

FRAGMENTATION AND DEMOCRACY IN THE CONSTITUTIONAL LAW OF PUNISHMENT

Richard A. Bierschbach

ABSTRACT—Scholars have long studied the relationship of structural constitutional principles like checks and balances to democracy. But the relationship of such principles to democracy in criminal punishment has received less attention. This Essay examines that relationship and finds it fraught with both promise and peril for the project of democratic criminal justice. On the one hand, by blending a range of inputs into punishment determinations, the constitutional fragmentation of the punishment power can enhance different types of influence in an area in which perspective is of special concern. At the same time, the potentially positive aspects of fragmentation can backfire, encouraging tunnel vision, replicating power differentials, and making it easier for more well-resourced voices to drown out others. Thus, the same structure that generates valuable democratic benefits for punishment also falls prey and contributes to serious democratic deficits. But despite its drawbacks, we cannot and should not abandon the Constitution's fragmented approach to crime and punishment. The more promising move is to look for ways to make different loci of influence and representation more meaningful within our existing framework, doing more to ensure that multiple voices are heard.

AUTHOR—Dean and Professor of Law, Wayne State University Law School. Thanks to the *Northwestern University Law Review* for hosting this Symposium and to the Symposium and Conference participants for their helpful comments on an early sketch of this Essay.

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INTRODUCTION

What is the relationship of structural constitutional principles like checks and balances to democracy in criminal punishment? The usual answer is straightforward: in punishment, as elsewhere, checks and balances further democracy by avoiding tyranny and abuse. Beyond that, it is not much discussed. Most treatments of the relationship of constitutional law to democracy in punishment focus instead on a particular constitutional provision or institution, and they often lurch between two poles. At one, constitutional law ensures a popular voice in punishment. The eighteenth-century jury embodies this vision with its public trials in the town square. At the other, constitutional law gives a voice to the “discrete and insular minorities” who are so often punishment’s targets.¹ The Warren Court embodies this vision with its representation-reinforcing approach to judicial review.

Such neglect of structure is a mistake. Checks and balances and similar issues of what I call fragmentation—meaning the way in which the Constitution divides power between actors and governments—have a richer and more complicated relationship to democracy in punishment than this picture suggests in good and bad ways. While scholars of government often see fragmentation as a bug, when it comes to punishment, it also acts as a feature. Punishment is notorious for the messy mix of competing values, purposes, and trade-offs it implicates, to say nothing of its demand for attention to the details of each case. By affirmatively blending a range of inputs into punishment determinations, fragmentation can enhance different

¹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87–104 (1980).

types of influence in an area in which perspective is of special concern. At the same time, however, the potentially positive aspects of fragmentation can backfire, encouraging tunnel vision, replicating existing power differentials, and making it easier for more well-resourced voices to drown out others. In either case, the way in which the Constitution fragments the power to punish is a vital subject of attention for anyone interested in the intersection of democracy, criminal justice, and constitutional law.²

This Essay fleshes out these points in five short Parts. Part I discusses fragmentation in sentencing as a case study from positive law, and Part II shows how fragmentation creates diverse points of influence and perspective in punishment. Part III translates those points to criminal justice writ large. Part IV unpacks some of the downsides of fragmentation, and Part V offers some suggestions for reforms that might do more to capture its benefits.

I. SENTENCING

Let me begin with sentencing. Fragmentation occupies a crucial place in the modern constitutional law of sentencing, although scholarship has been slow to appreciate that. Like much criminal procedure scholarship, sentencing scholarship can be “clausebound.”³ It treats the individual constitutional rights that govern sentencing as discrete and isolated provisions and minimizes the ways in which rights and structural considerations interact.

Those interactions have become more important as sentencing has become more imbalanced. The dominance of plea bargaining, the disappearance of jury trials, the decline of parole and executive clemency, the growth of mandatory minima, the rise of sentencing guidelines that tie judges’ hands—these and other developments have shifted more power to prosecutors and have squeezed diverse views out of the system. As these structural imbalances have worsened, the Supreme Court’s constitutional sentencing law has pushed back against them. To the extent the Court has intervened in sentencing over the last four decades, it frequently has done so in ways that have resisted (albeit not prevented) the march toward concentrated sentencing power. Take three illustrations from three distinct areas, each of which involves fragmentation in its own way.

² Here a caveat bears emphasis. As the different dimensions of democracy inherent in the jury and Warren Court visions suggest, “democracy” and “democratic values” are deep and contested concepts. My points in this Essay do not turn on any specific definition of them; I simply use them and similar terms to capture values like representativeness and equal citizenship that are central to virtually all contemporary liberal democratic theories.

³ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 125 (1998).

A. The Law of Apprendi

Apprendi v. New Jersey resurrected juries as a check on the sentencing power of legislators, prosecutors, and judges under the Sixth Amendment.⁴ Given the prevalence of plea bargaining, *Apprendi* was something of a hollow victory for the jury, and in some ways it might even have strengthened prosecutors' hands. But later decisions gave its underlying structural concerns real bite. They further spread out power among sentencers by invalidating binding guidelines, freeing sentencing judges to consider a wide range of factors and policy concerns through reasoned variances at sentencing, and fine-tuning appellate review to prompt more give-and-take among sentencing judges, appellate courts, and sentencing commissions.⁵ Critics complain that those decisions have little to do with the Sixth Amendment's aim of reinjecting the jury into punishment. That is true and misses the point: on this reading, the *Apprendi* line is less about furthering the individual jury right than it is about catalyzing the systemic diffusion of concentrated power. The Sixth Amendment is the tool, not the goal.

B. Juvenile Sentencing

*Miller v. Alabama*⁶ and *Graham v. Florida*⁷ struck down mandatory life-without-parole sentences for juveniles convicted of homicide offenses and discretionary life-without-parole sentences for juveniles convicted of nonhomicide offenses, respectively. Most commentators follow the Court's lead in analyzing these decisions mainly as matters of substantive proportionality. But they also embody fundamental points about the institutional and procedural structure of juvenile sentencing. Both decisions, after all, left fully intact the power to imprison juveniles for their natural lives. Their more significant effect was to shift the decisional power to do so, from legislatures to trial judges and prosecutors in *Miller* and from trial judges and prosecutors to parole boards in *Graham*. Despite its doctrinal use of proportionality, those systemic consequences were not lost

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

⁵ See, e.g., *Pepper v. United States*, 562 U.S. 476, 500–05 (2011); *Kimbrough v. United States*, 552 U.S. 85, 111 (2007); *Rita v. United States*, 551 U.S. 338, 354–55 (2007); *United States v. Booker*, 543 U.S. 220, 259–65 (2005); *Blakely v. Washington*, 542 U.S. 296, 304–05 (2004).

⁶ 567 U.S. 460 (2012).

⁷ 560 U.S. 48 (2010).

on the Court. Both opinions weave into their analyses passages recognizing that the structure of juvenile justice is unbalanced.⁸

C. Capital Punishment

Constitutional capital sentencing law substantially breaks apart the power to impose the death penalty. The Supreme Court takes the death penalty off the table for certain crimes and offenders. Legislatures then make broad, *ex ante* judgments that lay out criteria for death-eligible crimes. Prosecutors make first-cut, *ex post* judgments about whether to file capital charges. Juries assess that judgment twice, at both the guilt and sentencing stages. Judges independently review potential death sentences at charging, immediately after trial, and on automatic appeal. Even governors pay more attention to clemency as a safety valve in capital cases than in noncapital cases. While the Court has not strictly required each of these procedures under the Eighth Amendment, it has viewed most of them as critical to capital punishment's constitutionality.⁹ The upshot is that, as Douglas Berman notes, "whatever one's perspective . . . on the modern administration of capital punishment, the system at least has the benefit of subjecting prosecutors' sentencing judgments . . . to a series of meaningful 'second looks.'"¹⁰

Several observations jump out about these cases. First, with the exception of limited portions of some of the *Apprendi* decisions that discussed the jury as a check, none is self-consciously about fragmentation. Second, their interventions have not been theoretically or doctrinally pure. They have moved in fits and starts, and they rest on a grab bag of interpretive approaches and constitutional grounds—formalism and functionalism, the Sixth Amendment and the Eighth. Third, in part for those reasons, scholars do not normally view them together, instead lumping distinct lines of cases into their own doctrinal boxes. Finally, despite all that, the basic idea of fragmentation inhabits their interstices.

⁸ See *Miller*, 567 U.S. at 488–89 (discussing the “limited utility” of juvenile transfer decisions as a check on the excessive punishment of juveniles); *Graham*, 560 U.S. at 67 (observing, based on structural considerations, that “the fact that transfer and direct charging laws make life without parole possible for some juvenile[s] . . . does not justify a judgment that many States intended to subject [them] to [such] sentences”); Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1780–81 (2012).

⁹ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 371–96 (1995) (reviewing the constitutional framework for regulation of capital punishment).

¹⁰ Douglas Berman, Keynote Address, *Encouraging (and Even Requiring) Prosecutors to Be Second-Look Sentencers*, 19 TEMP. POL. & C.R. L. REV. 429, 432 (2010).

Together they evince a shared (if imperfectly realized) theme: in sentencing, as elsewhere, no single actor should hold all the cards.

II. PUNISHMENT

That theme has special purchase when it comes to punishment. In that context, fragmentation is not only a check against the government. In an ideal world, it also acts as an affirmative good, working to ensure that punishment not only reflects the eighteenth century's populism or the Warren Court's representation-reinforcing countermajoritarianism, but also filters a broader range of views and considerations that matter to stakeholders on criminal justice issues. That is especially appropriate because of the indeterminate and perspective-driven nature of punishment determinations.

Substantively, punishment implicates a wide and messy array of competing values and objectives. Great disagreement often exists about how to weigh and apply the purposes of punishment—deterrence, retribution, incapacitation, and rehabilitation—generally and in specific cases. Even where some common ground exists, punishment must account for and pursue things like mercy, equality, fairness, reform, consistency across cases, healing, and dignity, among other weighty goals and values. It must protect the public while respecting individual defendants and victims. And it must simultaneously embrace rules and standards and be forward- and backward-looking, as what looks just *ex ante* in the abstract might look unjust *ex post* in a real, flesh-and-blood case.¹¹

For these reasons, as Henry Hart put it, punishment demands “multivalued rather than . . . single-valued thinking.”¹² That is why the Supreme Court has steadfastly resisted commitment to any single purpose of punishment as a matter of constitutional law.¹³ Comparative desert, informed by evidence of community consensus, provides a backstop for a small number of especially severe sentences, mostly capital ones. But beyond that, the Constitution leaves room to effectuate a “constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.”¹⁴

¹¹ See Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 428–29 (2013).

¹² Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 401 (1958).

¹³ See, e.g., *Ewing v. California*, 538 U.S. 11, 25 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 999–1000 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

¹⁴ *Powell v. Texas*, 392 U.S. 514, 536 (1968) (plurality opinion).

Procedurally, that adjustment process involves a host of actors, each with its own strengths and perspectives on the demands of justice. Some are well suited to bringing *ex ante*, high-level, and more centralized viewpoints to bear. Legislatures (at least in theory) are good at ranking categories of crime and making decisions about basic trade-offs. Sentencing commissions can do much of the same and can gather and crunch data, generate information on the costs of sentencing options, and establish more detailed guidance for given crimes and sentences. Appellate courts can spot trends and differences in treatment of similar types of cases that might be lost on frontline sentencers and can further craft rules and doctrines to guide line-level players.

Other actors are better at weighing individualized, granular, and *ex post* considerations. Juries and (when they have discretion) sentencing judges are especially good at considering particularistic, human aspects of blameworthiness. So too are prosecutors, who apply their equitable judgment in deciding which cases to charge, which to drop or divert, and what plea deals to strike. Probation and parole officials can evaluate offenders' prospects of and progress toward rehabilitation and reform. And governors exercising their clemency and pardon powers can do the same and can factor in other case-specific and circumstantial concerns that other actors failed or were unable to consider.

Each of these actors represents stakeholders in different ways. Legislatures are broadly representative and aggregate the abstract and general preferences of the body politic as a whole. Governors do so too, but from a unitary and often more *ex post* standpoint. Juries are at the opposite end of the spectrum: they directly inject the views and lay intuitions of ordinary, local citizens into real cases. Elected prosecutors are somewhere in between, channeling local community concerns about crime and justice. Judges likewise hear and filter local concerns, including those of defendants, victims, family members, and local community members. They also police punishment for deeper democratic failures by enforcing individual constitutional rights. Most state sentencing commissions include voices from across criminal justice, such as defense lawyers, prosecutors, judges, corrections officials, legislators, and members of the public.¹⁵ Parole boards consider the views of the community, victim, and victim's and offender's friends and family when making their decisions. And probation and parole officers work closely with communities to help ex-offenders get their lives back on track.

¹⁵ Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 174 (1995).

All of this explains why the Constitution does not prescribe particular goals of punishment or, except in rare circumstances, interfere with particular sentencing outcomes. In our system, just punishment is not, and has never been, a matter of a priori philosophical principles. It is a matter of democratic processes, of dialogue and deliberation that engages all of the considerations that plausibly inform punishment—not only its multiplicity of values, but also the different viewpoints, practical needs, and interests of stakeholders.¹⁶ The Constitution embodies that notion in a concrete set of institutional arrangements designed to give content to punishment by filtering those variegated inputs through different actors. Just punishment, by and large, is what comes out of that process; it is defined by the process that produces it.

This also explains why the fact that fragmented sentencing might lead to different sentences across different decisionmakers for similar offenders is not, without more, an affront to its constitutionality. Norms of equality are fundamental to any democratic system of punishment, and the dispersion of outcomes flowing from fragmented and decentralized sentencing is a frequent topic of concern. But when it comes to punishment, part of the point of fragmentation, especially insofar as its localist and community dimensions are concerned, is that different stakeholders might weigh the competing goals and values of punishment differently.¹⁷ So long as they do so through a process that takes care to ensure that discrete and powerless groups do not bear a disproportionate risk of worse results—so long as, in other words, the process is not infected by any democratic failures and does not rest on any constitutionally impermissible considerations—the Constitution lets divergent punishments fall where they may. As the Court’s jury cases emphasize, that respect for normative variation between and among communities is essential to punishment’s legitimacy.¹⁸

III. CRIMINAL JUSTICE

In these ways, the Constitution’s approach to sentencing is microcosmic of its approach to criminal justice. Fragmentation of criminal justice is baked into our constitutional framework, in the basic division of

¹⁶ Variants of this theme appear repeatedly in the Court’s sentencing cases. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 67–68 (2010); *Rita v. United States*, 551 U.S. 338, 350 (2007); *Blakely v. Washington*, 542 U.S. 296, 326 (2004) (Kennedy, J., dissenting); *Skipper v. South Carolina*, 476 U.S. 1, 4–5 (1986).

¹⁷ *See* Richard A. Bierschbach & Stephanos Bibas, *What’s Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1461–64 (2016).

¹⁸ *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 618 (2002) (Breyer, J., concurring in the judgment); *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

power in Articles I, II, and III and in numerous textual provisions. Article I's Ex Post Facto, Bill of Attainder, and Habeas Corpus Clauses prevent the legislature from exercising the judicial power by retrospectively targeting individuals for punishment or detention.¹⁹ Article II's pardon power gives the executive a hand in punishment, and Article III ensures (through its life tenure and salary provisions) that judges can enforce constitutional limits through impartial process and, through its guarantee of a jury trial for all crimes, that the citizenry can check all three branches.²⁰ The Bill of Rights layers on yet more mechanisms for fragmented input, including grand juries, public scrutiny of trials, the drawing of jurors from the local community, and a reasonableness limitation on searches and seizures—a limit that, Akhil Amar and others have argued, incorporated the views of local juries as originally applied.²¹ The Tenth Amendment (and federalism generally) makes clear that states, localities, and “the people” have central roles to play as well.²²

The diffusing effects of this structure radiate into nearly every doctrinal area. To take the Fourth Amendment as an example, local executive officials—elected mayors, elected or appointed police chiefs, and line-level police officers—build their compliance and implementation efforts around local needs and priorities, which might vary based on crime rates, community preferences, or policing philosophy. Disaggregated local judges give content to and enforce the Amendment's protections in suppression hearings, and local juries periodically weigh in also. We typically think of *Katz v. United States*' famous “reasonable expectation of privacy” test as laying down national norms for protected conduct.²³ But as applied in local courts, it often incorporates and turns on local norms about privacy and seclusion as well as duly enacted state and local laws and judge-made common law defining property or the like.²⁴ Appellate courts review and shape those interpretations and applications, and legislative bodies sometimes respond to them by expanding or restricting privacy protections in selective areas. And state and local legislative bodies initially delimit the conduct that might trigger Fourth Amendment searches and seizures by defining the bounds of criminal conduct through state laws and municipal codes. As with sentencing, what determines a lawful search and

¹⁹ U.S. CONST. art. I, § 9, cls. 2–3; *id.* § 10, cl. 1.

²⁰ *Id.* art. II, § 2, cl. 1; *id.* art. III, § 1; see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1013–16 (2006).

²¹ U.S. CONST. amends. IV–VI; AMAR, *supra* note 3, at 70–77, 85–89, 105–06, 112–13.

²² U.S. CONST. amend. X.

²³ 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

²⁴ See William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1834–36, 1867–71 (2016).

seizure is the product of many institutions and actors, each with its own perspective and each representing stakeholders in its own way.

The same dynamic flows through criminal justice writ large. As a matter of constitutional norms and practices, if not doctrine, criminal justice is highly disaggregated. Most criminal justice matters remain matters of state and local law. State attorneys general and police might investigate and prosecute some subset of especially significant crimes (like large-scale frauds or terrorism). But they leave the vast bulk of enforcement to localities, which pass and enforce their own codes in addition. That enforcement apparatus includes thousands of counties and municipalities, several thousand prosecutors' offices employing tens of thousands of prosecutors, and more than twelve thousand police departments employing hundreds of thousands of officers. It also includes thousands of local courts, judges, jails and prisons, parole and probation officers, and everyday citizens who interact (as jurors or otherwise) with the system on a daily basis.²⁵

The benefits of this structure are not only—or even primarily—in guarding against governmental abuse. They also rest on broadly democratic concepts like representativeness, deliberation, and self-determination. As with sentencing, fragmentation provides multiple nodes of input that allow communities and neighborhoods to tailor on-the-ground criminal justice to their unique needs and reconcile competing values and priorities in their own ways—to, in short, give content and meaning to the messy, multivalued, and trade-off-laden enterprise that is criminal justice. That is why it is not uncommon to see different local prosecutors, police departments, and courts and judges taking different enforcement or sentencing approaches to the same state- or even citywide laws. It is also why many movements that self-consciously seek to make criminal justice more responsive to stakeholders—like problem-solving courts, community policing and prosecution, and community justice centers—are

²⁵ See SUZANNE M. STRONG ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF PROBLEM-SOLVING COURTS, 2012, at 1, 3–4 tbl.1 (2016), <https://www.bjs.gov/content/pub/pdf/cpsc12.pdf> [<https://perma.cc/TWY5-YHW5>]; DUREN BANKS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 1 (2016), <https://www.bjs.gov/content/pub/pdf/nsleed.pdf> [<https://perma.cc/N29W-4FDP>]; BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 1 (2015), <https://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf> [<https://perma.cc/4TTH-GDVW>]; STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES 1 (2011), <https://www.bjs.gov/content/pub/pdf/psc07st.pdf> [<https://perma.cc/D8JT-TCHV>].

overwhelmingly seen as taking necessarily decentralized, bottom-up approaches to crime and punishment.²⁶

To be sure, the precise ways in which fragmentation will facilitate democracy in criminal justice will vary based on one's theory of democracy—whether it be pluralist, participatory, deliberative, anti-inegalitarian, or something else.²⁷ But robust avenues for input and exchange are central to virtually every one of these theories.²⁸ And fragmentation helps—at least ideally—to provide them.

IV. LIMITS

That is the optimist's vision. But of course, fragmentation has its democratic limits and downsides. Most glaring, the mix of inputs that the Constitution assumes will inform punishment in theory often fails to do so in fact.

This happens for a variety of reasons. One problem is politics. In almost every institutional arena, the politics of criminal justice is notoriously “pathological.”²⁹ Legislative and gubernatorial elections, even prosecutorial elections, are blunt instruments for highlighting nuanced policy differences and eliciting granular input from voters on specific policies. Election rhetoric often turns on high-profile, sensationalist, and atypical cases or crimes. While the benefits of appearing smart on crime are increasing, the risks of appearing soft on crime are still very substantial. Many of the groups most affected by real-world punishment policies—such as poor, urban, inner-city communities—have little voice at the ballot box and no real lobbying presence, leaving them with no effective say in criminal justice policymaking. (Felon disenfranchisement laws mean that most prisoners and ex-prisoners literally have *no* electoral voice.) Well-organized, well-funded, and usually tough-on-crime special interests—victims' groups, prison workers, police unions, the National Rifle Association—overwhelm debate and exert a disproportionate influence instead.

Perspectives thus flatten out, with legislators, prosecutors, governors, and elected judges often hearing roughly the same thing, and more of it. A

²⁶ By contrast, some of the worst excesses of criminal justice in recent years—namely, those of federal sentencing—occurred in an institutional context in which stakeholder participation and on-the-ground experimentation were minimal.

²⁷ David Sklansky has elegantly dissected such differences in the context of policing. See generally David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005).

²⁸ See Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 20–24 (2012).

²⁹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505 (2001).

similar problem exists at the retail level, where the voices of powerful defendants and their communities—think of corporate and white-collar cases—carry disproportionate weight at every point of the process, and the voices of marginalized defendants and their communities often get little traction.

Fragmentation also mutes the manifold influences that different actors ideally filter and represent. Prosecutors, for instance, ideally carefully consider the merits and context of each case and the needs and circumstances of the community, victim, and offender before deciding how to charge or what sentence to recommend. In reality, though, they often see their job as clearing the cases in front of them, giving them professional incentives to stack up convictions, boost clearance rates, and layer on plea bargaining chips by overcharging. They have few incentives to consider the impact of their recommended sentences on the community or even the direct costs of those sentences for taxpayers, as prison and jail costs come out of other actors' budgets. Parole boards ideally channel community concerns about safety and the virtues of forgiveness, moral reform, and rehabilitation. In reality, risk aversion almost always trumps everything else, as parole boards never capture the benefits of correct release decisions but stand to suffer immediate reprimands for incorrect ones. Sentencing judges trying to balance the interests of the victim, defendant, and community in punishment might lack information about how exactly a sentence of community supervision will be applied or what it will cost, and they have no direct incentive to consider cost in any case. Similar distortions affect other actors. Diffusion of power, in short, has a blinder effect: it both encourages actors to focus only on their narrow job, and makes it harder to take account of broader interests even if they want to.³⁰

A lack of accountability mechanisms exacerbates these problems. It is easier for actors to ignore broader interests if they do not need to explain or justify their decisions—which, with the partial exception of sentencing explanations, most actors in the punishment pipeline do not. It is also easier for them to ignore (or uncritically agree with) each other, undercutting the dialogic benefits of fragmentation that much of constitutional sentencing law presupposes.³¹ By providing multiple points of influence,

³⁰ See Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. (forthcoming 2017) (manuscript at 13–18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924584 [<https://perma.cc/B4XC-4QUY>].

³¹ Many observers of federal sentencing law, for instance, complain that the rule allowing federal appellate courts to presume that district courts' within-Guidelines sentences are reasonable encourages district courts uncritically to follow the Guidelines and impedes the conversational development of sentencing law that *United States v. Booker* envisioned. See Carissa Byrne Hessick, *Booker in the Circuits: Backlash or Balancing Act?*, 6 HOUS. L. REV.: OFF THE RECORD 23, 29 (2015).

fragmentation might even impede accountability and undermine expansive representation of interests. Savvy or wealthy players can find and exploit the access points that work best for them, such as when prison guard unions lobby for tougher sanctions or when corporate executives marshal teams of lawyers to work with prosecutors and regulators on deferred prosecution agreements that spare them any serious sanction. Dispersed or less visible ones might not have the experience or wherewithal to do so, and might find it more difficult to demand an accounting of multiple actors than a single one for policies and decisions that ignore their views.

Again, these points generalize. Return to the Fourth Amendment. While the perspectives of multiple actors might inform and give content to Fourth Amendment law, those perspectives often favor the powerful. The Amendment's incorporation of local laws and customs into reasonable expectations of privacy tilts it toward the propertied and moneyed classes who can buy privacy through land or the legislative process, as William Stuntz has shown.³² Tailoring implementation around dominant local needs and priorities can translate to interventions like order-maintenance policing that, while sensible to some local community members, are viewed more suspiciously by the residents of the neighborhoods at which they are aimed.

Fourth Amendment reasonableness is judged from the standpoint of a police officer interacting with a potential perpetrator or a hypothetical innocent person. It does not factor in the lived experiences of real flesh-and-blood targets, often politically disempowered minorities, whose responses to police conduct are colored by a long history of police abuse.³³ And while the Fourth Amendment's balancing test of public need versus individual right considers the interests of the defendant immediately before the court, it does not consider the interests of defendants as a class, let alone the interests of clearly innocent (but still searched) individuals as a class, whose cases do not even wend their way into the pipeline.³⁴ The Amendment's transactional focus thus systematically fails to take into account the perspectives of, say, inner-city minority youths, who might experience a large-scale stop-and-frisk initiative (like New York City's) as a program to police them as a group, or everyday telephone users, who might chafe at learning that the National Security Agency is collecting and

³² William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1265–67 (1999).

³³ See Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969–70 (2002).

³⁴ See *Terry v. Ohio*, 392 U.S. 1, 7–8 (1968) (discussing the Fourth Amendment's balancing test); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 534–35 (1967); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1051–56 (2016) (observing that Fourth Amendment balancing considers only the interests of the individual being searched).

searching metadata from their calls (as it did under the USA PATRIOT Act). But while the telephone users might be able to press their concerns effectively in the political process, the inner-city youths cannot.

As in sentencing, the fragmentation of power can encourage tunnel vision. Police, for instance, have little incentive to consider what their arrest decisions will do to prosecutors' caseloads, prosecutors have little incentive to consider what their bail recommendations will do to local jail populations, and neither have much incentive to consider how their actions will affect the defendant's job, family members, or neighborhood, let alone the public fisc. Part of the problem is doctrinal: those wider considerations are not baked into the constitutional or statutory criteria governing arrest or bail. But a big part of it is a psychological consequence of fragmentation: when the administration of criminal justice is split up between many players, each with her own bailiwick, focus naturally narrows. Even where actors could think and act more broadly, the siloed decisionmaking of fragmentation might become an excuse, allowing them to disclaim a particular injustice or pathology as not their fault.

The same accountability and related concerns discussed above follow. Who *is* accountable when no one actor in the criminal justice pipeline clearly has the responsibility to consider and give effect to a range of interests and points of view, let alone explain why she is doing so?³⁵ Well-organized and well-resourced groups can use this structure to their advantage, but the loosely organized and poorly resourced groups who so often are in the trenches of criminal justice cannot. For them, it is a barrier, not a boon.³⁶

V. REFORMS

We are left with a dilemma: the same structure that potentially generates valuable democratic benefits for punishment in terms of voice and perspective also falls prey and even contributes to serious democratic deficits. What to do?

Answering that question would be difficult in a lifetime's work, and I certainly cannot do it in a few paragraphs. But despite its drawbacks, we cannot and should not abandon the Constitution's fragmented approach to

³⁵ Contrast this with the unitary structure of agency regulatory authority in many areas of administrative law, in which all interests and points of view filter through a single, centralized agency that makes substantive rules and controls retail enforcement and sanctioning, and must rigorously explain and defend its decisions.

³⁶ For two excellent treatments of this effect, one dealing with policing and one dealing with criminal justice policymaking, see LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* (2008), and Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870 (2015).

crime and punishment. We cannot easily centralize everything at the federal or state level, nor can we easily eliminate the separate spheres of authority that actors in the system inhabit (though legislatures sometimes try). Even if we could, such changes would lead to more worrisome problems, such as criminal justice cut off from local conditions and even more beholden to powerful interests than it is now. The more promising move is to look for ways to make different loci of influence and representation more meaningful within our existing framework—to do more to ensure that multiple voices are heard.

Constitutional law can help, to a degree. Like the Warren Court, courts interpreting individual rights provisions could do more to reinforce perspectives that are often excluded from the process. For a sampling of possibilities, courts applying the Fourth Amendment could fold the outlooks of victims of police abuse, innocent civilians, and communities of color into their reasonableness analysis. They could look beyond the interests of individual defendants to accept aggregate data as evidence of the existence or gravity of group-based targeting and other harms from repeated searches, as Judge Shira Scheindlin did in the high-profile challenge to New York City's stop-and-frisk program.³⁷ The law of *Batson v. Kentucky* could be liberalized to make it easier to challenge juries that have been skewed along racial or gender lines, making them more representative of the community.³⁸ Juries could be allowed to know the penal consequences of their verdicts (which, outside of jury sentencing, current law ordinarily prohibits), expanding the factors they consider in their deliberations. More generally, the Equal Protection Clause could be given real teeth as a tool of judicial oversight with respect to police conduct, prosecutorial charging, and sentencing. Collateral consequences that impair voice, like felon disenfranchisement and prohibitions from serving on juries, could be held to more rigorous constitutional standards and struck down unless they directly relate to the crime of conviction.

Constitutional law also could force actors to listen more and take accountability seriously. *Graham's* requirement that parole boards give juvenile offenders a “meaningful” opportunity for release could itself be made meaningful by requiring parole boards to robustly explain and justify their decisions;³⁹ that would better force them to confront the defendant's,

³⁷ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013).

³⁸ 474 U.S. 79 (1986); see Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 161–65 (2010) (discussing the difficulty of proving unconstitutional reliance on race or gender in jury selection under *Batson*).

³⁹ *Graham v. Florida*, 560 U.S. 48, 79 (2010).

victim's, and community's interests and to grapple with the forward-looking considerations that in theory they should take into account. One might even apply some similar, if more deferential, reason-giving requirement to prosecutorial charging and bargaining decisions in some subset of serious cases as a matter of due process, which could serve to enhance feedback and responsiveness from and to the community.

Constitutional doctrine could better protect less institutionalized forms of input into police, prosecutorial, and judicial decisions as well, like cop watching (through the First Amendment) and the public's right to observe bail hearings, plea colloquies, trials, and sentencings (through the First and Sixth Amendments). Jocelyn Simonson and others have thoughtfully shown how this more oppositional approach to participation is an important source of perspectives that otherwise go unheeded.⁴⁰

Greater attention to the values (but not the doctrine) of federalism and its close cousin localism could likewise help. Pushing more criminal justice power—legislative, enforcement, adjudicative, and penal—down to directly affected communities and neighborhoods could enhance representativeness and sharpen lines of authority. City councils could be given real power to craft their own substantive criminal codes in response to community concerns—such as stricter gun control laws or more humane punishments for locally focused crimes—even if far-flung state legislators disagree. Prosecutorial districts could be drawn more narrowly to minimize the disconnect between who elects prosecutors (often suburban voters) and whom they prosecute (often residents of inner-city communities); judicial districts could be similarly tailored. Prosecutorial and police offices could adopt genuine community policing and prosecution structures that create regular and responsive interaction with stakeholders. In reviewing local laws, policies, and police and prosecutorial actions, judges might consider the degree to which they reflect community or neighborhood preferences based on inclusive, responsive, and autonomous processes, deferring more to those that do.⁴¹ Local prosecutors even could be given their own corrections budgets, which would counteract tunnel vision by widening their perspective on the impact of their interventions and prompting them to

⁴⁰ See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 441–43 (2016); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2197–205, 2227–32 (2014).

⁴¹ Cf. Brief for The Chicago Neighborhood Organizations as Amicus Curiae Supporting Petitioner at 5, *City of Chicago v. Morales*, 527 U.S. 41 (1999) (No. 97-1121), 1998 WL 328366, at *5 (defending Chicago's Gang Congregation Ordinance on the ground that it resulted from the efforts of the inner city, high-crime neighborhoods in which it was implemented and that those communities should have special autonomy to adopt norms that are responsive to local conditions).

work more closely with other actors in the pipeline—police, judges, parole boards, even community members—to marshal scarce resources.⁴²

Other statutory and administrative reforms could encourage more circumspect thinking in various ways. Subjecting wholesale police, prosecutorial, and sentencing policies to some variant of a notice-and-comment process could give more traction to a wider spectrum of stakeholders and yield more balanced interest representation on those policies than currently exists. Rewarding parole boards for successful release decisions or giving them release quotas could prompt them to consider points of view and interests that they otherwise ignore. Baking wider consideration of costs into statutory criteria for everything from bail to sentencing could do something similar, as costs act as a stand-in for typically ignored viewpoints, forcing decisionmakers to reflect on trade-offs—the impact of pretrial detention on defendants’ jobs or families, the community resources consumed by holding them instead of sending them out with ankle bracelets, and so forth—that they might otherwise shunt aside.⁴³

These examples are just a start. Some of them would require substantial innovation in constitutional doctrine or otherwise, and the political pathologies mentioned earlier would make some difficult to get off the ground.⁴⁴ Others would be more straightforward. All would do more to capture the benefits of fragmentation—the value in matters of criminal justice that comes from considering the perspectives of diverse stakeholders—than what we currently have.

CONCLUSION

The Constitution’s rough-and-tumble fragmentation of criminal justice does not just constrain the state’s power to punish. Ideally, it channels and guides it, creating pathways for different inputs in an area in which matters

⁴² Ronald Wright discusses some of these and similar reforms in Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. (forthcoming 2017) (manuscript at 21–24, 28–29) (on file with author).

⁴³ See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1277, 1309, 1314 (2005).

⁴⁴ Where political obstacles exist, courts and other actors (such as independent commissions) sometimes can aid in overcoming them by catalyzing and providing political cover for reforms. California’s Realignment, which substantially localized the responsibility for sentencing large numbers of low-level offenders, is a good example. Realignment was a direct response to the Supreme Court’s *Brown v. Plata* decision ordering California to reduce its state prison population to 137.5% of design capacity to relieve extreme overcrowding that led to violations of the Eighth Amendment. 563 U.S. 493, 538–45 (2011); see Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL’Y REV. 327, 327 (2014) (describing the legislative response to *Plata*).

of perspective are of special concern. The daunting challenge is to make sure that we capture this scheme's benefits—that the different nodes in the system give effect to diverse viewpoints representing all stakeholders' interests. Only by doing so can we realize the “cool and deliberate sense of the community”⁴⁵ that the Constitution aims to foster in matters of punishment.

⁴⁵ THE FEDERALIST NO. 63, at 327 (James Madison) (Gideon ed., 2001); *see also id.* NOS. 10, 51.