-86.

¹³⁸ The term “experimental laboratories” was coined by Justice Brandies in *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandies, J., dissenting). The concept of additional policy innovation created by jurisdictional competition has been subject to criticism in recent years. First, it has been argued that the desire of politicians to be reelected will curve down their incentives to adopt innovative yet risky policies. See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 *J. LEGAL STUD.* 593 (1980). Second, assuming local politicians do adopt innovative policies it is still not clear that such policies are applicable to other jurisdictions. See Volden, *id.* at 81-6. Nevertheless, it would still seem reasonable to assume that more jurisdictional diversity leads to more policy innovation. See Shapiro, *supra* note 31 at 85-6.

On the other side of the debate lie commentators who point out the potential adverse effects of jurisdictional competition.¹³⁹ They argue that in many instances jurisdictions face a collective action problem that can be modeled as a non-cooperative game such as the prisoners' dilemma.¹⁴⁰ These situations are characterized by a payoff structure in which, despite the fact that the aggregate welfare can be optimized by adopting "cooperative" policies, each player has an incentive to "defect" in order to maximize his personal payoff. Since all of the players anticipate the defection of the other players, they eventually reach an equilibrium in which they all choose to defect. In other words, the competitive process between jurisdictions can be characterized as an inefficient "race to the bottom". Thus, just as is the case in other instances of collective action problems, some form of external regulation might be desirable in the jurisdictional market in order to reach an efficient outcome.

Evaluating the race jurisdictions are engaged in with respect to criminal justice, one can point out both a potential race to the top and a potential race to the bottom. On one hand, competition in the area of criminal justice may have a positive effect on the way jurisdictions use the resources they dedicate to combating crime. In the area of enforcement, incentives created by crime displacement may drive local jurisdictions to adopt more cost effective measures to fight crime. Local law enforcement officials that do not deter crime effectively and draw criminals to their jurisdiction will be driven out of office over time and more successful individuals will take their place. In addition,

¹³⁹ See, e.g., Jenna Bednar and William N. Eskridge, *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL L. REV. 1447 (1995); Scott R. Saleska and Kristen H. Engel, "Facts are Stubborn Things": An Empirical Reality Check in the Theoretical Debate Over the Race-to-the-Bottom in State Environmental Standard-Setting, 8 CORNELL J. L. & PUB. POL'Y 55 (1998).

¹⁴⁰ Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 906-07 (1987); Bednar & Eskridge, *id.* at 1470-75; Saleska & Engel, *id.* at 74-6.

jurisdictions wishing to gain a competitive edge will be driven to innovate and create new law enforcement techniques. For instance, in the area of auto theft prevention, jurisdictions began to encourage car owners to etch VIN numbers on the windows of their vehicles, making it much more difficult to resell the stolen car.¹⁴¹ While this type of precaution might be efficient in the sense that it cheaply lowers the expected value of crime, it is also an observable measure that might divert criminals to cars that are not etched. Thus, the prospect of displaced crime might have contributed to the development of an efficient means to prevent auto theft.

In the area of sanctioning, competition might drive jurisdictions to innovate with respect to *how* they sanction criminals. Over time one can expect that competitive forces will drive communities to converge to the most cost effective form of sanctioning. For example, several jurisdictions have recently shifted towards using alternative sanctions such as public shaming.¹⁴² Arguably, alternative sanctions are a relatively cheap way to generate large sanctions and to deter criminals.¹⁴³ Thus, jurisdictions using these forms of punishment might develop a competitive advantage over jurisdictions not using them, and displace crime to those jurisdictions. This, in turn, will drive those jurisdictions to adopt more cost effective ways to punish criminals. In the area of prostitution it has been

¹⁴¹ Michigan 2003 Report, *supra* note 61 at 6; Arizona 2003 Report, *supra* note 75 at 16.

¹⁴² See generally Dan Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Dan Kahan & Eric Posner, *Shaming White-Collar Criminal: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J. L. & ECON. 365 (1999).

¹⁴³ See, e.g., Kahan & Posner, *id.* at 367-8 (arguing that “shaming could prove to be an efficient alternative to prison for white-collar offenders”); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 738 (1998) (noting that “at a time when the costs of imprisonment consume ever larger shares of state budgets, shame may serve as a politically viable and cost effective way of achieving deterrence, specific and general, as well as of satisfying the legitimate demands of retribution”).

reported that jurisdictions publicizing the names of the patrons of prostitutes have managed to displace the activity to neighboring jurisdictions.¹⁴⁴

Thus far, I have focused on the advantages associated with jurisdictional competition in the area of criminal justice, but, such competition might have significant problems as well. Economists have argued for many years that the attempts of private actors to displace crime lead to inefficiently high investment in crime prevention.¹⁴⁵ For instance, it has recently been argued that the trend of building gated communities in some parts of the country reflects an inefficient equilibrium in which too many resources are put into gating.¹⁴⁶ This insight also applies to the design and operation of local criminal justice systems. Criminal law is a type of “fence” a community builds around itself that raises the cost of committing crimes. Hence, jurisdictions ignoring the negative externalities created by the policies they adopt will be driven, over time, to adopt an increasingly harsh criminal justice system despite the fact that they would be better off agreeing collectively on a more lenient system.

The argument presented here can perhaps be best understood by analyzing the decision jurisdictions make as to the amount of monetary resources they invest in crime prevention. Generally, additional resources dedicated to this cause are expected to raise

¹⁴⁴ See Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1546-7 (1996) (noting that the shaming of patrons might simply lead them to relocate to non-shaming areas).

¹⁴⁵ See, e.g., Shavell, *supra* note 46 at 130 (arguing that victims might take excessive observable precautions); Omri Ben-Shahar and Alon Harel, *Blaming the Victim: Optimal Incentives for Private Precautions against Crime*, 11 J. L. ECON & ORG. 434, 435 (1995) (arguing that individuals will choose levels of private enforcement that diverge from the social optimum); Omri Ben-Shahar and Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim Centred Perspective*, 145 PA. L. REV. 299, 309-10 (1996) (arguing that investments in crime diversion are socially wasteful).

¹⁴⁶ Robert W. Helsley and William C. Strange, *Gated Communities and the Economic Geography of Crime*, 46 J. URBAN ECON. 80, 94 (1999).

the probability of detection, raise the expected sanction, and lower the crime rate by either displacing or deterring crime. Thus, when one jurisdiction raises its expenditure on crime prevention, its neighboring jurisdictions are compelled to raise their expenditure as well in order to prevent crime displacement.¹⁴⁷ Over time this process will drive both jurisdictions to invest an inefficiently high amount of resources in crime prevention.¹⁴⁸ This conclusion can be applied in a straightforward fashion to the decision jurisdictions make as to the size of the legal sanctions they impose on criminals. Generally, imposing harsh criminal sanctions reflects an additional expenditure for the local criminal justice system.¹⁴⁹ Communities unable to commit to an agreed sanctioning level will be driven to adopt increasingly high sanctions due to the prospect of crime displacement.

To be sure, investing additional resources in raising the probability of detection and incarcerating criminals will also generate positive externalities.¹⁵⁰ Apprehending and prosecuting a criminal who commits crimes in several jurisdictions lowers the crime rate in all of those jurisdictions if he is deterred from committing future crimes. Similarly, incapacitating a criminal through incarceration lowers the crime rate in all of those jurisdictions that were victimized by the criminal at hand. Viewed from this perspective, jurisdictions might have *insufficient* incentives to invest in crime prevention since they will try to free ride on the efforts of neighboring jurisdictions. A complete evaluation of

¹⁴⁷ Hakim et al., *supra* note 17 at 201-206; Uriel Spiegel, *Economic Theoretical View of Criminal Spillover*, in CRIME DISPLACEMENT 48, 49-53 (Simon Hakim and George F. Rengert eds., 1981).

¹⁴⁸ Spiegel, *id.* at 53 (noting that this process will lead communities that is not optimal).

¹⁴⁹ In some unique cases raising sanctions might actually lower the cost of administering the justice system. If, for instance, the threat of large sanctions assists investigators to persuade criminals to cooperate and testify against fellow criminals this could lower the costs of investigations. For the duration of the Article I will focus on the more intuitive case in which harsher sanctions reflect higher costs.

¹⁵⁰ See Richard A. Posner ECONOMIC ANALYSIS OF LAW 667 (6th ed., 2003) (pointing out that states will have suboptimal incentives to deal with criminals who operate in several states).

the efficiency of jurisdictional competition in the context of criminal justice will have to take these positive externalities into account.

In more general terms, the analysis presented here can be applied to all aspects of the criminal justice system that affect the expected sanctions potential offenders face. Jurisdictions adopting evidentiary rules that exclude evidence that could be useful to the prosecution, or procedural rules that create a significant burden on the police, will become more attractive crime targets and criminals will choose to shift their activity to them. In these contexts, the cost of imposing harsher criminal standards need not be encompassed in monetary terms and can be seen as the disutility caused by adopting legal rules that conflict with the moral values of a community, such as privacy. Hence, we can expect to see jurisdictions converging over time toward limiting defendants' rights despite the fact that at least some of these jurisdictions would prefer to grant defendants additional rights that would better reflect their moral values.

The use of legal means such as banishment to remove individuals with a high propensity to commit future crimes poses a more complex policy question. On one hand, such policies create negative externalities to neighboring jurisdictions, and thus states might use this type of punishment excessively. On the other hand, such forms of punishment might be a cost effective way to punish criminals. If that is the case, states might be willing to agree to a multilateral banishing regime that will allow them to reduce the amount of resources they spend on incarceration. Such a regime could be based, for example, on a tax paid by states to a common fund for each criminal they banish. If this tax equals the size of the negative externality associated with banishment,

it will function as a Pigouvian tax and assure that banishment punishments will be used efficiently.¹⁵¹

Analyzing policies that attempt to drive convicted offenders away by creating a hostile environment, such as the use of SORNs in the context of sex offenders, again yields inconclusive results. On one hand, states might find themselves in an escalating arms race to create relatively harsher policies in order to drive offenders away, just as was the case in the context of criminal sanctions. For instance, while public notification conducted door-to-door by police officers might not be an efficient way to conduct notification, states might find it to be an effective (yet costly) way to drive offenders out of the state. At the same time, other states that find some aspects of SORNs to be problematic because they conflict with other values they cherish, such as forgiveness and compassion, might find it difficult to protect those values without attracting sex offenders into their community. On the other hand, jurisdictional competition with respect to SORNs might be driving states to develop more efficient registration and notification programs. For example, the use of the Internet to disseminate information about sex offenders clearly has some efficiency advantages as a mode of transferring updated information cheaply to large populations. A final determination of the type of race states are engaged in with respect to SORNs requires additional examination, but at the very least there is a potential for a race to the bottom in this area.

Finally, it should be noted that several constraints limit the race to the bottom jurisdictions might be engaged in. First, since raising the expected sanction creates

¹⁵¹ The term Pigouvian taxes follows from A. C. Pigou, *THE ECONOMICS OF WELFARE* (1932). For a recent review see Anreu Mas-Colell, Michael D. Whinston and Jerry R. Green, *MICROECONOMIC THEORY* 354-56 (1995).

additional costs, such as the cost of additional policemen and the cost of incarceration, these costs will create a constraint on the decision jurisdictions make. At some point, communities will find the tradeoff between the investment in crime displacement and the investment in other social goals to tilt the balance towards other causes. Second, deterrence is not the only goal that affects the design of criminal law. Values such as retribution and fairness obviously play a significant role in shaping criminal sanctions. Eventually, these values will conflict with the incentives created by crime displacement and stop the process described herein. Thus, while cutting off the hands of all individuals convicted of stealing a candy bar might be an effective way to displace crime, the moral values of communities could prevent them from adopting such a policy.

In sum, it is difficult to give a conclusive answer to the question of whether jurisdictions are engaged in a race to the top or a race to the bottom in the criminal justice context, since such a determination requires additional information regarding the concrete policies at hand. Nevertheless, there are at least *some* cases that arguably reflect inefficient races to the bottom, in which social welfare could be enhanced by assisting jurisdictions to co-operate. In the next subsection, I will turn to evaluate potential ways to deal with those situations.

2. Resolving the Race to the Bottom Problem

i. Local Solutions

A good place to begin analyzing the potential solutions to the race to the bottom problem is the local jurisdictions themselves. After all, if jurisdictions are situated in a non-cooperative inefficient deadlock, they have the most to gain from resolving the

problem and reaching a cooperative outcome. Jurisdictions have two ways to overcome problems associated with inefficient competition, namely, informal and formal cooperation. I will begin by evaluating the former.

The race to the bottom hypothesis is based on the claim that when jurisdictions set policies in the context of criminal justice they are situated within a non-cooperative game such as the prisoners' dilemma and therefore cannot cooperate. Yet this result rests on a set of assumptions that define these games. More precisely, the setting of a prisoners' dilemma includes three explicit assumptions that make cooperation difficult. First, it assumes that the players are one-shot players. Second, it assumes that the players make a single simultaneous unobservable decision rather than multiple staggered observable decisions. Finally, it assumes that the players cannot communicate among themselves prior to making their choices. Yet one should notice that these assumptions do not adequately describe the situation of local jurisdictions. Jurisdictions are entities with an infinite life span that interact with each other on a regular basis.¹⁵² These interactions allow for constant communications that enable the evolution of a cooperative relationship. Furthermore, legislation and public policies are transparent in nature and therefore jurisdictions can observe each others' acts. Given these characteristics, one can expect that some form of voluntary cooperation might emerge between jurisdictions in order to avoid the inefficient results associated with non-cooperative behavior. Just as

¹⁵² To be sure, despite the fact that jurisdictions have an infinite life span, individual policymakers, namely elected politicians, do not. As such politicians approach the end of their political life they might adopt end game strategies and behave in a non-cooperative manner. The end game problem has been well documented in the norms literature, *see, e.g.*, Robert C. Ellickson, ORDER WITHOUT LAW 267-8 (1991) (analyzing the demise of cooperation among the Ik in an end game situation). On the other hand, one should note that bureaucrats with long term tenure tend to have a significant influence on public policies. Thus, jurisdictions might actually be some kind of intermediate entity, which can sustain long-term cooperation subject to short-term opportunism by politicians.

norms may serve as an alternative to formal law in solving collective action problems among individuals and small groups, local jurisdictions may develop means of cooperation without resorting to formal regulation.¹⁵³ In fact, some commentators have been pointing out that despite potential incentives to defect, jurisdictions are in many cases behaving in a cooperative manner.¹⁵⁴ In the context of law enforcement, one can find an abundance of examples of local police departments assisting each other in a cooperative fashion rather than engaging in opportunistic defections.¹⁵⁵ This type of behavior is consistent with a general norm of cooperation among jurisdictions.

A second way local jurisdictions can deal with the race to the bottom problem on their own is by formal legal means. Jurisdictions may enter into formal agreements in which they will commit themselves to behave in a cooperative manner. Currently, nearly 200 compacts regulate different aspects of state relationships ranging from environmental policies to taxation.¹⁵⁶ Voluntary compacts can be a useful means to solve some of the collective action problems jurisdictions face in the area of criminal justice as well. For example, the field of parolee and probationer supervision closely resembles the field of

¹⁵³ See, e.g., Robert Axelrod, *THE EVOLUTION OF COOPERATION* 73-87 (1984) (describing the emergence of cooperative norms between enemy soldiers in World War I that were situated in a repeated game); Ellickson, *id.* (describing the emergence of cooperative norms in Shasta County that functioned as an alternative to formal law).

¹⁵⁴ Peterson, Rabe and Wong, *supra* note 31 at 6 (noting that states tend to cooperate among themselves in many of the cases).

¹⁵⁵ See, e.g., Julie Bykowicz, *New Lines of Jurisdiction Trend: Police Departments are Increasingly Pooling Resources to Fight Crime More Efficiently*, *THE BALTIMORE SUN*, August 13, 2000 at 1B (describing cooperation among local police departments in Maryland); James Vaznis, *City Guard Against Gang Culture's Spread 'Tha Fam' Faces Drug Charges*, *BOSTON GLOBE*, Nov. 23, 2003 at 4 (reporting on cooperation between New Hampshire and Massachusetts police departments with respect to gang activity); Mary Jean, *Car-Theft Program Could End*, *THE GRAND RAPIDS PRESS*, July 8, 1992 at C3 (reporting on a visit of Florida officials in Michigan to learn about the Michigan ATPA).

¹⁵⁶ See The Council for State Government Website available at <http://www.csg.org/CSG/Programs/interstate+compacts/compact+laws.htm> (last visited May 5, 2004).

sex offenders analyzed above since it also deals with individuals that states are happy to drive away. In order to overcome the problem, states voluntarily entered into a compact that regulates their behavior in this area.¹⁵⁷ The compact created a commission that enacted rules to govern the transfer of offenders from one jurisdiction to the other.¹⁵⁸ Similarly, the states are moving toward adopting a compact regulating the area of juvenile offenders.¹⁵⁹

ii. Central Planners

The force driving the inefficiencies associated with crime displacement lies in the ability of jurisdictions to externalize a negative phenomenon to neighboring jurisdictions. Generally, a common solution to externality problems is the use of a central authority that takes into account all of the externalities and aims to maximize the aggregate welfare of society. For instance, in the context of state policies that create negative externalities, federal intervention is a possible solution.¹⁶⁰ Similarly, counties and cities creating negative externalities could be regulated by states.

¹⁵⁷ Interstate Compact for the Supervision of Adult Offenders *available at* http://www.adultcompact.org/about/history/historical/Compact_Preamble.pdf (last visited May 5th 2004). The field of parolee and probationer supervision use to be governed by the Interstate Compact for the Supervision of Parolees and Probationers since 1973. Recently, that compact was substituted by the Interstate Compact for Adult Offender Supervision. For updated information on the new compact *see* <http://www.adultcompact.org/About.htm>. For a review of the compact *see* James J. Gentry, *The Interstate Compact for Adult Offender Supervision: Parolee and Probationer Supervision Enters the Twenty-First Century*, 32 MCGEORGE L. REV. 533 (2001).

¹⁵⁸ Interstate Commission for Adult Offender Supervision, Rules (amended March 12, 2004) *available at* http://www.adultcompact.org/about/history/h_docs.shtml (last visited May 5, 2004).

¹⁵⁹ The Interstates Compact for Juveniles, *available at* <http://www.csg.org/CSG/Policy/public+safety+and+justice/interstate+compact+for+juveniles/default.htm> (last visited May 5th, 2004). The Compact requires that 35 states adopt it before it becomes binding (*see* Compact Article X). As of the beginning of 2004 12 states have enacted laws adopting the compact.

In recent years we have seen a substantial increase in federal involvement in the area of criminal justice. This increase can be seen in the enlargement of the scope of federal criminal law, in the added criminal litigation in the federal court system, and in the rise of the relative size of the federal expenditure on criminal justice.¹⁶¹ Generally, this trend has been widely criticized by legal scholars.¹⁶² While some of the current trends in federal criminal legislation have little to do with preventing inefficient jurisdictional competition, this Article does point toward the conclusion that the federal government could have an important role as a regulator of the states in the area of criminal justice. According to this line of thought, the federal government should help states achieve uniformity in their expected sanctions with respect to crimes that tend to be displaced.¹⁶³ One way the federal government could achieve this goal is by creating a uniform federal criminal code for such crimes that states would be encouraged to adopt. To the extent that states would be reluctant to adopt such a uniform code, the federal government might need to ensure that such a code preempts state criminal legislation with respect to the crimes that it covers.¹⁶⁴

¹⁶⁰ McKinnon & Nechyba, *supra* note 42 at 8-9 (discussing mobility externalities among states). Shapiro, *supra* note 31 at 44-5 (a strong national authority is needed in the presence of externalities).

¹⁶¹ Stephen Chippendale, Note, *More Harm than Good: Assessing the Federalization of Criminal Law*, 79 MINN. L. REV. 455, 461-65 (1994) (describing the recent “explosion” in federal criminal legislation); Beale, *supra* note 23 at 983-96 (evaluating the burden on the federal judiciary); Justice Expenditure Report, *supra* note 1 at 3 (reporting an increase in the relative size of the federal expenditure on the justice system between 1982 and 2001).

¹⁶² See *supra* note 26. This criticism goes hand in hand with a more general view that is prevalent in the federalism literature according to which the federal government has overstepped its bounds in recent years. See Ferejohn & Weingast, *supra* note 31 at x (arguing that in some areas powers should be given back to the states).

¹⁶³ See Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2421 (1997) (noting that uniform criminal penalties can minimize the geographic displacement of crime).

In the area of enforcement, the federal government should focus its attention on curbing down the incentives for states to spend inefficiently high amounts of resources on fighting crime. This goal could be achieved by mandating maximum law enforcement expenditures with respect to specific types of crimes. Such mandates could allow for an efficient planning of the amount of resources spent, while sustaining the advantages of jurisdictional competition with respect to how to use the resources. If such a scheme proves too difficult to manage, one will have to consider organizational consolidation, which would mean moving law enforcement activity to the hands of a central planner such as the FBI.¹⁶⁵ A concrete example of organizational consolidation dealing with problems of crime displacement is the state ATPAs discussed above.¹⁶⁶ While on the *interstate* level, the rise of ATPAs can be seen as part of the arms race different states are engaged in with respect to auto theft, on the *intrastate* level the creation of these authorities can be viewed as a way to curb down competition between neighboring localities within a given state that attempt to displace auto theft from one to the other. ATPAs are state authorities that aim to curb down auto theft in the state as whole and not in any specific county.¹⁶⁷ Thus, these authorities can act as central planners and take

¹⁶⁴ Generally current federal criminal legislation creates a concurrent criminal jurisdiction and does not preempt state criminal laws. See Susan Klein, *Independent – Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1451, 1552 (2002).

¹⁶⁵ See Mehay, *supra* note 48 at 67-8 (arguing out that crime displacement justifies consolidating local police departments).

¹⁶⁶ See *supra* notes 60-84 and accompanying text.

¹⁶⁷ See, e.g., Vernon's Ann. Texas. Civ. St. Art. 4413(37) Sec 7. (b)(1) (Texas authority required to create a plan of operation to deal with auto theft in "areas where the problems are greatest"); Act 4005 Illinois Motor Vehicle Theft Prevention Act §2 (Illinois authority is established for the purpose of "statewide planning"). This view was also incorporated by many ATPAs into their official policy statements. See, e.g., New York 2002 Annual Report at iv (mission statement states that the ATPA "shall provide for a coordinated approach to curtailing motor vehicle theft and motor vehicle insurance fraud throughout the

into account the potential displacement effect of local initiatives. For instance, the Pennsylvania ATPA reportedly monitored and dealt with the displacement effects caused by its concentrated efforts in Philadelphia.¹⁶⁸

Finally, a more general insight arising out of this Article is that the federal courts have an important role in the creation of pro-defendant rights and regulation of police behavior. Policies regarding search and seizure, interrogation methods, right to legal counsel, and the rules of evidence all affect the eventual probability of being sanctioned. Thus, jurisdictions may try to displace crime from one to the other by limiting defendants' rights in these contexts even if they would be willing to commit to a collective decision to protect these rights. In order to deal with this potential problem, federal courts have a responsibility to identify those rights that reflect a long term national consensus and protect them in the face of local jurisdictions attempting to displace crime. Thus, this Article presents an economic justification for the incorporation of the Bill of Rights into the Fourteenth Amendment. Opponents of incorporation repeatedly refer to concepts of federalism, and the fact that allowing for diversity in the area of crime control would allow rules to fit the specific needs of local communities and encourage additional experimentation with new policies.¹⁶⁹ While this view raises a valid issue, it overlooks other aspects of federalism. For one, federalism deals with solving

State"); Arizona 2003 Report, *supra* note 75 at 2 (mission statement "To deter vehicle theft through a statewide cooperative effort").

¹⁶⁸ Martin Pflieger, *Auto Thefts Targets of Crackdowns in PA.*, ALLENTOWN MORNING CALL, Oct. 15, 1996 at A1 (comments made by Roy Miller, executive director of the local ATPA). *See also* Jeanette Krebs, *Auto Thefts in State Stall*, PATRIOT NEWS, Dec. 1, 1999 at B1 (comment made by Kenneth Robinson of the local ATPA).

¹⁶⁹ Justice Harlan has voiced a constant view to that effect. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 680-1 (1961); *Malloy v. Hogan*, 378 U.S. 1, 16-7 (1964) (Harlan dissenting); *Pointer v. Texas*, 380 U.S. 400 (1965) (Harlan concurring); *Baldwin v. New York*, 399 U.S. 117, 138 (1970) (Harlan dissenting and concurring).

collective action problems within the federation, and as we have seen, states and other localities might face such a problem when designing their criminal justice system.

In addition, the analysis presented in this Article points out why, as a positive matter, we should be skeptical towards the viability of the “new federalism” in the area of criminal procedure. The term new federalism, coined by Donald Wilkes in the mid 70s, refers to a line of rulings of state Supreme Courts that used state constitutions in order to grant local criminal defendants rights that were beyond those required by the federal constitution.¹⁷⁰ As we have seen, jurisdictions that impose additional constraints on their law enforcement agencies are expected to find themselves in a competitive disadvantage when compared to other jurisdictions. This, in turn, will cause a rise in the crime rate, which will generate popular demand for adopting stricter policies with respect to crime control. Thus, it is not surprising to see that only a decade after the publication of his paper, Wilkes voiced serious concern as to the development of the new federalism.¹⁷¹ Two well publicized indications of the dynamics described here occurred in Florida and California, where constraints imposed by the local Supreme Courts on law enforcement were overruled by constitutional amendments that prohibited state courts from granting criminal defendants rights exceeding their minimal federal rights.¹⁷² These two examples

¹⁷⁰ Donald E. Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L. J. 421 (1974).

¹⁷¹ Donald E. Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of a Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 166 (Bradley D. McGraw ed., 1985)

¹⁷² See FLA. CONST. art. I, § 12 (1983); CAL. CONST. art. I § 28(d). For a review of these amendments see Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida’s “Forced Linkage” Amendment*, 39 U. FLA. L. REV. 653 (1987); Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 HASTINGS CONST. L. Q. 95 (1993).

seem to reflect a general trend, and currently, only a distinct minority of states grants defendants rights that exceed their federal rights.¹⁷³

The federal courts can play a similar role with respect to regulating criminal sanctions by using their authority under the Eighth Amendment to strike down cruel and unusual punishments.¹⁷⁴ In *Solem v. Helm*,¹⁷⁵ the Court evaluated a life sentence without the possibility of parole imposed on a repeat offender convicted of issuing a no account check for \$100.¹⁷⁶ Striking down the punishment, the *Solem* Court held that the prohibition on cruel and unusual punishments included a proportionality requirement between the crime and the punishment.¹⁷⁷ As part of this evaluation, the Court compared the punishment at hand with sentences imposed for the commission of similar crimes in other jurisdictions.¹⁷⁸ The *Solem* proportionality analysis is consistent with the role of federal regulators presented in this Article. States adopting criminal sanctions that are beyond the accepted sanctioning level in other states create a negative externality in the form of crime displacement, and the federal government should assist the states to solve this collective action problem. Regretfully, in recent years the *Solem* holding has slowly eroded and one should question the viability of current challenges to extreme incarceration sanctions.¹⁷⁹

¹⁷³ Kamisar et. al., MODERN CRIMINAL PROCEDURE 52 (10th ed., 2002)

¹⁷⁴ The Eighth Amendment provides that "[e]xcessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted". See U.S. CONST. Amend. VIII.

¹⁷⁵ 463 U.S. 277 (1983).

¹⁷⁶ *Id.* at 281-82.

¹⁷⁷ *Id.* at 286-88.

¹⁷⁸ *Id.* at 291-92.

Viewing the federal legislation dealing with the specific areas analyzed in this Article demonstrates that current federal criminal policies do not reflect a proper understanding of the federal government's role as a central planner with respect to criminal justice. In the area of auto theft, for example, following the rise in auto theft in general, and the emergence of a new and violent form of the crime ,carjacking, the federal legislature enacted the Anti Car Theft Act of 1992 (ACTA).¹⁸⁰ The ACTA includes several provisions that can be seen as positive steps made by a central planner in order to coordinate the activity of the states. For instance, encouraging states to participate in the creation of a national motor vehicle title registration system reflects an effort to promote projects creating positive externalities.¹⁸¹ Yet the ACTA adopts a more problematic approach as to the role of the federal government with respect to the regulation of the resources spent on fighting auto theft. More precisely, the ACTA conditions state eligibility for federal grants on the creation of a state ATPA much like Michigan's.¹⁸² As we have seen, however, the prospect of crime displacement gives states sufficient incentives to create such entities, and it is not clear why the federal government is encouraging the adoption of local policies that create negative externalities. In this situation, a central planner should curve down the *excessive*

¹⁷⁹ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding a life sentence without the possibility of parole for a first time offender convicted of possessing more than 650 grams of cocaine); *Ewing v. California* 538 U.S. 11 (2003) (upholding a California 25 years to life sentence for stealing merchandise valued at approximately \$1,200); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding a California sentence for two consecutive sentences of 25 to life for two cases of petty theft). Interestingly, in *Ewing* Justice O'Connor took notice of the displacement effect created by the California three-strike law in question yet seems to have viewed this result as a legitimate state interest that justifies the law. *Ewing*, *id.* at 27. This type of analysis is inconsistent with a central planner attempting to deal with negative externalities created by members of a federal system of government.

¹⁸⁰ Codified in various sections of Section 15, 18 and 42 of the U.S. code.

¹⁸¹ 15 U.S.C. §2042-3.

¹⁸² 42 U.S.C. §3750b.

motivation states have in displacing auto theft by, for example, conditioning federal grants on a certain cap on the surcharge states can impose in order to fund their ATPAs.

Turning to the area of ex-post displacement of criminals, the Jacob Wetterling Act again reflects a misunderstanding of the role of the federal government in designing crime prevention policies, since it is structured under the premise that states have insufficient incentives to enact effective SORNs and therefore includes *minimal* requirements that states must live up to.¹⁸³ Given the evidence presented here, there is no reason to assume that states will have insufficient incentives to enact notification laws that primarily serve the interests of local communities.¹⁸⁴ To the contrary, states have an incentive to adopt strict notification provisions in order to generate sex offender migration. Thus, the appropriate federal policy in this context, much like in other NIMBY type situations, is to adopt a unified federal framework that has *maximum* standards.¹⁸⁵ This framework should determine issues such as who will be subjected to notification, notification methods, and the duration of notification. This framework could allow for

¹⁸³ *Megan's Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended*, 64 FED. REG. 572, 572 (1999) (noting that “[t]he Wetterling Act generally sets out minimum standards for state sex offender registration programs”).

¹⁸⁴ This might not be the case with respect to registration requirements. With respect to registration one might assume that there are positive externalities for the efforts of each individual state in the form of a comprehensive data set that can serve all states. This is especially true given the creation of a federal sex offender database. See 42 U.S.C. §14072 (establishing a federal sex offender database). Hence, imposing minimal federal requirements in that context might be a sensible policy.

¹⁸⁵ See Revesz, *supra* note 12 at 1219 note 24 (noting that “the solution to NIMBY problems is federal maximum standards (federal ceilings), which would pre-empt more stringent but not less stringent state standards”). At least one commentator has suggested the adoption of a unified federal scheme dealing with sex offender registration and notification. See Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 764-5 (1994). Houston rests her argument on what can be termed as economies of scale of a federal system rather than on the problems associated with state competition analyzed in the text above.

some forms of local policy innovations that diverge from it, yet these innovations should be scrutinized to assure that they are not opportunistic.

A specific aspect of SORNs that might generate future litigation is registration requirements that target sex offenders who migrate from states that require them to register to states that do not. As noted above, several states require such offenders to register as sex offenders despite the fact that current residents of the state that committed identical crimes are not required to do so.¹⁸⁶ From a constitutional perspective, these limitations are problematic since they might be seen by courts as a violation of offenders' right to travel freely from one state to another. The Supreme Court has recognized such a constitutional right in a long line of cases.¹⁸⁷ Recently, in *Saenz v. Roe*, the Court evaluated the implications of this right to state policies that create a differential treatment to new residents of states. The specific issue at hand was a California statute limiting the welfare benefits of new California residents during their first year of residence in California to the level of welfare that they were entitled to in their original state of residence.¹⁸⁸ Basing its decision on the Privileges or Immunities clause of the Fourteenth Amendment, the Court ruled that all citizens of the United States have a right to choose their state of residence and each state is obliged to treat them equally.¹⁸⁹ Furthermore, the *Saenz* Court found this to be a strict requirement and refused to adopt any intermediate

¹⁸⁶ See *supra* notes 129-130 and accompanying text.

¹⁸⁷ See, e.g., *United States v. Guest* 383 U.S. 745, 757 (1966); *Shapiro v. Thompson* 394 U.S. 618, 89 (1969); *Saenz v. Roe*, 526 U.S. 489, 498 (1999)

¹⁸⁸ *Saenz*, *id.* at 492-6.

¹⁸⁹ *Id.* at 504-5

standard of review to apply to policies that discriminate against new residents.¹⁹⁰ Thus, the Court found the adoption of discriminatory policies to prevent migration of welfare applicants to be impermissible.¹⁹¹ In addition, the Court rejected California's claim that the budget savings created by the policy justified its application.¹⁹² Accordingly, the Court struck down the California statute and ruled that it must provide all of its residents equal welfare benefits.¹⁹³

In light of the hostile attitude of the *Seanz* Court towards policies aimed at discouraging migration, there seems to be a distinct possibility that registration requirements based on previous residence will similarly be found unconstitutional. Once states do not require their own residents who committed identical crimes to register, it is difficult to see how they will be able to justify the differential treatment granted to new residents. Arguably these new residents pose no greater risk to the public than equivalent local residents. Nonetheless, states wishing to defend such policies might be able to distinguish the *Seanz* ruling in two ways. First, *Seanz* relies on the Privileges or Immunities clause of the Fourteenth Amendment, which lends itself quite naturally to an issue such as welfare benefits. It is not clear whether the Court will be willing to recognize a constitutional "privilege" not to be included in a sex offender registry. Second, the *Seanz* Court noted that the relatively generous welfare benefits granted by California did not create any significant migration of welfare recipients to the state.¹⁹⁴

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 506.

¹⁹² *Id.* at 506-7.

¹⁹³ *Id.* at 507.

Thus, one could argue that strong empirical evidence supporting the sex offender migration hypothesis might cause the Court to reconsider its ruling.

From the perspective of jurisdictional competition, residence based registration requirements are a sensible means to prevent a race to the bottom in the area of SORNs. 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. Thus, while such programs might seem detrimental to sex offenders (and quite naturally that would seem to be the case when a specific sex offender brings a lawsuit challenging such a policy) they might actually be in the best interest of sex offenders as a group.

A piece of federal legislation that attempts to deal with the problem of offenders displacement is Aimee’s Law,¹⁹⁵ named after Aimee Willard who was kidnapped, raped, and murdered near Philadelphia by a Nevada parolee. Aimee’s Law provides that a state that convicts an offender of murder, rape, or a dangerous sexual offense, who has a prior conviction for any one of those offenses, is entitled to a reimbursement of the costs of the incarceration, prosecution, and apprehension of that individual from the state that previously convicted and released him.¹⁹⁶ In addition, the law creates a safe harbor for states that impose an average term of imprisonment for the relevant offense that is higher than the national average imprisonment for that crime and that kept the individual at hand incarcerated for at least 85 percent of his prison term.¹⁹⁷ Aimee’s Law represents a

¹⁹⁴ *Id.* at 506.

¹⁹⁵ Codified as 42 U.S.C. § 13713.

¹⁹⁶ 42 U.S.C. § 13713(c). More precisely this reimbursement is achieved by a deduction of federal law enforcement grants that is transferred from state to state.

positive step toward causing states to internalize the effects of their policies since it imposes on states at least some of the costs of the crime they displace to neighboring states. On the other hand, it should be noted that the safe harbor created by the law creates yet another “face” for states in the context of criminal sanctioning, since by adopting and imposing sanctions that are above the national average, states are able to reduce their liability under Aimee’s Law to zero. While this incentive structure might achieve the actual goal of the proponents of Aimee’s Law, namely, the incarceration of offenders convicted of one of the crimes the law deals with for life,¹⁹⁸ this outcome is not necessarily efficient.

In sum, this Section has evaluated the normative aspects of jurisdictional competition in the area of criminal justice. The tentative conclusion of this discussion was that additional federal regulation in the area of criminal justice might be desirable if there exists a race to the bottom problem. Nevertheless, a caveat should be added. As we have seen, current federal legislation in the area of crime control does not reflect a proper understanding of the role of the federal government as a central planner. Rather, it reflects a “tough on crime” attitude no matter what the context of the legislation. If federal law makers - for whatever institutional, political, or personal reasons - cannot assume the role of a rational central planner, the United States’ criminal justice system has little to gain, and perhaps even much to lose, from additional federal regulation.

¹⁹⁷ 42 U.S.C. § 13713(c)(3).

¹⁹⁸ Statement of Representative Matt Salmon, May 11, 2000, Cong. Testimony 2000 WL 19303527.

IV. CONCLUSION

This Article has aimed to point out the unique dynamics that might be created by a decentralized criminal justice system such as the one in the United States. Using tools of positive public choice theory, I have demonstrated that in a decentralized criminal justice system local units have an incentive to lower their crime rate by displacing crime to neighbouring jurisdictions. More specifically, I have identified two ways jurisdictions can achieve this goal. The first focuses on ex-ante deterrence and aims to raise the expected sanction in any given jurisdiction to a level that is higher than that of its neighbouring jurisdictions. The second focuses on the ex-post displacement of individuals who have demonstrated by past behavior that they have a high propensity to commit crimes. This analysis led to a normative discussion according to which the United States might be engaged in a race to the bottom in the context of its criminal justice system. To the extent that this type of race is in fact taking place, this could have significant implications as to the role of the federal and state governments as regulators in the area of criminal justice.

Describing the criminal justice system as a product of market place interactions between jurisdictions might run against the intuitions of many who view the criminal justice system as a tool that both should, and actually does, focus on the infliction of just retribution. Yet, one should notice that the argument presented in this Article has little to do with the normative goal of the criminal justice system. Rather, this Article focuses on a positive description of the criminal justice system. From this perspective, all that is required for the political process described in this Article to take place is that deterrence

and reduction of future crime rates is *one* of the things that matters to local politicians. This does not seem to be a far fetched assumption. Furthermore, actual crime displacement is not a precondition for the validity of the argument made here. As long as the public *perceives* that displacement is caused by raising sanctions, raising the probability of detection, or limiting defendants' rights, politicians will aim to be driven to adopt such policies.

The introduction of the concept of the market for criminal justice leaves room for substantial future analytical and empirical research. On the analytical side, this research should focus on specific aspects of the criminal justice system that might be prone to competitive effects. This research could track the political forces that drive changes in the wide body of criminal doctrine, the criminal process, and evidence law. On the empirical side, future work could focus on measuring changes over time in the criminal justice system, and measuring the displacement effect of criminal law. Additionally, studies comparing the United States with countries that have a national unified criminal justice system could shed light on the topics identified in this Article. Only after this information is collected will one be able to offer a definitive answer to the question: Is the American criminal justice system engaged in a race to the top or a race to the bottom?