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Cost-Benefit Analysis in Criminal Law

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Cost-Benefit Analysis in Criminal Law

Darryl K. Brown

This Article explores the prospects for integrating criminal law into the widespread trend elsewhere in the executive branch of using cost-benefit analysis (CBA) to improve criminal justice policy making and enforcement practice. The Article describes an array of unnoticed and undervalued costs created by America's unique and fairly recent commitment to severe incarceration policies. It then maps the challenges for employing CBA in criminal enforcement practice. Those challenges include CBA's own methodological and conceptual limitations, public choice problems created by the populist structure of criminal justice administration, constraints on CBA in criminal justice in light of theoretical commitments to retributivism, and practical limits to employing such a policy in the executive branch when legislatures are unwilling to reduce statutory punishment mandates. Despite these obstacles, the Article argues that a properly devised, CBA-based decision procedure—one that takes account of distributive and other non-quantifiable, qualitative concerns—is a promising avenue for rationalization and reform of state and federal criminal justice.

INTRODUCTION

We get many benefits from criminal law. We incapacitate dangerous and costly offenders, deter future offenses, exact moral retribution, provide victims and others with emotional comfort, and express common public values. At the same time, criminal law also has substantial costs, which go far beyond obvious components such as funding police, prosecutors, defenders, and prisons. Like all government action, criminal law has a range of costs that are easy to overlook and hard to quantify. Felony convictions, for instance, diminish offenders' job prospects, a cost their dependents suffer as well. Convictions also diminish family stability, because felons are less appealing marriage prospects and the incarcerated cannot contribute child support and supervision. When the offender is a corporation or a crucial officer, employees may lose jobs, suppliers lose contracts, and customers lose goods and services.

All these costs may well be justified by the benefits of criminal law. In the most vivid set of serious offenses that quickly come to mind, they no

doubt are. We cannot fail to prosecute a major violent or financial crime, for example, because an offender's child will lose her sole source of financial support.¹ Yet in other situations, the benefits of criminal law enforcement may be far less compelling when considered alongside their attendant costs. Modern criminal law has no procedures for telling when a particular prosecution falls into one category or the other. Cost-benefit analysis² (CBA) can solve this problem.

This Article is based on two fundamental premises. The first is that, despite the conflict in competing retributive and utilitarian goals,³ one of the main purposes of criminal law remains the instrumental one of reducing harmful wrongdoing. The second is that criminal law need not be reduced to a binary decision for or against punishment: we can administer criminal law in many ways, with different charging policies, disposition alternatives, and sentencing options.

These premises lead to the conclusion that criminal law is only one policy option for dealing with harmful wrongdoing. The most obvious alternatives are civil and administrative penalties, but we also have a wide range of crime prevention strategies *other than* criminal, civil, and administrative punishment, justified in part by arguments that criminal law should have little focus on deterrence goals because it makes only a limited contribution to them.⁴ Further, criminal law has a range of disposition alternatives beyond incarceration. In order to choose among this broad basket of policy options, we need information about the cost-effectiveness and efficacy of each choice. In fact, there is an emerging literature comparing the range of costs imposed by criminal law to its benefits, but it so far has

1. See John W. Fountain, *Top Official In Cicero, Ill., Gets 8 Years In Fund Theft*, N.Y. TIMES, Jan. 10, 2003, at A14 (describing a defendant, convicted of \$12 million fraud, who argued for leniency because the prison term would harm her five-year-old daughter).

2. Cost-benefit analysis is a procedure that seeks to identify the full range of good and bad effects produced by a particular policy. It can be used to affect decision-making processes in a variety of ways. For a full discussion of the strain of cost-benefit analysis endorsed by this Article, see *infra* Part II.A.

3. The conflict is a practical one, because legislatures and courts commonly accept both retributive and preventive rationales for criminal law. The scholarship arguing against instrumental functions for criminal law reflects this conflict. See, e.g., Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943 (2000) (arguing for a virtue ethics approach to criminal law and criticizing instrumental commitments); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 205-08 (1996) (arguing for a criminal justice system based on moral condemnation and noting that premise is found in nearly all criminal justice systems throughout the world).

4. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001) (criticizing the growth of utilitarian over retributive functions as the defining feature of criminal justice); Paul H. Robinson & John M. Darley, *Criminal Law as an Instrument of Behavior Control: Should Deterrence Have a Role in the Formulation of Criminal Law Rules?*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=326681 (last visited Oct. 26, 2003) (arguing that the answer to the title question is no).

had little effect on the practice or administrative structure of criminal justice. Indeed, current practice even makes it hard to imagine how it could.

Two components establish the necessity and promise of this project: first, the distinctive populist political structure of American criminal justice, and second, the rise of analytic decision procedures in executive branch policy making. The need for a revamped decision-making process arises from the current structure of criminal law administration, which is especially sensitive to a popular politics that, in the last quarter-century, has tilted decisively toward harsh punitivism as the primary response to wrongdoing.⁵ The literature on that structure suggests a near impasse: the Supreme Court's meager efforts to regulate criminal procedure, with the notable exception of prosecutorial discretion, have failed.⁶ Judicial regulation of substantive criminal law could be a key alternative, but it is not one the Court will pursue in the foreseeable future.⁷

The project's promise comes from the increasing use of analytic decision procedures in the executive branch context to guide policy making and constrain discretion. This practice has not yet extended to the criminal justice system, where courts and legislatures have steadfastly refused to regulate prosecutorial discretion. Yet prosecutors themselves have not. We now have well-established, if limited, models for what are, in effect, administrative rulemaking to cabin prosecution decision making. Elsewhere in the executive branch, beyond criminal justice and especially at the federal level, CBA and similar decision procedures have emerged as a means to rationalize policy making, guide executive discretion, and limit agency problems. The comparably nascent practice in criminal justice can look to these established decision procedures as models of how to move toward a self-regulated executive-branch practice that provides a fuller accounting of costs and benefits of justice administration and crime prevention.

While rules and policies that constrain prosecutorial discretion have yet to employ CBA, there is a growing literature on the social costs and collateral consequences of criminal punishment.⁸ Aimed primarily at broad-level legislative policy making, this literature suggests both the

5. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 61-96 (2001); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533-39 (2001).

6. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996) (defining the difficult standard defendants must meet to merit discovery on claims of prosecutorial bias that violates the Equal Protection Clause); see also Peter J. Hennig, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999) (describing constitutional doctrine regulating prosecutor misconduct and criticizing the rigorous requirement of prosecutorial intent).

7. Stuntz, *supra* note 5, at 587-98 (suggesting ways courts can revise constitutional law to restrain legislators and prosecutors, and noting that these doctrines do not meaningfully exist now and seem "radical"); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 66-74 (1997).

8. See *infra* Part III.B.

dysfunction of current criminal justice practice and a growing research basis for assessing costs and benefits of criminal law administration along the lines of other executive action. This Article explores how cost-benefit literature on criminal justice might affect not only broad policy making but the daily practice of criminal law. It suggests that prosecutors and police could formalize their exercise of discretion and join trial courts in remedial innovations, in light of these costs and consequences.

From this exploration, we can consider what criminal law would look like if it were only one part of an integrated, optimal crime prevention policy. What would its outcomes be, and how would practitioners produce those outcomes in daily discretionary choices? By considering these outcomes, we can begin to build into criminal law an awareness that it is not a self-contained system, but rather one that is in a range of partly interchangeable mechanisms to confront social harms, each of which has its own costs and benefits.

This Article argues that CBA can be and should be applied to criminal law much as it has been applied to other executive regulation. Part I describes the structure of criminal justice administration, the outcomes it produces, and recent trends in scholarship for addressing related problems outside of constitutional doctrine. Part II first defines CBA, then describes its current use in administrative law and assesses the parallels and distinctions for its use in criminal law. Part III then analyzes how well CBA could address the structural dysfunction of criminal law enforcement and surveys existing CBA studies of alternative crime prevention programs. Most importantly, that Part describes the range of costs CBA would likely bring to light in criminal law and how those costs affect both criminal law goals and broader social policy goals outside criminal law. Part IV sketches a proposal (actually, several variations on a proposal) to implement CBA in criminal law. Finally, Part V addresses challenges to that implementation.

I

THE STRUCTURE AND OUTCOMES OF CRIMINAL JUSTICE ADMINISTRATION

A. *Political Responsiveness*

For a quarter century, the United States has addressed crime through drastically increased use of incarceration. This increase is measured in comparison both to American incarceration rates for the previous several decades and to those in other western democracies. Current American incarceration levels, for example, are the highest in the world, at about 700 inmates per 100,000 population.⁹ In comparison, the U.S. average was

9. See ROY WALMSLEY, UNITED KINGDOM HOME OFFICE RESEARCH, DEVELOPMENT AND STATISTICS DIRECTORATE, WORLD PRISON POPULATION LIST 1 (3d ed. 2002), <http://www.homeoffice.gov.uk/rds/pdfs/r166.pdf>. For an alternate source with slightly different data, see INT'L CENTRE FOR PRISON STUDIES, WORLD PRISON BRIEF, at <http://www.kcl.ac.uk/depsta/rel/icps/>

approximately 110 per 100,000 from about 1900 to 1970,¹⁰ a rate roughly equal to the current *highest* national incarceration rates in Western Europe and about double Europe's lowest.¹¹ In almost two-thirds of the world's nations, the rate is currently below 150 per 100,000.¹² As part of this shift, the intended purpose for incarceration has evolved in the last thirty years from one predominantly of rehabilitation to a mixture of deterrence, incapacitation, and retribution.¹³

This turn toward punitivism was not inevitable in American criminal policy. As the numbers from earlier decades suggest, the country had a long tradition of comparatively moderate incarceration policies, with at least a nominal commitment to rehabilitation through the 1960s.¹⁴ The punitive turn in political debate, public opinion, and criminal theory,¹⁵ however, has had a marked effect on the practice of criminal law. This is due in large part to the unique political responsiveness of American criminal justice administration.

The criminal justice systems of most European nations do not share this type of political responsiveness. Instead, in most European nations, the judiciary and prosecution are staffed with appointed attorneys who have more standardized training for their roles and work in more centralized structures that limit variation among practitioners, as well as political competition and popular responsiveness.¹⁶ In the United States, by contrast, most state judges and prosecutors are elected in decentralized districts under minimal state or national control.¹⁷ Federal prosecutors are not elected

worldbrief/world_brief.html (last modified Nov. 29, 2002) (citing the U.S. incarceration rate as the world's highest at 686 per 100,000 as of Jan. 1, 2002).

10. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-96*, in 26 PRISONS: CRIME AND JUSTICE—AN ANNUAL REVIEW OF RESEARCH 17, 18-19 (Michael Tonry & Joan Petersilia eds., 1999) (citing 1997 figures from the Bureau of Justice Statistics).

11. WALMSLEY, *supra* note 9, at 5; *see also* KAGAN, *supra* note 5, at 65, 68-69 (discussing the harshness of American punitivism compared to European countries); Marc L. Miller, *Cells vs. Cops vs. Classrooms*, in THE CRIME CONUNDRUM 127, 130-31 (Lawrence M. Friedman & George Fisher eds., 1997).

12. WALMSLEY, *supra* note 9, at 1.

13. For a discussion of this shift, *see* Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411 (2002).

14. *See* GARLAND, *supra* note 5, at 8. Widespread use of capital punishment in some regions was, of course, an obvious exception to this commitment.

15. A cultural explanation of this turn explains the greater harshness of American criminal punishment compared to Europe's as arising out of Americans' resistance to state power and commitment to social egalitarianism. *See id.* at 1-26. Greater state power in Europe gave rise to much stronger practices of state grants of mercy and amnesty; traditions of social hierarchy in Europe led to reforms that emphasize reintegration of offenders rather than civil disenfranchisement. *Id.*; *see also* Brown, *supra* note 13, at 1415-19 (arguing criminal procedure reform contributed to the shift toward severe punishment).

16. *See* KAGAN, *supra* note 5, at 40-41, 70-74.

17. *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996) (95% of state prosecutors are locally elected) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS 2 (1993)).

but they are political appointees to an office frequently used as a stepping-stone to elected office (or to judgeships controlled by the president and Congress).¹⁸

Likewise, American legislators are particularly responsive to public concerns about crime, more so than European legislators, who tend to work in systems with more centralized party discipline.¹⁹ The political responsiveness of American criminal justice makes the input of expertise from social scientists, Sentencing Commission staff, and other academics or policy analysts less influential. Consequently, criminal justice administration lacks the procedural mechanisms for moderating interest-group influence and rationalizing policy making that administrative law provides for agency action.

Finally, the particular interest group pressures on criminal law aggravate the trend toward harsh punitivism and the criminal justice administration's failure to respond rationally. Prosecutors face pressure mostly from victims and a public concerned about becoming victims; legislators face lobbying from that same public, as well as from prosecutors. Save for the occasional public scandal from prosecutorial overreaching (consider wrongful conviction cases or publicity of punishments far outside public

18. See generally JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003). For a discussion on federal prosecutors seeking elected office, see JAMES EISENSTEIN, *COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS* 230-31 (1978). For an argument on the disadvantages of electing prosecutors who exercise broad discretion, see James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1558-59 (1981).

19. See KAGAN, *supra* note 5, at 68-70. This does not necessarily suggest that European systems are less democratic and more bureaucratic. American democracy has its own distinctly undemocratic features; the wildly disproportional structure of the U.S. Senate and the widespread use of single-member, winner-take-all elections in gerrymandered districts (which limit proportional representation and third-party representation) are just two examples. See Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2128-37 (1990) (collecting sources and criticizing public choice theory critiques of democratic processes); Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L.J. 1255, 1289-91 (1996) (discussing critiques of legislatures based on procedural rules). Moreover, all legislative bodies must adopt procedural rules that have significant agenda-influencing effects and create majority outcomes where coherent majority sentiment may not exist. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46-60 (2d ed. 1963); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 38-62 (1991) (explaining Arrow's Theorem, which posits that, under certain conditions, in every process of collective decision making, outcomes will be arbitrary in the sense that they depend on the choice of procedural rules for decision making, such that different voting procedures will yield different results even when voters' substantive preferences are constant); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 971-74 (1989) (exploring the impact of the use of parliamentary rules of order on political and nonpolitical entities). The point here is, rather, that democratic systems can take many different forms, which do not necessarily map on a continuum from more to less democratic, yet have significant effects on democratic outcomes.

sentiment²⁰), there is little effective pressure from the defense side to moderate government policy on criminal justice.²¹

B. Prosecutorial Discretion

The criminal justice system is flawed not only because of the particular form and effects of its political responsiveness, but also because prosecutors have essentially no formal external checks on their discretion. Courts have never devised meaningful doctrines to constrain or regulate prosecutorial discretion,²² and legislatures have done little more.²³ Those doctrines that do exist, such as equal protection limits on racially biased prosecutions,²⁴ serve only to demonstrate the complete lack of judicial scrutiny under which prosecutors work in screening and charging cases.

As a result, current criminal law scholarship focuses on the failure of judicial regulation in criminal justice²⁵ and advocates alternatives of self-regulation by law enforcement. Erik Luna has recently argued for “transparency” in police practices through administrative regulation that would guide police enforcement discretion.²⁶ Marc Miller and Ron Wright

20. For a discussion on wrongful convictions and their influence on public opinion and legislative reform, see JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION & OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (1st ed. 2000). See also *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* (Saundra D. Westervelt & John A. Humphrey eds., 2001). For recent examples of publicity about prosecutorial over-reaching, see, for example, Dean Murphy, *Jurors Who Convicted Marijuana Grower Seek New Trial*, N.Y. TIMES, Feb. 5, 2003, at A13 (describing how jurors protested after finding that the federal prosecutor and the court withheld information that the defendant acted under state and local law authority). See also *Misguided Marijuana War*, N.Y. TIMES, Feb. 4, 2003, at A28 (criticizing same prosecution); *Strange Fla. Teens Case Gets Stranger*, CBS News, Oct. 17, 2002, at <http://www.cbsnews.com/stories/2002/10/21/national/main526255.shtml> (reporting that the conviction of two teenage brothers was overturned because the prosecutors had tried another man for committing the same crime).

21. See Stuntz, *supra* note 5, at 553-56 (describing the one-way pressure on legislatures for increasing, but not repealing or narrowing, criminal statutes).

22. See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (affirming prosecutors’ “broad discretion” to enforce criminal laws); see generally Richard Bloom, *Twenty-Eighth Annual Review of Criminal Procedure: Preliminary Proceedings—Prosecutorial Discretion*, 87 GEO. L.J. 1267 (1999) (summarizing case law on prosecutorial discretion). For a disparaging description of prosecutorial discretion, see Angela J. Davis, *Incarceration and the Imbalance of Power*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 61 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter *INVISIBLE PUNISHMENT*].

23. State legislatures occasionally enact statutes defining prosecution priorities. See, e.g., FLA. STAT. ANN. § 741.2901(2) (West 1997) (directing that prosecutors “shall adopt a pro-prosecution policy for acts of domestic violence . . . over the objection of the victim, if necessary”). Legislatures may also require prosecutors to write formal policies that guide their own enforcement discretion. See, e.g., FLA. STAT. ANN. § 775.0840(1)(a) (West 1997) (mandating guidelines for use of habitual offender statutes).

24. See *United States v. Armstrong*, 517 U.S. 456 (1996); see also Hennig, *supra* note 6, at 746-53 (discussing constitutional limits on prosecutorial authority).

25. See generally Stuntz, *supra* note 5.

26. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1166 (2000); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515 (2000).

have touted the model of stringent screening policies by prosecutors,²⁷ eliminating weak or inappropriate charges at the initial stages of charging, as a means to reduce plea bargaining. Tracey Meares, Dan Kahan, and Debra Livingston have urged policing strategies that require no legislative reform to increase prevention efficacy but reduce the use of harsh punitivism in poor communities.²⁸

These and other practices and proposals²⁹ are part of the turn toward strategies of executive-branch-based regulation for criminal justice (building in part on Kenneth Davis's work³⁰ of a generation earlier). This is currently the only feasible avenue for criminal justice reform, notwithstanding William Stuntz's calls for constitutional regulation of criminal law by courts³¹ and scattered revision of sentencing policies in several states.³² This Article extends the theme. Other projects primarily address problems internal to criminal law, such as how criminal law can be administered more fairly, without bias or excessive force, and how criminal law can

27. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

28. See Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 697-98 (1998); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

29. See, e.g., Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117 (2001) (suggesting racial profiling reform); David A. Harris, *The Stories, the Statistics and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999) (same).

30. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 65 (1969) (describing "administrative rulemaking" as "one of the greatest inventions of modern government" to control discretion); KENNETH CULP DAVIS, POLICE DISCRETION 98-120 (1975) (extending the argument for rules to govern police conduct). Davis's work was followed by widespread endorsement of administrative rulemaking in criminal justice, especially to control police discretion. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417-28, 473 (1974); see also *United States v. Caceres*, 440 U.S. 741, 755 (1979) (citing Amsterdam and agreeing with him that regulations governing police investigations are "generally considered desirable"); Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 362 (1986) (noting a consensus by the mid-1970s among scholars on the need for rulemaking to control police conduct).

31. See Stuntz, *supra* note 5, at 587-98 (calling for courts to regulate through constitutional law not because it is feasible in the near-term, but rather because it is the most plausible solution).

32. Apparently prompted by severe budget shortfalls as well as by the decreased use of crime as a political "wedge" issue, several states have eliminated mandatory incarceration for some drug offenders and replaced it with mandatory drug treatment. For an overview of these developments, see ROBIN CAMPBELL, VERA INSTITUTE OF JUSTICE, DOLLARS AND SENTENCES: LEGISLATORS' VIEWS ON PRISONS, PUNISHMENT, AND THE BUDGET CRISIS (2003), http://www.vera.org/publication_pdf/204_398.pdf; DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INSTITUTE OF JUSTICE, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION? (2002), http://www.vera.org/publication_pdf/167_263.pdf; VERA INSTITUTE OF JUSTICE, CORRECTIONS POLICY AND BUDGET ACTION IN THE STATES: 2003 (2003) (noting such legislation in California, Indiana, Kansas, Michigan, North Carolina, and Texas); see also Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1 (describing state laws eliminating some mandatory minimum sentences and restoring parole).

address the problems arising from pervasive plea bargaining.³³ My argument is that formal guidelines can clarify criminal law's pervasive choices of when and how to punish, and in the process address the external issue of the social costs and net benefits of criminal enforcement as a public policy choice. Such guidelines would move criminal law enforcement along the same road that a broad range of civil enforcement and administrative policy making has taken in recent years. I turn now to a survey of those developments.

II

CBA AND ITS CURRENT USES

A. *Current Implementation, Design, and Limits of CBA*

Critiques of regulatory strategies abound. Critics identify regulatory decisions across the full range of agency action that appear exceedingly costly, given their benefits, or that devote more resources to smaller magnitude risks than to larger ones.³⁴ In response, there has been a rise in the past two decades of several formal decision procedures, employed across a broad range of federal regulatory policy (with the exception of criminal law) as tools for crafting and choosing among policy options and improving the effectiveness of government action. CBA is the most prominent of these methods. The Office of Management and Budget (OMB) has engaged in a full-scale accounting of costs and benefits across the spectrum of administrative regulation.³⁵ Statutes and a succession of executive orders, beginning with President Reagan's and continuing with changes through the present administration, have required cost-benefit assessments

33. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) presents a classic argument on hazards posed by prosecutorial discretion in plea bargaining.

34. See, e.g., ROBERT W. HAHN ET AL., DO FEDERAL REGULATIONS REDUCE MORTALITY? 19 (2000) (finding that more than half of two dozen regulations studied were likely to increase rather than decrease mortality); Robert W. Hahn, *Regulatory Reform: What Do the Government's Numbers Tell Us?*, in RISKS, COSTS, AND LIVES SAVED 208, 214 (Robert W. Hahn ed., 1996) [hereinafter RISKS, COSTS] (most of ninety-two regulations studied failed CBA using government's own estimates); OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS tbl.12 (2000), <http://www.whitehouse.gov/omb/inforg/2000fedreg-report.pdf> (citing EPA regulations for financial assurance of solid waste landfills, Labor Department regulation of methylene chloride, and airbag depowering regulations as having costs that exceed benefits). For a prominent critique arguing that regulatory costs often outweigh benefits, with a focus on EPA action, see STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993). See also Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 257 (1996) ("[T]here can be no doubt that resources for risk reduction are badly allocated."); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1335 (1985) (arguing that environmental regulations "waste many billions of dollars annually by ignoring" local variations in compliance costs).

35. Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1657 & n.30 (2001).

of regulation.³⁶ The OMB and various agencies have developed extensive economic analyses of specific regulatory costs and gains. Concomitantly, scholarly interest in CBA has grown, particularly in the legal literature on regulation.³⁷

Much of this attention to CBA and related means of assessing the full consequences of projects stems from an increasing awareness of how government action reaches beyond its direct objects and goals. We know air pollution standards, for example, will affect not just air quality and pollution sources; they will also have economic effects and unintended displacement effects, such as reliance on older, unregulated power stations rather than newer, regulated ones.³⁸ Safety rules may also have ancillary economic effects and may change behavior in unintended ways that increase other risks. Many regulatory agencies now must pay explicit attention to these secondary costs or externalities. For example, when we regulate air pollution, we do not look solely at pollution sources and air quality anymore; we also consider the economic and social impacts of pollution abatement strategies and assess their full range of implications.³⁹

While a wide spectrum of administrative regulation has adopted CBA as a means of examination, we have not made a comparable move in criminal law. Yet criminal law also has a wide range of ancillary effects and social costs, some of which work against its primary purposes. Simply to meet criminal law's broadly conceived goals (which include utilitarian ones), we need to pay attention to enforcement's full costs. Further, to ensure a net social gain from government action—to ensure that criminal law

36. See OMB, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, INFORMING REGULATORY DECISIONS: 2003 REPORT TO CONGRESS ON THE COST AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES (2003), www.whitehouse.gov/omb/inforeg/2003_cost-ben_final_rpt.pdf (describing greater emphasis on cost-effectiveness analysis than Clinton-era policy); Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994) (Clinton's executive orders requiring executive agencies' rules to satisfy CBA where statutorily permissible); Exec. Order No. 12,291, 3 C.F.R. 127, 129-29 (1982) (Reagan's executive order requiring CBA by executive agencies); Unfunded Mandates Reform Act, 2 U.S.C. § 1551 (2000) (requiring CBA of federal rules); see also THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 17-25 (1991) (recounting the history of executive action on regulatory compliance costs).

37. Scholarly interest in CBA is longer standing in disciplines such as economics and philosophy. For a description of this broad literature, see Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999).

38. Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339, 1377 (1993); Andrew W. Reitze, Jr., *State and Federal Command-and-Control Regulation of Emissions from Fossil-Fuel Electric Power Generating Plants*, 32 ENVTL. L. 369, 387 (2002).

39. See, e.g., Douglas Jehl, *On Environmental Rules, Bush Sees a Balance, Critics a Threat*, N.Y. TIMES, Feb. 23, 2003, at A1 (quoting James L. Connaughton, chairman of Council on Environmental Quality, as saying: "Our approach is to maximize the quality of life for America, and that means balancing the environmental equation with the natural resource equation, the social equation and the economic equation").

does not aggravate other risks and undermine other social policies more than it achieves social good—some form of assessment is critical.

Such an assessment will require changing the way we currently view criminal law and its social impact. We do not usually focus on criminal law as part of a complex system with multiple cause-and-effect relationships. Instead, we focus on the state's response to individual offenders and the direct harm caused by the offense.⁴⁰ We think of criminal law goals for this state response, such as deterrence, retribution, and moral or expressive judgment, but we insufficiently consider how this state response has multiple effects beyond the cost the defendant experiences from punishment. In order to ensure that criminal law achieves both its own goals and a net social gain, we must begin to consider these multiple effects and broader social costs. CBA is well suited for this task.

For the purposes of this project, I use CBA to refer to a regulatory impact assessment procedure that calls for officials to identify the full range of effects of government policy, so that they have information about consequences before making decisions.⁴¹ I will bracket, to the extent possible, much of the heated debate about specifics of CBA methodologies such as monetizing interests, accounting for ill-informed preferences, and correcting for CBA's endowment dependence.⁴² CBA remains controversial and imperfect because of the difficulty of assigning monetary values to incommensurable and nonquantifiable values,⁴³ which include data from (or analogies to) real market values, when feasible, and survey-based data, particularly willingness-to-pay queries.⁴⁴ In addition, CBA requires initial

40. Prosecutors as well as defense attorneys who are asked to address factors (such as the personal life of an offender or his family) outside of the traditional components of criminal litigation often assert: "I'm a lawyer, not a social worker." This contention captures the idea that we do not focus on the entire system at play in criminal law.

41. This picture of CBA owes a great debt to Adler & Posner, *supra* note 37, and subsequent legal literature on CBA, particularly *Cost-Benefit Analysis: Legal, Economic and Philosophical Perspectives*, 29 J. LEGAL STUD. 837 (2000) (symposium issue on CBA).

42. For extensive coverage of these and related issues, see Adler & Posner, *supra* note 37, at 195-208, 238-43.

43. Even its advocates concede this. See, e.g., Adler & Posner, *supra* note 37, at 238-41 (describing CBA's endowment dependence and urging its use only where distorting wealth effects among affected parties are not substantial); Herman B. Leonard & Richard J. Zeckhauser, *Cost-Benefit Analysis Applied to Risks: Its Philosophy and Legitimacy*, in VALUES AT RISK 31, 34, 41-44 (Douglas MacLean ed., 1986) [hereinafter VALUES AT RISK]; Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper & Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1493 (2002) ("Precise numbers do not exist [for all human goods, and] . . . [w]e do not believe that cost-benefit analysis should be the exclusive basis for assessing regulation, but . . . it is an important tool."); see also Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913, 917-20 (2000) ("[C]onstructing plausible measures of the costs and benefits of specific actions is often very difficult . . . [And common estimate methods] are fraught with difficulty.").

44. See Frank, *supra* note 43, at 917-20; Leonard & Zeckhauser, *supra* note 43, at 41-44; Adler & Posner, *supra* note 37, at 175; Sunstein, *supra* note 35, at 1704-08, 1720-23. For a harsher view of

decisions about what effects will be incorporated into the analysis, a decision that CBA itself cannot dictate.⁴⁵ Those decisions must be made separately.⁴⁶

While it may not be possible to avoid controversy when quantifying soft variables such as clean air, diminished health,⁴⁷ or family stress,⁴⁸ a broadly conceived CBA-based decision procedure can incorporate qualitative assessments of such variables. Some studies of correctional programs, which are noted below, provide some examples.⁴⁹ Additionally, there may be politically acceptable ways to quantify some of those effects in terms of either dollars or specific social consequences (lives saved, earning potential reduced, childhood education impacts, etc.).⁵⁰

More importantly, CBA can be a component in a more comprehensive decision procedure that incorporates normative judgments about sensitive, nonquantifiable values.⁵¹ CBA does not mandate policy outcomes based solely on efficiency, that is, on whether its quantification of effects shows a net loss or gain from a given project. Instead, CBA can serve as an informational tool into which one can integrate normative commitments, qualitative assessments, and distributive impacts;⁵² it can be part of broader analysis serving any policy goal.⁵³ So, for example, we can still take

CBA valuation problems, see Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002).

45. Leonard & Zeckhauser, *supra* note 43, at 42.

46. Cf. Brandon C. Welsh & David P. Farrington, *Monetary Costs and Benefits of Crime Prevention Programs*, in 27 CRIME AND JUSTICE: A REVIEW OF RESEARCH 305, 341 (Michael Tonry ed., 2000) (criticizing some cost-benefit studies of correctional intervention programs as omitting "indirect or intangible costs to victims"); Daniel S. Nagin, *Measuring the Economic Benefits of Developmental Prevention Programs*, 28 CRIME AND JUSTICE: A REVIEW OF RESEARCH 347 (Michael Tonry ed., 2001) (making similar criticisms of cost-benefit studies of developmental prevention programs).

47. For a critique of one attempt to quantify lead poisoning of children by using the amounts parents spend on therapy, see Ackerman & Heinzerling, *supra* note 44, at 1554-55.

48. Family stress is a frequent collateral effect of incarceration. See *infra* Part III.C; see also Donald Braman, *Families & Incarceration*, in INVISIBLE PUNISHMENT, *supra* note 22, at 117, 118-22 (ethnographic study describing effects on families of a relative's incarceration, based on interviews with residents in Washington, D.C.).

49. See *infra* Part III.C.3; see also Welsh & Farrington, *supra* note 46, at 341 (citing and describing CBA studies of correctional programs that monetized such variables as health, education, and drug use).

50. See Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1064 (2000).

51. See Leonard & Zeckhauser, *supra* note 43, at 41-44 ("Some social values will never fit in a cost-benefit framework and will have to be treated as 'additional considerations' in coming to a final decision."); Adler & Posner, *supra* note 37, at 245.

52. See Exec. Order No. 12,866, 3 C.F.R. 638, 639-40 (1994) (permitting consideration of "equity," "distributive impacts," and qualitative concerns).

53. See Adler & Posner, *supra* note 37; Hahn & Sunstein, *supra* note 43, at 1498-1500.

account of racial or class distributional effects—critical concerns for criminal law and a particular weakness of CBA.⁵⁴

This is admittedly a “soft” version of CBA, in that it allows an explicit, strong role for the qualitative, political judgments that purer forms of CBA seek to minimize.⁵⁵ In that sense it loses some of the purported technocratic virtue of CBA. Even a strong form of CBA, however, does not fully avoid the problem of political judgments. Such judgments inhere in the choices of how to quantify essentially unquantifiable variables, as well as what variables will be included at all.⁵⁶

There are really three choices for criminal law: decision making in its current political structure, decision making informed by a stronger form of CBA, or decision making informed by a weaker form of CBA. None fully avoids political judgments (arguably a good thing if “politics” is a pejorative way of saying “democracy”). Nonetheless, the soft version, as I argue below, can improve on the current nature of decision making. That model makes political judgments clear, whereas harder forms of CBA obscure them. Thus, for now I acknowledge CBA’s inherent difficulties but posit that, in a well-designed decision procedure, it can make a valuable contribution to a broader analysis of criminal justice policy.

B. *Statutory Bases for CBA*

Statutory mandates and authorization define agencies’ regulatory agendas. These provisions delineate several ways how agencies should approach rulemaking and enforcement tasks, and they provide a basis for judicial review of agency action.⁵⁷ Statutes under which agencies have engaged in, and courts have approved, cost-benefit analysis vary considerably, and many do not mention CBA explicitly. Some seem to forbid consideration of costs arising from regulation,⁵⁸ while others allow or

54. Adler and Posner, leading advocates for CBA, recommend its use “except where wealth differences between those who gain from the project and those who lose are substantial enough” that CBA’s endowment dependence will be excessively distorting. Adler & Posner, *supra* note 37, at 238. I argue below that those wealth disparities are particularly acute in many criminal law contexts.

55. While Posner and Adler describe CBA’s feasibility in this soft form, I read Sunstein’s arguments to endorse more explicitly a large role for qualitative judgments and normative goals beyond efficiency in CBA. See Hahn & Sunstein, *supra* note 43; Richard Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 42-75 (1995).

56. This is a key part of Ackerman and Heinzerling’s argument against CBA. See Ackerman & Heinzerling, *supra* note 44, at 1576-80.

57. See, e.g., *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (analyzing EPA policy according to whether it is a permissible construction of the applicable regulatory statute). I hold aside here constitutional limits on agency action.

58. E.g., Clean Air Act Amendments of 1970, 42 U.S.C. § 7409(b)(1) (2000) (mandating EPA to set ambient air quality standards at levels “requisite to protect public health” without reference to costs); Federal Power Act, 16 U.S.C. § 803(a) (2000) (directing attention first to commercial benefits and then to environmental costs); Rivers and Harbors Act, 33 U.S.C. § 407 (2000) (focusing on government benefits rather than environmental costs).

mandate consideration of costs and substitute risks created by regulation.⁵⁹ Some statutes emphasize cost concerns, if somewhat obliquely, by requiring regulation to the extent “feasible”⁶⁰ or “achievable.”⁶¹ Finally, some require an accounting of costs and benefits on “significant” regulatory projects without specifying that benefits must outweigh costs.⁶²

It is under these varying statutory dictates that courts assess agencies’ use of cost-benefit analysis. The vast majority of these uses apply to agency rulemaking rather than to discrete enforcement or project choices that more closely parallel criminal law. However, as I argue below, the sorts of policy statements guiding criminal enforcement bear a strong resemblance to agency rulemaking.⁶³ Moreover, there are examples of cost-benefit mandates on activity roughly analogous to criminal enforcement, such as the statutory dictate that the Army Corps of Engineers should participate in flood control projects only “if the benefits to whomsoever they may accrue are in excess of the estimated costs.”⁶⁴

C. *Absence of CBA in Criminal Justice*

The prospect of CBA in criminal law does not face a central issue that hangs over CBA in administrative law: whether Congress has *authorized* government actors to weigh costs and benefits before setting policy (or whether it mandated any comparable balancing of competing interests). The relevant aspects of criminal justice administration involve prosecutors’ choices of when and how to enforce criminal statutes, choices over which

59. *E.g.*, 42 U.S.C. § 7411(a)(1) (2000) (authorizing EPA to set standards of pollution emission for new “stationary sources” while “taking into account the cost of achieving such reduction and any non air quality health and environmental impact and energy requirements”); 42 U.S.C. § 7429(a)(2) (2000) (similar language); 42 U.S.C. § 7545(k)(1) (2000) (setting standards for reformulated gasoline that require “consideration [of] the cost of achieving such emission reductions, any nonair-quality and other air-quality related health and environmental impacts and energy requirements”); Safe Drinking Water Act Amendments, 42 U.S.C. § 300g-1(b) (2000) (requiring cost-benefit analysis and reduction in standards if benefits “would not justify the costs”).

60. *E.g.*, Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 655(b)(5) (2000) (requiring that OSHA regulations on toxins in workplace “assure[], to the extent feasible . . . that no employee will suffer material impairment of health”).

61. *E.g.*, 42 U.S.C. § 7412(d)(2) (2000) (requiring prohibition of hazardous air pollutants “where achievable”).

62. *E.g.*, National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (1994) (requiring a “detailed statement” on “environmental impact” of “major Federal actions significantly affecting the quality of the human environment”); *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (interpreting NEPA as a procedural requirement that gives courts no basis for overturning the substance of agency decisions); Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1352 (2002) (distinguishing procedural cost-benefit statutes like NEPA from substantive cost-benefit statutes).

63. *See infra* Part IV.B.

64. Flood Control Act of 1936, 33 U.S.C. § 701a (1994); *see also* *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510 (1981) (citing Flood Control Act as “clearly indicat[ing]” Congress intends that the “agency engage in cost-benefit analysis”).

courts have no real review power.⁶⁵ This discretionary enforcement practice is indisputably policy making,⁶⁶ yet federal criminal enforcement is currently exempt from the CBA mandates imposed on other executive and independent agencies. At both state and federal levels, the executive's wide discretion in enforcement policy leaves ample executive authority for CBA or comparable methods to inform criminal practice without additional statutory authority. When statutes purport to define prosecutor authority,⁶⁷ they do so in broad terms that perpetuate prosecutorial discretion and permit implementation of charging policies informed by CBA and a range of normative concerns.

Despite that leeway, criminal law currently does not use CBA to inform its choices. Criminal law is a massive government social policy intervention on scale with the largest regulatory agendas and, broadly conceived, it does the same sorts of things regulatory agencies do. For instance, it aims to reduce specific types of risks to bodily harm, property loss, and associated psychological-emotional injuries.⁶⁸ We have tremendous amounts of data on crime rates, demographic information on crimes and offenders, as well as extensive statistical accounts of, *inter alia*, arrests, prosecutions, and case dispositions at state, local, and federal levels.⁶⁹ What we lack is extensive analysis of the sort we have for federal regulatory projects. We have a woefully thin account of whether the particular approaches we employ for criminal law enforcement cause more harm in

65. *Cf.* *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that a defendant is not entitled to review of a claim that he was singled out for prosecution unless he makes a threshold showing that the government failed to prosecute similarly situated suspects). Prosecutors' enforcement discretion is virtually unbounded. Of course, courts do restrain prosecutors' enforcement efforts, to the degree that prosecutors attempt to apply statutes to conduct not fairly covered by a criminal provision. Interpretation of criminal statutes, through such mechanisms as the rules of legality and lenity, can provide means to dismiss an indictment.

66. *See generally* Stuntz, *supra* note 5.

67. *See, e.g.*, WASH. REV. CODE ANN. § 9.94A.440(1) (West 1998) ("A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law."). *But see* ALA. CODE § 12-17-184(2) (1995) (suggesting that prosecutors have a duty to prosecute when probable cause exists); FLA. STAT. ANN. § 741.2901 (West 1997) (mandating that prosecutors "adopt a pro-prosecution policy for acts of domestic violence" and file charges "over the objection of the victim . . .").

68. Of course, this is not the only way to describe what criminal law does or tries to do. Deontological accounts, long a dominant perspective, describe criminal law as a means for ensuring just deserts for offenders and exacting retribution for wrongdoing. *See* MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997). Virtue ethics, in contrast, describes criminal law as a mechanism for making judgments about character of offenders through assessments of their practical reasoning that led to wrongdoing, and thereby to improve the practical reasoning, and virtue, of offenders and others. *See* Huigens, *supra* note 3, at 950-51, 978-80, 1030. Nonetheless, my account focuses on a consequentialist conception of criminal law as a practical policy approach for addressing pressing social problems, a view that clearly informs policy making as well as academic debate.

69. The most accessible and broadest source for such studies is the Justice Department website, http://www.usdoj.gov/05publications/05_3.html.

one respect than good in another, and little sense of how to incorporate such knowledge into criminal law administration.

An analogy from administrative law to criminal law's current (and traditional) state is "1970s environmentalism."⁷⁰ The first generation of environmental regulation "placed a high premium on immediate responses to long-neglected problems . . . [and] was often rooted in moral indignation directed at the behavior of those who created . . . risks to safety and health."⁷¹ Regulatory responses were adopted on a largely "cost-blind" basis.⁷² Just as that era of regulation, unlike recent years, gave little or no attention to CBA or comparable assessments,⁷³ criminal law still pays little if any attention to the ancillary costs of its enforcement policies. Both criminal law's theory and its practice constrain consideration of the broad costs of government action the same way agency enabling statutes and judicial review once did for regulation. The latter began to change in the early 1980s when the executive branch implemented cost-benefit analysis for most (non-independent) agency action⁷⁴ and courts began to approve that methodology under statutory language that did not explicitly authorize it.⁷⁵

Criminal law traditionally works like the EPA's authority to set national air quality standards, the issue in *Whitman v. American Trucking Associations*.⁷⁶ There, the Court held that the statute authorizing EPA action allowed consideration only of regulatory benefits—in this case, "public health"—not the costs incurred to achieve those benefits.⁷⁷ Similarly, criminal law traditionally focuses only on the benefits of punishment (deterrence, retribution) regardless of the costs on others—employees, clients or creditors of firms, offenders' families, and communities—of punishing individual or corporate offenders. In administrative law, however, such hard-line approaches that ignored costs have given way under the prodding of executive orders, statutes mandating CBA, and judicial approval of CBA. This is not the case in criminal law.

III

TOWARD CBA IN CRIMINAL ENFORCEMENT PRACTICE

Consider how the observations from the previous two sections fit together. The structure of American criminal law makes it easy to increase and perpetuate excessive punishment. Interest group lobbying is

70. Sunstein, *supra* note 35, at 1656-57.

71. *Id.* at 1656.

72. *Id.*

73. *See id.* at 1656-57.

74. This is not to say statutory-based CBA did not exist before 1980. *See supra* Part II.B.

75. *See* Sunstein, *supra* note 35, at 1654-55, 1663-68 (describing "default principles" courts have devised to approve agency use of CBA).

76. 531 U.S. 457 (2001); *see* Sunstein, *supra* note 35, at 1682-83.

77. *Whitman*, 531 U.S. at 465.

unbalanced, and key players are direct political actors responsive to an electorate sensitive about crime. Legislators face few constitutional constraints on crime and punishment policy, and prosecutors have unregulated discretion. Nonetheless, administrative decision making generally, with CBA as a component of that process, provides a model to moderate and rationalize the political dynamics of government action in criminal justice. CBA can help counter the structural features of criminal justice that lead to ignoring substantial costs of government action and to valuing poorly the full range of interests at stake. CBA can rationalize decision making in criminal law by correcting biases that lead to poor public policy and accounting for costs that criminal law neglects. This Part first examines how CBA can be useful in countering cognitive biases that skew judgments. Next, it argues that CBA can improve decision making in criminal law by revealing its full social costs in areas such as employment and marital attachment, family, and community. Finally, it turns to some of the limited ways in which CBA has already been implemented in crime-prevention policy and shows that these theoretical benefits have been realized in practice.

A. *Correcting Cognitive Biases in Criminal Law*

The current generation of CBA scholarship and policy application recognizes that CBA can serve goals beyond efficiency. It can be a tool for disciplining agencies' shirking, policy bias, or capture.⁷⁸ It can serve as a central component in a regulatory decision procedure oriented toward welfare rather than solely towards efficiency.⁷⁹ Further, CBA can help counter several well-established cognitive biases that skew judgments about criminal law policy and how it may be improved.⁸⁰ Several of these concerns, developed in administrative law contexts, map well onto criminal enforcement. These include the availability heuristic, inaccurate estimations of risk, and the inability to foresee complex effects of interventions.

78. See Johnston, *supra* note 62; Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001). Capture theory posits that agencies can become effectively controlled by the entities they are charged to regulate. Policy bias suggests that those who work for agencies are ideologically committed to regulatory missions even at the expense of the preferences of elected officials or the public. Shirking describes the risk that agency officials will self-interestedly try to avoid as much work as they can. See David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 116-23 (2000).

79. See Adler & Posner, *supra* note 37 (arguing for CBA as a decision procedure to assist in improving overall well-being); Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences are Distorted*, 29 J. LEGAL STUD. 1105 (2000) (making the same argument and suggesting CBA can correct for uninformed or misguided preferences).

80. Allan Gibbard, *Risk and Value*, in VALUES AT RISK, *supra* note 43, at 94, 97-98 (arguing that "normal ways of coping with risk and the cost of safety involve systematic, blatant irrationalities" that CBA can help clarify and rationalize); see Sunstein, *supra* note 50, at 1064-73 (developing a similar argument in greater detail).

One source of bias is the “availability heuristic”: events seem more probable if we can easily recall examples of them. People tend to overestimate vivid risks, such as car and plane accidents, school shootings, nuclear accidents, and underestimate less visible or publicized risks, such as heart disease.⁸¹ Without full information and a reflective decision process, such mental shortcuts lead to errors, and the risk of this is especially high with politically responsive government action.⁸² In criminal law, street crime (theft and violent crime) is especially vivid and frightful for most people. In contrast, white collar crimes, such as financial frauds in which many victims lose small amounts, seem much less threatening. Compared to corporate crime risks, street crime risks are more vivid. Thus, theft and violent crime induce more frequent public demand for harsh punishment,⁸³ making it harder for prosecutors to address such wrongdoing by means other than full prosecution.

A second and related cognitive bias is the inaccurate estimation of risks and benefits when the risks or benefits are particularly large. People often underestimate risks when the *benefits* of an activity seem clear and high, such as x-rays or coal-fired power plants. Conversely, people underestimate benefits when *risks* are perceived as high, such as pesticides or nuclear power.⁸⁴ In criminal law, prosecution of offenders has obvious and vivid benefits, but its costs are diffuse, externalized, and largely off-screen.

These biases are linked to another: people often cannot foresee complex, systemic effects of particular interventions. It is hard to anticipate unintended consequences, though they are common in complex systems regulated by social policy.⁸⁵ With the aid of CBA, regulatory statutes are often (and increasingly) attuned to these effects. For example, regulating auto emissions may result in increased demand for smaller cars, which in turn can lead to the unintended consequence of increased injury in accidents. Criminal law also entails unintended effects, and, with our current rates of incarceration, they reach significant magnitudes.

81. RICHARD NESBITT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 18-23, 28-42, 45-53, 462 (1980) (describing bias effects of availability heuristic and vivid data); Sunstein, *supra* note 50, at 1065, 1070-71 (discussing “alarmist bias” from vivid risk information that prompts unconsidered emotional responses); JONATHAN BARON, THINKING AND DECIDING 218 (2d. ed. 1994).

82. See NESBITT & ROSS, *supra* note 81, at 18-23, 28-42; Sunstein, *supra* note 50, at 1065.

83. On those occasions when corporate wrongdoing becomes especially vivid, as with Enron’s collapse and the subsequent personal losses to employees’ pensions, legislators may respond with increased criminal sanctions. See Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 (2002) (statute passed in the wake of high-profile corporate failures such as Enron’s that increases punishments for several federal crimes). Congress also created the Corporate Fraud Task Force, a Justice Department entity, to increase prosecution of corporate wrongdoing in reaction to the Enron scandal. See The President’s Corporate Fraud Task Force, at <http://www.usdoj.gov/dag/cftf/>.

84. NESBITT & ROSS, *supra* note 81, at 18-23, 28-42; Sunstein, *supra* note 50, at 1065-68.

85. See DIETRICH DORNER, THE LOGIC OF FAILURE (Rita Kimber & Robert Kimber trans., Henry Holt & Co., Inc. 1996) (1989).

Finally, criminal law costs and benefits are rarely linked. We tend to place them in different categories of social thinking. We do not readily connect, say, distressed communities and family structure to the collateral consequences of *punishment*⁸⁶ so much as to the consequences of *crime*. People tend to put very different values on preferences when each is considered in isolation from when those concerns are assessed together, across categories. Questions about how much people would pay for cleaner air, preschool for poor children, or workplace safety from toxic chemicals elicit very different answers from when asked in isolation than when they are posed to require cross-category comparisons.⁸⁷ Criminal law suffers the same bias: we consider the risks criminal law responds to separately from the other policies and aspects of social life that criminal punishment impacts. CBA can correct the cognitive disconnect between costs and benefits in criminal law by linking them together in policy making.

B. *Accounting for Overlooked Costs and Benefits in Criminal Law*

In addition to countering cognitive biases, CBA can help uncover costs not now readily attributed to criminal justice policy at all. A full assessment of the social costs and benefits of criminal justice is a daunting project. Some of those costs are massive but comparatively easy to identify, including the cost of prosecution, judicial time, and court expenditures, and the administrative costs of imprisonment or other punishments such as probation.⁸⁸ Other costs are harder to identify and quantify, such as punishment's impact on offenders' families, communities, and employment prospects. Assessing key benefits is also often difficult because it requires estimating the benefits of crimes avoided by incapacitation and deterrence. Economists have recently begun to produce a range of studies attempting to identify crime-prevention effects of criminal law and related policies, such as gun regulation.⁸⁹ Further, we have a growing body of

86. Collateral consequences to offenders' convictions are the main focus of the ABA's recently approved practice guidelines on collateral consequences. See *Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, 2003 ABA SEC. CRIM. JUST. REP. 101A (Margaret Love & Gabriel J. Chin, co-chairs), available at http://www.abanet.org/crimjust/standards/collateral_toc.html.

87. Sunstein, *supra* note 50, at 1071-73.

88. In an economic calculus, fines would count merely as a transfer rather than a gain or loss. Community service punishments might be assessed the same way—a public benefit at the cost of the offender's time and labor.

89. See, e.g., Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City*, 90 AM. ECON. REV. 584 (2000) (finding a deterrent effect for a range of crimes from increased law enforcement); Joanna Mehlhop Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment* (March 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=388960 (finding a deterrent effect from capital punishment); Joanna Mehlhop Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159, 159-162 (2002); Zhiqiang Liu, *Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence*, E. ECON. J. (forthcoming 2003) (similar finding); Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect?* *New*

social science literature on the broader social consequences of criminal law enforcement policy.

Despite the difficulty of assessing full costs and benefits, CBA can account for these consequences much better than current practice and can generate a plausible estimate of the full social impact of government action. I illustrate this by examining the problem of deterrence and the neglected costs of incarceration on employment and marital attachment, family, and community.

I. Deterrence

Deterrence is one example of how CBA can do a better job than traditional theories in predicting social costs and benefits. Assessing deterrence effects of criminal law is complex.⁹⁰ One reason for this complexity is substitution: prevention of one crime through high penalties might prompt offenders to commit other crimes. For example, an offender may substitute the sale of marijuana or powder cocaine with crack cocaine.⁹¹ The “elasticity of substitution” varies among sets of crimes. Some crimes are ready substitutes for others,⁹² while some crimes have no obvious substitutes. Thus, deterrence of one crime is more likely to have an overall crime-decreasing effect. In the context of drug sellers, deterrence of one set of buyers, perhaps wealthier buyers more responsive to the social stigma of increased penalties, might prompt a greater effort to sell to another set of buyers, perhaps low-income residents less deterred by such stigma. In this way, an increased penalty may simply shift offenses without reducing the overall number.⁹³ On the other hand, “income effects” can mean that raising the penalty of one crime can deter others as well. This is most clear with consumption crimes like drug use. Increasing the punishment—or price—of a crime can mean that offenders have to invest more time and money to commit the crime. They must make greater efforts to lower the odds of arrest, or the price of the contraband may increase. Either way, the result will be less time and money to commit other crimes.⁹⁴ The effects are richer and more subtle than this sketch describes, but the key point is that

Evidence from Postmoratorium Panel Data, 5 AM. L. & ECON. REV. 344 (2003) (similar finding); H. Naci Mocan & R. Kaj Gittings, *Pardons, Executions and Homicide* (Dec. 2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=259538 (similar finding).

90. See Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997).

91. For a speculative discussion of whether high penalties for crack prompt greater use of heroin, see *id.* at 2402-08.

92. *Id.* at 2393. Katyal discusses the crime of rape as one example. If rape is a crime of sex, lowering penalties for prostitution may decrease rape. If the offender is more interested in rape as a means of violence, reducing punishment of other forms of assault may reduce rapes.

93. See *id.* at 2416-19.

94. *Id.* at 2433-34. An optimal situation to employ this income effect would set the penalty for a crime at the highest level at which it would still occur, thereby draining offenders' resources for other crime commission.

estimates of crime prevention benefits not only are complex but also vary across types of crimes, depending on factors like whether offenders readily substitute one offense for another.

It may be that incarceration produces a *net* deterrence effect in many contexts. It is not now clear whether and how much prison either dissuades offenders from reoffending (because the prospect of incarceration is so distasteful) or increases reoffending (by either “training” criminals in prison or foreclosing much legitimate employment after prison, a thesis intuitively confirmed by high recidivism rates), and how these effects vary across subsets of offenders and crimes.⁹⁵ Regardless, enforcement that uses a CBA procedure would direct systematic attention to these concerns. CBA would help examine the risk that incarceration may sometimes harm one of the primary goals it purports to serve.

2. *Employment and Marital Attachment*

Beyond aiding a deterrence assessment, CBA can help integrate broader social costs of punishment into evaluations of criminal justice. Lengthy incarceration has indirect criminogenic effects because it harms prospects for both job stability and marital attachment.⁹⁶ Long prison terms leave offenders with large gaps in work history, while removing them from a culture that builds responsible work habits.⁹⁷ Lengthy sentences similarly strain existing personal relationships and make released offenders less appealing marriage prospects.⁹⁸ An offender’s job stability, family stability, and alcohol or drug use correlate significantly to reoffending.⁹⁹ Offenders with stable, functional marriages (or equivalent romantic partnerships) and job stability, which indicates both work commitment and opportunity, are significantly less likely to commit more crimes, especially if their drug and alcohol use is modest. While the evidence is not clear that a prison term more than modestly depresses long-term earnings (in part because many

95. See, e.g., Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. OF RES. IN CRIME & DELINQ. 445 (1993) (discussing variations in deterrent effects of criminal sanctions, depending on a range of social factors).

96. ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* 139-78, 163-68 (1993).

97. See *id.* at 165-68, 255-56 (“[T]he effects of long periods of incarceration appear quite severe when manifested in structural labeling—many of the [men studied] were simply cut off from the most promising avenues for desistance from crime.”).

98. See *id.* at 255; Bruce Western et al., *Black Economic Progress in the Era of Mass Imprisonment*, in *INVISIBLE PUNISHMENT*, *supra* note 22, at 175-78 (discussing effects on employment and earnings).

99. SAMPSON & LAUB, *supra* note 96, at 167-68.

inmates had low earnings prospects before prison),¹⁰⁰ prison does increase the likelihood of disengagement from lawful employment after release.¹⁰¹

A comprehensive CBA of a criminal justice policy with high incarceration rates must assess incarceration costs that include diminished earning potential of offenders after release and the effect of those lost earnings on their dependents. It must also account for the indirect effect incarceration likely has on harming criminal law's contribution to crime prevention. Part of that calculation must include diminished job prospects and family instability; both factors may increase the odds of recidivism. More controversially, that cost assessment might be integrated by attributing to incarceration policy a portion of overall costs of crime committed by released felons.¹⁰² The key insight from CBA is that full assessment of costs and benefits could well suggest that lengthy incarceration in some contexts is counterproductive, while shorter incarceration (perhaps coupled with other supervision, such as probation) could have a more positive cost-benefit ratio.

3. Families

Incarceration's impact on families and children may be criminal punishment's most substantial ancillary effect. Most incarcerated adults are parents who had regular contact with their children before prison.¹⁰³ While removing a parent who is abusive or otherwise a drain on a family's supportive capacity can be a net gain for family members in some cases, the evidence thus far suggests that the removal of even a nonresident parent is more often a detriment to children and families.¹⁰⁴ Even nonresident parents often provide financial support, babysitting, and child supervision, and, despite some criminal involvement, positive mentoring influence.¹⁰⁵ Most offenders are employed at the time of arrest and drift over time

100. Western et al., *supra* note 98, at 176-78.

101. John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in 26 CRIME AND JUSTICE: A REVIEW OF RESEARCH 121, 136 (Michael Tonry & Joan Petersilia eds., 1999) (citing studies).

102. That is an example of the sort of valuation decision that makes CBA, even in its pure form, replete with substantive, politically contestable value judgments. See discussion *supra* note 55.

103. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 1 (Aug. 2000), available at <http://www.ojp.usdoj.gov/bjs/abstract/iptc.htm> (most state and federal inmates have minor children); Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in INVISIBLE PUNISHMENT, *supra* note 22, at 137, 139 (estimating 75% of women prisoners are parents and two-thirds have minor children).

104. Hagan and Dinovitzer, *supra* note 101, at 125 (suggesting "more likely imprisonment is harmful to children even in dysfunctional families, because [it] . . . compound[s] . . . preexisting family problems"); *but cf.* SAMPSON & LAUB, *supra* note 96, at 64-98 (finding alcoholism and criminality by parents reduce their social control and monitoring of children, thereby increasing odds of delinquency).

105. Hagan & Dinovitzer, *supra* note 101, at 138-39 (citing studies including Creasie Finney Hairston, *The Forgotten Parent: Understanding the Forces that Influence Incarcerated Fathers' Relationships With Their Children*, 77 CHILD WELFARE 617 (1998)).

between legal and illegal work.¹⁰⁶ Single parents have less money and time to invest in children.¹⁰⁷ Moreover, imprisonment of a family member has a significant stigmatizing effect among neighbors and social groups, even in neighborhoods with high incarceration rates.¹⁰⁸ That effect increases stress on families and children. Most children whose sole parent is incarcerated reside with caregivers who lack financial resources for necessary expenses and, often, parenting skills.¹⁰⁹

Further, these economic, psychological, and social stresses are imposed disproportionately on children and families least able to cope with them. Street crime punishment primarily affects low-income offenders; their family financial resources are often marginal.¹¹⁰ Children in such families are also most likely to be at risk for low educational achievement. Parental incarceration often has negative impacts on attitudes toward school and correlates with other negative behavioral tendencies, including increased depression, anxiety, and rebelliousness.¹¹¹

When concentrated in communities, high incarceration rates impact family organization as well. Men make up the vast majority of inmates. Removal of large numbers of men from a community and the return of male ex-prisoners who have diminished employment prospects reduce the number of potential partners available to women. In that context, men more readily enter into relationships with multiple women, and women develop relationships with men who have other attachments. That decreases rates of marriage and of stable relationships, makes it more likely for men to have children by multiple partners, and increases single-parent (particularly fatherless) households. Those dynamics, unsurprisingly, correlate with adverse effects on children, including decreased parental involvement, increased risk of abuse, and juvenile delinquency.¹¹²

106. MUMOLA, *supra* note 103, at 9-10 tbl.13; Jeffrey Fagan & Richard B. Freeman, *Crime and Work*, in 25 CRIME AND JUSTICE: A REVIEW OF RESEARCH 225 (Michael H. Tonry ed., 1999).

107. Hagan & Dinovitzer, *supra* note 101, at 124-26; Braman, *supra* note 48, at 118-22.

108. Braman, *supra* note 48, at 131, 133 (ethnographic study documenting negative stigmatization and shame based on interviews with family members); Todd R. Clear, *The Problem with "Addition by Subtraction": The Prison-Crime Relationship in Low-Income Communities*, in INVISIBLE PUNISHMENT, *supra* note 22, at 191; Hagan & Dinovitzer, *supra* note 101, at 127-28, 139-40.

109. Hagan & Dinovitzer, *supra* note 101, at 143-44 (citing studies finding two-thirds of children with incarcerated mothers lived with caregivers who did not have adequate income and one study finding that most caregivers "do not exhibit prosocial parenting skills").

110. Joan Moore, *Bearing the Burden: How Incarceration Policies Weaken Inner-City Communities*, in THE UNINTENDED CONSEQUENCES OF INCARCERATION 67 (Vera Inst. of Justice, Jan. 1996), available at http://www.vera.org/publication_pdf/uci.pdf; Braman, *supra* note 48, at 122.

111. Braman, *supra* note 48, at 124-25; W.H. Sack, *Children of Imprisoned Fathers*, 40 PSYCHIATRY 163 (1977); Hagan & Dinovitzer, *supra* note 101, at 145-47 (summarizing studies with such findings); *cf. id.* at 128 (stating—before Braman's research—"[i]t is fair to say that we know little about the additive or multiplicative ways in which parental imprisonment may be causally linked to changes in the well-being of children.").

112. Braman, *supra* note 48, at 123, 126-29 (reporting interviews in which both men and women recognize the unequal gender ratio and its effect on relationships); *id.* at 127 (noting that in

4. *Communities*

Like the impact on family organization, other indirect costs of criminal punishment are aggravated because of its uneven social distribution. Beyond family organization effects, the disproportionate impact that high incarceration rates have on low-income communities affects the social capital of neighborhoods and networks to which prisoners belong, and those effects can be severe.¹¹³ John Hagan and Ronit Dinovitzer observe:

When incarceration is a rare or infrequent event within a social group, the change in social networks caused by imprisonment may be mainly a problem for the individuals involved. However, when imprisonment becomes more common and widely expected in a social group, the changes in social networks may often become damaging for the group more generally.¹¹⁴

Incarceration's uneven racial distribution—with much higher rates for minorities than whites¹¹⁵—aggravates the preexisting problem of minority youths' differential access to positive opportunities through work, family, and community social networks.¹¹⁶

Stigmatizing effects can spill over in high-incarceration communities to those without criminal histories, reducing economic prospects for the law-abiding.¹¹⁷ Most imprisoned offenders return to their communities, but their reduced appeal as employees and the instability of local labor markets make these communities unattractive to employers.¹¹⁸ High incarceration rates, then, affect non-offending community members as well, by reducing the community's economic viability.

These community-wide effects, combined with adverse impacts on employment and family structure, greatly diminish the social capital of vulnerable communities. High incarceration rates destabilize communities in ways that facilitate crime by undermining social infrastructures and thus

Washington, D.C., “where the male incarceration rate exceeds 2 percent, fathers are absent from over half of the families”).

113. Hagan & Dinovitzer, *supra* note 101, at 131-33 (“Imprisonment can swiftly and irreparably alter the social networks and structures to which inmates, and those to whom they are connected, belong.”)

114. *Id.* at 131-32.

115. Blumstein & Beck, *supra* note 10, at 22-26; Western et al., *supra* note 98, at 166-70; THE SENTENCING PROJECT, INTENDED AND UNINTENDED CONSEQUENCES: STATE RACIAL DISPARITIES IN IMPRISONMENT (1997), summary available at http://www.sentencingproject.org/pubs_06.cfm.

116. Hagan and Dinovitzer, *supra* note 101, at 132 (citing Glenn C. Loury, *The Economics of Discrimination: Getting to the Core of the Problem*, 1 HARV. J. AFR. AM. PUB. POL'Y 91-110 (1992)); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1009 (2001).

117. Western et al., *supra* note 98, at 178.

118. See Hagan & Dinovitzer, *supra* note 101, at 135; see generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* (1996).

informal social control.¹¹⁹ This community-wide effect suggests two policy implications for CBA. First, CBA needs to take account of the uneven distribution of these social capital effects. High imprisonment rates are concentrated in poor communities. Those elevated rates of incarceration thus impose the greatest social costs on communities that are already socially and economically marginal. Second, incarceration impacts different communities differently with respect to crime rates as well as economic viability.¹²⁰ Clear and Rose argue that low incarceration rates in stable communities have a positive effect on crime rates, but high rates in vulnerable communities have a detrimental effect.¹²¹ Crime prevention comes from both public (criminal sanctions) and private (informal social control) sources. In vulnerable communities, the cost of diminished informal social control may be greater than the benefits of criminal sanctions.

C. CBA Studies of Crime Prevention Policy

The insights of CBA have not been completely ignored in crime prevention policy, where CBA has been employed to assess a wide range of strategies that extend well beyond criminal law. These strategies can be divided broadly into three categories: situational crime prevention, developmental prevention, and correctional intervention programs. CBA analyses of these crime prevention projects suggest possibilities for employing CBA in criminal justice administration.

1. Situational Crime Prevention

Situational crime prevention, broadly speaking, seeks to change the context in which crime occurs. Unlike criminal law, which aims to prevent crime by using deterrence to affect offenders' motivation, situational crime prevention seeks to reduce crime by modifying the environment in which would-be offenders find criminal opportunities. Informed by rational choice and "routine activity" theories, which together suggest that criminal conduct varies with changes in opportunities and transitory pressures, it focuses on "the convergence in time and space of the three elements of

119. See Clear, *supra* note 108, at 182, 185, 188-91; Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441 (1998).

120. See Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URBAN L.J. 1551, 1554 (2003) (finding, in a time-series study of New York City neighborhoods, that incarceration rates are highest in the poorest precincts, which are not co-extensive with the highest-crime precincts, and that incarceration has perverse effects on crime rates because "incarceration . . . begets more crime").

121. Clear, *supra* note 108, at 183, 188-91; Rose & Clear, *supra* note 119, at 442, 450.

crime”—likely offender, suitable target, and absence of a guardian—that increases the odds of wrongdoing.¹²²

Sample situational prevention strategies include increased use of surveillance (both “formal,” as with cameras or guards, and “natural,” which includes building and street designs that improve public sight lines and pedestrian traffic); improvements of locks, fences, or other barriers (known as “hardening targets”); alarm-tripping merchandise tags to prevent shoplifting; verification procedures to prevent bounced checks; street closures to block traffic associated with prostitution or drug sales; credit card photos; and rapid vandalism or graffiti repair.¹²³ Neal Katyal’s survey of “architecture as crime control” examines one form of situational prevention.¹²⁴ Tort law encourages situational crime prevention by imposing liability for insufficient lighting or locks.¹²⁵

Welsh and Farrington recently attempted to identify all reliable cost-benefit studies of situational prevention programs (and other prevention strategies described below). Studies of thirteen programs met their criteria for validity, and eight of those thirteen studies showed a positive cost-benefit ratio (greater than 1.0).¹²⁶ Some were strikingly cost-efficient: a policy of removing coin meters in a public housing complex to prevent burglary had a cost-benefit ratio of 5.04; a street-lighting program to prevent personal and property crime had a 4.34 ratio.¹²⁷

2. *Developmental Crime Prevention*

Developmental crime prevention targets risk factors in youth development with the aim of reducing behavioral and attitudinal patterns learned in childhood that increase the odds of criminal conduct.¹²⁸ Prominent risk factors include socially disruptive behavior, cognitive and educational deficits, and exposure to poor parenting.¹²⁹ Strategies range from family counseling and parent support to vocational training, academic tutoring, health care, and behavioral counseling for youth. Developmental strategies are long-term approaches to crime prevention and, studies suggest, work

122. Ronald V. Clarke, *Situational Crime Prevention*, in BUILDING A SAFER SOCIETY: STRATEGIC APPROACHES TO CRIME PREVENTION 91, 95, 100 (Michael Tonry & David P. Farrington eds., 1995) [hereinafter BUILDING A SAFER SOCIETY].

123. *Id.* at 107-19.

124. Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002).

125. See, e.g., *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex. 1985).

126. See Welsh & Farrington, *supra* note 46, at 319-25.

127. *Id.* at 320-21 (citing Ronald V. Clarke & Gerry McGrath, *Cash Reduction and Robbery Prevention in Australian Betting Shops*, 1 SECURITY J. 160 (1990), and PAUL EKBLUM ET AL., HOME OFFICE RESEARCH AND STATISTICS DIRECTORATE, SAFER CITIES AND DOMESTIC BURGLARY (1996)).

128. See Nagin, *supra* note 46.

129. See generally Richard E. Tremblay & Wendy M. Craig, *Developmental Crime Prevention*, in BUILDING A SAFER SOCIETY, *supra* note 122, at 151 (surveying programs and studies of effectiveness).

best when they address multiple risk factors and are implemented before the at-risk youth reaches adolescence.¹³⁰

Due to the scope and expense of developmental prevention programs, many efforts have been relatively small in scale, and studies of their outcomes have similarly been limited, especially as to cost-effectiveness and long-term efficacy. Nonetheless, Welsh and Farrington identified half a dozen analyses that met their conservative standards for cost-benefit analysis.¹³¹ Five of the six studies found a positive cost-benefit ratio. One of the best-known longitudinal studies was the Perry Pre-school Program, which included a control group. The program began with educational intervention and home visits at preschool age and followed subjects into their late twenties. It reduced lifetime arrests by 50% and increased individuals' income, education, and home-ownership levels. CBA found \$7.16 return for every dollar invested.¹³²

3. *Correctional Intervention*

Correctional intervention includes incarceration as well as types of probation such as residential supervision, vocational and behavioral training, work requirements, and drug treatment regimes. Offender treatment is one type of correctional intervention that has fared well in cost-benefit analyses. Offender treatment programs focus on adjustment techniques, basic education and employment skills, and support for ex-addicts. The six studies of offender treatment programs that met Welsh and Farrington's CBA criteria had positive cost-benefit ratios, with returns ranging from \$1.13 to \$7.14 for every dollar invested.¹³³ Most of those studies measured benefits to include reduced use of social services as well as lower recidivism rates, and accounted for costs of recidivism, justice system administration, and some victim expenses.¹³⁴ This collection of studies could be particularly useful for criminal justice officials, who have little ability to facilitate alternatives to criminal law but substantial leeway in shaping options within criminal justice. I discuss more of these sorts of programs in Part V.D.

4. *Implications for Criminal Justice*

These studies provide some insight for the practice of criminal law enforcement, in part because they examine programs that are largely alternatives to criminal law (and, in the case of correctional intervention,

130. *Id.*

131. Welsh & Farrington, *supra* note 46, at 328-33.

132. *Id.* at 332-35.

133. *Id.* at 341. Welsh and Farrington criticize these studies, however, for including indirect or intangible victim costs in their CBA. *Id.*

134. *Id.* (noting that most studies did not monetize intangible victim costs such as pain, suffering, and fear of future victimization).

alternative ways of administering criminal law). They are useful for an audience of legislators and policy makers choosing among the broad array of crime prevention strategies, among which criminal law is only one option. However, we still lack the cost-benefit and other policy analyses that could inform daily judgments and ground-level charging policies through such tools as prosecutorial guidelines and creation of alternative responses to criminal conduct.

These studies also suggest that misallocation of resources and misdirection of policy, a familiar phenomenon in regulatory action, can also be found in criminal law.¹³⁵ They indicate poor priority setting in crime prevention policy, of which criminal law is a part, for which CBA can serve as a corrective. Criminal law has a unique function for making moral judgments and serving retributive ends, but it makes a limited contribution to the broad mix of policies that maintain public safety, health, and order. Its role in achieving these goals is secondary and, in fact, can be counterproductive. CBA is likely to suggest that for many crime problems, criminal law is a suboptimal or poor choice. Only when its retributive and expressive functions are crucial should forms of criminal punishment with high social costs be employed.

IV

A PROPOSAL FOR IMPLEMENTING CBA IN CRIMINAL LAW

As the foregoing survey suggests, criminal law traditionally pays little attention to the full social consequences of criminal enforcement, as opposed to law's specific goals such as deterrence. CBA could change this by identifying the broader social costs and thus transform the highly discretionary practice of criminal enforcement policy. I will sketch two avenues for initiating CBA in prosecution practice. The first version, like much of CBA in administrative law, arises from legislative mandate. The second, on the model of executive orders mandating CBA in a range of agency settings, relies solely on executive initiative without legislative authorization.

A. A CBA Mandate from the Legislative Branch

In the grandest vision, Congress could adapt approaches it has taken with other agencies and mandate CBA for the Justice Department in a limited way. The most practical version would be a *procedural* CBA statute that not only requires that prosecutor offices (and perhaps key enforcement agencies such as the FBI) develop guidelines and related policies based on

135. See Sunstein, *supra* note 50, at 1063 (arguing that, based on cost-benefit studies, the EPA "currently allocates its limited resources poorly, and it does so partly because it is responsive to ordinary judgments about the magnitude of risks [rather than judgments informed by CBA]. A government that could insulate itself from misinformed judgments could save tens of thousands of lives and tens of billions of dollars annually.").

those analyses but also makes that mandate immune to judicial review. One model here is the National Environmental Policy Act, which requires environmental impact statements for major agency actions.¹³⁶ A comparable statute could mandate cost-benefit analysis of major prosecutorial enforcement policies and guidelines. It could require the Justice Department to provide public assessments of the full costs and benefits of enforcement actions annually, including an assessment of distributional impacts. These assessments could be facilitated by a statutorily mandated independent committee modeled on similar bodies in other regulatory endeavors such as air-quality regulation.¹³⁷

This approach has at least two benefits. First, it would draw prosecutors' attention to currently ignored social costs and provide a basis for public assessment of controversial valuations without a judicially reviewable requirement that benefits must outweigh costs. This is important because judicial review is inappropriate for prosecutorial decision making. It is too great a break with the tradition of unbridled discretion and is not justified, as in regulatory contexts, by the independence of an agency exercising delegated authority. Further, a statutory mandate has the advantage of simply forcing the executive to employ a formalized decision procedure in a context that has traditionally lacked one. This reduces the odds that commitment to such analysis will vary with changes in administration, while maintaining the executive's traditional discretion to define and implement enforcement policies.

States, where most criminal enforcement occurs, could enact comparable regimes,¹³⁸ and Congress could encourage state action with funding for cost-benefit studies. A strong version of that encouragement would tie some form of CBA review of state enforcement to federal law enforcement funding. State and federal governments could sponsor CBA research and

136. National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(C) (2000); 40 C.F.R. § 1508.27 (2001) (requiring impacts to be assessed "in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality"). Unlike my proposal here, NEPA permits judicial review to ensure that an agency has completed an EIS and made a good-faith effort to rely upon it, but courts cannot overturn the substantive analysis unless it is clearly arbitrary. See *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); cf. Johnston, *supra* note 62, at 1349 (describing how the Office of Information and Regulatory Affairs in the Office of Management and Budget has specialized in CBA in the wake of executive orders mandating its use); *id.* at 1388 (noting one consequence of NEPA is that agencies hire scientists to gather information about costs of projects).

137. See, e.g., 42 U.S.C. § 7409(d)(2)(A) (2000) (mandating EPA administrator to appoint an "independent scientific review committee" to aid in periodic review of air-quality regulations).

138. In many states, local prosecutors are more autonomous from state attorneys general offices than federal prosecutors are from the Justice Department. While much might be accomplished by making voluntary training and research resources available, implementation of even a modest version of CBA at local levels might require more supervisory power over local prosecutors. For examples of states giving attorneys general such authority, see CONN. GEN. STAT. ANN. §§ 51-275 to 51-277 (West 1985) and DEL. CODE ANN. tit. 29, § 2502 (1997) (giving state attorney general supervisory authority over local prosecutors).

could sponsor periodic enforcement reviews as well. More practically, Congress could earmark funds for a specialized office in the Justice Department's research arm, the Institute for Justice Administration, to create broad CBA data sets for federal and state criminal enforcement. For state prosecutors, the process could be encouraged through federal training grants, administered by the Justice Department's Office of Justice Programs and Bureau of Justice Assistance,¹³⁹ that sponsor demonstration projects and support implementation assistance offered by such bodies as the NDAA. Equivalent efforts could aim to reform policing practices along the same lines.¹⁴⁰

Finally, Congress could encourage or mandate sentencing policy developed by the U.S. Sentencing Commission to incorporate the insights of CBA in designing punishment options. Again, state legislatures could mimic that process with state sentencing bodies where they exist, and Congress could encourage that trend with funding.

B. CBA Implementation by the Executive Branch

While a statutory mandate would initiate and institutionalize CBA in criminal law enforcement policy, that step is not necessary for CBA's development. Even without a legislative mandate, traditional executive-branch and prosecutorial discretion leaves ample authority for the Justice Department to develop and implement CBA.

The Justice Department has already taken some steps in this direction, albeit without the data to support formal CBA. Justice Department policies (and some sentencing decisions under the federal Sentencing Guidelines)¹⁴¹

139. The Bureau's mandate is to provide leadership and resources to state and local governments to reduce crime, violence, and drug abuse and to strengthen the nation's criminal justice system. Its programs include formula and discretionary grants, training, and technical assistance. See About the Bureau of Justice Assistance, <http://www.ojp.usdoj.gov/BJA/about/aboutbja.html>.

140. A generation ago, federal funding administered through the Justice Department coaxed local police departments to impose more centralized control and rigorous standards of conduct on officers. See Vorenberg, *supra* note 18, at 1521-22 (citing Graecen, *The Role of the Police: Should It Be Limited to Fighting Crime?*, in *PROGRESS IN POLICING* 18 (Richard A. Staufenberger ed., 1980)).

141. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL, § 5K (2000) (stating that judges can consider any compelling factor not listed in the Guidelines under the catch-all section that allows for departures based on grounds the Sentencing Commission did not adequately consider). Downward sentencing departures have been granted for family hardship reasons in a range of cases. See, e.g., *United States v. Haverstat*, 22 F.3d 790 (8th Cir. 1994) (price fixing in violation of the Sherman Act); *United States v. Gaskill*, 991 F.2d 82 (3d Cir. 1993) (public benefits fraud); *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992) (theft of public funds); *United States v. Scalamo*, 997 F.2d 970 (1st Cir. 1993) (drug distribution); *United States v. Alba*, 993 F.2d 1117 (2d Cir. 1991) (same); *United States v. Pena*, 930 F.2d 1486 (10th Cir. 1991) (same). For downward departures for reasons of economic hardship to others, see, e.g., *United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996) (tax evasion); *United States v. Milikowsky*, 65 F.3d 4 (2d Cir. 1995) (antitrust); *United States v. Somerstein*, 20 F. Supp. 454 (E.D.N.Y. 1998) (financial fraud). For a discussion of these cases and accommodations in sentencing for injury to third parties, see Darryl K. Brown, *Third Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1390-92 (2002).

now encourage prosecutorial attention to costs of criminal justice beyond traditional retributive or deterrence concerns. From this kernel we can develop initial ideas about extending federal CBA practice, and criminology's academic studies of crime prevention efficacy, to enforcement policy at the prosecution and sentencing stages.

Consider the Justice Department's internal "Guidance on Prosecution of Corporations."¹⁴² That policy lists "factors to be considered" in deciding whether to initiate prosecution against corporations.¹⁴³ Beyond traditional criminal law concerns (which we can analogize to the traditional benefits of regulation), the Guidance tells prosecutors to weigh whether prosecution will have "collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable."¹⁴⁴ Prosecutors are encouraged to assess whether the "likely punishment is appropriate given the nature and seriousness of the crime" in light of "the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders."¹⁴⁵ The policy acknowledges the inevitable, unintended costs of criminal enforcement. "Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties."¹⁴⁶ In a break with traditional criminal law theory, though perhaps not with sporadic practice,¹⁴⁷ the Department tells prosecutors to weigh the significant tradeoffs against enforcement's benefits. Prosecutors may "evaluat[e] the severity of collateral consequences" against other, traditional criteria.¹⁴⁸ This sort of rough balancing of costs and benefits can yield policy outcomes different from considerations solely of standard criminal law criteria. This Justice Department policy suggests that some sectors of federal prosecution practice resemble agency regulatory action taken under mandates to weigh benefits, costs, significant risks, and other side effects of regulation.¹⁴⁹ Yet at present this weighing is done impressionistically by prosecutors, without data to inform those judgments.

142. Memorandum from Larry D. Thompson, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components and U.S. Attorneys (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

143. *Id.* pt. II.

144. *Id.*

145. *Id.* pt. IX.

146. *Id.*

147. While some prosecutors may exercise discretion based on the social costs of criminal punishment, it is surely not a widespread norm.

148. Thompson, *supra* note 142, at pt. IX.

149. Further, in the area of forfeitures, which prosecutors administer even in their civil form because they are intended as a crime deterrent tool, Congress recently indicated a modest concern with ancillary effects of this sort of monetary punishment on others. In the Civil Asset Forfeiture Reform Act of 2000, Congress added protection for some claimants if "depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant." 18 U.S.C. § 983(d)(3)(B)(ii) (2002).

These guidelines govern a small segment of enforcement practice, but other Justice Department policies similarly guide and formalize decision making. The corporate charging guidelines are advisory to prosecutors, but other charging matters require approval from central Justice officials. The attorney general must approve all prosecutions under the Economic Espionage Act,¹⁵⁰ the Foreign Corrupt Practices Act,¹⁵¹ and the RICO statute¹⁵² as well as all prosecutions that seek capital punishment. More recently, Attorney General Ashcroft required that U.S. attorneys get approval before entering plea bargains in capital cases.¹⁵³ Ashcroft also announced significant new restrictions on all plea bargaining practices by federal prosecutors.¹⁵⁴ Moreover, Justice Department components, such as the Antitrust Division, have formal written policies and guidelines that aim to make their enforcement policy choices both public and consistent.¹⁵⁵

Together, these examples offer initial models of a more elaborate, formalized policy of prosecutorial discretion. Only the corporate charging guidelines recognize enforcement practice as playing a role in broader social policy, and all these policies attempt to improve enforcement practice by either centralizing decision authority or defining criteria that field prosecutors should employ in discretionary decision making. None, however, employs data or formal policy analysis in the criteria-assessment and factor-weighting process. Nonetheless, this collection of increasingly formalized policy making to guide prosecutorial discretion sets a promising

150. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-59.100 (2002), also published at 28 CFR 0.64-5 (1998), available in full at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/.

151. *Id.* at 9-47.100.

152. *Id.* at 9-110.101 (requiring approval by the Justice Department's Criminal Division); see also *id.* at 9-110.200 (specifying criteria by which Criminal Division will approve RICO prosecutions, because the statute requires "particularly careful and reasoned application," must be "selectively and uniformly used," and must balance "interest in effective law enforcement against the consequences for the accused").

153. See Adam Liptak, *Under Ashcroft, Judicial Power Flows Back to Washington*, N.Y. TIMES, Feb. 16, 2003, § 4, at 5; Benjamin Weiser & William Galberon, *Ashcroft Pushes Executions in More Cases in New York*, N.Y. TIMES, Feb. 6, 2003, at A1 (describing attorney general's new policy to mandate pursuit of death penalty in cases that U.S. attorneys recommend pleading to lesser punishments).

154. See Attorney General John Ashcroft, Remarks in Milwaukee, Wisconsin (Sept. 22, 2003), available at <http://www.usdoj.gov/ag/speeches/2003/092203milwaukee.htm> (describing new policy of plea bargaining restrictions); Curt Anderson, *Ashcroft Reducing Plea Bargaining Discretion*, LEXINGTON HERALD-LEADER, Sept. 22, 2003.

155. See, e.g., ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, LENIENCY POLICY FOR INDIVIDUALS, at <http://www.usdoj.gov/atr/public/criminal.htm> (Aug. 10, 1994); ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY, at <http://www.usdoj.gov/atr/public/criminal.htm> (Aug. 10, 1993). The Justice Department also has a policy on criminal charging for environmental violations. See U.S. DEP'T OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (July 1, 1991), reprinted in ENVIRONMENTAL CRIMINAL LIABILITY 471 (Donald A. Carr ed., 1995).

example: it looks like a form of administrative rulemaking. If the executive branch were to develop CBA as a means to improve and expand such quasi-rulemaking, then the application of CBA to criminal justice would look less different from CBA in other executive branch contexts.

Despite the increasingly formalized nature of Justice Department policy making, employing CBA in the development of such policies could make a drastic difference in their design and implementation. Criminal law is particularly vulnerable to errors that CBA can help government actors avoid. Recall the cognitive habits that bias judgments. People often have difficulty assessing systemic consequences of one-shot actions,¹⁵⁶ of which individual prosecutions are an example. In isolated responses to individualized events, it is hard to produce a full accounting of positive and negative effects. Agencies, like prosecutors, tend to downplay risks created by their actions.¹⁵⁷ Prosecutorial culture, in particular, has a tradition of looking only at the traditional reference points of criminal law—deterrence, retribution, implications for the offender versus law enforcement interests. Detailed studies of costs and risks can influence general prosecution guidelines and reduce the odds that such guidelines are executed in a reflexive, self-serving, or ill-informed manner.

The same avenues used by regulatory agencies can be used for criminal enforcement. Absent a mandate, regulatory bureaucracies are often slow to adopt up-to-date research when prior (less accurate) research exists.¹⁵⁸ Prosecutors, law enforcement agencies, and sentencing authorities,¹⁵⁹ like administrative agencies, should have access to, and be required to review, the best available risk and benefit information. Where knowledge of costs is imperfect, agencies can use probabilistic methods of uncertainty analysis, identifying, say, a range of risk or cost estimates rather than adopting a single (perhaps self-serving or selectively chosen) one. Analysis should include distributional variations, so that decision makers have information about the differential impact of practices on various citizen subgroups.¹⁶⁰

156. Sunstein, *supra* note 35, at 1662; *see also* DORNER, *supra* note 85, at 71-105 (discussing psychological factors that bear on human planning and decision making in complex systems).

157. *See* John D. Graham, *Making Sense of Risk: An Agenda for Congress*, in *RISKS, COSTS*, *supra* note 34, at 183, 196 (proposing that Congress require agencies to consider risk trade-offs, based on the concern that agencies downplay risks induced by their policies).

158. *See id.* at 189 (arguing that agencies neglect or reject high-quality scientific information because “bureaucracies have difficulty innovating without a clear statutory mandate” and prefer the consistency of existing models and assumptions).

159. At the federal level, this is the U.S. Sentencing Commission; state sentencing policy makers take a variety of forms.

160. These suggestions are developed in the administrative law context in Graham, *supra* note 157, at 189-91. For an argument and proposal that prosecutors should do “racial impact studies” to inform themselves on the broader social consequences of their enforcement practices, *see* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 18-19, 53-64 (1998).

Finally, the idea generalizes to state prosecutors, although in most states local elected prosecutors have a tradition of greater autonomy from the state attorney general than is true in the federal context. Comparable policies of centralized decision-making authority are scarcer in the states, and legislation may be required to give state attorneys general the authority to control charging decisions. As noted above, the federal government could encourage development of CBA-informed policy making by funding data gathering and analysis and assisting states in adapting this information for guidelines in their jurisdictions. Training entities such as the National District Attorneys Association,¹⁶¹ the American Bar Association, or even local prosecutors' offices in larger jurisdictions could facilitate the development of model policies for state adoption.

V

ADDRESSING CHALLENGES TO CBA IN CRIMINAL LAW

A. *Methodological Challenges for CBA in Criminal Law*

CBA faces a range of methodological challenges in criminal justice, some of which are common to all CBA implementation. Perhaps the most common objection is that CBA must confront a range of costs, risks, and benefits that cannot really be valued quantitatively. Criminal law includes many such effects, posing problems analogous to valuing scenic landscapes. CBA undoubtedly works best when costs and benefits can be quantified relatively uncontroversially,¹⁶² but it has also been employed with arguable success in assigning quantitative values to qualitative things, like the cost of lead poisoning in children or the benefit of scenic beauty.¹⁶³ Further, we do have models in administrative law for incorporating those values *qualitatively* in a broader assessment procedure that incorporates CBA.¹⁶⁴ With these models, we quantify what we can about regulation, then balance that directly against qualitative judgments of such values as poison-free children or scenic views. It is not clear which version would work better for criminal law. Many comparable, qualitative concerns are not even on the agenda of criminal enforcement policy so even CBA's imperfect tools for quantifying the unquantifiable serve in this context to

161. For a description of the NDAA's American Prosecutors Research Institute, which provides "research, training and technical assistance" to state prosecutors, see American Prosecutors Research Institute website, at <http://ndaa-apri.org/apri/index.html>.

162. Leonard & Zeckhauser, *supra* note 43, at 43-44 ("cost benefit analysis is *designed* as a method of quantification, so it surely is better able to deal with more quantifiable aspects of the issues it confronts," but this limitation is ethically neutral unless it systematically pushes decisions in a particular direction).

163. See, e.g., Ackerman & Heinzerling, *supra* note 44, at 1555 (criticizing one method of assessing the costs of lead poisoning in children).

164. See Welsh & Farrington, *supra* note 46, at 341 (discussing studies that have quantified humanistic costs).

force at least partial consideration of undervalued or unnoted effects. The softer version of CBA, in contrast, promises a fuller assessment but, in the hands of enforcement officials who have long ignored these costs, it risks becoming a means to undervalue these interests even more than quantification does.

Consider two other challenges for CBA that are more specific to criminal law. First, CBA will work better or worse depending on whether there are notable wealth differences between parties that win and parties that lose under a given policy project. CBA's uncorrected endowment dependence makes it a particularly weak tool when such wealth differences exist.¹⁶⁵ This limitation makes criminal law a difficult application context for CBA. Most criminal defendants are fairly poor, and the families and communities to whom they are connected are poor as well. To the extent CBA relies on willingness-to-pay and willingness-to-accept valuation methodology that is endowment dependent, it is likely to undervalue costs experienced by those defendants.¹⁶⁶ Criminal law benefits, on the other hand, are spread more broadly, creating a disparity in wealth endowments among those bearing costs and reaping gains.¹⁶⁷ There may be methodological strategies around this problem. For instance, these effects can be normalized or willingness-to-pay data can be drawn from a full range of race and income groups. Nonetheless, endowment dependence remains a serious challenge for CBA.¹⁶⁸

Second, CBA can only work if all the relevant costs and benefits are identified and evaluated. As has been discussed, some costs of criminal law are hidden or easily ignored, both because of the nature of those costs and because the political dynamic surrounding the project may not bring the full range of costs to officials' attention. In this respect, however, CBA should prove useful to criminal law because it establishes a structure by which decision makers seek to (and are forced to) identify costs. That structure, with a history in other contexts of broad cost considerations, should be a significant advantage for criminal justice, which now ignores many of its ancillary costs. Collateral consequences of street crime

165. See Adler & Posner, *supra* note 37, at 238-43 (suggesting that CBA should not be used to evaluate the welfare effect of large projects where substantive wealth differences exist because of the inaccuracies that can result from the monetized nature of CBA).

166. Standard CBA techniques could include survey data on what people would be willing to pay to avoid bad educational outcomes or antisocial behaviors for their children, the cost of counseling for the effects of home-life crises, remedial education for poor school performance, and criminal justice costs (including incarceration) for earlier and increased criminal offending. On top of those difficult quantification efforts, a broader decision procedure could then incorporate qualitative and distributional assessments to supplement CBA.

167. For a general discussion of this problem, see Adler & Posner, *supra* note 37, at 238-43.

168. See David A. Hoffman and Michael P. O'Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 364 (2002) (noting that efforts to correct for endowment dependence in CBA are "still unrealized").

punishment are a prime example of costs the criminal justice system now ignores. Analogous ancillary effects from corporate crime punishment, on the other hand, are not, because firms often are effective at bringing those costs to the attention of enforcement officials.¹⁶⁹

In short, criminal law poses significant, though not unique, challenges for CBA. Critics have extensively catalogued the methodological difficulties associated with CBA in other contexts, but policy makers in those fields have not responded by abandoning it altogether. Rather, they have learned to work with and compensate for CBA's inherent shortcomings. Criminal law analysts should take the same approach, recognizing that policy making will benefit greatly from CBA, even if their methodological concerns cannot be fully allayed.

B. Public Choice Challenges for Criminal Justice

The most prominent arguments for CBA in administrative law emphasize the procedure's ability to reduce public choice problems in agency behavior, such as excessive interest group influence, shirking or self-regarding behavior, and lack of monitoring by Congress and the president.¹⁷⁰ The problems arising from the structure of criminal law enforcement are different from most agency settings, however, so CBA's operation and rationales in criminal law vary somewhat from regulatory contexts.

In most administrative contexts, agencies have an informational advantage that CBA can help to offset. Agencies acquire specialized knowledge about the effects of their actions that their principals (Congress or the president) do not have. Often, that knowledge comes from regulated firms that have an interest in emphasizing compliance costs. CBA helps to offset the risk that interest groups skew an agency's information basis. It reduces the risk that agencies will use their advantage in knowledge and expertise to pursue policy outcomes that depart from the preferences of the legislative or executive branch.¹⁷¹ CBA is one way principals can force agencies to reveal their informational advantage because it makes the informational basis of their decisions more transparent.¹⁷²

169. See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1327-34 (2001) (describing how civil sanctions substitute for criminal punishment in many corporate contexts, especially when collateral consequences of punishment are substantial).

170. See Posner, *supra* note 78, at 1140-43, 1147-50. *But see* Johnston, *supra* note 62, at 1385-1401 (arguing that cost-benefit statutes increase interest groups' ability to influence regulatory outcomes).

171. For a critical overview of public choice theory regarding interest groups' influence on government action, see FARBER & FRICKEY, *supra* note 19, at 11-37.

172. See Posner, *supra* note 78, at 1140-50. *But see* Johnston, *supra* note 62, at 1349 n.23 (criticizing Posner's conclusion that an agency is better off when it is required to reveal its information to its principals). One benefit of CBA over other methods of regulatory impact analysis is the

In criminal law, the dynamic is different. Enforcement officials have neither incentive nor means to acquire information about the social costs of enforcement. To the contrary, they have an incentive to *avoid* such knowledge. As long as those costs remain hidden, the net benefits of enforcement, for which enforcement officials get political credit, appear more substantial. There is less fear that enforcers will depart from the preferences of legislatures, because both groups benefit from the public perception of stringent enforcement policies. Their preferences are closely aligned.¹⁷³ Neither has a strong self-interest-based preference for socially optimal criminal enforcement because enforcement's hidden costs are largely externalized. Additionally, those costs are largely diffuse and indirect, while key benefits, such as punishment of wrongdoers, are visible and immediate.¹⁷⁴

Moreover, prosecutors face little lobbying pressure from "regulatory targets" comparable to most administrative agencies.¹⁷⁵ Hence they do not have the same ability to acquire fuller information about benefits and costs.¹⁷⁶ The main exception is in federal enforcement of corporate crime, where precharge negotiations with suspects are common.¹⁷⁷ In that context we see broad social costs of prosecution—useful information—brought to prosecutors' attention. We also find charging guidelines that recognize those costs as a legitimate rationale for decisions not to prosecute as well as for substituting civil remedies for prosecution. Outside of corporate crime, criminal law is at risk of something like the opposite of agency

comparative ease with which officials, the public, and interest groups can review it. Adler & Posner, *supra* note 37, at 237-38 (arguing CBA is easier to assess than alternatives such as QUALY analysis). Because CBA quantifies all interests along a single, contestable metric, one can assess the persuasiveness of any given quantification. Analyses that are more qualitative and multi-dimensional in nature avoid the flaw of quantifying amorphous and diverse interests, but at the price of making qualitative comparisons of diverse goods (say, tradeoffs between family or community stability and incapacitation benefits) more contentious.

173. Cf. Stuntz, *supra* note 5, at 550 (arguing that "the same political forces that lead legislators to prefer a given defendant be left alone also work on prosecutors—at least on local prosecutors").

174. In regulatory contexts, we recognize that concentrated benefits coupled with large, diffuse costs present collective action problems that increase the odds of ill-conceived government action. See Johnston, *supra* note 62, at 1388.

175. Cf. KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986) (describing a mammoth empirical study of interest-group lobbying in federal politics that found, *inter alia*, interest groups varied in strength and were not always active or evenly matched on both sides of an issue).

176. Cf. Johnston, *supra* note 62, at 1354 (describing agency incentives to acquire information about compliance costs in response to firm lobbying on rulemaking).

177. Cf. JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE 239-40 (1996) (describing pre-indictment conferences between defense attorneys and Justice Department officials); KENNETH MANN, DEFENDING WHITE COLLAR CRIME (1985).

capture—excessive regulatory intervention (prosecution) due to an information deficit about the full social costs of government action.¹⁷⁸

To respond to these different dynamics, CBA in criminal law cannot rely on enforcement via judicial review as it generally does in administrative law.¹⁷⁹ Nevertheless, an unreviewable, procedural version of CBA still has the tools of transparency and information-forcing to inform policy making. In criminal law, the interest groups who can take advantage of CBA's transparency to lobby for policy making that moderates the ancillary costs of prosecution are comparatively weak politically, but they are not completely powerless. Monied interests do not always win, and forces for moderation in criminal defense often, but do not always, lose.¹⁸⁰ The implementation of CBA gives interested groups an additional forum, mechanism, and information base on which to monitor and influence enforcement policy.¹⁸¹ Further, holding aside the influence of interest groups, CBA forces officials to confront previously ignored costs and effects of

178. See Spence & Cross, *supra* note 78, at 119 (describing the theory of "agency policy bias" as maintaining that those who work in agencies are more ideologically committed to its mission than the public, often at the expense of other public goals or values).

179. Under a CBA regime enforced by judicial review, agencies have an incentive to ensure that their actions can be defended in CBA terms. In those regulatory settings that do not have reviewable statutory mandates, officials still face the check of lobbying by regulated entities. That can be a fairly effective substitute for judicial review. Firms lobby hardest when compliance costs for them are highest, so heavy lobbying gives agencies much information about compliance costs as well an incentive to gather information in response to firms' lobbying. See Johnston, *supra* note 62, at 1399-1400. Yet even with those two mechanisms facing most agencies, in addition to executive-order mandates for CBA, it seems many regulations still have costs that exceed benefits. See Hahn & Sunstein, *supra* note 43, at 1491-93 & nn.13-14 (citing ROBERT W. HAHN & ROBERT E. LITAN, AN ANALYSIS OF THE THIRD GOVERNMENT REPORT ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS tbls.1-2 (Feb. 2000), http://www.aei.brookings.org/publications/reganalysis/reg_analysis_00_01.pdf).

180. See Spence & Cross, *supra* note 78, at 121-23:

[A]gency capture is no longer regarded as a valid descriptive theory of bureaucratic behavior. . . . While it remains true that industry enjoys enormous resource advantages over others in the struggle to influence policy making in Congress and at the agency level, those resource advantages have simply not led to the outlier-dominated policy processes capture models describe. Few would argue that the Food and Drug Administration (FDA), Environmental Protection Agency (EPA), and Federal Trade Commission (FTC) act at the behest of industry (either directly or indirectly) when they decide whether drugs are safe, permits should be issued, or anticompetitive activities should be outlawed, respectively, or that industry's relative overrepresentation in the agency decisionmaking process has skewed the process in that way. Indeed, capture theory is directly contradictory to the agency policy bias criticism, which suggests that agencies will over-regulate.

See also William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 359-65 (1991) (describing factors that create more or less powerful interest groups and their ability to affect legislative agendas); discussion *supra* note 32 (describing state legislative reforms moderating punishments for drug crimes).

181. It may be, however, that greater data that link criminal justice to social costs might prompt groups bearing those costs—perhaps civil rights groups and others advocating for disadvantaged communities—to direct more attention to criminal justice policy. The ability of defendants to raise some of these costs in plea bargaining and sentencing proceedings is an inadequate substitute. It is interesting, however, to speculate whether CBA information about criminal enforcement would find its way into defense arguments at these litigation stages.

enforcement policy by increasing their own knowledge of costs. CBA should help establish a culture that recognizes those costs as legitimate bases for revising enforcement strategies, in contrast to the current tradition in which they receive much less attention.

Despite its significant costs (to gather and analyze data, train officials to utilize data, and do periodic reviews), CBA's promise is to change the context of political debate of expansive regulation through criminal justice. CBA does not eliminate political judgments. No procedure can fully replace politics with neutral rationality; the heated contention over valuations of qualitative interests in other regulatory contexts proves the point. Still, we can change the form by which political questions are addressed, and that change in form can have substantive consequences. Popular preferences are translated into different legislative outcomes depending on rules by which a legislature's membership is selected. Such rules include the choice of single-member or multi-member districts, say, and whether to use cumulative voting or proportional representation mechanisms. The internal rules governing legislatures also affect the translation of preferences into legislation. For example, the Senate's filibuster rules have a minority-empowering effect which the House rules lack. Similarly, CBA shifts the ground of some political decision making about enforcement policy. Prosecutors currently are acutely responsive to local political constituencies and can externalize many social costs of enforcement. CBA makes that externalization harder and provides a rationalizing counterbalance to political decision making, even if one believes that CBA itself is rife with political judgments.¹⁸² Existing political structures and means of policy making have swung enforcement policy as far as is feasible toward harsh punitivism. In that context, an analysis built on cost-benefit assessments poses more promise than risk.

C. *The Challenge of Retributivism and Virtue Ethics*

One theoretical roadblock to CBA-based decision procedures for criminal law may be opposition from nonconsequentialist theorists. CBA is inherently utilitarian, although other normative commitments can be integrated into a CBA-based procedure. Many criminal law theorists, on the other hand, fall into one of two nonconsequentialist camps—deontological retributivism or virtue ethics. Neither commitment should be a bar to CBA, however, because they operate largely (but not entirely) at different levels of criminal law administration.

182. See Emerson H. Tiller, *Resource-Based Strategies in Law and Positive Political Theory: Cost-Benefit Analysis and the Like*, 150 U. PA. L. REV. 1453, 1453 (2002) (noting the "insidious nature" of CBA and other decision procedures that facilitate "ideological, often partisan, control of public policy").

Retributivists base criminal law on a commitment to just deserts: punishment responds to the wrong manifest in criminal conduct. Liability is justified by the offender's moral blameworthiness; punishment restores the moral balance upset by an offense and treats the offender with dignity inasmuch as he is recognized as a responsible moral agent.¹⁸³ Virtue ethics asserts a different organizing concern for criminal law. For the virtue ethicist, "the inculcation of virtue is the criminal law's justifying purpose."¹⁸⁴ In judging criminal conduct, virtue ethics judges the offender's exercise of practical judgment, and thereby his character, with the aim of rendering individualized judgment and reinforcing sound judgment.¹⁸⁵

Few if any adherents to either of these nonconsequentialist camps, however, insist that we have a moral duty to punish *every* offense the government has evidence to prove. That is, retributivists and virtue ethicists accept some theory of declination (though we lack a detailed statement of that theory).¹⁸⁶ Retributivism and virtue ethics speak largely to the stages of adjudication and sentencing—to the administration of criminal law once we have decided to prosecute. Though both approaches imply a need to apply criminal law in cases of clear wrongdoing, neither requires it in every instance. A CBA-based decision procedure that primarily informs charging priorities speaks to this earlier stage of justice administration, before the imperatives of retributivism or virtue ethics take full force.

To the extent that CBA informs sentencing (or other remedy) policies in addition to charging policy, it may conflict with nonconsequentialist theories. However, some forms of retributivism would seem to counsel the sort of moderation in criminal law that CBA would likely justify. For example, consider what CBA could show a retributivist about the full range of unintended consequences caused by criminal punishment. If punishment policy imposes indirect harms on innocents, retributivism presumably would recognize a duty to refrain from creating such harms—and injustice—if they exceed the harms of unpunished criminal conduct.

183. Larry A. Alexander, *The Philosophy of Criminal Law*, in OXFORD HANDBOOK OF JURISPRUDENCE AND LEGAL THEORY 815, 816-23 (Jules Coleman ed., 2002) (summarizing variations in retributivist theories), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=285954; MOORE, *supra* note 68 (offering the most thorough contemporary argument for deontological retributivism as the basis for criminal law); Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 412 (1958) ("it is necessary to be able to say in good conscience in *each* instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community."); JAMES FITZJAMES STEPHEN, 2 A HISTORY OF THE CRIMINAL LAW IN ENGLAND 81-82 (1883).

184. See Huigens, *supra* note 3, at 1029.

185. See *id.* at 1029-30; Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 445 (2002) ("[I]nculcation and maintenance of the capacity for sound practical reasoning (virtue in its correct, technical sense) is a prominent objective of punishment that can justify punishment.").

186. See, e.g., Alexander, *supra* note 183, at 816-22 (noting few retributivists subscribe to a "strong" version of the theory that requires punishment in every instance of wrongdoing).

Nonconsequentialist theorists may raise yet another challenge for CBA in criminal law. Retributivism, at least, requires an ordinal ranking of offenses that sets the parameters of requisite punishment,¹⁸⁷ whereas criminal law policies informed by CBA could lead to punishing similar classes of offenders differently depending on the costs created by that punishment.¹⁸⁸ Note, however, a secondary effect that CBA could have on criminal justice for that large class of cases still prosecuted (and punished with incarceration) even in a world of justice policy fully informed by such analysis. There is little agreement among retributivists (or others) on how to match wrongdoing to specific levels or forms of punishment rather than a relative ranking—that is, a cardinal rather than merely an ordinal ranking.¹⁸⁹ There is certainly no agreement that retributivism requires anything like the sentencing levels and policies the United States adopted in the last quarter century.¹⁹⁰

One historical lesson of twentieth-century American punishment policy is that we can maintain public acceptance of much lower *relative* levels of incarceration, as we did through the mid-1970s. We drastically increased sentencing levels in the last quarter century largely in response to a set of social-political dynamics prompted in part by crime-rate increases—rather than changes in the nature of crime—and partly in response to a perception that criminal procedure reforms had weakened law enforcement capabilities.¹⁹¹ That is, we increased punishment levels for *crime control* purposes, rather than retributivist ones. Relative punishment levels are mostly a function of political responses to concerns about crime threats, safety, and order¹⁹²—the goals of utilitarian crime prevention strategies. We may not be able to return to 1950 punishment levels (which would require difficult political decisions such as repealing mandatory punishment statutes), even

187. See generally ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 17-19 (1993) (distinguishing ordinal ranking of punishments from cardinal ranking); *id.* at 36-46 (discussing bases for grounding a cardinal ranking of punishments).

188. This can be avoided, however, by reducing punishments that do not create costs to the level of those reduced because they create excessive social costs. That is, the baseline on which an ordinal ranking is created would be adjusted in light of CBA-informed assessments of punishments.

189. For discussion of theories for grounding a cardinal ordering of punishment, see VON HIRSCH, *supra* note 187, at 36-46.

190. *Cf. id.* at 38 (discussing a prison term of twenty-five years as an anchor—the most severe punishment—on which an ordinal ranking could be based). Many neo-retributivist theorists in the 1970s, when the approach came to overtake consequentialist theories for punishment, were liberals who saw retributivism as means of limiting arbitrary sentencing imposed by a justice system with excessive sentencing discretion. See, e.g., RICHARD G. SINGER, *JUST DESERTS* (1979); GARLAND, *supra* note 5, at 59 (noting that ANDREW VON HIRSCH, *DOING JUSTICE* (1976) argued for retributive punishment as end in itself for the first time in decades).

191. See Brown, *supra* note 13; HERBERT L. PACKER, *THE LIMITS OF CRIMINAL SANCTION* 149-73 (1968) (describing Packer's influential "two models of criminal procedure" according to which liberty-protecting rights diminish crime-control effectiveness).

192. See GARLAND, *supra* note 5, at 10-12, 30-34.

if we could restore the lower crime levels that prevailed then.¹⁹³ Nonetheless, lower crime rates, with concomitant moderation in punishment, are more likely with an optimal crime prevention and enforcement policy. Facilitating that policy shift is the project of CBA in criminal law, which could support a gradual shift toward social sentiment for lower relative baselines for criminal sanction consistent with retributivist commitments.¹⁹⁴

D. *Limitations in Light of Substantive Law of Crime and Punishment*

Criminal justice policy, revised through a CBA-based rationalized decision procedure, would reveal hidden costs to current enforcement strategies that would prompt revision of enforcement policies. Yet prosecutors (and trial courts, which could use data to innovate alternative resolution programs) are limited by statutory sentencing mandates, including the federal Sentencing Guidelines and widespread mandatory-minimum statutes at the state and federal levels.¹⁹⁵ This state of affairs suggests an important concern: is CBA-informed prosecutorial enforcement discretion and trial court innovation still too weak for substantial reform, in light of legislative sentencing commands?

193. One theory for anchoring a cardinal penalty scale, in fact, is on the basis of prison capacity. See VON HIRSCH, *supra* note 187, at 39-40. On that view, given American prison capacity, reducing crime rates would have little effect—conceivably even a detrimental effect—on the severity of punishments. A separate ground for the same argument arises from a public choice premise: interest groups invested in our current, high levels of imprisonment (e.g., prison employees, prison management firms, rural communities dependent on prison employment) would lobby in resistance to reduced prison capacity. See Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC MONTHLY, Dec. 1998, at 51, available at <http://www.theatlantic.com/issues/98dec/prisons.htm>.

194. More broadly, integration of CBA could jump-start a debate over whether criminal law should be a welfarist government program. On that view, overall well-being would be an additional, morally relevant criterion, rather than limiting concerns to criminal law's traditional goals of crime prevention and retribution. Mapping that debate is beyond the scope of this Article, but note this central insight of examining the full effects of criminal law enforcement: fully serving either retributivist or deterrence aims might cause substantial, ancillary social harms, harms that even outweigh the benefits of imposing just deserts on offenders. On a welfarist (as opposed to purely utilitarian) view, that diminishment in overall social well-being could be grounds for changing or forgoing government action (by not prosecuting or punishing differently). Though the working parameters of how such a welfarist commitment would operate are far from clear, we can conceivably retain strong commitments to retributivism and crime prevention while also explicitly integrating a commitment to assess and minimize social harms from criminal punishment. See Adler & Posner, *supra* note 37, at 196:

Utilitarianism is the view that overall well-being is morally decisive: The only important feature of a project is its effect on aggregate welfare. [A welfarist] view . . . is that overall well-being is morally *relevant*. Government should choose a welfare-improving project, but all things considered, nonwelfarist considerations (for example distributive or deontological considerations) may properly lead to the ultimate rejection of that project.

For a fuller description of a welfarist vision of CBA, see *id.* at 194-225.

195. For a description of one form of state-level mandatory sentencing statute, see FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001); see also THREE STRIKES AND YOU'RE OUT (David Shichor & Dale K. Sechrest eds., 1996).

For a truly substantial revision of American criminal justice, the answer is yes. Prosecution action and local court innovation alone, however, have a tremendous capacity to change the shape of enforcement practices, even in light of sentencing statutes and limited legislative funding for creative alternatives to criminal law and punishment. Prosecutors can do more than simply initiate or decline prosecution; courts can do more than adjudicate cases initiated by prosecutors. Each can take a role in devising or influencing such strategies as juvenile justice facilities, drug and domestic violence treatment programs, and community-based courts linked to social service agencies. Gerard Lynch has offered a well-known account of how prosecutors use their broad discretion within the wide scope of substantive criminal law to “set priorities and move resources effectively from one area to another depending on social need,” thereby constructing social policy in accord with changing social needs and in the process developing a justice system that looks almost as much administrative as adversarial.¹⁹⁶ In addition to targeting resources at some problems more than others, prosecutors can decline prosecution with supervision, pending the outcome of alternative approaches, thereby retaining significant influence on sentencing. They can also proactively initiate strategies with other agencies for responses to criminal conduct that reduce the social costs of punishment. We have models for these sorts of innovations now. Consider several examples.

The Washington, D.C., United States Attorney’s office in the mid-1990s created a community prosecution program in a high-crime area of Washington. Trial attorneys were reassigned to specific neighborhoods, and some attorneys were assigned to community outreach with no trial-court duties at all.¹⁹⁷ The program sought to change the fact that line attorneys “do[] not really think much (or have time to think much) about crime per se . . . or how to stop it, other than holding the guilty to account after the fact.”¹⁹⁸ It sought to change the prosecutorial culture in which trial attorneys measure their success solely by winning convictions in court. The program refocused attorneys on:

196. See Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2138 (1998); see also *id.* at 2124-38 (describing prosecutors as having administrative and quasi-judicial functions that effectively adjudicate guilt and set punishments in the pre-trial stages of many cases).

197. BARBARA BOLAND, NAT’L INST. OF JUSTICE, *COMMUNITY PROSECUTION IN WASHINGTON, D.C.* 1 (Apr. 2001); see also CAROL J. DEFANCES, BUREAU OF JUSTICE STATISTICS, *NATIONAL SURVEY OF STATE PROSECUTORS: STATE COURT PROSECUTORS IN SMALL DISTRICTS 2001 7-8* (Jan. 2003) (reporting 68% of small-district prosecutor offices used tools other than prosecution to address community problems, a minority assigned prosecutors to specific neighborhoods, and most worked with other agencies and community associations), available at <http://www.ojp.gov/bjs/pub/pdf/scpsd01.pdf>.

198. BOLAND, *supra* note 197, at 12.

figuring out what else is required to promote order and prevent crime in particular neighborhoods. Attorneys charged with the task of working with citizens and police to address crime problems in specific locations come to understand that a neighborhood's needs differ from those of individual victims. Their perspective broadens to include behaviors that conventional case processing overlooks because crimes are considered minor, the knowledge required to link specific incidents to larger patterns of criminal behavior is missing, or conventional adjudication is an ineffective solution.

. . . [A] community prosecutor needs the flexibility to supplement conventional prosecution with a range of tools—from aggressive pursuit of misdemeanor arrests . . . to the use of civil remedies to ameliorate underlying problems of disorder [and to] . . . coordinate their efforts with others.¹⁹⁹

Comparable innovations exist in many local prosecutors' offices. In 2000, half of all local prosecutors had some form of "community prosecution" program, and sixty-two received federal money to implement new programs.²⁰⁰ Components vary widely, but often include organizational changes that target specific neighborhoods; increased community input and social service agency involvement; support for prevention programs; and increased non-punitive remedies such as diversion programs for offenders, nuisance abatement orders, and license or building-code enforcement for trouble spots.²⁰¹ The federal "Weed and Seed" program supports similar efforts.²⁰²

State court administrators initiated their own variations of this trend. Cities and counties have experimented with a variety of models for "community courts" that aim for similar goals. These "problem-solving" courts develop programs in coordination with service agencies to address drug abuse, domestic violence, mental illness, and street-level quality-of-life crimes.²⁰³ Community courts are typically more likely to combine, if

199. *Id.* at 12.

200. JOHN S. GOLDKAMP ET AL., BUREAU OF JUSTICE ASSISTANCE, COMMUNITY PROSECUTION STRATEGIES: MEASURING IMPACT 2 (Nov. 2002) (listing jurisdictions with such programs).

201. *See id.* at 3-7. For a sense of how limited alternative outcomes are in felony criminal cases, consider that only 4% of felonies in the seventy-five largest counties ended through a diversion program or deferred adjudication rather than conviction, acquittal, or dismissal. *See* BUREAU OF JUSTICE ASSISTANCE, SOURCE BOOK FOR CRIMINAL JUSTICE STATISTICS 2001 452 tbl.5.55 (Ann L. Pastore & Kathleen Maguire eds., 2002).

202. *See* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, THE WEED AND SEED STRATEGY (providing overview of Weed and Seed program); *see also* Executive Office for Weed and Seed website, at www.ojp.usdoj.gov/eows. The Weed and Seed program coordinates local and federal crime prosecution—"weeding" out violent offenders from localities—and coordinates social services that "seed" economic revitalization efforts.

203. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, STRATEGIES FOR COURT COLLABORATION WITH SERVICE COMMUNITIES 2 (Nov. 2002) [hereinafter BJA, STRATEGIES] (describing such courts in California, Florida, New York, Michigan, Kentucky, Washington, and South Carolina); *see also* JOHN FEINBLATT & GREG BERMAN, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T

not substitute, treatment and assistance with punishment, as well as require community service or other forms of offender restitution to victimized communities. Aspirational statements for these projects often describe a shift from “case-processing to community-mending.”²⁰⁴ These projects seek to confront the conflicting cultures of criminal justice and social service agencies: judges and prosecutors work on a model of escalating sanctions, whereas treatment professionals run programs that expect relapses and failures. Training and communication efforts aim to overcome these professional-culture barriers to cross-system coordination.²⁰⁵

Finally, in recent years, scholars have described how prosecutors can encourage and coordinate with law enforcement agencies to pursue criminal investigations through means that impose the social costs of punishment on stable rather than marginal communities. Tracey Meares’ advocacy of reverse-stings is one example. She recommends using undercover investigations to arrest drug *buyers* or the *solicitors* of sex workers, who often reside outside poor communities, rather than *sellers* from inner-city communities.²⁰⁶ A CBA of that punishment strategy would likely find lower social costs, because punishments for buyers are typically lower than for sellers and have fewer community costs.²⁰⁷ Another strategy is the use of civil law tools such as injunctions against gang activities. Although those sanctions raise substantial civil liberty issues, they reduce the use of criminal sentences while offering an empirically confirmed method of crime deterrence.²⁰⁸

OF JUSTICE, RESPONDING TO THE COMMUNITY: PRINCIPLES FOR PLANNING AND CREATING A COMMUNITY COURT 4 (Feb. 2001) (describing operation of a community court, including coordination with social service agencies, in New York City). For a broader survey of community-level innovations in crime fighting, see BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, COMPREHENSIVE COMMUNITIES PROGRAM: PROMISING APPROACHES (Apr. 2001). For a description of another local project that emphasized more traditional law enforcement tools and community policing, see DAVID M. KENNEDY ET AL., NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT’S OPERATION CEASEFIRE (Sept. 2001) (describing enforcement efforts against gun-related and gang-related violence that are integrated with community outreach strategies).

204. See FEINBLATT & BERMAN, *supra* note 203, at 4.

205. BJA, STRATEGIES, *supra* note 203, at 6-7; FEINBLATT & BERMAN, *supra* note 203, at 5. For a description of efforts to overcome a comparable divergence between police and communities over crime-fighting methods and priorities, see David Thacher, *Conflicting Values in Community Policing*, 35 L. & SOCIETY REV. 765 (2001).

206. Meares, *supra* note 28, at 697-98.

207. See Hagan & Dinovitzer, *supra* note 101, at 131-32 (“When incarceration is a rare or infrequent event within a social group, the change in social networks caused by imprisonment may be mainly a problem for the individuals involved. However, when imprisonment becomes more common and widely expected in a social group, the changes in social networks and structures may often become damaging for the group more generally.”). On the other hand, middle-class offenders have higher incomes to lose from criminal punishment, which traditional CBA would mark as a greater social cost. We might consider whether an adjustment of that assessment on distributive justice and prevention grounds is appropriate.

208. See, e.g., Jeffrey Grogger, *The Effects of Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County*, 45 J.L. & ECON. 69, 89 (2002) (finding in an empirical

These innovations in prosecution and case-disposition strategies confirm the broad discretion and scope for alternative enforcement strategies that prosecutors and courts possess in a system replete with mandatory sentencing statutes. Given this room for reform, CBA can be a tool that inspires and supports significant criminal justice reform outside the legislative branch, which (despite recent promising reforms on drug sentencing in several states)²⁰⁹ is not a politically feasible locus for significant reform in the near future.²¹⁰ Statutory sentencing policies require legislative action, as do large-scale alternatives to criminal law for crime prevention. CBA-aided prosecutor policies and court innovation are limited means for systemic revision, but they are nonetheless substantial.

The breadth of prosecutorial discretion leaves much room for moderating even statutory sentencing policies. Charging decisions largely define sentencing possibilities²¹¹ and habitual offender sentence enhancements. Florida prosecutors, for example, voluntarily (though in response to popular criticism) adopted statewide policies limiting use of habitual offender status to a much more circumscribed set of cases than the statute authorizes.²¹² Further, models of successful community prosecution and courts, integrated with social services, provide a plausible opening for legislative action. Gradual funding increases for the non-incarceration-focused aspects of these approaches, particularly if supported by prosecutors, are a much more feasible prospect than repeal of mandatory sentencing laws.

Finally, and much more speculatively, widespread prosecutorial adoption of CBA-informed guidelines and alternative criminal justice practices could gradually contribute to a change in prosecutorial culture that arises

study a 5-10% decline in the crime rate from the use of civil injunctions against gang activity in Los Angeles County). For other views of such injunction strategies, see Jennifer Walwyn, Comment, *Targeting Gang Crime: An Analysis of California Penal Code Section 12022.53 and Vicarious Liability for Gang Members*, 50 UCLA L. REV. 685 (2002); Gregory S. Walston, *Taking the Constitution at Its Word: A Defense of the Use of Anti-Gang Injunctions*, 54 U. MIAMI L. REV. 47 (1999); Matthew Mickle Werdeger, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409 (1999).

209. See discussion *supra* note 32 (citing Vera Institute reports of drug sentencing reform in several states that have either removed mandatory minimums or mandated treatment for some drug offenders).

210. See Stuntz, *supra* note 5, at 552-57, 591 (arguing that political forces make it difficult for interest groups to oppose or narrow criminal legislation).

211. Hold aside the practice of "real offense" sentencing in federal courts. For discussions of that practice, see David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real Offense Sentencing*, 91 NW. U. L. REV. 1434 (1997); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real Offense System*, 91 NW. U. L. REV. 1342 (1997).

212. See FLORIDA PROSECUTING ATTORNEYS' ASSOCIATION STATEMENT CONCERNING IMPLEMENTING OF HABITUAL OFFENDER LAWS (1993), reprinted in Marc L. Miller & Ronald F. Wright, *CRIMINAL PROCEDURES: CASES, STATUTES AND EXECUTIVE MATERIALS* 1002 (1998) (defining and adopting "implementation criteria for use of habitual offender laws"); see also FLA. STAT. ANN. § 775.084 (West 1997) (habitual offender statute); FLA. STAT. ANN. § 775.08401 (West 1997) (authorizing prosecutor-drafted guidelines).

from criminal law's populist administrative structure.²¹³ One can see an attempt at such a transition in the D.C. federal prosecutor's effort to change intra-office incentives sustaining a cultural focus on convictions. That shift, in turn, could change the emphasis of prosecutor influence on criminal justice legislation and contribute to a broader reevaluation within criminal justice of excessive incarceration, alternative punishments, and prevention strategies.

VI CONCLUSION

In a recent article, William Stuntz described criminal law politics as "pathological." Prosecutors have unlimited discretion, legislatures have incentives only to increase criminalization while leaving prosecutors unchecked, and judges have no power to influence or check either, even through constitutional law. "Criminal law," Stuntz argues, is "not law at all, but a veil that hides a system that allocates criminal punishment discretionarily. . . . The system by which we make criminal law has produced not the rule of law but its opposite," and judicial doctrines "only add to the lawlessness."²¹⁴ Worse, he finds this pathology without an easy remedy. His solution is an ambitious constitutional doctrine of substantive due process that yields judicial control of criminal law—a strategy that aims to restore the rule of law by "requir[ing] courts to behave in an un-lawlike fashion."²¹⁵

Many people would agree with Stuntz's diagnosis, if not his solution. The structure of American criminal justice administration makes its problems at best formidable, at worst nearly unsolvable.²¹⁶ The proposal here for a CBA-based decision procedure is a strategy for moving toward a rationalized criminal justice policy without substantial legislative action or dramatic shifts in constitutional doctrine. Reform within prosecutors' offices, in the form of guidelines built on rigorous analysis of enforcement's effects, is a limited hope. It faces the substantial hurdle of political incentives on prosecutors militating largely against such efforts. Yet cost-benefit studies of criminal law's full social effects, juxtaposed with alternatives for

213. See BOLAND, *supra* note 197, at 12 (discussing how the Washington D.C. community prosecution program shifted attorneys' focus from pursuing convictions to stopping crime).

214. Stuntz, *supra* note 5, at 599.

215. See *id.* at 592.

216. It is unsolvable, at least, without some sweeping change. Such a change could support a public opinion shift toward a sustained commitment for criminal procedure protections, rehabilitative goals for punishment, and alternatives to criminal law for addressing social harm prevention. These sorts of changes are possible: some set of social conditions sustained moderate incarceration levels through much of the twentieth century, and revelations of wrongful capital convictions have shifted death penalty opinion in recent years. Nonetheless, broad and sustained cultural shifts seem unlikely in the near future, especially given that threats of terrorism push us away from such criminal law reforms.

crime prevention, will often reveal criminal law to be the less effective instrument for crime control.

CBA's virtues are that it facilitates incremental reform and provides the same rationalizing influence to improve priority setting and policy making that it does in regulatory settings. Further, although CBA is a quintessentially consequentialist mode of analysis, it actually complements retributivism or virtue ethics as organizing principles of criminal law. If we can rely on criminal law less, and other social policies more, for crime prevention, we can better limit criminal law to its core function of moral judgment.

Criminal law enforcement is executive-branch policy making, and it is a means of regulating particular risks of harm. The rest of the executive branch has moved to the "second generation" debate²¹⁷ of how best to operate and apply CBA in decision procedures that optimize priority setting and policy strategies. It is time for criminal law to follow suit and embark on the "first generation" task of exploring the feasibility and benefits of CBA-centered decision procedures in restructuring criminal justice administration.

217. See Sunstein, *supra* note 35, at 1655-56 (noting that in all branches of government, "first generation" debates over whether cost benefit analyses are desirable have terminated with victories for CBA proponents).