

Punishment Externalities and the Prison Tax

Sheldon A. Evans*

Punishment as a social institution has failed to live up to the quixotic ideals of theory and has descended into the practice of mass incarceration, which is one of the defining failures of modern times. Scholars have traditionally studied punishment and incarceration as parts of a social transaction between the criminal offender, whose crime imposes a cost to society, and the state that ensures the offender repays this debt by correcting past harms and preventing future offenses. But if crime has a cost that must be repaid by the offender, punishment also has a cost that must be repaid by the state. These social costs of punishment start by impacting the offender but inevitably ripple out into the community.

While the costs of crime remain a predominant theme in criminal justice, scholars have also recorded the economic, political, and social costs of punishment. This Article contributes to this literature by proposing a paradigm shift in punishment theory that reconceptualizes punishment as an industry that produces negative externalities. The externality framework recognizes punishment and its practice of mass incarceration as an institution that purports to provide certain benefits, but also must be balanced with the overwhelming social costs it produces in the community.

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Viewing punishment and the carceral state as an externality problem that accounts for community costs creates a unique synergy between law and economics and communitarianism that deepens punishment theory while carrying the practical value of exploring externality-based solutions. This Article argues for a Pigouvian prison tax, among other externality solutions, that will gradually lower the prison population while reinvesting revenue in the most impacted communities to mitigate punishment’s social costs in future generations.

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INTRODUCTION

Crime doesn’t pay, but neither does punishment. One of the dominant views of crime and punishment designs these social institutions as a set of countervailing costs.¹ Punishment is a reaction to crime,² which leads to the common sentiment that punishment should be proportionate to the crime. Through this lens, the cost of crime is the primary focus, and punishment

1. See THOMAS J. MICELI, *THE PARADOX OF PUNISHMENT: REFLECTIONS ON THE ECONOMICS OF CRIMINAL JUSTICE* 1–3 (2019) (explaining the cost and price model of crime and punishment); see also Bruce L. Bikle, Terry Campbell & Traqina Emeka, *Preface* to *THE AMERICAN PRISON: IMAGINING A DIFFERENT FUTURE*, at xiv–xv (Francis T. Cullen, Cheryl L. Jonson & Mary K. Stohr eds., 2014) [hereinafter *AMERICAN PRISON*] (discussing the justifications of prisons as a social construction of a “cost” to be balanced with the benefits it produced to society by teaching offenders that “crime does not pay”).

2. See THOM BROOKS, *PUNISHMENT: A CRITICAL INTRODUCTION* 66 (2d ed. 2021) (describing punishment theory as justifications “about how best to respond to crime”).

functions as an instrument that ensures the criminal offender repays their debt to society. Consequently, punishment merely serves as an end, and its own institutional costs are underappreciated.³ For over thirty years, scholars have bucked against this model and developed a robust literature that seeks to highlight and quantify the costs of punishment, both to the individual offender and to the communities that are disproportionately affected.⁴ And as mass incarceration has become the new normal of punishment practice, its costs to communities have become dire. This Article proposes a theoretical framework to capture these costs and spillover effects by examining punishment and mass incarceration through their negative externalities. This externality framework reconceptualizes punishment as a social institution that must be held accountable for its full range of costs, especially those that negatively affect the communities that it purportedly seeks to protect. And from a practical policy standpoint, this Article argues for solutions that are unique to externality problems to help solve the mass incarceration crisis.

Incarceration is the beating heart of criminal justice because it serves as the looming punishment tool that defines so much of how law enforcement, lawyers, judges, criminal defendants, and others practice their role in the system.⁵ And although incarceration is only one aspect of criminal punishment, it has become a defining characteristic of the nature of our society and how we treat the poor, downtrodden, and most vulnerable.⁶ Mass incarceration has become a human rights crisis⁷ that questions American identity by failing to live up to its highest ideals of exceptionalism. In a nation that locks 2.2 million people behind bars and is responsible for 25 percent of the world's incarcerated population,⁸ mass

3. See Robert J. Sampson, *The Incarceration Ledger: Toward a New Era in Assessing Societal Consequences*, 10 CRIMINOLOGY & PUB. POL'Y 819, 819 (2011) (describing different eras in criminology that focused "almost exclusively on the deterrent and incapacitation effects of imprisonment"); BROOKS, *supra* note 2, at 163 (noting that theories of punishment often consider "costs as an afterthought," instead focusing on "whether the deserving is punished or if potential offenders have been deterred").

4. See *infra* Part II.A.

5. See Lois Presser, *The Restorative Prison*, in AMERICAN PRISON, *supra* note 1, at 19, 26 (discussing incarceration's effects as a deprivation of liberty that touches on many processes including search, seizure, pre-trial detention, and post-conviction punishment); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 246 (2011) (describing the "punitive character" of the criminal justice system as its "defining feature").

6. See DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 287 (1990) (arguing that punishment is a social institution that "define[s] the nature of our society" and cannot be compartmentalized within the confines of criminal justice); see also SHANE BAUER, *AMERICAN PRISON: A REPORTER'S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT* 5 (2018) (contemplating that mass incarceration "will be one of the main factors that define the current era" in posterity).

7. JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 231 (2017) (describing the mass incarceration problem as a human rights crisis); Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 2021 YALE L.J.F. 798, 816 (2021) (referring to mass incarceration and overcriminalization as a humanitarian crisis).

8. See *infra* notes 86–87 and accompanying text.

incarceration is the enforcement mechanism that gives this overbroad system of punishment its teeth. Traditionally, scholars in the criminological, economic, and sociological literature that study mass incarceration focus on its impacts on the offender and the offender's relationship with the state that metes out punishment. As a result, there has been less attention paid⁹ to the more devastating story of American life where nearly 113 million people have close relatives that have been incarcerated at some point in their lives.¹⁰ In effect, one-third of Americans have been caught in the wide and unforgiving net of mass incarceration. Criminal punishment impacts more than the offender and the victim; it also impacts entire neighborhoods, communities, and demographics when the individual offenders, victims, and the people within their family, social, and economic networks are considered in aggregate. Thus, if the *community* is given personhood, it would have significant stake in deciding the impacts of crime and punishment.¹¹

Punishment on any scale is often justified through various theories, and mass incarceration has the unique malleability to be many things to many theorists. For retributivists, incarceration is a just punishment that repays and balances the offender's debt to society. For consequentialists, it is a necessary evil that maximizes a deterrent effect and steers people away from crime. But the major blind spot of these traditional punishment theories is that they fail to account for the community's place in punishment.

Consider two transactions to illustrate this point. The first is the *criminal* transaction, which is more commonly referred to as the commission of a crime. In this transaction between an offender and a victim, the offender violates the law and often impacts victims or the community by the defined wrongdoing. The criminal usually reaps some benefit from the crime while taking something from the victim or the community.¹² The second transaction is the *punishment*

9. See *Every Second: The Impact of the Incarceration Crisis on America's Families*, FWD.US, at 10, <https://everysecond.fwd.us/downloads/everysecond.fwd.us.pdf> [<https://perma.cc/52AT-86HH>] (stating that while "[t]he negative effects that individuals experience after being incarcerated are well documented," by contrast "much less is known about the incredible . . . harms and challenges that families face" in this "understudied aspect of mass incarceration").

10. *Id.* at 24. See also Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/NP3R-3YR2>].

11. This Article frequently refers to "the community," which is meant to refer to local neighborhoods, geographical zip codes, and even racial and socio-economic demographics that reside in close proximity to each other and feel the impacts of mass incarceration. This includes neighborhoods that suffer from mass incarceration when people are incarcerated from those neighborhoods but also includes neighborhoods that might support incarceration with their voting preferences. This practical definition also has important conceptual weight because the community's direct role in punishment is used as a contrast to the government's general role in punishment, although the two roles are sometimes related through the political process. It should also be noted that local neighborhoods are not homogenous when it comes to their interests or preferences on punishment. However, their preferences are not central to the claims of this Article, which focus instead on their role in the punishment process to exercise those preferences.

12. The criminal transaction, in these terms, need not only apply to economic crimes, but can also apply to victimless crimes in which society's mores have been violated, or even violent crimes in

transaction, which is more commonly referred to as the sentencing process. In most cases, the offender appears before a judge, and that judge issues a punishment that state or federal officers carry out. Under traditional theories of punishment, the punishment transaction is often between the offender and the state and typically manifests in various forms of surveillance, control, or incarceration imposed on the offender. The community becomes a third-party beneficiary that is promised certain benefits by the government if the community legitimizes and pays for the punishment scheme through its tax dollars. All the while, the community is being disenfranchised from taking part in the institution of punishment. Even though the community is impacted by the criminal transaction, it has much less of a role to play in the modern punishment transaction. And while the benefits to the community of the punishment transaction and its tool of incarceration are all too familiarly pushed by politicians, the media, and the prison industrial complex (PIC), the offender's community, in reality, bears tremendous costs as a result of that incarceration.

Punishment and incarceration impose a host of social costs that stretch further and penetrate deeper than the economic costs of building and maintaining prisons.¹³ Over the past generation, scholars in multiple disciplines have expanded their study of mass incarceration to account for the full range of social costs that results when the government takes so many people out of their neighborhoods, warehouses them in prisons, and then releases them back into those same neighborhoods without the resources to transition into productive lives.¹⁴ There is a rightful focus on how prison negatively affects offenders, but this Article focuses on a path less traveled that highlights the costs to the community that incarcerated persons are taken from and returned to.¹⁵ These costs include mass incarceration's capacity to diminish local economies, break apart families, delegitimize the rule of law, and discriminate due to the

which the victim's autonomy and personhood have been compromised. These crimes impact not only the victim but in aggregate also impact the neighborhoods and communities in which they occur by increasing fear, lowering property values, and even impacting local economies. See COUNCIL OF ECON. ADVISERS, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE JUSTICE SYSTEM 34 (2016), <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf> [<https://perma.cc/T79J-G4VC>] (recording harms to physical health, property values, and economic investment as related to the crime rate).

13. See ROB CANTON, *WHY PUNISH?: AN INTRODUCTION TO THE PHILOSOPHY OF PUNISHMENT* 98 (2017) (arguing that "philosophers of punishment must broaden their vision of consequences"); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 610 (1998) ("Economic analyses of criminal law that abstract from social meaning fail, on their own terms, because social meaning is something people value."); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 18 (2017) (contemplating the "staggering economic, social, political, and racial costs" of mass incarceration).

14. See Sampson, *supra* note 3, at 819 (describing different eras in criminology which have transitioned to study the "negative or 'criminogenic' effects of imprisonment").

15. See, e.g., Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 345-49 (2004) (engaging in a cost-benefit analysis across several areas of criminal law, including incarceration, and the impacts it has on employment, marriages, families, and communities).

disproportionate effects on the poor and people of color.¹⁶ These social costs have led to a troubling conclusion: that mass incarceration has passed an inflection point where it now imposes more burdens on the community than it purports to fix.¹⁷ Mass incarceration has grown away from the harm-prevention principles of punishment philosophy¹⁸ and has instead turned into an institution that causes harm.¹⁹

This Article proposes a unique framework to rethink and refocus on the economic, political, and social costs of the punishment transaction that incorporates commonalities of law and economics, punishment theory, and empirical criminology. As contemplated above, if punishment is viewed as a transaction—similar to but separate from the criminal transaction—there is a price that society is willing to pay to uphold the punishment system in return for certain benefits. But the price one pays for something is different than its social costs; the mismatch between price and costs forms the basis of externalities.²⁰ Many disciplines contemplate externalities, and law and public policy innovate ways to solve these problems. Pollution and greenhouse gas (GHG) emissions are prime examples of externalities. A buyer may pay the private *price* of \$100 for their electricity bill to enjoy its benefits, but there are public *costs*—say \$50 for argument’s sake—that might result from the release of GHGs into the atmosphere that was required to produce the electricity.²¹ Consequently, many externality solutions consider how to align these transactions so that buyers and sellers will fully consider both the private price and the public costs to bring this transaction closer to \$150. In a sense, externalities often suffer from a visibility problem whereby the parties to the transaction either do not know or do not appreciate the public social costs; only by bringing these costs to light can the transaction properly be priced. This is an apt comparison to punishment in a few respects. First, society does indeed pay a price for the punishment transaction to the government in their tax dollars to receive the benefit of public safety. However, neither party to this transaction (the tax-paying public nor the government) considers the full public costs to the community, which is negatively impacted by incarceration and other harsh punishment policies.

16. See *infra* Part II.B.

17. See *infra* notes 154–166 and accompanying text.

18. See Philip Montague, *Grading Punishments*, 22 L. & PHIL. 1, 8–10 (2003) (summarizing the philosophical approach of harm-reduction, whereby punishment is meant to provide a net benefit to social welfare by reducing societal harms).

19. See Bernard Williams, *Moral Responsibility and Political Freedom*, 56 CAMBRIDGE L.J. 96, 100 (1997) (referring to Nietzsche’s identification of punishment as a “ceremony of pain”); BIKLE ET AL., *supra* note 1, at xiii (describing mass incarceration as belonging to a “penal harm movement”).

20. See John E. Eck & Emily B. Eck, *Crime Place and Pollution: Expanding Crime Reduction Options Through a Regulatory Approach*, 11 CRIMINOLOGY & PUB. POL’Y 281, 288–89 (2012) (explaining economic concepts of externalities and how they relate to the study of crime’s effects on the community).

21. This is merely a hypothetical example that uses dollar figures for explanatory uses only, not accurately representing actual household electric bills or GHGs that subsequently result.

Indeed, the public, prosecutors, judges, and law enforcement officers that institute punishment do not know or appreciate punishment's hidden social costs.

As a point of punishment theory, this externality framework contributes to a communitarian approach to punishment. The government monopoly on punishment is a waning theoretical ideal. Advocates for diversion programs, restorative and transformative justice, and prison abolition challenge the government's punishment monopoly in favor of community empowerment, with community members as stakeholders in the punishment transaction. Community empowerment that gives neighborhoods and local organizations more of a say in punishment is a worthy project, and the externality framework helps highlight the community in a different way. It adds to the communitarian trend by considering the devastating social costs that the community and local neighborhoods bear, further justifying a greater stake and representation in the system.

By exploring the categories of social costs caused by mass incarceration, the externality framework is an effective tool to argue that the institution of punishment should be reformed because its negative externalities act as a social ill that seeps into the community and results in a net loss to social welfare.²² The externality framework is positioned to contribute to punishment theory as a paradigm shift in assessing punishment and policy design, and it adds to the ongoing debate and activism of criminal justice reform and prison abolition.²³ It also follows the advocacy trend of "New Administrativists"²⁴ that argues for more of a regulatory approach in criminal justice reform. New Administrativists' criminal justice scheme is similar to that of other fields of public law that use myriad tools to determine the effectiveness, efficiency, and social welfare of any given policy.²⁵ Indeed, if we approached punishment and mass incarceration with the same expertise and modelling as environmental or securities

22. See Joan Petersilia, *Beyond the Prison Bubble*, 268 NAT'L INST. JUST. J. 26, 27 (2011) ("[Mass incarceration's positive] effects have been considerably smaller than proponents claim and . . . we are now well past the point of diminishing returns."); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1297 (2004) (citations omitted) (citing empirical research that "the anemic incapacitative and deterrent effects of current prison policy are far outweighed by its criminogenic effects in neighborhoods where incarceration is concentrated").

23. See generally Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187 (2017) (exploring the externality problems of criminal justice more broadly across policing, incarceration, collateral consequences, and even pre-trial detention).

24. See *id.* at 209 n.103 (citing scholars in this growing school of thought, including Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 162 (2015); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1042 (2016); and Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016), to name a few).

25. See *id.* at 209.

regulations,²⁶ mass incarceration would be deemed so costly that we may have little choice but to drastically curb its use to only the most necessary cases in which incapacitation is necessary.

Viewing punishment through an externality framework is more than a theoretical point; it also leads to solving mass incarceration with solutions that have not been widely explored in this context and are successfully applied to other externality problems. This Article proposes three common externality solutions that could be redesigned to meet the punishment externality problem.

The first proposed solution is a Pigouvian prison tax that seeks to hold “local actors” (such as law enforcement agencies, prosecutors, judges, and other elected officials) economically accountable for their overuse of prison resources. Pigouvian taxes are used in several other contexts—such as environmental regulation and public health—and are designed to charge a fee for proscribed behavior. The Pigouvian tax increases the price of undertaking such behavior and consequently should reduce that behavior, while simultaneously raising funds that must be invested in social programs to reduce the social costs of the behavior.²⁷ Since state prisons house the greatest number of incarcerated persons and are maintained with state budgetary resources, local actors are not held financially accountable out of their own local resources when they adopt law enforcement, prosecution, and sentencing practices to send people to prison.²⁸ Instead, they free ride on state resources while enjoying the tough-on-crime political benefits. Imposing a Pigouvian prison tax at the state level would ensure that local actors would be more economically mindful of their overuse of state prison resources and would steer them toward different punishment tools with much lower destabilizing social costs than the status quo. The Pigouvian prison tax, therefore, helps fix the free riding problem by holding local government actors economically accountable for state prison resources that they use. Further, the Pigouvian nature of the prison tax would ensure that much of the revenue collected by the state from local governments would be reinvested in community in places that face the harshest treatment under the status quo; ideally, this type of reinvestment and revitalization would gradually lower the need for incarceration if the investments are targeted to lower the crime rate.

The second proposed solution is the opposite of a tax on local jurisdictions and is instead a subsidy and charge-back system. Governments often use

26. See *id.* at 190 (citing to cases describing regulatory and judicial oversight of securities regulation as being “too rigorous”).

27. See generally Miriam H. Baer, *Pricing the Fourth Amendment*, 58 WM. & MARY L. REV. 1103 (2017) (arguing that Fourth Amendment police stops and searches be priced with a Pigouvian tax to offset harms of police contact in certain communities).

28. See W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060, 1062 (2014) (describing differences in local and state funding that causes different incentive structures and accountability regarding mass incarceration at the local and state levels); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 719 (1996) (arguing the current flaw in the power of prosecutors is the failure for them to face the full costs of prosecutorial decisions).

subsidies to incentivize desired behavior with a carrot rather than disincentivize with a stick by giving grants, tax rebates, and other types of funding directly to the actors they seek to influence. In the context of mass incarceration, the local free riding problem could be solved if state governments (or even the federal government) gave local actors subsidies or grants to incentivize them to use alternative punishments and wean them off of the overreliance on state prisons. But money is not free. The charge-back system would add economic accountability by “charging back” the subsidy or grant funds if the local actors continue to send people to prisons. This is an attractive option because it would not impoverish poorer jurisdictions that may want to continue to incarcerate their worst offenders. Local actors would still be incentivized with the grant funds to invest in alternative punishment projects, but they would have to pay back funds to cover the costs for people they send to state prisons.

The third proposed solution is a cap-and-trade (CAT) system that borrows from environmental literature and practice whereby the government can impose a cap on an undesired activity (that gradually lowers every year) while also setting up a marketplace to trade allowances and credits. In the incarceration context, the state government could give each local government a cap on how many people it can send to state prisons that year, which would gradually lower every year. Local actors could comply with these caps, but if they go over their annual allowance, they would be subject to a financial penalty. However, they could also go out on the market and “trade” with other local jurisdictions that have not used up their allowance credits. This marketplace for allowances and credits would generate revenue not only for jurisdictions that sell allowance credits, but also for the state for facilitating such transactions. And like the previous solutions, any revenue should be reinvested in alternative punishment programs.

Admittedly, the externality framework and its proposed solutions will not fix all of the injustices in the institution of punishment, nor are they designed to do so. Racism, classism, and other inequities will continue. But by framing these inequities as part of the social costs of mass incarceration, the externality framework and its solutions seek to *lower*—as opposed to the impossible ideal to *eliminate*—social costs. Getting closer to equitable justice is worthwhile, and trading among lesser evils is often the difficult choice scholars and policymakers must pursue to achieve incremental progress that is transformative in scope.

This Article builds the theoretical and practical concepts of the externality framework in four parts. Part I begins by setting the foundations of punishment theory along a communitarian spectrum. While all punishment theories contemplate the role of the state, the effects on the community are often marginalized in this process. The communitarian spectrum lays the groundwork to explain the contributions of the externality framework to contemporary punishment theory. Part II transitions from the theory of punishment to the practice of mass incarceration. This Part employs a cost-benefit analysis similar

to other externality problems to determine the full range of mass incarceration's costs and effectiveness in promoting public welfare. Part III operationalizes the externality framework by exploring what the prison tax, subsidies and charge-backs, and CAT system might look like to accomplish their goals of imposing economic accountability to drastically decarcerate the state prison systems. This Part contemplates the federal, state, and local interests and infrastructure required to make the proposed solutions work. Part IV concludes by addressing the potential impacts these solutions might carry and even considers the possibility that externality solutions may produce new externalities that would have to be addressed in turn. But even in a world where these new problems arise, this Article argues that the proposed externality solutions would carry a net social benefit when compared to the existing state of mass incarceration.

I.

EXTERNALITIES AND THE BLIND SPOT OF PUNISHMENT THEORY

The criminal justice system and its commitments to equality, proportionality, and blindness towards the offender rarely lives up to its ideals. Indeed, if crime is understood as an action, then punishment is meant to be the reaction. But unlike Newton's laws of motion, it is hardly ever an equal reaction.²⁹ This is where punishment theories and the policies that animate those theories fall short. These theories fail to properly account for the cardinal principal of proportionality³⁰ when assessing the full costs of punishment.

For hundreds of years, philosophers, scholars, and jurists have debated the economic, moral, and other costs to society brought by crime and how it can erode the social order if not dealt with under the right punishment ethic.³¹ This is why the Crown, the government, or the representative of the people prosecutes criminals; the injury is not only to the victim of the crime, but to the community and social order.³² Yet for all of the theory justifying punishment as a reaction to repay the costs of crime, there is little consideration in traditional punishment theory accounting for how the community—comprised of the people at the street

29. See *Newton's Laws of Motion*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100232420> [<https://perma.cc/2M6N-EWL6>].

30. See CANTON, *supra* note 13, at 64 (explaining the concept of cardinal proportionality: a punishment is proportionate to the crime based on the harm that the crime does to the victim).

31. See, e.g., CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (David Young trans., 1986) (1764) (using eighteenth-century economic principles to theorize on punishment); JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in 1 *THE WORKS OF JEREMY BENTHAM*, 1 86–91 (J. Bowring ed. 1843) (discussing utilitarianism as a principle to guide punishment); IMMANUEL KANT, *Metaphysics of Morals*, in *THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT: PRACTICAL PHILOSOPHY*, 358, 474–75, 578 (Mary J. Gregor ed. and trans., 1st. ed. 1996) (espousing views of punishment in relation to human worth and moral agency).

32. See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *FORDHAM URB. L.J.* 607, 612, 625–28 (1999) (explaining that prosecutors' power is derived from the state that, in part, seeks to maintain social order through the criminal justice system).

level most affected by crime—often bear the social, economic, and political costs of punishment.³³ If crime is a social action committed by private actors that requires the institution of punishment as a means to return society to its proper order, punishment must also be considered a social action committed by the state that has reverberations throughout society.³⁴ If punishment is meant to right the wrongs of crime, what will right the wrongs of punishment?

This Part begins to answer these questions by proposing a new theoretical framework that rethinks punishment in accordance with its costs to the community. Section I.A starts by briefly outlining existing punishment theories to highlight what longstanding notions of punishment lack, namely a reasonable consideration of the community. Traditional and contemporary punishment theories are too often focused on the relationship between the criminal offender and the state; their relegation of the affected community varies. Section I.B considers the community in punishment theory by situating the externality framework along a spectrum and focusing primarily on how punishment affects the community through its negative externalities.³⁵

A. *The Communitarian Spectrum of Punishment*

Punishment theory forms a broad literature of diverse viewpoints with dizzying complexity.³⁶ But within this complicated mosaic, there are common definitions that guide punishment theory, such as the general consensus among theorists of what punishment is and why it exists. Put simply, criminal punishment is the pain, hard treatment, or deprivation of something desired that an authority figure imposes to censure an offender for a criminal offense.³⁷ While this tells us what punishment *is*, punishment theory seeks also to justify *why* the government punishes.³⁸ Punishment is not something to be celebrated—

33. See BROOKS, *supra* note 2, at 163.

34. See Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271, 273 (2007) (commenting on how common it is for all “social institutions and processes to have a secondary impact on those one step removed from their clientele,” but also expressing criticism that “the criminal justice system stands out for its general disregard of the likelihood of such reverberations occurring and its near total lack of infrastructure for responding to them”).

35. See, e.g., J. ANGELO CORLETT, RESPONSIBILITY AND PUNISHMENT 64 (4th ed. 2014) (exploring theoretical questions that a functional theory punishment theory must explain).

36. See Marc O. DeGirolami, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, 9 OHIO ST. J. CRIM. L. 699, 707–08 (2012) (outlining “dizzily” complex variations of punishment theory).

37. See CORLETT, *supra* note 35, at 25–26 (outlining definitions of punishment); CANTON, *supra* note 13, at 3 (same); see also JOHN RAWLS, COLLECTED PAPERS 26 (Samuel Freeman ed., 1999); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4–5 (1968); JOEL FEINBERG, DOING AND DESERVING 98 (1970).

38. See DeGirolami, *supra* note 36, at 701 (referring to these “why” questions as penological functions, capturing the close relationship between the theoretical questions and the practical justifications of punishment theory).

especially not in its current practice—but it must be rationalized and explained.³⁹ This is why punishment theory seeks to identify the end goals of punishment that would justify the state’s harsh treatment of offenders.⁴⁰

This Section provides an overview of these different punishment theories and places them along a communitarian spectrum of punishment. Conceiving of punishment theories on a spectrum allows us to see their relation to each other and how each theory credits or discredits community involvement and investment when rationalizing punishment. While this spectrum is far from exhaustive, it categorizes punishment theories in two buckets—traditional and contemporary punishment theories. This communitarian spectrum is important to convey the growing importance of the community in how punishment is conceived and practiced, and it provides the foundation to understand how an externality analysis of punishment complements community empowerment.

At one end of the communitarian spectrum, traditional punishment theories displace the community in the punishment transaction, even though the community is an integral part of the criminal transaction. If an offender commits a crime, the local government (and sometimes a state or national government) may take action against the offender. For crimes that harm innocent people directly or proximately, such as with robbery or assault, the criminal transaction affects these victims in deeply personal ways. And individual crimes aggregate into crime rates that can have deleterious effects on local neighborhoods, entire cities, and beyond. Retributivism is one of the most commonly discussed traditional punishment theories, and it justifies punishment under a “just deserts” theory that offenders deserve to be punished for their wrongful acts.⁴¹ Under this theory, punishment serves to rectify the moral balance that was upset by the criminal violation.⁴² Consequentialism is the other major school of traditional punishment theory, and it justifies punishment differently by positing that punishment prevents or improves future criminal transactions. By deterring

39. See CANTON, *supra* note 13, at 5–6 (describing the horrors of criminal punishment and the injury it causes to offenders, as well as questioning theoretical justifications for any such treatment).

40. See JOHANN GOTTLIEB FICHTE, FOUNDATIONS OF NATURAL RIGHT 228 (1797) (“Punishment is not an absolute end . . . [but] a means for achieving the state’s end, which is public security.”).

41. Markus Dirk Dubber, *The Unprincipled Punishment of Repeat Offenders: A Critique of California’s Habitual Criminal Statute*, 43 STAN. L. REV. 193, 202–04 (1990) (citing ANDREW VON HIRSCH, PAST OR FUTURE CRIMES, DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 77–91 (1985)); CANTON, *supra* note 13, at 60 (explaining the common theme among retributivist theories that punishment is justified based on what the offender has done).

42. See CANTON, *supra* note 13, at 60–62.

would-be offenders,⁴³ rehabilitating them,⁴⁴ or incapacitating them,⁴⁵ consequentialism seeks positive future *consequences* that justify harsh treatment of the offender. These traditional theories of punishment are quite different, but they are also oddly similar, considering that they focus on the same actors in the criminal and punishment transactions. The government is the primary arbiter of meting out punishment upon the offender.⁴⁶ At this end of the spectrum, the punishment transaction is between the state and the criminal offender. The community is merely a beneficiary of the benevolent government monopoly on punishment.⁴⁷ The social costs of punishment, as borne by the community, are often treated “as an afterthought.”⁴⁸

The community is undoubtedly affected by crime and does indeed have a say in the democratic process by electing local actors—including mayors, prosecutors, and sometimes law enforcement officers—that oversee punishment, but the community is not involved in the case-by-case processing of the criminal justice system. While it might seem like Americans tacitly accept modern criminal justice through their democratic voice,⁴⁹ most are woefully underinformed on criminal justice trends. They may unwittingly use their vote to promote representatives and policies that are divorced from the declining state

43. See BROOKS, *supra* note 2, at 47–48 (explaining that deterrence policy seeks to create a deterrent effect on offenders).

44. See CANTON, *supra* note 13, at 104–05, 112–13 (explaining the rehabilitation and medical model—that criminal actions are merely a type of event that social sciences can fix through behavioral remedies).

45. See MICELI, *supra* note 1, at 146; see also Raymond V. Liedka, Anne Morrison Piehl & Bert Useem, *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 CRIMINOLOGY & PUB. POL’Y 245, 246 (2006) (explaining the mechanism of physical restraint in incapacitation); Andrew Rutherford, *Criminal Policy and the Eliminative Ideal*, 31 SOC. POL’Y & ADMIN. 116, 117 (1997) (explaining the eliminative ideal as a common punishment tool to separate, quarantine, or permanently banish wrongdoers from the community).

46. See CANTON, *supra* note 13, at 93 (describing consequentialism as any “approach to ethics that holds that the consequences of an action . . . determine whether it is right or wrong”).

47. This monopoly is rooted in seventeenth-century political philosophy that justified the benefits of state control of punishment as a necessary justification for coming out of the state of nature and forming societies. See JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 13 (1689) (explaining that one of the key benefits of a centralized government is to ensure impartiality and proportionality of punishment); THOMAS HOBBS, LEVIATHAN 86–129, 183–221 (Richard Tuck ed. 1996) (1651) (theorizing that state punishment is necessary to maintain social order); see also A. John Simmons, *Locke and the Right to Punish*, 20 PHIL. & PUB. AFF. 311, 317 (1991) (summarizing similar position of Locke); Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 229 (2021) (explaining Hobbes’s view that “social peace and cooperation in the modern world require state punishment for those who break the law”).

48. BROOKS, *supra* note 2, at 163.

49. See STUNTZ, *supra* note 5, at 6 (explaining that “local prosecutors—the ones who try the large majority of cases—and trial judges (appellate judges, too) are, with few exceptions, chosen by voters of the counties in which they work,” meaning “[a]t least in theory, these features . . . give citizens in crime-ridden neighborhoods a good deal of power over criminal law enforcement in their neighborhoods”).

of crime in this country.⁵⁰ And although the jury system seeks to engage the community in the criminal process by determining guilt, juries are not nearly as involved in the sentencing process of the punishment transaction.⁵¹ But these instances of community involvement are political and process-oriented and are outside the traditional contours considered by punishment theory.

As scholarly conversations developed in the later twentieth century, new contemporary punishment theories have emerged that seek to empower the community as a stakeholder in the punishment transaction. Since the community is affected by crime, it should indeed have more than a vote every few years in how punishment is meted out. Related to this ethic, these contemporary theories deconstruct punishment as a state-controlled monopoly and offer alternative power dynamics that account for the community's place in the punishment transaction.

Expressivism is part of this contemporary movement and occupies a middle ground on the communitarian spectrum of punishment, both acknowledging the government's role in punishment while also recognizing the importance of the community. Its foundational premise is that punishment serves as an expression of public disapproval of an offender's crimes.⁵² State actors can express these attitudes through punishment, but so can the community in its role supporting the government, supporting punishments, and upholding the law as an indication of community values.⁵³

50. See RACHEL E. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 2* (2019) (discussing misconceptions of public views on crime statistics); see also BROOKS, *supra* note 2, at 127 (discussing how public views “do not always map onto criminological evidence”); Julian V. Roberts, *Public Opinion and Sentencing Policy*, in *REFORM AND PUNISHMENT: THE FUTURE OF SENTENCING* 18, 25 (2002) (finding that most Americans and Canadians believe crime to be rising although it has in fact been declining).

51. But even the jury process and the check on government power that it provides have been substantially curtailed by plea bargaining. So few cases go to jury trials, and close to 95 percent of cases are resolved through plea bargaining. See Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1432 (2017) (“In 2015, only 2.9% of federal defendants went to trial, and, although the state statistics are still being gathered, it may be as low as less than 2%.”).

52. See Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 400 (1965) (discussing how punishment has reprobative symbolism that is distinct from other types of penalties); see also MICHAEL CAVADINO & JAMES DIGNAN, *THE PENAL SYSTEM: AN INTRODUCTION* 43 (3rd ed. 2002) (quoting Lord Denning stating that “[t]he ultimate justification of punishment is . . . that it is the emphatic denunciation by the community of a crime”); David Garland, *Rethinking the Symbolic-Instrumental Distinction: Meanings and Motives in American Capital Punishment*, in *GOVERNANCE AND REGULATION IN SOCIAL LIFE: ESSAYS IN HONOUR OF W.G. CARSON* 109, 124 (Augustine Brannigan & George Pavlich eds., 2007) (“[C]ondemnation is a major end of criminal justice and symbolic communication a major means for achieving this end.”); RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* 5–6 (2015) (arguing that the law has two expressive functions: to coordinate people's behavior towards social order and to inform people about acceptable and necessary behavior).

53. For more discussion on how community social norms can impact punishment, see MICELLI, *supra* note 1, at 187 (distinguishing legal enforcement from moral enforcement, whereby the latter uses “feelings of guilt or shame to restrain immoral behavior” in communities). See also Amitai Etzioni, *Back*

Restorative justice is further separated from the legitimacy of governmental punishment and seeks to redefine the punishment transaction by including the community and victims in the process. Instead of the offender owing a debt to society as a whole to be punished by the state, restorative justice seeks to repair the emotional, social, and economic injury to the victim as an individual.⁵⁴ Restorative justice rejects incapacitation principles that animate incarceration as a punishment tool and instead embraces intimate conferences in which the victim sits down with the offender to express the extent of their injury;⁵⁵ in return, the offender absorbs the gravity of their actions and can also express remorse and apologize.⁵⁶ Thus, restorative justice empowers victims but also elevates the community as an important pillar in the institution of punishment.⁵⁷

Social control theory and prison abolitionism go even further in their paradigmatic shift away from government control due to a historical distrust of governmental punishment practices. Social control theory argues that punishment's primary purpose is to subjugate certain classes of people and maintain racial and socioeconomic power structures that facilitate white supremacy.⁵⁸ It forms the foundation for the prison abolition movement that seeks to abolish systems and structures—including the PIC⁵⁹—that uphold these racial and economic hierarchies. Professor Dorothy Roberts has prominently argued that “[c]riminal punishment has been instrumental in reinstating the subjugated status of [B]lack people”⁶⁰ and is designed as a “social policy aimed at governing marginal social groups.”⁶¹ This is why Professor Paul Butler, a prominent abolitionist, argues that reforming the criminal justice system is folly because the system is doing exactly what it was designed to do.⁶² So even if

to the Pillory? 68 AM. SCHOLAR 43, 45 (1999) (discussing symbolic acts of punishment that serve to shun and shame in the community).

54. See BROOKS, *supra* note 2, at 77, 82.

55. See John Braithwaite, *Survey Article: Repentance Rituals and Restorative Justice*, 8 J. POL. PHIL. 115, 115 (2000) (indicating the many things victims and communities may want to be restored and what they seek to gain, such as “property loss, injury, a sense of security, dignity, a sense of empowerment, voice, harmony based on a feeling that justice has been done, and social support”); see also CANTON, *supra* note 13, at 153–54 (same).

56. See CANTON, *supra* note 13, at 154; see also *id.* at 25, 163 (noting that social groups and communities are bonded by mutual trust and confidence, which can include rituals such as calling for and giving apologies, exercising forgiveness, and finding “closure”) (citations omitted).

57. See, e.g., DAVID O’MAHONY & JONATHAN DOAK, *REIMAGINING RESTORATIVE JUSTICE: AGENCY AND ACCOUNTABILITY IN THE CRIMINAL PROCESS* 198 (2017).

58. See Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4, 7–8 (discussing historical connections between prisons and slavery); Roberts, *supra* note 22, at 1298 (discussing the role of mass incarceration in subordinating African Americans as a marginal social group); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY* 35–37 (2003) (connecting the foundations of the PIC with the persistence of racism).

59. See, e.g., DAVIS, *supra* note 58, at 35–37 (connecting the foundations of the PIC with the persistence of racism).

60. Roberts, *supra* note 58, at 4.

61. Roberts, *supra* note 22, at 1298 (citations omitted).

62. See 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) (criticizing reformist advocacy by arguing that the

prison as an incapacitation ideal fails to deter or exact retribution, it still succeeds to control and subjugate the people it detains.⁶³

Social control theory and the abolitionist movement are more fully engaged with punishment and its relation to the community. Whereas restorative justice heightens the role of the victim and the community in meting out punishment, social control theory recognizes punishment as a way to subjugate the offender and racial demographics that form the community. If maintaining social order is one side of the state's criminal justice coin, then perpetuating racial and socioeconomic hierarchies is the opposite side of that coin. Thus, these contemporary theories of punishment represent an important shift away from the government monopoly on punishment towards a communitarian view that considers the benefits of giving the community a more direct role in the punishment transaction, in part to rebel against tyrannical government power.⁶⁴

B. *Externality Theory and the Costs to Society*

Recognizing this push towards communitarianism in punishment theory, this Section argues for an externality framework that acknowledges what many empiricists have found in the modern era: that punishment is a social institution that imposes significant social costs upon the community. Whereas traditional punishment theory seeks to highlight the benefits punishment bestows on social order, the contemporary theories of social control and abolitionism recognize that punishment comes with serious social costs for the most vulnerable communities. The externality framework does not merely rehash the decades of scholarship acknowledging the tremendous social costs of punishment, but instead makes an economic intervention by categorizing those costs as a negative externality.

This framing has two benefits. First, it continues to develop the communitarian trend in punishment theory by arguing that punishment's social costs are negatively affecting the very community it purports to safeguard through the lens of negative externalities.⁶⁵ Second, externality problems in

criminal justice system was built with the intention of subjugating people, and the system is not broken but rather accomplishing what it was designed to do); see also ALEX S. VITALE, *THE END OF POLICING* 4–30 (2017) (criticizing a number of police reforms to address injustice as ineffectual because “that is how the system is designed to operate”).

63. See Bernard E. Harcourt, Gary S. Becker & François Ewald, “*Becker and Foucault on Crime and Punishment*”: *A Conversation with Gary Becker, François Ewald, and Bernard Harcourt: The Second Session* 4 (Chi. Unbound Pub. L. & Legal Theory Working Papers, No. 440, 2013) (quoting conversation with François Ewald, who summarized the work and philosophy of Michel Foucault).

64. The punishment theories outlined in this Article are far from the only theories but are limited to the most impactful and recognized theories in contemporary punishment literature.

65. See Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM L. & PHIL. 457, 461–63 (2015) (forwarding a republican theory of punishment that sets retributivist punishment in its proper context as rooted in the community and judged on how the offender's crimes impacted the social bonds that are necessary to keep the community together). Whereas Yankah argues that these social costs are relevant to retributivist punishment as society's repayment for the crime debt accrued by the

various fields have tailored solutions that are somewhat unique to those problems. Thus, the externality framework can lead policy decision-makers down a new and innovative road to solve some of the most prominent modern problems of punishment theory and practice.

Externality analyses seek to measure inefficiencies in a transaction that do not account for all of the costs or benefits that are produced from that transaction.⁶⁶ All transactions involve an exchange; this usually takes the shape of exchanging money or resources for goods or services.⁶⁷ However, if the full costs of the goods or services are not considered in this exchange, then the seller/producer receives a subsidy and the consumer bears the loss as a negative externality.⁶⁸ The opposite would be true if the seller/producer did not account for the full benefits of the goods or services in the transaction, resulting in the consumer receiving a subsidy in a positive externality.⁶⁹ While sellers/producers factor in their own *private* costs to produce and provide the good or service, they are not often held accountable for the full *public* or *social* costs that their product causes to society.⁷⁰

Another useful framing is that externality analyses focus on the difference between price and cost. While public and private resources, goods, and services come with discernable prices that must be paid to enjoy their benefits, externalities exist when this price does not reflect the full costs of the resource, good, or services. This Section applies the same principles to prison and incarceration and finds that the full range of unaccounted costs likely exceeds the price of mass incarceration as a social institution that seeks to keep neighborhoods and the community safe. To some extent, the price versus costs comparison can be considered a more nuanced cost-benefit analysis in the subject transaction. The price being paid in the transaction is supposed to return a benefit to the buyer that justifies the price. The costs in an externality analysis are thus trying to determine if this price was really worth it. This all follows somewhat of a utilitarian ethic, in which an externality problem translates into a loss that fails to maximize social welfare.

As an example, take the pollution externalities of the energy industry. Energy production involves complex processes that create waste in the form of gas emissions and other harmful substances. When energy is bought and sold in the marketplace, it is sold at a price based on the supply and demand of that

offender, this Article argues that the social costs of the punishment itself must be considered as part of the punishment debt accrued by the government.

66. See Eck & Eck, *supra* note 20, at 288 (explaining economic concepts of externalities and how they relate to the study of crime's effects on communities).

67. *Id.*

68. *Id.*

69. *Id.*

70. See GILBERT E. METCALF, *PAYING FOR POLLUTION: WHY A CARBON TAX IS GOOD FOR AMERICA* 35, 36–37 (2019) (describing the key to pollution problems as a failure to distinguish between private and social costs).

product, but this *price* does not reflect the *costs* for the pollution that was created in order to bring the energy product to the marketplace.⁷¹ Instead, that pollution is released into the atmosphere or dumped into landfills or rivers and creates significant costs to society later on in the form of climate change, poor air quality, and polluted water.⁷² In this transaction, energy producers receive a subsidy because they can sell their product without having to bear the true costs of what that product is costing its consumers, which is a negative externality.⁷³ In response, governments have used various methods to address negative externalities—such as increased regulation, taxes, and subsidies for alternative products—to hold energy companies accountable for the full range of public and social costs.

In the context of criminal justice, crime can also result in negative externalities.⁷⁴ This perspective on crime focuses on the inefficient transaction between the offender and society, whereby the offender takes more than is due to them according to the social contract. Whether that be through a robbery, a murder, or insider trading, the criminal offender is gaining some social or economic benefit by committing the crime; otherwise, most criminals would not commit the crime if it did not benefit their personal interests. Thus, while the criminal offender often benefits from crime as balanced against their *private* considerations, the offender does not fully account for the *public* and *social* costs of committing the crime, such as the costs to community safety and to the victims. Under this approach, punishment is best understood as a social institution that seeks to mitigate the negative externalities⁷⁵—the social,

71. See Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming than Cap and Trade*, 28 STAN. ENV'T L.J. 3, 30 (2009) (explaining that “carbon dioxide emissions are the classic externality: emissions occur at no cost to the emitting facility, but at an enormous cost to society as a whole”); see also METCALF, *supra* note 70, at 36 (arguing that the costs to purchase energy “do not include the damages from the carbon dioxide emissions”).

72. See METCALF, *supra* note 70, at 36 (overviewing effects of GHGs on climate change); Tord Kjellström, Madhumita Lodh, Tony McMichael, Geetha Ranmuthugala, Rupendra Shrestha & Sally Kingsland, *Air and Water Pollution: Burden and Strategies for Control*, in DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES 817, 817–22 (Dean T. Jamison, Joel G. Breman, Anthony R. Measham, George Alleyne, Mariam Claeson, David B. Evans, Prabhat Jha, Anne Mills & Philip Musgrove eds., 2nd ed. 2006) (discussing the adverse health impacts of water and air pollution around the world).

73. See METCALF, *supra* note 70, at 36 (describing “carbon pollution” as “central to the problem of climate change”).

74. See Göran Skogh, *A Note on Gary Becker's “Crime and Punishment: An Economic Approach,”* SWED. J. ECON. 305, 310 (1973).

75. See, e.g., Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 126 (1998) (describing incarceration debates that “commonly compare the cost of keeping offenders in prison with the social harm of the crimes that would have been committed if those offenders already in prison had been on the street”); MICELI, *supra* note 1, at 23–37 (describing the economic approach to punishment as an effort to find the optimal deterrent effect while reaching net zero in the criminal transaction to return to the community and victim what was taken).

economic, and political costs—of crime.⁷⁶ Whether that be through incarceration, public shaming, restitution, or other forms of punishment, these various practices seek to mitigate the crime that was committed while also improving and deterring future criminal transactions.

A growing number of scholars have come to similar conclusions, using externality tools to evaluate criminal justice policies that create unmitigated social costs. John and Emily Eck developed an externality analysis of street crime,⁷⁷ Miriam Baer developed an externality analysis for Fourth Amendment searches and seizures,⁷⁸ and Richard Bierschbach and Stephanos Bibas applied externality analyses to a number of criminal justice ills that do not account for social costs, including bail, policing, incarceration, and even collateral consequences.⁷⁹ Externalities indeed exist in public resource problems and have been used to find solutions in a variety of other criminal justice fields.

While these scholars have mostly focused on externalities of the criminal transaction, a similar externality analysis can be applied to the punishment transaction. Although punishment can be perceived as a public good since it is provided by the government's monopoly, externality analyses need not be limited to solving private market inefficiencies. Public goods and services also suffer from inefficiencies in the form of the underappreciation of social costs.⁸⁰ The government would be the seller providing a good or service, and its constituents would be the buyers who pay taxes to receive the benefits of the public good or service. Just as in the private markets example, the government can provide a public good to benefit its constituents without fully appreciating the social costs it imposes on those same constituents, or even on other constituents in neighboring jurisdictions. For example, the government can provide the public service of a police force to keep its constituents safe, and this police force may succeed in doing so. But this transaction may fail to appreciate the social costs of providing the public service, especially if that police force is violating constitutional rights against some constituents in its pursuit of public safety. That police force could also produce spillover effects if its policing causes people to leave the jurisdiction to live or work elsewhere, requiring neighboring jurisdictions to take on new constituents.

76. See Eck & Eck, *supra* note 20, at 288–89 (likening high-crime locations as a producer of pollution, similar to energy production plants); Bronsther, *supra* note 47, at 245–55 (using terms “crime pollution” or “socio-legal pollution” to describe crime’s effects on communities).

77. See Eck & Eck, *supra* note 20, at 288–89, 291–99 (analyzing the application of command-and-control instruments, subsidies, Pigouvian taxes, and tradable permits to crime reduction).

78. See Baer, *supra* note 27, at 1137–50 (proposing a Fourth Amendment pricing instrument and analyzing its benefits).

79. See Bierschbach & Bibas, *supra* note 23, at 209–33 (applying the tools of cost-benefit analysis, devolution, pricing, and caps to various criminal justice ills).

80. See ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* 97–98 (2018) (acknowledging that while public goods produced by the government, such as “clean air, military defense, and public sanitation,” are different from private goods, the former can indeed be allocated using different means than standard markets).

The same can be said of an externality analysis of punishment. The punishment transaction between the state and the offender can also suffer from externality problems because the punishment takes more from the offender in the transaction than is needed to repay the costs of crime. Thus, punishing millions of people in predominantly poor and/or minority communities results in negative externalities—the social, economic, and political costs of punishment explored in Part II. It follows that the negative externalities produced by punishment can be conceptualized as a type of social pollution that seeps into and impacts the lives of those in the community. And like other inefficient externality problems, punishing criminal offenders effectively subsidizes the institution of punishment and its chief administrator, the state.⁸¹ From a theoretical perspective, existing punishment theory does not adequately reflect all of these negative externalities. By viewing punishment as a producer of externalities, this Article offers a new framework to capture its social costs.

These principles are in line with what Nobel laureate economist Gary Becker realized in his brief consideration of the social costs of punishment, stating that punishment “affect[s] not only offenders but also other members of society.”⁸² Becker considered the social costs of punishment to be “the cost to offenders plus the cost, or minus the gain, to others.”⁸³ He characterized this with the following:

$$f' \equiv bf$$

where f' is the social cost and b is a coefficient that transforms f into f' . The size of b varies greatly between different kinds of punishments: $b \cong 0$ for fines, while $b > 1$ for torture, probation, parole, imprisonment, and most other punishments.⁸⁴

Becker recognized that different punishments could have greater social costs and thus produce greater negative externalities.

The treatment of externalities across criminal law, punishment theory, and economics highlights the benefits of the externality framework. The framework adds depth to existing punishment theory by creating a new language that expresses how the social institution of punishment is necessarily intertwined with the community. But punishment theory and the contribution of the externality framework is only socially relevant to measure the costs of actual punishment practices in the real world. And over the past fifty years, the dominant traditional theories of punishment in the American criminal justice

81. See METCALF, *supra* note 70, at 37 (describing market efficiencies when all costs are properly accounted for in the environmental pollution context, and the subsidization and negative externalities that result when firms overproduce pollution because they do not account for its social costs). This is similar to the government’s overproduction of punishment as a public good.

82. Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 13 (Gary S. Becker & William M. Landes eds., 1974).

83. *Id.*

84. *Id.* at 13–14.

system have fueled a carceral state that has created an externality problem of tremendous social cost.

II.

THE PRICE VERSUS COSTS DICHOTOMY OF MASS INCARCERATION

Theories of punishment, their assessment of costs, and their inclusion of the community are more than erudite ideals—they form the foundation of society’s practices of punishment. The institution of punishment needs to be responsive to both abstract principles and the practical consequences that are informed by those principles.⁸⁵ History bears witness to the depraved imagination of humanity when cataloguing the various tools of criminal punishment, including various forms of capital punishment, dismemberment, public shaming, banishment, sterilization, economic sanctions, and a litany of others.⁸⁶ Each of these punishment practices throughout history has been justified using a combination of punishment theories, and each of these punishment practices would indeed have negative externalities if the government’s act of punishment created social costs that were not fully accounted for in the criminal justice transaction. Each punishment practice would also have a different externality analysis according to that punishment’s negative impacts on the community, captured by Becker’s $f' \equiv bf$ analysis. Using the externality framework, this Part explores the social costs of mass incarceration as a punishment case study and examines the range of underappreciated costs that the community bears.

The carceral state is built on the foundations of incapacitation, but it also seeks to channel retributivist punishment while creating prison conditions so appalling that it adequately deters future offenses. The United States imprisons nearly 2.2 million people⁸⁷ and enjoys the unfortunate distinction of the highest incarceration rate in the world.⁸⁸ Not only do the conditions of social isolation, violence, and overall suffering satisfy the retributivist urge to punish the

85. See CANTON, *supra* note 13, at 39.

86. See, e.g., *id.* at 16 (outlining various means of punishment throughout history that philosophers had to justify through their theories of punishment); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1211–12 (1985) (outlining a litany of medieval and cultural punishment practices that viewed punishment as an economic tool to help society reach optimal deterrence and that justified the severity of punishment as compensation for law enforcement inefficiency).

87. See VICTORIA LAW, PRISONS MAKE US SAFER: AND 20 OTHER MYTHS ABOUT MASS INCARCERATION 9 (2021). This number does not include the many other forms of detention, which the government purports are not punishment but merely a way to ensure that noncitizens in immigration proceedings and citizens in criminal proceedings do not flee during their respective civil and criminal proceedings. See *id.* (estimating that 6.7 million people in the United States are subject to other “forms of supervision includ[ing] house arrest, electronic monitoring, parole, and probation”).

88. See PFAFF, *supra* note 13, at 1 (stating that the incarceration rate in the United States is four to eight times higher than “other liberal democracies, including Canada, England, and Germany”).

individual offender,⁸⁹ but there are also undeniable ripple effects felt through the rotating doors of the community-to-prison-to-community pipeline.⁹⁰ These ripple effects are especially troubling when considering the following demographic statistics that bolster the social control theory of punishment: nearly 60 percent of incarcerated persons are Black or Latinx,⁹¹ women of color represent the fastest growing demographic in prisons,⁹² and members of the LGBTQ+ community are also disproportionately put behind bars.⁹³

Using the externality framework, this Section seeks to engage with the empirical and sociological data to capture and categorize the social benefits of incarceration against the social pollution mass incarceration emits into the community.⁹⁴ Part II.A begins by outlining a brief cost-benefit analysis on a broad scale that considers what benefits are derived from the government's public service of punishment that justifies its *price*; it then compares this by providing context of the social costs of mass incarceration and the too-often-ignored toll it takes on the community.⁹⁵ Part II.B adds to this by seeking a better balance in which incarceration and punishment can have a greater cost-to-benefit

89. *See id.* at 45 (capturing how “many feel that one of the goals of prison is for the prisoner to suffer”).

90. *See* BARKOW, *supra* note 50, at 5 (recording that nearly all incarcerated persons are eventually released and that “roughly ten thousand people return to society from a term of incarceration every week”).

91. *See* PFAFF, *supra* note 13, at 208; *see also* Roberts, *supra* note 58, at 13 (“Most people sentenced to prison in the United States today are from politically marginalized groups — poor, black, and brown.”); *see also* FORMAN, *supra* note 7, at 12 (stating that criminal justice cannot be properly discussed “without appreciating racism’s enduring role”).

92. *See* *Incarcerated Women and Girls*, THE SENTENCING PROJECT (May 12, 2022), <https://www.sentencingproject.org/app/uploads/2022/11/Incarcerated-Women-and-Girls.pdf> [<https://perma.cc/N7H7-7L9M>] (noting that since 1980, women’s incarceration has grown at twice the rate of men’s); *see also* LAW, *supra* note 87, at 91 (stating that women’s issues of incarceration are often lost since the focus tends to be on the disproportionate incarceration of men of color).

93. *See* Ilan H. Meyer, Andrew R. Flores, Lara Stemple, Adam P. Romero, Bianca D. M. Wilson & Jody L. Herman, *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012*, 107 AM. J. PUB. HEALTH 267, 271–72 (2017) (finding that while LGBTQ+ individuals make up 3.5 percent of the nation’s population, they represent 5.5 percent of the male prison population and 33.3 percent of the female prison population); *see also* Alexander Lee, *Prickly Coalitions: Moving Prison Abolitionism Forward*, in ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX, 109, 109–10 (CR10 Publ’ns Collective eds., 2008) (describing the plight of LGBTQ+ individuals in the carceral system) [hereinafter ABOLITION NOW!]; *id.* at 109 (finding that in the San Francisco Bay Area, nearly half of all transgender people have been incarcerated).

94. *See* Bruce Western & Christopher Muller, *Mass Incarceration, Macrosociology, and the Poor*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 166, 170 (2013) (describing two policy camps in the incarceration debate, where one “hypothesis claims that prison reduces crime, chiefly through deterrence or incapacitation,” and the other “claims that prison is criminogenic—crime-causing” by its effects on offenders and the community).

95. *See* Liedka et al., *supra* note 45, at 248 (collecting economic literature on effects of punishment and posing it as a cost-benefit analysis of the effectiveness of incarceration).

ratio—where there are lesser costs and greater benefits—if even possible in the current carceral environment.⁹⁶

This analysis is not empirical, and as legal scholar and economist John Pfaff correctly recognized, measuring social costs in pecuniary terms is illusive; not only will there be debate as to what should count as a social cost, but there will likely also never be agreement as to the actual figures.⁹⁷ Attempts to capture the full range of costs in any cost-benefit analysis is a Herculean, even Sisyphean effort⁹⁸ given the difficulties of translating non-economic values into dollar amounts.⁹⁹ But the goal of the externality framework is not to populate an accountant's spreadsheet. Instead, it helps categorize the underappreciated costs that mass incarceration imposes on the community.¹⁰⁰ And these costs are a necessary component of broader discussions regarding the theoretical and practical justifications of mass incarceration and the institution of punishment as a whole.

A. Societal Benefits and Community Costs

The price of mass incarceration is determined by how much society—the buyer in this punishment transaction—is actually paying for this governmental service and its perceived benefits. In 2010, when incarceration in America was at its historic high, the government spent \$80 billion of taxpayer money on corrections expenditures, with 90 percent of that figure being spent at the state

96. See Bronshter, *supra* note 47, at 247 (arguing that if social order could be maintained without the expense of the threat of state violence and punishment, then such punishment would not be justified).

97. See PFAFF, *supra* note 13, at 8, 119–20 (posing questions on what types of costs should be included in the assessment of punishment). But see David S. Abrams, *The Prisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 911 (2013) (engaging in an empirical cost-benefit analysis of several policy solutions to mass incarceration and finding that one-time prisoner releases are generally more effective than reclassifying criminal offenses).

98. See Sonja B. Starr, *On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to the Prisoner's Dilemma*, 98 IOWA L. REV. BULL. 97, 98 (2013) (referring to an empirical attempt at a cost-benefit analysis in criminal justice as Herculean and perhaps even Sisyphean in its difficulty and potential impossibility).

99. *Id.* at 101–02 (citing literature of cost-benefit analyses that critiques attempts to monetize non-economic costs, the overall utilitarian measure of net social welfare, and amorphous concepts such as “freedom” and “happiness”); Abrams, *supra* note 97, at 948–50 (compiling studies that consider harder-to-quantify losses, such as lost wages, and opportunity costs of the incarcerated, the valuation of loss of freedom and time spent with loved ones); John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1046–55 (2009) (reviewing literature on the hedonic costs of punishment); Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 183–86 (2009) (arguing that punishment should account for individual variation in these hedonic costs).

100. See Brown, *supra* note 15, at 345–49. Brown's work is one of the first attempts to do this very thing, but his analysis was over twenty years ago and did not benefit from the wealth of data collected in the past two decades; see also MARK A. COHEN, *Policy Analysis and the Costs of Crime*, in THE COSTS OF CRIME AND JUSTICE 90, 90–105 (2005). See generally COST-BENEFIT ANALYSIS AND CRIME CONTROL (John K. Roman, Terence Dunworth & Kevin Marsh eds., 2010) (addressing issues of using cost-benefit analyses in crime policy and research).

and local level.¹⁰¹ And what does society get in return for this price tag? Under traditional theories, the government uses its punishment monopoly benevolently to make the community, and society as a whole, safer. Many scholars in the field have found that incarceration does indeed lower the crime rate, but there is no agreement as to how much.¹⁰² There are other scholars, however, whose research suggests there is no correlation between incarceration rates and crime rates.¹⁰³ This Article does not seek to wade into this debate or establish any empirical findings, but the very fact there is a debate about these figures is enough to question whether the price of mass incarceration is delivering the level of promised benefit that would justify the prison system's existence.

The price of mass incarceration also must be viewed through the PIC, which cuts across multiple public and private industries. It includes prisons, construction, law enforcement, the legal profession, and even the tertiary companies that profit from selling goods and services to prisons. While abolitionists rightfully criticize the PIC as a class of business interests with perverse incentives, others might see the PIC as an industry that helps to support

101. Melissa S. Kearney, Benjamin H. Harris, Elisa Jácome & Lucie Parker, *Ten Economic Facts About Crime and Incarceration in the United States*, HAMILTON PROJECT 2, 10 (2014) (citing financial statistics).

102. See, e.g., FORMAN, *supra* note 7, at 218 (summarizing criminology literature that credits “[t]he tough-on-crime movement” and incarceration for lowering the crime rate, although acknowledging other contributing factors); BROOKS, *supra* note 2, at 52 (summarizing studies that “reveal that the effects of deterrence upon crime rates are at most between about a 2 and 5 per cent decrease in crime following a 10 per cent increase in the prison population”) (internal citations omitted); Todd R. Clear, *The Problem with “Addition by Subtraction”: The Prison-Crime Relationship in Low-Income Communities*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 181, 183 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter INVISIBLE PUNISHMENT] (finding that low levels of incarceration within a neighborhood increased public safety); Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST. (July 2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [<https://perma.cc/NX7M-ATCU>] (finding that between 1980 and 2000, every 10 percent increase in incarceration rate yielded a 2 to 4 percent reduction in crime rates); Sampson, *supra* note 3, at 822 (estimating incarceration has contributed to a 10 to 15 percent reduction in the crime rate); Petersilia, *supra* note 22, at 27 (“Mass imprisonment has helped reduce crime rates, but most specialists agree that the effects have been considerably smaller than proponents claim...”); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 177, 182 (2004) (estimating that as much as 25 percent of the crime drop during the 1990s came from higher incarceration rates).

103. See, e.g., Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 176 (2008) (“The failure of crime rates to decline commensurately with increases in the rate and severity of punishment reveals a paradox of punishment”: recent experiments have shown that among people of color, especially for those who are poor or who reside in poor neighborhoods, “higher incarceration rates resulted in stable if not *higher* levels of crime.”); STEVEN R. DONZIGER, *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 42 (1996) (summarizing National Criminal Justice Commission findings, which concluded that there is “little or no correlation between rates of crime and the number of people in prison”); Eck & Eck, *supra* note 20, at 282 (“After a decade of enquiry, for example, researchers cannot confidently attribute the dramatic decline in U.S. crime during the 1990s to any government policy: police hiring, police practices, incarceration policies, or other criminal justice strategies.”).

families and communities. It is undeniable that the prison industry provides economic benefit and jobs to both urban and rural populations. Fifty to 75 percent of all corrections spending at the state level funds employee wages.¹⁰⁴ Prison guard unions are powerful special interests that often lobby against closing prisons and other reforms that would cost union members their jobs or lower their pay.¹⁰⁵ And although the prison-building boom of the 1990s is over, construction companies and their workers continue to benefit from building new prisons and detention facilities.¹⁰⁶ The PIC also expands outward to industries and employees outside of the prison walls. Businesses that provide soap, food, toilet paper, clothes, and a host of other basic necessities for incarcerated persons are all a part of a larger industry of punishment.¹⁰⁷ These third-party contractors also pay local, state, and federal taxes and support lower- to middle-class families with the paychecks that go to their blue-collar employees.¹⁰⁸ The PIC also brings many benefits to special interest groups and politicians alike for their part in upholding the system,¹⁰⁹ but these benefits rarely, if ever, trickle down to local neighborhoods and the community and thus cannot be categorized as something taxpayers benefit from as part of the price they pay to maintain the carceral state.

This brief consideration of the price of mass incarceration and its purported benefits to society is not meant to be exhaustive but instead is meant to set the stage for a discussion of the countervailing social costs of mass incarceration. Countless scholars have sought to measure these costs, including economists such as Steven Levitt, sociologists like Bruce Western, and legal scholars like Tracy Meares and John Pfaff. Thus, measuring the social costs of mass incarceration is not new, but characterizing them through an externality framework that seeks to balance a theoretical social ledger with externality tools is a new way to tackle an old problem.¹¹⁰

104. See PFAFF, *supra* note 13, at 99.

105. See *id.* at 88 (citing instances in Pennsylvania, New York, and Michigan in which prison guard unions have lobbied against closing prisons).

106. See, e.g., Steven A. Holmes, *The Boom in Jails Is Locking Up Lots of Loot*, N.Y. TIMES E3 (Nov. 6, 1994) (describing California's boom in building prisons as part of a larger national trend).

107. See, e.g., INCITE! Women of Color Against Violence & Critical Resistance, *The Critical Resistance INCITE! Statement on Gender Violence and the Prison Industrial Complex*, in ABOLITION NOW!, *supra* note 93, at 15, 19 (finding that even nonprofits are a part of the PIC because they can be used to monitor and control social justice movements, divert public monies, redirect activist energies, allow corporations to mask involvement in mass incarceration through donations and philanthropic work, and other activities).

108. But see BAUER, *supra* note 6, at 23–24, 34–35 (detailing poor pay of private prison guards).

109. See, e.g., Steven Obadiah, *Those Profiting from the Prison-Industrial Complex*, SNOQAP (Aug. 1, 2020), <https://www.snoqap.com/posts/2020/8/1/those-profiting-from-the-prison-industrial-complex> [<https://perma.cc/V4B3-7WPK>] (highlighting the massive growth in the prison population between 1980 and 2008, its contribution to the proliferation of private prisons, and the tensions produced through the privatization of incarceration).

110. See Sampson, *supra* note 3, at 824–26 (explaining why criminologists should think about incarceration in terms of a “social ledger” that accounts for “the full ramifications of incarceration’s costs and benefits, especially of the unintended variety”).

The social costs of incarceration are felt by more than the offender behind bars, but also the job, family, and community the offender leaves behind.¹¹¹ Professor Jeremy Travis called this impact “invisible punishment” since the people in the offender’s community are not directly punished by the state, but nevertheless are proximately punished due to their relationship to the offender.¹¹² Literature studying these proximate punishments arose as far back as the 1980s,¹¹³ but this area of study gained steam when the carceral population ballooned past the two million mark toward the end of the 1990s.¹¹⁴ This scholarship considers social costs that range from the creation of single-family households, effects upon children and family, racial and social stigma, and the criminogenic effects of incarceration. Scholars continue to explore economic costs in the form of lost jobs, lost opportunity costs while incarcerated, and poor employment prospects upon release. Scholars have also considered the political costs when mass incarceration serves to delegitimize the state and its role in the institution of punishment.¹¹⁵

Beginning with economic community costs, the first place to start is on the other side of the government spending narrative. Above, government spending on incarceration was highlighted as a benefit, since government funds are spent supporting multiple industries and jobs in the PIC. But this comes at a cost to taxpayers in the community. The \$80 billion spent on the carceral state—which has amounted to nearly \$29,000 for each federal inmate and just over \$31,000 for each state inmate every year¹¹⁶—is a large expense that commandeers limited public funds that could be better spent on more effective measures to improve public safety and welfare such as education, public health, and economic

111. See Presser, *supra* note 5, at 20–21 (citing studies showing that “families, communities, and societies” are all affected by mass incarceration).

112. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT*, *supra* note 102, at 15, 15–16; see also Roberts, *supra* note 22, at 1281 (recognizing that incarceration harms more than just those who are incarcerated).

113. See, e.g., Nigel Walker, *Side-Effects of Incarceration*, 23 *BRIT. J. CRIMINOLOGY* 61, 61 (1983) (describing “the unintended harm which incarceration is believed to inflict”). One of the first studies to measure community impacts of incarceration was by Pauline Morris and surveyed nearly 600 wives of male inmates serving time in the British penal system. See generally PAULINE MORRIS, *PRISONERS AND THEIR FAMILIES* (1965) (exploring the range of family responses to incarceration across interpersonal, cultural, economic, and other factors).

114. See Comfort, *supra* note 34, at 272 (highlighting an important development in punishment scholarship since the turn of the century: an increased emphasis on the ripple effects of punishment on families, communities, and neighborhoods).

115. See PFAFF, *supra* note 13, at 10–11 (considering a host of incarceration costs and the difficulty in measuring them); ZACHARY HOSKINS, *BEYOND PUNISHMENT? A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION* 4–5 (2019) (considering the effects of carceral policies on the families and communities of offenders); Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258, 266 (2008) (same).

116. See Kearney et al., *supra* note 101, at 2 (2014) (citing financial statistics); Abrams, *supra* note 97, at 946–48 (compiling several studies that find that in the United States, the average cost to imprison a single prisoner for one year—including costs of feeding, housing, and monitoring prisoners; healthcare costs; and capital costs—is just over \$31,000 per year in 2010 dollars, which equates to approximately \$86 per day).

investment. Mass incarceration also imposes opportunity costs, since incarcerated persons, mostly Black and Latino young men, do not earn an income while incarcerated and thus cannot contribute to their communities for the duration of their punishment. In an alternative system, such as parole, the state can still punish without sacrificing earning opportunities for the punished.¹¹⁷ These are wages that their families, children, and local communities lose in building personal household wealth; these are also taxes that local, state, and federal governments are losing. This impact on the labor market continues well after incarcerated persons return to the community, as they often have trouble finding and maintaining employment due to the stigma associated with their status as ex-offenders.¹¹⁸ For those that can find employment, their long-term earning potential is significantly depressed.¹¹⁹

These economic costs also destabilize social networks, family formation, and community contributions.¹²⁰ In communities with a high rate of incarceration of young men, the pool of potential life partners for heterosexual women sharply decreases;¹²¹ scholars have commented that this delivers a devastating blow to forming stable and long-lasting relationships and families.¹²² And for those

117. See Posner, *supra* note 86, at 1214 (discussing economic principles of offenders favoring their current consumption over their future consumption, the latter of which incarceration will reduce); see also Becker, *supra* note 82, at 13 (same). But see James Kilgore, *Progress or More of the Same? Electronic Monitoring and Parole in the Age of Mass Incarceration*, 21 CRITICAL CRIMINOLOGY 123, 130–31 (2013) (discussing the difficulty of people on parole finding jobs if they have a criminal record, and how electronic monitoring and other restrictive conditions of release limit a person's ability to go to interviews or respond to employment opportunities).

118. See Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INST. 1, 4 (2018) (describing the difficulties in finding employment, as well as the lack of educational or training programs); see, e.g., Gabriel J. Chin, *Collateral Consequences*, in REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 371, 371–95 (Erik Luna ed., 2017) (giving an overview of impactful collateral consequences, ranging from the loss of civil status, deportation for noncitizens, severed access to public benefits, and strained family and community relationships); James P. Lynch & William J. Sabol, *Assessing the Effects of Mass Incarceration on Informal Social Control in Communities*, 3 CRIMINOLOGY & PUB. POL'Y 267, 267 (2004) (finding that mass incarceration weakens “family formation, labor force attachments, and patterns of social interaction among residents”).

119. See Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 L. & SOC'Y REV. 275, 276 (2008) (finding that contact with the penal system not only lowers the likelihood of obtaining gainful employment, but for those who do find employment, such contact also depresses their wages).

120. See generally IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Pattillo, David Weiman & Bruce Western eds., 2004) (exploring the family and community impacts of mass incarceration).

121. See Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* 4 (2015), <https://www.irp.wisc.edu/newsevents/workshops/2015/participants/papers/10-Mueller-Smith-IRP-draft.pdf> [<https://perma.cc/6CN4-RUSF>] (finding that young felony offenders exhibit significantly lower rates of marriage that are not made up for post-release, indicating a net decline in marriage rather than a temporal shift of getting married later in life).

122. This has even been linked to higher transmission rates of sexually transmitted diseases. See Josiah D. Rich, Sarah E. Wakeman & Samuel L. Dickman, *Medicine and the Epidemic of Incarceration in the United States*, 364 NEW ENG. J. MED. 2081, 2082 (2011) (discussing the effects of incarceration on public health).

offenders who are already married, few marriages survive the time and distance apart imposed by incarceration.¹²³ “Prison widowhood” is a term that refers to a partner who is married to an incarcerated person.¹²⁴ Although it shares some of the emotional trauma of being separated from a loved one and often having to take on more responsibility for child rearing and financial support, these “widows” are often looked down upon by the community due to enduring stigma around incarceration.¹²⁵ Thus, the families that are left behind when a person is incarcerated can be both economically and socially impoverished.¹²⁶

The same is likely true, if not even more pronounced, in the LGBTQ+ community. This community already faces tremendous social pressures to assimilate into a society that treats heterosexual, cisgender norms as the default, creating unique struggles in forming relationships and family units. Incarceration impacts transgender and gender-variant people (especially those of color) disproportionately, since this group is overrepresented in the prison and jail population.¹²⁷ These rates of imprisonment are likely tied to the already dastardly problem of high rates of poverty and unemployment in the LGBTQ+ community, which increases the need to resort to “survival” crimes.¹²⁸ Further, some of the most extreme cases of hate and violence against LGBTQ+ individuals occur within the walls of the prison itself, worsening the already significant struggles of the people in this community.¹²⁹

This damaging impact on incarcerated persons’ partners is an important social cost that is overlooked, and requires attention, because it actually worsens when considered together with the costs to the next generation.¹³⁰ More than half of incarcerated persons have children, and many incarcerated persons played active roles in their children’s lives prior to their incarceration.¹³¹ Their absence

123. See Jason Schmittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAVIOR 115, 117 (2007) (“[F]ew marriages survive the time and distance of a prison sentence” in part because of “the more general effects of non-cohabitation and poor communication.” (citation omitted)).

124. See Joyce A. Arditti, *Families and Incarceration: An Ecological Approach*, 86 FAMS. IN SOC’Y: J. CONTEMP. SOC. SERVS. 251, 254 (2005) (discussing “prison widowhood” as an often-ignored social status).

125. See *id.*

126. See Donald Braman, *Families and Incarceration* ii (2002) (Ph.D. dissertation, Yale University) (on file with author) (highlighting that family members of incarcerated people “are not only materially impoverished by incarceration” because incarceration restructures household composition, but also, and more significantly, that the incarceration of a family member erodes “the strength and quality of the relationships” within extended kinship networks).

127. See Lee, *supra* note 93, at 109.

128. See *id.*

129. See *id.*

130. See Arditti, *supra* note 124, at 254 (discussing the high price paid by the children of incarcerated persons).

131. See Schmittker & John, *supra* note 123, at 127; see also Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, ANN. REV. SOCIO. 387, 398 (2010) (estimating that “52% of state prison inmates and 63% of federal inmates are parents” and that “[a]n estimated 2.2 million children (about 3% of the total population under 18 in the United States) currently have a parent incarcerated”).

has a decidedly large impact on young boys in urban minority communities who are forced to grow up fatherless because of the impositions of the carceral state.¹³² This perpetual generation of boys reports higher rates of school failure, behavioral problems, and juvenile detention themselves.¹³³ Young girls are similarly affected when they have a parent (most often their father) who is incarcerated and suffer from higher rates of behavioral problems, juvenile detention, difficulty finding their own life partners, and difficulty with family planning as teenagers and adults.¹³⁴

The criminal justice system overwhelmingly incarcerates men of color, but the incarceration rates of mothers are also troubling and can wreak even more havoc on children than incarcerating fathers. When a father is incarcerated, the effects on the family unit are substantial; however, when a mother is incarcerated, the family unit can potentially be destroyed completely.¹³⁵ Incarceration forces mothers to leave their children to foster care and or other alternative public and private support systems, and growing up in these circumstances can cause long-term psychological impacts on children and their ability to develop into healthy members of society.¹³⁶ This illustrates how incarcerating parents often tragically sows the seeds for their children to take their place as the next generation of offenders.¹³⁷

132. Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RSCH. ON ADOLESCENCE 369, 370 (2004).

133. See, e.g., Sara Wakefield & Christopher Wildeman, *Mass Imprisonment and Racial Disparities in Childhood Behavioral Problems*, 10 CRIMINOLOGY & PUB. POL'Y 793, 794–96 (2011) (discussing how a father's incarceration produces harmful effects on children's behavioral and mental health); Western & Muller, *supra* note 94, at 172 (summarizing studies showing higher levels of aggressive behavior, depressive symptoms, and reduced academic achievement among children whose parents have been incarcerated); Harper & McLanahan, *supra* note 132, at 388 (finding elevated incarceration rates for national male cohort in fatherless households).

134. See, e.g., Myrna S. Raeder, *Special Issue: Making a Better World for Children of Incarcerated Parents*, 50 FAM. CT. REV. 23, 28 (2012) (finding a 60 percent rate of teenage pregnancy among girls who have a parent incarcerated) (citation omitted).

135. See Rosa Minhyo Cho, *Maternal Incarceration and Children's Adolescent Outcomes: Timing and Dosage*, 84 SOC. SERV. REV. 257, 258–60 (2010) (discussing the myriad ways that maternal incarceration impacts child development).

136. See Robynn J.A. Cox, *The Impact of Mass Incarceration on the Lives of African American Women*, 39 REV. BLACK POLIT. ECON. 203, 206, 209 (2012) (finding that nearly 65 percent of women incarcerated in state prisons lived with their child at the time of their admittance to prison, and that this leads to a greater percentage of incarcerated women having their children go into foster care than men); Laura Gypen, Johan Vanderfaellie, Skrallan De Maeyer, Laurence Belenger & Frank Van Holen, *Outcomes of Children Who Grew Up in Foster Care: Systematic-Review*, 76 CHILD. & YOUTH SERVS. REV. 74, 77–80 (2017) (reviewing over thirty studies and finding that children in foster care have lower rates of high school and college completion, lower employment rates and annual earnings, higher rates of mental health issues, and higher rates of substance abuse and criminality than the rest of the population).

137. See Western & Muller, *supra* note 94, at 172; Posner, *supra* note 86, at 1216–17 (discussing the elasticity of supply in the market of offenders as it relates to lowering the supply to improve public welfare); Liedka et al., *supra* note 45, at 246 (realizing that crime reduction will not be achieved if there is a “full replacement” of criminals if new criminals fill the niche left by those incarcerated).

From a public health standpoint, mass incarceration imposes significant costs on the health of the community. Serving time in prison has been linked to later health problems, with the strongest impacts related to infectious diseases.¹³⁸ Incarceration exposes many young offenders to a host of infectious diseases, including different types of hepatitis and tuberculosis, that can then be spread upon their release into the community.¹³⁹ The coronavirus also proved to be a potent killer in prison, spreading faster in overcrowded and underfunded carceral facilities than it did on cruise ships,¹⁴⁰ yet only cruise ship super-spreader events were met with widespread media attention and public focus. And as with all these social costs, they are unfortunately borne disproportionately by poor and/or minority communities, which only exacerbates existing health disparities.¹⁴¹

Another underappreciated set of social costs are those related to politics, civic engagement, and the overall legitimacy of the criminal justice system. Monica Bell calls this “legal estrangement” where despite a demographic of people’s adherence to and embrace of the law and legal authority, that demographic is nevertheless structurally ostracized, which can lead to civic and legal disengagement.¹⁴² Legitimacy of the state and its monopoly on punishment is essential to maintain social order through meaningful facilitation of retributivist and consequentialist goals.¹⁴³ However, legitimacy can be undermined if there is a perception of unfair treatment.¹⁴⁴ This has led to a significant race gap on the legitimacy of criminal justice. Surveys from the past twenty years consistently find that African Americans have less trust and

138. See Wakefield & Uggen, *supra* note 131, at 396 (collecting literature that indicates higher effects of exposure and spread of infectious diseases); Eric Reinhardt, *Why U.S. Pandemic Management Has Failed: Lack of Attention to America’s Epidemic Engines*, STAT (Oct. 5, 2021), <https://www.statnews.com/2021/10/05/jails-prisons-schools-nursing-homes-america-epidemic-engines/> [<https://perma.cc/THU4-X5CS>] (arguing that mass incarceration, and specifically the jails and prisons in which it manifests, “undercut national public health and safety” by functioning as an “epidemiological pump that fuel sickness and death, not just inside [the] facilities but also well beyond them”).

139. See Massoglia, *supra* note 119, at 296 (detailing that even short prison sentences can expose incarcerated persons to “HIV, hepatitis B, hepatitis C, and tuberculosis”).

140. See Maybell Romero, *Law Enforcement as Disease Vector*, 2020 U. CHI. L. REV. ONLINE (2020).

141. See Michael Massoglia & William Alex Pridemore, *Incarceration and Health*, 41 ANN. REV. SOCIO. 291, 294 (2015) (surveying health studies and incarceration’s effects on public health).

142. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2085–88 (2017) (discussing legal estrangement and how it contributes to a better understanding of the literature of law enforcement legitimacy).

143. See CANTON, *supra* note 13, at 28 (recognizing the importance of legitimacy in the context of punishment’s role in maintaining social order). See generally TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM (2016) (describing the failure to obey the law among people who persistently live under unjust conditions).

144. See HOSKINS, *supra* note 115, at 24–25 (recognizing that the disproportionate punishment of minority communities can undermine the state’s legitimacy); CANTON, *supra* note 13, at 29–30 (discussing the importance of procedural legitimacy and specifically its tenets of “neutrality, consistency, respect, accountability, and participation in decision making”).

confidence in the criminal justice system than their Caucasian counterparts.¹⁴⁵ And the community's perception of the justice system, how it is enforced, and how punishment is meted out are all critically important for that system's legitimacy and moral credibility.¹⁴⁶ Further, such a loss of respect for the rule of law can produce criminogenic effects.¹⁴⁷

Punishment's negative social cost on legitimacy can also be felt when demographics of people disengage from the political process and other avenues of civic engagement. Social scientists Todd Clear and Dina Rose have called this a kind of "social isolation" from the state where "residents in disadvantaged communities become more disenchanting . . . and more removed from the civic community."¹⁴⁸ This lack of engagement is compounded when considering that the criminal justice system disenfranchises offenders both during their incarceration and, in many places, for life.¹⁴⁹ Over six million people are either temporarily or permanently disenfranchised in America for committing a criminal offense; this is roughly 2.5 percent of the voting population.¹⁵⁰ This is a material figure in our voting rights policy, and scholars have confirmed that these disenfranchisements have played a decisive role in U.S. Senate and presidential elections.¹⁵¹

Outlining these different categories of economic, political, and social costs that cut across most aspects of community life cannot capture the full breadth of mass incarceration's externalities. But this brief discussion nevertheless serves as a useful engagement in policy debate. The astronomical price and supposed benefits of mass incarceration do not account for its full costs, which threatens the very justifications that uphold the current system.

145. See Western & Muller, *supra* note 94, at 173 (collecting data on surveys showing disparities in trust and legitimacy in criminal justice); see also Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT'L INST. JUST. J. 23, 23 (2002) (finding that 61 percent of White people report confidence in the police compared to 34 percent of Black people, and that more than a third of White people reported confidence in local courts, compared to just one in six Black people).

146. See PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 175-212 (2008) (discussing the concept of "empirical desert," which measures community mores of punishment as a baseline for punishment's legitimacy).

147. See 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 31 (Guenther Roth & Claus Wittich eds., 1978) (discussing the foundational importance of legitimacy to the rule of law); see also Western & Muller, *supra* note 94, at 174 (finding that youths who doubt the legitimacy of the criminal justice system are more likely to use violence to solve their problems, thus contributing to violence in over-policed and over-punished communities).

148. See Todd R. Clear & Dina R. Rose, *Individual Sentencing Practices and Aggregate Social Problems*, in *CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE* 27, 42 (Darnell F. Hawkins, Samuel L. Myers, Jr. & Randolph N. Stone eds., 2003).

149. See HOSKINS, *supra* note 115, at 19 ("Fourteen states . . . disenfranchise prisoners only during their incarceration, four states bar offenders in prison or on supervised release, and in 20 states, the bans extend also to those on probation. Finally, in 10 states offenders may be permanently disenfranchised.").

150. *Id.*; see also BARKOW, *supra* note 50, at 116.

151. See Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 777, 794-95 (2002).

B. *Balancing the Scales of Justice*

The full breadth of the costs and benefits of mass incarceration may never be translatable into a dollar amount, but there is widespread agreement among scholars that the social ledger almost certainly imposes a net loss to society.¹⁵² Just as the market price for cigarettes or the production costs of energy are far less than the total social costs of their use, the price that society pays for mass incarceration is far less than the total social costs of its wide carceral net. In other words, mass incarceration has an externality problem. This Section examines this externality problem to show that it exacerbates itself over time, leading to worse outcomes and deeper social costs.

While many economists and criminologists agree that incarceration rates have a slight correlation with lowering the crime rate,¹⁵³ this is only true up to a certain point. There is now a growing consensus after decades of data that incarceration rates are subject to the law of diminishing returns and, after reaching an “inflection point,”¹⁵⁴ can actually increase crime rates.¹⁵⁵ Instead of producing a deterrent effect on society, the incarceration rates of today produce a criminogenic effect on society.¹⁵⁶ Viewed through the externality framework, the pollutions of mass incarceration—its destruction of economic opportunities and investments, its destabilizing effects on families and social networks, and its political backlash and delegitimization—have passed the inflection point and are now doing more damage to the very community that incarceration was supposed to benefit.¹⁵⁷

152. See PFAFF, *supra* note 13, at 114–15.

153. See *supra* note 102 and accompanying text.

154. Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, VERA INST. OF JUST. 7 (2007), https://www.vera.org/downloads/publications/veraincarc_vFW2.pdf [<https://perma.cc/M8NG-TKLN>] (calling the point at which incarceration rates start to yield criminogenic effects an “inflection point”).

155. See Wesley Vaughn, *Does Putting More People in Prison Reduce Crime? Maybe Not Anymore*, AL.COM (Sept. 15, 2014), https://www.al.com/opinion/2014/09/does_putting_more_people_in_pr.html [<https://perma.cc/84DJ-28SN>] (reviewing Pew research and interviewing experts to conclude that “as prison populations continue to grow, the benefit of incarceration declines and reverses, and you even see crime increase. That seems to me to be where we are now.”).

156. See David Roodman, *Impact of Incarceration on Crime*, OPEN PHILANTHROPY PROJECT (Sept. 25, 2017), <https://www.openphilanthropy.org/blog/impact-incarceration-crime> [<https://perma.cc/7CBR-QJ69>] (“[A]t least as much evidence suggests that decarceration reduces crime as it increases it.”); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1108 (concluding that prison “punishment—at least as it is realized in modern-day America, through the pervasive utilization of incarceration—may be causing more crime than it is preventing”); Liedka et al., *supra* note 45, at 272 (finding that incarceration helped reduce crime rates but has now reached a point of declining effectiveness); see also Bronsther, *supra* note 47, at 237 (analyzing a similar problem from a utilitarian perspective that sees punishment as an evil that is only justified if it prevents “greater evils” (citing JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 360 (C.K. Ogden ed., Richard Hildreth trans., 1931) (1802); JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 289–311 (Wilfrid Harrison ed., 1948) (1789))).

157. This inflection point phenomenon is fueled by both first-time offenders in destabilized communities as well as high rates of recidivism of previously incarcerated people who cannot get their

The first concept of mass incarceration's unique externality problem is that it follows the pattern of diminishing returns and marginal utility. This means that as the incarceration rate goes up, the benefits to society, as measured by a decline in the crime rate, gradually decrease.¹⁵⁸ Economists and criminologists have found that incarceration is more effective as a deterrent when crime rates are high. Thus, the return on investment from locking up offenders was much more effective during the 1980s and 1990s and became increasingly diminutive in the 2000s and beyond.¹⁵⁹ In this sense, punishment must be tethered to equilibrium. Changes to the prison population over time will have ripple effects throughout society and establish a new equilibrium and a new cost-to-benefit balance.¹⁶⁰ The careful regulator will have to focus on this ever-changing balance to maintain steady decarceration while not sacrificing public safety.

The second concept of mass incarceration's unique externality problem is that it produces a criminogenic effect after passing a certain inflection point. Not only do the benefits of incarceration suffer from diminishing returns, but after the incarceration rates passes this inflection point, it imposes little to any benefit to the community while imposing ever-increasing social costs. At and after this inflection point, the theoretical and practical justifications for deterrence are completely lost. It is particularly difficult to establish this inflection point with any reliable precision, but there are a few studies worth highlighting.¹⁶¹ One study looked at thirty years of data from all fifty states and the District of Columbia and compared states' incarceration rates to their crime rates. The study estimated the inflection point to be between 325 and 492 incarcerated persons per 100,000 people.¹⁶² In other words, an incarceration rate that is higher than this would likely produce more crime than it prevents. Economist Michael

life on track when returning to these destabilized communities. As many as 82 percent of formerly incarcerated people are arrested within ten years of their release from incarceration. LEONARDO ANTENANGELI & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 24 STATES IN 2008: A 10-YEAR FOLLOW-UP PERIOD (2008–2018) 1 (2021), https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs [<https://perma.cc/7QM4-VHBN>].

158. See STUNTZ, *supra* note 5, at 245 (reviewing deterrence literature and concluding that “[i]f punishment deters crime, we seem to be getting much less deterrent bang for the imprisonment buck than we once did”); see also Roodman, *supra* note 156, at 128 (estimating that the impact of incarceration on crime in the United States today is zero); Levitt, *supra* note 102, at 179.

159. See Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. 275, 300–02 (2012) (finding that between 1978 and 1990, each additional prison-year (i.e., locking one more person up for one more year) prevented 2.5 violent crimes and 11.4 property crimes; between 1991 and 2004, however, those numbers fell to 0.3 violent crimes and 2.7 property crimes).

160. See Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13, 24 (2011) (finding that the crime rate and incarceration rate are “equilibrium outcomes” that will fluctuate according to both individual and institutional factors).

161. See PFAFF, *supra* note 13, at 8, 10 (distilling arguments against mass incarceration that note that too many people are in prison and fewer ought to be and concluding that an “ideal” level of incarceration is illusive).

162. See Stemen, *supra* note 154, at 3, 7 (comparing data measuring inflection point analysis).

Mueller-Smith conducted another study looking at data from 1980 to 2009 of over 2.6 million criminal court records accounting for 1.1 million unique misdemeanor and felony defendants that he identified as being low-risk, finding that every year of imprisonment for each offender decreased social welfare between \$56,200 to \$66,800. He calculated that in order for these costs to reach a net-zero effect on society, each one-year prison term would need to deter at least 0.4 rapes, 2.2 assaults, 2.5 robberies, 62 larcenies, or 4.8 habitual drug users in the general population.¹⁶³ Professor Earnest Drucker took a different approach of measuring social costs from a public health perspective using a “years of life lost” metric, estimating that the past thirty years of mass incarceration policies in New York City—a timeframe that limited the study to consider the effects of removing *only* 150,000 young men from their neighborhoods—would represent collective losses similar to the scale of epidemics, wars, and large-scale terrorist attacks.¹⁶⁴

In 2021, the incarceration rate in the United States was 664 out of every 100,000 people,¹⁶⁵ meaning we are now “well past the point of diminishing returns” and well into the red with negative returns.¹⁶⁶ Given the tremendous social costs of mass incarceration, there is a wide schism between reformers who seek to lower incarceration to a more reasonable rate and abolitionists who ultimately seek to close prisons and dismantle the PIC.¹⁶⁷ But among the many camps that are calling for change, there is agreement that mass incarceration has become a social ill that needs to be addressed through a gradual lowering of the prison population.¹⁶⁸

163. Mueller-Smith, *supra* note 121, at 4.

164. Ernest Drucker, *Population Impact of Mass Incarceration Under New York's Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 J. URB. HEALTH 435, 435–36 (2002).

165. See Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html?gclid=CjwKCAiAqIKNBhAIEiwAu_ZLDh24-yFYYGbBdFSDS80NxY-IEOXqntwy609JTio_JzIFFaXdSInN1hoCiWkQAvD_BwE [https://perma.cc/NCJ4-J4H8].

166. See Petersilia, *supra* note 22, at 27 (arguing that mass incarceration’s “effects have been considerably smaller than proponents claim and that we are now well past the point of diminishing returns”); Roberts, *supra* note 22, at 1297 (citing empirical research that “the anemic incapacitative and deterrent effects of current prison policy are far outweighed by its criminogenic effects in neighborhoods where incarceration is concentrated”); COUNCIL OF ECON. ADVISERS, *supra* note 12, at 37 (reviewing several studies on the efficiency of incarceration and finding it to have a 20 percent cost-effective policy rating).

167. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1826 (2020) (distinguishing abolitionist advocacy, which seeks to divest and dismantle existing law enforcement institutions, from reformist advocacy, which seeks to change existing institutions without limiting their reach); see also Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616–17 (2019) (describing five tenets of the abolitionist ethic and how this differs from criminal reformists).

168. See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) (describing abolition “as a gradual project of decarceration” that reimagines criminal justice and other institutions, and agreeing that abolitionists and reformists have this in common); LAW, *supra*

Reformists—especially the economists in this camp—seek to reduce the prison population in pursuit of optimality, a goal that is bolstered by the “inflection point” research showing incremental benefits in public safety up until a certain point.¹⁶⁹ It boils down to an attempt to find the lowest incarceration rate that will yield the maximum benefits for public safety while producing the minimum social costs. It is not simply enough for benefits to outweigh the social costs; instead, these reformists are also asking whether incarceration is the best investment of resources given its lack of returns.¹⁷⁰ Abolitionists, for their part, concede that there are rare people that comprise “the dangerous few” that cannot live safely among us.¹⁷¹ This is likely a very small number of people, however, and the vast majority of incarcerated persons would fall outside this category.¹⁷²

Social control theorists and abolition activists may hold the moral high ground, but reformists and economists hold the pragmatic high ground.¹⁷³ Professor Paul Butler’s argument that reforming the criminal justice system is doomed since it is not broken but performing exactly how it was designed has a ring of truth to it.¹⁷⁴ However, it is worth noting that prisons were first designed by Quakers who sought to abolish slavery and capital punishment to give

note 87, at 153 (acknowledging that while reformers may share some of the same goals of abolitionists, reformers nevertheless “cannot envision a world without prisons”).

169. See, e.g., Roodman, *supra* note 156, at 129 (arguing that we still do not know the exact place to stop decarceration to ensure that society does not suffer from a rise in crime).

170. See BARKOW, *supra* note 50, at 2; PFAFF, *supra* note 13, at 10–11 (considering more efficient investments in police and other law enforcement projects). *But see* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262 (2018) (criticizing reformers who believe criminal administration provides the social good of public safety but is currently operating beyond its optimal rate).

171. See McLeod, *supra* note 168, at 1168 (citing PRISON RSCH. EDUC. ACTION PROJECT, *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* 81, 129–35 (Mark Morris ed., 1976)); *see also* John Braithwaite, *Restorative Justice*, in *A HANDBOOK OF CRIME AND PUNISHMENT* 323, 336 (Michael H. Tonry ed., 1998) (arguing that prison is necessary for only “a tiny fraction of people”).

172. See McLeod, *supra* note 168, at 1168. Another place to look to gain insight into the mental health conditions that even abolitionists might concede is best addressed, at least in part, through incapacitation, is psychology and the study of criminal psychopaths. Psychopaths make up less than 1 percent of the male population and are especially difficult to rehabilitate since they resist, and may actually manipulate, rehabilitation methods to secure personal benefits. Kent A. Kiehl & Morris B. Hoffman, *The Criminal Psychopath: History, Neuroscience, Treatment, and Economics*, 51 JURIMETRICS 355, 355–56 (2011).

173. See, e.g., Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1548 (2022) (criticizing reformists by explaining that reformist reforms refer to change that “fails to fundamentally challenge existing power relations” and is not consistent with moving toward “an alternative framework [that can transform] political, economic, and social relationships, undermin[e] the logic of the status quo, and advance[] more collective modes of governing public life and addressing social problems”).

174. See Butler, *supra* note 62, at 1425; PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 5 (2017) (describing the criminal punishment system as “broke on purpose”); Mariame Kaba, *Prison Reform’s in Vogue and Other Strange Things...*, TRUTHOUT (Mar. 21, 2014), <https://truthout.org/articles/prison-reforms-in-vogue-and-other-strange-things> [<https://perma.cc/3QA6-XCLZ>] (“With every successive call for ‘reform,’ the prison has remained stubbornly brutal, violent, and inhumane.”).

criminal offenders time to achieve religious penance (thus, the birth of the *penitentiary*). Thus, it is not necessarily a fool's errand to explore the reclamation and redesign of the prison institution.¹⁷⁵ This does not have to ignore the realities that critical race scholars have argued that “[r]acial inequality is hardwired into the fabric of our social and economic landscape.”¹⁷⁶ Inequality cannot be fully stamped out of our society, and neither can the social pollutions of incarceration. In some ways, seeking to mitigate pollutions embraces this feeling of inevitable inequality.¹⁷⁷ It accepts it, and instead of trying to eliminate pollution altogether, it makes the callous and hard decision to accept a certain level of inequality for the utilitarian benefits to society as a whole.

This Part categorizes and weighs the externalities and social pollutions of mass incarceration to demonstrate how these costs exceed the price that society pays for the purported benefits of incarceration. This Section in particular outlines the exacerbating externalities of mass incarceration whereby increased incarceration does not lead to commensurate reductions in the crime rate, which has always been one of the key justifications for deterrence and incapacitation punishment theories. Indeed, we are at the point where incarceration has such a negative externality that it may be increasing crime rates in the neighborhoods and communities that have suffered its harshest destabilizing effects.

III.

EXTERNALITY-FOCUSED PUNISHMENT

Thus far, viewing punishment through a lens of externalities has provided insight into both punishment's theory and practice; this Section adds the unique contribution of externality solutions to bring us closer to a future in which incarceration is much less prevalent. And as with other externality problems, there are a range of solutions unique to the externality space that must navigate various institutional obstacles. This Section argues that the most efficient and effective solution is a Pigouvian prison tax on the overuse of prison resources. Alternatively, it also suggests a subsidy and charge-back regime, as well as a CAT system—both of which are used to curb other externality problems.

This Section leads by setting the political foundation on which the ultimate design of externality solutions must rest. Part III.A adds practical value by

175. *But see* Roberts, *supra* note 58, at 32 (questioning if prisons are too tainted by white supremacy to be reformed, but also aligning abolitionist principles with similar questions of whether democracy and America can be saved from their roots of racial subjugation or whether it all should be dismantled).

176. *See* Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 151 (2014); *see also* DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* ix (1992) (arguing that racism is an “integral, permanent, and indestructible component” of American democracy); Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1613 (2011) (same).

177. *See* STUNTZ, *supra* note 5, at 2 (opining that “[t]he justice system was always flawed, and injustices always happened,” which somewhat captures the acceptance of historical injustices and the unfortunate reality that they are likely to continue).

arguing that local actors should be held accountable for using the limited resource of prison space, thereby producing social costs. This Section also lays out how externality solutions might work given the complicated politics of punishment at the state and local levels. This context is important when constructing new institutions to mitigate the externalities of punishment.

Part III.B explores three potential externality solutions that are tailored to the problems and context of mass incarceration. First, it discusses how accountability might work via the implementation of a Pigouvian prison tax. A Pigouvian prison tax contributes to the goals of decarceration by pragmatically lowering the prison population to mitigate the social impacts on the community while simultaneously offering policy experts the flexibility to be responsive to public safety.¹⁷⁸ As an externality tool, a Pigouvian tax generally sets a price on a resource, good, or service that firms must pay as a cost of doing business. The more a firm produces the resource, good, or service that creates negative externalities, the more it, and/or its consumers, must pay to the government in the form of a tax.¹⁷⁹ The revenue from this tax is then used to balance the social costs by funding programs that address the externality or even paying dividends to citizens.¹⁸⁰

The second possible externality solution represents the opposite side of the same coin. Instead of a taxation model, a subsidy model may also be effective to incentivize local actors to develop alternative punishment regimes that carry fewer social costs. Providing grants and subsidies from both the federal and state governments also has the benefit of incentivizing maintenance of the system, whereby people sent to prison can trigger a charge-back mechanism requiring local governments to pay back or forfeit funds based on their incarceration rates.

The third creative externality solution is a CAT system that allocates limited resources to local government actors. In a prison CAT system, the state would control how many prison beds are available to be filled every year and would assign allowances or credits for each local government in the state. These local governments would have to abide by the number of prison bed allowances they can use for that year. If they go over these allowances, they would be subject to severe penalties and oversight going forward; if they do not use all their allowances, they can sell their leftover spaces to other jurisdictions who want to use them. This would create a market dynamic that incentivizes jurisdictions to hit their decarceration targets and potentially generate revenue by selling

178. See Carrie Pettus-Davis & Matthew W. Epperson, *From Mass Incarceration to Smart Decarceration* 1 (Ctr. for Soc. Dev., Working Paper No. 14-31, 2014) (outlining three goals for effective decarceration: “(1) the incarcerated population in U.S. jails and prisons is substantially decreased; (2) existing racial and economic disparities in the criminal justice system are redressed; and (3) public safety and public health are maximized”).

179. See Eck & Eck, *supra* note 20, at 295.

180. See METCALF, *supra* note 70, at 4, 52, 131 (discussing examples where a carbon tax is tax-neutral, meaning its revenue is redistributed to citizens through tax dividends, which is necessary for political support).

allowances to others, while penalizing and increasing costs on jurisdictions that continue to over-incarcerate.

A. *The Local Free Lunch and Coordination Problems*

The proposed externality solutions cannot succeed—even as thought projects—without contextualizing the local actors who contribute to mass incarceration and must be held accountable to make drastic cuts to the prison population. The nuances of local politics, tax structures, and various levels of accountability are complex; there are different types of mayors, police chiefs, prosecutors, and judges who are elected or appointed according to various practices in thousands of jurisdictions.¹⁸¹ Unfortunately, the political and economic incentives run in line with mass incarceration, which has contributed to incarceration's rise and its stubborn persistence for the past forty years. Thus, no ameliorative design can purport to be a one-size-fits-all solution or a silver bullet that will kill the problem in every jurisdiction. Notwithstanding, this Section interrogates general patterns among law enforcement, prosecutors, judges, and other local elected officials to map out the beginnings of workable externality solutions.

1. *Horizontal and Vertical Coordination*

Politicians and policy decision-makers work together in our system of divided government, and the power dynamics between them often dictate their ability to do their job of representation. At the horizontal level, local actors interact with each other within their jurisdiction; at the vertical level, local actors interact with state and federal actors at their different levels in the federalism hierarchy. Horizontally, Professors Bierschbach and Bibas have characterized how fragmentation among local actors can cause accountability problems in the allocation of criminal justice resources.¹⁸² All of these local actors have separate but interconnected roles and have little appreciation for the goals and incentives of the other actors.¹⁸³ Law enforcement, prosecutors, and judges—who are all funded differently by local and county funds—do not consider how their unchecked roles in arresting, prosecuting, and sentencing crimes overuse the punishment system in ways that they are either not aware of or are not held accountable for.¹⁸⁴ These actors also have little coordination or appreciation of how their individual actions affect the larger system. Individual law enforcement officers, prosecutors, and judges must perform their jobs according to certain

181. See, e.g., DUREN BANKS, JOSHUA HENDRIX, MATTHEW HICKMAN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUST., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 3 (2016), <https://bjs.ojp.gov/content/pub/pdf/nslead.pdf> [<https://perma.cc/562F-DE7G>] (finding approximately 18,000 separate law enforcement agencies and departments in the United States).

182. See Bierschbach & Bibas, *supra* note 23, at 196–98.

183. See *id.* at 198–200.

184. See *id.*

metrics that may not account for their broader context and role in the criminal justice system—such as those imposed by their supervisors in the police force or supervising attorneys.¹⁸⁵ Even judges, many of whom are elected by the local constituency, have been shown to issue longer sentences closer to elections to bolster their tough-on-crime record.¹⁸⁶

This leads to what David Ball called a state subsidy¹⁸⁷ and what Franklin Zimring and Gordon Hawkins identified as “the correctional free lunch.”¹⁸⁸ State prisons are built and maintained using state resources and budgets, while local actors (primarily law enforcement, prosecutors, and elected officials) are paid and supported by city and county resources and budgets. While local prosecutors are likely the most powerful set of local actors that contribute to state over-incarceration, police tactics, judicial sentencing, and local elected officials that are responsible for budgeting and setting priorities cannot be underappreciated in this analysis.

Law enforcement is where the story starts, since most jurisdictions allow the mayor or top elected official to appoint the jurisdiction’s chief of police.¹⁸⁹ Understandably, this gives the top elected official direct access to and power over law enforcement priorities. Police violations of civil and constitutional rights,¹⁹⁰ externalities,¹⁹¹ and legitimacy¹⁹² form robust conversations between scholars and policy makers, but for the limited purpose of the prison tax, they are only the beginning. Police departments and their individual officers choose to pursue certain offenses in certain communities. These actions form the broad foundation of the community-to-prison pipeline. And while not all arrests end in prosecutions, higher arrest rates only increase overall incarceration numbers. Poor and/or minority communities are the most frequently policed, a fact that is central to understanding how law enforcement helps create and exacerbate the externalities of mass incarceration.

185. *See id.* at 200–01.

186. *See* NAT’L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* 2 (2014).

187. *See* Ball, *supra* note 28, at 1062.

188. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991); *see also* STUNTZ, *supra* note 5, at 253–55 (discussing this problem as the politics of criminal policy budgets).

189. *See* SANFORD H. KADISH, STEPHEN J. SCHULHOFFER & RACHEL E. BARKOW, *CRIMINAL LAW & ITS PROCESSES: CASES & MATERIALS* 9 (10th ed. 2017) (discussing local dynamics between mayors who typically appoint police chiefs and other top law enforcement officials).

190. *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (examining the extent of immunities from civil liability when police violate civil and constitutional rights); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182 (2017) (discussing the constitutional bounds of police seizures in the context of unarmed people dying as the result of police violence); Zachary A. Powell, Michele Bisaccia Meitl & John L. Worrall, *Police Consent Decrees and Section 1983 Civil Rights Litigation*, 16 CRIMINOLOGY & PUB. POL. 575 (2017) (studying the impact of consent decrees issued against police departments for violations of civil and constitutional rights).

191. *See, e.g.*, Baer, *supra* note 27, at 1103.

192. *See* Bell, *supra* note 142, at 2076–83 (outlining the vast literature of police legitimacy scholarship, empirical data, and social science).

But for as many people as the police may arrest, prosecutors serve as the ultimate conduit of the community-to-prison pipeline. Nearly every person is sent to state prison through the prosecutorial discretion and resources expended by a local prosecutor's office. Prosecutors' decisions on whom, what, and how to charge have been described as one of the "main driver[s] of mass incarceration."¹⁹³ Prosecutors often use their discretion to charge people with more felonies to ensure that defendants will be sent to prison for longer periods of time.¹⁹⁴ Prosecutors make economic decisions when it comes to which prosecutions to prioritize and when to use plea bargaining to avoid the expense of trial.¹⁹⁵ They form powerful state and national organizations that lobby across the country to uphold the status quo and argue for more punitive laws.¹⁹⁶ In the context of this free lunch program, local prosecutors get to enjoy the tough-on-crime benefits of sending as many people away to prison as they see fit while the state picks up the cost. This is why any externality solution must succeed in holding local prosecutors economically accountable as a means to change carceral polices.

Judges, for their part, take the baton when it comes to sentencing decisions, although the prosecutor's charges and plea negotiations have already stacked the deck against defendants. Further, there has been a steady decline in judicial discretion with the rise of determinant sentencing regimes that set a range of incarceration within which a judge can calibrate a sentence appropriate to a given individual.¹⁹⁷ Mandatory minimums and mandatory life sentences strip the judge of discretion in many low- and high-level cases.¹⁹⁸ Notwithstanding, there are indeed cases in which judges can use their power to divert people away from

193. See KADISH ET AL., *supra* note 189, at 17 ("Prosecutorial charging decisions (and the sentencing consequences that follow) are a main driver—if not the main driver of mass incarceration—and in a world of guilty pleas and few trials, that means the plea stage is the critical point in the process, a stage where prosecutors are the actors in charge.").

194. See PFAFF, *supra* note 13, at 70–72 (discussing the sharp increase in prosecutorial decisions to charge people with felonies as a leading cause of the prison population spike in the 1990s).

195. See MICELI, *supra* note 1, at 104–13 (offering an economic analysis of prosecutorial decision-making and plea bargaining).

196. See BARKOW, *supra* note 50, at 7–8 (discussing the extensive influence of statewide and nationwide prosecutor associations lobbying for harsher criminal penalties, resisting reform, and seeking to preserve the status quo of criminal statutes and sentencing schemes, and stating that "[p]rosecutors control the vast architecture of criminal law administration in the United States, and they benefit from the existing stable of broad laws with severe sentences because of the leverage it gives them to process their cases").

197. See *Williams v. New York*, 337 U.S. 241, 247 (1949) (describing the wide discretion indeterminate sentencing gives to judges and parole officials); TASK FORCE ON CRIM. SENT'G, TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT 11 (1976) (same).

198. See, e.g., Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 211 (2019) (describing how federal sentencing reform in the 1980s "strip[ped] discretion from judges by establishing a new mandatory minimum punishment").

prison or to impose alternative punishments such as parole and probation.¹⁹⁹ In these ways, judges play a role in the community-to-prison pipeline but arguably are the least impactful. This is appropriate because state judges are likely the most insulated from economic pressure—as they should be. Imposing externality solutions on local actors is unlikely to have a measurable impact on judicial incentives because many local judges are paid a salary by the state, not the local government.²⁰⁰ Further, any attempt to hold judges economically accountable through their salary or court resources would be perceived as a threat to the independence of the judiciary.²⁰¹ But ironically, these state court judges are beholden to a different incentive that a local prison tax would appreciably change. To the extent that the externality solutions affect the politics of local constituents, as explored below, judges seeking reelection would have to be mindful of their role in increasing taxes for their local constituency based on their sentencing decisions.

Other local actors worthy of examination are mayors and other top elected officials at both the city and county levels. This group of high-ranking officials acts as the chief executive of the jurisdiction and faces local political pressure to

199. See, e.g., MARK S. WALLER, SHANNON M. CAREY, ERIN J. FARLEY & MICHAEL REMPEL, NPC RSCH. & CTR. FOR CT. INNOVATION, TESTING THE COST SAVINGS OF JUDICIAL DIVERSION: FINAL REPORT I (2013), https://www.courtinnovation.org/sites/default/files/documents/NY_Judicial%20Diversion_Cost%20Study.pdf [<https://perma.cc/UT9G-U6PG>] (discussing how judges did not necessarily avail themselves of diversion programs like drug treatments despite the added discretion that these alternative options provided); Henry J. Steadman, Suzanne M. Morris & Deborah L. Dennis, *The Diversion of Mentally Ill Persons from Jails to Community-Based Services: A Profile of Programs*, 85 AM. J. PUB. HEALTH 1630, 1631–32 (1995) (cataloging options for judges to send people dealing with mental illness to treatment programs instead of sentencing them to prison).

200. See, e.g., WIS. STAT. §§ 753.07(1)–(2), 753.19 (2021) (outlining how salaries for circuit court local judges are paid by the state, whereas other local court operational funds must be paid by the local government); OR. REV. STAT. § 292.416 (2021) (state legislative action setting pay rate for local judges); W. VA. CODE § 51-2-13 (“The salaries of the judges of the various circuit courts shall be paid solely out of the State Treasury. No county, county commission, board of commissioners, or other political subdivision shall supplement or add to such salaries.”); *Instructions for County Treasurers Seeking Reimbursement from the Supreme Court of Ohio for Compensation Paid to Acting and Assigned Judges*, SUP. CT. OF OHIO & OHIO JUD. SYS., (Nov. 3, 2022), <https://www.supremecourt.ohio.gov/JCS/judicialSvcs/instructions.pdf> [<https://perma.cc/Z3F7-DJSM>] (explaining changes to state law that transfer the responsibility of compensating local judges from local counties to the Ohio Supreme Court); Jon Campbell, *New York Judges Won’t Get a Pay Hike Next Year. They Aren’t Happy About It*, DEMOCRAT & CHRON. (Dec. 27, 2019, 2:05 PM), <https://www.democratandchronicle.com/story/news/politics/albany/2019/12/27/new-york-judges-wont-get-pay-hike-2020-and-beyond/2756374001/> [<https://perma.cc/2WAY-3KVQ>] (discussing New York state commission’s declaration that state and local judges would not receive a pay raise from the state).

201. See Roy A. Schotland, *Judges’ Pay: A Chasm Far Worse Than Realized, and Worsening*, 40 IND. L. REV. 1273, 1273–78 (2007) (discussing how dropping or failing to raise judicial pay can put pressure on judges and threaten judicial independence); James W. Douglas & Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?*, 63 PUB. ADMIN. REV. 441, 452 (2003) (finding that judicial independence is indeed threatened by certain aspects of governors’ and state legislators’ budgeting processes).

balance budgets in order to satisfy a variety of local interests. Schools, transportation, economic development, and other areas must be funded from the same local revenue as the criminal justice budget that funds law enforcement, courts, and local prosecutors.²⁰²

The last local actor that often goes underappreciated in such analyses is the voter. Voters ultimately put all of the above actors—from law enforcement to mayors—in power by voting their preferences, including in criminal justice. Tough-on-crime rhetoric and policies have softened in the past ten years to a more “smart-on-crime” approach,²⁰³ and there has even been a movement to elect progressive prosecutors that use their power and discretion to decarcerate.²⁰⁴ But there are many problems to account for when considering the interests of the local voter. First, local elections often draw the lowest voter turnout, which begs the question of what type of voters and demographics these local elections appeal to.²⁰⁵ Second, multiple studies have shown that most voters, including those at the local level, have erroneous beliefs about the criminal justice system. Many voters today believe that crime continues to rise, when in fact the crime rate has generally fallen over the past twenty years.²⁰⁶ Finally, perhaps the chief lie that many Americans believe is that prisons and incarceration make them safer²⁰⁷ when social science and economic studies have debunked the myth that incarceration contributes to lowering the crime rate.²⁰⁸ The typical local voter is dangerously uneducated on criminal justice policies, yet continues to vote for the things they wrongfully believe will make the community safer. Many times, this translates into voting to maintain the status quo out of fear that change could increase the local crime rate.

But these local actors do not tell the full story; the way they interact vertically with state authorities further complicates the political realities that

202. See *State and Local Expenditures*, URB. INST., [https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures#:~:text=State%20and%20local%20governments%20spend%20most%20of%20their%20resources%20on,higher%20education%20\(9%20percent](https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures#:~:text=State%20and%20local%20governments%20spend%20most%20of%20their%20resources%20on,higher%20education%20(9%20percent) [<https://perma.cc/7WCY-YGYJ>] (discussing the many local programs that state and local budgets fund).

203. See *infra* notes 213–214 and accompanying text.

204. See, e.g., LARRY KRASNER, NEW POLICIES ANNOUNCED FEBRUARY 15, 2018 1–5 (2018), <https://s3.documentcloud.org/documents/4415817/Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.pdf> [<https://perma.cc/CB3M-F3D2>] (describing a comprehensive plan to charge lower offenses and divert people away from prison, among other measures). *But see* Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master’s House, and the Master Wouldn’t Let Them Anyway*, 90 *FORDHAM L. REV.* 1983, 1988–98 (2022) (identifying and criticizing the work of progressive prosecutors around the country).

205. See Boqian Jiang, *Homeownership and Voter Turnout in U.S. Local Elections*, 41 *J. HOUSING ECON.* 168, 168 (2018) (referencing that mayoral and other local elections garner 20 to 40 percent voter turnout, whereas presidential and national elections garner roughly 60 percent voter turnout).

206. See BARKOW, *supra* note 50, at 2.

207. See LAW, *supra* note 87, at 13–15 (discussing politicization of mass incarceration based on the recurring theme that crime rates were inversely related to the prison population).

208. See *supra* note 102 and accompanying text.

have created mass incarceration. The most impactful actor at the state level is the legislature. State legislators, for their part, both vote to build prisons and enable local prosecutors to fill them up. The political incentives for state legislators are often symbolic, used to superficially demonstrate their concern about public safety.²⁰⁹ But William Stuntz recognized that these symbolic gestures to gain the favor of the public, law enforcement officers, and prosecutors (the latter two of which organize into powerful lobbies and voting blocs) are not necessarily meant to be used according to the very letter of the state statute. Instead, state legislators appease local prosecutors by writing laws that criminalize more types of conduct and carry harsher penalties so that local prosecutors can maintain high conviction rates through the plea bargaining process.²¹⁰ Legislators may not actually intend for local prosecutors to pursue the maximum penalty under these statutes, but prosecutors can use these harsh penalties to charge multiple overlapping crimes, forcing plea bargains that increase their prosecutorial efficiency.²¹¹ In return, legislators get continued financial and electoral support from law enforcement and prosecutors, and also benefit from the political favor of the public, who seemingly benefits from their symbolic commitment to public safety. And over time, as legislators continued to enable prosecutorial power and prosecutors became emboldened,²¹² the latter have sent more people to prison with harsher penalties, aggregating into the mass incarceration problem of today.

2. *The Modern Disincentives of Incarceration*

While the incentives of state legislators and local actors align in political partnership,²¹³ it might seem hopeless to dismantle mass incarceration using pragmatic tools. But there is hope yet for getting state and federal officials onboard to adopt decarceration programs, all of which would map well onto the externality tools explored below.

The first and most important factor in decarceration is its price. Political pressure to decarcerate is bolstered by periodic economic downturns in which politicians have been forced to be more responsible with state and local budgets. The first wave of smart-on-crime rhetoric came in the wake of the 2008 Great Recession. This resulted in calls to be more efficient with state budgets, including reallocating the \$80 billion annually spent on corrections.²¹⁴ Indeed,

209. See Ball, *supra* note 28, at 1062; Stuntz, *infra* note 242, at 576.

210. See STUNTZ, *supra* note 5, at 259.

211. See *id.* at 263–64.

212. Professor Stuntz also recognizes prosecutorial power as a measure of setting a standard in plea negotiations. See *id.* at 257–59 (describing a typical plea bargaining negotiation in which a prosecutor piles on charges and potential sentences and, if the plea bargain is not accepted, must follow through with these threats or otherwise diminish their bargaining capacity in the future).

213. See Stuntz, *infra* note 242, at 510 (discussing the strong political incentives that align the interests of state legislators and prosecutors).

214. See BIKLE ET AL., *supra* note 1, at xiii–xiv (discussing how the financial collapse of 2008 led politicians to start thinking about limiting prison resources and being smarter and more efficient about crime policy).

the prison population in the United States was in a state of constant growth until 2010, when many states were confronted with budgetary shortfalls in the wake of the financial crisis.²¹⁵ The first time in a generation that the prison population held constant was in 2010, and it even started to dip later in the decade.²¹⁶ The coronavirus pandemic has also tightened state budgets considerably due to the hundreds of billions of dollars lost in the economy due to government shutdowns.²¹⁷ State and local governments do not have the same blank checks of the 1990s and 2000s to build prisons at will and spend billions on punishment that yields little results.²¹⁸ To this day, activists continue to protest new prison construction while powerful lobbies argue for continued expansion of the PIC.²¹⁹ But as state lawmakers look at every measure to balance their budgets, prisons seem more like wasteful expenditures if activists can convince them there are better places to spend that money.²²⁰ Although externality solutions seek to account for the full *costs* of incarceration, the *price* of incarceration to taxpayers

215. See Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, SENT'G PROJECT (Sept. 17, 2019), <https://www.sentencingproject.org/app/uploads/2022/08/U.S.-Prison-Population-Trends.pdf> [<https://perma.cc/U56Z-SF8C>]; Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1277 (2005) (arguing that states are more cost-sensitive in managing their budget than the federal government, which has prompted more debate and discussion regarding decarceration policies at the state level).

216. See Ghandnoosh, *supra* note 215.

217. See Louise Sheiner & Sophia Campbell, *How Much Is COVID-19 Hurting State and Local Revenues*, BROOKINGS INST. (Sept. 24, 2020), <https://www.brookings.edu/blog/up-front/2020/09/24/how-much-is-covid-19-hurting-state-and-local-revenues/> [<https://perma.cc/3Z8C-K548>] (projecting that state and local revenue “will decline \$155 billion in 2020, \$167 billion in 2021, and \$145 billion in 2022—about 5.5 percent, 5.7 percent, and 4.7 percent, respectively—excluding the declines in fees to hospitals and higher education. Including those fees to hospitals and higher education would bring these totals to \$188 billion, \$189 billion, and \$167 billion”); see also *States Grappling with Hit to Tax Collections*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 6, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/4-2-20sfp.pdf> [<https://perma.cc/Z4RS-RKP7>] (discussing states having to make cuts to meet budget shortfalls caused by the coronavirus pandemic).

218. See Holmes, *supra* note 106 (describing California’s building more prisons in the 1990s as part of a larger national trend).

219. See, e.g., Beth Cann, *Email Insight: Jim Zeigler and Coalition of Activists Oppose Mega Prisons, Call on Legislature to Audit Department of Correction*, ALA. TODAY (Jan. 29, 2021), <https://altoday.com/archives/38904-email-insight-jim-zeigler-and-coalition-of-activists-oppose-mega-prisons-call-on-legislature-to-audit-department-of-corrections> [<https://perma.cc/4EK9-U6DP>] (arguing against building new prisons in Alabama due to unknown environmental impact of “wastewater treatment, water sourcing, storm runoff, [and] additional infrastructure”); Marianne Cufone, *Media Release: Prisoners and Activists Stop New Prison on Coal Mine Site in Kentucky*, ABOLITIONIST L. CTR. (June 20, 2019), <https://abolitionistlawcenter.org/tag/nepa/> [<https://perma.cc/G5NL-LH5U>] (reporting on a successful campaign, based in part on environmental grounds, to stop the federal government from building a new prison in Kentucky); J.D. Capelouto & Anjali Huynh, *Atlanta City Council Passes Police, Fire Training Center Proposal*, ATLANTA J.-CONST. (Sept. 8, 2021), <https://www.ajc.com/news/atlanta-news/breaking-atlanta-city-council-passes-police-fire-training-center-proposal/7OR7W3OLOZGJVPEUVE65KAOQBY/> [<https://perma.cc/MY6X-4D6L>] (detailing Atlanta’s decision to turn forested land into a police training center).

220. See PFAFF, *supra* note 13, at 4 (describing the “confluence of low crime and tight budgets” that has fostered “a surprisingly bipartisan push for reform during a time when those on the Left and the Right can barely agree on whether it is raining outside”).

has actually become a burden too heavy to maintain. As Pfaff has noted, it is these very prices that have produced rare bipartisanship in prison reform and decarceration. The First Step Act is an example of such successful reform in the modern era. Passed by a Republican federal administration, the Act shows there is indeed a national bipartisan conversation that is taking decarceration and criminal justice reform seriously if those interests can be met with moderate and pragmatic solutions.²²¹

A second factor of decarceration is the growing movement of voters and activists seeking to lower the prison population. Polling shows that a majority of Americans see mass incarceration and criminal justice problems as a social problem that should be fixed.²²² These attitudes have indeed started to carry weight at the local and state level, evidenced by the support for progressive prosecutors across the nation.²²³ The public's increasingly pro-reform attitudes have also contributed to existing trends of decarceration, albeit far too slowly for most advocates. In 2010, the national prison population edged downward for the first time since 1972 but had only dropped by 7 percent by 2017.²²⁴ At that rate, it would take close to seventy-two years to cut the prison population in half.²²⁵ At the state level, thirty-nine states decreased their prison population from peak levels, but the other eleven increased their prison populations.²²⁶ Progressive activism, such as prison abolition, Black Lives Matter, and the defund the police movements, has pushed politicians to adopt policies addressing criminal justice reform. In short, decarceration is already happening, and externality solutions are innovative ways for several levels of government across the nation to contribute to and catalyze this movement.

Third is the practical realization that decarceration actually works. Emptying prisons does not translate into a rising crime rate. States that have found ways to decrease their prison populations over the past decade have seen a decline in crime.²²⁷ The coronavirus pandemic also prompted state governments across the nation to release thousands of people from jails and

221. See, e.g., LAW, *supra* note 87, at 15 (positively acknowledging Donald Trump's administration for this action toward criminal justice reform).

222. See PFAFF, *supra* note 13, at 5, 162 (citing statistics showing that "44 percent of all respondents said they believed that 'reforming the criminal justice system should be a top priority'; the percentage rose to 73 percent for [B]lack respondents and 48 percent for Hispanics," and that "even staunchly conservative voters . . . increasingly favor 'smart' responses to crime, such as diversion programs, treatment for nonviolent offenders, and greater use of parole").

223. See BARKOW, *supra* note 50, at 154–60 (describing both the successes and struggles of progressive prosecutors and the movements to elect them across the country).

224. Ghandnoosh, *supra* note 215.

225. *Id.*; see also PFAFF, *supra* note 13, at 8 (referring to the Cut50 movement, which sought to cut the national prison population by 50 percent). The Cut50 initiative has since been expanded into Dream Corps Justice, which advocates for several prison reform initiatives.

226. Ghandnoosh, *supra* note 215.

227. See, e.g., PFAFF, *supra* note 13, at 12 (using national data showing that "[b]etween 2010 and 2014, state prison populations dropped by 4 percent while crime rates declined by 10 percent—with crime falling in almost every state that scaled back incarceration").

prisons as a public safety measure to prevent rampant spread of the virus in the confined spaces of carceral settings.²²⁸ While there was an uptick in crime as government shutdowns ended, there is no evidence attributing this uptick to individuals that were released from prison due to coronavirus.²²⁹ Indeed, what case studies like the recent coronavirus releases show is that there are a lot of people behind bars that do not need to be incapacitated.

California's realignment project also serves as a cautionary success story that resulted from both political and judicial pressure to decarcerate its state prisons. This program came as a result of California's unprecedented financial crisis²³⁰ and the Supreme Court's decision in *Brown v. Plata*.²³¹ In *Brown*, the Court held that the overcrowding of California's prisons was so bad that it violated the Eighth Amendment's protection against cruel and unusual punishment because prisoners could not get basic medical treatment.²³² California then adopted legislation to shift responsibility for housing low-level offenders to counties in order to lower the state's prison population. Realignment has succeeded in some ways, but some scholars criticize it as a shell game. Realignment began in 2011 and has significantly lowered California's prison population while resulting in an overall lower crime rate.²³³ But realignment has shifted California's prison population to counties that choose to house low-level offenders in their local jails.²³⁴ Overall, the number of people incarcerated has gone down, but realignment still shows that any system in which state governments try to shift accountability to local cities and counties must be well designed to ensure overall decarceration. California's regime has worked in a limited sense, and other states are trying to find similar ways to reduce their

228. See Patrice Gaines, *Thousands Were Released from Prison Because of Covid. Will They Have to Return?*, NBC NEWS (Sept. 12, 2021), <https://www.nbcnews.com/news/nbcblk/thousands-released-prison-covid-will-return-rcna1977> [<https://perma.cc/X5MW-SDUC>] (describing how 4,500 people were released from prison under the CARES Act and placed on home confinement).

229. See Cheryl Corley, *Massive 1-Year Rise in Homicide Rates Collided with the Pandemic in 2020*, NPR (Jan. 6, 2021), <https://www.npr.org/2021/01/06/953254623/massive-1-year-rise-in-homicide-rates-collided-with-the-pandemic-in-2020> [<https://perma.cc/E6S4-P6VV>] (describing a rise in murders and listing potential reasons, including exacerbated economic, mental health, and other issues); Jim Salter, *Study: Killings Surge in 2020: Pandemic, Protests Play Roles*, ASSOCIATED PRESS (Feb. 1, 2021), <https://apnews.com/article/michael-brown-st-louis-violence-coronavirus-pandemic-racial-injustice-70e400adf209cbf52dcecf47c46f9b0e> [<https://perma.cc/MD2F-5UEQ>].

230. Jeffrey Lin & Joan Petersilia, *Follow the Money: How California Counties Are Spending Their Public Safety Realignment Funds* 8 (Stan. Crim. Just. Ctr. Working Paper, Award No. 2012-IJ-CX-0002, 2014), <https://www.ojp.gov/pdffiles1/nij/grants/247086.pdf> [<https://perma.cc/Q58M-7JEA>].

231. *Brown v. Plata*, 563 U.S. 493 (2011).

232. *Id.* at 510–11, 517–22; see also PFAFF, *supra* note 13, at 14, 152.

233. See PFAFF, *supra* note 13, at 14 (explaining how much of the national prison population decline was attributable to California); Magnus Lofstrom & Brandon Martin, *Public Safety Realignment: Impacts So Far*, PUB. POL'Y INST. CAL. 5–7 (2015) (finding that while violent crime declined and overall recidivism rates were unchanged, auto thefts and some other property crimes rose for the first few years).

234. See Lofstrom & Martin, *supra* note 233, at 3 (explaining that while the prison population went down, local jail populations went up for a time).

prison populations.²³⁵ This short case study is enough to justify pursuing other creative and effective ways that state governments can respond to the increased public appetite for decarceration by coordinating local governments and holding them economically accountable for their role in the overuse of state prison resources.

B. *Externality Solutions by Design*

Analyzing the politics behind both mass incarceration and the converse reform movement is necessary to understand the institutional design for potential externality solutions. But the above analysis still begs the question: if political actors at the state level have the will to decarcerate, why are externality solutions needed? Certainly, there may be other ways to decarcerate the nation's state prisons. What follows are explanations of how externality solutions might work in the context of the political realities in most states, and why these creative solutions add value to the ongoing national project of decarceration.

1. *The Prison Tax*

Designing a Pigouvian prison tax for something as complicated as the incarceration industry requires the methodical consideration of several policy questions, such as whom and what to tax and how to operationalize such an undertaking in an era of political divisiveness. Admittedly, this carceral policy experiment lacks the precision and complexity of local, state, and federal tax law that would be required to create a blueprint for such a proposal. But it succeeds in outlining the policy goals and expected outcomes of a prison tax similar to what we see in other externality contexts.²³⁶

This Section argues that the most efficient and effective Pigouvian prison tax would be imposed by state governments on local governments as a way to solve the free lunch problem and impose economic accountability on local actors for their overuse of state prison resources. As considered in Part III.A, law enforcement, prosecutors, judges, politicians, and even voters all contribute in their own unique ways to sending people from their local jurisdictions to state prisons.²³⁷ By encouraging these local actors to exercise their discretion to

235. See Jeffrey L. Lin, *The Diversity of Decarceration: Examining First-Year County Realignment Spending in California*, 29 CRIM. JUST. POL'Y REV. 771, 773 ("Utah, for example, has recently passed legislation that looks very similar to Realignment, aiming to reduce the state's prison population by shifting responsibility for more offenders to its counties. Alabama's governor recently signed a bill designed to reduce its state prisoner population using evidence-based approaches.") In addition, Kansas, Massachusetts, Vermont, and Louisiana have all considered bills focusing on lowering their prison populations that have achieved mixed success. *Id.*

236. The prison tax builds on what other scholars have proposed by using taxes, pricing, and rationing in various criminal justice contexts to prevent the overuse of resources or to deter risky and detrimental behavior. See *supra* notes 77–78 and accompanying text.

237. This is not the first proposal to use financial disincentives to force criminal justice actors to economically internalize the costs of their decisions. See, e.g., Sherod Thaxton, *Shrinking the Accountability Deficit in Capital Charging*, in THE OXFORD HANDBOOK OF PROSECUTORS AND

consider less costly punishment tools, the social costs of mass incarceration will be lowered, with the corresponding outcome of gradual decarceration. And the Pigouvian design of the tax would require revenue raised by the state governments to be invested in mitigating the social costs of incarceration through myriad programs.

The most efficient place to start a decarceration campaign is the biggest demographic of incarcerated individuals according to their political subdivision in the carceral system. While federal prisons and local jails incarcerate hundreds of thousands of people, state prisons incarcerate the majority of people in this country.²³⁸ Along similar lines, *what to tax* also considers what type of incarceration should be taxed. For example, there are immigrant detention centers, juvenile detention centers, and pretrial detention centers.²³⁹ And while the incarceration of all of these groups undoubtedly produces social costs and externalities in the community, externality solutions must be specifically tailored to a narrower set of problems. In the same way the death penalty has different externalities than incarceration, so too would people incarcerated under the guise of immigration detention yield different externality solutions than those convicted of domestic crimes. And since people incarcerated in state prisons for the latter are the biggest demographic of the incarcerated population, the prison tax focuses on people incarcerated in state prison.

State governments would impose the prison tax on local governments in the state's jurisdiction for the right to use its limited prison resources.²⁴⁰ If the state set a cost of \$30,000 per offender for every year of incarceration—which is close to the average cost of incarcerating a state inmate²⁴¹—the local actors would have to make difficult decisions on how to spend their funds. It would indeed take effort to determine the amount of the tax, which could be handled by a combination of experts in state departments of justice and bureaus of corrections in tandem with state budgeting and tax offices. Under the prison tax, local actors would retain their discretion to prioritize goals of law enforcement, prosecution, and sentencing practices in line with their constituents' preferences. But, to avoid a massive tax burden, these local actors would likely have to engage

PROSECUTION 559, 559–84 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2020) (proposing that prosecutors' offices pay a percentage of direct and collateral review court costs if they disregard screening recommendations for a death penalty charge).

238. See Sawyer & Wagner, *supra* note 10 (comparing the 631,000 incarcerated persons in local jails and the 226,000 incarcerated in federal prisons and jails with the 1,291,000 incarcerated in state prisons).

239. See LAW, *supra* note 87, at 9 (estimating that as many as 6.7 million Americans are under some form of detention or correctional surveillance).

240. See, e.g., Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 693–97 (2016) (suggesting that making prosecutors directly responsible for detention and imprisonment costs could encourage them to be more circumspect in charging and sentencing); Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395 (2017) (same).

241. See *supra* note 116 and accompanying text.

in punishment innovation to avoid needlessly and ineffectively sending so many offenders to prison while also investing in decarceration punishment tools that divert offenders into more effective programs.²⁴²

The tax should also be levied per annum and per incarcerated person. The \$30,000 hypothetical amount would be an annual fee, and perhaps there should be an entrance fee to process and onboard new offenders into the carceral system. This would not merely be a one-time expense, but the costs to local government coffers must be budgeted on a long-term basis just as the social costs are incurred on a long-term basis in the community. The entry fee would require local actors, especially prosecutors and judges, to think twice about sending people to prison. The annual fee would also require them to think twice about imposing unduly harsh and ineffective long prison sentences during plea bargaining and sentencing proceedings.

A state-imposed tax on the local government will necessarily place a heavy burden on each of these local actors and will impact how the chief executive allocates even more limited funds. Local funds and expenditures are allocated to different departments, so it may be hard to hold any one actor accountable with a prison tax. But this is part of the design. If a locality is charged \$1 million for a given year, does that come out of the police, prosecutor, or city hall budgets? These are some of the practical challenges of designing an effective tax system.

Fragmenting the tax also seems nearly impossible; holding *only* prosecutors accountable requires them to internalize the costs of incarceration when they only hold a measure of the responsibility. Law enforcement officers will have no incentive to slow down their arrests and detainments, and judges will face no accountability for continuing to sentence offenders to prison time. Without holding the other actors accountable, a tax against prosecutors will only exacerbate the horizontal fragmentation that already exists. The best way to hold all parties accountable is to find a way to hold the entire locality responsible. By holding all of these actors accountable with a blanket tax on the locality, the tax can push for horizontal coordination in decarceration efforts; judges and prosecutors will both be aware of the bottom line, as seen in their own annual budgets, and can coordinate in the courtroom with their incentives now aligned. The same can be true among prosecutors and law enforcement when setting enforcement and prosecutorial priorities. Even the city executives will have to focus on how they will encourage law enforcement and prosecutors to be more frugal with the use of state prison resources. If Bierschbach and Bibas are correct, horizontal fragmentation can only be fixed if policies introduce common goals and incentives, which a blanket tax on the local government would accomplish.

From an administrative point of view, a prison tax has a few advantages, along with a number of challenges, when compared to other externality solutions.

242. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 526 (2001) (recognizing that punishment is one of the aspects of criminal justice “that leave[s] the most room for innovation, and [is] the place[] where discretion plays the largest role”).

First, every state already has a robust tax infrastructure that handles collection, accounting, budgeting, oversight, and enforcement of tax revenue. Both state and local governments are well accustomed to these tax structures. But there are difficulties to actual implementation. State imposition of a local tax is something that would take some imagination and additional tax infrastructure.²⁴³ The solution may be statutory, may be regulatory, or could even require state constitutional amendments. Another avenue may lay in reimbursement or eligibility for state subsidies to local governments that are already being paid to bolster local education²⁴⁴ and disaster relief.²⁴⁵ Undoubtedly, local governments will challenge a state's authority to levy such a tax at all. The devil will be in the details, and although this Article does not seek to solve all of the intricate dynamics of local and state vertical interactions of law and tax policy, it posits a general thought project that can be translated into a policy proposal.²⁴⁶

Second, a prison tax has the flexibility to be responsive to local government needs in case of a crime wave or a sustained decrease in crime. Just as a state government may declare a natural disaster emergency to disburse funds to local governments, a state government should be responsive to local needs by adjusting the prison tax to account for crime rates and safety. This works well with the equilibrium concept raised in Part II.B. Because prison resources have different utility depending on fluctuating crime rates, optimal deterrence must be managed by experts in the state departments mentioned above. In times with

243. See, e.g., Aurelien Breeden, *City of Paris Fined Nearly \$110,000 for Appointing Too Many Women*, N.Y. TIMES (Dec. 22, 2020), <https://www.nytimes.com/2020/12/16/world/europe/paris-too-many-women-fine.html> [<https://perma.cc/KT5X-RENP>] (reporting that a government department fined another government department in the city of Paris for violating a regulation that required gender equity in government appointments).

244. See William Blankenau, *Public Schooling, College Subsidies and Growth*, 29 J. ECON. DYNAMICS & CONTROL 487, 487 (2004) (stating that “[m]ore than 90% of expenditures [for primary and secondary K-12 education] are financed by federal, state, and local governments”); Ronald C. Fisher, *The State of State and Local Government Finance*, 6 REGIONAL ECON. DEV. 4, 6 (2010) (stating that “state governments provide substantial grants to cities and school districts to fund education”).

245. See PEW CHARITABLE TRS., WHAT WE DON'T KNOW ABOUT STATE SPENDING ON NATURAL DISASTERS COULD COST US 8–9 (2018), https://www.pewtrusts.org/-/media/assets/2018/06/statespendingnaturaldisasters_v4.pdf [<https://perma.cc/XM5A-VK7E>] (discussing variations of state funding for natural disaster relief to local governments); see also FED. EMERGENCY MGMT. AGENCY, *Overview of Local, State, and Federal Response to a Disaster*, in UNIT 3: DISASTER SEQUENCE OF EVENTS, at 3.6, <https://training.fema.gov/emiweb/downloads/is208sdmunit3.pdf> [<https://perma.cc/B8JU-6NVX>] (stating that state governments serve as the agents and purveyors of funds to distribute federal dollars to local jurisdictions that request natural disaster relief money).

246. Even if the tax infrastructure runs into problems, Eric Posner suggests that nominal “Net Benefit” accounts can also provide incentives for policymakers to change behavior. See Eric A. Posner, *Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment*, 150 U. PA. L. REV. 1473, 1475 (2002) (suggesting that “net benefits accounts” serve an important auditing function by “aggregat[ing] information about agencies’ regulatory activities in a way that facilitates monitoring” by the public, scholars, and other governmental actors, while also altering regulatory actors’ incentives to take account of the full panoply of the costs and benefits of their actions by rewarding them when they make socially valuable decisions).

higher crime, the prison tax can be lowered; in times with lower crime—when prisons have less utility—the prison tax can be increased. And with an eye towards long-term decarceration, the trend over the next few decades would be to gradually increase the prison tax to discourage the overreliance on prison resources.

Flexible tax rates can also depend on each county or local government. Just as many local governments have different property and sales taxes, there is no need for a statewide flat tax on all local governments. Instead, taxes can vary county by county, city by city, and so forth, to account for the overuse of prison resources and incentivize different policies in places with traditionally high incarceration rates. Certain crimes could also carry lower taxes to address crime rates or even be exempt from the tax. But these exemptions would need to be thoroughly justified so that they do not become big enough to swallow the policy.²⁴⁷ Flexible tax rates may introduce volatility into the criminal policy budgeting system, but this can be mitigated with enough advanced notice. State departments can notify local governments of their annual tax liabilities and can give notice of tax rates moving forward if current trends continue. Such trends could include current crime rates, but also current incarceration rates, so that local governments can enjoy enough notice to determine their tax liabilities for their next annual budget.

Flexible tax rates can also be responsive to incarceration rates in another innovative way by taking into account the demographics of the individuals being incarcerated. Other externality taxes support such variable rates, such as tobacco products being taxed differently,²⁴⁸ gasoline and diesel fuels being taxed differently,²⁴⁹ and carbon tax advocates arguing to tax methane differently than carbon dioxide based on their relative negative GHG effects.²⁵⁰ Should the state tax local governments more for putting younger people behind bars if it is convinced that their incarceration will result in more opportunity costs than older people? Should the tax account for gender if incarcerating women and separating them from their children will have higher social costs than men? Parents versus

247. For example, we may want to continue to punish serious crimes like murder and rape with prison time based on retributive or deterrence goals. And certainly if violent crime increases, exemptions might be revisited to allow local actors to use prison resources without incurring a tax to respond to local needs.

248. See *Cigarette and Vaping Taxes*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/cigarette-and-vaping-taxes> [<https://perma.cc/6W9H-A5VH>] (discussing how different tobacco products, such as cigarettes and vaping products, are taxed and the variances in tax rates among different states).

249. See *Gas Tax by State for 2020*, IGEN BLOG (Oct. 2020), <https://igentax.com/gas-tax-state/> [<https://perma.cc/PV7D-46TB>] (outlining different taxes per gallon of different types of fuel as levied by each state, including different rates for gasoline, diesel, aviation, and jet fuel).

250. See Dan Lashof, *Pricing Methane and Carbon Emissions Will Help US Meet the Climate Moment*, HILL (Oct. 26, 2021), <https://thehill.com/opinion/energy-environment/578528-pricing-methane-and-carbon-emissions-will-help-us-meet-the-climate> [<https://perma.cc/N5G5-A8CE>] (discussing potential political strategy to pass separate methane and carbon taxes based on different priorities and methane's larger impact on warming the atmosphere).

non-parents? Married versus single? Black versus White? There are a number of demographic attributes that policy experts may want to consider, but indisputably, incarcerating certain people will carry more social costs than incarcerating others; and this is indeed what we want a variable prison tax to take into consideration in order to mitigate and prevent those very social costs. These types of variable tax rates—that fluctuate by individual characteristics and immutable traits—are likely to run into constitutional, ethical, and practical problems, but nevertheless should be considered in the effort to minimize social costs, especially in disenfranchised and disempowered communities.

Regardless of the variable tax rates, one of the most important aspects of the tax is its Pigouvian nature. The ideal Pigouvian tax rate should be set so that total revenue will be equal with the total social costs, so that the revenue can then be invested to offset and ideally eliminate the social costs.²⁵¹ Calculating the dollar amount of the social costs of incarceration is an impossible task. State officials can nevertheless set the prison tax rate to generate enough revenue, with an eye toward mitigating social costs. The tax rate could be set at a rate that adequately deters local actors from overincarceration, supports rehabilitative programs in prison, or ensures robust investment in other local and community initiatives that have been proven to lower first-time offenses and recidivism.²⁵² State correctional agencies would find themselves with more resources that would be earmarked for prison reform projects to provide, for example, greater access to education, vocational training, and family visitation and contact. Third parties could also apply to the state for grants out of this prison tax fund to operate community programs. Examples of such community programs could

251. See Kimberly Amadeo & Eric Estevez, *Pigouvian Taxes, Their Pros and Cons, and Examples*, BALANCE (Nov. 28, 2020), <https://www.thebalance.com/pigouvian-tax-definition-and-examples-4157479> [<https://perma.cc/TDW2-Y5JN>] (describing the ideal Pigouvian tax rate to be set “equal [to] the costs generated by the negative externality”); see, e.g., Frederick van der Ploeg & Cees Withagen, *Growth, Renewables, and the Optimal Carbon Tax*, 55 INT’L ECON. REV. 283, 283 (2014) (noting that in the context of a carbon tax, “[t]he optimal carbon tax should be set to the social cost of carbon, which is the present value of all future marginal damages from global warming”).

252. There are dozens of such programs that range from early childhood education to drug and mental health courts, and a number of interventions in between. See, e.g., 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, 1215 (2017) (studying “a panel of 264 cities spanning more than 20 years,” and finding that long-term models indicate “that every 10 additional community nonprofits in a city with 100,000 residents leads to a 12 percent reduction in the homicide rate, a 10 percent reduction in the violent crime rate, and a 7 percent reduction in the property crime rate”); Hanna Love, *Want to Reduce Violence? Invest in Place*, BROOKINGS INST. (Nov. 16, 2021), <https://www.brookings.edu/research/want-to-reduce-violence-invest-in-place/> [<https://perma.cc/8VG3-CXSG>] (compiling data that investing in infrastructure, economies, nonprofits, and other social interventions represent some of the most promising ways to effectively lower crime rates); Pettus-Davis & Epperson, *supra* note 178, at 3, 8 (finding that specialized drug and mental health courts significantly reduce recidivism and the need for incarceration); BROOKS, *supra* note 2, at 64 (discussing success of juvenile drug and alcohol treatment and mental health treatment that reduce recidivism); Paula Smith & Myrinda Schweitzer, *The Therapeutic Prison, in AMERICAN PRISON*, *supra* note 1, at 1, 4 (describing the success of a 141-prong instrument to measure rehabilitative qualities of prison programs that reduce recidivism).

include job placement, vocational training, and after-school programs; the third parties could meet a threshold of documented results of steering people away from first-time offenses or recidivism. As the prison population lowers over time, the prison tax could increase or decrease depending on whether the state government wanted to continue funding social and prison programs or use sunset provisions to gradually wind the programs down as the social costs decrease.

The prison tax, and its Pigouvian design, offers an innovative solution that can be effectively applied to this unique externality problem. Adding this level of economic accountability onto local actors is a fruitful project that maintains actors' enforcement, prosecutorial, and sentencing discretion while contributing to public safety.

2. *State Subsidies and Charge-Backs*

A Pigouvian prison tax on local jurisdictions offers a new way of thinking about punishment through the externality framework. This thinking keeps in mind the goal of gradual and sustainable decarceration that seeks to optimize the use of prisons. While this Article focuses on a prison tax as the most viable solution, the other side of the taxation coin would be a government subsidy system in which the federal and state governments could incentivize local governments to invest in the same decarceration programs discussed under the prison tax while diverting offenders to alternative punishment practices.²⁵³ The following section briefly explores this alternative and contrasts it with the prison tax.

A government subsidy would be roughly the opposite of a prison tax. Here, the state government would give tax breaks or grants to alternative punishment programs and incentivize local actors to utilize those programs instead of prisons.²⁵⁴ The externalities of mass incarceration would still be addressed through the different means of supporting alternative programs, effectively using state government power as a carrot instead of a stick.²⁵⁵ The federal and state governments could also give grants to local governments to further invest in existing alternative punishment programs, such as drug and mental health courts or restorative justice programs.²⁵⁶ While all such alternative punishment

253. As an example, California's realignment program allocated an estimated \$4.4 billion to counties to use discretionarily to fulfill the state's goal of cutting its prison population. See Joan Petersilia & Jessica Greenlick Snyder, *Looking Past the Hype: 10 Questions Everyone Should Ask About California's Prison Realignment*, 5 CAL. J. POL. & POL'Y 266, 272 (2013).

254. See Eck & Eck, *supra* note 20, at 292 (discussing subsidies as similar to traditional government regulation but differing in that they use inducements to change behavior by subsidizing goods and services).

255. See Ball, *supra* note 28, at 1063–64 (proposing a subsidy system in which state governments would distribute subsidies to counties to use for criminal justice purposes, including policing and incarceration).

256. See, e.g., Henry J. Steadman, Roger H. Peters, Christine Carpenter, Kim T. Mueser, Norma D. Jaeger, Richard B. Gordon, Carol Fisher, Stephen Gross, Eric Olson, Fred C. Osher, Chanson D. Noether & Carolyn Hardin, *Six Steps to Improve Your Drug Court Outcomes for Adults with Co-*

practices have varying degrees of surveillance and deprivations of freedom, they will likely have drastically lower social costs than incarceration.²⁵⁷

A subsidy and charge-back system adds further depth by implementing a government grant that can be “charged back” if the grantee engages in proscribed behavior.²⁵⁸ Charge-backs have been used in criminal justice going back to the 1960s in California’s probation subsidy²⁵⁹ and in Community Correction Acts adopted in a handful of states.²⁶⁰ These state subsidy programs awarded grants to local governments to invest in punishment innovations that would divert offenders away from already-overcrowded state prisons. The charge-back mechanism was triggered if a local government sent a person to state prison. Thus, the grant that was given to a local government had to be partially repaid to the state, since the state would have to spend its own resources to house the prisoner sent to them by the local government.²⁶¹ In the late 1990s and early 2000s, several states used a subsidy and charge-back system in juvenile justice to successfully reduce juvenile detentions.²⁶²

A subsidy and charge-back system has the unique characteristic of being both a carrot and a stick. That is, while taxes merely extract, a subsidy or grant gives local governments funds for diversion services and money to invest in

Occurring Disorders, 8 DRUG CT. PRACTITIONER FACT SHEET 1, 2 (Apr. 2013), <https://www.ndci.org/wp-content/uploads/C-O-FactSheet.pdf> [<https://perma.cc/8U9V-HRV7>] (outlining different alternative court systems for drug- and mental health-related crimes).

257. Abolitionists have forcefully argued against the expansion of alternative punishment tools, such as e-carceration, which are alternative means of control. *See, e.g.*, Michelle Alexander, *The New Jim Crow*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html> [<https://perma.cc/GEJ4-M4KP>] (discussing the shift to e-carceration as a further expansion of the PIC and surveillance state); James Kilgore, Emmett Sanders & Kate Weisburd, *The Case Against E-Carceration*, INQUEST (July 30, 2021), <https://inquest.org/the-case-against-e-carceration/> [<https://perma.cc/Q8TA-4EXX>] (arguing that e-carceration is another form of incarceration because it diminishes the humanity of the recipient and denies fundamental liberties); Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 645–46 (2019) (arguing that e-carceration technologies increase social marginalization and racialize surveillance).

258. In addition, a pure charge-back system could also be implemented, given the approximately \$568 billion that states already transfer to subsidize local government programs. *See* URBAN INSTITUTE, *supra* note 202.

259. *See* Peter R. Jones, *The Risk of Recidivism: Evaluating the Public Safety Implications of a Community Corrections Program*, 19 J. CRIM. JUST. 49, 50 (1991) (detailing the history of charge-back programs in the United States).

260. *See id.* (discussing California, Minnesota, and Kansas programs).

261. *See* Mary Shilton, *Community Corrections Acts May Be Rx Systems Need*, 57 CORRS. TODAY 32 (1995) (stating that chargebacks “cut funding to localities that sentence too many low-level offenders to state prisons”).

262. *See* Eric Cadora, *Justice Reinvestment in the US*, in JUSTICE REINVESTMENT—A NEW APPROACH TO CRIME AND JUSTICE 9, 9–16 (Rob Allen & Vivien Stern eds., 2007), https://www.prisonstudies.org/sites/default/files/resources/downloads/justice_reinvest_9_high_res_0.pdf [<https://perma.cc/G799-XRC2>] (discussing Oregon, Michigan, Ohio, and Connecticut programs and success); *see also* Aurélie Ouss, *Incentives Structures and Criminal Justice* 3 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685952 [<https://perma.cc/UT7B-QSL5>] (finding that the 1996 California Juvenile Justice Realignment, which shifted the costs of juvenile corrections from states to counties, led to a drop in juvenile incarceration).

programs that would otherwise be funded by the prison tax revenue collected by the state government. While states would be hard-pressed to offer large enough subsidies or grants to all participating local jurisdictions in order to be effective, the federal government could subsidize this effort by divesting from the PIC and reinvesting in productive subsidy and grant programs. The federal government spends billions of dollars every year subsidizing law enforcement militarization. These funds can be more effective if used to lower crime rates through local economic investment and empowerment.²⁶³ These types of subsidies and charge-backs have similar incentive structures to both fund local programs to lower crime rates and disincentivize the overuse of state prison resources.²⁶⁴

Perhaps we will get more with honey than with salt, but there is no reason to believe that the two cannot work in tandem. As an example, many states use a tax on gasoline in tandem with a subsidy for hybrid and electric cars to encourage consumer choices that help reduce carbon emissions.²⁶⁵ The money raised by the prison tax will indeed be somewhat of a grant program to be reinvested in reforming existing prisons and other community programs. There could also be a separate subsidy or grant program on top of the prison tax that would likely yield beneficial results. However, this would depend on a given state's resources and willingness to reduce incarceration.

3. *Cap-and-Trade*

The prison tax, subsidy, and charge-back systems described above are likely the most administratively efficient externality solutions to decarcerate, but

263. See Lauren-Brooke Eisen, *The Federal Funding That Fuels Mass Incarceration*, BRENNAN CTR. FOR JUST. (June 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/federal-funding-fuels-mass-incarceration> [<https://perma.cc/G8Q9-64D4>] (describing the immense federal subsidies that fuel and incentivize state incarceration, including the Department of Justice "itself distribut[ing] more than \$5 billion in federal grants to state and local governments annually," the additional "funding that law enforcement agencies across the nation get from the Department of Homeland Security," the "[h]undreds of millions more come through the Department of Defense, which facilitates the transfer of military-grade weapons and armored vehicles to police departments," and the \$360 million provided by the Department of Agriculture "to build jails in rural communities since 1996"); Spencer Ackerman, *US Police Given Billions from Homeland Security for 'Tactical' Equipment*, GUARDIAN (Aug. 20, 2014), <https://www.theguardian.com/world/2014/aug/20/police-billions-homeland-security-military-equipment> [<https://perma.cc/T3FY-5BE3>] (documenting billions of dollars distributed to state and local governments to assist with counter-terrorism measures over several years).

264. See Kate Battiato, Callie Gray, Patrick Mueller & Angela Witt, *Justice Alternatives for Wisconsin: Reducing the Costs of the Criminal Justice System* 21–22 (Univ. of Wisc.-Madison, La Follette Sch. Workshop Repts., 2007), <https://minds.wisconsin.edu/bitstream/handle/1793/36786/justice.pdf?sequence=1&isAllowed=y> [<https://perma.cc/CPD4-AXPU>] (discussing how charge-back programs change the incentives of local actors such as prosecutors and judges to divert criminal offenders away from state prisons).

265. See ZIFEI YANG, PETER SLOWIK, NIC LUTSEY & STEPHANIE SEARLE, INT'L COUNCIL ON CLEAN TRANSP., *PRINCIPLES FOR EFFECTIVE ELECTRIC VEHICLE INCENTIVE DESIGN* iii (2016) (discussing the range of economic incentives used by different governments to encourage consumers to invest in electric vehicles); see *supra* note 249 and accompanying text discussing gasoline taxation.

a CAT system also carries promise. A CAT system applied to mass incarceration would combine the property rights of the Coase Theorem with market forces to trade resources with other local jurisdictions.²⁶⁶ And this would not be the first time scholars have designed a CAT system for the criminal justice system and prison reform.²⁶⁷

As a starting point, it is beneficial to illustrate how CAT systems are designed to solve environmental pollution externality problems. In the environmental context, a CAT system requires at least four steps. The first step is the government's role in setting a cap of GHG emissions and deciding what specific industries and emissions this cap will cover.²⁶⁸ The second step requires the government to allocate allowances to GHG emitters that are regulated by the cap. With these allowances, companies are assigned a certain amount of GHG emissions they are allowed to emit, usually for an annual term. This essentially assigns a property right to pollute that diminishes over time.²⁶⁹ The third step is verifying offsets, which are third parties that operate businesses, nonprofits, or other programs that help take GHGs out of the atmosphere.²⁷⁰ For example, a company that sets up machines that capture methane (a common GHG) from livestock farms before the methane has a chance to rise into the atmosphere can apply to be a licensed offset provider.²⁷¹ Because these providers help to prevent GHGs from getting into the atmosphere or preliminarily remove GHGs from the atmosphere (such as planting and maintaining trees and wildlife preserves), they

266. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8–9 (1960) (outlining what is now called the “Coase Theorem,” which states if transaction costs are low, assigning property rights that can be traded and bargained for will lead to both the most efficient solutions to solve social costs and to a Pareto-efficient outcome for all parties); see also Robert W. Hahn & Robert N. Stavins, *The Effect of Allowance Allocations on Cap-and-Trade System Performance*, 54 J.L. & ECON. S267, S269 (2011) (discussing the Coasian roots of a CAT system assigning property rights that can be traded to find their highest-value user); T.H. Tietenberg, *Economic Instruments for Environmental Regulation*, 6 OXFORD REV. ECON. POL’Y. 17, 21 (1990) (“[A] ‘well-defined’ emissions trading or emission charge system could cost-effectively allocate the control responsibility for meeting a predefined pollution target among the various pollution sources.”).

267. See Eck & Eck, *supra* note 20, at 297–99 (describing how a CAT system would work to lower local crime rates based on focusing enforcement on high crime areas); see also Cheryl L. Jonson, John E. Eck & Francis T. Cullen, *The Small Prison*, in AMERICAN PRISON, *supra* note 1, at 215, 226–28 (describing a CAT system that would regulate counties on how many offenders they can send to prison).

268. See METCALF, *supra* note 70, at 74.

269. See DANNY CULLENWARD & DAVID G. VICTOR, MAKING CLIMATE POLICY WORK 70 (2020) (stating that the fraction of allowances that governments auction to emitters tends to rise as governments reduce the number of free allowances the government gives out); Stephen Sewalk, *Carbon Tax with Reinvestment Trumps Cap-and-Trade*, 30 PACE ENV’T. L. REV. 580, 590 (2013) (discussing allowances as a property right to emit GHGs).

270. See CULLENWARD & VICTOR, *supra* note 269, at 87–88 (explaining administration of offset credits).

271. Offsets can be difficult to administer because of fraud, such as when an offset provider intentionally or negligently reports that their business or service removes more GHGs from the atmosphere than it actually does. See METCALF, *supra* note 70, at 82 (discussing fraud of offsets and allowances).

can *offset* the emissions of companies that are covered under the CAT system.²⁷² The fourth step is to set up a trading marketplace to allow the emitting companies to trade their allowances and buy offsets.

Because of the administrative complexity,²⁷³ a simplified example below may illustrate the benefits of a CAT system. At the first step, a government decides to cover an industry that has ten companies that emit GHGs and sets an annual cap of 1,000 tons of GHG emissions. Based on previous emissions and organized lobbying,²⁷⁴ the government would assign those ten companies a certain number of allowances that add up to the 1,000-ton cap. Company A may get 250 tons worth of allowances, and Company B may get 150 tons. At the same time, offset companies can receive government approval to sell their own offsets; if an environmental company helps to capture ten tons of GHGs each year, it can sell those ten tons to companies who may need them so as not to exceed their annual allowance. If Company A plans, or is on pace, to emit 300 tons of GHGs, it has a few choices in the existing marketplace. It could buy fifty tons of offsets, it could buy fifty tons of leftover allowances from Company B who may only be planning to emit one-hundred tons that year,²⁷⁵ or it could go over its allowances. Doing the latter could subject the company to legal penalties, which could go as far as halting its emissions altogether.²⁷⁶ The following year, the government could lower the cap (perhaps to 900 tons) and repeat the process with the goal of gradually reducing GHG emissions. This gives companies time to plan their emission schedules and flexibility to invest in research and development to innovate solutions to lower their emissions.

To design an effective CAT system that challenges mass incarceration, policymakers must avoid making decisions that can derail the system before it ever gets started. One consideration is the breadth of the CAT system. In the

272. For offsets to be effective, they must meet an “additionality” standard, meaning that the GHGs they remove from the atmosphere would not have been removed unless a company pays for the offset. If an offset company were removing GHGs in the normal course of its business, then it would not truly be *offsetting* the extra GHGs being emitted by the CAT industries. See CULLENWARD & VICTOR, *supra* note 269, at 87–91 (explaining the economics of offset credits).

273. See METCALF, *supra* note 70, at 82 (discussing several areas of procedural complexity when setting up and administering a CAT system).

274. See CULLENWARD & VICTOR, *supra* note 269, at 63 (“[F]irms that are highly organized press for free allowances [and] have no incentive to ask only for what they need.”).

275. In this scenario, Company B can also “bank” its allowances by saving them for the following year. This way, it has extra allowances it can use itself or keep as assets down the line. However, banking allowances and offsets have traditionally led to market instability, since more banking results in fluctuations in market prices. See *id.* at 125–27 (discussing the European Union Emission Trading System’s and the Regional Greenhouse Gas Initiative’s successful management of excess allowances that threatened to destabilize the CAT system).

276. Many of these markets employ brokerage firms to manage the buying, trading, and selling of allowances and offsets. See Hahn & Stavins, *supra* note 266, at S271. Brokerages are used to reduce transaction and information costs so that everybody knows what the prices are, and there is transparency in how many allowances and offsets are in the marketplace at any given time. See also METCALF, *supra* note 70, at 76 (discussing the benefits of using brokers that excel in “matching buyers and sellers, determining market clearing prices, and facilitating trades for modest fees”).

environmental field, there are several industries that emit GHGs. Some examples include oil, electricity, gas, coal, and transportation—and each has different emission outputs that have unique political concerns and interests.²⁷⁷ CAT systems that limit their own breadth by focusing on one or two of these industries tend to be more successful, since it is more difficult to manage a one-size-fits-all model.²⁷⁸

The parallel in the punishment sphere would be to focus on one punishment industry. Thus, instead of treating bail reform, mass incarceration, and immigration detention under one system, designing a system that specializes in lowering the state prison population will likely be more effective. Setting a cap is also difficult because it requires a high level of expertise to determine the optimal level of pollution, which will change over time.²⁷⁹ For this reason, legislatures are likely not the best governmental actors to manage a CAT system, but are better off delegating this to an agency that can regulate, supervise, and enforce the changing cap. Agency politics and regulations will add more administrative complexity to any CAT system. However, state sentencing commissions and departments of corrections are already in place around the country that have the resources and expertise to make these decisions, in consultation with public comments from other organizations and advocates.²⁸⁰

Another related design question is that of governmental hierarchies in operationalizing a CAT system. The lack of coordination in global politics is one of the reasons that the CAT system proposed in the 1997 Kyoto Protocol failed, and why there is still not a multinational CAT system to this day.²⁸¹ The contours

277. See CULLENWARD & VICTOR, *supra* note 269, at 55–60 (explaining political dynamics of different energy and transportation industries).

278. See *id.* at 53 (arguing that policymakers struggle to understand nuances of multiple industries when designing CAT systems); see also TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM FOR THE NEXT GENERATION* 43–44 (2015) (detailing the success of the Clean Air Act of 1990 CAT system to reduce sulfur dioxide); *id.* at 21 (detailing the challenges of the United States’ Regional Greenhouse Gas Initiative that covers nine Northeast and Mid-Atlantic states); CULLENWARD & VICTOR, *supra* note 269, at 22–24 (detailing the European Union’s Emissions Trading System and the Western Climate Initiative in California and Canada).

279. See ANDERSON & LEAL, *supra* note 278, at 98 (describing the difficulty of making predictions about the optimal level of pollution); You-hua Chen, Chan Wang, Pu-yan Nie & Zi-rui Chen, *A Clean Innovation Comparison Between Carbon Tax and Cap-and-Trade System*, 29 *ENERGY STRATEGY REV.* 1, 5 (2020) (“A major problem for the regulator is to choose the suitable emission cap and carbon trading price, or the CAT system will lose its regulation efficiency.”); CULLENWARD & VICTOR, *supra* note 269, at 49 (doubting the effectiveness of CAT systems if these predictions are wrong).

280. See BARKOW, *supra* note 50, at 173–75 (discussing the prevalence of state sentencing commissions and arguing for their expansion as expert agencies that can determine better sentencing practices).

281. See Avi-Yonah & Uhlmann, *supra* note 71, at 17–18 (explaining the failure of the Kyoto Protocol); CULLENWARD & VICTOR, *supra* note 269, at 21 (describing the Kyoto Protocol that imposed a cap for all industrialized countries and noting that the United States never joined, fearing the restrictions would “jeopardize the United States’ economy or lifestyle”); ANDERSON & LEAL, *supra* note 278, at 158 (discussing global politics and the need for enough nations to agree to the CAT system for it to be effective).

of federalism and localism are not easily navigated, but provide a framework for implementing federal, state, and local accountability for mass incarceration via a CAT system. Since the vast majority of incarcerated persons are in state prisons,²⁸² the most effective marketplaces would be ones set up by individual states with federal oversight and incentives. The federal government could also set up its own CAT marketplace for its own prison system, but it would have little power to commandeer state prison reform policy. Federal coordination of a national policy to lower the prison population is a necessary step. The federal government has many tools at its disposal to use the power of cooperative federalism to incentivize states to join its program through funding, grants, political pork, and administrative support.²⁸³ Alternatively, the federal government can use its tools of coercive federalism to cut existing funding unless states adhere to the national policy goals.²⁸⁴ Certainly, not all states will participate, but there is good reason to believe that many will since thirty-nine states have already devoted resources to lowering their prison populations in the past decade.²⁸⁵ Then, individual states can set up their own infrastructure and marketplace for a CAT system.

A CAT system for prisons is markedly different than the government's regulation of private GHG emitters since the primary actors facilitating incarceration are public officials. Thus, the best way to operationalize a CAT system for government-owned assets—here, prison space—is to treat local government actors as the emitters, similar to the prison tax and subsidy and charge-back systems.²⁸⁶ Each state can set a cap, allocate allowances to local governments or specific prosecutors' offices, and maintain a marketplace where

282. See Sawyer & Wagner, *supra* note 10 (over three-fourths of the U.S. incarcerated population are housed in state prisons and local jails).

283. See Sam H. Clovis, Jr., *Federalism, Homeland Security and National Preparedness: A Case Study in the Development of Public Policy*, 2 *HOMELAND SEC. AFFS.* 1, 5 (Oct. 2006) (citing MORTON GRODZINS, *THE AMERICAN SYSTEM* (1966)) (explaining cooperative federalism, in which funding is exchanged by the federal government in return for state and local government performance to implement federal policies and standards); see also Lauren-Brooke Eisen & Inimai M. Chettiar, *The Reverse Mass Incarceration Act*, *BRENNAN CTR. FOR JUST.* (Oct. 12, 2015), <https://www.brennancenter.org/our-work/policy-solutions/reverse-mass-incarceration-act> [<https://perma.cc/7WP6-J2CW>] (calling on the federal government to give \$20 billion over ten years to states that reduce prison populations by at least 7 percent over three years without seeing any real increases in crime); PFAFF, *supra* note 13, at 164–65 (describing substantial funds the U.S. Department of Justice already spends on its Justice Reinvestment Initiative, which awards billions of dollars to states to incentivize them to implement more efficient criminal justice policies).

284. See, e.g., Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 *OHIO ST. J. CRIM. L.* 51, 63 (2008) (discussing Congress's mixed attempts to use federal funds as a "stick" to "prod all States to enact similar laws and to provide for a national registration system"); PFAFF, *supra* note 13, at 102–03 (discussing how federal grants were used with mixed success to encourage states to adopt "truth in sentencing" laws and develop registries for people convicted of sex crimes).

285. See *supra* note 226 and accompanying text.

286. See BARKOW, *supra* note 50, at 149 (calling for laws and mechanisms to be used to hold prosecutors accountable for the costs of their policies).

prosecutors can buy, trade, and sell the limited resource of state prison space.²⁸⁷ A CAT system where prosecutors can no longer send people to prison for free, but instead have a limited number of allowances, means they will have to be judicious in managing this new property right. To be clear, the property right here would be their diminishing right to use state prison beds.²⁸⁸ All the while, prosecutors will maintain their discretion and flexibility to use their limited office resources to buy allowances from other prosecutors across the state or to buy offsets²⁸⁹ to meet their public charge of protecting the community and their private charge of getting reelected or reappointed.

Offsets would maintain their basic function and would require investment in local programs that have been proven to reduce rates of first-time offenses and recidivism.²⁹⁰ And because crime and deterrence are mostly state and local issues, offset programs would need to operate at the local level. City and county prosecutors would have to invest in these offset programs within their own jurisdiction to ensure that this truly does offset the social costs felt locally. And like other successful CAT systems, each state would be encouraged to limit or outright prohibit how many allowances a prosecutor's office can "roll-over" to the next year. This limit would deter prosecutors from saving allowances just to be able to lock up more people the next year.²⁹¹

A CAT system would also benefit from the "teeth" of consequential enforcement that global CAT systems have never enjoyed. States have tremendous power to hold the prosecutors their localities employ to account, but unfortunately states rarely use this power. If a prosecutor's office chooses to flout the cap or consistently fails to use its state-allocated resources effectively, a state can remove the head prosecutor. Alternatively, the state can also limit a prosecutor's ability to run for reelection. Without tough enforcement

287. California has already been forced to operate under a cap of prison space under order of the Supreme Court in *Brown v. Plata*, 563 U.S. 493 (2011), which held that the state's overcrowded prisons violated the Eighth Amendment. Thus, California adopted a system of realignment where it successfully reduced the prison population by 35,000 while simultaneously enjoying a decline in violent crime rates. See PFAFF, *supra* note 13, at 14, 152.

288. These market-based solutions also have the benefit of preventing overcrowding, which is an epidemic in the prison system. With the right oversight, prosecutors and state corrections agencies will be held accountable for using only one prison bed for one incarcerated person. With this type of resource allocation, prosecutors and the state's prison system will no longer be able to send multiple offenders to prison for every one prison bed available. While state corrections agencies may respond by simply converting more space to house more prisoners (such as recreational rooms, classrooms, and other usable space), cases like *Brown v. Plata* should give these agencies pause.

289. See Johnson, Eck, & Cullen, *supra* note 267, at 227.

290. There are dozens of such programs that range from early childhood education to drug and mental health courts, among others. See, e.g., Pettus-Davis & Epperson, *supra* note 178, at 3, 8 (finding that specialized drug and mental health courts significantly reduce recidivism and a need for incarceration); BROOKS, *supra* note 2, at 64 (discussing success of juvenile drug and alcohol treatment and mental health treatment that reduce recidivism); Paula Smith & Myrinda Schweitzer, *supra* note 252, at 4 (describing the success of a 141-prong instrument to measure rehabilitative qualities of prison programs that reduce recidivism).

291. See *supra* note 275 and accompanying text.

mechanisms, it is unlikely that prosecutors will respect a CAT system, since they might operate by the endowment principle—that prosecutors feel entitled to send as many people to prison as they need, since they have always enjoyed this freedom of prosecutorial discretion.²⁹² It is also likely that any proposal to reign in prosecutorial free riding on prisons will be met with opposition from prosecutors' national and state lobbying and professional organizations. This will test the political will of any state governor and legislature that seek to join a proposed federal program.

Unlike in the environmental context, a CAT system designed to reduce the prison population would not likely raise any significant revenue in the buying, selling, or trading of prison allowances or offsets.²⁹³ Prosecutors who need more allowances or offsets would spend locally budgeted funds that are allocated for these offices; thus, any little money that is transferred from one office to another will likely not generate much revenue at the state level. And the state should reinvest any small amount of revenue to cover the costs of administering the program and the marketplace. If successful, it is likely that the CAT system will pay for itself with the cost to administer the program covered by the savings the state will enjoy as its normal allocation towards prisons and corrections gradually decreases.

In addition to being more administratively burdensome than a prison tax or a subsidy and charge-back system, a CAT system that assigns property rights that govern people's freedom is morally unseemly. From an economics standpoint, a CAT system is worthwhile and viable, but applying this to a criminal justice system that disproportionately incarcerates men of color has hints of Jim Crow and slavery that would send troubling signals to society.²⁹⁴ Remember, the only way a CAT system could work is if it assigned property rights to local governments and prosecutors over human beings and their liberty interests. This is a tough policy point. A CAT system could be effectively designed to benefit poor and/or minority communities by lowering the incarceration rate that disproportionately spills social costs into their communities. However, a CAT system also communicates that public actors have a property interest in criminal defendants' and prisoners' freedom. This moral dilemma may indeed be enough to question whether a CAT system is the best solution to the externalities of mass incarceration.

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292. See POSNER & WEYL, *supra* note 80, at 67 (explaining how the endowment effect sets expectations of ownership over resources).

293. See Jeremy Carl & David Fedor, *Tracking Global Carbon Revenues: A Survey of Carbon Taxes Versus Cap-and-Trade in the Real World*, 96 ENERGY POL'Y 50, 51, 60 (2016) (estimating that CAT systems collected \$6.57 billion globally in 2013 alone).

294. See *supra* notes 58–61 and accompanying text. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing mass incarceration as a new form of racial subjugation).

While the prison tax remains the most pragmatic of the externality solutions, there is no reason why a subsidy and charge-back system with federal oversight could not be used in tandem or according to the preferences of states. Federal incentives may not persuade some states to implement a decarceration agenda, and, if they do, externality solutions may not be their preference. Different preferences among states and localities should be expected and encouraged, and their use of multiple decarceration tools of their choice would be a welcome change. After all, the crisis of mass incarceration requires an all-of-the-above approach to solve this problem going forward.²⁹⁵

In conclusion, it should be noted that this Section is not an exhaustive treatment of tax, subsidy, or a CAT design. There are many lingering questions about feasibility, aligning incentives, tax rates, allowance caps, and other technicalities. But the forest should not be lost in the trees. This Section successfully describes many design points that will both inspire further inquiry and facilitate additional discussion to get the most out of any potential externality solution.

IV.

THE EXTERNALITIES OF THE EXTERNALITY SOLUTIONS

The irony of externality problems and solutions is their cyclical nature. Any solution formed to mitigate an externality problem carries the risk of forming its own positive or negative externalities. Society and its representatives must make a choice between the price and costs of the new system and the old system. A prison tax or any other externality solution that seeks to mitigate the social costs of mass incarceration will indeed come with its own social costs based upon the ways it changes behavior. Specifically, law enforcement, prosecutors, judges, and even the community will experience any systemic impact. This Part considers the most salient of these costs and argues that the externality solutions can nevertheless be designed to address them while outperforming the status quo. These new costs and consequences create a natural avenue to discuss what the future of punishment might look like when checks, balances, and incentives are wrapped up in a new policy that appreciates the full weight of punishment's externalities.

The externality framework and its proposed solutions also position this project from an advocacy standpoint. Treating punishment and the carceral state as an externality means viewing these systems as a constant social pollutant that must be managed and regulated. Public health may improve if cigarettes were banned, but Prohibition and the current "war on drugs" have shown us why

295. See BARKOW, *supra* note 50, at 4 (describing criminal justice reform as an "all of the above approach to crime prevention" and to "not just rely on a criminal justice response"); FORMAN, *supra* note 7, at 12 (discussing African Americans' desire for an "all of the above" strategy in their fight against crime).

outright bans are ineffective.²⁹⁶ Banning carbon emissions before alternative energy solutions are fully available is not practical, although it would stop climate change in its tracks. Similarly, locking up human beings in cages is morally problematic, and mass incarceration must be addressed.²⁹⁷ And while society may reach a point through generations of advocacy where cigarettes are no longer consumed and GHG-producing processes are no longer needed, their externalities must be mitigated in the here and now.²⁹⁸ Although punishment is far from the only institution that suffers from negative externality problems, it is an institution that has failed to grapple with these issues and is perhaps ill equipped to do so with the current available tools.²⁹⁹ And as the analogy to drugs and environmental pollution goes, policy changes will indeed come with their own consequences; taxing cigarettes and regulating GHGs changes behavior on both sides of the market transaction of the buyer and seller, and so too would the externality solutions proposed in Part III.

Every policy action will have a reaction. The goal of a prison tax is to encourage local actors to use alternative punishment practices that have lower social costs than incarceration. And they may do just this by over-relying on incarceration, parole, and other incredibly restrictive and invasive conditions of release. This would be far from a welcome result, but it is a lesser of two evils. The externality framework cannot achieve a perfect or ideal criminal justice system. It is only designed to lower social costs, albeit even if it results in a new punishment system that has its own set of *lower* social costs. The externality framework of punishment is a tool that shows how all forms of punishment carry tremendous social costs to the community, and the analysis of mass incarceration

296. See, e.g., Wayne Hall, *What Are the Policy Lessons of National Alcohol Prohibition in the United States, 1920-1933?*, 105 ADDICTION 1164, 1165–66, 1171 (2010) (giving a background on the U.S. experiment with prohibiting alcohol in the 1920s and arguing that there are more effective ways to mitigate externalities of drug use than criminalization and overbroad prohibition); CHRISTOPHER J. COYNE & ABIGAIL R. HALL, CATO INST., FOUR DECADES AND COUNTING: THE CONTINUED FAILURE OF THE WAR ON DRUGS 2–4 (2017), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-811-updated.pdf> [<https://perma.cc/8L2H-EHT2>] (drawing parallels between the failure of the Prohibition era and the modern war on drugs, which sees the United States use drug laws to prohibit the use, sale, and trafficking of certain controlled substances that has failed to curb the illicit market for these substances while simultaneously ballooning the prison population in a costly failure of policy).

297. See Roberts, *supra* note 22, at 1298 (discussing the moral significance of mass incarceration and its impacts on the communities disproportionately impacted by its effects); see also Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 25 (2011) (“[M]illions of people have been rounded up en masse, locked in cages, and then released into a parallel social universe in which they can be discriminated against for the rest of their lives—denied the very rights our parents and grandparents fought for and some died for.”).

298. See PFAFF, *supra* note 13, at 186 (advocating for incremental change because “[w]e can’t go from soaring prisons one day to emptying them of the most serious offenders the next. Progress is incremental, and a reform movement that races ahead of itself could end up foundering as a result”).

299. See Comfort, *supra* note 34, at 273 (criticizing “the criminal justice system” for its “general disregard of the likelihood of such reverberations” that impact community members that are not caught up in the criminal justice system).

and its solutions may indeed come at the expense of expanding other forms of punishment. The social costs of these other forms of punishment should be subject to their own case studies and analyses with their own externality solutions.³⁰⁰ If the prison tax, for example, results in local actors using prisons less but using e-carceration more, this is far from ideal. Notwithstanding its inability to produce a utopian criminal justice system, the externality framework and its solutions will have accomplished the goal of lowering social costs and can redesign its externality analysis of e-carceration in the generation to come.

It is debatable whether these punishment trade-offs are one for one. For example, prosecutors may seek to avoid sending somebody to prison for one year if that person consents to two years of e-carceration during plea negotiations or consents to some other surveillance-heavy alternative punishment. This type of trade-off would increase punishment, and any expansion of alternative punishments would continue to disproportionately affect poor and/or minority communities as they always do.³⁰¹ Disparities in punishment exist, and the externality framework alone cannot solve these disparities, which are deep seated in the criminal justice system. The externality framework and the prison tax, however, would not make things worse for poor and marginalized communities but actually seek to mitigate the social costs. For those sent to prison, money would in turn be invested in the community. For those subject to alternative forms of punishment—when they would have otherwise been sent to prison—the net benefits favor the community. And for those that would have been subject to an alternative form of punishment in any event, nothing would change from how they would have been treated under the old system.

Prosecutors and judges may also try to reduce their prison incarceration numbers by relying more on local jails.³⁰² This was a key criticism of California's realignment campaign, although this critique was somewhat

300. See *supra* note 257 and accompanying text (citing abolitionist and reformist scholars that have highlighted the costs of e-carceration).

301. See generally RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CROW (2019) (discussing how technology has been used as a seemingly racially neutral way to govern our preferences and provide services, but that in reality reinforces stereotypes and racism, since human preferences are unavoidably coded into these programs); Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 490–91 (2021) (arguing that racial justice initiatives must be used to inform criminal justice technology tools instead of being layered on top of current practices that produce racial disparities); Torin Monahan, *Questioning Surveillance and Security*, in SURVEILLANCE AND SECURITY: TECHNOLOGICAL POLITICS AND POWER IN EVERYDAY LIFE 1, 10 (Torin Monahan ed., 2006) (“Technologies are neither separate from society nor are they neutral tools . . . [i]nstead [they] are part of the social problems they are intended to correct.”).

302. To comply with the constitutional mandate to lower its prison population and manage overcrowding, California shifted much of its prison population into local jails and gave subsidies to local counties to maintain these jails. See PFAFF, *supra* note 13, at 151 (explaining “at least twenty-eight of California’s fifty-eight counties have received a total of \$1.7 billion in state aid for this purpose” and “the voters in California approved a referendum making these state subsidies permanent”).

unfounded since overall incarceration decreased.³⁰³ But even if local actors decide to send more people to their city and county jails as opposed to state prisons, this only *may* be a better result that arguably comes with lower social costs and higher local accountability since local jails are funded by local budgets. Jails, however, have terrible living conditions that would be worsened by further overcrowding. Fresh analyses would determine if local jails returned lower social costs than state prisons. On the one hand, incarcerated persons in jails have shorter sentences and are closer to their families and support networks; prisons are often in rural areas that separate incarcerated people from these networks. On the other hand, medical and rehabilitation services may be more robust in prisons than in local jails because more state resources are being poured into fewer state prisons. Local jails may suffer from poor and inconsistent services since the turnover rate is higher, which means inmates may not have the time necessary to get behavioral or other services and make breakthroughs. Once again, an overreliance on jails rather than prisons would simply move the problem to obfuscate state prison numbers and avoid the economic accountability of the prison tax.

Another issue is whether prosecutors and law enforcement might overcorrect by under-policing or under-charging in order to avoid the prison tax or charge-backs. For example, would an economically minded prosecutor ever under-charge a murder to avoid the exorbitant taxes of sending someone to prison for life? Would law enforcement and the city's chief executive prioritize chasing petty crime and misdemeanors to avoid having to arrest a large number of potential felony offenders, since prosecuting them would result in higher taxes or charge-backs? If sending people to state prisons for serious crimes costs a lot of money, could local actors simply stop prioritizing investigating, solving, and prosecuting such serious and violent crimes? This would undoubtedly result in pushback from local voters if serious property and violent crime rates increased. Local voters are in tune enough with property and violent crime to make sweeping changes in local elections, holding their local political actors accountable for something as important as crime. Although voters are often misinformed about crime rates, they form visceral reactions to serious crime that they see in their neighborhoods that impacts their friends, neighbors, and local businesses. It is hard to sweep a murder under the rug or to not respond to an increase in street robberies or vehicular burglaries. Local actors will still have to appropriately pursue and prosecute people who break the law in order to be reelected. They cannot shirk this responsibility just to save money in a new prison tax or subsidy and charge-back system. Instead, what these externality solutions are designed to do is to get local actors to rely on alternative punishments with lower social costs, as opposed to ignoring crime altogether.

303. See *supra* note 233.

Another consideration is that any policy change will always be subject to gamesmanship by local actors who will maintain their discretion to incarcerate people, albeit at a cost. A number of jurisdictions could decide to reallocate funds away from productive public services—like schools, transportation, and economic development—to fund the increased revenues needed to pay the new prison tax and keep the jurisdiction's carceral record the same.³⁰⁴ Another possibility would be to maintain funding of these productive public services while raising local taxes to fund the prison tax to achieve the same perverse result of maintaining the jurisdiction's incarceration rate.

Increasing local taxes would introduce a level of political accountability that bolsters the economic accountability of the prison tax. If these taxes were passed on to local constituents in the form of diminished social services, or otherwise in the form of higher sales and property taxes, there may indeed be political backlash. All ends of the political spectrum react strongly to higher taxes if they are not sufficiently justified. For many on the left, the extraction of taxes to fund the prison tax and uphold the PIC would mobilize activism and political ouster of those in power; for many on the right, the imposition of higher taxes would never be popular, especially when the taxes support ineffective programs. The prison tax has a way of making everyone unhappy, which is the exact political dynamic necessary to institute change.

It is also possible that these constituencies would be willing to pay more in taxes to support their punishment mores. Incarceration rates vary widely between local jurisdictions,³⁰⁵ and we should not expect the prison tax to level off these disparities. We should expect existing disparities to continue among different cities and counties that are already committed to different carceral paths. The prison tax, subsidy, and charge-back systems are designed to bring about sharp change in a majority of jurisdictions but still allow an economic avenue to punish according to a community's values. Flexible tax rates could mitigate this problem, and such local constituencies could be subject to much higher taxes if they continue to exercise these counterproductive policies. But still, nothing would prevent these local constituencies from the freedom of self-determination as long as they are willing to pay for it.³⁰⁶

Along class lines, this may result in middle- and upper-class localities choosing to pay more in taxes to satisfy their collective values and peace of mind

304. Allegra M. McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525, 531 (2011) (using the example of Chicago to show that diverting public monies from social programs toward the criminal legal system has been a decades-long trend).

305. See PFAFF, *supra* note 13, at 30 (pointing out the importance of local variances and preferences in the “war on drugs” context, meaning that “there is no single ‘war on drugs,’ but rather somewhere between 50 and 3,300 wars on drugs, fought with varying degrees of intensity at different times, in different jurisdictions, and in different ways”).

306. See Ball, *supra* note 28, at 1078–79 (arguing that creating a system that highlights these disparities by comparing communities can spotlight racism and classism, which can be addressed appropriately by policymakers).

when it comes to public safety. Ironically, crime is often lower in these localities anyway, so their elected or appointed officials would not be sending as many people to prison in any event. And anybody they do send to prison would create something of a Robin Hood effect; the rich and middle class would be contributing to a Pigouvian prison tax system in which money is taken from their public funds and given to the poorer communities who disproportionately suffer the social costs of mass incarceration. The same would be true for mixed jurisdictions, where wealthy and poor neighborhoods share the same voting district. Wealthier neighborhoods may indeed pay higher property taxes to enable their elected officials to incarcerate criminal offenders, but those taxes over time would effect a positive change for their poorer neighbors. This process would still send many people to prison, but that is no different than the status quo. The prison tax adds value by fixing the problem incrementally with wise resource investments made by the state.

Any prison tax that is passed down to constituents in the form of higher property, sales, or other local taxes has to be accompanied with the right messaging. The public suffers from an immense information gap about criminal justice, which in part drives fear and tough-on-crime voting that has proved to be unshakable for the past thirty years.³⁰⁷ Perhaps this education opportunity would be a worthy investment of the Pigouvian tax revenue, where part of it can be dedicated to fund public service announcements and a public education campaign of news, television, internet, and other media, so the public can begin to grapple with criminal justice truths. Not only would the public be educated on why they are paying more in local taxes, but they would also learn that these taxes are being used to uphold a prison industry that does not make them any safer. To be sure, such a campaign would not be trusted in all localities nor by all demographics, but it could do enough to fuel the type of political backlash required to hold elected officials accountable for levying higher taxes to maintain high incarceration rates.

While wealthier or even more conservative jurisdictions may indeed choose to maintain their incarceration rate at a cost, it is also important to consider the impact on poorer communities that could be further impoverished by externality solutions. Could a prison tax turn into another “Black tax”³⁰⁸ or even a regressive

307. See BARKOW, *supra* note 50, at 2 (citing an example of the public’s general ill-informed opinions of criminal justice and crime rates).

308. See Ashleigh Eldemire, Kimberly F. Luchtenberg & Matthew M. Wynter, *Black Tax: Evidence of Racial Discrimination in Municipal Borrowing Costs*, BROOKINGS INST. (Nov. 9, 2022), <https://www.brookings.edu/research/black-tax-evidence-of-racial-discrimination-in-municipal-borrowing-costs/> [https://perma.cc/T7BN-3A9E] (referring to the “Black Tax” as financial discrimination that imposes higher costs for Black borrowers when compared to similarly situated White borrowers); Aris Foley, *New Research Details Effect of “Black Tax” on African American Homeownership*, HILL (Oct. 22, 2020), <https://thehill.com/policy/finance/521337-new-research-reveals-effect-black-tax-african-american-homeownership/> [https://perma.cc/324K-DYNR] (discussing similar impact showing Black homeowners pay more in property taxes than similarly situated White homeowners).

tax that impacts poor and/or minority communities more than wealthier communities? This is a possibility, but likely not one that would come to fruition. For example, if the argument is that poor and/or minority communities have higher rates of certain crimes, those very communities—and the prosecutors and officials they vote for—may have more need to use prison resources than wealthier communities that report lower crime rates. But this argument suffers from a few misunderstandings.

First, a higher crime rate does not translate into a higher tax rate under the prison tax. Jurisdictions will still have the ability to invest in alternative punishments, and it is poor communities that will likely get the most Pigouvian investments from the states to mitigate social costs to their communities. Second, the subsidy and charge-back system could provide poorer communities with funds upfront to invest in alternative programs and punishments, meaning these communities would only have to pay charge-backs if they use prison resources. Third, even if a tax or subsidy imposes financial burdens on these communities, this is the very type of problem that could be solved with flexible tax rates or exemptions, as discussed earlier. For example, the state government can adjust tax rates or provide exemptions for sending certain types of offenders to state prison. If designed well, externality solutions will allow poorer jurisdictions to enjoy the benefits of decarceration and investment that will lower social costs to their communities.

On the positive side, prosecutors and their relationship with defense counsel may change in defendants' favor. Prosecutors will be less likely to stack charges or overcharge with felonies to avoid the need to send people away for longer prison sentences.³⁰⁹ Since the prison tax and local government expenditures will be public, this information can serve as an arrow in defense counsels' quiver during plea negotiations if they know that prosecutors are more economically concerned about negotiating prison time. And since the ultimate decision-maker is the judge on matters of sentencing,³¹⁰ prosecutors may be more willing to file joint motions with defense counsel to ensure the best-case scenario for their own prosecutorial budget.

An unintended consequence of imposing a prison tax might support progressive prosecutors and law enforcement officials. Progressive prosecutors have faced tough opposition on a number of innovative initiatives that do exactly what this Article seeks to encourage; they have been charging less serious crimes and diverting people away from incarceration.³¹¹ A tax imposed on local

309. See Andrew M. Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1313–16 (2018) (discussing plea bargaining tactics of prosecutors).

310. Judges can accept or deny sentencing recommendations from both sides, but any attempt by externality solutions to control or incentivize judges will threaten the independence of the judiciary.

311. See, e.g., KRASNER, *supra* note 204; Jonah E. Bromwich, *Manhattan D.A. Sharpens Crime Policies That Led to Weeks of Backlash*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/nyregion/manhattan-da-alvin-bragg-memo-prosecution.html>

governments, however, would give progressive prosecutors necessary political cover to economically justify their actions. Such a tax would reward prosecutors in the vanguard with a legitimate boon to their political messaging, whereby they would be seen by their constituents as saving the locality money while the crime rate may not suffer as a result.

Neither the prison tax, a subsidy and charge-back regime, nor a CAT system can solve all of the injustices of mass incarceration, and the externality framework cannot create an ideal criminal justice system. These contributions have consequences and come with their own social costs, but they also provide a net benefit to poor and/or minority communities by lowering existing negative social costs and bringing us closer to an optimized use of incarceration as a punishment tool.

CONCLUSION

The externality framework of punishment offers a new approach to punishment theory and practice. As both a contribution to the community-focused trend of contemporary punishment theory and a synergistic approach that applies externality solutions to the social costs of mass incarceration, this new framework holds the social institution of punishment accountable for its full range of costs.

This new path also raises interesting questions about the future of punishment if regulated according to its externalities. Punishment has always been meant to mitigate the social pollutions of crime. In turn, a Pigouvian prison tax is the most viable externality solution that has a chance to garner the type of bipartisan political support that is required to make deep cuts to the prison population. Undoubtedly, a prison tax itself will have unintended consequences and result in creating social pollutions.³¹² Externalities are somewhat unavoidable in all of our social institutions, which leads to a never-ending analysis revealing few win-win policy scenarios. Lowering social costs and trading between the evils of punishment is part of the ongoing pursuit of the ideals of justice that humanity is never meant to fully attain. At least in the case of punishment, deep and lasting cuts to the prison population seem as close to a win-win for offenders, their families, and the community as it gets.

[<https://perma.cc/8WN9-X8TK>] (discussing political pushback that progressive New York City prosecutor Alvin Bragg faced when trying to implement changes to charging and incarceration policies).

312. See Comfort, *supra* note 34, at 273 (noting commonality of externalities in all social institutions and their need for infrastructure to respond to them).