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## Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity

Tomer Broude

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## Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity

*Tomer Broude\* & Doron Teichman\*\**

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*If displacement is happening then I would say that's all the more reason why other areas should take on this model. Let's drive people out to Lincolnshire and into the sea.*

—Alan Given, Chief Executive  
of the Crime and Drugs Partnership<sup>1</sup>

## I. INTRODUCTION

Globalization is on the rise. The last few decades have been marked by dramatic reductions in transaction costs that have helped bring together local markets. Technological advances such as wireless telecommunications and the Internet have connected buyers and sellers of goods and services across the planet through transactions that were not even feasible, let alone cost-effective, as little as a decade ago. No less importantly, the systematic removal of regulatory barriers to international trade has facilitated economic globalization. At the forefront of international economic liberalization, the creation of the World Trade Organization (“WTO”)<sup>2</sup> in 1995 extended multilateral trading rules beyond trade in goods to cover transnational provision of services, protection of intellectual property rights, and

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1. *City's Blitz is Pushing Crime into the County*, NOTTINGHAM EVENING POST (Eng.), July 3, 2007, at 10.

2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1144–53 (1994) [hereinafter Final Act].

technical and health-related standards.<sup>3</sup> Hundreds of Regional Trade Agreements (“RTAs”) that further reduce barriers<sup>4</sup> are complemented by an even greater number of international investment protection agreements called Bilateral Investment Treaties (“BITs”).<sup>5</sup>

In the shadow of these economic developments, the same period has also witnessed the rise of transnational crime (roughly defined as serious crime whose perpetration and effects occur in more than one state)<sup>6</sup> as a source of grave concern around the globe.<sup>7</sup> Drug smuggling, arms trading, human trafficking, illegal sex trade, money laundering, wholesale intellectual property rights infringement—these and other illicit activities<sup>8</sup> have flourished due to the advances of

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3. For analysis of the political economy of the WTO, see KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* (2005); MICHAEL J. TREBILCOCK & ROBERT L. HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* (3d ed. 2005).

4. For a report on the proliferation of RTAs, see Roberto V. Fiorentino, Luis Verdeja & Christelle Toqueboeuf, *The Changing Landscape of Regional Trade Agreements: 2006 Update* (WTO Discussion Paper No. 12, 2007), available at [http://www.wto.org/english/res\\_e/booksp\\_e/discussion\\_papers12a\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/discussion_papers12a_e.pdf).

5. On the increase in the number of BITs over the last few decades and analyses of their economic effects, see Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 *WORLD DEV.* 1567, 1568–71 (2005); Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 *INT’L ORG.* 811 (2006).

6. United Nations Convention Against Transnational Organized Crime art. 3(2), opened for signature Nov. 15, 2000, entered into force Sept. 29, 2003, G.A. Res. 25, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 [hereinafter CATOC]. The CATOC defines an offense as “transnational” if:

- (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.

*Id.* The juridical significance of this definition is limited to the purpose of delimiting the CATOC’s scope of application; the relevance of its different elements to our analysis varies, but it is, in any case, a useful starting point.

7. As will be evident below we do not restrict our analysis to activities that are universally defined as criminal. Indeed, it is the very existence of different national approaches that enables the dynamic theory we present. Thus, it may be sufficient for a given profit-driven activity to be criminalized, or de-criminalized (either de jure or de facto), in a single national jurisdiction to trigger transnational crime shifting and the subsequent dynamic policy responses by other jurisdictions.

8. The CATOC does not list the types of crimes that may be regarded as “transnational.” Generally it applies to serious crimes “punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.” CATOC, *supra* note 6, art. 2(b). The *Fourth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems* listed the following categories of transnational crime: money laundering, terrorist activities, theft of art and cultural objects, theft of intellectual property, illicit trafficking in arms, aircraft hijacking, sea piracy, land hijacking, insurance fraud, computer crime, environmental crime, trafficking in persons, trade in human body parts, illicit drug trafficking, fraudulent bankruptcy, infiltration of legal business, corruption and bribery of public officials or party officials and elected representatives,

technology and the freer movement of goods, services, money, and people that characterize the modern world, just as legal international business transactions have flourished. There are, no doubt, direct links between technological progress and economic liberalization, on the one hand, and the growth of transnational crime and the accompanying anxiety, on the other hand. For example, illegal child pornography became easier to distribute via the Internet,<sup>9</sup> and the removal of barriers to international trade in goods and the free flow of funds may have facilitated cross-border trafficking in illicit drugs.<sup>10</sup>

As such, transnational crime is indeed “the dark side of globalization,”<sup>11</sup> and it is not surprising that national governments and law enforcement agencies worldwide have increasingly turned to international law and international cooperation to fight it, considerably augmenting the international legal field of global crime control.<sup>12</sup> However, as leading transnational crime experts Peter Andreas and Martin Nadelmann note in a recent book, it is an all too common generalization to view “the growth of international crime control as simply a natural and predictable response to the explosive

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and other offenses committed by organized criminal groups. U.N. Doc. A/CONF.169/15/Add.1 (Apr. 4, 1995).

9. See, e.g., Patrick Forde & Andrew Patterson, *Paedophile Internet Activity*, AUSTL INST. CRIMINOLOGY: TRENDS & ISSUES IN CRIME & CRIM. JUSTICE, Nov. 1998, at 2–3, available at <http://www.hawaii.edu/hivandaids/Paedophile%20Internet%20Activity.pdf> (charting the transformation of child pornography by new technologies, with an emphasis on the transnational dimension); Anna Grant, Fiona David & Peter Grabosky, *Child Pornography in the Digital Age*, 3 TRANSNAT'L ORGANIZED CRIME 171 (1997) (same).

10. See, e.g., Kal Raustiala, *Free Trade Pact a Boon to Drug Dealers*, UCLA TODAY, May 22, 2001, available at <http://www.today.ucla.edu/portal/ut/010522freetrade.aspx> (last visited Apr. 7, 2009) (suggesting that economic liberalization can fuel international trade in drugs).

11. Melvin Levitsky, *The Dark Side of Globalization*, 5 INT'L STUD. REV. 253, 253–54 (2003). Arguably, there are other “dark sides” to globalization, such as the negative distributional effects of global trade liberalization. See Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the World Trade Organization*, 45 COLUM. J. TRANSNAT'L L. 221, 246–59 (2006) (discussing areas of the WTO where the dissonance between “function and aspiration is most acute”).

12. Global crime control is not an entirely new area—the International Criminal Police Organization, better known as Interpol, dates back to 1923, but was ineffective during World War II when it fell under Nazi control, remaining moribund until its reestablishment in 1956. For a history of Interpol, see Interpol History, <http://www.interpol.int/Public/icpo/governance/sg/history.asp> (last visited Apr. 7, 2009). Moreover, international governmental activity in the field has gained considerable momentum since the 1990s, as attested by the young age of the CATOC and other international arrangements such as the *Forty Recommendations* of the Financial Action Task Force on Money Laundering (“FATF”), originally agreed upon in 1990, but significantly updated in 2003 and 2004. FIN. ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS (2004), available at <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF>. For an evaluation of the FATF, see Jackie Johnson & Y.C. Desmond Lim, *Money Laundering: Has the Financial Action Task Force Made a Difference?*, 10 J. FIN. CRIME 7 (2003).

growth of transnational crime.”<sup>13</sup> The interaction between globalization, transnational crime, and the emergence of global crime control is much more nuanced and complex in its historical, political, and economic dimensions. For example, the rise of “transnational organized crime” as a major point on the international policymaking agenda in the 1990s has been attributed to the end of the Cold War and U.S. efforts to exert its international hegemonic influence in areas of domestic concern.<sup>14</sup> It has also been persuasively argued that contemporary global crime control is a continuation of historical trends evident in international efforts to combat piracy and privateering in the eighteenth century and slavery in the nineteenth century,<sup>15</sup> as well as a manifestation of “ambitious efforts by generations of Western powers to export their domestically derived definitions of crime.”<sup>16</sup>

This Article will elucidate some of this complexity by exploring the connections between globalization, criminal activity, and international crime control through the prism of political economy. Using this perspective we present a theory that sheds new light on the dynamics of transnational crime and global crime control. In essence, we aim to answer three consecutive questions.

First, why does crime travel across national borders? Our initial argument is that much like other forms of economic activity, criminal activity travels across the globe to the places in which conducting it is most profitable for criminals.<sup>17</sup> We do not argue that all forms of crime will shift across international borders in this fashion. Rather, crimes that are driven by market-based profit move in reaction to cost-imposing domestic regulation that makes crime less lucrative.<sup>18</sup>

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13. PETER ANDREAS & MARTIN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS*, at v (2006).

14. See Michael Woodiwiss, *Transnational Organised Crime: The Global Reach of an American Concept*, in *TRANSNATIONAL ORGANISED CRIME: PERSPECTIVES ON GLOBAL SECURITY* 13, 13–27 (Adam Edwards & Peter Gill eds., 2003) (arguing that the United States has successfully exported its analysis of organized crime problems despite evidence of its inadequacy).

15. ANDREAS & NADELMANN, *supra* note 13, at 22.

16. *Id.* at vii.

17. The analogy between criminal and legal economic activity has its caveats (e.g., the use of violence against competitors is more common in the former), but, in general, “illegal markets are governed by the normal economic forces.” See Pino Arlacchi, *The Dynamics of Illegal Markets*, in *COMBATING TRANSNATIONAL CRIME: CONCEPTS, ACTIVITIES AND RESPONSES* 7, 7 (Phil Williams & Dimitri Vlassis eds., 2001) (defining illegal markets and their nature in comparison with legal markets).

18. This conforms to some extent to the strong, though non-exclusive, association of transnational crime with profit-based organized crime, although the theory presented in this

Second, how do governments react to the international mobility of criminal activity? In response to this question, we distinguish between two types of transnational crimes, focusing on different national approaches to the same activity. The first type consists of crimes that local jurisdictions consider beneficial: “desirable” crimes. These are crimes whose production processes generate economic benefits, leading some national governments to adopt lenient crime control policies to attract them to their territory—thus “insourcing” crime. These crimes are generally those for which the costs of crime “consumption” are severable from the benefits of crime “production.” For instance, money laundering often carries economic benefits in one jurisdiction but promotes harmful crimes in other jurisdictions.

The second type consists of crimes that national jurisdictions perceive as harmful: “undesirable” crimes. These are crimes that carry a net cost for the state. With respect to these crimes, jurisdictions adopt harsher sanctions at the domestic level to shift and displace crime to other jurisdictions—thus “outsourcing” crime. For example, many jurisdictions raise expected sanctions for drug crimes to force drug dealers to shift their harmful activity to neighboring jurisdictions.<sup>19</sup>

What emerges when analyzing transnational crime and crime control is a complex pattern of criminal regulatory competition. Over time, various jurisdictions’ tendencies towards either lenient regulation or harsh regulation, in tandem, trigger a dynamic crime control race. Some jurisdictions escalate their sanctions towards undesirable crimes in a type of “arms race” to become less attractive crime targets. Alternatively, some jurisdictions lower the criminal sanctions for other desirable criminal activities to attract them and reap their economic and social benefits.

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Article does not rest on such an association. The CATOC, for example, criminalizes agreements among people aimed at committing serious crimes “relating directly or indirectly to the obtaining of a financial or other material benefit.” CATOC, *supra* note 6, at art. 5(1)(a)(i). Also, we should note that costs are not the only determinant of crime location; clearly, the potential for gain is also important. Profit-driven criminal activity will only occur where it can profit. When asked why he robbed banks, the famous 1930s bank robber “Slick” Willie Sutton replied, “Because that’s where the money is.” Fed. Bureau of Investigation, FBI History, Famous Cases: Willie Sutton, <http://www.fbi.gov/libref/historic/famcases/sutton/sutton.htm> (last visited Apr. 7, 2009); see also WILLIE SUTTON & EDWARD LINN, WHERE THE MONEY WAS (1976).

19. To be sure, the terms outsourcing and insourcing do not describe the phenomena we deal with perfectly because usually “outsourcing” refers to shifting production activity while consumption activity remains static. In our context, the displacement of crime will in some cases shift both the production and the consumption activities. Nonetheless, we choose to use these terms in order to emphasize the connection between our framework and the vast literature dealing with the mobility of legal economic activities.

Finally, we ask, how should global crime control be designed to enhance global welfare? We argue that different crime control regimes and strategies are required depending on the type of cooperation problem a particular transnational crime poses. The required approach hinges mainly on the extent to which states engage in outsourcing or insourcing of crime. Thus, while some situations call for setting global minimum criminal standards, other situations require setting maximum standards or more sophisticated models of international cooperation.

To develop our theory we draw on several bodies of literature that, in our view, have yet to be combined in a comprehensive manner to address international crime control.<sup>20</sup> The first is crime displacement literature.<sup>21</sup> This literature demonstrates that profit-driven criminals tend to shift their activity to the geographic location in which the expected criminal payoff is maximized. Thus, if the expected sanction in one jurisdiction rises,<sup>22</sup> some crime from that jurisdiction will shift to areas in which the sanction is lower.

The second body of literature we draw from is public choice literature.<sup>23</sup> This literature uses economic models to predict and explain decisions made by political agents as aimed at promoting a given set of preferences. We will use public choice literature's discussion of the political economy of decentralized governments and its analysis of criminal law. As for decentralized governments, ever

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20. For an analysis of related questions in the realm of domestic law, see Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831 (2005). For a discussion of the theory and further refinements, see Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713 (2006); Samuel R. Gross, *Jurisdictional Competition in Criminal Justice: How Much Does it Really Happen?*, 104 MICH. L. REV. 1725 (2006); Wayne A. Logan, *Crime, Criminals, and Competitive Crime Control*, 104 MICH. L. REV. 1733 (2006); Doron Teichman, *Decentralizing Crime Control: The Political Economy Perspective*, 104 MICH. L. REV. 1749 (2006).

21. For early contributions to this literature, see Thomas A. Reppetto, *Crime Prevention and the Displacement Phenomenon*, 22 CRIME & DELINQ. 166 (1976); Simon Hakim et al., *Interjurisdictional Spillover of Crime and Police Expenditures*, 55 LAND ECON. 200 (1979). For later reviews of the topic, see CRIME DISPLACEMENT (Robert P. McNamara ed., 1994); CRIME SPILLOVER (Simon Hakim & George F. Rengert eds., 1981); RATIONAL CHOICE AND SITUATIONAL CRIME PREVENTION (Grame Newman, Ronald V. Clarke & S. Giora Shoham eds., 1997).

22. Note that following traditional models of deterrence and crime control, a rise in the expected sanction can be achieved either by raising the sanction attached to a crime, or by raising the probability of detection. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207 (1968) (describing this model and using economics to find optimal policies for combating crime).

23. For a non-technical introduction to public choice theory, see ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* (2000). For a recent comprehensive discussion on the relation between public choice theory and the law, see Symposium, *Getting Beyond Cynicism: New Theories of the Regulatory State*, 87 CORNELL L. REV. 267 (2002).



since Tiebout's seminal paper on the subject,<sup>24</sup> legal scholars have modeled the effects of decentralization and jurisdictional competition on an array of legal topics.<sup>25</sup> The general theme of these studies is that local jurisdictions aiming to maximize their own welfare compete among themselves in the legislative process to attract desirable activities and repel undesirable activities. Regarding criminal law, this emerging line of legal scholarship has explored how different political forces involved in criminal law affect the way in which it is structured.<sup>26</sup>

The third body of scholarship we turn to is International Relations ("IR") theory on international cooperation.<sup>27</sup> Institutionalist or neoliberal IR theories use rational choice methods to explain and model the emergence of different international cooperative regimes under the prevailing condition of anarchy—that is, the absence of centralized authority in international law and politics. These theories build on the rationality of states and add layers of strategic thinking to state behavior through the use of game theory.<sup>28</sup> This literature and other streams of IR theory assist us both in explaining the existing

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

25. See, e.g., Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992) (corporate law); Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995) (family law); 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) (taxation); 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) (bankruptcy law); 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) (environmental regulation); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000) (trust law).

26. For some examples of this literature, see Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973 (2006); Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. LEGIS. 527 (1996); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); Teichman, *supra* note 20.

27. For primers on the use of IR theories in the study of international law, see Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Anne-Marie Slaughter et al., *International Law and International Relations: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998).

28. See, e.g., COOPERATION UNDER ANARCHY (Kenneth Oye ed., 1986) (reviewing game theory and applying it to security and economic affairs); James Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INT'L ORG. 387 (1994) (modeling coordination under uncertainty and evaluating forms of coordination); Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation*, 79 AM. POL. SCI. REV. 923 (1985) ("relaxing traditional prisoners' dilemma assumptions and developing an alternate model of the coordination game").

patterns of cooperation we observe and in evaluating the policy recommendations we put forward.

The Article is organized as follows: Part II sets out our positive theory of the political economy of global crime control, building on the economic analysis of crime displacement and on the public choice analysis of international regulatory competition. Part III relies on this positive theory and explores its normative implications. We deal with an array of legal mechanisms that states have adopted both unilaterally and in cooperation with other states, and we present their advantages and disadvantages in terms of efficiency and global welfare. In addition, we explore innovative legal regimes that could assist states in reaching more efficient crime control policies. Part IV concludes.

## II. GLOBALIZATION AND THE TRANSNATIONAL MOBILITY OF PROFIT-DRIVEN CRIME

In this Section we present a positive theory of the political economy of transnational crime and its movement across national borders in response to local crime control policies. We begin by describing the way technology and economic liberalization have internationalized the production and distribution patterns of legitimate goods and services. Economic and regulatory differentials between jurisdictions have permitted lawful economic activity to travel to the locations in which it incurs lower costs and generates higher profits. With this background, we turn to the core of our thesis and argue that profit-driven criminal activity behaves similarly to legal economic activity by shifting, whenever possible, to the areas across the globe in which it is most profitable for criminals. Since crime control policies constitute some of the major costs of conducting criminal activity, crime is expected (other things being equal) to travel across the globe to areas in which the cost of commission is relatively low. Thus, crime control policies adopted by states influence the global distribution of criminal activity and consequently affect the level of crime and domestic policy responses thereto in other states.

### *A. Globalization and Shifts in Legitimate Economic Activity*

One of the most salient characteristics of globalization and the growth in international trade is the shifting of economic activity to locations around the globe in which it can be conducted most efficiently. In gross terms, over the last few decades significant segments of manufacturing have shifted from developed states to the

developing world.<sup>29</sup> Geographical transfers of economic activity have also occurred within the industrialized world itself, as evidenced by the decrease in the U.S. share in global output, the uneven growth of European economies, and the rise of Japan as an economic power.<sup>30</sup> As the size of the global economy grows, production associated with a certain place gradually shifts to more efficient locales. Those original activities are replaced with more sophisticated and profitable ones. For example, the textiles industry with its various stages—fiber production, yarn preparation, fabric manufacture, cutting, sewing, and distribution—has proven especially mobile, with its economic locus continuously shifting from Europe to the Americas to Asia and Africa.<sup>31</sup>

These geographical movements of business activity result from systemic changes that allow Smith's "invisible hand"<sup>32</sup> and Ricardo's principle of comparative advantage<sup>33</sup> to act on the international plane. The combination of advanced technology, labor-cost differentials, trade liberalization, and cross-border investment protection has led to increasingly complex transnational patterns of production. Today, the simplest of consumer products is likely the outcome of productive economic processes that take place on a number of continents.<sup>34</sup> Dialing a customer-service telephone number in North America may connect the consumer to a call center in India, where many other service activities, such as software development, have also shifted over the last decade.<sup>35</sup> As the last example demonstrates, economic shifting

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29. See PETER DICKEN, *GLOBAL SHIFT: TRANSFORMING THE WORLD ECONOMY* 27 (1998).

30. *Id.* at 28–29.

31. *Id.* at 283–315.

32. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*, bk. IV.ii, at 456 (1776):

[B]y directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. . . . By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.

33. See DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* ch. 7 (1817) (explaining the concept of comparative advantage using wine and cloth made in Portugal and England).

34. For an engaging account of transnational production and distribution chains, see PIETRA RIVOLI, *THE TRAVELS OF A T-SHIRT IN THE GLOBAL ECONOMY* (2005) (analyzing the inter-related cotton, textile, retail, and second-hand clothing sectors that span the globe).

35. See PAUL DAVIES, *WHAT'S THIS INDIA BUSINESS? OFFSHORING, OUTSOURCING AND THE GLOBAL SERVICES REVOLUTION* (2004); Srilata Zaheer & Radhika Rajan, *Creativity Under Constraint: Technological Imprinting and the Migration of Indian Business to the New Economy*, in *THE GLOBAL INTERNET ECONOMY* 191, 192–93 (Bruce Kogut ed., 2003) (discussing the "evolution" of the Indian economy and factors that "influence the migration of Indian businesses to the new economy").

is not restricted to the manufacturing sectors but is also widely evident in service sectors, whose importance in the global economy has grown tremendously. Many services—such as telecommunications, financial services, and entertainment, among others<sup>36</sup>—are particularly prone to economic expansion due to the increase in service input mobility<sup>37</sup> and other transnational impacts of technological changes.<sup>38</sup>

In a world considerably flattened by technological advances and international economic liberalization,<sup>39</sup> the global distribution of economic activity is affected most fundamentally by objective economic differences between locations, roughly tracing the range of relevant “factor endowments” such as labor, land, and capital that determine local comparative advantages.<sup>40</sup> Where physical trade is concerned (in goods or in services requiring proximity), geographical distances to markets that raise transportation costs may also figure highly into decisions on production and supply locations. At times, these transportation costs are more important than the costs of production itself.<sup>41</sup> However, no less important are legal and regulatory differences between jurisdictions that make or break the international economic viability of an enterprise in its location of choice.

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36. The WTO General Agreement on Trade in Services (“GATS”) covers twelve general service sectors: Business, Communication, Construction and Engineering, Distribution, Education, Environment, Financial, Health, Tourism and Travel, Recreation, Culture and Sporting, Transport, and the catch-all Other, that are further divided into sub-sectors. Final Act, *supra* note 2, at 1168. For an introduction to the GATS, see WTO, *A HANDBOOK ON THE GATS AGREEMENT* (2005).

37. On the importance of input mobility in the growth of international trade, see RONALD W. JONES, *GLOBALIZATION AND THE THEORY OF INPUT TRADE* (2000).

38. Technological advances have been key in increasing international trade in services, perhaps even more than legal deregulation. For a prescient analysis of the potential geographical effects of technological change in international services provision, see D.G. PRICE & A.M. BLAIR, *THE CHANGING GEOGRAPHY OF THE SERVICE SECTOR* chs. 6, 8 (1989).

39. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005) (a popular and influential depiction of the technological and economic changes of globalization).

40. We allude to the Heckscher-Ohlin “factor-proportions hypothesis,” whereby states will tend to export products that use factors of production in which they are abundant, and import products that use factors in which they are poor. For the original formulations of the Heckscher-Ohlin theorem from 1919 and 1924, see ELI F. HECKSCHER & BERTIL OHLIN, *HECKSCHER-OHLIN TRADE THEORY* (Harry Flam & M. June Flanders eds., trans., 1991).

41. The literature on location and transportation costs is vast and highly sector-specific. For basic generalized discussions, see Maurice Fulton & L. Clinton Hoch, *Transportation Factors Affecting Locational Decisions*, 35 *ECON. GEOGRAPHY* 51 (1959) (discussing transportation and economic theory); Aneel Karnani, *The Trade-Off Between Production and Transportation Costs in Determining Optimal Plant Size*, 4 *STRATEGIC MGMT. J.* 45 (1983) (presenting a model for analyzing the trade-off between a large plant that enhances economies of scale and a small plant that decreases transportation costs).

Perhaps the most obvious regulatory factor is taxation. Corporate, capital, sales, and income tax rates and policies among different locations may vary considerably and impact business plans regarding international investment, incorporation, and physical location of production or supply. Such differences have resulted in vigorous international tax competition.<sup>42</sup> States compete to provide the lowest tax rate to attract multi-million dollar manufacturing and assembly plants that may significantly affect economic growth and the livelihood of thousands of workers. A famous example is the role of low taxes in the reinvention of the Republic of Ireland as the “Celtic Tiger,” attracting strategic investments from corporations such as Intel, Bell Labs, and Dell.<sup>43</sup> Other regulatory factors include but are not limited to bureaucracy; labor; environmental, health, and safety regulations; consumer protection rules; and subsidies.

Shifting production and distribution has been encouraged by transnational corporate conglomeration in the business sector. Multinational corporations (“MNCs”) have emerged as major economic players with both the incentives and resources needed to take optimal advantage of economic and regulatory differences between jurisdictions and to channel each part of their activities to the most efficient location through geographically sensitive trade and investment.<sup>44</sup> This entails globalizing at all levels of business activity—research and development, manufacturing, product development, quality control, financing, purchasing and procurement, inventory management, marketing and advertising, distribution, sales and service, administration, and more.<sup>45</sup>

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42. See INTERNATIONAL TAXATION AND MULTINATIONAL ACTIVITY (James R. Hines, Jr., ed., 2001) (analyzing the effect of tax policies on the activities of multinational firms); Reuven S. Avi-Yonah, *Bridging the North/South Divide: International Redistribution and Tax Competition*, 26 MICH. J. INT’L L. 371 (2004) (explaining the distributive effects of tax competition in the context of international development).

43. See PAUL SWEENEY, *THE CELTIC TIGER: IRELAND’S CONTINUING ECONOMIC MIRACLE* (2000) (providing various explanations for Irish growth with a focus on tax policy and surveying the effects of tax-induced investment on production and trade); Sean Dorgan, *How Ireland Became the Celtic Tiger* (The Heritage Foundation, Background No. 1945, 2006), available at <http://www.heritage.org/Research/WorldwideFreedom/bg1945.cfm> (discussing Ireland’s economic revival).

44. See Brian Roach, *A Primer on Multinational Corporations*, in LEVIATHANS: MULTINATIONAL CORPORATIONS AND THE NEW GLOBAL HISTORY 19 (Alfred D. Chandler & Bruce Mazlish eds., 2005) (reviewing the growth of multinational corporations and explanations for their success).

45. See MICHAEL J. MARQUARDT, *THE GLOBAL ADVANTAGE: HOW WORLD-CLASS ORGANIZATIONS IMPROVE PERFORMANCE THROUGH GLOBALIZATION* (1999) (providing a business literature perspective on the globalization of business operations by Multinational Corporations).

Of course, these are not the only factors that contribute to the international locational shifting in the production of legitimate goods and services, but they are important ones. What is significant is that regulatory differences between jurisdictions are a major consideration in business decisions relating to location of business activities such as production and supply. At this point we turn to explore the analogous effects of globalization on the locational aspects of transnational criminal activity.

### *B. Globalization and Decentralized Crime Control*

The economic model of crime control treats potential criminals as rational individuals who choose to participate in criminal activity to promote their personal well-being.<sup>46</sup> According to this model, criminals weigh the costs and benefits associated with criminal activity and choose to commit a crime if, and only if, its benefits outweigh its costs. Our focus in this study is not on the decision criminals make as to *whether* to commit a crime. Rather, we focus on the decision they must make as to *where* to commit a crime. Just as T-shirt producers decide what location will maximize the value of production, certain criminals figure out which location will maximize their criminal profits. As in legal markets, the profitability of crime differs between states due to an array of factors, including the distance to consumer markets and the technological infrastructure of the state.

Additional factors that affect the profits of crime are legal costs. The expected sanction (composed of the probability of detection and the actual sanction inflicted) is a cost criminals must consider when deciding where to commit their crimes. Indeed, “the cost of doing business within the illegal economy is much higher than in the legal economy”<sup>47</sup> because of the additional cost of minimizing exposure to sanctions. This suggests that differences in expected sanctions may weigh heavily in the determination of the locus of criminal enterprises. When crime control is governed by a decentralized political structure, as in the international arena, sanction arbitrages may emerge. In such situations, if everything else is equal, criminal

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46. See, e.g., Becker, *supra* note 22, at 176–79 (analyzing the supply of crime); Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 44 (1996) (identifying, as one of the key assumptions underlying the economic model of crime, that criminals “behave in accordance with the rules of optimizing behavior”).

47. Arlacchi *supra* note 17, at 8.

activity will shift to those states in which the expected sanction is lowest.<sup>48</sup>

Building on this theoretical framework, economists have modeled different aspects of the geography of criminal activity and the precautions taken by crime victims.<sup>49</sup> Criminologists have studied how public and private measures aimed at lowering the expected payoffs of crime by “hardening” potential crime targets have affected the location of criminal activity.<sup>50</sup> Examples of such measures include installation of police patrols, fences, and street lighting. These studies demonstrate that in many cases such measures result in the displacement of crime to areas where similar measures are not used. Concrete examples of such crime displacement exist with respect to burglary,<sup>51</sup> robbery,<sup>52</sup> sales of illegal narcotics,<sup>53</sup> growing of illegal narcotics,<sup>54</sup> and prostitution.<sup>55</sup>

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48. Significant criticism has been brought against the traditional economic model of crime control. See, e.g., Gross, *supra* note 20 (expressing disagreement with the scope of Teichman's argument that states can export crime); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004) (arguing that laws do not deter criminals, in part because criminals do not know the law and/or are not capable of acting rationally in the economic sense). In a nut shell, these criticisms view crime as a complex social phenomenon and argue that criminals do not behave in the way economic models predict. While this literature makes legitimate criticisms, we find it less relevant to our project because our analysis deals mostly with transnational profit-driven crimes.

49. E.g., Joseph Deutsch, Simon Hakim & J. Weinblatt, *A Micro Model of the Criminal's Location Choice*, 22 J. URB. ECON. 198 (1987) (modeling the spatial decision of criminals); Scott Freeman, *The Spatial Concentration of Crime*, 40 J. URBAN ECON. 216 (1996) (modeling 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) (modeling 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 that potential crime victims make).

50. See generally sources cited *supra* note 21 (surveying crime displacement literature).

51. Stephen L. Mehay, *Burglary Spillover in Los Angeles*, in CRIME SPILLOVER, *supra* note 21, at 67.

52. Chrisban 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) (reporting that “[r]obbery calls . . . were not displaced”).

53. Rick Curtis & Michele Sviridoff, *The Social Organization of Street-Level Drug Markets and Its Impact on the Displacement Effect*, in CRIME DISPLACEMENT, *supra* note 21, at 155 (studying the displacement of drug dealers in Brooklyn); John E. Eck, *The Threat of Crime Displacement*, in CRIME DISPLACEMENT, *supra* note 21, at 103, 111–12 (Robert P. McNamara ed., 1994) (reviewing the literature on displacement and drug enforcement). But see Braga et al., *supra* note 52, at 567 (reporting that “drug offense calls and arrests . . . were not displaced”).

54. John R. Fuller & James R. O'Malley, *Enforcement and Displacement: The Case of Marijuana Growing*, in CRIME DISPLACEMENT, *supra* note 21, at 137.

55. 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 CANADIAN J. CRIMINOLOGY 1 (1986); Roger Mathews,

One example of sanction arbitrages that bring about intrastate crime displacement can be seen in the U.S. criminal system. In the U.S. federal system, the constituent states control most criminal regulation. This decentralized power provides a ripe environment for local initiatives that cause crime to travel across state lines. For example, some states' "three strikes" laws have caused criminals who already have two convictions to shift their activity to non-three strikes states, because the sanction faced in those states is significantly lower than those faced in the three strikes states.<sup>56</sup> Within states with centralized criminal systems, local jurisdictions cannot control the severity of criminal sanctions because the central government holds the exclusive power to legislate criminal law. Nonetheless, even in centralized settings local government initiatives can cause crime displacement. In Israel, for instance, some municipalities use private security companies to deal with local crime problems. These initiatives, in turn, cause criminals to shift their activity to municipalities that do not employ such measures.<sup>57</sup>

Several qualifications must be made to the displacement hypothesis set forth above. First, in the realm of domestic law, criminals are literally displaced from one area to another; displacement in the international context probably will not produce the same result. In the domestic context, as the cost of committing crimes in one jurisdiction rises, criminals leave that jurisdiction and move to other jurisdictions in which the cost is lower.<sup>58</sup> While displacement of criminals themselves cannot be ruled out in the international context, a much more plausible result is displacement of the criminal activities. In other words, lowering the cost of crime in one part of the globe will probably not attract the physical relocation of foreign criminals, but instead it will provide local criminals a competitive advantage with respect to committing crime. As a result of that advantage, more local residents will engage in criminal activity, thereby lowering the number of people in other jurisdictions engaged in the same crime.<sup>59</sup> Just as the people engaged in T-shirt production

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*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 21, at 121.

56. Teichman, *supra* note 20, at 1847–48.

57. Doron Teichman, *The Geography of Crime: Jurisdictional Competition and Crime Control Policies*, MISHPATIM (forthcoming 2010) (manuscript on file with the Vanderbilt Law Review).

58. See Teichman, *supra* note 20, at 1843–47 (describing how auto thieves migrated between states).

59. In the regulatory competition literature this phenomenon is known as "market share competition." See DALE D. MURPHY, *THE STRUCTURE OF REGULATORY COMPETITION* 7 (2004).



do not travel from one state to another as a result of changing costs, the producers of illegal narcotics are not expected to travel.

Second, shifting criminal activity from one place to another is a costly endeavor that is expected to create rigidity in the crime market and prevent some criminal activity from moving to more profitable areas. Costs such as setting up production lines, establishing contacts with local enforcement officials, and developing contacts with other criminals in the region are all state specific and must be treated as sunk costs for criminals.<sup>60</sup> In addition, ethnic and language differences might cause difficulties for crime displacement. For instance, if a certain narcotic is distributed in the United States by members of criminal groups that migrated from its traditional place of production,<sup>61</sup> then shifting production to other parts of the globe that have different ethnic composition and hence cannot build on pre-existing social networks might be difficult.<sup>62</sup> Thus, some criminal activity might remain in regions despite the costs of crime in those regions rising over time.

Finally, we would like to emphasize the scope of our claims in this Article. Our theory deals mainly with profit-driven criminal activity that tends to behave in a rational manner: crimes such as money laundering, drug trafficking, and gambling. Clearly, many (perhaps even most) crimes do not fit this characterization and are committed on a local and spontaneous basis, notwithstanding the potential for sanction arbitrage by commission in other areas. For instance, crimes driven by emotions such as intramarital crimes are probably not susceptible to geographic substitution.<sup>63</sup>

### *C. The Political Economy of International Crime Control*

Our theory is built from the bottom up. In other words, we describe the incentives of decisionmakers on a national level, and from that we draw a global picture of crime control. As we shall see in detail below, domestic politicians and decisionmakers may have

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60. For examples of barriers to displacement on the local level, see René Hesseling, *Theft from Cars: Reduced or Displaced?*, 3 EURO. J. ON CRIM. POL'Y & RES. 79, 87-88 (1995) (finding that reluctance to move to unfamiliar areas or to move away from known suppliers or customers can prevent displacement); Reppetto, *supra* note 21, at 175.

61. See, e.g., William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2178-79 (2002) (pointing out the role of ethnic ties in crime organizations).

62. One could view the argument in the text as a form of informal vertical integration that creates barriers to entry into the market. See generally ROGER D. BLAIR & DAVID L. KASERMAN, *LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL* (1983).

63. See, e.g., John P. McIver, *Criminal Mobility*, in *CRIME SPILLOVER*, *supra* note 21, at 20, 36 (pointing out that crimes of passion tend not to be displaced).

incentives either to attract crime (crime “insourcing”) or to repel it (crime “outsourcing”). The precise structure of these incentives will depend on the nature of the activity involved and the nature of each state’s regime, economy, and society.

### 1. International Crime Outsourcing

We begin by describing the outsourcing of crime because it reflects the basic intuitions of crime control. The general tendency is to view crime as a negative social phenomenon that involves many harms. First and foremost are direct harms such as lost lives, bodily injuries, and destroyed property. In the United States alone, a 1988 study estimated the costs of crime to victims at \$92.6 billion.<sup>64</sup> These direct harms result in popular demand for crime reduction, which in turn translates into incentives for elected politicians to adopt policies that will reduce crime. Another harm associated with crime is its effect on international investment. Local communities have an incentive to attract capital that can bring about increased employment and economic prosperity. High crime rates deter foreign investors and impair economic growth,<sup>65</sup> giving states an incentive to reduce their crime rates. For instance, President Mbeki of South Africa has reportedly adopted an aggressive crime control program in order to attract international investors.<sup>66</sup> Finally, the types of profit-driven crime investigated in this study often involve sophisticated criminal organizations. As these organizations gain power and influence, they pose threats to the stability of states’ political systems. The United Nations General Assembly has noted its concern with “the impact of

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64. Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Crime to Victims*, 22 LAW & SOC’Y REV. 537, 539 (1988).

65. See, e.g., U.N. OFFICE ON DRUGS & CRIME & LATIN AM. & CARIBBEAN REGION OF WORLD BANK, CRIME, VIOLENCE, AND DEVELOPMENT: TRENDS, COSTS, AND POLICY OPTIONS IN THE CARIBBEAN 49 (2007), available at <http://siteresources.worldbank.org/INTHAITI/Resources/Crimeandviolenceinthecaribbeanfullreport.pdf> (showing that a majority of firms in the Dominican Republic cite crime as “a major obstacle to investment” and reported that their access to financing had declined due to crime, even though only a small portion of the same firms had been direct victims of crime); *Kenyan Crime Puts Off Investment*, BBC NEWS, Mar. 21, 2006, <http://news.bbc.co.uk/2/hi/business/4828070.stm> (reporting that rising crime rates in Kenya have significantly reduced levels of Foreign Direct Investment (“FDI”) in comparison to safer neighboring states such as Uganda and Tanzania); U.N.: *Urban Crime Drives Away Investment*, USA TODAY, Oct. 1, 2007, [http://www.usatoday.com/news/world/2007-10-01-urban-crime\\_N.htm](http://www.usatoday.com/news/world/2007-10-01-urban-crime_N.htm) (describing U.N. report finding a correlation between insecurity caused by crime and low investment).

66. See Sam Kiley, *Mbeki’s Crime Busters*, TIMES (Eng.), July 16, 1999, at 16; see also George R.G. Clarke et al., *South Africa: An Assessment of the Investment Climate* 90–97 (Africa Private Sector Group, World Bank 2005), available at [http://www.info.gov.za/otherdocs/2005/dti\\_ica.pdf](http://www.info.gov.za/otherdocs/2005/dti_ica.pdf) (demonstrating strong influences of crime rates on investment).

transnational organized crime on the political, social and economic stability and development of societies.”<sup>67</sup> Thus, if a political establishment wishes to maintain its independence from criminal forces, it has an incentive to adopt policies that will combat these threats.

The forces described above give politicians and decisionmakers incentives to reduce local crime, even if this entails displacing crime to other states—producing the outsourcing of crime. This goal can be achieved by raising expected sanctions and harshening other types of regulation that affect crime so that the state becomes a relatively less attractive environment (or target) for criminals. In other words, when states design their crime control policies they take into account the policies of *other* states. In the dynamic setting in which these conditions apply, many states interested in outsourcing crime will adopt a similar national strategy towards crime, which will result in a “race towards strictness” of ever-increasing sanctions. Thus, much like the arms race of the Cold War, there can be an “arms race” between states as a result of each state’s war on crime.

To be sure, we do not argue that jurisdictions engage in deliberate efforts to displace crime to other jurisdictions. A nation can adopt a certain crime control measure for an array of political reasons that have little to do with crime displacement.<sup>68</sup> Nonetheless, once one state adopts a measure, for whatever reason, the effects of this policy will be felt in other states, driving them to adopt similar policies. For instance, three strikes laws were not enacted deliberately to displace crime into other jurisdictions.<sup>69</sup> Yet once they were enacted, displacement became a factor in their dissemination.<sup>70</sup>

## 2. International Crime Insourcing

The dynamics of outsourcing crime are, however, only one part of the story. We now turn to explore the political economy of insourcing crime. While some types of criminal activity pose threats to national political actors and decisionmakers, other crimes might actually be seen by them as “desirable.” We identify three main forces

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67. G.A. Res. 56/120, at 1, U.N. Doc. A/RES/56/120 (Jan. 23, 2002).

68. For an analysis of the political forces driving criminal legislation in the United States, see Barkow, *supra* note 20, at 1720–23.

69. OFFICE OF THE ATT’Y GEN., CAL. DEPT’ OF JUSTICE, “THREE-STRIKES AND YOU’RE OUT”: IT’S IMPLICATIONS ON THE CALIFORNIA CRIMINAL JUSTICE SYSTEM AFTER FOUR YEARS 10 (1998) (describing the displacement caused by the local three strike law as an “unintended but positive consequence”).

70. David LaCourse, *Editorial, Viewpoint: ‘3 Strikes, You’re Out’ Law Proving to Be Efficient Crime Fighter*, NEWS TRIB. (Tacoma, Wash.), Apr. 3, 1997, at A9.

(at times overlapping) that might turn crime into a desirable activity from the perspective of policymakers. First, crimes (or activity that contributes to crime) might be perceived as conferring benefits on the general public. This might be the case when communities in different jurisdictions differ with respect to the definition of undesirable activity. For example, one community might view the production or use of a certain substance (such as alcohol or marijuana) as a crime worthy of severe punishment, while other communities see it as legitimate behavior that is not a crime—or at least as behavior that although formally illegal, is not to be subjected to strict sanctions because it is not understood to cause social problems.<sup>71</sup>

The general benefits of crime may be indirect as well, such as when activity considered criminal in some jurisdictions is tolerated elsewhere not because of any inherent value but simply because it supports local employment, economic growth, and government revenue. Legal casino gambling in places like Macao or Monte Carlo is an example. In Macao, the local population does not see the freedom to gamble as a value worth protecting in itself—in fact, there is considerable local concern about its negative social effects—but at the same time it is understood that the local economy is highly dependent on the provision of gambling services, which are tolerated for the sake of their indirect effects.<sup>72</sup> These trends explain the emergence of criminal activity even when it is recognized internationally as illegal. For example, narcotics farming and production, for all their negative effects in source (and target) states, support production states' economies and the livelihood of the farmers.<sup>73</sup>

Second, harmful crimes might confer benefits to specific interest groups. These interest groups may include actors from the legitimate economy, such as the tourism sector and financial institutions. Or, these groups may include shadier forces like organized crime entrepreneurs. These interest groups can influence politicians to view these crimes as desirable, or at least to turn a blind

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71. For example, the liberal policy towards drug use in the Netherlands has been explained as the outcome of a general liberal and non-paternalistic Dutch approach to law-enforcement known as "Gedogen", whereby only social cost-imposing law violations are repressed through law enforcement. Justus Uitermark, *The Origins and Future of the Dutch Approach Towards Drugs*, 34 J. DRUG ISSUES 511 (2004).

72. See Fanny Vong Chuk Kwan, *Gambling Attitudes and Gambling Behavior of Residents of Macao: The Monte Carlo of the Orient*, 42 J. TRAVEL RES. 271 (2004) (noting that fifty percent of Macao's tax revenue in the 1990s came from gambling, and discussing the future of Macao's economy in the face of local ambivalence towards gambling practices).

73. On the complexity of the effects of narcotics farming in source states, see Richard B. Craig, *Illicit Drug Traffic: Implications for South American Source States*, 29 J. INTERAMERICAN STUD. & WORLD AFF. 1 (1987) (analyzing these effects for Bolivia, Peru, and Columbia).

eye to them, through legal practices like political sponsoring and election funding, or through illegal practices like vote buying and bribery.

Finally, crimes can directly serve the personal interests of politicians and decisionmakers. This is the case with corrupt regimes in which political leaders concurrently function as heads of criminal organizations or maintain close relations with them. In such situations, politicians pocket the profits of crime for themselves and have an interest in insourcing its production, regardless of who bears the costs.

The political forces that lead to the insourcing of crime suggest a dynamic that is the mirror image of the crime outsourcing process. Over time, a race towards leniency should be observed, in which some states situate themselves as attractive sites in which to commit certain crimes or crime-related acts.<sup>74</sup> This race towards leniency can be seen with respect to both regulation and enforcement mechanisms. In extreme cases, governments might become directly involved in international criminal activity.

### 3. Complex Scenarios: Concurrent Insourcing and Outsourcing

In addition to examples of pure insourcing or outsourcing races, more complex patterns of international criminal regulatory competition are likely to emerge. In a given area of transnationally mobile illicit activity, some jurisdictions might consider the activity, on balance, to be undesirable and attempt to outsource it, while other jurisdictions may consider the activity, on balance, to be desirable and attempt to insource it. Thus, we might see the emergence of policy heterogeneity: a “race towards strictness” in some jurisdictions and a simultaneous “race towards leniency” in others.

However, this does not mean that the relationship between crime-outsourcing states and crime-insourcing states is complementary or symbiotic. Crime-attracting states can produce transnational harmful effects in crime-detering states, making the latter’s efforts at combating the undesired activity ineffective. Such policies might even be deliberate, as states seek to capture the benefits of a criminal activity while externalizing its costs. Paradoxically, the combination of crime deterrence and crime encouragement may prove so effective and mutually supportive that

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74. To be more precise, this is the case with respect to crimes that serve interest groups or the regime itself. Crimes that are not regulated only because of diverse beliefs about wrongfulness are not expected to generate a race towards leniency.

both sides lose. For example, the United States has pursued aggressive deportation and repatriation policies to “export” (or rather, to re-export) dangerous criminal gang members to their source states. These states may have in the past generally considered gang activity (especially in its “exported” form) desirable or tolerable. However, in many cases these states were not prepared for the repatriation of gang members hardened by the tough realities of U.S. inner cities. As a result, gang activity has intensified in the source states and is no longer considered desirable by any standard. The same gang members use their reclaimed homelands as bases from which to conduct advanced criminal activity in the United States.<sup>75</sup> Even more complex are situations in which cross-crime effects are felt. The legality of the sale of guns in the United States results in a flow of weapons to Mexico; these are then used in Mexico by drug dealers who target the U.S. market for illegal narcotics.<sup>76</sup>

In each of these three scenarios—insourcing races, outsourcing races, and heterogeneity—states (and the international community) are faced with different cooperation problems. As we will discuss in Part III, the diversity of relationships between and among crime-outsourcing states and crime-insourcing states—as well as the optimal form of regulating these relationships—hinges on understanding the externalities that each type of state inflicts on the other in the global environment.

#### *D. Examples*

In this Subsection we present a few concrete examples of crime outsourcing and insourcing. These examples will allow us to substantiate our theory and explore how it plays out in practice.

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75. See Ana Arana, *How the Street Gangs Took Central America*, 84 FOREIGN AFF., May/June 2005, at 98, 98 (“Ultraviolent youth gangs, spawned in the ghettos of Los Angeles and other U.S. cities, have slowly migrated south to Central America, where they have transformed themselves into powerful, cross-border crime networks.”); Robert J. Lopez, Rich Connell & Chris Kraul, *MS-13: An International Franchise-Gang Uses Deportation to its Advantage to Flourish in U.S.*, L.A. TIMES, Oct. 30, 2005, at 1 (reporting that “a deportation policy aimed in part at breaking up a Los Angeles street gang has backfired and helped spread it across Central America and back into other parts of the United States,” including Washington, D.C., and New York).

76. Louis E.V. Nevaer, *American Guns Help Fuel Mexico’s Drug Trade Killings*, S.F. CHRON., July 15, 2007, at D4.

## 1. Drugs

An obvious first example is drug production and trafficking. Actors in the international market for illicit drugs function much like for-profit corporations, aiming to maximize their revenues and minimize their costs.<sup>77</sup> Interestingly, we can observe that some states attempt to insource these crimes while others attempt to outsource them.

Insourcing states do so for a variety of reasons. One major reason is that the ruling political elite in those states often reap the benefits of the crime. One such example is North Korea, whose central government is reportedly actively engaged in the production and exportation of illicit drugs.<sup>78</sup> A second example is Guinea Bissau, where cooperation between the local military and South American drug cartels has created an ideal transit point for drugs into Europe<sup>79</sup>—demonstrating that every link in the criminal production chain can be displaced and is therefore subject to regulatory competition. Another prominent example of a drug production insourcing state is Afghanistan, which has experienced an opium boom since the 1990s due to a confluence of factors.<sup>80</sup> Under international pressure, traditional opium-producing states such as Iran, Pakistan, and Turkey gradually managed to eradicate their opium-farming industries, leaving global demand unsatisfied. During the same period, central governance collapsed in Afghanistan due to the 1979 Soviet invasion and its aftermath. This presented a tremendous economic opportunity for Afghanistan's impoverished farmers: "[I]n many ways [opium] is a miracle crop for Afghanistan's battered rural economy—a durable commodity commanding a high

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77. The size of the worldwide retail-level market for illicit drugs in 2003 was estimated at \$321.6 billion. U.N. OFFICE ON DRUGS & CRIME, 2005 WORLD DRUG REPORT 17 (2005), available at <http://www.unodc.org/unodc/en/data-and-analysis/WDR-2005.html>. The latest U.N. report does not include an updated figure of this estimate. U.N. OFFICE ON DRUGS & CRIME, 2007 WORLD DRUG REPORT (2007) [hereinafter 2007 U.N. DRUG REPORT], available at <http://www.unodc.org/unodc/en/data-and-analysis/WDR-2007.html>.

78. Bill Powell, *The Tony Soprano of North Korea*, TIME, July 12, 2007, <http://www.time.com/time/magazine/article/0,9171,1642898,00.html>.

79. Vivienne Walt, *Cocaine Country*, TIME, June 27, 2007, <http://www.time.com/time/magazine/article/0,9171,1637719,00.html>. Similarly, it has been reported that Guatemala has become a haven for drug dealers due to the corruption of local law enforcement. Jerry Seper, *U.S. Agents See Drug Flow via Guatemala on Increase*, WASH. TIMES, Mar. 11, 2003, at A8.

80. See Christopher Ward & William Byrd, *Afghanistan's Opium Drug Economy* (World Bank, South Asia Poverty Reduction Working Paper, 2004), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2005/01/06/000012009\\_20050106091108/Rendered/PDF/311490PAPER0AF100SASPR0no051Dec0171.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2005/01/06/000012009_20050106091108/Rendered/PDF/311490PAPER0AF100SASPR0no051Dec0171.pdf) (analyzing the opium boom in Afghanistan and its effects on Afghanistan's economy).

price, with a guaranteed market outlet, easy to transport, and non-perishable.”<sup>81</sup> Thus, the lack of law enforcement allowed global market forces to work, turning the illicit production of opium into a “desirable” crime in Afghanistan. Furthermore, opium production was sheltered by governmental protection when Afghan warlords became involved in production and trafficking, reportedly giving allegiance to the Taliban “in return for a promise to keep the opium profit.”<sup>82</sup>

States that wish to fight the drug trade, on the other hand, find themselves not only in a battle with drug traders, but also in criminal regulatory competition with other states regarding the toughness of their drug laws. Tough drug laws in other states drive international drug activity in their direction, prompting a “race towards strictness,” or outsourcing race. For example, Canada borders the United States, which is known as one of the toughest states in the world with respect to drug crimes. Law enforcement agents in Canada have demanded larger budgets and higher sanctions in order to effectively fight drug activity coming from the United States. Because of Canada’s relatively low sentences for drug crimes, one Canadian drug enforcement official was quoted as saying, “Organized crime groups laugh at us in Canada. We are an easy mark.”<sup>83</sup>

Similarly, the United States has managed to displace a significant part of the production of the synthetic drug methamphetamine (“meth”) to Mexico<sup>84</sup> by adopting a regulatory scheme that has made it more difficult to buy the chemicals from which the drug is produced.<sup>85</sup> Interestingly, U.S. legislators were aware of the possibility that the regulations would merely shift meth production to Mexico and leave local consumption unchanged—a classic case of outsourcing production, even if the unwanted costs of consumption remain.<sup>86</sup> Nonetheless, given the dangers meth production presents for law enforcement agents and the surrounding communities, the legislators were content with displacing production only. As Senator Talent, who cosponsored the bill, stated: “Even if it

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81. *Id.* at 9.

82. *Id.*

83. Andrew Mitrovica, *Low Funding Caused U.S. Drug Action, B.C. Says Blacklist Considered, Ruled Out for Now*, GLOBE & MAIL (Can.), Aug. 16, 1999, at A1; see also Shannon McCaffrey, *Potent Marijuana Rolls into U.S. from Canada: A Joint Antismuggling Effort is Hindered by Liberal Laws in Canada*, PHILA. INQUIRER, June 23, 2003, at A1 (noting that U.S. law enforcement agents cite the lower sanctions for drug crimes in Canada as a “problem”).

84. 2007 U.N. DRUG REPORT, *supra* note 77, at 123.

85. See 21 U.S.C. § 830 (2006) (creating an array of limitations on the sale of pseudoephedrine, the active ingredient in Meth).

86. See Sam Hananel, *Congress Moves Closer to Passing Anti-Meth Law*, ASSOCIATED PRESS, Feb. 16, 2006.



doesn't reduce the number of meth addicts by even one, stopping the labs is a huge plus."<sup>87</sup> Following these developments, Mexico has reportedly adopted similar measures, thus displacing some of its meth-related activity to Central America and even Africa.<sup>88</sup>

## 2. Gambling

Gambling is another telling example of illicit activity shifting from one national jurisdiction to another, being both outsourced and insourced in response to differential domestic regulation. Gambling presents an interesting case for a number of reasons. First, in economic terms, gambling services are relatively unfettered by the objective criteria that generally establish competitive advantages, such as climate, land, labor, or skills. Absent regulatory intervention, gambling services can be provided or consumed virtually anywhere. Therefore, geographical movements of gambling activity can be attributed largely to regulatory differences between jurisdictions.<sup>89</sup> This is evident not only on the interstate level but transnationally as well. For example, since the early 1990s the government of Ontario, Canada, has invested heavily in the legal casino it owns in Windsor, Ontario—just across the river from Detroit, Michigan.<sup>90</sup> This development—reportedly causing Michigan a capital loss of almost \$1 million per day in 1994<sup>91</sup>—prompted Michigan voters to approve various proposals legalizing casinos throughout the state, overcoming previous objections to gaming operations.<sup>92</sup>

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87. *Id.*

88. 2007 U.N. DRUG REPORT, *supra* note 77, at 123. There are examples of such phenomena taking place with respect to trafficking as well. For example, in 1999 Mexican officials proudly indicated that they had managed to displace cocaine routes to other states with their law enforcement efforts. John Ward Anderson & Douglas Farah, *Mexico Faces U.S. Scorn in Failing Drug War*, SEATTLE TIMES, Feb. 10, 1999, at A15.

89. In the United States, for example, casino gaming, which was originally pursued in only a few locales, has considerably expanded in geographic terms over the last few decades due to economic competition. The number of states licensing casinos increased from only one in the 1970s to twenty-seven states in 1999. William R. Eadington, *The Economics of Casino Gambling*, 13 J. ECON. PERSP. 173, 173 (1999).

90. In 2005, the Ministry of Economic Development and Trade announced that the government was going to invest \$400 million in Casino Windsor. News Release, Ontario Ministry of Econ. Dev. & Trade, Government of Ontario Invests in a Competitive Casino Windsor (Feb. 14, 2005), <http://www.ontariocanada.com/ontcan/page.do?page=5900>.

91. *As Vote Nears, Detroit Edges Closer to Gambling*, N.Y. TIMES, July 24, 1994, at 28.

92. William M. Thompson & R. Fred Wacker, *The Michigan Question: A Legal Quandary*, 1 GAMING L. REV. 501, 501 (1997).

Second, the immorality of gambling is relative and evidently pliable<sup>93</sup> to the point that gaming lends itself easily to a spectrum of incremental degrees of criminalization. This spectrum ranges from absolute bans, to discreet regulation or guarded tolerance, to government monopolization, and even to full liberalization. This allows governments to be relatively flexible in setting the desired level of formal gambling activity in their territories, either discouraging or encouraging it as the case may be.

Third, while gambling operations in the past would rely on the physical mobility of patrons and their relative geographical proximity (e.g., Monte Carlo in Western Europe,<sup>94</sup> Las Vegas in the western United States, Atlantic City in the eastern United States,<sup>95</sup> and Macao in East Asia<sup>96</sup>), contemporary gaming services have proven particularly adaptive to Internet technology. Much of the modern gambling economy is online, permitting remote transboundary provision of gaming services, with gamblers virtually indifferent to the physical location of providers.<sup>97</sup> Moreover, this has complicated the ability of national authorities to regulate gambling independently within their jurisdictions, creating a distinctly international issue.<sup>98</sup>

Fourth, the relative criminalization of gambling is often considered in cost-benefit terms, taking into account government profits, tax revenues, increased employment, and peripheral gains

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93. Allegedly, even evangelist Reverend Billy Graham found Las Vegas to be “a nice place to visit,” pointing out that “while he did not gamble himself, the Bible said nothing definitive against the practice.” JOHN M. FINDLAY, *PEOPLE OF CHANCE: GAMBLING IN AMERICAN SOCIETY FROM JAMESTOWN TO LAS VEGAS* 203 (1986).

94. The economic affluence and continued political independence of the principality of Monaco have, to a large extent, been based on the legendary success of Monte Carlo’s luxury casino in the nineteenth century—a direct result of regulatory lenience aimed at insourcing activity that was considered illegal elsewhere. The Principality’s income from gambling permitted it to engage in another form of regulatory competition when it abolished all individual taxes in 1869, creating a tax haven that has drawn millionaires from all over the world to shift their domicile to Monaco. Russell T. Barnhart, *The Legal Future of Monte Carlo, the World’s Oldest Gambling Casino*, 1 *GAMING L. REV.* 371 (1997).

95. Legalized casino gambling was introduced in Atlantic City, N.J., in 1976, in an effort to revitalize the East Coast resort. This is another example of a jurisdiction’s attempt to decriminalize a certain activity for economic gains. However, interfering planning and political factors severely impeded the anticipated success of this move. Paul Teske & Bela Sur, *Winners and Losers: Politics, Casino Gambling, and Development in Atlantic City*, 10 *REV. POL. RES.* 130, 135 (1991).

96. See *supra* note 72 and accompanying text.

97. See I. NELSON ROSE & MARTIN D. OWENS, JR., *INTERNET GAMING LAW* 53 (2005) (discussing the proliferation of gambling in light of technological change).

98. See I. Nelson Rose, *Should Antigua Sue China?*, 11 *GAMING L. REV.* 645, 645 (2007) (noting that “[g]ambling has almost always been a local issue . . . . The introduction of internet gaming into interstate and intercommercial commerce has turned the control of gambling on its head.”).

(such as income from tourism) on the one hand, and moral considerations as well as social and incidental costs associated with gambling (such as violence and prostitution) on the other hand.<sup>99</sup>

Thus, it is particularly interesting to focus on the dynamics of the contemporary online gambling industry and the transnational insourcing and outsourcing trends that it has produced over the last few years. At the advent of online gambling in the 1990s, because remote gaming was generally outlawed in the United States,<sup>100</sup> Internet firms targeting the U.S. market for gaming sought to establish their operations—in both corporate and operational terms—outside the United States to avoid criminal liability and its costs. U.S. laws thus resulted in crime outsourcing, with production of the criminal activity shifting abroad and consumption remaining at home. Concurrently, in a classic case of crime insourcing, a number of non-U.S. jurisdictions rose to the challenge and provided attractive taxation and regulatory packages to investors in gaming enterprises, facilitating the establishment and licensing of Internet gambling providers. This phenomenon continues today, with many jurisdictions competing over the insourcing of Internet gaming providers.<sup>101</sup>

There is an acute tension between the United States as a gaming outsourcing jurisdiction and other states as gaming insourcing jurisdictions.<sup>102</sup> Indeed, to the extent that Internet technology enables a state to reap the economic benefits of gaming while minimizing its costs, there is a strong incentive to insource gambling services for export purposes. At the same time, “a country that ‘exports’ gambling

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99. For a comprehensive study of gambling regulation in the United States, covering many of the points mentioned here, see EDWARD A. MORSE & ERNEST P. GOSS, *GOVERNING FORTUNE: CASINO GAMBLING IN AMERICA* (2007).

100. See Joel Michael Schwarz, *The Internet Gambling Fallacy Craps Out*, 14 BERKELEY TECH. L.J. 1021, 1028–38 (1999) (arguing forcefully that internet gambling is illegal in the United States, even if servers are based offshore); see also Gregory Manter, *The Pending Determination of the Legality of Internet Gambling in the United States*, 2003 DUKE L. & TECH. REV. 16, 16–22, available at <http://www.law.duke.edu/journals/dltr/articles/pdf/2003DLTR0016.pdf> (discussing legality of internet gambling in the United States with respect to judicial and legislative subsequent developments).

101. Such jurisdictions include, but are not limited to, the United Kingdom, Canada, Costa Rica, Gibraltar, Antigua and Barbuda, and recently, the seemingly unlikely state of Papua New Guinea. See Edward A. Morse, *The Internet Gambling Conundrum: Extraterritorial Impacts of Domestic Regulation*, 23 COMP. L. & SEC. REPORT 529, 530 (2007). For an example of undisguised publicity aimed at attracting internet gambling businesses to (in this case) the Isle of Man, see Casino Blog, *Isle of Man: Nice Place for Your Online Gambling Business!*, <http://casinoblog.viaden.com/2007/03/15/isle-of-man-nice-place-for-your-online-gambling-business/> (Apr. 16, 2007, 18:26 EST) (publishing an interview with Tim Craine, e-business minister of the Isle of Man, who explains tax and other benefits).

102. This is an example of heterogeneity, a complex model of inter-jurisdictional competition, as explained *supra* Part II.C.3. See *infra* Part III for discussion of its policy implications.

services may also be exporting social costs that other governments may have to address without the benefit of the tax revenues traditionally generated by land-based gambling enterprises.”<sup>103</sup> Morse, a gaming law expert, observes that many of the states that export Internet gambling services have “relatively low percentages of Internet penetration in their own markets.”<sup>104</sup> This means that the otherwise illicit activity can be insourced with very small negative impact on local society. Indeed, production and its benefits are internalized, while the service is exported and its costs are externalized. In contrast, governments of export market states must choose between joining the insourcing race by permitting Internet gambling that will generate taxes to cover social costs on the one hand—that is, to enjoy the benefits of production instead of merely suffering the costs of consumption—and pursuing more aggressive crime outsourcing policies to deflect the impact of foreign-based activity on the other hand.<sup>105</sup>

The U.S. response to this policy dilemma has resulted in an interesting confluence of the international rules regulating the globalization of legitimate economic activity and the globalization of illicit activity. Due to aggressive enforcement policies aimed at deterring foreign-based gaming services,<sup>106</sup> U.S. federal and state gambling legislation has, for a number of years, stood at the center of an important trade dispute at the WTO initiated by Antigua and Barbuda, a major gaming insourcing state. In international litigation, the WTO found the United States to be in violation of its obligations under the WTO General Agreement on Trade in Services (“GATS”).<sup>107</sup> Until its legislation is compliant, the United States faces the prospect of authorized retaliation by Antigua and Barbuda of over \$20 million per year.<sup>108</sup> The United States has preempted similar future WTO

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103. Morse, *supra* note 101, at 531.

104. *Id.*

105. Note that a similar phenomenon may occur with respect to traditional casino gambling. Several states that legalized gambling have done so only with respect to foreigners. This policy allows these states to reap the benefits of gambling tourism, while minimizing the risk of internal social problems that might be created by gambling. See Walter T. Champion, Jr., *Is Da Nang the Next Atlantic City? Why Vietnam is the Next Sure Thing in Casino Development*, 11 GAMING L. REV. 714, 717 (2007) (Vietnamese casino open only to non-Vietnamese); Edward B. Miller, *An Oasis or Just a Mirage: The Jericho Casino and the Future of the Israeli Palestinian Peace Process*, 2 RICH. J. GLOBAL L. & BUS. 33, 47 n.54 (2001) (Palestinian casino open only to non-Palestinians).

106. See discussion *infra* Part III.B.

107. See Report of the Appellate Body, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 123–27, WT/DS285/AB/R (Apr. 7, 2005).

108. Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Recourse to Arbitration by the United States Under Article 22.6 of*

complaints by negotiating a withdrawal of U.S. gaming-related GATS commitments towards other interested parties, including the European Union.<sup>109</sup> The United States has also enacted legislation that aims to prevent Internet gambling in the United States not by criminalizing gambling patrons and gaming services, but by making it illegal for providers of credit card and online payment services to accept and process transactions that they suspect to be online wagers,<sup>110</sup> with clear detrimental effects on gaming insourcers.<sup>111</sup>

This is not, however, the end of the transnational gaming story. Having been frustrated by U.S. policy in the attempt to use foreign jurisdictions as offshore bases targeting the lucrative U.S. market for gambling, online gaming enterprises are now reversing their strategy: the latest trend is the establishment of gaming operations based (at least at the corporate level) in the United States, but targeting patrons in other jurisdictions—all the while complying with U.S. criminal law, including the Unlawful Internet Gambling Enforcement Act (“UIGEA”). For example, U.S.-based *Yahoo!* has launched *Yahoo Poker*,<sup>112</sup> which is provided on *Yahoo!*'s United Kingdom and Ireland website by St. Minver, a company licensed in Gibraltar but blocked by *Yahoo!* itself in the United States. Here we see that a crime outsourcing policy based on strict legislation and domestic enforcement can coexist with an insourcing policy by separating the costs and benefits of transnational illicit activity. Furthermore, we see that regulatory policy has not only shifted the locus of the illicit activity of providing gaming services, but has also contributed to the displacement of gambling itself: gaming firms that have abandoned the U.S. market are reporting significant growth in their revenues from wagers placed in non-U.S. jurisdictions.<sup>113</sup>

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*the DSU*, 1, WT/DS285/ARB (Dec. 21, 2007); see also James Kanter & Gary Rivlin, *In Trade Ruling, Antigua Wins Right to Piracy*, N.Y. TIMES, Dec. 22, 2007, at C3.

109. See *EU Out of US Online Gambling Market*, L.A. TIMES, Dec. 18, 2007, at C7.

110. See generally Unlawful Internet Gambling Enforcement Act (“UIGEA”), Pub. L. 109-347, 120 Stat. 1952 (codified as amended at 31 U.S.C. §§ 5561 to 5567 (2006)). For a more in-depth discussion applying legal regulation to intermediaries in this context, see generally Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239 (2005).

111. See *US Gambling Legislation Hitting Gibraltar Jobs*, GAMBLING PLANET, Nov. 7, 2006, <http://www.gamblingplanet.org/latest-news/10249> (claiming hundreds of online gambling employees have been laid off in Gibraltar and India due to UIGEA); see also Simon Bowers, *Players Walk Away as US Law Wipes Out 90% of PartyGaming's Poker Revenue*, GUARDIAN, Oct. 17, 2006, <http://www.guardian.co.uk/business/2006/oct/17/usnews.gambling> (describing investor response in leading online gaming firms after enactment of UIGEA).

112. *Yahoo! Poker Online*, <http://yahoopoker.stenodoc.com/yahoopoker/poker/home/index.html> (last visited Apr. 7, 2009).

113. See Morse, *supra* note 101, at 531.

### 3. Money Laundering

An additional example of the way transnational crime displacement and attraction play out in local politics can be seen in money laundering. Money laundering is “the process by which one conceals the existence, illegal source, or illegal application of income, and disguises that income to make it appear legitimate.”<sup>114</sup> This process is conducted through an array of transactions involving different financial institutions, at the end of which cash generated by criminal activity (e.g., drug sales) is transformed into funds in a private bank account that can be used for personal consumption at best, or for other antisocial activities (e.g., funding terrorism) at worst.<sup>115</sup> Money laundering can therefore be viewed as a derivative crime. The criminality of the financial transactions involved in laundering depends on the criminality of the source of the funds being laundered. On this basis, these transactions abuse bank secrecy and other aspects of financial regulation to erase the criminal origins of the funds.<sup>116</sup> As part of an effort to fight money laundering, states have adopted international agreements and national laws that both prohibit different aspects of the laundering process and require financial institutions to report suspicious transactions.<sup>117</sup>

Once criminalized, money laundering is an activity that typifies the model we describe in this Article. Money launderers engage in a business-like activity, which is purely motivated by financial gain. In addition, the activity itself is highly mobile worldwide. Unlike in the past, when criminals had to carry suitcases filled with cash to nearby states, current technology allows for swift and inexpensive money transfers that enable launderers to pick and

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114. PRESIDENT'S COMM'N ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND ATTORNEY GENERAL, *THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING* 7 (1984). For a definition embraced in the international community, see G.A. Res. 55/25, art. 6(1)(a), U.N. Doc. A/RES/55/25 (Nov. 10, 2000), where money laundering is:

(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.

115. For a more detailed description of the mechanics of money laundering, see Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 325–36 (2003).

116. *Id.*

117. The Financial Action Task Force on Money Laundering (“FATF”) has pushed for many of these initiatives. See sources cited *supra* note 12.

choose the jurisdiction in which they will commit at least some segments of the laundering.

In analyzing the political economy of money laundering, the interesting players are the financial institutions. Financial institutions have two incentives to ease money laundering regulation. First, such regulation creates significant direct costs due to the vast reporting requirements. Second, and more importantly, the displacement of laundering to jurisdictions with lenient regulation causes significant revenue losses for domestic financial institutions.<sup>118</sup> Thus, we see several examples of financial sector lobbying to ease or prevent money laundering regulations. These examples include both small and relatively undeveloped economies, in which the banking industry contributes a relatively large part of the GDP, and larger developed economies.<sup>119</sup> Even in the United States, until the attacks of September 11, 2001 highlighted the connection between terrorism and money laundering, the banking lobby managed to derail tough legislative proposals on the matter.<sup>120</sup>

#### 4. Sex Crimes

Finally, our argument can be extended even to the area of sex crimes and the illicit sex trade. While sex crimes tend to be perceived as having much to do with passion and urges and little to do with rationality, in some cases, sex offenders—and those who satisfy their

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118. See Kathleen A. Lacey & Barbara Crutchfield George, *Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms*, 23 NW. J. INT'L L. & BUS. 263, 274 (2003) (noting that it has been reported that the Bank of New York made as much as \$240 million per month in fees from money laundering).

119. See, e.g., Judy Dempsey, *Israel Plans to Act Against Money Laundering*, FIN. TIMES (Eng.), June 30, 2000, at 14 (noting an Israeli bank association's concern over "protecting the privacy of the citizen"); Ivelaw L. Griffith, *Drugs and Democracy in the Caribbean*, 53 U. MIAMI L. REV. 869, 873–74 (1999) (describing how banks prevent legislation in the Caribbean); Igor Reichlin & Peter Galuszka, *Germany's Brash New Import: Dirty Money*, BUSINESS WEEK, Apr. 6, 1992, available at <http://www.businessweek.com/archives/1992/b326044.arc.htm> (suggesting that German legislation could "scare away customers"); Mark A. Uhlig, *Panama Resisting Move to Clean Up Banking System*, N.Y. TIMES, Oct. 22, 1990, at A1 (reporting Panamian businessmen were worried the legislation "would ruin the country's lucrative position as a tax haven and dollar-based financial center").

120. See, e.g., George A. Lyden, *The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001: Congress Wears a Blindfold While Giving Money Laundering Legislation a Facelift*, 8 FORDHAM J. CORP. & FIN. L. 201, 230–31 (2003) (noting that banks in the United States traditionally opposed new legislation because it would bother them to compete internationally); S. Selena Nelson, *Regulating Money Laundering in the US and Honk-Kong: A Post 9-11 Comparison*, 6 WASH. U. GLOBAL STUD. L. REV. 723, 735–39 (2007) (noting the stricter U.S. legislation after 9-11 as an indication of the decline of the previously influential banking lobby).

demands—exhibit behavior completely in line with the rational choice model.<sup>121</sup> The emerging international “sex tourism” market serves as an example for this type of phenomenon. In the last few years, the coupling of lower travel costs with the reduced search costs brought about by the Internet have enabled people from developed states interested in engaging in commercial sexual activity deemed abnormal in their home states—including pedophilia—to travel to developing states in which the expected sanction is significantly lower than in their home states. As one Kenyan observer puts it, “Men who would never visit brothels in their home countries for example, will end up doing so in a foreign state where there is a negligible chance of detection and (or) penalty.”<sup>122</sup> That is to say, equal opportunities exist in Western states, but the social and legal sanctions, and chances of detection, are much higher there.

This type of crime displacement has put political pressure on national legislators and law enforcement agencies to align their policies with other states so as to not attract sex tourism. For example, after British rocker Gary Glitter was sentenced to only three years in jail for molesting two girls in Vietnam, local experts reacted by noting that “[s]uch an outcome could reinforce a perception of lax laws in Southeast Asia and attract foreign child molesters who face tougher penalties at home.”<sup>123</sup> Similarly, commentators in Thailand have raised concerns that weak law enforcement and the low probability of detection are drawing sex offenders to the state.<sup>124</sup> The fear of sex tourism has caused states in Southeast Asia to become aware that differences in policies among themselves can also affect sex offenders’ chosen destinations. For instance, Tjokorda Bagus of Indonesia’s Committee Against Sexual Abuse has noted that “[s]ince Thailand has become more stern in [its] law enforcement, more pedophiles are coming to Indonesia.”<sup>125</sup> We should note that given the

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121. For a comprehensive analysis of an array of policy issues relating to sexual activity from a rational choice perspective, see generally RICHARD A. POSNER, *SEX AND REASON* (1992).

122. Rose Kisia Omondi, *Gender and the Political Economy of Sex Tourism in Kenya's Coastal Resorts* 9 (Africa Regional Sexuality Resource Centre, Working Paper, 2003), available at <http://www.arsrc.org/downloads/features/omondi.pdf>.

123. Christopher Torchia, *Child Sex Tourism Continues in Southeast Asia Despite Legal Efforts*, ASSOCIATED PRESS (Mar. 11, 2006).

124. Thomas Bell, *Thailand Police Arrest Suspected Paedophile*, TELEGRAPH (Eng.), Oct. 20, 2007, available at <http://www.telegraph.co.uk/news/worldnews/1566720/Thailand-police-arrest-suspected-paedophile.html>.

125. Torchia, *supra* note 123; see also *Summary of the News: From Jan 19 to Jan 25, 2003*, BANGKOK POST, Jan. 26, 2003 (finding policymakers aware of sex crimes shifting from Thailand to Cambodia and Bali as a result of new legislation); *Thailand Under a Familiar Glare*, BANGKOK POST, Aug. 27, 2006 (pointing out that “child sex tourists are more likely to go to Cambodia, Vietnam, the Philippines, or Indonesia, where law enforcement is less strong”).



touristic nature of these crimes, the effects of legal reforms can be global and not merely regional. A policy change in Southeast Asia can simply cause a sex tourist to get on a flight to another part of the globe. Indeed, a Kenyan government report recently pointed out that sex tourism has moved to that African state from Asia as a result of the different legal sanctions.<sup>126</sup>

It should be noted, though, that the phenomenon described here is not limited to developing economies, as the case of the recent increase in the age of sexual consent in Canada demonstrates. For years, Canada set the age of consent at fourteen. This relatively low age caused U.S. citizens who wanted to engage in sexual acts with young teens to search for partners in Canada. For example, Michael H. Simonson, a fifty-one-year-old man from the United States, reportedly traveled to Canada to have sex with a fifteen-year-old girl he met online.<sup>127</sup> Interestingly, a search of his computer revealed extensive research into Canada's age of consent, demonstrating just how rational sex offenders might be. Furthermore, as our theory suggests, the legal arbitrage between the United States and Canada played a role in the Canadian political debate over raising the age of consent. As one Canadian supporter of a bill raising the age noted, "We have sex tourism laws for Cambodia and Thailand, when in fact we are becoming a sex tourism destination for America because of our low age of consent laws."<sup>128</sup> Another bill supporter was quoted saying "Canada has to send internationally a strong message that it is no longer legal to have sex with 14 year-olds."<sup>129</sup>

### III. OPTIMAL INTERNATIONAL CRIME CONTROL

We have demonstrated that crime control policies adopted by individual states influence the global distribution of crime and subsequently impact the crime control policies adopted by other

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126. Patrick Mayoyo, *Tour Firms 'In Child Sex War,'* NATION (Kenya), Nov. 4, 2004.

127. *Wash State Man Sentenced to 10 Years for Soliciting Teen Online*, AP ALERT—IDAHO, Oct. 25, 2006.

128. Ken Reed, Letter to the Editor, *Age of Consent Should Be 16*, COLLINGWOOD CONNECTION (Can.), Nov. 25, 2005, at A1 (quoting Member of Parliament Vic Toews); see also Nancy Turley, Viewpoint, *Age of Consent Should Protect Kids*, CAMBRIDGE TIMES (Can.), July 4, 2006, at 6 ("Because Canada's age of consent is only 14, Canada has become a preferred destination for predators to prey on innocent children."); Nancy Turley, Viewpoint, *Salvation Army Applauds Federal Bill to Raise Age of Consent*, STONEY CREEK NEWS (Can.), July 28, 2006, at 9 (expressing support for the bill because it will "help prevent Canada from being a destination for sex tourism").

129. *Tory Government to Raise Age of Consent to 16 to Target Sex Predators*, AP ALERT—BUS., Feb. 8, 2006 (quoting child protection advocate Roz Prober).

states. We now turn to explore the normative and prescriptive implications of these findings. We will set out a framework for analyzing the efficiency of crime control measures adopted by states acting in a globalized environment, employing theories of regulatory competition and international cooperation. Although there are many advantages associated with the current decentralized system of crime control—based on sovereign domestic policies—the mobility of transnational crime and the increasing interdependence of national policies require an evaluation of the relative efficiencies of a broad array of international policy instruments. These instruments range from aggressive unilateralism and self-help, to informal and formal intergovernmental cooperation, to more innovative legal regimes such as international crime standards and the establishment of international state responsibility for harms caused by transnational crime. Moreover, different types of transnational crime represent distinct sets of problems that require different international solutions. Our characterization of international crime control races involving either crime insourcing, crime outsourcing, or a heterogeneous combination of both serves as a reference point for identifying the form of international crime regulation that will be optimal in each case.

*A. The Normative Framework: Regulatory Competition and International Cooperation and Regimes*

When should states maintain full autonomy over the regulation of criminal activity in their territory, and when—and how—should they cooperate with other states? No less importantly, when *will* states opt for either of these courses of action? In essence, these are questions that can be framed in the complementary terms of both the general theory of regulatory competition and institutional theories of international cooperation.

1. Regulatory Competition

There is a longstanding debate on the efficiency of regulatory competition.<sup>130</sup> The core question is to what degree policy decisions should be allocated to regional or otherwise subordinate political units versus to what extent they should be centralized. On one hand, some view competition as a desirable means to promote the efficient supply

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130. For an updated introduction to the topic, see COOTER, *supra* note 23, at 127–48.

of public goods by governments.<sup>131</sup> Much like in other market settings, regulatory competition functions as a check on the monopoly power of central authority and helps promote individual welfare.<sup>132</sup> The normative conclusion stemming from this line of thought is that this market, much like other competitive markets, should be left unregulated.<sup>133</sup> On the international level, this approach agitates against international harmonization and centralization and towards the preservation of national decisionmaking autonomy, with states acting as competitive agents.<sup>134</sup>

On the other side of the debate are those who argue that regulatory competition is inefficient.<sup>135</sup> These scholars point out that agents making regulatory decisions within their jurisdictions face collective action problems caused by strategic interdependence with the effects of policies made in other jurisdictions.<sup>136</sup> In these situations, often framed as noncooperative games such as the

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131. See Tiebout *supra* note 24, at 424. For an example of a later optimistic view on regulatory competition in the area of environmental regulation, see Revesz, *supra* note 25, at 1233–44.

132. See COOTER, *supra* note 23, at 128.

133. See Tiebout, *supra* note 24, 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.”).

134. To be sure, scholars who have applied the theory of regulatory competition to international affairs are not opposed to international harmonization of substantive norms as such, but rather examine the optimal balance between harmonization and competition on an issue-specific basis. See generally REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES (Daniel C. Esty & Damien Geradin eds., 2001) [hereinafter Esty & Geradin]. Moreover, a strong case for international regulatory competition based on the allocation of horizontal (i.e., interstate) regulatory jurisdiction is made by Trachtman. See Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT’L L. J. 47 (1993); Joel P. Trachtman, *Regulatory Competition and Regulatory Jurisdiction in International Securities Regulation*, in Esty & Geradin, *supra*, at 289. We acknowledge that the application of Tiebout’s model to international affairs is not without difficulty. Tiebout assumed labor mobility, which permitted individuals to move to the local jurisdiction whose policies best suited their preferences. Tiebout, *supra* note 24, at 419. Labor mobility is much more restricted in the international setting, so ostensibly this parameter of the theory of regulatory competition is not met. However, the mobility of transnational crime in a globalized environment does not depend on the movement of people. See *supra* Part II.B. Moreover, as Trachtman notes in his analysis of international securities regulation, “the parameters [of the Tiebout model] are never completely met, placing us in the realm of the theory of the second best.” Trachtman, *Regulatory Competition and Regulatory Jurisdiction in International Securities Regulation*, *supra*, at 289.

135. For a few examples of skepticism with respect to the efficiency of regulatory competition, see 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); 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).

136. Bednar & Eskridge, *supra* note 135, at 1470–75.

prisoner's dilemma,<sup>137</sup> the agents might prefer to reach a cooperative solution, yet each agent's individual interest is to defect, leading to an inefficient equilibrium in which all group members defect.<sup>138</sup> Thus, some type of limitation on the ability of jurisdictions to compete among themselves can be justified from an efficiency perspective.

In practice, both of these extreme positions should be qualified. The optimal structure of regulation or competition depends on the specific circumstances. The regulatory market can function as an efficient method for supplying public goods, as long as a series of conditions are satisfied. Importantly, one necessary condition is a lack of externalities.<sup>139</sup> Thus, the focus of our discussion shifts to the existence of externalities.<sup>140</sup> If externalities exist in the area of crime control, they will undermine the efficiency of the regulatory market. Thus, states may require centralized policies to deal effectively with those externalities.

There are two main advantages to a regulatory market for crime control. First, the competitive pressures created by a decentralized international market for crime control can increase the efficiency of domestic crime control policies. States that do not develop a well-functioning and effective law enforcement system will be driven to adopt efficient crime control policies as their crime rate increases because of incoming displacement. Furthermore, competitive forces will drive states to innovate and develop new ways to combat crime.<sup>141</sup> Each state consequently functions as a "laboratory" in which new crime control policies are tested and later adopted by other states if successful.<sup>142</sup>

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137. For a complete explanation about the prisoner's dilemma, see Saleska & Engel, *supra* note 135, at 55 n.2.

138. *Id.*

139. In his model of regulatory competition, Tiebout explicitly assumed away all externalities. See Tiebout, *supra* note 24, at 419. A transnational externality emerges when "actions by one state create an uncompensated interdependency for other nations." TODD SANDLER, *GLOBAL COLLECTIVE ACTION* 69 (2004).

140. For a similar framework evaluating the efficiency of regulatory competition and externalities with respect to corporate law, see Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1485-95 (1992).

141. See Craig Volden, *Entrusting the States with Welfare Reform*, in *THE NEW FEDERALISM* 65, 78-86 (John Ferejohn & Barry R. Weingast eds., 1997) (reviewing the connection between federalism and innovation).

142. In the American context, the concept of the states as "experimental laboratories" for public policy has been a powerful justification for federalism. The term was originally coined by Justice Brandeis in *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

A second advantage of international decentralization is that it permits governments to adopt policies that are tailored to the preferences of their specific constituencies. This is desirable not only from the perspective of efficiency (because preferences are better satisfied), but also from the viewpoint of democratic legitimacy.<sup>143</sup> Moral diversity and distinct social norms might lead different states to regulate the same activities differently.<sup>144</sup> Decentralizing the control over criminal justice allows communities that have different views on issues such as prostitution and the definition of illicit drugs to design regulation that best fits their preferences. Similarly, communities can differ as to the manner and magnitude of appropriate punishment for non-consequentialist reasons. For example, one state might view the death penalty as morally repugnant while another might see it as the appropriate way to punish criminals.<sup>145</sup> Decentralizing control over these decisions allows communities to adopt what they deem the appropriate sanction.

Yet, decentralizing crime control also has significant drawbacks that stem from some of the pathologies of markets. The central insight of our positive analysis is that crime control policies adopted by states do, in fact, create externalities. There are two types of externalities that these policies create. First, some crimes committed in states create harm in other states. This is the case, for instance, when an illicit drug is manufactured in one state and consumed in another. In such cases, crime control efforts in the states in which crime originates create *positive* externalities by reducing harm in other states; crime control failures of such states create *negative* externalities by increasing harm in other states.<sup>146</sup> Second, as

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143. This is the central argument in favor of subsidiarity in international regulation as a principle whereby decisions should be taken at the lowest, and most specialized, possible level. "The more local and the more specialized an international norm is, the better its legitimacy, or its 'compliance pull.'" Andreas L. Paulus, *Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY* 193, 193 (Tomer Brode & Yuval Shany eds., 2008).

144. Interestingly, there is great convergence regarding how communities judge different crimes. See Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 8–12 (2007) (reviewing studies on the matter).

145. Note that the non-consequentialist views with respect to sanctioning may have consequentialist implications to the extent that people's welfare is affected by the appropriateness of the sanctions assessed to criminals. For a connection between non-consequentialist views and welfare economics, see LOUIS KAPLOW & STEVEN SHAPELL, *FAIRNESS VERSUS WELFARE* 21–23 (2002) (presenting the concept of a taste for fairness).

146. This claim is tied to a long line of criminological studies that point out the positive diffusion of law enforcement efforts from one area to another. See generally Ronald V. Clarke & David Weisburd, *Diffusion of Crime Control Benefits: Observations on the Reverse of Displacement*, 2 CRIME PREVENTION STUD. 165 (1994).

we have seen, crime control efforts in one state cause criminal activity to be displaced to other states. In such cases, the crime control efforts of one state cause a *negative* externality in other states. This is the case, for example, when the production and consumption of illicit drugs move to another state because of tough regulation.

Importantly, from a normative perspective, these externalities can lead states acting in a dynamic globalized setting to equilibrium, in which they adopt suboptimal crime control policies that do not maximize aggregate welfare. Indeed, these are precisely the situations we have described above as outsourcing and insourcing races, as explained in further detail below.

Finally, our analysis of the efficiency of decentralization is not complete without referring to its distributional aspects. The regulatory market—much like other competitive markets—measures agents' willingness to pay based on their initial endowments and not their actual expected welfare gains.<sup>147</sup> For instance, in an organ market, the fact that a rich person will be willing to pay more than a poor person to acquire a heart only reflects the rich person's higher ability to pay. It does not represent a higher valuation of the heart. A large body of public finance literature has analyzed the fiscal disparities associated with decentralization.<sup>148</sup> In general, this literature points out that decentralization brings about inequalities that benefit wealthier groups. In the area of crime control, poor states might suffer tremendously from the adverse affects of cross-border crime being displaced into them, but they might be unable to invest the resources necessary to keep up with other states. Most states simply cannot afford to indulge in the per capita incarceration rate that the United States currently maintains, even if they wish to use this method to increase expected sanctions in their territories.<sup>149</sup> Indeed, it is not surprising that less developed states are most often prone to suffer from crime outsourcing, as the examples of meth production and sex tourism have shown.<sup>150</sup>

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147. See generally, e.g., Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

148. See, e.g., James M. Buchanan, *Federalism and Fiscal Equity*, 40 AM. ECON. REV. 583 (1950). In the American context this issue has manifested itself through the debate over the desirability of federal grants to the states. See, e.g., Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restrictions of Federal Subsidies to State Governments*, 90 GEO. L.J. 461 (2002).

149. The United States currently has the highest per capita incarceration rate in the world. Robert Batey, *The Cost of Judicial Restraint: Forgone Opportunities to Limit America's Imprisonment Binge*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29, 29 (2007).

150. See *supra* notes 84–88, 121–29 and accompanying text.

## 2. International Cooperation and Regime Theory

The above analysis suggests that for transnational criminal activity, enforcement-related externalities and inefficiencies result from the absence of centralized international crime control. If these conclusions were related to crime insourcing and outsourcing among political units of a federal state, rather than among autonomous states, our general prescriptive recommendation would be to consolidate crime control policy within the federal government, at least to the extent necessary to remove inefficiencies. However, we are discussing *international* crime control. In contrast to a federal environment, the international political system is characterized by anarchy, that is, the absence of central authority.<sup>151</sup> Full regulatory centralization, let alone formal crime control centralization, is clearly not a viable option in the contemporary international environment in which state sovereignty remains a fundamental principle.<sup>152</sup> The negation of externalities and the removal of inefficiencies in the regulation of transnational crime must therefore be achieved through other means. We now take our analysis a step further, into International Relations ("IR") theory, to examine possible efficient alternatives to formally centralized crime control. We will focus on the effects of unilateral policies and international cooperative regimes.<sup>153</sup>

Roughly stated, IR theory has three streams of thought: realism, neoliberalism, and constructivism. Each theory has a different explanation for the emergence of international regimes. Realists see the state as the primary actor in international relations,

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151. In articulating the "security dilemma" pervasive among nuclear powers, John Herz referred to "anarchic society" as "a fundamental social constellation, one where a plurality of otherwise interconnected groups constitute ultimate units of political life, that is, where groups live alongside each other without being organized into a higher unity." John Herz, *Idealist Internationalism and the Security Dilemma*, 2 *WORLD POL.* 157, 157 (1950); see also HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977).

152. In considering the prospects for international harmonization of rules regarding domestic regulatory subsidies, Trachtman notes that "[w]e may assume that international society is unprepared for such an effort toward 'essential harmonization' on any comprehensive basis." Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, *supra* note 134, at 102. This is *a fortiori* true in the even more sensitive areas of criminal regulation. See SANDLER, *supra* note 139, at 161 (noting that "autonomy has great sway over nation-states, particularly when it comes to law enforcement").

153. According to Krasner's classic definition, international regimes are implicit or explicit "principles, norms, rules, and decisionmaking procedures around which actors' expectations converge in a given [area of international relations]." Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 1 (Stephen D. Krasner ed., 1983). For discussion of the definition of international regimes, see ANDREAS HASENCLEVER, PETER MAYER & VOLKER RITTBERGER, *THEORIES OF INTERNATIONAL REGIMES* 8-22 (1997).

framing it as a rational, self-interested, and welfare-maximizing unitary actor. The realist's state is interested in relative gain and operates in a competitive, power-based international environment.<sup>154</sup> Realists are skeptical about international cooperation, preferring to explain the emergence of international regimes in the power-based terms of theories such as hegemonic stability, in which the dominance of a great power allows it to provide the regime as a collective good to the international community,<sup>155</sup> either benevolently or coercively.<sup>156</sup>

Neoliberals, or liberal institutionalists, share the realists' view of the state as a rational egoist.<sup>157</sup> However, they do not consider the state to be driven by a quest for power and relative gain in comparison to other states.<sup>158</sup> Crucially, where realists see international regimes as based on power structures, neoliberals consider regimes to be predicated on the interests of all participating actors in the creation and maintenance of the regime. On this basis, neoliberalism models the strategic constellations of state interests in particular issue areas to explain the structure of cooperation that might emerge.<sup>159</sup> Primarily based on prisoner's dilemma models,<sup>160</sup> neoliberal explanations of international cooperative regimes employ a broader set of game theory models.<sup>161</sup>

Constructivists are dissatisfied with the assumptions of state rationality that guide both the realist and neoliberalist approaches, stressing instead the role of shared normative beliefs in shaping state behavior. As a result, they emphasize the role of knowledge and learning, arguing that epistemic communities and transnational expert networks with shared values shape the perceptions of political

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154. See Abbott, *supra* note 27, at 348–51; Slaughter, *supra* note 27, at 381.

155. A crude formulation of hegemonic stability theory in the era of the 1980s is provided in Charles P. Kindleberger, *Dominance and Leadership in the International Economy: Exploitation, Public Goods and Free Rides*, 25 INT'L STUD. Q. 242 (1981). A critique and nuanced application of the concept is provided in ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

156. See Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 INT'L ORG. 579 (1985) (criticizing hegemonic stability theory and distinguishing between its benevolent and coercive strands).

157. See KEOHANE, *supra* note 155, at 67.

158. *Id.* at 27; see also HASENCLEVER, MAYER & RITTBERGER, *supra* note 153, at 26.

159. See KEOHANE, *supra* note 155, at 25–26 (explaining why a study of international regimes should focus on states).

160. See *id.* at 68–69 (summarizing the prisoner's dilemma model).

161. For an overview of game theory applications to IR, see Duncan Snidal, *The Game Theory of International Politics*, in COOPERATION UNDER ANARCHY, *supra* note 28, at 25.



actors who guide state behavior in ways that are at times inconsistent with the rational choice framework.<sup>162</sup>

Each of these approaches has implications for the study of transnational crime and the design of international crime control. For example, the realist mindset is most evident in Andreas and Nadelmann's assertion that global crime control is in essence a hegemonic program pursued through mainly benevolent methods.<sup>163</sup> Alternative explanations express constructivist tendencies, such as Löwenheim's sophisticated approach towards "persistent agents of transnational harm": transnational non-state actors (e.g., pirates, drug traffickers, and terrorists) who trigger fierce sovereign reaction when they threaten the moral norms of the state.<sup>164</sup>

The normative framework we have set out above best correlates with the neoliberal institutionalist approach. In our analysis, national crime control policies are formulated by each state mainly in consideration of its (self-defined) interests. The negative externalities states impose on one another through their crime control policies are not, in the main, deliberately intended to inflict transnational harm or to achieve an advantage in purely realist terms of power (at least, we have not seen any indication of such attitudes in our case studies of drugs, money laundering, gambling, and the sex trade). The realist framework is, therefore, less relevant to a general understanding of international crime. And while a constructivist view would highlight internationally shared norms regarding crime and shared knowledge of law enforcement (perhaps typified by Interpol),<sup>165</sup> we are most interested in those cases in which there exists international normative diversity, and in which crime control remains a matter for domestic authorities.

Thus, in evaluating existing and proposed solutions to the inefficiencies of international decentralized crime control, we combine the insights of regulatory competition theory and of IR theory.

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162. See Emanuel Adler & Peter M. Haas, *Epistemic Communities, World Order and the Creation of a Reflective Research Program*, 46 INT'L ORG. 367 (1992) (generally discussing the use of epistemic communities in studying international theory).

163. ANDREAS & NADELMANN, *supra* note 13, at 243 ("[I]t would not be too much of an exaggeration to say that much of the internationalization of crime control has in practice meant Americanization. . . . For the United States, exercising policing hegemony through international institutions enhances legitimacy, is easier and less costly than the raw exercise of power.").

164. ODED LÖWENHEIM, *PREDATORS AND PARASITES: PERSISTENT AGENTS OF TRANSNATIONAL HARM AND GREAT POWER AUTHORITY* (2007).

165. See *supra* note 12.

*B. Evaluating Existing and Suggested Solutions*

## 1. Outsourcing Races

In outsourcing races, or races to strictness, interacting states are interested in reducing the amount of local crime production. As a result, they tend to adopt crime control policies that are harsher than those they would have adopted had the states operated in isolation from one another. The resultant crime displacement creates an international crime control arms race. Domestically, this may lead to inefficiencies associated with over-enforcement.<sup>166</sup> For example, states might invest inefficiently high amounts of resources in funding their police forces in an attempt to raise the probability of detection, rather than funding other public goods (e.g., health care, education, etc.) that do not create negative externalities in other states. In game theory terms, such states are situated in a prisoner's dilemma.<sup>167</sup> No outsourcing state can afford unilaterally to relax its domestic enforcement because to do so will create crime displacement from counterpart states with high levels of enforcement. A more centralized international crime control regime would prevent this inefficient regulatory competition since the central planner would internalize all of the effects of the crime control policies it adopts.

The prisoner's dilemma faced by crime-outsourcing states is not, however, unresolvable. Game theory<sup>168</sup> and its international regime applications<sup>169</sup> predict that the emergence of international cooperation is more likely when the game is iterated and when certain additional circumstantial and institutional conditions exist. Clearly,

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166. Under an economic perspective on crime control, there is an efficient (usually positive) level of crime in society, and investing resources in order to reduce crime below this point is socially wasteful. For the development of this idea, see Becker, *supra* note 22, at 180–85 (deriving the optimal level of crime).

167. Sandler briefly presents the phenomenon analyzed here as an example of an international collective action problem. See SANDLER, *supra* note 139, at 160.

168. There is a wealth of literature on this subject. The pathbreaker in the field was Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 *SCIENCE* 1390 (1981) (focusing on reciprocal "tit-for-tat" strategies). For similar arguments, see also ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); Robert Axelrod, *The Emergence of Cooperation Among Egoists*, 75 *AM. POL. SCI. REV.* 306 (1981). The role of additional factors in the facilitation of cooperation—such as the number of players, the range of possible choices, variation in the payoff structure, noise, the shadow of the future, population dynamics, and population structure—is consolidated in Robert Axelrod & Douglas Dion, *The Further Evolution of Cooperation*, 242 *SCIENCE* 1385 (1988).

169. See Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 *WORLD POL.* 226 (1985); Robert O. Keohane, *Reciprocity in International Relations*, 40 *INT'L ORG.* 1 (1986).

crime control policymaking is not a one-shot decision; states are, therefore, repeat players. Thus, the potential long-term benefits associated with cooperation can cause states to adopt policies that are mutually beneficial despite the short-term tendency to defect by inefficiently outsourcing crime.

Cooperative policies might emerge spontaneously, without formal agreement. Just like neighbors in local settings,<sup>170</sup> states can achieve cooperation without formal legal mechanisms. Such policies have the advantage of retaining the semblance of sovereignty and independent decisionmaking. Alternatively, under the right conditions, states can opt for more formal coordination and cooperation. Cooperation in crime outsourcing races is thus a possibility. We must ask, then, what the substance of such cooperation should be to achieve efficiency.

The best policy recommendation that emerges from our analysis of crime outsourcing races is, in our view, straightforward: states should agree upon a set of *maximum* criminal standards that they may not exceed. These standards can define offenses (the threshold of criminalization), regulate the severity of criminal sanctions, and set levels of enforcement. Such agreements would allow states to maintain predefined optimal levels of crime and crime control in different issue areas, without imposing externalities on each other, and without wasting resources that could be redirected to other social ends.

In realistic terms, however, we must acknowledge that there are several reasons that such a system would not be adopted by sovereign states. First, the concept of inefficiently excessive crime control measures runs against the basic intuition of most people who view crime as inherently bad and any measure adopted against it as necessarily good. Consider, by analogy, that many private crime control measures adopted by individuals are potentially inefficient since they are observable and only bring about crime displacement.<sup>171</sup> Nonetheless, authorities are usually reluctant to regulate such private crime control measures and do not prevent people from protecting their private spheres in any way they see fit. If the authority of the

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170. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (documenting cooperative social norms among neighbors in Shasta County, California).

171. See, e.g., Robert W. Helsley & William C. Strange, *Gated Communities and the Economic Geography of Crime*, 46 J. URB. ECON. 80 (1999) (analyzing the inefficiencies associated with gated communities); Steven Shavell, *Individual Precautions to Prevent Theft: Private Versus Socially Optimal Behavior*, 11 INT'L REV. L. & ECON. 123 (1991) (presenting a general model of the issue).

state is mostly uncontested in the state-citizen constellation, the possibility of regulating states' efforts to reduce their own crime rates through cooperative international maximum standards would, *a fortiori*, be slim.

Second, even if there were an international consensus (global or regional) on the legitimacy of setting maximum crime control standards, as a practical matter such an exercise would be a daunting task. As we have seen, criminals are sensitive to an array of policy variables that determine the expected costs of crime. Thus, international maximum standards would have to account for an assortment of issues such as the probability of detection, the probability of conviction, and the level of sanctions.<sup>172</sup> Regulating all of these dimensions on the international level is clearly a significant challenge.

These problems have led to the current situation in which there are, to our knowledge, no existing examples of international maximum standards in the area of criminal law. Instead, international efforts aimed at cooperation in crime control focus on setting *minimum* standards.<sup>173</sup> While minimum standards might be justified to deal with problems created by insourcing and the resulting races to leniency (as we discuss below), ignoring the symmetric problem associated with outsourcing crime is difficult to justify.

Given the impractical nature of setting maximum criminal standards, we turn to explore second-best alternatives that in the long term could be more achievable as international normative regimes designed to increase the efficiency of crime control. One option that might be more palatable to policymakers is the establishment of international maximum criminal enforcement standards from which states are allowed to stray in certain circumstances. Two models from international trade regulation—safeguards<sup>174</sup> and Sanitary and

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172. Note that even easily comparable measures such as average prison terms might be difficult to compare once you take into account that different prison conditions might create different deterrence levels. See Lawrence Katz, Steven D. Levitt & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003) (exploring the deterrence value of harsh prison conditions).

173. See *infra* Part III.B.2.

174. See Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/25-safeg.pdf](http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf); General Agreement on Tariffs and Trade art. XIX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

Phytosanitary (“SPS”) measures<sup>175</sup>—might serve as useful models in this respect.

First, according to WTO law, states agree to set maximum levels of import protection, but under an escape clause they are allowed to impose safeguard measures, which temporarily raise trade barriers in the case of an unforeseen increase in imports of any product that is causing, or which is likely to cause, serious injury to their industry.<sup>176</sup> Analogously, states could agree to a maximum penalty for a drug offense as an international standard. This would generally reduce negative externalities and prevent inefficient over-enforcement. However, if faced with unforeseen, increased drug offense rates within their jurisdictions, states would be permitted to increase the penalty and the level of enforcement temporarily. Just as the trade safeguards clause was instrumental in encouraging decisionmakers to lower trade protection,<sup>177</sup> so might a crime control safeguard permit decisionmakers to agree on maximum levels of criminal enforcement.

Second, under the SPS Agreement, WTO members privilege nonbinding international public health standards set by expert groups. However, states retain the right to set higher standards, provided that they are based on scientific risk assessment.<sup>178</sup> In crime control, we envision an international group of crime experts setting an optimal standard of enforcement and sanction. States would then commit either to follow this standard or to provide sufficient evidence that this standard is insufficient within their jurisdiction. In any case, such a standard would provide states with a benchmark for international coordination.

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175. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round 33 I.L.M. 1125 (1994) [hereinafter SPS], available at [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf).

176. See GATT, *supra* note 174, art. XIX.

177. See Alan O. Sykes, *Protectionism as a ‘Safeguard’: A Positive Analysis of the GATT ‘Escape Clause’ with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991).

178. The SPS preamble and SPS Article 3.4 refer to international expert groups such as “the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention.” SPS Article 3.2 establishes a presumption that SPS measures conforming to international standards are SPS consistent; but SPS Article 3.3 permits WTO members to introduce higher standards of protection if they are scientifically justified. SPS Article 5 sets out the rules for scientific risk assessment that might justify such higher standards. For detailed commentary of the SPS agreement and its WTO case law, see JOANNE SCOTT, *THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES: A COMMENTARY* (2007).

An alternative program that could optimize international crime control where races to strictness emerge would not set an international enforcement standard at all. Rather, states would agree to a liability rule (or establish it on international customary law) that would require compensation where one state could prove that an excessively high level of criminal enforcement had caused transnational harm by displacing crime to another national jurisdiction.<sup>179</sup> This is analogous to the international community's acknowledgement of the legal consequences of transnational environmental harm in the 1930s.<sup>180</sup> Conceptually, negative crime enforcement externalities are similar to the exportation of environmental costs, even if they result from over-enforcement. We are not oblivious to the procedural and analytical problems that such a legal regime would raise.<sup>181</sup> However, in the absence of agreement on maximum criminal standards, we consider this idea worthy of further exploration.

Finally, some aspects of crime outsourcing can be dealt with through the unilateral broadening of the criminal jurisdiction of outsourcing states. In general, international law recognizes five distinct justifications for the assertion of a state's national criminal jurisdiction: (1) territorial, (2) nationality of the perpetrator, (3) nationality of the victim, (4) protective, and (5) universal.<sup>182</sup> Nonetheless, Anglo-American criminal law traditionally has tended to minimize the use of extraterritorial jurisdiction and has instead focused on crimes committed within the jurisdiction.<sup>183</sup> This tradition has been neglected in recent years as the United States and other

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179. For a similar proposal in the context of local governments, see Amnon Lehari, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929 (2006).

180. We refer to the famous *Trail Smelter* arbitration. See *Trail Smelter Arbitral Tribunal Decision*, 33 AM. J. INT'L L. 182 (1939); *Trail Smelter Arbitral Tribunal Decision*, 35 AM. J. INT'L L. 684 (1941). For contemporary analysis, see TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (Rebecca M. Bratspies & Russel A. Miller eds., 2006) [hereinafter TRANSBOUNDARY HARM IN INTERNATIONAL LAW].

181. It has been argued that the *Trail Smelter* "polluter pays" principle cannot be extended to the effects of drug trafficking, because its transnational harms are more complex, diffuse, and causally attenuated than environmental harm. See Judith Wise & Eric L. Jensen, *International Drug Pollution? Reflections on Trail Smelter and Latin American Drug Trafficking*, in TRANSBOUNDARY HARM IN INTERNATIONAL LAW, *supra* note 180, at 281. However, we do not consider this analysis definitive; similar arguments could have been raised against international environmental accountability at the time of its establishment. In any case, Wise and Jensen address problems caused by under-enforcement, not over-enforcement.

182. See Eric Cafritz & Omer Tene, *Article 113-7 of the French Penal Code: The Passive Personality Principle*, 41 COLUM. J. TRANSNAT'L L. 585, 586 (2003).

183. See, e.g., Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 126-29 (2007).

states have prosecuted their nationals who commit crimes outside of their home jurisdiction, even if these crimes have few consequences within the home jurisdiction. The most prominent example is the trend of several states enacting laws that criminalize illicit sexual conduct practiced extraterritorially.<sup>184</sup> These new laws, aimed at fighting the growing sex tourism industry, function under the assumption that several developing countries simply cannot generate sufficient deterrence to combat these crimes. Thus, developed countries from which sex tourists originate attempt to provide additional deterrence by sanctioning offenders at their end. When sex offenders face sanctions in their home countries, the incentives for displacement are diminished because offenders face the same sanction no matter where they commit their crimes. Hence, competition between target states is expected to decrease as the crime control measures they adopt become the less important policy variable.

## 2. Insourcing Races

In the case of outsourcing, the normative analysis is relatively straightforward, because by definition states are not interested in hosting the regulated activity. Insourcing poses more difficult normative problems. In insourcing races, or races to leniency, states are interested in attracting elements of transnational criminal activity that they perceive as desirable—usually the production of crime, but not its consumption. In these cases, the value of different policies depends on the scope of externalities they impose and the benefits they generate. If negative externalities are relatively small, then one might view regulatory competition as a positive means to achieve legislative diversity. This may be the case with respect to consumption activities that take place within the producing jurisdiction itself (e.g., local drug consumption, gambling in physical casinos, etc.). If, on the other hand, negative externalities imposed on other states are significant, then competition will drive states to an inefficient outcome in which the level of crime is excessive. This might be the case with respect to unregulated online gambling, where the vast majority of states might actually want to outlaw the practice. Given the competitive nature of regulation, these states realize they will suffer from the harms associated with the activity in any event and might as

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184. See 18 U.S.C. § 2423(c) (2006) (criminalizing illicit sexual conducts outside of the United States). Section 2423(c) was upheld against a constitutional challenge in *United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006). For a review of the legislation, see Naomi L. Svensson, Note, *Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws*, 28 LOY. L.A. INT'L & COMP. L. REV. 641 (2006).

well reap its benefits. Thus, few states will regulate these activities. The consequence is a reduction of aggregate welfare that a more centralized international system could avoid.

The combination of local benefits from crime and crime's accompanying negative externalities may trigger an insourcing race, risking the emergence of excessive crime rates. Such situations, in game-theoretic terms, are assurance games or stag hunts, not a prisoner's dilemma; in assurance games or stag hunts, the payoffs of mutual cooperation (e.g., in the form of minimum standard setting) are *greater* than the maximum payoff of unilateral defection. And, unilateral defection creates an equilibrium in which all of the actors have defected rationally—leading to an even lower payoff in the shape of higher (and costlier) crime rates.<sup>185</sup>

In such situations, institutional IR theory calls for international cooperation to create incentives for states to raise criminal sanctions and enhance enforcement. Unlike the outsourcing race, however, there are fewer political barriers to setting *minimum* standards with respect to crime control, because the political economy of local crime control policies tends to foster support for almost any initiative that raises sanctions.<sup>186</sup> Thus, we find several salient examples for such international cooperation already in existence.

The European case is perhaps the most developed, satisfying many of the theoretical preconditions for cooperation: the selectivity of group membership, the structure of the population, and the existence of a tested institutional structure for cooperation.<sup>187</sup> The member states of the European Union have developed and established not only an agreed upon central criminal intelligence agency, the Europol,<sup>188</sup> but also a specialized agency for inter-judicial and prosecutorial cooperation, the Eurojust.<sup>189</sup> Furthermore, under the European Union's second pillar of Justice and Home Affairs ("JHA"),<sup>190</sup> European Union member states have undertaken legislative projects

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185. On the "assurance" or "stag hunt" game, see HASENCLEVER, MAYER & RITBERGER, *supra* note 153, at 49–50.

186. See Stuntz, *supra* note 26, at 523–29.

187. See Axelrod & Keohane, *supra* note 169, at 147–54.

188. On the development of Europol, see Monica den Boer, *Law-Enforcement Cooperation and Transnational Organized Crime in Europe*, in *TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL?* 103, 103–06 (Mats Berdal & Mónica Serrano eds., 2002).

189. See Council Decision 2002/187/JHA, *Setting Up Eurojust with a View to Reinforcing the Fight Against Serious Crime*, 2002 O.J. (L 63) 1.

190. On JHA in the EU, see Klaus Eder & Hans-Jörg Trenz, *The Making of a European Public Space: The Case of Justice and Home Affairs*, in *LINKING EU AND NATIONAL GOVERNANCE* 111 (Beate Kohler-Koch ed., 2003).



aimed at harmonizing and approximating national crime control and related policies in several areas, such as organized crime, drugs, money laundering, cybercrime, and trafficking in firearms.<sup>191</sup> The rationale of these efforts follows the logic of our theory, aiming at the reduction of externalities caused by differential national policies, leading to the creation of a more efficient joint crime control policy.<sup>192</sup> Thus, there exists European Union legislation that establishes minimum provisions for criminal penalties related to drug offenses.<sup>193</sup> Note, however, that while such cooperative policies might overcome the crime control arbitrage associated with insourcing problems, they would be counterproductive if states are actually facing an outsourcing problem.<sup>194</sup> The European model does not appear sensitive enough to this possibility.

On the multilateral international level, cooperation in crime control is less developed than in Europe but similarly focuses on issues associated with insourcing crime. Most formal international criminal cooperation is a reciprocal exercise in enabling states to impose their sovereign authority in areas of criminal enforcement, such as extradition, legal assistance, and mutual recognition and transfers of convicted persons.<sup>195</sup> Where there are attempts to set international crime control standards, they tend to be of the nature of minimum standards. A central example is the United Nations Convention Against Transnational Organized Crime ("CATOC"), the

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191. For an overview, see the website of the Directorate-General for Justice, Freedom and Security of the European Commission, EUROPA, Justice and Home Affairs—Freedom, Security and Justice, [http://ec.europa.eu/justice\\_home/fsj/intro/fsj\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/intro/fsj_intro_en.htm) (last visited Apr. 7, 2009).

192. See, e.g., EUROPA, Justice and Home Affairs—Freedom, Security and Justice—Criminal Justice, [http://ec.europa.eu/justice\\_home/fsj/criminal/fsj\\_criminal\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/criminal/fsj_criminal_intro_en.htm) (last visited Apr. 7, 2009) ("The functioning of the European judicial area could be undermined by differences between national criminal legislation. Approximation of legislation is needed to avoid criminals using differences between national legislations legislation [sic] to operate from one EU country toward others . . ."); see also Memorandum from the General Secretariat of the Council of the European Union to the European Council, EU Drugs Strategy (2005–2012), at 5 (Nov. 22, 2004), available at <http://register.consilium.europa.eu/pdf/en/04/st15/st15074.en04.pdf> ("Member States should consider the impact of their national strategies on other Member States, the ways national strategies of different Member States can be mutually supportive . . .").

193. See Council Framework Decision 2004/757/JAI of 25 October 2005, Laying Down Minimum Provisions on the Constituent Elements of Criminal Acts and Penalties in the Field of Illicit Drug Trafficking, 2004 O.J. (L 335) 8.

194. This is, no doubt, part of the crime control problem of drugs in Europe, which is in part an outsourcing race and in part a heterogeneous race. See Caroline Chatwin, *Drug Policy Developments Within the European Union: The Destabilizing Effects of Dutch and Swedish Policies*, 43 BRIT. J. CRIM. 567 (2003) (discussing the effects of divisions in policy styles among European Union member states).

195. See Matti Joutsen, *International Instruments on Cooperation in Responding to Transnational Crime*, in HANDBOOK OF TRANSNATIONAL CRIME AND JUSTICE 255 (Philip Reichel ed., 2005).

main international instrument aimed at combating organized crime.<sup>196</sup> The CATOC establishes an obligation upon signatory states to criminalize participation in organized criminal groups,<sup>197</sup> and then requires states to make the relevant offenses “liable to sanctions that take into account the gravity of the offense.” This would seem to leave states with a good deal of crime control discretion. However, another provision requires states party to the CATOC to “endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered . . . are exercised to *maximize the effectiveness* of law enforcement measures.”<sup>198</sup> Although the real effect of this provision is questionable, being somewhat of a soft “best efforts” obligation, it clearly encourages states to increase their enforcement measures. The CATOC and similarly worded international treaties<sup>199</sup> thus focus mainly on insourcing. They do not restrain the tendency of outsourcing states to over-enforce; rather, they legitimize it.

The cooperational problems associated with insourcing crime can also result in the strategic use of policy tools aimed at structuring the incentives of insourcing states. In the domestic sphere, a common legal response to individuals who create negative externalities is the use of penalties to alter their incentives. Tools such as tort law, criminal law, and taxation set prices that can structure people’s behavior in an efficient way. In the area of international cooperation, by extension, the use of such incentives can be difficult, since

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196. See CATOC, *supra* note 6.

197. *Id.* art. 5(1). The CATOC also criminalizes money-laundering, *id.* art. 6, and certain forms of corruption, *id.* art. 8; however, this would appear to be consistent with the view that states might consider these activities to be “desirable,” and so a minimum standard is in order.

198. *Id.* art. 11(2) (emphasis added). McClean points out that this provision is virtually identical to Article 3, Paragraph 6 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 493. See DAVID MCCLEAN, TRANSNATIONAL ORGANIZED CRIME: A COMMENTARY ON THE UN CONVENTION AND ITS PROTOCOLS 133 (2007). Importantly for our purposes, McClean notes that “the authors of this proposal were concerned that withdrawal of charges, or plea-bargains as to the level of offence or the likely sanction might be secured by improper means.” *Id.*

199. The U.N. has adopted several Protocols that apply the CATOC’s general provisions, including Article 11, to a series of transnational criminal problems, such as human trafficking. See Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (May 31, 2001); Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, annex III, U.N. Doc. A/RES/55/25 (Nov. 15, 2000); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

generally, the international community has a limited ability to enforce sanctions legitimately on sovereign states. Thus, in the international context we observe a unique use of both negative incentives (“sticks”) and positive ones (“carrots”) to achieve the desired outcome.

A concrete example of a non-unilateral regime that is based mostly on carrots can be found in the Organization of Economic Cooperation and Development (“OECD”). The OECD is a compact and essentially elite international organization whose members are the developed global economies. While membership in the organization might have few direct payoffs, it is seen as a stamp of approval for emerging economies and carries an array of indirect benefits. Thus, states have an incentive to comply with the requirements for admission to the organization. This, in turn, enables the OECD to cause states to adopt policies that may run against their own narrow interests. For example, Israel has recently adopted serious reforms in areas such as intellectual property protection and money laundering to comply with the OECD requirements. These reforms led the OECD to open a formal discussion on accession with Israel in May 2007.<sup>200</sup> Notably, several of the standards to which OECD members are expected to adhere relate to transnational criminal issues such as money laundering and bribery.<sup>201</sup>

Additionally, in a more realist hegemonic vein, incentives for cooperation on crime control matters can be generated unilaterally by powerful states that have the ability to create an array of carrots and sticks to incentivize insourcing states to adopt minimum crime control efforts. These measures can be economic, if the reduction of transnational criminal activity is tied to financial aid or international market access. In addition, unilateral acts can attempt to make use of the normative power of powerful states. These efforts often focus on shaming countries that behave in ways that create negative externalities.<sup>202</sup> For instance, there are several blacklists and watch lists operated by the United States that contain the names of all countries engaging in illicit behavior. A concrete example of such a

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200. See Press Release, Israel Ministry of Foreign Affairs, Israel to Join OECD (May 16, 2007), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Israel+to+join+OECD+16-May-2007.htm>.

201. See FATF, *supra* note 12 (an OECD initiative); see also Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, S. TREATY DOC. NO. 105-43 (1997).

202. See, e.g., Peter L. Fitzgerald, *Managing “Smart Sanctions” Against Terrorism Wisely*, 36 NEW ENG. L. REV. 957, 959–60 (2002); Jesse S. Morgan, *Dirty Names, Dangerous Money: Alleged Unilateralism in U.S. Policy on Money Laundering*, 21 BERKLEY J. INT’L L. 771 (2003); Daniel J. Steinbock, *Designating the Dangerous: From Blacklists to Watch Lists*, 30 SEATTLE U. L. REV. 65, 117–18 (2006).

unilateral policy can be found in U.S. policies regarding illicit drugs. According to the Foreign Relations Authorization Act ("FRAA"), the President must submit to Congress an annual report identifying states that serve as major centers for the production or distribution of illicit drugs.<sup>203</sup> States included in this list can, as a result, lose fifty percent of the financial support they receive from the United States.<sup>204</sup> In addition, according to the Act the executive director of each multilateral development bank must vote against any loan or other allocation of funds from his or her respective institution to any listed state.<sup>205</sup> Another watch list example is the European Union's former Generalized System of Preferences ("GSP"), which granted trade preferences to states that pursued policies aimed at combating drug production.<sup>206</sup>

Unilateral policies such as the FRAA have both advantages and disadvantages. The clearest advantage is their effectiveness. Unilateral enforcement creates a clear decisionmaking process that can impose substantial sanctions on nations that do not comply. Thus, one can point to several states that reformed their policies as a direct result of the threat of unilateral enforcement. In the area of human trafficking, for example, Israel has amended its criminal code and has begun to enforce this legislation as a result of its inclusion in the U.S. State Department report.<sup>207</sup> This move can be explained by the threat of decreased U.S. aid to Israel and by the shaming effect caused by the inclusion in an official list of the U.S. State Department.

On the other hand, unilateral enforcement suffers from several drawbacks that stem from the fact that it is conducted to serve the hegemonic interests of the initiating state, and therefore will not necessarily serve the interests of aggregate global welfare. First, in many cases unilateral enforcement focuses only on issues that are of interest to the initiating states. These can be economic interests, as is

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203. 22 U.S.C. § 2291h(a)(3) (2006). Updated information on the application of the Act can be found at the website of the State Department. U.S. Dep't of State, Narcotics Certification Process, <http://www.state.gov/p/inl/rls/rpt/c11766.htm> (last visited Apr. 7, 2009).

204. 22 U.S.C. § 2291j(a)(1).

205. *Id.* § 2291j(a)(2).

206. See Robert Howse, *India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy*, 4 CHI. J. INT'L L. 385, 385-87 (2003).

207. In 2006, Israel was put on a watch list prior to being categorized as a Tier 3 country in the State Department's report on human trafficking. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 46 (2006), available at <http://www.state.gov/documents/organization/66086.pdf>. Following this addition to the list, Israel amended its legislation on the matter and appointed a special inter-office liaison in order to improve enforcement. See Ruth Eglash, *Israel Still Falls Short Over Human Trafficking Problem*, JERUSALEM POST (Isr.), Nov. 20, 2007, at 4.

the case with the strong emphasis the United States puts on enforcing intellectual property rights, or other political interests, as is the case with the pressure the United States puts on other states with respect to illicit drugs. Yet a unilateral mechanism might circumvent this balancing of interests and force a solution that is not necessarily welfare maximizing.

Second, within the issues that are enforced unilaterally, enforcement will be subject to the political interests of the enforcing state. For example, the FRAA subjects the sanctioning regime of the Act to the national interests of the United States.<sup>208</sup> The President has routinely used this authority to sustain American financial aid to countries listed as major centers of drug production and trafficking in order to promote other interests, such as the war against communism (in the past) and the war against terror (in the present).<sup>209</sup>

An additional drawback of unilateral policymaking has to do with its consequences on the domestic political landscape of the states being pressured. Concepts such as sovereignty and national independence might in themselves drive parties to oppose policies that are adopted as a result of external pressure. Thus, policies that could have been adopted voluntarily or multilaterally might run into opposition if they are imposed solely because of other countries. For instance, U.S. attempts, through various unilateral sanctions, to force the Colombian government to change its drug policies achieved the exact opposite result. Not only did the U.S. sanctions go unnoticed in Colombia, but they served to weaken the Colombian government's authoritativeness in the eyes of its citizens and of its drug traffickers in particular.<sup>210</sup>

Finally, states deal with insourcing problems unilaterally by broadening their own criminal jurisdiction to regulate cross border criminal activity. In this regard, one can see a growing tendency among jurisdictions to prosecute individuals operating abroad for the criminal consequences of their acts within the jurisdiction. For example, U.S. authorities—either concerned about the corruptive effect of online gambling on U.S. gaming patrons or alternatively about the protection of land-based and other gaming services in the United States—have pursued aggressive extraterritorial prosecutorial policies against principals of offshore gambling enterprises who cater

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208. See 22 U.S.C. § 2291j(b)(1)(B) (creating a "vital national interest" exception to the certification process).

209. See Jimmy Gurulé, *The 1998 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—A Ten Year Perspective: Is International Cooperation Merely Illusionary?*, 22 *FORDHAM INT'L L.J.* 74, 86–87 (1998).

210. See Morgan, *supra* note 202, at 799–800.

to U.S. customers. These efforts included the celebrated arrest, prosecution, and extended jailing of Jay Cohen, an executive of an Antigua-based Internet sports betting company.<sup>211</sup> They also included the arrest of Peter Dicks, a British director of Sportingbet, an offshore Internet sports betting company, while visiting the United States<sup>212</sup>—resulting in the closure of Sportingbet’s online gaming activities in the United States.<sup>213</sup> Finally, the efforts included the arrest of David Carruthers, chief executive of Betonsports, another online gaming website<sup>214</sup>—leading to a settlement essentially abolishing this corporation’s U.S. commercial operations from 2007 onwards.<sup>215</sup>

#### IV. CONCLUSION

In this Article we presented a novel theory describing the political economy of transnational crime control. The story we told was one of growing global integration, which has given rise to various externalities between nations pursuing their own crime control interests. More specifically, we pointed out how different countries might engage in both outsourcing and insourcing of certain types of criminal activities, depending on their political structure and the payoffs created by the relevant crimes. Thus, we argued that local crime control policies are not designed and executed in a vacuum. Rather, the policies adopted by one country (be they relatively harsh or relatively lenient) affect the policies adopted by other countries.

The core of our positive analysis, namely, that crime control policies of one country have spillover effects in other countries, led us to evaluate the current state of transnational crime control. Our analysis justified current practices aimed at regulating insourcing countries that create harm in other countries in the form of setting international minimum standards. Yet our analysis pointed towards a less intuitive (and currently nonexistent) set of policies that should be adopted to deal with the symmetric problem of outsourcing crime. We pointed out that the international community should set out maximum standards to limit the ability of nations to displace crime.

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211. *United States v. Cohen*, 206 F.3d 68 (2d Cir. 2001), *cert. denied*, 536 U.S. 922 (2002).

212. Simon Bowers & Andrew Clark, *Sportingbet Arrest Threatens Internet Gambling*, *GUARDIAN* (Eng.), Sept. 9, 2006, at 29.

213. Dominic Walsh, *Sportingbet Pays \$400,000 to Call it Quits*, *TIMES* (Eng.), Mar. 22, 2007, at 53.

214. James Quinn, *You Bet: Dallas Arrest Spoils the Party*, *DAILY TELEGRAPH* (Eng.), July 22, 2006, at 35.

215. Andrew Ross Sorkin & Stephanie Saul, *Gambling Subpoenas on Wall St.*, *N.Y. TIMES*, Jan. 22, 2007, at C1.

While we remain tentative with respect to specific policy recommendations, leaving those details for future research, the clear conclusion drawn from our analysis is that the traditional concept of state sovereignty over criminal justice must make way for new concepts of international cooperation if efficient crime control is to be achieved.