The Price of Criminal Law

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Should tax dollars pay for more criminal law, better public schools, or a new community center? Different counties will answer the question differently, but facing these tradeoffs is profoundly important to democratic governance. Nonetheless, because the criminal legal system diffuses power and hides and offloads costs, officials and voters do not have to honestly consider that question. These structural features place a hidden thumb on the scale that gives counties more criminal enforcement than they pay for. That is a problem. Too much enforcement is particularly pernicious in criminal law: Incarceration inflicts tremendous suffering, especially in poor communities of color. Suburban voters who do not live in or look like residents of overpoliced communities have no incentive to account for others' suffering. But if their tax dollars had to pay for the entire criminal law apparatus in their community, their financial stake might urge restraint.

Accountability poses a central challenge in criminal law. Because power and funding are diffuse no one knows who to blame. This Article argues that budget constraints provide an important accountability measure for criminal law and that counties should be empowered to make—and be burdened with making—the hard choices. It then articulates the goals to which a democratically accountable budget in criminal law should strive. Such a budget would require government officials to be transparent in setting priorities and respect basic rights such as the right to counsel, the right against being caged in dangerous conditions, and the right to a speedy trial. To protect these rights and respect budgetary balance, budget allocations for indigent defense, carceral facilities, and courts should limit the number of cases prosecutors can bring. Ultimately, this Article aims toward a system in which criminal law is used only to the extent that a local community views its benefits as greater than the suffering it inflicts. It is animated by the instinct

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that some communities would spend differently if they saw the full financial costs of criminal law.

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INTRODUCTION

How should a community balance spending on playgrounds and recreation centers, public schools, mental and physical health care, garbage collection, employment programs, supporting community-based nonprofits, and criminal law? That question is profoundly important, but it is rarely asked without substantial distortion in criminal law spending. Government officials (and perhaps voters) reflexively see robust spending on police and prosecutors as essential to promoting public safety.[1] And they often get to spend someone else's money toward these ends. Yet officials and voters rarely see the financial costs of the carceral state—let alone its tragic human costs.[2] Among the many pathologies of American criminal law is the way in which our systems diffuse and hide costs and decision-making across numerous actors and levels of government.[3] States pay for prisons while counties pay for prosecutors;[4] indigent defense is funded by states, counties, or some combination of the two[5]—although all vastly underfund it.[6] Defendants and their loved ones are charged fees for the privilege of intense suffering that the criminal legal system inflicts on them—suffering exacerbated by inadequate funding.[7] States and the federal government give

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1. *See, e.g.*, Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725, 736–39 (2022); *see also* Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby*, 80 WASH. & LEE L. REV. 143, 208 (2023) (finding that when prosecutors lobby for more punitive measures they couch these efforts in terms of benefiting victims or the public).

2. *See* Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 50–51 (2008).

3. *See, e.g.*, Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 342 (2004); Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 194–96 (2017); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 78–79 (2011).

4. *See, e.g.*, FRANKLIN ZIMRING & GORDON J. HAWKINS, THE SCALE OF IMPRISONMENT 139–40 (1991); Bierschbach & Bibas, *supra* note 3, at 190.

5. *See* Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 125 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf [https://perma.cc/RNV7-HJQQ].

6. *See, e.g.*, Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 391 (2016).

7. *See, e.g.*, Russell M. Gold, *Paying for Pretrial Detention*, 98 N.C. L. REV. 1255, 1286 (2020); *see also* HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 112 (2015) (discussing how cost-driven prison closures have yielded overcrowding).

counties "free money" to prosecute more and differently than they otherwise would—money counties rarely feel able to refuse.[8]

Substantial distortion from "correctional free lunches," grant funding, fines, fees, forfeitures, and feckless judicial protection for indigent defense, prison conditions, and speedy trial all obscure essential questions: does the current scope of our local criminal legal system provide enough benefit to justify the massive costs it inflicts? Could we improve wellbeing (and public safety) if we spent our money differently? Is caging people for sleeping in a park what our community actually wants to do with our tax dollars even when we know that incarceration will increase incarcerated people's chances of committing crime later?[9] Abolitionists shout in the wind their calls for less punishment and greater community support to protect public safety,[10] but county officials have little incentive to consider their proposals when many costs of the status quo remain safely hidden from view.

Priorities for spending and how best to protect public safety will vary from county to county and within each county.[11] But this Article argues that government officials should squarely face the question. The central claim of this Article is that county-level budgeting can and should provide an

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8. *See, e.g.*, Kay Levine, *The State's Role in Prosecutorial Politics*, *in* THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 31, 33 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008); *see also infra* Section III.A.1.

9. *Cf.* Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597, 1612–18 (2022) (explaining that policing is how we respond to homelessness).

10. *See, e.g.*, Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html; *see also* Patrick Sharkey, Gerard Torrats-Espinosa & Delaram Takyar, *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 AM. SOCIO. REV. 1214, 1219–20, 1234 (2017) (finding "strong evidence that establishment of community nonprofits had a substantively meaningful negative effect on murder, violent crime, and property crime" using data from 1990–2013).

11. *See generally* W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 109–14 (2014) (defending county-level decision-making regarding prison usage). This Article typically refers to "county" decision-making because prosecutor officers are typically structured as county-level officials. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1549 (2020). Nonetheless, some states combine counties into larger judicial districts, and one state elects some felony prosecutors at the city level. *See id.* at 1549–50, 1553–54. Regardless of these variations, the central points are that these critical decisions about budget and case processing should be made at the same level of government and that decision-making closer to the people is better. Other times, this Article refers to "local" decision-making—a choice made to reflect the variety of existing structures and diffusion of authority in criminal law.

important locus of democratic control over American criminal law.[12] It relies on the simple idea that a county should get only as much criminal law as it is willing to pay for.[13] County budgeting should be designed to surface as much of the costs of criminal law as possible and promote open and transparent consideration of tradeoffs to provide a critical source of accountability.

Budgets are an important place to focus power—a claim that abolitionists and defunders have recently brought to the fore.[14] The ability to divest *police* funding is tightly constrained as a matter of positive law even if it could garner sufficient political support—a big if.[15] Reformers do not often call for defunding *prosecutors*,[16] but such a call would prompt an important conversation. Indeed, constraining the overall scope of prosecution and criminal adjudication through budgeting offers a more practical solution than constraining prosecutors' charging or bargaining power externally, such as through judicial oversight.[17] And because prosecutors serve as intermediaries,[18] constraining prosecutors does substantial work to constrain criminal law more broadly.[19]

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12. *Cf.* Bierschbach & Bibas, *supra* note 3, at 232 (noting that "budgeting can be a promising concept" in criminal justice).

13. *See, e.g.*, AVIRAM, *supra* note 7, at 3–6, 150–70 (arguing that criminal law policy has shown itself to be somewhat cost-sensitive).

14. *See, e.g.*, Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. BOOKS (June 15, 2020), https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands [https://perma.cc/2BYX-QPA4]; *The Time Has Come to Defund the Police*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/defund-the-police [https://perma.cc/LV76-9AME].

15. *See* Rick Su, Anthony O'Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1200, 1217–31 (2022).

16. *But see* Udi Ofer, *Defunding Prosecutors and Reinvesting in Communities: The Case for Reducing the Power and Budgets of Prosecutors to Help End Mass Incarceration*, 2 HASTINGS J. CRIME & PUNISHMENT 31, 31–33, 54–63 (2021); Rory Fleming, *Don't Forget Prosecutors When It Comes to Defunding*, FILTER MAG. (June 11, 2020), https://filtermag.org/defund-prosecutors [https://perma.cc/S823-CGVJ].

17. *See infra* Section I.C.

18. David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 498–510 (2016).

19. Although some of this argument shares common cause with abolitionists, some abolitionists argue that fiscal concerns cannot drive the sort of transformative change that American criminal law requires. *See, e.g.*, Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 656–57, 665–76 (2017). That may well be true, but I fear that insisting on sweeping change may let the perfect be the enemy of the good. *See generally* Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245 (2023).

This Article outlines the goals toward which a democratically accountable county budget should strive.[20] Most importantly, a county should get only as much criminal law enforcement as it is willing to pay for.[21] That assertion may sound unremarkable: the level of enforcement should not exceed the point where marginal cost equals marginal benefit. But ensuring that a county does not get more than it is willing to pay for is especially important in criminal law and is a far cry from the status quo. Criminal law imposes massive externalized costs on defendants, their loved ones, and their communities. These heavy costs fall disproportionately on a small subset of a county's population—largely poor people, particularly poor people of color. Spreading at least some of the burdens of the criminal legal system through the financial incidence of taxation helps ensure that a broader swath of the community has reason to worry about overuse of criminal law, even if only for their own financial self-interest.

Limiting the available resources for the county's criminal legal system helps force a government to prioritize amongst competing uses of money.[22] Officials' choices about how to prioritize various expenditures should be transparent to voters so that voters can evaluate those choices.[23] A democratically accountable budget must also embody a commitment to basic civil rights—including the right to effective assistance of counsel, the right against cruel and unusual punishment, and the right to a speedy trial.[24] In short, a government should not be able to choose criminal law on the cheap[25]: offloading costs onto people charged with and convicted of crimes by failing to respect basic rights. A government should not underfund indigent defense, cage defendants in horrifically dangerous conditions, or incarcerate people for years as they await trial—all of which are commonplace today. Indeed, many current budgets and potential budgets that enjoy popular support do not embody the basic commitment to civil rights that I articulate. Officials and voters instead need to decide whether the level of enforcement they seek is actually worth its costs even when those costs are no longer artificially

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20. *See infra* Part II.

21. *See infra* Section II.A.

22. *See infra* Section II.B.; *accord* Bierschbach & Bibas, *supra* note 3, at 232 (arguing that scarcity can be "a blessing" in criminal law, "forcing tradeoffs and careful husbanding of resources").

23. *See infra* Section II.C.

24. *See infra* Section II.D.

25. Hadar Aviram's wonderfully titled book, *Cheap on Crime*, discusses how focusing on costs can help support decarceral reform but also how budget cuts can yield problematic outcomes such as overcrowded prisons. *See* AVIRAM, *supra* note 7, at 109–13, 169–70.

deflated. Lastly, the budgetary choices the county makes should be implemented in ways that respect civil rights.[26] A prosecutor's choices should thus be bounded not only by their own office's budget but also by appropriations for indigent defense, carceral facilities, and courts. For example, when a county sets its jail budget, that budget should translate into a cap of how many jail-bed-days the county can use rather than letting the same appropriation stretch to incarcerate ever-more people.[27]

The desire for a more democratically accountable budget builds on discussions about to what extent local decision-making by the communities most affected can combat the dysfunctions of American criminal law.[28] Regardless of one's specific view in that debate, there is much to be said for local political control of criminal law,[29] at least if we took that concept seriously. But we don't. American criminal law has a far shallower commitment to democracy than many realize. This Article offers a path toward a deeper commitment.

Although as a formal matter one could say that American criminal law has largely opted for political and electoral accountability, that answer would be profoundly incomplete. Elected legislators have delegated massive power to prosecutors by passing broad and deep criminal codes with harsh (sometimes mandatory) sentences.[30] Lead local prosecutors are nearly all elected, typically at a county level, which also sounds democratic.[31] But obscuring costs hides the difficult tradeoffs that America's bloated systems of mass incarceration should pose.[32] A meaningful politics of criminal law would be

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26. *See infra* Section II.E.

27. Indigent defense and prison budgets should give rise to similar caps, but the logistics are more complicated because they involve, at least in some states, state funding. *See* Primus, *supra* note 5, at 125. For a more detailed explanation, see *infra* Section III.B.

28. *See infra* Section I.A.

29. *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 7, 64–65 (2011) (arguing for greater return to local democratic control of criminal law); Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1693–96 (2017) (outlining a set of policy ideas driven by the shared commitment of nineteen legal scholars toward more local, democratic decision-making in criminal law); *see also* David Alan Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 276, 279 (Máximo Langer & David Alan Sklansky eds., 2017) ("Politics might be a bug in European systems of prosecution, but it is a feature in ours.").

30. *See infra* Section I.B.

31. *See, e.g.*, Carissa Byrne Hessick, Michael Morse & Nathan Pinnell, *Donating to the District Attorney*, 56 U.C. DAVIS L. REV. 1769, 1774 (2023) (arguing that elections function better as prosecutor accountability tools in larger jurisdictions).

32. *See* Gold, *supra* note 3, at 78–91; Brown, *supra* note 3, at 342.

one in which voters understood the costs and fundamental tradeoffs underlying their systems—a sense that is sorely lacking now.[33]

This Article embraces David Sklansky's theory that prosecutors are critical intermediaries that allow the criminal legal system to function.[34] They interface with police and courts, and they serve as the bridge between law and discretion.[35] Seeking to impose hard external constraints on prosecutors is highly impractical because of that intermediary role.[36] So too is simply requiring prosecutors to stand for election difficult because voters often do not understand the breadth of prosecutorial discretion.[37] Budgets help fill this relative accountability void. Without constraining the specific choices that prosecutors can make, county officials can use budget constraints to set the overall scope of the criminal legal system. Indeed, budget constraints already serve this function, but this Article highlights how budgeting could more meaningfully account for costs in criminal law.

Making county-level budgeting a powerful accountability tool that surfaces and addresses costs in criminal law is admittedly ambitious.[38] Counties often receive funding not solely from their own taxation but also from state or federal grants.[39] Those grant programs might fund police, prosecutors, or corrections but might not fund (or might be more difficult to obtain for funding) indigent defense.[40] That "free" money troublingly skews counties' enforcement priorities. Civil forfeiture proceeds or fine and fee revenue that funds prosecutor offices operate similarly. So do prisons paid for by the state.

Many counties may lack sufficient tax revenue to pay the full costs of the criminal legal system they might desire, especially if those costs must include politically unpopular things like protecting the accused and the incarcerated. While there is much to be said for the idea that lack of available tax revenue

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33. *See* Gold, *supra* note 3, at 70–71, 78–79, 84–87.

34. Sklansky, *supra* note 18, at 498–510; *see also* Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 806–13 (2020) (defining prosecutors' role using a fiduciary lens); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1220–36 (2020) (arguing that prosecutors should be servants of the law).

35. Sklansky, *supra* note 18, at 473.

36. *See id.* at 512.

37. *Id.* at 511–14.

38. For more on the gap between the democratically accountable budget that this Article advocates for and our current system, see *infra* Part III.

39. *See Local Government Revenue Sources—Counties*, GOV'T FIN. OFFICERS ASS'N, https://www.gfoa.org/revenue-dashboard-counties [https://perma.cc/WTL7-HXLU].

40. *See* Jennifer Burnett, *Budget Cuts Put State Public Defense Systems Under Stress*, CAPITOL IDEAS, July–Aug. 2010, at 18, 19.

suggests that more enforcement is not worthwhile in that jurisdiction,[41] some jurisdictions may simply lack the tax base or be too constrained in their taxation power by state law to achieve their goals. In those instances, outside money is necessary. But giving the county money to do with what it thinks best is vastly better than using that money to skew the counties' priorities toward prosecutors and prisons.[42] The former expands the pie to account for the reality that county taxation is lower and more varied than at other levels of government, while the latter distorts choice.

Some decisionmakers presumably like the system as it is—hiding the costs of criminal law and vastly underfunding indigent defense and carceral facilities.[43] But as a scholar it is nonetheless valuable to outline what meaningful democratic control in criminal law through budgets would look like. Moreover, the distance between that model and our current practice affords a critical lens as well; it demonstrates that our current approach to the important criminal law policy decisions does not meaningfully rely on democratic control.

Although the path may be difficult, there is reason to think that this ambitious agenda is worth the candle—that more attention to costs would change behavior. It has worked for sentencing and prison reforms[44]: even in the "tough on crime"[45] 1990s, North Carolina rebuffed sentencing proposals that would require new prisons and chose cost-neutral alternatives instead to preserve spending on health and education.[46] When California required counties to pay more for the prison beds they used, prosecutions dropped substantially.[47]

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41. *See* Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 CALIF. L. REV. 1129, 1185 (2018).

42. *See infra* Section III.A.1.

43. *Cf.* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016) (arguing that the criminal legal system is not "broken" but rather that its pathologies are by design).

44. *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 811 (2005) (explaining the role that sentencing commissions can play in making cost of sentencing changes salient for legislatures); *see also* Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 29 CRIME & JUST. 39, 70–78 (2002) (explaining in detail how the North Carolina legislature adopted different sentencing reforms than originally proposed because of concerns about increased cost).

45. There are, of course, much less charitable names for criminal law in the 1990s.

46. Wright, *supra* note 44, at 70–71, 75–76.

47. *See* Aurélie Ouss, *Misaligned Incentives and the Scale of Incarceration in the United States*, 191 J. PUB. ECON. 1, 2 (2020); Magnus Lofstrom & Steven Raphael, *Prison Downsizing and Public Safety: Evidence from California*, 15 CRIMINOLOGY & PUB. POL'Y 349, 350–55

This Article proceeds in three parts. Part I begins by explaining the scholarly discussion about prosecutor accountability and prosecutors' role. Part II describes the goals to which democratically accountable budgeting in criminal law should strive—namely, requiring taxpayers to bear the financial brunt of the system, transparency, respecting civil rights, and protecting the budgetary balance in implementation. Lastly, Part III discusses the sizable obstacles in the current funding and expense structure of criminal law that impede robust budgetary choice at the county level. Part III then explains how best to minimize these distortions and vest more meaningful power into county budgeting processes—largely by loosening constraints on grant funding and translating budget lines into caps that constrain the local carceral state.

I. DYSFUNCTION, POWER, AND ACCOUNTABILITY

Criminal law scholars widely agree that our systems are broken in countless ways. Several of those debates and their insights provide an important backdrop to understanding budgets' role as an essential accountability tool. First, there is widespread consensus that current political processes are badly broken to achieve accountability in criminal law.[48] Second, criminal law diffuses power and responsibility across numerous decisionmakers and levels of government in a way that impedes democratic accountability.[49] But amidst this structure prosecutors have substantial discretionary power to make many of the critical decisions that drive the criminal legal system.[50] They are the critical intermediaries that allow the system to function.[51] That intermediary role makes traditional accountability mechanisms difficult and largely ineffectual.[52] Although most lead local prosecutors are elected, incumbents typically run unopposed and voters are

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(2016); *see also* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 19 (2001) (describing the cost-consciousness of American criminal law).

48. *See infra* Section I.A.

49. *See, e.g.*, Brown, *supra* note 3, at 342; Bierschbach & Bibas, *supra* note 3, at 194–96; Gold, *supra* note 3, at 78–79; Hessick et al., *supra* note 31, at 1773; *see also infra* Section I.D.

50. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (describing prosecutors as "the criminal justice system's real lawmakers").

51. *See* Sklansky, *supra* note 18, at 498–510; Sklansky, *supra* note 29, at 276–77; *see also infra* Section I.D.

52. *See infra* Section I.D.

not well informed.[53] This backdrop helps reveal why limited budgets can constrain prosecutors' power without impeding the flexibility that is essential to their task and why prosecutors are such an important fulcrum. It also helps explain why budget scarcity can and should be an important tool in the arsenal to promote democratic accountability—because little else does in all but the most egregious cases.

A. Broken Politics of Criminal Law

Scholars widely agree that current politics of criminal law do not function well.[54] So too do scholars widely agree that more effective democratic decision-making—particularly at the local level—holds promise for better choices than does our current system.[55]

Democracy is an important part of the solution to criminal law's ills.[56] One profound problem that Bill Stuntz identifies with the politics of criminal law is that White flight to the suburbs leaves suburban voters who view crime as an abstraction to decide how to enforce criminal law in "other"

53. *See infra* Section I.C.

54. *See, e.g.*, Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1447 (2017) ("In almost every institutional area, the politics of criminal justice is notoriously 'pathological.'"); Stuntz, *supra* note 50, at 506–09; RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 1–15 (2019).

55. *See, e.g.*, BARKOW, *supra* note 54, at 143–44, 154–60 (arguing that local politics and local control offer greater promise than reform at other levels of government because voters have more direct information and experience about criminal law in their communities); Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 748–51, 756 (2020) (discussing the benefits of localism in bail reform successes); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1609, 1612–13 (2017) (describing community-based tools of criminal law resistance and reform as "display[ing] a faith in local democracy" and seeking a system "truly responsive to local demands for justice and equality"); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1409 (2017) (arguing for the importance of "the local community" reaction to the criminal legal system).

56. Scholars disagree about the extent to which more democracy *alone* can solve the criminal legal system's ills. *See* Kleinfeld, *supra*, note 55, at 1376. Joshua Kleinfeld frames a dichotomy between one group that "basically see[s] [the democratic public] as the solution" and one that "basically see[s] [it] as the problem." *See id.* But unless one accepts that stark binary—and I don't—that point of disagreement is orthogonal to the claim of this Article.

The role of democratic voice here is to make systemic decisions rather than individual case-level decisions. *See, e.g.*, Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 12 (2012) (arguing that political judgments should not affect individual cases); Sklansky, *supra* note 29, at 277 (describing Tonry's claim as "a widely shared view").

neighborhoods.[57] Now-Judge Stephanos Bibas argues that criminal justice policy "result[s] from warped, dysfunctional political process"[58] in which voters have very little access to information.[59] Taking Stuntz and Bibas together, the idea is that better-informed voters who make decisions that affect themselves would improve criminal law.[60]

Scholars advocate a variety of changes to improve democratic accountability.[61] Jocelyn Simonson reveals ways that ordinary citizens can and already do exercise some control over their criminal legal systems through organized courtwatching, copwatching, community bail funds, and participatory defense.[62] Bibas advocates a greater role for victims and voters.[63] Marc Miller and Ron Wright encourage prosecutor offices to provide meaningful public data.[64] Bibas argues that electoral accountability for prosecutors could be improved by increasing information flow to potential voters.[65] I have proposed a cost disclosure regime to make cost concerns more salient in prosecutor elections.[66] Most recently, Carissa Hessick, Michael Morse, and Nathan Pinnell proposed requiring even unopposed prosecutor candidates to provide detailed position statements as part of a voter guide or

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57. STUNTZ, *supra* note 29, at 7.

58. STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE, at xx (2012).

59. *Id.* at 36, 43–46.

60. *See* Gold, *supra* note 3, at 78–87 (arguing that voters lack sufficient information about the costs of prosecutions to hold lead prosecutors accountable at the ballot box).

61. *See* Sklansky, *supra* note 29, at 280–81 (succinctly summarizing the relevant literature on prosecution in the United States); *see also* Angela J. Davis, *Prosecutors, Democracy, and Race*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 29, at 195, 209–10 (urging public information campaigns and for citizens to become more aware of their prosecutors' work).

62. *See* Simonson, *supra* note 55, at 1617–21 (setting out these various means of democratic participation in criminal law and collecting the author's previous work on those subjects); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2181–84 (2014) (discussing courtwatching and the audience's role); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 409–27 (2016) (discussing organized copwatching groups); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599–611 (2017) (discussing the rise of community bail funds); JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION 16–126 (2023).

63. *See* BIBAS, *supra* note 58, at 144–65.

64. Marc L. Miller & Ronald F. Wright, *Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 392, 393, 396 (Erik Luna & Marianne L. Wade eds., 2012).

65. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 988–91 (2009).

66. *See* Gold, *supra* note 3, at 91–102.

requiring prosecutors to disclose aggregate data about their cases.[67] Several scholars, including most prominently Laura Appleman, have called for a greater role for juries in various aspects of criminal law as a tool of local democratic control.[68]

Other scholars such as Rachel Barkow and John Rappaport agree that current processes yield overcriminalization and mass incarceration but explain that voters provide only part of the solution.[69] Barkow argues that local political control coupled with more potent judicial review and some role for expertise offers the best path for reform.[70] Rappaport argues that solutions "require[] us to contemplate how best to blend accountability to the public with various kinds of criminal justice expertise."[71] Barkow and Rappaport are hardly alone in valuing expertise in criminal justice.[72]

I share the view that there is a role for both law and politics, experts and democracy. I focus here on how democracy could work better: envisioning a local democracy where officials and voters face meaningful tradeoffs about how to spend their marginal dollar. I am hopeful that such an approach can make American criminal legal systems less punitive. Although Rappaport's critiques of the idea that more democracy will yield decarceration are powerful,[73] voters' views may be tempered if they consider and bear the costs

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67. Hessick et al., *supra* note 31, at 1833–34.

68. *See, e.g.*, LAURA I. APPLEMAN, DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION 3–6 (2015); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1365–66 (2012) (discussing bail juries); Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 321 (2012) (proposing a more judgment-laden role for grand juries); Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 733 (2010) (arguing for the use of plea juries).

69. BARKOW, *supra* note 54, at 167–68; *see also* John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 813 (2020) ("In all events, the choice between more and less 'democracy' is a false one.").

70. BARKOW, *supra* note 54, at 143–201.

71. Rappaport, *supra* note 69, at 813.

72. *See* Kleinfeld, *supra* note 55, at 1397–99 (summarizing the positions of several scholars in this camp); *see also, e.g.*, GARLAND, *supra* note 47 (arguing that pathologies in American criminal law reflect broader societal forces); Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?*, 126 HARV. L. REV. 1299, 1311–22 (2013) (reviewing STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012)) (arguing that more public participation in criminal law would worsen rather than combat the ills of American criminal legal systems); MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 208–13 (2004) (proposing that judges and prosecutors should be career civil servants instead of elected officials and arguing for the importance of professional bureaucrats through sentencing commissions).

73. *See* Rappaport, *supra* note 69, at 739–809.

of criminal law enforcement and potential tradeoffs.[74] Barkow's support for block grants that allow local communities to decide how best to spend their resources to meet their community's needs shares a similar instinct to mine about communities understanding their own needs best, especially when faced with tradeoffs.[75]

Many cost-informed communities will likely balance competing considerations differently than I would.[76] But I am comfortable with the idea that weighing the costs of their decisions against the benefits will help encourage meaningful democratic choice even though that choice may often not align with my own preferences.

B. Prosecutorial Power and Cost Sensitivity

What actually happens now in criminal law politics, for the most part, is widespread enforcement discretion delegated to prosecutors that is only loosely constrained—a well-chronicled phenomenon.[77] Prosecutors' power comes from legislatures that create broad and deep criminal codes with incredibly harsh penalties.[78] In many instances, because of the depth of

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74. *See infra* Section I.B (addressing criminal law cost-sensitivity in greater detail). *See generally* Gold, *supra* note 3, at 91–102 (arguing that prosecutors should disclose cost information about their decisions to better inform the public and increase the salience of cost considerations).

75. BARKOW, *supra* note 54, at 167.

76. *See, e.g.*, Bierschbach, *supra* note 54, at 1444 (explaining that "part of the point of fragmentation" into local communities in criminal law "is that different stakeholders might weigh the competing goals and values of punishment differently"); Gold & Wright, *supra* note 55, at 748–51 (discussing the benefits of localism in bail reform).

77. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1049 (2006); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1414–15 (2010); STUNTZ, *supra* note 29, at 87–88; Sklansky, *supra* note 18, at 480–82. Stuntz referred to prosecutors as "the criminal justice system's real lawmakers." Stuntz, *supra* note 50, at 506. *But see* I. India Thusi, *Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 801–05 (2022) (arguing that race and gender also limit the power of prosecutors in ways that go beyond Stuntz's account of pathological politics). This scheme also delegates huge enforcement discretion to police that raises different concerns, but the focus of this Article is on prosecutors.

78. *See, e.g.*, Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1147 (2016) (collecting examples of overlapping federal statutes); Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1618–20 (2017) (discussing how broad and deep criminal codes create prosecutorial discretion). Jeff Bellin argues that because prosecutors' authority comes from legislatures who willingly delegate authority, prosecutors are not "powerful" because they do not overcome resistance of other actors.

criminal codes (i.e., that conduct often violates several criminal laws that carry different penalties)[79] prosecutors can charge from a "menu" of crimes.[80] Prosecutors can often charge a crime that carries a hefty mandatory minimum or one that doesn't; they can often charge an enhancement that carries a hefty mandatory sentence—or not.[81] Legislatures are well served to delegate that power to prosecutors through broad and deep criminal codes, especially ones that carry harsh sentences to be invoked at the prosecutor's option.[82] That arrangement provides legislatures with a "heads I win, tails you lose" scenario: if people are happy with prosecutors triggering a harsh sentence then the legislature has satisfied its constituents; if people are unhappy with that harsh sentence, legislatures can blame the prosecutors for exercising discretion unwisely.[83] The only downside in this model for legislatures, according to Stuntz, is if legislatures provide too little power to prosecutors or authorize sentences that are too lenient.[84] One important piece of Stuntz's model of legislatures' incentives is the idea that "organized interest group pressure to *narrow* criminal liability is rare."[85] My sense is that decarceral interest group pressure is somewhat stronger than it once was, and it may yield cracks in the pathological politics in some places into which further public pressure can flow.[86] But I think the dynamic still holds truer than not.

Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 175–76 (2019). I agree with Bellin that prosecutors wield their authority because legislatures empower them to do so, but I nonetheless refer to prosecutors as "powerful" because of the way that their decisions affect so many other aspects of the criminal legal system.

79. Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1304–05 (2018) ("[S]ubstantive criminal law . . . penalizes so much conduct, so severely, *and so many times over* that it serves simply to delegate power to prosecutors . . . ." (emphasis added)).

80. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

81. *See, e.g.*, Russell M. Gold, *Prosecutors and Their Legislatures, Legislatures and Their Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 327, 333–37 (Ronald F. Wright et al. eds., 2021) (discussing mandatory minimums, including "discretionary mandatories" under federal law).

82. Stuntz, *supra* note 80, at 2560; *see also* Stuntz, *supra* note 50, at 546–57; TONRY, *supra* note 56, at 6.

83. Stuntz, *supra* note 50, at 546–57.

84. Stuntz, *supra* note 80, at 2560.

85. Stuntz, *supra* note 50, at 529–30, 553.

86. *See* Russell M. Gold & Kay L. Levine, *The Public Voice of the Defender*, 75 ALA. L. REV. 157, 203–05 (2023) (arguing that public defenders who view their work in part as engaging with their community can help provide and create organized decarceral community pressure); *see also* Simonson, *supra* note 55, at 1617–21 (describing how community-based efforts can advance decarceral advocacy).

While the pathological politics account that finds legislatures with a one-way upward ratchet continuing to increase the scope and harshness of prosecutors' options has much to be said for it, that account overlooks some important dynamics. Importantly for purposes of this paper, fiscal pressures can constrain the carceral state.[87] Fiscal pressures can push legislatures away from long sentences,[88] at least when the cost of those sentences becomes salient.[89] Even though longer sentences empower prosecutors and shield legislatures from blowback about being soft on crime,[90] they are expensive; expense matters at the state level where corrections take up a large share of the budget and budgets typically must balance.[91]

North Carolina sentencing reforms provide an illustrative example.[92] Even during the "tough on crime" era of the 1990s, when the North Carolina Sentencing Commission met to revise its guidelines, a member of the legislature warned the commission that expensive changes would not pass.[93] When the legislature then debated whether to adopt the reform that would cost additional money versus one that would not, cost concerns and the desire to spend instead on education meant that the proposal to use only existing prison capacity (and not spend additional money to build prisons) passed resoundingly.[94] Future efforts to expand prisons in North Carolina were again thwarted by fiscal concerns.[95]

Concerns about expense also led Texas to reject funding for new prison beds and instead allocate money for rehabilitative programs.[96] Over the

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87. *See generally* AVIRAM, *supra* note 7 (discussing the role of the great recession in shifting criminal law politics).

88. Gold, *supra* note 81, at 337–38.

89. Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1302, 1308 (2005); Ronald F. Wright, *The Power of Bureaucracy in the Response to* Blakely *and* Booker, 43 HOUS. L. REV. 389, 404–05 (2006); *see also* Barkow, *supra* note 44, at 811 (explaining the role that sentencing commissions can play in making cost of sentencing changes salient for legislatures); *see, e.g.*, Wright, *supra* note 44 (explaining in detail how the North Carolina legislature adopted different criminal law reforms than originally proposed because of concerns about increased cost).

90. AVIRAM, *supra* note 7, at 58.

91. Barkow, *supra* note 44, at 811; Wright, *supra* note 89, at 404; Gold, *supra* note 81, at 337–39.

92. *See generally* Wright, *supra* note 44.

93. *Id.* at 70–71.

94. *Id.* at 75–76.

95. *Id.* at 80–84; *see also id.* at 41 ("Over the last twenty years, money became the universal solvent of sentencing disputes in North Carolina.").

96. Angela J. Thielo et al., *Rehabilitation in a Red State*, 15 CRIMINOLOGY & PUB. POL'Y 137, 139 (2016).

ensuing years, Texas continued to allocate more money to rehabilitation, leading to significant reductions in the corrections budget and the closure of several prisons and juvenile facilities.[97]

For fiscal reasons, Minnesota imposed a cap on prison capacity, which forced prosecutors to prioritize more.[98] Although the primary point about the pathological politics is the amount of discretion that legislatures afford to prosecutors, the other point here is that the politics of criminal law change when costs become more salient. Costs provide an imperfect proxy for defendants' interests in keeping the carceral footprint down.[99]

Cost concerns have helped yield marijuana legalization and limits on or abolition of the death penalty.[100] California's retrenchment of its three strikes laws via ballot initiative was also attributable in part to fiscal concerns.[101] The ballot initiative itself said that it would save hundreds of millions of tax dollars every year.[102]

Public sentiment on criminal justice policy measured experimentally also seems somewhat sensitive to cost. One study that asked respondents to determine the appropriate sanction in several hypothetical cases found a substantial drop in the number of respondents who chose prison sanctions once they learned the cost of such sanctions.[103] Another study found a significant number of respondents willing to reduce prison sentences in exchange for fines[104]—a result that suggests cost sensitivity. Several other experimental studies showed declining interest in imprisonment when costs became more salient.[105] When respondents can choose actual crime

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97. *Id.*

98. Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, 75 MINN. L. REV. 727, 733–35 (1991); Michael Tonry, *Sentencing Guidelines and Their Effects*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES 16, 19–20 (Andrew von Hirsch et al. eds., 1987).

99. Barkow, *supra* note 89, at 1278.

100. AVIRAM, *supra* note 7, at 69, 78.

101. *Id.* at 138–41.

102. *Id.* at 138.

103. Douglas R. Thomson & Anthony J. Ragona, *Popular Moderation Versus Governmental Authoritarianism: An Interactionist View of Public Sentiments Toward Criminal Sanctions*, 33 CRIME & DELINQ. 337, 350 (1987).

104. MARK A. COHEN, ROLAND T. RUST & SARA STEEN, U.S. DEP'T OF JUST., No. 199365, MEASURING PUBLIC PERCEPTIONS OF APPROPRIATE PRISON SENTENCES, FINAL REPORT 41 (2002).

105. Eyal Aharoni et al., *Slippery Scales: Cost Prompts, but Not Benefit Prompts, Modulate Sentencing Recommendations in Laypeople*, 15 PLOS ONE 12 (July 31, 2020), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0236764 [https://perma.cc/

prevention, they are willing to spend their own money to do so,[106] but it is far from clear that respondents would necessarily support more incarceration and arrests.

C. Current Constraints on Prosecutors

Once widespread authority is delegated to prosecutors, the natural question is how that prosecutorial authority is checked. In our existing systems, the most meaningful constraints on prosecutorial discretion are district attorney elections and limited budgets—with the latter playing a more important role than the former in most places but with neither operating at its full potential.[107] This subsection addresses elections as a mechanism of prosecutor accountability.

It is easy to think at a glance that district attorney elections meaningfully hold prosecutors accountable insofar as lead local prosecutors who determine enforcement policy across the vast majority of the United States are elected.[108] But most prosecutor elections do not effectively hold prosecutors accountable.[109] Prosecutor elections have several flaws, but chief among them is that voters do not have meaningful information about their prosecutors'

E56G-HCLA] (demonstrating cost-sensitivity in juvenile context); Eyal Aharoni et al., *Justice at Any Cost? The Impact of Cost–Benefit Salience on Criminal Punishment Judgments*, 37 BEHAV. SCI. & L. 38, 47, 52–54 (2019) (demonstrating cost-sensitivity in adult context); *see also* Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 43–44 (2000) (collecting studies).

106. COHEN ET AL., *supra* note 104, at 63, 67–71.

107. *See, e.g.*, Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 593 (2014) [hereinafter Wright, *Beyond Prosecutor Elections*] (explaining that "we hold high expectations for elections, treating them as a crucial device to legitimize the work of prosecutors" but that "these high expectations create a problem since any observer of prosecutor elections would have to conclude that they do a poor job"); *id.* at 595 (explaining why positive law and legal institutions "make surprisingly little impact on prosecutors in the United States"); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 581–82 (2009) [hereinafter Wright, *How Prosecutor Elections Fail Us*] ("At the end of the day, the public guards against abusive prosecutors through direct democratic control. . . . Yet the reality of prosecutor elections is not so encouraging."); Russell M. Gold, *Volunteer Prosecutors*, 59 AM. CRIM. L. REV. 1483, 1485 (2022) (describing limited budgets as the most meaningful constraint on prosecutors' power); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 257 (2007) (arguing that budget constraints embody legislatures' decisions to constrain the scope of criminal law enforcement).

108. Wright, *How Prosecutor Elections Fail Us*, *supra* note 107, at 589.

109. *See, e.g.*, Bibas, *supra* note 65, at 987; Wright, *Beyond Prosecutor Elections*, *supra* note 107, at 593; Wright, *How Prosecutor Elections Fail Us*, *supra* note 107, at 582.

performance—at least in most instances.[110] Voters typically do not know the bundle of cases their prosecutor's office has brought or the office's charging and bargaining practices.[111] Perhaps voters think their district attorney's office focuses its efforts on the homicide cases that catch media attention;[112] the reality known to American criminal law scholars, however, is that most criminal cases are low-level offenses.[113] Voters do not know the costs of prosecutors' decisions because those costs are obscured from voters' view and thus easily overlooked.[114] Prosecutor elections are typically uncontested, leaving voters with no meaningful choice.[115] In recent years, however, a few high-population counties have seen competitive prosecutor elections that likely do provide more meaningful accountability than the standard story.[116] In sum, although prosecutor elections provide the potential to hold prosecutors accountable to their local populace, they do not do so effectively

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110. *See* Sklansky, *supra* note 29, at 280–83; Bibas, *supra* note 65, at 960–61; Gold, *supra* note 3, at 78–87. *See generally* Miller & Wright, *supra* note 64, at 392 (providing examples of and assessing prosecutorial reporting practices in the United States and internationally).

Several "progressive prosecutors" have run for office espousing clear enforcement policies such as declining theft cases below a certain dollar amount or not seeking pretrial detention in most cases. *See, e.g.*, Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391, 397–410 (2022). These campaigns have been laudably transparent to voters in their preference articulation. *See* Hessick & Morse, *supra* note 11, at 1585 (discussing progressive prosecutors who "ran on policies, not just personalities and conviction rates" as incumbent prosecutors typically do).

111. Wright, *How Prosecutor Elections Fail Us*, *supra* note 107, at 582–83; *see also* Angela J. Davis, *The American Prosecutor—Power, Discretion, and Misconduct*, CRIM. JUST., Spring 2008, at 24, 26.

112. *See* Hessick et al., *supra* note 1, at 154–57.

113. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 735, 764 (2018); Ofer, *supra* note 16, at 32.

114. Russell M. Gold, *"Clientless" Lawyers*, 92 WASH. L. REV. 87, 117 (2017); Gold, *supra* note 3, at 78–79. One exception comes from Philadelphia where the District Attorney has required line prosecutors to state the estimated cost of a prison sentence when they seek one. *Philly DA Larry Krasner Tells Prosecutors to Seek Lighter Sentences, Estimate Costs of Incarceration*, PHILA. SUNDAY (Mar. 16, 2018), https://www.philasun.com/local/philly-da-larry-krasner-tells-prosecutors-to-seek-lighter-sentences-estimate-costs-of-incarceration/ [https://perma.cc/K7KH-WXSY].

115. Hessick & Morse, *supra* note 11, at 1544–45, 1561–64; *see also* Wright, *How Prosecutor Elections Fail Us*, *supra* note 107, at 582 ("[I]ncumbents do not lose often."). Win rates remain extremely high even as they have decreased since 2015. Ronald F. Wright, Jeffrey L. Yates & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 144 (2021).

116. Hessick et al., *supra* note 31, at 1774, 1828; *see also* Murray, *supra* note 110, at 397–410 (detailing some campaign policy promises of "progressive prosecutors").

most of the time because voters lack sufficient information and often lack competing candidates for whom they can vote.[117]

D. Prosecutor Accountability

Scholars have focused recent attention on how to view the prosecutor's role.[118] I am ultimately most persuaded by David Sklansky's argument that a prosecutor's role is to serve an intermediary function—mediating and blurring boundaries between adversarial and inquisitorial justice, law and discretion, police and the courts.[119] Prosecutors work in a somewhat adversarial system where, at least at the outer reaches, their work can be challenged in an adversarial way even as harsh sentencing law and broad and deep substantive law make a prosecutor's job inquisitorial in other ways.[120] Prosecutors work as representatives of the people[121] who bear some responsibility to their constituents' views on prosecution and yet so too are they agents of the law who bear specific ethical and constitutional obligations.[122] This is the task of mediating between law and discretion. Mediating between police and courts involves ensuring that police comply with the law and then defending police work in court.[123] "This mediating role is what distinguishes prosecutors most significantly from other actors in the criminal justice system, and it is likely why the system has come to rely on

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117. Carissa Byrne Hessick, Sarah Treul & Alexander Love, *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31, 45 (2023). In many states, prosecutors who are unopposed in their primaries do not appear on the ballot. *Id.* at 35, 59, 68 nn.228–30.

118. *E.g.*, Bellin, *supra* note 34, at 1212–23 (articulating a "servant of the law" model with a more ministerial role for the prosecutor whereby cases with sufficient credible evidence should go forward, at least subject to resource constraints); Green & Roiphe, *supra* note 34, at 809–14 (articulating a fiduciary vision of prosecution where prosecutors pursue not an amalgam of citizen interest but a sense of justice elaborated by prosecutors over time).

119. Sklansky, *supra* note 18, at 499; Sklansky, *supra* note 29, at 277.

120. Sklansky, *supra* note 18, at 499–502; *see also* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998) (describing prosecutors' role as more inquisitorial than many realize).

121. Lead prosecutors are elected in most jurisdictions. Hessick & Morse, *supra* note 11, at 1548–52; Wright, *Beyond Prosecutor Elections*, *supra* note 107, at 598.

122. *See* Máximo Langer & David Alan Sklansky, *Epilogue* to PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 29, at 300, 325.

123. Sklansky, *supra* note 18, at 503; Daniel C. Richman, *Accounting for Prosecutors*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 29, at 40, 53 ("Prosecutors, however, have a privileged vantage point. From there, they can force police officers to 'explain what they have done' . . . .").

them so heavily."[124] Prosecutors play a number of roles in different aspects of American criminal law,[125] and only Sklansky's description seems sufficiently robust to capture the panoply.[126] Moreover, the American tradition of locally electing prosecutors foists prosecutors with more obligation to set priorities than the fiduciary or servant of the law models afford.[127]

Sklansky's model recognizes that heavy-handed judicial efforts to regulate prosecutor behavior—especially as to charging and bargaining—will be quite unlikely;[128] judges are well served by prosecutors' flexibility.[129] Descriptively, Sklansky seems right that judges hesitate to rein in prosecutorial overreach—frequently framing overreach as a matter of discretion rather than of law.[130] Similarly, while it would be wonderful for legislatures to repeal a good portion of existing criminal codes, legislatures have no institutional incentive to do so and largely do not.[131] Prosecutors are theoretically subject to bar discipline and even criminal prosecution, but these tools are best suited to address the most egregious instances of prosecutorial

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124. Sklansky, *supra* note 18, at 478.

125. Ronald F. Wright, Kay L. Levine & Russell M. Gold, *Introduction* to THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION, *supra* note 81, at xxi–xxiii.

126. *See id.* at xiv–xxvi (explaining the numerous different roles that prosecutors play and offering a context-dependent vision of prosecutors' role).

127. *See* Gold, *supra* note 3, at 71 (arguing that prosecutors' role as agents of the public as a whole means that they should determine priorities with an eye to their constituents' preferences); Sklansky, *supra* note 29, at 279 ("Politics might be a bug in European systems of prosecution, but it is a feature in ours."); TONRY, *supra* note 56, at 3 (explaining that local nature of prosecution is particularly American).

128. Sklansky, *supra* note 18, at 505 ("[F]ew judges would assert the authority, let alone the responsibility, to decline to enforce a criminal law simply because it seems, in the circumstances, inappropriate.").

129. *See* Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L.J. 207, 208 (2003) ("Prosecutorial discretion is the primary means to allocate scarce enforcement resources effectively.").

130. *See* Sklansky, *supra* note 29, at 290; *see also* TONRY, *supra* note 56, at 5 ("[T]he American system of public prosecution is unique in the world and in an important sense lawless"); DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 3–12 (2016) (arguing that American criminal law needs more legal constraint enforced by judges and less faith in markets); Wayte v. United States, 470 U.S. 598, 607–08 (1985) (explaining the breadth of prosecutorial discretion).

131. *See* Richman, *supra* note 123, at 63 (explaining that legislatures have not restrained prosecutors through more specific criminal laws nor have other system actors tried to rein in prosecutors). *But see* Brown, *supra* note 107, at 225 (pointing to legislative repeal or narrowing of criminal statutes).

misconduct rather than to provide an everyday accountability measure and are rarely used in any event.[132]

Because prosecutors' enforcement flexibility is the coin of the realm, efforts to hold prosecutors accountable necessarily become complicated, albeit not impossible.[133] Enforcement discretion makes electoral checks difficult.[134] In addition to the problems above with lack of voter information about prosecutors' policy choices or the cost-benefit tradeoffs prosecutors make, flexibility itself can cause role confusion that complicates elections. Voters who might be inclined to constrain the discretionary side of prosecution—charging and bargaining decisions and the policies underlying them—may view prosecutors as ministerial servants of the law without recognizing the breadth of their discretion.[135]

But even with flexible enforcement discretion, democratic constraints on prosecutorial power remain possible. Unlike the (quite unlikely) prospect of judicially imposed rules that regulate proportionality or legislative narrowing and shallowing of criminal codes, budget constraints preserve the essential flexibility and discretion that allows prosecutors to be critical intermediaries.[136] Limited budgets force prosecutors to prioritize even without constraining their choices in any particular case.[137] The next section discusses what goals a democratically accountable and economically efficient budget would strive toward in criminal law.

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132. *See, e.g.*, Bruce A. Green, *Bar Authorities and Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION, *supra* note 81, at 311; Green & Roiphe, *supra* note 34, at 824–25. For a vivid example of the unwillingness of bar authorities to regulate prosecutors who violate defendants' constitutional rights, see Lara Bazelon (@larabazelon), X (June 22, 2022, 9:24 AM), https://x.com/larabazelon/status/1539645457495773184 [https://perma.cc/XEP7-BCZZ] (recounting the California State Bar's failure to discipline prosecutors for, among other things, avoiding disclosing material exculpatory evidence). An extremely rare instance of a prosecutor facing criminal charges came in the aftermath of Ahmaud Arbery's tragic death. *See* Alyssa Lukpat, *Former Prosecutor in Ahmaud Arbery's Death Faces Criminal Charges*, N.Y. TIMES (Nov. 24, 2021), https://www.nytimes.com/2021/09/02/us/jackie-johnson-indicted-ahmaud-arbery.html [https://perma.cc/5K3E-XQQG].

133. *See* W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060, 1062–63 (2014) (explaining why case-level regulation of prosecutors is not feasible and thus that fiscal constraints are more promising).

134. *See* Sklansky, *supra* note 18, at 511–13; *see also* Sklansky, *supra* note 29, at 290.

135. Sklansky, *supra* note 29, at 290 ("In other words, the political side of the prosecutor's role makes judicial control more difficult, while the jurisprudential side of the prosecutor's role frustrates political control."); *see also* STUNTZ, *supra* note 29, at 295 (arguing that "prosecutorial power is" "barely checked by politics" because of "its invisibility").

136. *See* Sklansky, *supra* note 18, at 498–510.

137. *See* Brown, *supra* note 107, at 257; *see also* Gold, *supra* note 107, at 1521–23.

II. ACCOUNTABLE BUDGETING IN CRIMINAL LAW

Budgeting is an important tool for constraining criminal law and could be structured to do so even better. County governments can and should be able to choose their preferred level of criminal enforcement, but they should do that under accountable conditions that provide only as much criminal law as they are willing to pay for. This Part seeks to articulate the objectives that a democratically accountable budgeting system should seek to accomplish. First, a county budget should bear as much of the costs of the local criminal legal system as possible funded from county tax dollars.[138] The scarcity that the constraint of tax dollars creates forces officials to balance spending on the criminal legal system with other important government expenditures and prioritize spending within the various arms of the criminal legal system.[139] An accountable budget should also be transparent to voters about the way the government has balanced those competing priorities.[140] Although most of these constraints are procedural, so too should there be substantive limits on the possible budgets for a criminal legal system in a liberal democracy.[141] Such budgets must protect basic rights, including the right to effective assistance of counsel, the right to be free from cruel and unusual punishment, and the right to a speedy trial—all of which require adequately funding indigent defense, carceral facilities, and courts.[142]

Preserving budgeting choices in implementation is also essential: one agency cannot run roughshod over others.[143] In criminal law, this means that prosecutors should be constrained not only by their own budgets but also by other budgets—including budgets for indigent defense, carceral facilities, and courts. More specifically, this Article proposes limiting cases to numbers derived from those other agencies' budgets. If county officials think they have too tightly constrained prosecutors by, for instance, underfunding indigent defense, they can spend more money on indigent defense to loosen the constraint. But that change requires taking money from some other priority or raising taxes. Legislators and prosecutors can choose to be more

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138. *See infra* Section II.A.

139. *See infra* Section II.B.

140. *See infra* Section II.C.

141. *See infra* Section II.D.

142. Adequate funding is not sufficient to ensure effective assistance of counsel, humane prison conditions, or speedy trials, but it is necessary.

There are important differences between jails and prisons for these purposes—namely that jails are typically paid for at the county level while prisons are paid for at the state level. This Article will address those details below. *See infra* Part III.

143. *See infra* Section II.E.

carceral, but they should not be permitted to choose carcerality on the cheap: racking indigent defense, bursting capacity of carceral facilities, or leaving the accused in jail for years awaiting trial.[144]

As a matter of political theory, the idea that budgeting provides an important moment is straightforward: the budget is where the government establishes priorities, translates abstract policy preferences into action, and determines how to prioritize various competing goals.[145] But budget accountability is especially important in criminal law because prosecutors serve as essential intermediaries that allow the gears to turn and because so few other accountability mechanisms actually hold prosecutors accountable in all but the most egregious individual cases. Moreover, even in moments when it seems that mass incarceration will grow endlessly, cost concerns help combat those pressures, at least to some extent in some states.[146]

Criminal legal systems inflict massive burdens disproportionately on certain groups—particularly poor people of color. Criminal legal systems should require taxpayers to bear as much of the financial costs of the system as possible because taxation at least helps distribute some of the costs of the criminal legal system more broadly.[147] If a broader subset of the population bore more of the costs of criminal law enforcement, the populace would be at least somewhat more likely to discourage its overuse. In short, counties should have only as much criminal law enforcement as their citizenry is willing to pay for, and budgets should be created and implemented in ways that allow voters to evaluate their officials' choices and that protect basic civil rights.[148]

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144. *See* Bellin, *supra* note 34, at 1240–41.

145. *See* Aimee L. Franklin, Alfred T. Ho & Carol Ebdon, *Participatory Budgeting in Midwestern States: Democratic Connection or Citizen Disconnection?*, 29 PUB. BUDGETING & FIN. 52, 52 (2009) ("[A] budget is government in miniature."); Kathe Callahan, *The Utilization and Effectiveness of Citizen Advisory Committees in the Budget Process of Local Governments*, 14 J. PUB. BUDGETING, ACCT. & FIN. MGMT. 295, 298 (2002); Semih Bilge, *A New Approach in Public Budgeting: Citizens' Budget*, 5 J. INT'L EDUC. & LEADERSHIP 1, 10 (2015) ("The annual budget is typically the key instrument by which a government translates its policies into action.").

146. *See supra* Section I.B.

147. *See infra* Section II.A. I recognize of course that taxpayers bearing the financial costs of incarcerating and prosecuting defendants still falls far short of taxpayers internalizing all the costs that the criminal legal system imposes on defendants and their loved ones.

148. *Cf.* Lemos & Charles, *supra* note 41, at 1185 (challenging the practice of citizens giving money to the government because "[i]f there is not political will to pay for a given initiative out of public funds—to do it the hard way, as it were—perhaps it should not be done at all").

County governments should not have their budgetary preferences distorted by the nature of their funding streams, and they should not allow one system actor to foist costs onto others. Both

Section II.A explains why local government should typically get only as much criminal law as its citizens are willing to pay for. Section II.B discusses the benefit of budget scarcity—the need for government to prioritize amongst competing choices. Section II.C articulates the importance of government transparency with voters so that voters can evaluate their officials' choices—choices such as how they have balanced funding for the criminal legal system with other important societal programs like education or public health. Section II.D then discusses a substantive limit on available budgetary choices—protecting basic civil rights. Lastly, Section II.E explains the implementation constraints necessary to preserve the budgeting balance the government strikes.

A. Spreading Criminal Law's Burdens Through Taxes

Criminal law finds the government forcibly depriving some of its citizenry of their liberty, often by locking them in cages. In so doing, criminal law inflicts massive harm on incarcerated people and their loved ones and communities.[149] Abolitionist scholars criticize reliance on punitive imprisonment through incarceration because of these extraordinary harms;[150] so too do abolitionists argue that prisons do not generate the public safety benefit that they purport.[151] My view is that deprivations of liberty are sometimes justified to protect public safety, albeit vastly less often and less

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of those pathologies—distortion from grant funding and "correctional free lunches"—are widespread features of criminal law today. Before discussing how to resolve those pathologies in Part III, this Part discusses the goals to which criminal law budgeting should strive.

149. *See, e.g.*, Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 302, 311–12 (2014) (finding that incarceration of a parent is worse than death of a parent when measuring a child's ADD or ADHD); Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. PUB. HEALTH 523, 526 (2013) (finding a two-year decrease in life expectancy for every year a person spends in prison); E. ANN CARSON, SUICIDE IN LOCAL JAILS AND STATE AND FEDERAL PRISONS, 2000–2019—STATISTICAL TABLES 1 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf [https://perma.cc/7BU9-B48H] (reporting that 695 people died by suicide in carceral facilities in 2019); Lois Presser, *The Restorative Prison*, *in* THE AMERICAN PRISON: IMAGINING A DIFFERENT FUTURE 19, 20–21 (Francis T. Cullen et al. eds., 2014) (collecting studies on how mass incarceration harms "families, communities, and societies").

150. *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172–99 (2015); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

151. *See, e.g.*, McLeod, *supra* note 150, at 1199–1207.

reflexively than the way we incarcerate now.[152] Criminal punishment has massive "destructive power" and thus "is a necessary but terrible thing—to be used sparingly, not promiscuously."[153] We should use the destructive power of the criminal law only when its massive costs (in human suffering and dollars) are worth it to us societally.[154] Insisting that taxpayers bear the financial burden of those choices increases the swath of the populace with incentive to worry about over-enforcing criminal law; it thus helps better align incentives toward using the criminal legal system only when it is worth what we pay for it.

One of the substantial problems that distorts the politics of criminal law is that many voters make decisions about how criminal law will be enforced against "others."[155] An especially egregious instance of wresting control over those most affected by the system played out recently in Mississippi: a White supermajority in the legislature passed a bill to replace officials in much of Jackson—a city that is 80% Black—with a separate court and policing system, all appointed by White officials.[156] The White Governor signed the bill.[157] A more common (and less obviously-egregious) instance of making decisions about how others are policed and prosecuted comes from Stuntz: suburban (often White) voters for whom "crime is an abstraction, not a problem that defines neighborhood life" dominate decision-making about how criminal law should be enforced in other people's neighborhoods—often

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152. *See* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 871 (2015) [hereinafter Harmon, *Federal Programs*] (explaining that the harms of policing "are sometimes worth suffering, at least to society as a whole, because they are part of the price we pay for the security and order we seek"); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 762–63 (2012) (discussing efficiency of policing using a more robust balancing of costs and benefits).

153. STUNTZ, *supra* note 29, at 311.

154. *See* Brown, *supra* note 3, at 328; *see also* Gold, *supra* note 3, at 79–82.

155. *See* STUNTZ, *supra* note 29, at 7.

156. *See* Wicker Perlis, *Over Accusations of Racism, Mississippi House Passes Bill to Create Unelected Court System*, MISS. CLARION LEDGER (Feb. 8, 2023), https://www.clarionledger.com/story/news/politics/2023/02/08/ms-bill-creates-separate-unelected-court-system-within-jackson-district-decried-as-racist/69883227007/ [https://perma.cc/U7WX-2W9D]. The Mayor of Jackson likened the proposal to apartheid. *Id.* (quoting a Black lawmaker who opposed the bill: "Only in Mississippi would we have a bill like this, with our history, where you say solving the problem is taking the vote away from Black people because we don't know how to choose our leaders.").

157. Bobby Harrison, *Gov. Reeves Signs Racially Divisive HB 1020; Legal Challenge Could Loom*, MISS. TODAY (Apr. 21, 2023), https://mississippitoday.org/2023/04/21/gov-reeves-signs-racially-divisive-hb-1020-legal-challenge-could-loom/ [https://perma.cc/L382-3QX8].

poor, urban neighborhoods of color.[158] That disconnect is exacerbated because voters have very little access to information about the criminal legal system as it actually operates, especially when it operates on people who they do not know and who do not look like them.[159] Punishment is hidden inside prison walls, and plea bargaining rather than citizen juries resolves the overwhelming majority of cases.[160] Most voters have no reason to know how their criminal legal system works and have very little visibility into it even if they wanted to know.[161]

The portion of voters with substantial involvement or experience with criminal law enforcement is small. Most prosecutor offices are organized at the county level;[162] overpoliced neighborhoods comprise a small part of a county that will often be largely populated by suburban voters and urban voters who live in less-policed neighborhoods.[163] That people convicted of felonies also lose the franchise further skews voting over criminal justice policy decision-making away from those it most affects.[164] One large southeastern county exemplifies the dynamics: the inner-city area has significant amounts of poverty and extreme poverty, and more than 90% of the extreme poverty census tracts were largely African-American or Hispanic.[165] The northern part of the county has predominately White

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158. STUNTZ, *supra* note 29, at 7.

159. *See* BIBAS, *supra* note 58, at 36, 43–46 (criticizing the public's lack of access to information about how the criminal legal system operates because it is dominated by insiders); *id.* at 51 ("[M]any criminal justice decisions result from secret or low-visibility exercises of discretion and are not constrained by rules or standards.").

160. *Id.* at 26–27.

161. *Id.* at 43, 45, 51; AVIRAM, *supra* note 7, at 3 (describing a carceral state "financed by a public that remains woefully uninformed about and uninterested in its existence"); *see also* Gold & Levine, *supra* note 86, at 159–65 (arguing that public defenders should lend their expertise to public discourse on criminal law to help the public better understand the realities of the system).

162. *See* Hessick & Morse, *supra* note 11, at 1544 (explaining that a minority of states combine counties into prosecutorial "districts" and a few treat particular cities as separate jurisdictions).

163. *See* Harmon, *Federal Programs*, *supra* note 152, at 941 (discussing the decoupling of who bears the benefits and burdens of policing and the way that impedes efficiency).

164. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1291–93 (2004); Barkow, *supra* note 89, at 1282; Simonson, *supra* note 55, at 1610–11; Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067 (2017) ("[C]urrent [criminal justice] regimes can operate to effectively banish whole communities from the body politic.").

165. *See* Kay L. Levine et al., Law in Inaction: The Origins and Implications of Chronic Drug Law Underenforcement in One Southern County 16 (unpublished manuscript) (on file with author).

neighborhoods, while the predominately Black neighborhoods "are located entirely in the city center and southern parts of the county."[166]

Robust data also exists on enforcement of New York's stop and frisk policy that provides a detailed example of the disproportionate burdens that criminal law enforcement foists onto communities of color.[167] Areas of New York City with large Black and Hispanic populations saw substantially more stops than other areas of the city.[168] In fact, the *demographics* of a geographic area better predicted the rate of stops than did the *crime rate* in the neighborhood.[169] That stops are conducted disproportionately in Black and Hispanic neighborhoods is due in part to the disproportionate allocation of NYPD personnel to such neighborhoods.[170] But even when controlling for allocation of police personnel, Black and Hispanic neighborhoods saw more stops and frisks than did White neighborhoods in New York.[171]

Even within heavily Black and Hispanic neighborhoods, the New York data show a burden of stop and frisk that falls disproportionately on people of color. Even after controlling for several factors including the racial composition and patrol strength of a neighborhood, Black and Hispanic individuals were much more likely to be stopped than White individuals within a particular neighborhood.[172]

These data show that at least in New York, the stop and frisk policy imposed the burdens of criminal law disproportionately on a small subset of the population. If we take a more crime-specific look at these burdens, the same pattern holds in the New York data. Stops and frisks on suspicion of weapons crimes demonstrates these patterns most egregiously.[173] Such stops and frisks were targeted at places where the Black and Hispanic populations were highest even as they were concentrated in neighborhoods where weapons crimes were *less* frequent than other crimes; overall crime rates did not affect the frequency of stop and frisk on suspicion of weapons offenses.[174] Drug offense stops and frisks were "concentrated in neighborhoods with high

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166. *Id.* at 17.

167. The New York stop and frisk data are not necessarily representative.

168. Floyd v. City of New York, 959 F. Supp. 2d 540, 589 (S.D.N.Y. 2013); Report of Jeffrey Fagan at 3–4, 32–34, *id.* (No. 08 Civ. 01034 (SAS)).

169. *Floyd*, 959 F. Supp. 2d at 589; Report of Jeffrey Fagan, *supra* note 168, at 3–4, 32–34.

170. *See* Report of Jeffrey Fagan, *supra* note 168, at 32.

171. *See id.* at 3–4.

172. *Floyd*, 959 F. Supp. 2d at 589; Report of Jeffrey Fagan, *supra* note 168, at 4.

173. *See* Report of Jeffrey Fagan, *supra* note 168, at 34.

174. *Id.*

proportions of Black and Hispanic residents."[175] That was true even as the location of those stops and frisks was *negatively* correlated with rates of drug offenses (and crime generally).[176]

Under current incentive structures, residents of overpoliced neighborhoods and Black and Hispanic individuals already have plenty of reason to worry about overenforcement of criminal law because they and their neighbors will be the most likely targets of that enforcement. Requiring taxpayers to bear the costs of their criminal legal system should give more people reason to worry about overenforcement even if the enforcement will not land them or their loved ones in a cage.[177]

Wealthier people who live in wealthier neighborhoods, particularly if they are White, have less reason to worry about being overpoliced than those who live in overpoliced communities.[178] But for wealthier people who do not worry about the burdens of criminal enforcement because those burdens fall on "others," increasing the extent to which they must bear the financial costs of criminal law by paying more money in taxes[179] can provide incentive to worry about overpolicing.[180] To put it slightly differently, spreading the financial burden of criminal law disproportionately onto the wealthy helps combat the othering problem that plagues policy-level funding decisions in

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175. *Id.*

176. *Id.*

177. The point is not that taxpayers will care more about the basic humanity of caging their fellow citizens but rather to develop interest convergence on constraining the scope of criminal law enforcement. *See, e.g.*, Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–28 (1980) (explaining the importance of interest convergence); *see also* Barkow, *supra* note 89, at 1278 (explaining how cost can imperfectly proxy for decarceral interests).

178. This is my lived experience. *See also* Report of Jeffrey Fagan, *supra* note 168, at 23–29, 32–39.

179. Property and sales taxes provide the greatest sources of tax revenue to local government. RANDY MOORE, KRISTEN RICKS & JEFFREY LITTLE, U.S. CENSUS BUREAU, ANNUAL STATE AND LOCAL GOVERNMENT FINANCES SUMMARY: 2020, at 1 (2022), https://www2.census.gov/programs-surveys/gov-finances/tables/2020/2020_alfin_summary_brief.pdf [https://perma.cc/2QBC-YKEB].

180. To be clear, my view is that some people will be willing to increase taxes on themselves to increase criminal law enforcement but that they will be less likely to do so on the reflexive notion that criminal law enforcement always generates public safety. *Cf.* Tarik Abdel-Monem et al., *Policymakers' Perceptions of the Benefits of Citizen-Budgeting Activities*, 39 PUB. PERFORMANCE & MGMT. REV. 1, 11–12 (2016) (explaining that tax increases are easier when citizens are involved in the budgeting process and realize that they cannot get the services they want without paying more for them).

criminal law.[181] So too might it prompt them to wonder whether their money could achieve safety better if spent in different ways.[182]

The perceived (and perhaps actual) benefits of criminal law enforcement and to whom they run are complicated. One account would view criminal law enforcement as a non-rivalrous, nonexcludable public good that runs to the population as a whole. Everyone is safer (or at least feels safer) because of criminal law enforcement.[183] A more granular account views the benefits of criminal law as varying widely, depending on the type of crime. Prosecuting property crime confers the most benefit to rich people who own a lot of stuff and want theft to be deterred or at least punished. Prosecuting drug crimes can be seen in at least two ways: perhaps it benefits the residents of the neighborhoods where the cases occur because it removes the visual scourge of open drug usage; prosecuting drug crime, particularly given the racial skew of those cases, also benefits those who value inflicting order on or oppressing communities of color.[184] Weapons possession crimes operate similarly: taking guns out of a neighborhood is most likely to benefit people who live in that neighborhood to be freer from gun violence, although there is also reason to think spillover effects make people who do not live in the neighborhood feel safer too. Most misdemeanor prosecutions likely benefit those with an authoritarian ideology who enjoy seeing law enforced for its own sake, particularly against outgroups[185]—as misdemeanors typically are.[186] If there were reason to be confident that misdemeanor prosecutions for crimes like intimate partner violence or driving under the influence deterred those crimes in the future, then the benefits would run most concentratedly to the neighborhood where these laws are enforced; evidence of such

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181. *See* AVIRAM, *supra* note 7, at 3 (describing the "willful blindness to the way our taxes and bonds are spent" in service of the machinery of mass incarceration).

182. *See* Sharkey et al., *supra* note 10, at 1227–35 (finding strong evidence that more community nonprofits reduce violent crime and property crime); W. David Ball, *Pay-for-Performance in Prison: Using Healthcare Economics to Improve Criminal Justice*, 94 DENV. L. REV. 451, 494–95 (2017) (discussing the idea that crime prevention outside the criminal legal system may be more effective at generating public safety than is punishment within the criminal legal system).

183. *See* Brown, *supra* note 3, at 325 (articulating the theoretical justifications for criminal law as benefits of the system while setting them against costs).

184. *See* Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 393–96 (1991); Richard Delgado, *Authoritarianism: A Comment*, 13 RUTGERS RACE & L. REV. 65, 72–75 (2012).

185. *See, e.g.*, Delgado, *supra* note 184, at 72–76.

186. *See* Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 978 (2020); Stevenson & Mayson, *supra* note 113, at 758–71.

deterrence is far from clear, however. Prosecuting serious felonies[187] benefits the community as a whole by incapacitating people who are likely dangerous and hopefully by deterring other crime; such prosecution likely concentrates those benefits in the neighborhoods where the prosecutions are brought, although general deterrence could spread benefits more broadly.[188] All of these prosecutions confer some diffuse and generalized benefit on suburban White voters who feel like they are safer because criminal cases are prosecuted and feel less at risk of suffering harm by way of crime—whether at home or when they go into the city for a night out.[189]

Because the way we discern the benefits of criminal law enforcement and to whom they run is deeply contested and complex, analyzing alignment of benefits and burdens is difficult too. To try to compare them, let's simplify the benefits analysis. The non-financial burdens of criminal prosecution fall disproportionately on poor communities and particularly communities of color—defendants as well as their loved ones and community members.[190] The benefits of criminal law run to a broader group, many of whom do not bear the burdens of those prosecutions[191]—although some of the benefits may

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187. "Violent" crime is a fraught term that I avoid here. *See generally* DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE (2021); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 571 (2011) ("The word 'violence' triggers deeply held intuitions about physical harm, but it is also the source of considerable dispute and contestation.").

188. Although this paragraph discusses how the benefits of arrest and prosecution distribute, the fact that the costs and benefits of prosecuting serious felonies fall on the same neighborhoods means that residents of those neighborhoods will likely have complicated but especially important views on enforcement levels and even enforcement mechanisms such as restorative justice versus traditional prosecution and sentencing.

189. Perhaps the origin story of Batman—where his wealthy parents dressed in their finest clothing are fatally shot during a robbery after seeing a movie with their son—looms large in the psyche. *See* BATMAN (Warner Bros. Pictures 1989); *see also* W. David Ball, *The Peter Parker Problem*, 95 N.Y.U. L. REV. 879, 879–80 (2020) (discussing the importance of framing and the problems of counterfactual thinking).

190. *E.g.*, Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 467–71 (2010); Jonathan Oberman & Kendra Johnson, *Broken Windows: Restoring Social Order or Damaging and Depleting New York's Poor Communities of Color?*, 37 CARDOZO L. REV. 931, 940 (2016) ("Poor communities of color in New York City experience a police presence that feels too much like an occupying army and too little like a police force committed to preserving peace, reducing fear, and maintaining order by protecting the lives of all citizens, regardless of the neighborhood in which they live . . . .").

191. Brown, *supra* note 3, at 342 ("[P]rosecution of offenders has obvious and vivid benefits, but its costs are diffuse, externalized, and largely off-screen.").

run disproportionately to poor communities of color.[192] Consider the average White suburban voter who benefits from property crime prosecutions insofar as they deter would-be burglarizers (or at least make the voter feel like criminal law has done that). Concentrating burdens on groups without political power and distributing perceived benefit widely permits widespread use of that tool—as indeed has happened in criminal law.[193] To be sure, some of the costs of the current system run to wealthy suburban voters, which slightly complicates this dynamic. But the claim here is that if the financial costs of criminal law run to the county's tax base as a whole—and therefore disproportionately to voters who are not overpoliced—the costs will be more widely dispersed in ways that reduce the mismatch between the incidence of costs and benefits, yielding less overuse of criminal law enforcement.[194]

It is problematic when county government places the cost incidence of criminal law somewhere other than on its tax base—whether onto defendants, other agencies, or other levels of government. Doing so takes the cost burden away from the suburban voters who are most likely to perceive themselves as benefiting from criminal law enforcement, the non-financial costs of which they largely do not bear. Foisting the cost incidence onto defendants, such as through fines and fees, for example, is especially problematic.[195] Those approaches place the financial burden of criminal enforcement on the group of people who already bear the brunt of the non-financial costs of criminal enforcement. That is an especially bad recipe for overuse. The burdens (both financial and non-financial) of criminal law in a system driven by fines and fees become extremely concentrated on a subset of the community, while the perceived benefits run to the community as a whole—and particularly to White, suburban voters who are not overpoliced.

Complete cost internalization would entail not only requiring the government to bear all the financial costs of criminal law enforcement but internalizing all of the costs that it imposes on defendants, their loved ones,

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192. *See* JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 10–11 (2017) (describing the complex role of Black lawmakers advocating procarceral reforms in DC as part of a package of proposals to help Black communities).

193. *But see* Daniel A. Farber & Philip P. Frickey, *Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 886 n.72 (1987) (providing standard public choice articulation for concentrated burdens and diffuse benefits that does not account for disproportionate political power).

194. *Cf.* LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL 170–73 (2008) (arguing that federalism dividing power across different levels of government works in part to exclude poor people and minorities from policy venues with the greatest capacity to effectuate change).

195. *See* Beth A. Colgan, *Fines, Fees, and Forfeitures*, *in* ACADEMY FOR JUSTICE: A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 205 (Erik Luna ed., 2017).

and their communities—misery, violence, lost income, and harm to both physical and mental health.[196] Full cost internalization seems deeply impractical, but being closer to that objective is better than being further away.[197]

This focused analysis of the cost incidence in criminal law is of course related to the standard economic story that financial incentives should be aligned as much as possible to get a level of enforcement where the social benefits justify the social costs. To begin with, the level of government making the choices about how much criminal law to use should thus be the level of government paying for criminal law enforcement. Plenty of criminal law scholars rightly lament how badly aligned financial incentives are in the criminal legal system.[198] To take a prominent example, states pay for prisons even though county prosecutors (and often city police) make the critical decisions about who to pursue and for what actions using what legal labels that carry which carceral consequences (and thus financial consequences for the state).[199] Other well-known examples include prosecutors aggrandizing their budgets beyond what tax revenue offers through civil forfeiture or the collection of fines and fees from criminal defendants, at least when such money can actually be collected.[200] Similarly, when people volunteer to prosecute crime, the prosecutor's office gets more labor than tax dollars have afforded.[201] Grant funding from the federal or state government for prosecutors or policing works similarly to provide resources for which county taxpayers are not paying—or at least think they're not paying because of a "fiscal illusion."[202] While the government getting more for less or getting something for free sounds alluring, that is far less obviously good in criminal

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196. Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 539–46 (2019) (arguing that courts should consider harms to defendants and their loved ones when determining whether to detain a defendant pretrial, in part to achieve a more efficient use of pretrial detention "whereby defendants are detained pretrial only when detention yields more benefit than cost"); Sheldon A. Evans, *Punishment Externalities and the Prison Tax*, 111 CALIF. L. REV. 683, 683 (2023) (making the same point about prisons).

197. *See* Evans, *supra* note 196, at 729–44 (proposing a prison tax to address the externality problem).

198. *See, e.g.*, Ball, *supra* note 11, at 109–14 (arguing for realignment of prison costs to the local level); W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060, 1060 (2014) (same); Bierschbach & Bibas, *supra* note 3, at 194–204 (discussing fragmentation across criminal law).

199. *See, e.g.*, ZIMRING & HAWKINS, *supra* note 4, at 140.

200. *See, e.g.*, Colgan, *supra* note 195, at 206–09.

201. *See* Gold, *supra* note 107, at 1517–28; *see also* Lemos & Charles, *supra* note 41 (challenging the notion that the government receiving private gifts is necessarily good).

202. *See* Lemos & Charles, *supra* note 41, at 1138; *see also infra* Section III.A.

law.[203] Although the primary focus of this Article is conceptual, Part III will address those misalignments in ways that help keep the incidence of criminal law's financial burdens on local taxpayers.

B. Scarcity, Prioritization, and Local Choice

Requiring taxpayers to bear as much as possible of the fiscal incidence of the criminal legal system also helps preserve scarcity. Scarcity forces the government to make hard choices about what more enforcement is worth, including the opportunity costs of different possible expenditures.[204] In a democracy voters should get to decide not only whether more (or even current levels) of criminal law enforcement is worth their marginal tax dollar but also whether those tax dollars might be better spent in other ways.[205] At least in some places, voters might prefer spending on schools, roads, or health care to spending on cages and suffering.[206] Even if one's sole objective is public safety,[207] public safety could be better achieved with the same (or less) money through means other than the criminal punishment system.[208] Studies

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203. *See* Lemos & Charles, *supra* note 41, at 1185 ("If there is not political will to pay for a given initiative out of public funds—to do it the hard way, as it were—perhaps it should not be done at all."); Gold, *supra* note 107, at 1517–28 (arguing that free labor for prosecutors likely yields net-widening); *see also* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 183–86 (2014) (explaining that although efficiency nearly always sounds like a good thing, that is far from obviously true in criminal law).

204. Barkow, *supra* note 89, at 1291–92; *see also* Bierschbach & Bibas, *supra* note 3, at 232 (explaining the benefits of scarcity as a disciplining force in criminal law); *cf.* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 227 (1999) (discussing the importance of "democratic control" through "careful taxpayer scrutiny of budgetary allocations in the area of rights protection and enforcement"). The discussion in this Article is about county or local budgeting, where budgets typically need to balance. The politics of federal criminal law are a different creature, in part because the budget need not balance—unlike nearly all states' budgets—and because criminal law represents a relatively small slice of the federal budget compared to state budgets. Barkow, *supra* note 89, at 1300–08.

205. Barkow, *supra* note 89, at 1291–92.

206. *See id.* at 1292 (suggesting that spending "on drug treatment or after-school programs" might "yield a greater social good" than more money spent on police, prosecutors, or prisons).

207. This assertion intentionally oversimplifies voter preferences for illustrative purposes.

208. *E.g.*, Friedman, *supra* note 9, at 1624 (describing the "failure to think intelligently about our wallets when it comes to public safety"); Sharkey et al., *supra* note 10, at 1227–34 (showing that more community nonprofits reduced crime from 1990–2013). This is a core notion underlying abolition—that investing in communities in ways that address root causes of crime will pay greater dividends than the counter-productive criminal punishment system. *See, e.g.*, Mirko Bagaric, Dan Hunter & Jennifer Svilar, *Prison Abolition: From Naive Idealism to Technological*

examining public preferences in criminal law show significant support for rehabilitation and non-prison solutions.[209] When asked to allocate grant money to a direct payment, incarceration, or treatment and prevention, survey respondents allocated 58.7% of the money to treatment and prevention programs.[210] Investing in mental health care, trauma support, youth recreational and social activities, community-based nonprofits that seek to prevent crime, or providing a universal basic income rather than more incarceration could make us all safer.[211] While incarcerating some people probably makes those who are not incarcerated safer through incapacitation, that frame ignores the harm to incarcerated people and the harm to us all once we release people from criminogenic carceral facilities. There is an important role for expertise: criminologists can help propose public policy to promote public safety.[212] But forcing choices about opportunity costs under conditions of scarcity can urge democratic politics to more seriously consider whether alternatives to incarceration would better protect public safety (and perhaps save taxpayer dollars in the process).

Which objectives to prioritize and how best to advance those objectives are difficult questions that voters and elected officials will answer differently in different places. Some places may retain current spending levels on incarceration[213] and discount offenders' role in the political community, while others might divert resources away from prosecuting quality-of-life misdemeanors to steer their resources into their schools, trauma-informed care, or violence interrupter programs to disrupt what might seem like endless cycles of violence.[214] The point of this Article is not to advocate for deepening mass incarceration or for prison abolition but rather to highlight the profound

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Pragmatism, 111 J. CRIM. L. & CRIMINOLOGY 351, 368–70 (2021). *See generally* RUTH WILSON GILMORE, GOLDEN GULAG (2007).

209. AVIRAM, *supra* note 7, at 153–54 (collecting sources).

210. COHEN ET AL., *supra* note 104, at 53.

211. *See, e.g.*, Maria Ponomarenko, *Our Fragmented Approach to Public Safety*, 59 AM. CRIM. L. REV. 1665, 1667 (2022) ("[S]tudies suggest that criminalizing homelessness costs jurisdictions quite a bit more than providing the housing and support that individuals need.").

212. *See supra* Section I.A (summarizing the literature on the extent to which more democracy can facilitate positive criminal law reform).

213. Increasing spending is also possible, but it is difficult to think of why governments would be underspending on criminal law compared to constituent preferences now.

214. *See* Ofer, *supra* note 16, at 32, 47–48, 65 (arguing that defunding prosecutors would lead to fewer misdemeanor prosecutions); Christopher Lau, *Interrupting Gun Violence*, 104 B.U. L. REV. 769 (2024) (discussing community violence interrupter programs).

importance of the choice and to consider how best to preserve and facilitate that choice locally.[215]

Although democratic politics might be capable of teeing up competing spending proposals in areas other than criminal law, the lopsided politics of criminal law require extra effort to structure processes that bring tradeoffs to the fore.[216]

C. Transparency

County officials should make the hard choices about prioritizing which causes should get how much of the county's scarce resources in a way that is transparent to local voters that those local voters can then evaluate. Following the discussion in Section II.B about the sorts of prioritization choices county officials must make, transparency in numerous facets is important: transparency of funding for the criminal legal system compared to other government priorities, such as schools or social services, and transparency about choices within the criminal legal system.

One tool that can help inform voters so that they can evaluate the priorities their local officials have set is a citizens' budget—a document written in plain English that describes to voters how their tax dollars are being spent (or how their officials propose to spend their tax dollars) without the technicalities that can obscure budgeting.[217] Other tools such as a "prison tax" itemized on income tax returns that make carceral spending more salient and visible are also good.[218]

Once officials' prioritization choices are transparent to voters, elected officials would be well-served to listen carefully to their voters and attempt

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215. *See* STUNTZ, *supra* note 29, at 283; *see also, e.g.*, Gold & Wright, *supra* note 56, at 748–50 (arguing that localism in bail reform is important); Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 212–13 (2012) (explaining that local variation in intra-state criminal law persists even amidst state efforts to create uniformity).

216. Barkow, *supra* note 89, at 1292.

217. *See, e.g.*, Bilge, *supra* note 145, at 9–12 (explaining citizens' budgets). For a helpful example of a citizens' budget, see MARICOPA COUNTY, CITIZENS' BUDGET: BRIEF 2023, https://www.maricopa.gov/DocumentCenter/View/78637/FY-23-Citizens-Budget-Brief [https://perma.cc/NA8E-KS8M]. My focus here is on how *government* can make budgeting more transparent to its constituents; so too have community groups developed thoughtful proposals for reallocating budgets to—at least in their conception—better promote public safety than existing budgets. *See* SIMONSON, *supra* note 62, at 127–49.

218. *See* W. David Ball, *Redesigning Sentencing*, 46 MCGEORGE L. REV. 817, 838–40 (2014).

to implement their (likely complex) preferences.[219] Transparency with voters may not always be advantageous from an electoral perspective; less truth-telling and allowing voters to remain uninformed and apathetic might sometimes be better for reelection prospects. That is especially true for funding unpopular causes like indigent defense. Indeed, transparency about decarceral reforms from some "progressive prosecutors" has provoked backlash that redounds to the detriment of my preferred policy objectives.[220] But transparency is normatively valuable to preserve democratic control even when it does not serve politicians' interests or my own preferred policy choices.

D. Respecting Civil Rights

In criminal law, some potential budgets that could garner majoritarian support (and many actual budgets) deny defendants' basic rights, such as the rights to a speedy trial, to effective assistance of counsel, and against cruel and unusual punishment when people are detained in inhumane jail or prison conditions. Budgets that deny basic rights should not be available in a democratic system even if they garner majoritarian support.[221]

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219. Although beyond the scope of this Article, there may be an important role for participatory or citizen-based budgeting. *See, e.g.*, Steven A. Miller, R. W. Hildreth & LaShonda M. Stewart, *The Modes of Participation: A Revised Frame for Identifying and Analyzing Participatory Budgeting Practices*, 51 ADMIN. & SOC'Y 1254, 1257–58, 1262–70 (2019) (describing participatory budgeting and modes of citizen budget participation); SIMONSON, *supra* note 62, at 144–48 (discussing participatory budgeting in the criminal law context).

220. *See* Radley Balko, *The Bogus Backlash Against Progressive Prosecutors*, WASH. POST (June 14, 2021, 3:23 PM), https://www.washingtonpost.com/opinions/2021/06/14/bogus-backlash-against-progressive-prosecutors/ [https://perma.cc/JD5W-5T4E]; *see also* W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 208–14 (2021) (arguing for the legitimacy of prosecutorial nonenforcement policies when they track popular will in a community).

221. *See* Bellin, *supra* note 34, at 1214 (arguing that prosecutors should only bring cases if they have sufficient resources to satisfy their own legal obligations in the case, including reviewing body camera footage and adhering to *Brady* obligations); *see also* R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 983 (2014) (arguing that prosecutors have a broader duty to ensure a fair criminal legal system than do ordinary advocates).

I take seriously the concern that cutting prosecutor budgets can harm defendants, but building basic civil rights into the model of democratic accountability should address that concern. *Compare* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 279–92 (2011) (arguing that overburdening prosecutors harm defendants), *with* Josh Bowers, *Physician, Heal*

Democracy requires a certain level of preservation of basic rights—namely rights to participate in government, as Robert Dahl explains.[222] Dahl does not discuss the criminal procedure rights listed here as inherently necessary in a democracy.[223] But because felony convictions exclude people from voting, the equal political participation that democracy requires suggests at the very least that exclusion from political participation should not happen easily.[224] Balancing a budget by denying some citizens' fundamental rights is the sort of tyranny of the majority we ought not permit. And to state the obvious, these are constitutional criminal procedure rights atop which our systems are built.

The right to effective assistance of counsel is a core right for criminal defendants—a right without which other rights, such as the right to testify in their own defense or cross-examine witnesses, likely matter little.[225] Providing even poor defendants with a lawyer who stands at their side, ready to protect them from their government, is a majestic and profound element of how a fair criminal legal system should work.[226] Stretching indigent defense funding so thinly that defendants meet their lawyer when the lawyer calls their name aloud to a crowd of defendants with upcoming hearings, or so thinly that defenders cannot do the factual or legal investigation that might afford their clients a defense, is abhorrent.[227] Although judges have not seen fit to end the crisis in indigent defense funding, it is no less a crisis for that

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Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, a Response to Adam Gershowitz and Laura Killinger, 106 NW. U. L. REV. COLLOQUY 143, 145–50 (2011) (arguing that prosecutors can use their discretion more judiciously to address funding shortfalls and that increasing prosecutor funding will increase caseloads).

222. *See, e.g.*, ROBERT A. DAHL, ON DEMOCRACY 48–50 (1998).

223. *See id.*

224. *See id.* at 37–38 (mentioning the importance of equal participation to democratic process).

225. *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963); Corrected Brief for Petitioner at 1, McCoy v. Louisiana, 584 U.S. 414 (2018) (No. 16–8255), 2017 WL 6885223, at *1. *But see* John H. Blume & Sheri Lynn Johnson, Gideon *Exceptionalism?*, 122 YALE L.J. 2126, 2147 (2013) (arguing that "the mere presence of an attorney is no panacea for the ills of the twenty-first-century criminal justice system" because the Court has not made the effective assistance guarantee more meaningful nor required states to provide adequate funding).

226. *Gideon*, 372 U.S. at 342–45; Argersinger v. Hamlin, 407 U.S. 25, 36–40 (1972).

227. *See* Joe, *supra* note 6, at 428 n.198; Penny J. White, *Mourning and Celebrating* Gideon*'s Fortieth*, 72 UMKC L. REV. 515, 538 (2003); *see also* Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1772 (2016) (discussing an Ohio judge holding a defender in contempt for refusing to represent a client they just met).

fact.[228] Caseloads in nearly all jurisdictions vastly outstrip the ABA recommendations.[229] In Oregon, for example, a recent ABA study found that the state needs four times as many lawyers as it has now to handle the current caseload; its shortfall is nearly 1,300 full-time lawyers.[230] Although these are the choices governments are making today, they should not be available funding choices in a liberal democracy. If elected officials want to allow prosecutors to bring this many cases they need to provide the funding to honor those defendants' rights to the effective assistance of counsel.

Similarly, budgetary allocations that provide too few resources to house incarcerated people in humane conditions are also inconsistent with basic tenets of liberal democracy. Consider a current example: In 2022, 266 people died in Alabama's state prisons—a statistic that does not even account for deaths in local jails.[231] Alabama's response to our egregious prison conditions

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228. For more on the indigent defense crisis, see, for example, Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331, 339 (2009) ("To any objective observer the nation's indigent defense system is in severe crisis."); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631 (2013) ("Indigent defense is in a state of crisis."); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 85 (1993) ("[T]he great majority of defender systems are understaffed and underfunded; they cannot provide their clients with even the basic services that a nonindigent defendant would consider necessary for a minimally tolerable defense."); Joe, *supra* note 6, at 391; Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2319 (2013).

229. *See, e.g.*, Primus, *supra* note 227, at 1771.

230. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEF. & MOSS ADAMS LLP, THE OREGON PROJECT: AN ANALYSIS OF THE OREGON PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 4, 26–28 (Jan. 2022) [hereinafter THE OREGON PROJECT], https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf [https://perma.cc/Z3NX-AS4L].

231. *See* Eddie Burkhalter, *266 Lives Lost in State Government Custody*, ALA. APPLESEED (Jan. 6, 2023), https://alabamaappleseed.org/author/eddie-burkhalter/266-lives-lost-in-state-government-custody/ [https://perma.cc/7KJP-S4AM]; *see also* Press Release, U.S. Dep't of Just., Justice Department Files Lawsuit Against the State of Alabama for Unconstitutional Conditions in State's Prisons for Men (Dec. 10, 2020), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-alabama-unconstitutional-conditions-states [https://perma.cc/W7G3-VASV] (quoting Assistant Attorney General Eric Dreiband while announcing a federal lawsuit against Alabama: "The Department of Justice conducted a thorough investigation of Alabama's prisons for men and determined that Alabama violated and is continuing to violate the Constitution because its prisons are riddled with prisoner-on-prisoner and guard-on-prisoner violence. The violations have led to homicides, rapes, and serious injuries.").

has been to build another prison using "free" federal dollars[232]—a new prison that will cost more than a billion dollars and still not come close to eliminating the overcrowding problem.[233] Although some Alabamians (including me) would prefer a different response to prison overcrowding, the choice to build more prisons rather than use prisons less often may accord with prevailing political views in Alabama. But the billion dollar price is much too *low* because even with two new large prisons the system would not have capacity for even the current prison population.[234] The essential point is that Alabama counties can choose to have a huge portion of our population incarcerated so long as we appropriate enough money to do so humanely—a choice we have not faced or made as we spend federal dollars and often too few dollars overall.[235] Sometimes the desire for cost savings also leads to prison closures, but closing prisons without other changes in a way that leaves remaining prisons dangerously overcrowded is not an acceptable democratic outcome.[236]

A budget that provides too few resources to courts to expediently adjudicate the cases that prosecutors bring is also inconsistent with democratic tenets. Such a budget allows defendants to languish in jail for years if they have the temerity to avail themselves of their right to a trial. Current speedy trial jurisprudence does not address that problem.[237]

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232. There are significant legal questions about using American Rescue Plan funding to build a new prison, Mary Scott Hodgin, *Lawsuit Aims to Block Alabama from Using COVID Relief Funds on Prison Projects*, WWNO (July 12, 2022), https://www.wwno.org/politics/2022-07-12/lawsuit-aims-to-block-alabama-from-using-covid-relief-funds-on-prison-projects [https://perma.cc/ZM7W-S6PB], but those concerns are beyond the scope of this Article.

233. *Cost of Building a Super-Size Alabama Prison Rises to More Than $1 Billion*, ASSOCIATED PRESS (Sept. 28, 2023), https://apnews.com/article/alabama-prison-cost-rises-7246b6afc68bd21e4a0c5249adcf7875 [https://perma.cc/PGX3-8SKU]; Ivana Hrynkiw & Ramsey Archibald, *Alabama's Billion-Dollar Prison Plan Does Not End the Overcrowding*, AL.COM (Apr. 7, 2023, 7:00 AM), https://www.al.com/news/2023/04/alabamas-billion-dollar-prison-plan-does-not-end-the-overcrowding.html [https://perma.cc/FSF2-RFSW] (explaining that the original plan to build two large new prisons would still not resolve the overcrowding problem in Alabama's prisons).

234. Hrynkiw & Archibald, *supra* note 233.

235. It bears repeating here that adequate funding is not sufficient to prevent inhumane prison conditions but is necessary.

236. *See* AVIRAM, *supra* note 7, at 112 (lamenting this reality in Illinois).

237. Colleen Cullen, *The Nonexistent Speedy Trial Right*, 51 PEPP. L. REV. 661, 677–718 (2024) (demonstrating through a fifty-state survey the ineffectiveness of the speedy trial right); Benjamin Weiser & James C. McKinley, Jr., *Chronic Bronx Court Delays Deny Defendants Due Process, Suit Says*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/11/nyregion/chronic-bronx-court-delays-deny-defendants-

E. Enforcing Budgetary Balance

Further steps are necessary to ensure that budgetary balances are respected in implementation in criminal law. The reason is that prosecutors hold massive discretionary power through charging and plea bargaining; their largely unfettered choices in this regard affect other offices' available resources.[238] They can offer substantial sentencing "discounts" or threaten severe sentencing penalties through mandatory minimums if a defendant refuses to plead guilty quickly.[239] Prosecutors can thus move defendants quickly through the machine of criminal law and bring more cases than a more protracted process would permit. But bringing more cases likely foists more clients on the county's indigent defense system, sends more people to jail, and then sends more people to prison on lengthy sentences—imposing more strain than those budgets can bear while still respecting constitutional rights. More cases than the courts' budget can bear causes protracted pretrial delays—often meaning defendants spend more time in jail awaiting trial.

For officials' budgetary choices to have bite, prosecutors cannot be allowed to overwhelm other agencies through their case processing decisions.[240] Although a more detailed explanation follows,[241] the basic idea

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due-process-suit-says.html (discussing long jail waits in the Bronx and the lack of speedy trial protection against that outcome); Daniel Hamburg, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 COLUM. J.L. & SOC. PROBS. 223, 226 (2015) (describing jail wait times "as long as three, four, or even five years" in the Bronx for a day in court); Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 402 (2021) (discussing cases languishing for years before resolution).

238. *See supra* Section I.B.

239. While many of these things might intuitively seem to violate due process or impose unconstitutional conditions, current doctrine does not support those arguments. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 358–59, 364–65 (1978) (upholding a mandatory life sentence that a prosecutor successfully pursued because the defendant refused to plead guilty to a charge involving an $88 check theft); *see also, e.g.*, Russell M. Gold, *"Clientless" Prosecutors*, 51 GA. L. REV. 693, 749–59 (2017) (calling for more judicial regulation of plea bargaining practices); Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 YALE L.J. 1401 (arguing that the unconstitutional conditions doctrine is troublingly missing in criminal procedure).

240. *See* Christi Metcalfe & Joseph B. Kuhns, *Coping with Limited Prosecutorial Resources: An Assessment of the Case Processing and Community Impact from the Perspective of Prosecutors and Staff in a Southeastern County*, 34 CRIM. JUST. POL'Y REV. 337, 348 (2023) (reporting that prosecutors in Charlotte recognized that funding levels in one part of the criminal legal system spill over and affect other areas of the system too); Lemos & Charles, *supra* note 41, at 1134 (explaining that governments spending gifted money "paper over the government's weaknesses"); *see also* Gold, *supra* note 3, at 79–87 (arguing that the opacity of costs undermines prosecutor accountability).

241. *See infra* Section III.B.

is this: when a county sets an indigent defense budget, that budget should carry with it limits on the number of indigent defendants who can be prosecuted, at least unless the government later appropriates more money for indigent defense. Those limits should be created in ways that ensure that the fundamental right to counsel is respected—deriving from a source like the ABA recommendations on caseloads. Prosecutors can otherwise use their leverage to force indigent defenders to work more cases with the same resources; that move starts a vicious cycle by then making prosecutors' future efforts easier to move their cases quickly because defenders lack sufficient resources to adequately investigate their cases or file potentially meritorious motions.[242] A similar cap would work for the jail budget.

Criminal law budgeting involves tradeoffs—both internally, such as budgeting for the prosecutor's office versus budgeting for the sheriff's office—and externally, such as investing in community centers, social workers, or mental health services versus more prosecution. County officials should be able to choose how much they want to allocate to the criminal legal system compared to other important county priorities.[243] Within the criminal legal system, county officials also should choose how to balance funding for different offices, including prosecutors, sheriffs, and indigent defense, subject to a basic level of rights protection.[244] The core of this Article is requiring elected officials and voters to face the costs of their choices rather than to continue to reflexively incarcerate people to advance some flattened notion of public safety.

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Constraining budgets as a means of prosecutor accountability allows local elected officials to choose the overall scope of their criminal legal system without reducing prosecutors' flexibility—the flexibility essential to making

242. These dynamics have led to calls for defenders to make prosecutors take all cases to trial and thus "crash" the system, although these tactics are not often deployed. *See* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html; Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1094–95 (2013).

243. *See* Ball, *supra* note 133, at 1061–63.

244. That the political process does not now provide for budgets that respect these basic rights suggests that judicial or administrative enforcement of the caps described here will likely be necessary.

the gears of the criminal legal system turn.[245] Budget constraints are also easier for elected officials politically than constraining substantive criminal law by repealing existing crimes.[246]

The idea that cost concerns will pressure local governments in at least some places to spend less money on criminal prosecution can help combat overcriminalization, albeit somewhat indirectly. So too can the need to spend money prompt officials to more carefully scrutinize what they are buying. For instance, Harris County, Texas (Houston) projected a more than 50% overrun on the appointed counsel budget for 2023, and before simply appropriating more money it audited how that money is being spent.[247]

Let us step back here and consider the sorts of problems in criminal law that encouraging meaningful budget debate are likely to help address. Ben Levin describes a hidden divide in criminal law reform scholarship between a camp that seeks to combat overcriminalization and those who seek to combat mass incarceration.[248] He defines the "over[criminalization] frame" as "rooted in a belief that the criminal law has an important and legitimate function, but that it has exceeded that function."[249] It is this

245. *See* Su et al., *supra* note 15, at 1202 ("Local electorates should be free to choose among different conceptions of, and pathways to, public safety."). There are those who would wish to grind the gears of the criminal legal system to a halt because of the sheer misery that it inflicts on so many people—disproportionately people of color. While I am somewhat sympathetic to that wish because of the immense disparities and incredibly punitive nature of American criminal law, my approach here is more pragmatic—recognizing that a system that inflicted less harm than our current systems would be a welcome change. *See* Barkow, *supra* note 19, at 252–53 (arguing that abolition is a very unlikely outcome and a cause that sacrifices potential gains in the meantime).

246. *See, e.g.*, Gold et al., *supra* note 78, at 1640 (describing limiting the scope of criminal law as a "first-best solution" but one quite unlikely to be achieved); *see also* Stuntz, *supra* note 50, at 510 (describing institutional reasons why legislatures benefit from broad criminal codes). *But see* Brown, *supra* note 107, at 225 (explaining that legislatures repeal criminal laws more than people think).

247. Nicole Hensley & Neena Satija, *County to Exceed Budget for Court-Appointed Lawyers by $35 Million*, HOUS. CHRON. (Apr. 25, 2023, 7:46 PM), https://www.houstonchronicle.com/news/houston-texas/crime/article/harris-county-lawyer-budget-17917282.php [https://perma.cc/R62W-SSMV]. Harris County sensibly plans to expand its public defender office in lieu of spending so much on appointed counsel. Neena Satija, *Harris County Leaders Blast Local Judges*, HOUS. CHRON. (Sept. 21, 2023), https://www.msn.com/en-us/news/crime/harris-county-leaders-blast-local-judges-attorneys-as-audit-finds-court-appointment-costs-soared/ar-AA1h2Zzg [https://perma.cc/8NVR-BAGP]; *see also* Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 205, 238–52 (2023) (explaining that public defender offices are both more effective and cheaper than appointed counsel).

248. *See generally* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

249. *Id.* at 262.

overcriminalization concern—scaling back the overall size of the system toward something more optimal—that budget constraints can help address.[250] By contrast, budgetary pressures are less likely to address concerns that drive what Levin labels "the mass [incarceration] frame"[251]—concerns about criminal law inherently "marginaliz[ing] or subjugat[ing] poor people of color" and "exacerbating troubling power dynamics and distributional inequities."[252] The best prospect for budget constraints to make progress on racial justice concerns would be if tighter budgets led to less focus on offenses with particularly high racial disparities in enforcement. But I remain troubled by the prospect that criminal legal systems could become smaller yet even more inequitable.

The next Part considers how to address the massive structural distortions in the current system that impede budgets from operating in the ways discussed in this Part.

III. A LONG WAY FROM HERE

County budgeting processes that face the tradeoffs about the scope of criminal law enforcement and what taxpayers are willing to pay for offer hope for a better politics of criminal law. But that promise is tempered by the perhaps-dispiriting recognition that much in the financial incentive structures of criminal law would have to change to get us there. Counties make decisions about how to allocate their budgets and how to balance costs and benefits in criminal law with massive distortions from other funding streams—namely state funding for prosecutor offices and state, federal, or other grant funding. Relatedly, prosecutors' offices can aggrandize their budgets without governmental appropriation—most easily through fines, fees, and civil asset forfeiture but also through securing free labor. Lastly, prosecutors' ability to externalize costs to numerous other actors in criminal law—such as by overburdening indigent defense budgets or the jail—upsets whatever budgetary balance the county government has reached. These practices would have to change to pose the proper cost-benefit tradeoffs to county governments and their voters—an undistorted choice about whether

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250. *See id.* at 262–64.
251. *Id.* at 263.
252. *Id.* at 263–64.

and where to increase or decrease funding to promote public safety—however they define that contested term.[253]

The ideal scenario would be for each county to decide for itself how much money to commit to public safety and how to spend that money to best promote public safety within the boundaries of what Part II outlined. The county would decide for itself along with other important budget items how much money to allocate to police, prosecution, indigent defense, courts, jails, prison usage by their county's prosecutions, and community supervision. Counties could also pursue innovative solutions that allow for greater welfare and even greater safety than these carceral mechanisms. Some might invest in community-based organizations that help prevent crime rather than largely punishing crime after the fact. In some counties, the block of money to spend could likely be limited to taxes collected. While there is real benefit to constraining counties to their own taxpayer revenue in that way,[254] counties may be unable because of state law to make different taxation choices and because counties' tax bases vary dramatically.[255] For these reasons, some counties (maybe many counties) need funding from the state or federal government. But even when a county receives money to supplement its tax revenue, that money should be provided in a way that does not distort budgetary choices.

This Article focuses on financial distortions to local budgetary power and decision-making. But it is worth acknowledging here that some threats to local control come more directly from state governments or the federal government trying to displace the judgment of county prosecutors and the will of those prosecutors' voters.[256] For example, Florida Governor Rick Scott displaced Orlando's Aramis Ayala in death penalty cases, Pennsylvania's legislature tried to impeach Philadelphia's Larry Krasner and authorized the

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253. *Cf.* Su et al., *supra* note 15, at 1205 ("We urge freeing local governments to require law enforcement to prove its worth in competition with other funding priorities."); Ball, *supra* note 11, at 88 ("As long as there is substantial decision-making authority vested at the county and local level—and there is—costs and benefits should be aligned with that authority. Otherwise, bad policies, whatever they end up being, can be overfunded and good policies underfunded.").

254. *See supra* Section II.A.

255. *See, e.g.*, Ronald M. George, *Challenges Facing an Independent Judiciary*, 80 N.Y.U. L. REV. 1345, 1352 (2005) (raising concerns about intrastate equity because of divergent tax bases); Judson R. Peverall, *Inside State Courts: Improving the Market for State Trial Court Law Clerks*, 55 U. RICH. L. REV. 277, 292–93 (2020) ("[T]here is a substantial gap in the distribution of adequate court funding within states.").

256. *See* MILLER, *supra* note 194, at 4 ("Policies widely supported by local officials and citizen alliances are sometimes thwarted by legislators representing much larger constituencies with little or no connection to local problems and much less connection to serious crime.").

state's Attorney General to prosecute gun crimes that Krasner's office declines, and Florida Governor Ron DeSantis has removed Andrew Warren in Tampa because of his announced policies on abortion prosecutions.[257] Because of the reach of federal criminal law, federal prosecutors can often supersede local prosecutors' choices by charging cases that county prosecutors have declined.[258] Along with allowing county governments to make their own budgetary choices about how best to effectuate public safety, so too should state and federal prosecutors typically respect county choice in prosecutorial discretion. It should be quite an unusual case for the state or federal government to displace a county prosecutor's leniency or declination decision.[259]

This Part discusses how to get as close as possible to that ideal of local control, beginning by articulating two priorities in order of importance: (1) eliminating practices that skew a county's choices and (2) ensuring that the financial costs of criminal law are borne through county tax revenue. It considers separately two types of distortions to counties' decision-making—funding subsidies and cost offloading. Section III.A analyzes the distortions

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257. *See* Hessick et al., *supra* note 31, at 1830–31; Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669, 1678–80 (mentioning examples); Tyler Q. Yeargain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 110–26 (2018) (conducting a fifty-state survey on states' supersession power over local prosecutors' decisions); Brooke Schultz & Marc Levy, *Pa. Senate Delays Philly DA's Impeachment Trial amid Court Case*, WHYY (Jan. 11, 2023), https://whyy.org/articles/pa-senate-delays-philly-da-krasner-impeachment-trial-amid-court-case/ [https://perma.cc/M5QR-AF7K] (discussing the Krasner impeachment example in more detail); Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, INTERCEPT (July 8, 2019, 5:55 PM), https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/ [https://perma.cc/85MT-FSFJ] (describing a Pennsylvania state law creating supersession authority only in Philadelphia).

258. Stephen F. Smith, *Federalization's Folly*, 56 SAN DIEGO L. REV. 31, 35 (2019) ("'[F]ederal criminal law' is sprawling and virtually limitless in its reach into the domain of state criminal law."); *see also* Sara Sun Beale, *Report's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1303–04 (1995) (discussing the breadth of federal law and the need for federal and local prosecutors to communicate regarding overlapping jurisdiction); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 760–70 (1998) (discussing the breadth of federal criminal law and the widespread enforcement discretion it creates); Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 856 (2015) (mentioning "the breadth and scope of federal criminal law").

259. Decisions about whether to prosecute a police officer are an example of where state involvement makes sense because of the conflicts of interest in local prosecutors deciding whether to prosecute the local police officers who help them make their cases. *See generally* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016).

in prosecutors' funding streams caused by federal, state, and other grants as well as the ways that prosecutors can aggrandize their budgets outside any appropriations process. It calls for an end to these practices and a shift toward block grants that allow local officials and voters greater control, as well as closing off the ways that criminal law is funded outside appropriations processes. Section III.B then looks at how prosecutors' offices offload costs onto other government agencies through their decision-making and considers practices to prevent such cost externalization, seeking to preserve the budgetary balances that the government has struck. It does so in large part by deriving caps on prosecutors' and courts' decision-making from the budgets appropriated to other relevant agencies.[260]

A. Skewed Funding

In ways that vary from state to state, counties do not alone pay for their prosecutors' offices. Sometimes prosecutor salaries are paid by the state, and sometimes prosecutor office expenditures are funded from federal grants, albeit in varying amounts and in amounts that might be hard to discern in any given place.[261] Prosecutors' offices are also funded in part by fines and fees, civil asset forfeiture, other outside grants, occasionally by private donation, and sometimes staffed by free labor. Unless these budgetary supplements come by way of block grants that afford counties huge flexibility about how they can spend that money,[262] these sources all skew the spending choices available to county officials toward more criminal law than the county might otherwise have chosen.[263] So too may they alter residents' ability to affect

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260. *See* Sklansky, *supra* note 18, at 498–510 (explaining prosecutors' role as intermediaries); Bierschbach & Bibas, *supra* note 3, at 228–33 (discussing caps as a tool to ration criminal justice).

261. *See* John F. Pfaff, *Why the Policy Failures of Mass Incarceration Are Really Political Failures*, 104 MINN. L. REV. 2673, 2675 & n.4 (2020) (recounting old data and explaining the lack of new data).

262. Ball, *supra* note 133, at 1073–75 (proposing block grants from states to counties to deal with violent crime as they wish).

263. *Cf.* Bierschbach & Bibas, *supra* note 3, at 219 (discussing the confluence of centralization and a fundamentally fragmented "system" that furthers misalignment of incentives, including through funding "for aggressive drug and gang enforcement, and funding to militarize local police"). By way of comparison, Texas usefully requires that funding for appointed defense counsel come from a county's general fund. TEX. CODE CRIM. PROC. ANN. art. 26.05(f) (West 2020).

their county's decisions if these funds operate outside regular budget processes.[264]

1. Government Funding

The most recent national data on prosecutor office funding shows that counties funded the entirety of district attorney budgets in only 32% of offices (a substantial decline from a decade earlier).[265] In that same data set, nearly half of prosecutor offices received state funds, and 40% received state or federal grants.[266] That said, the data is more than fifteen years old.[267] Recent data from urban prosecutor offices finds that the overwhelming majority rely on state funds and the majority also rely on federal funds.[268]

As we await newer data to determine whether the trend toward more state funding of prosecutor offices has occurred outside of big cities,[269] this Article will rely on a few examples drawn from prosecutor offices that are transparent about their funding streams to suggest that the picture may be even less county-funded than the 2005 data suggests. Some states like Alabama rely heavily on court fees rather than tax revenue to fund their court systems.[270] In some states, such as Wisconsin, the state pays salaries of

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264. Bierschbach & Bibas, *supra* note 3, at 219–20; *see also* Harmon, *Federal Programs*, *supra* note 152, at 934–44, 948–54 (explaining how federal grants evade traditional means of local control over policing via the budget).

265. STEVEN W. PERRY, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS 2005, at 4 (July 2006), https://www.bjs.ojp.gov/content/pub/pdf/psc05.pdf [https://perma.cc/9ZEF-D5GD].

266. *Id.*

267. Email from Bureau of Just. Stat. to author (Sept. 29, 2022) (on file with author); *see also* Pfaff, *supra* note 261, at 2675 n.4.

268. ADAM BIENER, PROSECUTOR WORKPLACE AND COMPENSATION STUDY: REPORT OF FINDINGS 7 (2021).

269. The Bureau of Justice Statistics has revived the relevant questionnaire that includes questions about funding sources. *See* Bureau of Just. Stat., National Survey of Prosecutors, Attachment 3, Survey Instrument (n.d.) (on file with author).

270. *See, e.g.*, Brian Lyman, *As COVID-19 Closes Courts, Alabama Prosecutors Face Collapse in Revenues*, MONTGOMERY ADVERTISER (Apr. 30, 2020), https://www.montgomeryadvertiser.com/story/news/2020/04/30/covid-19-closes-courts-alabama-prosecutors-face-collapse-revenues/3052219001/ [https://perma.cc/CL86-7NU7] ("DAs across Alabama get most of their budgets—as much as 70%—from the collection of court fees from those in the state court system.").

assistant district attorneys—line prosecutors.[271] In North Carolina, a substantial amount of funding for prosecutor salaries comes from the state, although some comes from the city, county, and federal governments as well.[272] In other states, most of the district attorneys' office budgets come from the county[273] even if the state pays the elected district attorney's salary.[274]

State grant money can alter enforcement priorities and increase the quantity of enforcement of selected crimes or types of crimes in ways that troublingly displace local control and the need to face hard tradeoffs.[275] Such programs have sprung up across the county but have particularly burgeoned in California with the state funding units to address "career criminals, gangs, rural crime, auto theft, narcotic sales, elder abuse, domestic violence, child abuse, and statutory rape."[276] Sometimes the priorities for such funding are set entirely top-down at the state level, which badly distorts local choice, such as with California's statutory rape enforcement funding.[277] Despite the lack of grassroots organizing and that many district attorneys disagreed with raising the enforcement priority of statutory rape, "free" "money was too good to refuse" for "county prosecutors' offices [that] were operating on tight budgets," so 97% of counties took the money.[278] Other state-funded prosecution programs involve local prosecutors seeking out the money, such

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271. *See, e.g.*, *Proceedings of the Brown County Public Safety Committee, Green Bay, Wisc*. 2–3 (Dec. 13, 2017), https://www.browncountywi.gov/i/minutes/644addfed098/publicsafetyminutesdecember13_2017.pdf [https://perma.cc/GB7Y-KSHV] (approving a resolution requesting funding from the state for additional positions in the District Attorney's Office); Mark Leland, *FOX11 Investigates Shortage of DAs, Backlog of Cases*, FOX 11 NEWS (Mar. 15, 2017), https://fox11online.com/news/fox-11-investigates/fox11-investigates-shortage-of-das-backlog-of-cases [https://perma.cc/HG9B-BSPT] (explaining that twelve of the positions in the District Attorney's Office in Brown County, Wisconsin are funded by the state while the county pays for two more prosecutors).

272. Metcalfe & Kuhns, *supra* note 240, at 345.

273. MONTGOMERY CNTY. MD. STATE'S ATT'Y, OPERATING BUDGET, https://www.montgomerycountymd.gov/OMB/Resources/Files/omb/pdfs/FY25/psprec/24-StatesAttorney-FY2025-REC-Publication-Report.pdf [https://perma.cc/BYB9-LBNE] (showing county general fund as the overwhelming source of funds for the State's Attorney's Office with very little in fees or grant funding).

274. *See, e.g.*, *Oregon's 36 District Attorneys*, OR. SEC'Y STATE, https://sos.oregon.gov/blue-book/Pages/state/executive/district-attorneys.aspx [https://perma.cc/KE46-B9M8] (explaining that district attorneys are paid by the state).

275. *See* Levine, *supra* note 8, at 33, 37–39 (discussing state grant programs as a situs of state power over local criminal law enforcement).

276. *Id.* at 38.

277. *Id.* at 33–34.

278. *Id.* at 41–42.

as California's effort to combat rural farm theft.[279] Both types of state-funding programs are problematic, although those that come in part through a local prosecutor applying for the grant are somewhat less so. Both increase enforcement beyond what the county has chosen,[280] and both give the county money to spend for a particular purpose without the county having to face the hard tradeoffs about how to spend that additional money.

Several federal grants are available to prosecutors' offices, and each alters the balance that local budget officials might strike because of the constraints on their use.[281]

The Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") Program is the "leading federal source of criminal justice funding to the states, territories, local governments, and tribes."[282] While some Byrne JAG funding goes to support indigent defense, the money skews toward prosecution, law enforcement, and corrections;[283] it is also awarded predominately at the state level, although some of the money goes to cities and even counties.[284] Moreover, "[f]or years the Justice Department had asked states to report the number of arrests they made with the funds, the amounts of drugs they seized, and the number of cases they prosecuted."[285] Such reporting requirements "encouraged states to" prioritize arrests, seizures, and prosecutions rather than "fairness, justice, and public safety."[286]

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279. *Id.* at 39–40.

280. *See id.* at 40–42.

281. *See* Harmon, *Federal Programs*, *supra* note 152, at 912–13, 939–44, 948–54; HERNANDEZ D. STROUD, LAUREN-BROOKE EISEN & RAM SUBRAMANIAN, BRENNAN CTR. FOR JUST., A PROPOSAL TO REDUCE UNNECESSARY INCARCERATION 3 (2023), https://www.brennancenter.org/our-work/policy-solutions/proposal-reduce-unnecessary-incarceration [https://perma.cc/YE9X-4HSN] ("For a half century, the federal government has harnessed its grant-making power to spur states to incarcerate more people and to impose longer sentences . . . ."). *See generally* BUREAU OF JUST. ASSISTANCE, PROGRAMS THAT SUPPORT PROSECUTORS (2021), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/programs-that-support-prosecutors.pdf [https://perma.cc/K8H7-C5V6] (explaining these federal grants).

282. BUREAU OF JUST. ASSISTANCE, *supra* note 281, at 1.

283. Law enforcement receives the majority of Byrne Grants. *See* MAREA BEEMAN, NAT'L LEGAL AID & DEFENDER ASS'N, NAVIGATING BYRNE JAG AND OTHER FEDERAL RESOURCES: DEFENDER PROGRAMS BENEFIT FROM PROACTIVE ENGAGEMENT WITH SAAS 2 (2020), https://www.nlada.org/sites/default/files/2021-1-7%20CESF%20Survey%20Results%20FINAL.pdf [https://perma.cc/29AN-5QU2].

284. *See* ALEXIA D. COOPER, BUREAU OF JUST. STAT., NCJ 304372, TECHNICAL REPORT: JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, 2021, at 5–7 (2022), https://bjs.ojp.gov/content/pub/pdf/jagp21.pdf [https://perma.cc/52XG-EGMV].

285. STROUD ET AL., *supra* note 281, at 5.

286. *Id.*

The Innovative Prosecution Solutions ("IPS") Program provides grants to state, local, or tribal prosecutors "to address and prosecute individuals who commit violent crime."[287] For instance, the second largest prosecutor's office in the country—in Cook County, Illinois—has created an entire unit called the Gun Crimes Strategies Unit with federal IPS funding for prosecutors to work with police to build cases against those suspected of fueling violence.[288] Combatting gun violence is good. But whatever efforts county governments wish to take to combat gun violence should be approved through local democratic processes.[289] And federal funding to create a new unit skirts county-level accountability.

The notion that state and federal grants could skew counties' or cities' choices in criminal law is hardly new. Rick Su, Anthony O'Rourke, and Guyora Binder have explained the vast extent of grant funding that bolsters police agencies and how those grants entrench high levels of funding over the longer term.[290] Rachel Harmon, Richard Bierschbach, and Stephanos Bibas raised this concern as well.[291]

There are two different, albeit related, problems here about funding from the state or other government entities that are nonetheless susceptible to the same solution. The first problem is when the state pays prosecutor salaries or perhaps other office expenses. When paying salaries, the state adds prosecutors beyond the number the county has decided to fund. When paying other expenses, the state may enable the county to shift more funds toward prosecutor salaries than it otherwise could but doesn't directly dictate that outcome. The second problem is when states (or the federal government or other entities) fund prosecutors' offices in various ways through grants that constrain how the county can spend that money—typically steering it toward law enforcement. These two practices are both problematic insofar as they distort the budgetary choices available to county governments. When a state funds prosecutor positions it places a thumb on the scale of how many prosecutor positions the county thinks would best implement its conception

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287. BUREAU OF JUST. ASSISTANCE, *supra* note 281, at 1.

288. *Gun Violence: Chicago, Illinois*, INNOVATIVE PROSECUTION SOLS., https://innovativeprosecutionsolutions.org/chicago/ [https://perma.cc/3RH6-CQ53].

289. Byrne JAG grants are awarded based on decisions of *state* administering agencies and flow to either state or local governments—not county governments. *See* BEEMAN, *supra* note 283, at 1; COOPER, *supra* note 284, at 1, 3–5.

290. *See* Su et al., *supra* note 15, at 1200–05 (discussing the way that state and federal grants entrench police funding and make "defunding" exceedingly difficult).

291. *See* Harmon, *Federal Programs*, *supra* note 152, at 912–13; Bierschbach & Bibas, *supra* note 3, at 219.

of public safety. State funding of prosecutors operates for present purposes like a state grant whose use is tightly constrained. When states pay other prosecutor office expenses or simply increase funding, they allow flexibility to the prosecutor's office; while that is better than adding lawyer salary lines directly, better still would be letting the county decide whether that money should go to prosecutors or whether another office or social purpose should get the money.

Because it is the specificity of these funding sources that distorts local choice and control and disempowers local voters, block grants are the standard (and sensible) solution.[292] Block grants entail government giving money to lower levels of government without significant restriction on how the money can be used but rather with broad objectives such as "community development, social services, [or] public health."[293] So instead of a county government receiving funding to buy new tactical gear for the sheriff's office or even receiving funding for the jail, the county government could receive money with a broad mandate to improve public safety.[294] The meaning of "public safety" is deeply contested,[295] and funding with such a broad sweep would allow local communities to determine for themselves what public safety means and how best to achieve it. Instead of funding more traffic enforcement or quality-of-life prosecutions, a community could decide instead that they prefer expanding the social safety net to combat root causes of crime. Other counties could of course double-down on broken windows policing, as misguided as that is;[296] one might expect political blowback if

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292. *See* Bierschbach & Bibas, *supra* note 3 at 220–21; BARKOW, *supra* note 54, at 167; W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—And Why It Should*, 28 GA. ST. U. L. REV. 987, 1062–63, 1075–78 (2012).

293. JOSEPH V. JAROSCAK, CONG. RSCH. SERV., R40486, BLOCK GRANTS: PERSPECTIVES AND CONTROVERSIES 1 (2022), https://sgp.fas.org/crs/misc/R40486.pdf [https://perma.cc/PUX7-M9GH].

294. *See* Bierschbach & Bibas, *supra* note 3, at 221–22; BARKOW, *supra* note 54, at 167.

295. *See, e.g.*, Friedman, *supra* note 1, at 739–46 (articulating a broad vision of "public safety"); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 810–13 (2021) (arguing that police reform should account for residents' view of what safety means); Friedman, *supra* note 9, at 1630–37 (explaining affirmative obligations toward a broader governmental obligation to provide public safety); Kaba, *supra* note 10 (describing "a different vision of safety and justice").

296. BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 6–11 (2001); *see also* Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 798, 818 (1999); Joshua C. Hinkle & David Weisburd, *The Irony of Broken Windows Policing: A*

low-level offenses are prioritized over serious "politically mandatory" felonies, at least if voters are made aware of that choice and cohere around what cases are "politically mandatory."[297] David Ball sensibly argues for block grants awarded proportionally to counties' violent crime rates—recognizing that the point of the money is to address criminal justice need by decreasing the social harm from crime rather than to fully fund existing institutions.[298]

Consider an example about specificity of grant funding: one federal grant is currently awarded "to address and prosecute individuals who commit violent crime,"[299] which would be less distortionary if the middle of that clause were removed, leaving "to address violent crime." The Byrne JAG grant provides funding for several different possible purposes including: "law enforcement; prosecution and courts; prevention and education; corrections and community corrections; drug treatment; planning, evaluation, and technology improvement; crime victim and witness assistance (other than compensation); [and] mental health and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams."[300] Although "prevention" sweeps more broadly than the other listed purpose areas, the list skews heavily toward policing, prosecution, and jails, perhaps making it easier for counties to get the money if they pursue more carceral ends.[301]

Although grants allow for more criminal law enforcement than local tax revenues support, they may nonetheless be necessary sometimes: some counties may have too poor of a tax base to provide adequate services on tax dollars alone or be too restricted by state law in their taxation power. When

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Micro-Place Study of the Relationship Between Disorder, Focused Police Crackdowns and Fear of Crime, 36 J. CRIM. JUST. 503, 508–09 (2008).

297. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600 (2005).

298. Ball, *supra* note 292, at 1073–75; *see also* Ball, *supra* note 11, at 114 ("[P]rison subsidies are not crime-fighting subsidies. If the problem is crime, we should provide resources to high-crime areas; but these resources should not only take the form of free access to state prisons.").

299. BUREAU OF JUST. ASSISTANCE, *supra* note 281, at 1.

300. NATHAN JAMES, CONG. RSCH. SERV., IF10691, THE EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 1 (2023), https://crsreports.congress.gov/product/pdf/IF/IF10691 [https://perma.cc/CDB3-4MWB].

301. *See id.*

it isn't feasible[302] for counties to run on their own tax dollars alone, grant funds should at least stop prioritizing criminal law enforcement over other important government objectives and allow counties to strike their preferred budget balance.[303] In the same way, even if states need to provide counties with money to protect public safety, they should not directly fund line prosecutor salaries or even fund prosecutor offices but should let counties choose how to spend the money.

Federal government grants that fund police and prosecution badly distort counties' options and are remarkably opaque to those not intimately involved in trying to secure those grants. That opacity hides costs of prosecution in places that most citizens will not see them and averts budget discussions about those costs.

The Brennan Center for Justice recently proposed that the federal government award grants to support decarceral initiatives; that proposal usefully fleshes out the complications that decades of grant distortion has created.[304] A first-best solution would be to eliminate the distortionary effects of federal grant funding.[305] But because federal grants have entrenched pro-carceral distortion into systems across the country for decades,[306] a counterweight to that incentive would be a good second-best solution. Some of the money in the Brennan Center proposal would reward states for important decarceral changes such as repealing mandatory minimum sentences or sentencing enhancements and mandatorily reviewing sentences for possible modification after an incarcerated person serves fifteen years imprisonment.[307] But if a community really wishes to spend its money doing

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302. "Feasibility" here likely should account for violent crime rates to provide a measure of whether more funding for criminal law is necessary rather than simply desired. *See* Ball, *supra* note 292, at 1073–75. As David Ball demonstrates, California counties widely diverge in their choices of how many of their residents to incarcerate, even relative to violent crime rates. *Id.* at 1027–35.

303. *See* Lemos & Charles, *supra* note 41, at 28–29, 50 (distinguishing levels of specificity in private donations made to the government).

304. *See generally* STROUD ET AL., *supra* note 281.

305. Funding that merely supports studying different options does not induce the same distortionary effect but rather allows local governments to make a more informed choice about how to spend its money. *See, e.g.*, *id.* at 3 (proposing in part "federal dollars to study the drivers of unnecessary incarceration").

306. *See* Su et al., *supra* note 15, at 1200–05 (discussing the way that state and federal grants entrench police funding and make "defunding" exceedingly difficult); *see also* Bierschbach & Bibas, *supra* note 3, at 219 (raising a similar concern); STROUD ET AL., *supra* note 281, at 3.

307. STROUD ET AL., *supra* note 281, at 9.

the opposite of each of those proposals, then it should be permitted to make those choices so long as it pays for them.

2. Non-Governmental Funding Sources

Prosecutors can flout budgetary control with various tools to aggrandize their own budgets outside of the appropriations process. One area that has received the most attention for allowing prosecutors to aggrandize their own budgets is civil asset forfeiture.[308] Federal and state law govern asset forfeiture, and both provide opportunities for county prosecutors to secure funding.[309] But federal law is more permissive.[310] The federal "equitable sharing program" funnels easy money into county prosecutor offices[311] because it allows prosecutor offices to benefit from the breadth of federal asset forfeiture law and often to retain more forfeited proceeds than their state's forfeiture law would.[312] Equitable sharing is available to any "law enforcement agency" that participates in the program.[313] When a prosecutor office receives "equitably shared" forfeiture funds, the idea is to distort budgetary choice by "increas[ing] or supplement[ing] the resources of the receiving state or local law enforcement agency" rather than "replac[ing] or supplant[ing] the appropriated resources."[314] Indeed, the DOJ "may terminate sharing" with an agency if the local government tries to offset the new forfeiture in budgeting.[315] In other words, county prosecutors receiving new revenue through the equitable sharing program necessarily disrupts whatever balance the county government has struck about the financial scope of prosecution compared to other agencies inside or outside the criminal legal system.[316]

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308. *See generally* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998). *See also* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 285–88, 298–99 (2014).

309. Blumenson & Nilsen, *supra* note 308, at 51.

310. *Id.* at 51–54.

311. *See, e.g.*, 21 U.S.C. § 881(e)(1)(A); 19 U.S.C. § 1616a. For a more detailed description of how equitable sharing operates, see U.S. DEP'TS OF JUST. & TREAS., GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES (July 2018), https://www.justice.gov/criminal-afmls/file/794696/download [https://perma.cc/XG9P-5VRG].

312. Blumenson & Nilsen, *supra* note 308, at 52–54, 53 n.66.

313. U.S. DEP'TS OF JUST. & TREAS., *supra* note 311, at 4.

314. *Id.* at 13. As relevant for purposes of this Article, equitable sharing proceeds are limited in the extent to which they can be used to pay salaries. *Id.* at 18.

315. *Id.* at 13.

316. *See* Harmon, *Federal Programs*, *supra* note 152, at 929–36.

The lack of meaningful constraint on prosecutors' power to seize assets from its citizens through civil forfeiture is troubling.[317] But from economic and democratic accountability perspectives, the most troubling piece of civil asset forfeiture is that forfeiture proceeds provide money to spend on criminal law that does not burden the citizenry through tax collection and evades budgetary deliberation. That some forfeiture proceeds can flow right back to the prosecutor's office and to other law enforcement entities[318] particularly distorts the budgetary balance that county officials struck. One aspect of the distortion is fairly easily solved. Civil forfeiture proceeds should go into the county's general fund to be spent as county officials see fit.[319] Under that structure, forfeiture proceeds would yield new revenue without prioritizing criminal law enforcement above other uses. A more limited forfeiture regime with money going to the general fund would prevent some people convicted of crimes from retaining illegally gotten gains while avoiding the distortionary effects that occur when forfeiture funds go to police, prosecutors, or courts.[320] The approach to forfeiture that would not only avoid distortion but also have the citizenry paying for all services through taxes—i.e., addressing both goals articulated above—would be to eliminate all civil asset forfeiture.

Fees are the quintessential example of placing the cost incidence of criminal law in the wrong place when seeking to ensure that a county gets only as much criminal law as it is willing to pay for. Courts charge criminal

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317. *See, e.g.*, Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari) (describing the civil forfeiture system as one "where police can seize property with limited judicial oversight and retain it for their own use" that "has led to egregious and well-chronicled abuses").

318. *See, e.g.*, Gold, *supra* note 7, at 1287–88; Blumenson & Nilsen, *supra* note 308, at 63. Pursuit of forfeitures also skews policing. *See, e.g.*, Su et al., *supra* note 15, at 1201 ("The pursuit of fines, fees, and forfeitures draws policing priorities away from serious crime and falls most heavily on the poor."); Blumenson & Nilsen, *supra* note 308, at 68–69 (discussing the focus on policing to seize money that would be used to buy drugs rather than seizing drugs).

319. Louis S. Rulli, *Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for Profit in All the Wrong Places*, 72 ALA. L. REV. 531, 547–48 (2021) (explaining that some jurisdictions have abolished civil forfeiture and others have directed proceeds into the general fund).

320. A more thoughtfully calibrated restitution regime than the one we have now that was geared toward disgorging ill-gotten gains and making victims whole would be seemingly better still for achieving this purpose. *See* Cortney E. Lollar, *What Is Criminal Restitution*, 100 IOWA L. REV. 93, 99–105 (2014) (describing the evolution of restitution away from a focus on disgorgement); *see also* Lula Hagos, Follow the Money: The True Cost of Criminal Restitution 3–4 (unpublished manuscript) (on file with author) (describing the ways in which restitution diverges from the victim compensation method one would likely anticipate).

defendants fees for police investigations, arrests, trial preparation, impaneling a jury, pretrial detention, and even post-conviction incarceration—as though defendants had chosen to enjoy the pleasures of any of these things.[321] In Alabama, for example, a defendant is charged a fee of $847 for being arrested on a charge of trafficking in a controlled substance.[322] Moreover, to the surprise of many, defendants who are afforded a "free" lawyer because they are indigent can then be charged for that lawyer.[323] Some of these fees generate revenue for the prosecutor's office: portions of many court fees in Alabama go to the district attorney's fund[324]—monies that can be used "for the payment of any and all expenses to be incurred by [the district attorney] for law enforcement and in the discharge of the duties of his office, as he sees fit."[325] Instead of insisting that taxpayers bear the burden of criminal prosecution, fees structured this way instead concentrate the burdens further onto defendants. While that choice may be politically popular, it's indefensible as a matter of efficient resource allocation and externalities.

Many crimes also come with financial penalties upon conviction, and those fines too can provide unappropriated funds for criminal law enforcement. One recent study found that in seventeen states traffic fines go at least in part to fund courts or law enforcement.[326] In many ways, they operate similarly to fees or forfeiture insofar as they take money from a defendant and give it to the government. Restitution can also aggrandize

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321. Colgan, *supra* note 308, at 291; Colgan, *supra* note 195, at 206; Gold, *supra* note 7, at 1285–86; Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1192. Shifting costs onto defendants embodies the overly simplistic narrative of crime perpetrated by bad actors who freely chose to do wrong and thus not only deserve to suffer but also to pay for us to inflict that suffering. *Cf.* AVIRAM, *supra* note 7, at 144 (discussing the neoliberal ethos with criminal as consumer that the increased use of fees embodies).

322. STATE OF ALA. UNIFIED JUDICIAL SYS., FEE DISTRIBUTION CHART 2, http://www.alacourt.gov/docs/FEE%20DISTRIBUTION%20CHART.pdf [https://perma.cc/QD5Z-ZH5S].

323. *See* Beth A. Colgan, *Paying for* Gideon, 99 IOWA L. REV. 1929, 1929–31 (2014).

324. *See* STATE OF ALA. UNIFIED JUDICIAL SYS., *supra* note 322 (providing a breakdown of where proceeds from various fees are distributed, including the "DA Fund").

325. ALA. CODE § 12-17-197(c) (2024).

326. ARAVIND BODDUPALLI & LIVIA MUCCIOLO, URB. INST., FOLLOWING THE MONEY ON FINES AND FEES: THE MISALIGNED FINANCIAL INCENTIVES IN SPEEDING TICKETS 5–8 (Jan. 2022), https://www.urban.org/sites/default/files/publication/105331/following-the-money-on-fines-and-fees_final-pdf.pdf [https://perma.cc/9WN9-4BFG].

government coffers with nontax revenue, at least when the funds go to the government and are not in fact distributed to a particular victim.[327]

Volunteer prosecutors also provide prosecutor offices with resources outside the appropriations process.[328] Whether to burnish their professional credentials or simply to gain experience, some people work as prosecutors without getting paid, in either full-time or part-time positions.[329] Their free labor provides prosecutors with a larger workforce than the one the county's budget provided, allowing the prosecutor's office to cast a wider net—particularly in misdemeanor cases.[330] This practice too sidesteps the budget and disrupts the balance it struck.[331] The idea that volunteer prosecution is a "win-win"—as some prosecutors have described it[332]—embraces the notion that locking up more bad guys is good, without any meaningful consideration of whether prosecution does more harm than good in a particular case.[333] Avoiding distortions to the budget balance requires prohibiting volunteer prosecution, despite its understandable upside to some of the volunteers.[334]

A practice that's related to volunteer prosecution is private financial donations to prosecutor offices.[335] Instead of providing free labor, a private citizen provides money to subsidize a particular prosecution (or type of prosecution).[336] Leaving aside the potential due process concerns,[337] its implications look similar to volunteer prosecutors—enabling more prosecution than the government has decided to pay for in ways that evade

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327. *See* Cortney E. Lollar, *Punishment Through Restitution*, 34 FED. SENT. REP. 98, 99–100 (2022) (explaining that restitution proceeds can go to the government rather than individual victims); Hagos, *supra* note 320, at 34–37.

328. For more on this practice, see generally Gold, *supra* note 107.

329. *Id.* at 1490–96.

330. *Id.* at 1517–23.

331. *Id.* at 1523–28.

332. *Id.* at 1490, 1495.

333. *Id.* at 1532–33.

334. *See id.* at 1533.

335. *See* Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 667–68 (1996); Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 477–79 (2017); Rebecca A. Pinto, *Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U. L.Q. 1343, 1345–48 (1999).

336. Kennedy, *supra* note 335, at 667–70.

337. *See* People v. Eubanks, 927 P.2d 310, 312–14 (Cal. 1997) (upholding the trial court's ruling that this contribution created a conflict of interest for the district attorney's office); State v. Culbreath, 30 S.W.3d 309, 311–12, 316 (Tenn. 2000) (affirming the lower court's finding that private donations to hire private attorney to act as special prosecutor for obscenity cases created a conflict of interest and affirming dismissal of the indictment).

deliberative government processes. The solution to this distortion too is straightforward: prohibit the practice.

B. Foisting Costs on Other Agencies

Prosecutors'[338] charging and bargaining decisions burden other agencies' budgets in numerous ways that alter the budgetary balance the government struck.[339] Prosecutors' choices can increase the burden on indigent defense, the sheriff's office's jail budget, state prison budgets, and courts. Complicating matters further is that while jail budgets are typically determined and funded at the county level and that is sometimes true of indigent defense budgets, prison budgets are set at the state level. Court budgets vary as to whether they are funded by states or counties.[340] Financial responsibility for prisons, indigent defense, and courts should be devolved to the county level.[341] Preserving the balance among various agencies would then require limiting the number of cases that prosecutors can bring against indigent defendants, total cases, and the number of days that defendants can spend in jails and prisons—limits that would be based on the budgetary

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338. It is not only prosecutors who can foist the costs of their choices on others. Before a case gets to a prosecutor, police decide who to arrest and for what without needing to consider the ways their arrest choices will burden jails or prosecutors. *See* Bierschbach, *supra* note 54, at 1450. This Article nonetheless focuses on prosecutors.

339. This Section focuses on how prosecutors impose costs on other *government* actors. It thus does not even take up the massive harms that prosecutors' choices inflict on defendants and their loved ones—another profound distortion but one that is difficult to correct within the boundaries of this proposal. *See, e.g.*, Gold, *supra* note 196, at 539–45 (arguing that pretrial detention analysis should weigh the harm inflicted on defendants and their families); Gold, *supra* note 3, at 91–102 (proposing that prosecutors be required to disclose costs of their decision-making, including human costs, to allow voters to better evaluate their work).

340. GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, RAND INSTITUTE FOR CIV. JUST., WHO PAYS FOR JUSTICE?: PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE 12 (2014), https://www.rand.org/pubs/research_reports/RR486.html [https://perma.cc/RLY4-S2V2].

341. *See, e.g.*, Ball, *supra* note 11, at 79; *see also* Franklin E. Zimring, *Substance and Procedure in the Reform of Criminal Sentencing*, 46 MCGEORGE L. REV. 735, 740 (2014) (describing realignment in California and the financial incentive for counties to reduce overall incarceration); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 720–21 (1996) (arguing that states should provide prosecutor funding to counties but that counties should then be permitted to keep any unspent surplus or cover any overages from their own funds). Indigent defense likely needs funding from elsewhere in the state to function adequately in some places. *See* Primus, *supra* note 5, at 125. As with money that might be spent on prosecutors, state funding should be provided in a way that does not distort local priorities.

allocations to the relevant agencies and that would likely require enforcement by judges or an agency.[342] These financial incentives for prosecutors to limit how many jail-bed-days they use could add substance to feckless speedy trial rights.[343] So too could they create incentives to reduce court costs generated by slow-moving cases with countless hearings.[344]

Consider first the interaction between prosecutors and indigent defense: prosecutors can overrun their local indigent defense system if they so choose—and they usually do.[345] Both have a set appropriation, which comes from a combination of county and state-level funding.[346] But prosecutors control the case spigot—they decide which and how many cases to charge.[347] Regardless of how many cases prosecutors charge, there remains a set budget for defending those who cannot afford their own representation.[348] As prosecutors charge more people with crimes, they force indigent defenders to represent more defendants using the same resources, spreading their workload in many instances well beyond the point that the Sixth Amendment should tolerate and that caseload guidelines countenance.[349] While the ABA

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342. *See* Bierschbach & Bibas, *supra* note 3, at 228–32 (proposing caps and nominal prices as a way to constrain the overuse of criminal law).

343. *See, e.g.*, Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1026 (2019) (describing "widespread failure to make speedy trial guarantees meaningful"); Weiser & McKinley, *supra* note 237 (discussing long jail waits in the Bronx and the lack of speedy trial protection against that outcome).

344. *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 357 (2016) (collecting sources for the proposition that "slower cases cost more money").

345. *See, e.g.*, Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1211–1212 (2020) (arguing that prosecutors violate their ethical obligations when they overload the indigent defense system).

346. *See supra* Section III.A.1.

347. *See supra* Section I.B.

348. Not all defendants are represented by indigent defense counsel, although most are. Primus, *supra* note 247, at 207–08. Indigent defense representation is typically handled by a public defender office or appointed counsel. *Id.* For a more detailed explanation of the various different systems and other structural questions such as state versus county-level organization, see Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS., Winter 1995, at 31, 37–49; Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 127–31 (2020).

349. Countless sources discuss the crisis of caseloads and lack of funding for indigent defense. *See supra* note 228. There are jurisdictions where indigent defenders are paid per case, but in those jurisdictions running out of money in the budget remains a problem. *See, e.g.*, Jeffrey Schweers, *Court-Appointed Lawyers Waiting Anxiously to Get Paid as Florida Governor Gets Budget*, TALLAHASSEE DEMOCRAT (June 13, 2019), https://www.tallahassee.com/story/news/local/state/2019/06/13/court-appointed-lawyers-cant-

recommends that a single defender handle no more than 150 felonies or 400 misdemeanors per year, reports have shown defenders handling 19,000 misdemeanors per year per attorney, 700 felonies, or 2,000 misdemeanors, in various jurisdictions—many times greater than the recommended maximum caseload.[350] "[O]n average, even if a defender works every single day without taking breaks for weekends or holidays, that defender cannot devote even one full day each year exclusively to each case on her docket."[351] California's indigent defense system is underfunded by at least $300 million.[352] Oregon's indigent defense system needs more than four times as many lawyers as it has to adequately handle its caseload—it is short by 1,296 full-time lawyers.[353] New Mexico needs more than triple the number of indigent defense lawyers it can employ under current appropriations.[354]

Indigent defense funding should be set at the county level even if it needs supplementing by the state, and whatever budget the county affords for indigent defense should then be used to set a caseload limit for local prosecutors. To be more concrete, in a county with a public defender office, the caseload limit should take the ABA recommendation of no more than 150 felonies or 400 misdemeanors per year and multiply by the number of full-time equivalent public defender positions the county has funded.[355] In a county that relies on an appointed counsel system using a pay-per-case model, the difficult question would be setting an adequate hourly

get-paid-till-florida-governor-signs-budget/1443630001/ [https://perma.cc/3ZXN-6NPV]; Brian Bowling, *Pay Trimmed for Attorneys*, PITTSBURGH TRIB. REV., Sept. 10, 2013.

350. Primus, *supra* note 227, at 1771.

351. Joe, *supra* note 6, at 394.

352. Laurence A. Benner, Comment, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 313 (2009).

353. THE OREGON PROJECT, *supra* note 230, at 4, 26–28; *see also id.* at 35 ("The single most important conclusion from this report is that Oregon has a massive gulf between the number of cases currently in the public defense system and the number of attorneys available.").

354. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENSE & MOSS ADAMS LLP, THE NEW MEXICO PROJECT: AN ANALYSIS OF THE NEW MEXICO PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 4–5 (Jan. 2022), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-moss-adams-nm-proj.pdf [https://perma.cc/SDM2-FRP8].

355. Even these caseload recommendations should likely be reduced in an era where digital technology creates more discovery for an effective advocate to request and review. *See* Amy F. Kimpel, *Violent Videos: Criminal Defense in a Digital Age*, 37 GA. ST. U. L. REV. 305, 382–85 (2021); *see also* Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L. & CRIMINOLOGY 237, 244–46 (2019) (discussing electronic discovery in the criminal context). The calculation for case caps should then change accordingly.

reimbursement rate,[356] but then the case cap would operate as a simple pricing mechanism subject to the existing appropriation.[357] I do not advocate that indigent defense needs to be organized or structured only at the county level; rather, I am persuaded by Eve Brensike Primus's arguments favoring statewide organization that nonetheless permits localization to address counties' particular needs.[358] But the choice of how big to make each office should be made at the county level.

The most discussed example of prosecutors increasing the burden on other agencies is the "correctional free lunch": neither prosecutors nor their offices pay to house the people whose incarceration they seek and obtain; although counties pay for prosecutors, states pay for prisons.[359] When a *county* prosecutor charges a defendant and obtains a sentence of longer than a year, the *state* bears the cost of incarcerating that defendant.[360] Not only does the prosecutor's office externalize the cost of incarceration onto another agency, with respect to prisons it externalizes those costs onto a different level of government.[361] But while prosecutors' decisions to bring another case, file additional charges, or seek a longer sentence will increase the burden on the state's prison budget, their decisions do not increase the resources available to the state to house, feed, and supervise those individuals.[362] To create better budget accountability, prison costs should be devolved down to the county level, and courts should be limited in what they can impose based on the

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356. Current reimbursement rates are far from adequate. *See, e.g.*, Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 847–57 (2004); JOHN P. GROSS, *Rationing Justice: The Underfunding of Assigned Counsel Systems*, *in GIDEON* AT 50: A THREE-PART EXAMINATION OF INDIGENT DEFENSE IN AMERICA 8–15, 20–32 (2013).

357. *Cf.* Bierschbach & Bibas, *supra* note 3, at 224–28 (discussing pricing as an approach to rationing criminal law); Miriam H. Baer, *Pricing the Fourth Amendment*, 58 WM. & MARY L. REV. 1103, 1137–53 (2017) (arguing that a pricing mechanism would help limit unreasonable searches and seizures).

358. *See* Primus, *supra* note 247, at 265–69.

359. ZIMRING & HAWKINS, *supra* note 4, at 140.

360. *See, e.g.*, STUNTZ, *supra* note 29, at 289 (arguing that local governments should pay for half the cost of prison beds they use). Complicating matters further, the defendant was likely arrested by a city police officer.

361. Misner, *supra* note 341, at 719–21.

362. Marginal costs of incarcerating an additional inmate are complicated because some amount of additional money is needed to feed each additional inmate but at certain points a vastly larger amount of money becomes necessary to build a new prison—creating substantial discontinuities in the marginal cost curve.

county's budgetary choices.[363] To take an example, California laudably realigned prison costs such that counties now pay for a portion of the prison beds that they use, and that change has led to a substantial decrease in prison usage.[364] Counties could then continue to use the same number of prison beds they do now, but only if their residents are willing to pay for them.[365] Counties that wish to spend less on incarcerating or that achieve safety through cheaper means should be able to use that cost savings elsewhere to improve their residents' lives.[366]

Even solely at the county level, prosecutor offices and jails currently have separate budget lines.[367] Sheriffs' offices typically run jails.[368] Thus, when prosecutors successfully get a defendant detained pretrial or sentenced to a term shorter than one year, prosecutors' offices shift the cost of housing yet another defendant onto the sheriff's office rather than bearing it themselves.[369] In so doing, prosecutors can upset whatever balance of resources the county has afforded between prosecutors and the jails. Because both these budgets are typically already set at the county level, the fix is straightforward: a cap on the number of jail-bed-days a court will permit would suffice to implement the county's budgeting choices.

Constraining use of jails based on limited budgets may shift jurisdictions toward electronic monitoring or other supervision rather than incarceration to save money.[370] Electronic monitoring too can impose significant harms on the accused and represents an important part of a locality's carceral footprint.[371]

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363. *See, e.g.*, BARKOW, *supra* note 54, at 167 (proposing various "institutional changes to force decisionmakers to internalize all the costs of their choices," including "imposing caps or rationing access to the number of prison beds a local jurisdiction can use" in various ways that account for local "levels of crime or violence").

364. *See* Ouss, *supra* note 47, at 2 (juvenile); Lofstrom & Raphael, *supra* note 47, at 355 & fig.4 (combined state prison and county jail population).

365. *See* Ball, *supra* note 292, at 1071–73.

366. *See* Bierschbach & Bibas, *supra* note 3, at 221 (explaining that one benefit of block grants is that counties could experiment with alternatives to prison "that might prove more cost-effective").

367. Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should the Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 679–80 (2016).

368. *Id.* at 679.

369. *Id.* at 679–80.

370. *See* Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 149–50, 153 (2022) (explaining that budget constraints prompted somewhat of a shift from incarceration to electronic surveillance).

371. *See* Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 675–80 (2019) (explaining how electronic monitoring "severs" monitored people's connections

Electronic monitoring would also need to be accounted for budgetarily and should be limited based on the relevant budget lines.[372]

More cases also require more judicial resources. Funding for state criminal courts now varies substantially from state to state in whether the funding comes from the state, county, or in large measure from defendants paying fees.[373] A study from the National Center for State Courts in 2012 found that the "state general fund is the primary source of court funding in approximately two-thirds of the states,"[374] while one commentator says that roughly half of the states centralize court funding at the state level.[375] States also vary in the extent to which they fund their courts on the backs of defendants.[376] Florida, for instance, relies heavily on fees; it assessed a billion dollars in fees in Fiscal Year 2010.[377] A large portion of the fees in Florida fund the courts, but some of the money goes back into the general fund or elsewhere.[378]

Regardless of how "efficiently"[379] judges may try to process cases, they are constrained in how quickly then can move cases by the number of cases charged.[380] As with the other budgets that prosecutors' choices affect, the

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to their communities); Weisburd, *supra* note 370, at 159–68, 173–84 (explaining the problems with pervasive electronic carceral surveillance); *see also, e.g.*, Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 183–92 (2021) (discussing the burdens on defendants of release under conditions, including electronic monitoring).

372. Because electronic monitoring is comparatively cheaper than jail, the same amount of money can constrain the liberty of more people. Whether electronic monitoring for a larger number of people imposes more or less of an externality than jailing a smaller number of people is a difficult question to evaluate in the abstract.

373. MCGOVERN & GREENBERG, *supra* note 340, at 10–12.

374. Daniel J. Hall & Lee Suskin, *Responding to the Crisis-Reengineering Court Governance and Structure*, 47 NEW ENG. L. REV. 505, 507 (2013) (quoting NAT'L CTR. FOR STATE CTS., THE 2012 BUDGET SURVEY OF STATE COURT ADMINISTRATORS 1 (2012), https://cdm16501.contentdm.oclc.org/digital/collection/financial/id/247 [https://perma.cc/SU7T-ANEP]).

375. Peverall, *supra* note 255, at 296.

376. *See, e.g.*, Neel U. Sukhatme, Alexander Billy & Gaurav Bagwe, *Felony Financial Disenfranchisement*, 76 VAND. L. REV. 143, 159 (2023) (explaining that "[m]ost states charge user fees to fund their courts" and that "[t]his practice has greatly expanded in scope over the past few decades").

377. MCGOVERN & GREENBERG, *supra* note 340, at 19 tbl.2.3.

378. *Id.* at 18–20.

379. *See* King & Wright, *supra* note 344, at 356–64. What exactly judges mean by "efficiency" in this context is unclear, but seemingly they mean quickly and inexpensively. *See id. But see* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015) (criticizing the flat notion of efficiency that considers only lowering cost).

380. *See* Metcalfe & Kuhns, *supra* note 240, at 351–52 (finding that Charlotte prosecutors are concerned that their court system is underfunded).

amount of funding dedicated to the county's criminal courts should be decided by the county. The funding should come from public dollars and not from fees levied on defendants. And that budget for the county's courts should then yield a cap on number of cases that prosecutors can bring to prevent prosecutors from overrunning the courts' budget.

Unlike jails and prisons, courts could simply delay cases longer if they are underfunded without too much expense to their budget.[381] But that delay increases jail-bed-day use for any detained defendant. And such an approach of slowing down judicial proceedings should be constrained by a meaningful speedy trial right.[382] The federal constitutional speedy trial right does not sufficiently protect defendants from delay,[383] but at least some statutory schemes are somewhat better.[384] Developing the permutations of the speedy trial right that meaningfully enables defendants to contest the charges against them without facing years of incarceration is beyond the scope of this Article, but a speedy trial right coupled with limited court budgets should also yield caps on prosecutors' charging decisions.

The point of these caps is to recognize that budgets are compromises and articulations of relative priorities and then to prevent prosecutors from disrupting that budget balance. But so too are they meant to preserve prosecutorial discretion and flexibility in the critical areas of charging and bargaining.[385] Rather than sharp or rigid externally imposed constraints on who prosecutors can charge for what, the idea is to impose quantitative limits and then let prosecutors exercise their discretion in how to navigate those limits.

Caps might pose a risk to public safety if a budget runs out of money and there are serious cases remaining to bring that budget year or dangerous defendants with no budget to incarcerate or even "e-carcerate."[386] But

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381. Slower-moving cases are more expensive than fast-moving ones, so simply delaying cases is not costless. *See* King & Wright, *supra* note 344, at 357.

382. *But see* Roberts, *supra* note 343, at 1026 (describing "widespread failure to make speedy trial guarantees meaningful").

383. WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 18.3(a) (6th ed. 2017).

384. *Id.* § 18.3(b) (discussing federal Speedy Trial Act); *id.* § 18.3(c) (discussing state speedy trial acts). Even with speedy trial statutes, defendants may languish in detention for years without going to trial. *See* Hamburg, *supra* note 237, at 226 (describing jail wait times "as long as three, four, or even five years" in the Bronx for a day in court); Miller, *supra* note 237, at 402 (discussing cases languishing for years before resolution, including because of supervision and electronic monitoring).

385. *See* Sklansky, *supra* note 18, at 504 (explaining that prosecutors' essential role is as an intermediary).

386. Arnett, *supra* note 371, at 645 (explaining the term "e-carceration").

prosecutor offices should largely be able to manage their budgets to avoid that outcome. Consider a related example of prosecutors managing to new constraints: Minnesota's sentencing commission imposed a strict capacity constraint—designed to keep prison populations within existing capacity.[387] System actors responded to the capacity constraint by prioritizing "violent" offenses over property offenses.[388] Adam Gershowitz proposed a cap on capital cases at two percent of all murders, again with the idea of requiring prosecutors to prioritize.[389] And if prosecutors are not able to manage to the constraints in a way that satisfies county officials, prosecutors can ask county officials to spend more money to alleviate the fiscal crunch.[390] But the important point is that they must choose whether to do that.

How jurisdictions manage their budgets for appointed criminal defense counsel to deal with shortages can yield insight into how to address shortages near the end of a budget year for purposes of my proposal. For instance, having some ability to spend a portion of the next year's dollars ahead of time could provide useful flexibility.[391] I cannot condone making the lawyers wait for weeks or even months to be paid as the federal government and Florida have.[392] Nonetheless, timely payment that is treated for accounting purposes

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387. Bierschbach & Bibas, *supra* note 3, at 230; Frase, *supra* note 98, at 733–35.

388. Tonry, *supra* note 98, at 164–65.

389. Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 113 (2007).

390. That is the approach some counties take when they exceed their budgets for appointed defense counsel. *See, e.g.*, Betsy Friedrich, *Auditing Firm Change Saves Buffalo Co. $4,000 a Year*, KEARNEY HUB, Apr. 27, 2011 (reporting that the county's board of supervisors added $90,000 to the county court account to address overruns in the budget for appointed counsel); Nick Swedberg, *Kane Judiciary over Budget, Too*, COURIER NEWS (N.J.), Nov. 6, 2009 (reporting that the county's chief judge asked the county board for more funding because of overruns in the appointed-counsel budget); *see also* Hensley & Satija, *supra* note 247 (describing the current projected budget shortfall and the need for the county to provide additional funding that will likely come from a projected surplus).

391. The Judicial Conference of the United States delayed paying appointed counsel for a few weeks to shift costs from one fiscal year to the next. Bowling, *supra* note 349.

392. *See id.* (Judicial Conference of the United States); Schweers, *supra* note 349 (Florida); Todd Leskanic, *Governor Frees Money to Pay Court-Appointed Lawyers*, TAMPA TRIBUNE, Dec. 9, 2006 (Florida); *see also* Vermont v. Brillon, 556 U.S. 81, 95–96 (2009) (Breyer, J., dissenting) (arguing that the Court should treat for speedy trial purposes the period in which defendant's lawyer's contract with public defender office had expired as one in which he had no lawyer at all). One Florida lawyer waited for months for payment of $25,000 she was owed as budget negotiations dragged on. Schweers, *supra* note 349. Sometimes public defenders too must wait to be paid when their agencies run out of money, perhaps because their budget depends too much on fines and fees that vary over time. *See, e.g.*, Eve Brensike Primus, A Better Defense:

as spending the following year's budget is less problematic. That approach allows prosecutors adequate notice to manage the next year's budgets accordingly. While counties should be able to shift funding from one place to another if they choose to expand the capacity of their criminal legal system, draining the courts' budget as Maine did to fund indigent defense leaves the courts too pinched to move cases expeditiously.[393]

One of the factors that is typically thought to yield the one-way ratchet of increasingly harsh criminal law is the idea that powerful interests tend to align on the same side—prosecutors, sheriffs, and police—against far less powerful interests—those who have been accused or convicted of crimes (and sometimes stripped of voting rights).[394] But limiting prosecutors' ability to overrun other offices' budgets can change that political dynamic. A prosecutor's office that seeks to cannibalize funding for indigent defense, jails, or prisons might succeed at getting the money but would then face tighter limits on what it can do with the money. Similarly, a sheriff's office that wants more money to fund the jail might have the backing of the prosecutor's office because that increase would also increase case limits for prosecutors. Prosecutors and sheriffs might both urge indigent defense funding increases—a far cry from the usual political alignment.[395] By contrast, a sheriff's office that wants more money for its policing function does not offer the same benefit to a prosecutor's office and thus may be less likely to have the district attorney's support. Indeed, the non-jail portion of the sheriff's office budget and the district attorney's office budget might find themselves in competition for the same scarce resources.

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In sum, much about current funding arrangements in criminal legal systems needs to change. Much more budgetary authority needs to be

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Why the Right to Counsel in Criminal Cases Is Broken and How to Fix it 6 (n.d.) (unpublished manuscript) (on file with author).

393. Greg Kesich, *Criminal Defense Costs Could Be the State's Next Crisis; It May Take Court Action to Force Maine to Change the Way It Pays Legal Bills for People with No Money*, PORTLAND PRESS HERALD, Dec. 17, 2008 (explaining that Maine judges had to cover shortfalls in appointed counsel budgets by taking from the court personnel budget, causing "[a] shortage of clerks [that] bogs down the whole system").

394. *See* Barkow, *supra* note 89, at 1277, 1281.

395. *See* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 232–42 (2004) (explaining that some states link public defender salaries to prosecutor salaries and arguing for broader resource parity between prosecutor offices and defender offices); *see also* Gold, *supra* note 81, at 339 (exploring examples of prosecutors opposing or remaining silent about increasing indigent defense funding).

assigned to counties rather than states. When necessary, counties can still receive funding from the federal or state government, but they should receive that money in block grants that preserve local decision-making authority rather than through grants that skew the available options. So too should counties then pay for much more of their criminal legal system than they now do.[396] Caps are then necessary to preserve the budgetary balance that county officials strike. Prosecutors should not be permitted to simply force indigent defenders, jails, prisons, and courts to continue taking on ever more cases or inmates beyond the resources the government has provided.

Focusing decision-making at the county level continues to leave criminal law subject to the dynamic where suburban voters can control decisions about how to enforce criminal law against urban residents.[397] And even decision-making at the city level leaves overpoliced communities under control of less-policed communities.[398] There are at least two possible solutions to that problematic dynamic. One approach is for lawmakers to work especially hard to hear the voices of those most affected by the criminal legal system, especially those who live in overpoliced neighborhoods. That would be very much to the good, although it may not be politically advantageous if the bulk of voters likely comes from the suburbs. Another approach would be to devolve power and budget decision-making even further down than the county level, at least in urban areas—to cities and even neighborhood groups—taking localism further on matters of criminal enforcement discretion.[399] Exploring city or neighborhood-level decision-making is beyond the scope of this Article.[400]

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396. Some states prohibit themselves from imposing unfunded mandates on local governments absent a supermajority vote but exempt criminal law from that requirement. *See, e.g.*, ALA. CONST. § 111.05(a), (b)(2); FLA. CONST. art. vii, § 18(a), (d). Although new criminal laws do not involve the state spending the county's money directly because they preserve enforcement discretion, it is nonetheless noteworthy to single out criminal law.

397. STUNTZ, *supra* note 29, at 7.

398. Nonetheless, both approaches steer away from the dynamic where dividing power across various levels of government makes it harder for informed voices to be heard. *See* MILLER, *supra* note 194, at 167–75.

399. *See* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 214–16 (2017) (arguing that prosecutor districts in urban areas should be divided up to give urban voters more local control); Hessick & Morse, *supra* note 11, at 1554 ("Virginia has a large number of cities that elect their own [felony] prosecutors."). *But see id.* at 1571–78 (recounting their finding that counties with low populations may not have a sufficient supply of prosecutor candidates).

400. *See, e.g.*, Simonson, *supra* note 295, at 803–24 (discussing the benefits of allowing policed communities to wield power over how they are policed). This Article also does not try to

IV. CONCLUSION

American criminal law largely opts for political control over essential policy decisions—or at least it purports to. But the politics of criminal law function poorly, in part because power and costs are diffused across different levels of government and agencies and they typically remain hidden from view; it is thus difficult for voters to know who to hold accountable for problems in their criminal legal system.[401] This Article offers a path toward accountability through reshaped county budgeting: Costs need to become more salient so that lawmakers and voters face rather than avoid difficult tradeoffs of more police and prosecutors versus funding for other important goals like public education. Budget discipline offers a more feasible path than one that requires judges or legislators to micromanage prosecutors' decision-making or even one in which legislators repeal criminal laws currently on the books, in part because it builds on prosecutors' role as intermediaries.

A democratically accountable county budgeting system should strive to ensure that taxpayers bear the burden of criminal law spending as much as possible, prioritize amidst scarcity, remain transparent with voters, respect civil rights, and enforce budgetary balance in implementation. Once costs become salient and civil rights are protected, legislators can strike whatever balance they and their constituents think best for their county. In some counties a majority of voters may already like the tradeoffs their government makes of funding schools versus prisons or community development versus prosecutors; perhaps those voters would still like the choices even if they had to pay much more for them. In other counties voters likely would not. This divergence is inherent in American criminal law's decentralization and localism, and I view that localism commitment as largely to the good. But forcing these choices and questions of opportunity cost into an open and deliberative process at the county level at least starts posing the right question for local resolution.[402]

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address the ideal size of a political unit. *See, e.g.*, Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 953–56 (1967); *see also* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 19–22 (1999) (criticizing the idea that devolving power to local governments is problematic because of the lack of expertise).

401. *See* PFAFF, *supra* note 399, at 13; Hessick & Morse, *supra* note 11, at 1538.

402. *Cf.* Bierschbach & Bibas, *supra* note 3, at 220 ("[I]n a bloated penal state, requiring criminal justice to compete against other objects of funding is a recipe for bringing costs and coercion into line."); Ball, *supra* note 11, at 109 (recognizing that ending the state subsidies for prisons might lead some counties to use prisons less while leading other counties not to change their behavior but that that state of affairs would "ensur[e] that the costs of prison are borne by

As with much about criminal law, there is reason for skepticism about a better tomorrow. Will we ever actually stop prosecutors from foisting greater burdens onto intolerably crowded and dangerous prisons? Will we ever meaningfully honor *Gideon*'s promise of affording a right to counsel rather than asking vastly overworked defenders to take on more cases? I don't know, but change could start with judicial courage that stops prosecution-on-the-cheap. Spending more money on criminals does not sell well in democratic politics, so the judicial role is important to prevent offloading costs onto defendants that the public should bear. If these basic protections were more robustly enforced judicially, costs would rise and be surfaced in political discourse. The extraordinary human costs of criminal law enforcement and the desire for fiscal restraint could create interest convergence that yields more thoughtful choices about government priorities and a less reflexive carceral state.

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those who choose to use them"); BROWN, *supra* note 130, at 159 (arguing that if the cost of adjudicating each case increased, a jurisdiction might "buy" less adjudication).