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Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change

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Abstract

The concept of a penal or carceral state has quickly become a staple in punishment and criminal justice literature. However, the concept, which suffers from a proliferation of meanings and is frequently undefined, gives readers the impression that there is a single, unified, and actor-less state responsible for punishment. This contradicts the thrust of recent punishment literature, which emphasizes fragmentation, variegation, and constant conflict across the actors and institutions that shape penal policy and practice. Using a case study of late-century Michigan, this paper develops an analytical approach that *fractures* the penal state, demonstrating that, far from a unified entity, it is a messy, often conflicted amalgamation of the various branches and actors in charge of punishment and the ways they resist the aims and policies sought by their fellow state actors. Ultimately, we argue that fracture is itself a variable that scholars must measure empirically and incorporate into their accounts of penal change.

Introduction

Since the inception of punishment and society as a field of study, the role of the state in creating and enacting penal law and policy has been an animating focus. Indeed, the role of politics and governance has been perhaps the most robust variable in explaining recent penal change (e.g., Barker, 2009; Beckett, 1997; Miller, 2008). Reflecting this focus, scholars have developed two inter-related concepts—the “penal state” and “carceral state”—to discuss shifts in punishment. Yet these terms are rarely precisely defined (Garland, 2013), instead serving as shorthand for the cumbersome criminal justice system, mass incarceration, the

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punitive turn, or normative corrections nomenclature. Those scholars who define the term often rely on divergent understandings that reflect particular assemblages of penal actors, policies, practices, and institutions that collectively produce punishment. Still other researchers use the term to signal the transition away from a penal-welfarist model of governance (the “welfare state”).

In this article, we interrogate the concept of the penal/carceral state and its utility for penal scholars, illuminating several important problems with the terminology. First, casual usage of the penal state concept and conflicting definitions have eroded its analytical utility. Second, treating penalty and penal actors as a coherent, unified entity—as implied by the definite article in *the* penal state—overlooks recent punishment and society scholarship that highlights the fragmentation, variation, and contestation within penal power, policy, and decision-making.

We first review the development and contemporary usages of the penal and carceral state concepts, critiquing many of the prevailing assumptions behind the terminology. Then we develop an analytical approach to *fracture* the penal state, highlighting the splintered nature of governance structures. We argue that rather than a singular entity, the state is a messy amalgamation of political, legal, and bureaucratic actors, all with their own interests and perspectives. Rather than assuming perennial consensus, we argue scholars must empirically measure conflict among those actors and groups that constitute the penal state.

To illustrate our approach, we turn to a brief case study of two periods in late-century Michigan (focusing on the early penal build-up and post-2000 reform efforts). We map conflict between the various state actors shaping punishment (particularly prison and community supervision) and show how these struggles produce messy patterns of continuity and change over time. Notably, this same pattern of internal state conflict is central to many accounts of mass penal control’s development, but is obscured by vague references to *a* penal state. To conclude, we argue that future research should explicitly break up the penal state into its constituent actors and empirically examine the level of conflict amongst them in order to better understand penal change.

The Rise of the Penal State Concept

The penal state and carceral state concepts coalesced in the late 1990s and early 2000s.¹ Use of both terms has increased dramatically, becoming staples of the contemporary punishment and society literature. These terms have spread beyond interdisciplinary journals for punishment studies to law and society (e.g., Comfort, 2008; Gottschalk, 2009; Kaufman et al. 2016; Schoenfeld, 2010; Simon, 2013), sociology (e.g., Wacquant, 2009c, 2010; Lacey, 2010; Bernstein, 2012), political science (e.g., Gottschalk, 2008; Grasso, 2017; Walker, 2014; Weaver and Lerman, 2010), geography (e.g., Peck, 2003), anthropology (e.g., Gilmore, 1999), history (e.g., Hernández et al. 2015; Lichtenstein 2011; Thompson 2010; Thompson and Murch 2015), gender studies (e.g., McKim, 2014), and philosophy (e.g.,

¹The first punishment and society scholars to use the phrase penal state were Garland (1996) and Wacquant (1997), while historians Lichtenstein (1996) and McLennan (1999) and geographer Gilmore (1999) were the first to use the phrase carceral state. (These attributions are based on articles and books searchable by Google since 1990.)

Nichols, 2014).² Although primarily used to describe the US context, the terms have been used to discuss Canada (Nichols, 2014), England (Garland, 1996), Europe (Wacquant 2009a), Norway (Shammas, 2016), and Latin American countries (Müller, 2012), among others (see also Garland, 2013; Gottschalk, 2009), even as some scholars question its applicability outside the US (Lacey, 2010; Zedner, 2016: 5).

Despite (or perhaps because of) its popularity, there is little consensus over what scholars mean by “the penal state.” Indeed, many scholars omit any explicit definition (Garland, 2013). Its uses vary in the degree of theoretical sophistication offered and the range of actors and institutions included.

Undefined Synonym for Recent Penal Trends

The first and most common usage is as an undefined rough synonym for other terms that reference the recent growth and increasing severity of punishment in the US, including the criminal justice system, corrections, mass incarceration, and the punitive turn.³ In this usage, the term is primarily descriptive, though appending “state” to the phrase lends a critical (or radical) inflection that subtly highlights the normativity inherent in many arguments about the severity of contemporary punishment, particularly in the US (Garland, 2013: 21).⁴

In contrast to the penal state, the carceral state is sometimes construed as reflecting only that which is *formally* carceral: jails and prisons. In Europe, scholars tend to prefer the penal state nomenclature, foregrounding the fact that most criminal sentences end in “non-custodial or community penalties” even if such punishments are explicitly framed and named in reference to confinement (Zedner, 2016: 5). The numerical dominance of non-carceral sanctions is, of course, true in the US as well, despite the heavy use of the carceral state concept and a concomitant focus on mass incarceration (Phelps, 2017). And as we show below, many scholars use the carceral state to refer to this broader archipelago of punishing institutions. This linguistic temptation toward the carceral state shorthand is powerful: even as one of us was developing the case study outlined below (focused initially on probation), she used the carceral state as an undefined synonym for the post-1970s period of US penal history in a book’s chapter title (Goodman et al., 2017).

Undefined but Theoretically Motivated

Among the most recognizable uses of the penal state is Wacquant’s (2009a, 2009b) analysis of the penal state as a core neo-liberal governance strategy. Avoiding an explicit and full definition, Wacquant alternatively envisions the penal state as consuming the welfare state (in funding and authority) or working alongside the welfare state to achieve a common inclusive (e.g., 1940s–‘60s America or contemporary Northern Europe) or exclusive (e.g., 1970s–2000s America or late-modern England and France) goal.⁵ As an example of the former, he explains, “*To the deliberate atrophy of the welfare state corresponds the dystopic*

²Many of these studies engage multiple disciplines and fields, but we categorize them by journal of publication to illustrate appeal to particular academic audiences.

³Even special issues of journals devoted to the carceral state (e.g., *JUH, JAH*) leave the term undefined. Instead, they recapitulate the standard descriptions of mass incarceration and the American punitive turn (Hernandez et al., 2015; Thompson and Murch, 2015).

⁴For parallel debates about the normative implications of the term mass incarceration, see Weisberg and Petersilia (2010) and Wacquant (2010).

hypertrophy of the penal state" (Wacquant 2009a: 58). As an example of the latter, Wacquant describes the transition from welfare to workfare (primarily governing poor women of color), which developed alongside its twin "prisonfare" (primarily governing poor men of color). In this account, the penal state is simultaneously an actor, an end-product, and a causal explanation.

Gottschalk (2005, 2006, 2008) offers a second theoretically grounded understanding of the carceral state, focused on what Garland calls "penal infrastructure" (2013: 21) or, more generally, the state's capacity to punish. This version describes a particular project or "state-building exercise" aimed at increasing state power and infrastructure at a scale on par with "the New Deal and the Great Society" (Gottschalk, 2005: 1695).⁶ While at points the term carceral state is *described* by reference to what it includes (e.g., the number of individuals affected by criminal justice contact in the US), Gottschalk avoids a formal definition of the term (as modeled in the examples below). Perhaps because of this ambiguity, Gottschalk (and others) invoke the state-building exercise usage of the term alongside multiple others, including as a synonym for mass incarceration ("a carceral state that warehouses a disproportionate number of blacks and other minorities" [2008: 241]) and as an umbrella for the entire constellation of punishment's forms, extensions, and consequences (2014a: 289–290).

Defined: From Narrow to Expansive Understandings of State

Scholars who explicitly define the penal state invoke it to refer to a range of empirical phenomena. They vary as to: (1) whether they include (a) only legislatures, governors, and appellate courts who control the law enforced by these institutions or (b) other, more local-level agencies; (2) whether they consider (a) all of the actors involved in these institutions or (b) only the decision makers at the head of these departments; and (3) how far they stretch beyond the criminal justice system into, for example, the private sector or civil portion of government. Given the carceral state's literal definition as relating to jails and prisons, it is surprising that all of the examples we found using either term included the whole gamut of criminal justice institutions (police, courts, prisons, parole/probation offices).

Beckett and Murakawa offer a useful baseline definition: "the penal state is typically conceived as the criminal justice institutions that adjudicate and sanction criminal wrongdoing" (2012: 221). Similarly, Garland, writing more than a decade after pioneering the term, offers a related but more limited version referring to "those aspects of the state that enact penal law, shape penal policy, and direct penal practice" (2013: 21). Notably, Garland's version does *not* "refer to the whole penal system and its apparatus of prisons, jails, correctional staff, and so on. The 'penal state' refers instead to the leadership elites that direct and control the use of that apparatus and its personnel." Stated differently, the penal state means "those aspects of the state that determine penal law and direct the deployment of

⁵Indeed, the penal state is only the latest in a long line of proliferating "states" in academic analyses that highlight a particular face of the government. In addition to the "penal state," scholars have referred to a "welfare state," a "social state," a "nanny state," a "neo-liberal state," a "post-Keynesian state," a "regulatory state," a "police state," a "punitive state," a "correctional state" (Lichtenstein, 2011), a "centaur state" (Wacquant, 2009b), and a "killing state" (Sarat, 1999).

⁶This version of the penal state as infrastructure, state project, or state capacity appears to be most popular among historians and historically minded social scientists (e.g., Hernandez et al., 2015; Lichtenstein, 2011; Thompson, 2010; Thompson and Murch, 2015).

the power to punish” (21). In both versions, the use of the state is grounded in the emphasis on state institutions authorized by state law and charged with the official work of criminal justice activities.

Most other definitions are more expansive. In her review of the literature, Schoenfeld (2016: 157) writes:

The carceral state includes the police, courts, and jails/prisons, but also other institutions and technologies responsible for “mass social control” such as legal financial obligations (fines, fees, restitution orders), probation, electronic monitoring, and other types of monitoring “in the community” (which may be done by private companies)...

This version includes institutions *and* technologies, as well as actors working beyond institutions traditionally recognized as part of the state (e.g., private actors doing government contract work).

Weaver and Lerman (2010) “refer to the totality of this spatially concentrated, more punitive, surveillance- and punishment-oriented system of governance [as] the ‘carceral state’” (818). Their definition includes any point of contact between government officials (broadly construed) and citizens in a penal context, whether in a traffic stop, security camera footage, or in a courthouse or prison. In addition, their more recent work motivates the importance of the *state*, calling “attention to the network of institutions that are a key aspect of American government” to critique the vision of “American governance as weak or stateless” (Lerman and Weaver, 2014: 20; see also Miller, 2016).

Other authors explicitly link the penal state to civil law. Kaufman et al. propose a broad definition spanning the criminal–civil divide:

We use *penal state* to refer to the punishing arm of the government, consisting of corrections departments, courts, law enforcement, and legislatures. The work of the penal state is not limited to criminal sentences but crosses into civil law, and need not be performed by governmental employees... that the boundaries and definition of the penal state are ambiguous: various nongovernmental parties now act in the state’s name and function as part of the penal state as they work with criminalized people. (2016: 3–4)

In perhaps the most expansive version, Beckett and Murakawa (2012) argue for “a comprehensive definition... independent of official claims about what is and is not punishment and legal technicalities that distinguish ‘civil’ incarceration and ‘administrative’ criminal justice sanctions from ‘real’ criminal punishment” (223). They develop the “shadow carceral state” and “shadow penal state” to bring attention to these alternative forms of punishment. They also maintain their theoretical commitment to studying the state, noting that their concept, while “expansive in many ways,” “is limited to state apparatuses” (239).

Out of Sync: The Penal State v. The State of Punishment Studies

As this brief survey indicates, the penal state has become a popular way of referring to a variety of criminal justice and adjacent institutions, actors, and activities. By including such a broad range of actors and arenas, the term has lost analytical precision, with important consequences for our understanding of penal change.

First, scholars have, at times, imprecisely identified “the state” as the only actor rather than specifying who is doing the work of policy change or implementation. This is particularly the case in invocations of the penal state that offer a radical critique of state power, often with a submerged (or, at times, explicit) Marxist undertone. As is true for Marxist sociology more broadly, such accounts are open to questions about the role of specific actors *behind* a de-personalized and expansive state. The lack of specificity and its resultant passivity creates the illusion of a “conspiratorial” narrative (Schoenfeld, 2011: 474). In reviewing such work, critics have asked, “Who, or which institutions... is ‘the state’?” (Lacey, 2010: 783). “Who is involved in calling for and implementing punitiveness, and who benefits from it? Are these groups the same in different places?” (Nelken, 2010: 333–334). Without specific actors, we are left with functional analyses that only tentatively identify the mechanisms of change (Schoenfeld, 2011: 474).

Beyond obscuring actors, invocations of *the* penal state can imply that there is a single homogenous, unified, or coherent entity shaping punishment. Yet scholars have long recognized that there is no singular or homogenous entity called “the state” (Mitchell, 1991; Morgan and Orloff, 2016), “the neo-liberal state” (Levi, 2011), or “the welfare state” (Esping-Andersen, 1990, 1996). Nor is there a single penal state.⁷ As Mona Lynch notes, the US contains “51 autonomous [state and federal] systems” as well as “3,141 county (or county equivalent) jurisdictions that do the actual prosecution and sentencing of felony defendants that themselves receive cases from even more local and regional law enforcement jurisdictions” (2011: 682). Miller (2008), for example, shows the sharp divergences between local punishment policy-making (developed through nuanced understandings of local conditions) verses state-level policy (driven by elite white-dominated groups with a narrow and punitive vision of the solutions to crime). Indeed, punishment scholars have discussed the “fragmented American criminal justice system(s)” for decades (Zimring and Hawkins, 1991: 137), and this recognition extends internationally. As Robinson and McNeill (2015) note, “Different nations allocate the power to punish differently,” which requires a consideration of “local” and “national forms of penal state” (Robinson and McNeill, 2015). Likewise, Müller (2012: 58) emphasizes differences across the “first world” version of the penal state and that (or those) found in Latin America.

In addition, the thrust of recent punishment studies has been to emphasize variation and contestation in penal trends. Offering a counterpoint to a “catastrophic criminology”

⁷Returning to Lacey’s (2010) critique of Wacquant’s use of the term, she asks, “Is there only one ‘penal state’?” She continues, “even if we focus on what is undoubtedly Wacquant’s key example—the USA—the notion of an overarching, monolithic ‘neo-liberal penal state’ is less than convincing. To take just one indicative factor, imprisonment rates across the USA vary hugely, encompassing a range which in the mid 2000s spanned imprisonment rates less than double that of the most punitive of the other advanced economies through to rates over ten times higher” (782).

associated with mass incarceration or the rise of a hypertrophic penal state, scholars have emphasized penalty's bifurcated, braided, or assembled nature (e.g., Hutchinson, 2006; Matthews, 2005; Maurutto and Hannah-Moffat, 2006; Seeds, 2016). Scholars have also illustrated that, following agency-, state-, or federal-level rhetorical and policy changes, front-line actors often act in ways that contradict formal shifts, even continuing old practices under new guise (see, for examples, Cheliotis, 2006; Hannah-Moffat, 1999; Lucken, 1998; Lynch, 1998, 2000; Robinson, 2008).

Recent US studies juxtaposing local-level variation against the assumption of homogeneity within or across states have been particularly fruitful (e.g., Barker, 2009; Campbell, 2011; Campbell and Schoenfeld, 2013; Goodman et al., 2017; Lynch, 2011; Rubin, 2016; Schoenfeld, 2010), demonstrating that even under apparently national trends toward mass incarceration, there is tremendous variation across states and over time (e.g., Barker, 2009; Campbell, 2011; Campbell and Schoenfeld, 2013; Jacobs, 1977; Kennedy, 2013; Lynch, 2010; Schoenfeld, 2014) or, more recently, less incarceration (Phelps and Pager, 2016; Turner et al., 2015).

Some of the most careful penal state scholarship explicitly includes such variation and contestation within theoretical and empirical frameworks. For example, Gottschalk (2006) outlines how distinct interest groups fighting at cross purposes helped to shape the current carceral state, and, later (2014b), the state and non-state forces that have aligned to prevent substantial declines in penal populations. Likewise, in her account of the rise of the penal state over the nineteenth and early twentieth centuries, McLennan (2008) identifies the roles of contractors, laborers and their unions, guards, prisoners, and politicians and other state authorities, all of whom variously competed and allied in ways that shaped penal policy. Discussing a carceral state, Miller (2014: 307) argues that reentry represents "a welfare state-criminal justice hybrid institution that activates the universe of human service actors, criminal justice agencies, and policy and program planners" who all have "specific goals, conceptualize prisoners in specific ways, and advocate for specific kinds of interventions in former prisoners' lives." Such nuances can be hidden within the term *the* carceral state or *the* penal state, which imply singularity, coherence, and state-centeredness rather than conflict and multiplicity.

Fracturing the Penal State

We need not advocate the surely impossible task of abandoning the penal state concept. Rather, we outline a mode of analysis to *fracture* the penal state. This requires first identifying and categorizing the agents who constitute the state (rather than treating the state as a single actor) and, second, analyzing the conflict amongst those actors (rather than assuming consensus).

As we have argued for others to do, we begin by defining the version of the penal state our case adopts. (Recognizing the variety of non-custodial punishments, we avoid the term "carceral.") Similar to Garland (2013), we focus on the state actors responsible for shaping and enacting formal penal law and punishment (the primary policies and practices that produced mass incarceration and mass probation). These include the police and court actors funneling individuals into the criminal justice system; legislators and other political elites

shaping the state's legal code; and the institutional actors responsible for implementing punishment. Departing from Garland's (2013) definition, we include front-line workers who supervise, assign, and mete out punishment (including police, prosecutors, judges, wardens, and parole officers), although our focus remains on elite rhetoric and the macro-level outcomes produced by those front-line workers.

To develop this fractured penal state analysis, we draw on the agonistic perspective (Goodman et al., 2015, 2017), which highlights contestation within the penal field, or "the social space in which agents struggle to accumulate and employ penal capital—that is, legitimate authority to determine penal policies and priorities" (Page, 2011: 10). Penal change is not simple a cycle of consensus and upheaval, but the result of constant struggle in multiple contexts among actors with conflicting opinions, beliefs, and preferences within the constraints and opportunities posed by changes in crime rates, racial politics, the economy, and other social forces. We use the term *fracture* to refer to the complex relationships and contestation among the actors and agencies that constitute the penal state. State actors are not necessarily in conflict, but we argue the degree of coherence and conflict among state actors responsible for punishment must be an explicit empirical question for each case or site. By tracing the efforts of actors as they pursue their preferred policy vision and goals, punishment and society scholars are better able to articulate the composition and role of the state, as well as its relationship with non-state and quasi-state actors and the transmission of policy from elites to front-line staff.

We now illustrate the utility of fracturing the penal state with a brief case study of two periods during the build-up of penal populations in Michigan.

The Fractured Penal State in Michigan

While no state can be said to be proto-typical (given enormous variation across US states), Michigan's turn toward mass incarceration fits well with the "transformation of the penal order" timeline presented by Campbell and Schoenfeld (2013). They posit a period of "destabilization" (~1960–75) and panic over high crime rates, followed by "contestation" (~1975–92) as political leaders began to take increasingly central roles in the punishment field, and finally "reconstruction" (~1992–2001), as tough-on-crime laws and policies solidified. Moreover, in the contemporary period, which Seeds (2016) dubs "late mass incarceration," Michigan has become an emblem of criminal justice reform trailing only New York and New Jersey in downscaling efforts (Greene and Mauer, 2010).

We contrast two key periods in Michigan's penal history: contestation (~1975–92) and late mass incarceration (~2002–2016). These periods represent starkly different alignments of the state's penal field, providing useful comparisons. For each period, we trace the dominant discourses and actions of key state actors—from prosecutors and judges in Michigan's courts to elite policymakers in the Department of Corrections and the political field. These struggles are mapped from the vantage point of the Michigan Department of Corrections (hereafter, MDOC), using the department's external and internal communications (including annual reports, statistical reports, newsletters, and press releases).⁸ Documents were culled from three libraries (University of Michigan Law School, State of Michigan Archives, and

an internal library at the MDOC offices). All quantitative data are from the MDOC's annual Statistical Reports (unless otherwise noted).⁹

Table 1 summarizes the positions of each of the core groups over the two periods.

Contestation (~1975–1992)

As in other US states, the 1960s were a tumultuous period of “destabilization” in Michigan (Campbell and Schoenfeld, 2013). Along with the early decline in American manufacturing and increasing white flight to the suburbs, violent crime (particularly homicide) in US cities began a steep ascent, sparking a new chapter in both racial politics and criminal justice policymaking (Miller, 2016). Once the country's manufacturing center, Detroit, MI was the epicenter of this racialized post-Fordist collapse; its trajectory would end with the city declaring bankruptcy in 2013 (Sugrue, 2014). Local difficulties, coupled with the national conversation around the futility of “treating” criminality in the wake of the infamous Martinson report (Garland, 2001), fed an emergent “law and order” ethos as legislators quickly began to “crack down” on crime. While the residue of the 1960s language of alternatives and rehabilitation remained, it was increasingly braided with the racialized “tough on crime” logic that would come to dominate US politics by the 1990s (Hutchinson, 2006).

Michigan's Governor William G. Milliken (1969–1982) articulated the prevailing political tone in his 1974 address to the state legislature. Resonant with earlier 1960s crime politics, Milliken argued that first-time, non-violent, and non-narcotics trafficking offenses should be eligible for diversion programs; he supported community programs for those “convicted offenders with reasonably good prospects for change” and better investments in “diagnosis, training, counseling and more relevant jobs” inside correctional institutions. However, Milliken simultaneously argued that it was time for the criminal justice system to “get tough,” particularly for violent offenses, crimes involving guns, narcotics offenses, and repeat convictions (*Frontline*, 1974).

This push to “get tough” quickly took over the Michigan political scene and “agitation for longer prison terms for more offenders, for less use of parole, for abandoning community corrections programs” became “intense,” in the words of MDOC Director Perry Johnson (*Dialogues*, 1975: 3). In 1978, the state legislature curtailed prison “good time credits” that allowed prisoners to be released early with good behavior and it enacted a draconian drug law modeled after the infamous Rockefeller laws. Proving Michigan's mettle on the public stage, the “650 Lifer Law” (H.B. 4190) established life without parole as the mandatory punishment for individuals found holding more than 650 grams of cocaine or heroin and set mandatory prison minimums for lesser quantities (*Dialogues*, 1978: 6). The legislature would follow up with a tough mandatory minimum sentencing scheme in 1998.

The MDOC's response was to swing back against the perceived punitive turn among state leaders (politicians and agency administrators) and the public. The 1975–76 Annual Report,

⁹For the remainder of the case study, we cite archival materials using in-text citations, noting the type of material instead of author. The author for all sources is the MDOC.

for example, summarized recent legislation by complaining: “Unfortunately, the majority of the bills that were introduced were ones the department opposed, yet... very likely reflected the concerns and wishes of many legislators” (3). The following year’s report included warnings about “hasty or piecemeal changes to the state’s penal code” and the dangers of eliminating good time credits (*1976–77 Annual Report*: 2). By 1977, Director Johnson would argue that the department’s overcrowding problems were due to an “emotional response” from judges, which “brought thousands of people to prison across the country” (*1977–78 Annual Report*: 10). The MDOC’s ire was directed at the public as well, with articles such as “Build More Prisons – For Less Money – But Not Here” that mocked citizens’ contradictory desires toward punishment.¹⁰ The article ended with a fact box noting the average minimum sentence had already risen from 3.2 to 4.2 years between 1972 and 1977—a statement presumably intended to underscore the already-tough state of punishment (*Deadline*, 1979).

The MDOC provided an alternative vision to respond to the state’s governance crisis: instead of “imprisoning people indiscriminately,” the state should use incarceration sparingly and judiciously, relying on community supervision to “really do the job of protecting the public without bankrupting it” (*1977–78 Annual Report*: 11). At the same time, MDOC worked to promote the prominence and legitimacy of community sanctions by increasing field services staffing, incorporating “tougher” supervision strategies, developing risk assessment tools, and encouraging the judiciary to divert more felons to probation (Phelps, 2014).

While this very public fight was brewing, police and court actors were steadily fueling the penal system with felony cases. Michigan in this period was experiencing both increases in crime and crime panics centered in Detroit; between 1960 and 1970 the state’s murder rate more than doubled, remaining at this high level throughout the 1970s and 1980s (USDOJ, 2017). Although it is difficult to tease apart the influences of increasing crime, police actions, prosecutorial discretion, and judges’ decisions, we can trace the end result in the number of felony dispositions in each year and the percent sentenced to prison or other sanctions. The total number of felony dispositions reported by state courts jumped from around 4,000–5,000 in the mid-1960s to more than 15,000 by 1970 and over 20,000 annual felony convictions by the early 1980s.¹¹

Increasing numbers of felony cases entering the system and lengthening sentences rapidly expanded the prison population. This bloat would create a cascade of crowding crises and attendant problems including prison riots, hostage crises, and emergency prison releases, which periodically set off media firestorms (*Signal*, 1990). By 1984, these scandals had proved toxic and Director Johnson—who had exhaustively argued for both alternatives to prison and adequate funding to build and maintain humane prison facilities—resigned his post. His replacement, Robert Brown, Jr., took a decidedly less aggressive stance toward

¹⁰On the theme of the challenges of getting public support for prison-building, see Guetzkow and Schoon (2015) and Schoenfeld (2010).

¹¹On the role of prosecutors on increasing the number of felony filings, see Pfaff (2017).

politicians. At the same time, Michigan's Governor began to push an ambitious legislative agenda for prison expansion.

By the early 1990s, something resembling a working consensus began to emerge among penal elite in Michigan. Felony convictions continued to rise; in 1991, over 44,000 felony cases were decided. By the decade's close, the prison population had nearly doubled as the number of Michigan prisons more than tripled from 9 to 28 prisons (*Signal*, 1990). Probation and parole rolls swelled from 32,000 in 1980 to over 54,000 by 1990. By 1992, Michigan would report that they had the highest rate of felony supervision in the Great Lakes states and were among the top five jurisdictions nationally (*Statistical Report*, 1992: 5). Paradoxically, however, the state continued to embrace "alternative" sanctions, passing a Community Corrections Act in 1988 that incentivized county judges to sanction lower-level felony offenses with probation or confinement in local jails instead of prison. In the years following the legislation, the percentage of felony cases sentenced to prison began to trend downward, reaching a "new normal" of around 25% by the mid-1990s, even as the total number of felony cases continued to climb.

In sum, throughout most of this period from the mid-1970s to early 1990s, the "state" in Michigan was a deeply contested entity. Police and prosecutors flooded the criminal justice system with a wave of new felony cases, and policymakers passed ever more draconian legislation even as the MDOC—the institution charged with actually enacting state punishment—fought against such changes. The MDOC (and especially Director Johnson) argued the state could better protect its citizens with fewer financial resources by expanding the use of community supervision. These discourse and policy efforts had real (if unintended) consequences as the state developed the infrastructure for *both* mass incarceration and mass probation (Phelps, 2014, 2017).

Late Mass Incarceration (2002–2016)

By the mid-2000s, Michigan began to face a series of budget crises (which would culminate in the Great Recession). Its tremendous spending on corrections was becoming a political liability (Pew, 2009), and its social and political context had changed substantially from the 1990s (Phelps, 2016). Crime rates, even in hard-hit cities like Detroit, had begun a descent in the 1990s and, by the 2010s, the state's violent crime rate was lower than before the prison boom (Friedman, Fortier, and Cullen, 2015). With a progressive Governor, Jennifer Granholm, in office as of 2003, political and administrative leadership slowly coalesced around the conclusion that the state's incarceration level was unsustainable (*FYI*, 2007).

This shift in the politics of punishment, explicitly motivated by budgetary concerns, led to a series of legislative and bureaucratic shifts in the penal field in Michigan and other states (Aviram, 2015). In 2002, Michigan's legislators scaled back the "650 Lifer Laws," eliminating mandatory minimums for drug violations, moderating sentencing guidelines, and abolishing lifetime probation. The protocols changed sentencing for new offenses *and* retroactively applied to current inmates, producing a wave of parole releases (Greene and Mauer, 2010).

At the same time, the MDOC (now helmed by Patricia Caruso) began its own series of reforms. In 2003 (her first year in office), the department announced an ambitious five-year plan designed to “manage the growth of the inmate population while addressing serious budget constraints” (*FYI*, 2003b). Key to this proposal was addressing increases in the number of probationer and parolees revoked to state prison, which had come to take an increasingly large share of annual prison admissions, and declines in the parole approval rate in the prior decade (Greene and Mauer, 2010). The most substantial of the resulting reforms was the development and expansion of the Michigan Prisoner Reentry Initiative (MPRI), which radically shifted the discourses and practices of parole in Michigan to emphasize “offender success” (Rengifo and Stemen, 2010). MPRI expanded parole release, built links between parole agents and local service providers, changed supervision practices, and developed intermediate sanctions for responding to parole violations. Additionally, the department revitalized the Community Corrections Act to reduce the percent of felons sentenced to prison.

In stark contrast to the contestation period, all of the key administrators and political leaders in the system agreed on the goal of reducing imprisonment rates. For example, in 2005, a Task Force on Jail and Prison Overcrowding published their final report on the challenges facing the department. In a unique display of cross-agency collaboration, the report was praised by the department’s Director (Caruso), as well as the Michigan Sheriffs’ Association, the Michigan Judiciary, and the Prosecuting Attorneys Association of Michigan. The report explicitly advocated “alternatives” (including community supervision, community residential placements, and electronic monitoring), with Michigan Judges Association President Thomas Eveland echoing department rhetoric by writing, “I believe that most members of the Michigan judiciary are committed to utilizing treatment and community corrections programs, where appropriate, in lieu of jail and prison commitments, so that these facilities can be available for those offenders who pose the greatest risk to our communities” (*News Release*, 2005).

With all of the key bureaucratic, judicial, and political bodies on board with a coherent direction for state action, all of the indicators of Michigan’s criminal justice system shifted in tandem. Rates of felony conviction, adjudication to prison, probation and parole populations, and supervision revocations all declined. For example, after peaking at nearly 53,000 in 2007, the annual number of felony dispositions declined to 49,000 by 2014, and the percent of felons sentenced to prison declined from 27% in 2002 to 22% in 2014. By the late-2000s, the technical revocation rate for parole reached its lowest on record (Greene and Mauer 2010) and, by 2014, prison admissions for adults on probation or parole dropped from a peak of nearly 9,000 entries in 2002 to 5,500.

The coalition in Michigan’s late mass incarceration period has (for the most part) survived a shift in the political field. In 2011, Governor Granholm was replaced with Republican Governor Rick Snyder—a move that seemed to rebuke the progressive coalition established in the 2000s. Snyder quickly appointed a former sheriff from a conservative county to MDOC director. Yet once in office, Daniel Heyns continued many of the department’s reform efforts, rebranding the work of MPRI as the “Michigan Offender Success Model.” These efforts are still in progress; for example, in 2017, Governor Snyder signed a package

of bills supporting “evidence-based” supervision for community supervision (State of Michigan, 2017).

Discussion

We use the case of Michigan criminal justice in these two periods to make a simple, but important, analytical point: there is no unitary penal state behind criminal justice trends. As is highlighted in much of the punishment and society literature, the *state* is actually a diverse array of actors from bureaucratic leaders down to the front-line staff implementing policy, each with their own (shifting) penal preferences and concerns. During the contestation period, the MDOC—the state agency directly charged with implementing punishment—had vastly different goals and understandings of the “problem” than political leaders shaping penal law. They also worked in direct opposition to the everyday actions of the police officers, prosecutors, and judges who inundated the MDOC with a flood of new cases. In contrast, we see much more coordinated state action in the 2010s, when all of the various state actors aligned around reducing the prison population. In this period, Michigan’s various criminal justice indicators have trended in the same direction. Far from a continuously unified state, our case study of Michigan illustrates that there are diverse state actors in each penal field and their consensus or disagreement has direct consequences for penal change.

The contested state we see in Michigan in the first period is emblematic of struggles within the penal field in many places during this time period—even if those internal fights are often backgrounded to other theoretical concerns. The literature offers a variety of examples of shifting alliances across political, bureaucratic, and judicial actors—including mid- or late-century Arizona (Lynch 2010), Texas (Campbell 2011), Florida (Schoenfeld 2010), and Arkansas (Feeley and Rubin 2000). Moving as far back as nineteenth-century Pennsylvania, we can see critical struggles between the courts and prison administrators to shape penal policies (Rubin 2017). Likewise, multiple studies have illustrated how front-line workers often chafe against programs, initiatives, and ideologies imposed from above, leading to various forms of rule bending, rule violation, and creative interpretations of formal mandates (e.g., Cheliotis 2006; Goodman et al. 2015; Kruttschnitt and Gartner 2005; Lynch 1998; Maynard-Moody and Musheno 2003). Others show the divergence between local- and state-level policy-making, particularly with respect to how the racial politics of crime and punishment differ at these levels (Miller, 2008). Although the penal state is not *always* conflicted, we can often find at least some level of contestation across state actors.

By emphasizing the various actors that make up the penal state and better reflecting their interests and activities, macro- and micro-level accounts of penal change will become more precise and theoretically rich. We can conceptualize (and measure) the state not as a single variable, but as distinct components, including the legislature, executive, judiciary, and relevant agencies (e.g., the DOC), each with specific political or penological ideologies and policy levers. Fracturing the state into its constituent parts can also help explain why policy changes only sometimes follow new state mandates in a linear fashion. When different branches of government and other powerful state and non-state actors reach greater consensus, we expect that change is more likely, faster, and more enduring than when there

is more visible struggle. When front-line workers agree with new mandates, policy more readily becomes practice.

By breaking up the penal state theoretically and empirically, and making the degree of fracture an empirical question, we gain a clearer understanding our penal past, present, and future. In addition to informing theory, this move can help us to understand the drivers of reform. Convincing one arm or hand of the state (e.g. the legislature) may not be sufficient for producing meaningful policy shifts. Instead, the work is in developing new policy discourses and practices that resonate across diverse actors and produce coherent reforms to pare back the scale and severity of punishment in the US.

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Table 1

Summary of Results

	Contestation (~1975–92)	Late Mass Incarceration (2002–2016)
<i>Court Inputs</i>	Very large increases in felony dispositions	Stabilization of felony dispositions after late-2000s
	Fluctuations up and down in felony dispositions sentenced to prison until 1988 Community Corrections Act	Decline in felony dispositions sentenced to prison
<i>Political Field</i>	Governor voices strong support for tougher punishment	Governor voices strong support for more progressive punishment
	Legislators pass series of punitive crime bills, including draconian drug sentencing and severe mandatory minimums in 1978	Legislators scale back drug laws and mandatory minimums to reduce prison sentences
<i>DOC</i>	DOC stridently speaks against punitive legislation and judicial decisions	DOC leads reform campaign to change sentencing and policy to reduce corrections populations
	Public campaign to avert mass incarceration through promoting and reforming community supervision	Bureaucratic reforms to increase diversion to community corrections and parole releases and reduce probation and parole revocations