

# WHY SHOULD STATES PAY FOR PRISONS, WHEN LOCAL OFFICIALS DECIDE WHO GOES THERE?

W. David Ball\*

## Abstract

*In the United States, states typically pay for prisons, even though the decisions that lead to prison admissions—arresting, charging, and sentencing—are made by local officials. The practice of state subsidies is relatively recent: there were no state prisons in the early part of the country’s history, and even as state institutions began to be developed, they largely supported themselves financially, rendering the notion of subsidies moot. Given the political economy of local decision-making, local preferences are unlikely to result in optimally-sized state prison populations. This Article suggests that since state prison subsidies may not be desirable and are certainly not inevitable, it may be time for states to reconsider paying for prisons.*

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\* Author’s Note.

## INTRODUCTION

Why does the state typically subsidize prisons,<sup>1</sup> when local actors such as county prosecutors, locally elected judges, sheriffs, and police have so much discretion over who gets sent there? It cannot be that the state simply wants to subsidize local criminal justice efforts, since the state does not also typically subsidize alternative criminal dispositions, such as jail or probation. Given that localities<sup>2</sup> can and do make different decisions from one another about who goes to prison, why does the state pay only for the most expensive outcome (state incarceration) and not cheaper options? Moreover, what does this say about the relationship between state criminal law and local law enforcement? Has the expansion in state penal codes made localities essentially unregulable?

This issue is particularly timely because states nationwide are experimenting with a reducing their role in imprisonment.<sup>3</sup> The most obvious example is California's criminal justice realignment: California's state prisons no longer accept prisoners convicted of non-serious offenses, non-violent offenses, and non-sex offenses, including felonies, prohibited by state law, carrying multi-year sentences.<sup>4</sup> This move has been seen as

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<sup>1</sup> Jail and prison are terms of art. Jail is county incarceration; prison is state incarceration. Jail populations typically include inmates awaiting trial, inmates who have not been charged and are awaiting arraignment before release, those who cannot make bail, probation violators, and inmates serving shorter sentences. Prisons—also called penitentiaries—take inmates sentenced to longer terms, death row, and parole violators. However, there is nothing ironclad about which crimes or sentences must be served in either. In some states, prisoners can serve multi-year jail terms, in some they can only serve a year or less, and in Maryland, the distinction is made between felonies and misdemeanors, even though misdemeanors can require longer sentences than some felony prison sentences. Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 *Clev. St. L. Rev.* 461, 490 (2009) (“In Maryland, the legislature can designate a crime as either a misdemeanor or a felony, *irrespective of the sentence imposed.*”) (emphasis in original).

<sup>2</sup> I tend to use localities and counties interchangeably in this article; however, I note that two states are not divided into counties: Alaska and Louisiana. Alaska is divided into boroughs; Louisiana is divided into parishes. These local units are, however, similar to counties. See <http://quickfacts.census.gov/qfd/index.html>.

<sup>3</sup> In the juvenile context, for example, Texas now requires counties to house low-level juvenile offenders in county detention halls. California has done something similar. However, critics of both California and Texas report that “city and county detention programs are uneven and point out that states often do a poor job of monitoring them.” Solomon Moore, “Missouri System Treats Juvenile Offenders with Lighter Hand, *New York Times*, 3/27/2009.

<sup>4</sup> For an excellent overview of the changes in California, see Rebecca Sullivan Silbert, *Thinking Critically About Realignment in California* (Feb. 2012), available at <http://library.constantcontact.com/download/get/file/1103416365531->

one of the biggest changes in criminal justice in a generation, but lost in this discussion is the fact that the practice of sending local offenders to state facilities at state expense was once itself a seismic change in criminal justice. State provision of and payment for prisons is a relatively recent innovation and one that is in tension with the reality that decisions about prison inputs are made, almost exclusively, at the local level. Given the political economy of these decisions, prison populations are unlikely to reach equilibria through budgetary or political constraints. State-funded prisons are far from inevitable, and possibly far from desirable. It is time for states to reconsider their role in the provision of—and payment for--incarceration.

This Article lays the groundwork for reconfiguring the relationship between state prisons and local law enforcement. It will proceed in three parts. Part I focuses on the political economy of prison admissions. Because decisions about criminal punishment are not aligned with budgetary responsibility for those decisions, and because local agencies can externalize the costs of their policies to the rest of the state—while being politically accountable only to local voters—local policies will not be subjected to meaningful political or economic constraints. Part II examines the historical record in an attempt to understand why, if state subsidies are suboptimal, it is the dominant modality in the United States. There are two answers: the first has to do with the rise of state prisons as an outgrowth of the prison reform movement, and the second with the changing nature of prison labor and its effects on costs. Part III moves back more broadly to explore the state’s role in criminal justice, discussing where it might be essential, where it might be optional, and where it might be not at all desirable.

#### I. THE POLITICAL ECONOMY OF PRISON ADMISSIONS

Decision-making authority in law enforcement and prosecution is overwhelmingly local, yet only some of the budgetary consequences of those decisions are borne at the local level. The costs of imprisonment are generally borne by the state. As a result, not all costs are internalized to local decisionmakers. This model of cost-sharing creates the risk that localities will make decisions that, while fiscally ruinous from the state perspective, are nevertheless affordable to the entities making them.

The problem with trying to harmonize local preferences (or local

utility) with statewide preferences (or statewide utility) is that localities have different opinions about what crime policy should be. Counties<sup>5</sup> acting individually will not make uniform decisions. Counties can have similar levels of crime and respond to that crime in different ways, such as diversion programs, drug and alcohol treatment, probation, and with prison. In the current system, counties which rely on state prisons will be subsidized at the expense of counties using in-county dispositions such as jail and probation. This subsidy would be justified if prison were demonstrably preferable to other kinds of dispositions, but there is no consensus on the value of prison. Given this uncertainty, it does not make sense to subsidize only prison and not other methods of dealing with crime and criminality. This conclusion does not depend on the strong case that prisons are worse than other dispositions—although there is evidence to make such a case. This conclusion is robust even under the weak case that prisons cannot be proven superior: that is, *unless* the superiority of prison can be proven, it should not be subsidized relative to other policy responses. The costs of all criminal justice interventions, prison or not, should, instead, be treated equally.

#### A. *Criminal Justice Is Local*

Criminal law is written at the state level, but it is enforced, prosecuted, and processed at the local level.<sup>6</sup> County and local officials, whether local law enforcement, probation, prosecution, and even judges,<sup>7</sup> have ample opportunity to influence crime and punishment outcomes through various decisions, such as those involving whether to charge “wobbler” offenses as misdemeanors or felonies, whether to suspend sentences or impose probation, whether to divert offenders into drug or mental health treatment, what to charge and what to offer during plea

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<sup>5</sup> For ease of expression, this paper uses the term “county” as a short-hand reference to local administrative units that constitute the locus of decision-making on criminal justice issues, including parishes, districts, and the like.

<sup>6</sup> See, e.g., Mona Lynch, *Mass Incarceration, Legal Change, and Locale*, 10 *Criminol. & Pub. Pol.* 673, 682 (2011) (“[C]riminal justice policy is made and put into action at the municipal, county, state, and national levels, and the thousands of organizations that comprise this criminal justice network are, for the most part, relatively autonomous both horizontally and vertically.”).

<sup>7</sup> The majority of states have some form of judicial election or retention process. See Meryl J. Chertoff, *Trends in Judicial Selection in the States*, 42 *McGeorge L. Rev.* 47, 50 (2010) (“Currently, thirty-two states use contested elections (either partisan or nonpartisan) to pick judges for at least some level of their courts, and twenty-one states elect all judges. Twenty-five additional states utilize the so-called “merit selection” system, in which judges are initially selected by a state’s governor to serve a term in office, and then face the voters in an up-or-down uncontested retention election.”) (internal citations omitted).

bargaining, and even whether to arrest, cite, or prosecute a given offense at all.<sup>8</sup> The state as a whole is, actually, not a whole—the system is made up of many interlocking pieces,<sup>9</sup> with most of the criminal justice decision-making concentrated at the local level.<sup>10</sup>

Local control has, ironically, become more entrenched with the expansion of state penal codes. William Stuntz has written the definitive treatment of why state penal codes expand, arguing that expansive codes do not drive criminal punishment but instead “empower prosecutors, who are the criminal justice system’s real lawmakers.”<sup>11</sup> Legislatures respond to traumatic, well-publicized crimes with largely symbolic statutes—often targeting behavior that is already criminal—in order to send a signal that they understand the scope of the tragedy.<sup>12</sup> The end result is “criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys’ offices and police departments.”<sup>13</sup> These expansive codes mean that it is possible to create multiple criminal charges out of a single event,<sup>14</sup> giving prosecutors bargaining power in their plea negotiations. Because symbolic legislation is cheap, and prosecutorial power is good for legislators, we cannot expect the legislature to curtail the expansion either of law enforcement’s discretion or the criminal code that enables it.<sup>15</sup>

The result is that local decisions drive state prison populations. Mona Lynch has concluded that “[M]uch of the criminal law and policy that resulted in mass incarceration is local at its core, emanating in large part

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<sup>8</sup> Most countries (other than the United States) have mandatory prosecution. See, e.g., Ronald F. Wright and Marc L. Miller, the Worldwide Accountability Deficit for Prosecutors, 67 Wash. & Lee L. Rev. 1587, 1595-96 (2010) (“If the evidence supports a criminal charge, the prosecutor in theory is obliged to file those charges and does not ask if the prosecution is a wise use of limited resources or if it serves appropriate social objectives. Those are questions for other government officials to answer.”).

<sup>9</sup> W. David Ball, E Pluribus Unum: Data and Operations Integration in the California Criminal Justice System, 21 Stan Law & Pol’y Rev. 277 (2010).

<sup>10</sup> Moreover, the options available locally are themselves heterogeneous. A jail in one county might differ from another in a different county in a multitude of ways, such as approaches to discipline, the size and characteristics of the jail population, the availability of rehabilitative services, or even the availability of beds. Even rehabilitative programs differ from one another in their curricula, to whom they are made available, how often they are made available, etc.

<sup>11</sup> William Stuntz, the Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 506 (2001-2002).

<sup>12</sup> Id. at 531-32.

<sup>13</sup> Id. at 509.

<sup>14</sup> Id. at 519.

<sup>15</sup> Id. at 510.

from specific regions of the nation and then diffusing from there.”<sup>16</sup> She goes on to differentiate between “law on the books” and law in action, noting that despite having uniform laws within a state, law in action results in “microlevel variation shaped by local norms and culture related to how the business of criminal justice happens in any given place,”<sup>17</sup> a phenomenon that she describes as “probably the least explored in criminological literature in terms of its contributory role to mass incarceration.”<sup>18</sup> In short, while statutes do not themselves create crowded state prisons, they can enable the localized decisions that lead to them.<sup>19</sup>

### *B. Budgets are Not Aligned with Responsibility*

Criminal justice budgets are not aligned with criminal justice decision-making. The cost of decisions made at the local level is not borne at the local level. The state typically pays for prisons and parole, while the county typically pays for probation, jail, and diversion into drug treatment in lieu of criminal penalties.<sup>20</sup> County policies that result in increased prison usage will be subsidized by the state, while policies that use local resources will not be. The extent to which this disjuncture actually affects decision-making at the margins—whether, say, a judge opts for prison rather than jail on budgetary grounds—remains unclear, and, for this analysis, is beside the point. This Article does not analyze this problem

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<sup>16</sup> Mona Lynch, *Mass Incarceration, Legal Change, and Locale*, 10 *Criminol. & Pub. Pol.* 673, 674 (2011).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 680.

<sup>19</sup> *Id.* at 676 (“Although sentencing statutes have been toughened at the state and federal levels, thereby creating the capacity for mass incarceration, mass incarceration has not been realized without local-level criminal justice actors transforming their daily practices to send more and more offenders away to state penal institutions.”).

See also Franklin E. Zimring & Gordon Hawkins, *The Scale of Imprisonment* 141 (1991) (“While we speak of state prison populations and state imprisonment policies, frequently the power to choose between imprisonment and alternative sanctions and to fix terms of imprisonment is decentralized to the county level. Different areas in some states may have sharply contrasting rates of use of state imprisonment facilities, so that state aggregate rates of imprisonment may represent an amalgam of diverse imprisonment policies. Frequently what is called a state’s imprisonment policy may include elements beyond the short-term control of the executive and administrative powers of state government.”).

<sup>20</sup> States do, of course, vary widely in how their state and local governments are funded, but this variation—and opacity—is actually part of the reason accountability gets lost. In other words, we don’t have a generalizable model about state and county functions and funding, making the analysis of a given state’s prison population dynamics much more complex and much less relatable to the local decisions that underlie, in part, the reasons for changes in population.

along principal-agent lines. Instead, it focuses on the ways in which the budget/decision-making disjuncture affects the resources available within a county. Because prison takes up less room in a local budget, it is a more abundant resource to local decisionmakers, and it will be easier for those decisionmakers to pursue policies that use prison. Policies that use other resources, like probation, will be less abundant and hence harder to pursue. This fiscal limitation distorts local choices by making some policies cheaper than others.<sup>21</sup>

These decisions need not be at all conscious. Suppose, for example, that a municipality decides to pursue a broken windows policing model, wherein minor offenses result in arrest without exception.<sup>22</sup> This decision alone would increase resource usage in other areas. The caseloads of Public Defenders and District Attorneys would increase, and more court time would be used. It is likely that at least some of these new defendants would be found to have violated parole terms or to be guilty of prison-eligible statutes affecting felons (i.e., being an ex-felon in possession of a firearm). The true cost of broken windows policing will be at least partly subsidized by the state (in terms of prison time) without the state's input or control.<sup>23</sup> This means that, in considering whether to pursue a broken windows policy, municipal police need only consider whether they can pay for their

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<sup>21</sup> Franklin E. Zimring & Gordon Hawkins, *The Scale of Imprisonment* 211 (1991) (But these results—indeed, “the rational operation of the system”, “depends on the agency that is to incur the cost of imprisonment also having the power to determine the extent of imprisonment. Violation of this assumption can result in patterns of imprisonment that are anything but cost-effective across all levels of government. Yet the current distribution of prosecutorial, sentencing, and correctional authority in all states violates that assumption to an exorbitant degree.”). Because localities don't pay for prisons, the marginal cost of prison is zero. *Id.* at 211. This means that if there is any benefit (marginal benefit greater than zero), officials are likely to imprison, even when total systemic costs are greater than the marginal benefits. *Id.* at 212.

<sup>22</sup> For an examination of the cost of arrest in a zero tolerance policing context, see Babe Howell, *Broken Lives from Broken Windows: the Hidden Costs of Aggressive Order-Maintenance Policing*, 33 *NYU Rev. of L. & Soc. Change* 271, 280-290 (2009).

<sup>23</sup> Franklin E. Zimring & Gordon Hawkins, *The Scale of Imprisonment* 140 (1991) (“One reason for the passive, almost fatalist, attitude of correctional administrators to forecasting correctional populations ... is the passive role played by correctional administration, and the level of government that sustains it, in regard to the determination of prison and jail populations. From the standpoint of prison administration the problems are a mixture of separation of powers and federalism. Even if jail policy is determined by units of local government, it is not the people who run the jails who fill the jails but rather the police and the judiciary. State prison populations are determined by state legislatures, state and local judges, and local prosecutors. Only rarely are those who administer prisons given any substantial authority to set the terms of imprisonment served by those in their custody.”).

increased staff time, and consider the reputational benefits to themselves.<sup>24</sup> They need not think about whether they can afford the downstream costs of their policy—more court time, staff time from other agencies, and carceral resources—because that budget’s relationship to their own is so attenuated.<sup>25</sup>

Zimring and Hawkins observed one possible effect of the state prison subsidy, noting that (county-funded) jail populations increased 83% during a period (1970-87) when (state-funded) prison populations increased 192%.<sup>26</sup> Under the present system, a bloated state prison system can actually benefit counties by providing them money-making opportunities to lease local beds to overcrowded prison systems.<sup>27</sup> Many states pay local facilities to house state prisoners. Half of Louisiana’s state inmates are housed in local (parish) jails; the sheriffs receive a per diem to hold state prisoners.<sup>28</sup> Federal prisoners can also generate revenue,<sup>29</sup> and as far back as the late 19<sup>th</sup> century, before the creation of the first federal prisons, federal prisoners were a significant source of revenue to states that housed them.<sup>30</sup>

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<sup>24</sup> For an example of how this might distort a District Attorney’s perspective, see Steven Mayer, the Bakersfield Californian, Kern DA Measures Success by the Number Sent to Prison, 10/11/2008 (“We tend to measure our performance by the per capita prison commitment rate,” [Kern County District Attorney Ed] Jagels said. “We’ve always been at the top until the last three years.”).

<sup>25</sup> It is somewhat related, however. Some state tax revenue from the municipality will undoubtedly pay for some of the costs, but the link is so attenuated that it will fail to send transparent signals—or the attendant political accountability—to the populace about local decisions.

<sup>26</sup> Franklin E. Zimring & Gordon Hawkins, *The Scale of Imprisonment* 211 (1991) (internal citations omitted). Of course, Zimring and Hawkins do not claim that all demand for prison beds is economically based, nor that demand is essentially limitless. Some demand depends on individual views of actors in the system and how are limited by the human costs of imprisonment. *Id.* at 214-15.

<sup>27</sup> A cautionary note: state budgets are *sui generis*. There are no clear rules about how states fund localities in general, how they raise taxes, which programs are administered by the state or subsidized by it, and the like. But as long as there is some disjuncture between decision-making authority and budgetary responsibility, there will be distortions.

<sup>28</sup> Campbell Robertson, “Sheriff Wants a Big Jail in New Orleans, but City Balks”, *New York Times*, 2/17/2011.

<sup>29</sup> Ken McLaughlin, Santa Clara County’s Lucrative Jail Business Takes a Hit, *San Jose Mercury News*, 12/05/09 (Quoting the chief of the Santa Clara County Department of Corrections saying “To be quite honest I’d prefer not to have federal and state prisoners and inmates from other counties,” he [Edward Flores] said. But he and other county officials emphasize that the revenue-generating inmates—who in March accounted for nearly 10 percent of the jail population—have become an economic necessity in a world of tight county budgets.”).

<sup>30</sup> Blake McKelvey, *American Prisons: A Study in American Social History* Prior to

*C. Localities Disagree On Criminal Justice Policies*

Across states, but particularly in populous states, localities tend to use criminal justice resources at varying rates. These differences are not dictated by crime rates or by statute; rather, they reflect local policy preferences and norms. These local policy choices have aggregated themselves into statewide problems, but the complexity of the system serves to insulate decision makers from accountability and obscure their contributions to prison population increases.<sup>31</sup>

It is worth emphasizing that prison usage at the local level is not necessarily dictated by underlying differences in the reported violent crime rate. In a prior work, I examined ten years of California data from 2000-09 and concluded that, while there was great variation in California counties' usage of prison, this variation was not due to differences in underlying violent crime rates: reported violent crime rates explained only three percent of the variance in new felon admissions.<sup>32</sup> Moreover, the group of California counties with the highest rates of prison usage had below-average reported violent crime rates, and individual counties with similar violent crime rates had radically different rates of prison usage.<sup>33</sup> Although I do not claim that California is typical, this data at least proves that a crime/prison linkage is not necessary,<sup>34</sup> and it suggests that there is a large amount of prison usage that can be explained by county choices. In other words, counties choose prison. They do not have prison thrust upon them.

Other studies also underscore the extent of local policy differences within states. A study of the Illinois death penalty found that “the counties

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1915 (1936, paperback edition 1972), 154.

<sup>31</sup> See, generally, Mona Lynch, *Mass Incarceration, Legal Change, and Locale*, 10 *Criminol. & Pub. Pol.* 673 (2011).

<sup>32</sup> W. David Ball, *Tough on Crime (On the State's Dime)*, 28 *Ga. St. L. Rev.* 987, 1020 (2012).

<sup>33</sup> *Id.* at 1023. For example, from 2000-2009, Fresno County and San Francisco County had similar population sizes. Even though San Francisco suffered from greater levels of violent crime, Fresno sent 2½ to 7 times as many people to prison each year, and had between 2 and 3 times the number of people in prison. Other pairs of counties demonstrate similar disjunctures. *Id.* at 995 n27.

<sup>34</sup> This empirical analysis does not address a second objection—that crime might, in fact, be the result of policies, not simply an exogenous phenomenon. For alternative explanations, see, e.g., John F. Pfaff, *The Macro and Micro Causes of Prison Growth*, 28 *Ga. St. L. Rev.* 1239, 1254 (2012) (concluding that “Prison growth has been driven by admissions, and at least since the early 1990s admissions have been driven by prosecutorial filing decisions.”).

with the most murders are not the counties most likely to declare a case capital.”<sup>35</sup> In California, three counties accounted for 83% of death sentences in 2009.<sup>36</sup> Nationwide, “1% of counties account[] for roughly 44% of all death sentences.”<sup>37</sup> Counties in California have shown differences in the rates at which they file juvenile cases directly in adult courses,<sup>38</sup> and differences in the way in which they charge and file offenses eligible to be sentenced under the “three strikes” law.<sup>39</sup> The point of these examples is to illustrate what to most readers will seem axiomatic. In all states—but particularly in heavily populated, heterogeneous states—there will be parts of the state that tend to favor more rehabilitation and parts that are more punitive. Only the choices favoring prison, however, will be subsidized by the entire state.

Democratic checks provide no solution to the heterogeneity problem, given that elections of law enforcement (including District Attorneys) are overwhelmingly local. Local officials might, in fact, be keenly attuned to local needs, and, more importantly, they are more accountable to their local constituents than, say the state secretary of

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<sup>35</sup> Leigh B. Bienen, Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Saliency for Issues of Cost, 100 J. L. Crim. & Criminol. 1301, 1331 (2010).

<sup>36</sup> Natasha Minsker et. al, Death in Decline '09, ACLU of Nor. Cal. 3/29/2010, at i, available at [https://www.aclunc.org/docs/criminal\\_justice/death\\_penalty/death\\_in\\_decline\\_09.pdf](https://www.aclunc.org/docs/criminal_justice/death_penalty/death_in_decline_09.pdf). See also Romy Ganschow, Death by Geography: A County by County Analysis of the Road to Execution in California, ACLU of Nor. Cal., available at [https://www.aclunc.org/docs/criminal\\_justice/death\\_penalty/death\\_by\\_geography/death\\_by\\_geography.pdf](https://www.aclunc.org/docs/criminal_justice/death_penalty/death_by_geography/death_by_geography.pdf).

<sup>37</sup> Robert J. Smith, the Geography of the Death Penalty and Its Ramifications, 92 B.U. L. Rev. 227, 233 (2012).

<sup>38</sup> Selena Teji & Mike Males, An Analysis of Direct Adult Criminal Court Filing 2003-2009: What has been the Effect of Proposition 21 (August 2011), available at [http://www.cjcj.org/files/What\\_has\\_been\\_the\\_effect\\_of\\_Prop\\_21.pdf](http://www.cjcj.org/files/What_has_been_the_effect_of_Prop_21.pdf) (noting disparities in direct-filing). The study concludes that “[P]rosecutor predilection towards direct-filing is not founded upon any demonstrable effect of reducing juvenile crime rates.” *Id.* at 5. Instead, the authors suggest, the issue is affected by issues of who pays for incarceration. The costs of incarcerating youth convicted in adult courts are borne by the state. “The data analysis suggests that direct adult criminal court filing is being disproportionately used by prosecutors from state-dependent, high direct filing counties .... These youth, if convicted and sentenced to confinement, are housed in state youth correctional facilities. If a youth is confined at DJF [Division of Juvenile Facilities] as a result of an adult court commitment, the county is not charged by DJF through its sliding scale system.” *Id.* at 8.

<sup>39</sup> See Elsa Y. Chen, In the Furtherance of Justice, Injustice, or Both? A Multilevel Analysis of Courtroom Context and the Implementation of Three Strikes, Justice Q. 1, 20 (2012) (finding, inter alia, that “[p]olitical conservatism appears to influence the extent to which the law is implemented....”).

corrections is. But residents of other counties in the state who might disagree with a given county's policies have no say in selecting the officials who make them, even though they will pay for the outcome of policies resulting in state imprisonment. State residents can vote only for their local DA,<sup>40</sup> their local sheriff, and their local judges. They can serve only on their own county's juries. They vote only for their own mayors and city councilmembers who, in turn, who hire local law enforcement and corrections officials.<sup>41</sup> A resident of one county who disagrees—and does not wish to pay for—the policies of another county has one only option: to move to that county, register to vote, and vote against the current crop of policymakers. Without political accountability to the state as a whole, and without full budgetary accountability to the local population, local policymakers are free to deviate from statewide norms: they can please their constituents without requiring them to bear the full cost of their choices, and without fear of ballot box reprisals from those outside the county.

#### *D. There is No Right Answer*

Local variance would be less of a problem if there were a right answer—or even a working consensus—on how to deal with crime. If we agreed on how best to respond to crime, states could simply subsidize what works and make the counties pay for everything else. If state prison were the most effective means of promoting public safety, then prison subsidies would make sense. We could live with the fact that counties picking the wrong policies were being penalized. But until we can agree—or prove—the wisdom of one approach or another, we should not subsidize one set of policy preferences over another.

The argument against state prison subsidies, then, does not depend on proving that prisons are an inefficient use of resources—even though there is substantial evidence to support that claim.<sup>42</sup> Instead, it turns on the

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<sup>40</sup> Note that DA's are not elected in all states. Alaska, Connecticut, and New Jersey have state appointments of local DA's. <http://www.ndaa.org/index.html>.

<sup>41</sup> Of course, they vote for the representatives who write the statutes, but the statutes themselves grant so much discretion that how they are written is less important than how they are enforced.

<sup>42</sup> One study's authors, upon reviewing "the best available evidence", were "persuaded that *prisons do not reduce recidivism more than noncustodial sanctions*." Francis T. Cullen, Cheryl Lero Johnson, & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 *Pris. J.* 48S, 50S (2011) (emphasis in original). The problem with current studies is that most estimates of incapacitation "rig the data in favor of finding such an [incapacitation] effect. This is because they compare how many crimes are prevented if offenders are locked up as compared with *doing nothing to them*. Of

more modest argument—that **unless** we can make the case that prisons are better than all the other options, we shouldn't be subsidizing their use.

People can and do disagree about the most effective means of promoting public safety. If society does not agree on which policies are best, variation becomes a virtue. Localities can experiment and find out what works. A high-prison-use county<sup>43</sup> might be right about incarceration working. If so, it should reap the benefits. If a low-prison-use county is right about probation, it should reap the benefits. But neither county should have to bear the costs of the other's mistakes, nor should there be a thumb on the scale in favor of one or the other. The policies should have to prove their worth, not have their worth assumed by the state. As long as there is substantial decision-making authority vested at the county and local level—and there is—costs and benefits should be aligned with that authority. Otherwise, bad policies—whatever they end up being—can be overfunded and good policies underfunded.

Moving beyond the cost-benefit framework, one must consider the normative elements to society's response to crime. Even if we agreed on which interventions reduced crime and by how much, we might still disagree about whether, normatively, expenditures on these interventions would be worth it.<sup>44</sup> Perhaps prison usage is partly a means of expressing values, and we lack consensus on how much condemnation a given crime deserves, or how much we are willing to pay to express that condemnation. If punishment is partly an expression of values, though, such expression makes a stronger, not weaker, case for localism and local payment.<sup>45</sup>

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course, this comparison makes no sense because the alternative to imprisonment would be some noncustodial penalty.” *Id.* at 51S (internal citations omitted). Indeed, prison has variable effects, “leading some categories of offenders to recidivate less often,” but, for others, “prison might not simply be null but iatrogenic; that is, prisons might have a criminogenic effect on those who experience it.” *Id.* at 50-51S. The authors conclude that “The era of mass imprisonment has taken over corrections *even though nobody has had a firm idea of whether placing offenders behind bars makes them more or less likely to recidivate.*” *Id.* at 59S (emphasis in original).

<sup>43</sup> Usage is, of course, relative, and saying that a county uses a “high” rate of prison necessarily involves judgments about what a “normal” usage of prison is. I have dealt with this issue in a prior article, where I defined “high use” counties as those which were in the top quartile of state prison-to-crime ratios more than 7 of 10 years. W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—and Why It Should*, 28 *Ga. St. L. Rev.* 987, 1014 (2012).

<sup>44</sup> See W. David Ball, *Normative Elements of Parole Risk*, 22 *Stan. Law & Pol'y Rev.* 395 (2011).

<sup>45</sup> See, generally, Stephanos Bibas, *The Machinery of Criminal Justice* 4-16 (2012) (discussing the how early criminal justice in the United States was local in nature).

Paying to vindicate one's own values demonstrates how sincerely those values are held, while forcing someone to support the expression of a sentiment they do not themselves believe only weakens the expressive value of that sentiment.

## II. WHY DO WE HAVE STATE-FUNDED PRISONS?

If state prison subsidies do not make sense from a political economy perspective, then why (and how) did most states in the country end up with that system?<sup>46</sup> An examination of the historical record suggests that such a system is neither inevitable nor necessary. State prisons themselves are just one way of managing incarceration, and even if centralized prisons were necessary, there is nothing necessary about the state funding prison admissions without any conditions attached.

A brief survey of the history yields three salient points. First, there were no state prisons at the time of the country's founding—not all punishment was carceral, and any punishment involving incarceration was local. Second, the move towards greater state provision and control of incarceration in the middle of the 19<sup>th</sup> century was motivated by a desire for professionalism and programming in prisons. Local jails were seen as chaotic places without hope of reforming inmates; longer terms in state prisons were necessary to provide wardens and their staffs more time to reform the individuals in their care. Third, and most crucially, the question of state control and state funding were, at least initially, different questions: the use of prison labor helped to offset the costs of imprisonment. In some areas, in fact, localities were reluctant to send sentenced prisoners to the state, preferring instead to use valuable prison labor to build roads or to earn money through leases to private industry.

Two hundred years of history does not readily lend itself to accurate and brief summary, and states are and have always been different in their approaches to incarceration. As such, the analysis that follows is

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<sup>46</sup> In the words of one observer:

No matter how empathetic one may be to the reformers' impulse to find a substitute for garroting the condemned, the fundamental question still remains: why invent a system of incarceration, why substitute confinement in segregated spaces and design a routine of bell-ringing punctuality and steady labor? Why channel the impulse to do good into creating something as strange as the prison, a system that, over 150 years later, can still prompt an inmate to want to meet the man who dreamed it all up, convinced that he must have been born on Mars?

David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *The Oxford History of the Prison* 115 (Norval Morris & David J. Rothman, eds., 1998).

abbreviated and will involve some rounding of edges. Nevertheless, one can at least see from the history that the current, dominant mode of states paying for prison has not always been the case, was not predestined either by policy or by our legal system, and that the initial drive towards a greater state role rests on assumptions and penal goals that do not have wide purchase today.

This section proceeds in two parts. Part A discusses the rise of incarceration in the United States from the time of the founding through roughly the middle of the 19<sup>th</sup> century, when local imprisonment was only gradually replaced (if at all) by state monitoring and control. Part B discusses the economic considerations of the state-local arrangement, discussing three subtopics: prison labor, the case of Southern county chain gangs, and the Pennsylvania experience. Economic arrangements between state and local governments have varied based on the cost (and benefit) of prisons, and suggests that states might not have minded taking on responsibility for prisoners in the 19<sup>th</sup> century because they could either hope to make a profit from them or at least mitigate some of the costs of housing them.

#### *A. The Development of State Prisons*

Given the current size and scale of state prisons in the United States, it seems strange to consider that at the time of the country's founding, prison was not the default punishment, that incarceration (when it was imposed) was local, and that state control of imprisonment was minimal. By the middle of the 19<sup>th</sup> century, however, prison was the norm, at least in the states outside the Confederacy.<sup>47</sup> This subpart explores the development of state prisons. Though incarceration was unusual at the time of the founding, it quickly became an alternative to capital punishment. Incarceration was imposed mostly in jails, which were administered locally with minimal state oversight. Gradually, local experiments with prison labor and the organization of prison populations in Pennsylvania and New York began to be reproduced in other states, and a new consensus—again, outside the South—about treatment, professionalism, and robust state oversight began to coalesce in the mid- to late-19<sup>th</sup> century. In the South,

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<sup>47</sup> See, e.g., Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* 54 (1927, 1968 ed.) (“[A]t the beginning of the eighteenth century prison was unusual, except as applied to political and religious offenders and to debtors, though there can be no doubt that it was at that time occasionally employed in the punishment of criminals; and that before the middle of the nineteenth century it was the conventional method of punishing crime in both Europe and America.”).

meanwhile, “convict leasing” meant that prisoners were largely sentenced to hard labor under the control of private contractors. Because the Southern experience so closely aligns with prison labor, it will be discussed in Subpart B, *infra*.

At the time of the founding, jails served as places of incarceration, but jails were not necessarily used for punishment. In early Pennsylvania, for example, jails were for political and religious offenders as well as debtors, and workhouses “were employed almost solely to repress vagrants and paupers and were not open to the reception of felons.”<sup>48</sup> By the early 18<sup>th</sup> century, “fines and corporal punishment were substituted for imprisonment as the typical mode of punishment.”<sup>49</sup> In 1775, on the eve of the formation of the United States, Pennsylvania saw “little or no imprisonment as a normal punishment for crimes.”<sup>50</sup> Instead,

Felonies were almost exclusively punished by death and the lesser offenses by fines or brutal forms of corporal punishment, such as whipping, branding, mutilating, and exposure in the stocks and pillory. There was no unified state prison system. The local county and municipal jails were the typical penal institutions of the period. In them there was no classification or separation of convicts on any basis.<sup>51</sup>

The same was true for the rest of the country as well—carceral sentences were rare, and jails were reserved for debtors and those awaiting trial.<sup>52</sup>

Jails at the founding were, of course, based in part on English jails. In England as well, incarceration was not the default disposition for criminal offenders. While England imposed prison sentences for witchcraft and theft in antiquity, the most common penalties for other crimes in that era were mutilation, death, exile, and compensation.<sup>53</sup> These punishments were mostly decentralized until the reign of Henry II (1154-89)—the Tower of London was the first royal prison, holding the king’s enemies.<sup>54</sup> In the

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<sup>48</sup> *Id.* at 54.

<sup>49</sup> *Id.* at 57.

<sup>50</sup> *Id.* at 72.

<sup>51</sup> *Id.* at 72-73.

<sup>52</sup> David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *The Oxford History of the Prison* 101 (Norval Morris & David J. Rothman, eds., 1998) (There were many punishments for crimes, but “What was not on the list was imprisonment. The local jails held men (and it was almost always men) ... awaiting trial or convicted but not yet punished, or men who were in debt without having satisfied their obligations.”).

<sup>53</sup> Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, in *The Oxford History of the Prison* 31 (Norval Morris & David J. Rothman, eds., 1998).

<sup>54</sup> *Id.*

18<sup>th</sup> century England continued to punish most offenders with “whipping, the pillory, and the gallows.... People were confined while awaiting trial or the execution of a sentence. Only a small minority were actually imprisoned as punishment, usually for such minor offenses as vagrancy.”<sup>55</sup>

These early jails were profitable to those who administered them. Starting with the reign of Henry II, the rights to operate jails were sold to operators who profited by the difference between the cost of running the prison and the allocation given the operator.<sup>56</sup> Jails charged fees to prisoners: iron fees, for example, were those a prisoner paid to avoid being in shackles during his or her time in jail.<sup>57</sup> Jailers were expected to earn their income from these fees, a practice that continued into the 18<sup>th</sup> century in England.<sup>58</sup>

As part of a number of post-revolutionary changes, the United States changed its approach to criminal punishment away from English colonial practices. While the country initially relied on capital punishment,<sup>59</sup> states soon began to experiment with incarceration as a substitute, with the first experiments taking place in Pennsylvania. In the late 18<sup>th</sup> century, the Quakers were influential in moving the state from corporal (and capital) punishment towards imprisonment; it is against this backdrop that the

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<sup>55</sup> Randall McGowen, *The Well-Ordered Prison, England 1780-1865*, in *The Oxford History of the Prison* 72 (Norval Morris & David J. Rothman, eds., 1998).

<sup>56</sup> Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, in *The Oxford History of the Prison* 31 (Norval Morris & David J. Rothman, eds., 1998).

<sup>57</sup> *Id.* at 32. The fee-paying in criminal justice extended well beyond imprisonment: crime victims were also expected to bear all the costs of prosecution. George Fisher, *The Birth of the Prison Retold*, 104 *Yale L.J.* 1235, 1248 (1995).

<sup>58</sup> Randall McGowen, *The Well-Ordered Prison, England 1780-1865*, in *The Oxford History of the Prison* 74 (Norval Morris & David J. Rothman, eds., 1998) (“Prisons were largely self-financing operations, and the jailer was supposed to derive his income from the fees owed by prisoners for various legal services. In addition, the jailers enjoyed the profits from whatever commercial opportunities they could organize. They might collect fees from visitors, charge for bedding, or benefit from the sale of beer in the prison. In the larger prisons the office was so lucrative that it was widely sought after.”).

The English prison reformer John Howard was particularly outraged when he found an acquitted man behind bars because he could not pay jailers’ fees, leading him to write the *State of Prisons in England and Wales in 1777*, a book that has been credited with “making the prison the center of focus, shifting all other forms of punishment to the margins” and sparking the passage of the Penitentiary Act of 1779. *Id.* at 79.

<sup>59</sup> David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *The Oxford History of the Prison* 102 (Norval Morris & David J. Rothman, eds., 1998) (“In effect, capital punishment had to compensate for all the weaknesses in the criminal justice system, which is why capital crimes were defined so very broadly.... [T]he recidivist, whether a pickpocket, horse thief, or counterfeiter, might well find himself mounting the gallows.”).

Walnut Street Jail was established in Philadelphia.<sup>60</sup> The Walnut Street Jail has been described as a “semi-state prison:”<sup>61</sup> though it was used to house state prisoners alongside local jail populations,<sup>62</sup> it was not part of a broader system. The development of a statewide system would come about only as a result of overcrowding at the Walnut Street Jail.<sup>63</sup>

Gradually, other institutions began to emerge, coalescing in the early part of the 19<sup>th</sup> century around two models: the Pennsylvania system, developed at the Eastern State Penitentiary, which involved total isolation of inmates while they worked and slept, and the Auburn system (named after the Auburn State Penitentiary in New York), which involved inmates working together (congregate labor) before returning alone to their cells at night. Both of these prisons were nominally state institutions, in that they had the word “state” in their names, but they were not, in a “thick” sense, state institutions. They were not administered by state officials, these officials were not paid by the state, and the officials did not implement policies drawn up at the state level. California provides perhaps the most extreme example of how “thin” the concept of the state prison system in the mid-19<sup>th</sup> century could be: there, the state prison was established by legislative fiat, with an act at statehood that announced that all six county jails in the state were henceforth “declared to be a State prison until such time as the State should build one.”<sup>64</sup>

Evidence of how prisons operated in the mid-19<sup>th</sup> century comes from the monumental 1867 study by E.C. Wines & Theodore W. Dwight, *Report on the Prisons and Reformatories of the United States and Canada*, described as “the most thorough account of the nation’s prisons in the post-

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<sup>60</sup> G. de Beaumont & A. de Toqueville, *On the Penitentiary System in the United States, and Its Application in France* 1 (Francis Lieber trans., 1833).

<sup>61</sup> Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* 3 (1927, 1968 ed.).

<sup>62</sup> LeRoy B. DePuy, *The Walnut Street Prison: Pennsylvania’s First Penitentiary*, 18 Pa. Hist. 130, 136 (Apr. 1951).

<sup>63</sup> Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* 116 (1927, 1968 ed.) (The move towards incarceration “did not bring about the immediate establishment of a state prison system. Rather the attempt was made to use the Philadelphia county and city jail as a substitute for a state prison until by the growth of population and the consequent increase in the numbers of the delinquent classes, the commonwealth was literally crowded out of the jail system and into a system of state penitentiaries.”). Due to overcrowding and decline, the Walnut Street jail reverted to an ordinary jail in the 1820’s. LeRoy B. DePuy, *The Walnut Street Prison: Pennsylvania’s First Penitentiary*, 18 Pa. Hist. 130, 132 (Apr. 1951).

<sup>64</sup> Bonnie L. Petry & Michael Burgess, *San Quentin: The Evolution of a State Prison* 8 (2005).

Civil War era”.<sup>65</sup> Wines and Dwight sent out a voluminous survey to officials<sup>66</sup> and followed this with in-person visits.

Wines and Dwight had one superseding demand for reform: a central state authority. They considered “the creation of a central authority, having general powers of discretion and control, absolutely essential,”<sup>67</sup> an authority that was lacking in all states.<sup>68</sup> Without such an authority, different institutions administered by different levels of government could not coordinate the placement and treatment of prisoners, a situation which they described as a “sore evil.”<sup>69</sup> Only New York and Massachusetts succeeded in even examining all the prisons of the state, but even where there were inspections, prison boards were “little more than advisory” with “no power of enforcement. In effect, the administration of the prisons was left to individual superintendents.”<sup>70</sup> Not until 1901 did New York combine oversight of prisons and prison industries “into one commission with full authority to appoint and remove officers of state institutions, to order transfers or new construction in both state and local institutions, and to manage industries.”<sup>71</sup> Compounding the problem was the fact that prisons were run by political appointees, which meant both high turnover of management and a lack of qualifications. As Wines and Dwight put it, “[T]he radical defect of the prison systems in most of the states of the

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<sup>65</sup> David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *The Oxford History of the Prison* 111 (Norval Morris & David J. Rothman, eds., 1998).

<sup>66</sup> E.C. Wines & Theodore W. Dwight, *Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867* at 19-36 (1867) (listing the 430 questions in interrogatories to prison officials about prison control, central authority, staff, their qualifications, discipline, religion, education, hygiene, prison labor, sentence lengths, race, and costs, among many other subjects.). Jail officials were sent a mere 102 questions. *Id.* at 36-39.

<sup>67</sup> E.C. Wines & Theodore W. Dwight, *Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867* at 83 (1867).

<sup>68</sup> *Id.* at 77.

<sup>69</sup> *Id.* at 335. (“The reform which would crown, and give efficiency to, all the others is a central authority of some kind, having the general oversight and control of the entire prison system of the state.... The state prisons are controlled and governed by state authority; the common jails and houses of correction, where such exist, by whatever name called, are directed by the counties; while the city prison is superintended and managed by the city itself. These various departments of administration in the several states being almost as independent of each other as the states themselves, it results that they hardly ever act either uniformly or simultaneously.... This is a sore evil.”)

<sup>70</sup> Edgardo Rotman, *The Failure of Reform, United States 1865-1965*, in *The Oxford History of the Prison* 153 (Norval Morris & David J. Rothman, eds., 1998).

<sup>71</sup> Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 127.

American Union ... lies in political appointments and the inevitably resulting consequence, brevity and uncertainty in the tenure of official position in our state penitentiaries.”<sup>72</sup> State prisons, then, were run as local fiefs, by politically appointed wardens pursuing independent policies.<sup>73</sup>

In addition to coordination, Wines and Dwight saw two advantages to centralization. First, local jails were generally seen as horrible, criminogenic places. Reformers mistrusted jails and thought they were counterproductive. Wines and Dwight described local jails as “but public schools, maintained at the expense of the community, for the encouragement of vice, and for providing an unbroken succession of thieves, burglars, and profligates....”<sup>74</sup>

Second, though it may seem incredible to the contemporary reader, reformers believed that state carceral institutions were the best hope for reforming prisoners. The use of medical metaphors (e.g., curing one of criminal tendencies) was widely used to support the imposition of indeterminate sentences—that is, sentences that terminated in a discretionary release into parole. Zebulon Brockway, a famous warden at Elmira State Reformatory in New York,<sup>75</sup> once noted that it would be foolish to tell a doctor that a patient had to stay in the hospital for a certain number of days and then force the patient to be released whether or not she had gotten well. The same was true for prisoners.<sup>76</sup> Brockway wanted longer sentences in state facilities—or at least the option for him to keep

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<sup>72</sup> E.C. Wines & Theodore W. Dwight, Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867 at 127 (1867).

<sup>73</sup> Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 44-45.

<sup>74</sup> *Id.* at 67. They described their visit to the jail in Jefferson City, Missouri, for example, “with mingled feelings of horror and disgust.” *Id.* at 319. Even the jails in their home state of New York were “in a deplorable condition; utterly unworthy of our civilization, and of the renown and fame we have acquired among our sister states and the nations of the world.” *Id.* at 321. Jails had no programming: there was no education, no work, and no religion. *Id.* at 317. Many confined in vermin-infested cells were later determined to be innocent. *Id.* at 317-18. Wines and Dwight were not alone in this estimation. In general, the reform movement pushed for state supervision and control, “chiefly because of the irresponsibility of the counties.” Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 210.

<sup>75</sup> E.C. Wines & Theodore W. Dwight, Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867 at 67-68 (1867).

<sup>76</sup> James J. Beha II, *Redemption to Reform: the Intellectual Origins of the Prison Reform Movement*, 63 *N.Y.U. Ann. Surv. Am. L.* 773, 796 (2007-2008).

prisoners longer—because he could do more to reform prisoners the longer they were in his care. These longer sentences were not meant for punishment, but for rehabilitation.<sup>77</sup> This view was later endorsed by the Model Penal Code in its definition of felony: local jails lacked the ability to reform prisoners,<sup>78</sup> and at least a year was needed for treatment,<sup>79</sup> so more serious offenses needed longer sentences in the more professionally administered state facilities.

To implement a reformatory, medicalized system, prisoners needed to be classified. Indeed, this was one of the problems with jails: the commingling of the young and old, sentenced and not sentenced, men and women.<sup>80</sup> But classification, Wines and Dwight argued, required the state to be at the helm. Under the current system of “separate local jurisdictions,” classification was “impossible”: it could “neither be established nor worked otherwise than by combined action and a general administration.”<sup>81</sup> Analyzing the relationship between medical models of criminality, the use of classification, and the influence of social science on the prison reform movement is beyond the scope of this paper and would duplicate the excellent treatment it has already received from Professor Will Tress,<sup>82</sup> but I note only that these forces drove the creation of state-administered, professional, treatment-oriented prisons.

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<sup>77</sup> E.C. Wines & Theodore W. Dwight, Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867 at 65-66 (1867).

<sup>78</sup> Will Tress, Unintended Collateral Consequences: Defining Felony in the Early American Republic, 57 Clev. St. L. Rev. 461, 484 (2009) (“Because jails lacked the reformatory programs of the state prisons, the revisors [sic] stipulated that no imprisonment in a county jail would exceed one year. This made a sentence of more than one year and a sentence of incarceration in the penitentiary equivalent—an automatic sentence. Eventually, some jurisdictions used the ‘more than one year’ length of sentence instead of the place of incarceration to define felony, and this became the definition used in the *Model Penal Code*.”).

<sup>79</sup> Id. at 487 (citing Am. Law Inst., Model Penal Code 23 (Council Draft No. 1, 1953) (MPC commentaries say that a year was needed “to apply any substantial program of treatment.”).

<sup>80</sup> E.C. Wines & Theodore W. Dwight, Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867 at 316 (1867) (internal citations omitted).

<sup>81</sup> Id. at 116.

<sup>82</sup> Will Tress, Unintended Collateral Consequences: Defining Felony in the Early American Republic, 57 Clev. St. L. Rev. 461 (2009). See also Edgardo Rotman, The Failure of Reform, United States 1865-1965, in *The Oxford History of the Prison* 154 (Norval Morris & David J. Rothman, eds., 1998) (describing Wines as a “new type of professional penologist, interested in behavioral methodologies and scientific data but not without religious zeal.”).

It is worth emphasizing Tress's central point, however: the notion of "serious" crimes that require treatment in prison and less serious crimes that do not require prison cannot simply be mapped on to our contemporary notions of felony and misdemeanor. Indeed, the notion of felony and misdemeanor classification itself comes from the 19<sup>th</sup> century reform movement, not before. There is nothing inherent about the word felony that requires a felon to serve time in a state institution, and classification of prisoners was, in fact, unknown until mid-nineteenth-century prison reforms took hold. Felony is now, generally, taken to mean crimes punished by sentences of more than one year, with time served in state prison, but this doctrine developed haphazardly and is as much a result of New York's definition in 1829 in its revised penal code—and its leadership in penology—as anything else.<sup>83</sup> Even this definition of felony, however, was tied up in the concept of moral reformation and the return of the citizen to society.<sup>84</sup> At least as late as 1823, more than a generation after the ratification of the constitution, one treatise author wrote that it was "it is impossible to know precisely in what sense we are to understand this word [felony]."<sup>85</sup>

### *B. Economic Considerations*

The United States now finds itself in an era where the cost of state prisons is both extremely large and politically salient. Details about the rise in incarceration and its attendant expense have been amply documented elsewhere. This Part attempts to address one question: if state subsidies were, indeed, not the result of considered policy and were, instead, simply path-dependent outcomes, why did no one notice it before now?

Zimring and Hawkins, who originally coined the term "correctional free lunch" in their 1991 book *the Scale of Imprisonment*,<sup>86</sup> suggested that the answer lay in the scale of imprisonment. The relatively stable size of

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<sup>83</sup> Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 *Clev. St. L. Rev.* 461 (2009).

<sup>84</sup> *Id.* at 462-63.

<sup>85</sup> *Id.* at 465.

<sup>86</sup> Franklin E. Zimring & Gordon Hawkins, *The Scale of Imprisonment* 140 (1991) ("It is likely that some tension is generated by the fact that the level of government that is responsible for paying the bills for the upkeep of prisons does not make decisions about the numbers of persons sent to prison or the length of their stay there. To judges and prosecutors imprisonment may seem to be available as a free good or service or at least may be viewed as the subject of a major state government subsidy. This phenomenon, which we call the 'correctional free lunch' ....").

the prison population meant that costs weren't really much of an issue until the prison population exploded starting in the 1970s.<sup>87</sup> While scale is certainly a factor, it does not completely explain the phenomenon. This Part argues that the cost structure of prisons has also changed significantly due to the reduced value and/or phasing out of prison labor,<sup>88</sup> meaning that prisons have also gotten more expensive, not just larger.

Southern states used the convict leasing system to avoid any state financial responsibility for prisoners.<sup>89</sup> Originally designed as a means of minimizing the cost of prisons and prisoners, convict leasing instead became a source of revenue for Southern states and an engine of economic development. Outside the South, prison labor was also endorsed, but for a different reason: reformers saw prison labor as a crucial component of rehabilitation. Wines and Dwight, for example, pointed out that prison labor was both fiscally prudent and penologically sound,<sup>90</sup> and de Beaumont and de Toqueville, sent by the French government to study American prisons,<sup>91</sup> agreed.<sup>92</sup> The moral component of not draining the public fisc

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<sup>87</sup> *Id.* at 141 (“One reason why the existing pattern of fiscal responsibility went unaltered and unchallenged was that until recently the states were not overwhelmed with prisoners.”).

<sup>88</sup> Zimring and Hawkins discuss Rusche and Kirchheimer’s theory about the relationship between free labor/modes of production and the need to absorb it via prisons, see *id.* at 6-10, but this discussion centers on population, not budgetary concerns. Hawkins gives the subject of prison labor a fuller treatment in *Prison Labor and Prison Industries*, 5 *Crime and Justice* 85 (1983), where he argues that prison labor should once again be deployed, *id.* at 86, but his economic analysis is again focused on how the economics of society affects prison policies—not on the economics of prison policy itself—though he does mention the cost-offsetting value of prison labor later in the article. *Id.* at 98, 115.

<sup>89</sup> See, generally, Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* (1996).

<sup>90</sup> “The element of hard labor in the sentence is the dictate at once of justice and policy: of justice, because it is right that criminals, who have put the state to more or less expense, should do something towards defraying the public cost of their crimes; of policy, because work is an essential condition of the prisoner’s reformation; and reformation, so far as this class of persons is concerned, is the great interest of the state.” E.C. Wines & Theodore W. Dwight, *Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867* at 248 (1867).

<sup>91</sup> *Democracy in America*, the book for which de Toqueville is most famous, was just a spin-off of his trip to study American prisons. David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *The Oxford History of the Prison* 100 (Norval Morris & David J. Rothman, eds., 1998).

<sup>92</sup> G. de Beaumont & A. de Toqueville, *On the Penitentiary System in the United States, and Its Application in France* 22 (Francis Lieber trans., 1833) (“Far from being an aggravation of the punishment, it is a real benefit to the prisoner.

But even if the criminal did not find in it a relief from his sufferings, it nevertheless would be necessary to force him to it. It is idleness which has led him to

even extended to parents of juvenile delinquents, whom Wines and Dwight argued should pay for the cost of their children's incarceration or be put to hard labor themselves.<sup>93</sup>

Prison labor was, therefore, popular among those with reformist tendencies as a means of rehabilitation and among others who simply wanted to economize or extract rents from their prison populations. Far from being a liability, then, prisoners provided economic benefits to the level of government able to capture them. The benefits of prison labor resulted in tugs of war between counties and the state in North and South Carolina, for example, where prison labor gangs were in demand to help build and maintain roads. One exception was in Pennsylvania, where a combination of market restrictions on prison-made goods and the Pennsylvania system's isolated (non-congregate) labor system meant that prisons did not pay for themselves. But even in Pennsylvania, economic considerations made state centralization less costly: in Pennsylvania, the state with an economically inefficient prison labor system, there was an early tradition of charging counties for cost of maintaining the prisoners they sent to other counties' institutions.

A full picture of why states did not anticipate the huge costs of prison when they asserted control would combine the insight from Zimring and Hawkins about the scope of imprisonment with the fact that prisoners generated enough economic benefits to cover some costs or even generate revenue. Prison systems were not large enough nor costly enough for states to anticipate why paying for them might be a bad idea.

Subpart 1 gives a brief overview of the economic effects of prison labor in the United States during the 19<sup>th</sup> century, outlining the various ways in which it was put to use and the economic benefits accruing to it. Part 2 uses the history of road-building county chain gangs in the Carolinas to examine the effects economic rents had on county and state responsibilities for incarceration. Where prisoners provided economic benefits, the state

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crime; with employment he will learn how to live honestly.

Labour of the criminals is necessary still under another point of view: their detention, expensive for society if they remain idle, becomes less burthensome [sic] if they labour.”).

<sup>93</sup> E.C. Wines & Theodore W. Dwight, Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867 at 66 (1867) (“It is our opinion that the parent of a child who falls into crime should be compelled, except in peculiar cases, to pay the cost of its maintenance in a preventive or reformatory institution, or, in default, be deprived of his liberty and forced to toil to that end.”).

system remained small and counties had incentives to keep prisoners. Part 3 explores what happened in Pennsylvania, where imprisonment was expensive and costs were not offset by labor: carceral facilities charged counties for each prisoner they sent.

### 1. Prison Labor

In some ways, the relationship between incarceration and labor has deep roots—after all, early jails were filled with debtors, and in colonial and post-colonial Pennsylvania and elsewhere, the line between workhouses as poor relief and workhouses as secondary jails was hard to discern.<sup>94</sup> As the U.S. matured, though, the increasing use of prison labor was more than just an accident of history—prison labor was seen as both reformatory and economically beneficial. Labor was characterized as a form of discipline, but de Beaumont and de Toqueville observed that it had economic benefits as well: “the discipline which has been established in the United States with so little expense, supports itself in some states, and has become in others a source of revenue.”<sup>95</sup> Wines and Dwight were more blunt. In “prison reports and other documents relating to prisons.... [o]ne string is harped upon, *ad nauseam*—money, money, money.... Where one word is spoken for reformation, hundreds are spoken for revenue.”<sup>96</sup> For example, Wines and Dwight reported that the goal of New York’s prison system, according to a man who worked there more than 30 years, was “to make the prison pay its way.” The authors editorialized, writing that the statement was too mild: instead, the goal was “to show as large a surplus revenue as possible.”<sup>97</sup> Prisoners typically worked 8-10 hours a day. This reformed them and also “brought the state a financial return on its prison investment.”<sup>98</sup> Contractors and industrialists “considerably assisted the states in developing a stable penal system in America,” though there was

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<sup>94</sup> Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 3. See also Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* 56 (1927, 1968 ed.) (internal citations omitted) (the Charter and Laws of Pennsylvania held that “all prisons shall be workhouses for felons, vagrants, and loose and idle persons; whereof one shall be in every county”).

<sup>95</sup> G. de Beaumont & A. de Toqueville, *On the Penitentiary System in the United States, and Its Application in France* 79 (Francis Lieber trans., 1833).

<sup>96</sup> E.C. Wines & Theodore W. Dwight, *Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867* at 289 (1867).

<sup>97</sup> *Id.* at 288.

<sup>98</sup> David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *The Oxford History of the Prison* 109 (Norval Morris & David J. Rothman, eds., 1998).

also a religious component to hard work.<sup>99</sup>

Prison labor was employed in a variety of ways.<sup>100</sup> Convicts could work directly for the state, or the state could buy goods made by convict labor. Many states used prison labor to build the prisons themselves, saving on the costs of construction, as California did with San Quentin prison<sup>101</sup> and New York did with Sing Sing.<sup>102</sup> Another system was on-site contracting, where a contractor would come into a prison and oversee the use of labor.<sup>103</sup> Contracting was the most common form of prison labor in Wines & Dwight's survey.<sup>104</sup>

Convicts could also be leased directly to private companies—an early form of privatization—whereby the state was paid either a lump sum for the right to use all prisoners or paid a daily rate per prisoner used. The company who hired the prisoners was responsible for their care and feeding (such as it was). Convict leasing was so widely used in the Southern United States following the Civil war that “the Southern states had no prisons to speak of.”<sup>105</sup> Three Southern states had no state prison before the Civil War—North Carolina, South Carolina,<sup>106</sup> and Florida<sup>107</sup>—but those that did have antebellum prisons found them either completely destroyed<sup>108</sup> or severely degraded both structurally and financially after the Civil War.<sup>109</sup>

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<sup>99</sup> Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 12-13.

<sup>100</sup> For a broader overview of the types of prison labor, see Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* at 14-15 (1996); see also Harry Elmer Barnes, *The Economics of American Penology as Illustrated by the Experience of the State of Pennsylvania*, 29 *J. Polit. Econ.* 617, 624-25 (1921).

<sup>101</sup> Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 191.

<sup>102</sup> G. de Beaumont & A. de Toqueville, *On the Penitentiary System in the United States, and Its Application in France* 7 (Francis Lieber trans., 1833).

<sup>103</sup> E.C. Wines & Theodore W. Dwight, *Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867* at 248-49 (1867).

<sup>104</sup> *Id.* at 255.

<sup>105</sup> Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* 1 (1996).

<sup>106</sup> *Id.* at 199.

<sup>107</sup> *Id.* at 184.

<sup>108</sup> Georgia's penitentiary was destroyed during the Civil War. *Id.* at 82.

<sup>109</sup> When Mississippi was faced with the prospect of repairing its penitentiary in 1876, it opted to avoid the expense of these repairs and instead leased its entire convict population to “the Hamilton and Hebron Company.” This company, in turn, “sublease[d] the convicts at even higher rates, and no check was maintained over the cruel fate of the penal slaves.” Blake McKelvey, *American Prisons: A Study in American Social History*

Southern states initially turned to convict leasing to avoid the costs of rebuilding and maintaining these prisons, but leasing soon proved incredibly lucrative.<sup>110</sup> By the mid-1880s, “practically every [Southern] state was reaping a clear profit from its convicts.”<sup>111</sup> In Alabama, for example, from 1876 until 1928 the state always made money on its prison population.<sup>112</sup> In 1878, income from convict leasing made up an astounding 73 percent of total state revenue.<sup>113</sup> Even in 1915, when the size of Alabama’s budget was much larger, convict leasing still provided the state with a sixth of its revenues.<sup>114</sup> Southern states would generally bear almost no legal responsibility for the prisoners under convict leasing; in Georgia, for example, lessees had to keep prisoners, pay to transport them, and fulfill all duties under the law concerning their management and care.<sup>115</sup>

Even outside the South, states used the prospect of prison labor revenues to guide their decisions about how to budget for new state systems. In 1859, a joint committee of the New Jersey legislature reported that the workhouse system would pay for itself.<sup>116</sup> In the case of Connecticut, the proceeds from convict labor immediately turned jails from an expense into a source of revenue.<sup>117</sup> These revenues, when combined with state payments for inmates’ room and board, were sufficient not only to pay for the jails, but for *every* county expense:

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Prior to 1915 (1936, paperback edition 1972), 174-75. The bright side was that there was no overcrowding in Mississippi—but only because there was no physical prison there. *Id.* at 184.

<sup>110</sup> See, e.g., Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* 132-33 (1996) (discussing the cases of Mississippi, Alabama, and Arkansas). See also *id.* at 119 (discussing Arkansas, noting that the initial lease contract emphasized that the state would not pay any expenses relating to its prisoners.).

<sup>111</sup> Blake McKelvey, *A Half Century of Southern Penal Exploitation*, 13 *Soc. F.* 112 (1934-1935).

<sup>112</sup> Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* 101 (1996).

<sup>113</sup> *Id.* at 112.

<sup>114</sup> *Id.* at 119.

<sup>115</sup> *Id.* at 88.

<sup>116</sup> E.C. Wines & Theodore W. Dwight, *Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867* at 53 (1867) (“With a well-established system, it is the unanimous opinion of the committee that the State prison will afford an income sufficient to sustain itself, and in a few years reimburse the full amount now asked for (\$20,000)... From this statement it will be perceived that the committee are justified in recommending the workhouse system for its pecuniary advantages.”) (ellipsis in original, citing another source). They concluded that “financial considerations were most potent in effecting the change.” *Id.*

<sup>117</sup> G. de Beaumont & A. de Toqueville, *On the Penitentiary System in the United States, and Its Application in France* 78-79 (Francis Lieber trans., 1833).

[N]ot merely the entire expenses of the jails, but all the ordinary and extraordinary expenditures of the counties themselves, so that, in one case at least, not a dollar has been exacted of the citizens for county purposes, during a period of more than twenty years.<sup>118</sup>

Revenues from the prisoners in New Haven county jail were sufficient to cover all county expenses and still have a profit left over.<sup>119</sup>

Slowly, however, a political movement grew to ban the sale of goods made with prison labor on the open market, cutting into revenues and leaving goods and services produced for government consumption as the only outlet for prison labor. Opposition to prison labor came from “free” industry and organized labor.<sup>120</sup> In 1887, federal prison labor contracting was outlawed, and when states could no longer use prison labor, the balance sheet for prisons went from surpluses to “enormous deficits”.<sup>121</sup> Subsequent statutes in the early to mid- 20<sup>th</sup> century restricted the market for and use of prison labor even further.<sup>122</sup> The result of these changes was a dependence on funds from the state to a degree that was not required when prison labor made prisons self-sufficient. “[G]radually the old American tradition of prisons supported by the labor of their inmates gave place to a new standard of convicts working to learn trades but avoiding the public markets.”<sup>123</sup> By the turn of the 20<sup>th</sup> century, “the day of self-supporting prisons was passing...”<sup>124</sup>

## 2. County Road Gangs

This subpart looks at two states’ experiences with county road-building chain gangs as a means of exploring how different economic arrangements might affect the incentives counties have to either send prisoners to the state or keep them in-county. These examples suggest that, if prisoners were an economic benefit, counties would retain more of them,

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<sup>118</sup> E.C. Wines & Theodore W. Dwight, Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867 at 329 (1867).

<sup>119</sup> Id. at 330. Ohio and Tennessee also defrayed expenses through the contracting of prison labor. Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* 31 (1936).

<sup>120</sup> Id. at 93.

<sup>121</sup> Id. at 98.

<sup>122</sup> Frank T. Flynn, The Federal Government and the Prison-Labor Problem in the States. I. The Aftermath of Federal Restrictions, 24 Soc. Serv. Rev. 19 (1950).

<sup>123</sup> Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 104.

<sup>124</sup> Id. at 106.

and that in the immediate years following state centralization, state control might have been associated with economic losses locally. This Subpart focuses on North and South Carolina, where the economic benefits of county road gangs in both states led to a shrinkage of the state prison system and an increase in sentence lengths (and prisoner populations) served in counties. Although this Subpart focuses on these two states, they should not be seen as outliers. It is true that they are rooted in particular times, places, political cultures and crime levels, but they also illustrate the basic point of this Part: that state payments for prisoners have not always been the exclusive policy in the United States, and that changing the economics of prisons might change the population dynamics between state and local governments.<sup>125</sup>

To set the stage more broadly, after the Civil War, when the value of prison labor grew increasingly evident, states in the South jealously guarded prisoners—and their economic potential—from localities. In 1875 the Governor of Alabama, George Huston, “expressed his dissatisfaction at judges’ having discretionary power to send convicts to counties, because he wanted them delivered to the penitentiary where the state could take direct advantage of their labor...”<sup>126</sup> In Georgia, county leasing was outlawed in 1879, but counties nonetheless found ways to continue to lease their prisoners for the next 30 years.<sup>127</sup> Only when the state outlawed leasing and gave counties prisoners for public works did the practice stop.<sup>128</sup>

The eventual phasing out of convict leasing to private industry was, in part, due to the well-publicized brutality of the practice, and in part due to the rise of the good roads movement, which sought to use convict labor as an engine for economic development through the building and maintaining of roads.<sup>129</sup> In Georgia, for example, when the (private) convict lease was abolished in 1908, 50 percent of convict labor was

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<sup>125</sup> I also note that county road gangs were not originally just a Southern phenomenon, and laws were still on the books to use county convict work on public highways for all states except Rhode Island as late as 1923 (even if the states didn’t use it). See, e.g., Jesse F. Steiner & Roy M. Brown, *The North Carolina Chain Gang: A Study of County Convict Road Work* 2-3 (1927, reprinted 1970 Negro Universities Press). In fact, not all Southern states had county road crews: Virginia had a state road force. Jane Zimmerman, *The Penal Reform Movement in the South During the Progressive Era, 1890-1917*, 17 *J. Southern Hist.* 462, 470-71 (1951) (internal citations omitted).

<sup>126</sup> Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* 101 (1996).

<sup>127</sup> *Id.* at 222.

<sup>128</sup> *Id.* at 223.

<sup>129</sup> Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: "The Negro Convict is a Slave"*, 59 *J. Southern Hist.* 85 (1993).

working on the state's roads.<sup>130</sup> The practice of using manual labor to work roads predates its penal uses; Southern states had long used a system of “warning out”, whereby all able-bodied hands were expected to work to maintain county roads. This practice continued until the early part of the 20<sup>th</sup> century. “In Georgia, for example, only 8 of 137 counties had done away with this so-called labor tax by 1904, and the value of conscripted labor across the state that year exceeded the cash taxes collected for county road work.”<sup>131</sup>

Turning to South Carolina, its penological history from the Civil War until 1916 is one that has been described as a “circle” going from county control to state centralization back to county control via work gangs.<sup>132</sup> State control over the county-dominated system was established after the Civil War, but within 50 years counties were not only sentencing prisoners to county labor for terms of more than 10 years, they were taking prisoners sentenced to state prisons—including those with life terms—back to the county in order to work them on the roads. This serves as a notable counter-example to the correctional free lunch: counties who saw economic benefits in incarceration starved the state of prisoners. It is only now, when prison labor generates no local benefits, that counties have such a strong incentive to give up prisoners to state control.

Before the Civil War, South Carolina housed sentenced prisoners in jails.<sup>133</sup> These prisoners were either serving long-term sentences or were awaiting trial; misdemeanants were fined or flogged. Convicts serving short-term sentences “did not exist.”<sup>134</sup> Only after the Civil War did South Carolina begin to exert state control, passing an act to build a state penitentiary on the theory that the laws violated were laws of the state, not the counties.<sup>135</sup> The penitentiary system, however, was designed to be, in the words of Governor Wade Hampton, “self-supporting as far as

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<sup>130</sup> Id. at 100 (internal citations omitted).

<sup>131</sup> Id. at 87. Lichtenstein goes on to make a convincing case that penal road crews reproduced the slave system in both its use of conscripted labor and the “benign paternalism” embedded in the idea that such labor was for the convict’s own benefit. Id. at 91.

<sup>132</sup> Albert D. Oliphant, *The Evolution of the Penal System of South Carolina from 1866 to 1916* at 14 (1916).

<sup>133</sup> Id. at 3. (“Until after the War Between the Sections persons sentenced to imprisonment by the courts of South Carolina were kept in the jail maintained by the county in which they were convicted.”)

<sup>134</sup> Id.

<sup>135</sup> Id. (Also noting that county finances were depleted by the civil war.)

possible.”<sup>136</sup> The state began a convict leasing system in 1877, leasing all prisoners except those convicted of “murder, statutory assault, arson or manslaughter.”<sup>137</sup>

Counties slowly began to claw back the control of sentenced prisoners. In late 1885, the legislature passed a statute “permitting counties and municipalities to use convicts sentenced for not more than 90 days to work on their roads and streets,”<sup>138</sup> an attempt to reassert local control over convicts.<sup>139</sup> As the law developed over the next decades, counties won increasing control over prisoners, getting first crack at retaining workable prisoners while returning “ungovernable” convicts to the state.<sup>140</sup> By 1903, sentencing limits for local control had increased dramatically: prisoners “whose sentence did not exceed 10 years” could be sentenced to hard labor in the counties—except those sentenced for statutory assault.<sup>141</sup> By 1911, even this limit was removed: hard labor could be assigned without regard to sentence length.<sup>142</sup> Finally, in 1914 the state passed a law allowing counties to take back any convicts sentenced from their counties without financial charge in order to work them on the chain gangs; more than half the prisoners taken were sentenced to life terms.<sup>143</sup> By 1916, the system could be summarized as follows: county supervisors could “take from the penitentiary any convicts they choose, convicted in their counties, and to return them if they see fit.”<sup>144</sup> By 1916, 5/6 of the state’s prisoners were under county control.<sup>145</sup> The reason was economic—prison labor was valuable.<sup>146</sup>

In North Carolina, prison labor at the county level dated back to the years following independence; from 1787 to 1797 sheriffs could hire out any prisoner unable to pay costs assessed by the court.<sup>147</sup> This law was

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<sup>136</sup> Id at 4.

<sup>137</sup> Id. at 5.

<sup>138</sup> Id. at 8.

<sup>139</sup> Id. at 9.

<sup>140</sup> Id. at 10.

<sup>141</sup> Id. at 11.

<sup>142</sup> Id. at 12.

<sup>143</sup> Id. (internal citations omitted).

<sup>144</sup> Id. at 13.

<sup>145</sup> Id. at 14.

<sup>146</sup> Id. (“The marked tendency to divorce convicts from State control to county control and the effort to make money for the State from the labor of convicts under its control were the doubtful foundation which carried most of the superstructure of the State’s penal system when the State board of charities and corrections was created in 1915.”)

<sup>147</sup> Jesse F. Steiner & Roy M. Brown, *the North Carolina Chain Gang: A Study of County Convict Road Work 18* (1927, reprinted 1970 Negro Universities Press).

repealed in 1797, replaced in 1831 by a law that specified that if “any free Negro or free person of color” could not pay a fine imposed, the sheriff could hire him out “to any person who will pay the fine for his services for the shortest space of time.”<sup>148</sup> After the Civil War, the legislature authorized road crew sentences for non-capital crimes; the crews were to work “in chain gangs on the public roads of the county or on any railroad or other work of internal improvement in the state” for a term “not to exceed one year.”<sup>149</sup>

As in South Carolina, this local power was gradually extended to cover a greater number of sentenced prisoners. In 1874-75, a new statute extended the law to cover “any person convicted of any criminal offense in any court, and to those liable for costs.”<sup>150</sup> A few years later, in 1876-77, county commissioners, as well as mayors of cities and towns, not only had the power to use the labor of “all persons imprisoned in the county jails as punishment for violation of the laws or for non-payment of fine and costs,”<sup>151</sup> but also to lease labor to “individuals or corporations” unrelated to public works and roads.<sup>152</sup> This power was limited slightly in 1879: local officials needed judicial authorization to hire out jail inmates to individuals and corporations.<sup>153</sup> In practice, however, one author observed that a provision to lease out prisoners to private interests was seldom used: “no one of these counties has yet decided that it is not profitable to work the prisoners on the roads. No one of them, therefore, has taken advantage of the authority to lease its prisoners.”<sup>154</sup>

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<sup>148</sup> *Id.* at 19 (internal citations omitted). The relationship between Southern convict labor and slavery is perhaps no coincidence. The 13<sup>th</sup> Amendment does not, after all, end all forms of slavery—it allows slavery as a condition of penal servitude. One author goes so far as to say that prison gangs in the American South “took their inspiration from slavery. The result was a ruthless exploitation with a total disregard for prisoners’ dignity and lives.” Edgardo Rotman, *The Failure of Reform, United States 1865-1965*, in *The Oxford History of the Prison* 157 (Norval Morris & David J. Rothman, eds., 1998). For more on the comparison between state road gangs and slavery, see Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: “The Negro Convict is a Slave”*, 59 *J. Southern Hist.* 85, 91 (1993) (arguing that penal road crews reproduced the slave system both by using conscripted labor and in the “benign paternalism” embedded in the idea that such labor was for the convict’s own benefit).

<sup>149</sup> Jesse F. Steiner & Roy M. Brown, *The North Carolina Chain Gang: A Study of County Convict Road Work* 21 (1927, reprinted 1970 Negro Universities Press) (quotation marks in original; internal citations omitted).

<sup>150</sup> *Id.* at 21-22.

<sup>151</sup> *Id.* at 22-23.

<sup>152</sup> *Id.* at 23.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 48.

North Carolina, like South Carolina, had no state prison prior to the Civil War, and an 1846 proposal to build one was voted down.<sup>155</sup> The state eventually built a prison during reconstruction,<sup>156</sup> but counties siphoned off so many prisoners for their road crews that the prison became “a mere asylum for the ‘prison paupers’—the decrepit and diseased criminal offenders.”<sup>157</sup> By 1907-08, the North Carolina Superintendent of the Prison reported that counties had complete control over their own laborers:

[E]ach county is in supreme control of its own gang, prescribes its own rules of discipline, of clothing, of feeding, of guarding, of quartering and of working. Consequently, in addition to what is known as the State’s Prison, North Carolina has forty wholly independent State prisons, under forty separate and distinct managements, with forty different and distinct sets of rules and regulations, and over which there is absolutely no State supervision and inspection.<sup>158</sup>

The State did not so much as supervise county camps and jails until 1917,<sup>159</sup> but there was no *enforcement* of state standards until 1925: “prior to 1925 the state authorities had no power to enforce their recommendations when bad conditions were found in these county convict camps.”<sup>160</sup> North Carolina’s system “would not be consolidated at the state level until 1933.”<sup>161</sup>

As in South Carolina, the result in North Carolina was a system with more prisoners under county control than state control. In North Carolina in 1927, there were twice as many prisoners on county road gangs as in state prison.<sup>162</sup> On a commitment basis, ten times as many convicts were sent to work on county road gangs as prison. The maximum road gang sentence was up to ten years, and some convicts were sentenced to county time for “rape, burglary, assault with intent to kill, and manslaughter.” The ultimate

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<sup>155</sup> *Id.* at 11. In 1894 the Secretary of the State Board of Charity justified the use of chain gangs as relieving the state of the financial burden of a state penitentiary. *Id.* at 35.

<sup>156</sup> Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* 199 (1996).

<sup>157</sup> Jane Zimmerman, *The Penal Reform Movement in the South During the Progressive Era, 1890-1917*, 17 *J. Southern Hist.* 462, 469 (1951) (internal citations omitted).

<sup>158</sup> Jesse F. Steiner & Roy M. Brown, *the North Carolina Chain Gang: A Study of County Convict Road Work* 39-40 (1927, reprinted 1970 Negro Universities Press) (internal citations omitted).

<sup>159</sup> *Id.* at 65.

<sup>160</sup> *Id.* at 66.

<sup>161</sup> Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* 202 (1996) (internal citations omitted).

<sup>162</sup> Jesse F. Steiner & Roy M. Brown, *the North Carolina Chain Gang: A Study of County Convict Road Work* 4 (1927, reprinted 1970 Negro Universities Press).

placement of a prisoner was usually left to the discretion of the judge.<sup>163</sup>

The economic benefit of prison labor in North Carolina was seen as a reason that counties kept their sentenced prisoners and sent only those who could not be worked to the state.<sup>164</sup> “Without a doubt the motive underlying the establishment and the continuance of the county chain gang [was] primarily economic,” and economics dominated “any corrective or reformatory value in such methods of penal treatment.”<sup>165</sup> Indeed, the leading history of North Carolina chain gangs suggested that in times with few prisoners, “the local criminal courts tend to be looked upon as feeders for the chain gang, and there is evidence in some instances that the mill of criminal justice grinds more industriously when the convict road force needs new recruits.”<sup>166</sup>

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<sup>163</sup> *Id.* at 4.

<sup>164</sup> *Id.* (“It is commonly asserted by the state prison officials that those unfit for hard labor are committed to their institution while the strong and able-bodied are required to work out their sentences on county roads.”)

<sup>165</sup> *Id.* at 6. Although the authors of this study dispute the economic benefits, finding that the lack of accurate bookkeeping makes such an assessment difficult. *Id.* at 7.

Even now, though, some states with road crews have counties who depend on the economic benefits of prisoners. Kentucky, which uses state prisoners to do county road work, garnered this recent criticism from a local Jailer, Darwin Dennison, for its proposal to move state prisoners currently housed in local jails to private facilities. “We count on the money generated by the Class D program to operate our jail annex and the female facility. If that money were to dry up, it could cost jobs. The jail annex houses nothing but state Class D inmates.”<sup>165</sup> Missy Mudd, Proposed Bill Could Devastate Local Jail Budget, Grayson County News, 2/3/2011, available at <http://gcnewsgazette.com/bookmark/11219535>. Moreover, prisoners were “able to save the cities and county government a lot of money by providing inmates to work,” Dennison said. “This proposal could eliminate that program and cost our county thousands of dollars in the process. Our program saves the cities and county hundreds of thousands of dollars on labor costs every year. If this passes, city and county governments would either have to start paying for labor they have been getting from inmates or cut back on their services.” *Id.*

<sup>166</sup> Jesse F. Steiner & Roy M. Brown, *the North Carolina Chain Gang: A Study of County Convict Road Work 6* (1927, reprinted 1970 Negro Universities Press). See also Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 168 (discussing that, in places where sheriffs were paid by the county per prisoner, “It was not unknown for constables to ‘run men in for revenue only.’”) (internal citations omitted). See also E.C. Wines & Theodore W. Dwight, *Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867* at 519 (1867) (Reporting that a respondent to their survey said the fee system in New Jersey was “tempting to undue exertion to convict, and tempting to receive rewards from the defendants to favor them.”).

### 3. County Capitation in Pennsylvania

Pennsylvania provides a counter-example to the story in the Carolinas. Prisons on the “Pennsylvania system” were always more expensive than those on the Auburn (congregational labor) system,<sup>167</sup> and even those prisons within the state that experimented with congregational labor were crippled by state restrictions on prison labor. Prisons were expensive in Pennsylvania, but the state nevertheless moved to centralize its control over them. The reason might be that in Pennsylvania, something besides prison labor offset the cost: the state’s carceral institutions had a long history of charging counties for each prisoner they sent.

Pennsylvania, like other states, had a long history of prison labor; the difference is that prison labor in Pennsylvania did not generate much revenue, due in part to the system of isolated labor and in part to restrictions on the sale of prison-made goods. Prisoners in the late 18<sup>th</sup> century were put to work on highways and gaols,<sup>168</sup> and prisoners at the Walnut Street jail also had to work. But overcrowding at Walnut Street meant that there was less room to set up shop. By 1825, “the income from labor did not meet more than 10 per cent of the total cost of operating the institution, and not more than one-tenth of the population was permanently or uniformly employed.”<sup>169</sup> The Pennsylvania system, developed at the Eastern State Penitentiary at Cherry Hill (the successor to Walnut Street), involved total isolation, including solitary labor, and was both “ruinous to the public treasury” and ineffective at “the reformation of the prisoners....”<sup>170</sup> Throughout its long history, the Eastern State Penitentiary at Cherry Hill “never ... earned enough in any year to equal the cost of feeding and clothing the convicts.”<sup>171</sup> Part of the expense was due to the architecture—the need for separate workspaces, rooms, and even individual exercise yards, for example.<sup>172</sup> Complete isolation also led to overcrowding and an inability for inmates to work.<sup>173</sup> Even in the late 19<sup>th</sup> century, when other

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<sup>167</sup> G. de Beaumont & A. de Toqueville, *On the Penitentiary System in the United States, and Its Application in France* 75 (Francis Lieber trans., 1833).

<sup>168</sup> Harry Elmer Barnes, *The Economics of American Penology as Illustrated by the Experience of the State of Pennsylvania*, 29 *J. Polit. Econ.* 617, 620 (1921).

<sup>169</sup> *Id.* at 621 (internal citations omitted).

<sup>170</sup> G. de Beaumont & A. de Toqueville, *On the Penitentiary System in the United States, and Its Application in France* 3 (Francis Lieber trans., 1833).

<sup>171</sup> Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* 287 (1927, 1968 ed.).

<sup>172</sup> Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 11.

<sup>173</sup> *Id.* at 6.

prisons had long since turned to the efficiency of mass production and industrialized labor, Eastern State prisoners still made handicrafts,<sup>174</sup> mostly hosiery, chairs with cane seating, and cigars.<sup>175</sup> After the Civil War, Western State Penitentiary moved to the Auburn system.<sup>176</sup> Western state was slightly more economical than Eastern state as a result, but in the 60 years after 1864 it failed to generate enough revenue to offset building maintenance costs (and came nowhere close to offsetting the cost of officials' salaries).<sup>177</sup>

One cause of the revenue shortfall was the result of the free (non-incarcerated) labor movement in Pennsylvania's extremely effective campaign to limit the production and sale of goods made with prison labor.<sup>178</sup> A 1915 Report of the Penal Commission on the Employment and Compensation of Prisoners was very critical of the idleness of Pennsylvania prisoners, noting that "From the financial point of view no policy could be more silly than that of supporting in idleness the thousands of prisoners which make up the never-ending stream of humanity that pours through our penal institutions."<sup>179</sup> In 1909, in fact, "out of the 2,900 idle able-bodied prisoners in the entire United States, no less than 2,073 were listed as being in Pennsylvania."<sup>180</sup>

Pennsylvania prison reformers were aware that nonproductive prisoners meant that their prisons in particular were ruinously expensive. In the late 19<sup>th</sup> century, the Annual Report of the Eastern State Penitentiary dismissed the argument that prisons should pay for themselves by appealing to the need to reform prisoners.<sup>181</sup> While the Report's authors acknowledged that self-sufficiency had some merits, they nevertheless optimistically asserted that the public would be willing to pay the costs for the reformation of prisoners.<sup>182</sup>

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<sup>174</sup> Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 95.

<sup>175</sup> Harry Elmer Barnes, *The Economics of American Penology as Illustrated by the Experience of the State of Pennsylvania*, 29 *J. Polit. Econ.* 617, 623 (1921).

<sup>176</sup> *Id.* at 623.

<sup>177</sup> *Id.* at 640.

<sup>178</sup> *Id.* at 633-34.

<sup>179</sup> Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* 253 (1927, 1968 ed.).

<sup>180</sup> Harry Elmer Barnes, *The Economics of American Penology as Illustrated by the Experience of the State of Pennsylvania*, 29 *J. Polit. Econ.* 617, 635 (1921) (internal citations omitted).

<sup>181</sup> 58 *Ann. Rep. Inspectors of the Eastern Penitentiary* 110-111 (1877).

<sup>182</sup> *Id.* ("This objection in regard to expense is one which the public will probably meet in the heroic manner in which it meets all such problems, that is, to do the best for the

How, then, did the state afford its prison system? From the very beginning, Pennsylvania facilities charged counties for the inmates they committed. In 1789, when Pennsylvania made the Walnut Street Jail available for prisoners from across the state, “The expenses of operating the Philadelphia prison were to be defrayed by the several counties in proportion to the number of prisoners from each county.”<sup>183</sup> As the Pennsylvania system expanded, the state paid salaries in state prisons, but the expenses of “keeping and maintaining the convicts” continued to be “borne by the respective counties in which they shall be convicted”.<sup>184</sup> The state did not always have enough money to cover costs; when it didn’t, counties were forced to contribute to make up the shortfall.<sup>185</sup>

The capitation system also operated, to a certain extent, in New York and Illinois. Wines and Dwight observed that New York penitentiaries—intermediate institutions between state prisons and county jails—were “all local institutions, created by special statutes and managed by the authorities in which they are situated,” even though they received “inmates from the adjoining counties.”<sup>186</sup> They were, however, compensated for the costs of boarding those prisoners, and they also were allowed to retain “the avails of their labor during their imprisonment.”<sup>187</sup> The Illinois system was also described as one in which “Jailers are remunerated by fees and not by salaries. The sheriff boards the prisoners at so much per week, but the sum allowed is not stated. Clothing is supplied to prisoners, when necessary, at the expense of the counties.”<sup>188</sup>

Facilities with good reputations for reforming prisoners, such as the Elmira reformatory, could sometimes find themselves inundated with

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whole body politic without regard to expense...”).

<sup>183</sup> Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* 116 (1927, 1968 ed.).

<sup>184</sup> Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* 279 (1927, 1968 ed.). See also E.C. Wines & Theodore W. Dwight, *Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867* at 294 (1867). (“In the Pennsylvania state prisons, this is even now the method of computation; the government paying the salaries, and the counties making up any deficit in the cost of subsistence, &c., accruing in the earnings of the convicts.”)

<sup>185</sup> *Id.* at 281.

<sup>186</sup> E.C. Wines & Theodore W. Dwight, *Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867* at 57 (1867)

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 322-23.

prisoners.<sup>189</sup> “Wherever a good system did develop, the jail was almost immediately crowded beyond capacity by neighboring cities or counties eager to house their criminals as safely as possible—a procedure which the fortunate sheriff was usually glad to encourage.”<sup>190</sup> To be fair, though, in states with per capita reimbursement systems in place, this development meant more revenue for the facilities and was not necessarily unwelcome.

Most important for this analysis, cost-sharing was seen in Pennsylvania as a means of controlling admissions, with one observer writing that county payments were seen as a means “to some slight extent tend to reduce criminality, in that it sets a financial penalty upon counties which furnish a disproportionate number of convicts.”<sup>191</sup> In North and South Carolina, state prison populations were controlled by allowing localities to retain economic benefits of prisoners. In Pennsylvania, state prison populations were controlled by dunning localities for the cost of prisoners. In both examples, the price of using state prison was used to control localities’ usage of state prison.

### III. SHOULD WE HAVE STATE-FUNDED PRISONS?

States should not fund the usage of prison on a “no strings attached” basis. This argument does not mean that states should eliminate criminal justice or all houses of incarceration. Instead, it is a specific argument about whether the state needs to administer these institutions and/or pay for them. This Part discusses the advantages to a stateless prison system, primarily transparency and sincerity, and then discusses some disadvantages relating to unequal distribution of resources. I conclude that concerns about inequality are misplaced: we currently have an unfair system with locally-driven policies. Taking the state out of the equation would take away no tools for curing inequalities, and would, in fact, make these inequalities easier to diagnose.

#### A. *Advantages: Process Outcomes, Not Necessarily Policy Outcomes*

What would happen to prison populations if the state no longer subsidized prison admissions? One might expect prison usage to decrease as the price paid by individual counties increased. However, this Article

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<sup>189</sup> Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936, paperback edition 1972), 113.

<sup>190</sup> *Id.* at 168.

<sup>191</sup> Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* 281 (1927, 1968 ed.).

makes no such assumption: given the heterogeneity of local preferences, individual counties might decide that their prison usage was, in fact, worth the added expense and continue with business as usual. The goal of removing the state is not necessarily about replacing the orthodoxy of prison subsidies with a new orthodoxy. It is, rather, about embracing the local heterodoxy that already exists. Thus, states could acknowledge intra-state disagreements about policies and their implementation and allow different parts of states—particularly populous states—to express their different preferences and policies. The end result would be that localities would retain their discretion and autonomy but would own the financial consequences of these decisions. This would have four main advantages: it would make decisions more transparent, it would make them more meaningful, it would make them more likely to yield positive and negative examples, and it would be more in line with certain constitutional values.

The first advantage is transparency. The size and complexity of large states exceeds that of the entire country at the time of its founding. California alone has several counties with more people than even the largest states at the time of the founding, and one county, Los Angeles, is bigger than all but nine states in the union today.<sup>192</sup> Disaggregating the criminal justice policies of populous states into local criminal justice systems with local budgets would make the relationship between policies and outcomes easier to discern. Citizens would not have to figure out how the state makes policy, just how their county does, and they could then vote locally to reinforce or replace the people who developed and enforced these policies. Given that criminal justice policies, agents, and voter feedback are already local, keeping track of the implications of those policies by locality makes good sense. Who are the bums a voter can kick out of a dysfunctional state, especially when the system is so complicated?<sup>193</sup>

A second benefit would be to make criminal justice decisions more

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<sup>192</sup> As of the 2010 census, 39 counties had populations of more than 1 million people, and the most populous 150 counties (out of 3221) contain about half the country's population. Data available at [https://www.census.gov/geo/www/2010census/centerpop2010/county/CenPop2010\\_Mean\\_CO.txt](https://www.census.gov/geo/www/2010census/centerpop2010/county/CenPop2010_Mean_CO.txt).

<sup>193</sup> See, e.g., Lisa L. Miller, *The Local and the Legal: American Federalism and the Carceral State*, 10 *Criminol. & Pub. Pol.* 725, 727 (2011) (“The problem with the politics of the local, then, might be the problem of *accountability* in a political system that diffuses policy issues across a wide range of venues, allocating fiscal resources and budgetary power to the higher levels of government but providing virtually no channels of accountability for whether the manner in which that power is exercised actually ameliorates crime and violence in local communities.”)

meaningful. Partly because there is no social science consensus on effective policy—or perhaps because policies are not based on any emerging social science consensus—much of criminal justice policy now is justified by appeals to retribution. But retribution and its variants<sup>194</sup> rely on social norms, the expressive value of condemning offenders, and/or the role of making victims whole. These norms and values have local variations, and their expression would be more meaningful if their costs were borne wholly by the people expressing them. Local criminal justice would isolate who is speaking—and who is wronged—much more than the state.<sup>195</sup> While counties are no less an abstraction than states are, they are at least abstractions where individual voices make up a greater percentage of the whole.

Consider this case of sincerity. To pay for a capital trial and for the automatic appeals granted in all death cases, Quitman County, Mississippi, raised its taxes and took out a loan. When the defendants were granted a second round of appeals, the county faced another decision about raising taxes and/or cutting services. “The county paid for three trials ([one defendant] was reindicted and tried twice). Taxes were raised for three years, and it took the county more than five years to retire the loan used to cover expenses.”<sup>196</sup> But the county was willing to pay to seek the death penalty for these men, and few could doubt that this decision was taken lightly. The costs of the extra trials and the extra cost of seeking the death penalty were made plain to the county seeking them. Contrast this with a recent case in Riverside County, California, where the district attorney was criticized for spending public money seeking capital punishment for a defendant who had already been sentenced to death in Idaho.<sup>197</sup> The DA

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<sup>194</sup> For my views on expressive retribution and how it relates to the role of the jury in sentencing, see W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 *Col. L. Rev.* 893, 923-26 (2009).

<sup>195</sup> I note, again, that the local agencies—not state agencies—are already responsible for investigating, arresting, prosecuting, and, in some states, sentencing offenders, even though trials (when there are trials) are between individuals and the state (or commonwealth). The point here, then, is to put the proper nametag on the arm of government doing the execution of state laws—albeit state laws that permit a wide number of charges (or none at all). For a more detailed suggestion of how criminal justice systems can more readily accommodate the founding tradition of local morality, see, e.g., Stephanos Bibas, *The Machinery of Criminal Justice* 109-127 (2012).

<sup>196</sup> *Poor County Forced to Finance Killers' Appeals*, *Los Angeles Times* 3/28/1999, available at <http://articles.latimes.com/1999/mar/28/news/mn-21958>.

<sup>197</sup> John Asbury, *Cost of Death for Duncan Questioned*, *Riverside Press Enterprise*, 4/20/2010 (Citing the cost as \$167,000 and counting). The man in question later pleaded guilty and received a California sentence of life without possibility of parole. Associated Press, *Idaho killer Duncan pleads guilty to 1997 Calif. Murder*, 3/15/11, available at

received political benefits without the county having to bear all of the costs, but the move was purely expressive, since the defendant was already going to die. It is more difficult to isolate whether this expressive benefit was worth the cost to the local constituency. As the old saying goes, talk is cheap. When choices are made knowing what they will cost us, they are more likely to be choices that are sincerely and fervently held. Decisions that are costless mean less.

The third advantage of decentralization is that it would allow for experimentation. Allowing greater local control would make sense for the same reason that federalism makes sense.<sup>198</sup> Society can learn from local experiments, and communities can compete for citizens who then vote with their feet. A local approach could tailor incarceration to local preferences. Punitive localities could—within the confines of the Eighth Amendment—pursue harder time, in the belief that punishment deters. Rehabilitative localities could address underlying risks and needs in the belief that criminals are made, not born.

For prisoners serving indeterminate sentences, local preferences might affect length of time served in a manner that reflects local preferences. Parole boards measure an offender's readiness to return to society. Most parole boards are state agencies without local input, even though an offender will be returning to a particular location, not the state in general. A local parole board could be more like a re-entry jury, where intimately local issues dominate: the issues of when someone has served sufficient time and when she is no longer dangerous.<sup>199</sup>

Fourth, localism might be more in line with some constitutional values than statewide criminal justice. The Sixth Amendment jury right specifically calls for a local jury, one not only of the state but also the

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<http://www.komonews.com/news/local/118044069.html>.

<sup>198</sup> In suggesting this, I am proposing a doctrine which one might call sub-state federalism, where the relationship between the state and its counties mirrors that between the federal government and the states. See Heather Gerken, *Federalism All the Way Down*, 124 *Harv. L. Rev.* 1,21 (2010).

<sup>199</sup> W. David Ball, *Normative Elements of Parole Risk*, 22 *Stan. Law & Pol'y Rev.* 395, 407 (2011). Local unification would also help to address the current disjuncture between parole and probation. Parole schemes are supposed to measure an individual's readiness to return to society. Parole boards are state agencies without local input, even though an offender will be returning to a particular community within the state, not the state in general. To the extent these questions are normative, it makes more sense to talk about the norms of a particular part of a state, rather than generalizations about a state as a whole. Again, both states and counties are abstractions, and both would involve generalizations, but one is at least slightly more targeted than the other.

“district wherein the crime shall have been committed.”<sup>200</sup> This is part of the realm of local values that the jury is meant to vindicate: the application and priorities of law enforcement.<sup>201</sup> When one considers the grand jury requirement of the federal constitution (and several state constitutions), we can see it as placing local limits on state power.<sup>202</sup> These local limits were more effective during the founding era given that law enforcement was intensely local, made up of local citizen constables, not professional police forces.<sup>203</sup> The jury (us) protects the people (us) from the constable (also us).

This does not mean there is no role for the state, however. Indeed, Wines and Dwight suggested more than 150 years ago that supreme authority could co-exist with local administration.<sup>204</sup> The state could remain involved by aggregating information and guiding local policies. The state could also regulate local counties, penalizing counties with high crime

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<sup>200</sup> U.S. Const. amend. VI, cl. 3.

<sup>201</sup> Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 818 (1994) (arguing that civil damages for 4<sup>th</sup> Amendment violations were part of juries’ role in setting criminal justice priorities: “Threats to the ‘security’ of Americans come from both government and thugs; the jury is perfectly placed to decide, in any given situation, whom it fears more, the cops or the robbers.”).

<sup>202</sup> See, e.g., Larry Kramer, *The People Themselves* (2005) 157 (In the early history of the United States, and by its founders’ design, “The principal device expressing popular control over ordinary law ... was the jury.”).

<sup>203</sup> For a survey of the ways in which police practices have changed since the Framers’ generation, see, e.g., Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 830-838 (1994) (Focusing on the rise of professional police forces, as opposed to the amateur policing at the framing, and concluding, at 830, that “Our twentieth-century police and even our contemporary sense of ‘policing’ would be utterly foreign to our colonial forebears.”).

In investigation, for example, there was almost no discretion. See Wesley M. Oliver, *The Modern History of Probable Cause*, 78 Tenn. L. Rev. 377, 390 (2011) (“State officers exercised almost no discretion in the investigatory or prosecutorial process. The constable’s role in the criminal case ended with the arrest and any search that accompanied it. The magistrate was the only participant in the criminal justice system expected to question suspects. The constable was not expected to question the suspect.”).

Courts also bear a strong mark of localism; they emerged at the local and municipal level, even though they are enforcing state law. See Lynn Langton & Thomas H. Cohen, *State Court Organization, 1987-2004* 1 (Oct. 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco8704.pdf>. As of 2004, only ten court systems were unified. *Id.* at 6. This is a self-designation, however: “No state court system actually meets all of the criteria for total unification.” *Id.* at 6 n.5. Payment also varies: Illinois funds most of its local courts with state monies, *id.* at 1, while New York Town and Village Justice Courts are funded at the county level. *Id.* at 5.

<sup>204</sup> E.C. Wines & Theodore W. Dwight, Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, January, 1867 at 84 (1867).

or high recidivism, and rewarding ones that perform well.

The model of statewide subsidies and local administration is employed in other fields. Schools provide a ready example of how statewide requirements can be combined with local administration. There are statewide requirements that children attend school (though these, too, are relatively recent), and there are various ways in which the state ensures certain minimum standards of quality. Teachers are credentialed by the state, there are statewide tests designed to measure how schools are performing, there are audits of schools. The state sets performance metrics (e.g., children in fourth grade need to competently perform the following math and reading skills), but local districts experiment with how to ensure that—via pedagogical approach, expanded school terms, uniforms, and other policies and procedures. Local differences don't represent different goals—everyone wants kids to learn—but represent differences about the most effective means to attain common goals. But states themselves do not administer education.

Criminal enforcement and sentencing is similar in some ways. The state sets baseline rules about legality through statutes. Different sentencing outcomes might be seen to represent disagreements about the most effective means to achieve the same goal—public safety. (Just as everyone wants kids to learn, everyone wants communities to be safe. Ignorance and public danger do not have large constituencies.) Criminal justice might only be different because it *feels* different—we think that there *should be* limits we all agree on, even if we know that we don't, ultimately, do so.<sup>205</sup>

This Article has proposed to acknowledge this empirical uncertainty about what works, arguing that the state should not subsidize only the particular disposition of prison. This does not mean the state would not be involved: the state could serve a valuable role in collecting and disseminating information, for example publishing relevant county statistics (the way it publishes school performances on achievement tests). Voters could use this information to reward or punish local officials responsible for

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<sup>205</sup> The leading research on the relationship between community notions of desert and the execution of criminal punishment is Paul Robinson. See, inter alia, Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 *Minn. L. Rev.* 1829 (2007); Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 *Ariz. St. L. J.* 1089 (2011); Paul H. Robinson, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* (2008). For a critical view of Robinson's work, see Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 *Stanford L. Rev.* 1 (2013).

the policies that affect these statistics. The state could also reserve the right to step in to maintain a criminal justice floor, taking over the administration of criminal justice directly in extreme cases, the way it takes over certain wholly dysfunctional schools.

### *B. What About Equality?*

Even if one accepts the administrative-based arguments against the present system of state prison subsidies, one might argue that there are reasons grounded in equality to subsidize prisons. The equality argument in favor of prison subsidies might be made as follows. Although it might be unfair for one area to subsidize the prison-using policies of another, it is arguably just as unfair to saddle a crime-ridden area with the sole responsibility to pay for its crime problem, especially if crime rates and poverty rates are positively correlated. This argument depends on demonstrating three things: that crime is what drives prison usage, that counties inherit rather than create their crime problems, and that prison does not increase crime. Addressing two of these three contentions briefly, crime and prison usage are not necessarily linked at the local level; crime variations explain very little of the variation in new felon admissions.<sup>206</sup> There is also evidence that prison is, in fact, criminogenic.<sup>207</sup> So if crime does not necessarily have to result in prison use, then eliminating prison subsidies isn't necessarily condemning crime-ridden areas. If crime does drive prison admissions but prisons are criminogenic, then imprisonment will contribute to future crime (and prison) problems.

The contention that requires lengthier discussion is the one that crime is inherited by localities, not made by them. It might be fair to make localities pay for prison if they caused the crime increase to begin with. In other words, part of the answer to the inequality question depends on whether crime is caused by policy (endogenous) or inherited by localities (exogenous). Because we do not have any kind of consensus on how (or whether) crime spreads,<sup>208</sup> I will discuss both the endogenous case and the

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<sup>206</sup> See, e.g., W. David Ball, *Tough on Crime (On the State's Dime)*, 28 Ga. St. L. Rev. 987 (2012).

<sup>207</sup> Francis T. Cullen, Cheryl Lero Johnson, & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 *Pris. J.* 48S, 50-51S (2011). This, of course, does not account for the incapacitation argument in favor of prison, but that, in turn, depends in some ways on the marginal costs and benefits of prisons. Prisons might be useful if they are used sparingly, but they might also reach a point of diminishing returns when used too much.

<sup>208</sup> David Weisburd, for example, has argued that crime is a place-based phenomenon. See David Weisburd, *Shifting Crime and Justice Resources from Prisons to Police*, 10

exogenous case.

If crime is endogenous, the next question is “What caused it?” Assuming that it is even possible to satisfactorily explain the causes of crime,<sup>209</sup> we might then look at whether county policies contributed to the increase in crime. If the crime increase is the result of county policies, then the county should pay the consequences. To do otherwise would be to create perverse incentives for counties to pursue counter-productive policies, knowing the state will bail them out. If, on the other hand, state policies caused the increase in crime, it would be fair for the state to bear the costs associated with it. This would be particularly true if the reason for increased crime—assuming a link could subsequently be made to increased prison usage—was the result of state underinvestment in poor areas (although it is not necessarily true that poor areas use more prison per capita, even accounting for the crime rate).<sup>210</sup> The state would be redressing its own mistakes by funding prison admissions.

The issue of state underinvestment raises a larger question, however: if areas suffer increased crime because the state has failed to provide them with adequate schools, aid to needy families, and the like, why not address these root causes and demand that the state fund these programs? Why is prison the place to equalize the state’s underinvestment? Prison is not the cause of inequality; it is simply where these inequalities make themselves manifest. We should focus on inequality when it occurs, not simply once prison comes into the equation.

What if no one policy or agency causes crime waves, and thus no one is to blame for them? Does this mean that removing state subsidies

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Criminol. & Pub. Pol.153, 155 (2011) (reviewing the literature and concluding that “crime is ‘tightly coupled’ to place, suggesting “promise for reducing crime without increasing imprisonment if the police can put places rather than people at the center of the crime equation.”). For an epidemiological analysis of the prison system, see Ernest Drucker, *A Plague of Prisons* 2011.

<sup>209</sup> A full discussion of the causes of crime—and the social, ethnic, and economic characteristics of perpetrators and victims—is beyond the scope of this paper. I note only that it could be the case that crime causes poverty while, at the same time, victims of crime are not poor—it is also possible that the opposite is true. It is hard to conclude that there is scholarly consensus on the relationship between economics and crime—or even if economics is the dominant factor in causing crime—but I do note that one study indicates that crime victims got poorer from the 1970’s to the 1990’s. See Steven D. Levitt, *The Changing Relationship Between Income and Crime Victimization*, 5 *Econ. Pol. Rev.* 87 (1999)

<sup>210</sup> See, e.g., W. David Ball, *Tough on Crime (On the State’s Dime)*, 28 *Ga. St. L. Rev.* 987, 1051 (2012).

would exacerbate the inequalities of criminal justice then? The answer to this question depends on one's view of the way criminal justice is currently funded. Localities currently have unequal resources to fight crime. Money for crime fighting does not necessarily follow crime levels: more often it is disbursed on the basis of population, or programming, or financial contributions to the state's general fund. In fact, part of the goal of this Article is to highlight that the money we spend on prisons is money we do not spend fighting crime or preventing it. We do, in fact, spend millions of dollars on people from poor, crime-ridden areas. It's just that we do so in prison.<sup>211</sup> Jurisdictions that currently cut their prison usage do not get money back from the state—the state pockets the savings. This gives localities no incentives to decrease prison usage, especially given that alternatives to prison such as community supervision or treatment are typically paid out of local budgets. If localities kept the money they saved, treating prison dollars as a funding source, they could reallocate money towards more cost-effective means of promoting public safety.

#### CONCLUSION

A proposal to reduce or eliminate the state's role in criminal justice is not a suggestion that we do away with prisons and/or criminal justice, but a suggestion that we reorient it to represent local considerations. This suggestion is perhaps less radical than it seems—it returns local concerns to the central role they play in the constitution. At the time of the founding, criminal justice was not something that happened elsewhere: it happened locally, with greater citizen involvement. We have moved away from that. Criminal justice is now impersonal, outside any notion of “community.” There is no hope of it being less than anonymous at the state level. Localism might rehumanize the actors in different roles in the system.

This Article has explored how we might return to these local principles by asking a basic question: what should be the state's role in imprisonment? In this Article I have attempted to show how state participation is not always necessary and how, in some ways, it might be contraindicated. I have proceeded by taking as a given local control of certain functions—jail, law enforcement, prosecution, and community supervision and treatment<sup>212</sup>—and by assuming that regional tastes for

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<sup>211</sup> See, e.g., Spatial Information Design Lab, *The Pattern* 37 (2008), available at <http://www.spatialinformationdesignlab.org/MEDIA/ThePattern.pdf> (mapping “Million Dollar Blocks,” city blocks in New York City whose incarcerated residents cost the state more than a million dollars annually in incarceration costs).

<sup>212</sup> There are alternatives to local control, such as state unification of all corrections

punishment and rehabilitation differ. From here it is a relatively short step to local control. Without some kind of realignment, some counties must subsidize other counties' choices that do not align with their preferences. Counties should be freer to pursue community interests in public safety—which is, after all, a local issue, about making an individual community safer. With this freedom comes the responsibility to live with the consequences.

Local power comes, ironically, from statutory expansion at the state level. The rise in the number of statutes which either decrease judicial discretion or increase the number and severity of criminal sanctions has, paradoxically, made local decisions much more important. Localities have been granted a firehose and told to use it moderately; the system cannot sustain literal, full-throated enforcement. A further irony is that expanding responsibility to localities might rein in statutory expansion—and local power. Counties that were happy to have harsh mandatory penalties in the state penal code might question the wisdom of these same penalties if they were to foot the bill. If localities faced the resource implications of these laws, state sentencing schemes might face pressure from these local actors.

What, then, might a more localized system look like? Time permits only a brief sketch; the aim of this Article has been mostly to diagnose the condition, not prescribe policy. It would seem, though, that the state could reallocate the money it currently spends on a single, no-questions-asked cure—prison—into the disease—crime. To the extent that crime is co-extensive with other issues, such as poverty, poor education, and the like, funds could be reallocated on these bases as well. The state could also continue to provide prison beds but not subsidize them, charging counties a capitation fee per prisoner. Or states could get out of the prison business entirely.

The state could always be more involved, of course. The state could, and can, always shrink its penal code, train District Attorneys, and serve to monitor the equality concerns expressed in Part III. If decentralization generated outrage, and that led to action, all the better—because it would arise from an organic, popular will to assert state power,

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agencies. For a general discussion, see, generally, Barbara Krauth, *A Review of the Jail Function Within State Unified Corrections Systems* (National Institute of Corrections, 1997), available at <http://nicic.gov/Library/014024>. In another article, I propose that unified corrections be localized and expanded to include law enforcement—making agencies geographically smaller but all-encompassing within a given area. See W. David Ball, *Defunding State Prisons* (forthcoming 2013).

not because a court imposed it on the populace. In the end, the current system does nothing to prevent inequality, and, in fact, it makes accurate diagnosis of inequality more difficult. It papers over very real local differences by maintaining the fiction of a “state” system and a “state” problem that is really a lot of local problems interacting in a complex way. Under a stateless system, we might end up agreeing that counties shouldn’t have discretion in some areas—that they are over- or under-punishing. We might rein in the number of substantive offenses. But we have those differences now. The only difference is that they are not named, so we don’t discuss them.

The policy implications will be developed further in future articles. Ultimately, the purpose of this Article has been to question why the state pays for prisons. There is nothing necessary about this arrangement, and many reasons why we might want to change it. Unless and until we can all agree on what statewide policies should be, we would be better off agreeing to disagree and letting each locality reap what it sows.