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The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition

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

Doron Teichman\*

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## 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.<sup>1</sup> Discounting for inflation, this number reflects a 165%

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1. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2001, at 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.

real increase in spending,<sup>2</sup> as well as an increase in the percentage of the American Gross Domestic Product dedicated to the justice system.<sup>3</sup> 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 100,000 residents in 2002.<sup>4</sup> This rate of increase is in sharp contrast to other Western countries.<sup>5</sup> 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.<sup>6</sup>

The systematic harshening of the American criminal justice system<sup>7</sup> is a complex phenomenon lacking a single explanation. Rather, it relates to American attitudes toward crime, local crime rates, and the partisan politics surrounding criminal law.<sup>8</sup> This Article aims to add another piece to this puzzle by pointing 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

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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 nominal 271% increase in the per capita expenses on the justice system. *Id.* at 2.

4. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INCARCERATION RATE, 1980-2003, at <http://www.ojp.usdoj.gov/bjs/glance/tables/incrttab.htm> (last modified Nov. 7, 2004); *see also* David C. Leven, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 642-43 (1993) (pointing out the rising prison population in the United States in recent decades).

5. Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 CRIME & DELINQ. 419, 419 (1999). Furthermore, 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. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1749-50 (1993).

6. See Tonry, *supra* note 5, at 419-20; *see also* Louis Michel Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENT. 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 evidence a half century ago").

7. A comment on terminology 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, e.g.*, Tonry, *supra* note 5.

scholars have not yet combined in a complete fashion.<sup>9</sup> The first is the jurisdictional competition literature. This line of literature demonstrates that under a stylized set of assumptions, competition among local governments might lead to efficient levels of taxation and of supply of public goods.<sup>10</sup> In the past few decades this literature has covered a wide array of legal fields including corporate law,<sup>11</sup> environmental law,<sup>12</sup> taxation,<sup>13</sup> bankruptcy,<sup>14</sup> trusts,<sup>15</sup> and family law.<sup>16</sup> The common characteristic of these studies is the treatment of the different units of 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.<sup>17</sup> This literature treats the decision of profit-driven criminals (e.g., car thieves, drug dealers) regarding *where* to commit a crime as a rational decision in which criminals aim to

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9. For an exception, see Richard Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 180 (1996), which notes the competitive effects that might be created within a federal system of criminal justice.

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 Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913 (1982); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

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., 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); David A. Skeel, *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994).

15. See Stewart E. Sterk, *Asset Protection Trusts: Trust 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 Simon Hakim et al., *Interjurisdictional Spillover of Crime and Police Expenditure*, 55 LAND ECON. 200 (1979), and Thomas A. Reppetto, *Crime Prevention and the Displacement Phenomenon*, 22 CRIME & DELINQ. 166 (1976). For reviews of the topic see, for example, CRIME DISPLACEMENT (Robert P. McNamara ed., 1994); CRIME SPILLOVER (Simon Hakim & George F. Rengert eds., 1981); and RATIONAL CHOICE AND SITUATIONAL CRIME PREVENTION (Graeme R. Newman et al. eds., 1997).

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 another.

Combining the insights of jurisdictional competition and crime displacement illustrates how the goal of encouraging crime migration might drive local communities to gradually harshen their criminal justice system. If one jurisdiction raises the price of committing a crime within it, either by increasing the sanction or the probability of detection, then neighboring jurisdictions become more attractive crime targets. This, in turn, will cause these neighboring jurisdictions to adjust their sanctions and probabilities of detection in order to prevent criminal activity from moving to their communities. Over time, these dynamics will cause a decentralized criminal justice system to shift toward harsher standards. In other words, while some commentators have argued that we are witnessing an arms race between law enforcement agencies and criminals,<sup>18</sup> 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 this Article is closely related to the debate triggered by the Supreme Court's ruling in *United States v. Lopez*<sup>19</sup> regarding the role of the federal government in the realm of criminal law.<sup>20</sup> Thus far, this discussion has mainly focused on issues such as the historical limits of congressional authority,<sup>21</sup> the relative advantages of the federal and state criminal justice systems,<sup>22</sup> the burden imposed upon the federal judiciary,<sup>23</sup> the potential effects of the federalization of criminal law on

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18. A. 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. *Id.*

21. See, e.g., Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995).

22. Jamie S. Gorelick & Harry Litman, *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. & 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 Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 983-96 (1994-1995) (arguing that the creation of additional federal crimes is undesirable because it overburdens the federal judiciary). But see Tom Stacy & 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).

individual rights,<sup>24</sup> and the importance of normative diversity in criminal law.<sup>25</sup> This Article adds to the debate by using a political economy perspective to illustrate the potential advantages and disadvantages of allowing local communities to control criminal justice policies. The theoretical argument presented in this Article leads to the conclusion that, contrary to the commonly held view among legal scholars,<sup>26</sup> additional federal regulation in the area of criminal justice might be desirable 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,<sup>27</sup> this Article makes the counterintuitive 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: Part I introduces the concepts of jurisdictional competition and crime displacement and argues that, as a positive matter, a decentralized criminal justice system may create a competitive process among the different units composing it, in which each such unit attempts to divert crime to neighboring communities. Part II then turns to evaluate the normative aspects of jurisdictional competition in the area of criminal justice. In this context I will show 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 neighbors. In such a case, every jurisdiction's interests would be served if jurisdictions could commit themselves not to compete in the area of criminal justice. The second half of Part II examines more closely the problem of inefficient competition in the realm of criminal justice, and explores different ways to deal with these inefficiencies. Finally, I offer concluding remarks as well as suggestions for future research.

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24. Beale, *supra* note 23, at 995 (arguing that a national police force might threaten individual liberty).

25. Brickey, *supra* note 21, at 1138-39; see also Koleman S. Strumpf & 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 n.1 (reviewing the literature on the issue).

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

## I. 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.<sup>28</sup> In addition, the enforcement of criminal laws lies, in most cases, in the hands of local law-enforcement agencies.<sup>29</sup> Furthermore, the officials controlling such local agencies are often elected directly by the communities they serve. This, in turn, promises the development of policies attuned to the preferences of local communities.<sup>30</sup> Employing the tools of positive public choice theory, this Part will evaluate the decisionmaking process that units of a decentralized system of government face when they design their criminal justice policies.

### A. *Jurisdictional Competition*

To model 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 suggested that we view local units in a decentralized system as players aiming to maximize their own welfare.<sup>31</sup> Thus, the interactions among these units can be categorized as competitive in nature and the tools of game theory can be employed to model the expected equilibrium to which those interactions will lead.

The jurisdictional competition literature can be traced back to Charles Tiebout's article on the topic,<sup>32</sup> in which he demonstrated that, under a stylized set of assumptions,<sup>33</sup> competition among local

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28. See *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995); see also *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (asserting that the states possess primary authority for defining the criminal law).

29. See *Engle*, 456 U.S. at 128; JUSTICE EXPENDITURE REPORT, *supra* note 1, at 2-3 (presenting data on federal state and local expenditures); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2565-66 (2004) (pointing out that the federal enforcement bureaucracy is a relatively small player in the broader criminal justice system).

30. This structure should be contrasted with the centralized structure of the criminal system in other countries. In Israel, for instance, the bulk of criminal offenses 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, & Menachem Amir, *Community Policing in Israel, Resistance and Change*, 25 POLICING 80, 82 (2002).

31. For some general examples of this line of literature see THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? (John Ferejohn & Barry R. Weingast eds., 1997); PAUL E. PETERSON ET AL., WHEN FEDERALISM WORKS (1986); and DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995).

32. Tiebout, *supra* note 10.

33. Tiebout makes several assumptions within his model. *Id.* at 419. First, there exists a large number of communities. Second, there are no costs associated with moving from one

governments might lead to efficient levels of taxation and of supply of public goods.<sup>34</sup> While some view the normative aspect of this model (i.e., jurisdictional competition is efficient) as controversial, few would contest its positive aspect (i.e., competitive incentives drive local policies). Since the publication of Tiebout's article, the jurisdictional competition literature has spread to a wide variety of legal fields.<sup>35</sup> Two illustrative examples, which 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 increase their tax revenues.<sup>36</sup> Given the high mobility of corporations associated with the relatively low costs of reincorporation, corporations will tend to reincorporate in states that offer them a set of corporate-governance laws maximizing their value. Thus, states wishing to enlarge their tax revenues will 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.<sup>37</sup> Welfare policies redistribute wealth from the rich to the poor. Thus, a state adopting such policies will encourage migration of poor people from states that do not have such policies. Yet, states generally wish to *discourage* the influx of poor people because such movement decreases the welfare of the state's current residents. Hence, the prospect of migration by the poor will make states reluctant to adopt welfare policies as generous as they would have been willing to adopt in the absence of such migration.

My model of the competitive process in the context of criminal law builds upon the same insights as the existing jurisdictional competition literature. Crime is a negative social phenomenon that imposes several costs on the community within which it is committed. First, crime

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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 an optimal size, which means that they have the number of members 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 spillover effects or externalities. This set of assumptions clearly oversimplifies the jurisdictional competition picture. For instance, as will be developed in more detail below, policies adopted with respect to crime control might create negative externalities and not fulfill the sixth assumption.

34. *Id.* at 421-24.

35. See *supra* notes 11-16 and accompanying text.

36. See generally Bebchuk, *supra* note 11.

37. For a recent review of the literature on jurisdictional competition in the area of welfare policies, see generally Craig Volden, *Entrusting the States with Welfare Reform, in THE NEW FEDERALISM*, *supra* note 31, at 65.

imposes direct costs on the victim.<sup>38</sup> These costs can be borne by the individual victims of 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.<sup>39</sup> Communities with low crime rates attract economic investments that increase employment, generate additional tax revenue, and enhance welfare. Finally, crime rates affect property values in the area where crimes are committed. Generally, communities suffering from high crime rates will suffer depreciation in their property values and a decrease in wealth.<sup>40</sup> 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 property.<sup>41</sup>

Given the costs of crime, local communities have an incentive to lower their crime rates by adopting policies that will "export" this problem to neighboring communities.<sup>42</sup> This is not to say that policies are necessarily tailored with this goal in mind (though as we shall see, in some cases they are); rather, jurisdictions facing increased crime

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38. Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Crimes to Victims*, 22 LAW & SOC'Y REV. 537 (1988) (measuring the costs imposed by crime on individuals).

39. See, e.g., 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); 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). 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., HAW. DEP'T OF BUS., ECON. DEV. & TOURISM, ADVANTAGES FOR HAWAII BUSINESS, at <http://www.hawaii.gov/dbedt/advantages.html> (last visited May 20, 2004); ST. TAMMANY ECON. DEV. FOUND., ABOUT ST. TAMMANY PARISH, at <http://www.stedf.org/aboutsttammany.htm> (last visited May 20, 2004).

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

41. See Nina J. Crimm, *Why All Is Not Quiet on the "Home Front" for Charitable Organizations*, 29 N.M. L. REV. 1, 11 (1999) (pointing out that "the property tax historically has been and continues to be the single largest source of revenue for local governmental units"); 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 n.100 (1999) (noting that in Maryland most local governments rely primarily on property taxes); 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, 502-03 (1993) (noting that in Texas most local governments rely primarily on property taxes).

42. Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems*, in THE NEW FEDERALISM, *supra* note 31, at 3, 6 (noting that generally states have an incentive to export social problems to neighboring states).

rates might adopt policies aimed at reducing crime, not realizing that as a result, they divert it to neighboring 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 of diverting crime more closely.<sup>43</sup>

### B. *Displacing Crime*

The first way jurisdictions may shift criminal activity to neighboring jurisdictions is by affecting the *ex ante* decision about where to commit certain crimes. Economists view the decision criminals make to commit a certain crime as a rational cost-benefit analysis.<sup>44</sup> According to this line of thought, criminals evaluate 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

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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 who 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 the 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 these types 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 for local governments. A closely related category is crimes that border on positive types of activities that jurisdictions 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 fearful 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 latter jurisdictions are not suffering from a "negative externality" since they do not see this activity as negative. On normative diversity and criminal law, see *supra* note 25.

44. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176-79 (1968) (presenting an analysis of the supply of crime). For a more contemporary treatment of the issue, see Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43 (1996).

who are actually detected. Generally, as the expected sanction rises, the net value of committing a crime diminishes and criminals are deterred.<sup>45</sup>

An additional dimension of the decision potential criminals make concerns where to commit their crimes. Arguably, criminals might choose from a diverse set of targets, which 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.<sup>46</sup> 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.<sup>47</sup> At the same time, criminologists have studied the effects of measures taken by both public and private actors aimed at lowering the expected payoffs of crime by "hardening" potential crime targets.<sup>48</sup> Examples of such measures include police patrols, fences, street lighting, and the like. These studies demonstrate 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,<sup>49</sup> robbery,<sup>50</sup>

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45. See generally ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 435-41, 460-63 (3rd ed. 2000) (presenting a theoretical model of criminal deterrence and supporting evidence). But see PAUL ROBINSON, DOES CRIMINAL LAW DETER? A BEHAVIORAL SCIENCE INVESTIGATION (2004), at <http://lsr.nellco.org/upenn/wps/papers/32/> (presenting an updated critical evaluation of deterrence theory).

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

47. *Id.* (modeling the spatial decision of criminals); Joseph Deutsch, Simon Hakim, & J. Weinblatt, *A Micro Model of the Criminal's Location Choice*, 22 J. URB. ECON. 198 (1987) (same); Scott Freeman et al., *The Spatial Concentration of Crime*, 40 J. URB. ECON. 216 (1996) (presenting a model explaining the spatial concentration of crime); Koo Hui-wen & I. P. L. Png, *Private Security: Deterrent or Diversion?*, 14 INT'L REV. L. & ECON. 87 (1994) (presenting a model of crime displacement); 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).

48. See generally *supra* note 17.

49. Stephen L. Mehay, *Burglary Spillover in Los Angeles*, in CRIME SPILLOVER, *supra* note 17, at 67.

50. Christian Grandjean, *Bank Robberies and Physical Security in Switzerland: A Case Study of the Escalation 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).

sales of illegal narcotics,<sup>51</sup> growing of illegal narcotics,<sup>52</sup> and prostitution.<sup>53</sup>

It should be noted that although the economic and criminological studies cited above suggest 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 designed to lower crime rates.<sup>54</sup> 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.<sup>55</sup> The focus of this Section, rather, is on criminal activity driven by monetary profits — such as the trade in illegal narcotics,

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51. Rick Curtis & Michele Sviridoff, *The Social Organization of Street-Level Drug Markets and Its Impact on the Displacement Effect*, in CRIME DISPLACEMENT, *supra* note 17, at 155 (presenting a case study of the displacement of drug dealers in Brooklyn); John E. Eck, *The Threat of Crime Displacement*, in CRIME DISPLACEMENT, *supra* note 17, at 103, 111-12 (reviewing the literature on displacement and drug enforcement). *But see* Braga et al., *supra* note 50.

52. John R. Fuller & James R. O'Malley, *Enforcement and Displacement: The Case of Marijuana Growing*, in CRIME DISPLACEMENT, *supra* note 17, at 137.

53. Phil Hubbard, *Community Action and the Displacement of Street Prostitution: Evidence from British Cities*, 29 GEOFORUM 269 (1998); J. Lowman, *Prostitution in Vancouver: Some Notes on the Genesis of a Social Problem*, 28 CAN. J. 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, *supra* note 17, at 121.

54. 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*, 54 SOC. FORCES 802 (1976) (finding that one-half of the offenders committed their crimes within two miles of their homes); S. Turner, *Delinquency and Distance*, in DELINQUENCY: SELECTED STUDIES 11 (Thursten Sellin & Marvin E. Wolfgang eds., 1969) (showing that three-quarters of juvenile offenders committed crimes within one mile of their home).

55. See, e.g., John P. McIver, *Criminal Mobility*, in CRIME SPILLOVER, *supra* note 17, at 20, 36 (pointing out that crimes of passion tend not to be displaced).

prostitution, and theft — which 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 some criminals from moving to more profitable crime zones. A criminal who shifts 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 displacement.<sup>56</sup> For example, drug dealers who are highly dependent 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 other areas.<sup>57</sup> Thus, it is not surprising that studies finding a statistically significant displacement effect also find that the magnitude of this effect is relatively small.<sup>58</sup>

The jurisdictional competition and crime displacement theories point out a competitive process jurisdictions might engage in when designing key elements of their criminal justice system, such as the severity of the sanctions they impose on offenders and the amount of resources they dedicate to detecting criminals. Traditional models of the political economy of criminal sanctions have focused on what can be termed an island economy.<sup>59</sup> 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 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 expected sanctions creates the potential for a competition among jurisdictions wishing to become the least "crime friendly" jurisdiction. From this perspective, jurisdictions do not even have to believe that criminals are aware of the nuances of the different measures they adopt. Rather, they might wish to develop a general reputation of being a type of jurisdiction that criminals do not want to "mess" with. Over time, this process can evolve into a competitive cycle in which jurisdictions impose increasingly harsh

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56. See, e.g., René Hesseling, *Theft from Cars: Reduced or Displaced?*, 3 EUR. J. ON CRIM. POL'Y & RES. 79, 87-88 (1995); Reppetto, *supra* note 17, at 175.

57. Curtis & Sviridoff, *supra* note 51, 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).

58. See, e.g., Mehay, *supra* note 49, at 78.

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

sanctions and spend increasing amounts on policing to enlarge the probability of detection.<sup>60</sup>

The policies adopted by local governments to deal with auto theft are a concrete and useful example of the process described here. This example is useful because of both the characteristics of auto thieves and the harm created by auto theft. Auto thieves can be divided into two distinct types. The first type steals cars to actually use them either for simple joy rides or to get from one place to another. The second steals cars 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 harm caused by auto theft place political pressure on local governments to prevent it, even at the cost of crime displacement. First, auto theft is a rather common crime and therefore many constituents will care about it when making their voting decisions. Second, auto insurance premiums create an explicit price tag that allows residents to compare the ability of different jurisdictions to prevent this type of crime.

During the mid-1980s auto theft was on the rise in the United States.<sup>61</sup> This rise was especially felt in Michigan, which held the unfortunate title of the state with the highest auto theft rate in the nation.<sup>62</sup> Increasing inconvenience and rising insurance premiums eventually led the Michigan legislature to act, and in 1986 it created the Michigan Auto Theft Prevention Authority (ATPA).<sup>63</sup> The

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60. 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. *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. Furthermore, one could question whether "similar" crimes selected by federal prosecutors are in fact similar to those that are left to the states. Federal prosecutors might be selecting cases, which, while from a technical legal perspective are similar, represent distinct fact patterns that are more severe.

61. MICHAEL R. RAND ET AL., U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 1973-95, at 4 (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv73-95.pdf>.

62. MICHIGAN AUTOMOBILE THEFT PREVENTION AUTHORITY, 2004 ANNUAL REPORT 4 [hereinafter MICHIGAN 2004 REPORT], available at [http://www.michigan.gov/documents/2003\\_Annual\\_Report\\_84040\\_7.pdf](http://www.michigan.gov/documents/2003_Annual_Report_84040_7.pdf) (last visited Mar. 29, 2005).

63. MICH. COMP. LAWS § 500.6103 (2001).

Michigan ATPA includes representatives of law enforcement, auto insurance purchasers, and the auto insurance industry.<sup>64</sup> Its goal is to fight auto theft in the state by funding police, prosecutorial, judicial, and private initiatives aimed at the reduction of auto theft.<sup>65</sup> The activities of the Michigan ATPA are funded by a one-dollar surcharge added to the price of auto insurance policies in the state.<sup>66</sup>

The creation of the Michigan ATPA gave law enforcement agencies in Michigan a boost in their war against auto theft from two perspectives. First, this initiative allocated additional resources to fighting auto theft, which helped raise the probability of detection and the ability to prosecute 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 national level of auto theft.<sup>67</sup> Yet at least part of the success of the Michigan ATPA might 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."<sup>68</sup> Neighboring states, facing an increase in their auto theft rates,<sup>69</sup> either adopted similar measures or felt the consequences of becoming more attractive crime targets.<sup>70</sup> 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

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64. *Id.* § 500.6103(3).

65. *Id.* § 500.6107(3).

66. *Id.* § 500.6107(1).

67. In each 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 2004 REPORT, *supra* note 62, at 11. Between the years 1986 and 2002 auto thefts in Michigan decreased by 32% while the national thefts increased by 2%. *Id.*

68. Vicki Contavespi, *Auto Suggestions*, FORBES, Dec. 19, 1994, at 336 (quoting Rene Monforton, the director of claim services for AAA Michigan); see also Tom Held, *Auto Thefts Soar 121% in Wisconsin*, MILWAUKEE SENTINEL, June 5, 1993, at 1A (pointing out that the aggressive anti-theft programs in neighboring states drove thieves to Wisconsin); *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); Neil D. Rosenberg, *2 Similar Plans Fight Auto Theft, Each Other*, MILWAUKEE J., July 12, 1993, at B1 (detailing the displacement of car thieves to Wisconsin as a result of anti-theft programs in neighboring states).

69. ILLINOIS STATE POLICE, CRIME IN ILLINOIS 13 (1998) (noting that auto theft in Illinois peaked in 1990); WISCONSIN OFFICE OF JUSTICE ASSISTANCE, CRIME AND ARRESTS IN WISCONSIN 64 (1998) (showing that motor vehicle theft in Wisconsin rose during the late 1980s and peaked around 1991-1992).

70. In 1991 Illinois created the Illinois Motor Vehicle Theft Prevention Council. See 20 ILL. COMP. STAT. 4005 (1992).

they passed a bill . . . . What we have are professional thieves moving to different states from Michigan to Illinois to Wisconsin.”<sup>71</sup> The same phenomenon seems to have taken place in other parts of the country.<sup>72</sup> Thus, we can see how one state’s initiative eventually drove other states across the country to adopt similar (costly) programs.

Several additional points should be noted when viewing 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 ATPA enumerated by the Michigan legislature, the top four deal exclusively with “economic automobile theft.”<sup>73</sup>

Second, one can identify a rise in the effective sanction auto thieves faced.<sup>74</sup> In the past, the prosecution of auto thieves was of

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

72. The market for stolen cars in the southwest 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 theft. Initially, Arizona under-funded this effort and did not fund its auto theft prevention authority with mandatory surcharges. *See infra* notes 81-83. This, in turn, led to the displacement of auto theft activity to Arizona. *See Arizona Soars to 4th in Auto Thefts*, ARIZ. DAILY STAR, Feb. 9, 1995, at 3B (reporting the rise in auto thefts in Arizona relative to other border states); Miriam Davidson, *Arizona Auto Theft Moves Into Fast Lane*, CHRISTIAN SCI. MONITOR, July 24, 1995, at 3 (reporting that “[c]ar thieves are flocking to Arizona from neighboring California, which has cracked down on car theft”); Howard Fischer, *State at Top of Stolen Car List*, ARIZ. 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). Eventually, these trends forced the Arizona legislature to provide for larger funding for the state’s ATPA. *See ARIZ. REV. STAT. ANN. § 41-3451(J)* (West 2004) (creating a mandatory surcharge of fifty cents); *see also* 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); 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”).

73. MICH. COMP. LAWS § 500.6107(3)(b) (2001); *see also* CAL. INS. CODE § 1872.8 (West 1993) (focusing on economic auto theft); TEX. REV. CIV. STAT. ANN. art. 4413(37), § 8 (Vernon Supp. 2004-2005) (same). *But see* ARIZ. REV. STAT. ANN. § 41-3451 (West 2004) (giving no distinction between economic auto theft and other types of auto theft); 20 ILL. COMP. STAT. 4005 (1992) (same); PA. STAT. ANN. tit. 40, § 326 (West Supp. 2004) (same).

74. The term “effective sanction” refers to the actual sanction auto thieves face. *See supra* text accompanying notes 44-46. 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* Contreras, *supra* note 72 (quoting Deputy District Attorney Richard Bowman stating that the penalties for swiping vehicles are not strict enough); Rosenberg, *supra* note 68 (reporting on a suggested bill to increase the penalties on auto theft in Wisconsin); 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

relatively low priority.<sup>75</sup> Thus, these thieves faced a low, if not nonexistent, effective sanction. To change this situation and deter auto thieves, ATPAs began funding prosecutors dedicated exclusively to the prosecution of auto thieves.<sup>76</sup> The activity of these prosecutors increased the number of auto thieves actually charged and convicted.<sup>77</sup> 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.<sup>78</sup> The creation of this court ensured that auto thieves would actually be punished and thus assisted in deterring auto theft.<sup>79</sup> Over time, the impact court was so effective in deterring auto theft that its services were no longer needed.<sup>80</sup>

Finally, one can observe 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 mandatory surcharges like those employed by nearby California and Texas.<sup>81</sup> This, in turn, put Arizona at a competitive disadvantage in its effort to deter auto theft.<sup>82</sup> Yet by 1997, the movement of car thieves to Arizona

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theft rates); Sheba R. Wheeler, *Colorado Auto Theft Leaps 24%*, DENVER POST, Nov. 15 2002, at A1 (noting that "authorities say they can't combat the crime without tougher penalties").

75. See, e.g., MARYLAND VEHICLE THEFT PREVENTION COUNCIL, 2002 ANNUAL REPORT 9 (2003) [hereinafter MARYLAND 2002 REPORT], available at <http://www.mdautotheft.org/documents/2002annualreport.pdf> (last visited Mar. 29, 2005) ("In the past, the prosecution of vehicle theft cases had a relatively low priority.").

76. See, e.g., ARIZONA AUTOMOBILE THEFT AUTHORITY, 2003 ANNUAL REPORT 17 [hereinafter ARIZONA 2003 REPORT], available at <http://www.aata.state.az.us/pdfs/2003%20ANNUAL%20REPORT.pdf> (last visited Mar. 29, 2005); MARYLAND 2002 REPORT, *supra* note 75, at 9.

77. See, e.g., ARIZONA 2003 REPORT, *supra* note 76, 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).

78. See generally John Council, *Tarrant Judges Hijack Prized Auto-Theft Impact Court*, 12 TEX. LAW., July 22, 1996, at 2. See also Wheeler, *supra* note 74 (noting that auto theft charges have been filed in the municipal court where they expect harsher sanctions).

79. See Council, *supra* note 78, at 2 (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*, 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); Renee C. Lee, *Officers Honored for Curbing Tarrant County Auto Thefts*, 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).

80. See Council, *supra* note 78, at 2.

81. CAL. INS. CODE § 1872.8 (West 1993) (imposing an annual fee of up to one dollar); TEX. REV. CIV. STAT. ANN. art. 4413(37) § 10 (Vernon Supp. 2004-2005).

82. Davidson, *supra* note 72 (noting the lack of funding for the local ATPA as one of the reasons for the rising auto theft rate).

drove the state's legislature to adopt a surcharge scheme.<sup>83</sup> 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.<sup>84</sup> This, in turn, led to public pressure to raise the amount of resources dedicated to the state's ATPA.<sup>85</sup>

A second example of displacing crime 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.<sup>86</sup> Adoption of these laws created 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 will 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.<sup>87</sup> For example, a study conducted by the California Department of Justice found that the state's three-strike law had the "unintended but positive consequence" of causing parolees to leave the state.<sup>88</sup> Furthermore, several public figures have explicitly indicated that they support three-strike laws because of their

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83. ARIZ. REV. STAT. ANN. § 41-3451(J) (West 2004) (creating a mandatory surcharge of fifty cents).

84. See MARYLAND 2002 REPORT, *supra* note 75, at 1.

85. See Jo Becker, *Auto Theft Fund Cut Decried in Maryland; Executives Petition to Keep Programs*, WASH. POST, June 12, 2001, at B1; Editorial, *Fully Restore Theft Program*, BALT. SUN, June 21, 2001, at 16A; Del Quentin Wilber, *Grant Cuts Concern Police, Auto Theft Programs Affected by State's Reduced Funding*, BALT. SUN, Aug. 9, 2001, at 1B.

86. For a comparative description of these laws see JOHN CLARK ET AL., U.S. DEP'T OF JUSTICE, "THREE-STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION 6 (1997).

87. See Brian P. Janiskee & Edward J. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three-Strikes Law*, 39 DUQ. 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 Rene Sanchez, *A Movement Builds Against "Three-Strikes" Law*, WASH. POST, Feb. 18, 2000, at A3)); David LaCourse, Viewpoint, "*3 Strikes, You're Out*" Law Proving to Be Efficient Crime Fighter, NEWS TRIB. (Tacoma), Apr. 3, 1997, at A9 (relaying head of the Seattle Police sex offender detail report that as a result of the state's three-strikes law seventeen two-strike offenders fled from Seattle to other states); Terry McCarthy, *L.A. Gangs Are Back*, TIME, 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"); John Painter Jr., *Prosecutor Antsy Over "Three-Strikes"*, PORTLAND OREGONIAN, Sept. 16, 1994, at B2 (noting that offenders facing their third strike might be leaving the state).

88. OFFICE OF THE ATTY. GEN., CAL. DEP'T OF JUSTICE, "THREE-STRIKES AND YOU'RE OUT": ITS IMPLICATIONS ON THE CALIFORNIA CRIMINAL JUSTICE SYSTEM AFTER FOUR YEARS 10 (1998).

displacement effect.<sup>89</sup> 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."<sup>90</sup> Hence, it seems 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 to prevent offender migration.<sup>91</sup>

A final example of displacing crime can be found in the area of regulatory schemes developed in order to deal with the production of the drug methamphetamine ("meth"). In the beginning of 2004 the problems associated with meth production were brought to the public's attention in Oklahoma when a state trooper was killed in a meth-related event.<sup>92</sup> The public outcry caused the Oklahoma legislature to intervene, and in April of 2004 it enacted the nation's toughest law dealing with meth. Meth can be produced from pseudoephedrine, an active ingredient in common cold medicines such as Sudafed. The new Oklahoma law created significant barriers for individuals attempting to buy pseudoephedrine in order to produce meth by moving these drugs behind the counter, limiting the amount of pseudoephedrine each individual may buy, and requiring each purchasing individual to present a photo ID that would be registered by the selling pharmacist.<sup>93</sup>

The new regulatory scheme brought about an immediate decline in meth production in the state of Oklahoma. Reportedly, the number of meth labs confiscated in the state dropped between March 2004 and

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89. See, e.g., David Bloom, *Wilson Cites "3 Strikes" Results*, L.A. DAILY NEWS, Mar. 7, 1996, at 1 (indicating that one of the reasons Wilson 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).

90. LaCourse, *supra* note 87.

91. Between 1993 and 1995, twenty-four states enacted some type of three-strike legislation. CLARK ET AL., U.S. DEP'T OF JUSTICE, *supra* note 86, 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 Juan R. Ramirez & William D. Crano, *Deterrence and Incapacitation: An Interrupted Time-Series Analysis of California's Three-Strikes Law*, 33 J. APPLIED SOC. PSYCHOL. 110 (2003) (measuring the potential deterrence and incapacitation value of the California three-strike law). But see Lisa Stolzenberg & Stewart J. D'Alessio, "*Three-Strikes and You're Out": The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates*", 43 CRIME & DELINQ. 457 (1997) (measuring a limited deterrence effect of California's three-strike law).

92. Matthew Hathaway, *Authorities Here Push Plan to Fight Meth by Curbing Sale of Cold Pills*, ST. LOUIS POST-DISPATCH, Dec. 29, 2004, at A1 (noting that the Oklahoma law passed as a result of the murder of Trooper Nik Green).

93. OKLA. STAT. ANN. tit. 63, § 2-212(A)(2) (West Supp. 2005).

May of that year by 71%.<sup>94</sup> Yet as might be expected, at least part of this decline can be explained by the displacement of criminal activity from Oklahoma to neighboring states. In Texas, police officers complained that the Oklahoma law was causing crime displacement and “ruining” them.<sup>95</sup> One Kansas officer described the phenomenon more bluntly, and stated “that new law is kicking our butts.”<sup>96</sup> Furthermore, crime displacement brought about a realization in neighboring states that they must adjust their legislation in order to keep up with Oklahoma and prevent displacement. In Missouri a local police detective noted that:

What states need to decide now is whether to get on the train that Oklahoma let out of the station, or get run over by it.... There's 12 states that are going to try for Schedule 5 next year. Whoever doesn't pass it is (going to) be stuck with a lot of meth cooks.<sup>97</sup>

While in Kansas a spokesperson for the Kansas Bureau of Investigation acknowledged that “if all the other states do pass this, and you don't, you're going to become a magnet for meth cookers.”<sup>98</sup> In Texas a senator representing a northern region of the state has already introduced legislation similar to the Oklahoma legislative scheme in order to stop crime displacement.<sup>99</sup>

### C. *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 way jurisdictions can 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.<sup>100</sup> Expulsion can be achieved either by outright forbidding

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94. Ron Jackson, *Meth Cases Sink; Pill Law Fuels 70% Fall; Texas Sees Traffic Rise*, DAILY OKLAHOMAN, June 22, 2004, at 1A.

95. Associated Press, *New State Law Bringing Meth Woes in Texas*, TULSA WORLD, June 21 2004, at A13 (quoting Police Lieutenant Fred Smith).

96. Rood Lee, *The Drive for Drugs*, DES MOINES REG., Jan. 9, 2005, at 1A.

97. Hathaway, *supra* note 92 (alteration in original).

98. Steve Painter, *End of Bulk Sales of Cold Remedies in Oklahoma Brings Headaches to Kansas: Meth Makers Flock Here for Ingredients*, WICHITA EAGLE, Dec. 14, 2004, at 1.

99. *Under the Dome*, DALLAS MORNING NEWS, Jan. 11, 2005, at 5A (reporting on a bill introduced by Senator Estes).

100. There is an abundance of studies showing that individuals who commit certain types of offenses are more likely to engage in future criminal activity. See PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEPT OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1994* (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>

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, as was the case with criminal sanctions, we can expect to see a dynamic process in which jurisdictions adopt increasingly harsh policies aimed at 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 known as Not In My Back Yard ("NIMBY") legislation, which aims to remove unwanted activities to other jurisdictions.<sup>101</sup>

An example of a policy that literally removes criminals from a given jurisdiction is banishment. Historically, banishment has been used by jurisdictions to remove unwanted individuals such as sex offenders.<sup>102</sup> For instance, in ancient India under the Laws of Manu the crime of rape was punished by banishment,<sup>103</sup> and the Hammurabi Code specified this punishment for those convicted of incest.<sup>104</sup> Aristotle noted that "the incurably bad should be banished."<sup>105</sup> During the eighteenth century the British employed this sanction on a large scale by banishing criminals to America and Australia.<sup>106</sup> The British eventually abandoned this form of punishment only when the communities to which the criminals were transported had the political power to avoid the imposition of this negative externality.<sup>107</sup>

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(measuring high recidivism rates among released offenders); ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 (1989) (same).

101. See generally BARRY G. RABE, BEYOND NIMBY: HAZARDOUS WASTE SITING IN CANADA AND THE UNITED STATES (1994).

102. 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).

103. ISRAEL DRAPKIN, CRIME AND PUNISHMENT IN THE ANCIENT WORLD 131 (1989).

104. Lindgren, *supra* note 102, at 48.

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

106. 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, at 2-3 (1987) (noting that the main goal of transportation was to rid Britain of dangerous offenders).

107. 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 nineteenth century, several European countries (mainly Germany) continued to transport their dangerous criminals to the United States in covert ways. See Richard J. Evans, *Germany's Convict Exports*, HIST. TODAY No. 47(11), Nov. 1997, at 11, 11.

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 condition of probation. For instance, Georgia courts use a punishment known as “158-county banishment” under which offenders are 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.<sup>108</sup> According to one Georgia prosecutor, he was personally involved with over two hundred cases in which defendants were banished to Echols County.<sup>109</sup> Though banishment might not be the punishment of choice in most criminal cases in the United States, an abundance of cases demonstrates that courts in other jurisdictions use it as well.<sup>110</sup>

Banishment is also making its way into legislation enacted by smaller 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.<sup>111</sup> The Cicero ordinance also sets out a procedure for applying the sanction, which is less stringent than typical criminal procedure, as it allows the admission of hearsay testimony, and requires proof only by a preponderance of the evidence rather than beyond a reasonable doubt.<sup>112</sup> Reportedly, soon after the ordinance’s enactment, gang

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108. See Alloy, *supra* note 102, 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 “[n]either banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime”).

109. Alloy, *supra* note 102, at 1099.

110. See William 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 agreement. Such cases will for the most part not manifest themselves in case law. See Alloy, *supra* note 102, at 1103.

111. 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, *supra* note 7. 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. *Id.* at 439-42 (reviewing an ACLU study measuring the displacement effects of the injunctions).

112. Smith, *supra* note 111, at 1466.

members in Cicero began to migrate out of the city.<sup>113</sup> In addition, the enactment caught the attention of neighboring communities that considered adopting such measures themselves.<sup>114</sup>

A closely related topic demonstrating communities' desire to expel unwanted individuals is the transfer of prison inmates between states. In recent years a market for inmates has developed in the United States, such that states with an insufficient number 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 in escaping 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 affected communities.<sup>115</sup> One can even see specific legislative proposals intended to protect the interests of communities that agree to host prison inmates. For instance, in Louisiana, the state legislature proposed to mandate that any out-of-state inmate hosted by Louisiana be removed from the state prior to his release.<sup>116</sup> 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.”<sup>117</sup>

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. Jurisdictions can achieve this goal 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 may 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.<sup>118</sup> For instance, states routinely use

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113. *Id.* at 1467.

114. *Id.*

115. See, e.g., Noah Bierman, *Private Prisons Might Import Inmates*, PALM BEACH POST, Apr. 14, 2000, at 1A; 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).

116. Capital Bureau, *Law Could Ensure Convicts' Return Trip: Politician Fears They Would Remain in La.*, TIMES-PICAYUNE (New Orleans), Aug. 14, 2001, at 2.

117. Capital Bureau, *supra* note 116.

118. See Avi Brisman, *Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment*, 28 WM. & MARY ENVTL.

their authority to require occupational licenses to limit the employment opportunities of convicted offenders.<sup>119</sup> This general picture is consistent with the hypothesis that states are attempting to displace individuals who have demonstrated a high propensity to commit future crimes.<sup>120</sup>

One set of policies that can serve the goal of encouraging offender migration are criminal registration laws. Generally, under such laws convicted criminals are required to register with local police officials, and furnish them with certain personal information.<sup>121</sup> The registration requirement serves as a way to harass local criminals and encourage them to leave the jurisdiction.<sup>122</sup> Over time, however, as more jurisdictions adopt such laws the ability of these laws to encourage migration diminishes.<sup>123</sup> A concrete and current example of registration laws being used to encourage offender migration can be found in the context of Sex Offender Registration and Notification 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.<sup>124</sup> The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program,<sup>125</sup> which describes the minimal required registration and notification provisions that each state must

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L. & POL'Y REV. 423, 432-48 (2004) (reviewing collateral consequences of convictions in different states); Nora V. Demleitner, "*Collateral Damage": No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1033-47 (2002) (same); Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187 (1995) (reviewing employment limitations).

119. See Brisman, *supra* note 118, at 432-35; May, *supra* note 118, at 193-205. 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 positions such as billiard room operator, junk dealer, and engineer seems to have little to do with the prevention of future crimes. See Brisman, *supra* note 118, at 433 (listing limitations on employment of convicted offenders).

120. 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 play an active and independent role in this process and use their authority in those areas in which the federal government is not active.

121. Note, *Criminal Registration Ordinances: Police Control Over Potential Recidivist*, 103 U. PA. L. REV. 60, 60 (1954).

122. *Id.* at 63.

123. *Id.*

124. According to a recent study of the Bureau of Justice Statistics, sex offenders have a substantially higher chance than other violent offenders to be re-arrested for a new violent sex offense. See Press Release, U.S. Dep't of Justice, Sixty Percent of Convicted Sex Offenders Are on Parole or Probation (Feb. 2, 1997), available at <http://www.ojp.usdoj.gov/bjs/pub/press/soo.pr> (last visited Mar. 24, 2005).

125. 42 U.S.C. § 14071 (2000).

enact in order not to lose federal law-enforcement grants,<sup>126</sup> sets forth the federal framework for SORNLs. Currently, all fifty states and the District of Columbia have enacted some form of such a law.<sup>127</sup>

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.<sup>128</sup> In addition, the notification aspects of SORNLs subject sex offenders to a wide array of nonlegal sanctions ranging from embarrassment to extreme acts of violence.<sup>129</sup> 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, SORNLs 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.<sup>130</sup>

Anecdotal evidence regarding the enactment and application of SORNLs supports the analysis presented here. First, one can observe 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

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126. *Id.* § 14071(g).

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

128. See ALA. CODE § 15-20-26 (Supp. 2004) (establishing a list of limitations on the places in which sex offenders may reside); ALA. CODE § 15-20-26(a) (Supp. 2004) (prohibiting offenders from working within 2000 feet of a school or a child care facility); MINN. STAT. ANN. § 244.052 (4)(a), (b) (West 2003) (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. STAT. tit. 57, § 589(A) (2001) (prohibiting offenders from working in business that provides service to children and schools); OKLA. STAT. ANN. tit. 57 § 590 (West 2004) (prohibiting offenders from residing within a 2000-foot radius of any school or educational institution). 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 (S.D. Iowa 2004) (analyzing the effects of the Iowa housing limitation).

129. For a review of these sanctions, see Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan’s Laws*, 42 HARV. J. ON LEGIS. (forthcoming 2005).

130. To be sure, SORNLs could also raise the probability of detection for offenders planning to commit additional sex crimes. Thus, such offenders might choose to shift their residence to jurisdictions without such laws since the expected sanction they face in those jurisdictions is lower. Viewed from this perspective, SORNLs might also create ex ante crime displacement as described above. See *supra* Part I.B.

looking for a state where they don't have to register."<sup>131</sup> Similar anecdotal information gathered from 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.<sup>132</sup>

Second, comments made during the legislative debates on 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 SORNL 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."<sup>133</sup> Similarly, in Tennessee the Senate sponsor of the local SORNL, Senator Crow, stated that "we'll see sex offenders leaving Tennessee and you won't see them coming in."<sup>134</sup> In Idaho, the Attorney General who promoted the adoption of the local SORNL said, "what these individuals [sex offenders] were

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131. Jennifer Bjorhus, "*Megan's Law*" May Have Loopholes, PORTLAND OREGONIAN, Dec. 7, 1997, at B1; see also Brian Coddington, *Plan Brands Sex Offenders: Legislation Seeks to Name Names, Confine Worst Offenders Indefinitely*, SPOKESMAN REV. (Spokane), Dec. 12, 1997, at B1 (reporting that it is "not uncommon for 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*, 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 SORNL and that he suspected that these calls were made by offenders who were shopping for a state with lenient notification policies).

132. Bob Schwartz, *From Mottos to Molesters*, ALBUQUERQUE J., Nov. 2, 2002, at E1 (reporting on the case of David Siebers); see also 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 latter did not have a registration requirement at the time); Jenny A. Montana, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J.L. & POL'Y 569, 582 n.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); Bjorhus, *supra* note 131. (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).

133. Doe v. Pataki, 940 F. Supp. 603, 621-22 (S.D.N.Y. 1996) (quoting N.Y. Assemblyman Weisenberg). Yet another New York legislator commented that sex offenders "are the human equivalent of toxic waste." See *id.* at 622 (quoting N.Y. Assemblyman Tedisco). This comment makes the connection between SORNLs and environmental NIMBY regulation self-evident.

134. See Petition for a Writ of Certiorari at 3, Cutshall v. Sundquist, 529 U.S. 1054 (2000) (No. 99-1123).

doing was shopping around to see what states did not have sex offender registration.”<sup>135</sup>

Third, the actual content of the different SORNLs also validates the jurisdictional competition hypothesis. As a general matter, the hypothesis predicts that over time, states will increasingly harshen their SORNLs. Indeed, a survey of new and pending legislation in twelve states, in 1998, indicated that states mostly adjust their SORNLs to make them stricter.<sup>136</sup> States have adopted harsher penalties for failing to register, enlarged the scope of notification, and chosen to apply their legislation in a retroactive manner.<sup>137</sup> Minnesota provides a concrete example. Since 1995, the Minnesota legislature has been debating the issue of community notification.<sup>138</sup> Generally, the debate has been much more vigorous than that of other legislatures and a number of the proposals made have been rejected.<sup>139</sup> Nevertheless, by 2001, the Minnesota legislature realized that the state’s ten-year maximum period of registration under its SORNL was causing offenders required to register for life in other jurisdictions to move to Minnesota.<sup>140</sup> To deal with this, the Minnesota legislature amended its SORNL and required certain types of offenders to register for life.<sup>141</sup> 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 — for one of the offenses enumerated in its SORNL.<sup>142</sup> Yet some states have begun requiring

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135. Coddington, *supra* note 131; see also Cierzniak, *supra* note 132, at 720 (noting that the Co-Chairman of the Kentucky Attorney General’s Task Force on Child Sexual Abuse was quoted saying, “[t]here’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 Jeff Neighbors*, TIMES-PICAYUNE (New Orleans), Feb. 6, 1996, at B2 (paraphrasing 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”).

136. See NAT’L CRIM. JUST. ASS’N, SEX OFFENDER REGISTRATION AND NOTIFICATION: PROBLEM AVOIDANCE AND BARRIERS TO IMPLEMENTATION, AND SEX OFFENDER REGISTRATION AND NOTIFICATION COSTS SURVEY RESULTS 67-69 (1999).

137. *Id.*

138. 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).

139. *Id.*

140. *Id.* at 1316.

141. MINN. STAT. §§ 243.166(1)(b)(3), (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) (2000) (requiring lifetime registration for certain types of offenders).

142. See ALASKA STAT. § 12.63.100(5) (2004) (defining “sex offender”); ARIZ. REV. STAT. ANN. § 13-3821(A) (West 2001) (defining the people required to register under the

sex offenders moving from other states to register, 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.<sup>143</sup> 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, local law-enforcement officials are using community notification 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.<sup>144</sup> The flyers sparked public demonstrations that only managed to force the offender to relocate within the town. Subsequently, the police department switched to a more proactive method, raising money from a private donor to purchase for the offender a one-way plane ticket out of town. This case is not an isolated incident.<sup>145</sup>

## II. REGULATING THE MARKET FOR CRIMINAL JUSTICE

In the previous Part, I explained the existence of a competitive market for criminal justice that 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 Part, I will discuss 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.

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act); MISS. CODE ANN. § 45-33-25 (Supp. 2004) (defining registration requirements); N.J. STAT. ANN. § 2C:7-2 (West 1995) (defining registration requirements); OKLA. STAT. tit. 57, § 582 (2001) (defining the applicability of the act).

143. ME. REV. STAT. ANN. tit. 34-A, § 11223 (West Supp. 2004); MICH. COMP. LAWS ANN. § 28.723(1)(d) (West 2004).

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

145. See Schwartz, *supra* note 132 (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, Jan. 14 2000, at C2 (reporting that a judge in Nebraska ordered a sex offender to leave the state).

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

The debate over the efficiency of jurisdictional competition is a longstanding one in the federalism literature.<sup>146</sup> On one side of the debate are those who argue that competition among jurisdictions, much like other forms of competition, drives them to an efficient outcome.<sup>147</sup> These commentators view jurisdictions as producers of a product, namely public goods such as law, and potential residents (both real persons and corporations) as consumers of the product.<sup>148</sup> The need to attract satisfied taxpaying residents drives jurisdictions to meet the preferences of their consumers in an optimal fashion.<sup>149</sup> In addition, proponents of jurisdictional competition point out that such competition may lead to more innovation with respect to public policies.<sup>150</sup> According to this line of thought, local jurisdictions can function as “experimental laboratories” for the development of beneficial social policies.<sup>151</sup> Thus, these commentators argue 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.

On the other side of the debate are commentators who point out the potential adverse effects of jurisdictional competition.<sup>152</sup> They

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

147. 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).

148. Tiebout, *supra* note 10, at 422 (“Just as the consumer may be visualized as walking to a private market place 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.”).

149. *Id.* at 424.

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

151. The term “experimental laboratories” was coined by Justice Brandeis in *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, 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 reduce 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, *supra* note 37, at 81-86. Nevertheless, it would still seem reasonable to assume that more jurisdictional diversity leads to more policy innovation. See SHAPIRO, *supra* note 31, at 85-86.

152. See, e.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Saleska & Engel, *supra* note 12.

argue that in many instances jurisdictions face a collective-action problem that can be modeled as a noncooperative game such as the prisoner's dilemma.<sup>153</sup> These situations are characterized by a payoff structure in which, despite the fact that 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 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 undesirable "race to the bottom." Therefore, as is the case with collective-action problems, some form of external regulation might be needed in the jurisdictional market to reach a desirable outcome.

Note that the two theories of jurisdictional competition are not mutually exclusive. In any given concrete context jurisdictions might be engaged in both beneficial competition driven by surplus-generating innovations, and undesirable competition driven by the ability to impose negative externalities on neighboring jurisdictions. For example, in the area of corporate law, Bebchuk has demonstrated that states might be engaged in both a race to the top and a race to the bottom.<sup>154</sup> While generally state competition in that area promotes the creation of corporate-governance rules that are socially beneficial, in some concrete contexts, such as those involving negative externalities, state competition might yield an undesirable outcome.<sup>155</sup>

Evaluating the criminal justice context, one can also discern both a potential race to the top and a potential race to the bottom. 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 who 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, 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 Vehicle Identification Numbers on the windows of their vehicles, making it

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153. Bednar & Eskridge, *supra* note 152, at 1470-75; Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 906-07 (1987); Saleska & Engel, *supra* note 12, at 74-76.

154. Bebchuk, *supra* note 11, at 1455-58.

155. *Id.*

much more difficult to resell stolen cars.<sup>156</sup> 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 toward using alternative sanctions such as public shaming.<sup>157</sup> Arguably, alternative sanctions are a relatively cheap way to impose sanctions and deter criminals.<sup>158</sup> 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, jurisdictions publicizing the names of the patrons of prostitutes have reportedly managed to displace the activity to neighboring jurisdictions.<sup>159</sup>

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.<sup>160</sup> For instance, it has recently been argued that the trend of building gated

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156. See ARIZONA 2003 REPORT, *supra* note 76, at 16; see also MICHIGAN 2004 REPORT, *supra* note 62, at 5.

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

158. See, e.g., Kahan & Posner, *supra* note 157, at 368 (arguing that "shaming penalties 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").

159. 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, 1546-47 (1996) (noting that the shaming of patrons might simply lead them to relocate to non-shaming areas).

160. See Omri Ben-Shahar & 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 & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim Centered Perspective*, 145 U. PA. L. REV. 299, 309-10 (1996) (arguing that investments in crime diversion are socially wasteful); Shavell, *supra* note 47, at 130 (arguing that victims might take excessive observable precautions).

communities in some parts of the country reflects an inefficient equilibrium in which too many resources are put into gating.<sup>161</sup> 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.

Perhaps the argument presented here can 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 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.<sup>162</sup> Over time this process will drive both jurisdictions to invest an inefficiently high amount of resources in crime prevention.<sup>163</sup> This conclusion can be applied in a straightforward fashion to the decision jurisdictions make as to the severity of the legal sanctions they impose on criminals. Generally, imposing harsh criminal sanctions reflects an additional expenditure for the local criminal justice system.<sup>164</sup> 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 to increase the probability of detection and incarceration of criminals will also generate positive externalities.<sup>165</sup> Apprehending and prosecuting a criminal who commits crimes in several jurisdictions lowers the crime rate in all those jurisdictions if it deters the apprehended individual

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

162. Hakim et al., *supra* note 17, at 201-06; Uriel Spiegel, *Economic Theoretical View of Criminal Spillover*, in CRIME SPILLOVER, *supra* note 17, at 48, 49-53.

163. Spiegel, *supra* note 162, at 53 (noting that this process will lead communities to act in a way that is not optimal).

164. 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 in persuading 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.

165. 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).

from committing future crimes.<sup>166</sup> Similarly, incapacitating a criminal through incarceration lowers the crime rate in all the jurisdictions 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 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 sanction potential offenders face. Jurisdictions adopting evidentiary rules that exclude evidence 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 might 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 so, 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

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166. In addition, it has been suggested that deterring crime in one area might create a general deterrence effect in neighboring areas. See, e.g., Ronald V. Clarke & David Weisburd, *Diffusion of Crime Control Benefits: Observations on the Reverse of Displacement*, in 2 CRIME PREVENTION STUDIES 165-83 (Ronald V. Clarke ed., 1994). The main mechanism Clarke and Weisburd identify in their review is the creation of uncertainty in the minds of criminals as to the extent of crime-prevention measures. For example, they refer to the well-documented positive externalities created by using concealed tracking devices in cars to deter auto theft, and the use of caller ID services by a small group of the population to deter obscene phone calls. *Id.* at 174-76. The positive externalities created by concealed crime-prevention measures have been noted and formalized in the law and economics literature. See, e.g., Shavell, *supra* note 47. Yet criminal law, almost by definition, is an observable crime-prevention measure. Thus, it is unlikely that the mechanisms described by Clarke and Weisburd are applicable in this context.

banishment, it will function as a Pigouvian tax and assure that banishment punishments will be used efficiently.<sup>167</sup>

Analyzing policies that attempt to drive convicted offenders away by creating a hostile environment, such as the use of SORNLs in the context of sex offenders, also 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, as in the case 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. Meanwhile, other states that find some aspects of SORNLs 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 the treatment of convicted offenders might drive states to develop more efficient programs dealing with these individuals. For example, using 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 the treatment of convicted offenders requires additional examination, but at the very least the potential exists 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 additional costs, such as the cost of additional policemen and the cost of incarceration, these costs will constrain the decisions jurisdictions make. At some point, communities will find the trade-off 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 would probably prevent them from adopting such a policy.

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167. The term "Pigouvian tax" follows from A.C. PIGOU, THE ECONOMICS OF WELFARE (1948). For a recent review, see ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 354-56 (1995). It should be noted that, as a practical matter, setting the Pigouvian tax at the required level might be a difficult task for policymakers.

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 cooperate. In the next section, I will turn to evaluate ways to deal with those situations.

### B. *Resolving the Potential Race to the Bottom Problem*

#### 1. *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 noncooperative inefficient deadlock, they have the most to gain from resolving the problem and reaching a cooperative outcome. Jurisdictions have two ways of overcoming 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 noncooperative game such as the prisoner's dilemma and therefore cannot cooperate. Yet this result rests on the set of assumptions that define these games. More precisely, the setting of a prisoner's dilemma includes three explicit assumptions that make cooperation difficult. First, it assumes that the participants 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 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.<sup>168</sup> These interactions allow for constant communications, which enable the evolution of a cooperative relationship. Furthermore, legislation and public policies are transparent in nature and therefore jurisdictions can observe each

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168. 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 noncooperative manner. The end-game problem has been well documented in the norms literature. See, e.g., ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 267-68 (1991) (analyzing the demise of cooperation among the Ik of northern Uganda 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.

others' actions. Given these characteristics, one can expect that some form of voluntary cooperation might emerge between jurisdictions to avoid the inefficient results associated with noncooperative behavior. Just as 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.<sup>169</sup> In fact, some commentators have pointed out that despite potential incentives to defect, jurisdictions in many cases behave in a cooperative manner.<sup>170</sup> 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.<sup>171</sup> 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 commit themselves to behave in a cooperative manner. Currently, nearly two hundred compacts regulate different aspects of state relationships ranging from environmental policies to taxation.<sup>172</sup> Voluntary compacts can be a useful means of solving 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 sex offenders analyzed above since it also deals with individuals whom states are happy to drive away. To overcome the problem, states voluntarily entered into a compact that regulates their behavior in this area.<sup>173</sup> The compact created a commission that

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169. 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); ELICKSON, *supra* note 168, at 280-86 (describing the emergence of cooperative norms in Shasta County that functioned as an alternative to formal law).

170. PETERSON ET AL., *supra* note 31, at 6 (noting that states tend to cooperate among themselves in many of the cases).

171. See Mary Jean Babic, *Car-Theft Program Could End*, GRAND RAPIDS PRESS, July 8, 1992, at C3 (reporting on a visit of Florida officials to Michigan to learn about the Michigan ATPA); Julie Bykowicz, *New Lines of Jurisdiction Trend: Police Departments Are Increasingly Pooling Resources to Fight Crime More Efficiently*, BALT. SUN, Aug. 13, 2000, available at 2000 WL 4875842 (describing cooperation among local police departments in Maryland); James Vaznis, *City Guards 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).

172. See Council of State Governments, *Interstate Compact Statutes*, at <http://www.csg.org/CSG/Programs/National+Center+for+Interstate+Compacts/statutes.htm> (last visited Mar. 24, 2005).

173. Interstate Compact for the Supervision of Adult Offenders, available at [http://www.adultcompact.org/about/history/historical/Compact\\_Preamble.pdf](http://www.adultcompact.org/about/history/historical/Compact_Preamble.pdf) (last visited Apr. 7, 2005). The field of parolee and probationer supervision had been governed by the

enacted rules to govern the transfer of offenders from one jurisdiction to the other.<sup>174</sup> Similarly, the states involved are moving toward adopting a compact regulating the area of juvenile offenders.<sup>175</sup>

## 2. 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. 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.<sup>176</sup> Similarly, counties and cities creating negative externalities could be regulated by states.

In recent years federal involvement in the area of criminal justice has increased substantially. This increase can be observed 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.<sup>177</sup> Generally, legal scholars have criticized this trend.<sup>178</sup> While some of the current trends

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Interstate Compact for the Supervision of Parolees and Probationers since 1937. Recently, that compact was substituted by the Interstate Compact for Adult Offender Supervision. For updated information on the new Compact, see INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION, HISTORY, at <http://www.adultcompact.org/about/history/default.shtml> (last visited Apr. 7, 2005). For a review of the Compact, see James G. Gentry, *The Interstate Compact for Adult Offender Supervision: Parolee and Probationer Supervision Enters the Twenty-First Century*, 32 MCGEORGE L. REV. 533 (2001).

174. INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION, RULES (effective Jan. 1, 2005), available at [http://www.adultcompact.org/about/history/h\\_docs.shtml](http://www.adultcompact.org/about/history/h_docs.shtml) (last visited Apr. 7, 2005).

175. The Interstate Compact for Juveniles, available at <http://www.csg.org/NR/rdonlyres/elcsssvsx6hlen2wcr32mq6kw36yeujobpmxyd2wnrvs4r3qy5fzpqbz47o7rxvn3hkxz2gqpfidpl3isgqxhxlg/Interstate+Compact+for+Juveniles.pdf> (last visited Apr. 7, 2005). The Compact requires that 35 states adopt it before it becomes binding. *Id.* Art. X. As of March 2005, twenty-three states have enacted laws adopting the Compact. See COUNCIL OF STATE GOVERNMENTS, INTERSTATE COMPACT FOR JUVENILES, at <http://www.csg.org/CSG/Policy/public+Safety+and+Justice/interstate+compact+for+juveniles/default.htm> (last visited Apr. 7, 2005).

176. SHAPIRO, *supra* note 31, at 44-50 (arguing that a strong national authority is needed in the presence of externalities); McKinnon & Nechyba, *supra* note 42, at 8-9 (discussing mobility externalities among states).

177. 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); Beale, *supra* note 23, at 983-96 (evaluating the burden on the federal judiciary); 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).

178. See Stacy & Dayton, *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

in federal criminal legislation have little to do with preventing undesirable 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.<sup>179</sup> This type of federal regulation might seem counterintuitive since it requires intervention when states *succeed* rather than fail to deal with crime.

One way the federal government could assist states is by creating a uniform federal criminal code dealing with displaceable 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.<sup>180</sup> In the area of enforcement, the federal government should focus its attention on reducing the incentives for states to spend inefficiently large amounts of resources on fighting crime. The federal government could achieve this goal by mandating maximum law enforcement expenditures for specific types of crimes. Such mandates could allow for 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, policymakers will have to consider organizational consolidation, which would mean moving law enforcement activity to the hands of a central planner such as the FBI.<sup>181</sup>

A concrete example of organizational consolidation dealing with problems of crime displacement is the state ATPAs discussed above.<sup>182</sup> 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. But on the *intrastate* level the creation of these authorities can be viewed as a way to curb competition between neighboring localities within a given state that attempt to displace auto theft from one to the

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government has overstepped its bounds in recent years. See *THE NEW FEDERALISM*, *supra* note 31, at x (arguing that in some areas powers should be given back to the states).

179. 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).

180. Generally current federal criminal legislation creates a concurrent criminal jurisdiction and does not preempt state criminal laws. See Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1552 (2002).

181. See Mehay, *supra* note 49, at 67-68 (arguing that crime displacement justifies consolidating local police departments).

182. See *supra* notes 61-85 and accompanying text.

other. ATPAs are state authorities that aim to reduce auto theft in the state as whole and not in any specific county.<sup>183</sup> Thus, these authorities can act as central planners and take 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.<sup>184</sup>

Finally, a more general insight arising from 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, the 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. 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.<sup>185</sup> While this view raises a valid point, it overlooks other aspects of federalism. For one, federalism deals with solving collective-action problems within the federation, and as we have seen, states and other localities

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183. See, e.g., 20 ILL. COMP. STAT. 4005/2 (1992) (stating that Illinois authority is established for the purpose of "statewide planning"); TEX. REV. CIV. STAT. ANN. art. 4413(37), § 7(b)(1) (Vernon Supp. 2004-2005) (requiring Texas authority to create a plan of operation to deal with auto theft in "areas of the state where the problems are greatest"). This view was also incorporated by many ATPAs into their official policy statements. See, e.g., ARIZONA 2003 REPORT, *supra* note 76, at 2 (listing as part of its mission statement: "To deter vehicle theft through a statewide cooperative effort"); N.Y. STATE MOTOR VEHICLE THEFT & INS. FRAUD PREVENTION BD., 2002 ANNUAL REPORT, at iv, available at <http://criminaljustice.state.ny.us/ofpa/pdffdocs/mvtifpannualreport02.pdf> (last visited Mar. 29, 2005) (stating in mission statement that the ATPA "shall provide for a coordinated approach to curtailing motor vehicle theft and motor vehicle insurance fraud throughout the State").

184. Martin Pflieger, *Auto Theft Target of Crackdown in Pa.*, MORNING CALL (Allentown), Oct. 15, 1996, at A1 (reporting comments made by Roy Miller, executive director of the local ATPA); see also Jeanette Krebs, *Auto Thefts in State Stall*, PATRIOT-NEWS (Harrisburg, PA), Dec. 1, 1999, at B1 (reporting comment made by Kenneth Robinson of the local ATPA).

185. Justice Harlan has voiced a constant view to that effect. See *Baldwin v. New York*, 399 U.S. 117, 138 (1970) (Harlan, J., concurring in part and dissenting in part); *Pointer v. Texas*, 380 U.S. 400, 408-09 (1965) (Harlan, J., concurring); *Malloy v. Hogan*, 378 U.S. 1, 16-17 (1964) (Harlan, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643, 680-81 (1961) (Harlan, J., dissenting).

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 toward the viability of the “new federalism” in the area of criminal procedure. New federalism, a term coined by Donald Wilkes in the mid-1970s, refers to a line of rulings of state supreme courts that used state constitutions to grant local criminal defendants rights that went beyond those required by the federal constitution.<sup>186</sup> As we have seen, jurisdictions that impose additional constraints on their law enforcement agencies are expected to find themselves in a competitive disadvantage compared to other jurisdictions. This, in turn, will cause the crime rate to rise, 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.<sup>187</sup> Two well-publicized indications of the dynamics described here occurred in Florida and California, where constraints imposed by the state supreme courts on law enforcement were overruled by constitutional amendments that prohibited state courts from granting criminal defendants rights exceeding their minimal federal rights.<sup>188</sup> These two examples seem to reflect a general trend. Currently, only a distinct minority of states grants defendants rights that exceed their federal rights.<sup>189</sup>

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.<sup>190</sup> In *Solem v. Helm*,<sup>191</sup> 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.<sup>192</sup> Striking down the punishment, the

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

187. Donald E. Wilkes Jr., *The New Federalism in Criminal Procedure in 1984: Death of a Phoenix?*, in *DEVELOPMENTS IN STATE CONSTITUTIONAL LAW* 166, 167-68 (Bradley D. McGraw ed., 1985).

188. See CAL. CONST. art. I, § 28(d); FLA. CONST. art. I, § 12. 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, 685-722 (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, 122-26 (1993).

189. KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 52 (10th ed. 2002).

190. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

191. 463 U.S. 277 (1983).

192. *Id.* at 281-82.

*Solem* Court held that the prohibition on cruel and unusual punishments included a requirement of proportionality between the crime and the punishment.<sup>193</sup> As part of this evaluation, the Court compared the punishment at hand with sentences imposed for the commission of similar crimes in other jurisdictions.<sup>194</sup> 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 in solving this collective-action problem.<sup>195</sup> Regrettably, in recent years the *Solem* holding has slowly eroded, and one must question the viability of current challenges to extreme incarceration sanctions.<sup>196</sup> The cases that eroded *Solem* reflect the Court's misunderstanding of its role as a federal regulator. In *Ewing*, for instance, Justice O'Connor took notice of the displacement effect created by the California three-strike law in question, yet viewed this result as a legitimate state interest that justified the law.<sup>197</sup> A central planner attempting to deal with negative externalities created by members of a federal system of government should have rejected this line of reason.

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, Congress enacted the Anti Car Theft Act of 1992 ("ACTA").<sup>198</sup> The ACTA includes several provisions that can be seen as positive steps made by a central planner to coordinate the activity

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193. *Id.* at 286-88.

194. *Id.* at 291-92.

195. The regulation of criminal sanctions through the proportionality test of the Eighth Amendment might have a practical drawback. If states tend to converge quickly to higher criminal sanctions, then by the time an Eighth Amendment challenge is litigated through the federal court system a historically disproportionate punishment might become proportionate. Nonetheless, this practical problem only reflects the under-inclusiveness of the Eighth Amendment's proportionality test, and does not undermine its desirability.

196. See *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (upholding a California sentence of two consecutive sentences of twenty-five years to life for two cases of petty theft); *Ewing v. California*, 538 U.S. 11 (2003) (upholding a California twenty-five years to life sentence for stealing merchandise valued at approximately \$1,200); *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).

197. *Ewing*, 538 U.S. at 27.

198. Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (codified as amended in scattered sections of 15 U.S.C. and 42 U.S.C.).

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.<sup>199</sup> Yet the ACTA adopts a more problematic approach toward the federal regulation of state resources spent on fighting auto theft. More precisely, the ACTA conditions states' eligibility for federal grants on the creation of a state ATPA much like Michigan's.<sup>200</sup> As we have seen, however, the prospect of crime displacement provides sufficient incentives for states 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 try to reduce the *excessive* motivation states have in displacing auto theft by, for example, conditioning federal grants on staying below a certain cap on the surcharge states can impose to fund their ATPAs.

Turning to the area of ex post displacement of criminals, the Jacob Wetterling Act again reflects a misunderstanding of the proper role of the federal government in designing crime-prevention policies. The Act is structured under the premise that states have insufficient incentives to enact effective SORNLs and therefore includes *minimum* requirements that states must live up to.<sup>201</sup> Given the evidence presented here, there is no reason to assume that states will have insufficient incentives to enact notification laws, which primarily serve the interests of local communities.<sup>202</sup> 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.<sup>203</sup> This

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199. See 49 U.S.C. § 30502-03 (2000).

200. 42 U.S.C. § 3750b (2000).

201. 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 (Jan. 5, 1999) (noting that "[t]he Wettlerling Act generally sets out minimum standards for state sex offender registration programs").

202. 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 (2000) (establishing a federal sex offender database). Hence, imposing minimal federal requirements in that context might be a sensible policy.

203. See Revesz, *supra* note 12, at 1219 n.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, 764-65 (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.

framework should determine issues such as who will be subjected to notification, notification methods, and the duration of notification. This framework could allow for some forms of local policy innovations that diverge from it, yet these innovations should be scrutinized to ensure 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 who committed identical crimes are not required to do so.<sup>204</sup> From a constitutional perspective, these limitations are problematic since courts might see them 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.<sup>205</sup> Most recently, in *Saenz v. Roe*, the Court evaluated the implications of this right for state policies that create differential treatment of new residents. Specifically at issue 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.<sup>206</sup> 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.<sup>207</sup> Furthermore, the *Saenz* Court found this to be a strict requirement and refused to adopt any intermediate standard of review to apply to policies that discriminate against new residents.<sup>208</sup> Thus, the Court found the adoption of discriminatory policies to prevent migration of welfare applicants to be impermissible.<sup>209</sup> In addition, the Court rejected California's claim that the budget savings created by the policy justified its application.<sup>210</sup> Accordingly, the Court struck down the statute and ruled that California must provide all of its residents equal welfare benefits.<sup>211</sup>

In light of the hostile attitude of the *Saenz* Court towards policies aimed at discouraging migration, there seems to be a distinct possibility that registration requirements based on previous residence

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204. See *supra* notes 142-143 and accompanying text.

205. See *Saenz v. Roe*, 526 U.S. 489, 498 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969); *United States v. Guest*, 383 U.S. 745, 757 (1966).

206. *Saenz*, 526 U.S. at 493.

207. *Id.* at 502-03.

208. *Id.* at 504.

209. *Id.* at 506.

210. *Id.* at 506-07.

211. *Id.* at 507.

would 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 could justify the differential treatment of 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 *Saenz* ruling in two ways. First, *Saenz* 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 *Saenz* Court noted that the relatively generous welfare benefits granted by California did not create any significant migration of welfare recipients to the state.<sup>212</sup> Thus, one could argue that strong empirical evidence supporting the sex offender migration hypothesis might cause the Court to reject the *Saenz* approach.

From the perspective of jurisdictional competition, registration requirements based on offenders' previous place of residence are a sensible way to prevent a race to the bottom in the area of SORNLS. 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 out-of-state sex offender brings a lawsuit challenging his registration under such a policy) they might actually be in the best interest of sex offenders as a group since they will allow jurisdictions to adopt more lenient registration requirements.

A piece of federal legislation that attempts to deal with the problem of offender displacement is Aimee's Law,<sup>213</sup> 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.<sup>214</sup> In addition, the law creates a safe harbor for states that impose an average term of imprisonment

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212. *Id.* at 506.

213. Aimee's Law, 42 U.S.C. § 13713 (2000).

214. *Id.* § 13713(c). More precisely, this reimbursement is achieved by a deduction of federal law-enforcement grants that is transferred from state to state.

for the relevant offense that is higher than the national-average imprisonment for that crime and that kept the individual in question incarcerated for at least eighty-five percent of his prison term.<sup>215</sup> Aimee's Law represents a 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, the safe harbor enacted within the law creates yet another "race" 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,<sup>216</sup> this outcome is not necessarily desirable.

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In sum, this Part has evaluated the normative aspects of jurisdictional competition in the area of criminal justice. The tentative conclusion of this discussion is that additional federal regulation in the area of criminal justice might be desirable if there is 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 lawmakers — 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.

## CONCLUSION

This Article has aimed to point out the unique dynamics that a decentralized criminal justice system, such as the one in the United States, might create. 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 neighboring jurisdictions. More specifically, I have identified two ways jurisdictions can achieve this goal. The first focuses on *ex ante*

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215. *Id.* § 13713(c)(3).

216. See *Aimee's Law, Matthew's Law, Two Strikes and You're Out Child Protection Act and Stop Material Unsuitable for Teens Act: Hearing on H.R. 894, H.R. 4045, H.R. 1989, H.R. 4047 and H.R. 4147 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. 23 (2000) (statement of Rep. Matt Salmon).

deterrence and aims to increase the expected sanction in any given jurisdiction to a level that is higher than that of its neighboring 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 marketplace 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 viewed key elements of the criminal justice system such as the desirable size of sanctions and defendants' rights as exogenous, and focused on the design of the institutional structures that could help fulfill these goals given the competitive forces functioning in the market for criminal justice. From this perspective, all that is required for the political process described in this Article to take place is that deterring and reducing future crime rates be *one* of the things that matters to local politicians. This does not seem to be a far-fetched assumption.<sup>217</sup> 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 increasing sanctions, raising the probability of detection, or limiting defendants' rights, politicians will be driven to adopt such policies.

Introducing 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

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217. To be more precise, all that needs to be assumed is that policymakers care to some degree about deterrence and crime rates, and that they are willing to trade off between other policy goals and those goals. If policymakers hold lexicographic preferences, in which a goal like retribution or rehabilitation simply comes first, with no trade-offs in the relevant "region" of the graph in policy-goal space, then displacement will not affect the design of the criminal justice system. Again, it does not seem to be far-fetched to assume that policymakers are willing to make some types of trade-offs when designing a criminal justice system.

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?