

Connectedness and Its Discontents: The Difficulties of Federalism and Criminal Law

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In response to Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005).

I. CONSTRUCTING CRIMINAL HISTORY

When E. M. Forster chose “Only connect . . .” as an epigraph to his novel *Howards End*,¹ he surely wasn’t thinking—it is safe to say—of the kind of connectedness among polities that Professor Wayne Logan describes in his rich, measured, and illuminating article.² This should come as no surprise. Forster was exalting the weightless energy of passionate encounter. Logan’s research, by contrast, reveals the potential gloominess of connectedness.

By focusing on the legal implications of the migratory patterns of criminal offenders, Logan’s article asks two important questions that have been given spare and insufficient attention. The first focuses on how states construct the criminal histories of the offenders who are now in their midst. The second asks what tradeoffs are implicated as states make their choices regarding how to interpret the pasts of these itinerant offenders as they relate to registration requirements or sentence enhancements for recidivism.

Answering the first question, Logan observes the existence of two archetypal approaches a state might adopt when assessing an offender’s prior record: an internal one and an external one.³ Under the *internal* approach, the use of “out-of-

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¹ E. M. FORSTER, *Epigraph* to HOWARDS END (Vintage Int’l 1989) (1910).

² See Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 260 (2005) (examining problems arising from the diversity among states in the area of criminal laws regarding sex offenders).

³ Here I follow Logan’s practice of collapsing the distinction between the “strict internal” and the “modified internal” approaches. *Id.* at 267–68. The basis for this elision is practical: theoretically, states might decide to take a “strict internal” approach, by which they refuse to consider altogether a person’s conduct or convictions that occurred out of state. *See id.* (noting that, by the mid 1970s, only Virginia had taken this approach). The distinction between the modified internal approach and the strict internal approach is purely academic now, since, according to Logan’s

state convictions, and any punishment resulting from those convictions, [must] satisfy the eligibility requirements of the forum state's registration or recidivist enhancement law."⁴ On this view, for example, a state would not apply a recidivist sentencing enhancement to an offender on the basis of a conviction in another state for conduct that would not be illegal in the forum state.⁵ By contrast, under the *external* approach, a forum state faithfully implements the consequences of the legal judgments of its fellow sovereign states, rather than re-examining those determinations to see if the underlying circumstances (or length of sentence) would have initiated the same legal consequences in the forum state.⁶ Consequently, with the external approach, an offender's former actions potentially trigger a "marked trail" effect in the new forum state. Of course, jurisdictions need not be consistent between recidivism and registration requirements: some states might adopt, for instance, an internal approach with respect to recidivist sentencing enhancements but an external approach to sex offender registration laws.⁷

With respect to the second question regarding tradeoffs between the approaches, Logan capably shows how both approaches raise difficult policy questions.⁸ Indeed, simply by ventilating the various issues as he does, Logan helpfully foregrounds many otherwise easily obscured value trade-offs, and thus makes a profound contribution to the study of federalism and American criminal law.⁹

This essay registers no real quarrel with Logan's analysis of the scope and nature of criminal justice connectedness. My focus, instead, is on the normative argument in Logan's apparent preference for the internal approach.¹⁰ I choose this

research, no jurisdiction employs the "inviting" strategy of a strict internal approach. *See id.* at 260 (noting that the strict internal approach incentivizes prior offenders to emigrate); *id.* at 269 n.54, 276–77 n.92 (classifying every state's approach as either "modified internal" or "external"). Hence the "internal" approach described in the text's next sentence is actually a "modified internal approach," but for shorthand's sake, I refer to it simply as the "internal" approach hereinafter, unless otherwise specified.

⁴ *Id.* at 261.

⁵ The "forum state," on Logan's account, is the state currently assessing whether to impose a sentence enhancement or registration requirement; the forum state can be contrasted with the "foreign state," which is the prior state of residence and/or conviction. *See id.* at 266 n.41 (defining "foreign" jurisdictions as domestic jurisdictions other than the forum jurisdiction).

⁶ *Id.* at 261.

⁷ *Id.* at 290 n.167 (discussing New York's use of the internal approach in some contexts and the external approach in others).

⁸ *See id.* at 292–329.

⁹ In addition to analyzing the curlicues of horizontal federalism, Logan has recently explored how the *federal* government, by adopting a largely "external" approach, "infuses federal law with the normative judgments of the respective states." Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 67 (2006).

¹⁰ I say "apparent" because Logan plays his (normative) cards close to his vest in this piece, at least until the end, where his antipathy for the external approach appears more pronounced. *See* Logan, *supra* note 2, at 320–29.

focus not because I am convinced that the external approach is the obviously superior one. Rather, I think Logan overestimates its deficiencies. The goal of this essay, then, is to adumbrate a few of the rejoinders available in defense of the external approach against Logan's criticisms. To the extent these responsive arguments are persuasive, then state courts and/or legislatures will be in a better position to select an approach more consonant with their particular concerns and objectives.¹¹

II. THE EXTERNAL APPROACH'S HIDDEN VIRTUES

As alluded to above, Logan ultimately sides with the internal approach. This might seem odd as Logan himself recognizes several distinct advantages to the external approach. First, at least as compared to the internal approach, the external approach advances judicial economy, sparing courts the task and expense of comparing whether the predicate conduct would satisfy the forum state's eligibility requirements for offender registration laws or sentence enhancements.¹² Second, by serving judicial economy, the external approach is capable of serving distributive justice goals as well, since a dollar saved in administrative costs is a dollar available for helping other social projects.¹³ Third, by giving effect to the prior judicial decisions and legislative determinations of foreign states, the external approach instantiates comity among the several states, evidencing respect for the equal dignity of the states.¹⁴ Fourth, the external approach is often the better

¹¹ Of course, it is possible that a coordination rule will emerge under which all states pick either the internal or the external approach. I leave for another day whether such a hypothetical rule would, absent constitutional amendment, survive litigation challenges. See *United States v. Lopez*, 514 U.S. 549, 561 & n.3 (1995) (noting traditional role of states in regulating criminal justice matters).

¹² Bear in mind that what I am calling the internal approach is really the "modified" internal approach. See *supra* note 3. The distinction is critical here because it would be just as economical, indeed perhaps more so, to adopt the strict internal approach, since no inquiry into extraterritorial wrongdoing would be necessary at all.

¹³ On this point, Logan, *supra* note 2, at 294 n.183, refers us to *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9662), a case where Justice Story denied the filing of federal suits in state court because such practices "may most materially interfere with the convenience of their own courts, and the rights of their own citizens, and be attended with great expense to the state, as well as great delays in the administration of justice." Of course, the distributive justice gains in judicial economy are likely offset by the expenses associated with incarcerating offenders for longer periods of time for sentence enhancements; but the costs of these longer sentences may, in turn, generate some benefits such as crime reduction through incapacitation or general or specific deterrence.

¹⁴ Michael O'Hear has suggested to me that the value of comity is oversold here so long as these registration requirements or recidivism enhancements are justified as preventive measures. That is because, to the extent these provisions are imposed for future social self-protection, only the legislated values of the (forum) state in which the offender is currently living (or more likely to be committing an offense) should have significance, and not the values embraced, potentially years ago, by another state. This point is surely correct, but only so far as it goes. My sense is that these

vehicle for providing notice to a migrating offender. Under the external approach, for example, the offender need only know one set of laws regarding registration requirements—those of the state in which she committed the offense. If states employ an internal approach, then migrant offenders will have greater difficulty in keeping abreast of whether or not they are expected to register. Finally, the external approach is more likely to reinforce norms of individual responsibility and accountability, since it signals, as President Clinton said, that if you break the law, “the law will follow you wherever you go—state to state, town to town.”¹⁵ In other words, if an offender must register in Alabama as a consequence of some crime she committed there, she would not be able to escape those registration requirements simply by moving to a different state, where the same underlying conduct would have been perfectly legal.

Despite the variegated benefits of the external approach, Logan condemns the external approach for four reasons: its harshness, its creation of inequalities, its denigration of state autonomy, and, relatedly, its discouragement of jurisdictional competition for citizen migration. In what follows, I explain why these charges are overstated or misplaced.

A. *Is the External Approach Unduly Harsh?*

To begin with, Logan notes that an embrace of the external approach can lead to the imposition of evermore onerous registration requirements or sentence enhancements based on weird predicate crimes or harsh procedural sorting rules that are extant in the several states.¹⁶ It may be true that, on the margins, the external approach leads to more harm to defendants,¹⁷ but Logan’s article does not furnish us with enough evidence to believe that is conclusively the case, as there are a variety of circumstances in which the internal approach may lead to worse outcomes for migrant offenders. For example, forum states may have a lower bar

enhancements or registration requirements are often added precisely to further punish (on the basis of desert) the affected classes of offenders. When that’s the case, comity could make sense again.

¹⁵ Logan, *supra* note 2, at 261.

¹⁶ See, e.g., *People v. Mazzie*, 358 N.Y.S.2d 307, 311–12 (Sup. Ct. 1974) (noting that under an external approach, New York would have to extend felony enhancements for those “convicted of Fornication in Alabama . . . Seduction in Texas . . . Blasphemy in New Jersey . . . Vagrancy in Rhode Island, or of stealing a library book in North Carolina . . . or a turkey in Arkansas” (citations omitted)); *Mitchell v. State*, 467 A.2d 522, 533 (Md. Ct. Spec. App. 1983) (noting that the legislature did not intend to impose a mandatory sentence because of a prior conviction for “[c]utting cacti in California, uprooting the state flower (rhododendron) in West Virginia, or desecrating a confederate cemetery in Mississippi”). Logan appears to share these concerns. See Logan, *supra* note 2, at 303 (“[T]he notable idiosyncrasies of state laws are permitted to affect outcomes in other states. For instance, if an individual moves from South Carolina to one of the fifteen other states using an external test for registration, the Palmetto State’s unusually broad gamut of registerable offenses will come into play.”).

¹⁷ The empirical determination would ultimately depend not only on the number of states adopting the internal approach, but also on the number of cases heard by each state.

for longer registration requirements than foreign states; thus, out-of-state conduct that may be deemed relatively benign in the foreign state may prompt severe consequences once the migrant offender moves to the forum state.¹⁸ Indeed, as Logan himself notes, the external approach would lead to better circumstances for offenders on occasions where “a crime classified as a misdemeanor in a foreign state can be treated by the forum as a felony for purposes of assessing recidivism,” or where the forum state considers deferred adjudications or prior juvenile dispositions but the foreign state does not.¹⁹

That said, even if it could be shown that the external approach is a net detriment to *defendants* because it tends to widen the scope of penalty, this is not always bad *for society*. For one thing, take note that the democratic weirdness of federalism’s fifty labs approach may cut in many directions. One need only imagine that the forum state adopts the internal approach and also fails to recognize the crime of marital rape, or refuses to impose higher penalties for racially-motivated assaults or driving under the influence. Shorter criminal codes (and sentences) are not inexorably *better* criminal codes (and sentences). Consequently, when offenders move to an internal approach jurisdiction, there is a decent chance that the resulting outcomes will offend, rather than reflect, progressive political sensibilities in the forum state because the criminal codes of foreign states may actually serve retributive (or other) ends more effectively than those of the forum state.

In this regard, by giving effect to the “marked trail” of an offender’s conduct through the external approach, a forum state may in fact be able to better conduct comparative experiments in crime policy than they otherwise would be able to perform.²⁰ Of course, this would raise, albeit in a different way, Logan’s pronounced concern that the external approach entails a basic unfairness by treating similarly situated offenders differently.²¹ This concern warrants careful scrutiny.

¹⁸ Logan, *supra* note 2, at 301; *see also id.* at 305 n.256 (discussing *Hendrix v. Taylor*, 579 S.E.2d 320, 325 (S.C. 2003), in which the forum state required an immigrant, under the internal approach, to register for life, even though the foreign state’s registration requirements would have ended after five years).

¹⁹ Logan, *supra* note 2, at 301 (citations omitted).

²⁰ For example, states could track recidivism rates of offenders with similar offenses but different penalties that result from application of the external approach. *See* Doron Teichman, *Decentralizing Crime Control: The Political Economy Perspective*, 104 MICH. L. REV. 1749, 1758 n. 53 (2006) (“Actually, the external approach offers many opportunities for those engaged in empirical studies. Rather than comparing two sets of criminals in different states with different legal regimes, the external approach will create within the state two sets of criminals that are subject to different legal regimes. Measuring the differences between these two groups will isolate the effect of the legal policy from differences attributable to social differences between states.”).

²¹ Logan, *supra* note 2, at 303.

B. *Does the External Approach Promote Inequality?*

Logan's basic point about unequal treatment resulting from the external approach is that "[w]hen forum states defer to outcomes reached in foreign states with significant variations in substantive laws, punishments, and procedural rights, otherwise similarly situated individuals can be treated unequally."²² To see how this works, consider two types of inequality under the external approach that Logan espies:

The first [unequal treatment] involves immigrants from states with narrower registration eligibility criteria; they, unlike the immigrant from, say, South Carolina, will not be subject to registration because it was not required by the foreign state from which they migrated. The second arises when an offender in the forum state is not required to register as a result of being convicted of an offense (e.g., peeping), yet the newcomer is so required, again because of the idiosyncratic nature of the foreign state's registration law. Alternatively, the duration of registration can be made lengthier for newcomers if the forum state ties the newcomer's period of registration to the duration imposed by the state left behind. In each such situation, registration, with its direct and collateral burdens (including possibly community notification, with its litany of negative consequences), is driven by the geographic happenstance of where the foreign conviction occurred, leading to unequal outcomes in the forum state.²³

To be sure, unequal treatment of similarly situated offenders should give us pause—as a normative and constitutional matter.²⁴ But the unequal treatment resulting from adoption of the external approach is not necessarily “unwarranted” or “unfair” if it doesn't involve offenders who are actually similarly situated. Logan's first scenario compares immigrants from different states who arrive in the same new forum state; one is susceptible to more onerous registration requirements while another is not, merely because of where the foreign conviction occurred. According to Logan, this disparity is troublesome, as is the resulting disparity between the immigrant offender and the native offender in the second scenario.

To my mind, both scenarios of unequal treatment do not present any real unfairness. Upon scrutiny, the apparently unfair aspect of this unequal treatment

²² *Id.*

²³ *Id.* at 304–05.

²⁴ See Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. (forthcoming 2007) (manuscript on file with the author) (arguing that disparate treatment of similarly situated offenders creates “gashes in the moral fabric of impartial justice”); Dan Markel, *Luck or Law? The Constitutional Case Against Indeterminate Sentencing Schemes*, 8–9 (Aug. 27, 2006) (unpublished manuscript, on file with the author) (arguing that certain discretionary sentencing schemes are unconstitutional).

dissolves simply by recourse to the very point about notice that Logan acknowledges elsewhere. Let me elaborate. In the case of the two immigrant offenders now in the forum state, it makes little sense to think that they are similarly situated if they committed their offenses in different states against different sovereigns. The same holds for the comparison of the perpetrator of an offense in jurisdiction X to the perpetrator of the same offense in jurisdiction Y. These offenders are not similarly situated precisely because the predicate conduct was perpetrated against *different sovereigns* whose democratic institutions may legitimately issue different rules with different consequences.²⁵ This matters because, in a federal scheme of decentralized democracy, an offense of drug possession in state X may reasonably be regarded as having a different valence than those schemes criminalizing drug possession in state Y.²⁶ (Of course, we might not like all the laws resulting from the plural nature of the states, but this calls, perhaps, for increased constitutional regulation of criminal law legislation, not an abandonment of federalism as such.) Moreover, given the variety of ways in which similar acts committed in different states may reveal different attitudes about criminal propensities, there is further reason for thinking that the offenders in Logan's two scenarios are not similarly situated—though of course, this would depend on the assumption that the offenders had knowledge of these varying penalties.

In short, to generate a legitimate inference of *unwarranted* disparity, one should focus attention on differences between two similarly situated perpetrators of the same offense in the same jurisdiction. Neither of Logan's two scenarios present that prerequisite.²⁷ Indeed, when a forum state effectuates the consequences that would be visited upon an offender had she remained in the foreign state—by adoption of the external approach—the forum state is actually serving the cause of equality because it ensures that similarly situated defendants

²⁵ One might still venture that Logan's hypothetical scenarios present the *appearance* of inequality, which could undermine popular support for the criminal law. See, e.g., Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 476 (1997) (explaining that social groups more likely flout a particular prohibition if the overall legal system has a bad reputation). But in the context of the choice between the external and internal approach, I doubt the "appearances of inequality" here will mobilize massive resentment of the system at large.

²⁶ See *Ewing v. California*, 538 U.S. 11, 24–25 (2003) (emphasizing the tradition of judicial deference to legislative crime-control strategies).

²⁷ And it might be the case that Logan's preferred solution leads to greater harshness, which was one of Logan's primary concerns. As Professor Doron Teichman writes, "Logan's conclusion that unequal treatment necessarily implies unfairness is tenuous since he employs a strictly ex post view of fairness. He implicitly assumes that if Michigan did not adopt the external approach everyone would be treated equally, and the immigrant from South Carolina would not have to register as a sex offender in Michigan. However, once we shift to the ex ante point of view, this result does not necessarily hold. Facing sex offender migration from South Carolina due to the harsh legal conditions there, Michigan might be compelled to duplicate those conditions in order to cut down unwanted migration. Thus, both the immigrant from South Carolina and the native resident of Michigan will have to register. True, Logan's world is fair in the sense that everyone is treated equally; but everyone is treated more harshly in his world as well." Teichman, *supra* note 20, at 1758.

convicted in the same jurisdiction endure the same kind of consequences, regardless if one of the offenders decides to go to another jurisdiction. More importantly, no unfairness or surprise to the offender can be claimed because she is (presumptively) on notice from the outset; she is simply receiving under the external approach what she would otherwise have received had she stayed in the foreign state.²⁸ In other words, while there may be differential treatment of the offenders in the scenarios presented by Professor Logan, such differences are not themselves instances of an injustice.

C. Does the External Approach Undermine State Autonomy?

In addition to his concerns about widening penalty and inequality, Logan also fears the external approach leads to the erosion of autonomy in individual states. This erosion of self-government occurs on account of the ossification effects resulting when states, through the external approach, “replicate temporally and geographically contingent aspects of substantive criminal law, punishment, and procedure.”²⁹ Logan thinks these “frozen-in-amber” effects are more pronounced in jurisdictions employing the external approach because, under the internal approach, such “intergenerational drift” might be checked by the forum state’s own substantive rules and procedural requirements.³⁰ There are two reasons to hesitate before condemning these replication and ossification effects. First, as shown earlier, because the internal approach is not always less harsh and because criminal codes in the foreign state may be more “progressive,”³¹ the replication and ossification created by the external approach might not be bad for defendants or society.

Second, and more relevant to the autonomy erosion claim, there are two reasons states may see their choice of the external approach as an expression of their autonomy, rather than as a denigration of it. First, a state may view its choice of the external approach as saying to an offender something like: “if you made the choice to violate the criminal law of another state, we have a concern you might do so here as well, even though what you did there would not have been a violation here.” Thus, a state might self-consciously try to enhance its crime reduction strategy against specific threats by adopting the external approach.³² Second, notwithstanding its “right to act autonomously and independently, free of the

²⁸ For these reasons, states adopting the external approach would have little difficulty in justifying these “disparate treatments” under the Equal Protection Clause’s rational basis test. And the constitutional challenges brought so far have failed for these or other reasons. *See* Logan, *supra* note 2, at 311, 311 n.287 (discussing failure of challenges to West Virginia and New York laws).

²⁹ *Id.* at 307.

³⁰ *Id.* at 308.

³¹ *See supra* notes 18–19 and accompanying text.

³² Thanks to J.B. Ruhl for this point.

constraining authority of other governmental units,”³³ a state might adopt the external approach because it wants to see its norms adhered to when its offenders migrate to other states. If the state sees itself in an iterative process by which it believes that other states will reciprocate with adoption of the external approach, then its choice to embrace the external approach will make sense. To illustrate: State X might be willing to give effect to State Y’s laws to offenders whose crimes were prosecuted in State Y if State X thinks that State Y (or States A through W) will adopt and abide by the external approach. That’s because State X believes that in subsequent cases, those states will give effect to State X’s laws to former X-convicted offenders who migrate to these other states.

Indeed, State X might try to persuade other states to adopt an external approach so that they give effect to State X’s legislative views on offenders previously convicted in State X. Though they have no power to mandate the extraterritorial application of their laws, the states employing the external approach might try to convince the “internal approach” states that they are acting as “free-riders.” They are free-riders because internal approach states have their laws apply in their own jurisdiction to indigenous and immigrant offenders *and* they also have their laws apply to their own former citizens who migrate to external approach states. Without a rule mandating one approach or another, internal approach states are able to enjoy a kind of law-hoarding, thereby undermining norms of reciprocity.

There is a solution available to bring this “game” to equilibrium: states that care about this problem could use a bifurcated strategy. The courts in the forum state could apply the external approach to offenders from other external approach states while using the internal approach against offenders migrating from internal approach states. But the fact that such a strategy is not used indicates that this unfairness is either deemed relatively insignificant or that the unfairness has not been made obvious to relevant policymakers.

D. Does the External Approach Discourage Democratic Experimentalism and Jurisdictional Competition?

Logan concludes his critique of the external approach by contending that states that adopt the internal approach are better able to serve as “stalwarts of ‘fifty-labs’ federalism.”³⁴ I find this claim puzzling. To begin with, a state adopting the external approach is at least equally able to convey its respect for fifty-labs federalism precisely because it may doggedly apply its own laws to offenders who commit crimes in that state while at the same time demonstrating equal respect for the dignity of its sister states by implementing the laws of its sister states on their migrant offenders. *Contra* Logan, the external approach poses no real jeopardy to the spirit of democratic experimentalism—after all, the

³³ Logan, *supra* note 2, at 324.

³⁴ *Id.* at 318.

proportion of migrant offenders is likely to be small compared to the number of indigenous offenders,³⁵ so lawmakers will not likely be deterred from trying to undertake criminal law innovations to see how they work. Indeed, the external approach allows forum states to adopt more lenient legislation toward its own citizens without having to worry that it will serve as a magnet for opportunistic offenders migrating from elsewhere.³⁶

Indeed, for the same reason, the risk attending Logan's fear that the external approach prompts a slippage in democratic accountability³⁷ seems remote. How many instances are there where someone convicted of a weird crime in another state—Logan's examples are adultery and peeping³⁸—has that offense later serve as a predicate to enhanced sentences or registration requirements in a forum state adopting the external approach? My guess is not that many.³⁹ Unfortunately, Logan's article (quite reasonably) does not provide the empirics. But even if it were a non-trivial number, calling that result, as Logan does, "stealth legislation"⁴⁰ is inapposite. After all, no citizens of the forum state will face penalty enhancements for such conduct if that conduct is committed in the forum state.

As long as the forum state's citizens are free to engage in that predicate conduct, then virtually no risk to Alexander Hamilton's vision of the states competing for the "people's 'affection'" materializes—because people are still able to make informed choices about where to live *ex ante*—that is, before any crime is committed.⁴¹ If I want to move away from a state that makes peeping a felony, I can do so at no penalty if I have not committed an offense. And as Professor Teichman notes, even after the offender commits a crime, there is no "penalty" on migration by use of the external approach. Instead, the external approach "simply sustains the same legal regime that [the offender] was subject to in his initial place of residence. Hence, if an offender wishes to migrate from South Carolina to Michigan because of a lucrative job offer, the fact that his

³⁵ Cf. Teichman, *supra* note 20, at 1759 ("[T]he external approach by definition applies only to individuals immigrating to the state, which is a rather small subset of individuals. Between 1995 and 2000 the interstate migration rate was 86.7 per 1,000 residents. Thus, this does not seem to be a practical way to harshen a state's entire criminal code, and one should not exaggerate the concerns arising from it.").

³⁶ See Teichman, *supra* note 20, at 1758 ("Not using the external approach, on the other hand, will bring about uniformity in the area since states will simply converge to the harshest possible standards.").

³⁷ See Logan, *supra* note 2, at 322–23.

³⁸ *Id.* at 322.

³⁹ See *supra* note 35.

⁴⁰ Logan, *supra* note 2, at 323.

⁴¹ See *id.* at 325 (quoting THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); see also Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1835 (2005) (discussing the incentives for local communities to harshen their criminal justice systems in order to encourage offenders to migrate to other jurisdictions).

registration requirement will follow him only means that he will be indifferent in his residence decision from that perspective. If there is social capital to be gained from migration, the individual will still migrate.”⁴²

By maintaining the position that the external approach serves as an undesirable “penalty” on inter-state migration, Logan appears to think that people should be able to commit an offense and then escape (some of) the consequences of that conduct by moving to an “easier” place to live. Certainly, offenders who serve their sentence and complete all their conditions of release should enjoy the fruits of mobility associated with the American religion of self-reinvention.⁴³ But by what moral rights do they merit a free roaming pass prior to their release from the criminal justice system?⁴⁴ It is unlikely this is the kind of jurisdictional competition Hamilton or other federalists had in mind. Moreover, to the extent that internal approach states end up being harsher on defendants,⁴⁵ then that too will deter migration on the margins, thereby depriving “prospective state[s]” of “such persons’ talents and resources.”⁴⁶ At the level of abstraction Logan has pitched this inquiry, the selection of the internal approach over the external approach can often cut both ways.

Finally, to the extent anyone in an external approach state is troubled by the introduction of what Logan calls “stealth legislation,”⁴⁷ she might take comfort in knowing that her own state’s weird legislation is being given effect in other

⁴² See Teichman, *supra* note 20, at 1759.

⁴³ Cf. *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (“We have expressly identified this right to remove from one place to another according to inclination as an attribute of personal liberty protected by the Constitution.”) (internal quotation marks and citations omitted).

⁴⁴ See *Smith v. Doe*, 538 U.S. 84, 101 (2003) (noting that ex-offenders under supervision are not “free to move where they wish and to live and work as other citizens”). Of course, this point is compatible with a belief that the criminal justice systems across the states have gone too far in intruding upon ex-offenders’ lives. The proper response to that problem, however, is broad-based democratic reforms of the criminal justice system in the foreign state, not application of the internal approach to those few migrant offenders affected in the forum state.

⁴⁵ See *supra* notes 18–19 and accompanying text.

⁴⁶ Logan, *supra* note 2, at 326. One might wonder whether use of the external approach implicates values such as an offender’s fundamental right to travel. Although this topic is well beyond the scope of this essay, it bears mention that the external approach hardly interferes with that right as such. It simply ensures that the migrant offender receives no particular benefit from leaving the foreign jurisdiction.

⁴⁷ *Id.* at 323. Logan seems worried that use of the external approach will mean that a state can “effectively codify ‘peeping’ (South Carolina) or adultery (Kansas) as convictions requiring registration” if it is fearful of legislating such requirements through “the formal legislative process.” *Id.* at 322. It seems just as plausible that, to the extent that legislators are paying attention to these applications of the external approach in their jurisdiction, they would be spurred to repeal antiquated legislation that might still exist on their books. More likely still is that all such signals from the occasional case of the migrant offender from the “weird” state are far from the attention of state legislators in external approach states. Finally, Logan’s awareness of the costs of such “stealth legislation,” *id.* at 322 n.343, would countervail against these concerns about democratic accountability.

external approach states. Logan correctly worries that the external approach might give extended effect to laws like the ones invalidated in *Lawrence v. Texas*.⁴⁸ But that is just one side of the coin. The flip side is that progressive states might be criminalizing marital rape, or making it easier to prosecute date rape, and, through the external approach, they are seeing norms shift in “better directions.” In the end, there is an unspoken *quid pro quo* among the external approach states—one that Logan appears reluctant to acknowledge. To the extent there are many *Lawrence*-type laws out there, litigants can always appeal to have criminal legislation regulated by the federal Constitution.⁴⁹ And for those states that are still worried about the injustices potentially worked by replicating weird laws of other states, they have yet another strategy available to them: employ the external approach generally while simultaneously carving out specific safe harbors for particular conduct the legislature deems worthy of protection. On this view, a legislature could cleanly direct its courts to exclude from consideration those out-of-state convictions arising from, say, consensual sodomy or growing marijuana for medicinal use.

III. FEARING DEMOCRACY?

In reviewing Logan’s multiple concerns about the external approach, one might view them as fragments of a larger skittishness toward the work of democracies in the realm of criminal law politics, and the purported crisis of overcriminalization produced therefrom.⁵⁰ To be sure, there is a basis for fearing incessant overcriminalization. But the claims of pernicious democratic pathologies in criminal law politics are also prone to exaggeration, as Professor Darryl Brown has recently demonstrated convincingly.⁵¹ And to the extent the crisis of

⁴⁸ 539 U.S. 558 (2003).

⁴⁹ *E.g., id.* at 578–79 (overturning criminal law prohibiting consensual sodomy); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (flag desecration); *Roe v. Wade*, 410 U.S. 113, 166–67 (1973) (abortion); *Cohen v. California*, 403 U.S. 15, 26 (1971) (public display of offensive words); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (miscegenation).

⁵⁰ I am grateful to Ron Wright for this suggestion.

⁵¹ Professor Brown summarized his findings:

Legislatures routinely decline to enact bills proposing new crimes or increased punishments, for reasons familiar to students of legislative process. . . . [L]egislators also repeal longstanding criminal statutes, reduce punishments, reduce offense severity, and occasionally convert low-level crimes to civil infractions. . . . Moreover, interest groups and popular opinion often support and sometimes drive de-criminalization reforms, which means both that democratic sentiment is not solely in favor of ever-increasing harshness and that democratic processes can accurately respond to that sentiment—even when, as in the case of consensual sex crimes, popular sentiment is not uniform. Legislatures in fact criminalize relatively little conduct that most people think should be completely unregulated, and they sometimes reduce punishments even for widely supported offenses. . . . Further, when legislatures leave outdated crimes on the books, other components of democratic process compensate: politically accountable prosecutors rarely prosecute (and thus effectively nullify) many of the crimes scholars complain

overcriminalization is real, it probably does not make much sense to seek its amelioration through choosing between the internal or external approach—simply because there are far more direct measures available.

In any event, whether one supports the external approach or not, one can't help but be impressed by the tremendous service performed by Logan's research and arguments. My hope is that this essay has both shed some further light on the topic of conversation invaluabley provoked by Professor Logan and shown that the case against the external approach is not quite as forceful as it might seem at first blush.

Professor Logan replies to Professor Markel in the Commentary that follows.

The Editors

about.

Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. (forthcoming Fall 2007).