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# YALE LAW & POLICY REVIEW

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## Why State Prisons?

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## INTRODUCTION

The United States finds itself in an era where the cost of state prisons<sup>1</sup> is both extremely large and politically salient. State prisons held approximately 1.3 million people in 2012, almost twice as many people as county jails and more than five times as many as federal prisons.<sup>2</sup> The total cost of state corrections in 2010 was \$48.5 billion.<sup>3</sup> In response, states nationwide are now experimenting with ways to reduce their role in imprisonment. The United States Department of Justice's Bureau of Justice Assistance launched the Justice Reinvestment Initiative to promote policies that reduce prison populations; the seventeen states that have participated are expected to save up to \$4.6 billion.<sup>4</sup> Perhaps the most obvious example of a state prison depopulation policy is California's criminal justice realignment: under a new law, California's state prisons now accept only prisoners convicted of serious, violent, or sex offenses—other felons, even those sentenced to multiple years, must serve their time in local jails.<sup>5</sup>

1. 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 individuals sentenced to longer terms, death row inmates, 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 serve only a year or less. For instance, Maryland makes the distinction 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, 462, 490 (2009) ("In Maryland, the legislature can designate a crime as either a misdemeanor or a felony, *irrespective of the sentence imposed.*").
2. Lauren E. Glaze & Erinn J. Herberman, *Correctional Populations in the United States, 2012*, BUREAU OF JUSTICE STATISTICS 10 (2013), <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.
3. Tracey Kyckelhahn, *State Corrections Expenditures, FY 1982-2010*, BUREAU OF JUSTICE STATISTICS (2014), <http://www.bjs.gov/content/pub/pdf/scefy8210.pdf>.
4. Nancy LaVigne et al., *Justice Reinvestment Initiative State Assessment Report*, URBAN INST. & BUREAU OF JUSTICE STATISTICS 1, 3 (2014), <http://www.urban.org/uploadedpdf/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.pdf>.
5. For an excellent overview of the changes in California, see Rebecca Sullivan Silbert, *Thinking Critically About Realignment in California*, CHIEF JUSTICE EARL

There is plenty of conversation about how to reduce state prison populations, but what almost no one talks about is this: there is no historical, logical, or constitutional reason for state prisons to exist. Perhaps no one talks about this because everyone assumes that state governments have always paid for prisons, but, as this Article reveals, this conventional wisdom is wrong. States neither built prisons nor paid for incarceration until the middle of the nineteenth century. State downsizing might, in fact, represent a return to our country's historical roots. It is time for us to stop treating state funding for prisons as an inevitable and inherent part of the American criminal justice system, when it is actually a relatively recent phenomenon based on a political economy that has long since changed.

Given this history, one might ask why states decided to pay for prisons in the first place. Why should states agree to subsidize the cost of prisons when local officials—county prosecutors, locally elected judges, sheriffs, and police—decide who goes there? Why should state governments subsidize prisons when they don't pay for other criminal dispositions, such as jail, probation, or drug treatment? Given that localities<sup>6</sup> can and do make different decisions about the sanctions accompanying violations of state law, why do states pay only for the most expensive sanction (state incarceration) and not cheaper ones?

Frank Zimring and Gordon Hawkins raised this question in their 1991 book, *The Scale of Imprisonment*, referring to the state prison subsidy as the “correctional free lunch.”<sup>7</sup> They suggested that the correctional free lunch might itself be responsible for over-incarceration, since prison is essentially free

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WARREN INST. ON LAW & SOC. POLICY (2012), <http://library.constantcontact.com/download/get/file/1103416365531-32/Thinking+critically+about+realignment+in+CA++2.29.pdf>.

6. I tend to use the terms “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 *State & Country Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last accessed Oct. 24, 2014). In unified corrections states, however, authority for all custodial prisoners—including, in some cases, probation, parole, and community corrections—is combined into a single agency with a single budget. See, e.g., Barbara Krauth, *A Review of the Jail Function Within State Unified Corrections Systems*, NAT'L INST. OF CORR. (1997), <http://static.nicic.gov/Library/014024.pdf>. For an appraisal of unified corrections as an alternative means of addressing the correctional free lunch, see W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. (forthcoming 2014) (manuscript at Part II.B and C).
7. 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 . . . we call the ‘correctional free lunch. . . .’”).

to local governments. But if prison subsidies might lead to overuse, why did states ever agree to them? Zimring and Hawkins suggested that the answer lay in the scale of imprisonment. By their account, the relatively stable size of the prison population meant that costs were not readily apparent until the prison population began to explode in the 1970s.<sup>8</sup>

While scale is certainly a factor, this Article argues that the establishment of the correctional free lunch is also the result of two other factors: the prison reform movement of the mid-nineteenth century and the economics of prison labor.<sup>9</sup> Penal reformers in the 1800s promoted the establishment of state prisons as a means of professionalizing and rationalizing correctional treatment. Reformers were not opposed to prison labor; indeed, they viewed labor as crucial to rehabilitation. State governments were only too happy to take on prisoners, since their labor generated revenue for the state. This is the missing piece of the story: state governments wanted prisoners because their labor generated surplus cash.<sup>10</sup> The correctional free lunch started out as a catered lunch for the state. Prisons only became an economic liability with the withering away of prison labor.

Now that the original justifications for state control no longer apply—since the belief in the professional and rehabilitative power of state prison is no longer dominant among reformers<sup>11</sup> and there are no economic benefits from con-

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8. *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.”).

9. For a comprehensive treatment of the role of prison labor in the creation of American prisons, see REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776-1941* (2008). McLennan’s meticulous history explores the ways in which prison labor was crucial to the establishment of prisons, prison discipline, and modern penology, but it does not focus on the issue in this Article: the relationship between state and local governments and the ways in which cost-passing and rent-seeking behaviors might distort the usage of state prison as opposed to jail, probation, and other criminal sanctions.

10. Zimring and Hawkins discuss Rusche and Kirchheimer’s theory about the relationship between free labor and the need to absorb it via prisons, *see* ZIMRING & HAWKINS, *supra* note 7, 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 & 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.

11. Beliefs changed in the 1970s, in what is now known as “the punitive turn.” *See, e.g.,* THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES (Pratt et al., eds. 2011); *see also* NATASHA A. FROST, *THE PUNITIVE STATE: CRIME, PUNISHMENT, AND IMPRISONMENT ACROSS THE UNITED STATES* (2006); Francis Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, NAT’L

trolling prison labor—are state prisons still a good idea? I argue that the answer is no. State funding of prisons distorts local decision making; making prisons free to local governments encourages their overuse. 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.

This Article provides a historical and critical framework for evaluating the provision of and responsibility for incarceration at the state and local levels. Examining the origins of the state prison system can help us reevaluate how it should be structured today. That said, the emphasis here is on clearing the land, not planting it. In other words, the goal of this Article is to decouple the concept of incarceration from incarceration provided and paid for by state governments, to understand that the system we have now is not the only one we could have.

This Article proceeds in five parts. Part I focuses on the current political economy of prison admissions and argues that the correctional free lunch has contributed to the excessive use of state prisons. Part II looks at the establishment of state prisons as an outgrowth of the prison reform movement, in which prison reformers sought to build and regulate prisons as a means of promoting rehabilitation. Part III looks at the history of prison labor and how prison labor was an economic asset for the level of government that controlled it. Part IV goes into more depth, focusing particularly on how local and state governments actually battled for control over sentenced prisoners in order to control the economic benefits they brought with them. Part V 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 not be desirable at all.

### I. LOCAL DECISIONS AND STATE PRISON POPULATIONS

State prison subsidies decouple the decision to send someone to prison from the fiscal consequences of that decision. States have little control over prison admissions yet bear all their costs. This Part explores how the correctional free lunch contributes to the overuse of state prisons.

Decision-making authority in law enforcement and prosecution is overwhelmingly local, but only some of the budgetary consequences of those decisions are borne at the local level. With the end of prison labor, the costs of state imprisonment are generally borne by state governments—and they are substantial. As a result, not all costs are internalized to local decisionmakers. State prison subsidies generate incentives for localities to make decisions that minimize

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CRIMINAL JUSTICE REFERENCE SERV. (2000), [http://www.ncjrs.gov/criminal\\_justice2000/vol\\_3/03d.pdf](http://www.ncjrs.gov/criminal_justice2000/vol_3/03d.pdf).

local costs and maximize those borne by the state, resulting in greater usage of state prison facilities.

In the current system, counties<sup>12</sup> whose criminal justice policies result in heavy usage of state prisons are subsidized; counties who use in-county dispositions such as jail and probation are not. This puts a thumb on the scale in favor of responding to crime with state imprisonment. The prison subsidy might be justified if prison were demonstrably preferable to other options, such as probation or county jail, but there is no evidence that it is. Without that evidence, it makes no sense to encourage the use of state prison and not other responses to crime. The costs of all criminal justice interventions, prison or otherwise, should be treated equally absent proof that one is superior to another.

### 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>13</sup> County and local officials, whether local law enforcement, probation officers, prosecutors, or even judges,<sup>14</sup> have ample opportunity to influence crime and punishment outcomes through a variety of decisions: whether to charge certain 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 bargaining; and even whether to arrest, cite, or prosecute a given offense at all.<sup>15</sup>

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12. For ease of expression, this paper uses the term “county” as a shorthand reference to local administrative units that constitute the locus of decision-making on criminal justice issues, including parishes, districts, and the like.
  13. See, e.g., Mona Lynch, *Mass Incarceration, Legal Change, and Locale*, 10 CRIMINOLOGY & 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.”).
  14. 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).
  15. Most countries (other than the United States) have mandatory prosecution. See, e.g., Ronald F. Wright & 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.”).

The state as a whole is, actually, not a whole—the system is made up of many interlocking pieces,<sup>16</sup> with most of the criminal justice decision-making concentrated at the local level.<sup>17</sup>

Local control has, ironically, expanded alongside the expansion of state penal codes. William Stuntz has written the definitive treatment of why state penal codes expand, arguing that expansive codes delegate authority to “prosecutors, who are the criminal justice system’s real lawmakers.”<sup>18</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>19</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>20</sup> These expansive codes mean that it is possible to create multiple criminal charges out of a single event,<sup>21</sup> giving local 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>22</sup> This Article, then, takes as its starting point Stuntz’s analysis that state penal codes are unlikely to contract.

Because expansive state penal codes delegate power to local actors, state prison overcrowding is driven by local decisionmakers. Mona Lynch has concluded that “much of the criminal law and policy that resulted in mass incarceration is local at its core, emanating in large part from specific regions of the nation and then diffusing from there.”<sup>23</sup> She goes on to differentiate between “law on the books” and law in action, noting that despite the existence of 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

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16. See generally W. David Ball, *E Pluribus Unum: Data and Operations Integration in the California Criminal Justice System*, 21 STAN. L. & POL’Y REV. 277 (2010). The Article also notes that the idea of purely “local” criminal justice is not without its problems.

17. 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 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.

18. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001).

19. *Id.* at 531-32.

20. *Id.* at 509.

21. *Id.* at 519.

22. *Id.* at 510.

23. Lynch, *supra* note 13, at 674.

any given place,”<sup>24</sup> a phenomenon that she describes as “probably the least explored in the criminological literature in terms of its contributory role to mass incarceration.”<sup>25</sup> In short, while expansive criminal statutes do not themselves create crowded state prisons, expansive statutes enable the localized decisions that result in overcrowding.<sup>26</sup> State law is enforced in a non-uniform manner. Absent mandatory arrest and prosecution, local officials have the power to decide what kind of criminal justice resources to use. There is no statewide criminal justice policy, then, just a collection of different criminal justice policies, all made with reference to—but different levels of enforcement of—state law.

*B. Budgets Are Not Aligned with Responsibility*

The cost of decisions made at the local level is not always 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>27</sup> Local policies that result in increased prison usage are thus subsidized by the state, while policies that use local resources are not. The extent to which this disjuncture actually affects decision-making at the margins—whether, say, a judge opts for prison over jail solely on budgetary grounds—remains unclear, and, for this analysis, is beside the point. This Article does not analyze the problem along principal-agent lines, where individuals fail to take social interests into account, but in terms of externalities, where the true costs

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24. *Id.*

25. *Id.* at 680.

26. *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* ZIMRING & HAWKINS, *supra* note 7, at 141 (“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.”).

27. 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 do not 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.

of a policy are not borne by the entity making them.<sup>28</sup> If counties had to pay for the true resource costs of policies that used prison, these policies would become more expensive and scarcer. This is the power of accounting: evaluating the costs of a policy depends on which budget one looks at. Policies that use local resources, like probation, have to be accounted for and paid for locally. Their budgetary impacts are clear to the actors using them. Policies that use prison need not be accounted for, so they cost local governments nothing. This distorts local choices by making some policies appear cheaper and more readily available than others, but they are cheaper and more readily available only in a local and fiscal sense, rather than in a societal and absolute sense.<sup>29</sup>

Decisions that promote the use of “off the books” resources need not be made consciously. Suppose, for example, that a city decides to use broken windows policing, where police aggressively pursue any infraction, no matter how minor.<sup>30</sup> Broken windows policies necessarily increase the usage of other criminal justice resources.<sup>31</sup> Jails become more crowded as arrestees are processed. The caseloads of public defenders and district attorneys increase. More court time is used. It is likely that at least some of those arrested under broken windows will be found to have violated parole terms or to be guilty of prison-eligible statutes affecting felons (e.g., being an ex-felon in possession of a firearm). The true cost of broken windows policing is at least partly subsidized by other agencies and the state without their input or control.<sup>32</sup> This means that, in

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28. William J. Stuntz, however, expressly makes a principal-agent argument in *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008).

29. ZIMRING & HAWKINS, *supra* note 7, at 211. “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.” *Id.* Because localities do not pay for prisons, the marginal cost of prison is zero. *Id.* 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.

30. 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 N.Y.U. REV. L. & SOC. CHANGE 271, 280-90 (2009).

31. This is why I propose that, in a stateless system, all local criminal justice agencies, including police, should be unified at the local level. See Ball, *supra* note 6.

32. ZIMRING & HAWKINS, *supra* note 7, at 140 (“One reason for the passive, almost fatalistic, 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

considering whether to pursue a broken windows policy, municipal police need only consider whether they can pay for their increased staff time.<sup>33</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 those costs are not in their budget.<sup>34</sup>

When Zimring and Hawkins discussed the correctional free lunch, they looked for some evidence that it had distorted usage of criminal justice resources. From 1970 to 1987, they observed that (county-funded) jail populations increased 83% while (state-funded) prison populations increased 192%,<sup>35</sup> suggesting that, in a general sense, the “cheaper” form of incarceration was used more heavily. In some areas, however, the correctional free lunch might even turn into a profit opportunity, as overcrowded state prisons pay local facilities to house state prisoners.<sup>36</sup> Half of Louisiana’s state inmates, for example, are housed in local (parish) jails; the sheriffs receive a per diem to hold state prisoners.<sup>37</sup> Federal prisoners can also generate revenue,<sup>38</sup> and as far back as the late

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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.”).

33. For an example of how this might distort a district attorney’s perspective, see Steven Mayer, *Kern DA Measures Success by the Number Sent to Prison*, PRISON REFORM MOVEMENT (Oct. 11, 2008, 1:30 PM), <http://prisonreformmovement.wordpress.com/2008/10/11/kern-da-measures-success-by-the-number-sent-to-prison/> (“‘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.’”).
34. These downstream costs are 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.
35. ZIMRING & HAWKINS, *supra* note 7, at 213. Zimring and Hawkins do not claim that all demand for prison beds is economically based or that demand is essentially limitless. Some demand depends on individual views of actors in the system as well as the human costs of imprisonment. *Id.* at 214–15.
36. 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.
37. Campbell Robertson, *Sheriff Wants a Big Jail in New Orleans, but City Balks*, N.Y. TIMES (Feb. 15, 2011), <http://www.nytimes.com/2011/02/16/us/16orleans.html>.
38. Ken McLaughlin, *Santa Clara County’s Lucrative Jail Business Takes a Hit*, SAN JOSE MERCURY NEWS (Dec. 5, 2009), [http://www.mercurynews.com/breaking-news/ci\\_13929429](http://www.mercurynews.com/breaking-news/ci_13929429) (“‘To be quite honest I’d prefer not to have federal and state prisoners and inmates from other counties,’ [Edward Flores, chief of the Santa

nineteenth century, before the creation of the first federal prisons, federal prisoners were a significant source of revenue to states that housed them.<sup>39</sup>

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. Police officers are not required to arrest those who violate the law; prosecutors are not obliged to prosecute those who are arrested. Even if someone is arrested or prosecuted, there are a myriad of choices about what offense to charge, what sentence to recommend, and the like. 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 state prison population increases.<sup>40</sup>

Localities use state prison at different rates, but these differences are not the result of underlying differences in the reported violent crime rate. In a prior work, I examined ten years of California data from 2000 to 2009 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>41</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>42</sup> Although California may be atypical, these data at least prove that a crime-prison linkage is not necessary,<sup>43</sup> and it suggests that there is a large

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Clara County Department of Corrections] 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.”).

39. BLAKE MCKELVEY, *AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915*, at 154 (paperback ed., Patterson Smith 1972) (1936).

40. See generally Lynch, *supra* note 13.

41. 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. U. L. REV. 987, 1022 (2012).

42. *Id.* at 1023. For example, from 2000 to 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 n.27.

43. 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 additional explanations of the relationship between policies and prison growth, see, for example, John F. Pfaff, *The Macro and Micro Causes of Prison Growth*, 28 GA.

amount of prison usage that can be explained by county choices. In other words, after controlling for violent crime, counties *choose* prison. They do not have prison thrust upon them. The question is why the state subsidizes this choice.

Additional studies also underscore the extent of local policy differences within states. A study of the Illinois death penalty found that “the counties with the most murders are not the counties most likely to declare a case capital.”<sup>44</sup> In California, three counties accounted for 83% of death sentences in 2009.<sup>45</sup> Nationwide, “1% of counties account[] for roughly 44% of all death sentences.”<sup>46</sup> Counties in California have shown differences in the rates at which they file juvenile cases directly in adult courts<sup>47</sup> and in the way in which they charge and file offenses eligible to be sentenced under the “three strikes” law.<sup>48</sup> The point of these examples is to illustrate what to most readers will seem axiomatic. In all

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ST. U. L. REV. 1239, 1254 (2012) (concluding that “[p]rison growth has been driven by admissions, and at least since the early 1990s admissions have been driven by prosecutorial filing decisions”).

44. 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. CRIM. L. & CRIMINOLOGY 1301, 1331 (2010).
45. Natasha Minsker et al., *Death in Decline* ‘09, ACLU OF N. CAL. at i (2010), [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 N. CAL., [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) (last accessed Oct. 24, 2014).
46. Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 233 (2012).
47. Selena Teji & Mike Males, *An Analysis of Direct Adult Criminal Court Filing 2003-2009: What Has Been the Effect of Proposition of 21?*, CTR. ON JUVENILE & CRIMINAL JUSTICE, 21 (2011), [http://www.cjcj.org/uploads/cjcj/documents/What\\_has\\_been\\_the\\_effect\\_of\\_Prop\\_21.pdf](http://www.cjcj.org/uploads/cjcj/documents/What_has_been_the_effect_of_Prop_21.pdf) (noting disparities in direct-filing). The study concludes that “prosecutor 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 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.
48. 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”).

states—but particularly in heavily populated, heterogeneous states—there are parts of the state that tend to favor more rehabilitation and parts that are more punitive. Only the choices favoring prison, however, are 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. Residents of one county have no say in selecting officials from another county, even though non-residents must pick up the check for any policies that result in state imprisonment. State residents can vote only for their local DA,<sup>49</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, hire local law enforcement and corrections officials.<sup>50</sup> 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 corrections is. But a resident of one county who disagrees—and does not wish to pay for—the policies of another county has no ability to change those policies without moving to the offending county, registering to vote, and voting against the current crop of policymakers during the next election. 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 policy choices and without fear of ballot-box reprisals from those outside the county.

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

Subsidizing county prison use would pose no problem if there were a consensus that prison is a better way of responding to crime than alternatives such as drug treatment, day reporting, and probation. After all, states commonly incentivize localities to pursue better policies through subsidies. There is no evidence, however, that prisons are demonstrably superior to the alternatives, and until we can agree—or prove—that prison is superior, states should not make it cheaper than the alternatives.

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>51</sup> Instead, it turns on the more mod-

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49. Note that DAs are not elected in all states. Alaska, Connecticut, and New Jersey have state appointments of local DAs. Carol J. DeFrances, *Prosecutors in State Courts, 2001*, BUREAU OF JUSTICE STATISTICS 2 (2002), <http://bjs.gov/content/pub/pdf/psc01.pdf>.

50. 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.

51. One study's authors, upon reviewing "the best available evidence," were "persuaded that *prisons do not reduce recidivism more than noncustodial sanctions*."

est argument that *unless* we can make the case that prisons are better than all the other options, we shouldn't subsidize them and nothing else.

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 might be a virtue. Localities can experiment and find out what works. A high-prison-use county<sup>52</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<sup>53</sup>—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 also consider the normative elements of society's response to crime. Even if we agreed on which interventions reduce crime and by how much, we might still disagree about whether, normatively, expenditures on those interventions would be worth it.<sup>54</sup> If punishment is partly an expression of values, such expression makes a strong-

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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). 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 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, "the overall impact of imprisonment might not simply be null but be iatrogenic; that is, prisons might have a criminogenic effect on those who experience it." *Id.* The authors conclude that "[t]he 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.

52. 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 in the top quartile of state new-felon-admissions-to-violent-crime ratios more than seven of ten years. Ball, *supra* note 41, at 1014.
53. Indeed, as Stuart Scheingold argues, "[s]tandards of uniformity and formal equality . . . have a hollow ring to them" since they "have never really been widely honored." STUART SCHEINGOLD, *THE POLITICS OF LAW AND ORDER* 211 (2010).
54. See W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL'Y REV. 395 (2011).

er, not weaker, case for localism and local payment.<sup>55</sup> Paying to vindicate one's own values demonstrates how sincerely those values are held. Forcing other people to put *their* money where *my* mouth is weakens the expressive value of my sentiments.

## II. THE ORIGIN OF STATE PRISONS

The preceding Part has shown that imprisonment need not be subsidized by state governments—and, indeed, that the practice might result in less efficient and less desirable outcomes. In the absence of statewide consensus on criminal justice policies, states should, at the very least, stop treating prison differently. This means either that states should stop paying for localities' prison usage or that they should also subsidize everything else. Without proof that incarceration in state prison is the best policy, states should not encourage that policy via the prison subsidy.

If state subsidies are such a bad idea, however, why are they the norm? There are two historical reasons, neither of which presently obtains. This Part explains why states established and regulated prisons in the first place.

State prisons are a relatively recent phenomenon. 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 and that incarceration (when it was imposed) was administered locally. As late as 1775, Pennsylvania saw "little or no imprisonment as a normal punishment for crimes."<sup>56</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>57</sup>

Pennsylvania was not alone in this regard. In the country as a whole there were many punishments for crimes, but "[w]hat 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>58</sup>

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55. See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 3-13 (2012) (discussing how early criminal justice practices in the United States were local in nature).

56. HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY* 72 (Patterson Smith 1968) (1927).

57. *Id.* at 73.

58. David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 101 (Norval Morris & David J. Rothman, eds., 1998). Punishment was also local—and

After the American Revolution, Quakers in Pennsylvania were influential in moving the state from corporal (and capital) punishment towards imprisonment; it is against this backdrop that the Walnut Street Jail, the most influential house of incarceration in the late eighteenth century, was established in Philadelphia.<sup>59</sup> This jail has been described as a “semi-state prison”<sup>60</sup>; though it was used to house state prisoners alongside local jail populations,<sup>61</sup> it was not part of a broader state system.

The country’s move away from corporal and capital punishment toward imprisonment was seen as an international exemplar. In the 1830s, the French government sent Gustave de Beaumont and Alexis de Toqueville to study the penitentiary system. This tour resulted in de Toqueville’s monumental work *Democracy in America*, but that book was merely a personal project. At the time, the real draw to the government of France was not our democracy, but our penal institutions.<sup>62</sup> Indeed, the French authors wrote that “it is a matter of pride to every American, that the new penitentiary system has been first established and practiced in this country.”<sup>63</sup>

In 1867, de Beaumont and de Toqueville’s evaluation of the U.S. penal system was supplanted by a work that gives us our best understanding of the state of American incarceration before the establishment of the state prison system. *Report on the Prisons and Reformatories of the United States and Canada*, by prison reformers E.C. Wines and Theodore W. Dwight, has been described as “the most thorough account of the nation’s prisons in the post-Civil War era.”<sup>64</sup>

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not carceral—in England. In the Anglo-Saxon era predating the Norman conquest, the most common punishments for crimes were mutilation, death, exile, and financial compensation; only witchcraft and theft were punished by imprisonment. Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 31 (Norval Morris & David J. Rothman, eds., 1998). In the eighteenth century, England punished most offenders with “whipping, the pillory, and the gallows” and “only a small minority were actually imprisoned as punishment, usually for such minor offenses as vagrancy.” Randall McGowen, *The Well-Ordered Prison, England 1780-1865*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 72 (Norval Morris & David J. Rothman, eds., 1998).

59. GUSTAVE DE BEAUMONT & ALEXIS DE TOQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES, AND ITS APPLICATION IN FRANCE* 1 (Francis Lieber trans., 1833).

60. BARNES, *supra* note 56, at 3.

61. LeRoy B. DePuy, *The Walnut Street Prison: Pennsylvania’s First Penitentiary*, 18 PA. HIST. 130, 136 (1951).

62. Rothman, *supra* note 58, at 100.

63. Francis Lieber, *Introduction* to DE BEAUMONT & DE TOQUEVILLE, *supra* note 59, at viii.

64. Rothman, *supra* note 58, at 111.

Their report involved a comprehensive survey of carceral officials<sup>65</sup> followed by in-person visits to jails and penitentiaries around the country.

Wines and Dwight were key architects of state governmental control over prisons, arguing that “[t]he 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.”<sup>66</sup> As they noted, however, no state in their survey had such an authority.<sup>67</sup> State prisons were run as local fiefs, by politically appointed wardens pursuing independent policies,<sup>68</sup> with a high degree of turnover.<sup>69</sup> No states other than New York and Massachusetts succeeded in even examining all the prisons of their states, 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> California provides the most absurd example of just how gossamer-thin “state” systems could be: at statehood in 1850, the state prison was established by legislative fiat, with an act 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>71</sup>

Wines and Dwight saw two advantages to state centralization that went beyond coordination of the placement and treatment of prisoners. First, they saw local jails as disgusting, deplorable institutions that were “but public schools, maintained at the expense of the community, for the encouragement of vice,

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65. 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.

66. *Id.* at 335.

67. *Id.* at 77.

68. MCKELVEY, *supra* note 39, at 44-45.

69. WINES & DWIGHT, *supra* note 65, at 77.

70. Edgardo Rotman, *The Failure of Reform, United States 1865-1965*, in THE OXFORD HISTORY OF THE PRISON, *supra* note 58, at 153. 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.” MCKELVEY, *supra* note 39, at 127.

71. BONNIE L. PETRY & MICHAEL BURGESS, SAN QUENTIN: THE EVOLUTION OF A STATE PRISON 8 (2005). It is important to remember, however, that state governments themselves were growing in power and sophistication, and one might argue that construction of imposing, fortress-like prisons was an expression of that power. Sing Sing prison in New York, for example, has been called the American Bastille. REBECCA M. MCLENNAN, *supra* note 9, at 1.

and for providing an unbroken succession of thieves, burglars, and profligates.”<sup>72</sup> Jails had no programming: there was no education, no work, and no religion.<sup>73</sup> Many of those confined in vermin-infested cells were later determined to be innocent.<sup>74</sup> Wines and Dwight were not alone in this estimation. In general, the prison reform movement pushed for state supervision and control “chiefly because of the irresponsibility of the counties.”<sup>75</sup>

Second, these reformers believed that state carceral institutions were the best hope for reforming prisoners and that prisons needed time for reformation to be effective. Medical metaphors (e.g., “curing” one of criminal tendencies) were 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, 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.<sup>76</sup> The same was true for prisoners.<sup>77</sup> Brockway wanted the option to keep prisoners in state facilities because he believed he could use this time to rehabilitate them.<sup>78</sup> These longer sentences were not meant for punishment, but for rehabilitation.<sup>79</sup> This view informed the modern understanding of the relationship between felonies and prisons. The first Model Penal Code defined felonies in terms of treatment: because local jails lacked the ability to reform prisoners, and because at least a year was needed for effective treatment, serious offenses needed long sentences in professionally-administered state prisons.<sup>80</sup>

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72. WINES & DWIGHT, *supra* note 65, 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.

73. *Id.* at 317.

74. *Id.* at 317-18.

75. MCKELVEY, *supra* note 39, at 210.

76. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 33 (2002).

77. 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 (2008).

78. ROTHMAN, *supra* note 76, at 33-35.

79. WINES & DWIGHT, *supra* note 65, at 65-66.

80. See, e.g., Tress, *supra* note 1, at 484 (“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

To implement a reformatory, medicalized system, prisoners needed to be classified. Indeed, this was one of the problems with local jails: the commingling of the young and old, sentenced and not sentenced, men and women.<sup>81</sup> But classification, Wines and Dwight argued, required state governments to be at the helm. Under the late 1860s 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>82</sup>

Finally, it is worth emphasizing that there is nothing inherent about the word “felony” that requires a felon to serve time in a state institution. At least as late as 1823, more than a generation after the ratification of the U.S. Constitution, one treatise author wrote that it was “impossible to know precisely in what sense we are to understand this word [felony].”<sup>83</sup> 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>84</sup> The notion of felony and misdemeanor classification itself, then, comes from the nineteenth-century reform movement. We began to think of sending felons to prison only after we had prisons to send them to. The contemporary idea that there is a necessary connection between felonies and state imprisonment is a *result* of the formation of state prisons, not a cause of their formation.

### III. STATE PRISONS AS PROFIT CENTERS

Part II illustrated why reformers wanted state prisons; this Part explains why states were willing to take on the responsibility for prisoners. Up until the twentieth century, prisoners were profitable, not costly. As far back as the reign of the English King Henry II (1133–1189), the rights to operate jails were sold to individuals who profited by the difference between the cost of running the prison and the per-prisoner allocation given the operator.<sup>85</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>86</sup> Jailers were expected to earn their in-

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definition used in the Model Penal Code.”); *see also id.* at 487 (citing MODEL PENAL CODE 23 (Council Draft No. 1, 1953)) (claiming that a year was needed “to apply any substantial program of treatment”).

81. WINES & DWIGHT, *supra* note 65, at 316 (internal citations omitted).

82. *Id.* at 116.

83. Tress, *supra* note 1, at 465.

84. *See id.*

85. Peters, *supra* note 58, at 31.

86. *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).

come from these fees, a practice that continued into the eighteenth century in England.<sup>87</sup>

The window for the establishment of state prisons, during which the goals of reformers overlapped with the economic benefits of prison labor, was brief: the Wines and Dwight study was published in 1867, but within thirty years, prison labor had begun its decline.<sup>88</sup> By that point, the idea that states could and should have a statewide system of punishment had already taken hold. State prisons came of age during a time when they were economically viable, but even when prisons no longer paid, state governments maintained responsibility for them. The problem with this arrangement would remain hidden until the scale of imprisonment exploded in the 1970s.

Prison labor attracted two different constituencies: those interested in the rehabilitative power of work, and those interested in the economic benefits. Prison reformers Wines and Dwight, for example, pointed out that prison labor was both fiscally prudent and penologically sound, noting that

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.<sup>89</sup>

De Beaumont and de Toqueville, writing some forty years earlier, agreed,<sup>90</sup> though they noted that, while European prisoners kept the value of the goods they made, in the United States "the criminal owe[d] all his labour to society, in

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87. McGowen, *supra* note 58, at 74 ("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.

88. MCLENNAN, *supra* note 9, at 185.

89. WINES & DWIGHT, *supra* note 65, at 248.

90. DE BEAUMONT & DE TOQUEVILLE, *supra* note 59, at 22 ("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 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.").

order to indemnify it for the expenses of his detention.”<sup>91</sup> The moral component of not draining the public fisc even extended to parents of juvenile delinquents: Wines and Dwight argued that parents of delinquents should pay for the cost of their children’s incarceration or be put to hard labor themselves.<sup>92</sup> Prison labor reformed prisoners and also “brought the state a financial return on its prison investment.”<sup>93</sup>

Prison labor was employed in a variety of ways.<sup>94</sup> Convicts could work directly for the state, or the state could buy goods made by convict labor, a practice that continues to this day.<sup>95</sup> Many states used prison labor to build the prisons themselves, saving on the costs of construction, as California did with San Quentin State Prison<sup>96</sup> and New York did with Sing Sing.<sup>97</sup> Another system was on-site contracting, where a contractor would come into a prison and oversee the convicts’ work.<sup>98</sup> Contracting was the most common form of prison labor in Wines and Dwight’s survey.<sup>99</sup>

Convicts could also be leased directly to private companies—an early form of privatization—whereby the state was paid either (a) a lump sum for all its prisoners or (b) a daily rate per prisoner used. The company who leased the prisoners was responsible for their care and feeding, such as it was. 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>100</sup> Southern states

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91. *Id.* at 36-37. Even earlier, one commentator in Pennsylvania rejected the idea that taxes should pay for prisons, seeing it as a breach of the social contract. MCLENNAN, *supra* note 9, at 40-41 (citing a 1788 editorial in a Pennsylvania newspaper).
  92. WINES & DWIGHT, *supra* note 65, at 66 (“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.”).
  93. Rothman, *supra* note 58, at 109.
  94. For a broader overview of the types of prison labor, see MCLENNAN, *supra* note 9, at 103-04. *See also* MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 at 14-15 (1996); Harry Elmer Barnes, *The Economics of American Penology as Illustrated by the Experience of the State of Pennsylvania*, 29 J. POL. ECON. 617, 624-25 (1921).
  95. *A Study of Prison Industry: History, Components, and Goals*, AM. CORR. ASS’N 4 (1986), <https://s3.amazonaws.com/static.nicic.gov/Library/004194.pdf> (describing state use as the “most prevalent” form of prison labor in the United States during the past half century).
  96. MCKELVEY, *supra* note 39, at 191.
  97. DE BEAUMONT & DE TOQUEVILLE, *supra* note 59, at 7.
  98. WINES & DWIGHT, *supra* note 65, at 248-49.
  99. *Id.* at 255.
  100. *Id.* at 88.

used the convict leasing system to avoid any state financial responsibility for prisoners,<sup>101</sup> and after the Civil War leasing was so widely used that “Southern states had no prisons to speak of.”<sup>102</sup>

Leasing became a profit center for Southern states. Though these states initially turned to convict leasing to avoid the costs of rebuilding and maintaining their prisons, leasing soon proved incredibly lucrative.<sup>103</sup> By the mid-1880s, “practically every [Southern] state was reaping a clear profit from its convicts.”<sup>104</sup> In Alabama, for example, from 1876 until 1928 the state consistently made money on its prison population.<sup>105</sup> In 1898, income from convict leasing made up an astounding seventy-three percent of total state revenue.<sup>106</sup>

Even outside the South, prison labor was profitable.<sup>107</sup> States used the prospect of prison labor revenues to guide their decisions about how to budget for new state systems. Wines and Dwight observed that 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>108</sup> Wines and Dwight reported that the goal of New York’s prison system, according to a man who worked there more than thirty 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>109</sup> When New Jersey was considering a prison labor

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101. See generally MANCINI, *supra* note 94.

102. *Id.* at 1. Three Southern states had no state prison before the Civil War—North Carolina and South Carolina, *id.* at 199, and Florida, *id.* at 184. Those that did have antebellum prisons found them either completely destroyed (e.g., Georgia, *id.* at 82) or severely degraded both structurally and financially after the Civil War. When Mississippi was faced with the prospect of repairing its penitentiary in 1876, for example, 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.” MCKELVEY, *supra* note 39, at 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.

103. See, e.g., MANCINI, *supra* note 94, at 132-33 (discussing the cases of Mississippi, Alabama, and Arkansas); see also *id.* at 119 (discussing Arkansas and noting that the initial lease contract emphasized that the state would not pay any expenses relating to its prisoners).

104. Blake McKelvey, *A Half Century of Southern Penal Exploitation*, 13 SOC. FORCES 112 (1934).

105. MANCINI, *supra* note 94, at 101.

106. *Id.* at 112. 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. *Id.* at 119.

107. MCLENNAN, *supra* note 9, at 134-36.

108. WINES & DWIGHT, *supra* note 65, at 289.

109. *Id.* at 288.

system, “financial considerations were the most potent in effecting the change.”<sup>110</sup>

The use of prison labor was not to last, however. By the turn of the twentieth century, “the day of self-supporting prisons was passing,”<sup>111</sup> though it would not be fully extinguished until the early 1940s, when interstate trade in prison-made goods was effectively outlawed. Opposition to prison labor came from “free” industry and organized labor, who argued that the low wages from prison work constituted unfair competition.<sup>112</sup> In 1887, these forces gained their first significant victory when federal prison labor contracting was made illegal.<sup>113</sup> States followed the federal government, and by 1895 “almost half the states . . . place[d] restrictions of some sort or other on the contracting out of prison laborers to private enterprise.”<sup>114</sup> When states could no longer use prison labor, the balance sheet for prisons went from surpluses to “enormous deficits.”<sup>115</sup> Federal statutes passed during the Great Depression restricted the market for and use of prison labor even further, culminating in 1940 with the virtual prohibition of prison products in interstate commerce.<sup>116</sup> This left goods and services produced for government consumption as the only outlet for prison labor.<sup>117</sup> These changes made state prisons dependent on funds from state governments to a degree that was not foreseen 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>118</sup>

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110. *Id.* at 53.

111. MCKELVEY, *supra* note 39, at 106.

112. *Id.* at 93.

113. MCLENNAN, *supra* note 9, at 184. Though California banned convict leasing in 1882 by constitutional amendment and enacting legislation, prisoners still worked for private contractors for many years after that. *See, e.g.*, JOHN SUMMERFIELD ENOS, SECOND BIENNIAL REPORT OF THE BUREAU OF LABOR STATISTICS OF THE STATE OF CALIFORNIA 124 (State Office, Sacramento, 1887) (“Practically this idea and order has not been carried out, and the old contract system is still as active as it ever was, although under a different name. Instead of contracting to pay so much per day for convict labor, the firms who now make use of a State institution contract to pay so much for the product of that labor.”).

114. MCLENNAN, *supra* note 9, at 185. McLennan notes, however, that in some places where contracting was formally outlawed, “actual abolition took longer.” *Id.* at 187.

115. MCKELVEY, *supra* note 39, at 98.

116. 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).

117. MCLENNAN, *supra* note 9, at 197-200.

118. MCKELVEY, *supra* note 39, at 104.

In sum, states agreed to administer state prisons during a time when there was only an economic upside to doing so. The problem of the correctional free lunch lay dormant until the scale of imprisonment exploded in the 1970s.<sup>119</sup> But long before the 1970s, the groundwork for the correctional free lunch had already been laid. By agreeing to build and maintain state prisons almost a hundred years earlier, and holding fast to this agreement when the underlying economics changed, states left themselves exposed to a potentially ruinous fiscal commitment.

#### IV. HOW PRISON COSTS AFFECTED PRISON GROWTH: HISTORICAL COUNTER-EXAMPLES FROM PENNSYLVANIA AND THE CAROLINAS

What would have happened if the economic benefits to prison labor had been captured not by the state, but by local governments? Alternatively, what if there had not been any economic benefits to prison labor? This Part examines two natural experiments where changes in the economic benefits of prison labor altered the size and shape of state prison systems. Part IV.A examines the history of South Carolina and North Carolina, where counties fought the state for the benefits from prison labor, resulting in very long sentences being served at the county level. This suggests that state prison systems might have remained small if the cost differential between local and state dispositions had also remained small. Part IV.B explores Pennsylvania's experience. Due to the inefficiencies of the isolated system of prison labor used there, as well as early moves to ban the sale of prison-made goods, Pennsylvania prison labor never made much money. Rather, Pennsylvania's prisons were a drain on the state budget. Pennsylvania's response was telling. State facilities did not subsidize the costs of prisoners; instead, sentencing counties paid houses of incarceration for the upkeep of each prisoner they sent. Both examples hint that the economic benefits of prison labor were crucial to establishing the size and scope of state prison systems.

##### A. *Carolina County Road Gangs: The State-Local Battle for an Economic Asset*

In North and South Carolina, local governments desperately wanted to capture the economic benefits of as much prison labor as possible. As a result, they were constantly reclaiming locally-sentenced convicts from the state prison system.<sup>120</sup> Their experiences highlight how different economic arrangements

119. ZIMRING & HAWKINS, *supra* note 7, at 141.

120. County road gangs were not originally just a Southern phenomenon, and, as late as 1923, all states except Rhode Island had laws authorizing county convict work on public highways. See, e.g., JESSE F. STEINER & ROY M. BROWN, *THE NORTH CAROLINA CHAIN GANG: A STUDY OF COUNTY CONVICT ROAD WORK* 3-4 (Negro Universities Press, 1970) (1927). In fact, not all Southern states had county road crews: Virginia had a state road force. Jane Zimmerman, *The Penal Reform*

shape state prison usage, suggesting that, if prisoners were an economic benefit, counties might retain more of them. In the immediate years following state penal centralization in the Carolinas, state control was not seen as a correctional free lunch (that is, a way for counties to get the states to absorb the cost of imprisonment), but rather as a way for states to seize economic assets from localities.

The relationship between Southern convict labor and slavery is no coincidence. The Thirteenth Amendment, after all, did not and does not end all forms of slavery—it allows slavery as a condition of “punishment for crime.”<sup>121</sup> The antebellum Southern economy was based on the enslavement of African Americans, and many authors have argued that “the convict lease system was a functional replacement for slavery.”<sup>122</sup> One author goes so far as to say that prison gangs in the American South “took their inspiration from slavery.”<sup>123</sup> To this day, of course, African Americans are disproportionately represented in our country’s prisons, and the racial origins of our correctional policies are widely discussed (though perhaps not as widely as they should be).<sup>124</sup> Looking only at the economic considerations of prison labor, particularly in the South, presents an incomplete picture of why prison labor policies enjoyed support. Surely part of the impetus behind chain gangs was a return, in some sense, to a racialized form of social control, since chain gangs, with their collection of uniformed prisoners chained together in hard labor, were “more disgraceful and humiliating than a sentence to the state prison.”<sup>125</sup> Nevertheless, an exploration of how these policies were implemented tells us what factors lay behind the control of convict populations. Why did localities want responsibility for prisoners when the state was willing to take them?

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*Movement in the South During the Progressive Era, 1890-1917*, 17 J. S. HIST. 462, 470-71 (1951) (internal citations omitted).

121. U.S. CONST. amend. XIII, § 1, cl. 2.

122. Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865-1890*, 30 SOC. PROBS. 555 (1983). However, it is also true that Northern prisons relied so heavily on the use of convict labor that “the framers of the Thirteenth and Fourteenth Amendments were apparently well aware [that] *an unqualified, truly universal, proscription of slavery and involuntary servitude would have effectively rendered most Northern penal systems illegal.*” MCLENNAN, *supra* note 9, at 85.

123. Rotman, *supra* note 70, at 157. 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. S. 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).

124. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLOR BLINDNESS* (2010).

125. STEINER & BROWN, *supra* note 120, at 6.

The answer is that prison labor was profitable. After the Civil War, with the end of all non-penal forms of slavery, the value of prison labor was evident, and state governments in the South jealously guarded prisoners—and their economic potential—from localities. In 1875 the Governor of Alabama, George Huston, was upset that judges had 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, the state outlawed county leasing of misdemeanants in 1879, but counties, seeking economic benefits, openly flouted the law for the next thirty years.<sup>127</sup> Only when the state prisons abolished their own leasing programs and instead sent state prisoners to counties for public works did county leasing come to an end.<sup>128</sup>

By the late 1920s, Southern states had phased out the practice of leasing convicts to private industry, in part due to the well-publicized brutality of the practice. In the intervening years, though, localities in two states fought bitterly for control over prisoners. In other words, there was nothing inevitable about state control over incarceration. In these two states, state control was decidedly unwelcome.

### 1. The South Carolina Experience

South Carolina’s penological history from the Civil War until 1916 is one that has been described as a “circle” going from county control to state centralization and back to county control via work gangs.<sup>129</sup> State control over the county-dominated system was established after the Civil War, but within fifty years counties were not only sentencing prisoners to county labor for terms exceeding ten 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 counterexample to the correctional free lunch: counties that saw economic benefits from incarceration starved state governments of prisoners.

Before the Civil War, South Carolina housed prisoners in local jails; there were no state facilities.<sup>130</sup> Prisoners in local jails were either serving long-term sentences or were awaiting trial. Convicts serving short-term sentences “did not exist”: misdemeanants were fined or flogged.<sup>131</sup> Only after the Civil War did

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126. MANCINI, *supra* note 94, at 101.

127. *Id.* at 222.

128. *Id.* at 223.

129. ALBERT D. OLIPHANT, *THE EVOLUTION OF THE PENAL SYSTEM OF SOUTH CAROLINA FROM 1866 TO 1916* at 13 (1916).

130. *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.”).

131. *Id.*

South Carolina begin to exert state control, passing an act to build a state penitentiary on the theory that lawbreakers violated state law, not county law.<sup>132</sup> The penitentiary system, however, was designed to be, in the words of Governor Wade Hampton, “self-supporting as far as possible.”<sup>133</sup> The state began a convict leasing system in 1877, leasing all state prisoners except those convicted of “murder, statutory assault, arson or manslaughter.”<sup>134</sup>

South Carolina counties slowly began to claw back control of sentenced prisoners from the state government. 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>135</sup> an attempt to reassert local control over convicts.<sup>136</sup> As the law developed over the next decades, counties won increasing control over prisoners and were given first crack at retaining workable prisoners while returning “ungovernable” convicts to the state.<sup>137</sup> By 1903, sentencing limits for prisoners under local control had increased dramatically: prisoners “whose sentence did not exceed 10 years” (except those sentenced for statutory assault) could be sentenced to hard labor in the counties.<sup>138</sup> By 1911, even this limit was removed: no sentence length was too long to be served locally, at hard labor.<sup>139</sup> Finally, in 1914 the state passed a law authorizing counties to reassert control over *any* of its sentenced prisoners in order to work them on the chain gangs; more than half the prisoners subsequently taken by counties had been sentenced to life terms.<sup>140</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 [to the state] if they see fit.”<sup>141</sup> Under this regime, more than eighty percent of the state’s prisoners were under county control.<sup>142</sup> The reason was economic—prison labor was valuable.<sup>143</sup>

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132. *Id.* (noting that county finances were depleted by the Civil War).

133. *Id.* at 4.

134. *Id.* at 5.

135. *Id.* at 8.

136. *Id.* at 9.

137. *Id.* at 10.

138. *Id.* at 11.

139. *Id.* at 12.

140. *Id.*

141. *Id.* at 13.

142. *Id.* at 14; see also McKelvey, *supra* note 104, at 118 (reporting that, in 1915, 1500 out of 2000 of South Carolina’s state convicts were working in county chain gangs).

143. OLIPHANT, *supra* note 129, at 13 (“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

## 2. The North Carolina Experience

In North Carolina, prison labor at the county level dated back to the years following national independence; from 1787 to 1797 sheriffs could hire out any prisoner unable to pay costs assessed by the court.<sup>144</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>145</sup>

As in South Carolina, the local leasing power was gradually extended to cover a greater number of sentenced prisoners. In the mid-1870s, a new statute extended convict leasing to cover “any person convicted of any criminal offense in any court, and to those liable for costs.”<sup>146</sup> A few years later, officials—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” including those who could not pay fines and costs, but also to lease labor to “individuals or corporations” unrelated to public works and roads.<sup>147</sup> This power was limited slightly in 1879, when local officials were required to obtain judicial authorization to hire out jail inmates to individuals and corporations.<sup>148</sup> In practice, however, one author observed that a provision to lease out prisoners to private interests was seldom used, since counties preferred to use convict labor to build roads.<sup>149</sup>

The role of the North Carolina state government in criminal justice was thus quite limited. North Carolina, like South Carolina, had no state prison prior to the Civil War.<sup>150</sup> The state eventually built a prison during Reconstruction,<sup>151</sup> but counties siphoned off so many prisoners for their road crews that

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most of the superstructure of the State’s penal system when the State board of charities and corrections was created in 1915.”).

144. STEINER & BROWN, *supra* note 120, at 18. This law was repealed in 1797, replaced in 1831 by a racialized system that exempted whites, specifying 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.” *Id.* at 19 (internal citations omitted). The “great majority” of prisoners in both the state and county systems were African Americans, “especially in the county chain gangs.” *Id.* at 14-15.

145. *Id.* at 21 (internal citations omitted).

146. *Id.* at 21-22.

147. *Id.* at 23.

148. *Id.*

149. *Id.* at 48.

150. *Id.* at 11.

151. MANCINI, *supra* note 94, at 199.

only those unable to work—"the decrepit and diseased criminal offenders"—were housed there.<sup>152</sup> In 1889, the legislature authorized judges to impose local hard labor for men with sentences of up to ten years; the result was that the state prison population declined from 1300 prisoners in 1890 to just 660 in 1905.<sup>153</sup> By 1908, the North Carolina Superintendent of the Prison reported that counties had complete control over the state's convict population, arguing that the state prison system was, essentially, a collection of individual county systems:

[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>154</sup>

North Carolina did not so much as supervise county camps and jails until 1917,<sup>155</sup> and 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>156</sup>

In 1926, there were nearly twice as many prisoners on North Carolina county road gangs as in state prison.<sup>157</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 offenses as serious as "rape, burglary, assault with intent to kill, and manslaughter." The ultimate placement of a prisoner was usually left to the discretion of the superior court judge.<sup>158</sup>

The economic benefits of prison labor drove sentencing in North Carolina: counties kept their sentenced prisoners and sent only those who could not work to the state.<sup>159</sup> "Without a doubt the motive underlying the establishment and

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152. Zimmerman, *supra* note 120, at 469 (internal citations omitted). Indeed, 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. STEINER & BROWN, *supra* note 120, at 35.

153. McKelvey, *supra* note 104, at 117.

154. STEINER & BROWN, *supra* note 120, at 39-40 (internal citations omitted).

155. *Id.* at 65.

156. *Id.* at 66.

157. *Id.* at 5.

158. *Id.*

159. *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 country roads.")

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>160</sup> Indeed, the leading history of North Carolina chain gangs suggests that in times with few prisoners, “the local criminal courts tend[ed] 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>161</sup>

### B. County Capitation in Pennsylvania

Pennsylvania provides a counterexample to the story in the Carolinas. Pennsylvania, like other states, used prison labor from the colonial period onward. Prison labor in Pennsylvania, however, did not generate enough revenue to offset the costs of operation for two reasons: first, prisoners labored in solitary confinement, which was inefficient and costly; and second, the state imposed restrictions on the sale of prison-made goods. Because prisoners were not economic assets, localities did not fight to maintain control of them. Instead, Pennsylvania controlled its prison population another way. Beginning with the Walnut Street Jail in the late 1700s, local governments had to pay costs associated with the prisoners they sent to state facilities. In other words, Pennsylvania never gave localities a “free lunch.”

The development of Pennsylvania’s statewide prison system came about as a result of overcrowding at the Walnut Street Jail.<sup>162</sup> Overcrowding meant less room for work. By 1825, convict labor met only ten percent of Walnut Street’s costs, and less than ten percent of prisoners were employed.<sup>163</sup> By the 1820s, Walnut Street reverted to an ordinary jail<sup>164</sup> and was replaced by the Eastern State Penitentiary in Cherry Hill. At Eastern State, prisoners lived and worked

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160. *Id.* at 6. Although the authors of this study question the economic benefits, finding that the lack of accurate bookkeeping makes such an assessment difficult. *Id.* at 7.

161. *Id.* at 6; *see also* MCKELVEY, *supra* note 39, at 168 (discussing that, in places where sheriffs were paid by the county per prisoner, “[i]t was not unknown for constables to ‘run men in for revenue only’”) (internal citations omitted); WINES & DWIGHT, *supra* note 65, at 519 (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”).

162. BARNES, *supra* note 56, at 116 (“[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.”).

163. Barnes, *supra* note 94, at 621 (internal citations omitted).

164. DePuy, *supra* note 61, at 132.

in twenty-four-hour isolation. This became known as the “Pennsylvania” (or “separate”) system, as opposed to the “Auburn” (or “congregate labor”) system employed at Auburn State Penitentiary in New York, which allowed inmates to work together during the day before returning alone to their cells at night. The Pennsylvania system was both “ruinous to the public treasury” and ineffective at “the reformation of the prisoners.”<sup>165</sup> Part of the expense was due to the architecture—the need for separate workspaces, rooms, and even individual exercise yards, for example.<sup>166</sup> Complete isolation also led to overcrowding and an inability for inmates to work.<sup>167</sup> Throughout its long history, the Eastern State Penitentiary “never . . . earned enough in any year to equal the cost of feeding and clothing the convicts.”<sup>168</sup> Up until the late nineteenth century, when other prisons had long since turned to the efficiency of mass production and industrialized labor, Eastern State prisoners still made handicrafts,<sup>169</sup> mostly hosiery, chairs with cane seating, and cigars.<sup>170</sup>

But even the more efficient Pennsylvania prisons did not make money. After the Civil War, Pennsylvania’s other prison, the Western State Penitentiary, moved to the congregational labor (“Auburn”) system, which allowed prisoners to work together.<sup>171</sup> Western State was slightly more economical than Eastern State as a result, but in the sixty years after 1864 it never generated enough revenue to offset building maintenance costs and came nowhere close to offsetting the cost of officials’ salaries.<sup>172</sup>

Part of the problem was that Pennsylvania’s free (non-incarcerated) labor movement had been extremely effective in campaigning to limit the production and sale of goods made with prison labor.<sup>173</sup> An 1897 bill restricting trade in prison-manufactured goods turned prison labor in the state into a “farce and a misnomer.”<sup>174</sup> By 1909, Pennsylvania led the nation in idle prisoners: “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>175</sup> A 1915 report by the Penal Commission on the Employment and Compensation of Prisoners was very critical of the idleness of Pennsylvania prisoners, noting that “[f]rom the financial point of

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165. DE BEAUMONT & DE TOQUEVILLE, *supra* note 59, at 3.

166. MCKELVEY, *supra* note 39, at 11.

167. *Id.* at 6.

168. BARNES, *supra* note 56, at 287.

169. MCKELVEY, *supra* note 39, at 95.

170. Barnes, *supra* note 94, at 621, 623.

171. *Id.* at 623.

172. *Id.* at 640.

173. *Id.* at 633–34.

174. *Id.* at 635.

175. *Id.*

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>176</sup>

If its prisons were so expensive, how, then, did Pennsylvania afford them? Beginning in 1789, with the Walnut Street Jail, Pennsylvania facilities charged counties for the inmates they committed on a per capita basis, also known as a capitation system.<sup>177</sup> In 1789, when Pennsylvania made the Walnut Street Jail available for prisoners from across the state, “[t]he 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>178</sup> As the Pennsylvania system expanded, the state paid salaries in state prisons, but “the expenses of maintaining and keeping the convicts” continued to be “borne by the respective counties in which they shall be convicted.”<sup>179</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>180</sup>

Most important for this analysis, cost-sharing was seen in Pennsylvania as a means of controlling prison admissions, with one observer writing that county payments “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>181</sup> In North and South Carolina, state prison populations were controlled by allowing localities to retain the economic benefits of prisoners. In Pennsylvania, state prison populations were controlled by charging localities for the cost of prisoners. In both examples, localities changed their prison usage when the cost of using them changed.

## V. ENVISIONING THE END OF STATE PRISON SUBSIDIES

The primary goal of this Article has been to point out that a state-funded prison system is neither necessary nor inevitable. By illustrating the difference between our current system and other possible systems, I hope to begin the discussion of alternatives. As the prior sections have demonstrated, state prisons

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176. BARNES, *supra* note 56, at 253.

177. *See id.* at 116 (“In case the proceeds of the labor of the prisoners exceeded the expense of their maintenance it was ordered that the surplus should be divided in proportion to the number of prisoners in each county.”). Philadelphia also received a hundred pounds a year for incidental expenses. DePuy, *supra* note 61, at 133-34.

178. BARNES, *supra* note 56, at 116.

179. *Id.* at 279; *see also* WINES & DWIGHT, *supra* note 65, at 294 (“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, [etc.], accruing in the earnings of the convicts.”).

180. BARNES, *supra* note 56, at 281.

181. *Id.*

were created in order to provide the rehabilitative options not found in local jails, and the use of prison labor meant that, far from being a drain, state control of prisons increased state revenues. Today, though, the rehabilitative efficacy of prisons is doubtful,<sup>182</sup> and their drain on state finances is undeniable. It no longer makes sense for state governments to provide localities with unlimited and fully-subsidized access to state prisons.

In this Part I outline some features of what a non-subsidized system might look like.<sup>183</sup> I begin by noting that there are still many places where the state could, and perhaps should, remain involved. Part V.A envisions a system in which the state no longer subsidizes prison admissions but nevertheless continues to regulate its existing prison facilities. Part V.B discusses the ways in which a non-subsidized state system would make local policy choices more transparent and sincere. Part V.C anticipates some concerns about unequal redistribution of resources. I conclude that concerns about redistribution 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. *Ending the Correctional Free Lunch*

Because there are several ways in which state governments are involved with prisons, there are several ways in which state governments' roles might be reduced. State governments generally build prisons, supervise them, and, of course, subsidize all expenses associated with prisoners. This section focuses on the last item: ending the prison subsidy.

There is little reason to destroy existing state facilities or to require local governments to duplicate them. Prison infrastructure is a sunk cost. Prisons are specialized buildings that are typically removed from population centers, making them difficult to repurpose. As buildings need to be upgraded or replaced, however, states should consider carefully whether they should pay for new construction. For the reasons specified in Part I, local governments should internalize as many costs associated with corrections as possible.

Similarly, state governments should continue to monitor and regulate prisons to ensure that conditions are humane and that programming is effective. Indeed, Wines and Dwight suggested almost 150 years ago that state authority could co-exist with local administration.<sup>184</sup> 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, were

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182. See, e.g., Lynne M. Vieratis, Tomislav V. Kovandzic, & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002*, 6 CRIMINOLOGY & PUB. POL'Y 589 (2007).

183. For more on the policy implications of ending the state prison subsidy, see Ball, *supra* note 6.

184. WINES & DWIGHT, *supra* note 65, at 84.

not present at the country's founding),<sup>185</sup> 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, and there are audits of schools. The state sets performance metrics, but local districts experiment with how to meet those metrics—via pedagogical approaches and other policies and procedures.<sup>186</sup> Local differences don't represent different goals but, instead, represent differences about the most effective means to attain common goals. Crucially, though, states themselves do not administer K-12 education. Local governments do.<sup>187</sup>

Criminal enforcement and sentencing are 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. States could ensure that corrections officers are licensed and that facilities meet certain standards of quality. States might also collect and disseminate criminal justice information, publishing relevant county statistics the way they publish scores on achievement tests. Voters could then use this information to reward or punish local officials responsible for 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.<sup>188</sup> Regulating at the state level would ensure that regulatory bodies were relatively independent, and therefore less subject to capture by local officials.

When it comes to paying for prisons, however, states should follow the Pennsylvania example<sup>189</sup> and stop distorting the cost of prison, either by ending

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185. See, e.g., Charles Woltz, *Compulsory Attendance at School*, 20 LAW & CONTEMP. PROBS. 3, 4 (1955).

186. For the difficulties this can engender, see Heather C. Hill, *Policy Is Not Enough: Language and the Interpretation of State Standards*, 38 AM. EDUC. RESEARCH J. 289 (2001).

187. States do, however, administer the more “professionalized” and specialized education at colleges and universities, suggesting that for special needs prisoners, such as those who are elderly or mentally ill, states might take a more active role.

188. See, e.g., Joseph O. Oluwole & Preston C. Green III, *State Takeovers of School Districts: Race and the Equal Protection Clause*, 42 IND. L. REV. 343 (2009).

189. The capitation system also operated, to a certain extent, in other states. 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 of the counties in which they are situated,” even though they received “inmates from the adjoining counties.” WINES & DWIGHT, *supra* note 65, at 57. 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.” *Id.* In the Illinois system of the late 1800s, local jailers were “remunerated by fees and not by salaries. The sheriff boards the pris-

the prison subsidy or equally subsidizing all the alternatives to prison. Every state is like Pennsylvania now: prison labor no longer supports the cost of prisons.<sup>190</sup> Because prison is not the only way to respond to crime (even in the context of sentencing), and because prison is expensive, it should not be subsidized relative to other options absent some proof that it is superior. States could experiment with variations on this general goal, for example paying most or all of the costs associated with serious offenses (e.g., murder), but paying none of the costs for lower-level offenses eligible for probation. Ending the prison subsidy would leave the buildings and administration at the state level but merely change the price paid by localities. It would be a change both simple and profound, as discussed below.

### B. *Taking Local Policies Seriously*

Currently, local policies on prison usage diverge, with all of a state's citizens paying only for those local policies that use state prison. Ending the prison subsidy would take these locally-expressed policy choices seriously by forcing localities to pay for them. One might expect prison usage to decrease as the price paid by individual counties increased, and, indeed, that is likely to be the case. However, it is at least possible, given the heterogeneity of local preferences, that individual counties might decide that their prison usage is, in fact, worth the added expense and continue with business as usual. The goal of removing the subsidy is about ensuring that the costs of prison are borne by those who choose to use them. Allowing localities to retain the discretion and autonomy they presently have, while making them more responsible for the financial consequences of these decisions, 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 United States has simply gotten too populous, and state governments too complex, for citizens to understand, at the state level, the relevant causes of crime and the effects of policies designed to address them. The first census in 1790 recorded a population of 3,929,214;<sup>191</sup> as of 2010, more than half the states in the country had more people than that.<sup>192</sup> California alone has several counties with more people than even the largest

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oners at so much per week. Clothing is supplied to prisoners, when necessary, at the expense of the counties." *Id.* at 322-23.

190. Even if the legal and regulatory framework of the last hundred years were to be unwound, macroeconomic conditions in the U.S. have changed. The unskilled factory labor suitable for prisoners is no longer in high demand.

191. *Measuring America: The Decennial Censuses From 1790 to 2000*, U.S. CENSUS BUREAU 141 (2002), <http://www.census.gov/prod/2002pubs/polo2marv.pdf>.

192. *Resident Population Data*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/data/apportionment-pop-text.php> (last visited Nov. 8, 2014).

states at the time of the founding, and one county, Los Angeles, is more populous than all but nine states in the union today.<sup>193</sup> Disaggregating the criminal justice policies of populous states into local criminal justice systems would make the relationship between policies and outcomes easier to discern.<sup>194</sup> As Lisa Miller has argued, the problem is that there is no 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.<sup>195</sup>

In a local system, citizens would vote locally to reinforce or replace the people who developed and enforced those policies. Given that so much of criminal justice policy is already local, keeping track of the budgetary implications of those policies by locality makes good sense. Even if a voter is presently dissatisfied with a state's criminal justice system, how can she choose the particular bums to kick out of office when the system is so complicated?<sup>196</sup>

A second benefit would be to make criminal justice decisions more meaningful, especially those grounded in retribution. Perhaps because there is no social science consensus on effective criminal justice policy—or perhaps because criminal justice policies are not based on social science—much of criminal justice policy now is justified by appeals to retribution.<sup>197</sup> But retribution and its

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193. As of the 2010 census, 39 counties had populations of more than one-million people, and the most populous 150 counties (out of 3221) contained about half the country's population. *Centers of Population*, U.S. CENSUS BUREAU (2010), [http://www.census.gov/geo/reference/docs/cenpop2010/county/CenPop2010\\_Mean\\_CO.txt](http://www.census.gov/geo/reference/docs/cenpop2010/county/CenPop2010_Mean_CO.txt).

194. See LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 8-11 (2008) (arguing that local politics allows greater participation and a more complex discussion of crime than state politics).

195. Lisa L. Miller, *The Local and the Legal: American Federalism and the Carceral State*, 10 *CRIMINOLOGY & PUB. POL'Y* 725, 727 (2011).

196. Stephanos Bibas has also argued that localism allows “outsiders” (ordinary citizens) to more easily access and monitor the “insiders” who design and implement policies, ensuring that the resulting policies more closely map onto “the public’s sense of justice.” Bibas, *supra* note 55, at 52.

197. The leading researcher on the relationship between community notions of desert and the execution of criminal punishment is Paul Robinson. See, e.g., PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* (2008); 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). For a critical view of Robinson’s work, see Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 *STAN. L. REV.* 1 (2013).

variants<sup>198</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—with greater precision than statewide criminal justice.<sup>199</sup> While counties are no less an abstraction than states, 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 its appeals, Quitman County, Mississippi, raised its taxes and took out a loan. Eventually, because one defendant was reindicted and tried twice, the county paid for three trials. “Taxes were raised for three years, and it took the county more than five years to retire the loan used to cover expenses.”<sup>200</sup> The costs of the trial were clear, yet county residents were willing to pay them. The decision to seek the death penalty was one with broad community support. Contrast this with a recent case in Riverside County, California, where the district attorney spent public money seeking capital punishment for a defendant who had already been sentenced to death in Idaho.<sup>201</sup> The DA received local political benefits without the county having to bear all of the costs, but the move was purely expressive, since the defendant had already received a death sentence. It is more difficult to isolate whether this expressive benefit was worth the cost to the local constituency. When citizens make policy choices with a willingness to absorb their true costs, those choices are more likely to reflect beliefs that are sincerely held. Decisions that cost less mean less.

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198. 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 COLUM. L. REV. 893, 923-26 (2009).

199. 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 executing 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, for example, Stephanos Bibas, *supra* note 55, at 109-127.

200. *Poor County Forced to Finance Killers' Appeals*, L.A. TIMES (Mar. 28, 1999), <http://articles.latimes.com/1999/mar/28/news/mn-21958>.

201. John Asbury, *Cost of Death for Duncan Questioned*, RIVERSIDE PRESS ENTERPRISE, (Apr. 20, 2010) (citing the cost as \$167,000 and counting). The man in question later plead guilty and received a California sentence of life without possibility of parole. Associated Press, *Idaho Killer Duncan Pleads Guilty to 1997 Calif. Murder*, KOMO NEWS, (Mar. 15, 2011), <http://www.komonews.com/news/local/118044069.html>.

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>202</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 harsher punishments in the belief that punishment deters.<sup>203</sup> 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 locality within the state. A local parole board could be more like a reentry jury, where intimately local issues dominate: the issue of when someone can live in a particular part of a state without jeopardizing its safety.<sup>204</sup>

Fourth, local criminal justice, rather than statewide criminal justice, is more in line with the values expressed in the Bill of Rights. The Sixth Amendment jury right specifically calls for a local jury, one not only of the state but also the

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202. 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 K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 1, 21 (2010).

203. Outside the context of juvenile sentencing, e.g., *Graham v. Florida*, 560 U.S. 48 (2010) (overturning a sentence of life without the possibility of parole for a juvenile convicted of a non-homicide offense), however, the Supreme Court has been extremely reluctant to overturn lengthy sentences on Eighth Amendment grounds, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding a sentence of life without the possibility of parole for a first-time offender convicted of possessing more than 650 grams of cocaine); see also *Ewing v. California*, 538 U.S. 11 (2003) (upholding a twenty-five years-to-life sentence for stealing golf clubs under California's recidivist-enhancement "Three Strikes" law). The problem with the lack of substantive limitations on the sentencing power, though, already exists in the current doctrine: it is a problem with Eighth Amendment jurisprudence that state prison subsidies cannot and do not solve.

204. Ball, *supra* note 54, at 407. 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>205</sup> This is part of the realm of local values that the jury is meant to vindicate: placing popular limits on state power.<sup>206</sup> Juries enable local citizens to control the application and priorities of law enforcement: “thus, the jury [is] our best assurance that law and justice accurately reflect[] the morals, values, and common sense of the people asked to obey the law.”<sup>207</sup> These local limits were more effective during the founding era given that law enforcement was intensely local,<sup>208</sup> made up of local citizen constables rather than professional police forces.<sup>209</sup> Under the founding

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205. U.S. CONST. amend. VI. For an exhaustive history of the vicinage requirement, see Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801 (1976). For more on the importance of locality in minimizing punitiveness and racial disparities in punishment), see Stuntz, *supra* note 28, at 2035.
206. See, e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES* 157 (2004) (arguing that in the early history of the United States, and by its founders’ design, “[t]he principal device expressing popular control over ordinary law . . . was the jury”).
207. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 28 (2000); see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 818 (1994) (arguing that civil damages for Fourth Amendment violations were part of the jury’s role in setting criminal justice priorities). The grand jury requirement of the Fifth Amendment also involves ideas of local citizen control. See Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in Our Criminal Justice System?*, 82 B.U. L. REV. 1, 3 (2002) (“Grand juries can also help to legitimize the criminal justice system by imbuing the participants—the witnesses, the grand jurors, and perhaps even the defendants themselves—with a sense of procedural justice.”).
208. See, e.g., Fisher, *supra* note 86, at 1248 (“Crime victims had to bear the expense of prosecution in the first instance and therefore had a strong incentive to prosecute locally if at all.”).
209. For a survey of the ways in which police practices have changed since the Framers’ generation, see, for example, Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830-838 (1994). Professor Steiker focuses on the rise of professional police forces, as opposed to the amateur policing at the framing, and concluding that “[o]ur twentieth-century police and even our contemporary sense of ‘policing’ would be utterly foreign to our colonial forebears.” *Id.* at 830. 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*, BUREAU OF JUSTICE STATISTICS 1 (2007), <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, how-

model, the jury (us) protects the people (us) from the constable (also us). But we are the people in a particular local community—not one of millions in a state.

C. *Are Prison Subsidies Redistributive?*

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 redistribution to subsidize prisons. The argument 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. In other words, would paying for prisons bankrupt poor cities and counties?

This argument depends on demonstrating that crime is what drives prison usage and that prison does not increase crime. 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>210</sup> There is also evidence that prison is, in fact, criminogenic.<sup>211</sup> So if crime does not necessarily have to result in prison sentences, 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, and also should not be subsidized.

This underscores a basic point: prison subsidies are not crime-fighting subsidies. If the problem is crime, we should provide resources to high-crime areas; but these resources should not only take the form of free access to state prisons. Localities should be given crime-fighting grants that they can use to implement whatever criminal justice policies they deem necessary.<sup>212</sup>

The problem is that 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 to fund particular projects, or on the basis of 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

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ever: “[n]o 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.

210. See, e.g., Ball, *supra* note 41; see also SCHEINGOLD, *supra* note 53, at ix-x, 48-52.

211. Cullen et al., *supra* note 51, at 50-51. 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.

212. I have developed this idea further in Ball, *supra* note 6.

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 the form of building and staffing prisons.<sup>213</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 incentive 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.<sup>214</sup>

The issue of state underinvestment raises a larger question, however: why redistribute only in the form of prison beds? 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? Isn't the real problem that we have impoverished cities and counties to begin with? 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. If poverty is the problem, tackling poverty is the solution. Funding prison to account for some of poverty's effects leaves poverty itself entrenched. Prison is not the place to equalize state underinvestment.

## CONCLUSION

Reducing or eliminating state governments' role in imprisonment does not mean the end of either criminal punishment or incarceration. Instead, it simply means that these practices should be reoriented towards localities. This suggestion is perhaps less radical than it seems—it returns local concerns to the central role they played at the time of the founding, when criminal justice was administered 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 anything other than anonymous at the state level. Localism might rehumanize the actors in different roles in the system, as well as those who are imprisoned by it.

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,

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213. See, e.g., Spatial Information Design Lab, *The Pattern*, COLUMBIA UNIV. GRADUATE SCH. OF ARCHITECTURE 37 (2008), <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 expenses).

214. For an estimate of the fiscal implications of reallocating the prison subsidy with a crime-based subsidy, see Ball, *supra* note 41, at 1059-73.

and community supervision and treatment<sup>215</sup>—and by assuming that regional tastes for punishment and rehabilitation differ. Without some kind of realignment, residents of one county will end up subsidizing the policies of other counties at odds with their own. Each county should be freer to pursue its community's interests in public safety; public safety is, after all, a local issue.<sup>216</sup> With this freedom, however, comes the responsibility to live with the consequences.

Local power to make policy is, in part, a product of expansive penal codes that grant wide-ranging arresting, charging, and sentencing discretion to local officials. Ironically, returning fiscal responsibility to localities might be the best way to reverse the expansion of state penal codes. In the present system, localities have been granted a firehose and told to use it moderately; the system cannot sustain literal, full-throated enforcement. Expanding fiscal responsibility to localities might rein in statutory expansion, which would rein in local power at the same time. Counties that were happy to have harsh penalties in the state penal code might question the wisdom of these same penalties if they were made to foot the bill. If localities faced the resource implications of these laws, state sentencing schemes might at last face downward pressure from local actors.

What, then, might a more localized system look like? Time has permitted 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—to 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 grounds 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 redistributive concerns expressed in Part V.C. Our current system, however, does nothing to prevent inequality, and, in fact, it makes the accurate diagnosis of inequality more difficult. We maintain the fiction of a “state” system and a

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215. There are alternatives to local control, such as state unification of all corrections agencies. For a general discussion, see, Barbara Krauth, *A Review of the Jail Function Within State Unified Corrections Systems*, NAT'L INST. OF CORR. (1997), <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 Ball, *supra* note 6.

216. 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 CRIMINOLOGY & PUB. POL'Y 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”).

#### WHY STATE PRISONS?

“state” problem when these problems are actually the result of local policies that merely aggregate at the state level. 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 counties are different now. Counties over- or under-punish now. The only difference is that we pretend that the prison population is the state’s problem, so we can ignore localities’ role.

There is nothing necessary about a system where state governments pay for prisons, and there are 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 to agree to disagree and let each locality reap what it sows.

