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ELECTIONS, POWER, AND LOCAL CONTROL: REINING IN CHIEF PROSECUTORS AND SHERIFFS

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Our problem of mass incarceration, and perhaps more importantly, the barriers to changing it is, at least in significant part, tied to the manner in which key actors in our criminal justice system are selected in relation to other political actors. More specifically, there are two problems with the election of local chief prosecutors and sheriffs that contribute to the problem of mass incarceration and act as a barrier to reform. First, prosecutors and sheriffs have an extremely narrow, single-minded focus – crime control and suppression. Second, unlike other elected government officials with much broader responsibility—such as mayors, city councilmembers, governors, and state legislators—local chief prosecutors and sheriffs are not term limited and often run unopposed. Chief prosecutors and sheriffs frequently remain in office for an entire generation or more. This toxic combination of narrow focus and disproportionate power skews our political system in the direction that secures and increases the power of chief prosecutors and sheriffs. And the primary thing that this does, either directly or indirectly, is mass incarceration. In this paper, we argue that the historical goals causing the move from appointed chief prosecutors and sheriffs to elected ones have not been realized because of these distortions. In fact, because times and government have changed, these goals are now better realized and managed by moving back to a system of appointments, allowing citizens to retain local control over criminal justice through more responsive and balanced elected local officials.

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I. THE HISTORICAL REASONS FOR ELECTING PROSECUTORS AND SHERIFFS

The states' primary impetuses for the move from appointed chief prosecutors and sheriffs to elected ones was the desire for more local input and control and for increased democratization of American government by giving citizens input through elections of officials.¹ During this period, citizens became dissatisfied with a remote central state government appointing local officials such as prosecutors and sheriffs, which often resulted in appointments simply being the spoils of electoral victory at the state level, *i.e.*, a patronage system.²

In addition, the appointment of state officials to run local governments was inevitable for the vast majority of the country. By far, the most well developed governmental structures existed at the level of state government. Most of the country lived in rural areas and small towns with local governments that were fairly rudimentary in their development. Therefore, except for perhaps in the few large cities, the only real option for the vast majority of the country was appointment by state level officials who did not come from the area nor represent their local interests. Therefore, when the citizenry became dissatisfied with the patronage system that had developed over the appointment of local officials such as judges and chief prosecutors, it was inevitable that it turned to local elections. Because government at the local level was, as a general matter, rudimentary and inconsistent, the natural solution, really the only option, was local elections.³

¹ Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012). As described by Michael Ellis, it is no coincidence that this change came at the same time when American government became more democratic. *Id.* at 1530. State constitutional conventions adopted measures to “enlarge voting franchises, reapportion legislatures, and make many more government offices, including governors and judges, elected.” *Id.*

² *Id.*

³ Today, local chief prosecutors are elected in all states but five. See Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 598 (2014) [hereinafter Wright, *Beyond Prosecutor Elections*]. In Alaska, Connecticut, Rhode Island,

II. THE SINGULAR INSTITUTIONAL POWER OF THE ELECTED PROSECUTOR AND SHERIFF

The quintessential elected officials are the chief of the executive branch and the legislative branch. At the local level this usually means a mayor and city council or their equivalent. Mayors and city councils are typically responsible for providing a broad array of services to the local citizenry. These services include police, firefighters, streets, water, lighting, other utilities, sanitation, parking, health, housing, and parks and recreation. Because of this wide range of responsibilities, a mayor and city council cannot put too much money into any one area. Rather, a mayor and city council must develop a ranking of services in order of priority and allocate limited resources accordingly. Moreover, the relative ranking of various services must correlate fairly well with that of the local citizens or the elected officials risk being voted out of office.

Local chief prosecutors and sheriffs, however, do not have this breadth of responsibility. They are law enforcement officials with a singular responsibility—crime suppression and control. Their job performance, to the extent it is evaluated at all, is based solely on how local citizens feel they are doing in terms of dealing with one issue—crime. Therefore, for the chief prosecutor and sheriff, the more money spent prosecuting crime and punishing criminals the better. Unlike the mayor or city council, they do not need to weigh the costs and benefits of prosecuting and punishing crime against any other community needs such as streets, water, lighting, sanitation, housing, health, or parks and recreation.

Another weight on the scales of power is the vested interests their offices garner. Local prosecutors' and sheriffs' offices function much like any other government bureaucracy. The bigger they get and the more resources they command, the more powerful they are and the

Delaware and New Jersey, a statewide elected official appoints the local chief prosecutors. *Id.* at 598–99.

better positioned they are to command more and more resources. For example, the bigger the office, the more people it employs. The more employees the office has, the more voters it touches through the employee, the employee's family and friends, and their families and friends. In addition, and this is particularly true of sheriffs running local jails, the bigger the jail or the office, the larger the contracts the office has to give out. These valuable contracts for food, laundry, plumbing, electrical, and the like further create vested interests that seek to protect and enlarge the status quo.⁴

One might believe that a mayor has vastly more of this kind of power than a mere sheriff or district attorney given the broad array of responsibilities and the multitude of employees and facilities under his or her purview. But such is not the case. Most city employees, beyond the mayor's and city councilmembers' personal staffs, are covered by civil service rules that bar political activities and protect against political retaliation. Many of the larger departments such as police, fire, and sanitation may be staffed by union workers protected by collective bargaining arrangements. Further, local government contracts are usually covered by competitive bidding rules and regulations that greatly limit discretionary authority.

On the other hand, the same is often not true for sheriffs' and particularly prosecutors' offices. In many places, especially in the South where incarceration rates are higher, employees of these offices are exempted from civil service. This means that they are "at will" employees who may be hired and fired for any reason or no reason at all. This also means that not only are employees and their families and friends a direct source of votes, but they may provide labor for the campaigns of the head of the office for whom they work and for

⁴ A study by the Vera Institute of Justice showed that 74% of a typical jail's costs is employee costs, such as for benefits and health care, and the number of employees is, of course, driven by the number of inmates and the size of the jail. VERA INSTITUTE OF JUSTICE, *THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION* 10 (2015), <http://www.vera.org/sites/default/files/resources/downloads/price-of-jails.pdf>. Sheriffs have every incentive to grow the size of their population and their facilities.

political allies or future allies of the sheriff or chief prosecutor. Once again, bigger is definitely better.

And while some of the same may be said for the bureaucracy under a mayor and city council, even if not to quite the same extent due to civil service rules, because the broad array of responsibilities conspires to limit their power. Thus, while a health department creates a vested interest in resources going to the health department, this is balanced by competition from the sanitation department, the fire department, and the police department, etc. The same is not true for prosecutors' and sheriffs' offices with their narrow, single-minded focus on crime. All of the pressure is in the same one direction – towards more and more resources for prosecution and punishment of crime.

III. THE ELECTORAL FORCES CREATING INTERMINABLE POSITIONS OF POWER

The election process itself utterly fails to ensure local control by the citizenry. Control remains firmly in the hands of the chief prosecutor and sheriff. Voters have very little to do or say about prosecutors' and sheriffs' elections. Unlike sitting mayors, governors, and state and local legislators, the vast majority of incumbent prosecutors and sheriffs run unopposed.⁵ The unopposed chief local prosecutor and sheriff need offer little, if any, information or accountability to voters during an election. Additionally, regardless of whether he is opposed or unopposed, the incumbent prosecutor and

⁵ To ensure they retain this unchecked power over the criminal justice system, chief prosecutors have their own war chests, and to remain ingratiated with this all-powerful dispenser of mercy and favors, lawyers contribute heavily to the incumbent to ensure they will be treated well by the District Attorney. *See* Jeff Morganteen, "The DA Who's Staying Put With the Help of Generous Donors," (Sept. 12, 2013), <http://www.thenewyorkworld.com/2013/09/12/vance/>. There are many examples, but Manhattan District Attorney Cyrus Vance provides one ready example of the excess. After Robert Morgenthau retired at age 89, having served for nearly 35 years in the position, Vance was elected in 2009. *Id.* In order to ensure his victory in 2013, he began an aggressive fundraising campaign; his campaign treasury held a \$1.6 million balance as of July 2013. *Id.* Of course, no opponent emerged.

sheriff wins the vast majority of the time.⁶ And, even when there is opposition, the voters neither hear nor demand more than statements about personal experience and character or platitudes indicating the candidate is “tough on crime.” Voters neither hear about nor demand information about the incumbent prosecutor’s office policies, whether on plea bargaining or charging, or about the cost to the taxpayer of overcharging and mass incarceration of arrestees and nonviolent offenders.⁷

To distort the process further, unlike sitting mayors, governors, and state and local legislators, incumbent prosecutors and sheriffs do not have term limits.⁸ Although term limits never garnered sufficient support to become law at the federal level, a veritable wave of term

⁶ In Ronald Wright’s study of ten states between 1996 and 2006, he found that sitting prosecutors won 71% of the general elections. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592 (2009) [hereinafter Wright, *How Prosecutor Elections Fail Us*]. “Because the incumbent sought reelection in only 75% of all general election campaigns, the incumbent success rate when running for office was 95%.” *Id.* Even more striking is the lack of opposition at election time. Over 80% of prosecutor incumbents run unopposed in both general elections and primaries. *Id.* at 596 Table 2. Contrast that with state legislative incumbents, who run unopposed in only 35% of their elections. *Id.* at 594.

⁷ “Prosecutor elections fail for two reasons: (1) they do not often force an incumbent to give any public explanation at all for the priorities and practices of the office and (2) even when incumbents do face challenges, candidates talk more about particular past cases than about the larger patterns and values reflected in local criminal justice.” *Id.*, at 583.

⁸ As of 2004, one state, Colorado, does have term limits for chief prosecutors, who can serve no more than two consecutive four-year terms. Wright, *Beyond Prosecutor Elections*, *supra* note 3, at 602 n.37. “As a result, the percentage of re-election races run by incumbents is 51%, is much lower than the normal 74%.” *Id.* at 602. One benefit of turnover that could also affect incarceration rates is diversity. Brooklyn District Attorney Charles J. Hynes was finally defeated in 2013 after twenty-four years in office. Hynes was defeated by Kenneth Thompson, a former federal prosecutor, who became the first African-American district attorney in Brooklyn’s history. This is no small matter as a recent study showed that about 95 percent of the 2,437 elected state and local prosecutors across the country in 2014 were white, and 79 percent were white men. Nicholas Fandos, A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States, N.Y. TIMES (July 7, 2015), http://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html?emc=edit_th_20150707&nl=todaysheadlines&nid=55122800.

limits legislation swept through the states, especially in the South.⁹ The term limits wave, however, was focused on state legislators and eventually state executives, and never made its way down to sheriffs and chief prosecutors.¹⁰ As a result, a single chief prosecutor is able to stay in office for decades – for an entire generation – without challengers, and without anyone questioning the policies that cause more convictions, the Sheriff to call for larger jails, and a bloated and outsized bureaucracy to hold the machinery together.¹¹ Taxpayers foot the bill and have no idea what it is.¹²

⁹ Since the 1980's, when the war on drugs combined with the crack epidemic to create a tidal wave of "tough on crime" legislation, at the same time there was a wave of "term limits" legislation that spread throughout the country. Term limits were initially conceived by Republicans to solve what might now be regarded as a quaint problem – as a way to finally break the stranglehold on the federal Congress that Democrats had enjoyed since the New Deal in the 1930's.

¹⁰ To the extent the issue has been or would ever be put to voters, they would seem to support term limits. In 1994, Colorado voters passed a constitutional amendment expanding term limits to all but judges, and including District Attorneys. In 2002, the state's District Attorneys sponsored a referendum to exempt DAs from term limits, but it lost by 65 to 35 percent margin. The issue was finally settled in 2004 when the Colorado Supreme Court ruled that inclusion of District Attorneys term limits followed the intent of the voters. In 2001, Nassau County residents voted in favor of a referendum that no district attorney could serve longer than 12 consecutive years in office. Unfortunately, the referendum was invalidated by the court, which held that only the state, and not voters, could determine how long district attorneys, who were state officials, could remain in office.

¹¹ Using New York City as an example, chief prosecutors can fully expect to stay in power for decades without opposition if they want. Until Brooklyn District Attorney Charles Hynes was defeated in a contested election in 2013, after 24 years in office, 1955 was the last year an incumbent district attorney in New York City had been beaten by an opponent. In Brooklyn, the last time an incumbent prosecutor was voted out was in 1911. Richard Brown in Queens has been in office since 1991. Robert Johnson in the Bronx has been the borough's top prosecutor since 1989. Robert Morgenthau served as Manhattan district attorney for nearly 35 years before retiring at age 89. As another example, Harry Connick, Sr. presided as Orleans Parish District Attorney from 1973 to 2002. Over the course of his career, "he lobbied against almost any policy that could be perceived as a sign of prosecutorial 'softness,' even plea bargaining." Gwen Filosa, *Connick calling it quits*, TIMES-PICAYUNE, Mar. 23, 2002; see also Gwen Filosa, *Harry Bids Adieu*, TIMES-PICAYUNE, Mar. 28, 2002.

¹² See Daniel Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004) ("While district attorneys must consider the costs of prosecuting crimes – because they largely use county funds in

As a result, what is left is a senseless political system with respect to criminal justice priorities. Theoretically, governors, state legislatures, mayors and city councils, as the elected chief executives and legislative branches of government ought to be making policy decisions with respect to criminal justice. These individuals should also be prioritizing resource allocations so that spending on prosecuting crime and imprisoning people is placed in proper perspective and relation to other community needs such as housing, jobs, education, health, water, or sanitation. But that is not what actually takes place.

Chief prosecutors and sheriffs, with their electoral clout, supported by virtually wholly owned vested interests, and with the ultimate trump card of non-term limited virtual lifetime positions, exercise vastly disproportionate power to direct inordinate resources towards prosecuting and punishing crime. Imagine a state with 50 or 60 counties, each with their own locally elected sheriff and chief prosecutor who has been there for more than a decade, perhaps several decades. These longtime sheriffs and chief prosecutors have organized themselves into statewide sheriffs' and District Attorneys' "Associations." These associations form powerful lobbies for legislation. But equally, pity the poor politician running for governor in such a state with each of these 50 or 60 sheriffs and prosecutors, in close contact with their local communities after years or decades in office, against or without the support of these powerful, experienced political players. It is difficult to find or even imagine a candidate who could prevail. The same is true for those running for office as state legislators, mayors and local city councilmembers. As a result, candidates for "policymaking" offices, such as chief executive or legislator, are often captive to what ostensibly are, and should be, non-

managing their offices – they need not overly concern themselves with the costs of incarceration given that, in the majority of jurisdictions, the prison system operates via state monies. This 'split-funding' of the criminal justice system results in both the diffusion of the financial burden between the states and local budgets and, in political terms for prosecutors, the evasion of wholesale blame for the expenditures required in seeking convictions and procuring severe sentences.”).

policymaking elected officials in the form of local sheriffs and chief prosecutors who are benefited and empowered by mass incarceration.

IV. TODAY'S SOLUTION TIES HISTORICAL GOALS TO REALITY

Today, local governments are quite well developed. In contrast to the first half of the 19th century, most Americans live in urban areas, not rural. Cities and towns have developed local government structures, similar to the federal and state models, with a chief executive, usually a mayor, and a legislative branch such as a city or town council. The same is true at the county level with the development of county presidents and county boards. Accordingly, in today's day and age, it is no longer true that the only practical option for imparting or maintaining local control over chief prosecutors' offices and sheriffs' departments is the local election.

Unlike the early 19th century, it is now perfectly plausible and practical to have local chief prosecutors and local sheriffs appointed in the same manner as almost all high federal government officials and many high state level officials – appointment by the local chief executive (be it city mayor or county president) with advice and consent of a local legislative body (be it city or town council or county board). This would be a better compromise between the appointment system at the remote state level of governor or state legislature that initially existed at the start of the 19th century, and the local election system that we now have. The local election system has led us down the path of incarceration as a solution to many problems, such as mental health, substance abuse, lack of jobs, education, and poverty, resulting in our current system of mass incarceration.

Appointing sheriffs and chief prosecutors would have a number of salutary effects. First, it would place what should be non-policymaking positions under the control and authority of those who rightfully ought to be elected – those in policymaking positions such as the chief executives and legislators. In this way, the position of

sheriff and chief prosecutor would be charged with carrying out the policies of the elected policymakers, which is as it should be.

Second, appointing sheriffs and chief prosecutors would more likely ensure that the priority ranking of prosecution and punishment within the broad array of services the government is expected to deliver is aligned with that of the elected policymakers, and therefore more closely aligned with the wishes and priorities of the electorate, and more responsive to it. It is much easier and more likely for a chief executive such as a mayor, or a legislator such as a city councilmember, to be voted out of office than a sheriff or chief prosecutor. And in an appointment system, voting out the appointer ends the appointment. Additionally, the existence of term limits for the chief executive ensures that sheriffs and chief prosecutors, with their virtually unchecked authority within their sphere, would not be in place for decades, as is now the case, with the attendant aggrandizement of power over time. Finally, appointing chief prosecutors and sheriffs would place the positions one step removed from direct electoral politics. This would significantly reduce the ill effects of vested interests such as employees, their family and friends and the letting of contracts.

All of the above would lead to less emphasis and resources on incarceration as a solution to societal problems, and put the prosecution of crime and its punishment more in its proper perspective and balance with other community needs and alternative solutions. It will also significantly reduce the entrenched political opposition to ending mass incarceration that impedes reform. There are those who say a return to appointments is politically infeasible.¹³ To the contrary, just as elections swept in to replace appointments in the hope of increased democracy and local control, an informed citizenry today would see that democracy and local control requires taking those outsized political offices and placing them back into the hands of the properly responsive elected official, and this time a truly local one.

¹³ Wright, *Beyond Prosecutor Elections*, *supra* note 3; Medwed, *supra* note 12.