

2013

On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to The Prisoner's Dilemma

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Recommended Citation

"On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to The Prisoner's Dilemma." *Iowa L. Rev. Bull.* 98 (2013): 97-111.

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On the Role of Cost–Benefit Analysis in Criminal Justice Policy: A Response to *The Prisoner’s Dilemma*

Sonja B. Star*

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With one in 100 adult Americans behind bars, and prison budgets consuming an increasing share of state budgets, few social policy issues compare in significance to the debate over which criminal offenders should be incarcerated and for how long. David Abrams’ article, *The Prisoner’s Dilemma: A Cost–Benefit Approach to Incarceration*,¹ makes an important contribution to that debate, offering an economic approach to assessing the net benefits of holding or freeing prisoners on the incarceration margin. In this short Response, I first highlight several strengths of Abrams’ piece and discuss the possible case that could be made for incorporating formal cost–benefit analysis (“CBA”) as a routine part of criminal justice policymaking, as well as some potential objections. Second, I offer more specific critical comments focused on Abrams’ analysis of the costs of incarceration, which I find to be less fully developed than his discussion of its benefits. Finally, I close with some brief thoughts on an issue Abrams makes a point of leaving open: the role that retributive justice concerns should play in an analysis of incarceration’s costs and benefits.

* Professor of Law, University of Michigan Law School. Thanks very much to Nick Bagley and John Bronsteen for helpful comments.

1. David S. Abrams, *The Prisoner’s Dilemma: A Cost–Benefit Approach to Incarceration*, 98 IOWA L. REV. 905 (2013).

I. ABRAMS' CONTRIBUTION: CAN FORMAL COST-BENEFIT ANALYSIS IMPROVE CRIMINAL JUSTICE POLICY?

Abrams' task is a Herculean (indeed, arguably Sisyphean) one, in that it requires each of the major utilitarian costs and benefits of incarceration to be quantified in dollars. Incarceration affects society in many complex ways, so although the overall approach is straightforward, the underlying estimation tasks are daunting. One could write a long article, or many, disputing the methods of the various studies Abrams cites and the values that should be given to the key terms in his equations. But the merits of Abrams' article are neither strictly wedded to those of any particular empirical estimate of each term, nor to the specific conclusions he reaches based on his preferred estimates. Rather, the piece sets forth a general method of analysis, identifies the information policymakers need in order to answer incarceration policy questions, provides guidance for how to sift through the thousands of relevant studies and look for the most rigorous methods, and highlights a few particularly well-designed studies on each key point.

Abrams is not the first to suggest that the costs and benefits of incarceration should be weighed against one another. Variations on CBA of criminal punishment go at least as far back as Jeremy Bentham. But Abrams brings to the table a firm grounding in the relevant empirical literature and an exacting critical take on its methods. He is especially adept at explaining why the causal identification methods used in some studies are more credible than those of others, an important lesson for policymakers, who might otherwise too readily assume that all empirical estimates are created equal. Abrams appropriately emphasizes studies that use quasi-experimental methods—for instance, randomization of judge or counsel assignments as an instrument for sentence length. Such studies are designed to respond to the problem of omitted variables bias, which is often a serious concern in studies relying on regression methods that depend on being able to observe and control for relevant confounding variables. Ultimately, Abrams concedes that there remains much empirical work to be done and predicts that the CBA method he outlines will increase in practical usefulness as the underlying research improves.

Abrams' contribution is also timely: state legislatures, courts, and corrections departments have begun to seriously consider the question of how to reduce prison costs and overcrowding without compromising public safety.² The existing research on that question has mainly focused on the problem of identifying the individual prisoners who pose the least risk of

2. *E.g.*, NGA CTR. FOR BEST PRACTICES, ISSUE BRIEF, STATE EFFORTS IN SENTENCING AND CORRECTIONS REFORM (2011), available at <http://www.asca.net/system/assets/attachments/3702/1110SENTENCINGREFORM.pdf> (reviewing recent state initiatives).

recidivism, taking the need to limit prison populations as a given.³ Abrams addresses instead the first-order question of how many people to incarcerate in the first place.

In some ways, it is surprising that formal economic analysis like Abrams' is not already common in criminal justice policymaking. Non-criminal regulatory decisions are routinely subjected to formal CBA, often carried out by government by requirement of law.⁴ This is so even though they often involve quantification questions that are similarly challenging—for instance, estimating society's willingness to pay for particular environmental benefits, or the climate benefits of reducing greenhouse gas emissions.⁵ Moreover, regulatory CBA typically also requires the relative merits of *alternatives* to the proposed regulation to be assessed.⁶ Regulatory CBA is now a well-established feature of the administrative state, and it is perhaps curious that nothing like it has ever been incorporated into the carceral state. Incarceration, after all, is one of the most profound exercises of state authority.

Imagine, then, that a similar CBA requirement applied when the state adopted rules expanding the incarceration of its citizens. Too often in recent decades, legislatures have adopted policies that increase incarceration (such as mandatory sentencing laws, new criminal prohibitions, or "truth in sentencing" laws that curtail parole) without *any* serious critical assessment of those policies' costs or the availability of effective but less costly alternative crime prevention strategies.⁷ If legislatures

3. For brief reviews of the criminological literature and policy recommendations, see Jordan M. Hyatt, Mark H. Bergstrom & Steven L. Chanenson, *Follow the Evidence: Integrate Risk Assessment into Sentencing*, 23 FED. SENT'G REP. 266 (2011); Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1405–09 (2008). I have critiqued the current risk-prediction instruments used by some state courts on the basis that their practice of basing punishment on group membership promotes disparity and is likely unconstitutional. See Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, STAN. L. REV. (forthcoming); available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318940##.

4. For examples at the federal level, see Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (specifically requiring assessment of the effect of regulations on small businesses); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Office of Mgmt. & Budget, Circular A-4 (Sept. 17, 2003), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>.

5. See generally Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost-Benefit Analysis*, 99 CALIF. L. REV. 1557 (2011) (describing and critiquing efforts to monetize climate change effects).

6. See, e.g., Exec. Order No. 12,866, § 1(b)(3), 58 Fed. Reg. at 51,736.

7. See, e.g., Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180, 184 (1999) (quoting a speech by Chief Justice Rehnquist and stating that "mandatory minimums are generally not the product of careful deliberation . . . [and] 'are frequently the result of floor amendments to demonstrate emphatically that legislators want to get tough on crime'" (internal quotation marks omitted)); Mary Price, *Everything Old Is New Again: Fixing Sentencing by Going Back to First Principles*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 75, 80

or sentencing commissions were required by state law, or otherwise chose, to engage in an Abrams-style CBA before adopting changes to sentencing law or policy that would expand incarceration, it might force such critical assessment, and perhaps spur research that helps to fill gaps in existing knowledge. If so, it could substantially improve the decision-making process—even if the CBA is crude and the “right” estimate of net benefits remains elusive.

I am assuming here that CBA would operate principally as a *constraint* on the growth of the carceral state. Abrams does not make such an assumption; he applies his analysis evenhandedly to both cuts and expansions. Still, in practice I suspect that if rigorous CBA were incorporated routinely to all substantial changes in criminal justice policy, the effect would probably mainly constrain overzealous expansions, if only because there are many more expansions to analyze. Although cost pressure has lately given rise to policy interest in reducing prison populations, for decades the vast majority of changes to sentencing law and substantive criminal law have been in the direction of increasing severity—what Bill Stuntz referred to as a “one-way ratchet” driven by fundamentally “pathological politics.”⁸ In any event, one can probably safely assume that any major policy change that frees prisoners will *already* be subject to considerable analysis before passage (although perhaps with less rigor than Abrams’ approach offers). It is *increases* in severity that, historically, have often avoided serious debate. Moreover, if one were to seriously consider imposing *requirements* of CBA in criminal justice, these one-sided political pressures could potentially even provide a reason to apply such requirements only to expansions of incarceration, much as federal law requires CBA when regulations are to be expanded.⁹ A one-sided requirement could also be grounded in the foundational premise of punishment theory: when the state seeks to impose deliberate harm on an individual, it must justify it.

However, a CBA requirement (especially a one-sided one) is unlikely to be adopted for the same political reasons described above, so the idea at this point is merely a thought experiment. Moreover, it has drawbacks. The analogy to regulatory CBA, which has been widely criticized, does not support an overly sanguine view of the potential benefits of CBA in criminal justice. Abrams does not engage in detail with the regulatory CBA literature;

(2010) (noting that the major federal drug mandatory minimums were passed in response to basketball star Len Bias’s death, “in less than one week, without hearings, debate, or study”).

8. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505, 509 (2001).

9. See, e.g., Office of Mgmt. & Budget, Circular A-4, *supra* note 4, at 6 (explaining “a presumption against certain types of regulatory action” that requires “a particularly demanding burden of proof” to overcome). If the politics fundamentally change in the future, then the political case for a one-sided requirement could disappear.

it would have been useful to do so, because many of the critiques raised are equally applicable to the criminal justice context.

One of the most common criticisms concerns the challenges associated with *monetizing* the value of non-economic costs and benefits, which is often carried out via methodologically problematic contingent valuation studies.¹⁰ Abrams' CBA monetizes the crime prevention benefits of incarceration (multiplying all terms on the benefits side by a "cost of crime") as well as the "value of freedom" on the cost side. He cites differing studies using a variety of methods of estimating the "cost of crime" (one contingent valuation study and several that attempt to aggregate concrete costs like lost wages), and relies on a "revealed preference" measure of the "value of freedom," which I discuss in more detail in Part III. Abrams acknowledges the challenges of monetizing these values; in particular, he emphasizes the need for better research on crime costs. Still, it is probably too optimistic to expect anything but quite crude and highly contestable monetary valuations of most of the relevant terms to be available anytime soon; after all, decades in, regulatory CBA is still struggling with similar valuation problems.

In the regulatory context, some critics have proposed an alternative: instead of monetization, regulators should assess the net benefits of policies for human welfare or happiness, relying on recent psychological research on the determinants of subjective well-being.¹¹ Such an approach could likewise be applied to the criminal justice context. Indeed, it would be well grounded in standard utilitarian punishment theory, which requires maximization of societal happiness. No punishment theory emphasizes maximization of societal *wealth*, and a CBA along Abrams' lines can only be reconciled with utilitarian theory if the monetized values are an effective proxy for happiness or welfare. But are they? Critics of CBA argue that the amount people pay for something (much less the amount that they say that they are willing to pay for it) is often a very poor proxy for the amount that it actually improves

10. See, e.g., John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1658–63 (2013); Alexander Volokh, *Rationality or Rationalism? The Positive and Normative Flaws of Cost-Benefit Analysis*, 48 HOUS. L. REV. 79, 82–87 (2011). The contingent valuation, or "willingness-to-pay," approach assesses the cost of a harm based on how much people would pay to avoid it. This amount is in turn identified in one of two ways: (1) a "revealed preference" approach uses observational data about the amount people in the real world pay to avoid some risk of the harm; (2) while a "stated preference" approach relies on survey data that poses hypothetical questions. Both approaches have been criticized for, among other things, producing estimates that vary wildly based on small differences in study design. Some scholars have gone further and argued that monetizing non-monetary costs and benefits is simply theoretically incoherent, involving comparisons of incommensurable values. E.g., Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1562–70, 1578–80 (2002).

11. Bronsteen et al., *supra* note 10, at 1616–45.

their happiness.¹² If so, an approach that simply estimates happiness directly seems preferable, at least if (and this is a big if) the effects of crime and incarceration on happiness can be measured more reliably than their monetary costs.

Abrams does not address the possibility of assessing welfare rather than economic costs, but in fact, much of his article could helpfully inform such an analysis. For example, a welfare analysis would certainly take into account incapacitation and general and specific deterrence effects on crime rates. The translation of those changes into costs and benefits is what would differ. The “cost of crime,” like the cost to prisoners and the loss to society from budgetary expenditures on prison, would be estimated in terms of happiness (or perhaps some other measure of human well-being, such as “life satisfaction”), rather than dollars.¹³

Another critique of regulatory CBA focuses on regulators’ less-than-rigorous approach to assessing uncertainty and conflict in the underlying science. For instance, regulators sometimes simply average conflicting estimates of key terms, an approach that ignores the possibility that some of the conflicting estimates are presumably wrong.¹⁴ Abrams, in contrast, critically assesses the underlying research, and uses estimates drawn from specific credible studies to carry out the CBA. Where there are multiple well-designed studies to choose among, Abrams shows that the CBA can be repeated using the alternative estimates in order to calculate upper and lower bounds on the ultimate estimate of net benefits. He illustrates this point by providing a set of alternate estimates drawing on different studies’ estimates of the cost of crime. Even so, this example only shows what happens if you vary *one* of the terms in the model at once (the terms other than the cost of crime are held constant). One concern is that if one accounts for conflicting estimates of *all* the terms at once, the resulting bounds on the net-benefits estimate might be so wide as to provide little guidance to policymakers.¹⁵

12. See *id.* at 1615; Cass R. Sunstein, *Willingness to Pay vs. Welfare*, 1 HARV. L. & POL’Y REV. 303 (2007).

13. See 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); Mark A. Cohen, *The Effect of Crime on Life Satisfaction*, 37 J. LEGAL STUD. S325, S326–29, S348–51 (2008) (reviewing the literature and finding that overall county crime rates do not greatly affect life satisfaction, but actual crime victimization does); see also 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).

14. Masur & Posner, *supra* note 5, at 1580–87; see also Lynn E. Blais, *Beyond Cost/Benefit: The Maturation of Economic Analysis of the Law and Its Consequences for Environmental Policymaking*, 2000 U. ILL. L. REV. 237, 242–43 (critiquing the crudeness of the estimates on which environmental CBA has relied).

15. Even as it is, the varying cost-of-crime estimates produce quite large differences in “net benefits,” including variations in sign for four out of six crime categories and order-of-magnitude differences in magnitude for the others.

But perhaps narrower bounds would be achievable by reference to empirical research that is more crime-specific. Because Abrams is outlining a method of general application in this piece, he uses estimates for “crime” generally, or for broad categories such as “violent crime.” However, provided on-point empirical research is available, there is no reason his approach could not be applied in a crime-specific way. After all, legislatures usually consider sentencing questions in the context of particular crimes. For instance, if a legislature was considering increasing the penalty for selling cocaine by one year, it would want to know how cocaine dealers perceive and respond to sentencing law changes, how much cocaine an average incarcerated dealer would otherwise have sold on the outside during that year, what other crimes he would on average have committed, the extent of substitution by other dealers when one dealer is incarcerated, and so forth. Of course, this crime-by-crime approach would require specific studies to be carried out in each context, requiring a substantial investment of social resources. But this is not very different from the challenges posed by CBA in the regulatory context, in which regulators assess specific regulations of specific activities. Moreover, given the large expenses associated with incarceration, an investment of research resources that allows incarceration to be used more efficiently might well be cost-justified.

II. TOWARD A RICHER ACCOUNT OF INCARCERATION’S COSTS

Abrams’ objectives go beyond merely introducing a general cost-benefit approach; he also seeks to identify the best empirical research to date as to each of the quantities necessary to carry out that analysis. His assessment of the benefit side of the ledger focuses on three of the most commonly cited utilitarian justifications for punishment—general deterrence, specific deterrence, and incapacitation—and on estimating the costs of crime, a key term in estimating the value of each of these crime-prevention benefits.¹⁶ It is in this discussion that Abrams’ analysis is at its best, showing a strong command of the literature and providing characteristically clear explanations of causal identification strategies. By comparison, Abrams’ discussion of the *costs* of incarceration (a scant six pages of the paper) seems somewhat half-hearted. Abrams includes just two terms on the cost side of his calculations: the budgetary costs to the state and the value of freedom to the prisoner. In this Part, I argue that Abrams’ estimation of both these terms is problematic, and that he also omits other social costs of incarceration.

16. A fourth punishment objective, rehabilitation, is briefly discussed as part of the specific deterrence inquiry. While this may seem odd from a punishment theory perspective, it is sensible as an empirical matter, because the studies estimating incarceration’s net effects on an individual’s subsequent offending cannot disentangle these two causal mechanisms.

First, incarceration imposes its most obvious and, in most cases, its most severe harm on the prisoner himself. From a retributive perspective, one might wonder whether this harm ought to be considered a “cost,” a point I will return to in Part III. Utilitarian punishment theory, however, traditionally poses the question whether the social benefits of punishment are sufficient to justify the suffering imposed on the defendant. Any CBA of incarceration ought to take quite seriously the empirical question of how to quantify that suffering.

Unfortunately, the existing empirical research on this question is far thinner than, for instance, the deterrence literature. This is not Abrams’ fault, and indeed, his own prior study with Christopher Rohlfs¹⁷ provides one of the only attempts in the empirical literature to answer the question, and the only one Abrams relies on in *The Imprisoner’s Dilemma*. Because of its centrality, it merits particular attention. The study uses the Philadelphia Bail Experiment, which introduced a random source of variation into the setting of bail amounts (some judges were given guidelines), to assess the effect of bail amounts on defendants’ willingness to post bail and their eventual return for trial. The study is well conceived and well executed, and provides persuasive evidence on its central questions of how bail values affect trial appearance and bail-posting rates. In addition, Abrams argues that the study should be seen as providing general evidence of the “value of freedom,” as reflected by defendants’ willingness to pay for it, and on this point I am less persuaded. The study provides a start on the question, but taken alone, it is not enough to persuade me that we have a very good sense of how policymakers should value incarceration’s harm to the individual outside the bail context.

The estimate of the “value of freedom” that Abrams and Rohlfs provide is about \$1000 per ninety days for serious offenders, and about \$4000 per ninety days for less serious offenders (a difference they attribute to serious offenders’ low average wages). At the outset, these numbers seem strikingly low. Can about \$11 a day, or even about \$44 a day for less serious offenders (which is approximately what a minimum wage worker currently earns in six hours), really be the weight that policymakers should give to the harm prison causes the individual? After all, prison does not *only* involve lost wages; it is a massive restriction on daily activities, a separation from family and friends, a harsh physical environment, and prisoners also may experience loss of subsequent earnings, social stigma, and other disadvantages upon release.¹⁸ Abrams says that one can assume that a

17. See David S. Abrams & Chris Rohlfs, *Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment*, 49 *ECON. INQUIRY* 750 (2011).

18. E.g., JOAN PETERSILIA, *WHEN PRISONERS COME HOME* 3–12 (2003) (surveying challenges facing ex-prisoners). But see Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings*, 96 *AM. ECON. REV.* 863, 864–66, 874–75 (2006) (using random assignment of judges

“forward-looking offender” would incorporate all such costs into his decision whether to post bail,¹⁹ but if so, the low bail amounts posted might well suggest that real-world offenders are not, in fact, so forward-looking. The study finds that offenders are posting amounts that are similar to what would be their lost wages during the detention period. This in turn implies that the average offender values all of the other short-term and long-term costs of prison at *zero*—or else, more realistically in my view, that something else is going on.

As to what that something could be, there are several possibilities. One is simply that criminal defendants are shortsighted and do not, at the moment of the bail decision, consider all of the costs of incarceration. Second, the bail-posting decision might be substantially driven by ability to pay, rather than by willingness to pay. Contingent valuation studies are often criticized for conflating these concepts.²⁰ One might especially worry about this problem in this context; the population in question is largely impoverished and bail is not a trivial cost.²¹ Third, for defendants who are convicted and sentenced to prison, time spent in pretrial detention is credited against the prison sentence. Most defendants plead guilty and many (especially serious offenders) expect incarceration. In theory, though perhaps not often in practice, serving time immediately could even be *more* appealing than waiting until later if the conditions in the local pretrial detention are better than those expected in prison.²² So bail, for many defendants, means not precisely *buying* one’s freedom, but *borrowing* it in exchange for an equivalent loss of subsequent freedom plus a loan, and small permanent loss, of money.²³ This is paying for freedom in a sense, but it is not entirely obvious that it translates neatly into a contingent-valuation framework—at least not one that translates into the context of *punishment* policy, in which losses of freedom are permanent.

The second term on the cost side of Abrams’ ledger is the direct budgetary cost of imprisonment to the state. Estimating this cost is less difficult in one sense, because states keep track of expenditures, but Abrams may actually be overstating the extent to which this budgetary cost should count as a *social* cost. As Abrams points out, over 60% of prison budgets go

as an instrument and finding that among those incarcerated for at least some time, increased sentence length does not harm subsequent earnings and employment).

19. Abrams, *supra* note 1, at 950–51.

20. *E.g.*, Sunstein, *supra* note 12, at 310–11.

21. See Laura I. Appelman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1306 (2012) (“Judges often set money bail at an amount the defendant cannot afford.”).

22. Pretrial detention is purportedly “nonpunitive,” and therefore one might expect superior conditions, although in many jurisdictions the opposite is true. *See id.* at 1301–02.

23. The money lost permanently is relatively small because bail money itself is mostly a loan: Abrams and Rohlf explain in Philadelphia that defendants post 10% of the bail amount and receive 7% back. Abrams & Rohlf, *supra* note 17.

to pay prison employees.²⁴ But money that the state pays to its employees is not all deadweight loss to society. On the other hand, money spent on prisons might otherwise be used for more effective forms of economic stimulus. Society might gain much more if the government employed more teachers instead of prison guards, for instance. Thus, CBA should include an estimate of the net social loss or gain relative to whatever the government would otherwise have spent its money on, drawing on research on the relative effectiveness of different forms of stimulus.

A larger concern with the cost side of the equation is that it leaves out the many complex ways in which incarceration affects society beyond its budgetary cost and its direct effect on the prisoner. These include consequences for families and broader distortive effects on communities, which may be especially acute because mass incarceration is demographically and geographically concentrated. Abrams acknowledges this omission, stating that such costs might include:

promotion of racial stigma, poverty, absent parents, loss of economic mobility, distorted marriage markets for black women, detrimental effects on children, and increases in juvenile crime. These large-scale, societal harms are certainly of a magnitude that they would significantly impact a cost-benefit analysis. However, in this Article I confine myself only to the consideration of policy changes with relatively short-term impacts on incarceration. Because the policy changes discussed in this Article do not result in the abolition of the large-scale use of incarceration in society, I assume that these long-term effects will remain relatively unchanged.²⁵

This response is unsatisfying. Even though the policy changes Abrams discusses would not *abolish* large-scale incarceration, they would affect the extent of its use, and thus would affect the magnitude of all of the societal harms he mentions. Abrams recognizes that, for instance, general deterrence effects depend on the *rate* at which the government incarcerates people. It is odd, then, to suggest that effects on families or communities depend only on the *existence* of a system of incarceration. All of incarceration's costs and benefits depend on how many people society chooses to incarcerate and for how long.

Of course, assigning quantified values to very complicated social impacts is a very difficult task, but excluding things that are hard to estimate from a CBA is not a very satisfying answer—it purchases (relative) simplicity at the cost of accuracy. Moreover, there is considerable research attempting to quantify these impacts, mostly by criminologists and sociologists, and it

24. Abrams, *supra* note 1, at 948 fig.6.

25. *Id.* at 951 (citation omitted).

would have been useful for Abrams to offer his critical take on its merits and suggestions for improving it. I will not attempt to engage in such a review here, but I offer a couple of thoughts.

First, incarceration's most diffuse social impacts may be particularly difficult to assess rigorously. For instance, it is not obvious how to interpret a correlation between a jurisdiction's overall poverty rate and incarceration—it is possible that poverty *causes* incarceration (instead of, or in addition to, being caused by it), perhaps by increasing crime, or that both variables are influenced by other factors like the political environment. Some researchers sought to address this problem by taking advantage of variations in criminal justice policy—across time or jurisdictions—to study incarceration's effects, under the theory that such policies provide an exogenous source of variation in incarceration rates.²⁶ But here, too, there is some risk of reverse causation; jurisdictions might adopt policy changes for reasons influenced by poverty or by unobserved factors correlated to poverty. Another general concern is that incarceration's social impacts might play out slowly, even across generations, which makes it harder to interpret relationships between time trends in incarceration, poverty, and other effects.

But even if the broadest social effects of incarceration are particularly challenging to assess, its immediate impacts on family members (the subset of society that one would expect to be most affected) are fairly susceptible to empirical analysis. The majority of prisoners have minor children, and there is considerable research on the effect of parental incarceration on children's poverty, graduation rates, and other outcomes. While these studies generally find strong relationships, most rely on regression methods that do not permit omitted variables bias to be ruled out.²⁷ But the effects of parental incarceration could certainly be subjected to quasi-experimental methods like those Abrams advocates for assessing incapacitation and specific deterrence effects: while parental incarceration is obviously not randomly assigned, it can be influenced by random factors such as assignment of judges or counsel.²⁸ The principal limitation on such studies is probably data availability (in particular the ability to link family outcome data to criminal justice data including judge or counsel identifiers).

If family impacts could be quantified, the next step would be to translate them into social cost measures that are comparable to the other

26. See, e.g., Robert DeFina & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, 59 CRIME & DELINQ. 562, 581 (2013) (using instrumental variables including sentencing law differences in an analysis finding that, had incarceration not quadrupled over the 20-year study period, "poverty would have decreased by more than 20 percent, or about 2.8 percentage points").

27. See generally John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999) (reviewing the literature).

28. Cf. Kling, *supra* note 18, at 864–66 (using similar methods to assess effects on prisoners' post-prison earnings).

terms in the CBA. For instance, how much does a percentage-point increase in child poverty cost society? Answering this question is surely no less complicated than estimating the cost of crime—indeed, one of the social costs of child poverty may be an increase in crime, so the latter question may be embedded in the former. Still, this is also a question researchers have grappled with. For instance, one literature review considered studies of child poverty's effects on lost subsequent earnings and productivity as adults, crime, and health, and concluded that in the aggregate, “the costs to America associated with childhood poverty total \$500 billion per year—the equivalent of nearly 4 percent of GDP.”²⁹ About one-third of this estimate consists of an increase in the social costs of crime—illustrating that understanding the familial effects of incarceration is important even if one seeks merely to estimate incarceration's relationship with crime rates, much less to assess its aggregate social impact.³⁰

III. WHERE DO RETRIBUTIVE JUSTICE CONCERNS FIT IN?

For readers who think about criminal punishment from a retributive perspective, Abrams' article may seem to miss the point. If punishment is to be determined *exclusively* on the basis of moral desert, then Abrams' CBA could provide useful information for other purposes, such as planning budgets, but it provides no basis for changing incarceration rates. Stated this way, the retributive objection does not really provide room for compromise with Abrams' approach; there is no way to adjust the CBA to accommodate it.

But many readers might, instead, have a softer objection. Traditionally, judges are told to consider retribution *and* utilitarian objectives of punishment when they choose sentences—even though it is not obvious how these should combine to produce a single “right” sentence.³¹ Likewise, every first-year law student learns that both types of concern are pervasive in criminal justice policymaking. For instance, when legislatures set the statutory ranges for crimes, they presumably consider, at least implicitly, whether the punishment is fair as well as whether it will accomplish practical objectives. When analyzing the net benefits of pursuing a particular policy, then, is there not some way to incorporate retributive concerns?

In briefly discussing this question, I intend neither to defend a single answer to it nor to offer any novel insights on punishment theory. Rather, I wish merely to point to a few possible ways that different takes on

29. Harry J. Holzer et al., *The Economic Costs of Poverty in the United States: Subsequent Effects of Children Growing Up Poor* 1 (Nat'l Poverty Ctr., Working Paper No. 07-04, 2007), available at http://www.npc.umich.edu/publications/u/working_paper07-04.pdf.

30. *Id.* at 17–20, 23–24.

31. *See, e.g.*, 18 U.S.C. § 3553 (2012).

punishment theory might lead us to think about the relationship between CBA and retributive justice.

(1) *Negative retributivism*. One variant on retributive theory considers moral desert to be a *necessary* prerequisite for punishment, but does not hold that it renders punishment morally obligatory. Under this view, considerations of social benefits and costs can affect the decision of whether to punish a person who deserves it.³² Under this approach, Abrams' CBA need not be adjusted to incorporate any retribution-related considerations. Rather, it is the second step in an analysis of whether a given punishment (or sentencing law) is appropriate; the first step is whether it is morally deserved.

(2) *Choice within a range*. Another possibility is that moral desert *does* necessitate proportional punishment, but that there is no single "correct" sentence for each crime, or at least none that society is able to agree on. The translation of the evil of a crime into a proportional length of incarceration involves the comparison of incommensurate values, and is inherently subjective. If, however, reasonable agreement could be reached as to the *range* of possible sentencing rules that would be proportionate for a given crime, perhaps CBA could help policymakers to choose among their permissible options.³³ This conception again does not require any changes to Abrams' CBA; it is again the second step in the policy analysis, after the range of permissible rules is determined by reference to the proportionality principle.

(3) *Excluding the defendant's costs*. Another possibility is that retributive concerns ought to influence the way we weigh certain costs of incarceration—in particular, the costs to the defendant. After all, punishment involves the deliberate infliction of suffering on the defendant. If the defendant *deserves* to suffer, then retributive theory tells us that inflicting this harm on him is a moral *good*, not an evil. But in that case, perhaps the defendant's lost "value of freedom" does not belong on the "cost" side of the CBA ledger. These costs might be appropriate to include to the extent that they *exceed* what is morally deserved, but in such cases the problem with the punishment from a retributive perspective is more acute: an excessive punishment should simply not be given, regardless of its other costs and benefits.

32. This view is most prominently associated with H.L.A. Hart. See H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 233–37 (1968); see also John Bronsteen, *Retribution's Role*, 84 IND. L.J. 1129, 1149–53 (2009); J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982).

33. This theory is similar to the "limiting retributivism" advanced by Norval Morris, although he argued for allowing *judges* to choose within the retributively grounded constraints set by the legislature. See Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 366–74 (1997) (concisely summarizing Morris's theory).

(4) *Valuing society's taste for punishment.* Another option is to treat the public's retributively grounded preference for punishment as a term on the "benefits" side of the model. To help to quantify this term, one could, for instance, refer to experiments in psychology and behavioral economics that demonstrate people's willingness to spend money in order to punish those who have wronged them in a game.³⁴ Note that this approach is not philosophically consistent with retributivism. It is essentially forward-looking, not backward-looking; it is indifferent to whether the public's taste for punishment is appropriately grounded in the defendant's moral desert; and it treats retributive concerns as merely one social benefit that can readily be outweighed by competing interests. But from a purely utilitarian perspective, like Abrams', it may make sense to incorporate this term; if people care about it, then perhaps it should be weighed as a social good. Including this term is consistent with *keeping* the defendant's cost term on the other side of the balance—from a utilitarian perspective, the defendant's interests and those of society all count.

(5) *CBA as a measurement of society's revealed preference for punishment.* Another possibility, briefly suggested by Abrams himself, is to treat what we spend on incarceration as a measure of how much Americans value punishment of those who deserve it.³⁵ More precisely, our revealed preference for punishment is reflected by the extent to which the costs we are willing to accept exceed the expected concrete benefits. If so, CBA could be used to estimate the magnitude of that preference. Personally, however I am skeptical of the extent to which CBA can *really* reveal Americans' preferences as a descriptive matter. After all, the assumption would have to be that the public widely understands the magnitudes of the various terms in the equation, and given that empirical researchers have struggled to estimate them, this seems unlikely. In addition, the approach in effect assumes that current incarceration policy is rational and perfectly justified, such that the apparent costs must be balanced out by a punishment-preference benefit. I am, suffice it to say, skeptical that such an assumption of rationality is justified.

IV. CONCLUSION

CBA is not, to be sure, an easy solution to the many difficult challenges of criminal justice policy. Just as regulatory policy does—indeed, perhaps even more so, given the significance of retributive concerns—punishment choices involve subjective normative judgments, rather than merely

34. See, e.g., Armin Falk, Ernst Fehr & Urs Fischbacher, *Driving Forces Behind Informal Sanctions*, 73 *ECONOMETRICA* 2017, 2017–19 (2005). Note that it would be important to rely on experiments designed to exclude the possibility that the reason people choose to punish is for non-retributive purposes, such as deterrence; otherwise the "taste for punishment" term would be redundant with other terms in the CBA.

35. Abrams, *supra* note 1, at 911.

problems of empirical estimation. In addition, even if one focuses only on forward-looking considerations rather than moral desert, CBA (at least as Abrams frames it) does not account for *distributive* concerns that policymakers might also want to consider—it simply aggregates net social costs and benefits, with no concern for who experiences those costs and benefits.³⁶ This limitation is particularly acute in the criminal justice context: incarceration imposes intense costs on the (relatively) few in order to benefit the many, and the few are drawn principally from already disadvantaged groups.³⁷ These problems, combined with the serious difficulties involved in obtaining accurate and precise empirical estimates, are serious limitations to the practical value of CBA in this context.

Despite these drawbacks, it is very possible that the incorporation of CBA (perhaps with modifications, as suggested above) would substantially improve legislative decision-making about criminal punishment. The CBA would not necessarily *answer* the question whether incarceration is justified, but it could help to inform an inquiry that too often has been deeply ill-informed. After all, political decision-making about incarceration policy has for decades been characterized by ever-upward ratcheting, often with little analysis of net costs and benefits, little serious discussion of the proportionality of punishment, *and* little regard for distributive consequences. Abrams' article is obviously not a definitive solution to the challenges of incarceration policy, but it does not purport to be. What it does do is provide a set of insights that, even if his approach is not adopted wholesale, should be quite useful to policymakers and to scholars who are interested in thinking more rigorously about whether and when incarceration benefits society.

36. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1324–29 (2006) (discussing the need to expand or adjust regulatory CBA to account for distributive consequences).

37. Some of those experiencing the costs are those who have committed crimes (such that moral desert considerations might weigh in the opposite direction of distributive considerations), but others are innocent, such as the prisoner's family members.