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ARTICLES

THE PRISONER TRADE

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THE PRISONER TRADE

*Emma Kaufman**

It is tempting to assume that the United States has fifty distinct state prison systems. For a time, that assumption was correct. In the late twentieth century, however, states began to swap prisoners and to outsource punishment to their neighbors. Today, prisoners have no right to be incarcerated in the state where they were convicted, and prison officials may trade prisoners — either for money or for other prisoners — across state lines.

Interstate prison transfers raise questions about the scope of states' authority to punish, the purpose of criminal law, and the possibilities of prison reform. Yet apart from prisoners and their families, few people know that prisoners can be shipped between states. Because information on prisoners is so hard to obtain, scholars, lawyers, lawmakers, and even the judges who impose prison sentences often have no idea where prisoners are held.

Drawing on a wide range of primary sources, including data uncovered through open records requests to all fifty states, this Article offers the first comprehensive account of the prisoner trade. It demonstrates that states have far more authority than one might expect to share and sell prisoners. It reveals that certain states rely on transfers to offset the actual and political costs of their prosecution policies. And it critiques the pathologies of interstate punishment, arguing that courts should require consent before a prisoner can be sent outside the polity whose laws he has transgressed.

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INTRODUCTION

[I]t is neither unreasonable nor unusual for an inmate to serve practically his entire sentence in a State other than the one in which he was convicted . . . Even when, as here, the transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits.

— *Olim v. Wakinekona*, 461 U.S. 238, 247 (1983)

To remain in West Virginia, even to complain and be difficult, is that prisoner's constitutional right.

— *Ray v. McCoy*, 321 S.E.2d 90, 92 (W. Va. 1984)

Imagine two people convicted of the same crime in Manchester, Vermont. Both are sent to prison for twenty years and begin their sentences at Granite Correctional Facility, a medium-sized prison about an hour from home. By prison standards, the conditions at Granite are relatively good. The prisoners receive weekly visits from their families and have little trouble getting mail and basic healthcare. They call home each morning and enroll in a job-training program that will earn them up to four years off their sentences.¹

A year later, when the prison's population swells, a correctional administrator picks up the phone to call her counterpart at Hancock Correctional Center in Nevada. Hancock is a remote prison with few programs and a history of violence.² Lockdowns are common, and the prison's warden has been enjoined for failing to provide adequate healthcare. As it turns out, Hancock has extra beds. So the bureaucrats agree to a trade: twenty Vermont prisoners in exchange for \$76 per person, per day.³ After several weeks, one of the Vermont prisoners is placed on a bus to Hancock, where he lives — 2775 miles from home — for the next nineteen years. The other prisoner serves fifteen years in Vermont.

¹ See VT. STAT. ANN. tit. 28, § 818 (2019) (directing the Vermont Department of Corrections to implement a “good time” program under which prisoners can receive sentence reductions for good behavior and “meet[ing] milestones . . . that prepare offenders for reentry”); see also PRISON FELLOWSHIP, EARNED AND GOOD TIME POLICIES: COMPARING MAXIMUM REDUCTIONS AVAILABLE (2018), https://www.prisonfellowship.org/wp-content/uploads/2018/04/Good-TimeChartUS_Apr27_v7.pdf [<https://perma.cc/J4UV-ZPHH>] (surveying good-time laws in all fifty states).

² As in the previous paragraph, these are hypothetical claims about fictional prisons, intended to illuminate the stakes of prison transfers.

³ This was the price quoted by a California prison official describing interstate contracts for that state. Telephone Interview with J.W. Moss, Contract Beds Unit Chief, Cal. Dep't of Corr. & Rehab. (Feb. 6, 2019).

Nothing about this story is unlawful. Under current doctrine, prisoners have no right to be incarcerated in the state where they were convicted,⁴ and states may trade prisoners — either for money or for other prisoners — when they wish. In practice, most states export a small percentage of their total prison population.⁵ Some states, however, rely on the prisoner trade. Vermont outsources a sixth of its prison population, and Hawaii houses close to half of its prisoners on the mainland.⁶ At various points in the last decade, Wyoming exported a third of its prison population, and California shipped roughly 10,000 prisoners to other states.⁷ Until last year, La Palma Correctional Facility, a private prison in Arizona, held only people serving California time.⁸

Out-of-state imprisonment is relatively new. Exporting prisoners was illegal in many states until the mid-twentieth century and was uncommon everywhere until states built the infrastructure required to move and monitor prisoners. Then states started to share prison beds, to swap prisoners, and to pay private companies to hold prisoners across state lines. Slowly, state borders grew less salient to the practice of punishment.

The expansion of interstate punishment raises urgent questions about the scope of states' authority to incarcerate and the allocation of responsibility when punishment goes wrong. Interstate prison transfers create serious, unresolved legal conflicts about parole eligibility, habeas relief, and § 1983 liability. They unsettle basic assumptions about the purpose and limits of criminal law. Transfers also prompt deep normative debates about the government's authority to confine people in penal institutions. If the power to imprison arises from a social contract between members of a bounded political community, why is extraterritorial punishment ever permissible? Alternatively, if punishment can be outsourced, why not transfer prisoners more? Could states send all their prisoners to the cheapest prison system? Could one state — say Alaska or Mississippi — become a penal colony for the rest of the country?

Scholars have yet to ask these questions. Perhaps because information on prisoners is so hard to obtain, legal academics have not explored the conceptual and practical problems posed by the unrestricted movement of prisoners within the United States.⁹ As a result, scholars,

⁴ *Olim v. Wakinekona*, 461 U.S. 238, 248 (1983).

⁵ See *infra* Appendix, tbl.1.

⁶ See *id.*

⁷ See *infra* pp. 1843, 1853–54.

⁸ See *infra* note 138 and accompanying text.

⁹ There is almost no academic scholarship on prison transfers. One exception is Professor Benjamin Levin's 2014 article on the exchange of prisoners between Belgium and the Netherlands, which examines the implications of European prisoner exchanges for selling prisoners' labor within the United States. Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509 (2014). There is also a limited but illuminating body of

practitioners, lawmakers, and even the judges who impose prison sentences often have no idea where prisoners are held. This is alarming in a system where people are confined for years or decades at a time.¹⁰

This Article presents the first comprehensive study of the American prisoner trade. Building from legal sources including cases, contracts, handbooks, and internal agency documents, from firsthand accounts offered in interviews with prison officials, and from data obtained through open records requests (and follow-up requests) to all fifty states, the piece advances three claims.

The first is historical: in the last half-century, courts and prison officials have deterritorialized punishment. Interstate transfers represent a stark departure from the territoriality norm in American criminal law.¹¹ Since the birth of the modern penal institution, state prison systems have been tied to state borders and justified by reference to state criminal law. Indeed, when they drafted their constitutions, many states banned out-of-state confinement for state crimes. This presumption against extraterritorial punishment began to recede as the administrative state expanded and the penal bureaucracy professionalized. It disappeared with mass incarceration, which left many prisons bursting at the seams. By the end of the twentieth century, almost every state had agreed to share prison space and the Supreme Court had upheld the constitutionality of interstate confinement. Today, as a matter of law, state prisoners may be traded at will.

In practice, however, only some states have embraced transfers. The Article's second claim is empirical: most states trade less than three percent of their prisoners,¹² and in the last several years the total number of exported prisoners has ranged from 10,000 to 20,000.¹³ This number

writing on domestic prison transfers by advocacy groups and government agencies. *See, e.g.*, HOLLY KIRBY, GRASSROOTS LEADERSHIP, LOCKED UP & SHIPPED AWAY: INTERSTATE PRISONER TRANSFERS AND THE PRIVATE PRISON INDUSTRY (2013); NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, INTERSTATE TRANSFER OF PRISON INMATES IN THE UNITED STATES (2006).

¹⁰ As of March 2019, there were roughly 2.3 million people in a range of American custodial institutions, including prisons, jails, immigration detention centers, and civil commitment centers. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [https://perma.cc/4B8Y-RCZN]. Approximately 1.3 million of those people were in state prisons. *Id.*

¹¹ *See* Lucia Zedner, *Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment*, in *THE BORDERS OF PUNISHMENT* 40, 46 (Katja Franko Aas & Mary Bosworth eds., 2013) ("In . . . classical accounts of the power of the sovereign . . . the scope of domestic criminal law is also clearly bounded. It extends only to the borders of the sovereign realm . . . — the so-called 'principle of territoriality.'").

¹² *See infra* p. 1842. By contrast, the West Virginia Supreme Court of Appeals has concluded that out-of-state punishment violates a constitutional prohibition on banishment. *Ray v. McCoy*, 321 S.E.2d 90, 91 (W. Va. 1984).

¹³ *See* Emma Kaufman, *Compiled State-Level Data on Interstate Transfers* [hereinafter FOIA Data] (on file with author); *infra* pp. 1853–54.

is small relative to the country's staggering prison population.¹⁴ But certain states — notably, those facing budget and crowding crises — rely on mass transfers to run their prison systems. In the places where transfers are concentrated, outsourcing prisoners is a way to displace the actual and political costs of incarceration when states cannot afford to pay prison officers, provide constitutionally adequate prison conditions, or convince lawmakers to build the number of prisons the state's prosecution and sentencing policies demand. Transfers, in other words, are a safety valve when states incarcerate more people than they are willing or able to confine.

The Article's third, most normative claim is that courts ought to regulate the prisoner trade. Interstate transfers impose serious harms. They limit prisoners' access to courts and family, create perverse incentives to incarcerate, and aggravate the concern that America's reliance on prisons is unsustainable and unjust. At the same time, transfers can have real benefits. As this Article uncovers, prison officials trade prisoners not just to expand prison capacity and avoid the costs of incarceration but also to protect prisoners and provide them with healthcare. The United States delivers a wide array of social services through its prisons, and transfers facilitate more efficient service delivery. In this respect, interstate prison governance allows penal institutions to serve a critical welfare function.

Transfers thus have nuanced consequences for prisoners and societies that depend on imprisonment. This system demands a rule on when trade is permissible. But courts leave the enforcement of criminal sentences to prison administrators, who determine prison placements with almost complete freedom and no oversight. In practice, those administrators make ad hoc decisions that both under- and overuse the interstate transfer system. This Article critiques that approach and proposes an alternative: a transfer regime based on consent. Such a regime would permit cooperative governance while curbing the more troubling aspects of cross-border confinement.

The Article develops these claims in three Parts. Part I documents the evolution of America's prison network from its creation in the early part of the twentieth century through its expansion at the turn of the twenty-first. Part II describes the current transfer regime. This Part introduces previously undisclosed data on prison transfers, surveys the varied rationales for moving prisoners, and explores how states use transfers to resolve political disputes over corrections budgets and

¹⁴ See Sawyer & Wagner, *supra* note 10 (calculating that 1.3 million people live in state prisons). Note that this number is driven by certain high-incarceration states. In 2017, thirty states had fewer than 20,000 prisoners in their entire prison population, while only five states — California, Florida, Georgia, Ohio, and Texas — incarcerated more than 50,000 people. JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017, at 4–5 tbl.2 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/GF86-62RN>].

prison construction. Part III maps the normative stakes of prison transfers and defends the consent requirement as an imperfect but workable solution to the pathologies of the prisoner trade.

This account sharpens critiques of the criminal justice system in several ways. The history of prison transfers contextualizes prison privatization, which is often presented as a unique or new phenomenon. As this Article shows, privatization is only one species of punishment outsourcing. Moreover, while private corporations have exacerbated the dislocation of punishment, they did not invent it. Instead, it was public administrators who pioneered extraterritorial incarceration, paving the way for private companies to build prisons in cheap locations and import prisoners from across the country. This Article connects private prisons to their origins in Progressive Era penal policy.

This study also reorients debates about American penalty. The states most often cited in discussions of American imprisonment are those with the biggest, harshest systems and the highest incarceration rates — states like Texas, California, Louisiana, and Alabama.¹⁵ While these states are a key part of the country's penal culture, this Article focuses on a more unlikely set of protagonists: West Virginia, the only state in the nation that still prohibits interstate transfers, and Hawaii and Vermont, left-leaning states that export a significant percentage of their prisoners. Perhaps because transfers are rare at the national scale, or perhaps because they take place in near-total obscurity, scholars have overlooked how transfers function in these states.

Yet, as this Article demonstrates, West Virginia has a protective theory of prisoners' rights, and some blue states with reputations for lenient penal policies overincarcerate and then ship prisoners thousands of miles away. These stories reveal the counterintuitive politics of punishment. They also suggest that the problems with American imprisonment are deeper and less obvious than they can seem from reports on the most high-profile state systems.

This observation, in turn, is a lesson for prison reform. In recent years, debates about how to improve prisons have often focused on measures such as reinvesting state funds, increasing state budgets, closing state prisons, or electing different prosecutors. Given the ease with which states can outsource punishment, these reforms may matter less than one would hope. As the prisoner trade makes plain, taming America's prisons will have to be a durable, national project.

¹⁵ See, e.g., ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE* (2010); KERAMET REITER, 23/7: *PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT* (2016); Casey Leins, *10 States with the Highest Incarceration Rates*, U.S. NEWS & WORLD REP. (May 28, 2019, 8:00 AM), <https://www.usnews.com/news/best-states/slideshows/10-states-with-the-highest-incarceration-rates?slide=11> [https://perma.cc/x8y2-r27y]; *Alabama's Prisons Are Deadliest in the Nation*, EQUAL JUST. INITIATIVE (Dec. 3, 2018), <https://eji.org/news/alabamas-prisons-are-deadliest-in-nation> [https://perma.cc/BY7G-4EPC].

I. BUILDING THE AMERICAN PENAL ESTATE

Interstate punishment was not inevitable. It was the product of tremendous effort by prison officials, state governments, and federal courts. This Part documents the development of the American penal estate. It explores why states originally objected to out-of-state punishment and how those objections faded in the Progressive Era. It then describes early efforts to trade “problem” prisoners — specifically women — that, over time, laid the groundwork for a larger system of prisoner trade. Finally, Part I turns to courts to examine when it became legal to ship prisoners across state lines.

This is a story of bureaucratic and doctrinal innovation. State prison officials connected their penal systems through commissions, conventions, compacts, contracts, computer databases, and prison policies. When prisoners challenged their transfers, courts cited this infrastructure as evidence that prisoners had no reasonable expectation — and no right — to be held close to home. Prison officials thus invented interstate prison governance well before courts ratified the practice. Between 1920 and 1970, bureaucrats built an interstate prison network. Courts then created the doctrine to enable it.

A. *The Rise of Regional Prison Governance*

Transportation has long been a basic feature of imprisonment. In the eighteenth century, the British government shipped roughly 50,000 convicts to American colonies under contracts of indentured servitude that typically lasted seven years.¹⁶ After Reconstruction, convict leasing — the sale of prisoners’ unpaid labor to private parties such as mining and railroad companies — spread across the South.¹⁷ Forced mobility is a familiar tool of punishment in the United States.

Since the late nineteenth century, however, American prison systems have lived within state lines.¹⁸ This phenomenon is an outgrowth of the territorial, state-based nature of American criminal law. Although the

¹⁶ See REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT* 27–29 (2008); Bruce Kercher, *Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700–1850*, 21 *LAW & HIST. REV.* 527, 527 (2003); cf. A. Roger Ekirch, *Great Britain’s Secret Convict Trade to America, 1783–1784*, 89 *AM. HIST. REV.* 1285 (1984) (noting that the British government continued to impose sentences of transportation even after the Revolutionary War largely halted transportation to the United States).

¹⁷ See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 54–57 (2008); ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR* 2 (1996); MCLENNAN, *supra* note 16, at 87, 102.

¹⁸ See generally David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in *THE OXFORD HISTORY OF THE PRISON* 111, 119–20 (Norval Morris & David J. Rothman eds., 1995) (discussing the creation and expansion of the modern prison system in the United States).

federal government has long been involved in the enforcement of criminal laws,¹⁹ most of the action in the American criminal legal system unfolds within state borders. State codes define the vast majority of crimes that send people to prison;²⁰ state prisons predate both federal prisons and federal criminal law;²¹ and nearly ninety percent of the people currently imprisoned in the United States live in state and local penal institutions.²²

Indeed, for a period in American history, it was illegal to ship prisoners out of state. During and after the American Revolution, politicians including Thomas Jefferson, Benjamin Rush, and Benjamin Franklin assailed the harsh penal practices they associated with the British Crown.²³ The Founders railed against “monarchical” sanctions such as transportation and corporal punishment, which they saw as “the native weapons of kings and despots.”²⁴ In the process, they began to develop an alternative “positive republican theory of crime” based on the penitentiary.²⁵ In this new theory, criminals would be confined in a local prison, transformed through solitude or labor, and then returned to the polity.²⁶

As this philosophy of punishment took root, a number of states codified their opposition to transportation in state constitutional provisions barring out-of-state confinement for state crimes.²⁷ Between 1776 and 1845, eleven states enacted constitutional bans or limits on criminal sanctions involving forced mobility.²⁸ Ohio’s first constitution, for example, provided that no person may “be transported out of this state for

¹⁹ See Daniel Richman & Sarah A. Seo, *How Federalism Built the FBI (2020)* (unpublished manuscript) (on file with the Harvard Law School Library) (tracing the birth and expansion of the federal law enforcement apparatus).

²⁰ Sawyer & Wagner, *supra* note 10 (noting that eighty-nine percent of all convicted prisoners are held in state prisons and local jails for violations of state criminal laws).

²¹ See Act of Mar. 3, 1891, ch. 529, 26 Stat. 839 (authorizing the purchase of land for America’s first federal prison in 1891); see also PAUL W. KEVE, *PRISONS AND THE AMERICAN CONSCIENCE* 13 (1991); Richman & Seo, *supra* note 19, at 5 (noting that there were few federal criminal laws other than piracy, counterfeiting, and treason statutes before the twentieth century).

²² See Sawyer & Wagner, *supra* note 10.

²³ MCLENNAN, *supra* note 16, at 19.

²⁴ *Id.* at 19; see *id.* at 27, 31.

²⁵ *Id.* at 19.

²⁶ *Id.* at 38.

²⁷ See, e.g., *Sayles v. Thompson*, 457 N.E.2d 440, 443 (Ill. 1983) (describing the transportation clause in Illinois’s state constitution as reflecting “historical animosity” toward convict transportation by the British); see also Benjamin Franklin, *Felons and Rattlesnakes*, PA. GAZETTE, May 9, 1751, <https://founders.archives.gov/documents/Franklin/01-04-02-0040> [<https://perma.cc/XWMS-HZFH>] (objecting to the practice of convict transportation and threatening to send England rattlesnakes in return).

²⁸ For bans, see ALA. CONST. of 1819, art. I, § 27; MISS. CONST. of 1817, art. I, § 27; OHIO CONST. of 1802, art. VIII, § 17; VT. CONST. ch. 1, art. XXI. For limits, see ARK. CONST. of 1836, art. II, § 10; FLA. CONST. of 1838, art. 1, § 8; ILL. CONST. of 1818, art. VIII, § 8; N.C. CONST. of

any offense committed within the state,"²⁹ while early constitutions in Mississippi and Alabama prohibited the practice of "exile[]." ³⁰

Constitutions amended or enacted after the Civil War contain similar prohibitions. The Reconstruction Era witnessed a burst of energetic (if short-lived) prison reform in which states sought to curb the sale of prison labor and remake prisons as sites of discipline and education.³¹ Transportation bans resurfaced in this period, often in constitutional provisions prohibiting cruel and unusual punishment.³² West Virginia's analogue to the federal Eighth Amendment states that "[n]o person shall be transported out of, or forced to leave the State, for any offense committed within the same."³³ Arkansas amended its constitution in 1874 to make its limit on transportation a prohibition, clarifying that "[no] person, under any circumstances, [may] be exiled from the state."³⁴ Three years later, Georgia added a provision to its constitution barring "banishment beyond the limits of the State" as punishment for a crime.³⁵ By 1907, at least sixteen state constitutions included a transportation clause.³⁶

It is difficult to determine exactly what sort of punishment these measures prohibited. The text of transportation clauses leaves unclear whether state constitutions proscribe only formal banishment — that is, punishing a person by requiring him to leave the state in lieu of some other criminal sanction — or also encompass forms of banishment incidental to punishment, such as shipping prisoners to states with less crowded prison systems.³⁷ At least initially, courts did not have to answer that question because imprisonment rates were low and interstate

1776, art. I, § 12; S.C. CONST. of 1778, art. XLI; TENN. CONST. of 1796, art. XI, § 8; TEX. CONST. of 1845, art. I, § 16.

²⁹ OHIO CONST. of 1802, art. VIII, § 17.

³⁰ ALA. CONST. of 1819, art. I, § 27; MISS. CONST. of 1817, art. I, § 27.

³¹ McLENNAN, *supra* note 16, at 90–95 (describing Reconstruction-era efforts to "rein in the contract prison labor system," *id.* at 90, and introduce "religious instruction, education, a merit mark system, [and] a conduct-based system of probation," *id.* at 93, into prison administration). As Professor Rebecca McLennan explains, Reconstruction-era prison reformers, much like the Founders, "sought the overthrow of a 'tyrannical' system of punishment and the creation of a properly 'republican' penal institution." *Id.* at 97.

³² *See, e.g.*, W. VA. CONST. art. III, § 5.

³³ *Id.*

³⁴ ARK. CONST. art. II, § 21.

³⁵ GA. CONST. OF 1877, art. I, § 1, para. VII; *see also* SAMUEL W. SMALL, A STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN ATLANTA, GEORGIA, 1877, at 91 (1877) (debating the new banishment prohibition).

³⁶ ALA. CONST. art. I, § 30; ARK. CONST. art. II, § 21; GA. CONST. of 1877, art. I, § 1, para. VII; ILL. CONST. of 1870, art. II, § 11; KAN. CONST. Bill of Rights, § 12 (amended 1974); NEB. CONST. art. I, § 15; OHIO CONST. art. I, § 12; OKLA. CONST. art. II, § 29; TEX. CONST. art. I, § 20; VT. CONST. ch. I, art. XXI; W. VA. CONST. art. III, § 5; *see supra* note 28 and accompanying text.

³⁷ *Compare* *Sayles v. Thompson*, 457 N.E.2d 440, 442 (Ill. 1983) ("The language of the [Illinois transportation] clause . . . prohibits prisoner transportation only when such transportation is for the

transfers were rare.³⁸ Whether or not it was legal, sending prisoners to another state's penal system was cumbersome and expensive. In the late 1800s, states lacked centralized police forces and prisoner databases, not to mention the network of automobiles and highways required to ferry prisoners from state to state.³⁹ These practical barriers prevented interstate coordination and, by extension, interstate prisoner trade.⁴⁰

Prison governance grew more cooperative as prison administrators professionalized and developed methods to document the prison population. In 1870, Enoch Cobb Wines, a prison reformer from New York, founded the country's first association of prison administrators.⁴¹ Ten years later, his son Frederick led the first effort to count "all prison inhabitants" in "every state or local prison, penitentiary, reformatory, workhouse and jail."⁴² Congress accelerated that effort in 1902 when it established a permanent Census Bureau and instructed its Director to collect prisoner statistics.⁴³ Soon, prison officials began to serve as census enumerators, and the Institutional Population Report — a detailed

commission of an offense."), *with id.* at 445 (Clark, J., dissenting) ("The transportation clause clearly does not state, as the majority suggests, that a person shall not be transported out of the State for an offense committed within the State only if it constitutes cruel and unusual punishment.").

³⁸ *Cf. id.* at 442–43 (majority opinion) (considering whether the state's transportation ban applied to interstate prison transfers for the first time in 1983).

³⁹ See MARGARET WERNER CAHALAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, UNITED STATES HISTORICAL CORRECTIONS STATISTICS: 1850–1984, at I-1 to I-3 (1986) (describing early, piecemeal efforts to collect statistics on prisoners between 1880 and 1904); DAVID M. HUDAK & RICHARD D. ENGLER, NAT'L SHERIFF'S ASS'N, RESEARCH STUDY NUMBER 2.2: COSTS OF INTERSTATE PRISONER TRANSPORTS 12 (1977) (discussing impediments to cooperation between state prison officials and noting that even the "information technology of the 1950s was simply not equal to the task of supporting" an interstate prisoner transfer system); Richman & Seo, *supra* note 19, at 6 (observing that many states lacked their own police forces into the twentieth century).

⁴⁰ This claim refers to interstate transfers between prison systems. As noted above, convict leasing was a vast regime of prisoner trade. See BLACKMON, *supra* note 17, at 54–57.

⁴¹ John Wooldredge, *American Correctional Association*, in ENCYCLOPEDIA OF AMERICAN PRISONS 27, 27 (Marilyn D. McShane & Frank P. Williams eds., 1996). The National Prison Association would later become the American Correctional Association (ACA), an independent accrediting body that functions as "the closest thing [the United States has] to a national regulatory body for prisons." Shane Bauer, *My Four Months as a Private Prison Guard*, MOTHER JONES (July/Aug. 2016), <https://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer> [<https://perma.cc/EH8H-7ZQY>]; see also *About Us*, AM. CORRECTIONAL ASS'N, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/About_Us/Our_History/ACA_Member/AboutUs/AboutUs_Home.aspx [<https://perma.cc/D8YW-7YS6>].

⁴² CAHALAN, *supra* note 39, at I-2; see also F.H. WINES, REFORMATION AS AN END IN PRISON DISCIPLINE (1888), <https://socialwelfare.library.vcu.edu/corrections/corrections-part-iv-reformation-as-an-end-in-prison-discipline> [<https://perma.cc/ZNE2-Z4YA>].

⁴³ Act of Mar. 6, 1902, Pub. L. No. 57-27, 32 Stat. 51 (codified as amended in scattered sections of 13 U.S.C.).

tally of prisoners that was a prerequisite for systematic information-sharing between correctional administrators — was born.⁴⁴

Cooperation between law enforcers picked up pace outside prisons as well. The invention of mass-produced automobiles in the early twentieth century led to “unprecedented mobility” and with it to pervasive social anxiety about interstate crime.⁴⁵ The result was a national movement to streamline policing by documenting and sharing information.⁴⁶ During this period, politicians, progressive reformers, and law enforcement officials hailed uniform laws as a solution to the coordination problems presented by interstate criminal activity. In 1916, the National Conference of Commissioners on Uniform State Laws (NCCUSL)⁴⁷ — a collection of lawyers, judges, legislators, and academics formed in 1892 and most famous for inventing the Uniform Commercial Code — proposed a uniform act providing for the arrest and extradition of “Persons of Unsound Mind.”⁴⁸ Several years later, the NCCUSL approved the first Uniform Criminal Extradition Act, a legal framework for the apprehension and transportation of interstate fugitives.⁴⁹ By the mid-1920s, law enforcement officials were collecting and trading information at both the front and back ends of the criminal legal process, which, in turn, was beginning to look more like a coordinated criminal justice system.

One should not overstate the coherence of this system.⁵⁰ Many of the agencies involved in criminal law enforcement were in their infancy during the Progressive Era; documentation of prisoners was a piecemeal

⁴⁴ CAHALAN, *supra* note 39, at 1-3; *see also* STEPHANIE MINOR-HARPER, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE AND FEDERAL PRISONERS, 1925-85, at 2 (1986) (documenting the creation of a National Prisoner Statistics program within the Bureau of the Census).

⁴⁵ Richman & Seo, *supra* note 19, at 3; *see id.* at 6-8; *see also* DAVID M. HUDAK & RICHARD D. ENGLER, NAT’L SHERIFF’S ASS’N, RESEARCH STUDY NUMBER 2.1: MANDATES FOR INTERSTATE PRISONER TRANSPORTS 32 (1977) (“Early in this century the increasing use of the automobile and the convenient availability of other modern means of transportation resulted in larger and larger numbers of offenders being convicted of crimes in states far away from their homes.”).

⁴⁶ *See* Richman & Seo, *supra* note 19, at 12.

⁴⁷ The National Conference of Commissioners on Uniform State Laws is also known as the Uniform Law Commission. *About Us*, UNIFORM L. COMMISSION, <https://www.uniform-laws.org/aboutulc/overview> [<https://perma.cc/YC4T-WQLK>].

⁴⁸ HUDAK & ENGLER, *supra* note 45, at 29; *see id.* at 29-30.

⁴⁹ *Id.* at 7, 11.

⁵⁰ Some resist calling it a “system” at all. *See* Bernard E. Harcourt, *The Influence of Systems Analysis on Criminal Law and Procedure: A Critique of a Style of Judicial Decision-Making* (Columbia Law Sch., Public Law Research Paper No. 14-562, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062900 [<https://perma.cc/H8YE-HYZA>] (arguing that the concept of a criminal justice “system” emerged in the 1960s and critiquing the implications of this method of describing the legal structures surrounding criminal law); *see also* JOHN F. PFAFF, LOCKED IN 163 (2017) (“[C]riminal justice is, at best, a set of systems, and at worst it is a swirling mess of somewhat antagonistic agencies.”).

project;⁵¹ and states and localities voiced significant opposition to the centralization of criminal law enforcement.⁵² Still, this was a sustained period of state-building driven by an interest in data collection, enthusiasm about cooperative governance, and fear about interstate crime.⁵³

The 1920s was also a decade of increasing optimism about regional administration of American laws. Across domains from transportation and waste disposal to education and criminal justice, government officials touted the benefits of regional governance, specifically interstate compacts.⁵⁴ Compacts, these officials argued, could address the policy concerns wrought by increased mobility without sacrificing cultural variation and local control.⁵⁵ For opponents of federal law enforcement and skeptics of the fledgling administrative state, regional agreements served as a means to “stave off federal intervention.”⁵⁶

Against this backdrop, state officials came together in 1933 to form the Council of State Governments, a “region-based forum”⁵⁷ composed of governors, state legislators, and delegates from state judiciaries.⁵⁸ The next year, Congress granted blanket approval for states to “enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime.”⁵⁹ The Interstate Commission on Crime Control — a working group that would soon be supplanted by the Council of State Governments — then began to draft laws and model agreements “designed to improve law enforcement practices”⁶⁰

⁵¹ CAHALAN, *supra* note 39, at 2–4.

⁵² Richman & Seo, *supra* note 19, at 5–6 (“Centralized police forces were anathema, and federal criminal intervention politically fraught . . .” *Id.* at 5).

⁵³ As immigration scholars have shown, anxiety about crime in the early twentieth century was also connected to growing xenophobia and nationalism prompted by immigration from China, Mexico, and eastern Europe. See, e.g., JOHN HIGHAM, *STRANGERS IN THE LAND* 160 (2002); MAE M. NGAI, *IMPOSSIBLE SUBJECTS* 67–69 (2004); Louis Henkin, Essay, *The Constitution and United States Foreign Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 855 (1987).

⁵⁴ See Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 384–87 (2018); see also Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 3–4 (1997).

⁵⁵ Bulman-Pozen, *supra* note 54, at 397.

⁵⁶ *Id.* at 395. See generally Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 112–13 (2014) (explaining that state agencies form networks to “stave off federal intervention,” *id.* at 113).

⁵⁷ *About CSG*, COUNCIL STATE GOV’TS, <https://www.csg.org/about/default.aspx> [<https://perma.cc/WGH9-LH8Z>].

⁵⁸ HUDAK & ENGLER, *supra* note 45, at 30.

⁵⁹ Act of June 6, 1934, ch. 406, § 1, 48 Stat. 909, 909 (codified as amended in 4 U.S.C. § 112 (2018)); see also *Interstate Corrections Compact*, COUNCIL STATE GOV’TS, <http://apps.csg.org/ncic/Compact.aspx?id=82> [<https://perma.cc/LN8K-QYFL>] (indicating that state statutes codified the compact between 1959 and 1994).

⁶⁰ HUDAK & ENGLER, *supra* note 45, at 33.

and “establish legal machinery to permit corrections administrators to transfer convicted offenders to institutions in other states.”⁶¹

At the same time, correctional officials started to enter bilateral agreements permitting interstate prison transfers. Women prisoners in particular presented a policy problem for state governments. As the Council of State Governments (CSG) explained in its *Handbook on Interstate Crime Control*, “[s]ome states [did] not have the large number of female prisoners required to justify heavy investments in a state prison for women.”⁶² Rather than building new prisons or adopting alternative punishments, states began to share space. In 1941, New Hampshire contracted to send its female prisoners to the Vermont Women’s Reformatory, paying a per diem rate per prisoner.⁶³ At least six states — Colorado, Nebraska, New Mexico, South Dakota, Utah, and Wyoming — entered similar contracts for housing their female prisoners.⁶⁴

Eventually, this model of penal management spread across the country. Building from contracts devised for “specialized” — that is, relatively small — categories of prisoners including women, “the criminally insane,”⁶⁵ and “the mentally retarded,”⁶⁶ state corrections agencies began to enter multistate compacts allowing for transfers of all sentenced prisoners.⁶⁷ A subcommittee of the Council of State Governments drafted the first of these agreements, the Western Corrections Compact, in 1958.⁶⁸ A group of New England states then created a nearly identical compact,⁶⁹ and the Council of State Governments followed suit with

⁶¹ *Id.* at 53.

⁶² *Id.* at 54 (citing COUNCIL OF STATE GOV’TS, *THE HANDBOOK ON INTERSTATE CRIME CONTROL* 48 (rev. ed. 1966)).

⁶³ *Id.* at 56; see also COUNCIL OF STATE GOV’TS, *supra* note 62, at 48.

⁶⁴ HUDAK & ENGLER, *supra* note 45, at 56; see also COUNCIL OF STATE GOV’TS, *THE HANDBOOK ON INTERSTATE CRIME CONTROL* 99 (1955) (recounting a meeting in October 1954 at which “representatives of the states of Alabama, Louisiana, Mississippi, Oklahoma, Tennessee, and Texas” met to “explore ways and means of developing future plans and program [sic] for adult women prisoners on the basis of interstate cooperation”); Mitchell Wendell, *Multijurisdictional Aspects of Corrections*, 45 NEB. L. REV. 520, 524–25 (1966) (describing a failed effort to create a “regional women’s prison,” *id.* at 524, in the early 1950s).

⁶⁵ HUDAK & ENGLER, *supra* note 45, at 53.

⁶⁶ *Id.* at 54.

⁶⁷ See *id.* at 53–54.

⁶⁸ *Id.* at 57; see also *Western Corrections Compact*, COUNCIL STATE GOV’TS, <http://apps.csg.org/ncic/Compact.aspx?id=209> [<https://perma.cc/L696-A63B>] (indicating that state statutes codified the compact between 1959 and 1971). The Western Corrections Compact was drafted by the Western Governors’ Conference, which was then an “integral part[]” of the CSG. HUDAK & ENGLER, *supra* note 45, at 57 n.120.

⁶⁹ HUDAK & ENGLER, *supra* note 45, at 58; *New England Corrections Compact*, COUNCIL STATE GOV’TS, <http://apps.csg.org/ncic/Compact.aspx?id=130> [<https://perma.cc/5GDC-S6E8>] (indicating that Congress authorized the compact in 1934 and state statutes codified the compact between 1958 and 1973).

a national compact in 1968.⁷⁰ By the mid-1970s, thirty-five states and Guam were party to at least one corrections compact, each state had passed enabling legislation,⁷¹ and states had begun to build computerized databases to facilitate interstate prison transfers.⁷²

States justified their participation in these compacts on the ground that interstate imprisonment would produce more tailored — and hence more effective — punishment. In handbooks and government studies, officials insisted that cooperative governance would not only lower the cost of housing specialized populations, reduce crowding, and make it easier to manage prisoners who pose “chronic threats” to staff and other inmates;⁷³ regional prisons would also facilitate a more personalized, benevolent model of corrections. As one prison bureaucrat explained, “pooling and cooperative utilization of resources” could promote “development of an individualized approach to corrections that is frequently beyond the capabilities of any single state.”⁷⁴ Calls for regional prison governance thus dovetailed with the rise of the rehabilitative ideal, a vision of corrections in which prisons “serve to reform criminals through individualized, therapeutic treatment.”⁷⁵

In some ways, this rehabilitative conception of punishment echoed eighteenth-century arguments for the penitentiary. Like the Founders, midcentury reformers believed that prisons could transform people before their eventual return to society.⁷⁶ By the 1970s, however, the penal institution was no longer framed as a local alternative to shipping prisoners out of the jurisdiction. Instead, transportation had become a mechanism for prisoners’ reform — a way to collaborate, share costs, and deliver bespoke prison programs. Over the course of a century, the expansion and professionalization of American prison systems had defanged transportation, turning the forced movement of prisoners

⁷⁰ HUDAK & ENGLER, *supra* note 45, at 59.

⁷¹ *See id.* at 57–59. By the midnineties, thirty-eight states and Washington, D.C., had signed on to and codified the Interstate Corrections Compact. *See Interstate Corrections Compact, supra* note 59 (listing state statutes codifying the national compact).

⁷² *See* HUDAK & ENGLER, *supra* note 45 (describing findings documented on the Computer Assisted Prisoner Transportation Index Service (CAPTIS)).

⁷³ *Id.* at 54; *see id.* at 54–56.

⁷⁴ *Id.* at 54.

⁷⁵ Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1393–94 (2019); *see also* Rothman, *supra* note 18, at 116–19 (describing the emergence of the rehabilitative ideal).

⁷⁶ *See* MCLENNAN, *supra* note 16, at 36–38 (noting that Benjamin Rush advanced this view in Philadelphia in the late eighteenth century). The midcentury rehabilitative ideal differed from earlier models of punishment in its focus on tailored prison programs and therapeutic — that is, medical and psychiatric — interventions. *See* FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 41–45 (1981). By contrast, the early penitentiary was meant to be a place where solitude spurred reflection and repentance. MCLENNAN, *supra* note 16, at 36. These visions of corrections are quite different: one is quasi-religious, the other medical; one prioritizes idleness, the other programmed activity; one is premised on uniformity, the other personalization. Both, though, imagine prisons as transformative institutions.

from a barbarous sanction into an incidental feature of efficient prison governance.

The result is a penal estate in which prisoners can be transferred great distances in the name of effective administration. With exceptions explored below, interstate corrections compacts mean that prison officials can ship state prisoners all over the United States. In practice, as Part II explains, transfers occur infrequently in most states and tend to be used to manage crowding or political opposition to prison construction.⁷⁷ But under the terms of interstate compacts, state prison systems are legally borderless. Despite the fact that state criminal codes deliver people to prison and state budgets determine criminal enforcement practices, state prisons are part of an interstate network in which prisoners are objects of free trade.⁷⁸

B. *The Law of Prison Transfers*

Though they differ in important respects,⁷⁹ interstate corrections compacts share a basic model. These agreements allow states to contract with one another to trade their prisoners and establish ground rules concerning payment, transfer procedures, and jurisdiction over prisoners who are sent across state lines.

The general principles are straightforward: sending states pay receiving states for each prisoner they transfer and cover “extraordinary medical and dental expenses” as well.⁸⁰ Sending states can recall their prisoners and inspect prisons in receiving states.⁸¹ Technically, a transferred prisoner has the right to the same hearings and benefits he would have if confined in his home state, though this rule is often honored in the breach.⁸² At the end of their sentences, transferred prisoners return home unless they and both states agree to “release in some other place.”⁸³ Sending states “bear the cost of [prisoners’] return to [their] territory.”⁸⁴

⁷⁷ See *infra* pp. 1842–43.

⁷⁸ There are, of course, exceptions to this broad claim. West Virginia continues to ban interstate prisoner transfers, see *infra* pp. 1835–36, and as section II.B explains, prison officials use corrections compacts much less often than they could.

⁷⁹ For example, the Western and New England Corrections Compacts permit states to agree, before any new prison construction, that a prison in the “receiving state” will reserve a specific percentage of its capacity for prisoners from a “sending state.” CONN. GEN. STAT. § 18-102 (2019) (New England Interstate Corrections Compact); WASH. REV. CODE § 72.70.010 (2019) (Western Corrections Compact). The national compact lacks this construction provision. See NEV. REV. STAT. § 215A.010-.060 (2019) (Interstate Corrections Compact).

⁸⁰ *E.g.*, CONN. GEN. STAT. § 18-102.

⁸¹ *E.g.*, *id.*

⁸² See, *e.g.*, *id.*; *infra* note 87 (collecting cases in which courts have come to conflicting conclusions about which state’s classification policies, disciplinary rules, and grievance procedures apply to transferred prisoners).

⁸³ *E.g.*, CONN. GEN. STAT. § 18-102.

⁸⁴ *E.g.*, *id.*

Compacts thus create a power-sharing framework in which states can rent out space in other states' prisons without relinquishing their authority over prisoners.

This framework is fraught in practice. Interstate corrections compacts raise thorny legal questions about jurisdiction and liability for illegal conduct. If a prisoner remains in the constructive custody of his home state after an interstate transfer, who is the proper custodian when a prisoner brings a habeas claim?⁸⁵ Which state's officers can be sued for violations of a prisoner's constitutional rights?⁸⁶ Is a prisoner governed by the security classification, grievance procedures, and disciplinary rules of his home state or the state where he is confined?⁸⁷ When is medical care sufficiently unusual or serious to warrant payment by a sending state?⁸⁸ Who decides when a prisoner is eligible for parole or other forms of discretionary early release?⁸⁹ Which state's criminal code

⁸⁵ See, e.g., *Unger v. Moore*, 258 F.3d 1260, 1264 (11th Cir. 2001) (holding that a prisoner serving a Maryland sentence while incarcerated in Florida should have filed his habeas petition in Maryland); *Fest v. Bartree*, 804 F.2d 559, 560 (9th Cir. 1986) (holding that Nebraska retained constructive custody for purposes of habeas over a prisoner sentenced in Nebraska and transferred to Nevada); *Smart v. Goord*, 21 F. Supp. 2d 309, 314 (S.D.N.Y. 1998) (holding that New Hampshire was the proper custodian of a habeas petitioner sentenced in New Hampshire and transferred to New York).

⁸⁶ See, e.g., *Hannon v. Beard*, 524 F.3d 275, 281 (1st Cir. 2008) (holding that the Massachusetts long-arm statute permitted a federal district court in Massachusetts to exercise personal jurisdiction over the head of the Pennsylvania Department of Corrections when a prisoner challenged as retaliatory his transfer to Massachusetts); *Bertram v. Wall*, No. CA 01-422ML, 2002 WL 1889030, at *4 (D.R.I. July 11, 2002) (holding that a Rhode Island district court lacked personal jurisdiction over Connecticut prison officials alleged to have violated the constitutional rights of a prisoner transferred from Rhode Island).

⁸⁷ Compare, e.g., *Boyd v. Werholtz*, 203 P.3d 1, 2-3 (Kan. Ct. App. 2008) (holding that Kansas grievance procedures applied to a prisoner from Kansas who was confined in Washington state), with *Blevins v. Jones*, No. CIV-07-388-T, 2007 WL 1731442, at *7 (W.D. Okla. June 14, 2007) (holding that Kansas classification procedures applied to a prisoner from Oklahoma who was confined in Kansas).

⁸⁸ Cf. Defendants' Motion for Summary Judgment at 33, *Rodesky v. Wexford Health Sources Inc.*, No. 15-CV-1002 (C.D. Ill. Jan. 10, 2020) (noting, in a case concerning delayed and allegedly unconstitutional medical care, that Illinois doctors in the receiving state "were waiting on a response from the New Jersey Department of Corrections"). The Illinois Department of Corrections has raised the issue of interstate agreement to medical expenses in this ongoing case, but the record leaves unclear what role New Jersey officials played in this prisoner's treatment.

⁸⁹ Generally, transferred prisoners remain subject to the parole authority in their state of conviction. Issues arise, however, when conditions in a receiving state — such as that state's security classification policies or the availability of particular programs — affect a prisoner's eligibility for parole. See, e.g., *Fox v. Stotts*, No. 99-3231, 2000 WL 84899, at *1-2 (10th Cir. Jan. 27, 2000) (rejecting a due process challenge to the Kansas Parole Board's decision to hold parole hearings in absentia for a Kansas prisoner transferred to Florida); *Reid v. Stanley*, No. 04-CV-369, 2006 WL 1875335, at *4-5 (D.N.H. July 6, 2006) (rejecting a New Hampshire prisoner's claim that his confinement in Connecticut, where the security classification system prevented his eligibility for parole, violated his right to due process).

applies when a prisoner commits a crime in an out-of-state prison?⁹⁰ The list goes on. And the core question remains: Do states have the power to send prisoners outside the polity whose laws they have broken?

The last question concerned the lawyers who invented interstate corrections compacts. In 1966, Mitchell Wendell, the general counsel for the Council of State Governments, wrote an article exploring the legal puzzles raised by multijurisdictional corrections.⁹¹ “[W]e are not accustomed to think of State X having any power to act within State Y,” Wendell began.⁹² Indeed, “[t]he very idea that a person could be effectively restrained of his liberty on a continuing basis pursuant to the penal power of another jurisdiction [is] unfamiliar to traditional concepts of American criminal jurisprudence.”⁹³ In a criminal legal system premised on the social contract — on the idea that a state’s power to punish derives from a democratic decision to sanction certain conduct by members of a political community whose “jurisdiction ends at the state line” — it was odd, to say the least, to permit states to outsource their punishment authority.⁹⁴

But, the article reasoned, interstate agreements on probation and parole had paved the way for a solution: consent. “No candidate for parole or probation is forced to accept supervision in another state,” Wendell explained.⁹⁵ The “voluntary character” of interstate parole agreements, combined with the fact that “no person has a constitutional right” to be paroled, “eased, if not entirely dissipated,” concerns about the constitutionality of such agreements.⁹⁶ Wendell did not clarify which legal construct — voluntariness or the absence of a constitutional right — made interstate probation and parole regimes permissible. But reasoning by analogy to those regimes, he concluded that interstate prison transfers could be constitutional.⁹⁷

⁹⁰ See, e.g., *State v. Wagner*, 596 N.W.2d 83, 88 (Iowa 1999) (holding that Iowa could not criminally prosecute an Iowa prisoner who had been transferred to Texas and then escaped on the ground that the Interstate Corrections Compact (ICC) “did not make it a crime against the laws of Iowa for a prisoner to escape Iowa’s legal custody while in another state”). As the Supreme Court of Iowa explained, nothing in the ICC “implies any reference to criminal or territorial jurisdiction.” *Id.* Note the sharp distinction between preconviction criminal jurisdiction and postconviction jurisdiction to punish here.

⁹¹ Wendell, *supra* note 64.

⁹² *Id.* at 527; see also DAVID M. HUDAK ET AL., NAT’L SHERIFF’S ASS’N, LEGAL FEASIBILITY ANALYSES 3.1 THROUGH 3.5: ANALYSIS OF LEGAL AUTHORITY FOR COOPERATIVE INTERSTATE PRISONER TRANSPORTS (1978) (cataloguing the legal questions prompted by interstate prisoner transfers).

⁹³ Wendell, *supra* note 64, at 532.

⁹⁴ *Id.* at 522; see *infra* Part III.C, pp. 1869–73 (discussing the social contract theory of punishment at greater length).

⁹⁵ Wendell, *supra* note 64, at 532.

⁹⁶ *Id.*

⁹⁷ *Id.* at 528.

Two years later, on the basis of this analysis, the Council of State Governments drafted the first national corrections compact.⁹⁸ That compact, like its regional predecessors, was silent on the question of prisoner consent.⁹⁹ Soon, however, prisoners began to challenge their transfers, and courts began to build a jurisprudence on whether prisoners have a right to remain in their home states.

In early cases on that question, lower courts concluded that prisoners had no federal right to be incarcerated in the state where they were convicted.¹⁰⁰ To reach that conclusion, courts turned to *Meachum v. Fano*,¹⁰¹ a 1976 decision in which the Supreme Court had rejected a Massachusetts prisoner's due process challenge to an *intrastate* transfer on the ground that the prisoner lacked a right to be held in any particular Massachusetts prison.¹⁰² Citing *Meachum*, appellate courts reasoned that interstate transfers, too, passed constitutional muster.¹⁰³ "Were we to hold the Due Process Clause applicable to . . . out-of-state transfer[s]," the Second Circuit warned, "we would 'place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges.'"¹⁰⁴ As the Second Circuit saw it, federal courts ought not decide where state prison sentences are imposed.

The Supreme Court affirmed this view in *Olim v. Wakinekona*,¹⁰⁵ a landmark, understudied case from 1983. *Wakinekona* arose from Hawaii's decision to transfer Delbert Kaahanui Wakinekona, a prisoner whom correctional officials had "singled out . . . as [a] troublemaker[]," to Folsom State Prison in California.¹⁰⁶ When Wakinekona challenged

⁹⁸ See *Interstate Corrections Compact*, *supra* note 59.

⁹⁹ Some states, however, took positions on the necessity of consent. When it first adopted the New England Corrections Compact, Vermont "included a special provision . . . designed to insure that any inmate committed in Vermont would not be transferred" out of the state without his consent. Opinion of the Justices to the Senate, 184 N.E.2d 353, 355 (Mass. 1962). Vermont's consent rule has since been revoked. VT. STAT. ANN. tit. 28, § 1603 (2019).

¹⁰⁰ See, e.g., *Hillen v. Dir. of Dep't of Soc. Serv. & Hous.*, 455 F.2d 510, 511 (9th Cir. 1972) (holding that transfers under the Western Corrections Compact "present[ed] no issue related to federally protected constitutional rights of the prisoner"); see also *Cofone v. Manson*, 594 F.2d 934, 937-38 (2d Cir. 1979) (concluding that Connecticut law conferred no federally protected due process right to avoid the transfer of a Connecticut state prisoner to a federal prison in Georgia).

¹⁰¹ 427 U.S. 215 (1976).

¹⁰² *Id.* at 225 ("Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.")

¹⁰³ *Cofone*, 594 F.2d at 937 (citing *Meachum*, 427 U.S. at 224-25).

¹⁰⁴ *Id.* at 939 (quoting *Meachum*, 427 U.S. at 228-29).

¹⁰⁵ 461 U.S. 238 (1983).

¹⁰⁶ *Id.* at 240-41.

his transfer under the Due Process Clause, the Supreme Court cemented what several lower courts had held: prisoners have no federally protected right to confinement in any specific prison, “[e]ven when . . . the transfer involves long distances and an ocean crossing.”¹⁰⁷ In justifying this holding, the Court echoed arguments made by the state officials who had drafted interstate corrections compacts two decades earlier. Practical concerns — including “[o]vercrowding and the need to separate particular prisoners” — “necessitate[d] interstate [prisoner] transfers” and therefore a permissive reading of the Due Process Clause.¹⁰⁸

The Court also invoked the existence of “[c]orrections compacts between states” as evidence that prison transfers were constitutional.¹⁰⁹ Citing the Western, New England, and national compact agreements, Justice Blackmun’s majority opinion noted that states had embraced interstate transfers, rendering out-of-state confinement “neither unreasonable nor unusual.”¹¹⁰ This assertion was questionable — as Justice Marshall pointed out in his dissent, less than three percent of Hawaii’s prisoners and just one percent of prisoners nationally were transferred out-of-state in 1979¹¹¹ — but corrections compacts were on the rise. Because compacts had grown increasingly common, the Court concluded, “an inmate . . . has no justifiable expectation that he will be incarcerated in any particular State.”¹¹² The birth and expansion of a borderless prison system thus became the grounds for its own constitutionality.

After *Wakinekona*, prisoners had no federal right to contest transfers.¹¹³ The case, moreover, resolved the question left open by Mitchell Wendell’s 1966 article: if Delbert Wakinekona’s nonconsensual transfer to California was constitutional, it was the absence of a federal right to be punished where one is convicted, not the voluntariness of a transfer, that made interstate prisoner transportation legal.¹¹⁴ By 1983, even forced transfers comported with the Federal Constitution.

There remained, however, the problem of state law — specifically, the centuries-old banishment prohibitions that existed in many state constitutions. Although several states had amended or repealed their

¹⁰⁷ *Id.* at 247.

¹⁰⁸ *Id.* at 246.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 247.

¹¹¹ *Id.* at 254 (Marshall, J., dissenting).

¹¹² *Id.* at 245 (majority opinion).

¹¹³ At least on due process grounds. *See id.* at 248 (“[A]n interstate prison transfer . . . does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself.”). Part III explores whether *Wakinekona* was wrongly decided and whether the case forecloses other constitutional challenges to transfers. *See infra* pp. 1873–74.

¹¹⁴ *See* Wendell, *supra* note 64, at 532.

transportation bans by the 1980s,¹¹⁵ a number of state constitutions, including those of Illinois, Vermont, and West Virginia, retained clauses prohibiting banishment, outlawry, and out-of-state confinement for state crimes.¹¹⁶ Prisoners turned to those provisions to challenge their transfers, arguing that interstate transfers amounted to unlawful “exile.”¹¹⁷

West Virginia adopted the prisoners’ interpretation. In a little-known opinion from 1984 — a precedent cited only nine times in thirty-six years — the West Virginia Supreme Court took up a case that grew out of the closure of a women’s prison in Pence Springs, an unincorporated community in southern West Virginia.¹¹⁸ After that prison closed, the West Virginia Department of Corrections sent two “obstreprous and difficult” women, Connie Ray and Kathy Schofield, to prison in California.¹¹⁹ “Miss Schofield and Miss Ray” sued under article III, section 5 of West Virginia’s constitution,¹²⁰ which provides that “[n]o person shall be transported out of, or forced to leave the State, for any offence committed within the same.”¹²¹ That clause, they argued, barred not only formal banishment from the state as punishment for a crime but also involuntary confinement “beyond the borders of West Virginia.”¹²²

The court agreed, holding that the state’s constitution forbade “any semblance of the punishment known at common law as ‘abjuration of the realm,’” including the involuntary transfers at issue.¹²³ “Our state’s

¹¹⁵ Some states, including Mississippi and South Carolina, removed their banishment prohibitions in the aftermath of the Civil War as the convict leasing system took root across the South. Compare MISS. CONST. of 1817, art. I, § 27, and S.C. CONST. of 1778, art. XLI, with MISS. CONST. of 1868, and S.C. CONST. Other states amended their constitutions in the latter half of the twentieth century when regional governance and interstate corrections compacts were on the rise. Texas, for instance, amended its constitution in 1985 to clarify that its transportation ban did not “prohibit an agreement with another state providing for the confinement of inmates of this State in the penal or correctional facilities of that state.” TEX. CONST. art. I, § 20.

¹¹⁶ ILL. CONST. art. I, § 11; VT. CONST. ch. I, art. XXI; W. VA. CONST. art. III, § 5.

¹¹⁷ See, e.g., *Girouard v. Hogan*, 378 A.2d 105, 106 (Vt. 1977).

¹¹⁸ *Ray v. McCoy*, 321 S.E.2d 90, 91 (W. Va. 1984).

¹¹⁹ *Id.* The plaintiffs were first sent to a federal women’s prison in Alderson, West Virginia, before the state chose to transfer them to California. *Id.*

¹²⁰ *Id.*

¹²¹ W. VA. CONST. art. III, § 5.

¹²² *Ray*, 321 S.E.2d at 91.

¹²³ *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *333). Because Ray and Schofield were transferred to California as punishment for their “recalcitrant[ce],” *id.* at 91, one might adopt a narrow reading of the case in which only punitive or disciplinary transfers violate the state constitution. The West Virginia Department of Corrections has, however, taken a broader approach, interpreting the banishment provision to cover all interstate transfers. NAT’L INST. OF CORR., *supra* note 9, at 11. Nevertheless, in recent years, West Virginia has considered sending its prisoners to private prisons out of state. See, e.g., Andrew Cohen, *Yes, West Virginia, a Private Prison Transfer Is a Terrible Idea*, THE WEEK (Feb. 5, 2014), <https://theweek.com/articles/451644/yes-west-virginia-private-prison-transfer-terrible-idea> [<https://perma.cc/7J7J-XX6E>]. West Virginia courts have yet to rule on whether such a practice, if adopted, would be constitutional.

hostility to banishment is . . . an essential prophylaxis to protect our inmates,” the majority announced.¹²⁴ “To remain in West Virginia, even to complain and be difficult, is that prisoner’s constitutional right.”¹²⁵

Prisoners in other states fared worse. In the early 1980s, the Supreme Court of Illinois construed that state’s nearly identical transportation ban — “[n]o person shall be transported out of the State for an offense committed within the State” — to permit transfers under the Interstate Corrections Compact.¹²⁶ The Supreme Court of Vermont endorsed the same reading of its constitution, concluding that a prisoner’s “analogizing of [his out-of-state] transfer . . . with exile, banishment and transportation outruns the realities.”¹²⁷ Under the Vermont Constitution, a person’s “right to freely inhabit the State . . . is forfeit by his sentence of incarceration.”¹²⁸

Over time, West Virginia became the exception to a rule in favor of transfers. By the early 1990s, state and federal jurisprudence had cohered around the idea that interstate prisoner transfers were legal. The practice was also becoming increasingly normal. After *Wakinekona*, states like Hawaii and Vermont began to rely on interstate transfers to manage a growing share of their prison populations.¹²⁹ Prisons were booming — mass incarceration began in earnest in the mideighties¹³⁰ — and some states turned to transfers to ease overcrowding.¹³¹

States also looked to the private prison industry, which was expanding at a rapid clip.¹³² As state prison populations ballooned, some states

¹²⁴ *Ray*, 321 S.E.2d at 92.

¹²⁵ *Id.*

¹²⁶ *Sayles v. Thompson*, 457 N.E.2d 440, 444 (Ill. 1983) (quoting ILL. CONST. art. I, § 11).

¹²⁷ *Girouard v. Hogan*, 378 A.2d 105, 106 (Vt. 1977).

¹²⁸ *Id.*

¹²⁹ See DEP’T OF SOCIOLOGY, UNIV. OF HAW. AT MANOA & DEP’T OF THE ATT’Y GEN., STATE OF HAW., HAWAII’S IMPRISONMENT POLICY AND THE PERFORMANCE OF PAROLEES WHO WERE INCARCERATED IN-STATE AND ON THE MAINLAND 6 (2011) [hereinafter HAWAII’S IMPRISONMENT POLICY] (describing Hawaii’s turn toward out-of-state prisons); KIRBY, *supra* note 9, at 17 (documenting Vermont’s use of out-of-state private prisons); see also N.H. Dep’t of Corr. & N.Y. Dep’t of Corr. Servs., Inmate Fact Sheet (on file with the Harvard Law School Library) (noting that the Supreme Court’s ruling “that inmates do not have the right to expect to be confined in any particular jurisdiction . . . clear[ed] the way for interstate transfers”).

¹³⁰ See THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 1 (2017) (documenting a marked increase in prison admissions beginning in the early 1980s).

¹³¹ See, e.g., HAWAII’S IMPRISONMENT POLICY, *supra* note 129, at 36; see also Brandon v. Alaska Dep’t of Corr., 938 P.2d 1029, 1030 (Alaska 1997) (noting that Alaska transferred approximately 200 prisoners to a private prison in Arizona “[d]ue to overcrowding in Alaska prisons”).

¹³² The contemporary private prison industry was “born in 1983 with the formation of Corrections Corporation of America (CCA).” KIRBY, *supra* note 9, at 7. In the United States, that industry is dominated by three corporations: GEO Group, Management and Training Corporation, and CCA, which is now known as CoreCivic. See Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 73 (2016) (noting that these three companies “constitute more than 80% of the market for private prisons”); Kaufman, *supra* note 75, at 1402 n.157 (describing CCA’s rebranding). As prison historians have pointed out, there is a much longer history of

started to transfer prisoners not only to other states' public prison systems but also to out-of-state private prisons.¹³³ Hawaii "leased its first [private] prison beds" in 1995 and sent 300 prisoners to private prisons in Texas the next year.¹³⁴ A decade later, the number of Hawaii prisoners in private facilities on the mainland had "increased almost sevenfold" and more than half of all Hawaii prisoners lived in out-of-state facilities.¹³⁵

Other states followed Hawaii's lead. In 1997, Idaho sent several hundred state prisoners to Prairie Correctional Facility, a private prison in Minnesota.¹³⁶ Vermont began to house its prisoners in private facilities in Kentucky and Tennessee in 2004.¹³⁷ In 2007, the California Department of Corrections and Rehabilitation signed a contract for Corrections Corporation of America to build and manage the medium-security prison that holds California prisoners in Eloy, Arizona.¹³⁸ By 2010, there were "California" and "Vermont" prisons in completely different states.

These prisons exist because state prison officials invented interstate imprisonment. As noted in the Introduction, the history of corrections compacts sheds new light on prison privatization, a phenomenon that is often critiqued as part of a late twentieth-century trend toward decentralized, neoliberal governance.¹³⁹ If prison privatization reflects the decline of the modern state, it also depends on ideas about punishment that emerged at the height of public administration. The interstate prison system was born in the Progressive Era and bolstered by midcentury government officials who were committed to using public prisons

private prison management in the United States, which includes the privately run workhouses and jails of the early nineteenth century, the convict leasing system discussed in section I.A, and the largely unbroken history of selling goods made by prison labor. *See, e.g.*, BLACKMON, *supra* note 17, at 54–57; MCLENNAN, *supra* note 16, at 27–29; Rothman, *supra* note 18, at 119–20.

¹³³ KIRBY, *supra* note 9, at 9 (noting that, by 2013, California, Hawaii, Idaho, and Vermont were transferring prisoners to out-of-state private facilities).

¹³⁴ HAWAII'S IMPRISONMENT POLICY, *supra* note 129, at 6.

¹³⁵ *Id.*

¹³⁶ KIRBY, *supra* note 9, at 18.

¹³⁷ *Id.* at 17.

¹³⁸ CDCR *Contracts for Additional Out of State Beds to Reduce Overcrowding*, CAL. DEP'T OF CORR. & REHAB. (Oct. 5, 2007), <https://www.cdcr.ca.gov/news/2007/10/05/cdcr-contracts-for-additional-out-of-state-beds-to-reduce-overcrowding> [<https://perma.cc/DP55-F4EE>]. This prison was mentioned in the Introduction. *See supra* p. 1818; *see also La Palma Correctional Center*, CORECIVIC, <http://www.corecivic.com/facilities/la-palma-correctional-center> [<https://perma.cc/YD65-BMPU>].

¹³⁹ *See, e.g.*, Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT'L J. CONST. L. 162, 181–90 (2013); Jonathan Simon, *Rise of the Carceral State*, 74 SOC. RES. 471, 492 (2007) (connecting the rise of mass incarceration to neoliberalism); Marie Gottschalk, *The Folly of Neoliberal Prison Reform*, BOS. REV. (June 8, 2015), <http://bostonreview.net/books-ideas/marie-gottschalk-neoliberal-prison-reform-caught> [<https://perma.cc/E2NH-CWDW>].

to reform criminals and thereby curb crime.¹⁴⁰ It was the *public* prisoner trade, in other words, that unmoored imprisonment from the territorial boundaries of state criminal law. And it was public prison officials who perfected the practice of outsourcing punishment. Private prisons depend on these developments.

The prisoner trade also depends on courts' willingness to license interstate punishment. Since the Supreme Court first encountered cross-border corrections in *Olim v. Wakinekona*, lower courts have developed a dense body of law answering the questions raised by cooperative prison administration.¹⁴¹ West published the first American Law Reports on Interstate Corrections Compacts in 2010.¹⁴² Those reports expose ongoing disagreements — it remains unsettled, for instance, which state's disciplinary rules govern transferred prisoners¹⁴³ — but their existence demonstrates just how fine-grained and widely accepted the law of prison transfers has become. Fifty years after the Council of State Governments' lawyer wondered whether interstate transfers could be legal, most courts have accepted the proposition that trading prisoners across state lines offends neither the Federal Constitution nor the core tenets of American criminal law.

II. THE PRISON NETWORK

Part I documented the history of interstate prison governance. This Part picks up where that story left off to describe the current state of the prisoner trade in the United States. Drawing on data obtained through state open-records laws¹⁴⁴ analogous to the federal Freedom of Information Act¹⁴⁵ (FOIA), this Part provides an overview of states' use of prison transfer agreements.

¹⁴⁰ See *supra* section I.A, pp. 1822–30.

¹⁴¹ See *supra* notes 85–90 (listing cases addressing jurisdictional and other legal questions raised by interstate prison transfers).

¹⁴² George L. Blum, Annotation, *Construction and Application of Interstate Corrections Compact and Implementing State Laws — Equivalency of Conditions and Rights and Responsibilities of Parties*, 56 A.L.R. 6th 553 (2010); George L. Blum, Annotation, *Validity, Construction, and Application of Interstate Corrections Compact and Implementing State Laws — Jurisdictional Issues, Governing Law, and Validity and Applicability of Compact*, 54 A.L.R. 6th 1 (2010) [hereinafter Blum, *Validity*].

¹⁴³ Compare, e.g., *Boyd v. Werholtz*, 203 P.3d 1, 2–3 (Kan. Ct. App. 2008) (holding that a Kansas prisoner incarcerated in another state had to follow Kansas Department of Corrections grievance procedures), with *Salstrom v. Sumner*, No. 91-15689, 1992 WL 72881, at *1 (9th Cir. 1992) (rejecting the claim that Arizona corrections officers should have applied Nevada disciplinary rules to a Nevada prisoner's hearing), and *Stewart v. McManus*, 924 F.2d 138, 141–42 (8th Cir. 1991) (holding that Iowa disciplinary rules applied to a prisoner transferred from Kansas). See Blum, *Validity*, *supra* note 142, § 7 (summarizing various conflicting holdings on this question).

¹⁴⁴ See *State Freedom of Information Laws*, NAT'L FREEDOM OF INFO. COAL., <https://www.nfoic.org/coalitions/state-foi-resources/state-freedom-of-information-laws> [<https://perma.cc/JFZ8-MT2T>] (listing state open-records statutes).

¹⁴⁵ 5 U.S.C. § 552 (2018).

The data reveal a patchwork system in which most states confine their own prisoners but some — especially small states and those facing penal crises — rely on transfers to resolve budget disputes, comply with court orders, and placate opponents of prison construction. This Part unearths these political dynamics. It begins by explaining my efforts to obtain data on prison placements using state transparency laws. It then presents that data and outlines the varied, sometimes conflicting reasons that prison officials give to explain why they choose to move prisoners out of state. This survey raises normative questions about whether states should be able to trade prisoners, and if so, whether they ought to be trading them more.

A. *State Sunshine Statutes*

There is almost no public information on prison transfers. As a general rule, state correctional agencies do not publish data on how many prisoners are transferred each day, month, or year. Unlike the preconviction criminal legal process — where hearings are public and researchers routinely obtain and analyze pre-trial, post-trial, and sentencing data¹⁴⁶ — the postconviction criminal justice system is tightly, notoriously closed.¹⁴⁷ In this respect, transfer practices are one piece of the broader black box of prison management. This lack of transparency makes it difficult to determine whether corrections officials are using the interstate infrastructure they created over the last thirty years.

¹⁴⁶ See, e.g., Stephanie Holmes Didwania, *The Immediate Consequences of Pretrial Detention*, AM. L. & ECON. REV. (forthcoming 2020) (manuscript at 6–13) (on file with the Harvard Law School Library) (assessing data on pre-trial release from seventy-one district courts); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 24–31 (2013) (using data from the U.S. Marshals Service, the Executive Office for U.S. Attorneys, the Administrative Office of the U.S. Courts, and the U.S. Sentencing Commission to examine arrest, booking, charging, and sentencing decisions); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 82–85 (2015) (analyzing data on federal sentences); *Research*, U.S. SENTENCING COMM’N, <https://www.ussc.gov/research/datafiles/commission-datafiles> [<https://perma.cc/D3D6-2U8M>] (providing comprehensive annual data on federal sentences). Prosecutors’ offices, where charging and plea-bargaining decisions are made, are a critical exception to this claim. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008) (noting that the “inner workings of prosecutor’s offices” are notoriously opaque). *But see* Starr & Rehavi, *supra*, at 24–26 (constructing a dataset that illuminates prosecutors’ decisions). Indeed, one might argue that the most important stages of the criminal legal process — prosecution decisions, plea bargains, and imprisonment — are the least transparent. From this perspective, the publicity of courts is the exception rather than the norm.

¹⁴⁷ See Colin Wood, *Forgotten Inmates: Can Technology Help Prisons Remember?*, GOV’T TECH. (July 17, 2015), <https://www.govtech.com/public-safety/Forgotten-Inmates-Can-Technology-Help-Prisons-Remember.html> [<https://perma.cc/X8RU-G37R>] (quoting Professor Sharon Dolovich’s description of the lack of transparency in prisons); *see also* Loïc Wacquant, *The Curious Eclipse of Prison Ethnography in the Age of Mass Incarceration*, 3 ETHNOGRAPHY 371, 385 (2002) (noting that penitentiaries were “clos[ed] . . . to social researchers . . . just as the United States was settling into mass incarceration” in the 1980s).

Freedom of information laws offer a partial solution to this problem. Each state has a sunshine statute similar to FOIA, although some states, including Arkansas,¹⁴⁸ Tennessee,¹⁴⁹ and Virginia,¹⁵⁰ allow only their citizens to make open records requests. Over the course of a year, I submitted records requests and follow-up requests to all fifty states. Those requests asked every correctional agency to disclose the number of prisoners who were serving time in an out-of-state prison; the states to which those prisoners had been transferred; the number of prisoners the state had received from another jurisdiction; the number of prisoners serving sentences in private facilities in or outside the state; the reason for each transfer; and demographic data on transferred prisoners, including their sentence length, offense of conviction, race, ethnicity, age, gender, and citizenship status.¹⁵¹

Forty-eight states responded.¹⁵² The overwhelming majority — forty-two states — provided at least some of the data I requested, though the level of detail states were willing to share varied.¹⁵³ Some states listed where they sent prisoners but not how many prisoners they transferred to each state.¹⁵⁴ Other states kept no records of the reasons for transfers.¹⁵⁵ Many states ignored, refused to answer, or claimed to have no data on questions about their use of private prisons.¹⁵⁶ Georgia and

¹⁴⁸ ARK. CODE ANN. § 25-19-105(a)(1)(A) (2019).

¹⁴⁹ TENN. CODE ANN. § 10-7-503(2)(A) (2019). Tennessee nonetheless chose to respond to my request.

¹⁵⁰ VA. CODE ANN. § 2.2-3704 (2020); *see also* Email from Ryan C. McCord, Legal Issues Coordinator, Va. Dep't of Corr., to author (Feb. 12, 2019) (on file with the Harvard Law School Library) (requesting my "legal Virginia address" in order to "compil[e] a response to [my] request").

¹⁵¹ *See, e.g.*, Letter from author to Charles L. Ryan, Dir., Ariz. Dep't of Corr. (May 17, 2018) (on file with the Harvard Law School Library).

¹⁵² After submitting requests between summer 2018 and spring 2019, I am still waiting for data from New Mexico and West Virginia. *See* Letter from author to Ashley Espinoza, Pub. Affairs Coordinator, N.M. Corr. Dep't (Jan. 27, 2019) (on file with the Harvard Law School Library); Letter from author to Rebecca Hildebrand, W. Va. Dep't of Corr. (Feb. 5, 2019) (on file with the Harvard Law School Library).

¹⁵³ *Compare, e.g.*, Letter from Billie Reich, Interstate Compact Coordinator, Mont. Dep't of Corr., to author (Feb. 11, 2019) (on file with the Harvard Law School Library) (providing extremely detailed information on Montana prisoners transferred under Interstate Corrections Compacts), *with* Letter from Lisa Weitekamp, Freedom of Information Officer, Ill. Dep't of Corr., to author (June 8, 2018) (on file with the Harvard Law School Library) (providing only a summary list of states with which Illinois had traded prisoners).

¹⁵⁴ *See, e.g.*, Email from Allison Vyncke, Interstate Corr. Compact Case Manager, Colo. Dep't of Corr., to author (Aug. 8, 2018) (on file with the Harvard Law School Library) (listing states that hold Colorado prisoners); Letter from Lisa Weitekamp, *supra* note 153 (listing states that hold Illinois prisoners).

¹⁵⁵ *See, e.g.*, Email from Cyndi Heddleston, Office of Research and Legislative Serv., Ky. Dep't of Corr., to author (Mar. 1, 2019) (on file with the Harvard Law School Library).

¹⁵⁶ The states that reported sending prisoners to out-of-state private prisons were California, Hawaii, Maine, Nevada, South Carolina, and Wyoming. The states that said that they did not send prisoners to out-of-state private facilities were Alaska, Colorado, Delaware, Indiana, Kentucky,

Kansas asked for large sums to process my request,¹⁵⁷ and Maryland and New Jersey denied my request, in the former case on the ground that I did not “adequately identify the records”¹⁵⁸ and in the latter because such records are “highly confidential.”¹⁵⁹ Arkansas and Virginia declined to provide information to anyone without a state mailing address.¹⁶⁰

In the end, I opted not to contest these denials because the states that did respond sent sometimes quite granular information that could be cross-referenced. I learned about transfers to and from New Jersey, for example, from the nineteen states that reported sending their prisoners to that state and the eighteen states that said they had received New Jersey prisoners.¹⁶¹ The same held true for transfers involving Arkansas, Georgia, Kansas, Maryland, and Virginia. By comparing data sets, I was able to compile a relatively comprehensive picture of prisoners’ movement around the country.

To be clear, these data provide only a snapshot of interstate transfers at one moment in time.¹⁶² To get a sense of how frequent transfers are,

Montana, New Hampshire, North Dakota, Oregon, Rhode Island, Utah, and Vermont. Iowa reported that it did not have prisoners in private out-of-state facilities “to the best of [its] knowledge”; Oklahoma said it did not know whether prisoners went to private facilities once they were transferred; and Kansas explained that it permits other states to house transferred Kansas prisoners in their private prisons but has no current contracts with out-of-state private providers. The rest of the states either ignored the private prison question, declined to answer it, or claimed to have no responsive data. As a result, the data reported in Part II.B likely omit some (perhaps many) prisoners in out-of-state private prisons and therefore undercount the total number of transferred prisoners. Note, moreover, that news reports suggest that some states that claimed not to use out-of-state private prisons now do. See, e.g., Colin Meyn & Alan J. Keays, *Vermont’s Out-of-State Prisoners Settling in to Mississippi Facility*, VTDIGGER (Nov. 30, 2018), <https://vtdigger.org/2018/11/30/vermonts-state-prisoners-settling-mississippi-facility> [https://perma.cc/X9GR-3GEM] (noting that in September 2018 Vermont hired CoreCivic to house Vermont prisoners in Mississippi).

¹⁵⁷ Email from Cheryl Cadue, Publ’ns Editor, Kan. Dep’t of Corr., to author (July 12, 2018) (on file with the Harvard Law School Library) (“Should you wish for the KDOC to provide the information you requested, please provide a check or money order in the amount of \$3,800.00 . . .”); Email from Jamila Coleman, Assistant Counsel, Ga. Dep’t of Corr., to author (June 13, 2018) (on file with the Harvard Law School Library) (requesting \$70 per hour for an estimated 87.67 hours of work — \$6100 total — to fulfill the records request).

¹⁵⁸ Letter from John Falvey, Records Custodian, N.J. Dep’t of Corr., to author (June 1, 2019) (on file with the Harvard Law School Library).

¹⁵⁹ Letter from Renata Seergae, Acting Dir. of Commc’ns, Md. Dep’t of Pub. Safety and Corr. Servs., to author (Feb. 11, 2019) (on file with the Harvard Law School Library).

¹⁶⁰ See Letter from Julie Benafield, Ark. Chief Deputy Att’y Gen., to author (June 4, 2018) (on file with the Harvard Law School Library); Email from Ryan C. McCord, *supra* note 150.

¹⁶¹ See FOIA Data, *supra* note 13; see also *infra* Appendix, tbl.4 (mapping interstate prison pathways based on cross-referenced FOIA data).

¹⁶² A fuzzy snapshot at that. The data in this Article span from May 2018, when I received the first response, to February 2019, when I received the last. Because states respond to FOIA requests at different rates, it is very difficult (if not impossible) to capture a single moment in time. This is one instance of a broader problem with prison data, which are often inaccurate because states use

one would need to repeat the FOIA process every few months. It is possible, however, to get some sense of flow from existing reports. Although there is very little writing on prison transfers by government or advocacy groups,¹⁶³ and almost no academic scholarship on the subject, the National Institute of Corrections compiled one brief descriptive report on interstate transfers in 2006.¹⁶⁴ Comparing that report to my data and public information on the size of state prison populations¹⁶⁵ provides a rough sense of how much states have used transfers over time. I also conducted informal interviews with prison law practitioners and with the corrections officials responsible for managing interstate transfers in several states, including California and Texas. These sources reveal a complex web of penal institutions spread across the United States.

B. Interstate Prison Pathways

When compared to the American prison system as a whole, the number of prisoners living in out-of-state facilities is tiny. Of the 1.3 million people currently held in state prisons,¹⁶⁶ just under 10,000 currently live outside their state of conviction,¹⁶⁷ and most states export no more than three percent of their prison population.¹⁶⁸ At first pass, the story of interstate transfers appears to be one of widespread nonuse.

This is not a new development. Public reports on the shrinking American prison population¹⁶⁹ could lead one to believe that prisons are

different collection methods and prison populations change daily as prisoners are admitted, transferred, and released.

¹⁶³ For exceptions to this general claim, see KIRBY, *supra* note 9; NAT'L INST. OF CORR., *supra* note 9; and RANDALL G. SHELDEN & SELINA TEJI, CTR. ON JUVENILE AND CRIMINAL JUSTICE, COLLATERAL CONSEQUENCES OF INTERSTATE TRANSFER OF PRISONERS (2012).

¹⁶⁴ NAT'L INST. OF CORR., *supra* note 9. This report was published in 2006 but based on data from 2005. *Id.* at 1. The National Institute of Corrections (NIC) is a division of the Department of Justice that was created in the 1970s. See *History*, NAT'L INST. CORR., <https://nic.gov/history-of-nic> [<https://perma.cc/8QXK-KQAD>] (describing the NIC as a response to the "major riot at New York's Attica prison" in September 1971).

¹⁶⁵ See, e.g., PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2005 (2007) (surveying state prison populations based on custody counts in December 2004, June 2005, and December 2005).

¹⁶⁶ See Sawyer & Wagner, *supra* note 10. This number does not include people incarcerated in local jails, in federal prisons, in military prisons, in tribal prisons, in mental health facilities, or in immigration detention centers. If one includes those populations, the total number of people incarcerated in the United States is 2.3 million. *Id.* State prisons thus hold roughly fifty-five percent of the total confined population. See *id.*

¹⁶⁷ FOIA Data, *supra* note 13.

¹⁶⁸ *Id.*; see *infra* Appendix, tbl.1.

¹⁶⁹ See, e.g., JACOB KANG-BROWN ET AL., VERA INST. OF JUSTICE, THE NEW DYNAMICS OF MASS INCARCERATION 5 (2018) ("Since 2007, when the country hit a peak of nearly 800 people in prison per 100,000 working age adults — over 1.6 million people total — overall prison incarceration has declined by about 1 percent on average each year."). To be clear, this decline in state prison populations over the last decade does not necessarily mean that Americans are incarcerating

downsizing and interstate transfers are declining as a result. This prediction would make sense given that cross-border transfers are one way for crowded state prison systems to rent extra space. But the overall rate of interstate transfers is roughly the same as it was in 2005, at the height of America's reliance on state prisons.¹⁷⁰ Indeed, in states including Delaware and Montana, the number of transfers has increased as states have reduced their prison populations.¹⁷¹ The evidence therefore fails to support a general theory about decarceration. Instead, it seems that interstate transfers have been a small but consistent part of American punishment since courts deemed the practice constitutional in the early 1980s.¹⁷²

In some states, however, transfers are quite common. Hawaii and Vermont, both states in which there were early legal challenges to involuntary prison transfers, have long shipped a large number of their prisoners out of state.¹⁷³ Today, Hawaii houses close to half of its prisoners in mainland prisons, and a sixth of Vermont's prison population is confined out of state.¹⁷⁴ Wyoming exports five percent of its prisoners, down from nearly a third of its prisoners in 2005.¹⁷⁵ These states rely on transfers and suggest a slightly different account: transfers may be rare against the stunning baseline of mass incarceration, but they appear to be essential to certain punishment regimes.

fewer people. In some states such as Kentucky, local jail populations have increased as state prison populations have declined. *Id.* at 6. Thus, states may be turning to different sites of incarceration rather than rejecting custodial sanctions.

¹⁷⁰ FOIA Data, *supra* note 13 (showing a national average of 2.4% prisoners exported from their states of conviction in 2005 and 1.8% in 2019). Note that the figure for 2019 may actually be higher given the number of states that declined to respond to FOIA requests or omitted data on prisoners exported to private facilities.

¹⁷¹ *See id.* (showing this trend in states such as Delaware, Hawaii, and Montana).

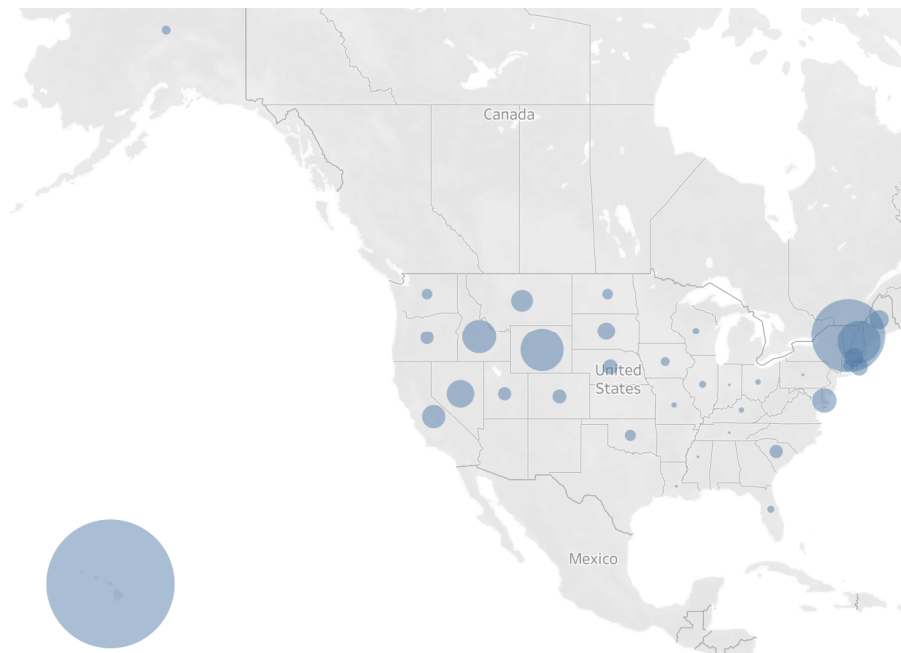
¹⁷² *See supra* pp. 1833–37 (discussing constitutional challenges to involuntary interstate prison transfers in the 1980s).

¹⁷³ *See supra* section I.B., pp. 1830–38.

¹⁷⁴ *See infra* Appendix, tbl.1.

¹⁷⁵ *See infra* Appendix, tbl.2. Alaska, too, held more prisoners out of state a decade ago. In 2005, nearly sixteen percent of Alaskan prisoners were transferred beyond the state, while in 2019 less than one percent of prisoners lived outside Alaska. *See* FOIA Data, *supra* note 13.

Figure 1: Transfers as a Percentage of Total
In-State Prison Population¹⁷⁶



¹⁷⁶ See *infra* Appendix, tbl.1 for a fuller account of this data.

Specifically, transfers appear to be concentrated in small and sparsely populated states, which depend on prisoner outsourcing.¹⁷⁷

Figure 2: States with the Highest Transfer Rates¹⁷⁸

	2005		2019	
	State	Prisoners Exported	State	Prisoners Exported
Top Exporters	Wyoming	29.2%	Hawaii	45.3%
	Hawaii	28.7%	Vermont	15.0%
	Vermont	18.7%	New Hampshire	5.2%
	Alaska	15.8%	Wyoming	5.1%
	North Dakota	4.8%	Idaho	3.2%
	Washington	3.4%	Nevada	2.1%

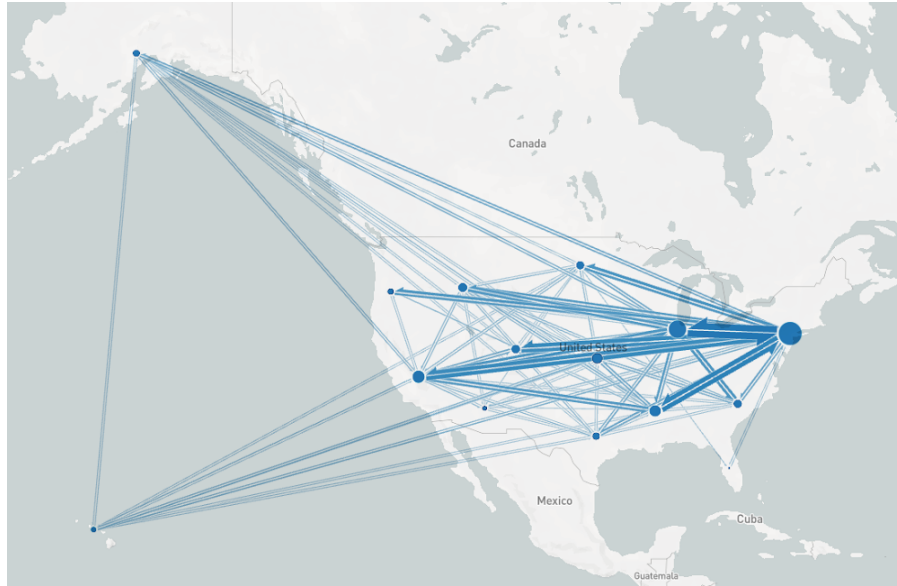
These figures suggest significant movement in certain states — notably, small “low-incarceration” states rarely mentioned in discussions of mass imprisonment. Nationally, though, the transfer rate is low and state borders appear to be remarkably resilient.

Still, the sheer scope of the interstate prison system is striking. Although the total number of transferred prisoners is relatively small, almost all states ship at least some of their prisoners beyond state borders. Only two states — Michigan and West Virginia — did not engage in interstate corrections in 2019.¹⁷⁹ Every other state shared prison beds, and not only with its neighbors. In fact, state prison officials sent prisoners all over the country:

¹⁷⁷ See *infra* Appendix, tbls.2 & 3 for a list of top importer and exporter states.

¹⁷⁸ Note that California transferred the highest raw number of prisoners — nearly 1900 — in 2019 but fails to make this list because the state’s overall prison population is so high. See *infra* Appendix, tbls.1, 2, & 3 for more data on transfers by state.

¹⁷⁹ FOIA Data, *supra* note 13; see *infra* Appendix, tbl.3 (depicting the pathways of all reported prisoner trades).

Figure 3: Interstate Prisoner Transfers in 2019¹⁸⁰

It is difficult to discern which of these pathways is most traveled because many states deemed the number of prisoners they sent to each state confidential. But it is clear that this is a national network. Colorado ships prisoners not only to Arizona, Kansas, and Utah, but also to Alaska and Maine.¹⁸¹ New Jersey sends prisoners to California, Florida, and Missouri.¹⁸² In other words, this is more than a few cases of sharing between contiguous states. Transfers often involve extraordinary distances: using conservative figures (and crow-fly distances rather than the likely longer distances visitors would have to drive on existing roads), the average length of an interstate prison transfer in 2019 was 1252 miles, almost twice the width of Texas.¹⁸³ The movement of

¹⁸⁰ See *infra* Appendix, tbl.4 for a detailed account of this data.

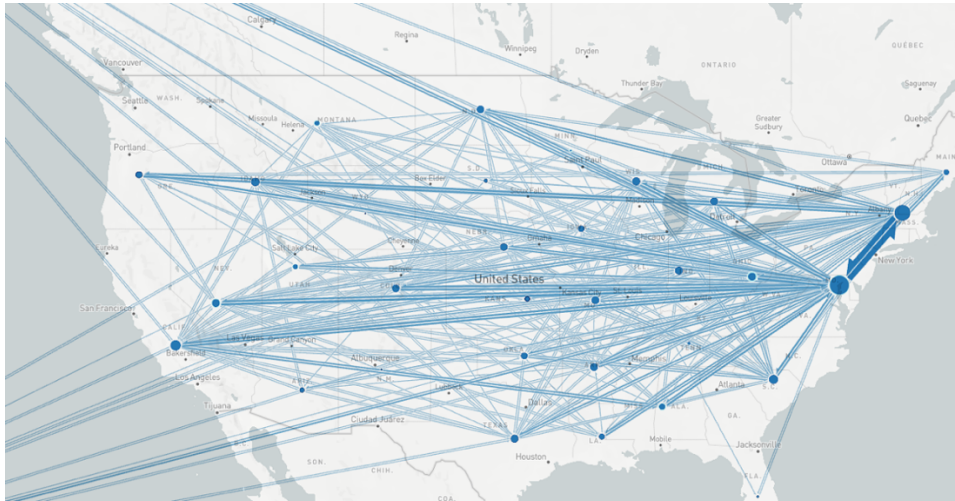
¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ I calculated this figure using publicly available zip code data. Using the average longitude and latitude of zip codes within each of the fifty states, I was able to construct a fairly accurate centered set of longitude and latitude coordinates for each state. I then determined the distance in miles between those coordinates for each interstate transfer reported by a state correctional agency. I used *one* transfer for each coordinate set — for example, one instance of a transfer from Hawaii to Arizona — because many states reported only the total numbers of transferred prisoners and a list of states to which they transferred prisoners rather than providing weighted data on how many prisoners they sent to each state. Given that many prisoners are transferred long distances — consider, for instance, Hawaii's high transfer rate — the average cited above (1252 miles) is likely

prisoners in this system looks less like regional cooperation than a highly coordinated flight map for a national airline.

Figure 4: Interstate Prisoner Transfers in 2019 — Contiguous United States¹⁸⁴



If one focuses on the location of transfers rather than their frequency, state prison systems start to look intensely interconnected.¹⁸⁵

The term “state prison system” obscures this mobility. Rather than fifty hermetically sealed state prison systems, the United States has an interlocking penal estate with negotiable, porous boundaries. State borders define this system, much more than one would expect given the capacious law on prison transfers, but territorial boundaries do not limit the operation of state prisons. Instead, those limits depend on the exercise of prison officials’ discretion. The real question, then, is when and why prison administrators choose to pay attention to state lines.

lower than a weighted average would be. The median distance of an interstate transfer using this approach is 1105 miles, and the maximum distance of any single transfer is 4893 miles.

¹⁸⁴ See *infra* Appendix, tbl.4 for a detailed account of this data.

¹⁸⁵ By contrast, correctional officials almost never agree to send foreign prisoners to serve their sentences in their countries of origin. See Emma Kaufman, *Extraterritorial Punishment*, 20 NEW CRIM. L. REV. 66, 80 (2017) (finding that state and federal correctional officials in the United States reject ninety-seven percent of applications from foreign national prisoners who seek repatriation to their countries of origin).

C. Rationales for Prisoner Transportation

Prison officials offer a range of reasons for sending prisoners outside the state. Some fall under the heading “compassionate transfers,” a category that includes removing high-risk prisoners such as former police and corrections officers from the prison population and sending prisoners to be closer to medical facilities, drug rehabilitation programs, or their families.¹⁸⁶ States transfer prisoners to alleviate overcrowding,¹⁸⁷ to “reduce mandatory overtime [payments] for correctional officers,”¹⁸⁸ and to discipline prisoners for misconduct.¹⁸⁹

Prison administrators also use transfers to regulate violence. Fourteen states indicated that they transferred prisoners who were particularly powerful, volatile, or dangerous to other prisoners.¹⁹⁰ Several states reported using transportation to handle prison unrest — for “management issue[s]”¹⁹¹ and “post[-]incident” cooldowns¹⁹² — and to confine prisoners who have previously escaped.¹⁹³ As one correctional

¹⁸⁶ FOIA Data, *supra* note 13.

¹⁸⁷ *Id.*

¹⁸⁸ Josephine Peterson & Esteban Parra, *Delaware Sending 330 Inmates to Pennsylvania at Cost of \$40,000 per Day*, DEL. NEWS J. (Nov. 8, 2018, 10:18 AM), <https://www.delaware-online.com/story/news/crime/2018/11/07/delaware-pays-pennsylvania-inmate-transfer-amidst-high-overtime-costs/1922382002> [<https://perma.cc/4MH2-73SK>].

¹⁸⁹ FOIA Data, *supra* note 13.

¹⁹⁰ *Id.*

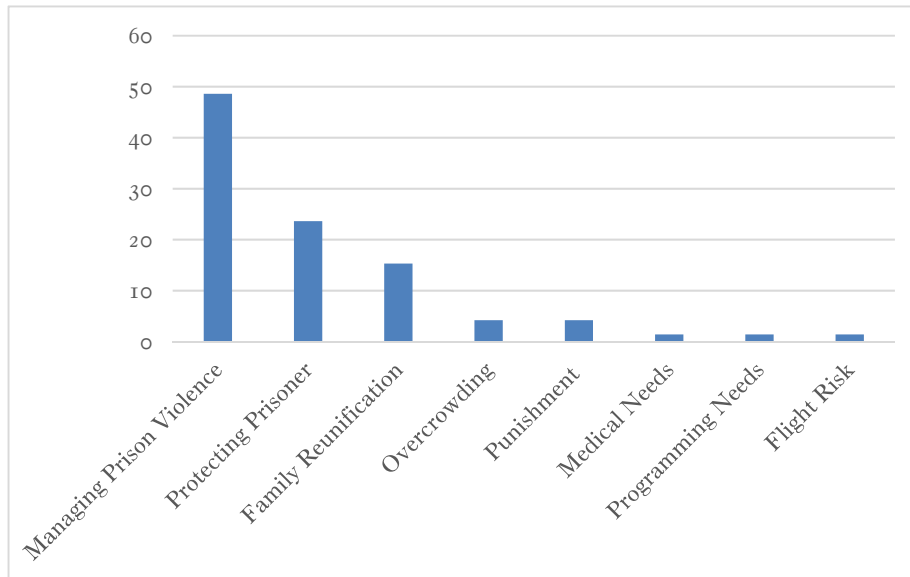
¹⁹¹ Email from Jonathan R. Eckstrom, Office of Gen. Counsel, S.C. Dep’t of Corr., to author (Feb. 4, 2019) (on file with the Harvard Law School Library); *see also* FOIA Data, *supra* note 13.

¹⁹² Email from Michelle Linster, Pub. Info. Officer, N.D. Dep’t of Corr. & Rehab., to author (Feb. 19, 2019) (on file with the Harvard Law School Library); *see also* FOIA Data, *supra* note 13. For example, the Pennsylvania Department of Corrections reported that fifty-six prisoners had been transferred into its prisons after a riot in Delaware. Email from Andrew Filkosky, Agency Open Records Officer, Pa. Dep’t of Corr., to author (June 19, 2018) (on file with the Harvard Law School Library); *see also* Andrew Knapp, *After South Carolina Riot, 48 “Problematic” Inmates Shipped to Private Mississippi Prison*, POST & COURIER (June 22, 2018), https://www.postandcourier.com/news/after-south-carolina-riot-problematic-inmates-shipped-to-private-mississippi/article_c22c925c-7626-11e8-9fcf-c75dcca4f8ec.html [<https://perma.cc/SL56-BPTE>]; Michael Tanenbaum, *Delaware to Transfer Hundreds of Inmates to Pennsylvania Prisons*, PHILLY VOICE (Nov. 8, 2018), <https://www.phillyvoice.com/delaware-prisons-pennsylvania-corrections-inmates-transfer-uprising/> [<https://perma.cc/EK26-8MGQ>].

¹⁹³ FOIA Data, *supra* note 13; *see also* NAT’L INST. OF CORR., *supra* note 9, at 12 (documenting use of the same rationales in 2005).

official put it, states tend to transfer prisoners who are “making life miserable for corrections staff.”¹⁹⁴

Figure 5: A Survey of Transfer Rationales, with Caveats¹⁹⁵



Transfers thus serve a variety of purposes. They can protect prisoners or penalize them. They can fill gaps in programming or expand prison capacity. They can make up for budget shortfalls and staffing shortages in states that cannot afford to recruit or pay the number of correction officers they need. They can bridge the distance between prisoners and their families or do precisely the opposite: operate as a

¹⁹⁴ Letter from Cord Overton, Commc’ns Dir., Iowa Dep’t of Corr., to author (Jan. 31, 2019) (on file with the Harvard Law School Library).

¹⁹⁵ It is important to clarify what this chart does and does not show. The chart depicts how often, of the total number of times that states offered explanations for their use of prison transfers, states gave each of these eight rationales. Thus, for example, just under fifty percent of the total number of explanations given in response to my FOIA requests concerned efforts to manage prison violence, and roughly five percent concerned overcrowding. Because some states declined to explain why they transferred prisoners and many offered only summary information on the general reasons they transfer prisoners rather than particular reasons for each transfer, these figures are at best partially illuminating. To determine the frequency of different transfer types — for example, the actual rate of compassionate versus punitive transfers — one would need information on individual transfer cases, which most states declined to provide.

punitive sanction, very much like formal banishment,¹⁹⁶ to make imprisonment harder and harsher on prisoners who violate prison rules. When describing transfer practices, state prison officials vacillate between these rationales.

States, moreover, sometimes *trade* prisoners rather than paying for another state's prison beds. In interviews, prison administrators described a system in which they could either lease prison space or agree to take another state's prisoners in return for their own.¹⁹⁷ Officials opt for the latter strategy when the purpose of a transfer is to maintain order by removing a particular prisoner — for example, an especially powerful prisoner — from the population rather than to rent extra prison space. States, in other words, can negotiate trades to create a specific prison population. In an article on this phenomenon, a *Baltimore Sun* reporter compared corrections officials to “general managers of a baseball team.”¹⁹⁸ Echoing this description, one prison official told me that “usually someone picks up the phone to make transfers happen” and that transfers work “exactly like baseball.”¹⁹⁹

This account underscores the scope of prison officials' discretion.²⁰⁰ Corrections compacts give prison managers enormous authority to set the location of punishment and, to some extent, the size and demographics of their prison population. This is remarkable given that prison managers often describe themselves as passive recipients of a population whose numbers and characteristics they cannot control. In fact, prison bureaucrats build and shape their own prison systems and make enormously consequential decisions about which prisoners deserve imprisonment close to home.

Prison officials appear to use this authority on a small subset of prisoners. To the extent that states maintained and shared it, the demographic data on transferred prisoners revealed few trends. The data did not, for instance, show that young people or African Americans were transferred much more than other prisoners.²⁰¹ Consistently, however, transferred prisoners were serving long sentences.²⁰² In Idaho, two-thirds of transferred prisoners had sentences of at least fifteen

¹⁹⁶ See *supra* pp. 1824–25 (distinguishing between “formal” banishment, in which officials punish a person by sending him outside the jurisdiction of conviction, and effective banishment, in which cross-border custody is an incidental — though entirely predictable — effect of other prison management decisions).

¹⁹⁷ Telephone Interview with Marshall Goff, Staff Att’y, Miss. Dep’t of Corr. (May 24, 2018).

¹⁹⁸ Del Quentin Wilber, *Prisons Wheel and Deal to Swap Troublemakers; Interstate Compact Lets Officials Quietly Transfer Prisoners*, BALT. SUN (Apr. 24, 1999), <https://www.baltimoresun.com/news/bs-xpm-1999-04-24-9904240296-story.html> [<https://perma.cc/TPK8-NWJT>].

¹⁹⁹ Telephone Interview with Marshall Goff, *supra* note 197.

²⁰⁰ West Virginia, where transfers remain unconstitutional under state law, is the exception to this claim. See *supra* pp. 1835–36.

²⁰¹ See FOIA Data, *supra* note 13.

²⁰² *Id.*

years.²⁰³ In Indiana, no transferred prisoner was serving fewer than fifteen years and the average sentence of a transferred prisoner was fifty-nine years.²⁰⁴ Long sentences were also the norm in Alaska, Colorado, Florida, Kentucky, Massachusetts, North Dakota, Oklahoma, Rhode Island, and South Dakota.²⁰⁵

This trend makes sense at first glance. If interstate transfers are expensive and difficult to arrange, one would expect corrections officials to transfer prisoners who would not come back soon. But interstate parole compacts allow prisoners to be released outside their state of conviction,²⁰⁶ so a transferred prisoner need not return to his home state. This raises a question about why states are especially likely to transport long-term prisoners.

The data alone provide no answer. Perhaps these prisoners — who in theory have less to lose because they have longer before eligibility for release — commit more infractions within prison and are being punished with transportation.²⁰⁷ Perhaps corrections officials have decided that prisoners with long sentences deserve to be near their families and are transferring people who were convicted outside their home state. Perhaps prisoners with longer sentences develop an approach to incarceration that means they protest less when forced to move and are thus more likely to be selected for transfers when prison systems become overcrowded.²⁰⁸ It would take more information and ethnographic research to explore these hypotheses, but it is clear from even a single snapshot that long-term prisoners are the ones being shuttled around the American penal estate.

The statistics on prisoner transfers also support broader conclusions about the politics of prisoner transfers. As noted above, two states —

²⁰³ See Email from Jeffrey F. Ray, Pub. Info. Officer, Idaho Dep't of Corr., to author (July 11, 2018) (on file with the Harvard Law School Library).

²⁰⁴ Email from Margaux Auxier, Commc'ns Dir., Ind. Dep't of Corr., to author (Feb. 7, 2019) (on file with the Harvard Law School Library).

²⁰⁵ FOIA Data, *supra* note 13. This list of states could be longer, as it includes only those states that provided detailed data on the sentence length for each transferred prisoner. Many states that reported transferring prisoners out of state declined to provide sentencing data.

²⁰⁶ See INTERSTATE COMM'N FOR ADULT OFFENDER SUPERVISION RULES ch. 3, r. 105 (INTERSTATE COMM'N FOR ADULT OFFENDER SUPERVISION 2014); see also *supra* p. 1832 (describing how interstate parole compacts helped justify interstate transfer compacts).

²⁰⁷ Alternatively, long-term prisoners may commit fewer in-prison offenses because they have “come grudgingly to accept the prison as their involuntary home.” Robert Johnson & Ania Dobrzanska, *Mature Coping Among Life-Sentenced Inmates: An Exploratory Study of Adjustment Dynamics*, CORRECTIONS COMPENDIUM, Nov./Dec. 2005, at 8, 8 (citing sources for the proposition that the “vast majority of lifers opt to avoid trouble”). Criminologists have long debated how long-term imprisonment affects behavior. For a classic study of this issue, see STANLEY COHEN & LAURIE TAYLOR, *PSYCHOLOGICAL SURVIVAL: THE EXPERIENCE OF LONG-TERM IMPRISONMENT* (1974).

²⁰⁸ See Johnson & Dobrzanska, *supra* note 207, at 8 (noting that “lifers” often accept that they have “little or no control over how they are treated”).

Vermont and Hawaii — are especially stark outliers in their embrace of interstate prisoner transportation.²⁰⁹ These states share characteristics: they are small, left-leaning polities where there has been significant resistance to building new prisons. In Vermont, lawmakers have repeatedly rejected the Governor’s efforts to construct new prisons inside the state.²¹⁰ Hawaii has witnessed similar debates over proposals to build new prisons on the islands or to purchase and repurpose the federal jail in Honolulu.²¹¹ At the same time, both states have struggled to decrease prison admissions.²¹² Prisoner transportation offers a solution to this dilemma — a way to reduce the state’s prison population without actually changing the number of prisoners serving state time.

Similar dynamics play out in Wyoming, though there the debate is less about opposition to prison expansion than a preference for private imprisonment. In that state, which has a relatively high transfer rate,²¹³ the legislature set aside funds to expand prison capacity in 2017, but lawmakers disagreed about whether and how to use those funds.²¹⁴ Since then, the state has signed new contracts with CoreCivic, a private

²⁰⁹ See *supra* p. 1843.

²¹⁰ See Neal Goswami, *New Vermont Prison Proposal*, WCAX (Feb. 8, 2019, 6:41 PM), <https://www.wcax.com/content/news/New-Vermont-prison-proposal-505578711.html> [https://perma.cc/8RVG-MBA8] (“The Scott administration is again asking lawmakers to consider a new, larger prison in Vermont. . . . The concept was raised last year, but lawmakers immediately rejected it.”); Xander Landen, *Scott Renews Pitch for New Prison in Franklin County*, VTDIGGER (Feb. 7, 2019), <https://vtdigger.org/2019/02/07/scott-renews-pitch-new-prison-franklin-county> [https://perma.cc/H2T6-V8CZ] (“Many in the Statehouse have been cool to the idea of building a new prison facility at a time when Democrats hope to reduce [the] prison population by enacting criminal justice reforms.”).

²¹¹ Mileka Lincoln, *Relief for Overcrowding at Hawaii Correctional Facilities Years Away*, HAW. NEWS NOW (Aug. 13, 2018, 8:20 PM), <https://www.hawaiinewsnow.com/story/38076042/hawaiiis-jail-overcrowding-crisis-worsens-causing-tension-among-inmates> [https://perma.cc/EJ59-U8ET]; Duane Shimogawa, *Hawaii May Build New Prison on Oahu, New Jails Statewide*, PAC. BUS. NEWS (Nov. 18, 2013, 4:55 PM), <https://www.bizjournals.com/pacific/news/2013/11/18/hawaii-may-build-new-prison-on-oahu.html> [https://perma.cc/2HRD-B2M5] (noting in 2013 that proposed new prisons would be “the first built in more than a generation”); *State Senate Kills Bill to Buy Federal Jail in Honolulu*, HAW. TRIB.-HERALD (Mar. 21, 2019, 12:05 AM), <https://www.hawaiitribune-herald.com/2019/03/21/hawaii-news/state-senate-kills-bill-to-buy-federal-jail-in-honolulu> [https://perma.cc/5NAZ-QDDM].

²¹² See HAWAII’S IMPRISONMENT POLICY, *supra* note 129, at 6, 36 (describing overcrowding in the state’s prisons); Dom Amato, *Vermont Officials Cope with Surging Prison Population*, WCAX (July 5, 2019, 6:49 PM), <https://www.wcax.com/content/news/Vermont-officials-cope-with-surgin-prison-population-512271932.html> [https://perma.cc/T748-BZR9] (“Ongoing efforts to reduce Vermont’s prison population . . . have fallen flat.”); *Hawaii Struggles as Overcrowding in Corrections Worsens*, CORRECTIONAL NEWS (May 2, 2018), <http://correctionalnews.com/2018/05/02/hawaii-struggles-overcrowding-corrections> [https://perma.cc/5TY2-GTQ2].

²¹³ See *supra* fig.2, p. 1845 (showing that Wyoming held nearly a third of its inmates outside the state in 2005 and remains a top prisoner exporter today).

²¹⁴ Laura Hancock, *Lawmakers Will Consider Private Prison Company to Build a New State Pen*, CASPER STAR TRIB. (Apr. 8, 2017), https://trib.com/news/state-and-regional/govt-and-politics/lawmakers-will-consider-private-prison-company-to-build-a-new/article_44e8d6b2-df4c-5ae9-8cf1-da8bda51ac30.html [https://perma.cc/KKM6-GYF7].

prison company,²¹⁵ to hold prisoners out of state.²¹⁶ As these examples illustrate, transfers work in different ways in blue and red states, but help both navigate the local politics of prison construction.²¹⁷

Transfers also ease anxiety about prison crowding. Although national data show no consistent relationship between crowding and transfer rates over time — nationally, the use of transfers seems to persist even when state prison populations decline²¹⁸ — prison officials do appear to turn to transfers when public concerns about crowding grow particularly acute. As noted in Part I, Hawaii’s now-entrenched “mainland incarceration policy” was initially a response to overcrowding in the early days of mass incarceration.²¹⁹ More recently, Wyoming cited crowding to explain its continued reliance on interstate transfers,²²⁰ and California turned to transfers to downsize its famously overcrowded prison system.²²¹

California’s story demonstrates how transfers can interact with prison litigation. In the 2011 case *Brown v. Plata*,²²² the Supreme Court upheld a cap on California’s bloated prison population that the lower court had imposed after concluding that the state could not provide constitutionally adequate healthcare while operating its prisons at nearly 200% of their design capacity.²²³ In the run-up to that ruling, California had begun transferring large numbers of prisoners — ultimately more than 10,000, some six percent of the state’s total prison population and twenty-five percent of the shift needed to meet the population cap²²⁴ —

²¹⁵ *State Prepares for Inmate Move with Prison Building Problems*, AP NEWS (May 3, 2017), <https://apnews.com/91787b83de03430baeba88e670ed5b3b> [<https://perma.cc/VG4K-6HLX>].

²¹⁶ Shane Sanderson, *Wyoming Transfers 88 Prison Inmates to Mississippi Facility to Ease Space and Staffing Concerns*, BILLINGS GAZETTE (Apr. 13, 2018), https://billingsgazette.com/news/state-and-regional/wyoming/wyoming-transfers-prison-inmates-to-mississippi-facility-to-ease-space/article_c8bdf3af-ca69-5dc2-bab2-b618e3ee96aa.html [<https://perma.cc/TE86-3BJE>].

²¹⁷ For a recent account of the politics of prison location, see generally JOHN M. EASON, *BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION* (2017) (arguing that small, stigmatized towns seek out prisons not only to stabilize their economies and provide jobs but also to “save their reputation[s],” *id.* at 17).

²¹⁸ See *supra* pp. 1842–43.

²¹⁹ See HAWAII’S IMPRISONMENT POLICY, *supra* note 129, at 36 (“The immediate necessity of dealing with prison overcrowding gave rise to the use of Hawaii’s mainland incarceration policy.”); see also James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST., (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/D99G-V4CY>] (documenting the growth in prison populations between 1950 and 2016).

²²⁰ Sanderson, *supra* note 216.

²²¹ See *supra* note 138 and accompanying text.

²²² 563 U.S. 493 (2011).

²²³ *Id.* at 502. In the lower court, a three-judge panel had ordered the California Department of Corrections and Rehabilitation to reduce the state prison population to 137.5% of its design capacity within two years. *Id.* at 509–10.

²²⁴ See MAGNUS LOFSTROM & BRANDON MARTIN, PUB. POLICY INST. OF CAL., *PUBLIC SAFETY REALIGNMENT: IMPACTS SO FAR* (2015), <https://www.ppic.org/publication/public->

to prisons outside the state.²²⁵ Seven years later, after a decline in the state prison population, the number of out-of-state prisoners had fallen to less than 3000.²²⁶ By 2019, the head of California's Contract Beds Unit, a division of the Department of Corrections "whose mission is to transfer inmates out of state for the purpose of temporarily alleviating overcrowding,"²²⁷ reported that the state was budgeted to be "out of the interstate business" by the middle of that year.²²⁸

California's turn to prisoner transfers is a less well-known response to *Plata* than "realignment," a package of reforms that shifted state prisoners to county and local jails.²²⁹ But interstate transfers were a critical part of the state's effort to comply with the ruling, and like realignment, they demonstrate that court-ordered population limits can lead to prisoners' relocation rather than decreased reliance on prisons. As one prison official explained, interstate transfers are "a good outlet for a population cap."²³⁰

These accounts suggest that prisoner transportation is a tool in times of political crisis. In small states, transfers are a safety valve in a system where the appetite to build state prisons does not match the drive to incarcerate. In big, overcrowded prison systems, transfers are a stopgap measure when courts mandate population limits. Not all interstate transfers can be explained on these grounds, and not all states rely on transfers to break political stalemates. One might wonder, for instance, why Massachusetts and Rhode Island do not use transfers more.²³¹ But the pattern of transfers in states like Vermont, Hawaii, Wyoming, and California demonstrates that prisoner transportation is as much a reflection of the political climate as it is a mechanism for internal prison management.

Ultimately, transfers are a way to operate state prisons without changing practices at the front end of the criminal justice system. Though they seem different, transfers to placate opponents of prison construction and transfers to reduce crowding are both ways to confine people when prison admissions exceed prison capacity. These strategies

safety-realignment-impacts-so-far [<https://perma.cc/4VK5-BGKH>] (noting that *Plata* required California to reduce its state prison population by almost 40,000 people).

²²⁵ Scott Graves, *California Prepares to Say Goodbye to Out-of-State Prisons*, CAL. BUDGET & POL'Y CTR. (July 26, 2018), <https://calbudgetcenter.org/blog/california-prepares-to-say-goodbye-to-out-of-state-prisons> [<https://perma.cc/MGT9-QSGT>].

²²⁶ *Id.*

²²⁷ *Out of State Prison Facilities*, CAL. DEP'T CORRECTIONS & REHABILITATION, <https://www.cdcr.ca.gov/visitors/CA-out-of-state-facilities> [<https://perma.cc/2YDW-LJA2>].

²²⁸ Telephone Interview with J.W. Moss, *supra* note 3.

²²⁹ See, e.g., LOFSTROM & MARTIN, *supra* note 224 (describing the effects of realignment).

²³⁰ Telephone Interview with J.W. Moss, *supra* note 3.

²³¹ One tentative thesis is that prison officers and their unions have objected to transfers in these states. See Eisenberg, *supra* note 132, at 93–94 (discussing prison officers' resistance to prison downsizing); *infra* notes 266–267 and accompanying text (same).

allow prosecutors and judges to send more people to prison than the state can safely or constitutionally confine. If Vermont, Hawaii, or Wyoming had to house all of its own prisoners in existing state facilities, the state's prisons would be too full to function, and, as *Plata* suggests, would likely run afoul of the Eighth Amendment. And if Delaware — which recently transferred more than 300 prisoners to Pennsylvania to reduce mandatory overtime payments to prison officers²³² — could not outsource its prisoners, the state would have to increase its corrections budget, which, given Delaware's balanced budget requirement, may mean cutting funds elsewhere.²³³

Focusing on transfers thus exposes a deeper constitutional deficiency in American prisons than one can glean from a survey of cases on harsh prison conditions. Interstate transfers reveal the degree to which states — including those that are not subject to structural injunctions or media coverage — struggle to ensure prison safety, pay prison officers, and meet basic constitutional requirements.²³⁴ Prisoner trades show that some states could not run constitutional prison systems if they could not export their prisoners. Transfers also demonstrate that small states with reputations for relatively hospitable prisons and low incarceration rates — Vermont, Hawaii, and New Hampshire have some of the lowest in the nation²³⁵ — are overincarcerating insofar as they sentence more people to prison than they can legally, politically, or actually afford to hold.

III. REGULATING THE PRISONER TRADE

The preceding Parts expose a puzzle about American imprisonment. On one hand, lawmakers have expended considerable energy building a custodial network in which prisoners can be traded, shared, and sold. On the other hand, prison officials export fewer prisoners than they could. Cross-border transfers are a critical tool of prison management, but prison governance is not nearly as integrated as the architects

²³² See Peterson & Parra, *supra* note 188.

²³³ See Ronald K. Snell, *State Constitutional and Statutory Budget Requirements for Balanced Budgets*, NAT'L CONF. ST. LEGISLATURES (Mar. 2004), <https://www.ncsl.org/research/fiscal-policy/state-constitutional-and-statutory-requirements-fo.aspx> [<https://perma.cc/585C-Q9RD>].

²³⁴ The claim here is not that constitutional requirements are especially onerous, but rather that states struggle to meet even a minimal constitutional baseline given the numbers of people being funneled into state prison systems. For a discussion of how and why the Eighth Amendment fails to serve as a meaningful check on the harsh conditions found in many American prisons and jails, see Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 935–64 (2009).

²³⁵ See LAUREN-BROOKE EISEN & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE UPDATE: CHANGES IN STATE IMPRISONMENT RATES 4 tbl.1 (2016), <https://www.brennancenter.org/sites/default/files/analysis/UpdateChangesinStateImprisonment.pdf> [<https://perma.cc/L67E-JGFC>]; Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> [<https://perma.cc/5R5H-LQ6B>].

of prison compacts imagined. This fallow legal regime raises questions about how territorial punishment ought to be.

Answering those questions requires an account of the normative stakes of prisoner transportation. This Part maps the costs, benefits, and implicit assumptions of the prisoner trade. It begins with the practical harms: increased distance from home, worse conditions, reduced access to courts and reentry programs, and perverse incentives to incarcerate. It then turns to the more formal objection: a state's power to punish extends only to its jurisdictional and territorial boundaries. To be legitimate, punishment for state crimes must take place within state lines.

After airing that objection, Part III examines the upsides of mobility, which include better and more efficient delivery of services to a group of people in desperate need of healthcare, housing, and access to family. The Article concludes by proposing a regulatory framework that would balance these concerns and bring courts into the debate over extraterritorial punishment.

A. *The Harms*

Political actors have long recognized that it can be harmful to ship prisoners beyond their jurisdiction of conviction. The pains of long-distance punishment were invoked to justify transportation in the eighteenth century and then to oppose it when the penitentiary emerged as an alternative.²³⁶ In 1802, Jeremy Bentham defended his proposal for the panopticon on the ground that transportation punishment, then the reigning noncapital sanction, was harsh, ineffective, and “flagrantly reprehensible.”²³⁷ Seventy years later, when Georgia added a transportation ban to its constitution, state legislators condemned the ongoing practice of convict leasing as a despotic and “barbarous” act.²³⁸

These critiques still resonate. Today, as in 1802, transportation separates prisoners from their families. Of course interstate transfers are not the only aspect of imprisonment that severs family ties. Imprisonment is intentional displacement, a sanction meant to remove people from their communities. If this is unacceptable, the real objection is to prisons, not transfers.

²³⁶ See Ekirch, *supra* note 16, at 1286–87; Kercher, *supra* note 16, at 530–31; Franklin, *supra* note 27.

²³⁷ Jeremy Bentham, *Panopticon Versus New South Wales: Or, the Panopticon Penitentiary System, and the Penal Colonization System, Compared*, reprinted in 4 THE WORKS OF JEREMY BENTHAM, 173, 186 (Edinburgh, John Bowring ed., 1843); see also Jeremy Bentham, *Principles of Penal Law*, reprinted in 1 THE WORKS OF JEREMY BENTHAM, 367, 420–23 (Edinburgh, John Bowring ed., 1843) (defending imprisonment on the ground that punishments ought not be more harmful than necessary, *id.* at 420); John Hirst, *The Australian Experience: The Convict Colony*, in THE OXFORD HISTORY OF THE PRISON, *supra* note 18, at 263, 274 (noting that Bentham, “the most persistent” critic of convict colonies, saw transportation punishment as an inhumane alternative to the panopticon and a threat to “his version of the penitentiary”).

²³⁸ SMALL, *supra* note 35, at 96.

State borders are also a rough proxy for proximity to home. Prisoners are not always convicted where they live, and it is the site of a crime rather than one's residence that determines where a criminal prosecution may lie. Even when people are convicted at home, moreover, states vary dramatically in size. Being imprisoned anywhere in California is very different from being imprisoned anywhere in New Hampshire. Given the arbitrariness of state lines, a prisoner from Chicago might prefer incarceration in Hammond, Indiana, to a prison in Springfield, Illinois.

For all of these reasons, the real harm of imprisonment is distance from home, which is not unique to out-of-state incarceration.²³⁹ There is no question, however, that interstate transfers result in extraordinary dislocation — more, on net, than would occur in the absence of interstate agreements. Take Hawaii prisoners in custody in Arizona.²⁴⁰ These prisoners live thousands of miles from their families, as do prisoners shipped from Alaska to Colorado, New Hampshire to Arizona, and Florida to Washington State.²⁴¹ As Part II noted, the average distance of an interstate prison transfer is more than 1200 miles, which is roughly equivalent to the twenty-hour drive from Florida to Rhode Island.²⁴²

This figure is striking given the relationship between imprisonment and poverty. Prisoners are “dramatically concentrated at the lowest ends of the national income distribution”²⁴³ — one recent study concluded that prisoners “had a median annual income of \$19,185 prior to their incarceration”²⁴⁴ — and prisoners' families are disproportionately likely to be poor.²⁴⁵ For low-income families, even the cost of phone

²³⁹ Although courts have upheld extraordinary restrictions on prison visits, they have also long recognized that prisoners retain some right to see their family members. *See Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (“We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration . . .”); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that the right to marriage survives incarceration); *Procunier v. Martinez*, 416 U.S. 396, 408–09 (1974) (invalidating a mail censorship regulation on the ground that it implicated the First and Fourteenth Amendment rights of people outside prison).

²⁴⁰ *See* FOIA Data, *supra* note 13.

²⁴¹ *See infra* Appendix, tbl.4.

²⁴² *See supra* p. 1846.

²⁴³ Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POLY INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/XW4V-T9G6>].

²⁴⁴ *Id.* This is “41% less than non-incarcerated people of similar ages.” *Id.* (emphasis omitted).

²⁴⁵ *See Half of Americans Have Family Members Who Have Been Incarcerated*, EQUAL JUST INITIATIVE (Dec. 11, 2018), <https://eji.org/news/half-of-americans-have-family-members-who-have-been-incarcerated> [<https://perma.cc/8EXX-C9WD>] (“[T]he proportion of people who have had an immediate family member incarcerated increases as income declines.”).

calls from prison can be a struggle.²⁴⁶ The cost of a 1200-mile trip can be prohibitive.²⁴⁷

Again, this is a problem of degree; distance is always an impediment to prison visitation. But travel costs become especially inhibitory when prisoners cross state borders. In large states including California, New York, and Texas, the Department of Corrections runs subsidized (sometimes free) bus services between prisons and major cities.²⁴⁸ These bus systems develop because a critical mass of prisoners from cities are confined in rural state prisons.²⁴⁹ The number of prisoners transferred to other states, by contrast, is relatively small,²⁵⁰ which means there is no analogous economy of scale to prompt an interstate bus system. Here, interstate transfers pose a special harm because the infrastructure built in and around prisons assumes in-state incarceration.

A similar concern arises with reentry programs. Interstate transfers remove prisoners from state-specific reentry and vocational programs — for example, electrical-trade training programs that culminate in a job certification from the state Department of Labor²⁵¹ — that ease prisoners' return to society and improve their job prospects upon release. There

²⁴⁶ There is considerable advocacy and litigation over the cost of prison phone calls. *See, e.g.*, *Global Tel*Link v. FCC*, 866 F.3d 397, 412 (D.C. Cir. 2017) (holding that the FCC lacked statutory authority to cap intrastate prison call rates); Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL'Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html#disparity_table_excerpt [<https://perma.cc/2BGC-ADEK>] (listing prison and jail call rates in all fifty states). Although rates vary, the cost to call home from an in-state prison may be as much as \$4.80 for fifteen minutes. *See* Wagner & Jones, *supra*. This is a considerable sum given that prisoners earn, on average, fourteen to sixty-three cents per hour for their labor in typical prison jobs. *See* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages> [<https://perma.cc/Z7G2-X5UB>].

²⁴⁷ *See, e.g.*, Eli Hagar & Rui Kaneya, *The Prison Visit that Cost My Family \$2,370*, MARSHALL PROJECT (Apr. 12, 2016, 7:00 AM), <https://www.themarshallproject.org/2016/04/12/the-hawaii-prison-visit-that-cost-my-family-2-370> [<https://perma.cc/WAF5-PXQY>] (describing the cost of a visit to a Hawaii prisoner held in Arizona).

²⁴⁸ *E.g.*, Dionna Harding, *Bus Trips to Correctional Facilities in New York State*, LEGAL BEAGLE (Oct. 18, 2017), <https://legalbeagle.com/12398747-bus-trips-to-correctional-facilities-in-new-york-state.html> [<https://perma.cc/B8LV-4BRF>]; *Get on the Bus Program*, CAL. DEP'T CORRECTIONS & REHABILITATION, <https://www.cdcr.ca.gov/visitors/visitors/get-on-the-bus> [<https://perma.cc/5VQ5-KE62>]; TEX. PRISON SHUTTLE, <https://www.texasprisonshuttle.org> [<https://perma.cc/ZV7W-L42Q>]; *Welcome to the Family Express!*, CTR. FOR RESTORATIVE JUST. WORKS, <https://familyexpress.us> [<https://perma.cc/K6PJ-YEEZ>]. Though these shuttles facilitate visitation, they have been criticized as an unpleasant, ineffective alternative to building prisons closer to the cities from which most prisoners come. *See* Johnna Christian, *Riding the Bus: Barriers to Prison Visitation and Family Management Strategies*, 21 J. CONTEMP. CRIM. JUST. 31, 40-41 (2005).

²⁴⁹ Thanks to Professor Rachel Barkow for making this point about bus systems.

²⁵⁰ *See supra* p. 1842.

²⁵¹ *See, e.g.*, *Programs*, N.Y. ST. DEP'T OF CORRECTIONS & COMMUNITY SUPERVISION, <https://doccs.ny.gov/programs> [<https://perma.cc/BUU4-SBGA>] (listing vocational training programs).

is also significant evidence that visits from family reduce recidivism by helping prisoners maintain ties to the communities to which they will return.²⁵² To the extent that interstate transfers deter visits, they increase that recidivism risk.

Finally, transfers affect the conditions of incarceration. Although prison conditions depend on highly localized features of institutional culture such as which warden is in charge,²⁵³ it is possible to make generalizations about state penal systems. States incarcerate people at different rates — strangely enough, *U.S. News & World Report* ranks the “best states for corrections” on this metric²⁵⁴ — and with different degrees of racial disparity.²⁵⁵ States have better or worse prison programs²⁵⁶ and pay prisoners different wages for their labor, from nothing in Arkansas to two dollars an hour in New Jersey.²⁵⁷ Some state prison systems are especially overcrowded²⁵⁸ or short-staffed,²⁵⁹ and many states (most recently Alabama) have been investigated and enjoined for failure to ensure minimally adequate living conditions.²⁶⁰ Prisoners

²⁵² See, e.g., MINN. DEP’T OF CORR., THE EFFECTS OF PRISON VISITATION ON OFFENDER RECIDIVISM iii (2011), https://mn.gov/doc/assets/11-11MNPrisonVisitationStudy_tcm1089-272781.pdf [<https://perma.cc/UVQ7-ZMZ9>] (collecting prior studies and, based on a four-year study of 16,420 Minnesota prisoners, concluding that “visitation significantly decreased the risk of recidivism”); Christian, *supra* note 248, at 33; Alex Friedmann, *Lowering Recidivism Through Family Communication*, PRISON LEGAL NEWS (Apr. 15, 2014), <https://www.prisonlegalnews.org/news/2014/apr/15/lowering-recidivism-through-family-communication> [<https://perma.cc/KLM2-4KEL>]; cf. *Brandon v. State Dep’t of Corr.*, 938 P.2d 1029, 1032 (Alaska 1997) (assessing though not resolving an Alaska prisoner’s claim that his transfer to Arizona inhibited visits from family and therefore violated his right to rehabilitation under the Alaska state constitution).

²⁵³ For classic criminological studies of the relationship between prison management and prison conditions, see JAMES JACOBS, STATEVILLE (1977); GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON (1958). For recent examples, see BEN CREWE, THE PRISONER SOCIETY: POWER, ADAPTATION, AND SOCIAL LIFE IN AN ENGLISH PRISON (2009); ALISON LIEBLING, PRISONS AND THEIR MORAL PERFORMANCE (2004).

²⁵⁴ *Corrections Rankings: Measuring the Efficiency of State Prison Systems*, U.S. NEWS & WORLD REP., <https://www.usnews.com/news/best-states/rankings/crime-and-corrections/corrections> [<https://perma.cc/4F7B-CN6W>]. Note that two of the “best” prison systems in this ranking are Hawaii and Vermont, both of which transfer relatively high numbers of their state prisoners to out-of-state facilities. See *supra* fig.2, p. 1845.

²⁵⁵ *The Facts: State-by-State Data*, SENTENCING PROJECT, <https://www.sentencingproject.org/the-facts/#map?dataset-option=BWR> [<https://perma.cc/SR67-3GTL>] (showing racial disparities in state incarceration rates).

²⁵⁶ See, e.g., Margaret diZerega, *College in Prison*, VERA INST. FOR JUST., <https://www.vera.org/projects/college-in-prison> [<https://perma.cc/8SHW-68GL>] (mapping the availability of college programs in prison by state).

²⁵⁷ Sawyer, *supra* note 246.

²⁵⁸ The California state prison system prior to the population cap upheld in *Brown v. Plata* is a good example.

²⁵⁹ See, e.g., Peterson & Parra, *supra* note 188 (describing thinly staffed prisons in Delaware).

²⁶⁰ U.S. DEP’T OF JUSTICE & U.S. ATT’Y’S OFFICES FOR THE N., MIDDLE, AND S. DIST. OF ALA., INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN (2019), <https://assets.documentcloud.org/documents/5793211/DOJ-Report-on-Alabama-Prisons.pdf>

transferred into these failing prison systems face a significant change in their quality of life. To be sure, conditions vary between facilities within state prison systems too. But insofar as there are statewide prison cultures and statewide prison conditions, prisoner transportation can aggravate the “pains of imprisonment.”²⁶¹

Transfers may also increase prison violence. Although prison officials cite violence reduction as a reason to remove prisoners, a steady stream of anecdotal evidence indicates that transfers heighten pressure inside penal institutions. In 2004, prisoners at a private prison in Colorado rioted after “growing tension” over “the presence of . . . inmates recently shipped in from Washington and Wyoming to fill beds.”²⁶² Three years later, prisoners from Arizona staged an uprising after being transferred to an Indiana state prison.²⁶³ In 2010, a large group of Vermont prisoners confined in a private prison in Tennessee “were controlled with chemical spray” after refusing to return to their cells.²⁶⁴ These stories suggest that transfers trigger violence by dislocating prisoners and upsetting social hierarchies built around geographic identification. They also expose a revolving-door phenomenon in which transfers to ease violence in one place beget it in another.

The concern about prison conditions grows as more prisoners are transferred. Take a state with expensive rehabilitative programs or highly paid correctional officers that decides to save money by sending its prisoners to a state with fewer programs or underpaid employees, and, consequently, worse conditions. Or consider a state where a sudden legal change — for example, a court-ordered improvement in prison conditions — makes it attractive to ship prisoners to a neighboring state rather than incarcerating fewer people or paying for better prisons. Nothing in federal law prevents such a state from sending *all* of its prisoners to the harsher prison system, and nothing prevents many states

[<https://perma.cc/6U5C-EZB4>]; see also Debbie Elliott, *Alabama Faces Deadline to Address Dangerous and Deadly Prison Conditions*, NPR (May 21, 2019, 9:49 AM), <https://www.npr.org/2019/05/21/725066218/alabama-faces-deadline-to-address-dangerous-and-deadly-prison-conditions> [<https://perma.cc/EB2C-9GTP>]. For a history of structural injunctions against state prison systems, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 39–43 (1998).

²⁶¹ See SYKES, *supra* note 253, at 63 (coining this famous phrase).

²⁶² Alan Prendergast, *Crowley Prison Riot: New Details of Unheeded Warnings Emerge in Epic Lawsuit*, WESTWORD (Dec. 21, 2011, 12:02 PM), <https://www.westword.com/news/crowley-prison-riot-new-details-of-unheeded-warnings-emerge-in-epic-lawsuit-5863180> [<https://perma.cc/LC3W-7J3X>].

²⁶³ *Inmates Riot at Indiana Prison*, CBS NEWS (Apr. 24, 2007, 3:28 PM), <https://www.cbsnews.com/news/inmates-riot-at-indiana-prison> [<https://perma.cc/59J8-UVQ8>].

²⁶⁴ Neal P. Goswami, *35 Vermont Inmates Riot in Tennessee Prison*, BENNINGTON BANNER (May 13, 2010, 9:13 PM), <https://www.benningtonbanner.com/stories/35-vermont-inmates-riot-in-tennessee-prison,77152> [<https://perma.cc/BSH9-HS38>].

from transferring their prisoners en masse.²⁶⁵ Constitutional law thus permits a perverse dynamic in which states overincarcerate with impunity and those with the cheapest prison systems become, in effect, wardens for the rest of the country.

One might ask why this sort of national migration has not taken place. It may be that well-organized prison officer unions have resisted interstate prisoner transfers in the name of job protection.²⁶⁶ In a discussion about transfers, one prison staff member told me that “corrections officers would push back if [the state began] transferring large numbers.”²⁶⁷ State correctional agencies may not have recognized the full extent of their power to outsource punishment or may be proud of their prisons and reluctant to send prisoners to systems they perceive as worse than their own.²⁶⁸ States may not have funded and built the full physical and informational infrastructure — buses, planes, computer databases, contracts, lawyers, correctional administrators — required to transfer and monitor tens of thousands of prisoners.

Whatever the source of the resilience of state borders, it is not *law* that is limiting transfers. To the contrary, current doctrine insulates states from the costs of their incarceration policies, and states like California, Delaware, Hawaii, Vermont, and Wyoming have taken note.²⁶⁹ As practices in these states illustrate, one of the harms of prison compacts is that they connect penal institutions in a way that can skew incentives in state criminal justice systems. Transfers make the post-conviction criminal legal system national, while the preconviction system remains a product of state law and local enforcement practices.

²⁶⁵ See *supra* section I.B, pp. 1830–38 (discussing the law of prison transfers).

²⁶⁶ This sort of organized opposition to prison transfers has occurred in other contexts. See, e.g., Kaufman, *supra* note 185, at 81–85 (describing efforts by prison officers’ unions and other state correctional officials to resist international prisoner transfers). For an account of the power and lobbying efforts of prison officers’ unions, see Eisenberg, *supra* note 132, at 74, 93–96 (“Because of their political clout, officers’ unions historically have been able to mobilize widespread support for their aims.” *Id.* at 74.).

²⁶⁷ Telephone Interview with Marshall Goff, *supra* note 197.

²⁶⁸ Ethnographers have observed this dynamic in prisons. See, e.g., EMMA KAUFMAN, PUNISH AND EXPEL: BORDER CONTROL, NATIONALISM, AND THE NEW PURPOSE OF THE PRISON 99 (2015) (noting, in a study of British prisons, that prison officers expressed a “complex blend of protectiveness, defensiveness, and ownership” over prisoners’ wellbeing). Recent efforts by correctional administrators to limit or oppose solitary confinement also suggest that some states are concerned about the relative harshness of their prison systems. See, e.g., Cheryl Corley, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement*, NPR (July 31, 2018, 5:01 AM), <https://www.npr.org/2018/07/31/630602624/north-dakota-prison-officials-think-outside-the-box-to-revamp-solitary-confineme> [<https://perma.cc/GH6E-QSY6>] (describing the North Dakota Director of Corrections’s effort to reduce “the use of isolation”); John Lam, *Humane Approach to Solitary Confinement*, SAN QUENTIN NEWS (Dec. 1, 2015), <https://sanquentinnews.com/humane-approach-solitary-confinement> [<https://perma.cc/ASY4-2C2H>] (describing similar efforts in Washington State).

²⁶⁹ See *supra* section II.C, pp. 1848–55 (noting that these states transfer significant numbers of their prisoners out of state).

This mismatch between the jurisdictional boundaries at the front and back of state criminal justice systems threatens to promote overincarceration and channel prisoners into cheaper, worse prisons.

The jurisdictional gap between criminal law and prisons also causes basic legal problems for transferred prisoners. Part I noted that prisoners sent across state lines remain in the constructive custody of their home state.²⁷⁰ As a practical matter, this means that transferred prisoners must litigate habeas suits in their jurisdiction of conviction rather than the court systems where they are held. Transferred prisoners have to navigate parole hearings from afar, often in absentia, and are subject to the rules for sentence reduction — known as “good time” credits — of the state in which they were convicted.²⁷¹ So, for example, a prisoner convicted in California and sent to Florida has to sue in California court to contest his conviction and has to defend his eligibility for parole in California from across the country. He must follow California’s good time regulations and, because Florida has different prison programs, will likely lose good time credit (that is, end up with a longer sentence) by virtue of his transfer.²⁷² If assaulted or denied access to a law library, that prisoner has to file an internal grievance before bringing a civil rights suit — but first, he has to determine whether California or Florida grievance procedures apply, a question on which courts disagree.²⁷³

Transfers also trigger legal disputes over medical care and impede access to counsel. Although compacts typically require sending states to bear the cost of a prisoner’s serious medical expenses, states debate when a condition is grave enough to warrant payment. In an ongoing case in Illinois, for example, a diabetic prisoner from New Jersey has alleged that his medical care was unconstitutionally delayed, leading to serious physical harm. In explaining that delay, the Illinois Department of Corrections has claimed that its surgeons were waiting for approval from New Jersey.²⁷⁴ In another case — this time, involving a transfer from Illinois to Florida — a prisoner lost contact with her lawyers and family when she disappeared from both states’ inmate locator systems

²⁷⁰ See *supra* notes 80–90 and accompanying text.

²⁷¹ See *supra* note 89.

²⁷² See Telephone Interview with J.W. Moss, *supra* note 3 (describing variation between states’ good time requirements).

²⁷³ The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2012), requires prisoners to exhaust their administrative remedies before bringing § 1983 suits concerning prison conditions. The Supreme Court has interpreted this mandatory exhaustion requirement narrowly. See, e.g., *Ross v. Blake*, 136 S. Ct. 1850, 1855 (2016) (invalidating the Fourth Circuit’s “special circumstances” exception to the exhaustion requirement). As a result, prisoners must navigate the (often byzantine) grievance procedures in prison before turning to courts for relief. See cases cited *supra* notes 87, 143 (collecting split authority on which state’s grievance procedures apply in the case of an interstate transfer).

²⁷⁴ Defendants’ Motion for Summary Judgment, *supra* note 88, at 33.

during and after her relocation.²⁷⁵ Practitioners report that the problem of “disappearing prisoners” is common in transfer cases.²⁷⁶ As these examples demonstrate, transfers create a dizzying array of consequences for the length of prisoners’ sentences and their access to courts.

These legal dilemmas distinguish interstate transfers from imprisonment in the federal prison system. In many ways, interstate incarceration looks like federal incarceration: prisoners can be shipped anywhere in the country, often far from family. But the Bureau of Prisons attempts to keep federal prisoners within 500 miles of home,²⁷⁷ less than half the distance of the average interstate transfer. And interstate transfers involve a jurisdictional border crossing that federal transfers do not. Federal prisoners are subject to one regulatory regime promulgated by the Bureau of Prisons and governed by federal law. As a result, they need not grapple with conflicts of law concerning habeas, entitlement to reentry programs, liability for medical care costs, and rules for discretionary release. Because its pre- and postconviction boundaries align, the federal prison system also lacks the pathological dynamics around outsourcing that are evident in states like Hawaii and Vermont.²⁷⁸ In short, there are distinct harms that arise from crossing a jurisdictional boundary, which compound the difficulties of distance from home.

The most abstract of these harms concerns the legitimacy of criminal punishment. To this point, the list of problems created by prison transfers has been functional: difficulty seeing family, delayed medical care, and so on. Interstate transfers also impose a more formal — though no less acute — challenge to one dominant theory of domestic criminal law.

In the classic liberal account of punishment, a state’s power to imprison flows from a democratic decision to make certain conduct criminal and to authorize incarceration as the sanction for that crime.²⁷⁹ This theory treats punishment as legitimate because it is tied to the collective

²⁷⁵ Telephone Interview with Nicole Schult, Uptown People’s Law Ctr. (Jan. 15, 2020).

²⁷⁶ *Id.*

²⁷⁷ See FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, PROGRAM STATEMENT, SECURITY DESIGNATION AND CUSTODY CLASSIFICATION MANUAL, ch. 2, at 5 (1999); see also FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, CHANGE NOTICE, INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION (2019), https://www.bop.gov/policy/progstat/5100_008cn.pdf [<https://perma.cc/8W7N-5Z3R>].

²⁷⁸ See *supra* p. 1855.

²⁷⁹ Philosophers of punishment have explored the relationship between democratic theory and the public character of criminal law. See, e.g., R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 36–39 (2001) (discussing liberal theories of punishment predicated on the social contract); R.A. Duff, *A Criminal Law for Citizens*, 14 THEORETICAL CRIMINOLOGY 293, 301 (2010) (“For a republican, law must be our law as citizens, a ‘common’ law that we make for ourselves, not a law made for us and imposed on us by a sovereign; citizens must be able to understand themselves as authors as well as addressees of the law.”); Zedner, *supra* note 11, at 43–45 (“The historically dominant account of the state as a sovereign who issues commands loyally obeyed by obedient subjects has been overlaid by liberal democratic accounts of the relationship between state and citizen as based upon mutual agreement or contract.” *Id.* at 44.).

choices of a bounded community. Traditionally, those boundaries have been territorial. (Thus Mississippi's jurisdiction to punish crime arises from the fact that a crime was committed in Mississippi.) The boundaries of criminal law need not be territorial; in Roman law, for example, criminal jurisdiction arose from a person's citizenship and followed Roman citizens wherever they went.²⁸⁰ But in the United States, much domestic criminal law operates on the idea that a state's penal power stems from and stops at state lines.²⁸¹ Criminal law scholars refer to this idea as the "principle of territoriality."²⁸²

In such a legal regime, it is unlawful to imprison someone if the criminal code does not permit imprisonment as a sanction — say, for a minor offense where the authorized punishment is a fine — because doing so would be undemocratic. And it is unlawful to imprison someone for conduct committed outside the democratic community that has deemed the action criminal — say, for taking drugs in another state or selling drugs in another country — because doing so would violate a territoriality norm. There are workarounds when these rules prove too constraining, such as laws authorizing extradition²⁸³ and making it a domestic criminal offense to commit a crime abroad.²⁸⁴ But their existence illustrates the point: the baseline assumption in many areas of domestic criminal law is that the authority to punish derives from a social compact, applies to members of that compact, and extends to the territorial borders of their community.²⁸⁵ Where punishment exceeds these boundaries, it is illegitimate and unauthorized in the absence of a legal fix.

²⁸⁰ Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1155 (1971).

²⁸¹ Zedner, *supra* note 11, at 46 ("In . . . classical accounts of the power of the sovereign . . . , the scope of domestic criminal law is . . . clearly bounded. It extends only to the borders of the sovereign realm . . . — the so-called 'principle of territoriality.'"). This concern about extraterritorial punishment also surfaces in the Supreme Court's punitive damages jurisprudence. See Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of Philip Morris v. Williams*, 46 WILLAMETTE L. REV. 449, 457 (2010) (discussing the "persistent appearance of the extraterritoriality concern" in cases limiting the reach of punitive damages awards).

²⁸² Zedner, *supra* note 11, at 46; see also Perkins, *supra* note 280. Note that this is a term of art in criminal law, distinct from uses of the term "territoriality" in other fields.

²⁸³ See 18 U.S.C. § 3181–3196 (2012) (defining conditions under which extradition is permitted); *id.* § 3184 (authorizing U.S. district courts to issue warrants for individuals subject to extradition under a treaty or convention to which the United States is a party); CHARLES DOYLE, CONG. RESEARCH SERV., RS22702, AN ABRIDGED SKETCH OF EXTRADITION TO AND FROM THE UNITED STATES (2016) (summarizing the requirements for extradition).

²⁸⁴ See, e.g., 18 U.S.C. § 1119(b) (making it a federal crime for a U.S. national to kill or attempt to kill another U.S. national in a foreign country).

²⁸⁵ Zedner, *supra* note 11, at 46 (describing the territoriality principle as a bedrock assumption in Anglo-American criminal law); see also DUFF, *supra* note 279, at 36–39 (outlining the traditional liberal theory of criminal law in which the obligation to obey arises from "hypothetical consent to a social contract," *id.* at 37).

There are obvious objections to this conception of punishment. Sociologists have spent half a century documenting the ways in which criminal law operates as a tool of social control, less to punish than to identify and manage marginalized groups.²⁸⁶ As they point out, the machinery of punishment does very little to reform and reintegrate those who have violated criminal laws,²⁸⁷ the people subject to criminal law are often alienated from the political community that enacts those laws,²⁸⁸ and the criminal legal process is itself punishing whether or not it results in imprisonment.²⁸⁹ Though they vary, each of these critiques advances the claim that criminal law is not so legitimate after all.

²⁸⁶ For a now-classic version of the social control thesis, see DAVID GARLAND, *THE CULTURE OF CONTROL* (2001). Professor David Garland documents the emergence in the mid-1980s of “control theories” of crime in which criminal activity is assumed to be routine and criminal justice strategies aim to track and protect the public from the dangerous classes. *Id.* at 15. See also Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 *CRIMINOLOGY* 449 (1992) (tracing the development of a “new penology” in which the goal of crime control is to identify and manage risk, *id.* at 450). For a recent version of the social control thesis, see Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2061 (2017). Professor Bell argues that “the American criminal justice system has dual purposes, only one of which is crime response and reduction. Its other, more insidious function is the management and control of disfavored groups . . .” *Id.* See also Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 *STAN. L. REV.* 611, 614 (2014) (contending that criminal law administration aims to “manag[e] people over time”). This literature develops from the critical turn pioneered by Michel Foucault, who argued that punishment practices create and reproduce social norms. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 1979) (1975). Foucault’s work, in turn, developed from Durkheim’s writing on the role that crime plays in delineating a common morality. ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., Free Press 2014) (1893). See generally David Garland, *Frameworks of Inquiry in the Sociology of Punishment*, 41 *BRIT. J. SOC.* 1 (1990) (providing an intellectual history of social control theories of punishment).

²⁸⁷ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 2 (2011) (“[T]he criminal justice system is doing none of its jobs well . . .”); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 *U. PA. L. REV.* 1789, 1793, 1799–1803 (2012) (describing the “systematic loss of legal status” — a species of civil death — that accompanies a criminal conviction, *id.* at 1793); Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 *CRIME & JUST.* 115, 115, 145 (2009) (challenging the deterrent effects of prison and maintaining that imprisonment is more likely to be “mildly criminogenic,” *id.* at 115).

²⁸⁸ By alienation, I mean both literal disenfranchisement and a sense of cultural estrangement. See Bell, *supra* note 286, at 2066, 2114–26 (describing the structural conditions that lead “many African Americans and residents of high-poverty urban communities” to feel alienated from and deeply cynical about criminal law enforcement, *id.* at 2066); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 510, 573–76 (2001) (discussing the “deep[] politics . . . of institutional competition and cooperation” that incentivize tough-on-crime policies at the expense of poor communities, *id.* at 510); Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 *WM. MITCHELL L. REV.* 1241, 1242–45 (2012) (noting the potentially “massive effect” of the Census Bureau’s policy of counting incarcerated people as residents of prison when, in many cases, they cannot vote in the districts where those prisons are located, *id.* at 1245).

²⁸⁹ See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979) (examining the burdens of the criminal process); see also Alexandra Natapoff, *Misdemeanors*, 85 *S. CAL.*

Interstate transfers exacerbate this legitimacy deficit. By extending the prison system well beyond the territorial and jurisdictional borders of the communities that authorized imprisonment, transfers lay bare the attenuated relationship between punishment and criminal law. In theory, punishment is a logical outgrowth of the criminal code, which ought to be tied to the boundaries of the community that enacted that code. But in practice, though prosecutions must take place where a crime occurred,²⁹⁰ punishment can happen anywhere. The power to punish is thus much broader — less territorial, more administrative, and less connected to the underlying criminal law — than the power to prosecute a crime. If punishment is licensed by its connection to criminal law, this is a troubling phenomenon. Put differently, transfers aggravate the sense that American punishment is indefensible, at least on the traditional account of why the state may place a person in a prison cell.

Transfers also raise a basic concern about accountability. It may be that the problem with interstate transfers is that they harm prisoners and their families. It could be that transfers expose a legitimacy gap between criminal law and its enforcement. Or perhaps the real issue with cross-border transfers is that they permit states to outsource the ugliness of punishment — to send people away when they are needy, difficult, or too volatile to confine. Imagine if a state authorized the death penalty but was too squeamish to impose it, so asked its neighbor to actually kill the prisoners it had condemned to die. Even if both states permitted the death penalty and agreed to the transfer, there is something untoward about the original state avoiding the most gruesome parts of its penal policies. The same critique applies to interstate transfers, particularly insofar as states use them to manage “troublesome” prisoners or to blunt the true impact of prison crowding. In effect, transfers permit states to pay to sanitize punishment. This is a problem if you think states ought to see, feel, and account for the most unpleasant parts of the decision to sentence a person to prison time.

B. *The Benefits*

The previous section makes prison transfers seem unequivocally harmful — harsh, illegitimate, and distorting. But transfers can also improve prisoners’ lives and promote better prison management. Recall that regional prison governance was an invention of the Progressive Era

L. REV. 1313, 1315–16 (2012) (discussing the harsh consequences of even low-level exposure to the criminal legal process).

²⁹⁰ See sources cited *infra* note 304 (collecting constitutional venue provisions).

that midcentury prison reformers embraced as a means to the rehabilitative ideal.²⁹¹ Part II suggested that this vision was not entirely misplaced: today, although states trade prisoners to avoid the costs of their criminal justice policies, they also send prisoners out of state to mitigate the harshness of imprisonment.²⁹²

Consider, for example, transfers for family reunification in cases where prisoners are convicted far from home. These trades reduce the banishment inherent to imprisonment. Transfers for personal protection, drug treatment programs, and better medical facilities are also distinctly nonpunitive. These sorts of transfers counteract the arbitrariness of state borders and make it seem impractical and stubbornly formalist to require state-based prison systems. If an interstate trade were the only way for a prisoner to see his family or get cancer treatment, I suspect many prison reformers and punishment theorists would endorse transfers, notwithstanding the theoretical problems posed by extraterritorial punishment.

The real point here is that prisons serve multiple purposes. Prisons are an instantiation of the criminal law, a site of enforcement meant to realize collective decisions about which conduct is illegal. They are also one of the last vestiges of the welfare state in a society in which social services are remarkably thin. American prisons house millions of people in need of mental healthcare and are the only place outside of the military and mental institutions where people have a right to state-provided healthcare.²⁹³ States deliver an enormous amount of medical care through their penal institutions: in 2016, healthcare costs were eighteen percent of all state prison operating expenditures, and states spent more than \$5700 on healthcare per prisoner.²⁹⁴ By comparison, in roughly the same time frame, Medicaid spending was just under ten percent of the federal budget and cost approximately \$7500 per enrollee.²⁹⁵

²⁹¹ See *supra* p. 1829.

²⁹² See *supra* p. 1848.

²⁹³ See *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (recognizing a right to medical care for people in mental institutions); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (holding that cases interpreting the Eighth Amendment “establish the government’s obligation to provide medical care for those whom it is punishing by incarceration”); Katherine L. Record, *Litigating the ACA: Securing the Right to Health Within a Framework of Negative Rights*, 38 AM. J.L. & MED. 537, 540–41 (2012) (noting that mental institutions and prisons are the only places in which Americans have a constitutional right to healthcare).

²⁹⁴ Shivpriya Sridhar, Robert Cornish & Seena Fazel, *The Costs of Healthcare in Prison and Custody: Systematic Review of Current Estimates and Proposed Guidelines for Future Reporting*, 9 FRONTIERS IN PSYCHIATRY 1, 5 (2018).

²⁹⁵ See JOHN HOLAHAN & STACEY MCMORROW, SLOW GROWTH IN MEDICARE AND MEDICAID SPENDING PER ENROLLEE HAS IMPLICATIONS FOR POLICY DEBATES 6 tbl.2 (2019), https://www.urban.org/sites/default/files/publication/99748/rwjf451631_1.pdf [<https://perma.cc/5374-B7WW>]; Alison Kodjak, *From Birth to Death, Medicaid Affects the Lives of Millions*, NPR (June 27, 2017, 5:01 AM), <https://www.npr.org/sections/health-shots/>

Correctional administrators use these funds to serve a population with acute needs. The prevalence rate of HIV in prison is four times the rate in the general population;²⁹⁶ a third of all people in the United States with Hepatitis C “spend at least part of the year in a correctional institution”;²⁹⁷ roughly sixty percent of state prisoners meet the criteria for drug dependence or abuse;²⁹⁸ and as the imprisoned population ages, penal institutions are increasingly serving as senior-living facilities, providing healthcare for chronic medical conditions, diminished mobility, hearing and vision loss, and dementia.²⁹⁹

Prisons may not be doing these jobs well, and they are almost certainly not the site where such jobs should be done. But for the moment — and in the absence of an enormous transformation in the structure of American society — prisons are places where the state offers and funds services for people who are poor, addicted, homeless, aging, and ill. From this perspective, imprisonment is as much about the administration of social welfare programs as it is about criminal law. If one focuses on this aspect of the penal project, it can seem tone-deaf to insist on the salience of state lines.

Transfers also make the job of running a prison easier. As any correctional administrator will attest, it is no easy task to confine thousands of people, many of whom are traumatized and in urgent need of care. Nor is it simple to employ and train thousands of correctional officers, particularly on a tight budget.³⁰⁰ Insofar as they provide a solution to

2017/06/27/534436521/from-birth-to-death-medicaid-affects-the-lives-of-millions [https://perma.cc/UKZ8-TBA6].

²⁹⁶ GAY MEN’S HEALTH CRISIS, *FENCED IN 1* (2012), http://gmhc.org/files/editor/file/a_pa_2012_prison.pdf [https://perma.cc/L2FF-8T48] (summarizing data from the Bureau of Justice Statistics); *see also* LAURA M. MARUSCHAK & JENNIFER BRONSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *HIV IN PRISONS, 2015 — STATISTICAL TABLES 1* (2017) (describing a decline — but continued persistence — of HIV cases in state and federal correctional facilities since 1991).

²⁹⁷ *HCV Testing and Treatment in Correctional Settings*, HCV GUIDANCE, <https://www.hcvguidelines.org/unique-populations/correctional> [https://perma.cc/3QRC-N9K7].

²⁹⁸ JENNIFER BRONSON ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *DRUG USE, DEPENDENCE, AND ABUSE AMONG STATE PRISONERS AND JAIL INMATES, 2007–2009*, at 1 (2017). By comparison, approximately five percent of people in the general population meet the same criteria. *Id.*

²⁹⁹ *See* Laura A. Bischoff, *Ohio’s Aging Prison Population Is Adding Costs for Their Care*, DAYTON DAILY NEWS (Aug. 26, 2018), <https://www.daytondailynews.com/news/ohio-aging-prison-population-adding-costs-for-their-care/EKnl7rSlz276J2LNIGaZQL> [https://perma.cc/7D2A-WS4G]; Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, PEW CHARITABLE TRUSTS (Feb. 20, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs> [https://perma.cc/R7KV-5T8S] (“From 1999 to 2016, the number of people 55 or older in state and federal prisons increased 280 percent. . . . State prison populations account for the vast majority of these . . . totals.”).

³⁰⁰ *See, e.g.*, Mary Ellen Klas, *Legislature Left \$28 Million Hole in Prison Budget. Now Essential Programs Are Cut*, MIAMI HERALD (May 4, 2018, 2:26 PM), <https://www>.

thin staffing and intractable management challenges, transfers improve prison administration, which might, in theory, make prisons less brutal places to live and work.³⁰¹

Interstate transfers thus have clear benefits for both prisoners and staff. In a criminal enforcement system characterized by competing values and conflicting purposes, it makes sense to build a flexible legal infrastructure that allows states to relieve some of the pressures of imprisonment. Sending prisoners to be near their families, reducing crowding, expanding healthcare, and protecting vulnerable members of the prison population are humane goals that interstate governance facilitates. Transfers seem less concerning the more one focuses on these goals, and the more one confronts the extraordinary welfare function the United States asks its prisons to serve.

C. *Outsourcing the Power to Punish*

Ultimately, whether interstate transfers are desirable depends on which account of imprisonment one adopts. If prisons reflect a classic territorial conception of criminal law, forced transfers are illegitimate. If prisons are sites of service delivery in a receding welfare state, transfers are efficient. These two positions are oversimplified, but they capture the dilemma: prisons are both a formal idea tied to the criminal law and real places where millions of people work and receive care. As with other debates between formalists and functionalists, evaluating prison policy hinges on which of these visions one prioritizes.

It would be somewhat strange for law to ignore the formal problem. It is one thing for social theorists to critique the disconnect between prisons and criminal law, but quite another for the legal system to tolerate a form of imprisonment that lacks a clear justification.³⁰² If the state's authority to punish derives from an implicit agreement between the criminal and the community whose laws he has transgressed, it is not clear why states can punish prisoners outside that community.³⁰³ In

miamiherald.com/news/state/florida/article210452109.html [https://perma.cc/Q56G-5WVY] (describing recent budget pressures in the Florida Department of Corrections); Peterson & Parra, *supra* note 188 (noting that the Delaware Department of Corrections transferred prisoners to Pennsylvania to reduce the amount of overtime pay to correctional officers).

³⁰¹ Prison ethnographers have contributed to a large literature on the relationship between prison staff satisfaction, staff culture, and prisoners' quality of life. See, e.g., LIEBLING, *supra* note 253, at 431–53; Ben Crewe, Alison Liebling & Susie Hulley, *Staff Culture, Use of Authority, and Prisoner Quality of Life in Public and Private Sector Prisons*, 44 AUSTL. & N.Z. J. CRIMINOLOGY 94, 111–12 (2011) (“Prisoner experiences are . . . shaped by factors such as prison design and material conditions, but these are less significant than staff behaviour in determining the quality of prison life for prisoners.” *Id.* at 111.).

³⁰² See R.A. DUFF, ANSWERING FOR CRIMES 51–55 (2007).

³⁰³ See DUFF, *supra* note 279, at 37–38 (“Even if we cannot simply argue that criminals choose or consent to their own punishment, we might ground their obligation to obey the law in their hypothetical consent to a social contract and argue that that contract would include provisions for

the version of criminal law prosecutors invoke when they act on behalf of “the people,” and the one implicit in constitutional provisions requiring criminal trials to be held where a crime is committed,³⁰⁴ crime is an offense against a polity of which the criminal is a member by virtue of his presence in the jurisdiction. This is why criminals (including noncitizens and out-of-state residents) can be punished for violations of a state’s criminal code. If they were not members by virtue of their presence, they would not be subject to the criminal law. This theory of criminal law also explains why states have to extradite people — literally move them to the proper territory — in order to prosecute a criminal offense committed elsewhere.³⁰⁵ In the preconviction justice system, we assume that criminal law has territorial boundaries, which both authorize and limit its force. In the postconviction justice system, the corollary assumption is that trading the power to punish to another sovereign severs the compact that makes punishment permissible in the first place.

In a sense, this is the objection to any prison privatization.³⁰⁶ Interstate transfers are a form of outsourcing in which the state delegates its authority to punish to another actor. Those who oppose private prisons on the ground that states alone can enforce their criminal laws will have the same concern about interstate transfers.³⁰⁷ And those comfortable with outsourcing imprisonment to private contractors may be fine with a system in which states trade their punishment power. If the state can authorize other parties to enforce its criminal code, it would seem to make little difference whether a private corporation or a separate sovereign imposes the criminal sanction.

Upon closer examination, though, there is a difference between privatization and interstate imprisonment. Privatization involves delegating the punishment power, but it need not involve extraterritorial

the punishment of those who break the law — thus justifying their punishment in terms of the contract to which they would consent.” *Id.* at 37.). Of course, this is only one theory of the legal basis for criminal sanctions.

³⁰⁴ See U.S. CONST. art. III, § 2, cl. 3 (introducing the venue requirement in federal criminal cases); Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44, 46 (1974) (listing analogous provisions in state constitutions, which typically require trials in the county where an offense was committed).

³⁰⁵ See *supra* p. 1864.

³⁰⁶ See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 469–71, 515–18 (2005) (outlining philosophical objections to private punishment); Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401, 1404 (2014) (rejecting the state monopoly theory of imprisonment in favor of “a pragmatic assessment of privatization”).

³⁰⁷ See MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 77–78 (H.H. Gerth & C. Wright Mills eds., 1946) (“[A] state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.” *Id.* at 78.). The Supreme Court of Israel (sitting as the High Court of Justice) cited this passage in 2009 when it held that a law permitting private prisons in Israel was unconstitutional. HCJ 2605/05 Acad. Ctr. of Law and Bus., Human Rights Div. v. Minister of Fin., 63(2) PD 545 (2009) (Isr.).

punishment. Private prisons can be located in-state. By contrast, interstate transfers involve both delegation and territorial dislocation. Interstate imprisonment is thus “outsourcing-plus”³⁰⁸ — a mode of punishment that challenges both the idea that states have a monopoly on the legitimate use of force *and* the territoriality norm in American criminal law. If the concern is that states ought to impose their own punishments, interstate transfers and private prisons are equally problematic. But if the concern is that punishment ought to take place where a crime occurred — either because maintaining community ties reduces recidivism and eases reentry; or because the legitimacy of punishment depends on its connection to the bounded community that enacted the underlying criminal law; or because punishment is an act meant to express communal disapproval and in doing so to reestablish the bond between a criminal and his community³⁰⁹ — then extraterritorial punishment is troubling whether it is private or not.

Transfers also raise a separate concern about transparency. Here again, the analogy to privatization is helpful. In the classic critique of privatization, the problem with private prisons is that punishment must be public to be legitimate.³¹⁰ Sometimes, though, what critics of privatization really object to is the lack of accountability that comes with private imprisonment.³¹¹ In this version of the critique, the difficulty with outsourcing punishment is not that it is unauthorized — after all, the state has never looked like Max Weber’s ideal³¹² — but rather that privatization insulates political actors from supervision. From this perspective, the terms “public” and “private” aim less to describe who may impose state power than to capture a set of values associated with good governance.

³⁰⁸ Thanks to Professor David Sklansky for suggesting this term and for generative conversations about the accountability concern.

³⁰⁹ For one version of this communitarian theory of punishment’s purpose, see DUFF, *supra* note 279, at 41. As he puts it, “Crime, as a violation of the community’s law and an attack on its good (as a breach of community), threatens to destroy the criminal’s relationship with the community. Punishment aims to restore that relationship, to repair that breach, by bringing the criminal back into (law-abiding) community.” *Id.*

³¹⁰ See *supra* note 307.

³¹¹ For example, the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2018), does not apply to private prisons. Legislators’ efforts to amend the “FOIA loophole” have been unsuccessful. See, e.g., Private Prison Information Act of 2017, S. 1728, 115th Cong. (2017).

³¹² Until the 1930s, for instance, the federal government outsourced its punishment authority to state prisons, “which received fees for each federal inmate they agreed to board.” Kaufman, *supra* note 75, at 1388 (citing KEVE, *supra* note 21, at 1, 13); see also Feeley, *supra* note 306, at 1412–14 (“Historically, Anglo-American countries have depended heavily on the private administration of public punishments, and for many other functions of the modern liberal criminal justice system.” *Id.* at 1414.); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 46–58 (1995) (recounting the history of privately funded criminal prosecution); cf. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE 42–43 (2013) (describing bounties paid to nineteenth-century prosecutors for each conviction they obtained).

On this more pragmatic view, the objection to prison transfers is that they are unregulated and opaque. Specifically, the problem is that there is no easily accessible information on prison transfers, and prison officials operate without any oversight from the public or other participants in the legal system. It is perhaps especially unsettling that judges — the actors one might expect to oversee prison sentences, given that they impose them — are nowhere to be found in the transfer system. In practice, it is prison bureaucrats — not judges, not legislatures, and not political communities — who choose where punishment may take place. The data in Part II indicate that their choices are ad hoc, and, at least in some cases, motivated by concerns that threaten to distort and degrade the legal system.

There are thus three distinct sorts of conceptual problems with interstate transfers. They involve *delegation* of the punishment power, which some find illegitimate. They undermine a *territoriality norm*, which may be critical to the effectiveness or philosophical coherence of punishment. And they occur without *oversight*, which offends principles of transparency and accountability central to good governance. Yet as the previous section explained, transfers can also have significant up-sides for prisoners and staff. This mixed bag — serious objections with obvious benefits — demands a limiting principle to guide when, if ever, transfers may take place.

To be sure, this is a call for regulation of a system that currently operates relatively smoothly on its own. One response to the data on prison transfers is that the prisoner trade is working just fine: it is legally authorized and is used only when it is beneficial to prisoners or prison officers. The system appears to be regulating itself. But beneath the surface, Part II uncovered disquieting trends. The reaction to *Brown v. Plata* suggests that transfers are a way to avoid reforming prison conditions or reducing prison admissions in response to prison litigation meant to achieve precisely those ends.³¹³ Part II described states that have used transfers to circumvent political opposition to prison building and to refrain from paying unionized (and therefore expensive) prison staff the wages to which they are legally entitled.³¹⁴ Even “compassionate” transfers can be recast as an effort to evade the true costs of imprisonment. Trades to prison hospitals and mental health centers mask the state’s inability to deliver constitutionally adequate healthcare in penal institutions. Trades to quell riots expose the state’s incapacity to protect the number of people it chooses to incarcerate. All of these transfers allow states to continue using prisons for purposes they are ill-equipped to serve.

It may be wise to force states to internalize the monetary, political, and human costs of their prison policies. For those unconvinced by the

³¹³ See *supra* pp. 1853–55.

³¹⁴ See *supra* section II.C, pp. 1848–55.

philosophical objections to interstate transfers and unconcerned about opaque bureaucratic administration of the transfer system, this is the final reason to regulate the prisoner trade. Unrestricted transfers enable a thin, neoliberal state in which prisons purport but fail to provide safety and social programs — which, in turn, prevents states from investing in more effective, noncustodial alternatives to the problems of crime and inequality.³¹⁵

D. Consent as a Cure

Thus far, this Article's aim has been to trace the deterritorialization of state punishment over the course of the twentieth century and to defend the value of an oversight regime that would make prison transfers less arbitrary and opaque. The question that remains is how best to regulate interstate imprisonment.

One option is for the Supreme Court to revisit the holding that prisoners lack a due process right to be incarcerated in their state of conviction.³¹⁶ Though this outcome seems unlikely, there are good reasons to rethink that rule. As Part I explained, the Court's reasoning in *Olim v. Wakinekona* hinged in part on the conclusion that out-of-state confinement was "neither unreasonable nor unusual" and that prisoners therefore had no justifiable expectation of in-state incarceration.³¹⁷ Yet as this Article has uncovered, more than thirty years after *Wakinekona*, interstate transfers remain relatively rare — common and concentrated in outlier states, often harmful and distorting when they do occur, but nonetheless rare against a national baseline. If what matters to constitutional analysis is the overall frequency of transfers, the afterlife of *Wakinekona* suggests that the Court's core conclusion was wrong.³¹⁸

Wakinekona may also have been misguided because, as the West Virginia Supreme Court put it one year later, prisoners have a right "[t]o

³¹⁵ From this perspective, prison transfers reflect a dynamic discussed by other scholars in which "an expansive penal system" becomes necessary "to enforce and uphold an increasingly deregulated economy." Ben Crewe, Alison Liebling & Susie Hulley, *Staff-Prisoner Relationships, Staff Professionalism, and the Use of Authority in Public- and Private-Sector Prisons*, 40 LAW & SOC. INQUIRY 309, 310 (2015). See generally BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS* 52 (2011) (arguing that neoliberalism has encouraged the growth of prison systems); LOÏC WACQUANT, *PUNISHING THE POOR* 305–08 (2009) (identifying an extensive penal system as one of the "constituent ingredients" of neoliberalism, *id.* at 308).

³¹⁶ See *Olim v. Wakinekona*, 461 U.S. 238, 251 (1983).

³¹⁷ *Id.* at 247; see *id.* at 245.

³¹⁸ Thanks to Professor Will Baude for helpful conversations on this point. See Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 931–33 (2014) (examining the Supreme Court's "penchant for suppressing outliers," *id.* at 931, including "upstart" practices that "depart[] from the dominant mode" in most jurisdictions, *id.* at 933); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 368–69 (2009) (noting that the Supreme Court often "determines constitutional protection based on whether a majority of states agree" with a practice or rule, *id.* at 369).

remain” in the state that claims the power to punish them.³¹⁹ Perhaps, as with healthcare, states incur a duty to care for the prisoners they choose to confine.³²⁰ Perhaps transfers are cruel and unusual; the Founders took that view with respect to forms of punishment that shipped prisoners out of state.³²¹ Or perhaps the right to remain stems from the associational rights of prisoners and their families, which *Wakinekona*, a procedural due process case, did not address. None of these theories is governing law,³²² but it is hardly inconceivable that the Court would constitutionalize a right to be confined in-state when convicted under state law.

Recognition of such a right need not produce a total ban on transfers. Although the right to remain could bar out-of-state punishment, it could also be less absolute. Like criminal procedure rights, a right to in-state imprisonment might be waivable. Presumably a prisoner would waive his right to remain when a transfer improved his life or health but would object to transfers with more deleterious effects, such as those that separate him from his family and access to courts. A waivable right to remain would thus enable some cooperative prison governance while limiting arbitrary or unduly punitive transfers.

Even in the absence of a constitutional right, legislatures or prison officials could create a regulatory regime to govern transfers. One straightforward approach would be to require prisoners to apply for interstate transfers rather than permitting prison officials to swap people at will. These applications could be adjudicated internally, though if oversight is the goal it would be wiser to require judges or some other external legal actors (a commission comes to mind³²³) to approve transfers before they take place. This approach would allow prisoners not merely to prevent but also to seek interstate transfers. If states kept records, these applications would be one way to track which state systems prisoners most want to leave.

As with a waivable right to remain, an application requirement is an attempt to build prisoners’ consent into the interstate transfer process. This is an old idea: as Part I explained, the drafters of early interstate compacts proposed consent as a solution to the philosophical and legal problems posed by forced prisoner transfers.³²⁴ Although that proposal

³¹⁹ *Ray v. McCoy*, 321 S.E.2d 90, 92 (W. Va. 1984).

³²⁰ *Cf. Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

³²¹ *See supra* p. 1823 (describing early critiques of “monarchical” punishments).

³²² Except, of course, in West Virginia.

³²³ Oversight of interstate parole agreements, for example, is provided by a board of governor-appointed commissioners. *About the Commission*, INTERSTATE COMM’N FOR ADULT OFFENDER SUPERVISION, <https://www.interstatecompact.org/about> [<https://perma.cc/T3SA-MAGF>].

³²⁴ *See supra* p. 1832 (describing Mitchell Wendell’s early consent proposal to the Council of State Governments).

disappeared with court rulings rejecting a federal constitutional right to be incarcerated within one's state of conviction,³²⁵ consent remains a guiding principle in analogous areas of criminal law.

Interstate probation and parole agreements, for example, begin when a person applies to transfer his supervision to another state.³²⁶ International prisoner repatriation — the process of transferring a noncitizen incarcerated in the United States to serve his sentence in his country of origin — also starts when prisoners seek their own transfers,³²⁷ and involves approval from a judge in open court.³²⁸ The forced trade of domestic prisoners is a departure from these bodies of law, where mobility requires consent. In this respect, interstate prisoner transfers are more akin to deportation and similar forms of forced movement in the immigration system than to other transfers in the criminal justice system.

Consent is also familiar from the plea bargain. Before a plea bargain becomes binding, a person charged with a criminal offense must appear in court and confirm that he understands the agreement he has entered.³²⁹ The judge entertaining that plea must conclude on the record that the agreement is voluntary and has an obligation to reject the plea if there is reason to believe the defendant fails to understand the charge, the possible punishment, or the rights he has waived.³³⁰

Of course, there is no part of the criminal process more pilloried than the plea bargain. Professor John Langbein famously compared plea bargaining to torture,³³¹ and the literature decrying America's plea rate is vast.³³² As these critiques suggest, it is hard to swallow the notion

³²⁵ See, e.g., *Olim v. Wakinekona*, 461 U.S. 238, 251 (1983).

³²⁶ See INTERSTATE COMM'N FOR ADULT OFFENDER SUPERVISION RULES ch. 3, r. 107 (INTERSTATE COMM'N FOR ADULT OFFENDER SUPERVISION 2003).

³²⁷ 18 U.S.C. § 4100(b) (2018); see also Kaufman, *supra* note 185, at 71–73 (explaining the international repatriation process). In requiring prisoner consent for international prison transfers, the United States is increasingly unusual. In the last decade, Western European countries have begun “moving away from the idea that prisoners should have to consent to transfer,” and have started to sign compulsory repatriation treaties. Mary Bosworth, *Penal Humanitarianism? Sovereign Power in an Era of Mass Migration*, 20 NEW CRIM. L. REV. 39, 46 (2017).

³²⁸ See Kaufman, *supra* note 185, at 72–73.

³²⁹ FED. R. CRIM. P. 11(b)(1).

³³⁰ *Id.* 11(b)(1)–(3).

³³¹ See John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 3 (1978) (“[T]here are remarkable parallels in origin, in function, and even in specific points of doctrine, between the law of torture and the law of plea bargaining.”).

³³² See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467–68 (2004) (discussing how “legally irrelevant factors,” *id.* at 2467, produce plea bargains that result in “substantial sentencing inequities” and “warp the fair allocation of punishment,” *id.* at 2468); Stephen B. Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 U. PA. J. CONST. L. 23, 24 (2008) (“[T]he overwhelming majority of criminal cases — 90% to 95% — are resolved with plea bargains. . . . The extraordinary breadth of [prosecutors'] discretion . . . makes it possible for racial biases to enter the process.”); Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 766 (2016) (“[T]here is broad

that criminal defendants are in fact consenting to their plea deals. And as feminist legal scholars would add, it is deeply complicated to construct a legal regime based on consent.³³³ In a society riven by intense power imbalances, consent is often difficult — perhaps impossible — to evaluate. This concern applies with equal force to the prison, an inherently coercive and imbalanced institution.³³⁴ One could imagine many scenarios in which prisoners were forced or induced to “consent” to transfers they would prefer to avoid.

A call to incorporate prisoners’ consent into any part of the criminal justice system should thus be met with considerable skepticism. Nonetheless, the idea has value in this context, less as a thick concept than as a design choice. A transfer regime based on a thin notion of consent may not capture prisoners’ authentic or free choices and, like every institutional structure in the prison system, would be subject to abuse. But requiring prisoners to apply for transfers and requiring external actors to approve them creates a default rule that makes it more difficult to trade prisoners for objectionable reasons, if not because the rule reflects true consent then because it imposes a transaction cost on prison administrators.

One could even go further, permitting nonconsensual transfers in some circumstances. There are cases where the argument for forced transfers is powerful — if a prisoner needed but declined life-saving medical care, for instance. Conversely, if that same prisoner sought a transfer to a state without the capacity to treat him, the argument for overriding his preference might be strong. These scenarios raise questions about state paternalism and free will that run throughout American law. In such situations, a rebuttable presumption against transfers may be nimbler than a rule requiring consent. My own view is that the prisoner’s preference should prevail, but the point here is not

agreement that the current plea bargaining regime is troubling.”); Langbein, *supra* note 331, at 9; William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2550 (2004) (“[P]lea bargains take place in the shadow of prosecutors’ preferences, voters’ preferences, budget constraints, and other forces — but not in the shadow of the law.”).

³³³ See Robin West, *Women in the Legal Academy: A Brief History of Feminist Legal Theory*, 87 FORDHAM L. REV. 977, 990 (2018) (surveying feminist critiques of consent as a tool for legitimating an oppressive social order); Janet Halley, *The Move to Affirmative Consent*, SIGNS (Nov. 10, 2015), <http://signsjournal.org/currents-affirmative-consent/halley> [<https://perma.cc/Z9JG-SGV9>] (critiquing efforts to incorporate affirmative consent into legal procedures); cf. Erin E. Murphy & Stephen J. Schulhofer, *Project Reporters on “Consent,”* THE ALI ADVISER (Aug. 30, 2016), <http://www.thealiadviser.org/sexual-assault/project-reporters-consent> [<https://perma.cc/Z4AK-4YZK>] (discussing the difficulties associated with defining consent in criminal law).

³³⁴ See KAUFMAN, *supra* note 268, at 58 (describing barriers to obtaining meaningful consent from prisoners); LIEBLING, *supra* note 253, at 462 (critiquing the coercive dynamics of imprisonment); Richard Sparks, *Can Prisons Be Legitimate?: Penal Politics, Privatization, and the Timeliness of an Old Idea*, 34 BRIT. J. CRIMINOLOGY 14, 15–16 (1994) (“One irony of the modern prison . . . is that it operates as an autocracy within a democratic polity,” *id.* at 15, which in turn leads to “a durable ‘legitimation crisis,’” *id.* at 16.).

that these problems have clear or easy answers. Rather, the claim is that current law undervalues the harm of prison transfers and leaves serious decisions about the location of punishment to bureaucrats who operate in opaque institutions. Requiring consent in many if not all cases would introduce accountability into the transfer system and would force courts to make public determinations about the scope of a prisoner's right to remain.

Not everyone will support this proposal. Formalists who endorse the territorial theory of criminal law³³⁵ or oppose the delegation of punishment power will likely prefer a rule prohibiting all transfers as illegitimate. Those who understand criminal law as a form of state-based common law and object to its transformation into a national system of bureaucratic administration may favor a strict territorial prohibition too. Retributivists might endorse unregulated prisoner transfers on the theory that the harshness of long-distance punishment is a feature rather than a bug of a system meant to harm people for wrongdoing. Critical theorists may deem any regulatory framework futile given prisoners' relative powerlessness and judges' apparent unwillingness to police similar agreements like plea bargains. And utilitarians would likely need to be convinced that the costs of transfers outweigh their benefits, which means deciding whose interests in prison administration have value.

A system that requires consent for transfers balances these competing conceptions of how to evaluate law. Requiring prisoners to agree to their own transfers addresses (though perhaps cannot cure) the formalist objection to prisoners' absence from the implied social compact that legitimates punishment. Having judges or public commissioners approve transfers ameliorates anxiety about transparency. A consent regime also permits collaborative prison administration but filters out its most noxious forms. For functionalists, this is one way to acknowledge that prisons serve multiple purposes while limiting the most distorting effects of prisoner transportation.

Still, those who demand harsh prisons or hard borders will not be satisfied. If everyone were a retributivist, a strict federalist, or a utilitarian, it would be much easier to determine how the transfer system should work. But disagreement is a defining feature of criminal law. Legislatures, courts, and communities have never settled on a single theory of punishment; instead, the criminal code nods to several competing views of the goals that imprisonment is meant to serve, and judges cite everything from deterrence and incapacitation to rehabilitation when sentencing a person to prison time.³³⁶ In the absence of a coherent, consistent approach to why we imprison people, the best rule is one that

³³⁵ See *supra* pp. 1863–65.

³³⁶ See 18 U.S.C. § 3553(a)(2) (2018) (listing factors judges must consider in imposing a sentence, including the need to “provide just punishment,” “afford adequate deterrence,” “protect the public from further crimes,” and rehabilitate the defendant).

grapples with both formalist and functionalist aims, which is to say, with the prison's dual role as a legal institution and a vehicle for social programs. Such a rule, though no doubt imperfect, is preferable to a system with clear flaws and no oversight.

CONCLUSION

There are several lessons one might take from this account of American punishment. The history of prison transfers illuminates the codependent relationship between bureaucrats, federal courts, and private corporations. The data on transfers reveal pathological dynamics in the postconviction justice system that parallel the better-known pathologies of plea bargaining and criminal sentencing.³³⁷ The normative debate over extraterritorial confinement demonstrates how difficult it is to run a criminal justice system without a clear theory of punishment.

But perhaps the clearest lesson from this Article is that judges, scholars, legislators, and reformers need to ask where America's prisoners are held. The straightforward assumption — state prisoners live in their state's penal institutions — is wrong, and has been for decades.

This means that, when they impose sentences, judges are authorizing the state to ship people thousands of miles from home. It means that legislators who fund correctional systems, including those who oppose prison construction, are licensing out-of-state punishment. And it means that reformers who want to reduce incarceration rates or improve prison conditions have to coordinate beyond state lines. There is no question that criminal justice is driven by local practices and state budgets.³³⁸ But in an important sense — more than academics or reformers may have realized — the country also has one interlocking penal estate with negotiable boundaries. In an era of tight budgets, divisive politics, and mass mobility, the question is how fluid those borders can become.

³³⁷ See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–78 (2009); Bibas, *supra* note 332, at 2467; Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1310–16 (2018); Langbein, *supra* note 331, at 12–19; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 578 (2001); see also Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty> [<https://perma.cc/S6F4-SXWT>].

³³⁸ See, e.g., PFAFF, *supra* note 50, at 13–15 (“[T]here is no single ‘criminal justice system,’ but instead a vast patchwork of systems” *Id.* at 13. “[S]eemingly national criminal justice problems are really local ones.” *Id.* at 15.)

APPENDIX

Table 1: Percentage of Prisoners Transferred

The table below shows the number of prisoners transferred out of each state as a percentage of that state's prison population. It includes only states that provided transfer data between May 2018 and February 2019 in response to my FOIA requests. To the extent that states declined to provide information on transfers to private prisons, these figures undercount the number of exported prisoners.³³⁹ State population counts are from Bureau of Justice Statistics reports³⁴⁰ and publicly available prison population data on state Department of Corrections websites, which I checked at the time that I received each FOIA response.

State	In-State Prison Population	Percentage Exported
Hawaii	3,540	45.31%
Vermont	1,557	15.03%
New Hampshire	2,609	5.17%
Wyoming	2,476	5.09%
Idaho	8,616	3.19%
Nevada	12,512	2.09%
Delaware	5,500	1.64%
California	126,537	1.50%
Montana	2,747	1.31%
Maine	2,321	1.08%
Massachusetts	8,802	0.99%
South Dakota	4,001	0.87%
Rhode Island	5,037	0.83%
Nebraska	5,358	0.62%
Colorado	20,136	0.53%
Utah	6,681	0.48%
Oregon	14,756	0.46%
South Carolina	18,958	0.42%

³³⁹ See *supra* note 156.

³⁴⁰ See HARRISON & BECK, *supra* note 165.

State	In-State Prison Population	Percentage Exported
Connecticut	13,289	0.35%
Oklahoma	26,254	0.34%
North Dakota	7,160	0.31%
Washington	19,369	0.31%
Alaska	4,992	0.22%
Iowa	8,351	0.22%
Florida	96,000	0.16%
Illinois	39,708	0.14%
Wisconsin	23,446	0.14%
Kentucky	12,240	0.12%
Missouri	32,461	0.09%
Ohio	48,847	0.08%
Pennsylvania	46,505	0.04%
Indiana	26,024	0.02%
Tennessee	22,339	0.02%
Mississippi	24,144	0.02%
Louisiana	17,368	0.01%

Tables 2 and 3: Top Exporters and Importers of Prisoners

The tables below list the states that transfer the most prisoners into and out of the jurisdiction. All 2019 data are taken from responses to my FOIA requests and, where available, public reports on the use of out-of-state private prisons. The 2005 data are largely drawn from a report by the National Institute of Corrections, which did not collect data on prisoners imported into each state.³⁴¹ Data for the prison population of each state in 2005 are drawn from the same Bureau of Justice Statistics report cited in Table 1.³⁴²

Note that export figures include prisoners transferred to out-of-state private prisons insofar as states reported that information.³⁴³ Because Vermont reported no transfers to private out-of-state prisons but now engages in that practice,³⁴⁴ the Vermont numbers are likely low. Note also that these data collection dates bookend and thus omit the interstate transfer (and eventual return) of 10,000 California prisoners in the aftermath of the Supreme Court's decision in *Brown v. Plata*.³⁴⁵ During that period, California exported close to 7.5% of its total prison population and would have made this list.³⁴⁶

³⁴¹ See NAT'L INST. OF CORR., *supra* note 9, at 13. Because Hawaii did not provide data to the NIC for the agency's 2005 report, I have used population figures published by the Hawaii Department of Public Safety during the same time period. See HAW. DEP'T OF PUB. SAFETY, FISCAL YEAR 2004 ANNUAL REPORT 17 (2004), <https://dps.hawaii.gov/wp-content/uploads/2012/10/PSD-AnnualReport-2004.pdf> [<https://perma.cc/2AJG-87HM>].

³⁴² HARRISON & BECK, *supra* note 165.

³⁴³ See *supra* note 156 (listing states that did and did not provide details on their use of private prisons).

³⁴⁴ See *id.*

³⁴⁵ See *supra* pp. 1853–54.

³⁴⁶ The figure cited here is estimated using California's total prison population (135,981) in 2013. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 (2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf> [<https://perma.cc/YM83-CTWD>].

Table 2: Exporters

	2005		2019	
	State	Prisoners Exported	State	Prisoners Exported
Top Exporters (By number)	Hawaii	1708	California	1892
	Alaska	762	Hawaii	1604
	Wyoming	598	Idaho	275
	Washington	588	Nevada	261
	Vermont	389	Vermont	234
	California	382	Florida	155
Top Exporters (By percentage of in-state prison population)	Wyoming	29.2%	Hawaii	45.3%
	Hawaii	28.7%	Vermont	15.0%
	Vermont	18.7%	New Hampshire	5.2%
	Alaska	15.8%	Wyoming	5.1%
	North Dakota	4.8%	Idaho	3.2%
	Washington	3.4%	Nevada	2.1%

Table 3: Importers

	2019	
	State	Prisoners Imported
Top Importers (By number)	Pennsylvania	302
	New Hampshire	152
	Colorado	133
	Florida	118
	Oklahoma	77
	Oregon	72
	Massachusetts	71
Top Importers (By percentage of in-state prison population)	New Hampshire	5.8%
	Montana	1.4%
	Wyoming	1.3%
	Maine	1.0%
	Massachusetts	0.8%
	South Dakota	0.8%
Colorado	0.7%	

