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Rationing Criminal Justice

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RATIONING CRIMINAL JUSTICE

Richard A. Bierschbach* & Stephanos Bibas**

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ABSTRACT

Of the many diagnoses of American criminal justice's ills, few focus on externalities. Yet American criminal justice systematically overpunishes in large part because few mechanisms exist to force consideration of the full social costs of criminal justice interventions. Actors often lack good information or incentives to minimize the harms they impose. Part of the problem is structural: criminal justice is fragmented vertically among governments, horizontally among agencies, and individually among self-interested actors. Part is a matter of focus: doctrinally and pragmatically, actors overwhelmingly view each case as an isolated, short-term transaction to the exclusion of broader, long-term, and aggregate effects. Treating punishment like other public-law problems of regulation suggests various regulatory tools as rough solutions, such as cost-benefit analysis, devolution, pricing, and caps. As these tools highlight, scarcity often works not as a bug but as a design feature. Criminal justice's distinctive intangible values, politics, distributional concerns, and localism complicate the picture. But more direct engagement with how best to ration criminal justice could help to end the correctional free lunch at the all-you-can-eat buffet and put the bloated American carceral state on the diet it needs.

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INTRODUCTION

Today, there is widespread agreement that America as a whole overpunishes. We lock up too many inmates for too long. The costs are substantial: taxpayers pay tens of thousands of dollars to house each inmate each year. But the costs go far beyond monetary ones. Inmates lose years of their lives and work experience, making them hard to employ.¹ Families lose husbands and fathers. Some neighborhoods have a void of young men, and many minority citizens resent and mistrust the bloated American carceral state. The system loses legitimacy. One would think that the social benefits of harsh prison sentences would have to be

¹ See, e.g., Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* 28–29 (unpublished manuscript, available at <http://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/07/incar.pdf>).

substantial to warrant these costs. Yet, in many cases, they pale in comparison.²

This overpunishment in practice is at odds with punishment theory. As Jeremy Bentham and many others have argued, governments should not impose punishments when they are ineffective, too expensive, or more expensive than alternatives such as prevention.³ Sentencing laws, such as the Sentencing Reform Act, likewise enshrine this principle of parsimony.⁴

Why, then, does our system overpunish? One classic and important explanation is the pathological politics of criminal law: public opinion, partisan argument, and interest-group politics generally push toward harsher penal policy, and legislators and prosecutors both win when prosecutorial power expands.⁵ But, as this Article explains, another, less noticed part of the problem is a mismatch between judging cases individually and weighing the spillover effects and collective costs of punishment systematically. In economic terms, criminal justice presents a classic case of *externalities*, particularly negative externalities. Individual actors, agencies, and levels of government benefit from pursuing individually rational actions but do not suffer the costs they individually and collectively impose upon others. Sometimes, individual actors lack good *information* about systemic effects; sometimes, they lack *incentives* to minimize the harms and costs they impose; much of the time, they lack both. The result is that criminal justice resources are badly misallocated. Unhinged from cost, actors overuse the most punitive and immediately rewarding criminal justice tools (like stop-and-frisks, pretrial detention, and prison beds) and underuse others (like community policing, alternative sanctions, and reentry programs).

The problem of externalities has not received nearly enough attention in the criminal law or procedure literature. Criminal law scholars gravitate toward the same questions of guilt and desert that underlie much of criminal law doctrine itself; criminal proceduralists do the same with

² The reasons for this are numerous. Deterrence is often too speculative, as short-sighted, impulsive, frequently intoxicated or mentally ill wrongdoers gamble on not being caught and punished at all. Incapacitation makes sense only for a fraction of inmates, who could be better picked out by risk assessment tools. Long sentences mean that many will be held long past their peak crime years, and many others are hardened by prison and commit even more crimes after release. See, e.g., *id.* at 24–27, 34–36.

³ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170–77 (Mineola, NY: Dover Publications 2007) (chapter XIII).

⁴ “The court shall impose a sentence sufficient, but not greater than necessary, to” ensure retribution, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a).

⁵ For the canonical analysis of both the surface and deep political dynamics at work, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

issues of distributive justice. Criminal law and procedure have mechanisms that try to ensure that individual defendants are arrested, prosecuted, convicted, and sentenced without bias and in rough proportion to their desert, however one defines that concept.⁶ But those individual arrests, convictions, and punishment decisions happen in the context of particular cases, isolated from their ripple effects and from a broader, system-wide perspective.⁷ The problem is exacerbated because some systemic effects, such as busting state coffers, depriving neighborhoods of young men, or undercutting legitimacy, emerge only once convictions and sentences reach a tipping point. Even those who doubt that we overpunish should worry about externalities, which lead to skewed, wasteful, or otherwise poor decisionmaking.

This Article explores the causes of this mismatch and some conceptual tools for addressing it. In part, the mismatch flows from the structure of our criminal justice system and the nature of criminal justice decisionmaking. American criminal justice is produced by many fragmented, loosely coordinated institutions: legislatures, police, prosecutors, judges, juries, parole boards, and probation officers. Typically, police are funded locally, prosecutors are funded by counties, and prisons are funded by states. County and local judges apply criminal laws and penalties authorized by state legislatures. The mishmash of jurisdictions, agencies, and funding exacerbates agency costs. It obscures responsibility and accountability. And it makes it easier for law-enforcement officials to externalize the costs of their actions upon both the discrete communities most affected by their decisions and diffuse taxpayers across the state.

Moreover, as a matter of doctrine and theory, criminal justice focuses overwhelmingly on individual guilt and desert. The disaggregated decisionmakers who determine punishment on the ground in turn think transactionally, not broadly or (beyond their own agencies' missions) programmatically.⁸ We have a host of legal and conceptual tools for

⁶ Whether they succeed is another matter. *See, e.g.*, Richard A. Bierschbach & Stephanos Bibas, *What's Wrong With Sentencing Equality?*, 102 VA. L. REV. 1447, 1449 n.5 (2016) (citing sources criticizing the Warren Court's procedural innovations for combatting racial inequality in criminal justice as unsuccessful).

⁷ Scholarship on the exclusionary rule is an exception, as the rule is commonly criticized on the ground that it allows police to externalize the costs of their illegal behavior onto the public because they do not feel the pain when evidence is suppressed. We discuss this further in the text accompanying notes 169 and 221 *infra*.

⁸ Discrete aspects of the punishment pipeline, such as surveillance, have grown increasingly programmatic recently. But even in those cases, conceptualizing surveillance or other interventions programmatically does not translate into conceptualizing the social costs of those interventions in that way as well. *See, e.g.*, Tracey L. Meares, *Programming Errors: Understanding the*

trading off liberty versus security for an individual arrest, or retribution versus rehabilitation for a particular defendant. At the other end of the spectrum, legislatures can make the bird's-eye, highest-level decisions to trade off funding for prisons against that for hospitals, schools, and roads. But legislatures cannot micromanage how others will implement their high-level policy choices. For the most part, legislatures pass overbroad criminal laws, delegating almost all of the implementation questions to police, prosecutors, and judges, who lack much guidance or coordination. And we have few doctrinal or regulatory tools to force such mid- and low-level actors to internalize the full social costs (and, in some cases, the net benefits) of their enforcement or sentencing approaches to drug crimes, high-crime neighborhoods, poor minority communities, and so forth. Contrast that with other public-law fields, like securities regulation, where judicial oversight of the costs and benefits of regulators' decisions is sometimes decried as *too* rigorous.⁹

That contrast points up a deeper issue with paradigmatic approaches to criminal justice. Because criminal justice is fragmented and concerns individual guilt and blame, we rarely approach the administration of punishment as a public-law problem of regulation, subject to the same tools and concepts that apply to clean air, safe food and drugs, and the like. Punishment (or retribution, or public safety—take your pick) is not a classic public good like clean air. But it often acts a lot like one: no single police officer, prosecutor, judge, or community can be excluded from using it, and one actor's or community's use does not reduce others' ability to use it.¹⁰ And we all know that, like clean air, punishment can be

Constitutionality of Stop-and-Frisk as a Program, Not an Incident, 82 U. CHI. L. REV. 159, 162 (2015); Daphna Renan, *Administering Surveillance: The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1042 (2016).

⁹ Cf. *Business Roundtable v. SEC*, 647 F.3d 1144, 1148–51, 1154–56 (D.C. Cir. 2011) (holding that SEC inadequately evaluated costs that Exchange Act Rule could impose on companies); *Securities Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 430–33 (D.D.C. 2014) (holding that agency inadequately considered the extraterritorial costs and benefits of new rules).

¹⁰ Punishment as currently administered, in other words, often is non-rivalrous and non-excludable. In those respects, it is much like public safety, which, “[a]lthough it is rarely treated as such, ... is an example of a non-tangible public [good].” Menahem Spiegel, *Public Safety as a Public Good*, 183, 183, in *MARKETS, PRICING, AND DEREGULATION OF UTILITIES* (Michael A. Crew & Joseph C. Schuh eds. 2003). Yet punishment is not inherently a public good, nor does it always operate like one in practice. At the most general level, the localities that are the backbone of the punishment machine essentially compete for state and local dollars, making punishment rivalrous at a high level. And even as administered, as issues like jail and prison overcrowding make clear, punishment becomes rivalrous and subject to depletion at certain points in the pipeline and past certain tipping points—it acts, in other words, more like a common good than a public good. See Todd Sandler & Daniel G. Arce M., *Pure Public Goods versus*

overused and abused—think of the tough-on-crime municipality that externalizes the high costs of state prison onto less punitive taxpayers elsewhere in the state, much as an upwind coal plant sends the full costs of its production downstate in the form of acid rain. When it comes to clean air, we have a number of regulatory tools to promote its judicious use, like cap-and-trade programs and carbon taxes.

What might it mean to apply such tools to the problem of criminal justice? One could ask the same question of other well-known approaches to managing externalities and regulatory burdens and benefits, such as cost-benefit analysis. These tools cannot magically solve the problem of overpunishment, and we are not here suggesting otherwise. But drawing on them to help more clearly frame that problem as one not only of individual justice but also of systemic regulation might at least encourage more productive thinking about how best to ration criminal justice as a resource and confront its full social and distributional consequences.

A handful of criminal procedure scholars have discussed some of these points. The late Bill Stuntz diagnosed America's problem as having moved power away from neighborhoods towards higher levels of government. But few of his prescriptions focused on externalities, apart from advocating more federal and state funding of local police and more local responsibility for prison costs.¹¹ Frank Zimring and Gordon Hawkins note the particular problem caused by a "correctional free lunch," in which local police and county prosecutors overuse prison beds paid for by the state.¹² Building on Zimring and Hawkins' work, David Ball advocates replacing this state-funded entitlement with giving prison funding to counties and cities, to encourage them to allocate prison beds wisely, as California's Realignment experiment has sought to do.¹³ Adam Gershowitz and Ronald Wright separately suggest how making prosecutors directly responsible for detention and imprisonment costs could encourage them to be more circumspect in charging and sentencing.¹⁴ Darryl Brown and others propose using cost-benefit analysis

Commons: Benefit-Cost Duality, 79 LAND ECON. 355, 355–56 (2003) (distinguishing between public and common goods). But neither that distinction nor the general characterization is critical for our purposes here.

¹¹ WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7–8, 287–307 (2011).

¹² FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 140, 211–15 (1991).

¹³ W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060 (2014); W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 107–14 (2014); W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—and Why It Should*, 28 GA. ST. L. REV. 987, 991–92, 1074–77 (2012).

¹⁴ Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 693–97 (2016);

in criminal law, though Brown's concrete proposals are largely limited to U.S. Department of Justice centralization of several federal prosecutorial policies.¹⁵ And some economists note related issues in particular contexts, such as the incentive effects of state-level funding of juvenile justice or police responsibility for jailed arrestees.¹⁶ Yet no work of which we know pulls these disparate pieces into the broader, bird's-eye framework of criminal justice externalities that we sketch here.

There is of course a much larger literature on externalities and solutions for them in more traditional regulatory contexts, like environmental law. But few contemporary scholars see criminal justice as a kind of regulatory system, so they have mostly neglected how its disaggregated and transactional nature has fed its systemic pathologies.¹⁷

Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. ____, __–__ (forthcoming 2017).

¹⁵ Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 352–58 (2004). Some economists, criminologists, and policymakers use cost-benefit analysis to measure the net benefits of specific crime prevention, sentencing, and rehabilitation programs, though not criminal law and procedure more generally. See, e.g., COST-BENEFIT ANALYSIS AND CRIME CONTROL (John K. Roman et al. eds., 2010); MARK A. COHEN, THE COSTS OF CRIME AND JUSTICE 91–105 (2005); MARK A.R. KLEIMAN ET AL., MEASURING THE COSTS OF CRIME (2014); W. David Ball, *Pay-for-Performance in Prison: Using Healthcare Economics to Improve Criminal Justice*, 94 DENV. L. REV. ____, __–__ (forthcoming 2017) (collecting additional sources).

¹⁶ Aurélie Ouss, *Incentive Structures and Criminal Justice* (July 3, 2015), <http://ssrn.com/abstract=2685952> (finding that 1996 California Juvenile Justice Realignment, which shifted the costs of juvenile corrections from states to counties, led to drop in juvenile incarceration); Itai Ater et al., *Organizational Structure, Police Activity and Crime*, 115 J. PUB. ECON. 62 (2014) (finding that Israeli reform that shifted responsibility for jailing arrestees from police to prison authority led police to make more arrests and that such arrests were for less serious crimes and were less likely to result in charges). Before Ouss and Ater's work, another cluster of economists grappled with the same "correctional free lunch" problem upon which Zimring and Hawkins later seized. See Kenneth L. Avvio, *The Economics of Prisons*, 6 EUR. J. L. & ECON. 143 (1998) (surveying the economic literature). As Ouss observes, however, even among economists, "[t]here has been surprisingly little discussion of how cost structures of law enforcement affect choices, either theoretically or empirically." Ouss, *supra*, at 5.

¹⁷ For a handful of important exceptions, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Renan, *supra* note 8; Meares, *supra* note 8; Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016); Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2050 (2016). Writing over two decades before these scholars, Stephen Schulhofer famously saw this analogy, critiquing plea bargaining as not a well-functioning market but a governance system riddled with

This Article thus also contributes to the nascent literature about underappreciated parallels between criminal justice and the regulatory state.¹⁸

The balance of this Article proceeds in three Parts. Part I analyzes the core problem of criminal justice externalities and the structural and conceptual features of American criminal justice that exacerbate it. It describes how our fragmented, transactionally focused criminal justice system misaligns who makes criminal justice decisions with who bears their full social costs. A dog's breakfast of institutions systemically allocates and rations criminal justice poorly if at all, relying on a congeries of ad hoc, disaggregated judgment calls with little coordination or bigger-picture thinking. Low-level actors see and care little about the overall patterns they collectively create, patterns that may have troubling consequences for poor and minority communities.

Part II explores how that approach to criminal justice epitomizes our more general failure to approach it broadly and programmatically, as we do in administering other public or social goods. Borrowing widely from other fields and building on some of the work of scholars like Brown, Ball, and others, Part II sketches how four tools common to other regulatory areas—cost-benefit analysis, devolution, pricing, and caps—might theoretically be used to push criminal justice toward more effective cost internalization and resource allocation. Its aim is not to robustly defend or prescribe any of these tools, but rather to outline a rough taxonomy of common rationing mechanisms and how they might translate to criminal justice. In doing so, it also complicates the conventional wisdom decrying tight budgets and resource constraints. While many criminal justice institutions are desperately underfunded and overworked, in some respects scarcity is a feature, not a bug: it forces police, prosecutors, judges, and other actors to do triage, focusing their efforts on the most socially beneficial interventions.

hidden agency costs. Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEG. STUD. 43 (1988). And, working in a related vein, an earlier generation of scholars, pioneered by Kenneth Culp Davis, argued for using administrative law to control police discretion. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 188 (1969); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

¹⁸ See, e.g., Barkow, *supra* note 17; Renan, *supra* note 8; Slobogin, *supra* note 17; see also Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721 (2014); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (2008); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005); Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1 (2012).

Part III turns to the limits of rationing in the real world. Especially in criminal justice, all of Part II's tools—and more direct approaches to rationing generally—come with significant drawbacks and limitations. Part III flags some of the more major ones and examines some of the tensions between a more rational, synoptic approach to managing punishment and criminal law's unique substantive, political, distributive, and localist aspects.

Its takeaway—and our ultimate takeaway in this Article—is mixed: while rationing will never be a silver bullet for the ills of American criminal justice, it might at least help nudge discussions and policymaking in useful directions. In the real world, given our traditions, American criminal justice will remain a largely decentralized, politically responsive institution, not a continental European bureaucracy. But even within these commitments and constraints, we could do more to promote engagement with systemic costs, benefits, and tradeoffs. Illuminating why we do not and prodding conversation on how to do so more—our modest ambitions here—might help make criminal justice more transparent and responsible in both its individual decisions and overall policies and patterns.

I. STRUCTURE, FOCUS, AND OVERPRODUCING PUNISHMENT

America is infamous for overproducing punishment, heedless of costs. We pay lip service to the principle of parsimony, but honor it mostly in the breach. The most obvious reason is that elected officials love to claim credit for being tough on crime, passing more and broader criminal laws, and bringing more cases. But there are other reasons as well, rooted in the structure and transactional focus of American criminal justice.

Criminal justice decisions are plagued with externalities, both negative and positive. We do little to internalize the costs and benefits of punishment, and we do not treat punishment like a regulatory or public good. As any economist knows, when the marginal cost of a good is zero, people waste or overuse it. And when users do not bear the costs that they impose on others, they act heedless of those costs, misallocating resources in ways that undermine rather than further the greater good. So too when actors fail to capture the benefits they confer. Our main concern here is with negative externalities leading to over- or otherwise misallocated punishment—the more commonly observed and discussed problem when it comes to criminal justice—but our framework applies to both types, and we periodically discuss issues of positive externalities as well.¹⁹

¹⁹ It is impossible to predict which type of externality is more severe as a theoretical matter. But the fact that, at least when it comes to street crime, we typically observe overpunishment instead of underpunishment should lead us to conclude that the failure to internalize costs is more powerful than the failure to internalize benefits as a general matter. Of course, in discrete areas—say, white

This Part ties the externalities problem to two basic features of American criminal justice: its structural misalignment and its transactional focus. Section I.A explores three ways in which those who make criminal justice decisions differ from those who bear the full social costs of those decisions. First, authority is fragmented vertically, among federal, state, county, and local levels of government. Second, it is diffused horizontally, so that one agency makes decisions even as other agencies bear the costs of them. And third, it is diffused even within each agency, as line police and prosecutors fail to internalize or even grasp the true costs of each arrest or prosecution while they reap much of its benefits.

Section I.B then explains how an emphasis on individual justice obscures systemic patterns and consequences. Many actions have immediate, concrete payoffs but diffuse, longer-term harms. The former are visible and weighty and seem to justify actions in the individual case, while the latter are overlooked. Police, prosecutors, and others thus pursue short-term goals at the expense of long-term legitimacy, racial equality, crime reduction, and other future goods. That approach flows naturally from the overwhelmingly transactional focus of the criminal law and procedure doctrines that underlie their decisions.

A. *Structure: Fragmented Levels, Misaligned Incentives*

The problem of externalities begins with the misaligned levels and institutions of criminal justice. American criminal justice is badly fragmented, in ways that correspond poorly to the costs and benefits of criminal justice. In some ways, even calling it a criminal justice system is a misnomer: it is a fragmented congeries of fifty states, thousands of counties, several thousand prosecutors' offices employing tens of thousands of prosecutors, and more than twelve thousand police departments employing hundreds of thousands of officers.²⁰

The multiplicity of government levels and institutions brings benefits: they can check and balance one another, limiting excessive concentration and abuse of power, and they can better reflect local values. But fragmentation also carries costs. By diffusing power among and within various levels and institutions of government, American criminal justice complicates thoughtful rationing, tradeoffs, and accountability. The system is fragmented along three dimensions: *vertically*, among different

collar crime, or domestic abuse, or date rape—the opposite might be true. *See infra* text accompanying notes 49, 239, and 253.

²⁰ *See* U.S. Dep't of Justice, Prosecutors in State Courts, 2007 Statistical Tables, NCJ 234211 (2011); U.S. Dep't of Justice, National Sources of Law Enforcement Employment Data, NCJ 249681 (2016); U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Local Police, <http://www.bjs.gov/index.cfm?ty=tp&tid=71>.

levels of government; *horizontally*, among different agencies at the same level of government; and *individually*, among different actors within the same agency. Each kind of fragmentation contributes to misaligning incentives and externalizing criminal justice's costs.

1. Vertical Fragmentation

Vertical fragmentation is perhaps the most familiar of these three, as an aspect of federalism. Federal criminal laws and enforcement overlap with many state and local ones, but the federal government also leaves a huge swath of criminal law solely to the states themselves. State governments, in turn, do the same with their many subunits: while state attorneys general and police might investigate and prosecute some subset of especially significant crimes (such as large-scale financial fraud, drug-running, or terrorism), they leave the bulk of criminal enforcement to counties and municipalities, which also enforce their own codes as well.²¹ At the same time, the federal government funds some state and local law enforcement efforts, and most states pick up the costs of imprisonment decisions made by county prosecutors and judges and local police.²²

The vertical fragmentation of enforcement and funding undoubtedly serves important federalism values.²³ But it also can lead to perverse incentives when it comes to rationing the costs of criminal justice. State-funded prisons, for instance, give local police, prosecutors, and judges little incentive to ration imprisonment. That is the “correctional free lunch” to which Frank Zimring, Gordon Hawkins, and David Ball rightly object.²⁴ The natural result is overimprisonment.

A natural experiment in California reveals the problem. Until two decades ago, the state bore the costs of juvenile corrections, even though county-level actors selected juvenile sentences. In 1996, California's Juvenile Justice Realignment shifted juvenile correctional costs from the state to the county level. Juvenile arrests stayed steady, but juvenile confinement dropped substantially. The natural inference is that counties

²¹ See Rachel Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545–56 (2011).

²² See *id.* at 543; William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2028 (2008); Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, 25 FED. SENT'G REP. 68, 68, 74 (2012).

²³ We have discussed some of these in the context of sentencing. See Bierschbach & Bibas, *supra* note 6, at 1484–91.

²⁴ Ball, *Why State Prisons?*, *supra* note 13; Ball, *Defunding State Prisons*, *supra* note 13; Ball, *Tough on Crime*, *supra* note 13; Zimring & Hawkins, *supra* note 12.

were overusing the “correctional free lunch” until they had to pay for it themselves.²⁵

Federal funding of state and local enforcement can have similar effects. Consider the federal government’s opaque role in financing local policing. Federal law funds domestic-violence and immigration-related arrests, as well as local police purchases of military and surveillance hardware.²⁶ Federal joint task forces encourage and fund enforcement of gang and drug trafficking laws.²⁷ And federal forfeiture laws provide financial incentives for local police to seek forfeitures.²⁸

As Rachel Harmon perceptively explains, these federal measures cloud local accountability for policing decisions.²⁹ Joint task forces, for instance, have no clear hierarchy or accountability and bypass local limits on authority.³⁰ Federal forfeiture laws go even further. While many states’ laws limit police and prosecutors’ ability to profit from their own forfeitures, federal revenue sharing offers effective kickbacks of eighty percent, rekindling their profit motive.³¹ Encouraged by federal money, local police have grown militarized and focused more attention on drug enforcement, where profitable forfeitures are more likely. As we discuss more below, aggressive policing may undercut local trust in police; excessive focus on profitable victimless crimes may distract police from the needs of victims and local residents. The funding decisions that encourage such approaches are made too far away from local concerns about police coercion and legitimacy, by decisionmakers who do not feel the full bite of their costs.³²

More generally, Bill Stuntz noted that the suburbanization of America has vertically fragmented power in and around cities. Until the middle of the twentieth century, crime was not a specifically urban problem. And when most non-rural voters lived in rather than around cities, the electorates for city police chiefs and mayors largely overlapped with that for county prosecutors and judges. But as cities grew increasingly segregated by race and wealth, crime grew concentrated in particular urban neighborhoods. Electoral power, however, did not. White flight exacerbated the segregation and concentration, so poor city neighborhoods grew more dangerous while wealthier neighborhoods and suburbs became

²⁵ Ouss, *supra* note 16, at 17–21.

²⁶ Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 NYU L. REV. 870, 912–28, 936 (2015).

²⁷ *Id.* at 936–37.

²⁸ *Id.* at 929–36 (citing 21 U.S.C. § 881(e) (2012)).

²⁹ *Id.* at 944–53.

³⁰ *Id.* at 944–48.

³¹ *See id.* at 929–36, 951–52.

³² *Cf.* Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2318 (2014) (discussing relationship between community voice and participation and the legitimacy of local law enforcement).

safer. Thus, much power now lies in the hands of voters for whom “crime is an abstraction, not a problem that defines neighborhood life,” meaning that they “have little stake in how the justice system operates.”³³ That lack of stake has allowed American criminal justice to swing from excessive leniency half a century ago to excessive severity over the past several decades. Imbalances in lobbying power make the problem worse, as concentrated, well-organized, and usually tough-on-crime groups like prison guard unions or the private prison industry exert disproportionate influence over punishment policy in state and federal legislative halls, while the diffuse and poorly organized communities that bear the costs of those policies struggle to get traction.³⁴ Stuntz saw that local democratic control was essential to remedy these externalities: “If criminal justice is to grow more just, those who bear the costs of crime and punishment alike must exercise more power over those who enforce the law and dole out punishment.”³⁵

2. Horizontal Fragmentation

Horizontal fragmentation is less visible. We divide responsibilities among police, prosecutors, judges, jails, prisons, probation officers, and parole boards. These divisions mean that each agency may not care enough about what goes on beyond its bailiwick. So police, who are measured by arrest statistics, may care too little about bail and ultimate convictions and so overuse jails and prisons. Prosecutors, proud of their convictions, likewise have little concern for conserving prison beds or for offenders’ treatment or performance on probation or parole. Prison guards and jailers might from time to time worry about immediate overcrowding, but they have far less incentive to care about treatment, rehabilitation, or recidivism once an inmate walks out the prison doors.³⁶ Criminal justice agencies might be getting better at managing their own resources in the most cost-effective way—witness the widespread use of CompStat to prioritize police efforts³⁷—but they are bad at managing or even considering the full costs their interventions impose.

³³ STUNTZ, *supra* note 11, at 6–7.

³⁴ For an excellent treatment of this problem, see LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* (2008).

³⁵ STUNTZ, *supra* note 11, at 7.

³⁶ Some have argued that their incentives may even be perverse. See, e.g., Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 *VAND. L. REV.* 71, 93–101 (2016) (discussing the incentives of prison industry stakeholders to support policies and decisions that expand the number of people in prison).

³⁷ See David Weisburd et al., *The Growth of Compstat in American Policing* (2004), <http://assets.lapdonline.org/assets/pdf/growthofcompstat.pdf>.

Because horizontal fragmentation is a fact of life in America, we rarely notice its effects here.³⁸ But another natural experiment, this one in Israel, highlights the problem. Until about a decade ago, Israeli police were responsible for transporting arrestees to and from court and housing them at police stations or jails run by the police. In 2007 and 2008, Israel transferred responsibility for arrestees from the police to the prison authority. Police no longer housed arrestees for more than a few hours, and the prison authority took over the jails and transportation of arrestees. The reform was phased in across five regions at different times, allowing researchers to study how the change affected arrests in each region.³⁹

The fragmentation of jail responsibility changed police arrest behavior, inflating quantity and reducing quality. Weekly arrests increased by more than 11%, and these arrests lasted for longer periods.⁴⁰ Most of the new arrests were for more minor crimes, mainly public-order and property offenses.⁴¹ These additional arrestees were 20% less likely to be charged with a crime, suggesting that police were making the additional arrests based on weaker evidence.⁴²

Similar dynamics exist elsewhere throughout the system. The judiciary bears little of the direct or indirect costs of its sentencing decisions; in some cases, due to lack of effective coordination and information sharing with probation and parole departments, judges may not even know what they are.⁴³ Outside the comparatively rare context of jury sentencing, criminal juries are forbidden by law even to learn, let

³⁸ That is not to say that they are not acutely felt on the ground. Adam Gershowitz, one of a few scholars to discuss this issue, recounts the difficulties that local sheriffs face in managing exploding jail populations over which they have no control. Gershowitz, *supra* note 14, at 684–87. One sheriff, having his request for additional funding to hire more guards rebuffed, went so far as to refuse new inmates, only to be sued by his own municipality. See Harrison Keegan, *Sheriff Arnot Disappointed That City Sued Him*, SPRINGFIELD NEWS LEADER, July 16, 2015.

³⁹ Ater et al., *supra* note 16, at 64–65.

⁴⁰ *Id.* at 66.

⁴¹ *Id.* at 67–68.

⁴² *Id.* at 66–67.

⁴³ See ROBERT WEISBERG & LISA T. QUAN, STAN. CRIM. JUST. CTR., ASSESSING JUDICIAL SENTENCING PREFERENCES AFTER PUBLIC SAFETY REALIGNMENT: A SURVEY OF CALIFORNIA JUDGES 10, 14 (2014), <https://www.law.stanford.edu/sites/default/files/publication/443996/doc/slspublic/Judges%20Report%20Feb%2028%202014%20Final.pdf> (discussing difficulties of California judges in getting reliable information about “jail plus a tail” sentences); W. DAVID BALL & ROBERT WEISBERG, STAN. CRIM. JUST. CTR., THE NEW NORMAL? PROSECUTORIAL CHARGING IN CALIFORNIA AFTER PUBLIC SAFETY REALIGNMENT 17 (2014), <https://www.law.stanford.edu/sites/default/files/publication/513777/doc/slspublic/DA%20report%20Feb%202014.pdf> (discussing similar difficulties regarding community supervision).

alone take into account, the human and financial costs of their conviction decisions.⁴⁴ Parole boards and probation offices pay nothing to prisons when they refuse to release or recommit inmates, and they capture none of the benefits when they move offenders from prison onto the path of law-abiding and productive life.⁴⁵ The upshot is that police likely arrest too much, prosecutors likely charge too much, judges likely bail too little and sentence too harshly, and jails and prisons likely treat too little because none of these agencies internalizes the full costs borne by other agencies or the communities they regulate.

3. Individual Fragmentation

Individual fragmentation is another way to describe the most classic agency-cost problem that pervades criminal justice. Individual police officers usually are rewarded and promoted based on their stops, searches, and arrest statistics.⁴⁶ Line prosecutors are likewise evaluated based on their conviction statistics.⁴⁷ In response to these incentives, individuals naturally maximize the quantity of cases they bring, focusing on meeting

⁴⁴ Shannon v. United States, 512 U.S. 573, 580 (1994) (noting the “principle that jurors are not to be informed of the consequences of their verdicts”).

⁴⁵ By contrast, they incur political and other costs when parolees or probationers reoffend. In the case of parole, that dynamic badly skews incentives, making release a no-win proposition. See W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL’Y REV. 395, 398 (2011) (noting parole boards’ incentives to avoid releasing prisoners); Alexandra Marks, *For Prisoners, It’s a Nearly No-Parole World*, CHRISTIAN SCI. MONITOR, July 10, 2001, at 1, available at 2001 WLNR 1261020 (surveying parole policies across time and states and describing the difficulty of countering political pressures against release).

⁴⁶ See, e.g., Malcolm K. Sparrow, Harvard Kennedy School & Nat’l Inst. for Justice Executive Session on Policing & Public Safety, *Measuring Performance in a Modern Police Organization* 2 (Mar. 2015), <http://www.ncjrs.gov/pdffiles1/nij/248476.pdf> (noting that many police departments “seem to remain narrowly focused on the same categories of indicators that have dominated the field for decades:” serious crime rates, clearance rates, response times, and numbers of arrests, citations, and stops-and-frisks).

⁴⁷ E.g., Jessica Fender, *DA Chambers Offers Bonuses for Prosecutors Who Hit Conviction Targets*, DENVER POST, Mar. 23, 2011, http://www.denverpost.com/ci_17686874; Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58, 106 (1991); Fred Klein, *A View From Inside the Ropes: A Prosecutor’s Viewpoint on Disclosing Exculpatory Evidence*, 38 HOFSTRA L. REV. 867, 876 (2010); Steven D. Dillingham, *Performance Measurement: Beyond Conviction Rates*, Prosecutor, vol. 36, Dec. 2002, at 9, 13.

monthly quotas or targets.⁴⁸ They reap some benefits but not the costs of bringing each case.

But maximizing quantity often comes at the expense of quality. Police who arrest based on bare probable cause risk sweeping innocent people into their net. They are also likely to pursue low-hanging fruit, such as undercover drug buys. Maximizing arrests or convictions may come at the expense of important but harder-to-prove cases, such as domestic abuse (in which victims are often reluctant to press charges) or date rapes (which often result in acquittals).⁴⁹

Prosecutors do the same. Individual prosecutors find it in their interest to plea bargain all of their cases at or below whatever price the market will bear. Plea bargains are guaranteed convictions, and prosecutors care much more about their conviction rates than the resulting sentences. These bargains, while individually rational, may undercut the interests of the prosecutors' office as a whole. For instance, various prosecutors' offices have tried to ban plea bargaining, to ensure consistency and send a message. But these bans often break down when individual prosecutors subvert them in order to dispose of their own troublesome cases.⁵⁰ In the same vein, U.S. Department of Justice policies forbid fact bargaining and

⁴⁸ See, e.g., Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, NAT'L PUB. RADIO, Apr. 4, 2015, <http://www.npr.org/2015/04/04/395061810/despite-laws-and-lawsuits-quota-based-policing-lingers>.

⁴⁹ See U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 14-18, 23-30 (1982); Joanne Archambault, Sexual Assault Training & Investigations, *Evaluating and Measuring Law Enforcement Success* 3, http://www.ncdsv.org/images/Evaluating_Measuring_Law_Enforcement_Success.pdf ("Even when [sexual assault] cases are seen as legitimate, they are often improperly unfounded because they are just plain difficult to investigate"); Jennifer G. Long & Elaine Nugent-Borakove, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, STRATEGIES, Apr. 2014, at 1-2, <http://www.aequitasresource.org/beyond-conviction-rates.pdf> ("Sexual assault cases are some of the most difficult to prosecute," but "[f]or many reasons, ranging from bias to resource shortages to concern about conviction rates, prosecutors weed out far too many cases because they wrongly believe they cannot win them.").

⁵⁰ See, e.g., *State v. Hessen*, 678 A.2d 1082, 1085-86 (N.J. 1996) (noting repeated reiteration of plea-bargaining ban and its eventual abolition except for drunk driving, implying that ban had been subverted and broken down); Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 306-10 (1987) (noting that plea-bargaining ban was subverted by judges and individual prosecutors departing from their office's policy).

greatly restrict plea bargaining generally, but individual federal prosecutors undercut or circumvent these policies.⁵¹

Even apart from self-interest, police, prosecutors, judges, and other actors often cannot even see the full costs they are inflicting upon others. They rarely must confront or consider how arrests, pretrial detention, repeated court appearances, and imprisonment harm or help suspects, their families, their employers, victims, and communities. Rachel Harmon rightly objects that scholarship and regulation of police do not focus on whether policing methods are “harm efficient”—that is, whether their benefits exceed the total costs they impose on everyone, not just police.⁵²

Take the decision to arrest. As Harmon explains, arrests are frightening and humiliating; cost a great deal of time, money, and lost income; and risk triggering violence. Though police could issue tickets or summonses instead, they still prefer arrests as the default way to initiate criminal proceedings and ensure the suspect’s appearance.⁵³ That decision is often quite rational, and sometimes necessary, but it leaves the costs to the arrestee, his employer, and his family out of the picture.

Pretrial detention likewise inflicts costs on defendants and third parties. Detainees are not only humiliated and more likely to commit suicide, but they also risk losing their jobs and families and find it harder to work with their lawyers to vindicate themselves.⁵⁴ Innocent third parties such as detainees’ spouses, children, and employers likewise suffer the absence of husbands, fathers, and workers.⁵⁵ These costs ought to be balanced carefully against the benefits of reducing the risk of flight and future crimes. But prosecutors and judges have little information to help them see, let alone make, these tradeoffs.⁵⁶ And pretrial detention makes their jobs easier, ensuring that defendants will show up and shielding them

⁵¹ Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 508, 522, 547, 556–57 (1992).

⁵² Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 792–94 (2012).

⁵³ Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–20 (2016).

⁵⁴ See *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1318–20 (2012); AMANDA PETTERUTI & NASTASSIA WALSH, JUSTICE POLICY INSTITUTE, JAILING COMMUNITIES: THE IMPACT OF JAIL EXPANSION AND EFFECTIVE PUBLIC SAFETY STRATEGIES 3, 16–18 (2008), http://www.justicepolicy.org/images/upload/08-04_rep_jailingcommunities_ac.pdf (“[T]he suicide rate in jails is nearly four times the rate in the general population.”).

⁵⁵ See Sharon Dolovich, *Foreword: Incarceration American Style*, 3 HARV. L. & POL’Y REV. 237, 247 (2009); Appleman, *supra* note 54, at 1319–20; PETTERUTI & WALSH, *supra* note 54, at 17–18.

⁵⁶ See Harmon, *supra* note 52, at 773–74; Appleman, *supra* note 54, at 1343, 1358.

from blame for defendants who jump bail or commit new crimes. Thus, prosecutors and judges' blind spots, as well as their self-interests, favor seeking pretrial detention even when its total costs exceed its benefits.⁵⁷

The same is true of imprisonment, which disrupts defendants' jobs, work history, and employability, increasing the likelihood that their families fall apart and must rely on welfare.⁵⁸ These costs may be warranted by greater benefits. But police, prosecutors, judges, and others have little information and little incentive to ensure that. Moreover, professionals' self-interests sometimes cut in the other direction. Elected judges, for example, tend to sentence more harshly in election years, presumably to enhance their chances of winning reelection.⁵⁹

Individual fragmentation afflicts investigative techniques as well. Reformers advocate conducting lineups sequentially and double-blind and videotaping them. They favor similar reforms to interrogation techniques, such as double-blind procedures, duration limits, videotaping, and bans on implicit promises and threats.⁶⁰ Evidence suggests that these reforms would significantly reduce the number of false positives, at little if any cost to correct identifications and true confessions.⁶¹ Such changes clearly make sense for the system as a whole. But police bear the burden of making these changes and understandably fear that they could somewhat impede solving cases and making arrests. Even evidence-based reforms that make sense for the system as a whole thus meet resistance from those

⁵⁷ See Aurélie Ouss & Alexander Peysakhovich, *When Punishment Doesn't Pay: "Cold Glow" and Decisions to Punish*, 58 J.L. & ECON. 625, 628 (2015) (observing based on lab experiments that "when costs are not fully internalized, [individuals] overpunish").

⁵⁸ See PETERUTI & WALSH, *supra* note 54, at 17–18; Angela Cai, *Insuring Children Against Parental Incarceration Risk*, 26 YALE J.L. & FEMINISM 91, 108–09, 145 (2014) (describing the costs that families bear from parental incarceration); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 134–37 (1999) (describing how incarceration can impact family, community, and employment).

⁵⁹ Carlos Berdejo & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741 (2013).

⁶⁰ See Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1113–17 (2010).

⁶¹ See *id.* at 1117–18; David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1262–63 (2002) (noting that the overwhelming majority of American police departments that use routine videotaping of interrogations "have found the costs negligible and the benefits considerable").

who would have to implement them. That helps to explain why such reforms have been so slow to catch on.⁶²

The one thing that promotes adoption of these reforms is how they can be shown to serve police officers' own interests. Police departments are more likely to adopt videotaping once they learn how it helps them to do their jobs.⁶³ It alleviates the burden of copious note-taking, helps officers and prosecutors to spot overlooked incriminating details, forestalls claims of abuse or trickery, and aids training and evaluation.⁶⁴ It is self-interest, rather than the interest of the entire system, that can motivate change.

B. *Focus: The Short-Term, Transactional Mindset*

1. Short-Termism

Maximizing quantity has more subtle effects on quality too. Many of the benefits of criminal justice are direct and concentrated, while costs are often more diffuse and remote, making them harder to quantify. Focusing excessively on quantity often goes hand-in-hand with hitting visible, short-term, quantitative targets, at the expense of less visible, long-term

⁶² See Harmon, *supra* note 52, at 796, 816; Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 46 (2009); Sklansky, *supra* note 61, at 1264–65 (observing that police resist taping interrogations because “[t]apes expose police interrogation practices to second-guessing by judges, juries, prosecutors, and defense attorneys—and to internal criticism from supervisors and colleagues”).

⁶³ See William A. Geller, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices – A Report to the National Institute of Justice* 152–54 (1992) [*Geller Study*] (stating statistics from the study that show police support for videotaping interrogations and confessions because doing so assists the police); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 489–90 (1996) (citing the results of the Geller Study—97% of all departments implementing videotaping found the practice “very useful” or “somewhat useful”—as “particularly striking because in many departments detectives initially resisted the innovation only to be won over by its benefits”); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 681–86 (1996) (citing the Geller Study to show the usefulness of videotaping to police and the corresponding likelihood of use by police departments); Sklansky, *supra* note 61, at 1262–63 & n.105 (describing the success of tape recording interrogations in England and Canada, and the benefits of videotaping interrogations experienced by American police departments that have explored the practice).

⁶⁴ See Thomas P. Sullivan, Ctr. on Wrongful Convictions, Nw. U. Sch. of L., *Police Experiences with Recording Custodial Interrogations* 6–10, 16–19 (Summer 2004).

interests. (To continue our earlier list, one could view this short-termism as *temporal fragmentation*.)

For instance, as Tracey Meares notes, undercover drug buys may exacerbate racial disparities by arresting predominantly black drug dealers selling in minority neighborhoods.⁶⁵ Reverse stings, by contrast, which arrest buyers who drive in from the suburbs, may catch more whites but are costlier and more time consuming.⁶⁶ Buy-and-bust operations are thus more rewarding in the short term but corrode law-enforcement legitimacy more in the long term. The same is true when police adopt military equipment and tactics or abuse forfeiture laws, as discussed above, or when prosecutors overuse electronic surveillance or cooperating witnesses.⁶⁷

Short-term-focused, quantity-driven enforcement can increase racial tensions and sacrifice police and prosecutors' legitimacy. That became painfully clear in Ferguson, Missouri, where police officers' focus on yearly revenue targets led to unconstitutional policing and inflamed tensions with minority residents.⁶⁸ Police departments' long-term interest is in building trust and fostering cooperation with neighborhood residents, so they will help to prevent and report future crimes.⁶⁹ But both departments and individual officers often lack incentives to pay attention to the long term or bigger picture.

Other criminal justice policies suffer from time lags as well. The benefits of pretrial detention are not only visible, but also immediate: the arrestee is guaranteed to show up for court and cannot commit new crimes. But some of the costs are longer term: When detainees lose their jobs, homes, and even families, as discussed above, they are more likely to commit future crimes. And when they find it harder to vindicate their innocence, they are more likely to be wrongfully convicted. The short-term gain may come at the long-term price of future crime and flawed convictions.

The same is again true of imprisonment. Prison incapacitates inmates immediately. But it also disrupts families, housing, and employment (which help to restrain crime) and connects inmates with gangs and

⁶⁵ Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 220–21 (1998).

⁶⁶ *Id.*

⁶⁷ See *supra* text accompanying notes 26–31; see also, e.g., Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 683–96 (2004) (discussing harms that flow from overuse of informants and cooperators).

⁶⁸ U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* 2 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

⁶⁹ Meares, *supra* note 65, at 222–23.

criminal networks. These effects sometimes outweigh deterrence, meaning that in the long term, for some inmates, prison breeds more crime than it prevents.⁷⁰

2. The Transactional Mindset

Short-termism naturally grows out of criminal justice's overwhelming *focus on individual cases and transactions*. The complex doctrines that compose criminal law and procedure, to say nothing of much of the theory underlying them, are overwhelmingly transactional. Judges focus on individualizing punishment in the right amount and of the right sort for a particular case.⁷¹ Police must justify probable cause to believe that a particular person committed a particular offense before they may search or arrest him.⁷² Juries must find a particular defendant's *actus reus* and *mens rea*.⁷³ Criminal law and procedure, in short, aim almost exclusively at the "careful administration of justice in each case."⁷⁴

Aside from a few idiosyncratic doctrines dealing with unique issues of guilt and blame—for example, the necessity defense⁷⁵—the law of criminal justice contains hardly any mechanisms for prompting weighing of larger costs and benefits, including the costs it imposes upon third parties. Thus, line-level actors almost never stop to consider or budget the use of arrests, filing of charges, entry of convictions, and imposition of punishment based on systemic considerations outside their own purview. They almost never, in other words, have to engage the large-scale tradeoffs that inhere in our aggregated enforcement and punishment decisions.⁷⁶

⁷⁰ Mueller-Smith, *supra* note 1, at 20–36.

⁷¹ *See, e.g., Koon v. United States*, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."); *Williams v. State of New York*, 337 U.S. 241, 247 (1949) ("[T]he punishment should fit the offender and not merely the crime.").

⁷² *See, e.g., Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.").

⁷³ *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 331 (1985) (reversing conviction where prosecutor's closing argument invited capital sentencing jury to "send a message" that was not tethered to the particular defendant's blameworthiness).

⁷⁴ *Taylor v. United States*, 493 U.S. 906 (1989) (Stevens, J., dissenting from denial of certiorari).

⁷⁵ *See* MODEL PENAL CODE § 3.02 (1985) (describing the defense).

⁷⁶ *See* Ouss & Peysakhovich, *supra* note 57, at 626 (noting disconnect between theoretical frameworks for determining socially optimal punishment

This transactional focus also isolates individual cases from systemic costs or consequences further up the ladder. For instance, the Supreme Court held that Warren McCleskey could not complain of racially disparate patterns of capital sentencing. He was guilty of capital murder, and he had no individualized proof that the prosecutors, judge, or jury in his case had sentenced him to die because of race rather than in spite of it.⁷⁷ On this approach, each case is a snowflake, unique in all its complexity, and cannot—indeed, should not—be analyzed as part of a pattern of systemic judgments. *McCleskey*'s transactional approach and requirement of individually proven bias screens out the diffuse and group harms caused by perceived or actual racial injustice.

Similar transactional blinders afflict other areas of criminal justice, such as Fourth Amendment search doctrine. As Meares observes, the Supreme Court in *Terry v. Ohio* required reasonable suspicion of an individual suspect to justify a stop and frisk.⁷⁸ But today, police departments often engage in deliberate stop-and-frisk programs. Focusing on individual cases misses the programmatic nature of the intrusion. “Young men of color experience the stops as a program to police them as a group”⁷⁹ One can see the systemic costs of racial mistrust and loss of legitimacy only after stepping back from the individual data points to see the whole, like an Impressionist painting emerging from dots of color. But, as the Court has developed it, Fourth Amendment reasonableness doctrine does not take such harms into account.⁸⁰

Transactional search doctrine also overlooks other societal values. Alex Reinert notes the collective social costs of various enforcement programs, ranging from post-September 11 targeting of Muslim communities to anticipatory searches of DNA databanks.⁸¹ Daphna Renan shows how our transactional, search-by-search Fourth Amendment doctrine is poorly suited to modern surveillance regimes. The transactional approach, she argues, misses broader issues such as the mosaics that emerge from patterns of data, the breadth and spillover effects of programmatic data collection, and the lack of governance tools to protect privacy after data collection.⁸² And Andrew Crespo explains how

levels and the fact that, “[i]n many cases, . . . levels of punishment in society are determined by aggregating individual decisions”).

⁷⁷ *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987).

⁷⁸ Meares, *supra* note 8, at 163; *Terry*, 392 U.S. at 10, 25.

⁷⁹ Meares, *supra* note 8, at 164–65; *accord id.* at 175–76.

⁸⁰ See Renan, *supra* note 8, at 1051–53, 1053, (describing the contours of the Fourth Amendment’s transactional framework and observing that even “systemic [Fourth Amendment] judgments tend to take the form of legal rules designed by courts and operating at the level of a specific police-citizen encounter”).

⁸¹ Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1488–89, 1500–02.

⁸² Renan, *supra* note 8, at 1056–67.

criminal trial courts' transactional orientation has caused them to neglect their ability to marshal valuable "systemic facts" that they could bring to bear on regulating the investigatory behavior of law enforcement.⁸³

The same transactional approach helps explain the overuse of other criminal justice instruments, like cooperation agreements. Prosecutors give cooperating witnesses large sentencing discounts in order to reinforce the strength of their cases. They have self-interests in overbuying testimony to guard against even a small risk of acquittal. But when thousands of federal defendants receive cooperation discounts, the collective effect is to undercut sentencing equity and general deterrence and fuel the Stop Snitching movement.⁸⁴ Daniel Richman insightfully suggests that risk aversion, greed, and sloth tempt prosecutors in individual cases to buy far more cooperation than is wise or socially optimal.⁸⁵ As with the issues discussed earlier concerning plea bargaining, domestic-violence and date-rape prosecutions, and various police tactics, prosecutors are not internalizing the externalities—negative and positive—that flow from a longer-term and bigger-picture approach.

Courts and scholars rarely interrogate this short-term, transactional approach because we think that criminal justice is by definition individual justice. But in plenty of other areas of law, we seek to do individual justice yet also advert to systemic costs. In prescribing demanding pleading standards for civil cases, the Supreme Court in *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal* emphasized overburdened federal dockets and the social costs of protracted discovery, particularly upon government-official defendants.⁸⁶ In the field of securities, the Court has long tweaked standards of materiality and causation to strike the right balance between protecting individual investors and managing the system-wide costs of nuisance suits and incentives to overdisclose.⁸⁷

One noteworthy aspect of these civil-procedure and securities-fraud examples is that they use rules or standards to address third-party and systemic consequences. That approach is largely foreign to criminal law and procedure. Criminal justice's fragmentation and its transactional focus have made it resistant to rules or (outside the Fourth Amendment) standards, let alone socially oriented ones that weigh broader costs. Instead, it leaves much to case-by-case, ad hoc, low-visibility discretion;

⁸³ Crespo, *supra* note 17, at 2054–57.

⁸⁴ See Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT'G REP. 292, 292–93 (1996).

⁸⁵ *Id.* at 293–94.

⁸⁶ 127 S. Ct. 1955, 1966–67 (2007); 129 S. Ct. 1937, 1953 (2009).

⁸⁷ See *TSC Inds., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976) (discussing downsides of a liberal materiality standard); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381–82 (1970) (discussing causation requirements for showing proxy rule violations in merger context).

unlike administrative law, a field obsessed with managing discretion for the public interest, it has few mechanisms to force the airing of broader perspectives.⁸⁸ That resistance to rules and dearth of broader inputs further obscures systemic considerations and prevents actors from considering them.

There is no necessary reason why criminal justice should eschew socially oriented rules and standards. Constitutional law does not clearly disallow this. For instance, the Fourth Amendment is framed not in terms of the rights of individual defendants, but “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The invocation of We “the people” and reasonableness would seem to invite broader social considerations. That reading is in keeping with Akhil Amar’s point that the Fourth Amendment, like the Jury Clauses and the rest of the Bill of Rights, “was fundamentally populist and majoritarian.”⁸⁹

Nor does punishment theory clearly disallow broader social considerations. Utilitarianism requires weighing all the costs and benefits of using criminal justice as a social regulatory tool, including externalities and less costly alternatives. Retributivists likewise cannot ignore practical constraints, costs, and tradeoffs, ranging from cooperation deals (to maximize punishment against others more deserving) to resource constraints on enforcement. Michael Cahill, for example, favors a “consequentialist retributivism” that would maximize just deserts within budgetary constraints.⁹⁰ Retributivists define costs and benefits differently from utilitarians, counting deserved punishment as a benefit rather than a cost, but they still must heed costs, including harm to innocent third parties. No retributivist that we know of would require closing down every last school and hospital to fund fully enforcing every criminal law.⁹¹ Indeed, Anglo-American criminal justice presupposes enforcement discretion. Our criminal laws are often broad and vague precisely because we trust police, prosecutors, and judges to focus their efforts where they are needed most.

⁸⁸ See Bierschbach & Bibas, *supra* note 18, at 20–28, 31–34.

⁸⁹ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133, 1177, 1185 (1991).

⁹⁰ Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 864–69 (2007).

⁹¹ Cf. Larry A. Alexander, *The Philosophy of Criminal Law*, in OXFORD HANDBOOK OF JURISPRUDENCE AND LEGAL THEORY 815, 816–22 (noting that few retributivists subscribe to a strong version of retributivism that would require punishment for every wrong).

II. FOUR TOOLS FOR RATIONING

The criminal justice system is not much of a system: it lacks the tools and perspective needed to structure and guide systemic thinking. But criminal justice can borrow from administrative and regulatory bodies of law. Environmental law, for example, has a host of ways to tally externalities and force tradeoffs and rationing. By contrast, such approaches remain in their infancy in criminal law, more than a decade after Darryl Brown first proposed incorporating cost-benefit analysis.⁹²

That is slowly beginning to change. America is now in an era of unprecedented openness to criminal-justice experimentation. The “smart on crime” movement, outrage over harsh punishments and police tactics, and fiscal pressures have prompted scholars and policymakers to think more creatively about socially-regarding, welfare-enhancing approaches.⁹³ “New administrativist” scholars recently have begun to advocate agency-centric approaches to regulating criminal law enforcement.⁹⁴ And as we have come to see criminal justice’s similarities to other fields of public law and regulation, it makes sense to explore how other tools from those fields—tools beyond traditional mechanisms of administrative governance⁹⁵—might help to address criminal justice externalities.

This Part does so for four such regulatory tools that build on one another and in places overlap: cost-benefit analysis, devolution, pricing, and caps. Each has long been discussed in connection with other fields of regulation and public administration, yet each has received only limited attention from criminal justice scholars and on-the-ground policymakers. More engagement with each could spur thinking about how to account for and manage criminal justice’s hidden tradeoffs and long-term and third-party costs. At the same time, each has its own limits, drawbacks, and difficulties. We are not offering an exhaustive examination of the pros and cons of any one of these strategies, let alone advocating them as panaceas. Nor do we suggest that they are the only possible regulatory tools that could be brought to bear.⁹⁶ Our purpose is much more

⁹² See Brown, *supra* note 15.

⁹³ For a thoughtful treatment of this topic, including an exploration of its potential downsides, see HADAR AVIRAM, *CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2015).

⁹⁴ See *supra* notes 17–18; see also Crespo, *supra* note 17, at 2059 n.37 (gathering additional work in this vein). The “new administrativist” terminology is from Crespo. See *id.* at 2059.

⁹⁵ By this, we have in mind mechanisms like notice-and-comment rulemaking. See, e.g., Friedman & Ponomarenko, *supra* note 18, at 1877–89 (discussing application of notice-and-comment principles to regulation of police).

⁹⁶ Other classic tools include tort law, privatization, and insurance, each of which also could figure more prominently in managing criminal justice, for good

exploratory and taxonomic than prescriptive. We provide a conceptual overview and sketch how each tool might help counteract some of the pathologies that we discussed above.

A. *Cost-Benefit Analysis*

Until several decades ago, environmental regulation was not all that different from criminal prosecution: reactive, ad hoc, indifferent to and unaware of costs. As Cass Sunstein explains, 1970s environmentalism was reactive to immediate problems and was often driven by moral outrage at wrongdoers.⁹⁷ As a result, many statutory provisions evinced no or at most secondary concern about cost.⁹⁸

Beginning in the 1980s, however, the federal Executive Branch began systematically evaluating regulations to assess whether their benefits exceed their costs. In 1981, President Reagan issued an executive order to federal agencies not to take regulatory action “unless the potential benefits to society for the regulation outweigh the potential costs to society.”⁹⁹ The order required agencies to submit detailed reports computing the costs and benefits of substantial projects to the Office of Management and Budget.¹⁰⁰ Successive presidents, though they replaced this order with new ones, retained the central requirement of “a reasoned determination that the benefits of the intended regulation justify its costs,” as well as vetting by OMB.¹⁰¹ Despite all of this, when it comes to cost-benefit analysis, criminal justice effectively is still where environmental law was in the 1970s.

The basics of cost-benefit analysis are well-known. Cost-benefit analysis requires agencies to look beyond their own costs and to project, quantify, and consider all the costs and benefits of various courses of action in making regulatory decisions. Especially important for criminal

or ill. See, e.g., John Rappaport, *How Private Insurers Regulate the Public Police*, 130 HARV. L. REV. ____ (forthcoming 2017) (exploring how liability insurance regimes can shape police behavior and reduce police misconduct); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005) (critiquing privatization of criminal justice in the prison context). Whereas each of these tools is in some sense deregulatory, we limit our discussion here to more traditional regulatory approaches.

⁹⁷ Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1656 (2001).

⁹⁸ *Id.* at 1656–57.

⁹⁹ Exec. Order No. 12,291, § 2(b), 3 C.F.R. 127, 128 (1982), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (1994).

¹⁰⁰ *Id.* § 3, 3 C.F.R. at 128–30.

¹⁰¹ See, e.g., Exec. Order No. 12,866, §§ 1(b)(6), 6, 3 C.F.R. 638, 639, 644–48 (1994); Exec. Order No. 13,563 § 1(b)(1), 76 Fed. Reg. 3,821 (Jan. 21, 2011).

law, this is not limited to monetary costs. Nonmonetary costs such as lost lives, shortened lifespans, loss of liberty, injury, pain and suffering, and fear need to be taken into account too. Frequently, these nonmonetary goods are monetized based on willingness-to-pay surveys, hedonic surveys, or comparable damages awards. But they need not be: if one objects to commodifying dignity or the like, one can specify these goods qualitatively.¹⁰² And because using raw willingness to pay or loss of income discounts harms to poor people, one can use normalized or average figures to better treat each citizen equally.¹⁰³

At the same time, cost-benefit analysis “is a decision procedure, not a moral standard.”¹⁰⁴ It structures consideration and evaluation but does not dictate particular outcomes. And it does so *ex ante*, at a systemic level, focusing on policies and the tradeoffs they necessarily entail. An agency need not take every action that is barely cost-justified or refrain from every action that is barely cost-unjustified. Unquantifiable goods, distributional concerns about race and wealth, and fairness considerations can and should influence reasoned decisionmaking as well.¹⁰⁵ But the agency must advert to all the quantitative and qualitative costs and benefits in reaching its decision. In that sense, when it comes to externalities, one might think of cost-benefit analysis as a useful transparency device: it surfaces and forces a decisionmaker to confront a range of costs that otherwise are not considered, without dictating that the decisionmaker choose a particular course of action.

These features of cost-benefit analysis are well-suited to counteract some of the shortcomings of criminal justice noted in Part I. Cost-benefit analysis shifts attention from ad hoc reactions to proactive, thoughtful deliberation. It thus moves from a focus on individual, low-level, disaggregated transactions to consistent, transparent policies that focus on the aggregate harms of on-the-ground decisions. It draws attention to costs that are diffuse, nonmonetary, off in the future, or borne by the poor and powerless.¹⁰⁶ It showcases the downsides of catchy but poorly tailored slogans, such as zero-tolerance and three-strikes policies. And it seeks to transcend vertical and horizontal as well as individual fragmentation,

¹⁰² See, e.g., Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1732, 1771–81 (2014).

¹⁰³ Brown, *supra* note 15, at 359.

¹⁰⁴ Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 167 (1999).

¹⁰⁵ See Brown, *supra* note 15, at 336–37.

¹⁰⁶ In doing so, it pushes back against self-interest, the availability heuristic, and salience bias, all of which skew attention toward immediate, scary effects upon oneself and powerful, vocal constituencies. *Id.* at 341–43. Similarly, reckoning future benefits and discounting them to net present value pushes back against short time horizons.

asking what is best for society and the system as a whole, not just for individual actors or agencies.

For those reasons, Darryl Brown rightly endorses cost-benefit analysis in criminal law. He draws attention to often-overlooked costs of punishment on employment, marriages, families, and communities.¹⁰⁷ He thoughtfully reflects on quantifying qualitative and retributive goods and compensating for differentials in wealth and power.¹⁰⁸ And he floats the idea of cost-impact statements that could reflect distributional considerations such as race or wealth, akin to environmental impact statements for major regulations.¹⁰⁹

Brown's article is written at a high level of generality about the cost-benefit concept, not its implementation or role in overcoming fragmentation. His few pages devoted to implementation focus mostly on action by the U.S. Department of Justice, which has unified authority over federal prosecutors.¹¹⁰ He suggests, for example, that federal corporate-crime charging policies currently balance costs and benefits impressionistically, but could do better with more data and a more explicit and formal embrace of cost-benefit principles.¹¹¹ The same is true of federal plea bargaining policies, he notes, as well as Main Justice approvals of capital charges and charges under several other federal statutes.¹¹² While he observes that "the idea generalizes to state prosecutors," states have many fewer centralized policies and authorities, so he offers no state proposals.¹¹³

Brown is right that it is easier to envision cost-benefit analysis within the unified, largely careerist Department of Justice hierarchy. He is also right to focus on areas where formal, written policies already exist, which facilitate cost-benefit review. But most arrests, charges, and prosecutions are in state court, where there often are no policies, and the problems of fragmentation and transactional focus are worse in states and localities. Most state prosecutors are directly elected, unlike appointed U.S. Attorneys. Though implementing cost-benefit analysis beyond the federal level would be trickier, if successful it would yield much larger payoffs, as it could positively influence a number of high-volume decisions in state courts, district attorney's offices, police departments, and state prisons. And while the general lack of formal, centralized policies at the state and local levels almost certainly would inhibit wide-ranging implementation,

¹⁰⁷ *Id.* at 345–49.

¹⁰⁸ *Id.* at 358–59, 364.

¹⁰⁹ *Id.* at 353.

¹¹⁰ Main Justice could act either of its own accord or at the prompting of Congress, offering cost-benefit analyses of its enforcement policies. *Id.* at 352–57.

¹¹¹ *Id.* at 355.

¹¹² *Id.* at 356.

¹¹³ *Id.* at 358.

discrete areas do exist where written guidelines or statutory criteria could more directly incorporate a cost-benefit approach.

Take bail and pretrial detention. Bail statutes typically instruct courts to set bail at the least restrictive amount and conditions needed to assure the defendant's appearance in court and the safety of the community.¹¹⁴ And some authorize pretrial detention for particular types of serious crimes.¹¹⁵ Some judges and police departments set bail schedules for particular crimes, but there is little focus on, let alone internalization, of costs and benefits. Nor is there much in the way of empirical validation to inform judges, prosecutors, police, or legislatures.¹¹⁶ Bail policy is, in short, impressionistic and reactive.

As a result, judges and prosecutors default to setting money bail, even though most defendants are unlikely to flee and money bail does almost nothing to reduce danger to the community.¹¹⁷ Judges anchor on prosecutors' recommendations, and prosecutors in turn anchor on the severity of the crime charged.¹¹⁸ That observed behavior belies what judges purport to be doing: when responding to hypothetical rather than actual cases, judges give the greatest weight to a defendant's local ties.¹¹⁹

Many states are rewriting their bail statutes in attempts to address such problems. But the discourse around bail reform does not get at the misalignments that are at the root of the problem. The conversation instead centers on rights-based reforms aimed at ensuring fairness and equality for individual arrestees in each case.¹²⁰ Framed as such, the

¹¹⁴ See, e.g., 18 U.S.C. § 3142(c)(1)(B); *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (interpreting the Eighth Amendment's Excessive Bail Clause).

¹¹⁵ See, e.g., 18 U.S.C. § 3142(e), (f) (for serious crimes involving violence, terrorism, drug trafficking, guns, minor victims, or third-time felons); VA. CODE § 19.2–120 (similar).

¹¹⁶ See Sandra G. Mayson, *Dangerous Defendants* 10–14, 33–43 (unpublished manuscript, <https://ssrn.com/abstracts=2826600>) (discussing problems with and limitations of recent moves toward statistical risk-based decisionmaking in pretrial detention, including lack of robust cost-benefit information).

¹¹⁷ See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. ___, ___–___ (forthcoming 2017) (raising questions about utility of money bail as mechanism to ensure appearance).

¹¹⁸ Ebbe Ebbeson & Vladimir Konecni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERSONALITY & SOC. PSYCHOL. 805, 814–17, 819–20 (1975).

¹¹⁹ *Id.* at 808–10.

¹²⁰ To do so, the current reform movement focuses on moving from a cash-based to a risk-based system, in which only risk-assessment—not money bail—is used to mitigate danger. See, e.g., *The Solution*, Pretrial Justice Institute, www.pretrial.org/solutions (urging jurisdictions to “move from resource-based to risk-based bail decision-making process”); PRETRIAL JUSTICE INSTITUTE,

current reform movement plants those important goals firmly in the soil of the transactional approach to criminal justice. It does little to step back and address what we should be equalizing at a systemic level or what tradeoffs are really at issue in the bail calculus.

Incorporating cost-benefit analysis more directly into statutory bail reform could help to break that pattern by better focusing decisionmaking on the full range of bail's harms and gains. That bird's-eye perspective is especially important because bail implicates problems of both poor, one-sided information and of horizontal and individual fragmentation affecting incentives. Criminal justice actors are poorly placed to see, much less fully consider, the costs that bail decisions impose upon arrestees, their families, and their employers. (Because arrestees are still presumed innocent, their loss of liberty and other harms must be treated as costs, not disregarded or retributively justified benefits.¹²¹) And prosecutors and judges do not internalize the costs of the pretrial detention they seek or authorize, because they do not run jails.

Moreover, if a released defendant flees, threatens a witness, or commits another crime, those costs are immediate, vivid, and likely to be blamed on the prosecutor or judge who agreed to release the defendant. The prosecutor or judge can anticipate regretting such an error and will thus be cautious. But if a judge detains a defendant, that false positive is hidden. No one will ever know that the defendant in fact would have appeared for court and refrained from crime. The false positive will never be blamed on the prosecutor or judge, and the costs of eroding families and employment and hindering criminal defense are longer-term, hidden, and diffuse.

There is better information out there. The Vera Institute's Manhattan Bail Project developed a point scoring system that successfully predicted defendants who would appear in court even without posting money bail.¹²² The Laura and John Arnold Foundation has developed the Public Safety Assessment risk-assessment tool, based on 1.5 million cases from more than 300 jurisdictions.¹²³ Twenty-nine jurisdictions currently employ it.

RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS (2012).

¹²¹ See Roger A. Bowles & Mark A. Cohen, *Pre-Trial Detention: A Cost-Benefit Approach*, DEP'T FOR INT'L DEV. 16–17, 30–32 (2009), http://www.opensocietyfoundations.org/sites/default/files/justice_20081124d_0.pdf (modeling potential costs of lost freedom to innocent defendants who are detained pretrial and their families).

¹²² VERA INST. OF JUSTICE, FAIR TREATMENT FOR THE INDIGENT: THE MANHATTAN BAIL PROJECT TEN-YEAR REPORT, 1961–1971 (1972), *reprinted in* 24 FED. SENT'G REP. 10, 11 (2011).

¹²³ Laura & John Arnold Foundation, *Public Safety Assessment*, <http://www.arnoldfoundation.org/initiatives/case-studies/public-safety->

Yet 90% of American jurisdictions use no evidence-based risk assessments to inform bail decisions.¹²⁴ And, critically, even these flight and risk assessments focus on only one side of the equation: the risk of nonappearance or further crime, not the benefits of release.

To overcome these information deficits and misaligned incentives, courts and pretrial services agencies that are serious about bail reform should focus on adopting evidence-based bail rules and policies that better reflect both the costs and benefits of bail. Governments or non-profit think tanks could develop these tools and help jurisdictions to implement them, just as the Arnold Foundation has done with the Public Safety Assessment. One could easily envision software that incorporates not only risk probabilities but also the expected costs of flight, crimes prevented, jail costs, lost liberty, lost employment and family time, additional welfare payments, and the like.¹²⁵ The software could give special priority to the risk of violent reoffending, weighting that legitimate fear in its calculus. It also could reflect the particular hardship money bail and pretrial detention place on the poor, calibrating bail to ability to pay and likewise normalizing other monetary harms.

Counties and cities could adopt this software jurisdiction-wide, helping to lower their own jail costs while giving judges and prosecutors political cover for individual release decisions. The software could be set up as a learning system, with feedback loops to incorporate new data on court appearances and rearrests.¹²⁶ And it could bring cost and risk figures out into the open, encouraging meaningful oversight and public debate.

We harbor no illusions about the ability of this more cost-benefit focused approach to solve all of bail's problems. Ascertaining and quantifying the harms and gains of bail will be expensive (but so will rights-focused procedural reforms); many of the costs and benefits involved might be estimated only crudely at best, and some might be subject to widely varying or subjective estimates (such as the cost of lost liberty) or might be nearly impossible to quantify at all (such as distributional harms).¹²⁷ But even then, framing bail decisions more

assessment-2/. At least six other risk assessment tools are currently in use also. See Mayson, *supra* note 116, at 9 n.52 (collecting tools).

¹²⁴ See Mayson, *supra* note 116, at 8–9.

¹²⁵ See Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. ___, ___–___ (forthcoming 2017) (quantifying fiscal impact of pretrial detention schemes).

¹²⁶ Cf. Richard Berk & Jordan Hyatt, *Machine Learning Forecasts of Risk to Inform Sentencing Decisions*, 27 FED. SENT'G REP. 222 (2015) (describing machine-learning in context of sentencing risk assessments).

¹²⁷ For a concise and helpful overview of many of the issues, see Mark A. Cohen, *The "Cost of Crime" and Benefit-Cost Analysis of Criminal Justice Policy: Understanding and Improving upon the State-of-the-Art* (Aug. 31, 2016), <https://ssrn.com/abstract=2832944>.

directly in cost-benefit terms can move the conversation forward by at least forcing us to ask questions that previously were not being asked.

If one concern is risk of flight, for instance, cost-benefit thinking might surface options that are much more cost-effective at ensuring defendants' appearances than is the traditional money bail versus detention framework. Pretrial services agencies have a wealth of other nonmonetary options for doing just that, including electronic monitoring, social workers, transportation assistance, drop-off child care, or even simple robocalls or texts the night before appearance dates.¹²⁸ But current statutes rarely direct courts to consider them. Even when they do, courts have little evidence-based guidance on when to choose or ration them over the more traditional detention versus cash alternatives. If alternative measures can reap the same benefits at lower total cost, there is no need to require bail or detention. By forcing decisionmakers to think more directly about which measures are cost-justified at the margins, one overarching benefit of cost-benefit analysis is that it can improve upon the traditional binary choice between money bail and pretrial detention.¹²⁹

Beyond statutory areas like bail, the cost-benefit lens might likewise illuminate other controversial areas of core state and local criminal justice enforcement, like misdemeanor and quality-of-life policing. Low-level enforcement involves a host of variables, which can be influenced ad hoc or programmatically: Police can systematically or occasionally make *Terry* stops and frisks.¹³⁰ They can arrest, ticket, or simply caution suspects. Prosecutors can charge, divert for treatment or restitution, or decline cases, either wholesale or retail. Communities can pursue preventive strategies, ranging from cops on the beat to street lighting, surveillance cameras, architecture, neighborhood watches, and loud music or noise to disrupt loitering.¹³¹ And communities can choose to pursue policies ranging from zero tolerance to anything goes, or simply leave judgment calls to individual officers' ad hoc discretion.

¹²⁸ See CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM (Oct. 2016), <http://cjpp.law.harvard.edu/assets/final-primer-on-bail-reform.pdf>.

¹²⁹ See ISSUE BRIEF, PRETRIAL RISK ASSESSMENT: SCIENCE PROVIDES GUIDANCE ON ASSESSING DEFENDANTS 2, 5 (Pretrial Justice Inst., May 2015) (discussing more nuanced tailoring of measures to flight or crime risk); Timothy P. Cadigan et al., *The Re-Validation of the Federal Pretrial Services Risk Assessment (PTRA)*, 76 FED. PROBATION 5–6 (2012) (same); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344 (2014) (arguing that “non-dangerous defendants” have a right to electronic monitoring in lieu of detention).

¹³⁰ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹³¹ See Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002) (discussing architecture- and design-based approaches to crime prevention).

The reactive, transactional approach to individual cases can obscure and skew these choices in multiple ways. In particular, law enforcement's traditional focus on arrests and charges obscures the many noncriminal alternatives that could achieve the same goals at lower cost. Ad hoc policing misses threshold effects that kick in only once there is a certain level of social disorder. And ground-level actors who address individual cases miss systemic issues, ranging from the dilution of criminal stigma and legitimacy to racially disparate patterns of enforcement.

It is a good start that debate over stop-and-frisk and broken-windows policing programs has become an issue in political campaigns.¹³² Police departments and district attorney's offices can go further to quantify the harms that neighborhood residents suffer from social disorder and those they suffer from police intrusion. Litigation has brought to light that programmatic stops and frisks have extremely low hit rates, particularly for finding guns.¹³³ Yet their costs to individual liberty and racial fairness are substantial, undermining law enforcement's legitimacy.¹³⁴

Even rough incorporation of cost-benefit analysis into policing strategy could help carry these insights further. Police departments could collaborate with economists, criminologists, and outside advisory boards in a form of community policing. These boards could include representatives from minority communities, victims' groups, public defender organizations, neighborhood watches, and shopkeepers. With this outside input, offices could formulate policies to weigh the costs and benefits of enforcement tactics. This representative process would ensure that policies reflected a broad range of costs and benefits and compared

¹³² See Aaron Blake, *The First Trump-Clinton Presidential Debate Transcript, Annotated*, WASH. POST (Sept. 26, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/26/the-first-trump-clinton-presidential-debate-transcript-annotated/?utm_term=.a262e72a9ad8 (debating effectiveness of stop-and-frisk); J. David Goodman, *De Blasio's Police Reform Pledges May Burden His Re-election Bid*, N.Y. TIMES (Oct. 14, 2016) <http://www.nytimes.com/2016/10/15/nyregion/de-blasios-police-reform-pledges-may-burden-his-re-election-bid.html> (discussing the effects of police reform, stop-and-frisk, and broken-windows policing on the 2017 campaign for Mayor of New York City).

¹³³ See *Floyd v. City of New York*, 910 F. Supp. 2d 506, 515–16 (S.D.N.Y. 2012) (citing David Seifman, *NYPD Less "Frisk"y*, N.Y. POST (Aug. 3, 2012)) (discussing expert testimony regarding the low rate of gun recoveries resulting from stop-and-frisk and stating, "the NYPD's data shows that approximately five percent of stops result in an arrest, six percent of stops result in a summons, guns are seized in 0.15 percent of stops, and contraband of any kind is seized in 1.75 percent of stops").

¹³⁴ See Meares, *supra* note 8, at 174, 175 (discussing "costs to the public in the form of massive numbers of unjustified police encounters" and "perceptions of the illegitimacy of the police" from programmatic stop-and-frisk policing).

well to noncriminal alternatives.¹³⁵ Researchers could thus help police to set thresholds for excessive noise, solicitation, loitering, public drinking, and similar nuisances, as well as objective criteria for stops and frisks.¹³⁶ They could set more objective criteria for stops and frisks, to increase hit rates and reduce their overuse and cost to legitimacy.¹³⁷ And the board could monitor police behavior and compliance, gauging when practice was tilting towards overly aggressive or lax enforcement. Information technology like CompStat could help with this monitoring, highlighting when particular patterns of disorder have flared up or died down.¹³⁸

Prosecutors' offices could do likewise. Today, prosecutorial decisions to charge, decline, or divert low-level cases for treatment or restitution are largely unreviewable. Many if not most prosecutors' offices make these decisions ad hoc, without formal policies. Others have charging and diversion policies, but rarely tie these to data about the costs and benefits of proceeding.¹³⁹ Cost-benefit experts and community boards could help prosecutors to formulate charging, declination, and diversion policies and thresholds, as a form of community prosecution. They could bring to light diffuse or less visible costs and benefits, like the distributional and other social harms of making diversion only available to defendants who can

¹³⁵ See Harmon, *supra* note 26, at 903 (“One reason the coercion costs of policing are neglected is that many of them accrue to the targets of policing. . . . The costs-of-crime literature reflects the intuition that these costs should not count.”).

¹³⁶ An extensive literature exists on how researchers and policymakers using cost-benefit analysis might methodically approach such issues. See, e.g., Christian Henrichson & Joshua Rinaldi, *Cost-Benefit Analysis and Justice Policy Toolkit*, Vera Inst. of Just., Dec. 2014 (offering a basic primer in the area of criminal justice).

¹³⁷ See *id.* at 895 (discussing similar benefits that typically go unaccounted for in assessments of policing policies).

¹³⁸ One might even consider doing the same for other areas of policing, like drug-enforcement tactics. To return to Tracey Meares' example, an advisory board could weigh the greater time and monetary costs of reverse stings against their benefits of distributing deterrence and punishment to more white buyers from the suburbs. See Meares, *supra* note 65, at 220–21. The board might well conclude that the optimal ratio is not all stings nor all reverse stings, but some fraction of each that equitably distributes costs and deterrence across communities.

¹³⁹ See, e.g., *State v. Baynes*, 690 A.2d 594, 599 (N.J. 1997) (rejecting as an abuse of discretion Monmouth County, New Jersey's categorical ban on diverting for drug treatment defendants who possessed drugs within 1000 feet of a school, as “requir[ing] prosecutors to disregard relevant factors”); RUSSELL D. HAUGE, KITSAP COUNTY PROSECUTING ATTORNEY, MISSION STATEMENT AND STANDARDS AND GUIDELINES 6–9, 14–15 (2007) (setting forth detailed criteria for charging and diversion, but admitting that “[t]he decision when to [divert] a case is less-than-scientific”).

pay for it.¹⁴⁰ And they could periodically review experience under the policies, helping offices to focus their limited resources. The resulting policies would be not only substantively better informed, but also procedurally and democratically more legitimate, as different constituencies would have more confidence that their voices had been heard. One could extend the practice to many other spheres as well, such as state sentencing, parole, and probation guidelines and criteria, all of which could profit from more rigorous and methodical application of cost-benefit techniques.¹⁴¹

B. Devolution

Fans of administrative rationality often favor pushing decisions upward and toward the center, in the hopes that a single unitary agency can optimize cost-benefit tradeoffs. But partial centralization can breed perverse results. Overlaying some centralization upon our fundamentally fragmented, decentralized system often exacerbates vertical misalignment. The “correctional free lunch” discussed in Part I.A is one example. Others include the federal kickbacks for locally initiated forfeitures, support for aggressive drug and gang enforcement, and funding to militarize local police.¹⁴²

Some crime issues are truly of nationwide or international concern. Piracy, counterfeiting, and most terrorism, human trafficking, and smuggling have to be dealt with nationally. But most crime can be and is addressed by counties, cities, and towns. In this context, higher-level intervention, particularly in the form of targeted funding of the sort just described, has four potentially negative consequences.

¹⁴⁰ Shaila Dewan & Andrew W. Lehren, *An Alabama Prosecutor Sets the Penalties and Fills the Coffers*, N.Y. TIMES (Dec. 13, 2016), at A1 (reporting on Henry County District Attorney Douglas A. Valeska’s treatment of diversion as a “dismissal-for-sale scheme, available only to those with money and, in some cases, favor”).

¹⁴¹ See, e.g., Jordan M. Hyatt et al., *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing*, 49 DUQ. L. REV. 707, 740–42 (2011) (discussing the potential value of cost-benefit analysis in bringing “sweeping change to the way that sentencing and parole are considered in Pennsylvania”); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1284–85 (2005) (discussing the use of cost-benefit analysis to inform sentencing but noting that “no jurisdiction has embraced a full-scale cost-benefit analysis for sentencing policies”). For further discussion of who specifically would conduct cost-benefit analyses and how, see *infra* notes 226–230 and accompanying text.

¹⁴² See *supra* notes 26–31 and accompanying text; Harmon, *supra* note 26, at 887–88, 919–27 (discussing federal funding of local police equipment).

First, targeted subsidies encourage overuse. Municipalities must use them or lose them. That may make sense for unsexy staples that would otherwise be neglected, such as replacing outmoded computer systems. More often, however, as Rachel Harmon explains, politicians either seek to claim credit by cherry-picking popular line items, such as police equipment, or local police chiefs rely on subsidies to fund and even justify unpopular or intrusive police tactics that local governments otherwise would decline to support.¹⁴³

That leads to the second problem: poor accountability. Federal and state involvement cloud which level of government is responsible for particular priorities and design choices. Higher levels of government attach strings and oversight to their funding. No one level of government is accountable, so each can claim credit if things go well or deflect blame if they go badly.¹⁴⁴ And, because targeted federal funding frequently operates outside localities' regular budget process, local communities lose the ability to check or reject government activities that their standard local budgeting process normally provides.¹⁴⁵

Third, categorizing funding distorts tradeoffs. We often focus on the choice between spending extra money on a prison cell versus letting a dangerous criminal roam the street for a year. But that focus is an artifact of our budget categories. As Phil Cook and Jens Ludwig note, "more prisoners versus more crime is the wrong question."¹⁴⁶ Instead, the question should be whether redirecting prison dollars to fund police, early intervention, or prevention would be more effective at reducing crime. They note reasons to believe that at the margin, spending additional dollars on police and other programs would be much more effective.¹⁴⁷

Fourth, local governments lose control. Their priorities are set far away in federal and state capitals. And they lose the ability to experiment with different and possibly better means to achieve the same ends. Proliferating programs may overlap or even be redundant.

¹⁴³ See Harmon, *supra* note 26, at 951; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 878 (1998) (explaining that "political reality" makes it nearly impossible for state and local governments to refuse even unneeded federal funds).

¹⁴⁴ See, e.g., Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 94–95 (1998) (discussing similar reasons why "[m]ultijurisdictional drug task forces may elude meaningful oversight"); Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 879 (2004) (noting the lack of "political controls over local police departments" that participate in drug task forces).

¹⁴⁵ See Harmon, *supra* note 26, at 948–50.

¹⁴⁶ Philip J. Cook & Jens Ludwig, *More Prisoners Versus More Crime Is the Wrong Question*, BROOKINGS INST. POLICY BRIEF NO. 185, Dec. 2011, at 1.

¹⁴⁷ *Id.* at 7–8.

All four of these pathologies afflict traditional federal funding targeted at particular categories of expenditure. The solution is often to shift funding from targeted programs to either revenue sharing or block grants.¹⁴⁸ Block grants are a form of devolutionary funding that shift decisionmaking authority and responsibility from higher to lower levels of government. Ideally, they let local actors shift money to where it is needed most, and reduce federal credit-claiming for particular items. They rein in subsidies for overuse and waste. And in the long term, they often facilitate cuts and reduce costs.¹⁴⁹ The prospect of cost-cutting makes supporters of particular programs eye block grant with suspicion, and block grants also can exacerbate risks of partisan manipulation, favoritism, and distributional inequity.¹⁵⁰ But in a bloated penal state, requiring criminal justice to compete against other objects of funding also is a recipe for bringing costs and coercion into line.

Block grants, or something like them, could revolutionize the “correctional free lunch.” David Ball has proposed similar solutions to get rid of states’ prison subsidies.¹⁵¹ One possibility is that, instead of funding “free” state prisons, states could send each locality a violent crime block grant based on its violent crime rate or similar metric. Counties would have flexibility to spend the money on police, prosecutors, prison, treatment, or social services. Though states would still operate prisons, they would charge localities per prisoner per night. Counties, cities, and towns could decide to control crime aggressively and raise the money to pay for additional police, prosecutors, or prison beds. They could also experiment and economize, pursuing alternatives such as early intervention, treatment, or other preventive measures that might prove more cost-effective.¹⁵² California’s Public Safety Realignment Act is a variation on this theme, pushing the cost of incarcerating low-level felons from states to counties and thereby forcing counties to internalize the costs of conviction and sentencing.¹⁵³

¹⁴⁸ See EUGENE BOYD & ROBERT JAY DILGER, CONG. RESEARCH SERV., R40486, BLOCK GRANTS: PERSPECTIVES AND CONTROVERSIES 1–8, 11 (2014) (describing use of and rationales for block grants in health care, transportation, and education).

¹⁴⁹ See, e.g., *id.* at 6, 10–11; Kenneth Finegold et al., Urban Inst., *Block Grants: Historical Overview and Lessons Learned*, ASSESSING THE NEW FEDERALISM 1, 4–5 (Apr. 2004).

¹⁵⁰ See, e.g., Margy Waller, Center on Children & Families, Brookings Inst., *Block Grants: Flexibility vs. Stability in Social Services*, BROOKINGS INST. POLICY BRIEF NO. 34, Dec. 2005, at 1–4, 8.

¹⁵¹ Ball, *Defunding State Prisons*, *supra* note 13, at 1072–75.

¹⁵² *Id.* at 1073.

¹⁵³ Realignment transferred responsibility for minor felons—those convicted of nonviolent, nonserious, and nonsexual crimes (or “triple nons”)—from the California state prison and parole system to the local jails and probation officers

While Ball's first proposal addresses vertical misalignment, his second idea combats both vertical and horizontal misalignment. Ball's thought experiment is to break up statewide criminal justice institutions and unify the pieces at the local level. Currently, police and prosecutors have no stake in what their actions do to prison or jail costs, whereas jails and prisons feel no repercussions from reducing or increasing recidivism. Unification would end these fragmented incentives. Policing, prosecutorial or jail policies that exacerbated recidivism would hit localities in their wallets. Conversely, good policing and preventive programs would reduce the incarceration bill, saving the local agency money.¹⁵⁴

Unification at the local level would face various obstacles, both political (given legislative inertia or worse) and practical (given statewide economies of scale and the lack of local administrative apparatuses).¹⁵⁵ But even modest movements toward devolved local responsibility could help. Putting local prosecutors in charge of local jails, for instance, would counteract one line of horizontal fragmentation by forcing prosecutors to pay for and live with their bail recommendations and misdemeanor charging and sentencing decisions.¹⁵⁶ That might incentivize prosecutors to recommend pretrial detention less reflexively, to offer more lenient plea bargains in misdemeanor and even some felony cases, and to otherwise downgrade or dismiss charges so as to limit jail admissions.¹⁵⁷ Specific reforms aside, the point is that devolution might in some cases be a useful corrective to some of the systemic features that contribute to externalities, and one that brings additional benefits of transparency, accountability, experimentation, and responsiveness to local priorities.¹⁵⁸ State involvement would still be needed to address crimes that span local lines and, through funding and other floors and ceilings, to foster distributional equity and guarantee resource-strapped districts a minimum level of public safety.¹⁵⁹ But subject to those constraints, local or sub-local districts might

of California's fifty-eight counties. Each county receives state funding to deal with its offenders, and each is given nearly unfettered discretion to design its own punishment policies. See Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 327 (2014) (providing an overview of Realignment).

¹⁵⁴ Ball, *Defunding State Prisons*, *supra* note 13, at 1075–78.

¹⁵⁵ See *id.* at 1086–89.

¹⁵⁶ See Gershowitz, *supra* note 14.

¹⁵⁷ See *id.* at 694–97 (discussing effects on plea bargaining and charge selection). But it would not address the further horizontal fragmentation between jails and the police or the corresponding problem of police externalizing costs onto jails through their arrest decisions.

¹⁵⁸ Ball, *Why State Prisons?*, *supra* note 13, at 107–14.

¹⁵⁹ See *id.* at 107–08, 114–15; *infra* notes 197 & 248 and accompanying text (further addressing this issue). While the effect was modest, David Thacher found

benefit from more flexibility, much as federal block grants for education aim to allow localities to emphasize their different norms, needs, and values while still seeking to ensure that every school district gives students a solid grounding in the fundamentals.¹⁶⁰

Other approaches to devolution are beginning to percolate through the criminal justice system as well. One of the more interesting and controversial ones enlists the private or charitable sector to fund potentially promising innovations in criminal justice that the state cannot—or will not—fund itself. Prison bureaus do not internalize the costs of recidivism, particularly in the short term, so they have no concrete incentive to invest in treatment or prisoner-reentry programs. Yet the costs of recidivism are substantial, particularly in the long term and particularly for victims and communities.¹⁶¹ Nor, by the same token, do prisons internalize the benefits of offenders who get their lives back on track—a form of positive externality that agencies have no direct means to capture. And while a state as a whole might capture those benefits, the difficulty of figuring out what works and what does not, the diffuseness of the benefits, and the time lag involved in realizing them all make funding new programs aimed at helping convicted criminals a generally unattractive proposition to state politicians.¹⁶²

To counteract these misaligned incentives, some governments have issued social-impact bonds, which are a form of payment by results. Investors or philanthropists agree to fund experimental criminal justice initiatives, such as treatment programs to reduce recidivism. Nonprofits (and, through them, governments) thus have access to funding for pilot programs without having to bear the risk. If recidivism drops

that federal funding of police protection (as opposed to targeted federal subsidies for certain enforcement initiatives or equipment) slowed the spread of inequality in the distribution of policing serves among rich and poor localities. David Thacher, *The Distribution of Police Protection*, 27 J. QUANT. CRIMINOL. 275, 277 (2010). Thacher concludes that the impact would have been bigger had federal funding been distributed by crime rates rather than population. *Id.*

¹⁶⁰ See Eloise Pasachoff, *Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement*, 111 PENN ST. L. REV. 349, 353 (2006).

¹⁶¹ See, e.g., Rose M. Burt, *More Than a Second Chance: An Alternative Employment Approach to Reduce Recidivism Among Criminal Ex-Offenders*, 6 TENN. J.L. & POL'Y 1, 9–17 (2014) (describing civil, social, and statutory barriers to employment of ex-offenders and their consequences for victims and society); Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 266–67 (2014) (discussing the “crippling economic effects” of the lack of employment prospects for ex-offenders and how the resulting “[r]ecidivism creates costs to the victims and community”).

¹⁶² See Christopher Jon Romani et al., *Treating Criminal Behavior: Is the Bang Worth the Buck?*, 18 PSYCHOL. PUB. POL'Y & L. 144 (2010).

substantially, the government reaps savings and pays a portion of those savings to the investors, who capture some of the positive externality that their investment creates. If it does not, the investors lose their investment, insulating the government from risk of loss.¹⁶³ Social-impact bonds ideally unite the costs and benefits (positive externalities) of criminal justice reforms in a single actor, giving it incentives to make systemically sound decisions. Unlike governmental agencies, social impact investors can more easily diversify the financial risks of experimentation, and they face no corresponding democratic pressure. They are thus less beholden to politicians' risk-aversion about gambling the public fisc and their own political stature on trying something new.¹⁶⁴

Social-impact bonds face challenges. Some benefits of reduced crime redound to victims and communities, and so do not factor into the government's fiscal savings.¹⁶⁵ When fixed costs are large (such as the cost of running a whole prison), reducing recidivism may bring modest immediate benefits.¹⁶⁶ And a couple of early social-impact bond projects failed to yield hoped-for results. A New York City project failed to reduce juvenile recidivism, and a Peterborough, England project reduced recidivism by 8.3%, rather than the 10% needed to repay investors.¹⁶⁷ Nevertheless, the promise of splitting the gains from reforms may help investors and governments to mitigate the problems of short time horizons and horizontally fragmented agencies, and as investors continue to try new programs, successful reforms might emerge.

Beyond questions of success, one might legitimately worry that, much like federal subsidies, social impact bonds make it *too* easy for governments to employ or experiment with new criminal justice interventions that they otherwise would not or could not roll out for political or other reasons.¹⁶⁸ That would make the externalities problem

¹⁶³ For a useful overview of these and other aspects of social impact bonds, see Sonal Shah & Kristina Costa, *Social Finance: A Primer*, Center for American Progress, 6–9 (Nov. 5, 2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/11/SocialFinance-brief.pdf>.

¹⁶⁴ See *id.* at 9 (noting usefulness of social impact bonds on issues that “are politically sensitive or politically unpopular” or “where political will for funding can be difficult to muster and/or sustain”).

¹⁶⁵ See *id.* at 5 (discussing the savings for the public sector as a function of lower public spending due to improved outcomes).

¹⁶⁶ Chris Fox & Kevin Albertson, *Payment by Results and Social Impact Bonds in the Criminal Justice Sector: New Challenges for the Concept of Evidence-Based Policy?*, 11 CRIMINOLOGY & CRIM. JUST. 395, 407–08 (2011).

¹⁶⁷ David Bank, *The Prison Reform #Fail That is Shaking the Social-Impact Bond Market*, IMPACTALPHA, July 16, 2015.

¹⁶⁸ Baltimore's secret aerial surveillance program, conducted for the Baltimore Police Department by a private company, provides a recent and troubling example. As the *Baltimore Sun* reported, the program “was kept secret in part because it never appeared before the city's spending board, paid for instead

worse, not better, as profit-seeking investors might concentrate some of the costs of crime reduction strategies on marginalized or disempowered groups who cannot hold the government to account. We share this and other concerns about overreliance on privatization in criminal justice. Nevertheless, experimenting with more creative funding mechanisms designed to make criminal justice more fully account for its range of harms and gains is at least worth exploring.

C. Pricing

While the benefits of vigorous enforcement are often salient and immediate, particularly to the enforcers, the costs are often diffuse, longer-term, or borne by others. Police can easily imagine the benefits of taking a gun off the street but do not feel the costs of how they go about doing so. Because in practice the only remedy for an unlawful search is suppression, they face zero cost for searches of innocent suspects that yield no evidence.¹⁶⁹ Prosecutors likewise see the benefit of pretrial detention in ensuring a suspect's appearance in court, but do not feel its burden on defendants or their families.

Police used to bear the costs of unreasonable searches and seizures: in the colonial era, searchers faced tort suits for trespass, so they had to satisfy juries that their conduct was reasonable.¹⁷⁰ But modern immunity doctrines insulate law-enforcement professionals from having to weigh the costs they impose on others.¹⁷¹ Courts are reluctant to suppress evidence, lest "the criminal . . . go free because the constable has blundered."¹⁷² Even reasonable searches, constitutional under the Fourth Amendment, impose costs, though there is no price to pay for them.

When the price of an action or good does not reflect its cost to society, people overuse it. That is one recurring problem with the transactional model: it encourages overuse by badly underweighting the true costs of

through private donations handled by the nonprofit Baltimore Community Foundation." Kevin Rector & Luke Broadwater, *Report of Secret Aerial Surveillance by Baltimore Police Prompts Questions, Outrage*, BALT. SUN. (Aug. 24, 2016), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-secret-surveillance-20160824-story.html>.

¹⁶⁹ See Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1271–72 (1983); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 609 (2000); see also *Irvine v. California*, 347 U.S. 128, 136 (1954) (plurality opinion) (observing that the exclusionary rule "does nothing to protect innocent persons who are the victims of illegal but fruitless searches").

¹⁷⁰ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 775–78 (1994).

¹⁷¹ *Id.* at 812–14.

¹⁷² *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.).

criminal justice interventions. But, just as they tax a pack of cigarettes, governments could counteract this problem by setting prices for various interventions roughly in line with the externalities they impose, functionally re-creating the deterrence that tort law used to provide.

Miriam Baer proposes such a scheme for searches. Her idea is that governments should attach a price to searches based upon their volume and intrusiveness as well as the difficulties of detection and apprehension.¹⁷³ That would, in essence, be a Pigovian tax, seeking to internalize the externalities that searchers impose upon searchees.¹⁷⁴ Jurisdictions, Baer explains, could set a higher price for more socially costly searches, such as stop and frisk, and a lower price for less socially costly ones, such as warrant-based searches, with things like abandonment and consent searches, searches incident to arrest, and automobile searches falling at various points in between.¹⁷⁵ She candidly acknowledges the difficulties inherent in measuring costs, managing and administering a pricing regime, and commodifying liberty.¹⁷⁶ Thus, she limits the scope of her proposal to Fourth Amendment violations by urban police. Nevertheless, Baer argues, setting a price would do a better job of internalizing costs, drawing attention to them, and promoting citizen participation in articulating policing policy.¹⁷⁷

Pricing would also affect incentive structures in another way, by creating an additional metric of success. Police working in a pricing regime would be judged not solely by their arrest or case clearance rates, but also by how well they managed their search budget. The price could be assessed at the department, precinct, or officer level.¹⁷⁸ Baer casts her proposal as an actual tax, but even if no actual transfer of dollars took place, officers could have some notional account, allowing them to conduct an average amount of searching per year but requiring them to justify overly aggressive search rates.¹⁷⁹ And to take Baer's proposal further, for each officer, precinct, or department, the amount "spent" on searches could be juxtaposed against actual convictions, which could likewise be credited to those accounts in amounts that correspond to the

¹⁷³ Miriam H. Baer, *Pricing the Fourth Amendment*, 58 WM. & MARY L. REV. ____ (forthcoming 2017).

¹⁷⁴ *Id.* at ____; see A.C. PIGOU, *THE ECONOMICS OF WELFARE* 192–95 (1920) (describing "bounties and taxes" that governments may use to correct "divergences" between the social and private costs of goods and actions).

¹⁷⁵ Baer, *supra* note 173, at ____.

¹⁷⁶ *Id.* at ____–____.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at ____.

¹⁷⁹ Cf. Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835, 837 (2014) (discussing the way in which notional "regulatory budgets" could limit and allocate agencies' authority to impose costs on private parties).

severity of the crime prevented (the more severe the crime, the more credit given).

As Eric Posner explains, such notional Net Benefits Accounts serve an important auditing function by “aggregating information about agencies’ regulatory activities in a way that facilitates monitoring” by the public, scholars, and other governmental actors.¹⁸⁰ They also improve the incentives of regulatory actors to take account of the full panoply of the costs and benefits of their actions by rewarding them when they make socially valuable decisions.¹⁸¹ Net Benefit Accounts are a relatively new idea, but their precursor, regulatory budgets, has been around since the 1970s.¹⁸² Yet, despite their potential usefulness in managing the externalities endemic to a wide range of regulatory activities, such mechanisms have rarely been discussed in the context of criminal justice.

Similar pricing-based budgeting mechanisms could likewise counteract overreliance on other resources, like pretrial detention and prison, that criminal justice actors currently use at little costs to themselves. As discussed, pretrial detention benefits prosecutors and judges but imposes costs on pretrial detainees and their families and employers, as well as jails. To counteract these misaligned incentives, Jeffrey Manns analogizes the problem to the Takings Clause. Just as the government must pay for taking physical property, he suggests, so prosecutors should pay for taking defendants’ liberty through pretrial detention.¹⁸³ On Manns’ proposal, liability would attach whenever a defendant is eventually acquitted or convicted of a crime that would not have warranted the detention.¹⁸⁴

Actual monetary compensation of the sort Manns argues for likely would prove too expensive and cumbersome.¹⁸⁵ But again, some kind of notional pricing mechanism could compel prosecutors to more thoughtfully use pretrial detention in much the same way. Prosecutors might have some limited pretrial detention budget, much like police department’s search budgets, calibrated to detention’s average daily costs. To reflect the more severe social costs of longer detentions, that price might increase along with the length of detentions. Such a scheme could force prosecutors to better ration detention by screening cases early before detainees languish in jail and by efficiently moving along cases for which

¹⁸⁰ Eric A. Posner, *Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment*, 150 U. PA. L. REV. 1473, 1475 (2002).

¹⁸¹ *See id.*

¹⁸² *See* Rosen & Callanan, *supra* note 179, at 848–55 (detailing history); Posner, *supra* note 180, at 1475 & n.7 (same).

¹⁸³ Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1983–95 (2005).

¹⁸⁴ *See id.* at 1999–2000.

¹⁸⁵ Presumably, insurance markets would develop to ameliorate some of these problems. *Cf.* Rappaport, *supra* note 96, at ____.

they believed detention was justified.¹⁸⁶ It could also encourage them to use less restrictive alternatives to detention such as home confinement or electronic monitoring, which could be priced and factored into the budgets. Because pretrial detainees are presumed innocent, costs would accrue unless detainees ultimately were convicted and warranted an equivalent (or greater) sentence. One would need to ensure that the peculiarities of the budget cycle do not create differential treatment among defendants, such as by encouraging prosecutors to spend more or less heavily on pretrial detention depending on where in the budget cycle a given case falls; as Ron Wright points out, allowing for some carryover between budget years and providing for other period adjustments to the pricing formula could help with those concerns.¹⁸⁷ As with every pricing regime, one also would have to rely on cost-benefit or some similar methodology to determine values and devise a schedule of fees. But, once that had been done, pricing could provide an effective way of giving real-world purchase to that accounting, and could provide an alternative to attempting to bake them (or something like them) into statutory pretrial detention criteria.

Analogous regimes could inform prison or parole, with sentencers or parole boards working with sentencing or detention budgets that better reflected the costs of their decisions. We will not say much more about that, except that some jurisdictions already have gestured tentatively in this direction. In 2010, after a recommendation from the Missouri Sentencing Commission, pre-sentencing reports prepared for sentencing judges in Missouri began including clear statements of the costs of possible sentencing options.¹⁸⁸ As Chad Flanders explains it, the idea is to make the cost of different sentencing options a “salient factor” for judges to consider.¹⁸⁹ Missouri’s move does not go nearly so far as would an actual pricing regime: among other things, the costs presented to judges include only the costs to the state (and not to third parties, such as offenders’ families), and the reform does not require sentencing judges to take them into account, let alone give them a budget within which to do it. But its unmistakable intent is to foster some rationing, and it has begun to spur similar experiments in other states.¹⁹⁰

¹⁸⁶ See Gershowitz, *supra* note 14, at 679–81 (discussing similar effects of prosecutorial control over jails).

¹⁸⁷ Wright, *supra* note 14, at ____.

¹⁸⁸ See Mo. Sentencing Advisory Comm’n, *Sentencing Information on www.mosac.mo.gov Now Includes Costs of Recommended Sentences and Risks of Reincarceration*, SMART SENTENCING, Aug. 17, 2010, at 1, 4–5, <http://www.mosac.mo.gov/file.jsp?id=45502>.

¹⁸⁹ Chad Flanders, *Cost as a Sentencing Factor: The Missouri Experiment*, 77 MO. L. REV. 391, 391 (2012).

¹⁹⁰ See Dan Strumpf, *Vermont Bill Calls for Judges to Consider Costs in Sentencing*, WALL ST. J. (Mar. 28, 2013),

D. Caps

Closely related to the idea of pricing is the idea of caps. Where actual monetary payments or even notional accounts might be too expensive or administratively burdensome, caps could accomplish much the same budgeting and incentivizing effects. Carbon taxes are one way of creating incentives not to overuse the resource of clean air; cap-and-trade schemes are another. One key difference between the two is how each scheme goes about controlling the level of use of the resource at issue. In the case of clean air, for instance, in a carbon-tax regime, the level at which the tax is set determines how much clean air will be used up; by contrast, a cap-and-trade scheme sets a maximum level of clean air use at the outset, through a cap, and distributes permits to pollute accordingly. Carbon taxes, in other words, are a traditional pricing instrument, whereas cap-and-trade is a quantity instrument.¹⁹¹

Whether and when to choose one regime over the other is a subject of some debate, as, among other things, the regimes perform differently under uncertainty about the costs and benefits of reducing the targeted activity.¹⁹² For present purposes, we note that there are a number of contexts, such as the search context, where one might not want to set a hard and fast cap on use of the criminal justice resource at issue. In those contexts, a pricing mechanism like those discussed above might be the best approach to managing overuse. But one can imagine other contexts in which, absent some extraordinary circumstances, a cap on overall use of a particular tactic or sanction might make sense.

Take, for instance, the use of prison as a sanction. The “correctional free lunch” masks the costs of imprisonment which, as a result, is badly overused by local prosecutors. In the same way that (absent regulation) a coal plant pays nothing to use clean air, those who send inmates to prison accrue gains without having to pay for them.¹⁹³ And in the same way that a capping scheme limits the amount of clean air that a given coal plant could use in generating its own profits, so too could a capping scheme limit the number of prison beds that local prosecutors can use in generating personal, political, and social gains.

<http://www.wsj.com/articles/SB100014241278873236997045783282001175992>
9. It is unclear how much the Missouri reform has affected judicial behavior. *See id.*

¹⁹¹ *See* Lawrence H. Goulder & Andrew R. Schein, *Carbon Taxes Versus Cap and Trade: A Critical Review*, 4 CLIMATE CHANGE ECON. 1350010, at 3–4 (2013) (reviewing differences between carbon tax, pure cap-and-trade, and hybrid regimes).

¹⁹² *See id.* at 14–16.

¹⁹³ *See* ZIMRING & HAWKINS, *supra* note 12, at 211–15.

Francis Cullen, Cheryl Jonson, and John Eck discuss just such a scheme to help ration the use of state prisons.¹⁹⁴ States, they argue, could set a cap on the number of people who could be sentenced to prison each year. States would then allocate prison beds to each county or locality based on some metric—they propose population size, but one also could use violent crime rates or any number of other metrics. Prosecutors and judges could use those prison beds however they pleased; once they hit their cap, however, their local taxpayers would be forced to pay the state directly for further imprisonments.¹⁹⁵ That would enhance accountability for use of criminal justice dollars.¹⁹⁶ So too would making the cap a hard and fast one, with no option to purchase additional beds, which would further encourage prosecutors to use prison sparingly in favor of other, less costly sanctions.

Whether a hard and fast cap or not, as usual, the devil would be in the details, which would need to be worked out in trial and error for the system to operate smoothly. For instance, exemptions might be necessary for certain categories of serious, violent crimes, to ensure that caps do not compromise public safety.¹⁹⁷ The level of the cap would need to be adjusted and fine-tuned; perhaps it also could be gradually reduced over time if studies showed no corresponding increase in recidivism for serious crime, eventually weaning localities off prison in favor of more effective and less costly interventions.¹⁹⁸ As Cullen, Jonson, and Eck discuss, as with pollution controls, one could combine the caps with a trading system under which counties that did not use their full allotment of beds could sell their extra beds to counties needing more prison space, sell them back to the state, or roll them over for use in later years (which also would alleviate concerns about the timing of the allotment cycle on localities' incentives).¹⁹⁹ Together, these measures could help to overcome the vertical and horizontal misalignments discussed earlier and to encourage judicious use of prison as a resource in a way that the current system does not.

The approach is not as far-fetched as it might sound. In formulating its sentencing guidelines, the Minnesota Sentencing Commission did

¹⁹⁴ Cheryl Lero Jonson et al., *The Small Prison*, in *THE AMERICAN PRISON: IMAGINING A DIFFERENT FUTURE* 215, 247 (2014).

¹⁹⁵ See *id.* at 226–27; see also Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 720–21 (1996) (suggesting a similar scheme).

¹⁹⁶ See Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 102–12 (2011) (explaining how requiring prosecutors to disclose the full costs of their criminal justice interventions would enhance accountability).

¹⁹⁷ See Jonson et al., *supra* note 194, at 227.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*; Wright, *supra* note 14, at ___ (discussing timing concerns in the budget context).

something functionally similar when it chose to adhere to a strict capacity constraint. Rather than allow for endless prison building, the Commission pegged its guidelines to keeping prison populations within existing prison capacities.²⁰⁰ That forced Commission members to set priorities. When prosecutors wanted to ensure that more first-time violent offenders would face prison, they had to trade off prison time for repeat property offenders.²⁰¹ Rationing forced them to rank and budget, keeping prison populations manageable and affordable. Michael Tonry notes that the Minnesota approach proved more successful than even the Commission had expected. Property offenders were replaced by violent offenders in prison; prison populations remained under control; disparities in prison sentences decreased; recidivism did not increase much; and the state saved money.²⁰² While some backsliding crept in later on, Minnesota's approach is widely regarded as an example of a successful and forward-thinking reform.

Other sanctions might be appropriate for caps as well. Take capital punishment which, like prison, is liable to overuse at the county level. A few counties seek disproportionately many capital sentences.²⁰³ Unlike prisons, the fact that counties, not states, usually shoulder the costs of capital trials has a disciplining effect on prosecutors' ability to treat it as free. But even so, prosecutors' decisions to seek the death penalty still externalize large fractions of the cost upon other actors, including courts and appointed counsel; states also typically still foot the bill for the multiple appeals that accompany each case, which make up the bulk of the

²⁰⁰ See Richard Frase, *Sentencing Reform in Minnesota, Ten Years After*, 77 MINN. L. REV. 727, 733–35 (1991) (discussing Minnesota's strict 95% capacity constraint); Andrew J. Morley, *Minnesota Sentencing Guidelines Commission: An Analysis of Sentence Fairness and Prison Population* 11–12 (2014), http://digitalcommons.csbsju.edu/cgi/viewcontent.cgi?article=1004&context=elc_e_cscday (discussing similar constraints in other states).

²⁰¹ See Michael Tonry, *Sentencing Guidelines and Their Effects*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 16, 20 (Andrew von Hirsch et al. eds., 1987).

²⁰² *Id.*; see also John Stuart & Robert Sykora, *Minnesota's Failed Experience with Sentencing Guidelines and the Future of Evidence-Based Sentencing*, 37 WM. MITCHELL L. REV. 426, 447 (2011) (citing Chris Bray, Deputy Comm'r of Corr., Minn. Dep't of Corr., Presentation to Corrections Strategic Management and Operations Advisory Task Force, Stillwater Prison, Bayport, Minnesota (Oct. 19, 2009)).

²⁰³ See, e.g., KEITH HARRIES & DERRAL CHEATWOOD, THE GEOGRAPHY OF EXECUTION 35–36 (1997) (discussing county-by-county discrepancies within states); Mike Tolson & Steve Brewer, *A Deadly Distinction: Harris County Is a Pipeline to Death Row*, HOUS. CHRON., Feb. 4, 2001, at A1 (describing prosecutors' aggressive use of the death penalty in Harris County, Texas).

costs.²⁰⁴ Moreover, prosecutors benefit from using capital charges to gain plea-bargaining leverage, although the *in terrorem* effect of a capital charge could induce even an innocent defendant to plead guilty.²⁰⁵ In contrast to capital trials, capital charges essentially *are* free, and the result is massive overcharging. Overuse of capital punishment also risks arbitrariness, as capital sentences are much less consistent in borderline cases than in the most aggravated ones.²⁰⁶

Caps could provide a way for states to force prosecutors to be more selective. Adam Gershowitz proposes capping capital charges at 2% of all murders.²⁰⁷ The result, he explains, is that prosecutors would have to save their limited capital charges for the worst of the worst, limiting excessive plea-bargaining leverage. And prosecutors and defense lawyers could husband investigative and mitigation resources for the small fraction of cases where the death penalty was a live issue, instead of spreading them thinly across cases that prosecutors might never have intended to pursue to begin with.²⁰⁸ Thus a cap would not only counteract excessive prosecutorial use, but also facilitate more just outcomes when capital charges were still used.²⁰⁹

One could extend the idea of caps beyond sanctions to other criminal justice tactics that raise special risks of overuse, like the use of cooperating witnesses at the front-end of the process or the denial of parole at the back-end. Prosecutors are notorious for “overbuying” cooperation.²¹⁰ As discussed earlier, cooperating witnesses benefit prosecutors but impose systemic costs to equality, equity, and legitimacy.²¹¹ Prosecutors could

²⁰⁴ See Robert M. Bohm, *The Economic Costs of Capital Punishment: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 573, 576–82 (James R. Acker et al. eds., 2d ed. 2003) (discussing pre-trial, trial, and post-trial expenses associated with capital cases); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2127 (2000) (observing that trial level prosecutors bear none of the “huge financial costs of the lengthy post-conviction process” that capital cases “impose[] on state-level states’ attorneys and judges”).

²⁰⁵ See Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 104–07 (2007). For these reasons, the U.S. Department of Justice bans using capital charges in plea bargaining. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-10.120.

²⁰⁶ See Gershowitz, *supra* note 205, at 104; David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 648–61 & tbl. 5 (2002) (finding much more consistency in cases involving multiple aggravating circumstances than in single-aggravator cases).

²⁰⁷ Gershowitz, *supra* note 205, at 114–15.

²⁰⁸ See *id.* at 115–16.

²⁰⁹ See *id.*

²¹⁰ Richman, *supra* note 84, at 293.

²¹¹ See *supra* text accompanying notes 67 & 84–85.

face a cap, limiting them to cooperation for perhaps 5% or 10% of all defendants, and only for certain kinds of crimes. Prosecutors would then have to decide which cases were most important and which would benefit most, as opposed to overbuying routinely as an insurance policy.²¹² Likewise, parole boards reluctant to release defendants could be subject to a quota—in essence, a reverse cap—that required them to release a certain number of prisoners each year. Those quotas could be limited to certain crime categories and could be pegged to recidivism rates and other criminological data, such as the well-established propensity of offenders to age out of crime.²¹³ By requiring a certain number of releases each year, a quota system not only would tamp down on excessively costly parole denials, but it also would incentive parole boards to make the best possible decisions about who to release, and would provide them some semblance of political cover when doing so.²¹⁴

* * *

At bottom, caps are just a special kind of budgeting mechanism. So too are pricing and even devolution, which, when properly implemented, force actors to grapple with and pay for the true cost of criminal justice policies and decisions.²¹⁵ We pause to note this because it underscores that, when it comes to criminal justice, budgeting can be a promising concept more generally. The conventional wisdom decries scarcity and underfunding in criminal justice.²¹⁶ The reality is more complicated: in the right circumstances, scarcity is a blessing, forcing tradeoffs and careful husbanding of resources. There is no question that many if not most criminal justice institutions are doing too much with too little, and some

²¹² See Richman, *supra* note 84, at 293–94.

²¹³ See Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 450 (2013) (discussing such a quota system); Alex Piquero, *Taking Stock of Developmental Trajectories of Criminal Activity Over the Life Course*, in *THE LONG VIEW OF CRIME: A SYNTHESIS OF LONGITUDINAL RESEARCH* 23 (A. Lieberman ed., 2008). More and more states are attempting to account for offenders' tendency to age out of crime by enacting various forms of geriatric or compassionate release laws. But narrow eligibility requirements, burdensome application and review procedures, and the ever-present worry of political risk have drastically limited the impact of such programs. See AVIRAM, *supra* note 93, at 134–35.

²¹⁴ See Ball, *supra* note 45, at 397–98 (discussing parole boards' incentives). A pricing strategy might work here as well.

²¹⁵ Cost-benefit analysis also enables and encourages actors to confront the full costs of their criminal justice interventions but, on its own, does not force them to do so. One might think of it as a necessary but not sufficient condition to actual budgeting. Cf. *infra* text accompanying notes 218–221.

²¹⁶ See, e.g., Cecelia Klingele et al., *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 955–56 nn.1–2.

are shamefully underfunded—think of public defenders forced to juggle three (or more) times the recommended caseload, with no investigative support.²¹⁷ But some institutions, such as prisons, do too little with too much, enabled in part by the systemic features described earlier.

Scarcity, then, should not always be thought of as a problem. Often, it is. But systemically, scarcity can be a feature, not a bug. Constraints on the system's ability to arrest, confine pretrial, charge, convict, and sentence already force (or should force) police, prosecutors, and judges to do triage, particularly when spending their own individual or agencies' resources.²¹⁸ They may do this triage poorly, but to the extent that they do it well, scarcity can focus criminal justice on those who have provably committed the worst crimes, deserve punishment the most, and pose the greatest dangers to public safety.²¹⁹ The enforced scarcity of rationing mechanisms that seek to overcome problems of fragmentation and encourage actors to take a more system-wide approach can have much the same effect, only at the systemic level. Forcing considered rationing by drawing out, harnessing, and even creating scarcity is the most basic point of a budget. Fundamentally, the tools surveyed here aim to do just that.

III. THE LIMITS OF RATIONING

At both a scholarly and practical level, rationing is slowly receiving increased attention. Parts I and II offered an overarching view of the systemic features that make it necessary and sketched how some common rationing tools might help to address them. This Part turns to a more

²¹⁷ See Campell Robertson, *In Louisiana, the Poor Lack Legal Defense*, N.Y. TIMES (Mar. 20, 2016), at A1; Derwyn Bunton, *When the Public Defender Says, "I Can't Help"*, N.Y. TIMES (Feb. 19, 2016), at A31.

²¹⁸ See, e.g., Harmon, *supra* note 26, at 948–49 (explaining how resource constraints discipline police); Crystal S. Yang, *Resource Constraints and the Criminal Justice System: Evidence from Judicial Vacancies* 3–4 (Mar. 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594019 (finding that federal prosecutors decline more cases and offer better plea deals in jurisdictions with vacant judicial seats and that “[p]rosecutors respond to judicial scarcity by screening out ... potentially marginal cases with weaker or more contestable evidence”).

²¹⁹ Justices Sotomayor and Alito stressed this point in *United States v. Jones*, 132 S.Ct. 945 (2012). *Jones* held that the attachment of a Global Positioning System (GPS) tracking device to a vehicle and subsequent use of that device to monitor its movements was a search under the Fourth Amendment. *Id.* at 954. Writing separately, both Justices observed that the scarcity imposed by resource constraints indirectly protects important privacy interests and that cheap and accessible GPS technology allowed police to engage in far more surveillance than such constraints would have allowed using traditional methods. See *id.* at 955 (Sotomayor, J., concurring); *id.* at 963–64 (Alito, J., concurring in the judgment).

general and cautious appraisal of rationing as an emerging criminal justice phenomenon: its promises and pitfalls as a strategy, where it might work better or worse, and how it intersects with other criminal justice values. Section III.A unpacks two related aspects of the externalities problem— incentives and information—as a potentially useful way of thinking about the value of rationing and where that value might run out. Section III.B flags and briefly discusses four aspects of criminal justice that present especially difficult obstacles to rationing: its emphasis on qualitative and intangible considerations; its pathological politics; its distributive impacts; and its essentially localist and democratic traditions.

A. *Rationing, Incentives, and Information*

The externalities problem is not one of theory but of practice. Criminal justice actors lack mechanisms that would push them to better coordinate, account for externalities, and trade off costs intelligently. Of course, the lack of such mechanisms in criminal justice does not automatically *prevent* its consideration of externalities. But it is especially hard to consider externalities without tools or strategies that focus attention on them. Without such approaches, ground-level actors naturally default to a short-term, transactional approach, and naturally pay attention only to those costs and benefits that touch them directly.

But the value of such tools and strategies is only as good as their ability to address the problem. And in assessing that ability going forward, it might help to break out two complementary but distinct aspects of the externalities problem that, until now, we have not treated separately: (a) informational deficits and (b) mismatched, or simply bad, incentives. No single actor in the criminal justice system is (a) informed about all of the relevant costs and benefits of his decisions, or (b) even if he were so informed, acts within an incentive structure that prompts him to care about those costs and benefits.

The defining features of the American criminal justice system that Part I identifies exacerbate both aspects of the problem to varying degrees. So, for instance, the structural fragmentation of criminal justice funding and responsibility produces incentive problems like the “correctional free lunch.” But it also contributes to informational deficits, as when sentencing judges cannot easily get reliable data from field offices on the details, costs, and results of community supervision programs.²²⁰ The transactional focus of criminal justice likewise limits the kind of information that is brought to bear on decisions, as when bail statutes focus judges on immediate questions of flight or danger rather than the macro-social effects of pretrial detention decisions. But it also structures

²²⁰ See *supra* notes 20–45 and accompanying text.

incentives, as when the individualized suspicion standard and the exclusionary rule combine to make aggressive stop-and-frisks that yield little evidence relatively costless to police.²²¹ A particular feature or practice might affect one aspect more than the other, or it might affect both in tandem, and sometimes its effects might be synergistic.

Isolating those effects on each aspect is beyond the scope of our project here. But we flag the issue anyway because doing so can help to see how, just as criminal justice's systemic features interact with both aspects of the externality problem to varying degrees, so too might different regulatory tools and strategies for addressing that problem. Cost-benefit analysis, for instance, works primarily to address informational problems but—without more—ultimately does not do much to realign incentives. Devolution, by contrast, works mainly by realigning incentives, though its ability to do so effectively will in part depend on the quality of the information that goes into devolved actors' decisionmaking. Pricing affects incentives, but also creates new information (prices and all that go into them) which might be brought to bear on different areas of criminal justice decisionmaking. Caps also mainly affect incentives, but likely will lead actors to search for and take into account information that they could previously afford to ignore, such as (for caps on prison beds or parole quotas) recidivism patterns.²²² The greatest impact of rationing approaches to criminal justice is likely to be seen in areas where relevant information about the full costs and benefits of criminal justice interventions can be easily provided to actors, and those actors' incentives can then be restructured so as to require or encourage them to take that information into account. Paying attention to a problem's distinct incentive and information aspects will be critical to assessing the power and limits of potential rationing strategies for addressing it.

This highlights an important point about rationing approaches that applies to all rationing tools and strategies, including those discussed above: any rationing strategy is only as good as the information that drives it. That itself is nothing unique to criminal justice. But in criminal justice, the challenges of obtaining useful and reliable information often are greater than they are in many other regulatory areas. Some of that is attributable to the same disaggregated and fragmented structure that drives much of the externalities problem to begin with. Whether for reasons of resources, focus, or need, jurisdictions collect criminal justice data

²²¹ See *supra* notes 65–88 and accompanying text.

²²² Even though parole authorities nominally must take such information into account, in reality, their decisionmaking is often impressionistic and influenced far more by the circumstances and severity of the original crime. See AMERICAN CIVIL LIBERTIES UNION, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES 59–68 (2016).

haphazardly and in different ways, which can make it difficult for researchers and policymakers to generate useful studies and analyses.²²³

But some of it also is due to the fact that many aspects of criminal justice—such as the tangible and intangible costs to victims, offenders, and their families of victimization and imprisonment—are notoriously hard to quantify in any objective and comprehensive way.²²⁴ As we noted earlier, problems with measuring intangibles also are not unique to criminal law, and many regulatory agencies in fields outside of criminal justice—think of, say, environmental or health law—have developed sophisticated methodologies for doing so. Federal agencies such as the Environmental Protection Agency and the Occupational Safety & Health Administration usually have staffs of in-house experts trained in relevant disciplines to do this. State and local criminal justice institutions usually do not.²²⁵

Rationing in criminal justice, then, must confront not only the problem of *how* to measure intangibles. It also must confront the question of *who* can and should do it. And the answers to those two questions might not always point the same way. Right now, as with the case of the Arnold Foundation's Public Safety Assessment tool, criminal justice often defaults to private philanthropy or the nonprofit sector to tackle such issues.²²⁶ But particularly when it comes to measuring and quantifying

²²³ See MEASUREMENT PROBLEMS IN CRIMINAL JUSTICE 3–4 (John V. Pepper & Carol V. Petrie eds. 2003) (discussing jurisdictional variations and noting “a significant lack of governmental and private interest and investment in research aimed at solving these problems”).

²²⁴ See, e.g., Michael Tonry, *The Fog Around Cost-Benefit Studies of Crime and Punishment May Finally Be Clearing: Prisoners and Their Kids Suffer Too*, 14 CRIMINOLOGY & PUB. POL'Y 653, 655–64 (2015) (discussing difficulties and perils in attempting to assign values to “the intangible costs of myriad human miseries...and joys” and to concepts like “social justice,” and noting that, when it comes to cost-benefit analysis, “[s]entencing and punishment policies raise fundamentally different kinds of issues than do ‘occupational safety and health, environmental regulation, and transportation safety’”) (citation omitted).

²²⁵ See Tina Chiu, *Building Cost-Benefit Analysis Capacity in Criminal Justice: Notes From a Roundtable Discussion*, Vera Inst. of Just., Apr. 2013; Carl Matties, *Advancing the Quality of Cost-Benefit Analysis for Justice Programs*, Vera Inst. of Just., Mar. 2014, at 18–19. Even federal criminal justice agencies lag in this area. See Mark A. Cohen, *Measuring the Costs and Benefits of Crime and Justice*, in MEASUREMENT AND ANALYSIS OF CRIME AND JUSTICE 263, 283–88 (David Duffee ed., 2000). Sentencing is the one notable exception at both the state and federal levels. See Barkow, *supra* note 141, at 1297–99 (discussing the role of costs in state sentencing debates).

²²⁶ Two recent and leading non-profit efforts in this vein are the Vera Institute of Justice's Cost-Benefit Analysis Unit and the Pew Charitable Trust and MacArthur Foundation's Results First Initiative. Both train and assist states in using cost-benefit analysis to evaluate criminal justice policies, and the Cost-

seemingly immeasurable considerations—what is the “cost” of fear of revictimization for violent crime?—one’s interests and normative priors can act as a strong counterweight to reliability and impartiality.²²⁷ That raises worries that, depending on who is doing the measuring and quantifying, rationing might become a tool that can be used to justify virtually any criminal justice policy or decision, whether unduly punitive, unduly lenient, or anything in between.²²⁸

These issues should not be fatal to rationing. But they do mean that, in considering it, policymakers would need to think carefully about where in criminal justice such concerns might be most acute. Some aspects of criminal justice—those where reliable information is readily available and moral and emotional considerations are at their ebb, like parole for older and lower-level offenders—might be most amenable to meaningful rationing. For others—like sentencing for violent crimes, where moral and emotional considerations are high and reliable information about the costs of future victimization and the like is harder to come by—rationing might be much harder to implement in a useful way. Even then, however, it would not be impossible. As with environmental law and other policy areas that confronted similar issues, as cost-benefit analysis and the like mature in criminal justice, techniques will develop for addressing bias and manipulation. A few progressive states like Washington already are grabbing this bull by the horns, using sophisticated cost-benefit analysis in non-partisan centers to rule in and out many different criminal justice policy options with little allegations of misuse.²²⁹ Much work remains to be done. But even for difficult issues, methodologically rigorous processes open to public scrutiny can go far toward ensuring that information is gathered and quantified “honestly and transparently” and

Benefit Analysis Unit also makes available its own analyses of criminal justice investments. For overviews, see *Cost-Benefit Analysis Unit*, VERA INST. OF JUSTICE, <http://archive.vera.org/centers/cost-benefit-analysis-unit> (last visited Jan. 20, 2017), and *Pew-MacArthur Result First Initiative*, PEW CHARITABLE TRUST, <http://www.pewtrusts.org/en/projects/pew-macarthur-results-first-initiative> (last visited Jan. 20, 2017).

²²⁷ See COHEN, *supra* note 15, at 30 (“Benefit-cost analysis is not a value-free concept, but instead includes definitions and explicit boundaries in order to determine whose costs and benefits matter”).

²²⁸ See, e.g. Tonry, *supra* note 224, at 659 (expressing concern that cost-benefit analysis predicted on high “cost of crime” estimates could be used to justify almost any punitive criminal justice policy); Cohen, *supra* note 127, at 13 (noting opposite and “common misperception that the high ‘cost of crime’ numbers can be used to justify the argument that ‘prevention always pays’”).

²²⁹ See Steve Aos, *What Is the Bottom Line?*, 14 CRIMINOLOGY & PUB. POL’Y 633, 633 (2015). The Washington state legislature’s non-partisan Washington State Institute of Policy Studies conducts the studies, using state-of-the-art techniques to account for the sort of uncertainties and estimates in costs and benefits that are endemic to public policy analysis. See *id.* at 637–38.

“devoid of political content,” such that it might “please or displease either side of the political spectrum.”²³⁰

B. *Is Criminal Justice Special?*

The general challenge of information aside, every rationing strategy carries theoretical and implementation challenges. We have sporadically mentioned a few of those already, and a broad and deep literature exists for each strategy.²³¹ We will not engage with these technique-specific challenges here. Instead, this section flags four broader concerns about rationing that might be seen as unique to criminal justice, and that arguably might make it a uniquely bad object of rationing.

1. Intangibles

The first is a more muscular version of concerns about the centrality of qualitative and intangible considerations to criminal justice. Concepts like retribution, justice, dignity, mercy, forgiveness, respect, and so forth drive much of what we care about in the criminal justice realm. It is not just that these considerations are difficult to value. Rather, one might plausibly argue that we *should not* value them, and that explicitly putting a price on them would undermine the very power and meaning of the criminal law.²³²

²³⁰ Cohen, *supra* note 127, at 11. This point squarely applies to risk-assessment and other actual tools of the sort described in the text accompanying notes 122–127 *supra* as well. See, e.g., Julia Angwin et al., *Machine Bias*, PRO PUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (discussing methodological issues and limitations surrounding the use of risk-assessment tools in sentencing).

²³¹ See, e.g., ISAAC SHAPIRO ET AL., FUNDING FOR HOUSING, HEALTH, AND SOCIAL SERVICES BLOCK GRANTS HAS FALLEN MARKEDLY OVER TIME (Center on Budget and Policy Priorities, 2016), <http://www.cbpp.org/sites/default/files/atoms/files/11-19-15bud.pdf> (discussing block grants); The Story of Stuff Project, *The Story of Cap and Trade*, YouTube, <https://youtu.be/pA6FSy6EKrM> (last visited Jan. 12, 2017) (discussing common criticisms of cap and trade); Patrick Bond, *Emissions Trading, New Enclosures and Eco-Social Contestation*, 44 ANTIPODE 684 (2012) (same); Omar Besbes & Assaf Zeevi, *On the Minimax Complexity of Pricing in a Changing Environment*, 59 OPERATIONS RESEARCH 66 (2011) (discussing pricing strategies).

²³² This concern has different strands. For instance, one might worry that trying to put a price on such considerations and then encourage actors to weigh them against other costs and benefits injects irrelevant factors into crime and punishment decisions. See Chad Flanders, *Cost and Sentencing: Some Pragmatic and Institutional Doubts*, 24 FED. SENT’G REP. 164, 166 (2012) (arguing that

This is a powerful concern, but it does not apply across the board. Not all criminal justice interventions will implicate intangibles, or at least not to the same degree. In some areas—say, bail, or use of prisons for victimless crimes—rationing strategies could profitably address some of the system’s worst pathologies, while leaving more contestable or difficult areas aside.

Even in more difficult areas—say, sentencing for serious felonies in which considerations like desert, retribution, and respect for victims dominate—rationing still might play a useful, if a more back-seat, role. That is because valuing criminal justice’s intangibles and weighing and trading them off against each other is already an inevitable part of criminal justice as it currently exists. It happens whenever a police officer makes a *Terry* stop, or a prosecutor decides how hard to plea bargain, or a judge locks someone up for twenty or thirty years for committing a serious crime, or a legislature or agency approves or rejects a policy initiative or enforcement strategy.²³³ But it happens silently, impressionistically, and subject to blinders and distortions.²³⁴ In short, even if we should not value such intangibles, we already are. That being the case, in some areas, nudges toward rationing might bring to the surface assumptions and tradeoffs that otherwise go undiscussed and undebated. Rationing certainly will not eliminate disagreements, and it could even exacerbate them by bringing them out into the open.²³⁵ But at least, in doing so, it will allow them to be honestly addressed.

considering the financial cost of punishment injects into sentencing considerations that are “largely exogenous” to punishment’s meaning and purposes). Or one might worry that we pay more attention to things that we can easily measure, but what is easily measureable is not always a good proxy for what we value or how much we value it. “What we measure,” in short, “affects what we do.” JOSEPH E. STIGLITZ ET AL., REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS 7 (2009), http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf. Or one might claim that by reducing things to numbers, rationing commodifies an irreducibly human enterprise. See Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245, 1245 (2016) (noting tension between actuarial approaches to criminal justice and “values protected by human safety valves, such as dignity, equity, and mercy”).

²³³ See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1686–87 (2010).

²³⁴ See COHEN, *supra* note 15, at 7 (observing that “even the policy maker who has ethical concerns about placing dollar values on crime and conducting cost-benefit analysis implicitly makes a value judgment” about costs and benefits “[w]henver a criminal justice or prevention program is adopted or not adopted”).

²³⁵ Cf. Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1256–57 (2007) (explaining how evidentiary rules can provide “a less morally charged locus for public disagreement and debate” over the substantive values that underlie them than would debate about those values themselves). *But cf.* Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV.

2. Politics

A second and equally serious concern has to do with the unique politics surrounding criminal justice. Given criminal justice's pathological politics, it rarely is in any politician's interest to support serious rationing initiatives.²³⁶ To the contrary, coming out in favor of capping prison populations, mandating parole release quotas, or imposing a tax on police search and seizure activity would be at best immensely controversial, at worst political suicide. To be more cynical about it, one might put it this way: rationing overwhelmingly is likely to benefit the poor and disenfranchised, who overwhelmingly suffer the cost of criminal justice's externalities and whose voices often go unheard.²³⁷ Indeed, that is why we do not see much of it around issues of street crime.²³⁸ But in corporate and white collar-crime, where aggressive use of criminal justice interventions threatens to externalize costs onto pension funds, average

L. REV. 413, 415 (1999) (arguing that mathematical approaches to punishment can help to “quiet illiberal conflict between contending cultural styles and moral outlooks”).

²³⁶ See Stuntz, *supra* note 5, at 547–57.

²³⁷ See Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. ___, __ (forthcoming 2017) (discussing factors contributing to this effect). A stark example is the federal regulations implementing the federal Prison Rape Elimination Act of 2003 (“PREA”), Pub. L. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §§ 15601–15609), which required all fifty states to take measures to reduce rape in their prisons. While the estimated costs of compliance were substantial, the United States Department of Justice's Regulatory Impact Assessment found, after public comment, that PREA would produce more than offsetting benefits. But the benefits—reduced risk of prison rape and its concomitant pain and suffering—would accrue to convicted offenders, and the costs would accrue to states' taxpayers. See U.S. Department of Justice, Prison Rape Elimination Act, Regulatory Impact Assessment, May 17, 2012, http://ojp.gov/programs/pdfs/prea_ria.pdf. Citing the cost to taxpayers, seven state governors refused to comply with the law. See Ryan J. Reilly, *Seven Republican Governors Won't Comply With Anti-Rape Rules*, May 29, 2014, http://www.huffingtonpost.com/2014/05/28/prison-rape-elimination-act-doj_n_5406665.html.

²³⁸ It is also an important part of why we do not see the state stepping in to correct the externalities problem in criminal justice writ large. One might point out, after all, that the state internalizes—or should internalize—just about everything. So if particular criminal justice burdens or costs are allocated a certain way, and the state has not changed them, we should assume that the state is getting what it wants. The pithy response is that, while it might be in politicians' interest not to step in, that does not make it in the state's interest, for familiar reasons. See STUNTZ, *supra* note 11, at 6–7; Stuntz, *supra* note 5; MILLER, *supra* note 34; *supra* text accompanying note 162.

stockholders, employees, and middle-class families, rationing-type arguments have gained far more traction, even if they have not risen to use of the tools mentioned here.²³⁹ Despite a new appetite among politicians for being “smart on crime” instead of only “tough on crime,” we do not see these political obstacles disappearing anytime soon.

At the same time, politicians are not the only actors who can spur rationing-oriented reforms. Independent commissions—empowered by legislators, but sufficiently autonomous and distinct from them to offer some cover against any political fallout—can do so also, as when the Minnesota Sentencing Commission adopted its 95 percent of capacity constraint after its enabling statute directed it to take correctional resources into “substantial consideration.”²⁴⁰ Around the right issues, direct and methodical application of rationing might even provide enough political cover and incentives for legislatures themselves to re-allocate resources to less costly criminal justice policies and initiatives. In Washington, for instance, cost-benefit analyses by the Washington State Institute for Policy Studies persuaded the legislature to build only one of two planned prisons and to spend the saved money on evidence-based prevention and intervention programs instead.²⁴¹

Courts too can catalyze and provide political cover for rationing-type solutions. California’s Realignment—which, as noted, aimed directly at the problem of the correctional free lunch with devolutionary approach very similar to the block-grant method described above—is a good example. Realignment was a direct legislative response to the U.S. Supreme Court’s *Brown v. Plata* decision, which ordered California to reduce its state prison population to 137.5% of design capacity to relieve extreme overcrowding that had led to violations of the Eighth

²³⁹ For a good overview of this phenomenon, see Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383 (2002).

²⁴⁰ Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 175–76 (1993); see also Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 698 (1995) (explaining how delegation to sentencing commissions helps to overcome the politics of crime control by “allow[ing] the non-elective commissions to serve as buffers” and “legislators to avoid public clamor for stiffer sentences”); Rachel E. Barkow & Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1973 (2006) (finding that “factors that are rooted in a concern with the costs of longer sentences and incarceration [] play a significant role” in predicting when state legislatures will delegate punitive power to sentencing commissions).

²⁴¹ See Brandon C. Welsh & David P. Farrington, *Monetary Value of Early Developmental Crime Prevention and Its Policy Significance*, 14 CRIMINOLOGY & PUB. POL’Y 673, 676 (2015).

Amendment.²⁴² And the eventual rollback and reform of New York City's stop-and-frisk program—an aggressive initiative that inflicted widespread and diffuse costs on communities of color—resulted from a successful class-action challenge in federal district court.²⁴³ In assessing that challenge, the court there took a step toward baking rationing-type thinking into doctrine as well, looking beyond the transactional frame of the individual interests at stake in a given search and relying instead on evidence of broader social harms from programmatic searches in the aggregate.²⁴⁴ Avenues to prompt, motivate and adopt rationing remain open, then, even if the politics of crime control make its widespread embrace unlikely.

3. Equity

A third, related concern centers on rationing's distributive implications. Distributive concerns run throughout a great many areas of law and public policy. But because of its unique combination of state coercion and stigma, they are especially acute in American criminal justice, which has long been directed most aggressively at the most marginalized populations.²⁴⁵ Encouraging rationing, the fear is, could exacerbate that problem of distributional inequity in different ways. Because the lowest-cost enforcement is often against the poorest and most vulnerable communities, law enforcement agents with arrest and search budgets might be even more likely to focus their efforts on those communities than they already do.²⁴⁶ Moreover, scarcity already disciplines many decisions: prosecutors and police in high-crime and

²⁴² 130 S. Ct. 1910, 1944–47 (2011); see Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 327 (2014) (describing the legislative response to Plata).

²⁴³ See *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 658, 660 (S.D.N.Y. 2013) (ruling in favor of Fourth and Fourteenth Amendment challenges to the NYPD's stop-and-frisk program); Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014), <http://nyti.ms/1ff11Km>.

²⁴⁴ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (2013).

²⁴⁵ See, e.g., Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 450–53 (2015) (discussing criminalization of the welfare state); KAARYN GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2102) (same).

²⁴⁶ See, e.g., *supra* notes 65–66 and accompanying text (discussing police preference for undercover drug buys directed at inner-city drug sellers over reverse stings aimed at suburban buyers); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 845–47 (2015) (explaining how Immigration and Customs Enforcement officers piggyback off of local arrests to make location and deportation of unlawful residents easier).

dense urban areas, for instance, focus on the most serious offenses as the best and highest use of their limited resources. To the extent that rationing allocates resources through funding or other mechanisms tied to crime rates, population, or the like—whether as part of cap and trade, devolutionary, or other strategies—one might worry that it will enable even more expansive use of criminal interventions in these areas, further skewing criminal justice against disadvantaged groups.²⁴⁷

Any rationing strategies for criminal justice problems must be designed and implemented with such concerns firmly in mind. Funding mechanisms, for instance, might be adjusted or normalized to factor in pre-existing resource disparities, and might be restricted with hard ceilings and floors as well as limits on sources to prevent over- or under-use of criminal justice resources.²⁴⁸ Similar rules might cabin how freely jurisdictions could redirect resources toward certain categories of crimes or interventions that raise heightened distributional concerns, like certain kinds of drug prosecutions. But while “[t]he details could be thorny,” governments also already have experience with similar issues, such as using complex funding formulas to determine the amount of money directed to counties for building certain types of roads.²⁴⁹

Beyond funding, distributive impacts should occupy a central place in the cost-benefit and related analyses that inform rationing. That means that, as we have suggested at various points above, cost-benefit analysis must take distributive effects into account in the most robust way possible.²⁵⁰ For some distributive impacts, where it is possible to measure them in a methodologically rigorous way that adequately considers

²⁴⁷ See, e.g., Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 239 (2009) (discussing similar “net widening” concerns with respect to various alternatives to incarceration); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1551–61 (2004) (same, with respect to drug courts). The opposite concern also could arise: that, for instance, resource-rich jurisdictions that ideally would not have more prison beds from a social justice standpoint might still purchase more from poorer ones that ideally would keep them from that same standpoint, thereby skewing the distribution of criminal justice interventions in both.

²⁴⁸ See, e.g., Ball, *Defunding State Prisons*, *supra* note 13, at 1082 (discussing how to peg funding to distributive considerations in prison context). Enhanced approaches to transparency could give these and similar funding rules more bite. Police, prosecutors and other agencies could be required to create transparent, publicly accessible plans detailing how their finite resources will be used, and retrospective audits of those plans could be made public as well. See Misner, *supra* note 195, at 767–68 (offering a similar proposal for prosecutors).

²⁴⁹ Wright, *supra* note 14, at ____.

²⁵⁰ See *supra* text accompanying notes 103, 105, 107, 109, 125, 135, 140, and 159.

uncertainty, their nature and bounds, and so forth, that might mean somehow pricing them and including them in the cost-benefit calculus. But in many cases, where that cannot rigorously be done, it might mean explicitly highlighting and considering them qualitatively, methodically elaborating their different dimensions and the number and characteristics of the people they affect and so teeing up the ethical question whether such impacts are justified.²⁵¹ The U.S. Department of Justice's Regulatory Impact Analysis of the implementing regulations for the federal Prison Rape Elimination Act ("PREA"), for instance, took steps to do just that, noting how the regulations would affect "non-monetizable values of equity, human dignity, and fairness" and explaining that "the true break-even level would likely be lower" were it possible to take them into account.²⁵²

None of these measures will come close to eliminating distributional inequity in criminal justice. But they will help to prevent rationing from making it worse. And, if properly designed and implemented, they could help to push criminal justice in more equitable directions. Explicitly bringing distributive impacts to the surface might highlight distributional concerns, such as why white-collar defendants enjoy better prospects for diversion and face less punishment.²⁵³ And robust treatment of distributive and other broad impacts as costs and benefits can give more weight to

²⁵¹ A growing literature exists on techniques and approaches for doing this. See, e.g., ANTHONY E. BOARDMAN ET AL., *COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE* 42–44 (4th ed. 2011); Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis* 7–9 (U. Chi. L. & Econ. Working Paper, John M. Olin L. & Econ. Working Paper No. 150 (2d Series), 2002), <http://ssrn.com/abstract=309754>.

²⁵² U.S. Department of Justice, Prison Rape Elimination Act, Regulatory Impact Assessment, May 17, 2012, Executive Summary, http://ojp.gov/programs/pdfs/prea_ria.pdf. Although it was a step in the right direction, the Department of Justice's analysis could have gone deeper in various ways, as Jonathan Masur and Eric Posner explain. See Jonathan S. Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 CORNELL L. REV. 87, 90, 105 n.90 (2016) (discussing shortcomings in the Department's approach); see also National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37106 (June 20, 2012) (codified at 28 C.F.R. pt. 115) (discussing human dignity and other nonmarket values in the Regulatory Impact Analysis at a fairly high level of generality).

²⁵³ See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1311–16 (2001) (discussing differential enforcement of non-violent corporate and street crime); Dewan & Lehren, *supra* note 140 (discussing differential impacts of pay-to-play diversion programs).

voices and viewpoints that typically get little attention in the political process, as Brown, Barkow, and others point out.²⁵⁴

4. Localism

A fourth and final worry is whether rationing is fundamentally inconsistent with criminal justice's highly localist traditions. Those traditions, which we and many others have emphasized in other work, stress the importance of local norms, lay input, and giving effect to the "conscience of the community" in the administration of criminal justice.²⁵⁵ Indeed, they are so important that are practically baked into our constitutional framework, in everything from the Sixth Amendment's jury clause, to Fourth Amendment search and seizure doctrine, to even the Eight Amendment's recently evolving requirement of individualized sentencing.²⁵⁶ While those and other areas of criminal justice privilege disaggregated, particularized decisionmaking that often is responsive to variations in local values and conditions, rationing strategies favor centralized, high-level, technocratic judgments that rely significantly on expert analyses. How can we retain our commitment to the former while still capturing the benefits of the latter?

We do not have one simple answer. Part of the problem is that the same features that American criminal justice celebrates—pluralism, local responsiveness, and corresponding divisions of power vertically and horizontally—are the same structural features that give rise to the need for and inhibit rationing in the first place.²⁵⁷ In some cases and for some aspects of rationing, mechanisms can be structured and implemented so as to provide local actors with information, resources, and incentives to better grapple with externalities and other allocative issues without making any particular decisions for them. That is what Realignment did in California, and, with respect to information, it is what entities like the Vera Institute's Cost-Benefit Analysis Unit help local governments to do on a wide range

²⁵⁴ Barkow, *supra* note 225, at 1309, 1314; Brown, *supra* note 15, at 346–49.

²⁵⁵ See, e.g., Bierschbach & Bibas, *supra* note 213, at 430–34; Bierschbach & Bibas, *supra* note 6, at 1484–91; Misner, *supra* note 192, at 766.

²⁵⁶ See Bierschbach & Bibas, *supra* note 213, at 410–16; see also Michael J. Zydney Mannheimer, *Decentralizing Fourth Amendment Search Doctrine* 35–37 (unpublished manuscript, on file with authors); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1460, 1465–67 (2001).

²⁵⁷ See Bierschbach, *supra* note 237, at ___–___ (unpacking this dynamic).

of criminal justice issues.²⁵⁸ In other cases, some more substantive unified or higher-level decisionmaking—what level of cap to set for state prison space, or how much to fund local criminal justice initiatives—will be necessary to give rationing mechanisms teeth.

At the same time, though, higher-level involvement will not necessarily bring rationing into more conflict with localism. Despite fragmentation and local control, state legislatures, state sentencing commissions, and other higher-level institutions already are inextricably intertwined with local criminal justice, in the laws they pass, the information they provide, the ways they fund police and incarceration, the support they provide for treatment programs, and a host of other ways.²⁵⁹ Focusing on rationing will help to systematize that involvement and train it on externalities and related incentive- and information-based problems. It also will help to strike the right balance between localism and centralization by better highlighting areas in which the costs and benefits of one design alternative (say, lack of accountability from overcentralization or centralization at the wrong level of government, or beneficial incentives created by consolidating local prosecutorial, incarceration, and release responsibilities) outweigh those of the other.

Even where rationing does intrude on localism, sometimes a little intrusion might not be a bad thing. Our belief in the importance of localism notwithstanding, we would support a state's reforming local funding practices that, for instance, incentivize prosecutors to "sell" diversion only to those who can pay, or to aggressively pursue fine-based misdemeanor charges as a source of local revenue.²⁶⁰ Rationing is valuable in part as a way to prompt candid dialogue about distributive justice, accountability, and representation and how they bear on externalities. And it can do so while still leaving ample room for local control and local preferences.²⁶¹

²⁵⁸ See *Cost-Benefit Analysis Unit*, *supra* note 226 (explaining mission of the Cost-Benefit Analysis Unit and the different ways in which it assists criminal justice policymakers).

²⁵⁹ See, e.g., WAYNE R. LAFAVE ET AL., CRIM. PROC. §§ 1.2(d), 1.2(h), 1.4(c), 1.7(g), 2.5(f) (4th ed. 2004).

²⁶⁰ See Colin Reingold, *Pretextual Sanctions, Contempt, and the Practical Limits of Bearden-Based Debtors' Prison Litigation*, 21 MICH. J. RACE & L. 361, 363–72 (2016) (discussing use of fines in misdemeanor cases involving poor defendants).

²⁶¹ See, e.g., Wright, *supra* note 14, at ___ (discussing how prosecutorial corrections budgets would leave prosecutors free to "respond to the priorities of their own local communities"); Francis T. Cullen et al., *Reinventing Community Corrections: Ten Recommendations*, 46 CRIME & JUST. ___, ___–___ (forthcoming 2017) (making a similar point about cap-and-trade schemes); Ball, *Defunding State Prisons*, *supra* note 13, at 1072–79 (discussing how forced rationing at the local level could internalize costs and benefits while still preserving local freedom and enhancing accountability).

CONCLUSION

American criminal justice's overconsumption of punishment is the result not only of harsh policies or pathological politics. It also stems from the structure and focus of the system itself. Within broad criminal statutes, police, prosecutors, and other ground-level actors exercise vast discretion case by case and agency by agency, without accounting for the full social costs of their decisions. Individually and in the aggregate, those decisions have spillover and systemic effects, ranging from costing pretrial detainees their jobs and homes to sacrificing legitimacy in the eyes of minority communities. But fragmentation and a short-term transactional mindset limit officials' information and incentives, preventing them from seeing or caring about externalities. Criminal justice needs bifocals: it must simultaneously do justice in individual cases, while keeping an eye on the bigger picture.

America's criminal justice institutions are deeply localist and pluralist. Those ingrained structural traits are here to stay. But stepping back to analyze how these structures interact—looking more at the forest instead of the trees—can shed new light on criminal justice's problems and suggest creative ways for nudging actors to better take externalities into account. The administrative state has plenty of experience with tools for improving information and incentives, such as cost-benefit analysis, devolution, pricing mechanisms, and caps, that could guide criminal-justice reform as well. Criminal justice is different, of course, and in addition to localism, politics, intangible costs, and distributive equity complicate the picture. Yet despite those differences, at bottom it is still a regulatory system, and our broadest goal of this Article has been to point up the value that can be gleaned from viewing it as such.

The rationing framework laid out here is just one way of doing so. And while it will not solve the system's ills, grappling with its diagnostic and analytical points at least might push us in the right direction, underscoring the connections between the harshness and misallocations of criminal justice interventions and the need to account for unheeded costs and listen to unheard voices—goals that have long been central to the projects of regulatory and administrative law.²⁶² Most fundamentally, the

²⁶² See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253–54 (2001) (tracing the rise of the regulatory state and the evolution of concerns about objectivity and legitimacy that accompanied it); Richard B. Stewart, *Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1682–88 (1975) (discussing reduced faith in agencies' ability to protect collective interests and the resulting need for new approaches to legitimating agency action and controlling agency discretion); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 172–80 (2009) (discussing the history and legal and political

lens of rationing suggest ways to draw out and treat scarcity in criminal justice not only as a bug but also as a welcome feature. If the correctional free lunch at the all-you-can-eat buffet is the source of some of our problems, solutions should strive to put the bloated American carceral state on the diet it sorely needs.

context of the development of robust public participation as a cornerstone of modern American administrative law); STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 23 (1982) (discussing externalities as a classic object of regulation).