

DECENTRALIZING CRIME CONTROL: THE POLITICAL ECONOMY PERSPECTIVE

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INTRODUCTION

In an article recently published on the pages of this Law Review, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition* (“*The Market*”),¹ I put forward a theory of crime control in a decentralized government. Specifically, I made three distinct claims. First, criminal justice policies affect the geographic decision of criminals as to where to commit their crimes.² Other things being equal, criminal activity will tend to shift to areas in which the expected sanction is lower. Second, local jurisdictions attempting to lower their crime rates will react to policies adopted by neighboring jurisdictions and try to keep up with their neighbors’ sanctioning levels.³ In other words, the optimal expected sanction for a certain jurisdiction cannot be derived from the characteristics of that jurisdiction alone; it must incorporate the expected sanctions of neighboring jurisdictions.⁴ Third, competition among local jurisdictions in the area of criminal justice could be both efficient (a race to the top) and inefficient (a race to the bottom) depending on the specific context over which jurisdictions are competing.⁵

In three insightful comments, Professors Rachel Barkow, Sam Gross, and Wayne Logan deepen and broaden the discussion I attempted to start in *The Market*.⁶ They flesh out in great detail some of the theoretical complexities and practical difficulties regarding the competitive forces driving criminal justice policies that I did not fully treat in *The Market*. Further, they demonstrate that we should use great caution before adopting any policy recommendations based on the insights of *The Market*. The comments

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

2. *Id.*

3. *Id.*

4. In this regard I parted from the classic economic analysis of crime control as presented in Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

5. Teichman, *supra* note 1, at 1858–64.

6. Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713 (2006); Samuel R. Gross, *The Market for Criminal Justice*, 104 MICH. L. REV. 1725 (2006); Wayne A. Logan, *Crime, Criminals, and Competitive Crime Control*, 104 MICH. L. REV. 1733 (2006).

clearly help a great deal to understand the issues at hand; one should not read *The Market* without reading this correspondence.

My goals in this short Reply are twofold. On one hand, I will answer some of the criticisms leveled against the arguments made in *The Market*. Obviously, due to the constraints of this format, I cannot answer every point made by the commentators, so I will focus my remarks on the main areas of disagreement. On the other hand, I will try to build on the comments to extend my initial analysis. The Reply is divided into two parts. In the first, I shall deal with the existence of competition in the area of criminal justice and defend my claim that competition affects the design of criminal justice polices in a decentralized government. In the second, I will turn to the policy implications of my claims and argue that *The Market* offers constructive policy recommendations for any decentralized criminal justice system, including the United States.

I. THE POTENTIAL PROBLEM

In *The Market* I argued that competition in the area of criminal justice could potentially lead to a race to the top or a race to the bottom. The focus of all three comments published here is on the potential problem—namely, the race to the bottom. Yet at the outset I would like to point out that in *The Market* I spoke of a *potential* race to the bottom and emphasized the benefits of jurisdictional competition in the area of criminal justice.⁷ Competition might drive local governments to innovate and adopt efficient crime control measures. In addition, decentralization could allow criminal laws to be tailored to the sensitive preferences of local communities. Furthermore, there might be organizational inefficiencies associated with creating large national agencies that can be avoided by creating small local agencies. Finally, there might be informational advantages to relying on local rather than national systems. Thus, while this Reply will focus on the potential race to the bottom, the reader should note that that race is only one possible factor to be weighed in determining crime policy.

The commentators express skepticism as to the existence of competition with respect to criminal justice. Gross, for example, argues that there might not even be a question of a race to the top or a race to the bottom for the simple reason that there is no race to begin with.⁸ Gross's skepticism arises from the lack of empirical data supporting the competition hypothesis. This concern is legitimate, and that is why the claims made in *The Market* were tentative, pending further empirical research. But Gross does more: he presents data that supposedly suggest that competition does not play an important role in the area of criminal sanctions.⁹ Yet a close evaluation demonstrates that the data he presents cannot rebut the competition hypothesis. For instance, Gross points out that between the years 1980 and 2001, while

7. Teichman, *supra* note 1, at 1858–64.

8. Gross, *supra* note 6, at 1732.

9. *Id.* at 1730–32.

the drug related *state* prison population rose by a factor of thirteen, the *federal* drug related prison population rose by a factor of sixteen.¹⁰ According to Gross, since the federal government is not part of the jurisdictional race, the fact that its sanctions rose faster than state sanctions falsifies the competition hypothesis.¹¹ This claim is unpersuasive for two reasons. First, I am not sure that the federal government is not functioning in a competitive setting in the area of drug crimes. Drug crimes in the United States are part of an international market for drugs, and from that perspective it might be the case that the United States is attempting to place itself as a country in which the cost of committing crimes is high. If, for example, the United States manages to confiscate twice as many drugs as Canada, a drug exporter in South America might decide to focus his activity on the Canadian market rather than on the American market. Secondly, and perhaps more importantly, as Barkow clearly described in her reply, the politics of criminal law at the state and federal level are not identical.¹² Thus, simply presenting the raw numbers (as is done in Gross's response) does not explain the causation behind the numbers. I do not claim to present a rigorous statistical analysis here, but it might well be the case that displacement was a driving force at the state level, while other political forces were active on the federal level. If, for example, the decision rule of federal legislatures in the area of criminal law is "copy all state legislation and make it a little tougher"—and Barkow's analysis seems to indicate that that is a distinct possibility—one would expect to see the exact statistical picture Gross presents. Everything else *isn't* equal and thus we simply cannot draw the conclusions that Gross would like us to draw from the evidence he presents.¹³

Gross's skepticism as to the competition hypothesis also rests on a rejection of the underlying assumptions as to the behavior of criminals. As he puts it, "[i]t's hard to imagine that black crack users from Cleveland have responded to the policy of the Cuyahoga County prosecutor by driving over the border [and] smoking crack in the nearly all-white suburbs. . . ."¹⁴ Even without conducting extensive empirical research one has to concede that this observation must be true in a large number of cases. Yet as the commentators

10. *Id.* at 1731.

11. *Id.* Gross also points out that from 1980 through 2001 the total population of prisoners in state custody increased by about 300% while the population of prisoners in federal custody grew by 630%. *Id.*

12. Barkow, *supra* note 6, at 1720–22.

13. To some degree, Barkow makes the same mistake that Gross does when she argues that the fact that the federal government set minimal standards for sex offender registration and notification leads to the conclusion that there is no race in this context between the states. *See id.* at 1722–23. While this fact might demonstrate that the federal government is a poor regulator of the states in this area due to the political forces active in Congress, it does not demonstrate that competition did not drive state legislation in the area. Competition might drive state legislation in the area, while other political forces might drive Congress to enact even tougher laws. The causation is simply unclear.

14. Gross, *supra* note 6, at 1727–28.

acknowledge, some displacement clearly cannot be ruled out;¹⁵ likewise, the possibility that the *perception* of displacement is driving policies cannot be ruled out.¹⁶ That is an empirical question, and aside from citing anecdotes supporting our positions, not much can be done at this point in time.¹⁷ What I would like to emphasize here is that at least one competitive force I described in *The Market* requires no assumptions as to the mobility of criminals: the force of competition for capital investments.¹⁸ If criminals are completely immobile, but capital is mobile and tends to shift to jurisdictions in which the crime rate is lower,¹⁹ then the competition for capital investments will drive the harshening of the criminal justice system.²⁰ To draw on Gross's hypothetical, a criminal in Cleveland might not move to Seattle because of a lower expected sanction, but a multinational corporation might decide to invest in Seattle rather than in Cleveland because of lower crime rates created by higher expected sanctions.

Finally, Logan also raises doubts as to the validity of the competition hypothesis due to the large scope of interstate reliance in the area of criminal justice. Logan points out that a sizeable number of jurisdictions (sixteen) adopted the external approach with respect to the registration requirement of their Sex Offender Registration and Notification Law (SORNLS).²¹ Logan notes many negative consequences that arise from the use of the external approach.²² I am not sure why this evidence is contrary to my assertion. The fact that so many jurisdictions adopted the external approach *supports* the competition hypothesis. The very content of those laws demonstrates that legislatures are concerned about sex offender migration when enacting SORNLS. In other words, a state cannot design its optimal SORNLS without taking into account the equivalent legislation of other states. That is precisely the positive claim I made in *The Market*.

15. Barkow, *supra* note 6, at 1723; Gross, *supra* note 6, at 1725.

16. Barkow, *supra* note 6, at 1720.

17. Measuring crime displacement empirically is an extraordinarily difficult task. The initial theoretical contribution in the area of geographic displacement caused by crime control efforts was made in Thomas A. Reppetto, *Crime Prevention and the Displacement Phenomenon*, 22 CRIME & DELINQ. 166 (1976). Until recently, not a single published study has evaluated displacement directly. Rather, studies dealing with other issues have incidentally reported on displacement. See David Weisburd et al., *Does Crime Just Move Around the Corner?: A Controlled Study of Spatial Displacement and Diffusion of Crime Control Benefits in Two Crime Hot Spots*, 44 CRIMINOLOGY (forthcoming Aug. 2006) (reviewing the literature and presenting the first such study).

18. Teichman, *supra* note 1, at 1838.

19. This is not to say that such an assumption is doubt-free. Crime's effects on both real estate and labor markets could cause places with higher crime rates to actually become attractive for investors. The reduction of real estate prices brought about by higher crime rates could lower costs for investors. In addition, higher crime rates might indicate the presence of a large labor force willing to work for relatively low wages.

20. See Nicolas Marceau, *Competition in Crime Deterrence*, 30 CAN. J. ECON. 844, 851–53 (1997).

21. Logan, *supra* note 6, at 1736.

22. *Id.* at 1737–45.

While I disagree with the comments' denial of the very existence of competition, the comments nonetheless help flesh out some of the nuances of competition in criminal justice that I did not pay full attention to in *The Market*. Gross, for example, points out that interjurisdictional differences can arise out of the way prosecutorial discretion is applied.²³ Given the fact that in the United States prosecutors hold tremendous discretion and power over the sanctioning process, it could very well be the case that a significant part of the effect of jurisdictional competition occurs in that area. To illustrate, think of the choice faced by a prosecutor who—due to a budget constraint—can only prosecute one of two criminals who committed identical crimes. The first is a local teenager, and the second is a teenager from the neighboring poor suburb. Suppose that there exists a relatively large pool of potential criminals who might come into the jurisdiction to commit their crimes from the poor suburb, while crimes committed by locals are rare events. The prosecutor might choose to invest his limited resources in prosecuting the out-of-town criminal in order to send a message to criminals in neighboring jurisdictions that they should take their business elsewhere.

The comments also help one understand how legislative competition is triggered. As Gross and Barkow point out, displacement was only an *unintended* consequence of California's three-strikes law.²⁴ Barkow continues by outlining the alternative political forces that drive the enactment of new criminal legislation.²⁵ I completely agree with this analysis. As the evidence cited in *The Market* shows, California did not anticipate the displacement effect of its three-strikes legislation prior to enacting it.²⁶ This was probably also the case with respect to other examples I analyzed in *The Market*, such as SORNLS and laws limiting the sale of pseudoephedrine. The original pieces of legislation—enacted in New Jersey and Oklahoma, respectively—probably had little to do with an intentional crime displacement plan and much more to do with the public outcry caused by two especially heinous crimes.²⁷ Nonetheless, an interesting question remains: what do such “legislative shocks” cause once they are enacted? In many cases, innovation stems from unintended consequences. A drug manufacturer developing a drug aimed at treating cardiac diseases might unintentionally develop a drug that

23. Gross, *supra* note 6, at 1727.

24. *Id.* at 1730; *see* Barkow, *supra* note 6, at 1716–18.

25. Barkow, *supra* note, 6 at 1718.

26. Teichman, *supra* note 1, at 1847.

27. New Jersey enacted its SORNLS after the brutal rape and murder of Megan Kanka by a neighbor who was a convicted sex offender. *See* E.B. v. Verniero, 119 F.3d 1077, 1081 (3d Cir. 1997) (describing how SORNLS spread to forty-nine states following the murder). Oklahoma enacted a law limiting the sale of pseudoephedrine, a key ingredient in the production of the drug methamphetamine, after a state trooper was murdered by someone under the influence of the drug. *See* Matthew Hathaway, *Authorities Here Push Plan to Fight Meth by Curbing Sale of Cold Pills*, ST. LOUIS POST-DISPATCH, Dec. 29, 2004, at A1.

treats erectile disorders.²⁸ This new (unintended) drug will be produced by that manufacturer and copied by other manufacturers, just like any drug that was created intentionally. Similarly, while California might not have adopted its three-strikes law in order to displace crime, its continued (costly) application in California, and its dissemination to other states, can be explained by its unintended consequence. Furthermore, to the extent that this dynamic process—heinous crime followed by public outcry, legal reform in one state, displacement, and legal reform in neighboring states—is driving criminal legislation, it implies that a long-term steady equilibrium might not be a feasible option in the market for criminal justice. Heinous crimes that shock the public are as sure a thing as death and taxes. Thus, the system will find it difficult to stabilize in a long-term equilibrium.

Barkow, in her comment, helps flesh out yet another complexity of competition in criminal justice. As she notes, governments generally wish to maintain an internally rational criminal code.²⁹ Thus, even if theft were totally displaceable, and murder were completely undisplaceable, governments would still maintain a higher sanction for murder since the criminal code reflects a type of moral menu of a community. I agree with this claim, yet I do not necessarily agree with Barkow's conclusion that the effect of competition on raising sanctions is limited since the set of displaceable crimes is very small. The rational menu argument cuts both ways because the need to maintain internal rationality might cause a trickling effect from displaceable crimes into the entire criminal code. In this process, sanctions for displaceable crimes might rise because of competitive pressures, and then the rest of the code might adjust upwards in order to sustain internal rationality. Thus, we will observe an escalation in criminal sanctions in general, not only in those that deal with displaceable crimes.³⁰

A final point, which may be a tangential step from the comments, has to do with the deeper social meaning of jurisdictional competition. Gross opens his comment by citing stories from *Huckleberry Finn* and *Unforgiven* about driving the bad guy out of town.³¹ These anecdotal stories might reflect the role that jurisdictional competition and crime displacement play in structuring the way people think and feel about crime control. People might not consciously think in terms of displacing crime, but after so many books, movies, and plays describe crime displacement as a solution to crime problems, they might simply perceive crime as something that needs to be displaced. If this is the case, displacement could very well be yet another

28. Consider the story behind the development of the blockbuster drug Viagra. See Dennis Fernandez & Mary Chow, *Intellectual Property Strategy in Bioinformatics and Biochips*, 85 J. PAT. & TRADEMARK OFF. SOC'Y 465, 468 (2003).

29. Barkow, *supra* note 6, at 1721.

30. The possibility mentioned in the text is rather bad news for empirical studies aimed at testing the competition hypothesis. One plausible empirical test would be to compare trends in sanctions in displaceable and undisplaceable crimes over time. To the extent that the sanctions for displaceable crimes tend to rise faster, that would support the competition hypothesis. Yet since the two variables might be connected, designing such a test might be difficult.

31. Gross, *supra* note 6, at 1725.

elephant hiding in the room of American criminal justice. Notice that this also leads to the conclusion that the effects of displacement might be well beyond displaceable crimes. A jurisdiction might adopt a harsh three-strikes law in order to send a general message to the public: “don’t mess with our jurisdiction.” This would be an especially likely strategy with high-profile legislation that tends to focus public attention. As Barkow points out, symbolism plays an important role in the structuring of American criminal law.³² But the question remains: what exactly are jurisdictions symbolizing when they enact tough criminal laws?

In sum, the competition hypothesis comes out of this correspondence alive and even strengthened. In a decentralized government, jurisdictions take into account the policies of neighboring jurisdictions when designing key elements of their criminal justice system. Yet as the short discussion demonstrates, this competition involves different social forces, and there is much more work to be done before we fully understand it.

II. THE SOLUTIONS

So there’s a race, and it might even be to the bottom; but what (if anything) do we do about it? One possible solution I suggested in *The Market* was the use of central planners that will regulate the behavior of local players by, say, setting maximal sanctions for local jurisdictions.³³ This implies that in the American setting additional federal regulation in the area of crime control might be desirable.³⁴ The commentators oppose this conclusion and argue that federal involvement in the area is undesirable.³⁵ Before turning to deal with the replies in detail, I would like to make two preliminary comments. First, as I noted in *The Market*, additional federal regulation is desirable only if this regulation will fulfill the role of a rational central planner. The few examples I analyzed in *The Market* showed that Congress is currently not acting in such a fashion.³⁶ The commentators took this issue a step further and demonstrated convincingly that the federal government cannot currently be expected to act as a rational central planner. Given this, I have no problem conceding that at this point “the United States criminal justice system has little to gain, and perhaps even much to lose, from additional federal regulation.”³⁷

Second, since the focus of the discussion here is on the American federal-state debate, I would like to situate this debate in its appropriate place

32. Barkow, *supra* note 6, at 1718.

33. Teichman, *supra* note 1, at 1866–74.

34. *Id.* This does not imply that only federal involvement is desirable. Additional state regulation of the activities of local law enforcement agencies may be useful as well.

35. Barkow, *supra* note 6, at 1720–23; Gross, *supra* note 6, at 1731–32; Logan, *supra* note 6, at 1745–47.

36. Teichman, *supra* note 1, at 1870–73 (evaluating federal legislation in the area of criminal justice in a critical fashion).

37. *Id.* at 1874.

vis-à-vis *The Market*. *The Market* is not a paper about the relationship between the federal and state governments in the United States in the context of criminal justice. Rather, my analysis of the specific relationship between the state and federal governments in the United States with respect to criminal justice aimed to serve as a mere illustration of a broad theoretical framework. *The Market* offers a way to think about any policy adopted by any level of a decentralized government in order to control crime. Issues such as the intrastate relationship between counties and the state government, the size of sanctions nations adopt with respect to crimes that can travel across international lines, immigration policies regarding potential felons, and the harmonization of criminal law in Europe as that unification process progresses, all fall under the framework of *The Market*. In the American context, as Gross points out, it might be the case that the interesting questions regarding crime displacement and the law lie in the intrastate domain between cities and counties, and not in the interstate domain.³⁸

Having made these preliminary comments, I would like to address several of the policy issues raised by the commentators and use this opportunity to clarify and extend some of the arguments I made in *The Market*. Barkow focuses her critique on the unique pathologies of the politics of American criminal justice. These pathologies, she argues, render the federal government a poor central planner. For the most part I find myself in complete agreement with Barkow. Yet her analysis does raise several side issues. First, while the institutional analysis she presents is important, a substantive theory of the goals of legislation is important as well. *The Market* offers policymakers a clear benchmark in order to evaluate crime control legislation enacted by Congress. For instance, it allows the critic to explain precisely what is wrong with federal legislation that imposes harsh minimal standards on states.³⁹ Second, a specific subset of policymakers that could find the ideas of *The Market* useful in making decisions are federal judges. As Barkow and I agree, the federal courts could serve a useful role in curbing the trend of increasing harshness in American criminal justice.⁴⁰ Understanding the role of the federal government as a central planner of crime control can assist federal judges in interpreting legal terms such as “cruel and unusual punishment” and “legitimate state interest.” Finally, Barkow’s analysis is extremely useful in the sense that it is pragmatic and takes the American criminal justice system as it is, yet in that sense it is also path dependent and does not deal with the issue of how an ideal system should look. For instance, Barkow points out that the fact that the federal government is responsible for prosecuting only a small subset of criminals

38. Gross, *supra* note 6, at 1727.

39. See, e.g., 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 Wetterling [sic] Act generally sets out minimum standards for state sex offender registration programs”).

40. Barkow, *supra* note 6, at 1723 n.46.

allows it to use the high sanctioning level it does.⁴¹ But if we do not take that as a given and ask ourselves how an optimal criminal justice system should be structured, we might conclude that crime control (or certain aspects of it) should be completely federalized. In that case, the federal government might adopt lower sanctions since it simply could not afford its current sanctioning level.

Logan continues the line of thought developed by Barkow and points out that, as a practical matter, even a well-intentioned federal government will find it difficult to regulate competition in criminal justice.⁴² This is clearly a valid point. The regulation of actors who are competing among themselves is a difficult, at times even impossible, task. Once one dimension of competition is regulated, the parties find nonregulated avenues to compete over. Even in a relatively centralized government, regulating local players could prove to be a tricky task. In Israel, for instance, crime control is managed by the national government.⁴³ This causes local municipalities to shift their crime displacement efforts to other avenues. The city of Tel Aviv recently invested substantial amounts of money in renovating and illuminating a park that became a magnet for drug dealers as a result of crime control efforts in a neighboring suburb.⁴⁴ This, in turn, caused the activity to shift from the park to neighboring areas.⁴⁵ Other Israeli municipalities have overcome the lack of a locally controlled police force by hiring private security companies that provide them with semi-police services.⁴⁶ Nonetheless, some forms of regulation can be easy to manage. For instance, in the area of SORNLS, the federal government could set the maximum duration of public notification allowed.⁴⁷ This is a clear, bright-line rule that the states will find difficult to circumvent. The duration of the registration requirement is of importance since, as I pointed out elsewhere, indefinite registration might create a problem of marginal deterrence with respect to sex offenders,⁴⁸ to say nothing of protecting other values such as forgiveness and rehabilitation. States might

41. *Id.* at 1722. In this regard, Barkow also raises the concern that this might cause the federal government to adopt a strategy of high sanctions coupled with a low probability of detection. Unlike Barkow, I am not sure that that is such a bad outcome. See Becker, *supra* note 4, at 184 (pointing out the efficiency of raising sanctions while lowering the probability of detection).

42. Logan, *supra* note 6, at 1746.

43. See David Weisburd, Orit Shalev & Menachem Amir, *Community Policing in Israel: Resistance and Change*, 25 *POLICING* 80, 82 (2002) (describing the structure of the national Israeli police force).

44. Yuval Azulay, *Tel Aviv Launches 'Green' Plan to Combat Inner City Drug-Addict Colonies*, HAARETZ, June 6, 2005, available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=584621>.

45. *Id.*

46. The affluent suburb Kefar Shmariahu adopted such a policy. See <http://www.kfar.org.il/> (describing the suburb's security program).

47. This is contrary to the current situation in which federal legislation sets out minimal registration requirements. See 42 U.S.C. § 14071(b)(6)(B) (2000) (requiring lifetime registration only for certain types of offenders).

48. Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 *HARV. J. ON LEGIS.* 355, 389–91 (2005).

not be able to protect such interests and values because of the risk of sex offender migration from states with long (at times indefinite) registration requirements to states with shorter registration requirements.

Logan focuses his critique on the reliance of states on the outcomes of criminal procedures in other states, what he terms as the external approach. In *The Market*, I endorsed the external approach as a viable way for states to shed themselves from unwanted migration triggered by other states' harsh criminal laws.⁴⁹ While Logan raises some interesting concerns as to the use of the external approach, these concerns do not undermine the case for its use as a tool to overcome some of the collective action problems identified in *The Market*. A central part of Logan's critique of the external approach is his concern that it will lead to what he sees as unfair outcomes.⁵⁰ As he points out, an immigrant from a state with harsh registration requirements such as South Carolina might have to register as a sex offender in a state that adopted the external approach (say Michigan⁵¹) in cases in which a resident of Michigan who committed an identical crime does not have to register. Yet Logan's conclusion that unequal treatment necessarily implies unfairness is tenuous since he employs a strictly ex post view of fairness. He implicitly assumes that if Michigan did not adopt the external approach everyone would be treated equally, and the immigrant from South Carolina would not have to register as a sex offender in Michigan. However, once we shift to the ex ante point of view, this result does not necessarily hold. Facing sex offender migration from South Carolina due to the harsh legal conditions there, Michigan might be compelled to duplicate those conditions in order to cut down unwanted migration. Thus, both the immigrant from South Carolina and the native resident of Michigan will have to register. True, Logan's world is fair in the sense that everyone is treated equally; but everyone is treated more harshly in his world as well. This raises the question: what's so fair about fairness?

Once the ex ante view is adopted, additional problems in Logan's comments emerge. For instance, he argues that adopting the external approach will bring about more uniformity in the area of SORNLS, which will undermine legal experimentation in the area.⁵² The effect of the external approach, however, is the exact opposite. The external approach allows for more legislative diversity, since states adopting it will be free to legislate more lenient SORNLS without being concerned about opportunistic immigration of sex offenders. Not using the external approach, on the other hand, will bring about uniformity in the area since states will simply converge to the harshest possible standards.⁵³ Following the argument presented above,

49. Teichman, *supra* note 1, at 1872–73.

50. Logan, *supra* note 6, at 1739–41.

51. See MICH. COMP. LAWS ANN. § 28.723(1)(d) (West 2004).

52. Logan, *supra* note 6, at 1742–44.

53. Logan is also concerned that the external approach will make it difficult to measure the efficiency of different policies since the control set will be eliminated. *Id.* at 1744. Actually, the external approach offers many opportunities for those engaged in empirical studies. Rather than

the fact that Michigan adopted the external approach allows it to adopt a SORN that is different (and more lenient) than that of South Carolina.

Logan's concern over the limitation of the freedom of movement caused by the external approach seems problematic as well.⁵⁴ The external approach does not penalize an offender for migrating to another state; it simply sustains the same legal regime that he was subject to in his initial place of residence. Hence, if an offender wishes to migrate from South Carolina to Michigan because of a lucrative job offer, the fact that his registration requirement will follow him only means that he will be indifferent in his residence decision from that perspective. If there is social capital to be gained from migration, the individual will still migrate.

Logan continues and raises two intriguing concerns over the effect of the external approach on the states' democratic process. Logan argues that the external approach allows states to codify harsh legislation from other states without a transparent political process.⁵⁵ As he put it "[t]he external approach thus permits a kind of stealth legislation."⁵⁶ This concern seems slightly overstated for two reasons. First, it again ignores the ex ante perspective that led to the conclusion that the external approach will generally allow for more lenient laws. Thus, while the external approach might secretly import to Michigan harsh requirements that will apply to individuals migrating to the state, it will also allow for more leniency towards Michigan residents. Second, it overlooks the fact that the external approach by definition applies only to individuals immigrating to the state, which is a rather small subset of individuals. Between 1995 and 2000 the interstate migration rate was 86.7 per 1,000 residents.⁵⁷ Thus, this does not seem to be a practical way to harshen a state's entire criminal code, and one should not exaggerate the concerns arising from it.

Logan further claims that the external approach is unwarranted since it forsakes "the right of states to act autonomously and independently, free of the constraining authority of other governmental units."⁵⁸ This claim overlooks the fact that even without any federal constraints, states act under a different, and at times much more ruthless, constraint: the constraint of the market. When actors operate within a competitive setting, their choices might be constrained such that they reflect the structure of the setting and not their individual choices.⁵⁹ *The Market* demonstrates that state legislation

comparing two sets of criminals in different states with different legal regimes, the external approach will create within the state two sets of criminals that are subject to different legal regimes. Measuring the differences between these two groups will isolate the effect of the legal policy from differences attributable to social differences between states.

54. *Id.* at 1743.

55. *Id.* at 1741-42.

56. *Id.* at 1742.

57. RACHEL S. FRANKLIN, DOMESTIC MIGRATION ACROSS REGIONS, DIVISIONS, AND STATES: 1995 TO 2000, at 3 (2003), available at <http://www.census.gov/prod/2003pubs/censr-7.pdf>.

58. Logan, *supra* note 6, at 1742.

59. See generally Debra Satz & John Ferejohn, *Rational Choice and Social Theory*, 91 J. PHIL. 71 (1994).

and policies in the area of criminal justice do not necessarily reflect the ideal decisions for the state. Rather, they reflect the ideal decisions given the competitive pressures arising from other states. I personally, like others writing from a rational choice perspective, am not inclined to make a fetish of federalism.⁶⁰ At the end of the day the question is an instrumental one. States should not have a “right” to engage in harmful competition, and the federal government should not be precluded from regulating certain types of state behavior merely because it did not do so before.⁶¹

The gap between what states do and what states want to do in the area of criminal legislation has doctrinal implications regarding the tendency of courts to use comparative legal analysis with respect to criminal law. Courts evaluating the constitutionality of criminal sanctions against Eighth Amendment challenges routinely engage in a practice of comparative legal analysis. According to this analysis, if a large group of states follows a certain sanctioning practice, then one can deduce that the practice should be upheld because there does not exist a national consensus against it.⁶² The implicit assumption in this type of analysis is that one can reach normative conclusions from the positive picture one sees. But with jurisdictional competition in the picture, such a connection does not necessarily exist since in a competitive setting jurisdictions might be compelled to adopt harsh policies that are far from ideal.⁶³

In conclusion, while the policy discussion in this correspondence naturally focuses the attention on the disagreements between my colleagues and me, one should take notice of the range of agreement between us as well. For the most part, the discussion reflects a methodological consensus as to the way the questions raised in *The Market* should be addressed. Namely, we agree that the desired structure of the criminal justice system should be analyzed through the lens of the political economy of the different governmental institutions composing it.

60. See, e.g., RICHARD A. POSNER, *ANTITRUST LAW* 281 (2d ed. 2001). See generally Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903 (1994) (presenting an instrumental analysis of federalism).

61. Rubin & Feeley, *supra* note 60, at 951 (noting that “[w]hen some branch of the national government decides to act in a way that displaces state authority, there is no basis for restricting such action”).

62. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 333–35 (1989) (upholding the death penalty for the mentally retarded); *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) (upholding the death penalty for individuals who committed their crimes as juveniles); *Tison v. Arizona*, 481 U.S. 137, 154 (1987) (upholding Arizona’s death penalty for felony murder). *Stanford* and *Penry* were later abrogated due to a trend among states to eliminate those forms of sanctioning. See *Roper v. Simmons*, 543 U.S. 551, 564–68 (2005) (striking down the death penalty for juveniles); *Atkins v. Virginia*, 536 U.S. 304, 313–16 (2002) (striking down the death penalty for the mentally retarded). The trends documented in these two cases stand in opposition to the claim of a general harshening in American criminal justice.

63. Note the difference between the argument I make here and the argument I made in *The Market* on the issue of comparative analysis, Teichman, *supra* note 1, at 1869–70. In *The Market*, I argued that a comparative analysis of sanctions might be useful in order to *strike down* disproportionately high sanctions. The point I make in the text above is that such analysis should not be made in order to *uphold* a general practice of harsh sanctions.

CONCLUSION

The Market ended with a question: is the American criminal justice system engaged in a race to the top or a race to the bottom? This correspondence demonstrates that answering this question might be a thorny task. Criminal law is a complex social phenomenon involving competing, and at times contradicting, values. It is difficult to understand, particularly in an intricate system such as the American one. Professors Rachel Barkow, Sam Gross, and Wayne Logan, each from her or his unique perspective, helped us all understand some of these difficulties. Furthermore, at the end of this correspondence, one can map out several avenues to continue and explore the issues raised here.

One avenue of research could explore plausible connections between mobility and criminal sanctions from a quantitative perspective. As mobility becomes easier, the competitive forces identified in *The Market* will be stronger, and jurisdictions will be expected to adjust their policies faster. This hypothesis could be explored by comparing jurisdictions that are relatively isolated, such as Hawaii and Alaska, with jurisdictions in which the costs of moving are lower. Testing the mobility hypothesis could also focus on how the lifting of legal travel restrictions affects the level of criminal sanctioning. Notice that as a theoretical matter it is difficult to predict the precise effect of such changes, and one must distinguish between short-term and long-term changes in the level of sanctions. While in the long run, competition generated by a decentralized criminal justice system is expected to drive sanctions upward, the short-term effect of decentralization might actually be the *reduction* of sanctions by some local jurisdictions. If at the initial point the units operated in isolation (think of Europe for example), then once travel restrictions are lifted and criminals are free to cross borders, the units with higher sanctions might see an immediate reduction in their crime rates, since local criminals will travel to the more lenient jurisdictions. This, in turn, will allow the harsher jurisdictions to lower their sanctions (while the lenient jurisdictions will face higher crime rates and raise their sanctions). Nonetheless, after the initial reduction, long term competition will still drive all jurisdictions to raise sanctions. As is evident from this point, the precise hypothesis generated by *The Market* could be rich and complex, depending on the unique circumstances of each situation.

More qualitative work could also further our understanding of the issues at hand. Closely examining the selection of cases made by prosecutors might shed light on the role of displacement in applying prosecutorial discretion. Specific case studies of criminal legislation could flesh out the political forces driving the enactment of new criminal legislation. Note, for example, that the Texas legislation aimed against the sale of pseudoephedrine was initiated by a state senator representing a county bordering Oklahoma.⁶⁴ To the extent that this is a common phenomenon, such studies could help us understand the

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

politics of criminal legislation. By using methodological tools—including interviews, media surveys, and close examinations of legislative history—they might help explain some of the complicated causation issues that quantitative studies cannot fully address.