



1-2013

Defunding State Prisons

W. David Ball

Santa Clara University School of Law, wdball@gmail.com

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>



Part of the [Law Commons](#)

Recommended Citation

50 No. 5 Crim. Law Bulletin ART 2 (2014)

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

Criminal Law Bulletin
Fall 2014
Volume 50, Issue 5
pp. 1060-90

Defunding State Prisons

W. David Ball[FN*]

Abstract

Local agencies drive criminal justice policy, but states pick up the tab for policy choices that result in state imprisonment. This distorts local policies and may actually contribute to increased state prison populations, since prison is effectively “free” to the local decisionmakers who send inmates there. This Article looks directly at the source of the “correctional free lunch” problem and proposes to end state funding for prisons. States would, instead, reallocate money spent on prisons to localities to use as they see fit—on enforcement, treatment, or even per-capita prison usage. This would allow localities to retain their decision-making autonomy, but it would internalize the costs of those decisions.

Introduction

The size and scope of the mass incarceration problem in the United States should, by now, be news to no one. State prisons incarcerate approximately 1.4 million people[FN1] at an annual cost of approximately forty billion dollars.[FN2] Rates of population increase have slowed in recent years,[FN3] but the United States is still incarcerating almost twice *1061 the number of people as it was twenty years ago,[FN4] and nearly eight times the number forty years ago.[FN5] Given the size and expense, states continue to grapple with ways to control their prison populations.

One problem state officials have, though, is that they don't decide who goes to prison: local officials do, by their decisions about investigation, prosecution, and, to a more limited extent, sentencing. Local officials can choose both whether to investigate and what to

investigate, whether to prosecute someone and what to prosecute them for.[FN6] State officials can neither compel localities to enforce a particular law in a particular instance, nor can they prohibit them from doing so. There is ample slippage between crime and a locality's response to it, and these local variations have profound effects on the size of prison populations. In a prior article, I found that prison usage in California varied dramatically from county to county over a ten-year period, but that these variations were not explained by variations in reported rates of violent crime.[FN7] The problem is exacerbated by the political economy of criminal justice, as a second article explains.[FN8] Criminal justice is local, and those who implement it are elected locally. At the same time, penal codes are written expansively by state legislators who seek symbolic accomplishments to demonstrate their concerns with crime and insecurity.[FN9] Given the expansive scope of the statutory regime and the lack of control over those who implement it, we should thus expect policies to diverge: local officials can implement *1062 policies reflecting the policy preferences of the local population, knowing that the full measure of social costs will be borne elsewhere, by the state as a whole. As long as local decisionmakers please their constituents, it doesn't matter how much they displease other citizens of the state.

With these concerns in mind, one might think that state officials would somehow seek to ration access to prisons, either by only accepting a certain number of prisoners or by retaining some right of refusal over which type of offenders localities send to prison. But not only do state governments generally not ration access to prison, they actually pay for it. Prison is, effectively, free to localities, a phenomenon that Franklin Zimring and Gordon Hawkins termed "the correctional free lunch." [FN10] This largesse seems stranger still when one considers that local, cheaper alternatives to prison, such as jail, treatment, and probation, are not typically subsidized by state governments. State governments thus make prison, the most expensive form of criminal sanction,[FN11] free to localities, while making localities bear the cost of cheaper alternatives to it. Prison subsidies make prison more abundant to local decisionmakers, giving them greater incentives to use it. Is it any wonder that localities' use of prison costs state governments billions in the aggregate?

This Article explores what might happen if state governments refused to pay for the unconditional usage of their prisons, and imagines what might replace the prison subsidy. Just as the end of the Cold War prompted calls for a "peace dividend," reallocating money spent on the military, one might consider the end of state prison subsidies an

opportunity for a “prison dividend,” reallocating the money spent on prisons towards other criminal justice or social development policies. Two particular fiscal policies are proposed as a means of exploring alternatives to state prison funding, both of which would internalize the costs of local criminal justice policies.

The first proposal, violent crime block grants, would simply distribute the prison subsidy to counties[FN12] without changing other facts about criminal justice administration. Rather than spending money to house a *1063 county's prisoners, a state government would distribute this pool of money to its counties on the basis of per capita reported violent crime. Counties could use this money to treat crime however they wished, including sending offenders to state prisons. The difference would be that counties would have to pay for any prison beds they wanted to use, and the costs of given decisions would be easier to track.

The second proposal, local unification, would be funded the same way—by reallocation of the prison subsidy—but it would eliminate state administration. State agencies would be split into smaller, unified criminal justice units, wherein all of the features of criminal justice, from policing to imprisonment to post-release supervision, would be under the administration of a single agency with an overarching budget. This would allow localities to retain their local decision-making autonomy, but it would also encourage the various parts of the criminal justice system to consider how the actions of one part affect resources available to other parts.

My hypothesis is that localities that bore the cost of imprisonment would be less likely to use it, but this is not a necessary outcome.[FN13] Neither proposal would commandeer localities in any way. Localities could still imprison at relatively high rates[FN14] if they were willing to pay for it, but the proposals would make the implications of local choices easier to see and would ensure that state governments would no longer bear unlimited financial responsibility for local decisions. If localities used prison in spite of the cost, this would much more likely be a reflection of local values than subsidized usage. Forcing localities to pay for their decisions and live with the consequences would take local autonomy seriously.

The Article proceeds in three parts. Part I demonstrates why case-by-case approaches to regulating prison usage are doomed to fail: there is no way to differentiate between “real” and “discretionary” causes in observed criminal justice outcomes. Part II lays out two *1064 systematic fiscal mechanisms for regulating a decentralized system: funding on the basis of violent crime and local unified criminal justice.

Part III discusses possible criticisms of decentralized policies, including distributional concerns and questions about scale and complexity.

I. The Real Offense Problem—Or, Why Case-Level Policies are Bound to Fail

One might hypothesize that prisons are overcrowded because localities err on the side of overzealous prosecution. We might suspect that certain localities over-investigate and over-charge crimes that shouldn't really warrant that attention, even though there is nothing “technically” improper about investigating them and charging people with them.

Many authors have wrestled with the problem of discretion in criminal justice and proposed guiding it or regulating it in order to avoid overuse.[FN15] Discretion itself is actually not the problem, of course: most people would agree that there are close cases that involve judgment calls, and that there is no satisfactory way of creating binding *ex ante* rules governing every situation. Concerns about discretion might more accurately be described as concerns about bias masquerading as discretion.[FN16]

The problem with focusing on individual cases is that there is *1065 no such thing as a “normal” charge or “normal” enforcement in a given case to which we could compare “over-charging” and “over-enforcement.”[FN17] One could look at the median sentence for a given crime, or the median charge-to-arrest ratio, and conclude that something is going on with a given local agency, but it would be impossible to prove which cases were over-charged and/or over-sentenced. Perhaps a crime was charged because a prosecutor thought it was particularly egregious, or perhaps it was done simply to rid the county of the costs of rehabilitation. The observed result—the charge and sentence—will not, on its face, tell us whether the exercise of discretion was reasonable or not. In short, we might have our suspicions, and they might not be unfounded, but we would be unable to find evidence that would prove our suspicions correct.

This Part discusses why distinguishing between “normal” and “unreasonable” law enforcement and prosecution in individual cases is impossible. There is no way of “neutrally” enforcing a law because it is impossible to distinguish—*ex ante* or *ex post*—between an ordinary application of the law and an extraordinary one.[FN18] I call this problem the “real offense” problem. Even if we could solve the real offense problem, however, and could agree on how to charge a given set of facts, the issue of what “real sentence” to impose on such a charge

would present the same difficulties. Given the real offense and real sentence problems, proposals that seek to achieve an optimal level of imprisonment through incentives in individual cases (e.g., targeting police or District Attorneys and their charging/sentencing/pleading) are, however well-intentioned, ultimately unworkable. We have no way to distinguish between the observed outcome (what happened) from the baseline (what should have happened) because we cannot define what the baseline offense and its corresponding baseline sentence *1066 looks like in the “real world.” This fundamental reality is why policies should focus on systems, not cases, and on crimes, not dispositions.[FN19]

* * *

There is no one way to cut the facts of a given offense so that we know what the “real” offense is; this was known even to prison reformers of the early nineteenth century.[FN20] There are several reasons, some of them doctrinal, some of them relating to evidence. Five will be discussed here.

First, as a matter of doctrine, *Blockburger v. United States* long ago established the difference between events and offenses.[FN21] Defendant Blockburger sold morphine to a single purchaser, was charged with five violations of the Harrison Narcotic Act, and convicted on three counts.[FN22] Two of the three convictions arose from the same sale: a charge of selling the drug “not in or from the original stamped package,” and selling it “not in pursuance of a written order of the purchaser”[FN23] Blockburger argued that these charges constituted only a single offense, for which he could be punished only once.[FN24] The Supreme Court disagreed, holding that “[a] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.”[FN25] Blockburger forecloses arguments about the real offense. There is no “right” charge among a prosecutor's possible charges, and there is no way to say what the “core” offense *1067 of a given event is.[FN26] Offenses are creatures of statute, not representations of Platonic forms.

A second, related point is that expansive penal codes have made charging the centerpiece of criminal justice policy. There are many ways in which a prosecutor can charge a given set of facts. William Stuntz, in his seminal article “The Pathological Politics of Criminal Law,” observed that modern codes make it easy to charge a given real event with multiple statutory violations, making prosecutors “the criminal justice system's real lawmakers.”[FN27] The central determination of outcomes, including prison usage, is not criminal activity, but charging.

Professor John Pfaff has recently examined how charging affects imprisonment, concluding that “at least since 1994, prison growth has been driven primarily by prosecutors increasing the rate at which they file charges against arrestees.”[FN28] Charging practices vary, of course, because even within penal codes prosecutors can choose which of the many applicable statutes to use.[FN29] Stuntz argued that discretion could, in the end, only be limited by reducing the breadth and depth of a state's penal code. As long as laws are on the books, no doctrinal barriers will prohibit a locality from enforcing them. Expansive penal codes have expanded local discretion and, with it, local policymaking.

Third, prosecutors might charge—or accept pleas—for strategic reasons having nothing to do with the underlying crimes themselves. Prosecutors might want to charge certain crimes only to induce defendants to make a given deal, and they might land on certain crimes as compromises between a plea offer and counter-offer. A recent empirical study by Professor Kyle Graham analyzed five years of data from the federal system and found that some crimes were often charged but seldom pleaded to, while other crimes were seldom charged but often pleaded to, a valuable insight into how ultimate *1068 charges might perhaps be dominated by bargaining in the marketplace.[FN30]

A fourth, related, explanation might have to do with the information a defendant has to offer the prosecution. We can easily imagine a case involving two defendants, equally complicit, in which one is offered a better deal because he or she has more valuable information to offer law enforcement. If someone is just along for the ride while narcotics are being transported, she and the driver will still be charged based on the weight of the narcotics. But if she knows less about the operation—if she cannot say who supplied the drugs or who was going to buy them—she has less to offer and will not be eligible to trade that information for a discount on her sentence. The person with more knowledge of or participation in the offense—arguably the more deserving of punishment—will be able to offer more information in exchange for a reduced sentence and will be punished less severely.[FN31]

Fifth, cases might have different outcomes based on the strength of or admissibility of evidence, factors that have nothing to do with guilt. A witness with a record will be subject to impeachment during cross-examination and can weaken or strengthen the case, depending on whether she is testifying for the prosecution or the defense. There might be problems with a crime lab, or with the chain of custody of evidence. There might be evidence that needs to be suppressed due to Fourth Amendment violations[FN32] or problems in taking confessions.[FN33]

Prosecutorial witnesses might not cooperate, or defense witnesses might not show up. These evidentiary concerns have nothing to do *1069 with “the facts” and everything to do with “the case.” The two are distinct; that is the essence of the real offense problem.

This list of factors does not include other strategic reasons for different charges or arrests (e.g., charging a defendant with conspiracy in order to get hearsay evidence before the jury). It also does not account for the possibility that the quality of lawyers in a particular case or in a particular part of the bar (defense or prosecution) might result in different outcomes. For those cases that go to trial, of course, there is no way to control for juries and judges that are harsher or easier than another. Jury decisions are black boxes—we don't typically know what goes on there—and appeals courts do not generally revisit their findings of fact.[FN34] Similarly, judges' rulings from the bench can affect the outcome (e.g., suppression motions) even where there is not a bench trial.

The point here is not merely that we do not know what the real offense is in the current system, but that we cannot know it.[FN35] Whether a given set of facts matches a given statute is, at some level, irreducibly a question of judgment. Any data would merely be a product of that judgment, using judgment (“this should be first-degree murder”) to measure judgment (“but it only got manslaughter”). For example, in California, violations of some statutes known as “wobblers” can be charged as either felonies or misdemeanors.[FN36] A recent study examined charging practices of a statute criminalizing, *inter alia*, methamphetamine possession, and found that “[t]he variation in charging this crime as a misdemeanor ranges from 0% to 100% across counties.”[FN37] But one cannot definitively state that counties which more often charge wobblers as felonies always do so for policy reasons: *1070 some cases might be felonies because they were, in fact, the kinds of offenses “we” think should be charged as felonies, even though others might be charged as felonies merely because a District Attorney wanted them to be considered as such. And even if a case were charged to reflect the District Attorney's preferences, one would have to be able to discern that the district attorney was either insincere or wrong in this assessment in order to isolate examples of over- or under-charging.

Assuming we could solve the problem in theory, no statistics are kept on non-statutory factors (e.g., an index of “seriousness” distinguishing a kid playing with matches from arson), so even if we were to isolate which factors were theoretically relevant, we would have no way of knowing which ones were operative in a particular case. We do not have careful records on plea bargain factors, nor do we generally learn potentially dispositive investigative factors from police reports—at least not in a

form that would readily lend itself to analysis. Even in the case of drug possession offenses, for example, where the quantity of drug is the driving factor behind charges, such data is hard to obtain.[FN38] Plea bargains are largely unregulated, and they comprise the overwhelming majority of dispositions. To the extent we do have data, it is noisy and imprecise.

* * *

Even if we could figure out the real offense, we would need to match it to a real sentence, and there is no inexorable sentence for a given crime, with given evidence, and a given statute. We do not agree on the goals of criminal justice *ex ante*. (Is justice local? Is it victim-driven? Is the existence of a statute and a set of enhancements an accurate measure of a state's view of just punishment?). Even if we did, it seems difficult to imagine that we could agree on how these goals should be applied in a particular case. The problems generated by discretion are further exacerbated by the fact that penal codes can allow for a wide range of criminal penalties to attach to a given set of facts, even within a given crime. We have a balance enforced by systemic financial and personnel constraints. The reality is that a district attorney can—but does not have to—charge a number of crimes and that a public defender can—but does not have to—go to trial, and that they will bargain over both charges and recommended sentences.

If one cannot know how different offenses are “really” different from each other, it is impossible to set out benchmarks of what “should have” happened in a particular case. One cannot say that a county *1071 should have had a certain level of prison usage based on a set of events and then use what “should have” happened in the aggregate to punish or reward the district attorney.[FN39] Individual cases cannot be systematically separated into “reasonable” and “unreasonable” categories, which is what would be required to determine exactly when a prosecutor overstepped the bounds of reasonable discretion.[FN40]

All of this means that a focus on individual cases as a means of harmonizing law enforcement within a state misses the mark entirely. Systemic problems cannot be solved by individually-targeted solutions. If the problem is at a systemic level—and, more importantly, if the diagnosis can only take place at a systemic level—it makes much more sense to adopt wider, more loosely-fitting solutions (such as broad fiscal constraints) rather than finely-drawn ones that operate on individual actors in individual cases. The system deals with individual cases in shades of gray, and turning a gray case black or white only makes it easier to sort, not, in some ultimate sense, “truer.” Putting an

indeterminate object in a determinate box is neither more precise nor more accurate—it is less of both.

II. Fiscal Limits on Local Discretion

Even though counties use state prison resources at different rates,[FN41] they do not typically pay the state based on this usage. State prisons are paid for out of general revenues: counties are not charged for heavy usage, nor are they reimbursed for light usage. Counties that choose to use state prison to address crime are, in essence, subsidized by counties that choose local programs such as probation and treatment instead, since the state typically pays for prison and the county pays for local dispositions. In another article, I argue that unless the case can be made for the superiority of prison over other *1072 dispositions, the state should not subsidize prisons without subsidizing other responses to crime.[FN42]

The fiscal and administrative dimensions of the state prison subsidy might be analyzed on three dimensions: who pays, who administers, and how centralized the system is. Each could be analyzed independently of the others. For example, we might imagine state governments paying localities to administer a decentralized system. We might equally imagine localities paying the state government to access a centralized system. We might also imagine the state paying for a centralized system that it administers.

This Part considers two thought experiments that would decentralize criminal justice and move fiscal responsibility down to the level where decisions are currently being made, then compares both experiments with a completely centralized model. Both of these thought experiments would reallocate the money state governments currently spends on prisons. This money would continue to fund county policies; the difference is that this aid would not be made solely in the form of state prison usage, nor would it be made on the basis of state prison usage. Instead, it would be based on measures of criminal justice need.[FN43]

The first proposal, violent crime block grants, would address only the “who pays” dimension. Localities would receive funds based on reported rates of violent crime and would be free to spend these monies on prison, diversion, jail, or anything else. State officials would continue to administer prisons but would charge counties for every prisoner they sent. Any expenses not covered by the violent crime subsidy—including extra imprisonment—would be paid for out of local revenues.

The second proposal, local unification, would again involve the reallocation of prison subsidies into criminal justice block grants, but

state agencies would no longer administer prisons. Instead, all criminal justice functions would be shifted to local criminal justice systems that combined both corrections and law enforcement into a single agency. This would help localities maintain equilibrium between the law-enforcement inputs of the system and the carceral outputs of the system.

These proposals are, in essence, about changing accounting practices. They would not necessarily result in lower prison usage—various localities might decide that higher spending on prison is, indeed, worth it. The proposals' main advantages come from improving *1073 accountability and transparency. By accountability, I mean that the resource consequences of a particular decision would be tied more closely to the level of government that made that decision. If a county decided to spend more money on incarceration, that county—and not the state as a whole—would have less money to spend elsewhere. By transparency, I mean that people could more easily track the decisions that are being made, who made them, and what the consequences were. These policies would make it easier for individual residents to see that their counties were, in fact, making policy choices about how to deal with crime when, for example, they chose imprisonment over treatment (or vice-versa). Residents could compare local dispositions—and attendant expenditures—to those in other counties, and see that these decisions were made by local officials who affected local budgets. The combination of accountability and transparency in decision-making would more likely result in policies whose costs reflected the local social benefits.

A. Changing State Allocations—Subsidizing Crime Fighting, Not Prison

The first proposal, violent crime block grants, would fund criminal justice on the basis of a single statistic: reported violent crime per 100,000 residents. A state would pool the money it currently spends on criminal justice—including all the money currently spent on prisons—and redistribute it to its localities in the form of violent-crime-treatment block grants.[FN44] Counties would have flexibility about how to spend their violent-crime weighted share of resources—on prison, on law enforcement, on treatment or even social services. A state could still offer to house prisoners but would charge for prison beds on a per capita basis. As counties ran out of state money—having spent it on prison or other policies—they would need to raise local funds. They would also get to keep any money they didn't spend. The thrust of the proposal would tie funding to reported crime rates rather than political capital or prison usage, directing funding formulas away from criminal justice usage and towards criminal justice need. The structure of the funding

would remind us that we have criminal justice policies to decrease the social harm from crime, not to keep particular institutions fully funded.

The violent crime block grant proposal has several potential benefits. First is its simplicity. Violent crime block grants could be implemented without substantial structural changes to state and local governments. *1074 Because budgets would be based on a single set of statistics, voters could more easily track why budgets fluctuated. I pick violent crime specifically because it fits best with justifications for criminal sanctions. From a public safety and incapacitation perspective, violent criminals are the most dangerous. From a retributive perspective, violent crimes are the most deserving of punishment. Of course, states could add population, demographics, and other “causes” of crime in the belief that such factors contribute to criminal justice needs or to account for differences in local resource endowments. Adding other factors besides crime might also help with any “winner's curse” problems—the fact that localities with successful violent crime reduction programs would, in the future, receive less money. The winner's curse could be dealt with in other ways as well: the state could smooth year-to-year allocation variances by employing a running average of three to five years, lag budget reductions for counties which cut violent crime, or allow counties to keep a given percentage of costs avoided.[FN45]

A second benefit is that violent crime block grants could be more responsive to crime waves. A state could reserve a certain amount of criminal justice funding to deal with sudden increases in crime. If crime went up in a given area, a locality would get more money to spend on it, but that additional money would not come in the form of a single intervention—prison—but with flexible funds that could be used to fight crime, not just punish it.

A third advantage to using violent crime as a funding benchmark is that local politicians already have incentives not to inflate crime rate numbers. High crime rates are political poison. Incumbents who run on a record of having overseen an increase in robberies, rapes, and murders are unlikely to win re-election, no matter how many more dollars come from the state as a result. Agencies which currently use data-driven systems have had problems with the “gaming” of numbers, except the incentives there typically result in under-reporting in order to increase clearance rates.[FN46] Tying funding to crime would provide a counterweight to this tendency: localities would have an incentive to *1075 admit they have a problem in order to increase the resources needed to address it.

It bears repeating that a locality could always spend more than its reallocated prison subsidy by using local funds. The key is that the

opportunity costs of these spending decisions would be borne locally. The county's decision would involve a choice not to spend local monies on something else. Currently, of course, there are opportunity costs to prison expenditures, just as there are with every other government program, but these tradeoffs are opaque, distributed across a diffuse state budget with a wide array of other inputs. If state criminal justice funding were, instead, locally accounted for, the resource implications of local decisions would be easier to identify. The average person could more easily spot the linkage between increasing numbers of local prison commitments and, say, a decrease in the frequency of road repairs or a shorter public school year, allowing political checks on criminal justice to operate more effectively.[FN47]

B. Breaking Up the State and Unifying the Pieces

The second proposal, local unification, would get state governments out of prison administration entirely. Under local unification, the state would once again fund local criminal justice with the money it currently spends on prison beds, but it would no longer offer state prison as an option. The state would instead be broken into county-sized public safety districts. Within each district all aspects of crime control would be unified into a single agency with a single budget, including policing, jails, prisons, probation, and parole. Some states already unify their corrections systems into a single agency;[FN48] the local unification proposal expands the idea to include law enforcement.[FN49] Breaking up the state and unifying the pieces would account for two externality problems: the county/state externality problem and the agency-to-agency externality problem. Counties would not be able to pass problems on to the state, and agencies would not be able to pass on impacts of their policies to other agencies.

The first part of the proposal, breaking up the state, would begin with the fact that counties have different policy preferences and restructure criminal justice administration accordingly. A state government might lease existing facilities to individual counties or groups of counties, but there would be no presumption of state prison administration. Instead, counties would provide incarceration, or contract with other entities—including other counties—to provide incarceration. Thus, not only would prison subsidies end, there would be no state prisons to subsidize.

The second part of the proposal would be to unify the inputs to the criminal justice system—law enforcement—with the outputs of the system—incarceration, treatment, and community supervision. First, on the level of individual treatment, unification could make it easier for agencies dealing with a given offender to exchange data and coordinate on a common approach.[FN50] Under the present system, the typical

offender is passed from police who arrest him, to sheriffs who jail him, to prosecutors who charge him and defense attorneys who represent him, to courts who sentence him, and then to probation, or to jail, or to prison and then parole. Even with one offender in custody for one offense, there is very little coordination on programming or information sharing across agencies: basic social and medical intake screens are often needlessly duplicated; programs targeting the same needs employ different methods, approaches, and goals; and continu- *1077 ity of medical and psychiatric care is often subject to troublesome gaps.[FN51]

The second benefit to unifying local criminal justice is that it would internalize all the effects of criminal justice interventions. Sound corrections can result in lower rates of recidivism, hence smaller drains on law enforcement; ineffective corrections can result in greater recidivism and increased law enforcement costs.[FN52] On the other side of the ledger, good policing, coupled with early, low-level intervention, can result in lower usage of prison.[FN53] But the current system does not reward such policies: the reduction in resource usage is realized in another agency's budget. Under local unification, the agency as a whole would save whenever society did. Unifying corrections and law enforcement would mean that policies that benefit another part of the system would no longer be under-funded relative to their social utility. The resource implications of all interventions—whether broken-windows policing on the front end, releasing prisoners on their own recognizance while awaiting trial, or post-release supervision on the back end—would be much clearer. Any cost savings would result in more resources to the unified agency, just as costly measures would result in fewer resources—and therefore some deterrence—to the agency.[FN54] Successful programs which now generate savings to other agencies would be internalized.

Prosecutors, for example, would maintain the level of discretion they currently have, but they *1078 could also take into account public safety as a whole in determining whether a particular case would use resources—both in terms of court costs and the costs of the resulting sentence—in the most effective way. The crux of the problem, as Professor Adam Gershowitz has pointed out, is that prosecutorial discretion is currently used without consideration of the resources those decisions will consume in other parts of the system.[FN55] Gershowitz has proposed that state boards of prisons educate county prosecutors about prison overcrowding, with the idea that simply knowing about the problem might influence prosecutors' decisions.[FN56] Judges might also benefit from more information. In Missouri, for example, judges now know the cost of the available sentencing decisions for a given

offender, informing the judge's sentencing decision without binding him or her to it.[FN57]

The problem is that neither of these policies imposes any resource constraints or rationing. Judges in Missouri can impose expensive sentences knowing that the state will be forced to pay for them; prosecutors under Gershowitz's policy could send prisoners to crowded state prisons notwithstanding the availability of other options. In both cases, rational actors could try to “free ride” on the more abstemious behavior of their colleagues across the state.

Unifying local corrections would make ultimate budgetary limits easier to discern while maintaining the local freedom to decide how to operate within those limits. It would combine internalization of costs and benefits with local control and do so in a way that is both far-reaching and relatively minimal: minimal because it would not change total allocations to criminal justice or dictate particular policies, and far-reaching because it would make the resource implications of all agency decisions more visible and more comprehensive. Accountability—both political and economic—would work hand in hand with *1079 transparency to ensure that given policies were what local citizens wanted.[FN58]

C. Centralization as an Alternative

The thought experiments proposed above have moved criminal justice to the local level, but the article has left unexplored an alternative means of dealing with local discretion: eliminating local administration entirely. States could create (or expand) statewide police forces, or replace local district attorney's offices with branch offices of a statewide agency. This would allow statewide policy to be enforced statewide, and it might do so in a way that shields actors from local political pressure. For example, local police might be limited to reporting crimes and gathering information about them, while statewide police would have the exclusive ability to charge and arrest.[FN59] Prosecution could also become a statewide function with uniform policies for prosecution set at a central state office: priorities, going rates for plea bargains, etc.[FN60] Both of these moves would map onto other areas of statewide centralization, most notably courts, which initially emerged at the local and municipal level, with “funding and rulemaking authority ... either split between state and local governments or fully assumed at the local level.”[FN61]

States could also unify their corrections systems, combining author-
*1080 ity for all custodial prisoners—including, in some cases, probation, parole, and community corrections—into a single statewide agency with a single budget.[FN62] There are perhaps diminishing

returns to unification as state systems get larger and more complex,[FN63] and unified correction systems have thus far been the province of states with small populations: Alaska, Connecticut, Delaware, Hawaii, Rhode Island, Vermont, and, recently, Maine.[FN64]

Statewide unification, though, seems much less in tune with the political heterogeneity of individual states, and it is correspondingly unclear how statewide priorities could be set, particularly in populous states. Currently, prosecution is overwhelmingly local, with statewide *1081 prosecutors generally handling only certain types of crimes such as public corruption and election fraud, federal benefits fraud, regulatory crimes and consumer protection, as well as local prosecutions involving a conflict of interest.[FN65] Statewide prosecution also seems at odds with, say, the localism embedded in the Sixth Amendment's requirement that juries be drawn not only from the state but also the "district wherein the crime shall have been committed." [FN66] Complete unification at the state level would be a much more radical change; whether there is something inherently preferable about state administration will be discussed in the following

III. Criticisms of Fiscal Decentralization

This Part discusses four objections to the policies proposed: distribution of resources, disparate treatment, dumping crime and criminals, and issues of scale. The scale of certain subpopulations in the prison system, particularly the number of mentally ill people behind bars, is perhaps the best reason to keep the state involved. Local facilities might not be able to adequately house and treat the mentally ill in the way a statewide facility could. But allowing for some statewide provision of facilities does not mean the state would have to subsidize them. Indeed, a stateless system would allow counties to decide whether criminally punishing or civilly treating the mentally ill made the most sense without the distorting influence of prison subsidies.

As for the other objections, a lack of centralized prison provision does not necessarily entail a lack of standards. States built their prisons in order to promote treatment, but there is nothing logically or historically necessary about state provision of or payment for local imprisonment needs.[FN67] Inequality is, arguably, more likely in a system such as ours where costs and decision-making authority have been decoupled, because it is so much harder to figure out the source of the problem and who is to blame for it. Local variations can currently be hidden in statewide statistics, which equalize local variations across the state population.

The present system is also equally vulnerable to charges that it fails *1082 to promote equality: our system does not explicitly pursue or deliver resource equality, provides few means of reducing disparate treatment, and encourages the dumping of costs. Decentralization could, however, provide better opportunities to address these problems. The state could address the root causes of inequality, not simply try to address inequality via prison subsidies. A more transparent system that more clearly isolated local variations might actually shed greater light on disparate treatment and could potentially generate popular support to deal with the problem politically. States could ensure that counties don't simply dump their crime problems on other counties by implementing mandatory periods where offenders had to remain inside a county's borders. The change in the political economy of local punishment might even promote more equality and consistency, as Lisa Miller, Stuart Scheingold, and William Stuntz have argued. In sum, a decentralized state does not create problems so much as reveal extant problems; this revelation might provide a more effective means of addressing these problems.

A. Distributional Concerns

As noted earlier, however, current prison funding is typically not tied to factors such as poverty level, educational attainment, or other forms of social deficits. The same is true of criminal justice funding more generally. The correctional free lunch of the present system does very little to guarantee minimum levels of quality or quantity across localities even as it exposes the state to virtually unlimited financial liability. It does nothing to address issues about lawyering and investigation, and if the free lunch leads to overcrowding, it can degrade the prison experience for all inmates.[FN68] At best, assuming that poverty causes crime and crime causes imprisonment, both of which are far from certain, the correctional free lunch might indirectly redistribute money—by subsidizing prison beds for inmates from poor (hence) crime-ridden counties—but the empirical evidence for such a claim is scant. The areas that use a lot of prison resources are not necessarily the most crime ridden, and poverty itself is not necessarily the driving force behind violent crime.[FN69]

If redistributing resources on the basis of need were a goal, however, state governments could always tie funding to income levels, or to other demographic factors that it thought were relevant. Perhaps a guarantee of minimum funding (either aggregate or per capita) could ensure that localities met certain minimum standards. Guaranteeing a minimum level, however, is certainly possible without writing a blank check to fund all prison commitments.*1083

The two proposals, then, are not more regressive than the current system—they simply lay bare the fact that redistribution on the basis of income or resources is not the current default in criminal justice funding. Again, this is a virtue of decentralization—greater would make these problems easier to diagnose.

B. Disparate Treatment

A related objection to the resource concern is fear that localism would enshrine disparate treatment of local populations, raising equal protection concerns. Equal protection is, undoubtedly, a primary concern in criminal law, but the dominant problem is the debilitated status of the jurisprudence itself: there is, practically, no equal protection doctrine in criminal justice.[FN70] Localities currently investigate, prosecute, and sentence crimes differently, and it is almost impossible, without a smoking gun document, to raise an Equal Protection claim.[FN71] Such a document would itself be practically impossible to discover after *United States v. Armstrong*, which requires a threshold showing that the government declined to prosecute “similarly situated suspects of other races” before discovery can be granted.[FN72] It seems unlikely that the existence of prison subsidies alone serves to deter lawlessness by local law enforcement in ways that, say, liability for civil rights violations under § 1983 does not.

Even where there are local equal protection violations or other constitutional issues, however, a subdivided state might more readily reveal them. We know that issues of race, for example, creep into *1084 every part of the criminal justice system, from racial profiling during investigation to disparate sentences for powder and crack cocaine. There is no reason, however, to assume that any bias (conscious or unconscious) operates uniformly throughout a state. Local variation in disparate treatment will necessarily rise above and fall below the average of a state's disparate treatment as a whole. Centralization allows a state to more easily hide its inequalities by averaging across intra-state differences. No less an expert than David Baldus himself observed that “anti-black discrimination in some counties may be neutralized by pro-black or no discrimination in other counties with a cancelling out of any statewide effect.”[FN73] If we were to stop focusing on the state level and focus instead on localities, evidence of disparate treatment might more readily reveal itself. We might discover that liberal urban areas are, in fact, padding the state average, and that some areas have long violated equal protection. (We might also discover that the opposite is true.) But disaggregation would heighten actual, extant distinctions among localities. It would make any political discussion at the statewide level

better informed. Everyone could see which counties are doing better and which ones worse.

Of course, the state could also assume responsibility for oversight—or enforce minimum standards—even if it did not pay for or operate prisons. After all, a state government need not wait to fix a problem until a court tells it to. The state could set statewide standards, investigate counties, publish data on outcomes, list under- and over-performing districts, disseminate best practices, and diagnose problems. Statewide regulation and enforcement could be kept even if administration and subsidies were discarded.

But, ultimately, statewide centralization of any kind might do more to perpetuate unequal treatment than localization, as Lisa Miller,[FN74] Stuart Scheingold,[FN75] and William Stuntz[FN76] have argued. At the local level, the politics of crime are more holistic, more democratic, and provide fewer barriers to participation for the poor and/or people of color.[FN77] The structure of state politics lends itself to punitive policies; local politics *1085 is more redistributive.[FN78] Part of the reason for this is the emphasis on symbolic politics, itself a product of how far removed statewide political bodies are from actual day-to-day concerns.[FN79] Localities are different, and policies should reflect that: “In a heterogeneous society marked by disparities of wealth, opportunity, and influence, as well as by great cultural variation, to treat all individuals alike will compound rather than mitigate injustice.”[FN80] In fact, Stuntz maintains that “centralized democratic power seems associated with discrimination and severity. In the past, local democratic control of criminal justice appears to have produced equality and lenity.”[FN81] Local justice can mediate the competing demands of fighting both crime and mass incarceration because local residents suffer from both.[FN82]

Ultimately, a state with a regionalized criminal justice system might provide more protections against Equal Protection violations than a statewide one. No judicial tools would be lost: jails are subjected to the same judicial oversight that state prisons are, so any problems could be fixed using the same means. Federal and state agencies can *1086 still take rogue localities to heel via regulations, statutes, and suits.[FN83] And political will might be easier to generate if only parts of the state were responsible for the constitutional violations: citizens might be more ready to blame or sanction particular locales as a means of distancing themselves from distasteful practices.

C. Dumping Crime and Criminals

While it is true that local governments stay put, crime and criminals do not. Perhaps decentralization will give counties more incentives to

dump crime and criminals on other jurisdictions, encouraging their criminals to move to other jurisdictions in order to save local time and resources. Crime-riddled counties who choose fiscal conservatism over law and order might “infect” other counties, as criminal networks grow or are left untreated. Under a centralized prison system nothing stops the exportation of crime and criminals, however, and they can and do move now.[FN84] As more costs need to be accounted for by counties, though, budgets might become—or at least seem—tighter, and there might be greater incentives for localities to try to decrease costs by actively shedding crime and criminals.

A decentralized state could enhance local accountability by requiring offenders to stay within county borders for a given period of time. That is, counties would thus have to keep offenders for a given post-release term in order to avoid dumping of criminals, just as they pay for any of the costs associated with criminal justice policies. Such a “pay and stay” policy would mean that counties would have to live with the results of counter-productive policies. If an offender has been inadequately rehabilitated, then the county that failed to rehabilitate him would bear the consequences of his or her subsequent criminality.

The idea of returning offenders to a given county for a period of years following release is quite common in states today, so this suggestion is less of a change than an explanation of how current policy already deals with crime-dumping concerns. When combined with fiscal responsibility, pay and stay would ensure that the outcomes of the choices about offender interventions—whether incarceration, treatment, or some combination—were borne by the communities that implemented them, ensuring that incentives were properly aligned.

D. Scale and Complexity

County lines are not drawn on the basis of population. Even though counties are currently responsible for incarceration in jails, counties might be unable to house “state” prison populations if the counties are too small or their prisoner populations too large. Counties might find themselves overwhelmed by the regulatory functions they would be taking on—tracking data and auditing it would be difficult for sparsely-populated counties with little capacity, as well as for densely-populated areas with perhaps too much complexity in their data. Jails also have populations that churn more rapidly than prisons, owing to generally shorter sentences and a significant part of the population that is simply being held until bail can be posted or a plea deal can be made. A one-size-fits-all approach to counties might thus be too large in some cases and too small in others. Indeed, prosecutors’ offices have already experimented with “community” or “zone” prosecution within large

urban counties. Zone prosecution divides these counties into smaller sub-areas and assigns teams of attorneys to them; they are responsible for all cases arising out of their particular part of the jurisdiction.[FN85]

There might also be economies of scale to centralization for subpopulations of prisoners with special programming or security needs. These prisoners might require particular facilities or staff not needed by the general population, and it might therefore make more sense to spread these costs—and open up their utilization—across a larger tax base. These needs provide the strongest arguments for state institutions. However, there is nothing about these needs that requires state governments to pay for all prisoners, or that requires them to do so without putting counties to the test. The state could always require that inmates identified with special needs—risk, education level, etc.—be proven to require special treatment before the state provides it for them.[FN86] On the other hand, if the state failed to provide subsidies for certain populations—say, the mentally ill—coun- *1088 ties might have much clearer incentives to divert these populations away from the criminal justice system and towards treatment unless incarceration were absolutely necessary, particularly since coverage of mental health has increased under both the Affordable Care Act and the Mental Health Parity and Addiction Equity Act.[FN87]

There is also an important distinction between physical control and financial, regulatory, and programmatic control. A single physical facility could have a number of virtual prisons inside it, where counties could pick and choose which functions they would perform with others and which they would administer—or at least pay for and regulate—themselves. A state agency might continue to provide prison beds but move towards a capitation system similar to that used in the downsizing of juvenile prisons, whereby counties would pay for each prisoner housed in a centralized facility. This could be combined, say, with a risk-based capitation fee, whereby sentencing jurisdictions would be required to pay larger amounts for less-dangerous offenders.[FN88] In this way, localities would be incentivized to send only the most dangerous prisoners—those with gang affiliations and discipline problems, for example—or the neediest prisoners to specialized facilities. Counties would still be responsible for prisoners, whether physically or financially, however, even if the state chose to house them or subsidize their housing. But the point here is that the case for state involvement would have to be made—not simply assumed.

Counties might not, more generally, be able to afford to build local prisons large enough to accommodate the large populations currently in state prisons. This raises the question of whether the scale of mass

incarceration is, in fact, due to the ability of state prisons to accommodate these populations. Perhaps we have built ourselves into the problem, not in response to it. It would be much harder for counties to overbuild within their boundaries and within their budgets. Though the accounting would not change, and though the state should be unable to do what counties in the aggregate cannot do, the ultimate costs would be more difficult to hide within a smaller, less complex budget, *1089 where the linkage between cause and effect—and the effects of budget shortfalls themselves—were more locally evident.

County lines are certainly not the only way to subdivide a state, of course.[FN89] Counties might not map onto crime and/or population patterns accurately.[FN90] Some states might want to organize on regional levels, or metropolitan statistical areas. Counties are a good place to start, though, because counties are the dominant model for subdividing states, and existing political authority—and law enforcement and judicial authority—typically follows county borders. Counties could also send prisoners to other counties' facilities with excess capacity—a practice that is more than a hundred years old.[FN91] Counties with larger facilities could thus put them to use by leasing space to other counties.[FN92]

The last argument concerns the physical location of facilities. As stated earlier, one could imagine that the physical location of prisons and jails would not change, and that jurisdiction would be virtual, with a single physical facility housing prisoners subject to different counties' financial, regulatory, and programmatic control. But there might also be an argument for requiring a county to house its prisoners within its boundaries. Prisoner reentry is made more difficult the further a prisoner gets from his or her home community. Siting prisons “in county” would have important expressive value as well. Prisoners are a county's responsibility. It should be a fact of life that offenders do not just go “away.” They are still part of the community, even as they are being punished by it. Incarceration would thus take its rightful place as part of the body politic, not something to be outsourced from it. The harms of having a prison within the county are part of the cost of incarceration—a cost that should be internalized. *1090

Conclusion

This Article has proposed a new approach to the issue of local discretion in criminal justice. Taking as a given that discretion cannot be eliminated, and that localities use their discretion to set criminal justice policies, it has proposed fiscal limits as a means of balancing local

preferences and statewide policies. Fiscal limits remove the correctional free lunch and address this systemic problem with an appropriately systemic solution. This avoids the “real offense” problem so fatal to solutions which depend on sorting through the results of individual cases.

This Article has also largely not explored several ways in which prison populations might be managed. I have taken as a given that state legislatures are unlikely to reduce the size and scope of their penal codes, and have, instead, discussed the ways in which these extensive codes exacerbate the local discretion problem.^[FN93] I have also taken as a given that prisons are difficult to regulate and reform, and that any attempts to regulate and reform them will be expensive. I have further assumed that local elections for key criminal justice players (district attorneys, sheriffs, and the local officials who hire police) are unlikely to be replaced by statewide elections or appointments. In short, one might wish that the system we have were different: that it penalized less, that it rehabilitated more, and that the politics of crime led to a smaller number of crimes punished by shorter and less severe penalties. But while we are at it, we might as well wish that ice cream were a vegetable. The point of this Article is to ask whether, given the remoteness of other kinds of well-trodden policy proposals, we might change the system by changing who pays for it.

Rationing access to incarceration might be a way of reducing imprisonment. But rather than try to impose a uniformity on states, this Article has explored what would happen if we acknowledged the degree of local control in the present system and stopped subsidizing only some of these decisions. This would not necessarily mean that the state was entirely absent from criminal justice, just that it would use different means to set incentives, ones that are more narrowly and purposively tailored than the correctional free lunch. Ultimately, ending prison subsidies could ensure that local decisions reflected sincere local preferences via the mechanisms of greater transparency and accountability. The move towards decentralization would acknowledge the reality that states are heterogeneous polities with real local differences. The present system does almost nothing to minimize these differences. It merely makes them harder to see.

[FN*] Assistant Professor, Santa Clara School of Law. My sincere thanks go to those who read and commented on earlier versions of the article, including those who participated in the University of Michigan Law School's Prison Scholarship Roundtable, participants in the Santa Clara Faculty Enrichment Workshop, and Farah Brelvi, David Friedman, Kelly Mitchell, Alexandra Natapoff, Michelle Oberman, David Sloss,

and Robert Weisberg. All errors remain mine.

[FN1] The most recent number from the Bureau of Justice Statistics is 1,382,418, relying on state reports. E. Ann Carson and William J. Sabol, *Prisoners in 2011*, at 3 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>.

[FN2] I arrived at this figure by multiplying the number of prisoners by an estimated cost of \$29,000 per prisoner. This estimate comes from the Pew Center on the States, *One in 31: the Long Reach of American Corrections* 12 (Mar. 2009), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

[FN3] Carson & Sabol, *supra* note 1, at 3.

[FN4] There were 711,643 people in state prisons in 1991. Allen Beck et al., *Survey of State Prison Inmates, 1991*, at 3 (1993), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/SOSP191.PDF>. Dividing the population figures in note 1 by this number yields a ratio of 1.94.

[FN5] There were 177,113 people in state prisons in 1971. Patrick A. Langan et al., *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86* at 11 (1988), available at <https://www.ncjrs.gov/pdffiles1/digitization/111098ncjrs.pdf>. Dividing the population figures in note 1 by this number yields a ratio of 7.81.

[FN6] This problem is exacerbated by the expansive nature of state penal codes, which serves to delegate discretionary exercises of power to local officials. I discuss this further in Part I. For the definitive theoretical treatment of why legislatures write expansive penal codes, see William Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505 (2001–2002). For the ways in which law “on the books” differs from “law on the ground,” see Mona Lynch, *Mass Incarceration, Legal Change, and Locale*, 10 *Criminology & Pub. Pol.* 673, 681 (2011).

[FN7] W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—and Why It Should*, 28 *Ga. St. L. Rev.* 987, 1014 (2012).

[FN8] For a fuller treatment of these observations, see W. David Ball, *Why State Prisons?* (forthcoming Yale L. & Pol'y Rev.), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871274.

-

[FN9] See, e.g., Stuart A. Scheingold, *The Politics of Law and Order* 74 (2010).

-

[FN10] Franklin E. Zimring and Gordon Hawkins, *The Scale of Imprisonment* 140 (1991).

-

[FN11] See, e.g., One in 31, *supra* note 2, at 2 (estimating that the daily cost of prison is twenty times that of the daily cost of probation).

-

[FN12] For ease of expression, this Article uses the term “county” as a short-hand reference to local administrative units that constitute the locus of decision-making on criminal justice issues, including parishes, districts, and the like. For the viewpoint that the county can, in some ways, distort local criminal justice, particularly when used as the basis for the Sixth Amendment's vicinage requirement, see William Stuntz, *Unequal Justice*, 121 Harv. L. Rev. 1969, 2035 (2008) (arguing that “[i]f the goal is to protect the interests of residents of high-crime city neighborhoods, that [the county] is the wrong pool”).

-

[FN13] In Quitman County Mississippi, for example, local officials raised taxes and shortened the school year in order to cover the costs associated with a capital trial. *Poor County Forced to Finance Killers' Appeals*, L.A. Times, Mar. 28, 1999, available at <http://articles.latimes.com/1999/mar/28/news/mn-21958>. In a separate article, I have argued that this choice was more likely to have been a sincere reflection of local values and social utility than a decision to seek the death penalty where the costs were covered by the state. See Ball, *supra* note 8.

-

[FN14] Usage is, of course, relative, and saying that a county uses a “high” rate of prison necessarily involves judgments about what a “normal” usage of prison is. I have dealt with this issue in a prior article, where I defined “high use” counties as those which were in the top quartile of state prison-to-crime ratios more than seven of ten years. Ball, *supra* note 7, at 1014.

-

[FN15] I note just a few recent examples here. The idea of performance based incentives for prosecutors has been bandied about

but not fully developed. See, e.g., Peter A. Joy & Kevin C. McMunigal, *Contingent Rewards for Prosecutors?*, ABA Crim. Just. 55, 56 (Fall 2011) (reviewing the policy idea that prosecutors be paid bonuses on a contingent basis but finding “no ethics opinions or cases that have considered bonuses or prizes for conviction rates at trial”).

- See also James M. Doyle, *Why (and How) We Need to Improve America's Prosecution System*, available at <http://www.thecrimereport.org/viewpoints/2012-05-why-and-how-we-need-to-improve-americas-prosecution>. Doyle proposes a division of prosecution into two offices: one which sets a price for plea (which he calls solicitors) and the other a more traditional prosecutor's office. Solicitors would set the price that the crime was worth, what he calls “sentencing investments.” Prosecutors would take the rest of the cases that did not bargain out. The idea is that this would internalize the costs of trial.

- Ronald F. Wright and Marc L. Miller propose internal bureaucratic checks on individual prosecutors within agencies. Ronald F. Wright & Marc L. Miller, *the Worldwide Accountability Deficit for Prosecutors*, 67 Wash. & Lee L. Rev. 1587, 1603 (2010). But, of course, this only ensures that the individual prosecutor is in line with the agency as a whole—not that the agency's preferences are aligned with society's preferences, which is, ultimately, what's important. I note also that their prediction that “data will slowly drive out local variation among prosecutor offices and individual variation within offices,” *id.* at 1617, must first account for how this data will be defined, isolating real offense factors so that apples are compared with apples.

-

[FN16] Stuntz argues that the problem is actually that discretion is concentrated only in the hands of the prosecution: “when prosecutors have enormous discretionary power, giving other decisionmakers discretion promotes consistency, not arbitrariness. Discretion limits discretion; institutional competition curbs excess and abuse.” Stuntz, *supra* note 12, at 2039.

-

[FN17] At a minimum, we would need to be able to distinguish among non-discretionary results (e.g., mandatory minimums, where there was no discretion), discretionary but “normal” results (genuinely close cases that turned out “well”), discretionary but unacceptable or unreasonable results (a sensible decision resulting in a bad outcome), and unreasonably discretionary, unreasonable results (a biased decision resulting in a bad outcome).

-

[FN18] One possible exception is driving while intoxicated (DWI). There one could conceivably determine that the real offense is the offender's blood alcohol content (BAC), which is chemically quantifiable. These data are not always available, however. See, e.g., Christopher L. Griffin, Frank A. Sloan, and Lindsey M. Eldred, *Corrections for Racial Disparities in Law Enforcement*, 55 *William & Mary L. Rev.* (forthcoming 2014), available at <http://ssrn.com/abstract=2104182> (analyzing DWI dispositions by race, but not controlling for the actual BAC because the data was not available).

-

[FN19] Of course, even these figures might fail to capture all of the phenomena in a given system, and could be manipulated, but there are political reasons not to game these figures, as I discuss *infra*.

-

[FN20] See, e.g., William Crawford, the English prison reformer, writing in his *Report on the Penitentiaries of the United States* 5 (1835, 1969 Patterson Smith ed.). "Experience shows how difficult it is to preserve an [sic] uniform course of punishment wherever the legislature has afforded any latitude for discretion, although this discretion be exercised by men of similar education, habits, studies, and employments." See also G. de Beaumont & A. de Tocqueville, *On the Penitentiary System in the United States, and Its Application in France* 65–66 (Francis Lieber trans., 1833). ("How shall the number of crimes be proved? By that of the convictions? Several causes, however, may produce more frequent convictions, though the number of crimes be the same.").

-

[FN21] *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) (holding that one sale of narcotics could nevertheless be subject to charges under two criminal statutes, provided that each statute "requires proof of a different element.").

-

[FN22] *Blockburger*, 284 U.S. at 300–01.

-

[FN23] *Blockburger*, 284 U.S. at 301.

-

[FN24] *Blockburger*, 284 U.S. at 301.

-

[FN25] *Blockburger*, 284 U.S. at 304 (internal citations omitted).

-

[FN26] See, e.g., William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 519 (2001–2002) (“[C]riminal codes consist of a great many more sets of overlapping concentric circles than concentric circles. Which is to say that defendants who commit what is, in ordinary terminology, a single crime can be treated as though they committed many different crimes—and that state of affairs is not the exception, but the rule.”).

-

[FN27] Stuntz, *supra* note 26, at 506.

-

[FN28] John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 Ga. St. U.L. Rev. 1239, 1241 (2012).

-

[FN29] Stuntz, *supra* note 26, at 509 (“As criminal law expands law enforcers, not the law, determine who goes to prison and for how long. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments.”).

-

[FN30] Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 Cal. L. Rev. 1573 (2012). See also Kyle Graham, *Facilitating Crimes*, 15 Lewis & Clark L. Rev. 665 (2011) (discussing, *inter alia*, pleas to a “broken speedometer” moving violation: these violations would be impossible for law enforcement to detect but are, instead, landing places for negotiations that start with other, more serious charges, such as speeding).

-

[FN31] See, e.g., John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. Times, Dec. 11, 2012, available at http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&_r=0 (describing case in which woman was sentenced to life without parole after police found cocaine in a lockbox in her house, while her husband, who led the cocaine dealing and had “a much longer criminal record” was sentenced to less than years in prison, due to his ability to provide evidence to the prosecution).

-

[FN32] *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961) (holding that “all evidence obtained by searches and seizures in violation of the

Constitution is ... inadmissible in a state court”).

-

[FN33] See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) (holding that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination”).

-

[FN34] See, e.g., *Tanner v. U.S.*, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90, 22 Fed. R. Evid. Serv. 1143 (1987) (refusing to overturn a guilty verdict despite testimony that jurors drank and used drugs during the trial).

-

[FN35] For a discussion of the difficulties of coding charges and real offenses, see M. Marit Rehavi & Sonia B. Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* (May 7, 2012). Univ. Mich. L. & Econ, Empirical Legal Studies Center Paper No. 12-002, available at <http://ssrn.com/abstract=1985377> or <http://dx.doi.org/10.2139/ssrn.1985377>. The authors of the study note that their analysis of racial bias in charging can only measure the change between arrest offense and charge offense, but it cannot “rule out the possibility that such disparities are legally justified by variations in the evidence.” *Id.* at 14. See also Scheingold, *supra* note 9, at 160–61 (discussing the difficulty of finding variables that explain variance, even though “informal and reasonably equitable norms exist”).

-

[FN36] See, e.g., *Ewing v. California*, 538 U.S. 11, 16, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003).

-

[FN37] Megan Berwick et al., *Wobblers & Criminal Justice in California: A Study Into Prosecutorial Discretion* viii (2010), available at <http://ips.stanford.edu/sites/default/files/shared/DA%20Discretion%20Final%20Report.pdf>.

-

[FN38] See, e.g., Berwick et al., *supra* note 37, at ix (noting that actual data about the quantity of drugs in an individual's possession is not tracked).

-

[FN39] But, of course, there are limits to what one can do to redress grievances against prosecutors. See, e.g., *Imbler v. Pachtman*, 424 U.S.

409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) (holding that prosecutors are immune from suit under 42 U.S.C.A. § 1983).

-

[FN40] This is, in some ways, reminiscent of the Court's conclusion in *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (holding that evidence of systemic bias in the administration of the death penalty (the Baldus study) was insufficient to prove that bias drove the death sentence in defendant's case). This analysis starts where *McCleskey*'s stops. If the problem is systemic, then the solutions must be as well.

-

[FN41] I discuss my analysis of the California experience from 2000–09 in my recent article *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—and Why It Should*, *supra* note 7 (concluding that counties used prison at wildly different rates during that time, and that the bulk of this difference could not be explained by referring to differences in rates of violent crime).

-

[FN42] *Ball*, *supra* note 8.

-

[FN43] I define criminal justice need in terms of violent crime, and discuss my reasons for doing so *infra* at Part A.

-

[FN44] A state might even want to distribute resources more finely—say, by giving more money to those neighborhoods reporting the most homicides. I discuss the issue in greater detail, with particular emphasis on the ideas of Lisa Miller, William Stuntz, and Stuart Scheingold in section III.B, *infra*.

-

[FN45] There might also need to be necessary adjustments involving the costs of imprisonment for those offenders currently serving sentences. That is, because the total cost of prisons each year is not just for new admissions, but also includes the costs of those already sentenced, some counties will continue to be subsidized for those prisoners they sent under a correctional free lunch regime. A state might decide to cover these costs during the transition or to make counties repay it for past use. Such a decision would undoubtedly involve political calculations. For the purposes of this Article, policies that concern past decisions would have little effect on the forward-looking incentives the end of state subsidies would create.

-

[FN46] A series of reports from New York City, the municipality which is best known for rolling out data-driven crime control (“Compstat”) has recently alleged that there is pressure to downgrade serious crimes in order to promote a narrative that crime is on the decline. See, e.g., John A. Eterno, *Policing by the Numbers*, N.Y. Times, June 18, 2012, at 23A (“Most seriously, crimes are being downgraded; crime scenes are revisited, and victims called back, expressly so that reports can be revised, and the seriousness of the crime downplayed. It should be no surprise that police manipulation of crime data has been reported in other jurisdictions—Baltimore, New Orleans, even Paris—where the police have emulated New York’s tactics.”). Eterno is a co-author, with Eli B. Silverman, of *The Crime Numbers Game: Management by Manipulation* (2012), a study of data manipulation in the New York Police Department. See also Graham Rayman, *The NYPD Tapes Confirmed*, Village Voice, Mar. 7, 2012, available at <http://www.villagevoice.com/2012-03-07/news/the-nypd-tapes-confirmed/> (quoting an unreleased NYPD internal investigative report which concludes: “When viewed in their totality, a disturbing pattern is prevalent and gives credence to the allegation that crimes are being improperly reported in order to avoid index-crime classifications This trend is indicative of a concerted effort to deliberately underreport crime in the 81st Precinct.”).

-

[FN47] While parts of this proposal are no doubt similar to California’s current program of realignment—which limits prisoners eligible for commitment to state prisons to those convicted of violent, serious, or sex offenses—it differs by letting the money flow both ways. Under realignment, the state does not reallocate all of the money it saves from prisoners, nor can localities tell the state that they want the money the state would have spent on prison. Prison is still “free” to counties, and not treated as a fungible pot of money: the state has simply restricted prison access to a certain offense level.

-

[FN48] Unified corrections systems combine authority for all custodial prisoners—including, in some cases, probation, parole, and community corrections—into a single agency with a single budget. See, e.g., Barbara Krauth, *A Review of the Jail Function Within State Unified Corrections Systems* (National Institute of Corrections, 1997), available at <http://nicic.gov/Library/014024>.

-

[FN49] Hawaii’s unified corrections system contains both corrections and law enforcement, though it excludes prosecutors.

Krauth, *supra* note 48, at 3.

-

[FN50] For a summary of some of these problems in the California context, see W. David Ball & Robert Weisberg, *Justice Information Sharing: A Legal Primer for Criminal Justice Practitioners in California* (Dec. 4, 2010), Stanford Public Law Working Paper No. 2141523, available at SSRN: <http://ssrn.com/abstract=2141523> or <http://dx.doi.org/10.2139/ssrn.2141523>.

-

[FN51] W. David Ball, *E Pluribus Unum: Data and Operations Integration in the California Criminal Justice System*, 21 *Stan. L. & Pol'y Rev.* 277 (2010).

-

[FN52] Changes in law enforcement—the “inputs” to the criminal justice system—have obvious resource implications on other parts of the system. If police arrest more people, or prosecutors charge more people, then, *ceteris paribus*, more court time, more jail and prison beds, and more community supervision will be used. Similarly, changes in the execution of sentences—whether custodial or non-custodial—will have resource implications on law enforcement. If prisons do not treat drug addiction, for example, law enforcement can count on increases in the amount of time they will have to dedicate to crimes fueled by drug abuse when prisoners are released.

-

[FN53] Indeed, William Stuntz has argued that “[p]olice officers and prison cells are substitutes: alternative means by which governments spend money to battle crime.” Stuntz, *supra* note 12, at 2015.

-

[FN54] For a more detailed discussion of the possible externalities to local jail reentry programming, for example, see John Roman & Aaron Chalfin, *Does it Pay to Invest in Reentry Programs for Jail Inmates?*, Justice Policy Center 1 (2006), available at: http://www.urban.org/reentryroundtable/roman_chalfin.pdf (outlining a blueprint for cost-benefit analysis of jail reentry and concluding that “under a variety of conditions, jail-based reentry programs would have to reduce recidivism by less than two percent to offset the cost of jail-based programming,” but that these benefits would accrue to the public, not necessarily to local jail budgets. “[W]e estimate that approximately 70% of the benefits of abated crime accrue to community members while the remaining 30% accrues to the criminal justice system.”).

-

[FN55] Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 *Ariz. St. L. J.* 47, 50 (2008).

-

[FN56] Gershowitz, *supra* note 55, at 50–51.

-

[FN57] Michael A. Wolff, *Missouri Provides Cost of Sentences and Recidivism Data: What Does Cost Have to Do with Justice?*, 24 *Fed. Sent. Rptr.* 161 (Feb. 2012). Vermont is considering a similar policy. See Peter Hirschfeld, *Sentencing in Vt.: Factor in Cost?*, Jan. 23, 2013, available at

<http://www.timesargus.com/article/20130123/NEWS03/701239955>.

For a more critical view of Missouri's practice of making sentencing costs known to judges, see Chad Flanders, *Cost as a Sentencing Factor: A Theoretical Inquiry*, 77 *Mo. L. Rev.* 391, 395 (2012) (While agreeing that sentencing cost should have some weight, not none at all, noting that “[t]here is ... a strong argument against making cost an especially salient factor, which is what the Missouri Sentencing Commission reform unambiguously does.”) (emphasis in original).

-

[FN58] I note, however, that the implementation of new policies would take place in an organizational culture that might prove resistant. For general observations about the importance of organizational culture in law enforcement, see, e.g., Scheingold, *supra* note 35, at 80–81, 107.

-

[FN59] Looking outside the United States, other countries employ the FBI model, with “national or provincial [police] bureaucracies designed to keep politics at bay” William J. Stuntz, *Accountable Policing*, Harvard Public Law Working Paper No. 130, at 2 (Feb. 21, 2006), available at <http://ssrn.com/abstract=886170> or <http://dx.doi.org/10.2139/ssrn.886170>.

-

[FN60] In the capital punishment context, Professor Adam Gershowitz's observations about the uneven use of the death penalty at the county level has led to his endorsement of “cutting counties out of the death penalty system” altogether, leaving “[a]ll aspects of death penalty cases—charging, trial, appeal, and everything in between” in the hands of state-level “prosecutors, defense lawyers, and judges whose sole responsibility is to deal with capital cases.” Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 *Vand. L. Rev.* 307, 310 (2010). But the dominant model of prosecution in the United States is local, “with little centralized supervision by a state-level actor.” Rachel

Barkow, *Federalism and Criminal Law: What the Feds can Learn from the States*, 109 Mich. L. Rev. 519, 545 (2011).

-

[FN61] Lynn Langton & Thomas H. Cohen, *State Court Organization, 1987–2004*, at 1 (Oct. 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco8704.pdf>. Court reform made courts into more of a state function, borne out of a desire to promote professionalism, and to administer the system in a more efficient and cost-effective way. *Id.* Only ten court systems (as of 2004) were unified, but even this figure relies on self-designation: “No state court system actually meets all of the criteria for total unification.” *Id.* at 6. This might be due to the existence of special jurisdiction courts (e.g., mental health courts, family courts, etc.).

-

[FN62] Barbara Krauth, *A Review of the Jail Function Within State Unified Corrections Systems* (National Institute of Corrections, 1997), available at <http://nicic.gov/Library/014024>.

-

[FN63] The California Prison Healthcare system is under the administration of a court-appointed receiver. But even this insider—on leave from his regular position as a law professor—suggested that the California Department of Corrections and Rehabilitation be broken up into smaller units, spinning off health care and other services. The reason had to do with the fact that the complexity of the system was getting in the way of greater accountability and transparency. J. Clark Kelso, *Time to Split Up Corrections Department*, *Sacramento Bee*, Dec. 20, 2010, available at <http://prisonreformmovement.wordpress.com/category/state-budgetmoney/page/17/> (“The department has become impossible to manage given the huge scope of its operations, the unrelenting overcrowding, and the tension between day-to-day operational improvement and crisis management driven by periodic bad headlines. It is time to reorganize CDCR into smaller organizational pieces to improve focus on discrete functions and to strengthen transparency and accountability for operations.”).

-

[FN64] Doug Harlow, *Franklin, Somerset County Jails Reach Agreement with State on Cost of Inmate Sharing*, *Waterville Morning Sentinel*, Aug. 2, 2012, available at http://www.centralmaine.com/2012/08/02/jails-reach-cost-shareagreement_2012-08 (noting that counties are capped in the amount they can raise taxes to pay for correctional spending). I will

refrain from analyzing Maine in this Article. It appears that there are some growing pains, and its implementation of unified corrections is much more recent than any of the other states (Hawaii, the next most recent state, was unified in 1978/1979, almost twenty years at the time of the NIC publication). Barbara Krauth, *A Review of the Jail Function Within State Unified Corrections Systems* 16 (National Institute of Corrections, 1997), available at <http://nicic.gov/Library/014024>. Maine has had difficulty in pricing the cost of housing inmates from other counties. Harlow, *supra* (reporting on county jail's refusal to accept inmates from other counties until state reimbursement amount was increased, putting the system "on the brink of crisis"). The fiscal implications of its county reimbursement policies deserve much closer analysis that I can dedicate to them here. See *An Act To Better Coordinate and Reduce the Cost of the Delivery of State and County Correctional Services*, Me. P.L. 2008, ch. 653, Part A (effective Apr. 18, 2008), available at <http://www.mainelegislature.org/ros/LOM/LOM123rd/123S1/pdf/PUBLIC653.pdf>.

-

[FN65] Rachel Barkow, *Federalism and Criminal Law: What the Feds can Learn from the States*, 109 Mich. L. Rev. 519, 545–56 (2011). Barkow notes, however, that there are some exceptions. Florida has a statewide prosecutor with authority to bring criminal charges on cases involving two or more intra-state jurisdictions. *Id.* at 565–67. Alabama's Attorney General has a wide-ranging power by statute to prosecute crimes, but, in practice, the exercise of this power is closely aligned with the types of crimes listed above. *Id.* at 567–68. Arizona has also established a Drug Unit to prosecute drug trafficking and money laundering. *Id.* at 568–69.

-

[FN66] U.S. Const. amend. VI.

-

[FN67] See Ball, *supra* note 8.

-

[FN68] See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011).

-

[FN69] Crime policy is not an inevitable (or mono-directional) response to crime itself. See, e.g., Scheingold, *supra* note 9, at ix-x, 48–51.

-

[FN70] William J. Stuntz, *The Collapse of American Criminal Justice* 120 (2011) (“The system as a whole may discriminate massively, but as no single decision-maker is responsible for more than a small fraction of the discrimination, the law holds no one accountable for it.”)

-

[FN71] See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973) (holding that the federal judiciary may not compel prosecution in an individual case); see also *U. S. v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) (Congress has the power to pass statutes containing almost identical elements but different penalties, and the prosecution may freely choose between them); see also *Wayte v. U.S.*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985) (no malicious prosecution claim even though out of 674,000 violations of failing to register for the draft, only sixteen indictments were issued).

-

[FN72] 517 U.S. 456, 465 (1996) (“In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present ‘clear evidence to the contrary.’”) (internal citations omitted). States have similar requirements. See, e.g., *Delores Carr, Prosecutorial Discretion*, *Cal. Daily J.*, Nov. 26, 2007 (discussing California’s legal and ethical restraints, concluding, inter alia, that the executive is charged with decisions about prosecution and that “the prosecutor’s decision about the type and number of crimes to charge is normally not subject to judicial review ... even if the prosecutor’s decision concerning which charges to file constricts the sentencing options available to the courts.”).

-

[FN73] David C. Baldus, *Racial Discrimination in Capital and Non-Capital Sentencing with Special Reference to the Evidence in Murder and Rape Prosecutions* 10 (2010), available at http://www.albany.edu/scj/documents/Race_Baldus.pdf.

-

[FN74] Lisa L. Miller, *the Perils of Federalism* (2008).

-

[FN75] Scheingold, *supra* note 9.

-

[FN76] Stuntz, *supra* note 12.

-

[FN77] Lisa L. Miller, *the Perils of Federalism* 11 (2008).

-

[FN78] Miller, *supra* note 77, at 118–28, noting that participation in statewide politics requires resources and narrow, single-issue-focused campaigns, whereas local politics is both more diffuse and more pragmatic.

-

[FN79] Scheingold, *supra* note 9, at 58 (describing the “simple morality play” of good and evil necessarily abstracted from the real members of society who are both victims and victimizers). See also *id.* at 66–69 (noting the security of a Manichean worldview in the face of intractable social problems).

-

[FN80] Scheingold, *supra* note 9, at 210. Scheingold calls his vision of a decentralized state “neighborhood justice.” He also notes that standards of “uniformity and formal equality have never really been widely honored,” *id.* at 211, and that criminal justice disparities, far from being “irrational,” are, instead “a direct consequence of the political accommodations of criminal courts to their respective local settings” *Id.* at 226.

-

[FN81] Stuntz, *supra* note 12, at 1975.

-

[FN82] As Stuntz puts it, criminal justice policies can be moderated if we

[p]lace more power in the hands of residents of those neighborhoods where the most criminals and crime victims live. Because residents of those neighborhoods suffer so much from crime, they are unlikely to support abandonment of the sort that Northern cities experienced in the 1950s, 1960s, and early 1970s. Because those same residents suffer so much from mass incarceration, they are also unlikely to support the mindless severity of the 1980s, 1990s, and this decade. Those propositions fit the historical track record: when high-crime cities have exercised the most control over criminal justice within their borders, punishment levels have been more moderate and discrimination less pervasive than today.

Stuntz, *supra* note 12, at 2031–32. Stuntz's policy suggestions are to provide more state and federal money to local police forces, to increase the number of crimes tried before neighborhood juries, and to introduce open-ended mens rea terms into criminal statutes to allow juries to exercise greater judgment. *Id.*

-

[FN83] One could even argue that local criminal justice offers more protection against constitutional violations, given the Supreme Court's

interpretation of state sovereignty. Counties are not subject to the sovereign immunity concerns of the Eleventh Amendment the way that states are. Alabama provides a notable exception to the case of local law enforcement—sheriffs are mentioned in the state constitution and have been deemed to be state actors, therefore immune to suit under 42 U.S.C.A. § 1983. See, e.g., *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 789, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997) (holding that Alabama sheriffs “are state officers, and that tort claims brought against sheriffs based on their official acts therefore constitute suits against the State, not suits against the sheriff’s county”).

-

[FN84] Indeed, prisons which draw from the statewide population might make it easier for gangs to expand into new territories, by enabling them to recruit members from new geographic areas among in the inmate population.

-

[FN85] See generally Steven Jansen & Robert Hood, *A Framework for High Performance Prosecutorial Services* (Ass’n. of Prosecuting Attorneys, 2011), available at <http://apainc.org/files/DDF/APA%20High%20Performance%20%20Framework%20FINAL.pdf>.

-

[FN86] This would put assessment and classification at the forefront of sentencing, which is, in many ways, a return to the reasons that justified the very establishment of state institutions in the first place. Ball, *supra* note 8, at Part II.

-

[FN87] See, e.g., Kirsten Beronio et al., *Affordable Care Act Will Expand Mental Health and Substance Use Disorder Benefits and Parity Protections for 62 Million Americans* 1 (Feb. 2013), available at http://aspe.hhs.gov/health/reports/2013/mental/rb_mental.pdf (“The Affordable Care Act will provide one of the largest expansions of mental health and substance use disorder coverage in a generation.”).

-

[FN88] See, e.g., Mac Taylor, *The 2012–13 Budget: Completing Juvenile Justice Realignment* 5–6 (Feb. 15, 2012), available at http://www.lao.ca.gov/analysis/2012/crim_justice/juvenile-justice-021512.pdf (describing sliding scale of charges based on seriousness of offense, rationing of state juvenile prison on the basis of offense charged, and shifting of parole from the state to counties).

-

[FN89] Corrections Independent Review Panel, Reforming Corrections (June 2004), at 5, available at http://www.immagic.com/eLibrary/ARCHIVES/GENERAL/CAGOV_US/C040600D.pdf (suggesting that California adult prison operations be divided regionally).

-

[FN90] Ball, *supra* note 51.

-

[FN91] 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 68 (1867). See also Jesse F. Steiner & Roy M. Brown, the North Carolina Chain Gang: A Study of County Convict Road Work 178–79 (1927, reprinted 1970 Negro Universities Press) (In 1927, “about half of the counties in the state [North Carolina] turn[ed] over their prisoners to other counties, instead of maintaining their own.”).

-

[FN92] In fact, California counties are currently experimenting with regional prisoner exchanges, but the costs of transportation might eat up the savings from not building a dedicated county facility. See Christina Villacorte, Sheriff's Department Considers Variety of Options to Ease Jail Overcrowding, L.A. Daily News, July 22, 2012), available at http://www.dailynews.com/news/ci_21133374/sheriffs-department-considers-variety-options-ease-jail-overcrowding.

-

[FN93] But see Stuntz, *supra* note 12, at 2032 (arguing that statutes which incorporated discretionary mens rea terms would result in fewer jury trial convictions).

-

Westlaw. © 2014 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

50 NO 5 CRIMLAWBULL ART 2

END OF DOCUMENT