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David Friedman's title makes an arresting promise: He will undertake to *make sense* of English law enforcement in the eighteenth century. At first one guesses he means merely to organize the tangled mass of procedures and punishments. Slowly one suspects he means to do more. He means to show that the institutions of eighteenth-century criminal justice were *sensible.* The task would be plausible if, by sensible, Friedman meant that the institutions of law enforcement advanced one of the system's articulated goals in an articulable way or that authorities defended existing institutions by reference to those goals. But Friedman means more. He means that the institutions of punishment in eighteenth-century England were a cost-effective means of fighting crime in a world of rational economic actors. His often ingenious paper belongs alongside other volumes that promise to uncover economic rationality beneath a skein of unreason: *Making Sense of Sex*; *Making Sense of War*; *Making Sense of the Eighteenth Century.*

Putting aside my admiration for the boldness of the undertaking and for Friedman's success in synthesizing so much material so neatly, I argue here that his major arguments lack support in the historical record. As theory—or "conjecture" as he often calls them—his ideas could be valuable tools for analysis, but only to highlight the divergence between theory and reality and thereby to spur deeper investigation. My argument tracks Friedman's two major points. Section I addresses his claim that the system of private prosecution was "reasonably successful" because it exploited the economic interests of crime victims.[1] I consider the lack of evidence of "success," the lack of evidence of an economic motive, and the lack of evidence that any such motive can explain the system as it stood. Section II looks at Friedman's discussion of the forms of punishment. Here he makes fewer broad claims, the most identifiable (and vulnerable) being that imprisonment gained favor at the end of the century because only then could the country afford it. Based on evidence that

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George Fisher is an assistant clinical professor of law at Boston College. He would like to thank Avi Soifer, Elena Kagan, and David Friedman for their help and comments.

1. David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U Chi L Sch Roundtable 477, 485 (1995).

prisons became more popular as they became more expensive, I argue that cost does little to explain their earlier unpopularity and that the nation's late-century affluence does little to explain the form the new prisons took or the ideology of their builders.

I. The "Logic" of Private Enforcement

Friedman does not question our modern judgment that a system of public prosecution ensures broader, more uniform law enforcement than a system that relies on the initiative of individual crime victims to bring a case to trial. But if Britain's protracted resistance to public prosecution had political or social motives, or if the system of private prosecution had deep historical roots tracing to outdated systemic incapacities, these do not interest Friedman. Private prosecution made sense, he says, because it worked. It worked because the practice of "compounding" crimes—terminating prosecution in exchange for payment by defendant to crime victim—gave the victim an incentive to prosecute.[2] Friedman does not claim that this system worked better than a system of public prosecution—although superior efficiency would seem important to any economic argument. Nor does he claim that authorities embraced or defended private prosecution because they *perceived* it to work—although contemporary rationale would seem important to any historical argument. Instead Friedman argues that private prosecution made sense simply because it *worked*, by which he means that it suppressed a lot of crime.

Friedman stakes this claim on J. M. Beattie's report of sharply declining homicide indictments in Surrey and Sussex between 1660 and 1800.[3] This evidence cannot bear Friedman's freight. To begin with, the system of private prosecution dates to the very earliest history of England's system of criminal prosecution.[4] If it worked, then why was the homicide rate so high in 1660? Second, Beattie has reported merely indictment rates, not crime rates. The latter, in an age without organized police, are beyond ascertainment. Friedman leaves out Beattie's very interesting discussion of the factors that might have

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2. I am leaving aside Friedman's argument that the large network of prosecutor associations helped to make the system of private prosecution effective against crime. See Friedman, 2 U Chi L Sch Roundtable at 486-88 (cited in note 1). His brief treatment of the subject presents no evidence that the associations increased prosecutions or deterrence, and at least one historian cited by Friedman has concluded they had little such effect. See P. J. R. King, *Prosecution Associations and Their Impact in Eighteenth Century Essex*, in Douglas Hay and Francis Snyder, eds, *Policing and Prosecution in Britain 1750-1850* 171-72, 189-92 (Clarendon, 1989). In any event, these associations grew up largely in the last third of the eighteenth century and so cannot much explain why the age-old system of private prosecution "worked." See David Philips, *Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England 1760-1860*, in Hay and Snyder, eds, *Policing and Prosecution* at 113, 122, 161-63.

3. Friedman, 2 U Chi L Sch Roundtable at 485-86 (cited in note 1).

4. See Roger D. Groot, *The Early-Thirteenth-Century Criminal Jury*, in J. S. Cockburn and Thomas A. Green, eds, *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* 3, 4 (Princeton, 1988).

depressed the *prosecution* rate but not the crime rate.[5] True, Beattie concludes that some of the decline in indictments reflects a real decline in violence, but he attributes that decline not to the efficiency of the system of private prosecution, which after all had existed for many centuries, but to a "developing civility, expressed perhaps in a more highly developed politeness of manner and a concern not to offend or to take offense, and an enlarged sensitivity toward some forms of cruelty and pain."[6] Third, Friedman's theory that the promise of a financial settlement impelled crime victims to press charges would seem to work worst in homicide cases. A system that officially sanctioned such settlements only in misdemeanor cases[7] would tolerate them least in homicide cases. Fourth, there is no evidence of a sustained or substantial fall in *property* crime during the eighteenth century. Beattie's figures show that the rate of robbery indictments in Surrey fell only about 20 percent between the late seventeenth and the late eighteenth centuries, while the rate of robbery indictments in Sussex *increased* about 50 percent.[8]

I do not mean to suggest that the system of private prosecution did *not* work. A great many cases were prosecuted and brought to trial, and a great many defendants were punished. To the extent that the system did work, however, Friedman fails to show that it worked because of the economic motive promised by settlement in lieu of trial. He concedes Peter King's finding that fewer than 15 percent of prosecutors who brought charges failed to press them forward to trial.[9] He admits Beattie's conclusion that the "vast majority" of cases went forward.[10] He then speculates that prosecutors were bought off *before* charges were brought.[11] Perhaps so, but we cannot know how often. "There is inevitably not a great deal of evidence" about such deals in court records.[12]

In the absence of direct evidence, how plausible is Friedman's speculation that financial settlements were common enough to inspire prosecutors to take action? In misdemeanor assault cases, the practice was perhaps common enough. Compounding misdemeanors was legal and was perhaps encouraged by the magistrates who presided over the local courts of quarter sessions.[13]

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5. J. M. Beattie, *Crime and the Courts in England 1600-1800* 108-11 (Princeton, 1986).

6. Id at 112.

7. See Friedman, 2 U Chi L Sch Roundtable at 488 (cited in note 1).

8. Beattie, *Crime and the Courts* at 162 (cited in note 5).

9. Friedman, 2 U Chi L Sch Roundtable at 490 (cited in note 1).

10. Id at 490 n 97.

11. Id at 490 & n 32.

12. Beattie, *Crime and the Courts* at 40 n 12 (cited in note 5).

13. See id at 39. Authorities felt that minor violence caused mainly private injury. See id at 76, 124. See also Peter King, *The Transformation of Attitudes to Interpersonal Violence in the English Courts in the Eighteenth and Early Nineteenth Centuries* 8 (draft on file with author) (noting that between 1748 and 1752, more than three-quarters of those accused of assault at Essex Quarter Sessions pleaded guilty and concluding that victim and accused "no doubt . . . in most cases" had reached a settlement).

Moreover, defendants in assault cases often might have had the means to make amends. Blackstone acknowledged (and condemned) a post-trial method of settling misdemeanor assault cases, which he said was "too frequently commenced, rather for private lucre than for the great ends of public justice."[14] Theft was a different matter. Because all theft was felony theft, compounding was illegal. Thieves were in any event more likely to be destitute, unable to make the slightest payment to the victim. But if Friedman's theory promises to work only with regard to assault cases, then it has little promise. The law enforcement system was far more concerned with theft than with minor crimes of violence.[15]

Contemporary commentary on the law enforcement system offers no help for Friedman's thesis that the promise of compounding cases made the system of private prosecution work. Commentators mentioned the practice only rarely and then unfavorably. In 1751, London magistrate and novelist Henry Fielding set out six causes of the "Remissness of Prosecutors," who he said are often:

> 1. Fearful, and to be intimidated by the Threats of the Gang; or,
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> 2. Delicate, and cannot appear in a public Court; or,
>
> 3. Indolent, and will not give themselves the Trouble of a Prosecution; or,
>
> 4. Avaricious, and will not undergo the Expence of it; nay perhaps find their Account in compounding the Matter; or,
>
> 5. Tender-hearted, and cannot take away the Life of a Man; or,

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14. William Blackstone, 4 Commentaries *356-57. Blackstone argued that forgiving assaults did not serve public justice:

> For, although a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others.

Id (quoting Beccaria).

15. Patrick Colquhoun complained that when "a personal assault is committed of the most cruel, aggravated, and violent nature, the offender is seldom punished in any other manner than by a fine and imprisonment, but if a delinquent steals from his neighbour secretly more than the value of twelvepence, the law dooms him to death." Patrick Colquhoun, *A Treatise on the Police of the Metropolis* 265-66 (H. Fry, 2d ed 1796).

My studies at the Manchester Quarter Sessions show that between 1774 and 1797, assault accounted for at most 13 percent of all convictions, whereas theft accounted for at least 70 percent. See Lancashire County Record Office, Preston, *Quarter Sessions Order Books* 143-66 (1774-97). Of course, these are *convictions*; compounded cases would not appear in these figures. Still, the percentages are so lopsided as to suggest a preoccupation with theft. The associations for prosecution that became so prominent toward the end of the century, see Friedman, 2 U Chi L Sch Roundtable at 486-88 (cited in note 1), concerned themselves mainly with thefts. See Philips, *Good Men to Associate* at 145 (cited in note 2); King, *Prosecution Associations* at 171, 173-74 (cited in note 2).

> Lastly, Necessitous, and cannot really afford the Cost, however small, together with the Loss of Time which attends it.[16]

Far from proposing that "Necessitous" crime victims launch a prosecution and then settle it for cash, Fielding scolded the "Avaricious" who did just that and lumped them in with all the other "remiss" prosecutors. One gets little sense that compounding cases was a common practice and even less that authorities perceived it to be helpful in suppressing crime. Lancashire magistrate Thomas Butterworth Bayley blamed the underenforcement of laws on crime victims' "selfish Indolence," yet he made no appeal to their selfishness by reminding them of the potential to settle cases for a gain.[17] And Bayley's complaint about victims' "tenderness,"[18] like Fielding's about their tender-heartedness and Blackstone's about their "compassion,"[19] displayed concern that crime victims sometimes shielded criminals from the law's severity.[20] These observers would be amazed at Friedman's image of crime victims as economic animals who wielded the threat of execution to leverage settlement from the defendant.[21]

In fact, contemporaries portrayed a criminal justice system hampered by its reliance on the private initiative of crime victims, who were put off by the sometimes extravagant costs of prosecution, turned off by the potential bloodletting, and scared off by the personal risk. Fielding thought it "a Miracle of Public Spirit if [the crime victim] doth not rather choose to conceal the Felony."[22] By appealing to the public spirit of crime victims, he and other public leaders hoped to persuade victims to go forward against their perceived self-interest. The futility of the task in many cases no doubt moved Lancashire magistrate Samuel Clowes to endorse "prosecuting Felons at the public Expence" as one of "the most effectual Means of suppressing Villainy."[23] That the system worked at all, indeed that it survived largely intact until 1879, is a paradox worthy of research.[24] The story of the system's ultimate disman-

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16. Henry Fielding, *An Enquiry into the Causes of the Late Increase of Robbers* 81 (G. Faulkner, 1751).

17. Manchester Mercury (Aug 9, 1785).

18. Id.

19. Blackstone, 4 Commentaries *18 (cited in note 14).

20. Beattie notes that while some victims altogether refrained from prosecution, others pointedly avoided charging defendants under capital statutes. See Beattie, *Crime and the Courts* at 181 (cited in note 5).

21. Friedman, 2 U Chi L Sch Roundtable at 490 (cited in note 1).

22. Fielding, *An Enquiry* at 110 (cited in note 16).

23. Letter from Samuel Clowes to Lord Liverpool (Dec 5, 1791) (258 Liverpool Papers, Duchy of Lancaster Papers 1790-94, British Museum Add MS 38447, f 148).

24. One reason the system of private prosecution survived may have been the success of early efforts to alter it in practice without doing so in law. In late-eighteenth-century Manchester, an attorney who served as clerk to seven justices of the local bench conducted as many as 80 percent of the prosecutions before the bench. He seems to have served as de facto public prosecutor. See George Fisher, *The Birth of the Prison Retold*, 104 Yale L J 1235, 1250-52 (1995). By the mid-nineteenth century justices' clerks often served as

tling reflects the complexity of affections for any hoary social institution, however inadequate to its task.[25] In any event, contemporaries certainly thought that the system of private prosecution did *not* work. Friedman's valiant revisionism notwithstanding, there is little evidence that the system of private prosecution worked *well*, even less that it worked because of the potential to settle cases for cash, and still less that contemporaries preserved it because they perceived it to work.

II. Punishment and Punishment Cost

The reason Friedman likes private prosecution so much becomes clearer when he turns his attention to comparing various forms of punishment. A costlessly collected fine or damage payment—of the sort paid to buy off a private prosecutor—has an inefficiency of zero. "[W]hat one person loses another gets."[26] Execution, in contrast, has an inefficiency of about one. "[T]he criminal loses his life and nobody gets one."[27] And imprisonment (on today's model) has an inefficiency far greater than one. "The criminal loses his liberty, nobody gets it, and the state must pay for the prison."[28] Friedman surmises that the great cost of imprisonment suppressed its use early in the eighteenth century and that the nation turned increasingly to prisons as the industrial boom of the latter half of the century generated the necessary funds.

It is hard to grasp why rational economic actors (as I understand Friedman supposes us to be) would have embraced wholesale what is perhaps the most inefficient form of punishment. Perhaps prisons produce goods that need to be factored into the equation, like the incapacitation of the criminal or the deterrence of others.[29] More startling to me as a non-economist is why our

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semi-official public prosecutors. See Douglas Hay and Francis Snyder, *Using the Criminal Law, 1750-1850: Policing, Private Prosecution, and the State*, in Hay and Snyder, eds, *Policing and Prosecution* at 3, 42-45 (cited in note 2).

25. See Philip B. Kurland and D. W. M. Waters, *Public Prosecutions in England, 1854-79: An Essay in English Legislative History*, 1959 Duke L J 493.

26. Friedman, 2 U Chi L Sch Roundtable at 494 (cited in note 1).

27. Id.

28. Id.

29. Elsewhere Friedman makes clear that he is ignoring the benefit of incapacitation and says that he considers deterrence "separately." David D. Friedman, *Should the Characteristics of Victims and Criminals Count?:* Payne v. Tennessee *and Two Views of Efficient Punishment*, 34 BC L Rev 731, 734 n 11, 735 n 13 (1993). In a letter to the author, Friedman argues that imprisonment was embraced because it promised to deter minor crime:

> Imprisonment is an expensive punishment relative to transportation or execution. Its great advantage is that the quantity can be varied much more easily; in particular, it is more suitable for lower (but still substantial) punishments.
>
> Lower but substantial punishments are useful because judges, juries, and victims will not (perhaps also should not) impose very severe punishments on first offenders, youths, etc. Their failure to do so reduces deterrence. So we can get more deterrence by making extensive use of imprisonment for the sorts of offenders that will go free if we only have available transportation and execution.

adoption of this inefficient form of punishment should have been delayed only by our inability to pay for it. Why should a suddenly prosperous late-eighteenth-century English society have decided to squander its newfound wealth on, among all things, a highly inefficient form of criminal punishment?

Before I examine the consequences of Friedman's argument, let me point out that he is again arguing in an evidentiary void. What evidence is there that imprisonment was more expensive than transportation, the form of punishment it most directly replaced?[30] We must be careful not to project backward onto eighteenth-century prisons the costs of today's heavily staffed, restlessly litigated fortresses. Here historians could really use the help of someone like Friedman, yet he merely churns back the few useful cost figures historians have managed to produce. Toward the beginning of the century, the government paid three pounds for each transported convict; the fee soon rose to five pounds.[31] Friedman reasons that English imprisonment may have cost the same as French imprisonment—about four pounds per year.[32] As the term of transportation for minor crimes was seven years, Friedman concludes that "imprisonment cost substantially more than the English state was willing to pay."[33]

That might be true if prison terms, when they took hold, replaced transportation terms year for year. But they did not. Records from the Manchester Quarter Sessions show that during the last quarter of the eighteenth century, imprisonment largely displaced transportation as the punishment for petty larceny, the crime that consumed the great bulk of criminal business in that court. The statutory term of transportation for petty larceny was seven years. Yet the average prison term for that same crime appears never to have reached ten months.[34] True, the cost of a new prison commissioned by the Manchester magistrates and completed in 1790 exceeded £13,000,[35] but the

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> This additional deterrence comes at a cost. That cost was too high to pay early in the century. But the 18th century was a period of substantial economic growth. By the end of the century, England, and in particular the English government, was rich enough to be willing to buy a 'higher quality' deterrent system—one with imprisonment as well as transportation and execution.

As I argue below, it is not at all clear that prisons were too expensive earlier in the century. I have argued elsewhere that the rise of prisons during the last quarter of the century reflected the rise of a *corrective* penology. See Fisher, 104 Yale L J at 1271-77 (cited in note 24). There is little evidence that could support Friedman's view that prisons grew up in response to a deterrent impulse long frustrated by financial constraints.

30. Imprisonment grew up at the end of the eighteenth century primarily as an alternative to transportation for the punishment of minor crimes, not as an alternative to execution for the punishment of great crimes. See Fisher, 104 Yale L J at 1264-67, 1293, 1312-13 (cited in note 24).

31. See A. Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775* 70-71 (Clarendon, 1987).

32. Friedman, 2 U Chi L Sch Roundtable at 497 (cited in note 1).

33. Id.

34. See Fisher, 104 Yale L J at 1265 (cited in note 24).

35. See id at 1260 & n 124.

magistrates could well have continued to use their old prison, built hundreds of years earlier and recently renovated for a relatively modest £1,671.[36]

These figures highlight one question it seems no cost-based argument can answer: Why did penal authorities in late-eighteenth-century England build such *expensive* prisons?[37] The prevailing prisons of the early and middle parts of the century had but few rooms in which prisoners indiscriminately mixed. These prisons were not inherently secure, but shackling the prisoners in heavy irons kept them in one place. Staffing was minimal, and the jailer's privilege to collect fees from the prisoners in exchange for improved accommodations and to operate a "tap," or prison pub, meant that salaries could be small. Even food burdened the rate-payer little. In Manchester, prisoners begged for donations by lowering collection bags through the bars. The prison reform of the last quarter of the century wrecked these economic virtues of early prisons. The Manchester bench closed the tap in 1777 and banned fee-taking from the prisoners—and was thereafter forced to raise the jailer's salary from £25 to £80.[38] Parliament soon closed prison taps nationwide, having earlier placed limits on the collection of fees.[39] The many new prisons built in this era provided separate cells for each inmate, separate courts for the several classes of prisoners, workshops, chapels, and infirmaries.[40]

Despite their seeming extravagance, some forty-five of these prisons were built between 1775 and 1795.[41] In Gloucestershire, Sir George Onesiphorus Paul persuaded county authorities to build five prisons on the latest model all at once.[42] Although there was occasional scattered grumbling about the cost of these state-of-the-art prisons,[43] the prevailing mood was that cost was no object.[44] Witness Bayley's announcement of plans to build a new prison in

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36. See Margaret DeLacy, *Prison Reform in Lancashire, 1700-1850* 74-75 (Stanford, 1986).

37. During the 1780s and 1790s a "good reformed prison" cost between £151 and £283 per cell-place. Reforming counties spent at least a quarter of their revenues on prison mortgages and administration. See Robin Evans, *The Fabrication of Virtue: English Prison Architecture, 1750-1840* 194 (Cambridge, 1982).

38. See DeLacy, *Prison Reform* at 78, 106-07 (cited in note 36); John Howard, *The State of the Prisons in England and Wales* 435 (Warrington, Eyres, 3d ed 1784).

39. See 22 Geo 3, ch 64, § 8 (1782) (banning taps in houses of correction); 24 Geo 3, ch 54, § 22 (1784) (banning taps in county jails); 14 Geo 3, ch 20 (1774) (placing some limitations on collecting fees from prisoners).

40. See Evans, *The Fabrication of Virtue* (cited in note 37) (reprinting plans of prisons built in this era).

41. See id at 94.

42. See id at 139. Gloucestershire's new jail, which incorporated a penitentiary and house of correction, cost almost £26,000. Four additional houses of correction cost between £3300 and £6200 each. See J. R. S. Whiting, *Prison Reform in Gloucestershire 1776-1820* 15, 17, 114, 139, 145, 160 (Phillimore, 1975).

43. See Evans, *Fabrication of Virtue* at 133-34 (cited in note 37); Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* 98, 234 n 65 (Pantheon, 1978).

44. In 1788, Dorset authorities decided that their new prison, built just five years

Manchester: "The necessary Expences which will attend the Completion of this good work of mercy and justice, will, I am confident, be cheerfully borne by an enlightened and generous Public, when they are rationally led to expect . . . 'That *solitary* Imprisonment, well regulated Labour, and religious Instruction, may be Means, under Providence, of deterring others from the Commission of Crimes, of reforming Individuals, and inuring them to Habits of Industry.'"[45] Of course, by protesting so much, Bayley betrayed his concern that the less enlightened would not pay their increased rates so cheerfully. That may explain his unspoken appeal to cost efficiency: It costs more because it saves more.

Perhaps Friedman is right that the government could not have afforded such elaborate imprisonment in the earlier years of the century, but he provides no evidence on the point. The question is more complicated than it seems, as these new prisons were built not by the central government but by many separate local and county authorities whose resources are not so easy to measure.[46] In any event, to syllogize increasing expenditure from increasing wealth obscures the truly interesting question about the rise of the prison: Why, at the end of the eighteenth century, did penal authorities in England *choose* a new and highly articulated prison regimen as the punishment of first resort for minor crime? Friedman is right that sufficient resources are a necessary condition to this choice, but can having the money explain the choice? Historical theorists trying to explain the rise of the English prison seize on religious movements, intellectual trends, industrial developments, social struggles, historical accidents, and the influence of motivated individuals, all of which help to explain dissatisfaction with transportation and expanding ambitions for imprisonment. Yet except for the occasional footnoted reference,[47] Friedman leaves non-cost-based forces for others to explore.

III. Conclusion

Friedman is surely right that a society will employ only those procedures and punishments it can afford, that the execution of any particular procedure or punishment will respond to cost constraints, and that the effectiveness of any procedure or punishment will depend to some degree on how well it exploits the self-interest of both criminal and law enforcer. Legal historians of this era have not proceeded in ignorance of these principles. That so many

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earlier at a cost of £4000, was not reformed enough and quickly built a £16,000 prison in its place. See Evans, *Fabrication of Virtue* at 132 (cited in note 37).

45. Manchester Mercury (Aug 9, 1785) (emphasis in original).

46. Parliament's involvement generally extended only to authorizing county authorities to raise funds. Between 1785 and 1788, six counties obtained acts for the rebuilding and the reorganizing of their prisons. See Sidney Webb and Beatrice Webb, *English Prisons under Local Government* 40 (Longmans, Green, 1922); 25 Geo 3, ch 10 (1785) (Gloucestershire); 26 Geo 3, ch 24 (1786) (Shropshire); 26 Geo 3, ch 55 (1786) (Middlesex); 27 Geo 3, ch 58 (1787) (Sussex); 27 Geo 3, ch 60 (1787) (Staffordshire); 28 Geo 3, ch 82 (1788) (Cheshire).

47. Friedman, 2 U Chi L Sch Roundtable at 484 n 67 (cited in note 1).

studies nonetheless have yielded so many widely varying accounts of the forces at work shows how unlikely it is that measuring costs can do much more than set the outer bounds of analysis. Friedman has helped us to see more clearly the cost constraints within which the law enforcers of the eighteenth century acted. We must still work to understand the choices they made within those constraints.