

Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment

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As the movement to reduce the outsized scale of U.S. incarceration rates gains momentum, there has been increased attention on what federal sentencing reform can accomplish. Since nearly ninety percent of prisoners are held in state, not federal, institutions, an important aspect of federal reform should be trying to alter how the states behave. Criminal justice, however, is a distinctly state and local job over which the federal government has next to no direct control.

In this Article, I examine one way in which the federal government might be driving up state incarceration rates, and thus one way it can try to alter them: not directly through its criminal code, but through the millions of dollars in grant money it provides. A strong predictor of state prison growth is state fiscal health: states with more money spend more on everything, including prisons. And federal grants bolster state fiscal capacity. So perhaps one way that the federal government could change state sentencing would be to help prop up corrections spending less.

My final conclusion, while quite tentative, is also somewhat surprising. Contrary to my expectations I held when I started work on this Article, it does not seem as if federal spending is bolstering state spending on incarceration to a significant degree. So cutting back on federal funding for criminal justice activities may not have much impact on state decisions about incarceration. Which, perhaps somewhat ironically, may suggest we want the federal government to spend more, not less, but to allocate the money in ways that encourage states to adopt reforms that push back against excessive incarceration.

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TABLE OF CONTENTS

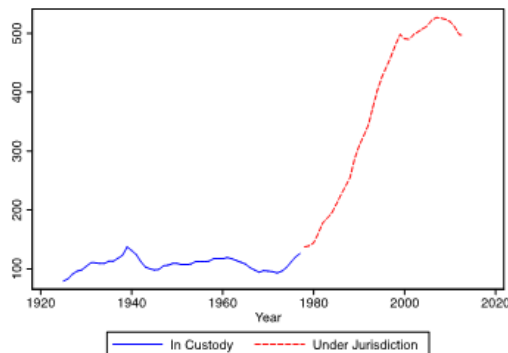
| | |
|-----------------------------------------------------------------|------|
| I. THE FEDERAL OUTLIER..... | 1573 |
| II. STATE AND LOCAL FISCAL CAPACITY AND PRISON GROWTH..... | 1579 |
| A. CRIMINAL JUSTICE SYSTEMS, NOT A CRIMINAL JUSTICE SYSTEM..... | 1579 |
| B. THE POLITICS OF STATE BUDGETING | 1582 |
| C. THE ROLE OF STATE AND LOCAL FISCAL CAPACITY | 1585 |
| III. THE ROLE OF FEDERAL MONEY IN STATE AND LOCAL BUDGETS | 1590 |
| A. CRIMINAL JUSTICE GRANTS | 1592 |
| B. AN ASIDE: IO33 GRANTS | 1595 |
| C. FEDERAL INTERGOVERNMENTAL TRANSFERS..... | 1597 |
| CONCLUSION | 1599 |

The United States has experienced an unprecedented explosion in incarceration over the past forty years. From the advent of reliable data in the 1920s through to the mid-1970s, the U.S. incarceration rate hovered around 100 per 100,000, on par with most of our peer countries. But as Figure 1 makes clear, by the end of the 1970s incarceration in the United States had started a steady upwards trajectory that did not level off until the early 2000s and did not reverse until 2010. By that year, the incarceration rate in prisons was 529 per 100,000,¹ and 743 per 100,000 for prisons and jails combined.² Home to only five percent of the world's population, the United States holds nearly twenty-five percent of its prisoners.³

1. Ann E. Carson & Joseph Mulako-Wangota, BUREAU OF JUSTICE STATISTICS, *Corrections Statistical Analysis Tool (CSAT) - Prisoners*, <http://www.bjs.gov/index.cfm?ty=nps> (last visited Aug. 5, 2015).

2. Roy Walmsley, INT'L CENTRE FOR PRISON STUD., *World Prison Population List*, <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf> (last visited Aug. 5, 2015). Note that the U.S. incarceration *rate* peaked in 2007 at 527 per 100,000, but the total *number* of prisoners did not peak until 2009, when it hit 1,615,487 (or so).

3. *See id.*

FIGURE 1: STATE INCARCERATION RATES, 1925–2013⁴

Not surprisingly, a lot of scholarly attention has been given to trying to uncover the causes of this surge in incarceration. Almost all of the work in this area—to varying degrees of success—has focused on legal and enforcement changes: the war on drugs, the passage of tougher sentencing laws, increasingly punitive parole practices, increasingly punitive district attorneys and legislators, and so on.⁵ In this Article, I want to turn my attention to another potentially important, but frequently overlooked, explanation: money.

That criminal justice costs a lot of money is well known. Academics and journalists frequently point out that states spend almost \$50 billion per year these days on incarceration alone. Less appreciated, but no less important, are the sums that county and local governments spend on criminal enforcement activities: \$82 billion on policing (mostly by cities)

4. MARGARET WERNER CAHALAN, U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, (1986).

5. For summaries of these arguments, along with overviews of their flaws (particularly when it comes to the war on drugs and long-sentences explanations), see John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go from Here*, 26 FED. SENT'G REP. 265 (2014); John F. Pfaff, *The Centrality of Prosecutors to Prison Growth: An Empirical Assessment*, SOC. SCI. RES. NETWORK (Jan. 23, 2012) [hereinafter *Centrality of Prosecutors*]; John F. Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73; John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239 (2012); John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13 AM. L. & ECON. REV. 491 (2011) [hereinafter *Myths and Realities*]; John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 174 (2015) [hereinafter *War on Drugs*]; John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087 (2013). A short, non-technical overview of these arguments is given by Leon Neyfakh, *Why Are So Many Americans in Prison? A Provocative New Theory*, SLATE (Feb. 6, 2015, 6:30 PM), http://www.slate.com/articles/news_and_politics/crime/2015/02/mass_incarceration_a_provocative_new_theory_for_why_so_many_americans_are_single.html.

and \$27 billion on jails (mostly by counties). State correctional and policing spending runs to about four percent of general budgets and seven percent of the more limited discretionary budgets; local and county spending on jails and police comes to about seven percent of general budgets and fifteen percent of discretionary.⁶

Any discussion of punishment and money generally assumes that the former drives the latter: we spend so much because we punish so much. But it is possible, even quite plausible, that to at least some degree causation runs in the opposite direction as well, that we punish so much in part because we simply have the ability to spend so much on punishment. When commentators draw attention to the steady increases in spending on incarceration in recent years, they generally do not point out that these took place during a time when state and local⁷ real per capita revenues were also rising—often significantly—as was real per capita spending on *everything*.

Increased attention to money and fiscal health helps explain one of the more intriguing aspects of recent prison growth trends, namely that prison populations continued to steadily rise throughout the 1990s and 2000s even as crime steadily declined.⁸ While total spending on prisoners rose during this time, that spending's *share* of the budget was actually fairly stable. Spending on prison rose along with all other budget lines in an era of growing state fiscal health. Tellingly, the first time since the mid-1970s that rates of incarceration dipped (even as total prison populations continued to rise) was in 2001 in the wake of the popping of the dot-com bubble. The next dip was in 2010, following the 2008–2009 financial crisis, when both the incarceration rate and the total number of prisoners fell.

Most analyses of prison growth, however, do not give much attention to the role of state fiscal health. As far as I can tell, only one

6. Unless otherwise stated, all data on state revenues and expenditures come from the author's own analyses of the Annual Survey of Government Finances, gathered annually (of course) by the U.S. Census Bureau. JEFFREY L. BARNETT & PHILLIP M. VIDAL, U.S. CENSUS BUREAU, STATE AND LOCAL GOVERNMENT FINANCES SUMMARY: 2010 (2012).

7. Unless otherwise unclear or imprecise, I will use "local" for the rest of this piece to refer to both local and county governments.

8. A common refrain I hear when I refer to the fact that prison populations rose as crime fell is "of course, that's what we should expect: more prisoners means less crime." But increases in incarceration were not the sole driver of the drop in crime that started in 1991, with the largest estimates suggesting that up to one-third of the crime reduction came from increased incarceration. See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 176–79 (2004). Furthermore, most prisoners serve short sentences, on the order of one to two years, so prison growth into the 1990s and 2000s is not the product of offenders serving out long (crime-reducing) sentences imposed in the 1970s and 1980s. See, e.g., *Myths and Realities*, *supra* note 5, at 491, 501–02; *Centrality of Prosecutors*, *supra* note 5, at 4. In short, the prison growth that extends through the crime decline cannot simply be explained by those underlying crime rates.

article, written by William Spelman, has attempted to rigorously assess the relationship between state fiscal resources and prison growth.⁹ Importantly, however, he finds that state fiscal capacity is one of *the most* important causal factors. Although biases in the model likely cause it to overstate the true effect of fiscal resources, the results nonetheless point to the importance of taking fiscal health into account.¹⁰

So what does all this have to do with *federal* sentencing? After all, the symposium for which this piece was written is titled “Federal Sentencing Reform: Ten Years After *Booker*.” My answer is this: a definition of “federal sentencing” that focuses just on federal cases tried in federal court following arrests by federal officers and resulting in time spent in federal prison is, perhaps surprisingly, too narrow a definition. Only about thirteen percent of the U.S. prison population ends up in federal prison. To understand prison growth, and to develop reforms that can really regulate it more effectively, we must look to the states and to how the federal government can shape those state outcomes.

Here is a simple example. As part of the 1994 Violent Crime Control Act, Congress awarded over \$10 billion to states that agreed to adopt an eighty-five percent “truth in sentencing” (“TIS”) law, which required that certain violent felons serve at least eighty-five percent of their sentence before being eligible for parole.¹¹ In the 1990s, twenty-seven states adopted TIS laws, with four states reporting that the TIS grants played a major role in the decision to enact the law, and with eleven more saying the grants played a partial role.¹² The overall impact of TIS laws on prison populations is complicated, but they do appear to lead to some increases in time served by both felony and misdemeanor defendants.¹³ And these increases, at least to some degree, can be seen as a form of “federal punishment”: Congress wanted violent felons to spend more time in prison, and it “subcontracted” with state legislatures to try to accomplish this goal, albeit imperfectly.

9. See generally William Spelman, *Crime, Cash, and Limited Options: Explaining the Prison Boom*, 8 CRIMINOLOGY & PUB. POL'Y 29 (2009) (finding crime, sentencing policy, prison crowding, and state spending were the best predictors of state prison populations).

10. *Id.* at 66–67. As Spelman admits, he cannot properly control for the endogenous relationship between prison growth and prison spending: more spending may lead to more prisoners, but more prisoners may lead to more spending. Without a tool for separating these reinforcing trends, regression estimates are likely to overstate the impact of spending on prison growth. Note, too, that the paper looks only at state spending, and not at local spending. *Id.* at 45–53.

11. Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75, 75 (1999).

12. U.S. GEN. ACCOUNTING OFFICE, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES 3 (1998), <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GGD-98-42/pdf/GAOREPORTS-GGD-98-42.pdf>.

13. See, e.g., Emily G. Owens, *Truthiness in Punishment: The Far Reach of Truth-in-Sentencing Laws in State Courts*, 8 J. Empirical Legal Stud. 239, 241 (2011).

However, the federal government's options when it comes to influencing the states are limited. In general, criminal punishment is a distinctly state and local function that is not easily "federalized." As the TIS example makes clear, however, one tool the federal government does have is money. It may not be able to *insist* that states adopt certain reforms, but it can *encourage* them to do so, or at the very least subsidize, and thus support, current practices. Yet as little attention is given to the importance of general state fiscal capacity, almost *none* is directed at the role federal grants play in influencing that capacity.

It is not my goal here to develop a rigorous model of the impact of federal spending on state prison populations; doing so is actually quite daunting, given some of the statistical challenges such a model presents.¹⁴ Instead, I want to examine more intuitively what data on finances and prisons suggest about how to think about fiscal capacity and prison growth. My focus is thus exploratory; it is an attempt to briefly develop some preliminary thoughts on the nature of federal financial involvement in state incarceration practices and to see whether it is sufficiently significant to be an important factor for consideration in future causal work.

My final conclusion, while still quite tentative, is also somewhat surprising. Contrary to my initial expectations, it does not seem as if federal spending is bolstering state spending on incarceration to a significant degree. This means that cutting back on federal funding for criminal justice activities may not have much impact on state decisions about incarceration.¹⁵ My conclusion, perhaps somewhat ironically, may suggest that we want the federal government to spend *more*, not *less*, and to allocate the money in ways that encourage states to adopt reforms that push back against excessive incarceration.

Part I of this Article starts by pointing out why we should take a more expansive view of what counts as "federal sentencing," noting the limited reach and idiosyncratic nature of "conventional" federal punishment. Part II then provides a brief overview of the relationship between state and local finances and prison growth, demonstrating why fiscal health is likely quite important in driving up prison populations. Part III then considers how the federal government might shape these financial relationships.

14. The key one here is the endogeneity problem discussed in note 10 above, which Spelman concedes. *See supra* note 10. The 2009 financial crisis may actually provide a useful way to address that endogeneity, since it forced cuts to correctional spending regardless of how many prisoners the states expected to house that year or the years after. But there is not yet enough post-crisis data to design a reliable model.

15. Were the federal government to cut back on its financial support for state and local governments more broadly, however, it would likely drive down incarceration. *See infra* note 86.

I. THE FEDERAL OUTLIER

Much of the discussion on criminal justice reform, in both academic and policy circles, is strongly focused on changes at the federal level;¹⁶ even debates about state reform often seem influenced by thoughts about sentencing at the federal level. This is deeply problematic for two interrelated reasons. First, federal punishment is highly idiosyncratic, both in terms of the types of people it punishes and the sorts of political and budgetary pressures it faces. When it comes to punishment, it is almost certain that any two states will have more in common with each other than either will with the federal government, no matter how much those two states differ when it comes to criminal justice policies. Second, the federal system simply is not that large. True, since 2002 the federal prison system is the largest in the country, but it still holds fewer than fourteen percent of all U.S. prisoners (with the state of Texas itself a close second with ten percent and California rounding out third with nine percent).¹⁷

In other words, to understand what we conventionally think of as “federal sentencing” is to understand only a small part of the puzzle, and one that does not shed much real light on the bigger part. Yet that does not mean that we should necessarily ignore what the federal system does, but only that we should take a broader view of what counts as “federal sentencing.” The federal government is frequently trying to influence state penal outcomes, and these efforts should also be considered an aspect of federal sentencing, perhaps an important one. My goal here, then, is to start pushing for this more expansive view by looking at one aspect of it— federal grants.¹⁸

16. Just look at how many articles the editorial board at the *New York Times* has written on reforms to federal sentencing laws, and to drug laws in particular. See, e.g., Editorial, *Sentencing Reform Runs Aground*, N.Y. TIMES (June 21, 2014), available at <http://www.nytimes.com/2014/06/22/opinion/sunday/bipartisan-push-to-reform-sentencing-stalls-in-congress.html>; Editorial, *Strong Steps on Sentencing Reform*, N.Y. TIMES (July 21, 2014), available at <http://www.nytimes.com/2014/07/22/opinion/Strong-Steps-on-Sentencing-Reform.html>; Editorial, *The Roadblock to Sentencing Reform*, N.Y. TIMES (Feb. 17, 2015), available at <http://www.nytimes.com/2015/02/17/opinion/the-roadblock-to-sentencing-reform.html>.

17. See Carson & Mulako-Wangota, *supra* note 1. Note that in 2001, the federal government took over responsibility for Washington D.C.’s 10,000 prisoners, thus giving it a significant one-time bump.

18. Money is, of course, not the only way that the federal government can try to influence the states. The White House, for example, recently attempted to shape local policing behavior by releasing a report on best policing practices (while also linking funding to adopting its recommendations). See OFFICE OF CMTY. ORIENTED POLICING SERVS., INTERIM REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING (Mar. 1, 2015), available at http://www.cops.usdoj.gov/pdf/taskforce/Interim_TF_Report.pdf. Less obviously, and perhaps less intentionally, the very way in which agencies like the FBI and the Bureau of Justice Statistics gather data can shape local behavior: had the FBI included, say, simple assault as one of its major index crimes (which currently includes only aggravated assault) and dropped theft, police would almost certainly focus more on simple assaults than on theft, even though the social costs of those crimes are independent of FBI reporting rules. Mayors, and thus

I thus want to use this Part to point out the limited and idiosyncratic nature of what I will call “direct” federal punishment: the incarceration in federal prison of defendants arrested by federal officers and tried by Assistant U.S. Attorneys in federal court. I do this primarily to justify my claim that indirect federal punishment deserves much more attention than it receives. But I also want to make this argument because in general it is made too infrequently. As I mentioned above, our national conversation is driven by thoughts of federal policies, even though state policies and politics are systematically different.¹⁹ It is therefore useful as an overarching matter to push attention away from the federal behavior and policies, and toward state and local approaches to crime control.

The first major difference between the two systems is the type of offenders they incarcerate. Table 1 provides the distribution of state and federal inmates in 1990 and 2009 by most serious charge.²⁰ What is immediately apparent is that federal offenders are much more likely to be in prison on drug charges (fifty percent in federal to about seventeen percent in state prisons today), and much less likely to be doing time for violent crimes (about seven percent versus fifty-three percent) or property crimes (eight percent versus twenty percent). Moreover, in 2009, almost twelve percent of federal inmates were serving time on immigration charges (classified under “other”), compared to almost none in state facilities. These statistics reflect clear, systematic differences between state and federal prison populations.

police chiefs, are sensitive to how official crime statistics influence people’s perceptions of cities. But my focus here is on financial carrots.

19. Think about debates over punishment for cocaine and crack. The notorious “100:1” crack to cocaine ratio (in which it took 500 (or 1000) grams of cocaine to get the same sanction as five (or ten) grams of crack) was a widely-cited aspect of the drug war and its disparate impact on minorities. What is often overlooked in that discussion is that *only* the federal government employed a 100:1 ratio. Thirty-seven states used a *one-to-one* ratio, and the remaining thirteen used ratios well below 100:1. And most crack defendants were sentenced in state, not federal, court. *See, e.g.*, Heather MacDonald, *Is the Criminal Justice System Racist?*, CITY J., Spring 2008, available at http://www.city-journal.net/2008/18_2_criminal_justice_system.html.

20. According to the taxonomy used in national data, an offender is classified by the most serious offense for which he was convicted, where seriousness is determined by type: violent crimes are the most serious, followed by property, then drug, and then other. These classifications hold regardless of sentence length. Thus an offender convicted of assaulting a police officer and stealing \$1 million would be listed as “violent,” even though his property crime likely carries a much greater sentence. An argument could be made that offenders should be identified by the crime that, say, received the longest sentence, but that is not how most data are reported.

TABLE I: DISTRIBUTION OF OFFENSES (PERCENT OF INMATES)²¹

| | 1990 | | 2009 | |
|-----------------|---------|-------|---------|-------|
| | Federal | State | Federal | State |
| Violent | 19.1 | 46.4 | 7.5 | 53.2 |
| Property | 14.8 | 25.5 | 8.4 | 19.2 |
| Drug | 54.2 | 21.8 | 50.2 | 17.7 |
| Other | 11.9 | 6.6 | 33.9 | 9.9 |

There is a simple explanation for the difference: federal jurisdiction is quite limited. While drug and gun cases all trigger federal laws, most violent and property crimes—the mainstays of county prosecutors' caseloads—do not. Just think about the murder cases arising out of the bombing of the federal Alfred P. Murrah building in Oklahoma City in 1995. While Timothy McVeigh killed 168 people, many of whom were federal employees, he faced only eight federal murder charges, since only a handful of those in the building were “covered” federal officials.²² The remaining 160 murder cases were state offenses, even when the victim was a federal employee. Conversely, immigration cases are almost exclusively within the domain of federal courts and thus rarely appear in state courts (and in state prisons).

The second major difference between federal and local punishment centers on the politics of sentencing law. When compared to state legislatures, low-population, low-crime jurisdictions are significantly overrepresented in Congress, resulting in criminal policy that is much more symbolic—and thus much more punitive. Crime, like people, is geographically concentrated: in 1980, over half of all index violent offenses were committed in only six states, and in 2012, in only eight states.²³ These states were home to just twelve percent (in 1980) and sixteen percent (in 2012) of U.S. senators. And while the high-crime states are better represented in the House of Representatives, with thirty-eight percent of the Representatives in 1980 and forty-six percent in

21. For the federal data, see UNIV. OF ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2013), available at <http://www.albany.edu/sourcebook/pdf/t600232013.pdf>. For the state data, see *War on Drugs*, *supra* note 5, at 182 tbl.1B.

22. See, e.g., Rick Bragg, *McVeigh Guilty on All Counts in the Oklahoma City Bombing; Jury to Weigh Death Penalty: Healing Must Wait*, N.Y. TIMES (June 3, 1997), <http://www.nytimes.com/1997/06/03/us/mcveigh-guilty-all-counts-oklahoma-city-bombing-jury-weigh-death-penalty-healing.html>.

23. In 1980, the states were California, Florida, Illinois, Michigan, New York, and Texas; in 2012, Pennsylvania and Tennessee joined the list, in no small part due to New York State's precipitous drop in crime. Not surprisingly, a lot of people live in these states as well—thirty-eight percent of the U.S. population in 1980 and forty-six percent in 2012. In 1980, the high-incarceration states were also the high-crime states, but by 2012 they were simply the high-population states—their violent crime rates were at, or often slightly below, the national average.

2012, the high-crime areas are not, since crime is concentrated in cities, and cities are systematically underrepresented even in the House.²⁴ Compare this to, say, New York State, where approximately forty percent of state senators and forty-three percent of state assembly people represent New York City, which experiences forty-five percent of the state's serious crime and provides forty-six percent of its prisoners.²⁵

In other words, high-crime areas, which bear both the costs of crime *and* the collateral costs (and benefits) of enforcement, are better represented in state legislatures than in Congress. As a result, we should expect state policies to at least take these costs into account, even if they do not always do so well. Members of Congress, however, are more likely to ignore them and take more “tough on crime” positions for general electioneering purposes.²⁶ Congressional sentencing policies thus should be—and are—significantly harsher than their state analogs.

This relative punitiveness is enhanced by the third major difference between local and federal punishment: budgetary pressures. Criminal justice expenditures impose much more real costs on state and local budgets than they do on the federal budget. In 2012, state governments spent \$46 billion on corrections alone, which constituted 2.3% of overall spending and 3.4% of discretionary spending (ranging across states from 1.7% in Minnesota to 5.5% in Maryland).²⁷ County and local governments that year spent \$84 billion on policing (mostly by local governments) and \$27 billion on jails (mostly by county governments); that total of \$111 billion is about 6.5% of the overall county and local spending and 13.5% of overall discretionary spending (ranging from six percent in Nebraska to almost nineteen percent in Nevada).

The federal numbers are fundamentally different. The Federal Bureau of Prisons' (“BOP”) budget in 2012 was \$6.6 billion, which was admittedly almost twenty-five percent of the Department of Justice's (“DOJ”) \$27 billion budget, but only 0.2% of the overall federal budget

24. See, e.g., John Sides, *Not Gerrymandering, but Districting: More Evidence on How Democrats Won the Popular Vote but Lost the Congress*, MONKEY CAGE, (Nov. 15, 2012), <http://themonkeycage.org/2012/11/15/not-gerrymandering-but-districting-more-evidence-on-how-democrats-won-the-popular-vote-but-lost-the-congress/>.

25. See *New York State Senate Districts*, N.Y. ST. SENATE, <http://www.nysenate.gov/districts/map> (last visited Aug. 5, 2015) for a map of the state senate.

26. For our purposes here, I will simply take it as a given that being “tough on crime” was generally politically advantageous through about 2010, especially at the federal level. Since 2010, we have started to witness the rise of a bipartisan “smart on crime” movement that advocates for less punitive, more efficient sanctioning regimes, especially for nonviolent and drug offenders.

27. JEFFREY L. BARNETT ET AL., U.S. CENSUS BUREAU, 2012 CENSUS OF GOVERNMENTS: FINANCE—STATE AND LOCAL GOVERNMENT SUMMARY REPORT 8 (Dec. 17, 2014). As discussed below, the discretionary budget excludes spending on areas that have significant federal spending mandates: elementary and high school education, welfare, health and hospitals, and highways. See *infra* note 86; Spelman, *supra* note 9, at 53.

of \$3.5 trillion and 0.6% of the \$1.2 trillion discretionary part of the budget.²⁸ And what matters is the BOP's share of the *federal* budget, not of the *DOJ's* budget: Congress sets both the BOP's and the DOJ's budgets at the same time, meaning spending on the BOP is effectively unconstrained by spending on the DOJ. In short, the budgetary tradeoffs faced by state and local governments when it comes to correctional spending are much more significant than those faced at the federal level, again allowing the federal system to act in qualitatively more punitive ways.

Moreover, not only are spending levels different in federal and state government, but as we will see in the Subpart below, the *politics* of budgeting differ systematically as well. With the ability to print money and with access to the most favorable bond market in the world, the federal government faces no real external budget constraint—it can spend as much as it wants to.²⁹ State governments, however, face higher bond prices as well as laws or constitutional provisions requiring balanced budgets which, even when imperfectly enforced, make expenditures much more of a zero-sum game. These limitations create a natural brake on state and local correctional spending: powerful lobbies like the National Education Association know that a dollar that goes to a prison does not go to a school, and they can push back against correctional expansion accordingly.

As a result, the federal criminal justice system has much more financial flexibility and freedom to engage in more symbolic punitive practices, both in the laws it passes *and* the enforcement decisions it makes. After all, states have frequently passed tough laws as well, but William Stuntz, for one, has argued that they are able to do so only because they know prosecutors will not actually *impose* the long sentences on a regular basis—otherwise, the fiscal pressures would become too great.³⁰ The federal system does not face such constraints. In fact, we often see Attorneys General pushing the regional U.S. Attorneys to impose even *tougher* sanctions more regularly.³¹

28. See U.S. DEP'T OF JUSTICE, FEDERAL PRISON SYSTEM (2014), <http://www.justice.gov/sites/default/files/jmd/legacy/2014/05/26/bop.pdf>; U.S. DEP'T OF JUSTICE, U.S. DEPARTMENT OF JUSTICE OVERVIEW (2014), <http://www.justice.gov/sites/default/files/jmd/legacy/2013/11/11/fy14-bud-sum.pdf>.

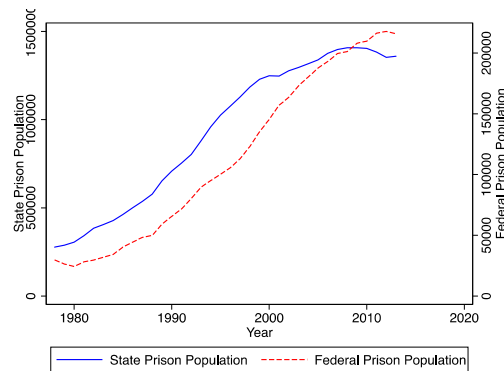
29. It is true that Congress has been adopting austerity measures and sequestration, but these are more voluntary decisions than the budget cuts that some state and local governments have been forced to undertake. See *infra* Part II.

30. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 257–60 (2011). See also FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 19–20 (2011), which notes that while a majority of states have harsh three-strikes laws, California is the only state which imposes strike sentences regularly.

31. See, e.g., John Ashcroft, U.S. DEP'T OF JUSTICE, *Memo Regarding Policy on Charging of Criminal Defendants* 3–4 (Sept. 22, 2003), available at http://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm; see also Memorandum from Eric H. Holder, Jr., U.S. Attorney General on

As a result of all these differences, it is not surprising that the growth in federal incarceration has followed a path slightly different than that in the states. Figure 2 recreates Figure 1, but separates out federal prison populations from those of the states. It is clear that the growth in federal punishment has greatly outpaced that in state sanctioning, at least since 1999. That said, another fact that Figure 2 illuminates is that while the federal system's 215,866 prisoners make it the largest single prison system in the country, it still pales in size to the number of inmates housed in all the states (note that the federal system is on a different scale than the state systems to highlight its faster rate of growth). In 2013, those 215,866 prisoners were just 13.7% of the 1.58 million inmates incarcerated nationwide.

FIGURE 2: STATE AND FEDERAL INCARCERATION RATES, 1978–2013³²



A single, coherent story emerges from this Part. To understand federal sentencing—viewed as punishment imposed by federal courts on those arrested by federal agents resulting in time served in federal prison—is to understand only a small fraction of what is going on, and it is a highly idiosyncratic fraction that tells us very little about what is going on at the vastly larger state level.

So we should expand our scope of what we think of as “federal sentencing.” My argument here is that one important, but generally overlooked, aspect of federal sentencing is the way in which the federal government attempts to shape *state* and *local* sentencing by offering (or,

Dep't Policy on Charging and Sentencing to All Fed. Prosecutors 2 (May 19, 2010), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>.

32. See Carson & Mulako-Wangota, *supra* note 1.

less frequently, threatening to withhold³³) money. To the extent that state and local governments respond to these offers, the resulting changes in incarceration can be seen as a form of “federalized” punishment: the federal government wanted more people in prison, and it accomplished this by effectively “sub-contracting” the job to local and state enforcement agencies.

In order to understand how important federal money may be to state and local criminal justice systems, however, it is helpful to start by looking at how money influences state and local outcomes more generally. So it is to that issue that we now turn.

II. STATE AND LOCAL FISCAL CAPACITY AND PRISON GROWTH

In 2012, state and local governments spent over \$211 billion on criminal justice-related matters,³⁴ with states spending \$46 billion on prisons, counties spending \$27 billion on jails, and local governments spending \$84 billion on police. And while those numbers seem a little less impressive in broader context—state governments spent almost \$2 trillion that year, and local and county governments almost \$1.7 trillion—the scale of enforcement and incarceration spending is clearly such that it cannot ignore overall state and local fiscal capacity.

In this Part, I want to focus on three related issues. First, I will briefly note how fractured financing is at the nonfederal level. Financial responsibility is spread across multiple jurisdictions, which can lead to predictable problems and inefficiencies. Second, I will touch on the politics of state budgeting—even in the absence of explicitly “soft on crime” groups, and even in a “tough on crime” era, there will be political actors at the state and local level willing to consistently push back against increased spending on criminal justice matters. And third, I will examine exactly how prison growth and state and local fiscal capacity have varied together.

A. CRIMINAL JUSTICE SYSTEMS, NOT A CRIMINAL JUSTICE SYSTEM

We often refer to those who police, prosecute, sentence, and parole as members of the criminal justice *system*, which suggests something resembling a unitary, coherent entity. This is quite misleading. What we have in the United States is a jumble of criminal justice systems, each

33. The Adam Walsh Child Protection and Safety Act, for example, stated that states would lose some of their federal law enforcement aid if they did not adopt the sex offender registry rules that mirrored the federal standards. Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C.A. § 16925 (2014).

34. Here, “criminal justice” spending is money spent on corrections, policing, and judicial services. While that last category includes both criminal and civil activities, there is no more granular way to get at spending on prosecutors and criminal courts.

responding to different constituencies and facing different incentives, and operating in an environment in which the delegation and division of responsibilities was not planned but emerged, and poorly at that.

To see the problem, we can look at the path a criminal case takes once a crime is committed:

(1) The police make an arrest. In urban settings, the police respond to the police chief, who answers to the mayor, who is elected by the residents of the city.³⁵ In more rural areas, the arrest is made by a sheriff's deputy who reports to a sheriff directly elected at the county level.

(2) Once the arrest is made, the case must be prosecuted. The district attorney is, in all but three states, directly elected, but by county voters, not urban ones.³⁶ And historically, suburbs have wielded disproportionate influence on county outcomes, and these suburbs have been wealthier, whiter, and more conservative than the cities they surround.³⁷

(3) The case is presided over by a judge, who may be elected or appointed. If elected, it is in a partisan or non-partisan election at the county level. If appointed, it is generally by a state-level merits commission.³⁸

(4A) If the defendant is sentenced to probation, he is monitored by a county-level probation office. Similarly, if he is convicted of a misdemeanor and sentenced to serve his time in jail, he goes to a county-funded jail.

(4B) If the defendant is convicted of a felony, he serves his time in a *state*-funded prison. As we will see, this creates a major financial schism with significant moral hazard risk.

(5) The decision whether to parole a felon in prison rests with a state-level parole board, whose members are appointed by the state-elected governor. The governor also determines any commutations or pardons.

(6) The sentencing laws driving all of this are written by state legislators, who are nominally state-level officials but who often represent hyper-local districts, especially those from urban areas.

35. Note that I am ignoring here all the agency problems *within* a bureaucracy. I once heard a researcher talk about the challenges of implementing a policing reform embraced by all the senior commanders of the police department. Initially the sergeants refused to participate, so the reform stalled. Once the researchers convinced the sergeants that the reform made sense, the sergeants reported that they had a hard time getting their officers—alone in their cars, subject to little direct oversight—to comply.

36. In Alaska, Connecticut, and New Jersey, district attorneys are appointed. Furthermore, in Delaware and Rhode Island, both very small states, the directly elected state-level attorney general is the district attorney for the whole state. See Steven W. Perry, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2005 (2006), <http://www.bjs.gov/content/pub/pdf/pcco5.pdf>.

37. See STUNTZ, *supra* note 30, at 192–94.

38. See JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURT 270–71 (2012), for a history of judicial selection methods, including current practices. See also *Methods of Judicial Selection*, NATIONAL CENTER FOR STATE COURTS (2015), http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state.

(7) Some states add state-level sentencing commissions on top of all of this, whose members are chosen by legislative and executive officials. And that is before we get to regional task forces and the constant flow of federal (as well as state) money to various agencies.

Neighborhoods, cities, counties, and the state: all of these play important roles in how this “system” functions, but there is almost nothing coordinating them and almost no way to make them interact well. One telling anecdote about the lack of coordination comes from New Orleans.³⁹ For many years, Harry Connick, Sr., was the district attorney of New Orleans, and he pledged to eliminate plea bargaining by making sure the police brought him good cases, and by vowing to dismiss weak ones rather than scrape out some sort of low-level plea. But Connick had no control over the New Orleans Police Department (“NOPD”), and the city-based NOPD did not necessarily share the goals of the county-elected district attorney. So Connick’s plan floundered as the NOPD simply refused to comply and continued to bring him weak cases.

Besides impeding coordinated action, this fracturing of responsibility creates room for budgetary moral hazard problems. Consider the local mayor, who can decide whether to hire more police officers, or encourage his police officers to make more arrests and send more people to prison. Or consider the county district attorney or county-elected judge facing a defendant who could be convicted of either a felony or a misdemeanor. What do these two examples have in common?

In both cases, budgetary moral hazard encourages the local actors to rely more heavily on incarceration than they otherwise would. The mayor has to pay for the local police out of local funds, but he does not have to pay anything for those he sends to prison, since the state department of corrections foots the bill. Furthermore, local budgets are more volatile than state budgets, and police are a durable hire: it is politically tougher to lay off police than to hire them, and a given hire imposes costs not just now but in the future through pension commitments.⁴⁰ It should not surprise us, then, that our cities are often thought of as being under-policed: mayors are rationally externalizing the costs of law enforcement to the state prison system.⁴¹

And the same holds true for prosecutors and county judges. Jail or probation, the sanctions for misdemeanants, come out of the county

39. Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2057 (2006).

40. Note that most discussions of the savings from decarceration miss this piece of the budgetary story. Not all of the costs of incarceration appear in the correctional budget, with one major exclusion being the pension obligations of prison guards, which will mostly persist even as prisons close and guards are laid off.

41. See, e.g., Levitt, *supra* note 8, at 179 (pointing out that a dollar spent on police could be as much as twenty-five percent more effective than a dollar spent on prisons, but spending on prisons increased much more than spending on police).

budget, while felony-level prison sanctions are picked up by the state. Thus, district attorneys and local judges are also incentivized to be tougher on crime than they otherwise might be. And as explained below, federal grants seem to exacerbate this problem, focusing more on giving money to the states rather than the county and local governments, thus subsidizing the overused state resource more than the arguably more efficient county and local ones.

William Stuntz, one of the few academic commentators to pay close attention to institutional design problems, summarizes the challenges posed by this fractured set of systems in his magisterial *The Collapse of American Criminal Justice*. There, Stuntz argues that this arrangement was “the rough equivalent of a vessel with no one at the wheel, its course and speed set by forces that were opaque even to the government officials who were subject to them,” and that neither prosecutors nor legislators “fully controlled the process by which those prison beds were made and filled, so neither was able to slow or reverse that process. And the voters with the largest stake in that process—chiefly African American residents of high-crime city neighborhoods—had the smallest voice in the relevant decisions.”⁴² Ultimately, Stuntz concludes, the events spanning from the 1960s to today are the product of fractured, short-term political considerations, not the results of “politicians consciously [using] the criminal justice system as an alternative means of governing the nation’s poor. That conventional wisdom gives too much credit to the politicians, whose conduct offers little evidence that they were seeking to create a justice system like the one we have today.”⁴³

B. THE POLITICS OF STATE BUDGETING

While too little attention has been given to the potential costs of our fractured state penal system, perhaps too much has been given to another potential budgetary defect in state punishment, namely the uniquely asymmetrical nature of the “politics of crime.” Most major policy issues have at least two competing interest groups lobbying legislators: management versus labor, industry versus environmental groups, telecom firms versus net neutrality advocates, and so on. But such balance, the theory goes, does not exist in criminal justice. There are “tough on crime” groups, but they face no off-setting “soft on crime” lobby, especially not before the rise of the “smart on crime” movement in recent years. Without anyone to push back against the proponents of increased punitiveness, punishment was sure to intensify.

42. STUNTZ, *supra* note 30, at 255.

43. *Id.* at 255–56.

At a literal level, this is perhaps correct. Even groups dedicated to criminal justice reform did not, and do not, rally around the banner of being “soft on crime.” But at a more nuanced level, the claim of no countervailing force is wrong, because there are actually many very powerful interest groups at the state level opposed to, or at least wary of, tough-on-crime policies in practice.

To see who these groups are, it is necessary to think for a minute about state budgeting, which is much more restrictive than federal budgeting—which makes the fact that most studies on the politics of crime take a federal and national perspective troubling. To start, states, unlike the federal government, cannot simply print money. More significantly, in forty-three states the governor is required, either by the state constitution or by statute, to submit a balanced budget, and in forty states the legislature is required to pass a balanced budget.⁴⁴ The bond market for states is also generally less favorable than that for the federal government, so states have to borrow at higher rates (and thus, one hopes, must do so less frequently and more carefully).

All this adds up to state budgetary battles being much more zero-sum than such debates at the federal level. And, importantly, at the state level, groups with interests antithetical to expanded incarceration are often quite powerful. Although disappointingly little work has been done looking at state (as opposed to federal) interest group behavior and effectiveness, what is out there indicates that tough-on-crime groups are perhaps surprisingly low in the rankings of impact and importance.

Ronald Hrebenar and Clive Thomas, for example, examine which groups were the most important at the state level in both 1985 and 2002.⁴⁵ They find that the two groups that are consistently the most powerful in the states are “general business organizations” (primarily state chambers of commerce) and “school teachers’ organizations” (particularly the National Education Association and the American Federation of Teachers). Where chambers of commerce stand on increased incarceration is not immediately clear, but as fairly conservative groups that generally favor lower taxes, they are not necessarily solid allies of tough-on-crime lobbyists; the position of teacher groups is, of course, instantly obvious.

44. NAT'L CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 2, 5 (2010), <http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf>. That state officials face balanced budget requirements does not, of course, mean that they are necessarily all that binding (such as in states that require the governor to submit a balanced budget but whose legislators face no requirement to pass one), and states often come up with innovative financial approaches to circumvent them. But in many cases these requirements will nonetheless impose some degree of restraint on state actions that simply does not exist at the federal level.

45. Clive S. Thomas & Ronald J. Hrebenar, *Interest Groups in the States*, in *POLITICS IN THE AMERICAN STATES* 100, 119 tbl.4.1 (Virginia Gray & Russell L. Hanson eds., 2004).

Moreover, none of the remaining groups that were in the top ten in 2002 (in terms of effectiveness) seem like natural supporters of tough-on-crime policies: insurance agencies, hospitals and nursing homes, lawyers (mostly trial lawyers), manufacturing associations, “general” local government organizations, physicians, and farmers. Sportsmen, which includes those opposed to gun-control legislation, ranked twentieth (out of forty) in 2002; “religious interests” (which includes the “religious right”) ranked twenty-seventh; the “criminal justice lobby” ranked thirty-ninth; and pro-life groups ranked fortieth.

Even the oft-cited power of private prison groups is generally overstated. A recent Justice Policy Institute report on private prisons, for example, warned that private prison firms, such as the Correctional Corporation of America and Geo Group, had spent more than \$6 million over the five election cycles between 2002 and 2010—but that comes to only 0.5% of the \$14.5 billion spent by lobbying groups at the state level during that time, and just barely one-sixth of the \$35 million spent by the education lobby alone.⁴⁶ Tellingly, for all the talk about the “privatization” of U.S. prisons, only about six percent to eight percent of all state prisoners are in private prisons, and almost all of those prisoners are held by just four states (Arizona, Florida, Oklahoma, and Texas).⁴⁷ It is clear that lobbying by the private prison lobby is not leading to major changes in state policy: the deck is clearly not stacked entirely in the prisons’ favor.

Due both to the constrained nature of state finances and to the strength of lobbying groups that are not only competing for the same money as prisons but are likely ideologically opposed to them (such as teachers, doctors, and hospitals), prison spending at the state level should be much more sensitive to fiscal capacity than federal spending.⁴⁸ During

46. See JUSTICE POLICY INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES (2011), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf. For more data on lobbying expenditures at the state level, see *Our Data*, NAT’L INST. MONEY ST. POL., <http://www.followthemoney.org/our-data/> (last visited Aug. 5, 2013).

47. About 19.1% of federal prisoners are in private prisons. Data on inmates in private prisons comes from the Bureau of Justice Statistics’ annual Prisoners reports. See Carson & Mulako-Wangota, *supra* note 1, at 2, 8.

48. A cynic might point out that hospitals could be bidding for prison services contracts and thus in favor of the “prison-industrial complex.” A recent case out of Alabama, however, cautions somewhat against this view. The current contractor providing medical services for the Alabama Department of Correction, Corizon, was the only company to bid on the contract. The underlying facts are complicated—the previous contractor claims that the current contract was altered to make it unappealing to any firm but Corizon—but they nonetheless suggest that there are not hosts of firms bidding for these contracts. See Casey Toner, *Medical Provider for Alabama Prisoners Repeatedly Failed State Audits*, AL.COM (Jan. 23, 2015, 11:01 AM), http://www.al.com/news/index.ssf/2015/01/alabama_corizon_prisons_health.html; Casey Toner, *\$224 Million Alabama Inmate Healthcare*

boom times, when there is more money for everyone, perhaps we should expect to see rising prison (and health, and welfare, and library) budgets. But as soon as resources tighten—when the political debate shifts from “give us more of this growing pie” to “don’t cut what we already get”—it appears that prison groups will face stiff, or at least stiffer, opposition.

C. THE ROLE OF STATE AND LOCAL FISCAL CAPACITY

Up until about 2010, state legislators had been content to let district attorneys commit new offenders to prison without having to incur any of the costs, and the interest groups in competition with prisons for funding did not appear to stop the rise of correctional budgets.⁴⁹ It is not as if legislators simply had no ability to rein in prison growth. In fact, they have taken direct steps in that direction since the 2009 financial crisis. Voters in California, for example, approved Proposition 47 in 2014, which converted numerous offenses that had been felonies before into misdemeanors, such as theft and fraud of any amount less than \$950.⁵⁰ Meanwhile, Ohio raised the minimum for felony theft from \$500 to \$1000 in 2011.⁵¹ But such efforts are new, and they were rarely, if ever, seen before 2010, despite nearly two decades of declining crime and rising prison budgets.

What explains this legislative indifference? One key explanation could be state fiscal capacity. The slow, steady increase in U.S. prison populations and budgets coincided with an equally slow, steady increase in real per capita state and county revenue—and in real per capita state and county expenditures. Figure 3 plots the annual totals of real (in 2012 dollars) per capita revenues and expenditures for all state and local governments.⁵² A clear pattern emerges: except for the stagflation era of the late 1970s, the 2001 dot-com bubble burst, and the 2008 credit crisis, real per capita state revenue has steadily risen, and expenditures have moved in lock-step, at least during good times. During the two recent drops in state and local revenue, state spending has not changed much—which is certainly due in part to federal assistance, a point we will turn to in Part III.

Contract Bidding Process, AL.COM (Aug. 28, 2014, 12:16 PM), http://www.al.com/news/index.ssf/2014/08/alabama_prison_health_care_con.html.

49. They may, however, have been able to restrict the *rate* of increase, although such effects are particularly hard to assess empirically.

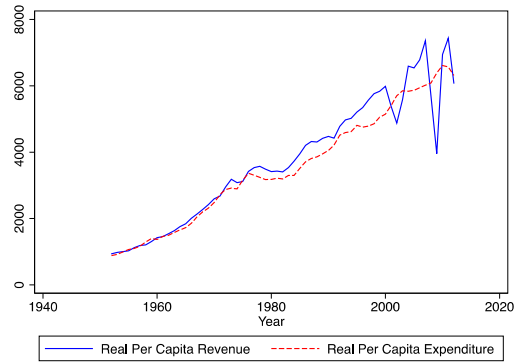
50. See *Proposition 47*, CALIFORNIACHOICES.ORG, <http://californiachoices.org/proposition-47> (last visited Aug. 5, 2015).

51. See BEN WOLF, ILLINOIS: GETTING SMART ON INCARCERATION POLICY 2–3 (2014), <http://www.aclu-il.org/wp-content/uploads/2014/10/Testimony-to-criminal-justice-reform-committee.pdf>.

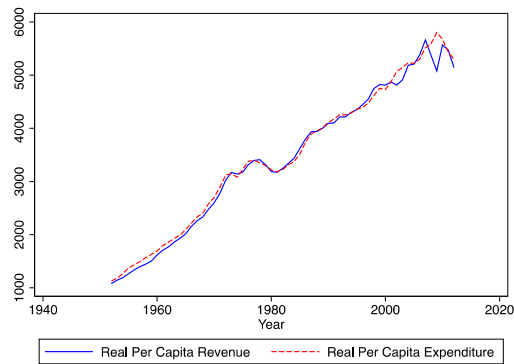
52. The local results start later than the state results—in 1977, as opposed to 1952—solely due to limitations in the local data provided by the Census Bureau.

FIGURE 3A: REAL PER CAPITA STATE AND LOCAL REVENUE AND EXPENDITURES

STATE REVENUE AND EXPENDITURES, 1952–2012



LOCAL REVENUE AND EXPENDITURES, 1977–2012

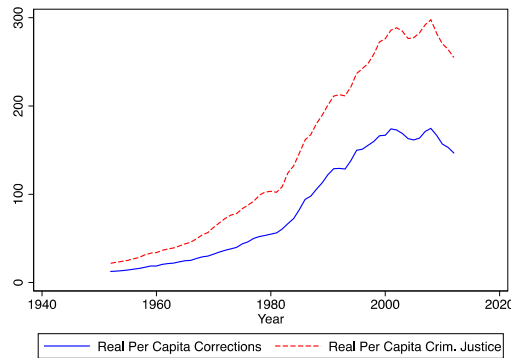


To see the connection between fiscal health and enforcement spending—and thus prison growth—Figure 4A plots the real per capita expenditures on corrections and all criminal justice activities for the states; and on police, corrections, and all criminal justice activities for the local governments.⁵³ As that figure makes clear, states were spending more and more on prison and criminal justice through the early 2000s, at

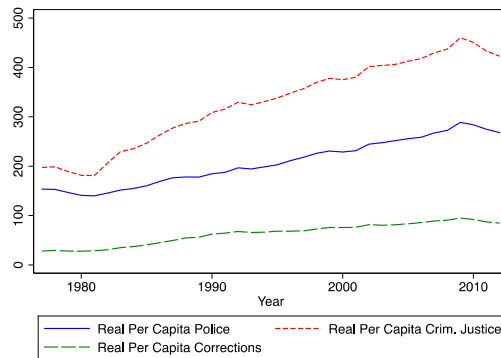
53. Here, “criminal justice” spending is money spent on corrections, policing, and judicial services. While that last category includes both criminal and civil activities, there is no more granular way to get at spending on prosecutors and criminal courts. The local results start later than the state results—in 1977, as opposed to 1952—solely due to limitations in the local data provided by the Census Bureau.

which point spending growth slowed markedly. But it was not until 2009, in the wake of the budget crisis that started in late 2008, that spending on either corrections or criminal justice fell broadly. Local spending on police, which is the bulk of local correctional expenditures, was even more stable and rose steadily until the 2008 recession.⁵⁴

FIGURE 4A: REAL PER CAPITA CRIMINAL JUSTICE EXPENDITURES
STATE EXPENDITURES, 1952–2012



LOCAL EXPENDITURES, 1977–2012



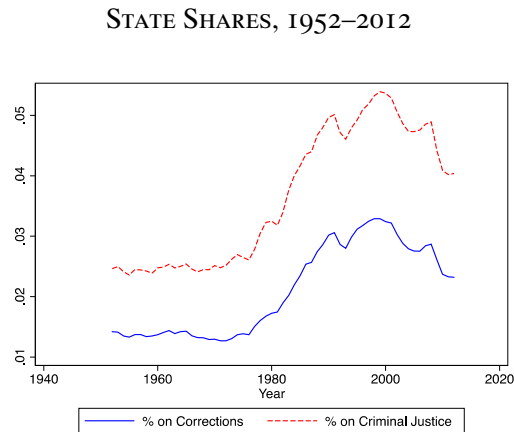
At first blush, Figure 4A seems to support the commonly cited claim that correctional spending in particular and criminal justice spending more generally had been “crowding out” all other types of spending even as crime rates fell. But recall Figure 3: the post-1991 surge in spending

54. The differences in state and local revenue trends may reflect different sources of revenue: state revenue may be much more dependent on income tax than on property tax, the former of which is likely more sensitive to short-run economic shocks.

occurs at the same time as fiscal capacity expands. During this time, states spent that additional money on everything: schools, hospitals, welfare, prisons.

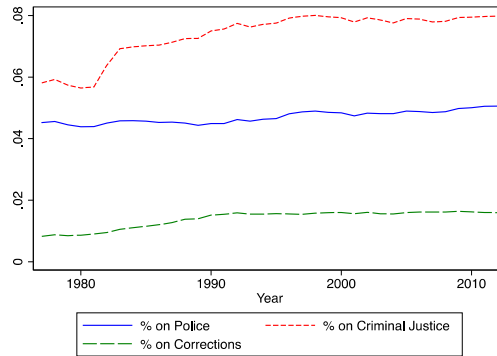
Figure 4B thus pulls these two points together, plotting spending on corrections, local policing, and all criminal justice activities as a *share* of annual discretionary spending.⁵⁵ At least in the aggregate, a fairly clear picture emerges. For the states, corrections' share of the budget rises steadily until 1991 (along with the crime rate), at which point it slows down significantly through 2001 and declines slightly to 2009; the net effect is no real change over the period 1991 to 2009. Then in 2009 corrections' share dips sharply in response to the budget crisis. For local governments, spending on police, corrections, and criminal justice is simply steady over the entire period.

FIGURE 4B: CRIMINAL JUSTICE SHARES OF EXPENDITURES



55. As Spelman, *supra* note 9, at 40–41, points out, state spending on elementary and high school education, welfare, hospitals, and highways is often dictated to an extensive degree by federal and other mandates (and extensively funded by federal transfers). Corrections, however, is more discretionary, so it makes sense to compare it to other discretionary line items in the budget.

LOCAL SHARES, 1977–2012



The inflection points at 1991 and 2001 in the state figures are not necessarily coincidental. The year of 1991, for example, marks the start of the “great crime decline” that has spanned the 1990s through today;⁵⁶ as crime starts to decline, state spending on corrections and criminal justice levels out *as a share of budget capacity*, even as absolute real per capita spending continues to rise. And, 2001 marked the first recession after crime began its decline,⁵⁷ and thus the first time states seriously contemplated cutting back on corrections in response to fiscal pressures.

Of course, a national average of fifty states masks a lot of heterogeneity, and the single curve in Figure 4B actually conflates two separate trends. Approximately sixteen states, including large prison states such as California, Maryland, Michigan, New York, and Texas, saw prison spending flatten almost right at 1991 (or a few years later for Texas); an additional five states saw spending level out even before 1991. In another twenty-one states, spending continued to rise as a share of state budgets until 2001—perhaps with a brief but temporary slowdown around 1991—at which point spending leveled out or fell; among these states are Florida, Illinois, New Jersey, and Pennsylvania.⁵⁸

So a story starts to emerge from these pictures. When crime was rising, so was the attention—budgetary and otherwise—paid to

56. It is important to note, though, that while crime has dropped significantly since 1991, violent crime rates remain about 100 percent higher than they were in 1960; at the national level, the country is about as safe today as it was in the early 1970s. So while crime has not been a major political issue of late, fear of crime, especially among older cohorts, such as the Baby Boomers, likely smolders and could reignite should crime rates start to inch back up again.

57. For the dates of U.S. recessions, see *U.S. Business Cycle Expansions and Contractions*, NAT'L BUREAU ECON. RES., <http://www.nber.org/cycles.html> (last visited Aug. 5, 2015).

58. The remaining eight states—Arkansas, Minnesota, North Dakota, Oregon, South Dakota, and Washington State—saw corrections' share of their budgets grow steadily over the whole period.

corrections. As crime rates leveled out, so too did the share of budgets given to corrections, with the recession in 2001 spurring even more states to curtail at least the *growth* in the share of revenue given to corrections. And the decline in both corrections' share of the budget and in incarceration rates starts in 2009, in the wake of the powerful 2008 recession.

All of this indicates that budgets matter and points to one way that federal policy can shape state sentencing: by its influence over state budgets and state fiscal health. It is thus important to at least consider the role that federal intergovernmental transfers can play in state criminal justice policy—not the most exciting topic, but an important one nonetheless.

III. THE ROLE OF FEDERAL MONEY IN STATE AND LOCAL BUDGETS

While much has been written about the nature of “direct” federal sentencing, very little attention has been given to its “indirect” influence on state penal outcomes.⁵⁹ The federal government often targets money at various criminal justice projects, and even its more general transfers effectively subsidize corrections (and everything else) thanks to the fungible nature of money. In other words, while the federal government cannot *force* states to adopt certain laws or policies, it can attempt to *encourage* them by granting (or, in less frequent cases, threatening to withhold) money.⁶⁰ For example, as noted above, the TIS grants offered by the Violent Crime Control Act of 1994 influenced the decisions of at least fifteen of the twenty-seven states that ultimately adopted TIS laws. Along similar lines, the Brennan Center has recently proposed that the federal government could retool its Edward Byrne Memorial Justice Assistance Grants program to encourage states to experiment with and adopt more effective criminal justice reforms.⁶¹

In this Part, I want to look at two major ways in which the federal government can try to shape state and local sentencing practices. The first, which is both more focused and smaller in scope, is through targeted criminal justice related grants, such as those that bolstered state support for TIS laws. I will look in particular at awards made by eight

59. Spelman, *supra* note 9, at 68–70, for example, briefly touches on the idea of using targeted federal funding to encourage state-level reforms, but he does not consider the role of federal transfers in his empirical models of the relationship between state fiscal health and contemporaneous prison populations.

60. For an example of withholding, see the Adam Walsh Sex Offender Act, 42 U.S.C. § 16925 (2013), which threatens to reduce certain criminal justice grants by ten percent for states that do not adopt the federal government's preferred sex offender registration system.

61. Inimai Chettiar et al., *Reforming Funding to Reduce Mass Incarceration*, BRENNAN CTR. JUST. (2013), http://www.brennancenter.org/sites/default/files/publications/REFORM_FUND_MASS_INCARC_web_o.pdf.

agencies under the purview of the DOJ. There are surely other criminal-justice related grants made by non-DOJ agencies (such as the Department of Homeland Security), but these DOJ grants likely make up a sizable fraction of federal criminal justice grants. I will also briefly talk about the now notorious “1033” program run by the U.S. Department of Defense (“DOD”), which transfers old military equipment (generally guns or desks, but sometimes armored personnel carriers) to local police.

The second tool available to the federal government is larger in size but also much broader in scope: general intergovernmental transfers to state and local governments. More than a quarter of state revenue comes from the federal government, and more than thirty percent of county and local revenue comes from state and federal transfers.⁶² As a result, the federal government not only subsidizes state and local projects, but it can influence how responsibilities are allocated between them. Therefore, by subsidizing state budgets more than local ones—which the federal government does by about a nine-to-one ratio—these transfers likely encourage state-level solutions over local ones. Prisons, that is, over police, probation, and other diversionary options.

My goal here is not to develop a rigorous econometric model to estimate the impact of federal grants on prison growth. Such a model is actually quite difficult to design well.⁶³ Instead, I set my sights on something much more modest: to shed light on whether federal grants even *appear* to be plausibly important, and if so, to what degree. Almost all models of criminal justice simply ignore the importance of general fiscal health, and none appear to look closely at federal grants and transfers.

My findings here are somewhat unexpected. The amounts given by the federal government are likely not large enough to exert significant influence on states’ willingness to incarcerate, though the apparent five percent “discount” that more general intergovernmental transfers appear to provide is not entirely trivial. But federal decisions about *how* to allocate funds across state and local governments might still be important. And the generally small scope of federal funding might actually suggest that *increased* spending, carefully targeted like the

62. Most transfers to local governments come from the state, not the federal government. But again, thanks to the fungibility of money, state and federal transfers are not as conceptually distinct as they appear at first blush.

63. The core technical problem is one of endogeneity: if we observe that states with more grants or transfers hold more prisoners, is it because the additional money encourages them to incarcerate more, or do they lobby for more money in order to fund the incarceration they plan to engage in? Breaking this feedback loop is one of the bigger problems in econometrics, and one that is beyond the scope of this piece.

Brennan Center suggests, could be effective.⁶⁴ I will start by looking at the criminal justice grants—first, at those administered by the DOJ agencies, and second, at those of the 1033 program. I will then examine the role of intergovernmental transfers.

A. CRIMINAL JUSTICE GRANTS

Many of the agencies that make up the DOJ provide funds to state and local criminal justice programs. The Office of Justice Programs provides data on all grants awarded since 1993 by eight of these programs: the Bureau of Justice Administration (“BJA”), the Bureau of Justice Statistics, the Community Capacity Development Office, the Drug Courts Program Office, the National Institute of Justice, the Office for Victims of Crime (“OVC”), the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”), and the Sex Offender Monitoring, Apprehension, Registering, and Tracking Office. About ninety percent of the grants given by these agencies come from just three of them, namely the BJA (forty-five percent), the OVC (twenty-six percent), and the OJJDP (nineteen percent).⁶⁵ Combined, these eight agencies have awarded over \$32 billion between 1993 and 2012 (or \$38 billion in real 2012 dollars), which appear to make up a lion’s share of total DOJ grant money awarded during this time.⁶⁶ About eighteen percent of the grant money was issued through the Byrne JAG program.⁶⁷

Figure 5A plots the real dollar grants to state and local governments. The large spike in 1996 in state grants reflects payment of the TIS awards to compliant state governments.⁶⁸ The spikes in both state and local grants in 2009 reflect a one-time increase in criminal justice funding as part of the American Recovery and Reinvestment Act of 2009 (“ARRA”)—the Stimulus program.

64. See Chettiar et al., *supra* note 61.

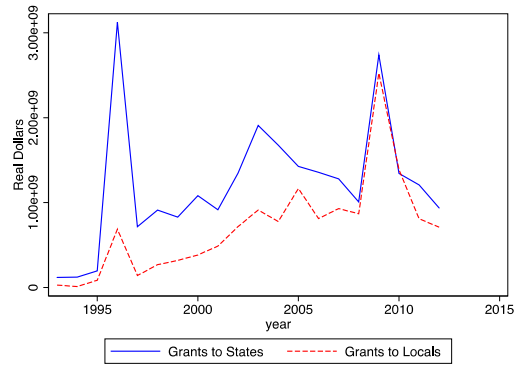
65. *OJP Grant Awards*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, <http://grants.ojp.usdoj.gov:85/selector/main> (last visited Aug. 5, 2015).

66. See *id.*; see also U.S. DEP’T OF JUSTICE, FY 2009 REQUEST COMPARED WITH FY 2007 ACTUAL OBLIGATIONS AND FY 2008 ENACTED (2014), available at <http://www.justice.gov/sites/default/files/jmd/legacy/2014/01/24/estimate-comparison.pdf>.

67. See *OJP Grant Awards*, *supra* note 65.

68. Since TIS applied only to state prisons, not county jails, a parallel spike does not appear on the local side.

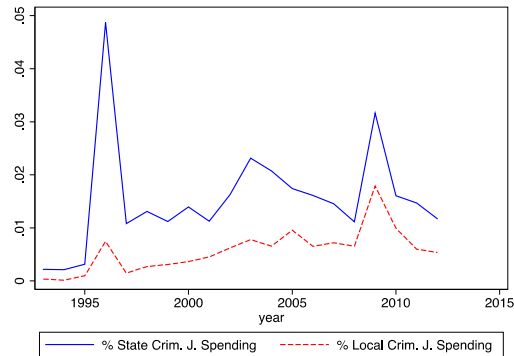
FIGURE 5A: DOJ GRANTS TO STATE AND LOCAL GOVERNMENTS, 1993–2012⁶⁹



To better appreciate the trends given in Figure 5A, Figure 5B looks at these grants as a *percentage* of all criminal justice spending for both state and local governments. For state governments, grants were generally under five percent of criminal justice spending, although the TIS grants in 1996 had a much greater effect in some states, and the ARRA grants in 2009 had a slightly lesser effect; the outliers are generally smaller states with smaller budgets (for which a few larger grants can have an outsized effect). For counties, the effect is smaller. First, as noted above, there is no real bump in 1996. Second, even including the 2009 ARRA grants, the median impact of grants never exceeds two percent of county spending, likely because they were not targeted as much at policing, which comprises the bulk of that spending. The variation here, however, is also much greater, with grants sometimes reaching over ten percent of local spending (although these big effects were consistently confined to more sensitive, small budget states, like Montana, New Hampshire, and both Dakotas).

69. See *OJP Grant Awards*, *supra* note 65.

FIGURE 5B: DOJ GRANTS AS SHARE OF STATE AND LOCAL CRIMINAL JUSTICE EXPENDITURES, 1993–2012⁷⁰



The impressionistic story here is somewhat ambiguous. First, it is clear from both Figures 5A and 5B that grants to states consistently exceed those to local governments, with over sixty-three percent of the (real) \$38 billion awarded between 1993 and 2012 going to state agencies,⁷¹ and with grants to states comprising a bigger share of state spending. This is a persistent theme of this Part—one that is slightly concerning—and points to one way that federal reforms could shape state and local practices. By funneling more money to state rather than local governments, the federal government essentially prioritizes state-level responses over local-level ones—that is, incarceration over policing.⁷² In effect, federal grants may *aggravate* the moral hazard problem between county prosecutors and state departments of corrections, and they do too little to discourage local governments from free-riding off increased incarceration by hiring too few police officers. And the grants do this despite the evidence that a dollar spent on policing reduces crime more efficiently and with fewer collateral costs than a dollar spent on incarceration,⁷³ and despite the fact that local

70. *See id.*

71. The comparison here may actually overstate the amount of funds that go to local governments. I coded as “state” all awards to agencies that were clearly state-level such as, “Alabama Department of Corrections,” “Connecticut State Police,” and so on. The “local” grant category thus includes not only local governments but all criminal justice nonprofits, some of which might actually be state-level (or even national-level) in scope.

72. About two-thirds of all correctional spending takes place at the state level, and correctional spending is about sixty percent of state expenditures on criminal justice. Conversely, slightly less than ninety percent of all policing is paid for by local governments, consuming about two-thirds of local criminal justice expenditures.

73. *See, e.g.,* Levitt, *supra* note 8, at 177; STUNTZ, *supra* note 30, at 278–79.

government budgets are much less stable than state budgets—and thus perhaps in greater need of external smoothing.

Second, through the ARRA grants the federal government likely enabled states (and states more so than local governments) to forestall having to respond to the financial crisis of 2008, or having to respond as sharply, for at least a year. That said, the general size of the subsidy—about five percent for the states and about two percent for the counties—suggests that simply adjusting the *size* of the subsidy likely won't have too big of an effect on state and local practices. But that then brings us back to the Brennan Center proposal, which focuses more on changing *how* various grants are used, such as allowing them to be tied to performance outcomes and encouraging them to be used to fund innovative non-incarcerative crime-reduction programs.⁷⁴ This strikes me as a more promising way to look at the role of direct federal funding, perhaps outside of large-scale (and rare) programs like the TIS grants.

B. AN ASIDE: 1033 GRANTS

While the DOJ grants have the potential to shape state penal outcomes but have generally been overlooked (except for the Brennan Center proposal), the DOD's 1033 grants have received significant attention of late, despite likely not being all that important. The main lesson from the discussion about 1033 grants is to never lose sight of just how much money state and local governments are already spending on law enforcement and criminal justice.

The 1033 grant program, which transfers old military hardware to local police departments, has received significant negative attention since the protests in Ferguson, Missouri, to which local police responded with heavily armed officers and armored vehicles. Concern about the "militarization" of the police has been growing in recent years, and the heavy-handed response in Ferguson raised those fears all the more.⁷⁵

At first glance, the 1033 grant program seems quite significant. The Marshall Project reports that since it started in 1990, it has doled out about \$5 billion worth of surplus military gear, much of it rifles, guns, socks, and desks, but also helicopters, trucks, and more than a few Mine

74. See Chettiar et al., *supra* note 61.

75. Several veterans of the wars in Iraq and Afghanistan reported that the police in Ferguson responded with more firepower and equipment than they used on patrols in a war zone. See, e.g., Adam Clark Estes, *Why the Ferguson Police Force Looks Like a Military Unit*, GIZMODO (Aug. 14, 2014, 2:03 PM), <http://gizmodo.com/why-the-ferguson-police-force-looks-like-a-military-uni-1621591905>. For a discussion of police militarization in general, see RADLEY BALKO, *THE RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2013).

Resistant Ambush Protected (“MRAP”) armored personnel carriers.⁷⁶ (Note, however, that the actual amount transferred could be less than half that, at \$2.1 billion.⁷⁷) But two features of the program deserve attention.

First, and less central to the point being made here, a sizable majority of the grants have been for basic office or officer supplies, or for relatively small arms. Almost fifty percent of all grants are either rifles or pistols, and nearly ninety percent of all items transferred are valued at under \$1000 per item.⁷⁸ The trucks and armored vehicles are distinctly in the minority.

Second, and more on point, while the absolute value of the grants may seem large, in relative context it is actually fairly small. Between 1993 and 2012, local governments alone spent over *one trillion dollars* just on policing (or nearly \$1.3 trillion in real 2012 dollars). Even if the 1033 program’s process donated \$5 billion in materiel, that comes to less than 0.5% of all local police expenditures. After all, that \$5 billion not only spans over twenty years but also stretches across more than 90,000 local governments, most of which have at least one police force.⁷⁹

Which is not to say that the 1033 program is not excessive or that President Obama was wrong to tighten the program’s standards.⁸⁰ It is unclear if local police forces needed over 600 MRAPs and 250 helicopters, not to mention the tens of thousands of military-grade rifles, pistols, and shotguns. Furthermore, even though the grants make up only a small fraction of total local budgets, it is unlikely that many

76. Shawn Musgrave et al., *The Pentagon Finally Details Its Weapons-for-Cops Giveaway*, MARSHALL PROJECT (Dec. 3, 2014, 7:35 PM), <https://www.themarshallproject.org/2014/12/03/the-pentagon-finally-details-its-weapons-for-cops-giveaway>.

77. The Marshall Report article links to a blog post on Forbes.com for the \$5 billion claim, but the post itself never cites a total (though the totals that the post gives for 2010 to 2014 add up to over \$2.4 billion). See *id.*; Niall McCarthy, *Chart: Pentagon Donations to Police Are Skyrocketing*, FORBES (Aug. 15, 2014, 10:12 AM), <http://www.forbes.com/sites/niallmccarthy/2014/08/15/chart-pentagon-donations-to-police-are-skyrocketing/>. In the raw data provided by the DOD, however, the total amount transferred between 1990 and 2014 comes to only \$2.13 billion. See *LESO 1033 Program*, DEF. LOGISTICS AGENCY, <http://www.dispositionsservices.dla.mil/EFOIA-Privacy/Pages/ereadingroom.aspx#1033> (last updated Mar. 31, 2015). It appears unlikely that the lower value in the DOD data is the result of that data missing more than half of the transfers since the DOD data indicate that over 600 MRAPs were given to local governments, exactly the same number given in the Marshall Project report. Were the lower transfer total in the DOD data somehow due to missing transfers, we would expect the number of reported MRAP transfers to be half as large as well.

78. See *LESO 1033 Program*, *supra* note 77.

79. Carma Hogue, *Government Organization Summary Report: 2012*, U.S. CENSUS BUREAU (Sept. 26, 2013), http://www2.census.gov/govs/cog/g12_org.pdf. Furthermore, some local areas have multiple police forces. For example, Columbus, Ohio, is home to both the Columbus police department as well as the police department for Ohio State (the latter of which was the recipient of an MRAP).

80. Mark Landler, *Obama Offers New Standards on Police Gear in Wake of Ferguson Protests*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/2014/12/02/us/politics/obama-to-toughen-standards-on-police-use-of-military-gear.html>.

jurisdictions that received the most militarized of donations, such as the now-famous MRAPs, would have bought them on their own volition. In other words, while a desk can be viewed as little more than a subsidy—by sparing the force from having to pay for a desk it needs, the grant program frees up funding to purchase other supplies—the MRAP almost certainly cannot, since it is a gift that the department otherwise never would have tried to obtain.

I am therefore not arguing that the 1033 program was irrelevant. It certainly contributed, in at least some way, to the increased militarization of American police forces. But it is still important to appreciate that grants that appear large in absolute value—\$5 billion is not a trivial amount of money—might not be as impressive compared to the magnitude of state and local expenditures on criminal justice.

C. FEDERAL INTERGOVERNMENTAL TRANSFERS

The second tool which the federal government can use to try to shape state and local penal outcomes is much larger in scope, but also much less precise: intergovernmental transfers in general. The federal government transfers billions of dollars every year to state and local governments, and these transfers effectively subsidize a lot of state and local spending. To understand the scope of federal involvement in state and local finances, Figure 6A plots the real per capita federal transfers to state governments, and the federal plus state transfers to local governments, from 1970 to 2012; Figure 6B presents these transfers as percentages of total state and local revenue.⁸¹ Figure 6 as a whole thus highlights several themes. First, after a slight lull in the late 1970s and early 1980s, real per capita transfers have risen steadily, largely in keeping with the broader rise in real per capita revenues. Second, as was the case with DOJ grants, federal transfers have focused much more on state support than local support since a large majority of transfers to the local governments come from the states. And third, as Figure 6B makes clear, transfers have become increasingly important to state governments but less so to local ones.

81. The transfers to local governments include those from both state and federal governments since some of the state transfers to local governments are either directly or indirectly subsidized by federal transfers to the states. To look just at direct federal transfers to local governments would surely understate the influence of federal transfers on local fiscal health.

FIGURE 6A: REAL PER CAPITA TRANSFERS TO STATE AND LOCAL GOVERNMENTS, 1970–2012

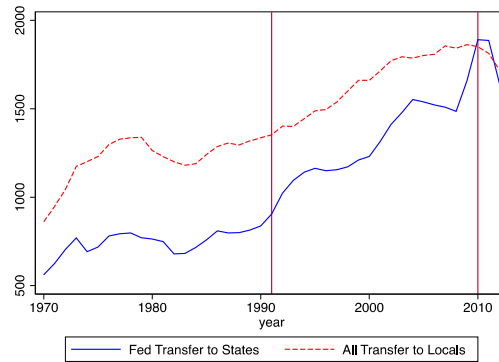
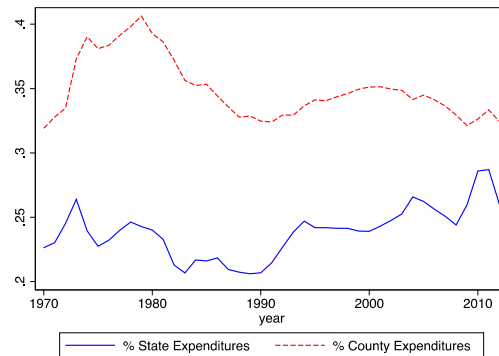


FIGURE 6B: TRANSFERS TO STATE AND LOCAL GOVERNMENTS AS PERCENT OF TOTAL SPENDING, 1970–2012



A fourth point, however, may be most relevant to the discussion here. Note that the share of state budgets coming from federal transfers rose between 1991 and 2010, the period marked by red lines: the period of rising incarceration and falling crime coincided with increased financial support from the federal government. Incarceration rose during a time when the federal government made incarceration cheaper by making *everything* cheaper.⁸²

82. Of course, that means that if I were writing about health care, I could say the same thing—that by effectively subsidizing prisons the federal transfers made hospitals cheaper.

It is important, however, not to overstate this point. Much of the federal money is earmarked, and approximately eighty-five percent to ninety percent of federal transfers were earmarked for the “nondiscretionary” budget lines of welfare, education, health and hospitals, and highways. Welfare alone consumes over half of all transfers from 1990 onward.⁸³ To put this in perspective, in 2008, the federal government transferred over \$423 billion to state governments, of which all but \$47 billion was earmarked for the nondiscretionary areas.⁸⁴ Although that \$47 billion is almost the exact amount that states spent on corrections that year, and slightly more than half the \$80 billion spent on all criminal justice expenditures, it comprises only about four percent of the \$1.2 trillion in discretionary state spending in 2008.

Nonetheless, by funding so much of state public assistance, health care, education, and transportation, and then effectively discounting the rest of spending by about four to five percent, federal transfers freed up at least some funds for states to spend on prisons. The coarseness of the data makes it hard to isolate exactly how much went to corrections, or how allocations to other line items effectively freed up cash for prisons, but the numbers here certainly suggest that the scope of federal transfers could matter, and that models of prison growth (and prison reform) that ignore the impact of federal support are overlooking an important variable. Furthermore, the apparent success of the TIS program suggests that relatively small grants can, at least in certain settings, have significant impact. Indeed, the \$10 billion awarded to the states was just a fraction of the \$677 billion (or \$807 billion in real 2012 dollars) spent on corrections since then, but it ultimately shaped the behavior of over a dozen states.

CONCLUSION

Despite all the eagerness, on the political left and right alike, to reform and reduce our country’s reliance on incarceration, we face a major informational problem: we do not really know how prison populations grew to be as large as they did, and our conventional explanations are generally incomplete at best and inaccurate at worst.⁸⁵ One key oversight is an underappreciation of the important, but far from glamorous, role of state budgetary health. In particular, almost no

83. See Cheryl H. Lee et al., *State Government Finances Summary: 2010, Governments Division Briefs*, U.S. CENSUS BUREAU 4, 8–10 (Dec. 2010), <http://www2.census.gov/govs/state/tostatesummaryreport.pdf>.

84. Moreover, \$21 billion of the remaining \$47 billion was targeted to specific discretionary budget lines, although the fungible nature of money suggests that it is likely better to view the full \$47 billion as available to all discretionary budget items.

85. See, e.g., sources cited *supra* in note 5.

attention has been given to the role federal money plays in shaping state fiscal capacity and thus state penal expenditures.

Though my results here are tentative and exploratory, they do perhaps point in an interesting direction: perhaps the best way to reduce *total* expenditures on prisons is to *increase* (or at least not necessarily decrease) federal expenditures. The total amount of federal money available to subsidize correctional budgets is actually fairly slight, and cutting back on it heavily may not really change state decisions.⁸⁶ But if the federal government were to target its funding more carefully—to design grants to encourage states to invest in and deploy alternatives to incarceration—then it could contribute to overall reform efforts more effectively.

Along similar lines, the federal government may be able to encourage better penal practices less by cutting funds and more by reallocating them, specifically from state to local governments. If policing deters crime more effectively than incarceration, and if more local punishment or alternative sanctions are more effective or more normatively appealing than more distant imprisonment, then subsidizing local policies rather than state ones may target the moral hazard problem if states themselves appear unwilling or incapable of doing so.

In general, reform has to come from the states themselves. And the fiscal story suggests that (1) a state's willingness to incarcerate is tied to its financial ability (or flexibility) to punish, and (2) federal funding of penal practices is not a major contributor to that fiscal ability, though not necessarily an irrelevant one either (as the TIS grant outcomes suggest).⁸⁷ But the federal government does provide enough money that it could encourage and assist states in developing new and innovative ways to deal with offenders, and it could attempt to help rectify the glaring moral hazard problem that runs through the criminal justice system.

86. This argument changes completely, of course, if we allow for deep federal cuts to other budget items: if the federal government slashes its support for welfare, education, hospitals, and roads, then we would expect to see states quickly reallocate funds from corrections to other services. But as long as the nondiscretionary budget items remain relatively unchanged, then changing the *levels* of federal funding for discretionary spending will likely not drive changes in incarceration to a significant degree.

87. Again, at least so long as we view grants to welfare, education, and so on, as fairly fixed.