



Institute for  
Policy Integrity

new york university school of law

July 16, 2012

United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC

Attn: Public Affairs—Priorities Comment for the Amendment Cycle Ending May 1, 2013

Dear Commissioners,

The Institute for Policy Integrity at New York University School of Law submits the enclosed materials in response to the Sentencing Commission's call for public comments on possible priority issues for forthcoming amendments to the Sentencing Guidelines. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, cost-benefit analysis, and public policy.

Policy Integrity released the enclosed report, *Balanced Justice: Cost-Benefit Analysis and Criminal Justice Policy*, last fall. The report reviews a growing body of research showing that calculating the economic costs and benefits of different sentencing schemes can reveal areas of improvement that potentially can save billions of taxpayer dollars without compromising public safety.

Instead of incarceration, behavioral therapy for young offenders has been shown to save Washington State money and keep citizens safer. In Hawaii, intensive supervision is keeping parolees out of expensive penitentiaries while also holding them accountable for parole violations. And all over the country, drug courts have proven cost-effective alternatives to standard prison sentences, lowering recidivism rates and earning taxpayers sizeable returns on their investments.

These results show how powerful the use of sound economic analysis can be when applied to criminal justice policy. The Commission should consult and rely upon such analyses as it prioritizes items for this amendment cycle. Going forward, the Commission may also want to consider incorporating cost-benefit analysis systematically into its decisionmaking process.

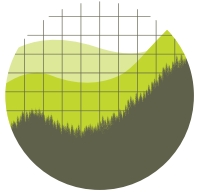
Sincerely,

Michael A. Livermore  
Jennifer S. Rosenberg

INSTITUTE FOR POLICY INTEGRITY AT  
NEW YORK UNIVERSITY SCHOOL OF LAW

# Balanced Justice:

## Cost-Benefit Analysis and Criminal Justice Policy



**Institute for  
Policy Integrity**  
*new york university school of law*

**Center on the  
Administration of  
Criminal Law**  
*New York University  
School of Law*

Jennifer Rosenberg  
Sara Mark  
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Crime and justice are not usually associated with cost-benefit analysis. But they should be.

A growing body of research shows how powerful the use of economic analysis can be when applied to criminal justice policy. Public safety can be prioritized and even improved at a lower cost than traditional incarceration, using techniques like behavioral therapy for young offenders, intensive supervision, or a new iteration of a drug court.

In an economic downturn, when state funding is scarce and legislatures are on the lookout for even the smallest of budget cuts, what could be more compelling than better results with a smaller price tag? Cost-benefit analysis can give state and federal lawmakers a more targeted way to identify and adopt sentencing structures and preventative programs that will save billions of taxpayer dollars without compromising public safety.

Around the country, research findings are being compiled and analyzed to identify policies that achieve desired outcomes and offer taxpayers high rates of return on their investments. In many cases, credible research shows that the administrative costs of implementing a new program can be dwarfed by future benefits. These benefits spring from not only reductions in crime and avoided sentencing costs, but also increased lifetime earnings and health outcomes.

In these and other ways, cost-benefit analysis injects data-driven methods and evidence-based practices into criminal justice policymaking. The outcome: **comprehensive, line-item comparisons of criminal justice policy alternatives**. Once each policy or program option is subjected to cost-benefit analysis, the results are presented side-by-side allowing lawmakers to select that which promises to generate the **greatest net benefits**.

Cost-benefit analysis can be applied to a range of programs, from sentencing and parole guidelines, to family therapy programs targeting “at risk” youth. There are also challenges to utilizing cost-benefit analysis, including the need for additional research and funding for that research. Yet momentum is building and decisionmakers throughout the justice system—**from sentencing boards, to judges, to prosecutors, to legislators**—are seeing the fiscal savings and public safety improvements that cost-benefit analysis can provide.

# Rethinking Policy

## The Value of Cost-Benefit Analysis to Criminal Justice

### Cost-Benefit Analysis

In the 1960s, crime rates in the United States rose to record levels. Policymakers on both sides of the aisle responded with stricter criminal policies that included mandatory minimum sentences and longer periods of incarceration.<sup>1</sup> While a range of factors fueled the subsequent incarceration boom—a phenomenon that continues in many jurisdictions today—almost entirely missing from the debate were analytical tools and evidence-based methodologies. Historically, decisions concerning criminal justice policy have been driven largely by political and ideological interests, and unscientific speculation over the causes and effects of crime. This stands in contrast to other areas of public policy, where decisions are grounded in concrete research and hard data.<sup>2</sup> Since the early 1980s, the federal government has placed cost-benefit analysis at the centerpiece of regulatory decisionmaking in a range of policy areas, including environmental protection, public health, and consumer safety.<sup>3</sup> In the subsequent years, a number of federal agencies became experts in this methodology, and their regulations have tended to generate benefits that far outstrip costs.<sup>4</sup> In the criminal justice world, however, cost-benefit analysis has only just begun to gain traction.

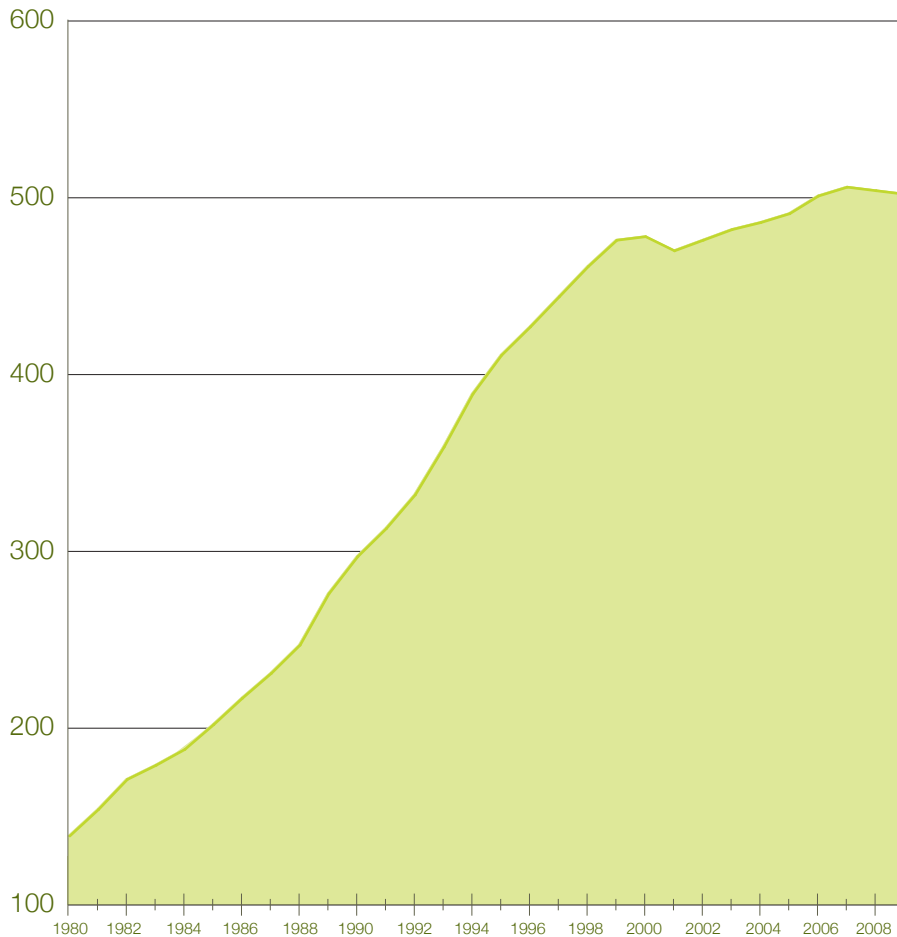
Cost-benefit analysis can help reform outmoded ways of thinking about criminal justice, and rationalize criminal justice policymaking. It offers a systematized approach for gathering all available information, looking at competing courses of action, and anticipating their likely consequences. It provides policymakers with hard data on the utility and cost-effectiveness of alternative options. In the state of Washington, a national leader in this emerging field, juvenile and adult crime rates have dropped, recidivism is down, and taxpayers have saved tens of millions of dollars through reliance on cost-benefit analysis in criminal justice policymaking.<sup>5</sup>

To get there, cost-benefit analysis engages in the quantification of the costs and benefits of different policies, which allows for direct comparisons along a common scale. Both costs and benefits are monetized in dollar terms. The total expected costs of a particular intervention or program are then subtracted from the total expected benefits, and the policy with the greatest net benefits is selected. Stated more simply, the results show which interventions or programs provide taxpayers the biggest bang for their buck. States that are at the vanguard of applying cost-benefit analysis to criminal justice policies have already proven that win-win policies and programs—those which save taxpayers significant amounts of money *and* reduce crime rates—are possible.

### Insights of Cost-Benefit Analysis

Cost-benefit analysis is still relatively new to criminal justice discourse. Its utilization is an emerging trend, but the handful of programs to which it has been applied demonstrates its broad appeal. Cost-benefit analysis can be used to evaluate a wide range of programs, from sentencing policies and corrections measures to law enforcement and youth crime intervention programs. Research institutions have used cost-benefit analysis to evaluate the effectiveness of drug courts<sup>6</sup> and mental health courts;<sup>7</sup> electronic monitoring programs for parolees and probationers;<sup>8</sup> and re-entry services for parolees.<sup>9</sup>

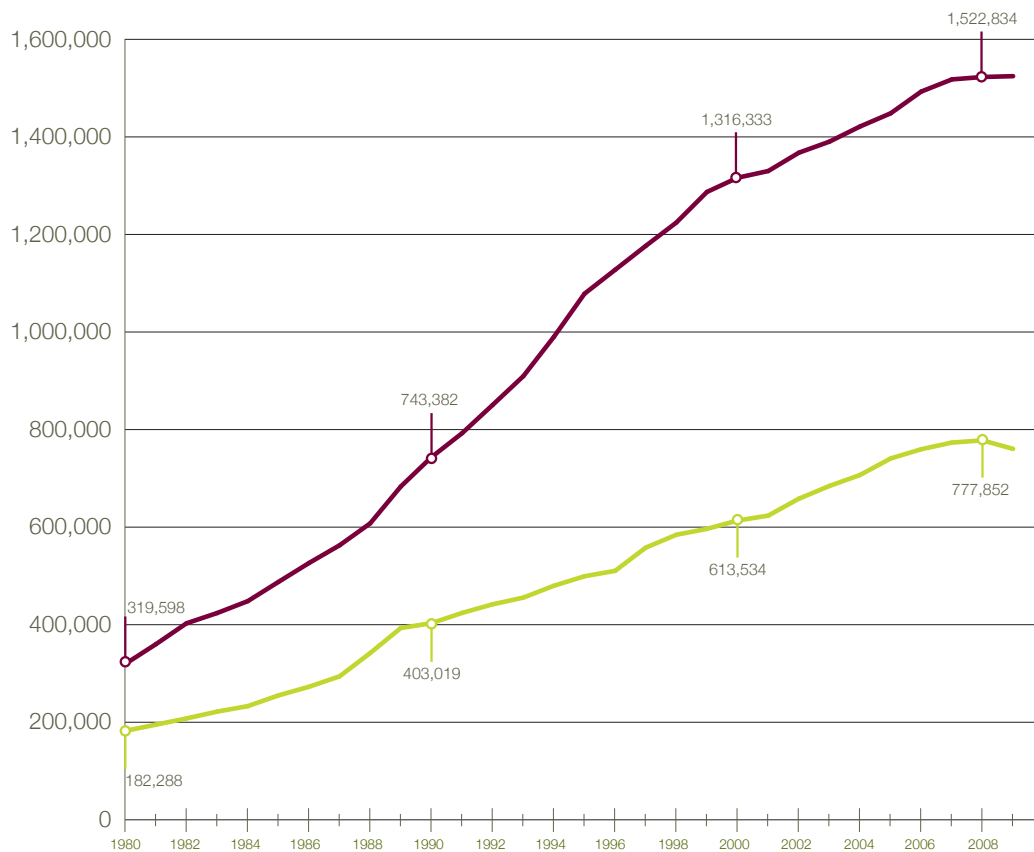
## Number of People Incarcerated under State and Federal Jurisdiction per 100,000 Population



Cost-benefit analysis can generate policy recommendations that improve public safety while lowering taxpayer costs. For example, in 2009, the Washington State Institute for Public Policy (“WSIPP”) evaluated the effect of a 2003 law that increased “earned early release time” for offenders who exhibited good behavior in prison. WSIPP’s cost-benefit analysis demonstrated that by allowing offenders to earn ‘credit’ for earlier release, the new law (1) shortened the length of prison stays by 63 days on average, which reduced prison costs; (2) decreased recidivism rates by 3.5 percent; and (3) increased long-term earnings for released prisoners. Overall, the program generated a net social benefit of \$1.88 per dollar of cost.<sup>10</sup>

In addition to evaluating the effectiveness of existing programs, cost-benefit analysis can be used to evaluate the likely returns-on-investment for programs under consideration. Cost-benefit analysis has been used, for instance, to evaluate a range of potential alternatives to building more prisons. By combining population forecast data with the results of studies on the success of various interventions, analysts can identify which program portfolios hold the most promise for improving safety and lowering costs. In one such analysis, WSIPP weighed the costs and

## Adult Prison and Jail Population



– Prison Population –  
– Jail Population –

benefits of the following interventions: vocational training programs for adult inmates, family therapy for youth offenders, nurse-family partnerships for low-income mothers, and numerous others. Results showed that specific combinations of these interventions could reduce the state's incarceration rate and generate net benefits. As an alternative to constructing more prisons, these interventions would save taxpayers about \$2 billion, including over \$1 billion in avoided prison costs and other criminal justice system costs.<sup>11</sup> Using a similar technique, WSIPP analyzed a sentencing proposal that would reduce prison stays for certain low-risk offenders, and found a net taxpayer savings of \$5.5 million, as well as a 96% probability of reduced net victimizations.<sup>12</sup>

Another example comes from North Carolina, where cost-benefit analysis was applied to a state proposal that would raise the age at which young offenders could still be sentenced as juveniles.<sup>13</sup> The North Carolina Youth Accountability Planning Task Force worked on the project with the Vera Institute for Justice, an independent nonprofit organization dedicated to reforming criminal justice practices and institutions. They assessed the efficacy and cost-effectiveness of transferring 16- and 17-year-old misdemeanants and low-level nonviolent felons to the juvenile system. Analysts determined that the plan's total cost to taxpayers would be \$70.9 million per year, which included the costs of law enforcement, court administration, and other expenses. On the other

hand, the total benefits to taxpayers and to the juveniles affected by the program would be \$123.1 million per year, consisting of cost-savings to the adult system, reduced costs of victimization, and the long-term benefits to society arising from having fewer youths with adult criminal records (such records markedly decrease employability and long-term earnings potential). Subtracting the costs from benefits, Vera and its partners concluded that the program would generate a net benefit of \$52.3 million per year.<sup>14</sup>

## Evidence-Based Practices in States

In the past decade, a number of states have enacted policies requiring the use of evidence-based decisionmaking in various fields, from criminal justice, to public health and the provision of social services.<sup>15</sup> These practices fall along a spectrum of evidence-based tools. Along this spectrum, cost-benefit analysis based on scientifically grounded empirical research is the high watermark. However, given the challenges in fully estimating and quantifying policy impacts, some researchers have relied on less intensive methodologies. Cost-effectiveness analysis, for instance, does not involve the monetization of benefits, but instead calculates how many units of a benefit are generated for each dollar spent. This analysis can be instructive, although unlike cost-benefit analysis, it does not facilitate comparisons between programs that generate different types of benefits, such as between a drug court that will reduce adult incarceration rates, and a job-training program that raise long-term employment prospects. Even further down on the spectrum is a more basic cost analysis known as fiscal forecasting, which assesses the costs of a program but does not include an analogous benefits analysis.

State legislators and policymakers have begun utilizing a variety of these evidence-based practices. Many states now require fiscal impact statements, which describe the economic effects proposed legislation, to be attached to every bill that proposes to alter sentencing or corrections law.<sup>16</sup> Other states are considering new ways of integrating evidence-based tools into criminal justice policymaking. Virginia is undergoing a structural shift toward greater reliance on such tools. The Virginia Department of Corrections has endorsed the “Transition from Prison to the Community Model,” which relies on social science research to design and administer re-entry programs.<sup>17</sup> The state’s Department of Criminal Justice Services has also developed a pre-trial risk assessment instrument that generates release recommendations for inmates.<sup>18</sup>

Alabama is also embracing evidence-based practices in reforming its criminal justice system. The state contracted with a private research company to create a simulation program that will identify optimal sentences by inputting offender characteristics into a rigorous statistical model.<sup>19</sup> In a report describing the new program, the Alabama Sentencing Commission noted the significance of this approach, stating that “[f]or the first time in our state’s history, reliance on anecdotal experience was abandoned for evidence substantiated by data to underscore the impact[s] of sentencing.”<sup>20</sup> And just recently, the state’s Chief Justice endorsed the incorporation of evidence-based research into sentencing procedures, calling for the expansion of drug courts and community corrections programs and organizing a judicial conference to train judges on cost-effective sentencing for nonviolent offenders.<sup>21</sup>

New York’s sentencing commission is also on board.<sup>22</sup> In 2009, the Commission published a report highlighting the need for correctional policies to be rooted in evidence-based research, finding it “essential that New York’s policymakers harness this growing body of knowledge of what works in corrections and infuse our institutional and community programming with scientifically validated, evidence-based practices.”<sup>23</sup> Notably, the Commission endorsed the use of risk/needs assessments to better tailor in-prison programs for inmates, and to more accurately align parole and probation supervision with inmates’ risk levels.<sup>24</sup> The commission also engaged in a fiscal analysis of shock incarceration—a shorter-term correctional bootcamp for first-time youth offenders—concluding that the programs were both financially and practically effective.<sup>25</sup>

# Calculating Impacts

## Applying Cost-Benefit Analysis to Criminal Justice

Cost-benefit analysis involves measuring all the benefits and costs of a particular criminal justice policy, and comparing the results across alternative options. For instance, conducting a cost-benefit analysis of a drug court program would catalogue all of the costs and benefits of sending an eligible offender to a drug court program, rather than through the traditional criminal justice channels.

Every cost-benefit analysis follows the same general roadmap: (1) Clearly identifying and specifying the elements of the program or policy in issue; (2) Gathering the best information available about the program's potential impacts; (3) Calculating all compliance and implementation costs; (4) Calculating all benefits; (5) Tallying costs and benefits; (6) Analyzing feasible program alternatives. The example of a drug court is illustrative. Applying cost-benefit analysis to a drug court program would proceed by:

1. Clearly identifying and specifying the program's elements. Key components of a drug court program would include: its criteria for eligibility; the process by which offenders are diverted into the program; where and for how long drug treatments take place; how participants are monitored and sanctioned for noncompliance; and how the court interacts with other existing programs.
2. Gathering the best information available about potential impacts. Necessary data would include estimates of the likely number of program enrollees; rates of recidivism amongst program participants, compared to offenders who are sentenced to traditional incarceration; and the costs of implementing various aspects of the program.

Some of this information can be obtained from state budget offices, corrections departments, and other criminal justice agencies. Existing social science literature and evidence-based studies should also be reviewed and mined for relevant data. Unfortunately, however, much of the needed information may be siloed or dispersed amongst various state agencies. Gathering comprehensive information about the costs of a drug treatment regimen, for example, require collecting data from the state budget office, corrections department, health department, and/or social services bureau.

Some efforts are being made to facilitate intra- and interstate information sharing. For example, Vera recently established a Cost-Benefit Analysis Unit dedicated to promoting cost-benefit analysis in state correctional and sentencing policymaking, and has developed a “Knowledge Bank” to serve as a clearinghouse for relevant studies.<sup>26</sup>

3. Calculating the costs. Various types of costs need to be included in a cost-benefit analysis, including capital costs (e.g., the one-time cost of constructing the physical drug court) and operational costs (e.g., staff salaries, maintenance, and other overhead expenses). In calculating expenses, marginal costs—which would refer here to the *additional* cost of sentencing an offender to a drug court rather than a traditional prison—should be favored over absolute costs.<sup>27</sup> One study conducted

in Washington found that drug courts cost about \$2,000 more per participant than ordinary court processing; this figure clearly conveys more information about the cost-efficacy of a drug court than would the raw total of costs.<sup>28</sup>

In addition to these tangible costs, a proper cost assessment will include an evaluation of the program's less tangible, yet still potentially significant, countervailing risks. Countervailing risks are in the nature of negative side-effects; they are the unintended consequences of a policy or program. In the case of drug courts, there is a risk that a participant will commit a crime that would have been preempted had the person been in prison. To the extent possible, this risk should be quantified and incorporated as a cost of the program. At the same time however, traditional incarceration poses its own set of risks that must be factored into the analysis. For instance, traditional incarceration may not adequately address an offender's underlying drug addiction, thus raising the risk that she will return to criminal behavior upon release. Or, time behind bars may increase a prisoner's opportunity to develop more sophisticated criminal knowledge and criminal network,<sup>29</sup> as well as greater propensity for violent behavior.<sup>30</sup> *Risk tradeoff analysis* weighs these risks to determine whether those associated with drug court programs are offset by those associated with existing policies, and assigns an appropriate cost to each option.<sup>31</sup>

4. Calculating the benefits. In tabulating the benefits of a drug court program—or any crime prevention program—the main category of benefits will be “negative costs,” or cost-savings generated by the program. As with costs, both direct and ancillary (or unintended) benefits must be included. A full accounting of the short and long-term benefits of a drug court program would include:
  - i. *Cost-savings to the criminal justice system.* Sending offenders to drug courts avoids the direct costs associated with traditional incarceration, such as feeding, clothing and housing an inmate. In addition, drug courts have been shown to reduce recidivism rates,<sup>32</sup> thereby saving taxpayers the expenses associated with recidivism. (These expenses include the administrative and personnel costs of criminal investigations, prosecution and incarceration, and parole and probation.)
  - ii. *Cost-savings to victims.* Another benefit of lower recidivism is the avoidance of costs to victims. Victimization costs vary by crime, but generally consist of tangible expenses paid by victims (such as medical costs, lost wages due to missed work, and stolen or damaged property) and intangible costs (such as lost quality of life, fear, and mental suffering). Where low-income victims would have to rely on public funding for emergency medical care or other services, reductions in recidivism may also generate significant cost-savings in social service outlays.
  - iii. *Cost-savings to offenders' families and communities.* Since participants in drug court programs are often able to live at home and work during their sentences, these programs avoid some of the costs shouldered by offenders' children and families during periods of incarceration. Examples of such costs include foregone financial support and the psycho-social effects of an absent spouse



or parent.<sup>33</sup> Moreover, in the long-term, drug court participants are likely to have greater opportunities for employment and lifetime earnings.

5. Tabulating costs and benefits. Subtracting the total costs from the total benefits reveals whether a particular program will generate a net social benefit and should therefore be adopted.<sup>34</sup> The results of a cost-benefit analysis can be presented in different forms. The most common metric is *net benefits*, which are total benefits minus total costs.

A cost-benefit analysis of a proposed drug court in Washington State concluded that in general, drug courts showed promise as cost-beneficial programs. Analysts further found that drug courts were likely to reduce recidivism in Washington by an estimated 16-38%, down from the 45% re-conviction rate observed in felony drug offenders processed by regular courts. In turn, this reduction in future crime would save state taxpayers \$4,900 in criminal justice costs per non-recidivist. Moreover, drug court participants could yield an average cost-savings of \$1,150 to \$3,450 in victimization costs. These benefits more than offset the additional \$2,000 per participant the drug court would cost, and ultimately translated into a net benefit of \$2.45 for each tax dollar spent.

6. Analyzing feasible program alternatives. Cost-benefit analysis facilitates a rational comparison between alternative policy options. In the drug court scenario, the net benefits of a drug court could be compared against, say, the net benefits (or costs) of a competing proposal that would improve existing in-prison drug treatments. Or, different iterations of a drug court program—with variations in eligibility requirements or other components—can be compared against one another. Under the cost-benefit standard, the government policy with the greatest net benefits would be selected.

# Net Benefits

## Applying Cost-Benefit Analysis to Criminal Justice

Like with any policymaking tool, there are challenges inherent in conducting sound cost-benefit analysis. Some of these obstacles are universal—for example, gaps in underlying data will affect any cost-benefit analysis, no matter the policy area. Other challenges are unique to the criminal justice context, such as extrapolating likely recidivism rates from small sample sizes of offenders.

### Fully Accounting for Costs and Benefits

When most people consider the costs and benefits associated with criminal justice programs, what comes to mind are the most direct costs and benefits. Some of these direct costs are tangible, such as the administrative and staff costs of implementing a job training or family therapy program. Others are intangible, such as the costs of recidivism or risks to public safety. On the other side of the coin, intangible benefits may include increased employment potential and improved re-integration into the community.

In addition to quantifying direct costs and benefits, a proper cost-benefit analysis will examine a wide range of ancillary effects. Historically, ancillary effects have been overlooked and underestimated in criminal justice policymaking. A rigorous cost-benefit analysis of a drug court program, for example, would account for the ancillary costs of the alternative option, traditional incarceration. These costs would include: destabilized family structures, psychological and emotional trauma sustained by children of inmates, reduced social capital, negative long-term effects on released offenders' income-earning potential, and the uneven distribution of social costs across economically marginalized and minority communities. Identifying and monetizing these ancillary--and sometimes unintended--costs and benefits is one of the key challenges of cost-benefit analysis.

In 2010, WSIPP contracted with the Pew Center on the States to develop user-friendly software of its standard cost-benefit model. The software application will cull existing empirical studies and research findings on a particular policy or program, and analyze that information in concert with state-specific fiscal or demographic data. The program will thus enable states to tailor previous cost-benefit analyses to their own needs, helping them identify corrections and sentencing policy options that will cut costs while enhancing safety.<sup>35</sup>

Finally, by design, cost-benefit analysis does not encompass every political or ideological factor relevant to policymaking. There are a range of moral, philosophical, and other considerations that fall outside the scope of cost-benefit analysis. These factors have a legitimate place in the decisionmaking process; they are also well complemented by research-driven, evidence-based analysis.<sup>36</sup>

### Quality of Research and the Need for More Criminal Justice Research

By definition, cost-benefit analysis is evidence-based. It follows that the quality of any cost-benefit analysis will rise and fall depending on the quality, relevance, and credibility of the underlying data. There is a dynamic range of what gets counted as “evidence,” and what ultimately gets counted may come from various sources, such as peer-reviewed journals, stakeholder consultations, output from statistical or economic modeling, or expert knowledge. But while the definition of “evidence” may admit of a broad and eclectic range of inputs, not all forms of evidence share equal relevance or weight. One important distinction is between “hard” or objective evidence, versus “soft” or

**Example Summary of Cost-Benefit Analysis of Crime Prevention Program:  
Early Intervention Family Therapy (EIFT) for Juvenile Property and Drug Offenders**

|  | Net Present Value     |
|--|-----------------------|
| <b>BENEFITS</b>                                      |                       |
| <u>Reduction in Rate of Recidivism With EIFT (%)</u> | -31%                  |
|  |                       |
| <u>Cost-Savings to Taxpayers</u>                     |                       |
| Police and Sheriff's Offices                         | \$400,000             |
| Superior Courts and Country Prosecutors              | \$500,000             |
| Juvenile Detention and Rehabilitation                | \$15.2 million        |
| Juvenile Probation and Parole                        | \$8.9 million         |
|  |                       |
| <u>Cost-Savings to Victims</u>                       |                       |
| Victim Monetary Costs                                | \$1.8 million         |
| Victim Quality of Life Costs                         | \$300,000             |
|  |                       |
| <u>Benefit to Youth Participants</u>                 |                       |
| Greater Lifetime Earnings                            | \$29.6 million        |
| Greater Quality of Life*                             | \$34.3 million        |
|  |                       |
| <b>Total Benefits</b>                                | <b>\$91 million</b>   |
| <b>COSTS</b>   |                       |
| <b>Cumulative Program Costs</b>                      | <b>\$8.1 million</b>  |
| <b>NET BENEFIT (Benefits minus costs)</b>            | <b>\$82.9 million</b> |

*Numbers are for illustrative purposes only. They are rough estimates based on several studies looking at the effects of family-oriented prevention and intervention programs targeting offenders ages 11-18.*

\* Greater Quality of Life results from the improved psycho-social well-being that is associated with having increased educational and employment opportunities and family stability, as well as freedom from the stigmas associated with having an adult criminal record.

subjective evidence.<sup>37</sup> Hard evidence consists of quantitative data--oftentimes primary data gathered by researchers from experiments (preferably randomized control trials), as well as secondary social and epidemiological data collected by government agencies or through survey questionnaires. Soft evidence, on the other hand, is qualitative data such as testimonials or anecdotes. Cost-benefit analysis requires hard, quantitative evidence, and rigorous cost-benefit analysis will insist on quantitative evidence that has been collected using scientifically tested methodologies.

Significant gaps in the literature must be filled before robust cost-benefit analysis can be conducted for many criminal justice policies and interventions. Numerous public and private institutions are already dedicated to improving the body of scientific knowledge upon which criminal justice decisions can be made, but they need substantial financial support in order to broaden their findings and confirm the validity of preliminary results.<sup>38</sup> The central reason why research gaps persist is a lack of adequate funding. And since criminal justice research is a public good for which

there is scant private market or economic incentive, the government must take the lead in subsidizing research. The amount of public monies currently spent on criminal justice research reveals a severe mismatch between need and funding levels, especially at the federal level.<sup>39</sup> The budget of the National Institute of Justice, which funds criminal justice research efforts by universities, private organizations, individuals, and other public agencies, provides an illustrative example. In 2008, the Congressional appropriation to the National Institute of Justice constituted just .2 percent of the total appropriation to the Department of Justice.<sup>40</sup> By contrast, about 7 percent of the Environmental Protection Agency's total annual budget is devoted to research, and the annual research budget of the National Institutes of Health, an arm of the Department of Health and Human Services, is also about 7 percent of that agency's total budget.<sup>41</sup>

Where the federal government has left off, states and foundations have begun to fill in gaps. The Campbell Collaboration, an international research organization, recently established a Crime and Justice Group to conduct systematic reviews of studies in order to synthesize the best available research and subject it to meta-analysis. That said, given constraints on foundations' resources and the limited returns on any private investment, government investment in criminal justice research remains crucial to rationalizing criminal justice policy and enacting fiscally responsible options.

## The Politics of Legislating Criminal Justice

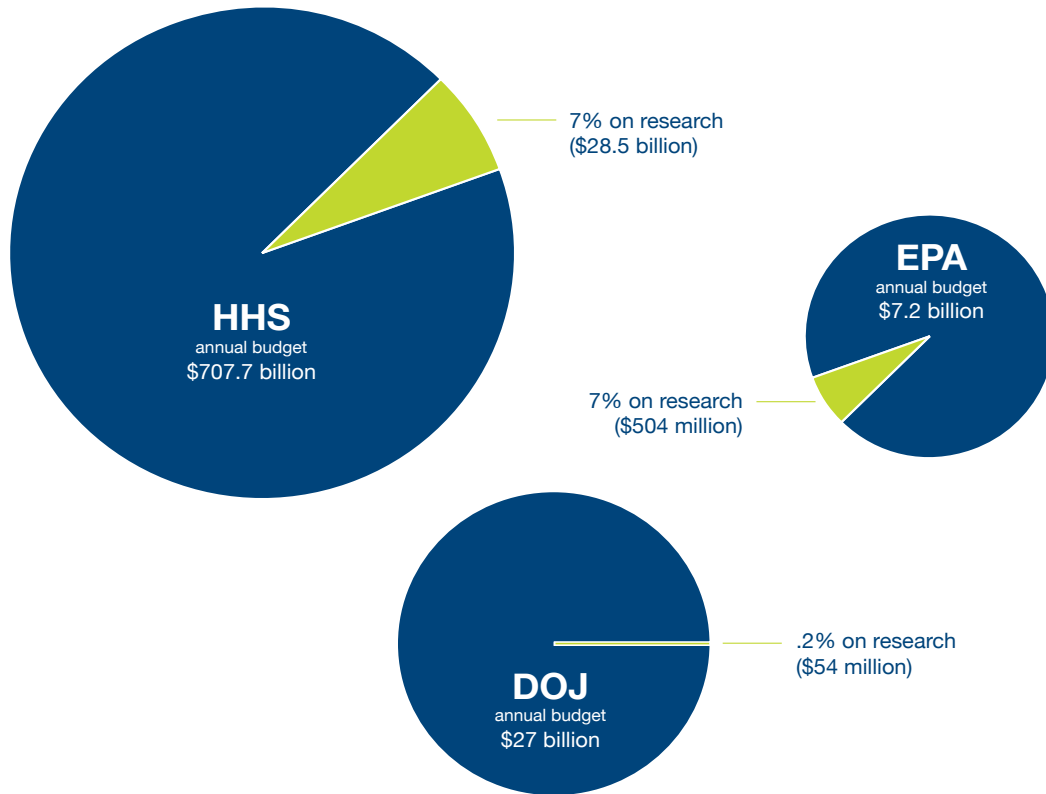
American debates over criminal justice policy are inherently politicized. Charges of being “soft on crime” can have serious political repercussions.<sup>42</sup> To avoid this fate, politicians have adopted “get tough” stances on crime, favoring harsher penalties in the form of three strikes laws, mandatory minimums, and longer sentences.<sup>43</sup> Anecdotal evidence and sensational headlines have driven this trend, and public support seems to affirm the longstanding conventional wisdom that being uncompromisingly “tough on crime” gets votes.<sup>44</sup> Thus, there are political disincentives to adopt new approaches, and supporting new evidence-based methods may be perceived to entail some political risk. Additionally, institutional constraints may act as obstacles to long-term criminal justice reform. Legislators may be reluctant to take actions when the benefits of those actions will not be felt until after the next election cycle; this is especially true in situations where those actions may generate short-term financial or political costs.<sup>45</sup> Finally, debates over criminal justice reform have tended to be one sided, dominated by prosecutors, law enforcement, private prison companies, and corrections officer unions. By contrast, prisoners and their families, as well as prisoners' rights groups, tend to wield less influence, as they are often poor, dispersed, and otherwise disenfranchised.<sup>46</sup>

Cost-benefit analysis can help correct for this imbalance in participation by shedding light on the wide range of social consequences associated with criminal justice policy. At the same time, the methodology should be deployed as a neutral tool for achieving more rational policies—not a mandate for easing criminal punishment. The purpose of cost-benefit analysis is to inform policymakers and improve the deliberative process:

Considering costs as part of the political calculus before enacting legislation does not, in other words, dictate that a particular sentencing philosophy be adopted or that a particular outcome be pursued. Having cost information does nothing to stop legislators from spending more money on prisons. It simply expands the range of data at their disposal and allows more than one side of the issue to be aired.<sup>47</sup>

Rather than being a political liability, empirically-grounded policymaking rooted in cost-benefit analysis is politically prudent today, given states' budget crises. Whereas headlines publicizing crime once helped drive a shift toward harsher policies and increased penalties, today's headlines on the economic crisis ought to motivate some rethinking of how criminal justice policy is made. Cost-benefit analysis provides an opportunity to implement a new approach in a way that is both fiscally responsible and consistent with public safety.

## Percentage of Federal Agency Budgets Dedicated to Research



Figures for FY 2008

## Conclusion

Cost-benefit analysis can dramatically improve criminal justice policymaking, infusing evidence-based and research-driven methodologies into decisionmaking processes that are often politically or ideologically motivated. As an analytical tool, cost-benefit analysis is well established in other disciplines, and is relied upon by economists, social scientists, and regulators alike. It allows for the thorough and objective consideration of how a policy change will impact society, facilitating comparisons amongst competing alternatives and conclusions about how to maximize fiscal resources. Despite some challenges, including the need for additional empirical research, the utilization of cost-benefit analysis to evaluate criminal justice programs is an attainable and worthwhile goal. Compared to other decisionmaking methods, cost-benefit analysis is neutral and transparent; it also has unique political salience given the economic climate. Successes already experienced by states like Washington and North Carolina—including reductions in recidivism and taxpayer costs—are replicable in jurisdictions around the country.

# Notes

- <sup>1</sup> JFA INSTITUTE, UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 5-7 (2007).
- <sup>2</sup> There is a rich literature explaining the convergence of social and political forces that led to the enactment of harsher criminal policies in United States during the 1960s through the late 1980s. For a thoughtful summary see *id.* (discussing political and media campaigns to “get tough on crime,” the growing use of crack cocaine, the public’s receptivity to tougher punishments, and so on). See also Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1278-1285 (2005) (describing the role that voters’ fears, interest group pressures, and a lack of institutional checks play in alloying discourse about sentencing policy at the state and federal levels).  
  
An equally vast literature evaluates the related yet analytically distinct question of why crime and imprisonment rates rose during that period—the range of sociological and economic factors that gave rise to the “perfect storm” that drove the imprisonment binge.” *Id.* at 6. See Scott Christianson, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 275-313 (1998); Elliott Currie, CONFRONTING CRIME: AN AMERICAN CHALLENGE 4-20 (1985); THE CRIME DROP IN AMERICA (Alfred Blumstein and Joel Wallman eds., 2005).
- <sup>3</sup> President Reagan’s Executive Order required federal executive agencies to use cost-benefit analysis in developing all “major” regulations, including those issued by the Environmental Protection Agency and the Departments of Health and Human Services, Transportation and Interior. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981). All subsequent presidential administrations have reaffirmed this mandate. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). See also White House Office of Management and Budget, Circular A-4, *Regulatory Analysis: Memorandum to the Heads of Executive Agencies and Establishments* (Sep. 9, 2003). In January 2011 President Obama issued another executive order underscoring the value of cost-benefit analysis and further entrenching its role in the regulatory process. Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011). See also RICHARD L. REVESZ AND MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 11 (2008) (noting that cost-benefit analysis “has enormous currency in the federal policymaking apparatus,” is “statutorily required” for many important environmental and social programs, and that despite its challenges the technique “is here to stay.”).
- <sup>4</sup> See OFFICE OF INFORMATION AND REGULATORY AFFAIRS, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES (June 2011).
- <sup>5</sup> See Washington State Institute for Public Policy, *Return on Investment: Evidence-Based Options to Improve Statewide Outcomes*, (July 2011) (see figures provided in Exhibit 1 and Technical Appendices), available at [www.wsipp.wa.gov/pub.asp?docid=11-07-1201](http://www.wsipp.wa.gov/pub.asp?docid=11-07-1201); Steve Aos, “Presentation of the Benefit-Cost Tool for States: Examining Policy Options in Sentencing and Corrections,” Testimony before the Washington State Human Services and Corrections Committee, (Jan. 21, 2011), available at [http://www.wsipp.wa.gov/video\\_tv21JAN2011.asp](http://www.wsipp.wa.gov/video_tv21JAN2011.asp).
- <sup>6</sup> See, e.g., MICHAEL W. FINIGAN ET AL., IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS (NPC Research, Apr. 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219224.pdf>.
- <sup>7</sup> See, e.g., M. SUSAN RIDGELY ET AL., JUSTICE, TREATMENT, AND COST: AN EVALUATION OF THE FISCAL IMPACT OF ALLEGHENY COUNTY MENTAL HEALTH COURT (RAND Corporation Technical Report, 2007), available at [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2007/RAND\\_TR439.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR439.pdf).
- <sup>8</sup> See, e.g., Stuart S. Yeh, *Cost-Benefit Analysis of Reducing Crime Through Electronic Monitoring of Parolees and Probationers*, 38 J. CRIM. JUSTICE 1090 (2010).
- <sup>9</sup> Sheldon X. Zhang et al., *The Cost Benefits of Providing Community-Based Correctional Services: An Evaluation of a Statewide Parole Program in California*, 34 J. CRIM. JUSTICE 341 (2006).

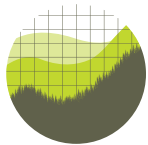
- <sup>10</sup> Elizabeth Drake et al., *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs* 1 (Washington State Institute for Public Policy, Apr. 2009), available at <http://www.wsipp.wa.gov/rptfiles/09-04-1201.pdf>. In addition to lowering recidivism, the program also resulted in a marginal increase in property crimes. *Id.*
- <sup>11</sup> Steve Aos et al., *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* 14 (Washington State Institute for Public Policy, Oct. 2006), available at <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>. Expressed in another way, implementing the alternatives to building more prisons would generate between \$2.59 and \$2.75 of taxpayer benefits per dollar of cost. *Id.*
- <sup>12</sup> Steve Aos and Elizabeth Drake, *WSIPP's Benefit-Cost Tool for States: Examining Policy Options in Sentencing and Corrections* 6-8 (Washington State Institute for Public Policy, Aug. 2010), available at <http://www.wsipp.wa.gov/rptfiles/10-08-1201.pdf>.
- <sup>13</sup> CHRISTIAN HENRICHSON AND VALERIE LEVSHIN, *COST-BENEFIT ANALYSIS OF RAISING THE AGE OF JUVENILE JURISDICTION IN NORTH CAROLINA* (Vera Institute of Justice, Jan. 2010), available at <http://www.vera.org/download?file=3185/CBA-of-Raising-Age-Juvenile-Jurisdiction-NC-final.pdf>.
- <sup>14</sup> *Id.* at 17.
- <sup>15</sup> See generally REVEZ AND LIVERMORE, *supra* note 3; JASON A. SCHWARTZ, *52 EXPERIMENTS WITH REGULATORY REVIEW: THE POLITICAL AND ECONOMIC INPUTS INTO STATE RULEMAKING* (Institute for Policy Integrity, Nov. 2010), available at <http://policyintegrity.org/publications/detail/52-experiments-with-regulatory-review>.
- <sup>16</sup> Virginia, North Carolina, New Mexico, Texas, and Florida are among the states that require fiscal notes. See also Daniel F. Wilhelm and Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?* 10-11 (Vera Institute of Justice, June 2002), available at <http://www.vera.org/download?file=269/IIB%2BBudget%2Bcrisis.pdf>.
- <sup>17</sup> Virginia Department of Corrections, *Virginia Adult Re-Entry Initiative: The Four-Year Strategic Plan, July 2010—June 2014* 3-18 (2010), available at <http://www.vadoc.virginia.gov/documents/reentryInitiativeExecSummary.pdf>.
- <sup>18</sup> VIRGINIA DEPARTMENT OF CRIMINAL JUSTICE SERVICES, *2007 BLUEPRINTS FOR CHANGE: CRIMINAL JUSTICE POLICY ISSUES IN VIRGINIA* 4 (May 2007), available at <http://www.dcs.virginia.gov/blueprints/EBP.pdf>.
- <sup>19</sup> JOHN SPEIR ET AL., *ALABAMA SENTENCING COMMISSION: DATA ANALYSIS AND SIMULATION ENHANCEMENT* 5-6 (Alabama Sentencing Commission, Jan. 2008) available at <https://www.ncjrs.gov/pdffiles1/nij/grants/225390.pdf>.
- <sup>20</sup> *Id.* at 1.
- <sup>21</sup> Alabama State Chief Justice Sue Bell Cobb, *State of the Judiciary Address* (Mar. 8, 2001), available at <http://www.wsfa.com/Global/story.asp?S=14212980>.
- <sup>22</sup> The history of sentencing commissions in New York is multifarious, and this particular commission was not the state's first. In 1983, Governor Mario Cuomo created New York's original commission, the New York State Committee on Sentencing Guidelines; from its beginning it was beset by highly politicized rivalries between members, and ultimately disbanded after only two years. See Michael Tonry, *The Politics and Processes of Sentencing Commissions*, 37 *Crime & Delinquency* 307, 315 (July 1991) (describing the commission as a "failure of politics" and "incompatible political demands"). In March 2007, Governor Eliot Spitzer established a new temporary commission, known as the Commission on Sentencing Reform, to conduct a comprehensive review of New York's sentencing practices. This commission became permanent in October 2010. Press Release, New York State Unified Court System, Chief Judge Announces Creation of Permanent Sentencing Commission for New York State (Oct. 13, 2010), available at [http://nycourts.gov/press/pr2010\\_11.shtml](http://nycourts.gov/press/pr2010_11.shtml); see also Press Release, New York State Division of Criminal Justice Services, Sentencing Commission Calls for Reform (Oct. 16, 2007) (noting previous "piecemeal attempts at reforming New York's sentencing structure... created a situation that [was] a model for the 'law of seemingly unintended consequences'" (quoting a preliminary report by the Commission on Sentencing Reform)), available at [http://criminaljustice.state.ny.us/pio/press\\_releases/2007-10-16\\_pressrelease.html](http://criminaljustice.state.ny.us/pio/press_releases/2007-10-16_pressrelease.html).
- <sup>23</sup> NEW YORK STATE COMMISSION ON SENTENCING REFORM, *THE FUTURE OF SENTENCING IN NEW YORK STATE: RECOMMENDATIONS FOR REFORM* 135 (Jan. 30, 2009).

- <sup>24</sup> *Id.* at 139-40.
- <sup>25</sup> *Id.* at 160.
- <sup>26</sup> Vera Institute of Criminal Justice, Knowledge Bank for Cost-Benefit Analysis in Criminal Justice, at <http://www.vera.org/project/cba-knowledge-bank>.
- <sup>27</sup> Marginal costs exclude fixed costs, or costs that will be incurred by both drug courts and traditional prisons, such as the salary of a staff employee. While it may be appropriate in some cases to use average costs, rather than marginal costs, the latter usually offer more conservative cost estimates and should therefore be favored in conducting a cost-benefit analysis of a criminal justice program.
- <sup>28</sup> Washington State Institute for Public Policy, *Can Drug Courts Save Money for Washington State Taxpayers?* 2 (Jan. 1999), available at [http://www.wsipp.wa.gov/rptfiles/Drug\\_Court.pdf](http://www.wsipp.wa.gov/rptfiles/Drug_Court.pdf) [hereinafter WSIPP Drug Courts].
- <sup>29</sup> See Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049, 1054-55 (noting that while the “precise magnitude of the effect is still uncertain,” research findings suggest that low-risk offenders are more likely to recidivate when they are placed with more experienced offenders, lending support to the idea that prison is a “school’ for criminals”).
- <sup>30</sup> See *id.* (discussing and citing sources for the “brutalization effect of prisons,” a phenomenon resulting from the prevalence of violence between prison inmates and against inmates by prison guards).
- <sup>31</sup> A proper examination of costs will also look beyond start up costs to long-term maintenance or compliance costs. These future costs must be adjusted for the time value of money to arrive at an estimate of their *net present value*. Net present value simply means discounting the value of future costs to reflect the fact that a dollar today is considered by most people to be “worth more” than a dollar acquired or spent far into the future, say twenty years from now. When translating costs (or benefits) into present value measures, the effects of inflation must also be considered; these effects can be accounted for by using a price index and an inflation-adjusted discount rate (often between three and seven percent annually in the United States).
- <sup>32</sup> See, e.g., WSIPP Drug Courts, *supra* note 27, at 2 (finding that drug courts can lower the rate of future criminal offending by 16 percent).
- <sup>33</sup> Parental imprisonment, for instance, increases dramatically the likelihood that children will develop antisocial-delinquent behavior. One research survey found that the risk for such behavior rose 340 percent, compared to children with no history of parental imprisonment. Joseph Murray and David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 *Crime & Justice* 1, 133, 152 (based on four previous studies).
- <sup>34</sup> It is worth noting that some costs or benefits may be very difficult to quantify. In this scenario, the qualitative descriptions (units) of these costs and benefits should be disclosed and considered alongside the monetized analysis. Failing to acknowledge costs or benefits simply because they are unquantifiable would distort the cost-benefit analysis. See Exec. Order No. 12,866, *supra* note 3 (noting that properly understood, costs and benefits “include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures ... that are difficult to quantify, but nevertheless essential to consider”); *Ctr. for Biological Diversity v. Nat’l Highway Transp. Safety Admin.*, 508 F.3d 508, 531-35 (9th Cir. 2007) (holding that notwithstanding of the difficulty of monetizing the benefits of reductions in greenhouse gas emissions, the agency is obligated to analyze those benefits in either quantitative or qualitative form).
- <sup>35</sup> Aos and Drake, *supra* note 11, at 1.
- <sup>36</sup> Examples of complementary moral considerations include the retributive goals of punishment and burdens of proof. While moral goods could, in theory, be monetized and incorporated as values in conducting cost-benefit calculations, for the most part they are treated as distinct and policymakers consider them alongside the results of a cost-benefit analysis. For an example of an attempt to analyze the moral benefits of criminal justice in utilitarian terms, see Paul H. Robinson and John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 *S. Cal. L. Rev.* 1 (Nov. 2007) (suggesting that setting sentences in accordance with people’s sense of retribution is necessary in order to maintain the overall legitimacy of the criminal justice system).
- <sup>37</sup> See Greg Marston and Rob Watts, *Tampering With the Evidence: A Critical Appraisal of Evidence-Based Policy-Making*, 3 *THE DRAWING BOARD: AN AUSTRALIAN REVIEW OF PUBLIC AFFAIRS* 3, at 144,



- 151 (2003) (“[Q]uantitative secondary social and epidemiological data collected by government agencies and... primary quantitative data collected by researchers from their experiments, clinical trials, and interview or questionnaire-based social surveys are typically valued highly as ‘objective’ or ‘hard’ data. On the other hand, qualitative data such as ethnographic accounts and autobiographical materials are more frequently devalued as ‘subjective’ or ‘soft.’”). See also LAWRENCE W. SHERMAN ET AL., PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING (National Institute of Justice 1997) (utilizing the Maryland Scientific Methods Scale to assess the validity and methodological quality of studies on criminal justice interventions, and favoring those with experimental and quasi-experimental designs).
- <sup>38</sup> See LAWRENCE W. SHERMAN, EVIDENCE-BASED CRIME PREVENTION 10 (2002) (noting that given the dearth of scientifically rigorous studies, a “clear trade-off” exists “between the level of certainty in the answers that can be given on program effectiveness and the level of useful information that can be gleaned from available science”). See also *id.* at 413; Tbl. 10.4 (listing particular crime prevention strategies whose effectiveness remains undetermined).
- <sup>39</sup> CHARLES F. WELLFORD ET AL., STRENGTHENING THE NATIONAL INSTITUTE OF JUSTICE 27-43; 223-25 (2010).
- <sup>40</sup> Moreover, only a portion of the NIJ’s budget may be allocated to discretionary research awards; most of its budget is restricted, earmarked either for specific research grants or a host of nonresearch, including administrative programming. *Id.* at 40-43 See also *id.* at 215-23 (calling for the NIJ to be given greater budgetary autonomy and institutional independence from the rest of DOJ, to allow NIJ to strengthen its identity as a research agency and advance needed research).
- <sup>41</sup> *Id.* at 41.
- <sup>42</sup> See Sara Sun Beale, *What’s Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 Buff. Crim. L. Rev. 23, 42-44 (1997); David C. Anderson, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE (1995).
- <sup>43</sup> *Id.* See also Eric Lotke et al., Three Strikes and You’re Out: An Examination of the Impact of Strikes Laws 10 Years After Their Enactment (Justice Policy Institute, Sep. 2004); *id.* at 2 (noting that in the mid-1990s, at least 23 states and the federal government enacted three strikes laws); Marc Mauer, *Why are Tough on Crime Policies So Popular?* 11 STAN. L. & POL’Y REV. 9, 11 (1999).
- <sup>44</sup> See generally Anderson, *supra* note 39; Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUSTICE 99, 119 (1992).
- <sup>45</sup> See Sarah A. Binder, *Can Congress Legislate for the Future?* (Brookings Research Brief No. 3, Dec. 2006), available at [http://www.brookings.edu/papers/2006/1215governance\\_binder.aspx](http://www.brookings.edu/papers/2006/1215governance_binder.aspx).
- <sup>46</sup> See also Erika Wood, *Restoring the Right to Vote* (Brennan Center for Justice, 2009) (documenting and arguing against felony disenfranchisement laws in the United States).
- <sup>47</sup> Barkow, *Federalism and the Politics of Sentencing*, *supra* note 2 at 1299.

For questions or comments, please contact Edna Ishayik at 212-998-6085 or [ednai@nyu.edu](mailto:ednai@nyu.edu).



*Institute for*  
**Policy Integrity**

*new york university school of law*

Institute for Policy Integrity  
New York University School of Law  
139 MacDougal Street, Third Floor • New York, New York 10012  
[www.policyintegrity.org](http://www.policyintegrity.org)

**Center on the  
Administration of  
Criminal Law**

*New York University  
School of Law*

Center on the Administration of Criminal Law  
New York University School of Law  
139 MacDougal Street, Third Floor  
New York, New York 10012