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# What's Wrong With Sentencing Equality?

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## WHAT'S WRONG WITH SENTENCING EQUALITY?

*Richard A. Bierschbach\* and Stephanos Bibas\*\**

*Equality in criminal sentencing often translates into equalizing outcomes and stamping out variations, whether race-based, geographic, or random. This approach conflates the concept of equality with one contestable conception focused on outputs and numbers, not inputs and processes. Racial equality is crucial, but a concern with eliminating racism has hypertrophied well beyond race. Equalizing outcomes seems appealing as a neutral way to dodge contentious substantive policy debates about the purposes of punishment. But it actually privileges deterrence and incapacitation over rehabilitation, subjective elements of retribution, and procedural justice, and it provides little normative guidance for punishment. It also has unintended consequences for the structure of sentencing. Focusing on outcomes centralizes power and draws it up to higher levels of government, sacrificing the checks and balances, disaggregation, experimentation, and localism that are practically baked into sentencing's constitutional framework. More flexible, process-oriented notions of equality might better give effect to a range of competing punishment considerations while still policing punishments for bias or arbitrariness. They also could bring useful nuance to equality debates that swirl around re-*

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*storative justice, California’s Realignment experiment, federal use of fast-track plea agreements, and other contemporary sentencing practices.*

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INTRODUCTION

ONE concern dominates much of modern criminal justice: equality. The Warren Court created the field of constitutional criminal procedure with its efforts to rein in racist local law enforcement half a century ago. Ever since, scholars, policymakers, and activists have sought to make equal treatment of criminal defendants a central (if as yet unattained) goal. Equality concerns undergird arguments about the right to counsel, litigation over stopping and frisking drivers and pedestrians, claims of selective prosecution, and debates over police use of deadly force.<sup>1</sup> In the field of sentencing—our main focus in this Article—

<sup>1</sup> For a vivid example of the latter debate, consider the recent and highly publicized string of controversial shootings of unarmed African-American men, most of them by police, and the ensuing and serious critiques about the criminal justice system’s lack of engagement with racial equality. John Eligon, *One Slogan, Many Methods: Black Lives Matter Enters Politics*,

equality concerns have propelled debate at least since the Supreme Court's landmark decision in *Furman v. Georgia*.<sup>2</sup> They are what gave birth to the sentencing-guidelines revolution, and they pervade critiques of everything from cooperation discounts and fast-track sentence departures to shaming punishments and restorative justice.<sup>3</sup>

This Article turns a critical lens on how criminal justice has come to frame and operationalize equality in sentencing over the last forty years. Equality is a broad and nebulous concept, so before continuing, we should be more specific about how we use the term. At a very general level, equality means simply treating like cases alike.<sup>4</sup> That of course includes, as the Warren Court made clear, not treating people differently on account of their race.<sup>5</sup> But as we discuss in Part I, sentencing equality now reaches well beyond conscious or unconscious consideration of race, sex, or class to critique all other kinds of variations, including geo-

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N.Y. Times (Nov. 18, 2015), <http://nyti.ms/1SFUnQY> (discussing the Black Lives Matter movement's push for racial justice in the wake of the killings of Trayvon Martin and Michael Brown).

<sup>2</sup> 408 U.S. 238 (1972).

<sup>3</sup> See, e.g., Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 Colum. L. Rev. 1190, 1202 (2005); Thomas E. Gorman, *Comment, Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. Chi. L. Rev. 479, 480 (2010); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1940-42 (1991); Michael M. O'Hear, *Is Restorative Justice Compatible with Sentencing Uniformity?*, 89 Marq. L. Rev. 305, 306 (2005); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 Vand. L. Rev. 1, 3 & n.3 (2003).

<sup>4</sup> William J. Stuntz, *Unequal Justice*, 121 Harv. L. Rev. 1969, 1976 (2008); see also H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 80 (2d ed. 2008) (observing that "the ideal of justice" demands "treating morally like cases alike and morally different ones differently"); Vincent Chiao, *Ex Ante Fairness in Criminal Law and Procedure*, 15 New Crim. L. Rev. 277, 279 (2012) (doing something "equitably" means "in a manner that treats like cases alike").

<sup>5</sup> The Warren Court's procedural innovations for combatting racial inequality in criminal justice were aimed at police conduct, not sentencing. As scholars like Devon Carbado, Paul Butler, and many others have argued, while the goal of those innovations was to prevent racial profiling and harassment by the police, the extent to which they succeeded is another matter. See, e.g., Paul Butler, "A Long Step Down the Totalitarian Path": Justice Douglas's Great Dissent in *Terry v. Ohio*, 79 Miss. L.J. 9, 27, 29 (2009) (arguing that the individualized suspicion requirement in *Terry v. Ohio*, 392 U.S. 1 (1968), evolved to become a "blessing[]" by some federal courts[] of racial profiling" and a "major contributor to the widespread antipathy toward the police that many people in minority and low-income communities demonstrate"); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543, 1573-78 (2011) (arguing that the Court's applications of *Terry* in the immigration context have exacerbated *Terry*'s effects of facilitating racial profiling and marginalizing the harms of racially selective policing).

graphic and jurisdictional variations.<sup>6</sup> At that level of generality, the language of equality often obscures the key question of what factors make cases relevantly alike or different.

That is especially true given the shape that sentencing equality has taken on the ground. In sentencing, equality in practice looks rather different from equality in theory. In theory, egalitarian sentencing could focus on equalizing inputs or processes that determine punishment. But in practice, the sausage factory that is the American criminal justice system focuses not on equal inputs or fair processes but on uniform *outputs*—equalizing the number of years in prison for each crime. Sentencing variations—or, to use another oft-invoked term, disparities—are suspect, regardless of how or why they occur. Differences in bottom-line results are presumptively arbitrary, if not discriminatory. That is the particular conception of equality that we critique here.

That outcomes-based emphasis frames a stale debate between equalizing outcomes and individualizing punishment. Mandatory minimum penalties, for instance, might eliminate disparities and achieve formal equality of punishments among offenders convicted of the same crime. But virtually no one would contend that they achieve individualized justice: The big fish deserve more punishment than the medium and small fry, even if they all violated the same statute. And indeed, for almost every area of sentencing where we see an equality-based argument on one side, we see an individualization argument on the other. The classic response to equality arguments pits equal justice against individual treatment, the reasons for rules against the virtues of discretion. The more we individualize sentences, the arguments usually go, the greater the risks that the system will produce sentencing disparities across cases. The equality versus individualization debate has been persistent and intractable in sentencing scholarship and doctrine for decades—most famously in death-penalty jurisprudence, and more recently in limits on noncapital sentencing.<sup>7</sup>

Our main goal in this Article is to disrupt the terms of this debate. We seek to expose how normatively complex issues of equality in sentenc-

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<sup>6</sup> See *infra* Section I.A.

<sup>7</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2469–70 (2012); *Graham v. Florida*, 560 U.S. 48, 77 (2010); *Gregg v. Georgia*, 428 U.S. 153, 199 (1976); *Furman*, 408 U.S. at 255; see also Michael Tonry, *Sentencing Matters* 14 (1996) (“[T]he result has been both to make punishment more severe and to create disparities as extreme as any that existed under indeterminate sentencing.”).

ing are by showing how equality debates often mask other substantive and institutional considerations that lie at the heart of sentencing. Arguments about equality and individualization, we contend, are often stand-ins for more fundamental—and more complicated—debates about *who* decides sentencing issues, *how* they do so, and *what purposes* their decisions should serve. Focusing on disparities without more threatens to bury these deeper institutional and substantive choices.

Much of the work equality does when it comes to sentencing outcomes is rhetorical. Calling variations “disparities” presupposes that equal outcomes are good and unequal outcomes are bad. But in many other areas of law and policy, variation is considered neutral or even a positive good. Consider, instead of the term “disparities,” the terms “differences,” “diversity,” “pluralism,” “localism,” “heterogeneity,” or “laboratories of democracy.” The language of equality and disparity has obscured the more positive ways one can understand sentencing differences.

The same holds true for the stale terms of the equality-individualization debate. When it comes to institutional design and the substantive goals and values that underlie punishment, equality and individualization push in very different directions. As operationalized in criminal justice, equality reforms tend to centralize punishment and concentrate power.<sup>8</sup> They are unitary and lead to top-down, high-level oversight to ride herd on outliers, leaving little room for local governance and experimentalism. They also conceal and homogenize the underlying normative reasons to punish, often emphasizing quantifiable goals and *ex ante* approaches to punishment such as general deterrence while excluding or minimizing harder-to-codify factors like rehabilitation. Individualization cuts the other way. It pushes toward decentralization, fragmentation, devolution, and difference.<sup>9</sup> Individualization eschews easily quantifiable metrics in favor of a rough-and-tumble mix of competing priorities that are hard to weigh *ex ante*. To favor one focus or the other is often to favor a certain approach to institutional design and cer-

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<sup>8</sup> Sentencing commissions are one example.

<sup>9</sup> The jury as the “conscience of the community” is a classic example. See *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (noting that “a capital sentencing jury representative of a criminal defendant’s community assures a ‘diffused impartiality’ in the jury’s task of ‘express[ing] the conscience of the community on the ultimate question of life or death.’” (alteration in original) (citations omitted) (first quoting *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), then quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968))).

tain justifications for punishment. But the rhetoric of equality versus individualization elides these tradeoffs. That may well be part of its appeal: It masks dissensus about substantive values and allocations of power, instead of tackling it head-on.

Our interrogation of equality at sentencing intersects with a broader critique of sentencing discourse. Sentencing scholarship, with a few notable exceptions such as the writing on *Apprendi v. New Jersey*,<sup>10</sup> has proceeded largely in isolation from broader conversations about checks and balances and federalism that have long informed fields like administrative law and state and local government law. Contrast that with, say, the scholarly field of policing, which has frequently been a site for debates surrounding localism in criminal justice.<sup>11</sup> The equality versus individualization framework obfuscates institutional design choices. But sentencing implicates basic issues of governmental design at least as much as do more traditional public law fields.<sup>12</sup> Just as one can debate how much policing should reflect the felt needs and priorities of different districts, counties, cities, neighborhoods, and even groups of people, so too can one engage in the same debates over sentencing. To see sentencing in this light further complicates an approach to equality that privileges centralized over devolved power and certain goals of punishment over others.

Sentencing scholarship has also been surprisingly divorced from debates in substantive criminal law. Criminal law theorists often aim to promote one or another justification for punishment: retribution, deterrence, incapacitation, rehabilitation, and so on. But equality per se is all but invisible in much substantive criminal law scholarship; theorists assume in the abstract that whichever justification they favor will be applied with an equal hand.<sup>13</sup> From that perspective, our critique of equality seems obvious. Conversely, criminal procedure scholars grapple with equality but rarely consider, let alone discuss, how it relates to the various justifications for punishment and their implications for who sentenc-

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<sup>10</sup> 530 U.S. 466, 490 (2000) (holding that the Sixth Amendment requires any fact other than the fact of a prior conviction that increases a sentence beyond the prescribed statutory maximum to be presented to a jury and proved beyond a reasonable doubt).

<sup>11</sup> The vast literature on community policing is a good example. See, e.g., Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *Colum. L. Rev.* 551 (1997).

<sup>12</sup> W. David Ball, *Why State Prisons?*, 33 *Yale L. & Pol'y Rev.* 75, 102–11 (2014).

<sup>13</sup> See Michael T. Cahill, *Retributive Justice in the Real World*, 85 *Wash. U. L. Rev.* 815, 818–22 (2007). For a notable exception, see Chiao, *supra* note 4, at 279.

es, how, and why. From the procedural side of the divide, our simultaneous engagement with the purposes of punishment, equality, and institutional design seems foreign. This Article is part of our larger project to make the two fields converse: Criminal procedure should better serve the values that motivate substantive criminal law, while substantive criminal law must consider how its values are implemented in practice.<sup>14</sup>

A number of scholars have attacked related issues from complementary angles. The late Bill Stuntz famously explored the pathological politics of pushing criminal justice up to the county, state, and federal levels.<sup>15</sup> Josh Bowers has contrasted juries' equitable responsiveness with the legalistic blinders worn by criminal justice professionals.<sup>16</sup> Heather Gerken has likewise shone a spotlight on local variation by juries.<sup>17</sup> Tracey Meares and Dan Kahan have endorsed local voters' ability to influence gang-loitering ordinances and community policing, while Rich Schragger has sounded a cautionary note on those topics.<sup>18</sup> And Rachel Barkow has written powerfully on how federalization and bureaucratization have exalted judges at the expense of juries and executive clemency, squeezing out softer values such as mercy.<sup>19</sup> Each of these authors has noted the complex interplay of equality concerns with criminal justice's vertical and horizontal structures. Yet, with the partial exception of Rachel Barkow, no one has explored the intersection directly in the

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<sup>14</sup> E.g., Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 Yale L.J. 85, 127–28 (2004) [hereinafter Bibas & Bierschbach, Integrating Remorse and Apology]; Richard A. Bierschbach & Stephanos Bibas, Constitutionally Tailoring Punishment, 112 Mich. L. Rev. 397, 426–27 (2013) [hereinafter Bierschbach & Bibas, Constitutionally Tailoring Punishment].

<sup>15</sup> E.g., William J. Stuntz, The Collapse of American Criminal Justice 7 (2011); Stuntz, *supra* note 4, at 1974, 1981–82, 2031–32, 2040.

<sup>16</sup> E.g., Josh Bowers, Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute, 110 Colum. L. Rev. 1655, 1660, 1673–77, 1688–92 (2010) [hereinafter Bowers, Legal Guilt]; Josh Bowers, The Normative Case for Normative Grand Juries, 47 Wake Forest L. Rev. 319, 322, 333–34, 340–42 (2012) [hereinafter Bowers, Normative Grand Juries].

<sup>17</sup> Heather K. Gerken, Foreword, Federalism All the Way Down, 124 Harv. L. Rev. 4, 30–33 (2010) [hereinafter Gerken, Federalism All the Way Down]; Heather K. Gerken, Second-Order Diversity, 118 Harv. L. Rev. 1099, 1136–39, 1184–87 (2005) [hereinafter Gerken, Second-Order Diversity].

<sup>18</sup> Compare Dan M. Kahan & Tracey L. Meares, Foreword: The Coming Crisis of Criminal Procedure, 86 Geo. L.J. 1153, 1162–66, 1171–84 (1998), and Tracey L. Meares & Dan M. Kahan, The Wages of Antiquated Procedural Thinking: A Critique of *Chicago v. Morales*, 1998 U. Chi. Legal F. 197, 209–11, with Richard C. Schragger, The Limits of Localism, 100 Mich. L. Rev. 371, 404–35, 461–72 (2001).

<sup>19</sup> E.g., Rachel E. Barkow, Essay, The Ascent of the Administrative State and the Demise of Mercy, 121 Harv. L. Rev. 1332, 1334–36, 1339–51 (2008).

context of sentencing, even though equality arguments have spurred much of the sentencing reform and commentary over the last four decades.<sup>20</sup>

Situating sentencing equality debates within that broader scholarly conversation helps to highlight that not all inequalities are created equal. Criminal justice scholars often complain about disparities in criminal case outcomes among different federal jurisdictions or different counties within the same state.<sup>21</sup> But it is not at all clear that such disparities should be troubling per se. Neighborhood-by-neighborhood or even jury-by-jury variations based on differently weighing competing purposes of punishment and other tradeoffs might not be problematic, or at least might be subject to richer debate. They can contribute to broader public conversations about how to balance retribution, public safety, cost, reintegration, and the like. They can operate as a useful feedback loop without privileging any one approach to punishment over another. They can allow communities and even neighborhoods to experiment with what works and what does not, letting them explore different means of implementing agreed-upon ends or determine which ends matter most to them.<sup>22</sup> By contrast, variations based on race or other factors that violate

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<sup>20</sup> See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 877 & n.29 (2009) [hereinafter Barkow, *Institutional Design*] (noting the significant degree of prosecutorial control over sentencing through charging); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 *U. Pa. L. Rev.* 33, 76–77, 88–89, 117, 120–21 (2003) [hereinafter Barkow, *Recharging the Jury*]; see also Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 *Tex. L. Rev.* 1973, 1988 n.68 (2006) (reviewing equality-based critiques of sentencing).

<sup>21</sup> See, e.g., Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 *Vand. L. Rev.* 307, 312–14 (2010); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 *Am. Crim. L. Rev.* 161, 188–89 (1991).

<sup>22</sup> “Community” is a malleable, somewhat amorphous and ambiguous term that is more often bandied about than defined. To critics, “‘community’ is a very dangerous concept. It sometimes means very little, or nothing very coherent, and sometimes means so many things as to become useless in legal or social discourse.” Robert Weisberg, *Restorative Justice and the Dangers of “Community,”* 2003 *Utah L. Rev.* 343, 343, 348, 374; see also Schragger, *supra* note 18, at 387–459 (discussing and critiquing contractarian, deep, and dualist versions of “community”).

Though the concept's boundaries are fuzzy and subject to debate or abuse, its core idea remains useful. We agree with Josh Bowers and Robert Weisberg, who have recognized that “the concept of community justice may serve as a useful heuristic—a stand-in for certain ill-defined, but nevertheless worthwhile, aspirations from which contemporary professionalized criminal justice has moved too far away. . . . [W]e may successfully use the ‘vocabulary’ of

constitutional values remain deeply troubling. Sentencing equality could borrow the conceptual tiers of equal-protection scrutiny: Racial, ethnic, religious, and fundamental-rights discrimination would face strict scrutiny and virtually always be unconstitutional, whereas geographic and jurisdictional variations would be least troubling and merit deference on any rational basis. In evaluating disparities, sentencing equality could also pay more attention to the procedural and institutional structure that generated them.

The remainder of this Article unfolds in three parts. Part I is about substance: how equality relates to the goals and values that sentencing serves. It shows how, in the sentencing context, equality has come to mean equalizing outcomes: that is, equalizing sentences and minimizing disparities. That conception of sentencing equality, it explains, privileges *ex ante*, numbers-driven approaches to punishment over others, particularly those that emphasize more granular, less-quantifiable values. In practice, sentencing too often reduces equality to a sort of mathematics. Equality's focus on outcomes also ignores or slights process-based considerations, such as listening to defendants and victims, reconciling them, and treating them fairly and respectfully. And even as a substantive standard, equality of sentencing outcomes has little helpful content. The notion of treating like cases alike masks basic sentencing questions, such as what factors make cases relevantly alike, who should measure them against which purposes of punishment, and how to resolve conflicts among those purposes. To speak of equalizing outcomes is rhetorically appealing, but it buries or glosses over such issues rather than providing useful guideposts for resolving them, watering down equality's focus, impact, and limits.

Part II is about structure. It examines how emphasizing equality of outcomes influences how we design sentencing institutions. In practice, the institutions that individualize sentences based on granular, *ex post*, and process-oriented factors tend to be disaggregated decision-making bodies, like individual judges, probation officers, and sentencing juries, and even plea-bargaining prosecutors and defense counsel. A focus on

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community without being used by it." Bowers, *The Normative Case for Normative Grand Juries*, *supra* note 16, at 322 (quoting Weisberg, *supra*, at 374). For present purposes, we define communities geographically and in terms of the impact of crime and criminal justice, as "[l]ocals affected by a particular crime." Stephanos Bibas, *Essay, Transparency and Participation in Criminal Procedure*, 81 *N.Y.U. L. Rev.* 911, 914 & n.6 (2006); accord Bowers, *Normative Grand Juries*, *supra* note 16, at 322 n.15 (quoting and adopting this definition).

equalizing outcomes thus has a centripetal force to it, pulling sentencing away from those bodies to more centralized, higher-level institutions like sentencing commissions. That centralizing effect interacts in previously unexamined ways with structural constitutional principles like checks and balances and federalism, complicating equality's heavy emphasis in practice on uniformity of outcomes. Drawing in part on federalism and localism scholarship, Part II shows how variations can both be the product of and advance crucial values of diversity, innovation, participation, and responsiveness that we often celebrate in other contexts. Those values should carry weight in the sentencing context as well, where issues like who decides and how they do so are so central to sentencing's legitimacy and substance that they are baked into our constitutional framework.

Part III brings our substantive and institutional critiques together. It focuses primarily on geographic sentencing variation, but also considers other sources of variation such as apparently random differences among decision makers and their varied value choices. Alternative conceptions of equality, it suggests, could put more emphasis on equalizing inputs or processes, giving better effect to the range of competing substantive considerations and institutions that inform sentencing. That approach is consistent with how much of criminal justice has operationalized equality outside of sentencing. It also better accommodates the different status of different kinds of inequalities. Using restorative justice, California's Realignment initiative, and federal fast-track plea agreements as illustrations, Part III shows how more flexible, less outcomes-driven approaches to equality could bring nuance to equality debates that color a range of sentencing innovations and practices. Restorative justice, for instance, deliberately deviates from equality of outcomes. But that objection is hardly fatal. Focusing myopically on variations in outcomes as inherently suspect blinds critics to how restorative processes can be inclusive, treat offenders and victims with equal dignity, and serve other weighty goals. The better criticisms of restorative justice are rooted not in outcome inequality per se, but in how it might exacerbate inequalities that flow from differences in race, wealth, and power.

One qualification is in order. Our mission here is primarily analytical and critical, and only secondarily normative. We do favor a less mechanical, less outcomes-focused approach to equality, especially for variations unrelated to race, sex, and socioeconomic status. But our main goal is to show how sentencing equality, as it has come to be conven-

tionally understood in outcomes-oriented terms, interacts with the institutional structure and goals of punishment, and how exposing that interaction complicates the tradeoffs that inhere in sentencing design.<sup>23</sup> Equality of outcomes in sentencing is an important heuristic for injustice, but it can also deflect attention from political, policy, and structural choices. At the very least, when assessing equality in sentencing, we should be more sensitive to the benefits as well as the costs of variation, and to distinguishing good variations from bad.

### I. EQUAL OUTCOMES AND THE SUBSTANCE OF SENTENCING

As criminal procedure took shape over the past half-century, judges and legislatures sought to eradicate discrimination by adopting rules to equalize outcomes. Though they were often motivated by racial fairness, often they articulated rules that formally had nothing to do with race. Today, as Section I.A shows, equality in sentencing has evolved from stamping out classic racial discrimination to promoting uniform sentencing outcomes across the board. Section I.B explains how this approach seems appealing as a neutral metric of fairness that brackets longstanding and troublesome debates over why and how much to punish. But in practice, Section I.C contends, that value-free emphasis on equalizing outcomes privileges a few values over all others. It turns criminal justice largely into a deterrence- and incapacitation-driven equation, leaving little room for rehabilitation, mercy, or subjective elements of retribution, and slighting important process values along the way.

#### A. *The Rise of Equal Outcomes*

Until the mid-twentieth century, the U.S. Constitution and federal courts had little involvement with state criminal justice, which handles most criminal cases. The Bill of Rights applied only to the actions of the federal government, and the Fourteenth Amendment's Due Process Clause had little independent bite. But in a series of cases, often involv-

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<sup>23</sup> As Gerken put it when drawing connections between the federalism and local government literatures in her *Harvard Law Review* foreword, "If we can show that federalism's signature vices can be recast as plausible virtues, the odds are that there are other areas where the cost-benefit analysis is more complicated than we typically assume." Gerken, *Federalism All the Way Down*, *supra* note 17, at 46; see also Gerken, *Second-Order Diversity*, *supra* note 17, at 1103. Our methodology and analytical approach in this Article are similar to hers.

ing racial or ethnic aspects and Southern states, the Court interpreted due process expansively, read it as incorporating the Bill of Rights, and applied its protections to the states. *Powell v. Alabama* first recognized the right to appointed counsel to protect the Scottsboro boys, all black youths, against a legalized lynching for allegedly raping young white women.<sup>24</sup> *Miranda v. Arizona* mandated its famous *Miranda* warnings to protect an “indigent Mexican defendant . . . with pronounced sexual fantasies” and “an indigent Los Angeles Negro who had dropped out of school in the sixth grade.”<sup>25</sup> *Papachristou v. City of Jacksonville* struck down as void for vagueness a vagrancy ordinance used to target young black males who were cruising around town with young white women in northern Florida very late one Saturday night.<sup>26</sup> *Furman v. Georgia* invalidated the death penalty as cruel and unusual punishment in the context of three black defendants in Georgia and Texas, two of whom had raped white women.<sup>27</sup> In support, Justices Douglas and Marshall cited evidence that blacks were disproportionately likely to be executed.<sup>28</sup> When the Supreme Court restored the death penalty four years later, it emphasized the need for “clear and objective standards so as to produce non-discriminatory application” and limit “arbitrariness and caprice.”<sup>29</sup>

Though many of these cases aimed to combat racial prejudice, their rules swept much more broadly against all unexplained variation. As Justice Stewart put it in his *Furman* concurrence, while race was the only discernible basis for imposing the death sentences before the Court, race discrimination had not technically been proven. What had been shown was that the defendants had been “capriciously selected” to die, and the Eighth Amendment forbids imposing capital punishment “so wantonly and so freakishly.”<sup>30</sup> In other words, racial bias was—and still is—natural to suspect but hard to prove, so that fear understandably bred hostility to variation writ large.

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<sup>24</sup> 287 U.S. 45, 49–52 (1932). See generally Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 48–49 (2000) (discussing why the flagrant racial injustices spurred the Supreme Court to act and how popular opinion generally supported the Court’s actions to combat egregious unfairness).

<sup>25</sup> 384 U.S. 436, 457 (1966).

<sup>26</sup> 405 U.S. 156, 158 (1972) (describing the arrest as “early on a Sunday morning”).

<sup>27</sup> 408 U.S. 238, 239–40 (1972) (per curiam).

<sup>28</sup> *Id.* at 249–53 (Douglas, J., concurring); *id.* at 364–65 (Marshall, J., concurring).

<sup>29</sup> *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)).

<sup>30</sup> 408 U.S. at 309–10 (Stewart, J., concurring).

The Supreme Court's movement to use rules to equalize disparate outcomes in capital sentencing and elsewhere filtered down to lower court judges, legislatures, and other actors. And like the Court's rulings, these rules reached well beyond racial discrimination to attack all sorts of variation. Most notably, in his 1973 book on sentencing, Judge Marvin Frankel worried that traditional, unstructured sentencing left judges free to discriminate, apply their idiosyncratic beliefs, or simply be arbitrary because of what they had eaten for breakfast that day.<sup>31</sup> Though he adverted briefly to racial, class, and religious biases, his fears rested in large part on survey evidence and anecdotes unrelated to race.<sup>32</sup> "[I]ndividualized justice," he contended, "is prima facie at war with such concepts, at least as fundamental, as equality, objectivity, and consistency in the law."<sup>33</sup> He denounced sentencing discretion as "almost wholly unchecked and sweeping," a grant of power "terrifying and intolerable for a society that professes devotion to the rule of law."<sup>34</sup> Thus, he proposed creating an administrative agency to promulgate rules to bind sentencing judges.<sup>35</sup>

Judge Frankel's book ignited a sentencing-reform movement across the country, culminating in sentencing guidelines governing not only federal criminal justice but also almost half of the states.<sup>36</sup> Liberal reformers such as Senator Edward Kennedy initially embraced sentencing reform as an "antidiscrimination measure."<sup>37</sup> But their target broadened beyond race as they joined forces with law-and-order conservatives, who feared judicial leniency. Both sides shared "a deep suspicion of discretionary judgment," so they agreed to centralize power in the U.S. Sentencing Commission to write binding rules.<sup>38</sup> The result was a mathematical, rather than a nuanced or moral, approach to justice and equality.

Other actors likewise supported adopting rules to ensure uniform outcomes. Representatives of the U.S. Department of Justice have supported mandatory minimum penalties to promote uniform sentencing by

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<sup>31</sup> Marvin E. Frankel, *Criminal Sentences: Law Without Order* 5–11 (1973).

<sup>32</sup> *Id.* at 17–24, 32–34, 42–43.

<sup>33</sup> *Id.* at 10.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.* at 121–22.

<sup>36</sup> Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 35–59 (1998); Frase, *supra* note 3, at 1194–96, 1196 tbl.1.

<sup>37</sup> Stith & Cabranes, *supra* note 36, at 38.

<sup>38</sup> *Id.* at 39–40.

treating like cases alike.<sup>39</sup> As Asa Hutchinson, a former U.S. Attorney, member of the House of Representatives, and later DEA Administrator and now Governor of Arkansas put it: “[Y]ou have to have a sentencing pattern that has uniformity across it, that sends the right signals . . . .”<sup>40</sup> Likewise, federal and state legislatures mandated zero-tolerance policies for possessing drugs and guns on school campuses, in part to guarantee equal treatment for these offenses.<sup>41</sup>

Al Alschuler perceptively diagnosed this approach to sentencing reform as “a mechanistic view of equality,” in which social scientists “appear to have treated equality as a self-defining concept, overlooking its normative character.”<sup>42</sup> Scholars praise sentencing reforms for reducing disparities in outcomes, but in doing so they overaggregate convictions for the same criminal charge, even when offenders and facts differ in other respects. In doing so, they bury the question of what makes cases alike in respects that merit alike or different sentences.<sup>43</sup> James Whitman agrees that “thirty years after the sentencing revolution commenced, and despite the travails of the Federal Guidelines, the campaign for equality in punishment has attained something like the status of political orthodoxy in the United States today.”<sup>44</sup> Though it quintessentially targets

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<sup>39</sup> U.S. Sentencing Comm’n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 85–86 (2011).

<sup>40</sup> Judge Stanley Sporkin & Congressman Asa Hutchinson, *Debate at Georgetown University Law Center* (March 2, 1999), in *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 *Am. Crim. L. Rev.* 1279, 1295 (1999); see Gov. Asa Hutchinson, *Arkansas’s Governor*, <http://governor.arkansas.gov/governor-hutchinson> [<https://perma.cc/E353-T8AV>].

<sup>41</sup> *Gun-Free Schools Act of 1994*, Pub. L. No. 103–382, Title I, § 101, 108 Stat. 3907 (codified as amended 20 U.S.C. § 8921 (1994)) (repealed 2002); *Drug-Free Schools and Communities Act Amendments of 1989*, Pub. L. No. 101–226, § 22, 103 Stat. 1928, 1938 (codified as amended at 20 U.S.C. § 1145g (1989)) (repealed 1998); Robert E. Shepherd, Jr. & Anthony J. DeMarco, *Weapons in Schools and Zero Tolerance*, *Crim. Just.*, Spring 1996, at 46; see also Rebecca Morton, *Note*, *Returning “Decision” to School Discipline Decisions: An Analysis of Recent, Anti-Zero Tolerance Legislation*, 91 *Wash. U. L. Rev.* 757, 773 (2014) (observing that “[w]hile zero tolerance policies may have been instituted as a well-intentioned way to discipline students equally,” they “do not necessarily treat students fairly” because “sameness is not always fair” and “subjectivity in the disciplinary process is inevitable” in any event (internal quotation marks omitted)).

<sup>42</sup> Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 *U. Chi. L. Rev.* 901, 915–18, 915 n.51 (1991) (capitalization omitted) (collecting scholarly articles adopting this approach).

<sup>43</sup> *Id.*

<sup>44</sup> James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 *J. Legal Analysis* 119, 129–30 (2009).

discrimination and bias, the sentencing-equality movement also seeks to combat dispersion of outcomes more generally.<sup>45</sup>

Many academics share this broad embrace of sentence equality as a goal to be maximized, not just against race-based variation but even for geographic or random variations across or within districts. The late Dan Markel forcefully criticized randomness and intra- as well as inter-judge sentence disparities as impermissible moral luck, quite apart from bias or discrimination.<sup>46</sup> Adam Gershowitz is deeply troubled that capital-punishment rates vary dramatically not only by state but also by county, even though all prosecutors are supposed to be enforcing uniform statewide laws. He dismisses different prosecutors weighing costs differently as an “arbitrariness problem.”<sup>47</sup> Wayne Logan complains that the “balkanization of the criminal law” unambiguously “threatens unequal treatment” while acknowledging that it does not violate the Equal Protection Clause.<sup>48</sup> Steven Clymer and Sara Sun Beale, among others, decry outcome disparities between federal and local punishments of street crime as at worst violations of equal protection and at best incompatible with basic notions of equity.<sup>49</sup> One of us has even earlier argued that local variations in federal law enforcement require justification, and that differing local values or strategies may not justify regional variations.<sup>50</sup> These arguments echo Cesare Beccaria’s much earlier contention, quite apart from fears of bias, that in order to be effective, punishments must be uniform.<sup>51</sup>

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<sup>45</sup> See *id.* at 128; see also *id.* at 120 (noting that “over the past thirty-five years” American criminal justice “has been the scene of a vigorous campaign to guarantee that all persons who commit the same offense should serve the same sentence,” and observing that the American system “seem[s] deeply committed to the proposition that all offenders who commit comparable offenses ought to suffer . . . comparable punishments”).

<sup>46</sup> Dan Markel, *Luck or Law: Is Indeterminate Sentencing Unconstitutional?* 58–81 (Nov. 19, 2012) (unpublished manuscript) (on file with authors).

<sup>47</sup> Gershowitz, *supra* note 21, at 312–21.

<sup>48</sup> Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 *Ohio St. L.J.* 1409, 1460, 1465–67 (2001).

<sup>49</sup> Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 *Hastings L.J.* 979, 997–1004 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 *S. Cal. L. Rev.* 643, 675–97 (1997).

<sup>50</sup> Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 *Stan. L. Rev.* 137, 140 (2005).

<sup>51</sup> See Cesare Beccaria, *An Essay on Crimes and Punishments* 93, 158–59 (Edward D. Ingham trans., 2d Am. ed., Philadelphia, Philip H. Nicklin 1819).

The bottom line is that while sentencing equality took flight to combat racial discrimination, it now extends well beyond racial bias or even racially disparate outcomes. Courts, legislatures, and pundits reflexively mistrust variations, whether or not they are caused by or even correlate with constitutionally suspect classifications. No one believes that every murderer, drug dealer, or thief need be sentenced identically to every other. But when it comes to equality, the name of the game is to at least make sure that their punishments are substantially similar, no matter who sentences them or where within a sovereign territory they happen to commit their crimes. Equality in sentencing, in practice, very often means standardizing punishments.

### *B. The Appeal of Equal Outcomes*

Given the complex and messy nature of sentencing, with its range of competing considerations and lack of easy answers, it is unsurprising that opposing sides have coalesced around outcomes as the measure of sentencing equality. Equality of outcomes is intuitively appealing as a metric for punishment. Equalizing outcomes seems like a neutral, almost mathematical criterion of justice. Bottom-line results seem to speak for themselves, irrespective of motives or reasons. From childhood, we learn to object that it is not fair if a sibling gets more of a dessert or a present. Equal pay for equal work is an appealing slogan, and not just in the context of race or sex discrimination. Employers that publish salaries, such as public universities, feel enormous pressure to equalize pay and peg all variations to seniority, even among white males. Merit pay, by contrast, touches off a firestorm, in part because few can agree on how to measure merit.<sup>52</sup>

In a world with pluralistic, diverse views about the purposes and goals of punishment, disagreement about how to sentence similarly situated offenders is almost inherent in the system. On some level, treating like cases alike seems easy. Criminal justice professionals define a category of cases as alike based on the crime of conviction, and then expect to see more or less equal prison sentences for the cases within that box.<sup>53</sup>

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<sup>52</sup> See, e.g., Lyle Leritz, Econ. Research Inst., Principles of Merit Pay 1 (2012), <http://www.eri.com/PDF/Principles-of-Merit-Pay.pdf> [<https://perma.cc/RHP8-W9D7>] (“Since many criteria used to measure performance are highly subjective, it can be difficult to objectively evaluate employees,” and thus merit.)

<sup>53</sup> See Bowers, *Legal Guilt*, *supra* note 16, at 1673–78, 1703.

Treating unlike cases unlike seems much harder. A few grounds for varying sentences are widely accepted, such as differences in crimes charged and criminal records. But other differences, such as motive or intent, are far more debatable both in fact finding and normatively.<sup>54</sup> Even the relevance of resulting harm is disputed, though less so than other factors.<sup>55</sup> Should we automatically sentence defendants alike simply because they are all charged under the same statute, or stole the same amount of money, or have the same number of strikes on their rap sheets? The problem is not that people agree that other factors are largely irrelevant to punishment. On the contrary, most would agree that much else matters too. It is that people cannot (or seem unable to) agree about which factors matter, how much, and why.

The result is intractable debates over retribution, deterrence, incapacitation, rehabilitation, and the like. One person says youth should mitigate punishment because it makes the defendant less blameworthy and more amenable to rehabilitation. Another views youths as dangerous predators who are at their violent, testosterone-fueled peak and need to be deterred and incapacitated.<sup>56</sup> One judge views mentally disabled or drug-addicted defendants as less blameworthy. Another views them as less able to exercise self-control and so more dangerous.<sup>57</sup> One prosecutor views a well-off college student as having a more promising future and posing less of a threat. Another insists that he is more culpable because he has had more opportunities in life and should have known bet-

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<sup>54</sup> Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. Cal. L. Rev. 89, 89 (2006) (proposing that motive play an expanded role within the context of criminal punishment in order to increase sentencing uniformity, with the resulting clarification of "the aggravating and mitigating nature of various motives ex ante").

<sup>55</sup> See, e.g., Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 Calif. L. Rev. 907, 908, 913 (2010).

<sup>56</sup> Compare *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012) (Kagan, J.) (noting mitigating characteristics of juvenile defendants), and *Graham v. Florida*, 560 U.S. 48, 78 (2010) (Kennedy, J.) (same), with *Miller*, 132 S. Ct. at 2482 (Roberts, C.J., dissenting) (expressing skepticism that "society should show greater mercy to young killers"), and *Graham*, 560 U.S. at 118 (Thomas, J., dissenting) (referencing research suggesting that "an adolescent offender's antisocial behavior is *not* transient").

<sup>57</sup> Compare *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (Stevens, J.) (arguing that "mentally retarded persons" are less culpable than other serious adult offenders "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses"), with *id.* at 351 (Scalia, J., dissenting) (arguing that "mentally retarded offenders" who commit "extreme crimes" are appropriate objects of "society's moral outrage").

ter.<sup>58</sup> The disagreements are particularly pronounced over offender characteristics, though they also extend to offenders' states of mind, victims' suffering and views, and many other issues too.<sup>59</sup>

Philosophers, theologians, moralists, and lawyers have long fought on the same hoary battlefield. Many of these disagreements stem from fundamental differences in worldview and outlook. Some people emphasize subjective blameworthiness, others objective harm or suffering caused, others the temptations to commit crime, and still others the danger and fear posed by crime. Some emphasize free will and individual moral responsibility, while others point to economic circumstances and broader social forces. The debates are endless, ebbing and flowing but with no resolution in sight.

Equalizing outcomes, at first blush, offers a neutral way around this clash. Equality of outcomes shunts the sages aside in favor of statisticians and social scientists. It avoids contentious moral judgments and debates over whether to favor retribution, deterrence, or some other jus-

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<sup>58</sup> Compare, e.g., Paul Elias, Brock Turner Leaves Jail, Gets Hate Mail for Sexual Assault, Associated Press, Sep. 2, 2016, <http://bigstory.ap.org/article/54d251e85e694c33a0327af6cc281d5a/ex-stanford-swimmer-leaves-jail-after-serving-half-his-term> [<https://perma.cc/385D-76VM>] (reporting that the judge sentencing college student Brock Turner to six months in jail for three felony sexual assault counts cited "'extraordinary circumstances' of Turner's youth, clean criminal record and other considerations in departing from the minimum sentence of two years in prison"), with Nick Anderson & Susan Svrluga, Prosecutors Urged "Substantial Prison Term" in Stanford Sexual Assault Case, Records Show, Wash. Post (June 11, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/06/11/prosecutors-urged-substantial-prison-term-in-stanford-sexual-assault-case-records-show/> [<https://perma.cc/EDJ2-5R52>] (stating that prosecutors in Brock Turner's case argued that "the fact that the Defendant preyed upon an intoxicated stranger on a college campus should not be viewed as a *less* serious crime than if he were to assault a stranger in Downtown Palo Alto"), and Christina Cauterucci, Brock Turner's Father Sums Up Rape Culture on One Brief Statement, Slate (June 5, 2016), [http://www.slate.com/blogs/xx\\_factor/2016/06/05/brock\\_turner\\_s\\_dad\\_s\\_defense\\_proves\\_why\\_his\\_victim\\_had\\_to\\_write\\_her\\_letter.html](http://www.slate.com/blogs/xx_factor/2016/06/05/brock_turner_s_dad_s_defense_proves_why_his_victim_had_to_write_her_letter.html) [<https://perma.cc/K53K-U5KT>] (reporting on the victim statement provided in Brock Turner's prosecution, in which the victim argued that the defendant's athletic talent and loss of a swimming scholarship at a prestigious university should not reduce the severity of his sentence).

<sup>59</sup> See, e.g., Antony Duff, Principle and Contradiction in the Criminal Law: Motives and Criminal Liability, in *Philosophy and the Criminal Law* 156, 171 (Anthony Duff ed., 1998) (discussing the contradiction among courts regarding the relevancy of motive in sentencing); Joe Frankel, *Payne*, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of Decency, 12 N.Y.C. L. Rev. 87, 114–15 (2008) (discussing differences in state courts' use of victim impact evidence); Carissa Byrne Hessick, A Critical View of the Sentencing Commission's Recent Recommendations to "Strengthen the Guidelines System," 51 Hous. L. Rev. 1335, 1354–55 (2014) (noting that there is a "widespread judicial disagreement regarding the relevance and appropriateness of mitigating offender characteristics").

tification for punishment. As Dan Kahan suggested in the context of deterrence, mathematical approaches to punishment have a “secret ambition,” that of “quiet[ing] illiberal conflict between contending cultural styles and moral outlooks.”<sup>60</sup> Equalizing sentencing outcomes functions in just this way. Rather than fighting culture wars over the purposes of punishment or what makes offenders alike or different in meaningful ways, it is easier to bracket such normative questions or treat them as self-evident. That was the explicit approach of the U.S. Sentencing Commission. To avoid moral disagreements, it explicitly eschewed any normative approach to punishment, and instead aimed largely to replicate average past practices while reining in outliers.<sup>61</sup> Where moral disagreement was endemic, math supplanted morality.

### *C. The Limits of Equal Outcomes*

The apparent neutrality of equalizing sentencing outcomes is intuitively appealing as an even-handed approach on which all can agree. But this neutrality has its drawbacks. Because equality of outcomes is not self-defining—it does not specify which variations in outcomes are bad, and which are not—it does not offer much useful substantive guidance, distracting attention from discussion of both the prior normative commitments that might animate it and the broader values punishment serves. At a deeper level, in practice, equalizing outcomes is far from equal. All justifications for punishment are supposedly equal, but some are more equal than others. General deterrence and incapacitation win out. Retribution gets homogenized in unappealing ways. Rehabilitation and mercy are shut out. And process values like respectful treatment and voice get overlooked.

#### *1. As a Normative Guidepost for Punishment*

Start with the fact that equality of sentencing outcomes is not self-defining. When it comes to sentencing, equalizing outcomes simply means punishing like cases alike. So speaking about equality of out-

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<sup>60</sup> Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413, 415 (1999).

<sup>61</sup> U.S. Sentencing Guidelines Manual § 1A1.3 (U.S. Sentencing Comm’n 2014) [hereinafter U.S.S.G.M.] (policy statement) (reporting that the U.S. Sentencing Commission sidestepped the problem of “reconcil[ing] the differing perceptions of the purposes of criminal punishment . . . by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice”).

comes is largely a shorthand for speaking about whether certain cases are alike in respects that are relevant to why we punish. If they are, they must be treated alike; if they differ in those ways, they should be treated differently. But standing alone, as Peter Westen observes, that principle is devoid of content.<sup>62</sup> Surely two crimes need not be treated alike because they both happened on Thursdays. Nor must they differ just because their perpetrators had different hair colors or skin colors. Focusing on equalizing outcomes per se functions to bypass prior questions of morality, social psychology, and other factors that inform punishment determinations. But without a foundation to ground it, equality of outcomes has no freestanding normative purchase.

Multiple foundations might exist, of course. One obvious one lies in our criminal justice system's abject failure on issues of racial justice. Decades of empirical work on racial disparities in arrest, prosecution, and sentencing have made clear that racial skew in the American criminal justice system is simultaneously endemic and extraordinarily difficult to uncover and prove.<sup>63</sup> At the same time, disparate-impact reasoning is controversial, and the Supreme Court has proven unwilling to extend it to sentencing.<sup>64</sup> Strict equality of sentencing outcomes based on objective criteria might be thought to serve as a prophylactic safeguard at the back end of the process, a last, formally neutral attempt to racially equalize a game that has been skewed against minority groups since its opening minutes. Beyond racial justice, other measures of substantive justice—whether rooted in nonarbitrariness, class, human dignity, or

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<sup>62</sup> Peter Westen, *The Empty Idea of Equality*, 95 *Harv. L. Rev.* 537, 543–48 (1982); see also Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 *Nw. U. L. Rev.* 1336, 1337 (1997).

<sup>63</sup> See O'Hear, *supra* note 3, at 306 nn.6–9 (reviewing research on racial bias in the American criminal justice system); see also John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 *Am. Crim. L. Rev.* 689, 690–91 (2014) (citing examples of the vast racial disparities infecting the system).

<sup>64</sup> *United States v. Armstrong*, 517 U.S. 456, 469–70 (1996) (holding that, in order to establish selective prosecution based on discriminatory effect, a defendant must show that similarly situated individuals of a different race were not prosecuted); *McCleskey v. Kemp*, 481 U.S. 279, 314–19 (1987) (concluding that a study showing that the death penalty was imposed more often on black defendants and killers of white victims than on white defendants and killers of black victims failed to establish any discriminatory purpose and, at most, merely indicated a discrepancy that appeared to correlate with race); see also *Dorsey v. United States*, 132 S. Ct. 2321, 2326–30, 2336 (2012); *Spears v. United States*, 555 U.S. 261, 261 (2009); *Kimbrough v. United States*, 552 U.S. 85, 85–90 (2007).

what have you—might also provide the normative foundation that equal outcomes by itself lacks.<sup>65</sup>

The goal here is not to defend or to isolate any of these or other prior normative commitments that might undergird equalizing sentencing outcomes, which is likely an impossible task. Equality of outcomes in sentencing, like punishment itself, appears badly overdetermined.<sup>66</sup> The point is that once one defines which differences merit different sentencing treatment by reference to an underlying substantive theory, relabeling those differences in terms of equal versus unequal outcomes adds little to the picture.<sup>67</sup> Indeed, it may obscure the specific racial or class basis that both justifies and limits the reach of outcomes-equalizing reforms. The rhetoric of equal outcomes undoubtedly carries symbolic weight in the scales, particularly as it concerns our sorry history of racial injustice. But employing it still assumes that we have already measured which dimensions make a sentence equal in relevant ways. Focusing on a certain kind of inequality (like racial bias) illuminates specific unjustifiable variations. But the broader rhetoric of unequal outcomes itself, in practice lumping geographic, random, race-based, and many other kinds of variation together, threatens to mask underlying substantive guideposts and can conceal more than it reveals.

## *2. As a Neutral Criterion for Punishment*

Focusing on equalizing sentencing outcomes can also distract attention from the substantive justifications for punishment and how they may cut in different directions. That is a great part of its appeal, at least as a discourse-management strategy. But it also has a downside. When it comes to the purposes and goals of punishment, emphasizing outcomes puts the cart before the horse. It lets a certain way of operationalizing equality dictate which justifications for punishment will dominate the

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<sup>65</sup> See, e.g., Douglas Rae et al., *Equalities* 133 (1981) (finding more than one hundred approaches to giving content to the concept of equality).

<sup>66</sup> See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 *Utah L. Rev.* 205, 282 (discussing the overdetermined nature of sentencing in the United States).

<sup>67</sup> See Westen, *supra* note 62, at 543–48; see also Alschuler, *supra* note 42, at 918 (“Every empirical effort to measure disparity rests implicitly on a normative concept of appropriate sentencing criteria.”).

sentencing calculus, because some seem more neutral, mathematical, and consistent in their results.<sup>68</sup>

*General Deterrence and Incapacitation.* When we emphasize equalizing outcomes, in practice that means privileging general deterrence and incapacitation. Both are easy to specify and quantify ahead of time. Neither depends much on discretion or qualitative evaluation. At most, prosecutors and judges must tally up a defendant's convictions or strikes from his rap sheet, a fairly perfunctory process.

General deterrence, in particular, is well served by threatening sanctions across the board, clearly and *ex ante*, and promising to carry out those threats consistently. Prospective offenders can understand slogans or billboards that communicate “three strikes and you’re out” or “gun crime means hard time.” That is why Beccaria placed so much emphasis on uniformity.<sup>69</sup> As noted above, advocates of mandatory minimum sentences stress the importance of a “sentencing pattern that has uniformity across it, [to] send[] the right signals.”<sup>70</sup> (Even so, deterrence arguably depends less on the predictability of sentences than on the predictability of arrest and conviction, which is much weaker in practice.<sup>71</sup>) Incapacitation is likewise the primary aim of recidivism enhancements, three-strikes laws, and the like.<sup>72</sup> Conversely, proponents of individualizing punishments may bristle at the blunt, across-the-board measures needed to make general deterrence or perhaps incapacitation work.<sup>73</sup>

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<sup>68</sup> To paraphrase the prominent Report by the Commission on the Measurement of Economic Performance and Social Progress, chaired by Nobel Laureate Joseph Stiglitz, we pay more attention to things that we can easily measure, but what is easily measurable 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), [<https://perma.cc/UNL6-L3WC>]; Nobel Prizes and Laureates, Joseph E. Stiglitz – Facts, [http://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/2001/stiglitz-facts.html](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2001/stiglitz-facts.html) [<https://perma.cc/6LSP-9LML>].

<sup>69</sup> Beccaria, *supra* note 51, at 149.

<sup>70</sup> *Supra* text accompanying note 40 (quoting Rep. Asa Hutchinson).

<sup>71</sup> See Whitman, *supra* note 44, at 142–43.

<sup>72</sup> See Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429, 1429–31, 1429 nn.2–8 (2001).

<sup>73</sup> They likely would not raise the same level of concern with selective incapacitation, which takes a more granular approach to determining individual defendants' dangerousness—a feature that, as we explain more below, has led critics to attack it on various equality grounds. See *infra* notes 96–98 and accompanying text.

*Retribution.* Retribution is sometimes confused with such punitive measures.<sup>74</sup> But to the extent that such measures incorporate retribution at all, it is only the crudest forms of retribution, the eye-for-an-eye of the *lex talionis*. To ensure equality of outcomes, retribution is bastardized, mass-produced in Procrustean boxes on the punishment assembly line.

To many, however, just deserts means something very different from getting tough or punishing mechanically. It requires considering not only the *actus reus* but also the offender's *mens rea* and motivations. It demands that punishments be proportionally based on a wide range of factors. It leaves room for partial justifications and excuses to reduce punishments. Grievance retributivism may give substantial weight to the victim's suffering and need for vindication.<sup>75</sup> And varieties of character retributivism also look carefully at the offender's education, family, mental and emotional state, and awareness of the wrong done.<sup>76</sup> As Paul Robinson's empirical work finds, people's retributive intuitions are surprisingly nuanced. When given detailed case studies and asked to impose a sentence, people vary punishments significantly based on a variety of such distinctions.<sup>77</sup>

Thus, how one approaches sentencing equality can shape how one defines retribution, or vice versa. A focus on equalizing outcomes can limit consideration of intent, motive, excuse, and offender characteristics.<sup>78</sup> Conversely, individualization leaves breathing room for more such considerations. Some retributive theorists, like Dan Markel, focus on clearly

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<sup>74</sup> See Tonry, *supra* note 7, at 184.

<sup>75</sup> Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. Rev.* 1659, 1686 (1992) (articulating a connection between retribution and victim vindication).

<sup>76</sup> Jeffrie G. Murphy, *Getting Even: Forgiveness and Its Limits* 43 (2003) (“[O]ne’s deserts are a function not merely of one’s wrongful acts but also of the ultimate state of one’s character.”).

<sup>77</sup> Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 *Vand. L. Rev.* 737, 789 *tbl.8* (2012) (reporting substantial support for considering remorse, apology, rehabilitation, restitution, victims’ wishes, and hardship to others in lay punishment decisions); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 *S. Cal. L. Rev.* 1, 3–4, 8–11 (2007).

<sup>78</sup> See Alschuler, *supra* note 42, at 902 (“Situational and offender characteristics are as important as social harm in assessing sentences even from a ‘just deserts’ perspective, but these characteristics are almost impossible to quantify and to describe in general language.”).

defined, rule-like factors that legislatures can codify *ex ante*.<sup>79</sup> Others, like Kyron Huigens, understand blame as a concrete, situational attribution that resists codification and has to be made *ex post*, ideally by a jury.<sup>80</sup> The former approach to retribution fits much more easily with equality of outcomes than does the latter.

Some of the blameworthiness factors omitted from raw punishment amounts do show up elsewhere in the system. They often inform low-visibility but influential decisions by police and prosecutors not to arrest, to decline or divert charges, to plea bargain, and to strike cooperation deals, among other things.<sup>81</sup> But the hydraulic pressures to dispose of cases quickly make these decisions invisible, unchecked, unaccountable, and highly variable. Those attributes run contrary to making sentencing rational and transparent, and they reinforce equality-based calls to stamp out such discretion and to harmonize outcomes to do justice.

*Rehabilitation and Reform.* The justifications for punishment that best facilitate equalizing outcomes are those that legislatures, prosecutors' offices, and sentencing commissions can specify *ex ante*. Conversely, justifications that require examining defendants as individuals, *ex post*, get squeezed out by the push for equal sentencing outcomes. Take rehabilitation. In the mid-twentieth century, Justice Hugo Black praised the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."<sup>82</sup>

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<sup>79</sup> Markel & Flanders, *supra* note 55, at 954 n.177 ("[T]he nature of the punishment for a particular offense should also be determined *ex ante* through legislative deliberation . . .").

<sup>80</sup> Kyron Huigens, *Solving the Apprendi Puzzle*, 90 *Geo. L.J.* 387, 432–34 (2002) (arguing that jury fact finding for "positive fault considerations," and unstructured/indeterminate sentencing, are constitutionally required because fault and proportionality "cannot be determined *ex ante* by a system of rules."); Kyron Huigens, *Virtue and Inculpation*, 108 *Harv. L. Rev.* 1423, 1462–67 (1995) (conceiving of criminal punishment as a particularistic inquiry into virtue, well suited to juries' *ex post* decision making, following Aristotle).

<sup>81</sup> See Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* 159–61 (1979) ("[T]here is . . . a desire to look beyond the charges, to respond directly to the incident itself and to the character of the defendant. For a charge to assume meaning it must be given substantive content supplied by a description of the incident and information about the defendant's character, habits, and motivation."); see also Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* 139 (1966) (describing how a "major purpose" of both declination decisions and negotiated pleas is to "individualize justice" for "defendants who . . . do not seem to deserve the full consequences of conviction and sentencing").

<sup>82</sup> *Williams v. New York*, 337 U.S. 241, 247 (1949) (citation omitted).

To effectuate that philosophy, rehabilitation gave power to probation and parole officers to determine *ex post* when an offender had turned over a new leaf.<sup>83</sup>

Rehabilitation's back-end variation was at odds with equalizing outcomes, and that was a large part of its downfall. Congress, in enacting the Sentencing Reform Act, objected that parole boards' "unfettered discretion" to gauge rehabilitation bred "an unjustifiably wide range of sentences."<sup>84</sup> The truth-in-sentencing movement abolished parole in order to make sentences honest, clear, and predictable up front. The movement rejected rehabilitation in part to promote general deterrence and equality.<sup>85</sup>

The focus on equalizing outcomes thus limits room for rehabilitation or its cousin, moral reform. Judges can, however, still exercise discretion within narrow ranges, police can decline to arrest, and prosecutors can decline to charge or can strike bargains. The role of discretion shows up most prominently in declination and diversion programs, whose admission criteria may gauge a defendant's amenability to rehabilitation.<sup>86</sup> The effect of these programs may be to decriminalize a large swath of low-level "junk" cases via the back door, with little oversight, or possibly heavier sentences for the fraction who fail treatment.<sup>87</sup> The contrast for equality is stark: rule-bound sentencing premised on equalizing outcomes for the many felony cases tracked through the regular system, versus vast rehabilitative discretion with far greater outcome variation

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<sup>83</sup> See *id.* at 248.

<sup>84</sup> S. Rep. No. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 (committee report to the Sentencing Reform Act of 1984).

<sup>85</sup> Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 *Cardozo L. Rev.* 2199, 2206–07 (2014) (reviewing history of truth-in-sentencing movement at the federal level).

<sup>86</sup> See Mary Fan, *Street Diversion and Decarceration*, 50 *Am. Crim. L. Rev.* 165, 182 (2013); John Clark, *Pretrial Justice Inst.*, *The Role of Traditional Pretrial Diversion in the Age of Specialty Treatment Courts: Expanding the Range of Problem-Solving Options at the Pretrial Stage* 9 (2007), [http://www.pretrial.org/download/pji-reports/PJI%20The%20Role%20of%20Traditional%20Pretrial%20Diversion%20in%20the%20Age%20of%20Specialty%20Treatment%20Courts%20\(2007\).pdf](http://www.pretrial.org/download/pji-reports/PJI%20The%20Role%20of%20Traditional%20Pretrial%20Diversion%20in%20the%20Age%20of%20Specialty%20Treatment%20Courts%20(2007).pdf) [<https://perma.cc/5TL4-TDS4>].

<sup>87</sup> See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 *UCLA L. Rev.* 783, 792–820 (2008); Morris B. Hoffman, *The Drug Court Scandal*, 78 *N.C. L. Rev.* 1437, 1475–79, 1501–07 (2000) [hereinafter Hoffman, *The Drug Court Scandal*]; Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 *Fordham Urb. L.J.* 2063, 2067 (2002) [hereinafter Hoffman, *Therapeutic Jurisprudence*].

for the (predominantly) misdemeanors and violations that are dismissed or pushed out of sight to problem-solving courts.

*Mercy.* Perhaps the most striking effect of the turn toward equalizing outcomes is the demise of mercy as an important value in sentencing. Utilitarians object that it undercuts deterrence; act-based retributivists object that it varies punishments for the same criminal act. Beccaria made the point centuries ago, denouncing pardons and clemency as “dangerous!” because they “nourish the flattering hope of impunity” and so undercut the law’s consistent “example.”<sup>88</sup> Contemporary punishment scholars follow Beccaria, trying to stamp out mercy in the name of equality, even if they do so in order to equalize retribution rather than deterrence. Dan Markel, in *Against Mercy*, objected strenuously that people “committed to the principle of equal liberty under law [should] be against mercy.”<sup>89</sup> His critique extended far beyond discrimination: “[M]ercy based on compassion is just as problematic as mercy motivated by bias or caprice.”<sup>90</sup> Jeffrie Murphy suggests that mercy raises an equal-protection-type problem, because it threatens to treat like cases unlike.<sup>91</sup> And Rachel Barkow perceptively observes that in our increasingly rule-governed system, discretion to individualize punishments and show mercy seems lawless, though she criticizes this trend. Our administrative model of specifying rules *ex ante* is at odds with holistic, particularistic review *ex post*, in the context of concrete cases.<sup>92</sup>

*Process Values.* When our approach to sentencing equality focuses on equalizing outcomes, it slights how we get to the moment of punishment and what happens along the way. Lawyers instinctively focus on bot-

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<sup>88</sup> Beccaria, *supra* note 51, at 158–59.

<sup>89</sup> Dan Markel, *Against Mercy*, 88 *Minn. L. Rev.* 1421, 1425 (2004).

<sup>90</sup> *Id.*

<sup>91</sup> Jeffrie G. Murphy, *Mercy and Legal Justice*, in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 162, 180–81 (1988).

<sup>92</sup> Barkow, *supra* note 19, at 1359–65. One could say something similar about the constricted role for mitigating factors that flow from an emphasis on equality of outcomes. Such factors are often based on difficult-to-quantify offender attributes like a poor upbringing, good works, family circumstances, and the like. For that reason, the U.S. Sentencing Guidelines clamped down on them in the name of reducing disparity, and some state systems limit their relevance to within a specified range. See *infra* notes 113–16116 and accompanying text. Conversely, the many states that continue to use traditional unstructured (indeterminate) sentencing leave all of these attributes and substantive values on the table. This approach is hospitable to the scholars who reject theorizing, those who embrace eclectic theories of punishment, and those whose theories require particularistic judgments. The latter category embraces not only restorative-justice and therapeutic-jurisprudence enthusiasts, but also virtue theorists like Kyron Huigens. See *supra* note 80.

tom-line outcomes. But laymen care about a good deal more. As we have argued elsewhere, the criminal justice system once did and could again make a point of promoting remorse, apology, forgiveness, and reconciliation throughout the criminal process.<sup>93</sup> One could say the same about treating victims and offenders with dignity and respect at sentencing, and giving each his day in court. But these considerations operate *ex post* in the context of adjudicating individual cases. They require context-specific judgments of real human beings in all their complexity and how the criminal process, and sentencing in particular, affects them. Because remorse, apologies, and respectful treatment occur after the crime and resist reduction to a formula, they appear to jeopardize the link between crimes and predictable, uniform punishments. They certainly do nothing to foster an outcomes-oriented approach to equality.

Finally, aiming at equalizing outcomes leaves little room for criminal justice reform movements like drug courts, therapeutic jurisprudence, and restorative justice. Their particularism and emphasis on process, qualitative variables, and individual defendants' needs can produce notably different outcomes for seemingly similar defendants. Some critics of drug courts rightly observe that discounting sentences based on defendants' personal circumstances undercuts equality of drug sentences and their general deterrent force.<sup>94</sup> But supporters of drug courts hardly view that objection as fatal. If the drug-court process of supervision and treatment reduces a defendant's addiction and future dangerousness, his greater rehabilitation and lesser need for specific deterrence and incapacitation may justify a lower sentence.<sup>95</sup> The two sides talk past each

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<sup>93</sup> Stephanos Bibas, *The Machinery of Criminal Justice* 6–13, 23–27, 159–62 (2012); Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 *Ohio St. J. Crim. L.* 329, 330, 347–48 (2007); Bibas & Bierschbach, *Integrating Remorse and Apology*, *supra* note 14, at 109–48 (2004).

<sup>94</sup> See, e.g., Kevin S. Burke, *Just What Made Drug Courts Successful?*, 94 *Judicature* 119, 123 (2010) (discussing criticisms that drug courts both exacerbate racial disparities and undermine incentives for compliance with drug laws); Hoffman, *The Drug Court Scandal*, *supra* note 87, at 1476–77 (2000) (arguing that drug courts result in a “half-crime approach to drug use” that undermines “the legitimate and rational interests of the law enforcement community”); Hoffman, *Therapeutic Jurisprudence*, *supra* note 87, at 2069 (arguing that drug courts wrongly reward “a defendant’s professed attitude adjustment” as opposed to “whether the defendant stops using drugs”).

<sup>95</sup> See, e.g., Burke, *supra* note 94, at 120 (explaining how defendants who successfully complete drug court treatment programs may have their sentences waived and their convictions expunged); Fan, *supra* note 86, at 179–80 (touting drug courts as among the most promising decarceration innovations because they give offenders incentives to succeed in addiction treatment in order to avoid prison).

other, to some extent, as each places different weight on different purposes of punishment. Casting the conversation in the language of equality of outcomes contributes to that state of affairs, obscuring which purpose of punishment should predominate while tacitly assuming that deterrence trumps everything else.

The same analysis holds true even for data-driven reforms like selective incapacitation based on clinical or actuarial risk prediction. Risk prediction often depends on factors such as education, employment history, drug use, and age that prove immensely controversial.<sup>96</sup> Some of the controversy is attributable to disparate racial impacts that correlate with the use of these factors, but some of it stems from uneasiness about varying sentencing outcomes that has nothing to do with race.<sup>97</sup> Despite incapacitative arguments for husbanding prison cells for the most dangerous offenders, equality objections to selective incapacitation have limited its adoption and popularity.<sup>98</sup> But arguments about equality of outcomes cannot by themselves explain whether the sentencing variations of selective incapacitation are good or rather unwarranted. To do that, one must answer the prior normative question whether, when it comes to sentencing, one should equalize risk management versus other arguably legitimate goals (like retribution). And to do that, one must appeal to independent moral, political, and policy considerations—such as irrelevance to a legitimate purpose of punishment, or impermissible use of unconstitutional sentencing considerations, or disproportionate impact on minority populations that have been disadvantaged from the get-go—instead of equality of outcomes itself. The most forceful and persuasive

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<sup>96</sup> See Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. Rev. 671, 687–90 (2015) (reviewing basics of clinical and actual risk-assessment tools in sentencing).

<sup>97</sup> See, e.g., *id.* at 693–718 (discussing equality and fairness objections to risk-based sentencing); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 Stan. L. Rev. 803, 817–42 (2014) (detailing criticisms of evidence-based sentencing, including various equality-based concerns); Devin Barrett, *Holder Cautions on Risk of Bias in Big Data Use in Criminal Justice*, *Wall St. J.* (Aug. 1, 2014), <http://www.wsj.com/articles/u-s-attorney-general-cautions-on-risk-of-bias-in-big-data-use-in-criminal-justice-1406916606> (warning that risk-based sentencing can “exacerbate unwarranted and unjust disparities”).

<sup>98</sup> See Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 Va. J. Crim. L. 1, 117 (2012) (discussing tension between selective incapacitation and equality); Alex R. Piquero et al., *The Criminal Career Paradigm*, 30 *Crime & Just.* 359, 381 (2003) (same).

equality arguments against selective incapacitation, like those of Sonja Starr, do just that.<sup>99</sup>

That does not mean that equalizing sentencing outcomes is necessarily misguided. If one emphasizes general deterrence (like Beccaria), general incapacitation, or retribution limited to the criminal act or harm, equalizing outcomes may follow naturally. It does mean, however, that sentencing needs to focus more on *why* we punish in order to figure out what to equalize and how vigorously to do so. How we operationalize equality in sentencing, in other words, should be subservient to exogenous moral and policy considerations. From the standpoint of the criminal law, one's substantive philosophy of punishment ordinarily would first establish what factors justify punishment, and to what extent. Those factors would specify which factors make cases alike along the relevant dimensions for purposes of ensuring equality. But with equality of outcomes as a baseline, the causal arrow appears, at least sometimes, to be reversed, letting equality dictate punishment philosophy rather than the other way around.<sup>100</sup>

That dynamic also underscores an important point about the tired equality-versus-individualization framework that too often falls by the wayside in criminal law and sentencing literature. To an extent, that debate in sentencing is a false dichotomy. Everyone agrees that the right factors need to be equalized and the wrong ones excluded. But people have a harder time agreeing which factors are irrelevant and how best to operationalize their views. If we could achieve perfect agreement on factors and could perfectly operationalize our consensus, then much of the equality-versus-individualization debate would fall away. If all punishments were perfectly individualized for all offenders, then no offender would be punished unequally vis-à-vis any other, at least in terms of outcomes.

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<sup>99</sup> See Starr, *supra* note 97, at 817–42; Sonja B. Starr, Op. Ed., *Sentencing*, by the Numbers, N.Y. Times, Aug. 10, 2014, at A17.

<sup>100</sup> One could maintain that the causal arrow *should* run in this direction—that is, that equality *should* dictate which punishment philosophies should be on the table, and that punishment philosophy should be subservient to exogenous equality considerations. Even that, however, does not get around the problem that one cannot determine how equality of outcomes should drive punishment philosophy without recourse to some foundational theory that provides guidance as to what makes cases relevantly alike or different for purposes of comparing outcomes. That theory need not be rooted in punishment philosophy, but it does need to exist.

When scholars and policy makers debate sentencing disparities against that backdrop, then, more is happening than meets the eye. Some of that debate implicates disagreements on how best to implement agreed-upon substantive approaches to sentencing. But much of it implicates underlying dissensus on questions of substance and, relatedly, the procedural and institutional structures that channel who resolves those questions and how. When we criticize disparate sentencing outcomes, what we often are criticizing is the reliance on the wrong or irrelevant factors, as well as the institutional arrangements that allow those factors to hold sway. In evaluating equality of outcomes in sentencing, it is thus critical to pay attention not just to substantive considerations. We must also focus on the institutional arrangements that drive sentencing variations and, as with underlying substantive concerns, the light they might cast on the normative status of any disparities they create. The next Part takes up that task.

## II. EQUAL OUTCOMES AND THE STRUCTURE OF SENTENCING

Just as a focus on equal outcomes can obscure issues of substance in sentencing, it also can obscure issues of institutional design: whose views should inform sentencing and how. This Part explores how an outcomes-based approach to sentencing equality tilts the institutional landscape of sentencing in ways that sit uneasily with other core principles of sentencing design. Section II.A looks at how a focus on equalizing outcomes leads to centripetal as opposed to centrifugal sentencing. It pushes sentencing power in to the center and up to higher levels of authority, leaving little room for the disaggregated and lower-level institutions that have long been seen as essential to just punishment. Section II.B explores how that oft-overlooked centralizing effect on sentencing stands in tension with principles of checks and balances and federalism. Those principles and the values underlying them have particular force in the context of sentencing, where a level of localism, pluralism, and communalism is practically built into our constitutional framework. That structural overlay complicates the picture for an approach to sentencing equality that aims at harmonizing outcomes, and brings normative nuance to aspects of sentencing variation that are commonly lumped together under the undifferentiated rubric of disparity.

*A. Centripetal versus Centrifugal Sentencing*

Equality of outcomes, by crowding out granular, ex post, and softer sentencing values in favor of more neutral, easily quantifiable metrics, also has institutional effects. When equality excludes the former in favor of the latter, it crowds out the institutional players that, in practice, are largely inseparable from them. In doing so, it privileges a centralized, often bureaucratic approach to sentencing over more decentralized and bottom-up approaches.

To see this, return for a moment to the equal-punishment versus individualized-punishment framework. As operationalized on the ground, individualized sentencing is typically disaggregated sentencing.<sup>101</sup> Classic sentencing decisions like *Woodson v. North Carolina*<sup>102</sup> and, more recently, *Miller v. Alabama*<sup>103</sup> reflect that notion. Both struck down mandatory sentencing statutes in light of the Eighth Amendment's constitutional imperative to ensure that the harshest penalties (death in *Woodson*, and life without parole for juveniles in *Miller*) are imposed only after contextualized, individualized assessments of blame.<sup>104</sup> In doing so, both shifted sentencing authority from legislatures to disaggregated groups of lower-level decision makers, including trial court judges and (ultimately, in capital cases) sentencing juries.<sup>105</sup> They also both directed sentencers to consider a wider range of sentencing factors and values—including, in capital cases, “any aspect of a defendant’s character or record”<sup>106</sup>—than those that mandatory-punishment statutes took into account.<sup>107</sup> More granular sentencing goals and values resist easy codification and weighting, and different disaggregated actors with differing perspectives might approach and apply them differently. Hence those actors might well reach different dispositions across objectively alike cases.<sup>108</sup> The result is disparity, or inequality of outcomes, in sentencing.

<sup>101</sup> See Bowers, *Legal Guilt*, supra note 16, at 1675 (noting that “discretionary regimes frequently rely on disaggregated decisionmaking”).

<sup>102</sup> 428 U.S. 280 (1976).

<sup>103</sup> 132 S. Ct. 2455 (2012).

<sup>104</sup> Id. at 2469; *Woodson*, 428 U.S. at 303 (plurality opinion).

<sup>105</sup> Richard A. Bierschbach, *Proportionality and Parole*, 160 U. Pa. L. Rev. 1745, 1770–71 (2012) (discussing the individualization principle of cases).

<sup>106</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

<sup>107</sup> Bierschbach, supra note 105, at 1767–70.

<sup>108</sup> See Bowers, *Legal Guilt*, supra note 16, at 1675–76; see also Gerken, *Second-Order Diversity*, supra note 17, at 1139 (discussing jury verdicts).

An outcomes-based approach to sentencing equality will be suspicious of such a disaggregated and devolved decision-making structure. To combat disparity, it will seek to centralize sentencing, pushing authority inward and upward to bodies like legislatures and sentencing commissions. That is, in fact, how states responded to *Furman v. Georgia*'s directive to eliminate arbitrariness, or unwarranted disparities, in sentencing.<sup>109</sup> Some state legislatures enacted mandatory or otherwise rigid capital punishment statutes that left little authority to lower-level sentencers, until *Woodson* and its progeny later held them unconstitutional.<sup>110</sup> That was also the modus operandi of the sentencing-reform movement that began in the 1970s and culminated in the widespread adoption of structured sentencing over the next few decades. Those systems often relied on centralized sentencing commissions to develop comprehensive guidelines to cabin and channel sentencing discretion.<sup>111</sup>

Guidelines vary considerably among jurisdictions, so making blanket pronouncements about them can be hazardous business. But generally, the more guidelines sought to equalize outcomes and minimize disparities, the more detailed and restrictive they were. Some guidelines systems, most notoriously, the Federal Sentencing Guidelines, were extraordinarily rigid, seeking to eliminate most disparities by eliminating possible differences of approach among the disaggregated judges who applied them.<sup>112</sup> The Federal Sentencing Commission emphasized “*uniformity* in sentencing . . . for similar criminal offenses committed by similar offenders.”<sup>113</sup> It defined similarity largely in terms of easily quantifiable factors that could be applied mechanistically, like the charges of conviction, drug amounts, and the offenders’ rap sheets. It minimized the importance of more qualitative “offender characteristics” like youth, mental or emotional condition, and family or community

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<sup>109</sup> 408 U.S. 238, 256 (1972) (Douglas, J., concurring).

<sup>110</sup> See *Lockett*, 438 U.S. at 604 (constitutionalizing a requirement of textured and granular sentencing in capital cases); *Woodson*, 428 U.S. at 303 (same); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 361–64, 375–78 (1995) (tracing the evolution of Eighth Amendment capital sentencing requirements aimed at promoting consistency).

<sup>111</sup> See *Sentencing Reform in Overcrowded Times: A Comparative Perspective* 6–8 (Michael Tonry & Kathleen Hatlestad eds., 1997) (describing the movement in the United States away from indeterminate sentencing regimes and toward guideline-based systems, which yielded sentencing commissions in nearly twenty-five jurisdictions by 1996).

<sup>112</sup> Stith & Cabranes, *supra* note 36, at 51 (noting that “the overriding statutory directive” imposed upon the U.S. Sentencing Commission was to “eliminate ‘unwanted disparity’”).

<sup>113</sup> U.S.S.G.M., § 1A1.3 (emphasis added).

ties.<sup>114</sup> That left sentencing judges very little room to contextualize sentences, leading to widespread criticism about the same kind of “false consistency” created by mandatory sentencing statutes.<sup>115</sup>

Other approaches, like those of Wisconsin or Kansas, gave front-line sentencers more leeway, either by making guidelines voluntary or by authorizing departures from presumed sentencing ranges on numerous grounds.<sup>116</sup> That approach leaves more wiggle room for variations, both good and bad, across cases. Whether one approach is better is beside the point. The point is that efforts to guarantee equality of outcomes correlate with centralized, monistic sentencing structures.

That centralization tamps down on variation in outcomes that may otherwise naturally result from the structures and processes of democratic self-government. Determining punishment is a deeply communal and moral act, one that implicates a wide range of values along with multifarious and competing purposes of punishment.<sup>117</sup> Different actors will apply and reconcile those values differently depending on their institutional perspectives, the level of government at which they operate, their community's particular norms, and so forth. As many of the Court's sentencing decisions acknowledge, sentencing thus requires and benefits from a range of judgments: some expert, some lay; some at a high level of abstraction, some more concrete; and some early in the process, some late.<sup>118</sup> As those cases further illustrate, sentencing thus intersects with

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<sup>114</sup> See *id.* § 1B1.1(a)(1), (6); *id.* § 1B1.2(a); *id.* ch. 4, pt. A; Douglas A. Berman, Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms, 58 *Stan. L. Rev.* 277, 281–85 (2005) (“The new sentencing philosophies and goals reflected in the Federal Sentencing Guidelines and mandatory sentencing statutes have emphasized offense conduct at sentencing and have limited judges’ opportunity to consider offender characteristics.”).

<sup>115</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); see Stith & Cabranes, *supra* note 36, at 95–97, 104–06; Tonry, *supra* note 7, at 72–89.

<sup>116</sup> See Nora V. Demleitner et al., *Sentencing Law and Policy* 152–54 (3d ed. 2013) (providing an overview of state guidelines systems and discussing Kansas approach); Neal B. Kauder & Brian J. Ostrom, *State Sentencing Guidelines: Profiles and Continuum* 12, 27 (2008) (discussing sentencing guidelines in Kansas and Wisconsin).

<sup>117</sup> See Bierschbach & Bibas, *Constitutionally Tailoring Punishment*, *supra* note 14, at 427–29; Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401, 401 (1958) (arguing that because criminal justice pursues a wide array of competing values and objectives, none of which wholly exclude the others, criminal law choices demand “multivalued rather than . . . single-valued thinking”).

<sup>118</sup> See Bierschbach & Bibas, *Constitutionally Tailoring Punishment*, *supra* note 14, at 430–34; see also Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 *Minn. L. Rev.* 1, 20–24 (2012) [hereinafter Bierschbach & Bibas, *Notice-and-Comment Sentencing*] (noting similar inputs in the agency context); Hart, *supra* note 117, at

other constitutional principles of institutional design, such as checks and balances and federalism, that routinely play central roles in other public law fields. The next section turns to that intersection and explores what it means for sentencing equality's outcomes-focused approach.

### *B. Horizontal and Vertical Sentencing*

The interaction of sentencing equality with structural constitutional principles like checks and balances and federalism is rich, complex, and understudied.<sup>119</sup> This Section explores those interactions along two different axes of sentencing design: horizontal, by which we mean how sentencing power is divided among all of the different actors who have (or could have) input into sentencing decisions; and vertical, by which we mean how sentencing power is divided among different levels of governance, from national or state down to local and neighborhood. Along each axis, we show how these principles and the values underlying them have special force in the sentencing context, intersecting with its pluralist and localist dimensions in ways that complicate an outcomes-oriented conception of sentencing equality.<sup>120</sup>

#### *1. Horizontal Design: Checks and Balances*

Real-world sentencing involves a host of institutional actors across each branch of government, each of which has its own unique competencies. Some, like legislatures, sentencing commissions, and (perhaps to a lesser extent) appellate courts, are well-suited for bringing an ex ante, high-level, centralized perspective to bear on questions of punishment. Legislatures can rank categories of crimes and group broadly alike cases alike. In theory, as Jenia Iontcheva Turner states, they are also the best body for “mak[ing] difficult choices among opposing moral and

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402 (noting that the value trade-offs inherent in criminal justice “do not present themselves . . . in an institutional vacuum,” and that criminal justice must thus incorporate a complex of institutions and institutional ends).

<sup>119</sup> See Rachel E. Barkow, Clemency and Presidential Administration of Criminal Law, 90 N.Y.U. L. Rev. 802, 840 (2015) (noting that “criminal law scholarship in general has paid relatively little attention to core structural constitutional checks and their relationship to criminal law administration”).

<sup>120</sup> To be clear, we do not claim that the Constitution requires particular sentencing institutions; we are not, for instance, making an argument for or against putting *Apprendi v. New Jersey*, 530 U.S. 466 (2000), on steroids. Our more modest claim is that centripetal sentencing is in tension with vertical and horizontal dimensions of sentencing that are both constitutionally and normatively important to sentencing's institutional structure.

ideological viewpoints” on punishment,<sup>121</sup> although in reality they often gloss over such issues. Sentencing commissions can in theory do the same, as well as establish more detailed guidance, gather and track data, and generate resource-impact assessments on the costs of various sentencing options.<sup>122</sup> Appellate judges’ birds-eye perspective allows them to spot differences in treatment that might not be seen by front-line sentencers with narrower fields of view.

Other actors are better suited to making individualized, *ex post*, granular judgments. Juries and sentencing judges (when not hemmed in by restrictive statutes and guidelines) fall into this category. So too do probation officers, parole boards, and upstream actors like prosecutors, who have huge influence over sentencing through deciding what crimes to charge and what plea bargains to strike. From the standpoint of separation of powers, each has its own sphere of competence and authority. Ideally, each exercises discretion to contextualize sentencing by weighing competing values from its own unique perspective.<sup>123</sup>

But like legislatures and sentencing commissions, each also has its own limitations. Juries more than any other actor reflect and embody community values. But their lack of training and experience might make them more prone to certain biases and less situationally aware of how a punishment fits within the larger sentencing framework.<sup>124</sup> Judges might be more situationally aware but also more “overconditioned” and accordingly less appreciative of complexities and moral nuances.<sup>125</sup> Parole boards, probation officers, and even governors (through clemency) are well-positioned to evaluate personal growth and moral reform. But they

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<sup>121</sup> Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311, 350 (2003).

<sup>122</sup> See Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 Yale L.J. 1773, 1786 (1992) (discussing the sentencing commissions’ use of resource-impact statements to help craft guidelines intended to “distribut[e] punishment under conditions of scarcity”).

<sup>123</sup> See Barkow, *Recharging the Jury*, *supra* note 20, at 35–39; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1053–54 (2006) [hereinafter Barkow, *Separation of Powers*]; Bierschbach & Bibas, *Constitutionally Tailoring Punishment*, *supra* note 14, at 413–15.

<sup>124</sup> Barkow, *Recharging the Jury*, *supra* note 20, at 74 (“It is of course possible that the jury might exercise this discretionary power in undesirable ways, that ‘the wishes and feelings of the community’ might be the kind of popular prejudice that is troubling.” (footnote omitted)); Iontcheva, *supra* note 121, at 354 (acknowledging that jury sentencing is criticized on grounds that “juries’ lack of expertise and experience result in disparate and systematically biased sentences and heavy financial burdens on the judicial system”).

<sup>125</sup> *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); see Iontcheva, *supra* note 121, at 353.

too can be overconditioned and risk-averse, succumbing to incentives to avoid any danger of recidivism instead of taking a chance on a deserving individual.<sup>126</sup> Prosecutors have the perspective and power to balance individual blameworthiness against systemic demands. But their decisions often turn on legalistic habits of charging and plea bargaining that are exacerbated by incentives to clear cases quickly.<sup>127</sup>

Moreover, left to its own devices, each of these institutions is also prone to generating disparities in sentencing outcomes between seemingly alike offenders, raising concerns about arbitrariness or bias. Like other institutions that implement policy through myriad disaggregated, low-level discretionary decisions (think, for example, of police officers), each is suspect in equality terms. One could, for that reason, narrowly restrict these actors and privilege legislatures, sentencing commissions, and other centralized sentencing institutions. But that would sit uneasily with the notion that each of these actors nevertheless has something unique and necessary to contribute. It also would sit uneasily with the even more fundamental constitutional notion that centralized, unchecked power is dangerous, in sentencing as elsewhere.<sup>128</sup>

The Court's sentencing case law reflects this. Though it acknowledges the value of equality at sentencing, the Court's sentencing cases do not embrace a simple institutional arrangement. Instead, the Constitution relies upon checks and balances to give content to the notion of just punishment. Over the last four decades, the Court has repeatedly intervened whenever one sentencing institution has arrogated too much power to itself or pushed sentencing toward an aggregated and homogenized cen-

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<sup>126</sup> See *Graham v. Florida*, 560 U.S. 48, 73 (2010) (treating review by parole board as critical to adequately considering juveniles' potential for growth, maturity, and personal transformation); W. David Ball, *Normative Elements of Parole Risk*, 22 *Stan. L. & Pol'y Rev.* 395, 397–98 (2011) (discussing incentives of parole boards to avoid any risk whatsoever in making release decisions).

<sup>127</sup> See Bowers, *Legal Guilt*, *supra* note 16, at 1701–02. Further complicating matters, head prosecutors as well as many judges are elected, which may make them risk-averse and too sensitive to transient waves of popular opinion. See, e.g., Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 *Ohio St. J. Crim. L.* 581, 597–606 (2009) (discussing campaign pressures facing prosecutors).

<sup>128</sup> See Thomas Lundmark, *Power & Rights in U.S. Constitutional Law* 93 (2d ed. 2008) (“[F]or federal structures like the one in the United States . . . [t]he most frequent justification is roughly the same as the policy underlying the principle of separation of powers: division of the monopoly on governmental powers to avoid tyranny, caprice, and oppression.”). As Rachel Barkow notes, “the Constitution’s separation of powers takes on greater significance in the criminal context because it provides the only effective check on systemic government overreaching.” Barkow, *Separation of Powers*, *supra* note 123, at 1053.

ter, whether in the name of reducing disparities or otherwise. The *Woodson/Lockett/Eddings* trilogy and *Miller* are examples.<sup>129</sup> So too is *Graham v. Florida*, which fragmented sentencing power by spreading out sentencing discretion horizontally and temporally, from judges and prosecutors at the front end of sentencing to parole boards at the back end.<sup>130</sup> The Court's watershed decision in *Apprendi v. New Jersey* revitalized juries as a powerful check on the sentencing authority of legislatures, prosecutors, and judges.<sup>131</sup> Post-*Apprendi* decisions like *Blakely v. Washington*,<sup>132</sup> *United States v. Booker*,<sup>133</sup> *Rita v. United States*,<sup>134</sup> and *Kimbrough v. United States*<sup>135</sup> further diffused power. They invalidated binding guidelines, freed sentencing judges to consider a wider range of factors and policy considerations through reasoned variances at sentencing, and prompted more give-and-take among sentencing judges, appellate courts, and sentencing commissions.<sup>136</sup>

These interventions have rested on varied interpretive and constitutional grounds—formalism and functionalism, the Sixth Amendment and the Eighth. Because of that, commentators do not view them together, lumping cases like *Graham* and *Miller* into the doctrinal box of proportionality while separately treating *Apprendi* and its ilk as an unrelated line of right-to-jury cases. But collectively they embody an elementary principle of institutional design for sentencing: No one institutional player should hold all the cards. A multiplicity of inputs is required both

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<sup>129</sup> *Woodson*, 428 U.S. 280; *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Miller*, 132 S. Ct. 2455; see supra notes 102–07, 110 and accompanying text.

<sup>130</sup> *Graham*, 560 U.S. at 81–82 (prohibiting sentencing juvenile nonhomicide offenders to life in prison without the possibility of parole); see Bierschbach, supra note 105, at 1779–81 (describing how *Graham* shifted authority from front-end to back-end sentencers).

<sup>131</sup> 530 U.S. 466, 494, 497 (2000) (emphasizing the jury's role in authorizing a particular maximum punishment in a particular case by its guilty verdict); Stuntz, *The Collapse of American Criminal Justice*, supra note 15, at 30, 304 (discussing the jury's checking role); Laura I. Appleman, *The Plea Jury*, 85 Ind. L.J. 731, 750–68 (2010) (same).

<sup>132</sup> 542 U.S. 296 (2004).

<sup>133</sup> 543 U.S. 220 (2005).

<sup>134</sup> 551 U.S. 338 (2007).

<sup>135</sup> 552 U.S. 85 (2007).

<sup>136</sup> See *id.* at 111; *Rita*, 551 U.S. at 354–55; *Booker*, 543 U.S. at 259–65; *Blakely*, 542 U.S. at 304–05; see also *Pepper v. United States*, 131 S. Ct. 1229, 1247–50 (2011) (permitting district courts to consider evidence of post-sentencing rehabilitation at resentencing); Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1667–81 (2012) (explaining how *Booker* and its progeny have fostered interbranch dialogue on federal sentencing policy, “permitting the courts to communicate with the Commission (and with each other) in a transparent and effective manner”).

to give content to the notion of just punishment, with its competing purposes, values, and tradeoffs, and to guard against unfair or otherwise undesirable decisions by any one actor.<sup>137</sup> An outcomes-focused conception of equality bent on centralizing sentencing and reducing discretion is in tension with this checks-and-balances approach.

## 2. Vertical Design: Federalism and Localism

The centralization that results from striving to equalize outcomes is also in tension with federalism values that inhere in sentencing's disaggregated structure. Federalism, for all of its relevance to institutional design, is not much discussed in contemporary sentencing scholarship.<sup>138</sup> When it is, it usually is in the context of Eighth Amendment proportionality jurisprudence. Debates revolve around how and when the Constitution should limit states' democratic processes when it comes to authorizing capital and other serious punishments for certain crimes.<sup>139</sup>

<sup>137</sup> See Bierschbach & Bibas, Constitutionally Tailoring Punishment, *supra* note 14, at 398–401, 405–16, 423–36 (discussing constitutional principles of institutional design inherent in Court's sentencing decisions); Bowers, Legal Guilt, *supra* note 16, at 1724 (arguing that criminal justice could be conceived “as a gauntlet of independently functioning switches,” and that “[t]he suspect who runs the . . . gauntlet and finds himself convicted and punished is likely to be the kind of person for whom conviction and punishment is normatively appropriate”); cf. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power.”). Conversely, efforts to homogenize sentences by centralizing power can backfire, as when mandatory-minimum sentencing laws give prosecutors unchecked power to charge-bargain away those supposedly uniform sentences.

<sup>138</sup> For some (comparatively rare) examples of discussions, see Michael M. O’Hear, National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities, 87 *Iowa L. Rev.* 721, 723–25 (2002); and Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 *Colum. L. Rev.* 1276, 1278 (2005). For examples of criminal justice federalism articles beyond the sentencing context, see Doron Teichman, The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition, 103 *Mich. L. Rev.* 1831, 1832 (2005); Wayne A. Logan, Horizontal Federalism in an Age of Criminal Justice Interconnectedness, 154 *U. Pa. L. Rev.* 257, 258–60 (2005); Robert A. Mikos, Preemption Under the Controlled Substances Act, 16 *J. Health Care L. & Pol’y* 5, 8 (2013); and Lauren M. Ouziel, Legitimacy and Federal Criminal Enforcement Power, 123 *Yale L.J.* 2236, 2239 (2014).

<sup>139</sup> See, e.g., Eric Berger, In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making, 88 *Wash. U. L. Rev.* 1, 70–75 (2010); Michael J. Zydney Mannheimer, Cruel and Unusual Federal Punishments, 98 *Iowa L. Rev.* 69, 87–90 (2012); see also *Graham*, 560 U.S. at 101 (Thomas, J., dissenting) (“[T]he Court intrudes upon areas that the Constitution reserves to other (state and federal) organs of government. . . . [T]he Eighth Amendment leaves the unavoidably moral question of who ‘deserves’ a particular nonprohibited method of punishment to the judgment of the legisla-

Such debates epitomize the conventional approach to federalism discourse, which emphasizes the political lines of sovereignty in terms of national power versus state autonomy.<sup>140</sup> The history of those debates when it comes to equality, broadly conceived, has not always been pretty. Federalism, so understood, has often been invoked to shield discriminatory state action from national interference. That helps to explain why, insofar as equality in sentencing implicates race, local criminal justice variation is presumptively suspect. Equality arguments pressed back against that history, pushing power inward and upward to the federal government in the service of national norms. That federal-state tug-of-war is in keeping with how the Warren Court expanded incorporation doctrine to reform criminal procedure over the federalist objections of the states.<sup>141</sup>

But that is neither the tension nor the aspect of federalism that we have in mind. The dimension of federalism to which we refer goes beyond states to encompass the local and sublocal sites on the front lines of governance. It shares much in common with what Heather Gerken calls “federalism all the way down,”<sup>142</sup> but one also could call it “normative” or “localist” federalism, or perhaps even simply “localism.”<sup>143</sup> We acknowledge that none of these theories is exactly like the others, and we do not mean to play too fast and loose with labels.<sup>144</sup> Nor do we

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tures that authorize the penalty . . . .”); *Atkins v. Virginia*, 536 U.S. 304, 321–24 (2002) (Rehnquist, C.J., dissenting) (stating that the majority’s method was “antithetical to considerations of federalism”).

<sup>140</sup> See Gerken, *Federalism All the Way Down*, *supra* note 17, at 11–21 (discussing ongoing influence of the “sovereignty” account of federalism).

<sup>141</sup> See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (incorporating Fifth Amendment privilege against self-incrimination into Fourteenth Amendment’s protections against the states); see generally Wayne R. LaFare et al., *Criminal Procedure* § 2.6(b)–(d), at 70–75 (5th ed. 2009) (discussing selective incorporation of criminal procedure protections and corresponding federalism concerns).

<sup>142</sup> Gerken, *Federalism All the Way Down*, *supra* note 17, at 8.

<sup>143</sup> Richard Briffault, “What About the ‘Ism’?” Normative and Formal Concerns in Contemporary Federalism, 47 *Vand. L. Rev.* 1303, 1317 (1994).

<sup>144</sup> “Federalism all the way down,” for instance, focuses on the way in which the localist dimensions of federalism can enhance and bolster national ends. See Gerken, *Federalism All the Way Down*, *supra* note 17, at 22. “Normative federalism” focuses on the way in which the values of federalism can be enhanced by devolving power beyond states to the local level. See Briffault, *supra* note 143, at 1316–17. Localism also seeks to devolve power to the local level, but it is less concerned with advancing federalism values in doing so. Localism, with its preference for local over state power, can in fact come into conflict with a conventional federalism, which favors strengthening the autonomy of the states vis-à-vis the national government. See *id.*

mean to defend or debate any one of these theories from the ground up. Scholars like Gerken, Richard Briffault, and many others have done and still do so extensively. For our purposes here, it suffices to note that all of these accounts focus on how localized actors well below the state level serve to further federalism's underlying values. These local actors include not just cities but zoning commissions, school boards, municipal court judges, homeowners' associations, business improvement districts, and a host of other discrete, special-purpose institutions. They serve goals of federalism that include checking tyranny, promoting political participation, reflecting diversity, improving government responsiveness, and advancing innovation and experimentation.<sup>145</sup>

Gerken and others have shown how devolution and disaggregated decision making common to low-level institutions serve these and related goals. Much of that scholarship limits itself to classic issues of local government law (like the constitutional place of municipalities within our federal structure<sup>146</sup>) or to discrete policy-making areas outside of criminal justice (like environmental law or securities regulation<sup>147</sup>). But not all of it does. Gerken herself, for instance, extensively discusses juries, explaining how, collectively, they function as a “tool for aggregation—of community judgments, interpretations of the law, whatever democratic judgments we think juries render—when we cannot all sit at the same table to hash out such questions.”<sup>148</sup> Juries enhance citizens' participatory experiences and increase incentives for those with opposing viewpoints to listen to each other. And they act as a vital means of achieving “second-order diversity,” infusing decisions with minority views that might have lost out at the ballot box and teeing up issues for larger state or national debate.<sup>149</sup> Ethan Leib brings a localist perspective to the field of statutory interpretation. He argues that locally elected judges interpreting state statutes appropriately give a “local flavor” to

<sup>145</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); Briffault, *supra* note 143, at 1312.

<sup>146</sup> See, e.g., David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 *Yale L.J.* 2218, 2220 (2006); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 *Va. L. Rev.* 959, 961 (2007).

<sup>147</sup> See, e.g., David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 *Minn. L. Rev.* 1796, 1796 (2008); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 *Nw. U. L. Rev.* 1097, 1099 (2009); Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 *Conn. Ins. L.J.* 107, 109 (2005).

<sup>148</sup> Gerken, *Second-Order Diversity*, *supra* note 17, at 1138.

<sup>149</sup> See *id.* at 1126–28.

those statutes, reflective of “local courts’ sense of local norms and the interests of the local population.”<sup>150</sup> That is especially so, he claims, when dealing with “[c]ontentious issues” that “may be susceptible to diverse interpretations.”<sup>151</sup> And within criminal justice, as Richard Schragger writes, discussions of policing strategies (from broken-windows to community policing) have long invoked localist arguments about the “specific needs of unique communities” and the ability of “[n]eighborhood-level governments [to] tailor their policies and allocate resources more efficiently than can larger governments.”<sup>152</sup> Those arguments are premised in part, he notes, on the notion that local communities provide a space in which individuals can arrive at shared values by engaging in negotiation over collective norms.<sup>153</sup>

Sentencing has so far flown below the radar of these debates. That it has done so is somewhat strange. In practice, individualized and disaggregated sentencing decisions are also by and large localized sentencing decisions. The judges, juries, prosecutors, and other criminal justice actors who determine punishment are often locally elected or otherwise cognizant of local interests. Yet contemporary sentencing scholars have failed to draw the connection, even though the individualization-versus-equality framework still colors much thinking in the field. Scholars typically do not view sentencing as analogous to other areas of regulation or governance (think land use or environmental law) that occupy federalism and local-government-law scholars.<sup>154</sup> Instead, they often approach it as pure theory, turning on claims about the ends and purposes of punishment that are removed from structural questions.

The assumption in all of this is that punishment should not turn on local views. It should not, as observers sometimes put it, depend on the

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<sup>150</sup> Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. Pa. L. Rev. 897, 919, 925 (2013).

<sup>151</sup> *Id.* at 927.

<sup>152</sup> Schragger, *supra* note 18, at 381; see, e.g., Meares & Kahan, *supra* note 18, at 198 (arguing that the Warren Court’s top-down, judicially enforced individual rights approach to criminal procedure has outlived its usefulness and is impeding reform in an era of greater minority enfranchisement and new approaches to community policing).

<sup>153</sup> Schragger, *supra* note 18, at 398–99.

<sup>154</sup> David Ball’s excellent work on the relationship between local criminal justice and the use of state prisons is a notable exception. See 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. U. L. Rev. 987, 990–91 (2012); Ball, *Why State Prisons?*, *supra* note 12, at 78.

fortuity of where one happens to commit a crime.<sup>155</sup> Once one moves past sentencing disparities based on impermissible factors like race, many other sentencing disparities about which scholars complain—such as those between different counties or prosecutorial districts in the same state or between sentences imposed by individual judges—are stuck in what Gerken characterizes as a sovereignty model of federalism.<sup>156</sup> That model views the political lines of states (and, to a lesser extent, cities) as the only lines that count. That is why, while intrastate sentencing disparities are frequently criticized on equality grounds, interstate disparities—say, one state taking a completely different approach to sentencing drug dealers than a neighboring state—rarely are.

The picture is more complicated when one looks beyond the sovereignty model to see the sources of those disparities as sources of localized power. Think again of sentencing judges, juries, prosecutors, probation officers, and the like. Disaggregating sentencing through such actors furthers many of the federalism values that scholars have touted outside the sentencing context. It makes sentencing flexible and responsive, letting front-line sentencers tailor punishments based on circumstances unique to the offender's and community's needs, much as drug and other problem-solving courts aim to do.<sup>157</sup> It is diverse, as juries, judges, prosecutors, and other locally embedded actors infuse sentencing determinations with local values that might vary from one place to an-

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<sup>155</sup> See Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 *Stan. L. Rev.* 85, 100 (2005) (citing Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 *Suffolk U. L. Rev.* 1027, 1028 (1999)).

<sup>156</sup> Gerken, *Federalism All the Way Down*, *supra* note 17, at 11–21 (discussing “ghost of sovereignty” in contemporary federalism scholarship (capitalization omitted)).

<sup>157</sup> Variations in outcomes have long been seen as a virtue of such “democratic experimentalist” approaches to law, which allow locally tailored solutions to legal issues to emerge from the bottom up, with the hope that successful approaches can then be taken and adapted to other communities' needs as circumstances dictate. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 401–02 (1998) (describing how drug court judges evaluate a wealth of information to determine “whether and how treatment may be more appropriate than prison”); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 *Vand. L. Rev.* 831, 832 (2000) [hereinafter Dorf & Sabel, *Drug Treatment Courts*] (describing how drug court judges closely monitor defendants' performance in treatment programs, which are selected by assessing their needs and possibilities); see also Greg Berman, *What Is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 *Judicature* 78, 78 (2000) (explaining that problem-solving courts “seek to use the authority of courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities”).

other.<sup>158</sup> It reinforces social solidarity, evaluating wrongs in order to underscore in the community's mind what is right and what is blameworthy.<sup>159</sup> It is participatory, requiring citizens and criminal justice institutions to engage with the realities of cases. That up-close engagement shapes judgments concerning desert and other punishment issues, as Paul Robinson and his coauthors have shown.<sup>160</sup> It also provides a useful feedback loop, leaving room for dissent, difference, and pluralistic approaches to hashing out difficult issues of punishment. At the same time, it aggregates community judgments at higher levels and generates information and dialogue that can foster innovation and reform.<sup>161</sup> One might even argue that the arguments and observations of Gerken, Leib, and Schragger should have special purchase at sentencing, with its lack of easy policy answers, difficult moral tradeoffs, and inextricable connection to community norms.

These themes, too, appear in the Court's sentencing cases. Dissenting in *Blakely*, Justice Kennedy stressed the importance of "recurring dialogue" between different levels of government acting as "laboratories

<sup>158</sup> See Leib, *supra* note 150, at 908–09 (discussing local judges' consideration of local needs and issues at sentencing). While that is most true in state systems, with their locally elected officials, it is even true to some degree in the federal system. See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 *Mich. L. Rev.* 519, 526 (2011) ("U.S. [A]ttorneys . . . are more responsive to local interests" than the U.S. Department of Justice in Washington, D.C. because "[t]hey are typically drawn from the district in which they serve, and they necessarily pay attention to the local values and practices . . . U.S. [A]ttorneys and federal judges in a district are also more likely than Main Justice to take into account the attitudes and values of local juries . . . ." (footnotes omitted)).

<sup>159</sup> Reinforcing social solidarity, according to Emile Durkheim, is perhaps the central mission of criminal justice. Emile Durkheim, *The Division of Labor in Society* 60–64 (W.D. Halls trans., The Free Press 1984) (1893); see also Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *Va. L. Rev.* 349, 363–66 (1997) (discussing criminal law's relationship to social meaning and social norms).

<sup>160</sup> See Robinson & Darley, *supra* note 77, at 57–66 (explaining how intuitions about punishment might change when individuals attempt to fit new factual scenarios into existing belief structures); Robinson et al., *supra* note 77, at 815–25 (showing how exposure to the particular factual details of a case, including "extralegal punishment factors," influences intuitions about punishment); cf. Gerken, *Federalism All the Way Down*, *supra* note 17, at 32 (observing that "[j]uries' decisions . . . give us a more fine-grained read on where the People stand" than do legislatures', as "[l]egislatures make law at some distance from individual cases," whereas juries do in the context of real-life victims and defendants, "unmediated by political parties or electoral politics").

<sup>161</sup> David Ball discusses similar "process" benefits—including transparency, sincerity, experimentation, and comportment with Sixth Amendment values—that would flow from forcing local governments as opposed to state governments to shoulder the costs of prison usage. See Ball, *Why State Prisons?*, *supra* note 12, at 109–14.

for innovation and experiment[ation]” in sentencing.<sup>162</sup> The tie between localism and sentencing is clearest in the Court’s jury cases, with their emphasis on the jury’s prerogatives to check overzealous government officials and give content to community values.<sup>163</sup> Justices Stevens and Breyer have even argued that the Eighth Amendment requires jury sentencing in capital cases precisely because of the jury’s ability to safeguard against the imposition of morally inappropriate sentences by bringing community norms to bear.<sup>164</sup> But if the jury’s ability to apply community standards is to have any actual meaning, juries must be able to vary in applying statewide capital statutes, no matter how much we try to guide jury discretion. Justice Breyer acknowledged as much in *Ring v. Arizona*.<sup>165</sup> The diversity of views among American communities on capital punishment, he emphasized, “argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate.”<sup>166</sup> Yet that same diversity of opinion also creates disparity in outcomes, which is a major criticism of juries both inside and outside of criminal justice.<sup>167</sup>

This constitutional overlay to localism in sentencing sets it apart from other areas of criminal justice as one where attention to localist values is especially important. One could, after all, extend many of the points above to argue for more devolution in other areas of criminal justice, including procedural rights or substantive crime-definition. Whether and how much to do so is beyond the scope of this Article, although we briefly flag some scholars’ movements in those directions below.<sup>168</sup> But when it comes to sentencing, the notion of disaggregated decision making and some degree of normative variation at the local level is practical-

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<sup>162</sup> *Blakely*, 542 U.S. at 327 (Kennedy, J., dissenting) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>163</sup> See *supra* notes 131–36 and accompanying text (discussing the *Apprendi* line of cases).

<sup>164</sup> See *Ring v. Arizona*, 536 U.S. 584, 613–19 (2002) (Breyer, J., concurring in the judgment); *Harris v. Alabama*, 513 U.S. 504, 515–26 (1995) (Stevens, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 467–90 (1984) (Stevens, J., concurring in part and dissenting in part).

<sup>165</sup> 536 U.S. 584.

<sup>166</sup> *Id.* at 618 (Breyer, J., concurring in the judgment) (observing that “[m]any communities may have accepted some or all” arguments against the death penalty and that “more than two-thirds of American counties have never imposed the death penalty since *Gregg v. Georgia*, 428 U.S. 153 (1976)”).

<sup>167</sup> Gerken, *Second-Order Diversity*, *supra* note 17, at 1165.

<sup>168</sup> See *infra* notes 178–79 and accompanying text (discussing community policing), 180–81 and accompanying text (discussing *City of Chicago v. Morales*, 527 U.S. 41 (1999), and procedural constitutional rights), and 182 (discussing municipal criminal codes).

ly baked into our constitutional framework—in the corpus of decisions and principles discussed above, and in more workaday constitutional rules like the Sixth Amendment rights to local venue and a jury based on a fair cross-section of the community.<sup>169</sup>

We do not want to overstate the case or to paint too rosy a picture of the federalist and localist dimensions of sentencing. Not all of the institutions that have a hand in sentencing reliably work well to channel local values. Prosecutors sometimes succumb to their own incentives or professional tunnel vision. Judicial elections can foster a tough-on-crime approach based on a sensationalist case. “Community” views might be badly fractured or, worse, reflect privileged over disadvantaged voices.<sup>170</sup> Feedback loops do little good unless sentencers offer reasoned explanations for what they are doing and why, and others actually take note. Our aim is not to defend a robustly localist approach to sentencing, let alone to argue that it is somehow constitutionally compelled. Rather, we simply want to suggest that we need at least as compelling justifications to write off the benefits of local variation at sentencing as we do in other contexts. Those justifications might exist, but we should determine what they are, and whether they are actually objections to variation or something else—whether concerns about arbitrariness, bias, dysfunctional local politics, or what have you.

### III. EQUAL SENTENCING WITHOUT EQUAL SENTENCES

If equality of outcomes crowds out key goals and values of punishment, and if it is in tension with core principles of sentencing design, what does that say about its status as our main marker of sentencing fairness? It would be foolish to abandon all concern with outcomes when it comes to fairness in sentencing. Consistency is a weighty value in and of itself. And, as we discuss more below, disparity and variation can be important proxies for more worrisome factors at play, especially race.

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<sup>169</sup> U.S. Const. amend. VI (guaranteeing public trial by “an impartial jury of the State and district wherein the crime shall have been committed”); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“[W]e accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment . . .”).

<sup>170</sup> See Schragger, *supra* note 18, at 471 (examining the normative dimension of the concept of “community” in localism and showing how it can be used to “reinforce existing distributions of crime, municipal resources, and social, economic, and symbolic capit[a]l”); see also *supra* note 22 (noting definitional difficulties with the concept of “community”).

At the same time, this Part argues, when it comes to outcomes, sentencing might better account for the fact that not all inequalities are created equal. More flexible notions of equality in sentencing might better respect the range of competing considerations discussed in the preceding Parts while still policing punishments for bias or arbitrariness. Section III.A shows how a more elastic, less outcomes-driven approach to equality is consistent with the norms and practices that govern much of criminal justice outside of sentencing. Section III.B demonstrates how that insight adds nuance to equality debates around restorative justice, California's recent Realignment initiative, and federal use of fast-track plea agreements. All three are examples of sentencing practices that simultaneously generate significant outcome disparities while giving effect to many oft-excluded substantive, procedural, and institutional values. Section III.C qualifies the limits of our analytical account and addresses some concerns about sorting good disparities from bad ones while still leaving room for legitimate variation in punishment.

#### *A. Process, Variation, and Punishment*

To question the conception of equalizing outcomes in sentencing is not to question commitment to the concept of equality itself in sentencing. As we noted at the outset, one can conceive of equality in a variety of ways. We do not here offer a lengthy account or precise definition of what those other approaches to equality might be. Our goal is less to defend alternative conceptions of sentencing equality than to highlight the underappreciated costs and normative complexities inherent in focusing primarily on outcomes. What we can say, though, is that instead of focusing so much on outputs, many alternative conceptions of sentencing equality would focus more on inputs and process.<sup>171</sup> Such process-driven conceptions of equality try to promote equal treatment by making deci-

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<sup>171</sup> But not all of them would. One could, for instance, imagine a substantive antisubordination approach to sentencing equality that takes into consideration the need to address race- and class-based inequalities that are rooted in our social structure and that infect the entire criminal justice system. Cf. Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 *Colum. Hum. Rts. L. Rev.* 261, 284–85 (2007) (arguing that “[i]f we see capital punishment, mass incarceration, and police terror as modern extensions of a caste system . . . that continues to subjugate black people, eliminating racial bias from the criminal justice system requires their abolition,” and that abolition “opens the possibility of creating alternatives to prison as the dominant means of punishment, as well as alternatives to criminal punishment as a dominant means of addressing social inequities”); *infra* notes 188–90.

sion making transparent and inclusive, in order to check excess, abuse, and caprice. They regulate the structures of decision making, not what comes out of it.

To take a few examples, Vincent Chiao, Josh Bowers, David Strauss, and other scholars have defended an *ex ante* approach to equality in criminal justice that seeks to equalize defendants' *ex ante* probabilities of being arrested, convicted, and sentenced in rough proportion to their desert.<sup>172</sup> As Chiao explains it, so long as chances are "roughly equaliz[ed]," and so long as a system takes some care to ensure that discrete groups do not bear disproportionate risks of worse results, the system may, consistent with the notion of treating like cases alike, leave punishment to fall where it may.<sup>173</sup> That is true even for identical cases, even though disparities in punishment for identically situated defendants might feel essentially random from the defendants' perspectives.<sup>174</sup> Gerken contends that arguments for "federalism all the way down," while leading to unequal outcomes in individual cases, nevertheless might foster a more systemic, "rough-and-tumble" vision of equality that recognizes the dignity in allowing minority viewpoints to hold sway.<sup>175</sup>

Such alternative approaches to sentencing equality would better recognize and respect legitimate normative variations in punishment. Different counties, cities, neighborhoods, and communities might weigh the values and tradeoffs of punishment differently and stand for different things, especially where those communities are cohesive and stakehold-

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<sup>172</sup> See Bowers, *Legal Guilt*, *supra* note 16, at 1677–78; Chiao, *supra* note 4; David A. Strauss, *Must Like Cases Be Treated Alike?* 14–15 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory, Working Paper No. 24, 2002), [http://ssrn.com/abstract\\_id=312180](http://ssrn.com/abstract_id=312180) [<https://perma.cc/K47X-6Y5M>]; see also Whitman, *supra* note 44, at 141–42 (noting with approval that when it comes to equality in criminal justice, Continental jurisdictions, in contrast with American ones, seek to ensure preconviction equality in investigation, arrest, and prosecution as opposed to postconviction equality in punishment).

<sup>173</sup> Chiao, *supra* note 4, at 306, 331.

<sup>174</sup> See, e.g., Strauss, *supra* note 172, at 21, 23–26 (arguing that "different outcomes" are defensible even in cases without "a morally relevant difference" as long as the outcomes are products of "a justifiable system" and "reasonably just institutions"); see also Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* 72 (1999) (arguing that randomness is permissible and even appropriate "where decision-makers struggle with indeterminacies"); David Lewis, *The Punishment that Leaves Something to Chance*, 18 *Phil. & Pub. Affairs* 53, 58–62 (1989) (tentatively defending "penal lotteries").

<sup>175</sup> Gerken, *Federalism All the Way Down*, *supra* note 17, at 53. Gerken is speaking specifically to the issue of racial equality, but her point generalizes to minority or heterogeneous viewpoints that go beyond race, as she herself recognizes. See *id.* at 57 (noting that "federalism all the way down" applies to "decisionmaking bodies of every sort").

ers exercise real voice.<sup>176</sup> Different sentencers—judges, juries, prosecutors striking plea deals—might contextualize and sentence the same crimes differently, particularly in heterogeneous communities. To use Bowers’s illustration, one sentencer might consider undeserving of punishment a homeless man without easy access to a safe public restroom who urinates in a deserted alley. Another might view him blameworthy and an appropriate object of sanctions, given the impact of his act on a public space and the need to deter similar actions.<sup>177</sup> Different people can reasonably disagree about how to weight substantive values or how best to implement them in a specific case. For reasons discussed in Part II, such variations in values or tactics are arguably legitimate, with upsides that are often overlooked in the face of the disparities they generate.

The point generalizes to other crimes and sentencers, both at the front and back ends of the process. Because sentencing is highly contextual and normative, different decision makers inevitably bring different evaluative frameworks to bear on even identical cases. But that does not make all disparities suspect, as there are a host of countervailing factors to consider.

Focusing solely on disparities also begs the question of why substantive outcomes have to be the measure of sentencing equality in the first place. Rough-and-tumble approaches to equality have long underlain other aspects of criminal justice, like community policing and community prosecution. A main goal of those movements, as Anthony Alfieri puts it, is to “advance the civic and dignitary interests of victims, offenders, and communities of color” by injecting community norms, priorities, and values into policing and prosecution through street-level collaboration with criminal justice officials.<sup>178</sup> Doing so can create neighborhood-to-neighborhood disparities in arrests, prosecutions, and, ultimately, punishments for identical conduct that violates the same citywide ordinances or statewide statutes. Scholars like Debra Living-

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<sup>176</sup> For a cautionary note about the circumstances under which this truly will be the case, see Schragger, *supra* note 18, at 444–59 (discussing problems with the “participatory defense” of localism).

<sup>177</sup> Bowers, *Legal Guilt*, *supra* note 16, at 1675–76.

<sup>178</sup> Anthony V. Alfieri, *Community Prosecutors*, 90 *Calif. L. Rev.* 1465, 1469 (2002).

ston, for example, contend that policing should be geographically tailored to the norms of specific streets.<sup>179</sup>

Proponents of those movements ordinarily see that normative variation as a virtue, not a vice, despite the variations in outcomes it produces. That was a chief argument of the supporters of Chicago's Gang Congregation Ordinance in *Chicago v. Morales*: that the ordinance resulted from the efforts of the inner-city, high-crime neighborhoods in which it was implemented, and that those communities should have special autonomy to adopt norms that are responsive to local conditions.<sup>180</sup> Although the Supreme Court struck down the statute on vagueness grounds, some scholars have criticized the result. They argued that the federal courts should defer to community norms even when they diverge from independent constitutional guarantees (an argument we do not make here) because local communities are best positioned to trade off liberty and order in light of local circumstances.<sup>181</sup> Doing so empowers local citizens, improving their buy-in and the law's legitimacy and support.

Even more fundamentally, unequal outcomes are endemic to all of criminal justice, not just sentencing. One police officer might detain a jaywalker while another does not. One prosecutor might divert a low-level drug case while another insists on a guilty plea. One victim might decline to press charges; another might press for the maximum. Zooming the lens out, some municipalities might expansively prohibit "quality of life" offenses, with related impacts on everything from Fourth Amendment privacy to forfeiture of motor vehicles; others might take a

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<sup>179</sup> Livingston, *supra* note 11, at 560–62; see also Robert C. Ellickson, Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning, 105 *Yale L.J.* 1165, 1167–85 (1996) (arguing for geographically specific norms and community standards as a basis for policing).

<sup>180</sup> 527 U.S. 41, 46–47 (1999); see Brief Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner at 5, *Morales*, 527 U.S. 41 (No. 97-1121), 1998 WL 328366, at \*5.

<sup>181</sup> *Morales*, 527 U.S. at 64; see Meares & Kahan, *supra* note 18, at 209–10 (arguing that the Warren Court's top-down, judicially enforced individual rights approach to criminal procedure has outlived its usefulness and is impeding reform in an era of greater minority enfranchisement and new approaches to community policing); Mark D. Rosen, Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community, 77 *Tex. L. Rev.* 1129, 1138 (1999) (criticizing the state supreme court holding in *Morales* on the ground that it "overlooked geographical nonuniformity"). But see Schragger, *supra* note 18, at 374 (critiquing localist arguments in defense of the Chicago ordinance).

more hands-off approach.<sup>182</sup> Some jurisdictions might legalize marijuana use; others might criminalize it. Some of these differences might be attributable to varying normative approaches to any number of underlying issues: criminalization, resource allocation, and perspectives on blame and punishment. Others might seem random, attributable to dumb luck: nothing more than jaywalking in the wrong place at the wrong time. In neither case, though, do we ordinarily insist on equality of outcomes. Our usual approach instead is similar to Chiao's.<sup>183</sup> So long as the differences are a product of a justifiable institutional design, we let the chips fall where they may.<sup>184</sup>

Why should sentencing be any different? One might try to argue that outcomes should matter more in sentencing because sentencing outcomes, unlike others, are uniquely and inherently coercive. But that is a difference of degree, not kind. Arrest patterns, prosecutorial charging decisions, and towns' and cities' decisions about how to regulate primary conduct are also coercive, sometimes severely so.<sup>185</sup> Even if one could draw a line based on degree, that line would be false. That is because arrests, charging decisions, primary conduct rules, and other early-stage criminal justice decisions are just as critical, if not more so, to the substantive penalties that cash out at sentencing as is the sentencing process itself. Wrongdoers who never get arrested, or whose cases get dismissed, get sentences of zero, while those who get arrested, charged, prosecuted, and convicted get much heavier sentences for the same crime. In a world of plea bargaining, mandatory minimum sentences, and sentencing

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<sup>182</sup> For an extensive treatment of how such municipal regulation intersects with criminal justice, see Logan, *supra* note 48.

<sup>183</sup> Chiao, *supra* note 4, at 306, 331.

<sup>184</sup> As Judge Posner puts it, objecting to “ex post inequality among offenders . . . is like saying that all lotteries are unfair because, ex post, they create wealth differences among the players. . . . [T]he criminal justice system . . . and the lottery are fair so long as the ex ante costs and benefits are equalized among the participants.” Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 *Colum. L. Rev.* 1193, 1213 (1985); see also John Rawls, *A Theory of Justice* 75–76 (1971) (arguing that a series of fair bets necessarily will produce a “distribution of cash after the last bet that is fair, or at least not unfair, whatever that distribution is”); Bowers, *Legal Guilt*, *supra* note 16, at 1677–78 (similarly arguing that “there is no persuasive reason why equal treatment must be measured according to substantive outcomes only”).

<sup>185</sup> To see this, one need only look at some of the arguments against the ordinance in the *Morales* case. Opponents argued, among other things, that they no longer felt free to engage in a wide range of incontestably innocuous behavior—such as, to use Justice Stevens' example, loitering outside Wrigley field in hopes of glimpsing Sammy Sosa leaving the ballpark, see 527 U.S. at 60—in light of the power that the ordinance conferred upon the police.

guidelines, prosecutorial charging and bargaining decisions are huge determinants of sanctions.<sup>186</sup> Because sentencing is a pipeline in which decisions upstream greatly influence punishment determinations downstream, requiring substantive equality of outcomes at sentencing requires substantive equality of arrests, charges, and most other criminal justice decisions as well.<sup>187</sup>

That same feature also forecloses any argument that equalizing outcomes at sentencing is needed to correct upstream disparities that have infected the criminal justice pipeline earlier in the process. Sentencing cannot do that when those earlier decisions cabin downstream punishments themselves. Indeed, equalizing outcomes at sentencing locks in earlier unequal decisions to arrest, charge, and plea bargain, much as the inability to bring disparate-impact claims under the Equal Protection Clause allows facially neutral state action to lock in pre-existing inequalities of race and class.<sup>188</sup> A number of studies suggest that, with so much determined at the front end through arrest, charging, and plea bargaining, tamping down on discretion at sentencing in an attempt to equalize back-end outcomes might on the whole just make things worse.<sup>189</sup> Paradoxically, if that is true, then what is needed to achieve equality of punishment throughout the system as a whole might be more back-end inequalities of certain kinds, not less. At the very least, the system would need to retain flexibility through sentencing at the back end to counteract potentially flawed decisions at the front.<sup>190</sup> Locking down discretion

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<sup>186</sup> See Bierschbach & Bibas, Notice-and-Comment Sentencing, *supra* note 118, at 36–37 (unpacking the relationship of upstream decisions to downstream punishments).

<sup>187</sup> Cf. Whitman, *supra* note 44, at 146 (decrying the false equality that results in a system that imposes “theoretically uniform” punishment on offenders while tolerating “a high risk of arbitrary treatment in the processes of investigation, prosecution, and determination of guilt”).

<sup>188</sup> See Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 *Stan. L. Rev.* 1111, 1144–46 (1997).

<sup>189</sup> E.g., Sonja B. Starr & M. Marit Rehavi, Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of *Booker*, 123 *Yale L.J.* 2, 77–80 (2013); M. Marit Rehavi & Sonja B. Starr, Racial Disparity in Federal Criminal Sentences, 122 *J. Pol. Econ.* 1320, 1334–45 (2014). Other studies suggest the opposite. E.g., Susan R. Klein & Jordan M. Steiker, The Search for Equality in Criminal Sentencing, 2002 *Sup. Ct. Rev.* 223, 232.

<sup>190</sup> The late Bill Stuntz put it well when noting how vague substantive standards that impart discretion to juries and judges can help to equalize the criminal justice playing field by counteracting potentially unequal decision making by prosecutors: “[W]hen prosecutors have enormous discretionary power, giving other decisionmakers discretion promotes consistency, not arbitrariness. Vague legal lines give more discretion to juries and trial judges.

at sentencing might prevent the system from becoming even *more* unequal at that stage of the process. But it also leaves no room to make things better, and, by formally addressing equality concerns so late in the game, it might impart a false sense of having dealt with the problem to boot.<sup>191</sup>

None of this is to say that comparative outcomes do not matter to sentencing. Nor is it to suggest that sentencing should be a free-for-all in which almost any value judgment goes. Like other criminal justice decisions, sentencing cannot be based on factors that offend independent constitutional principles like equal protection. In that vein, sentencing might conceptually borrow from the tiers of equal-protection scrutiny.<sup>192</sup> Variations based on racial, ethnic, or religious bias or implicating fundamental rights, of course, receive strict scrutiny and are almost always unconstitutional. Variations based on sex or illegitimacy would receive intermediate scrutiny, but may survive if related to an important state interest. For instance, mitigating sentences for custodial parents might disparately help mothers, but that could be justifiable if they are the sole or primary caretakers of their children.<sup>193</sup> Other variations are less trou-

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Discretion limits discretion; institutional competition curbs excess and abuse.” Stuntz, *supra* note 15, at 304. The same logic could apply to giving useful feedback to legislatures and sentencing commissions about the substance of sentencing itself. Cf. *United States v. VandeBrake*, 771 F. Supp. 2d 961, 1011 (N.D. Iowa 2011) (acknowledging that the court’s upward departure from the “Sentencing Guidelines’s relatively lenient treatment of antitrust violations when compared to fraud sentences” would “understandably result in a sentencing disparity between the defendants here and those sentenced previously,” but concluding that “the disparity is entirely warranted in order to reflect the seriousness that Sherman Act violations pose to the well-being of the nation”).

<sup>191</sup> Cf. Steiker & Steiker, *supra* note 110, at 435 (arguing that the extensive constitutional regulation of the death penalty has done little to advance equality while simultaneously legitimating capital punishment by leaving sentencers “with a false sense that their power is safely circumscribed”).

<sup>192</sup> See generally Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 Mich. L. Rev. 459, 461 (2010) (explaining how doctrines and rationales may be imported “from one area of constitutional law into another for persuasive ends”).

<sup>193</sup> See Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 St. Louis. U. L.J. 113, 114, 159 (2009) (discussing the “best interests of the child standard” as a compelling state interest (capitalization omitted)); see also Lanette P. Dalley, *Imprisoned Mothers and Their Children: Their Often Conflicting Legal Rights*, 22 Hamline J. Pub. L. & Pol’y 1, 16–17 (2000) (arguing that “there is a disproportionately negative impact on . . . children from maternal incarceration than from paternal incarceration” because, unlike when fathers are incarcerated, “when mothers are imprisoned, the[ir] children are often left inadequately cared for”).

As a matter of positive law, given how narrowly the Supreme Court has construed the concept of sex classifications, whether a sentencing practice like this one would trigger in-

bling, though wealth-based ones still deserve attention given *Gideon v. Wainwright*'s effort to achieve at least minimally equal justice for rich and poor.<sup>194</sup> But, all else being equal, there is much less reason to fear geographic variation, say, than racial bias.<sup>195</sup>

Sentences likewise should adhere to some rough norms of consistency and proportionality—one prosecutor or judge's treating an action as a misdemeanor while a neighboring prosecutor or judge treats the identical action as a capital offense would certainly be unfair no matter how normative and well-reasoned the divergence.<sup>196</sup> Prosecutorial decisions that influence sentencing variations currently do not face even rational-basis scrutiny; they could stand a little more review, perhaps for abuse of discretion.<sup>197</sup> And we might worry about even consistent and constitutionally permissible normative variations in sentencing if they generate intolerable spillovers or undermine larger and clearly established criminal justice policies resulting from well-functioning political processes.<sup>198</sup> One community should not be able to externalize the costs of its sentencing preferences onto others or to discrete and insular groups, nor should sentencing be an excuse to flout applicable substantive law with

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intermediate as opposed to rational basis scrutiny is far from certain. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274–80 (1979) (rejecting equal protection challenge to a state veterans' preference statute after finding that, even though the law overwhelmingly worked to favor men over women in state employment, it did not amount to a sex-based classification that would trigger heightened scrutiny); *Geduldig v. Aiello*, 417 U.S. 484, 494–95 (1974) (holding that unemployment insurance classification of work loss from normal pregnancy as a noncompensable event was not a sex-based classification under the Fourteenth Amendment's Equal Protection Clause).

<sup>194</sup> 372 U.S. 335, 344 (1963).

<sup>195</sup> In some circumstances, of course, geography can be an important proxy for race.

<sup>196</sup> Cf. Bernard E. Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtue of Randomization*, in *Criminal Law Conversations* 163, 167–70 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) (arguing that it is permissible for criminal justice to “turn to the lottery” in making punishment decisions so long as punishments remain within reasonable ranges).

<sup>197</sup> Cf. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657, 1669 (2004) (acknowledging that prosecutorial decisions not to indict “ha[ve] long been regarded as the special province of the Executive Branch,” but arguing that analogous administrative agency decisions not to enforce nevertheless should be subject to arbitrary and capricious review (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985))).

<sup>198</sup> See, e.g., Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 Stan. L. Rev. 115, 119 (2010) (linking the contours of constitutional federalism to the minimization of spillovers).

which sentencers disagree.<sup>199</sup> But in operationalizing these and other qualifications, we should better account for the fact that outcomes are not talismanic, and that disparities in punishment can carry benefits as well as costs. Even random variations may amount to natural experiments, serving as fodder for empirical researchers seeking to learn what works best.

### B. *Experiments in Unequal Outcomes*

Considering the benefits as well as the costs of disparity casts equality critiques of many sentencing practices and policies in a more productive light. We consider three illustrations here: restorative justice, California's recent Realignment initiative, and federal fast-track programs for processing large volumes of immigration and drug crimes, primarily along the southwestern border. Each has been the target of the conventional equality-of-outcomes critique. And each illuminates the limits of that framework and how it can obscure the upsides of sentencing variations and useful normative appraisal of the forces—whether substantive, procedural, or institutional—that drive them.

#### 1. *Restorative Justice*

Restorative justice is a sentencing-reform movement involving “a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.”<sup>200</sup> It focuses on victims, offenders, and affected community members and it can be intensely personal. Offenders are encouraged to apologize and to repair the harm they have caused, with the hope of healing and reconciliation between the victim, offender, and the community of which they are a part.<sup>201</sup>

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<sup>199</sup> See *id.* at 164 (citing the concern that “medical marijuana use in California makes it more difficult to police drug traffickers at the Arizona border” as an example of a potential spillover problem that pushed against deference to the local substantive criminal law at issue in *Gonzales v. Raich*, 545 U.S. 1 (2005)).

<sup>200</sup> John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, in 25 *Crime and Justice: A Review of Research* 1, 5 (Michael Tonry ed., 1999) (internal quotation marks omitted) (quoting definition of restorative justice formulated by Tony Marshall).

<sup>201</sup> See Bibas & Bierschbach, *Integrating Remorse and Apology*, *supra* note 14, at 103 (discussing the basic tenets of restorative justice).

It is easy to see how seeking to equalize outcomes leaves little room for a sentencing approach like this. Restorative justice's emphasis on the particular defendant's and victim's human relationships stands at odds with mechanistically equalizing punishments. The same is true of therapeutic jurisprudence's efforts to teach and heal each offender holistically. Outcomes-based equality reasoning abstracts from individual cases, while restorative justice and therapeutic jurisprudence are intensely particularistic. Choosing to equalize outcomes thus means forgoing the healing and reconciliation envisioned by those movements, because of their "high potential for giving similar offenders strikingly disparate treatment" based on the idiosyncrasies of their victims or the communities in which their crimes occur.<sup>202</sup> Supporters of restorative justice typically grasp this nettle. They embrace the individualized, tailored, highly contextualized approach to sentencing that restorative justice involves, and they stand ready to sacrifice uniformity of outcomes in doing so.<sup>203</sup>

But framing the debate as uniformity versus individualization or pro-equality versus anti-equality misses a much subtler point: The two sides are using equality arguments differently to emphasize different aspects of criminal justice. As Michael O'Hear perceptively explains, restorative justice opponents often treat equality as making outcomes equal and predictable *ex ante*, before anyone commits a crime.<sup>204</sup> That ensures that potential offenders and others have fair warning and can be deterred. They also frequently emphasize making sentences retributively proportional to each crime's *actus reus* and *mens rea*, no matter the victim's or community's views. Restorative justice conflicts with both of these approaches to equalizing outcomes because it depends substantially on what happens after a case enters the criminal justice system.<sup>205</sup>

Supporters of restorative justice highlight other ways to frame equality that are better served by this principle. Equality could mean treating cases equally once they enter the criminal justice system. It could mean proportioning punishments to the complete range of purposes they serve,

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<sup>202</sup> David Dolinko, *The Practice of Restorative Justice: Restorative Justice and the Justification of Punishment*, 2003 *Utah L. Rev.* 319, 331; accord Paul H. Robinson, *The Practice of Restorative Justice: The Virtues of Restorative Processes, the Vices of "Restorative Justice,"* 2003 *Utah L. Rev.* 375, 381.

<sup>203</sup> Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 *Utah L. Rev.* 413, 433; Dolinko, *supra* note 202, at 331–34 (discussing John Braithwaite's views).

<sup>204</sup> O'Hear, *supra* note 3, at 309–12.

<sup>205</sup> *Id.*

so offenders who are equally blameworthy, equally contrite, and equally amenable to reform et cetera are treated equally. It could mean treating offenders with equal dignity, respect, and autonomy.<sup>206</sup> Or it could even mean treating victims equally as well by factoring in their losses, suffering, and need for restoration. To traditional retributivists or deterrence theorists, these alternative approaches to equality are obviously wrong if not nonsensical.<sup>207</sup> But that bewilderment just goes to show how deeply an outcomes-focused approach to equality has colored the restorative justice debate.

Exposing the contestable nature of equality arguments in restorative justice does not make that debate go away. But it does free us up to focus on the issues that the conventional equality framing is driving underground. Those might have to do with which purposes of punishment and sentencing values are legitimate. They might have to do with the theoretical justification for according victims' views any weight in criminal justice in general, and sentencing in particular.<sup>208</sup> They might have to do with practical concerns about doing so, especially concerns about conscious and unconscious bias that can infect interpersonal interactions between victims and their offenders.<sup>209</sup>

Confronting those issues more directly might at least allow for more clear-eyed assessments of the costs, benefits, justifications, and limitations of restorative practices. Seeing victims not as idiosyncratic determinants of defendants' fates but as another locus of diversity in the chain of "federalism all the way down" could point up a further (albeit controversial) justification for including them at sentencing.<sup>210</sup> Similarly,

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<sup>206</sup> *Id.* at 319–24.

<sup>207</sup> See Dolinko, *supra* note 202, at 331–34 (expressing bewilderment at Braithwaite's inclusion of victims as watering down defendants' right to equal punishments).

<sup>208</sup> See, e.g., Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance, and the Role of Government*, 27 *Fordham Urb. L.J.* 1599, 1601–05 (2000); Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 *Legal Theory* 113, 115–22 (2008).

<sup>209</sup> See Susan A. Bandes, *Remorse and Demeanor in the Courtroom: Cognitive Science and the Evaluation of Contrition* 13–26 (DePaul Legal Studies Research Paper Series, Paper No. 14-05, 2016), <http://ssrn.com/abstract=2363326> [<https://perma.cc/WZU9-PA9Z>] (detailing how implicit bias can affect perceptions and evaluations of defendants' remorse, contrition, and similar emotions and expressions, and how such bias is especially worrisome across cultural, ethnic, and racial lines).

<sup>210</sup> See Gerken, *Federalism All the Way Down*, *supra* note 17, at 22 n.59 (noting that "[i]n theory, we could push federalism down to private associations, even individuals"); see also Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 *Fordham L. Rev.* 769, 781–93 (2006) (laying out such an account outside the context of restorative justice).

seeing differences between victims in restorative justice as no different from other differences between victims that routinely influence outcomes—think of the classic “eggshell” victim—might complicate arguments about the legitimacy of using restorative processes that result in varied outcomes. Focusing on bias might lead one to search for and more rigorously analyze specific constructive reforms, like better training for conference facilitators and better preconference preparation for victims, defendants, and other participants in restorative processes.<sup>211</sup> Such measures will do little to harmonize outcomes. But, in addition to minimizing bias, they could bring a host of other benefits that laypersons embrace as essential to sentencing fairness, including greater accountability, legitimacy, and realization of many of the softer values and goals of sentencing, both procedural and substantive.<sup>212</sup>

## 2. *Realignment*

In 2011, the California legislature enacted AB 109, the Public Safety Realignment Act, popularly known as “Realignment.”<sup>213</sup> Realignment responded to the Supreme Court’s decision earlier that year in *Brown v. Plata*, which ordered California to reduce its state prison population to 137.5% of design capacity within two years to relieve extreme overcrowding that had led to violations of the Eighth Amendment.<sup>214</sup> It did so by transferring responsibility for large numbers of low-level felons—those convicted of nonviolent, nonserious, and nonsexual crimes (or “triple nons”)—from the state prison and parole system to the local jails and probation officers of California’s fifty-eight counties. Each county receives state funding to deal with its offenders, and each is given nearly

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<sup>211</sup> For a thoughtful recent examination of some aspects of bias in restorative justice and constructive approaches to addressing it, see generally Meredith Rossner, *Just Emotions: Rituals of Restorative Justice* 1–14 (2013).

<sup>212</sup> See Robinson, *supra* note 202, at 375–77 (discussing various benefits of restorative processes); Rossner, *supra* note 211, at 25–26 (connecting the perceived fairness of restorative justice procedures to the increased legitimacy of the state and of sanctions); ; see also Tom R. Tyler, *Why People Obey the Law* 3–7 (2006) (discussing the importance of procedural justice to respect for criminal justice system).

<sup>213</sup> S.B. 89, 2013 Leg., Comm. on Budget & Fiscal Review (Cal. 2013); A.B. 109, 2011–2012 Leg., Reg. Sess. (Cal. 2011); see also A.B. 117, 2011 Leg., Comm. on Budget (Cal. 2011); A.B. 118, 2011 Leg., Comm. on Budget (Cal. 2011).

<sup>214</sup> 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*).

unfettered discretion to design its own punishment policies.<sup>215</sup> By forcing counties to internalize the costs of conviction and sentencing, Realignment seeks to mitigate what Frank Zimring and Gordon Hawkins famously called the problem of the “correctional free lunch”: namely, that states pay for prisons, but local prosecutorial and sentencing decisions fill them.<sup>216</sup> And by keeping offenders closer to their families, social groups, and community-based services and support networks, it also aims to take a more holistic approach to punishment that better promotes rehabilitation and reentry and, ultimately, reduces recidivism.<sup>217</sup>

Several years into Realignment, scholars are furiously gathering data on what *The Economist* dubbed “one of the great experiments in American incarceration policy.”<sup>218</sup> But already one thing is clear: Realignment is spawning notably disparate approaches to punishment among and within California’s counties. Counties vary enormously in how they spend their Realignment funds, using jail time, treatment, reentry services, prevention, and a host of other penal policies at widely different rates and in widely different ways.<sup>219</sup> For example, an offender convict-

<sup>215</sup> See Petersilia, *supra* note 214, at 327 (providing an overview of Realignment).

<sup>216</sup> Franklin E. Zimring & Gordon Hawkins, *The Scale of Imprisonment* 140 (1991); see also Ball, *Why State Prisons?*, *supra* note 12, at 78–79 (discussing the problem and placing it in historical perspective).

<sup>217</sup> Cal. Penal Code § 17.5 (Deering 2008 & Supp. 2016) (encouraging use of “locally run community-based corrections programs”); see also *id.* § 17.5(a)(8) (mentioning restorative justice, home detention, and work release plans as examples of appropriate alternative community-based sanctions); Jessica Spencer & Joan Petersilia, *Voices from the Field: California Victims’ Rights in a Post-Realignment World*, 25 *Fed. Sent’g Rep.* 226, 229 (2013) (“One of the driving theories behind Realignment was that officials closer to an offender’s community would be able to watch them more closely and offer better rehabilitative services than the more detached, state-level government, with the ultimate goal of reducing recidivism and victimization.”).

<sup>218</sup> *Prison Overcrowding: The Magic Number*, *Economist*, May 11, 2013, at 32; see also Petersilia, *supra* note 214, at 327 (calling Realignment “a prison downsizing experiment of historical significance”); Aaron J. Rappaport, *Realigning California Corrections*, 25 *Fed. Sent’g Rep.* 207, 207 (2013) (“[Realignment] is probably the greatest de-incarceration experiment in American history . . .”).

<sup>219</sup> See Sara Abarbanel et al., *Stanford Criminal Justice Ctr., Realigning the Revolving Door: An Analysis of California Counties’ AB 109 2011-2012 Implementation Plans 18–20* (2013), <http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/183091/doc/slspublic/Realigning%20the%20Revolving%20Door%20with%20updates%20for%2058%20counties%20080113.pdf> [<https://perma.cc/X6BM-PKG3>]; Jeffrey Lin & Joan Petersilia, *Follow the Money: How California Counties Are Spending Their Public Safety Realignment Funds* (Stanford Criminal Justice Ctr., Working Paper No. 2012-IJ-CX-0002, 2014), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/443760/doc/slspublic/Lin%20Money%20Final%20Report%20022814.pdf> [<https://perma.cc/2YTS-HYLQ>].

ed in Yuba County is roughly six times more likely to spend time in local jail than is an offender convicted in Sierra County.<sup>220</sup> When one accounts for the fact that localities can continue to choose state prison for “triple nons” with serious records and for certain “wobbler” offenses, the disparities increase even more.<sup>221</sup> Jail experiences are also diverging more after Realignment, with Realignment funding jailhouse Reentry Pods and Alternative Sentencing Planners in one county while it might fund the expansion of a more traditional command and control facility in the next.<sup>222</sup> So too are other significant determinants of punishment, like whether and which evidence-based practices and risk-assessment tools counties use in tailoring sanctions.<sup>223</sup> Commentators have decried the resulting disparities in outcomes as unequal “justice by geography.”<sup>224</sup> As one critic puts it, after Realignment, “A defendant who victimizes five separate people with identity fraud in Los Angeles is bound to be treated

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<sup>220</sup> See Magnus Lofstrom & Steven Raphael, Pub. Policy Inst. of Cal., *Impact of Realignment on County Jail Populations* 17 (2013), [http://www.ppic.org/content/pubs/report/R\\_613MLR.pdf](http://www.ppic.org/content/pubs/report/R_613MLR.pdf) [<https://perma.cc/C8LG-LAGE>].

<sup>221</sup> Mike Males and Lizzie Buchen, for example, report that even after accounting for county size and arrest rate, felons arrested in San Joaquin County are five times as likely to be sent to state prison as are those arrested in San Francisco County. Mike Males & Lizzie Buchen, *Ctr. on Juvenile & Criminal Justice, Research Brief, Beyond Realignment: Counties' Large Disparities in Imprisonment Underlie Ongoing Prison Crisis* 4 (2013), [http://www.cjcj.org/uploads/cjcj/documents/beyond\\_realignment\\_march\\_2013.pdf](http://www.cjcj.org/uploads/cjcj/documents/beyond_realignment_march_2013.pdf) [<https://perma.cc/G8D3-QSQT>]. Statewide, their findings show a range of 2.5% state prison usage (San Francisco County) to 24% state prison usage (Kings County). *Id.* When one looks at “triple non-violent” offenders with serious records, the disparity jumps even more. *Id.* at 5 (finding a 35:1 disparity in state prison usage for drug offenses between Kings County and Contra Costa County).

<sup>222</sup> See Abarbanel et al., *supra* note 219, at 55–57 (describing use of realignment funding for expanding existing jails and reopening closed jail space); Petersilia, *supra* note 214, at 350 (noting “[p]rogressive sheriffs’” use of their state jail construction funds to build jails having “space for more programming with an eye towards reentry planning”); Wendy S. Still, *San Francisco Realignment: Raising the Bar for Criminal Justice in California*, 25 *Fed. Sent'g. Rep.* 246, 248–49 (2013) (citing examples of Reentry Pods and Alternative Sentencing Planners in San Francisco).

<sup>223</sup> See Abarbanel et al., *supra* note 219, at 41–43 (cataloging each county’s evidence-based practices and risk-assessment tools after Realignment); Susan Turner & Julie Gerlinger, *Risk Assessment and Realignment*, 53 *Santa Clara L. Rev.* 1039, 1042, 1045–47 (2013) (noting that Realignment “virtually ignores risk,” and reviewing counties’ different approaches to evidence-based practices and risk-assessment tools).

<sup>224</sup> Males & Buchen, *supra* note 221, at 1.

differently than the one who commits the same crimes in San Francisco. Is this equal protection of the law?"<sup>225</sup>

From our perspective, it could be. At the very least, the answer is more complicated than the question suggests. Realignment illustrates why it is crucial to cut through generalized outcomes-based rhetoric and focus on what exactly is troubling about sentencing variation. One concern might be that similarly situated offenders should not receive different treatment simply by virtue of the county they happen to be in when they violate a state statute. But that argument, which emphasizes equality of outcomes within sovereign state lines, runs directly into the localist design of Realignment itself.<sup>226</sup>

A key notion behind the statute was that counties should have discretion to design sentencing around local priorities, preferences, and needs.<sup>227</sup> This means that some counties, like San Francisco, might take a more progressive approach to sentencing that emphasizes treatment, rehabilitation, reintegration, and many of the other factors that often are lost in rigid outcomes-focused equality regimes. Others, as Jeffrey Lin and Joan Petersilia have shown, choose to put resources into more traditional incapacitative or deterrence-driven approaches to punishment.<sup>228</sup>

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<sup>225</sup> Lisa Rodriguez, *Criminal Justice Realignment: A Prosecutor's Perspective*, 25 *Fed. Sent'g Rep.* 220, 222 (2013). Rodriguez's criticism is interesting because, unlike most outcomes-focused critiques of sentencing, it appears to turn on equality of outcomes for victims as opposed to defendants.

<sup>226</sup> Even were this not the case, absent recourse to an unjustified sentencing exception, it is hard to see how Realignment's disparate sentencing outcomes are any more suspect in equality terms than are other disparate outcomes that flow from different county- and city-level approaches to statewide legal issues, both within and outside of criminal justice. The Los Angeles County and San Francisco Police Departments, for instance, undoubtedly approach a host of statewide criminal justice issues very differently, and have done so since long before Realignment. Treatment of low-level marijuana offenses is one example. See Daniel Macallair & Mike Males, *Ctr. on Juvenile & Criminal Justice, Marijuana Arrests and California's Drug War: A Report to the California Legislature, 2010 Update* (2010), [http://www.cjcj.org/uploads/cjcj/documents/Marijuana\\_Arrests\\_and\\_Californias\\_Drug\\_War-2010\\_Update.pdf](http://www.cjcj.org/uploads/cjcj/documents/Marijuana_Arrests_and_Californias_Drug_War-2010_Update.pdf). [<https://perma.cc/FZU4-M6H3>]; see also Office of the Attorney Gen., State of Cal. Dep't of Justice, *CJSC Statistics: Arrests*, <https://oag.ca.gov/crime/cjsc/stats/arrests> [<https://perma.cc/8RPU-SM3C>] (reporting California misdemeanor arrest rates from 1999 through 2008).

<sup>227</sup> See Petersilia, *supra* note 214, at 328 ("Realignment . . . allows each county unprecedented flexibility and authority to . . . manage realigned offenders in a way that makes the most sense locally."); cf. Stephen F. Smith, *Localism and Capital Punishment*, 64 *Vand. L. Rev. En Banc* 105, 110 (2011) ("[T]he most important benefit of localism in criminal justice [is] its tendency to make the enforcement of criminal law more responsive to the values, priorities, and felt needs of local communities.").

<sup>228</sup> Lin & Petersilia, *supra* note 219, at 5, 12–13, 21.

In enacting Realignment, the California legislature consciously meant to encourage that very flexibility, innovation, experimentation, and hence, variation in sentencing, with all of its attendant costs and benefits. The purpose of the statute, in short, was to allow for—if not create—beneficial intercounty disparities in the sentencing treatment of statewide crimes.

Perhaps unsurprisingly given the speed with which it was conceived and rolled out, Realignment has suffered from, and continues to suffer from, implementation and planning-related issues,<sup>229</sup> and the data is still too new to draw any firm conclusions. Even so, based on early returns, and despite and even because of the sentencing disparities it has created, its benefits already appear to be significant. They include marked cost savings coupled with reductions in recidivism in some counties, greater interbranch and interagency collaboration, more effective experimentation with evidence-based sentencing practices, and the creation of dozens of innovative and bottom-up reentry programs that, as Petersilia explains, “will undoubtedly serve as incubator sites and pilot tests for scaling up of successful interventions.”<sup>230</sup>

At the same time, looking beyond outcomes to the reasons for some of the sentencing variations that have emerged after Realignment might surface different types of equality concerns that are not well-captured by a less nuanced approach. It is one thing if disparities result from the divergent local preferences of similarly resourced counties. It is another thing if the main reason that Yuba County utilizes jail at such a high rate is because, unlike San Francisco, it does not have the pre-existing infrastructure or finances to implement resource-intensive alternative ap-

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<sup>229</sup> See Allen Hopper et al., *Shifting the Paradigm or Shifting the Problem? The Politics of California's Criminal Justice Realignment*, 54 *Santa Clara L. Rev.* 527, 581–93 (2014) (detailing issues with the rollout of Realignment); Petersilia, *supra* note 214, at 338–56 (detailing Realignment's implementation issues as perceived by various stakeholders); Joan Petersilia & Jessica Greenlick Snyder, *Looking Past the Hype: 10 Questions Everyone Should Ask About California's Prison Realignment*, 5 *Cal. J. Pol. & Pol'y* 266, 266–69 (2013) (discussing the potential downsides of and open issues regarding Realignment).

<sup>230</sup> Petersilia, *supra* note 214, at 339, 343; see also Leroy D. Baca & Gerald K. Cooper, *Can AB 109 Work in Los Angeles County?*, 25 *Fed. Sent'g Rep.* 241, 243–44 (2013) (describing Los Angeles County Sheriff's Department's Maximizing Education, Reaching Individual Transformation (“MERIT”) program, reworked under Realignment, which now provides substance abuse treatment in collaboration with substance abuse professionals); Rodriguez, *supra* note 225, at 222–23 (describing developments spurred by Realignment in San Diego County, including a collaborative Mandatory Supervision Court).

proaches, its preference for doing so notwithstanding.<sup>231</sup> It is one thing if real differences in criminal history, local crime patterns, or even penal philosophy are driving some counties' continued use of state prison at far higher rates than others. It is another thing if county prosecutors are using state prison to shift punishment costs out of their jurisdictions and back to the rest of California's population, or if politically powerless groups are being cut out of local decision making on how to approach Realignment reforms.<sup>232</sup>

These possibilities, too, raise equality concerns. But they are input- and process-based concerns that might well call for process-based responses. If the concern is the continued externalization of prison costs for "triple nons" with serious records, one answer might be to expand Realignment to require localities to shoulder more of those costs.<sup>233</sup> If the concern is historical resource disparities that make it hard for poor counties to pursue nonjail alternatives, one response might be to adjust Realignment's funding formula to take that into account.<sup>234</sup> If the concern is lack of voice by disadvantaged groups, one thought might be to vest more control in a body comprising representatives of all stakeholders.<sup>235</sup> Sentencing disparities are not problems in and of themselves, but work as proxies that prompt us to interrogate the reasons behind variations, illuminating issues and solutions that a reflexive focus on equalizing outcomes can obscure.

The same complexities might inform how we look at even intracounty disparities. In devolving decisions about punishment policy to localities for "triple nons," Realignment gave prosecutors and judges wide discretion to choose between "straight sentence[s]" (jail time with no post-release supervision), "split sentence[s]" (with the sentence divided between jail time and community supervision), and more "traditional felo-

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<sup>231</sup> See Petersilia, *supra* note 214, at 350–51 (observing that for counties already "rich in resources and with jail beds to spare, Realignment has been an opportunity to expand and create innovative programming").

<sup>232</sup> See Males & Buchen, *supra* note 221, at 6 (explaining that counties that choose to maintain high rates of state incarceration are effectively forcing other counties to subsidize the formers' prison commitments).

<sup>233</sup> See *id.* (suggesting this approach).

<sup>234</sup> Cf. Ball, *Why State Prisons?*, *supra* note 12, at 107–09 (making a similar point outside the Realignment context).

<sup>235</sup> Cf. Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 *Fed. Sent'g. Rep.* 153, 155 (2009) (observing that successful sentencing bodies include both "those groups that typically get muted in the legislative process" and "those powerful groups who are readily heard").

ny probation.”<sup>236</sup> Individual judges and prosecutors vary in their use of such options, especially whether and how to use split sentences.<sup>237</sup> That has prompted criticism that, even within a single county, similarly situated offenders might receive meaningfully different punishments from courthouse to courthouse.<sup>238</sup>

Again, though, we need to know more about the reasons for these disparities before critiquing them, not just that they exist. One might defend some courthouse-to-courthouse variation in how prosecutors charge and judges sentence similar offenders as strong instances of “federalism-all-the-way-down.” To take a non-Realignment example, a low-level felon who appears before Judge Alex Calabrese’s community court at the Red Hook Community Justice Center in Red Hook, Brooklyn, will receive a very different disposition from the same felon who is funneled to a different courthouse because he happens to commit his crime one precinct over. That is undoubtedly an intracounty, courthouse-to-courthouse disparity. But it is one that stems from a considered philosophy of sentencing with community buy-in, which complicates its normative status.<sup>239</sup> The Red Hook disparity, if one wants to call it that, has real upsides. The Red Hook Community Justice Center receives exceedingly high marks on virtually every measure of sentencing justice—from cost effectiveness, recidivism and arrest rates, and use of jail time, to perceptions of justice and fairness among victims, offenders, and community mem-

<sup>236</sup> See Robert Weisberg & Lisa T. Quan, *Stan. Crim. Just. Ctr., Assessing Judicial Sentencing Preferences After Public Safety Realignment: A Survey of California Judges*, 8 (2014), <https://www.law.stanford.edu/sites/default/files/publication/443996/doc/slspublic/Judges%20Report%20Feb%2028%202014%20Final.pdf> [<https://perma.cc/3VFT-4VRW>] (summarizing sentencing options under Realignment).

<sup>237</sup> See *id.* at 14, 58 (finding wide variation in how judges use split sentences); see also W. David Ball & Robert Weisberg, *Stan. Crim. Just. Ctr., The New Normal? Prosecutorial Charging in California After Public Safety Realignment*, 14–15 (2014), <https://www.law.stanford.edu/sites/default/files/publication/513777/doc/slspublic/DA%20report%20Feb%202014.pdf> [<https://perma.cc/X25R-H34L>] (finding a “huge variance” in how prosecutors use straight sentences, split sentences, and felony probation).

<sup>238</sup> See, e.g., Rodriguez, *supra* note 225, at 222.

<sup>239</sup> For a comprehensive look at the history, philosophy, practices, and criminal justice outcomes of the Red Hook Community Justice Center, see generally Cynthia G. Lee et al., *Nat’l Ctr. for State Courts, Final Report, A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center* (2013), <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Problem%20solving%20courts/11012013-Red-Hook-Final-Report.ashx> [<https://perma.cc/4M2K-HUL5>].

bers—except equality of sentencing outcomes vis-à-vis neighboring courthouses.<sup>240</sup>

It might be that some of Realignment’s intracounty sentencing variations likewise spring from different philosophies of sentencing.<sup>241</sup> But it also might be the case that prosecutors and judges agree for the most part on how to approach sentences in the abstract, but do not have the right tools for translating those views into more consistent outcomes across individual cases. There is some evidence of that. In a study of judicial sentencing preferences after Realignment, Robert Weisberg and Lisa Quan found that while many judges think that offenders should face “jail plus a tail,” they do not have a good sense of their fellow judges’ views on how long or short the jail time or tail should be, which makes it hard to coordinate across similar cases.<sup>242</sup> Some judges and prosecutors also lack either information about or faith in the details of community supervision, which can breed reluctance to use it despite their desire to do so.<sup>243</sup> These process-focused problems invite process-focused solutions. Just gathering and publishing better intracounty data on dispositions and establishing other formal or informal means of coordination and information sharing for judges, prosecutors, and community supervisors would be a good start.<sup>244</sup> Those measures will not eliminate disparities, but they could help to sort “accidental” ones from ones that have more normative purchase.

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<sup>240</sup> Cynthia Lee and her coauthors found that an overwhelming majority of local residents support the Red Hook Community Justice Center, and approval ratings among community members of police, prosecutors, and judges have also jumped since the center opened. The vast bulk of defendants at Red Hook feel they have been treated fairly, regardless of their background or case outcome. Red Hook has reduced recidivism by adult misdemeanor offenders by twenty percent compared to traditional criminal courts while simultaneously reducing the use of jail time by nearly thirty percent, and it has substantially reduced overall arrest levels as well. *Id.* at 65–66, 78, 86–87, 148, 153.

<sup>241</sup> At least one California prosecutor appears to believe so. See Rodriguez, *supra* note 225, at 222 (stating that “judges with courtrooms right next to each other may have very different philosophies about [the] new practice” of split sentencing).

<sup>242</sup> Weisberg & Quan, *supra* note 236, at 10, 14.

<sup>243</sup> See Ball & Weisberg, *supra* note 237, at 17; Weisberg & Quan, *supra* note 236, at 59.

<sup>244</sup> See, e.g., Ball & Weisberg, *supra* note 237, at 17 (recommending that prosecutors “share views and practices on [Realignment] sentencing options and seek to establish at least general norms and presumptions to somewhat reduce the problem of extreme unpredictability and disparity”); Weisberg & Quan, *supra* note 236, at 59 (making a similar recommendation for judges).

### 3. *Fast-Track Plea Agreements*

Various federal sentencing debates likewise look different through our prism, which breaks disparity into a rainbow of variations, causes, and rationales. One is the use of fast-track plea agreements in immigration and drug cases. These rule-based, centrally sanctioned regional variations occupy a middle ground between free-for-all local variations and geographically uniform outcomes. Multiple federal districts, most but not all along the southwestern border, offer deep plea-bargained discounts as parts of package deals that greatly expedite case processing, with the specific prior approval of the Attorney General under the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (“PROTECT”) Act.<sup>245</sup> Rather than taking an aggravated illegal reentry case to trial, prosecutors might drop all statutory enhancements in exchange for a defendant’s waiver of indictment, discovery, trial, presentencing report, and appellate rights at the initial appearance.<sup>246</sup> In exchange for immediate guilty pleas and sentencing, defendants get agreed-upon departures and much lower sentences, while prosecutors can process far more cases using far fewer resources. By doing so, federal prosecutors in one district might pursue a high-volume, low-price strategy, even as neighboring federal districts pursue a low-volume, high-price approach, reserving sanctions for the worst of the worst.<sup>247</sup> Critics argue for equalizing these practices, emphasizing the interjurisdictional sentencing disparities they create and that immigration, especially human trafficking, is an area of exclusive federal jurisdiction and

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<sup>245</sup> Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, 18 U.S.C. § 3553(b)(1) (2012); see Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on “Fast-Track” Sentences*, 38 *Ariz. St. L.J.* 517, 517–19 (2006) (providing an overview of fast-track sentencing, including a review of the PROTECT Act, in the context of prosecutions after illegal reentry after deportation).

<sup>246</sup> See, e.g., *United States v. Ruiz*, 536 U.S. 622, 625 (2002).

<sup>247</sup> See, e.g., Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 *Symbolic Interaction* 255, 262–72 (2005) (comparing and contrasting different prosecutorial plea bargaining and sentencing strategies in four federal districts under the Federal Sentencing Guidelines).

national concern.<sup>248</sup> Drug smuggling, while an area of concurrent jurisdiction, is likewise a problem of national scope.<sup>249</sup>

But emphasizing disparity or the federal nature of immigration and drug crimes without more does little to tell us whether these sentencing variations are justified, just as analogous emphases do not much help in analyzing the intrastate disparities that Realignment spawned. One more specific argument against them might turn on spillovers. A uniform approach to punishing immigration and drug crimes, the argument would go, is needed to avoid externalizing the costs of those crimes onto other areas.<sup>250</sup> To make that claim, one would have to be able to maintain that, from the criminal's perspective, one of the two approaches to punishment—high-volume, low-price, or low-volume, high-price—is materially more attractive (or, perhaps more accurately, materially less unattractive) than the other. Ex ante, the answer is not obvious. Assuming the two approaches are not a wash, though, that might be a good reason to tamp down on the disparate sentences. The aim of punishment, after all, should not ordinarily be to merely shift crime from one place to another.<sup>251</sup>

There are, however, respectable counterarguments. By capturing a higher volume of offenders, fast-track programs might reduce the hidden disparity between those who are and are not prosecuted at all, thereby righting another imbalance that is a function of decisions made earlier in the criminal justice pipeline. Similarly, applying the high-price but high-resource strategy in districts swamped with cross-border crimes might result in underprotecting local citizens from certain gun, violent, and

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<sup>248</sup> See, e.g., Gorman, *supra* note 3, at 479–80; Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys, at 2 (Jan. 31, 2012), <https://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf> [<https://perma.cc/PRC3-6QM5>] (noting that “[t]he existence of [fast-track] programs in some, but not all, districts has generated a concern that defendants are being treated differently depending on where in the United States they are charged and sentenced,” and that some courts in non-fast-track districts grant fast-track departures that “introduce additional sentencing disparities”).

<sup>249</sup> See, e.g., Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 *Emory L.J.* 1, 37–49 (2012) (discussing concurrent federal and state jurisdiction over drug trafficking crimes and the factors that push some cases into federal instead of state court).

<sup>250</sup> See Neil Kumar Katyal, *Deterrence's Difficulty*, 95 *Mich. L. Rev.* 2385, 2421 (1997) (describing how disparate approaches to punishment can result in the “geographic substitution” of crime).

<sup>251</sup> See Neal Kumar Katyal, *Architecture as Crime Control*, 111 *Yale L.J.* 1039, 1133–35 (2002) (critiquing architectural solutions to crime on the grounds that they may simply shift crime to different locations).

gang crimes that need to be enforced everywhere and are often best handled at the federal level.<sup>252</sup> The low-price strategy could allow the feds to more effectively pursue the worst of those crimes while devoting comparatively fewer resources to things like drug crimes that many believe are best left to states and localities.<sup>253</sup> More generally, border districts face unique local burdens and problems—such as heavy strains on both local and federal criminal justice resources—that might demand locale-specific responses at the federal level.<sup>254</sup> Varying the federal approach might be a useful avenue for making even purely federal policy, allowing federal prosecutors to experiment with what works best instead of adopting a one-size-fits-all, all-or-nothing strategy.

It might seem strange for federal sentencing policy to vary from place to place. But it is not obviously stranger than state punishment policy varying from county to county under Realignment. The PROTECT Act, by expressly authorizing fast-track programs with the approval of Main Justice, also ensured that Main Justice can verify the need for and regulate district-by-district sentencing variations.<sup>255</sup> Had it not, the fast-track debate would be even more complicated, raising difficult questions about the authority of U.S. Attorneys to vary their sentencing practices significantly without prior congressional or at least high-level executive approval.<sup>256</sup> But even then, some wiggle room exists to argue that local

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<sup>252</sup> See *United States v. Estrada-Plata*, 57 F.3d 757, 761 (9th Cir. 1995) (finding that “[t]he [fast-track] policy benefits the government and court system by relieving court congestion”); Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 *Geo. Immigr. L.J.* 285, 301–02 (1998) (arguing that federal fast-track programs “enhance[] security[] while reducing the costs of extended incarceration and prosecution”). Of course, not everyone believes that the federal government should be as involved in these areas as it is. For a brief history of the debate and a sampling of arguments on the other side, see Ouziel, *supra* note 138, at 2238–39, 2238 nn.1–3.

<sup>253</sup> See Beale, *supra* note 49, at 1008–10 (arguing that federal resources could better be used to supplement state criminal law enforcement in various ways); John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 *Temp. L. Rev.* 673, 673–74, 678 (1999).

<sup>254</sup> This was, in fact, the original justification for federal fast-track programs. See Memorandum from John Ashcroft, Att’y Gen., to All Fed. Prosecutors, at 2 (Sept. 22, 2003), [https://www.justice.gov/archive/opa/pr/2003/September/03\\_ag\\_516.htm](https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm) [<https://perma.cc/4BQK-9GHV>].

<sup>255</sup> See 18 U.S.C. § 3553(b)(1) (2012).

<sup>256</sup> See, e.g., Barkow, *Clemency and Presidential Administration*, *supra* note 119, at 852–56 (discussing interplay between district-by-district disparities in federal prosecutorial charging, bargaining, and sentencing decisions and presidential control of enforcement). Such

U.S. Attorneys can adjust federal punishment policy to accommodate local conditions and views.<sup>257</sup> At the end of the day, deciding how far they can go requires giving weight to both national and local voices, to both principle and practical concerns and tradeoffs.

Fast-track programs are not necessarily ideal, or even good. They may require scrutiny and explanation on procedural as well as substantive grounds, and it is reasonable to question why some districts well inside the heartland of the country need to engage in the same shortcuts. Observing disparity may begin the conversation, but cannot end it.<sup>258</sup>

### C. Caveats and Limitations

As we explained earlier, even for more flexible notions of equality, outcomes still matter, and variations are not an unqualified good. Our broadening of the terms of debate raises several concerns about sorting good variations from bad ones that are critical to keep in mind when considering more elastic approaches to sentencing equality. First, there are fears of arbitrariness. That certainly was Judge Marvin Frankel's position, pitting what he saw as arbitrary and lawless sentencing discretion against the rule of law.<sup>259</sup> While Judge Frankel has a point, it must not be overstated. It helps to distinguish arbitrary from random variations. Some variations are *arbitrary*: They defy any reasoned explanation.<sup>260</sup> Think of a judge who is grumpy because he is overdue to eat lunch,<sup>261</sup> or

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questions of authority are far less significant at the state level given our country's longstanding tradition of local law enforcement control over state criminal justice.

<sup>257</sup> See Memorandum from Eric Holder, Jr., Attorney Gen., to Heads of Dep't of Justice Components and U.S. Attorneys 1 (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-substantial-federal-interest.pdf> [<https://perma.cc/HY2B-SA3B>] (acknowledging that there will be regional variation in federal prosecutorial priorities based on "local criminal threats and needs").

<sup>258</sup> This is a more nuanced assessment than one of us previously provided on this issue. See Bibas, *supra* note 50, at 137–38.

<sup>259</sup> See Frankel, *supra* note 31, at 5.

<sup>260</sup> See, e.g., Christine N. Cimini, Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare, 57 Rutgers L. Rev. 451, 473 (2005) (defining arbitrary governmental action as action exhibiting "no rational relationship between the government's ends and the means it employs"); R. George Wright, Arbitrariness: Why the Most Important Idea in Administrative Law Can't Be Defined, and What This Means for the Law in General, 44 U. Rich. L. Rev. 839, 840 (2010) (explaining that "arbitrariness often takes the form of capriciousness, with uncertainty or variability then resulting").

<sup>261</sup> See Shai Danziger et al., Extraneous Factors in Judicial Decisions, 108 Proc. Nat'l Acad. Sci. U.S. 6889, 6889–90 (2011) (study of eight Israeli judges showing that a judge's decision "can be influenced by whether the judge took a break to eat").

a parent who overpunishes a child because he had a bad day at work. Judge Frankel was right to call for reforms to structure deliberation and encourage some kind of reason giving. That deliberation can sometimes be private (think of jury deliberations on death sentences or damages). But it can also be public, as when a judge issues an oral or written opinion that gives publicly accessible reasons and is subject to objection, criticism, and appellate review. The discipline of having to offer reasons itself tamps down on biased, arbitrary, or unjustifiable variation without preventing variation *per se*.<sup>262</sup> That insight has long been a foundation of administrative law and, as we have argued elsewhere, it could do more to inform criminal sentencing.<sup>263</sup>

But variation can be *random* without being arbitrary. Think of a police checkpoint that stops every fifth car, or a clerk of court who wheels one case out to a stern retributive judge and another to a more rehabilitative judge. Though there is variation, each judge ultimately justifies each sentence in terms of reasons and policies that are subject to review and contribute to broader public debate.<sup>264</sup> If the process is *ex ante* identical and fair and the variations have reasoned explanations, one cannot call the sentence arbitrary, even though there is dispersion around some mean or bell curve.<sup>265</sup> To be sure, there may be legitimate notice and rule-of-law objections if the dispersion is too wide. But there are also

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<sup>262</sup> As Kevin Stack elegantly puts it, “reason-giving is a precondition to, and the object of, deference.” Kevin M. Stack, *Interpreting Regulations*, 111 *Mich. L. Rev.* 355, 398 (2012); see also Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* 48–50 (1988) (exploring the interplay between deference and reason giving); cf. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring administrative agency to “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’” (citation omitted)).

<sup>263</sup> See Bierschbach & Bibas, *Notice-and-Comment Sentencing*, *supra* note 118, at 15–17.

<sup>264</sup> On the distinction between arbitrary and random differences, see Michael Abramowicz et al., *Randomizing Law*, 159 *U. Pa. L. Rev.* 929, 967–74 (2011) (describing differences between random and nonrandom arbitrariness).

<sup>265</sup> See Chiao, *supra* note 4, at 323 (“[S]entencing takes on a lottery-like character when viewed externally . . . . But it remains a merits-based, case-by-case adjudicatory process from within the internal, deliberative point of view of the relevant legal actors.”). The problem with “pure” randomization in punishment is not that it creates disparities *per se*; it is that the punishment that flows from it is divorced from any reasoned, merits-based consideration of the person being punished. For different though complementary defenses of randomness, see Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* 237–39 (2007); Harcourt, *supra* note 196; Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 *U. Chi. L. Rev.* 809, 810, 815–16 (2011); and Adam M. Samaha, *Randomization in Adjudication*, 51 *Wm. & Mary L. Rev.* 1, 17–24 (2009).

countervailing benefits of diversity and experimentation. If feedback loops work well (and we admit that is a big “if”), natural experiments allow researchers (and sentencing commissions) to learn what works best and to improve sentencing through repeated iterations over time.

Arbitrariness needs to be defined more narrowly and clearly as sentencing based on factors that are irrelevant to any legitimate purposes and values of punishment.<sup>266</sup> Some variations are legitimate, and not arbitrary, even if they are more finely textured than existing doctrine recognizes. Paul Robinson and his coauthors find that numerous extralegal punishment factors are considered relevant by substantial numbers of citizens, including a defendant’s remorse, apology, restitution, other suffering, family circumstances, or good works or a victim’s forgiveness.<sup>267</sup> These factors may not show up in existing law and may resist easy codification. But that is the nature of *ex post*, context-specific judgment, and our modest analytical point is only that sentencing should not place such variations in the same normative box with truly arbitrary divergences. Effecting that notion will not be easy under current sentencing doctrine. But regulating with a lighter hand, while simultaneously trying harder to elicit sentencers’ explanations and patterns of decision, might help to distinguish between the two.<sup>268</sup>

A second issue is the relevance of sentencers’ subjective motivations and intentions, whether conscious or unconscious, and our ability to ascertain them given punishment’s overdetermined nature. Does one worry only about disparate *treatment* motivated by race, ethnicity, religion, wealth, or other impermissible factors? Or do we also try to stamp out disparate sentencing *impacts* when, for instance, consideration of an offender’s education or job prospects hurts minority defendants most, or because we can never know for sure whether conscious or unconscious bias has infected the process? We do not take sides in that debate, but

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<sup>266</sup> Cf. *Graham v. Florida*, 560 U.S. 48, 71 (2010) (noting that a sentence is not disproportionate as long as it advances “the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation” (citing *Ewing v. California*, 538 U.S. 11, 25 (2003))).

<sup>267</sup> Robinson et al., *supra* note 77, 789 tbl.8.

<sup>268</sup> Some states, like Minnesota, have made some progress along these lines. See Michael Tonry, *Sentencing Guidelines and Their Effects*, in Andrew von Hirsch et al., *The Sentencing Commission and Its Guidelines* 16, 42 (1987) (discussing the relationship of Minnesota’s presumptive guidelines to its emerging “meaningful system of appellate sentence review”).

want rather to flag it.<sup>269</sup> There may also be a middle ground in which disparities serve as yellow flags, not red ones. Data patterns can smoke out possibly biased or arbitrary variations, but doctrine could require and allow sentencing bodies to justify and explain those variations.<sup>270</sup> That is not a complete answer, because low-visibility discretion often makes it impossible to say for sure why sentences vary. And it also does not answer the difficult normative question of what to do with characteristics like education and job prospects that might correlate strongly with both an increased risk of recidivism and with race. But it can at least start focusing the conversation on disaggregating types of and reasons for variation. Even explicitly embracing disparate-impact reasoning at sentencing would still be narrower, and likely more useful, than lumping all variations together. Beyond disparate-impact data, as we suggested earlier, more process- instead of outcomes-focused equality reforms—such as Shima Baradaran Baughman’s proposal to use “prosecutorial blinding” to tamp down on racial, gender, or other impermissible factors in charging decisions<sup>271</sup>—can work to address subjective biases in ways that still accommodate some of the upsides of variation.

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<sup>269</sup> The debate is deep and longstanding. For a sample of the arguments on both sides, see Vada Berger et al., Comment, Too Much Justice: A Legislative Response to *McCleskey v. Kemp*, 24 Harv. C.R.-C.L. L. Rev. 437, 496–528 (1989) (outlining arguments regarding racial disparities in sentencing).

<sup>270</sup> Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432–36 (1971) (establishing a similar approach to adjudicating claims under Title VII of the Civil Rights Act of 1964). That dynamic is what led to reform of the 100:1 federal crack to powder cocaine ratio. See, e.g., Kyle Graham, Essay, Sorry Seems to Be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine, 45 U. Rich. L. Rev. 765, 790–93 (2011) (detailing the circumstances leading to the passage of the Fair Sentencing Act of 2010). That change required a statutory amendment to a statutorily prescribed penalty, but a similar dynamic can, and often does, operate to monitor aggregated, highly discretionary decisions. The debate over and ultimate repeal of New York City’s stop-and-frisk policy in light of its clearly disproportionate impact on African Americans is an example. See Joseph Goldstein, Judge Rejects New York’s Stop-and-Frisk Policy, N.Y. Times (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html>.

<sup>271</sup> Email from Shima Baradaran Baughman, Professor, Univ. of Utah Coll. Of Law, to Richard A. Bierschbach et al. (July 7, 2014) (on file with authors) (discussing “prosecutorial mercy and blinding”). This particular reform would be hard to implement directly at sentencing itself. While prosecutors make decisions largely on the basis of a paper record or contact with opposing counsel, the Constitution compels that defendants be personally present at sentencing. See *Hopt v. Utah*, 110 U.S. 574, 579 (1884). Having said that, presentence reports and similar preparatory work already has anchored much of a sentence at that point anyway, so similar reforms might be brought to bear on at least some aspects of those sentencing processes. Going too far in the direction of blinding also would carry costs that

Third, American criminal justice is already highly localized and fragmented. Like the history of federalism, the history of localism in criminal justice has not always been pretty. One might reasonably worry that conceptions of equality that provide more leeway for localized sentencing variations could open the door to rolling back progress and making sentencing even more hidden and opaque—and thus potentially more unequal—than before.<sup>272</sup> That is a serious concern, and it underscores the importance of doctrinal reforms that can facilitate reason giving, flag potentially problematic variations, and more carefully distinguish benign or beneficial variations from impermissible or unconstitutional ones. On a broader level, though, it is worth noting that there is real and ongoing debate about whether capital and noncapital sentencing have grown significantly more equal in terms of race, ethnicity, and class as they have become more centralized and top-down over the last four decades. Carol and Jordan Steiker have lamented that decades of “tinker[ing] with the machinery of death” have not produced meaningful improvements in equalizing who lives and who dies.<sup>273</sup> And in noncapital sentencing, supporters and opponents of sentencing guidelines each marshal bevy of empirical studies purporting to show that guidelines have made disparities better or worse.<sup>274</sup> There certainly is room to debate the costs and tradeoffs of pursuing equality through top-down rules versus bottom-up local approaches.<sup>275</sup> Even if one favors equalizing outcomes, the politics of criminal justice at the state level might well lead to “leveling-up” of sentences through centralized guidelines or statutes that overpunish and that in practice are often applied unequally anyway.

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might well outweigh the benefits, notably stripping away needed context surrounding the offender, victim, and crime. But the general idea is worth considering.

<sup>272</sup> See, e.g., W. David Ball, *Defunding State Prisons*, 50 *Crim. L. Bull.* 1060, 1083 (2014), (noting concern that more localism in criminal justice “would enshrine disparate treatment of local populations”); Nirej S. Sekhon, *Redistributive Policing*, 101 *J. Crim. L. & Criminology* 1171, 1218–19 (2011) (noting accountability- and equality-based objections to localism in policing).

<sup>273</sup> Steiker & Steiker, *supra* note 110, at 359 (quoting *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari)); *id.* at 357–60, 402.

<sup>274</sup> See, e.g., Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 *Am. Crim. L. Rev.* 161, 188–89 (1991) (finding that disparity has worsened); Klein & Steiker, *supra* note 189, at 232–33 (finding that disparity has improved).

<sup>275</sup> Cf. Stuntz, *supra* note 4, at 1982 (arguing that “criminal justice systems governed by local politics should achieve more egalitarian results than justice systems that are more centralized, legalized, and bureaucratized”).

For that reason, it is not obvious that centralizing power and pushing it up to higher state and federal levels leads to more transparency, more accountability, and, ultimately, better sentencing policy. The pathologies of mandatory minimum sentencing, and the one-upmanship over federal crack sentences, are only the best-known examples.<sup>276</sup> At least in some settings, it is possible that community policing, community prosecution, drug courts, restorative justice, and the like might in practice be more transparent, more participatory, more accountable, and result in fairer sentencing across the board.<sup>277</sup> That might be true in part because they are tied to real victims and real defendants, who are neighbors and not sound bites.<sup>278</sup> It might be true in part because of the political dynamics of criminal justice, as Bill Stuntz argued when he made the case that localized control by political machines resulted in a more egalitarian criminal justice than we have today.<sup>279</sup> It might be true partly because a local voice in sentencing policy legitimates the sanctions that local juries are asked to endorse, or better forces localities to internalize the full costs and benefits of punishment.<sup>280</sup> We do not know for sure if, when, or how that is true. But these are empirical questions that cannot be answered *a priori*. We need to descend to ground-level issues of institutional design and political dynamics to answer these questions, and the answers may

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<sup>276</sup> See LaJuana Davis, Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing, 14 J. Gender Race & Just. 375, 404 (2011) (discussing the “cautionary tale” of racial disparities in mandatory minimum sentencing for crack cocaine).

<sup>277</sup> See, e.g., Ball, *supra* note 272, at 1084 (noting that “[c]entralization allows a state to more easily hide its inequalities” by lumping much of sentencing together, whereas disaggregation highlights “actual, extant distinctions among localities” and enables “[e]veryone [to] see which counties are doing better and which ones worse”); Michael M. O’Hear, Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice, 20 Stan. L. & Pol’y Rev. 463, 487–99 (2009) (arguing that better use of participatory and inclusive restorative processes could help address some of the racial disparity problems associated with traditional drug courts).

<sup>278</sup> See Paul H. Robinson, Some Doubts About Argument by Hypothetical, 88 Calif. L. Rev. 813, 820–21 (2000) (observing that “people want to know the ‘story’” when making decisions about punishment, that “[s]mall facts of every sort can make a difference to a person’s blameworthiness judgment,” and that abstract hypotheticals that lack detail are thus “dangerous” guideposts for punishment determinations); see also *supra* note 160 (citing additional sources).

<sup>279</sup> Stuntz, *supra* note 4, at 1996–97.

<sup>280</sup> See Ball, *supra* note 272, at 1077 (explaining how more complete local control over criminal justice would “internalize all the effects of criminal justice interventions”); Ouziel, *supra* note 138, at 2322–27 (discussing the relationship between greater local voice in criminal justice, the criminal law’s moral credibility, and substantive justice).

differ depending on the crime, the type of variation, and the strengths and powers of the various stakeholders.<sup>281</sup> Those are the kinds of inquiries and tradeoffs that we need to debate. They are messier and more variable, but in the long run may prove more fruitful.

Finally, there are other notice and rule-of-law concerns. One might plausibly fear that too much variation undercuts not only deterrence, but the very idea of making the law clear and predictable. But this may be an area where Meir Dan-Cohen's distinction between conduct rules and decision rules is a good thing.<sup>282</sup> It is very important for citizens to know what is a crime, so they can avoid violating the law. But the idea that culpable criminals also know with accuracy the sanctions they face is largely a fiction, and its impact on deterrence is likely overstated in any event.<sup>283</sup> Rule-of-law values certainly still support some measure of transparency and consistency, but a fair and predictable process might suffice for that even if the sentence is not fully knowable before the crime.

#### CONCLUSION

Our goal in this Article has been primarily analytical: to break down and scrutinize equality in sentencing, explaining how it operates in practice substantively and structurally. The stale sentencing debates of equality versus individualization and rules versus standards need to stop treating equality as if it were a single concept. In practice, it is a number of

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<sup>281</sup> Cf. Barkow & O'Neill, *supra* note 20, at 1974–77 (studying the political and economic factors that influence the delegation of sentencing power through commissions and guidelines at the state level); Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 912–37 (2015) (showing how federal law enforcement subsidies can alter the priorities, accountability, and on-the-ground effects of local policing in particular substantive areas); Ouziel, *supra* note 138, at 2323–30 (disaggregating benefits of local control over criminal justice based on different types of crimes at issue).

<sup>282</sup> See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 625–26, 630–42 (1984).

<sup>283</sup> Because police and prosecutors rarely disclose their enforcement strategies, only seasoned criminals are likely to have any real sense of what the realistic punishment for their conduct is likely to be. See Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 Nw. U. L. Rev. 655, 686 (2006). Deterrence, moreover, is at least as much normative as it is coercive. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 603–04 (1996). And to the extent that deterrence is coercive, it is the certainty and not the severity of the punishment that matters most. See Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 Econ. Inquiry 297, 307–08 (1991); Ann Dryden Witte, *Estimating the Economic Model of Crime with Individual Data*, 94 Q.J. Econ. 57, 79 (1980).

conceptions—a panoply of equalities with a range of pros and cons. Sentencing policy and scholarship have often conflated one debatable approach—one might even call it a superficial or false equality—with equality itself. Measures that further the reigning conception of equality can undercut others while simultaneously skewing sentencing toward certain purposes of punishment and a certain approach to institutional design. Mandatory or mechanical sentencing rules may promote a centralized approach to general deterrence at the expense of the disaggregation and experimentation of localism or the flexible, rehabilitative, and process-focused sentencing of restorative justice. Three-strikes laws might promote general incapacitation and uniformity, but dilute selective incapacitation and the variation that inheres in it. Normatively, we see some virtues in a less outcomes-focused conception of sentencing equality. But regardless whether one agrees with us about that, we hope to have at least illuminated the substantive and institutional dimensions of equalizing outcomes and stamping out many different types of variation in punishment. The tradeoffs in doing so are complex and underappreciated. Different factors cut different ways in different contexts for different types of sentencing equality and different ways of achieving it.

Some pockets of sentencing have begun to recognize that complexity. Misdemeanor law and scholarship are more open to outcomes variation in exchange for the benefits of targeted lenience, diversion, treatment, and tailoring sentences to the needs and preferences of affected communities.<sup>284</sup> So too is the law of corporate crime, which adjusts sanctions to best fit the pathologies of organizational perpetrators, the needs of stakeholders, and the interests of the public.<sup>285</sup> But in the felony-centric world of mainstream sentencing debate,<sup>286</sup> equality of outcomes exerts a

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<sup>284</sup> See, e.g., Dorf & Sabel, *Drug Treatment Courts*, supra note 157 at 841–51 (discussing how the structure and focus of drug treatment courts permit flexibility in handling each individual case); Hon. Judith S. Kaye, Lecture, 81 *St. John's L. Rev.* 743, 748–49 (2007) (describing the implementation of problem-solving courts in New York and their malleable, collaborative approach to justice for low-level offenders); Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 *Ohio St. J. Crim. L.* 445, 463–64 (2015) (noting the complex relationship of commitments to equality and fairness and the evolution of problem-solving approaches to criminal justice, particularly “where defendants are poorest and offenses are pettiest”).

<sup>285</sup> That practice is not without serious criticism on a number of grounds. For an excellent overview, see generally Brandon L. Garrett, *Too Big To Jail: How Prosecutors Compromise with Corporations* 1–2, 142, 155–60 (2014). Interestingly, though, inequality of outcomes among corporate defendants is almost never one of them.

<sup>286</sup> We thank Sasha Natapoff for the characterization.

heavy pull. Why, one might ask, should our conception of sentencing equality vary with the level of crime charged or the corporate character of the perpetrator? It is noteworthy, yet rarely noted, that prosecutors unilaterally decide how to operationalize sentencing equality when they decide whether to seek retribution and deterrence (by filing felony charges) or rehabilitation and restoration (in juvenile court, misdemeanor court, diversion programs, or corporate and white-collar alternative sanctions). More work is needed to explore how to harmonize the concept of equality with the broad normative discretion that prosecutors and others exercise when placing cases into different baskets.

We cannot end these debates, but we hope to invigorate them with a fresh perspective. Disparity is a buzzword, but it often conceals more than it reveals.<sup>287</sup> The reasons for a disparity, the substantive policies it serves, and the structures and procedures that breed it all matter. Not all disparity amounts to arbitrariness or discrimination, and not all punishment need be *ex ante* general deterrence. In assessing disparities in sentencing, criminal procedure must do more to account for a range of substantive values important to punishment as well as the institutions that weigh and apply them. Sometimes that calls for nationalized, centralized, deterrence-focused sentencing, but sometimes it does not. Focusing too much on equalizing sentencing outcomes as our main measure of sentencing fairness hides other moral and political considerations that criminal justice must confront.

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<sup>287</sup> Former U.S. District Judge Nancy Gertner has bluntly stated that “[d]isparity-speak has sucked the air out of all interesting and meaningful discussion of criminal justice reform for the past several decades.” Judge Nancy Gertner, *How to Talk About Sentencing Policy—and Not Disparity*, 46 *Loy. U. Chi. L.J.* 313, 313 (2014).