Ending Prosecutor's Moral Hazard in Criminal Sentencing

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In 1988, Sierra County in northern California was, suddenly, going broke. "The sewage system at the courthouse is failing, a bridge collapsed, there's no county library, no county park, and we have volunteer fire and volunteer search and rescue," said county District Attorney James Reichle.[1] The cause was not a hurricane, nor an earthquake, nor a financial crisis. It was murder.

"If we didn't have to pay $500,000 a pop for Sacramento's murders, I'd have an investigator and the sheriff," Reichle said.[2] But he failed to mention that the cost was so high because each time someone was tried for murder, he sought the death penalty. Each death penalty trial costs far more than other criminal trials in additional depositions, discovery, and other litigation costs.[3] Not only are death penalty defendants more likely to have strong representation, in most states, their trial has two parts: one to determine guilt, and another to determine the sentence. All told, an execution can cost the government 50-200% more than a sentence of life in prison.[4]

And the costs are paid differently: The costs of death penalty prosecution are paid entirely by the local county budget, whereas long prison terms are paid by the state. In Sierra County, according to the county auditor, "another death penalty case would likely require the county to lay off 10 percent of its police and sheriff force."[5]

In this Note, I argue that prosecutors face moral hazard because they personally benefit from seeking higher sentences and pass off the cost to other branches of government. In the first section, I discuss the role of county prosecutors in determining sentences. I establish that county prosecutors are the primary decision makers in deciding the length of a criminal sentence. Then, I argue that the political incentives on prosecutors, coupled with their insulation from the cost

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1. Richard C. Dieter, *Death Penalty Info. Center, Millions Misspent: What Politicians Don't Say About the High Cost of the Death Penalty* (1992), https://deathpenaltyinfo.org/millions-misspent [https://perma.cc/XTF4-GW2T].

2. *Id.*

3. Amnesty U.S.A., *Death Penalty Cost*, https://www.amnestyusa.org/issues/death-penalty/death-penalty-facts/death-penalty-cost [https://perma.cc/L3E6-KAFR].

4. *Id.*

5. Dieter, *supra* note 1.

sentences, creates moral hazard that encourages them to seek unnecessarily long sentences at the expense of society and the public fisc.

In the second section, I survey existing criminal justice reform efforts and other government programs on which my policy proposal is based. I discuss the recent electoral success of self-proclaimed reformer District Attorney (DA) and State's Attorney (SA) candidates. Leading the charge is Philadelphia DA Larry Krasner, who implemented a series of radical changes in policy, including one that inspired my proposal.

In the third section, I propose a policy to address the moral hazard problem: that prosecutors should be legally required to justify the cost of a sentence in court during the sentencing hearing. A state agency will create charts estimating the cost to the government and society based on a variety of objective factors. Then, at the sentencing hearing, prosecutors must justify why the sentence is worth the cost. Judges must address the cost when they hand down the sentence.

Finally, I discuss the likely effects of the policy, not just on sentencing, but on charging decisions and plea bargains. I address likely arguments against the proposal, including that it will burden the judicial system, and that a non-binding policy will have no effect on sentencing at all. I conclude by asserting that the policy will likely reduce sentences, encourage non-incarceration alternatives to prison, and provide statistics to facilitate better policymaking in the future.

I. THE PROBLEM: UNBRIDLED AUTHORITY

Criminal sentencing is one of the few areas of law where there is, frankly, very little law that governs how the decisionmakers can act. Within the bounds of statutory minimums and maximums, judges are free to consider almost anything in handing down a sentence, though they must consider the guideline range (in the federal system and most states).[6] And even before the defendant gets to the sentencing hearing, he is subject to the prosecutor's decision as to what charges to bring. Since most criminal conduct meets the definition of different, overlapping crimes, prosecutors often have wide discretion as to what sentencing ranges go before a judge. Prosecutors and judges are subject to similar political incentives to push for long sentences: once the sentence is handed down, they almost never see the result unless they give a short sentence, and the public wanted a long one.[7]

As a result, our current sentencing process hands down excessively long sentences. These create significant costs—to the convict, to the government, and to society at large—and those costs are frequently ignored when the sentence is

6. *See generally* John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235 (2006).

7. As a practical matter, it is impossible to know whether prisoners *would* commit a crime had they been given a shorter sentence, but easy to know that recidivists *would not* have committed a crime had they still been incarcerated. *See also* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009) (finding campaigns often dwell on "a few high visibility cases" instead of the incumbent's policies).

determined. This creates moral hazard, as prosecutors and judges must choose between their own political interests and the public interest. The result is overly long sentences, a key factor in over-incarceration.[8]

A. GOALS OF SENTENCING AND OPTIMAL SENTENCES

At the outset, it is important to summarize the objectives that are frequently presented in connection with criminal sentencing. They are usually listed as: (1) incapacitation, (2) rehabilitation, (3) deterrence, both general and specific, and (4) retribution.[9] Many states explicitly mention some or all of these goals in their sentencing laws; in all states, they are widely considered.[10] Depending on the situation, one goal may take priority, or several or all may be considered.[11]

Incapacitation is the simplest reason to send someone to jail. The defendant is locked up because, if he were out in society, he is likely to commit another crime. The same logic applies to house arrest, restraining orders, and conditional probation: the state attempts to inhibit the defendant's capacity to commit more crimes. True fidelity to this goal would recognize that people are more likely to commit crimes in certain situations, and at certain times in their lives. Various new algorithms try to predict how likely an individual defendant is to commit another crime.[12] One trend, in particular, is well-researched: age. As a young adult, criminality is at its peak, but by the time the defendant reaches 40, he is unlikely to commit again.[13] Many sentences for violent crimes keep people in jail for decades, or even for life, even though they are unlikely to commit violent crimes after the age of forty years-old.[14]

Rehabilitation also seeks to prevent future crime, but by changing the defendant so he becomes a law-abiding member of society.[15] This is commonly seen in drug diversion programs, but also comes into play through education and work programs in prison, halfway houses, and probation. All these options serve as an alternative to jail, in order to keep the defendant in society. Some of these programs are well-studied, and many of them have been shown to be cheaper than

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8. JOHN F. PFAFF, SENTENCING LAW AND POLICY 490 (Robert C. Clark et al. eds., 2017) [hereinafter PFAFF, Sentencing Policy].

9. *Id*. at 37–38, 57.

10. For example, New York's penal code lists among its purposes deterrence, rehabilitation, and incapacitation. N.Y. PENAL LAW § 1.05 (McKinney). Colorado lists retributivism, rehabilitation, general deterrence, and specific deterrence (and consistency). COLO. REV. STAT. § 18-1-102.5. Minnesota lists deterrence, rehabilitation, and incapacitation. MINN. STAT. § 609.01. The federal code lists retributivism, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a)(2).

11. PFAFF, Sentencing Policy, *supra* note 8, at 63–70.

12. *See, e.g*., Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment With Sex Offenders: Accuracy, Admissibility, and Accountability*, 40 AM. RIM. L. REV. 1443 (2003).

13. PFAFF, Sentencing Policy, *supra* note 8, at 21–22.

14. *Id*. at 26–27.

15. *Id*. at 48.

prison and better at reducing recidivism.[16] But state and federal policy still reflects the belief that criminals who go to prison are generally rehabilitated.[17]

Deterrence works on two fronts: first, by punishing the defendant, the government hopes to deter him from committing the same crime again. Second, by making an example out of the defendant, the government deters other people from committing that crime. Statistics on the success of deterrence are lacking, and it is unclear if most prison sentences serve this purpose. On the whole, studies show that a high likelihood of getting caught has a far greater deterrent effect than the severity of the punishment once convicted.[18] This is in part because most criminals do not know the statutory punishment for their crime, and in part because the uncertainty of getting caught, getting charged, and getting convicted is too tenuous to serve as an effective deterrent.[19] Even so, many current sentences are still based in part on the idea that a long sentence will deter future crimes.[20]

The final reason is not based on outcome at all, but on morality. Retributivism is the idea that criminals should not get the benefit of their crime. They should be punished to restore moral order to society. This comes into play especially for heinous crimes that offend even the most austere judge: child sex abuse, cold-blooded murder, rape, but it also imbues mundane sentencings with the background principle, "If you didn't want the time, you shouldn't have done the crime." In this way, it encourages prosecutors and judges to ignore the best interest of the defendant—even if rehabilitating the defendant would be good for society at large. Despite this, it is still a valid and important reason for punishing criminals.[21]

In general, many sentences today are far longer than needed to accomplish any of these goals. But even sentences that do accomplish one or more of them might not be worth the cost. Every dollar spent on prison could otherwise go to schools, community development, tax credits, or any of the other myriad social programs that governments invest in. As Pfaff writes, "Some reforms are justifiable even if they *do* lead to more crime. It's true that crime is costly—but so, too, is punishment, especially prison."[22]

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16. *See, e.g.*, Angela Hawken, T*he Message From Hawaii: HOPE for Probation*, PERSPECTIVES: J. AM. PROBATION & PAROLE ASS'N 36 (Summer 2010); Lawrence W. Sherman & Heather Strang, RESTORATIVE JUSTICE: THE EVIDENCE, *reprinted in* PFAFF, Sentencing Policy, *supra* note 8, at 667.

17. *See supra* note 10.

18. National Institute of Justice, *5 Things About Deterrence*, https://www.ncjrs.gov/pdffiles1/nij/247350.pdf [https://perma.cc/WA3Z-W8L7] ("The certainty of being caught is a vastly more powerful deterrent than the punishment.").

19. There may be exceptions. For example, high-profile cases may have a deterrent effect, but they are too infrequent to study.

20. Pfaff, Sentencing Policy, *supra* note 8, at 63–65.

21. *Id*. at 57.

22. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 107 (2017) [hereinafter PFAFF, Locked In].

B. THE COSTS OF SENTENCING

Our criminal justice system is quite costly indeed. First and foremost, state, county, and federal governments must pay to incarcerate our ever-growing prison population. In the 30 years leading up to 2010, the United States prison population rose from 330,000 to more than 1.6 million, though while the total population grew by only 36%, and the crime rate fell by 42%."[23] And that is just the beginning. As Pfaff writes, "the real costs are much higher than the $80 billion we spend each year on prisons and jails: thy include a host of finical, physical, emotional, and social costs to inmates, their families, and communities."[24]

No good estimate of these total costs yet exists. The proposal below[25] lays out a recommendation for how they should be calculated going forward. Lacking better estimates, this section does not attempt to produce current costs of sentencing.

C. THE SENTENCING PROCESS

After a defendant is convicted, judges set a date for a sentencing hearing, and, before that, a date when sentencing recommendations are due. The prosecutor and defense attorney each write a memo advocating for a harsh or lenient sentence, explaining why the crime was or was not particularly bad, why the defendant will or won't offend again, and why their recommended sentence is the court's best option. At the hearing, witnesses may be called, videos may be shown, victim impact or character witnesses may submit statements, and the defendant himself may testify. In short, anything goes.[26]

Each crime for which the defendant was convicted has a statutory minimum and maximum sentence. The defendant will also have a guideline sentence. Set by the U.S. Sentencing Commission (for federal crimes) or a state analogue, the guideline will take into account the nature of the crime, the defendant's criminal history, and other relevant factors. The guideline range always falls within the statutory minimum and maximum.[27]

Judges need only follow the statute.[28] They must consider the guideline (and attorneys, therefore, must argue why it should or should not apply), but it is only advisory. They can consider any conduct they deem relevant, including alleged crimes that were never proven to a jury. If the defendant was convicted of multiple counts, they can often decide whether to run the sentences concurrently or consecutively.[29]

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23. Pfaff, John F, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program*, 13 AM LAW & ECON REV 491 (2011).

24. PFAFF, Locked In, *supra* note 22, at 107.

25. *See infra* Section III(3)

26. PFAFF, Sentencing Policy, *supra* note 8, at 145.

27. *Id*. at 264–265.

28. In addition to the statutory minimum and maximum, judges may be constrained by adjustments based on facts proven to the jury. *Id*. at 260–61.

29. *Id*. at 103.

Despite their broad authority, judges usually issue predictable sentences within the guideline range.[30] Judges may follow the guidelines for various reasons, including that they aspire to give consistent sentences, they trust the experts at the sentencing commission, or they simply do not know what else to do. But the fact that they so rarely exercise their discretion means that prosecutors can cue up the sentence they want by controlling what guideline range goes before the judge. They do this by deciding which of overlapping crimes to charge, what plea deals to offer, and what enhancements to seek at sentencing.

D. THE POWER OF PROSECUTORS

Like judges, prosecutors have wide discretion in the eventual sentence: in what charges they file, what adjustment to the guideline range they attempt to prove, and what sentences they seek.[31] Unlike judges, they use it.

Most criminal behavior meets the definition of multiple, overlapping crimes, any of which could be charged. Prosecutors often threaten to bring the harshest charges (for example, a felony), in order to negotiate a plea deal for less harsh charges (for example, a misdemeanor).[32] In another context, prosecutors are frequently relied upon by the legislature to use their discretion to not charge the maximum. Legislators can thus pass harsh laws (appealing to their constituents) with the knowledge that minor criminals will rarely be caught up in them.[33]

And this discretion exists without any checks from other units of government.[34] Prosecutors are elected by county, and most states have no oversight over them. And they are independent of county governments: they are separately elected from county supervisors and other officials, and their budget is largely outside their control and unrelated to their performance.[35] This is key to the moral hazard they face: they exercise discretion in the charging and sentencing process without it having any effect on their office.

II. THE SOLUTIONS: EXISTING REFORMS AND WHAT THEY LACK

The field of criminal justice reform is filled with policies as diverse as the counties and states that have implemented them. From legalizing marijuana to restoring felon voting rights, lawmakers across the country are experimenting

30. Douglas A. Berman, *Within-guideline sentences dip below 50% according to latest USSC data*, Sentencing Law and Policy Blog (May 7, 2014), https://sentencing.typepad.com/sentencing_law_and_policy/2014/05/within-guideline-sentences-dip-below-50-for-first-time-according-to-new-ussc-data.html [https://perma.cc/9M88-AJHD] (noting the first quarter of 2014 is the first time a majority of sentences fell outside the guideline range).

31. PFAFF, Sentencing Policy, *supra* note 8, at 92.

32. PFAFF, Locked In, *supra* note 22, at 130–31.

33. *Id*. at 55.

34. PFAFF, Sentencing Policy, *supra* note 8, at 97.

35. *Id*.

with a wide variety of policies to address over-incarceration. This section is neither a comprehensive review of those efforts, nor a commentary on the field as a whole. All of these policies affect how much discretion a prosecutor has. If possessing a small amount of marijuana is no longer a felony, for example, then prosecutors cannot threaten the defendant with a felony charge.

This Note focuses primarily on those policies that specifically deal with prosecutorial or judicial discretion. These policies fall into a familiar pattern: they identify a common error made during sentencing and limit the discretion of prosecutors or judges to make that error.

A. GUIDELINE SENTENCES

Guideline sentences have been a part of the federal criminal justice system since the Sentencing Reform Act of 1984.[36] Since then, the U.S. Sentencing Commission (an executive agency) has created sentencing charts based on the defendant's offense level. The level is determined by the nature of the crime and the defendant's criminal history, but can be adjusted for a variety of factors such as obstruction of justice (an upward adjustment) or acceptance of guilt (a downward adjustment).[37] The guidelines were passed as a mandatory range for judges to follow, but the Supreme Court struck down that feature of the law in *United States v. Booker*.[38] Now, the guideline range is non-binding, but judges must acknowledge the range at sentencing and, if they choose to issue a sentence that falls outside of it, they must state their reasons for doing so.[39] Most states follow similar guideline sentence schemes (though they vary greatly in how the guidelines themselves are set) making this the standard sentencing process for most crimes nationwide.[40]

Although they are nonbinding, the guidelines provide a strong anchoring effect. Aggregations of post-*Booker* sentences show that most judges choose to give sentences within the guidelines.[41] Judges supply a variety of reasons for this: trust in the Sentencing Commission, a desire to treat each defendant equally, and not wanting to take the risk that a defendant given a below-guideline sentence gets out of prison and commits a heinous crime.[42]

Guideline sentences pose two major problems: they are generally higher than the average sentence would otherwise be for the same crime, and they give prosecutors more discretion. The first problem has been widely criticized by criminal

36. United States Sentencing Commission, *Guidelines Manual*, §3E1.1 at 1–2 (Nov. 2018).
37. *Id*. at 345.
38. United States v. Booker, 543 U.S. 220 (2005).
39. Guidelines Manual, *supra* note 36, at 14.
40. PFAFF, Sentencing Policy, *supra* note 8, at 264–65.
41. *See* Berman, *supra* note 30.
42. *See generally*, John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235 (2006–2007).

justice reform advocates.[43] But the second may be more important: by making judges more predictable, guideline sentences allow prosecutors more discretion over the eventual sentence. Most significantly, prosecutors can radically change the defendant's offense score (a key factor in determining the guideline range) based on how they charge a crime, what plea they agree to, and what adjustments they assert at sentencing.[44]

The irony is that the original motivation behind the guideline sentences was to limit discretion in sentencing. Liberal reformers led by Senator Edward Kennedy were concerned about the disparities created by the unlimited discretion of judges and parole officers in how much time prisoners served for the same crime.[45] They were joined by conservative critics who feared lenient judges were failing to adequately enforce the law.[46]

The law assumed—rightfully at the time—that judges were the primary decision-makers in criminal sentences. But, for reasons already discussed, that is no longer the case. The sentencing guidelines have had the unfortunate effect of merely passing the buck from judges to prosecutors, driving sentencing choices back to the realm of charging decisions, plea bargains, and other unilateral decisions of prosecutors that are hard to appeal or review after the fact.

B. NEW JERSEY'S BRIMAGE GUIDELINES

Just as new laws were needed then to address the problems caused by excessive judicial discretion, now laws are needed to limit the problems caused by excessive prosecutorial discretion. One state, New Jersey, has done exactly that. The Brimage Guidelines, promulgated by the New Jersey Attorney General, provide presumptive rules that govern what plea bargains local prosecutors can offer.[47] In the same way that guideline sentences constrained what punishment judges could hand down before *Booker*, the Brimage Guidelines constrain what punishment a prosecutor can seek for certain crimes.

The legal basis for the Brimage Guidelines is a New Jersey statute, the Comprehensive Drug Reform Act, which allowed prosecutors to waive or reduce the mandatory minimum sentence for a variety of drug crimes so as to encourage defendants to plead guilty.[48] To allow for statutorily-required review of the plea bargains, the New Jersey Supreme Court mandated that prosecutors follow written guidelines and state their reasons in each case when accepting a plea below

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43. PFAFF, Locked In, *supra* note 22, at 197 (discussing perceptions of presumptive sentence policies).

44. *Id*. at 155.

45. Stith, Kate and Koh, Steve Y., *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines* at 227, Faculty Scholarship Series (1993), https://digitalcommons.law.yale.edu/fss_papers/1273 [https://perma.cc/QN2S-XJJ3].

46. *Id*. at 228.

47. Brimage Guidelines 2: Revised Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12 (2004), http://www.njdcj.org/agguide/directives/brimage_all.pdf [https://perma.cc/E6QY-HABK].

48. *Id*.

the minimum.[49] Later, in *State v. Brimage*, the Supreme Court mandated that these guidelines must be consistent across the state, instead of allowing each county to develop its own policy.[50]

Because it is based on a New Jersey statute, the mandate of *Brimage* will not apply to other states, and the Guidelines are often left out of criminal justice discussions.[51] But its method of curbing prosecutorial discretion—and the initial failures of implementation—are extremely useful starting points for solving this problem in other situations.

The initial failures are especially instructive. First, poorly written guidelines do nothing to constrain prosecutors. Prosecutors can still choose what crimes to charge, and therefore what guidelines to follow. But John Pfaff believes this can be easily remedied. He asserts:

> "If guidelines set the default ranges below what prosecutors had been demanding before, require that certain additional facts must be shown for borderline cases to result in prison admissions, and establish a generous set of mitigators that defense attorneys can raise before judges, then they will be able to push down prison populations."[52]

Poorly written guidelines may have the same effect as the federal sentencing guidelines: driving up prison time for everyone, regardless of whether it is warranted.

Another problem of curbing prosecutorial discretion is that discretion is often needed to smooth out the effects of unjust or disparate laws. For example, many criminal laws demand harsher punishments for those caught selling drugs within 1,000 feet of a school. But in many cities, the vast majority of the city falls in a school zone. For example, New Jersey has a 1,000 feet drug free school zone law.[53] But a full 76% of Newark is within 1,000 feet of school.[54] Therefore, roughly 3/4 of crimes will occur in a school zone. Since most people of color live in dense, urban areas, they are far more likely to be caught conducting criminal activity in a school zone, even if their crime is unrelated to the school. These laws therefore create huge racial disparities, as well as urban/rural disparities more generally.[55]

Before New Jersey prosecutors had to follow written guidelines, they frequently pled around these enhanced sentences. But after *Vazquez*, the pleading

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49. State v. Vasquez, 129 N.J. 189 (1992).

50. State v. Brimage, 153 N.J. 1 (1998).

51. For example, Michelle Alexander's famous book, The New Jim Crow, does not mention the Brimage Guidelines. MICHELLE ALEXANDER, THE NEW JIM CROW (2012).

52. PFAFF, Locked In, *supra* note 22, at 149.

53. N.J.S.A. 2C:35–7.

54. The New Jersey Commission to Review Criminal Sentencing, *Report on New Jersey's Drug-Free Zone Crimes and Proposal for Reform*, http://sentencing.nj.gov/report/december05.pdf [https://perma.cc/DLC2-VYMU].

55. *Id.*

guidelines put forth by the Attorney General made it effectively impossible to do so.[56] Prosecutors were unable to reduce unfair sentences. Arguably, this is a problem with the underlying substantive criminal law and not the pleading or sentencing process. But it also speaks to why prosecutors historically do have such great discretion: not every situation that meets the statutory definition of a crime deserves to be charged as such, and not every criminal should be indicted.

In New Jersey, the current Brimage guidelines allow prosecutors discretion to waive enhancements like school zone laws, leading Pfaff to conclude that "it is certainly possible to regulate how prosecutors perform one of their most influential and least transparent tasks."[57] But the initial failure demonstrates that a mandatory system for prosecutors can have the same drawbacks as mandatory sentencing schemes for judges.

C. CALIFORNIA'S REALIGNMENT

In 2011, California passed the Realignment, one of the most forward-thinking and successful pieces of criminal justice reform legislation. And by then, it was desperately needed.

After passing one of the harshest crime laws in the country's history, California's prisons were overflowing.[58] In twenty-five years, its incarceration rate increased five-fold. It opened 21 new prisons, but they still held more than twice as many prisoners as they had capacity for.[59] Prisons were overcrowded, conditions were terrible, and access to health care was rare. A panel of federal judges found that there was a preventable death every week—in fact, every five to six days.[60]

Like the Brimage Guidelines, California's reform was the result of a court order. Inmates in California prisons sued the state alleging a violation of their 8th Amendment right against cruel and unusual punishment due to overcrowding.[61] The courts agreed. After some legislative and judicial hot potato, Governor Jerry Brown signed The Public Safety Realignment Act of 2011.[62]

The Realignment sent low-level prisoners to county jail instead of state prison.[63] Anyone convicted of non-violent, non-serious, non-sex offenses now serves their entire sentence in county jail.[64] All parole revocations are now served

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56. *See generally Brimage*, 153 N.J. at 1.

57. PFAFF, Locked In, *supra* note 22, at 150.

58. *Id*. at 88.

59. *Id*. at 150.

60. *Id*.

61. Coleman v. Schwarzenegger, No. C01-1351 TEH, 2010 WL 99000, at 1 (E.D. Cal. Jan. 12, 2010), *aff'd sub nom*. Brown v. Plata, 563 U.S. 493 (2011).

62. Pfaff, Locked In, *supra* note 22, at 150.

63. California Department of Corrections and Rehabilitation, *2011 Public Safety Realignment*, https://www.cdcr.ca.gov/About_CDCR/docs/Realignment-Fact-Sheet.pdf [https://perma.cc/LJ7M-EGD7] (July 15, 2011).

64. *Id*.

in county jail, except for the most serious offenders.[65] The statute was passed as a way to reduce the state prison population but it had another benefit: it sent the cost of many criminal sentences closer to the people who issue them.

"It was a direct strike at the budgetary moral hazard problem of free prison space."[66] The cost of incarceration should weigh more heavily on the minds of prosecutors and judges if their own county must pay.

So far, the statistics bear that out. In the first year after the Realignment, prison populations dropped by 30,000 with no comparable increase in jails.[67] Other changes in California law have since muddied the statistical waters (especially decriminalizing many drug possession felonies), but it seems, overall, that California's incarceration rate went down and its crime rate did not go up.[68]

But the Realignment was not an effort to solve the moral hazard problem; it was a way to reduce overcrowding in state prisons. It never addressed the problem that independently-elected prosecutors are free to ignore their county's budget problems. And when county governments started protesting the cost of incarceration that they now have to pay, the state came to their rescue. Of California's 58 counties, 28 (nearly half) are receiving $1.7 billion in state aid to fund their jails.[69] Prosecutors no longer have to worry about straining their county's services to pay for jail sentences.[70] The moral hazard is back.

D. PROSECUTORIAL OVERSIGHT

Another way to improve prosecutors' decisions is to provide oversight—to change the fact that most prosecutors answer to no one. A few academics have proposed various forms of oversight,[71] but only one state has actually passed such a law.[72] It was a meager law, and while it does not address the moral hazard problem, it provides a framework for meaningful state oversight of county prosecutors.

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65. *Id*.

66. PFAFF, Locked In, *supra* note 22, at 151.

67. *Id*.

68. *Id*. at 152.

69. *Id*. at 151.

70. After seeing the success of the Realignment, Indiana enacted a similar, but less ambitious law. There, only those convicted of the "lowest-level felonies" are sent to local jail instead of state prison. As of 2017, no other state had enacted something like the Realignment. *Id*. at 152–53.

71. For example, Harvard Law Professor William Stuntz proposes that prosecutors must make public the charges they threatened to bring in negotiating a plea deal. William J. Stuntz, "*Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law," in CRIMINAL PROCEDURE STORIES, ed. Carol S. Steiker (New York: Foundation Press, 2006), 351–359. Pfaff proposes that they must publish statistics on charging decisions. PFAFF, Locked In, *supra* note 22, at 158–59.

72. *Cf*. PFAFF, Locked In, *supra* note 22, at 127 ("No major piece of state-level reform legislation has directly challenged prosecutorial power").

In 2017, over the strong objection of prosecutors,[73] New York created a State Commission on Prosecutorial Misconduct.[74] Modeled after a similar commission for judges, the eleven member commission can investigate allegations of misconduct, compel prosecutors to testify and turn over documents, and recommend that the Governor remove a prosecutor from office.[75] Only unethical, illegal, and unconstitutional behavior is investigated—not policy disagreements over how long defendants should be sentenced or which charges to pursue.[76] But the New York bill represents an important innovation in criminal justice policy: a way to provide independent checks on prosecutors that could, under a future law, serve as a check on bad decisions as well as illegal ones.

E. ELECT BETTER PROSECUTORS

If political incentives encourage excessive sentences, then political changes should be able to solve the problem. In a couple dozen, mostly-urban counties, they seem to be doing just that. 2018 was a banner year for self-proclaimed progressive prosecutors, running on platforms of ending mass incarceration by sending fewer people to jail.[77] In cities across California and Texas, the Midwest and the Northeast, reform candidates have run, won, and instituted major changes in how their office operates.

These new prosecutors are promoting drug diversion programs instead of jail, declining to charge children as adults, and declining to charge many crimes altogether.[78] In some counties, crimes such as shoplifting, prostitution, and possession of marijuana now do not lead to prison time, except in unusual circumstances.

The policy proposed in this note is based on a policy implemented by Philadelphia District Attorney Larry Krasner. Before running for office in 2017, Krasner was a career defense and civil rights attorney who sued the Philadelphia

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73. A coalition of prosecutors sued (unsuccessfully) to stop the bill. Ottaway, Amanda and Klasfeld, Adam, *NY Prosecutors Sue to Stop Misconduct Watchdog*, Courthouse News Service (Oct. 17, 2018), *available at* https://www.courthousenews.com/ny-prosecutors-sue-to-stop-misconduct-watchdog [https://perma.cc/X3HK-XVDV].

74. N.Y. JUDICIARY LAW § 499-a-j (McKinney).

75. *Id*., *see also* Innocence Project, *Innocence Project Applauds Gov. Cuomo for Approving Landmark Legislation to Combat Prosecutorial Misconduct*, https://www.innocenceproject.org/innocence-project-applauds-gov-cuomo-for-approving-landmark-legislation-to-combat-prosecutorial-misconduct [https://perma.cc/WW6A-JQ5J].

76. N.Y. Judiciary Law § 499 a.

77. Taylor Pendergrass, *The 2018 Midterm Elections Demonstrate Criminal Justice Reform Is a Winner at the Ballot Box*, ACLU Blog, https://www.aclu.org/blog/smart-justice/2018-midterm-elections-demonstrate-criminal-justice-reform-winner-ballot-box [https://perma.cc/6UK8-DAW4] (November 14 2018), *see also* Emily Bazelon and Miriam Krinsky, *There's a Wave of New Prosecutors. And They Mean* Justice, The New York Times (December 11, 2018), https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html [https://perma.cc/BY4J-86H9].

78. Bazelon & Krinsky, *There's a Wave of New Prosecutors*, *supra* note 77.

Police Department 75 times.[79] He ran in an effort to radically change the Philadelphia criminal justice system, and, upon winning, followed through with dramatic changes to office policy. After letting go dozens of prosecutors who disagreed with his vision,[80] he announced that he would no longer charge certain non-violent crimes, no longer seek money bail for non-violent offenses, and encouraged plea bargains below the guideline sentence range.

On February 15, 2018, Krasner circulated a memo instructing ADAs in his office to read a conservative estimate of the costs of incarceration into the record during sentencing, and to explain why, on the record, the cost was warranted.[81] He used a conservative estimate of the cost of incarceration.[82] Even so, this directly attacks the moral hazard problem by helping prosecutors internalize the cost of the sentence they are going to issue. Line prosecutors then see sentencing as a balancing of costs and benefits, rather than way to run up the score. Krasner went farther, mandating that no one can seek a sentence or plea deal above 15 to 30 years in prison without explicit permission from himself or one of his top deputies.[83] "We are not going to overcharge," he explained.[84]

Krasner's reforms—and those of the other reform-minded prosecutors—represent an electoral correction to the moral hazard problem. But these prosecutors are still a small minority. The exact number depends on how they are counted, but it is on the scale of 15-30. For example, Real Justice PAC, a group that endorses and assists reformer prosecutors, only endorsed 14 candidates in 2017 and 2018 combined.[85] As there are over 3,000 counties in America, even a generous estimate of 30 reformers is only 1% of the prosecutors in the country. As they are concentrated in urban areas, they reach a significant amount of the population. Still, this electoral approach is just not happened on the scale needed to affect national, or even state-wide change. A more far-reaching approach is called for.

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79. Alan Feuer, *He Sued Police 75 Times. Democrats Want Him as Philadelphia's Top Prosecutor*, The New York Times (June 17, 2017), https://www.nytimes.com/2017/06/17/us/philadelphia-krasner-district-attorney-police.html [https://perma.cc/TUT3-SLXY].

80. Chris Palmer, Julie Shaw, and Mensah M. Dean, *Krasner Dismisses 31 from Philly DA's Office in Dramatic First-Week Shakeup*, The Inquirer, http://www.philly.com/philly/news/crime/larry-krasner-philly-da-firing-prosecutors-20180105.html [https://perma.cc/PB3W-KQZ2].

81. The Intercept, *Philadelphia DA Larry Krasner's Revolutionary Memo*, available at https://theintercept.com/document/2018/03/20/philadelphia-da-larry-krasners-revolutionary-memo [https://perma.cc/S7H8-7362] [hereinafter Krasner Memo].

82. *Id.*

83. Maura Ewing, *America's Leading Reform-Minded District Attorney Has Taken His Most Radical Step Yet*, Slate (Dec. 4, 2018), https://slate.com/news-and-politics/2018/12/philadelphia-district-attorney-larry-krasner-criminal-justice-reform.html [https://perma.cc/AD7G-YKNZ].

84. *Id.*

85. Real Justice PAC, *Endorsements*, https://realjusticepac.org/endorsements [https://perma.cc/68V2-D3LL].

III. THE PROPOSAL: REQUIRE PROSECUTORS TO JUSTIFY THE COST OF SENTENCING

To reach optimal sentences, prosecutors must internalize the cost of sentencing. The statutory reforms that have passed so far mostly work to reduce prosecutorial discretion, rather than improve prosecutor's decision-making. These changes can reduce the scale of harm from suboptimal decisions, but they fail to address the underlying cause of the problem. The Realignment in California stands as an exception, but the financial incentives are being undermined by state grants to prisons, and independently elected prosecutors may still ignore the financial needs of their county. The best solution may be to elect prosecutors who personally care about optimal sentencing. In a growing number of high-profile elections, mostly in urban areas, Americans have done exactly that. But with over 3,000 counties in America and only about 15 committed reformers, it is clear that relying on such elections would leave most of the country behind.

Thus, state policy is needed to directly affect prosecutorial decision-making. An ideal policy applies to all crimes, is effective in urban or rural areas, and influences prosecutors directly, rather than counties or another adjacent branch of government. It must discourage excessive sentences without preventing worthwhile sentences. And it must allow for prosecutors to seek any or all of the four goals of sentencing as they see fit: incapacitation, deterrence, rehabilitation, and retribution.

An ideal solution must also be politically palatable. It should appeal to the liberal-libertarian coalition that has come together around the issue. It should make use of the cost-saving arguments that succeeded in passing California's Realignment. And perhaps most importantly, the solution should not put any elected official on the hook for releasing prisoners who might go on to commit crimes. Each of these features is embodied in the following proposal.

A. OVERVIEW

As a matter of state law, prosecutors would be required to consider the estimated cost to the public when recommending a sentence. Cost estimates will come from a central state agency and will combine the direct and indirect costs to local, state, and federal governments. To ensure compliance, and to improve public records, prosecutors must include in their sentencing memo a section that names the estimated cost and justifies why the sentence is worth paying for. Judges must address the cost when they hand down the sentence and, if they fail to do so, defendants may appeal for a new sentencing hearing.

The primary goal of this policy is to change how prosecutors and judges view criminal sentencing, to eliminate the moral hazard and encourage them to think of sentencing as a cost/benefit analysis. We expect this type of analysis for most other government expenses, and there is no reason why we shouldn't expect it of our criminal justice system. Instead of curbing prosecutorial discretion, this policy will encourage prosecutors to use their discretion to find the optimal sentence.

Another key result will be public accountability for the decisions of prosecutors. By putting the costs and justifications on the record, the Justice Department, academics, and advocates can build national data sets to better study the effect of sentencing on crime or rehabilitation. Furthermore, if a local prosecutor is bankrupting his county with legal fees (as James Reichle was in Sierra County), a political opponent will have the necessary data to run an opposition campaign.[86]

Overall, these two mechanisms will likely lead to shorter sentences, more non-incarceratory sentences, and less severe plea deals. The cost savings will more than make up for the additional burden to the legal system. The reduction in prison population will likely have no effect on crime, but may even decrease recidivism, since our overreliance on incarceration may be inhibiting rehabilitation.[87] This proposal should be politically unobjectionable because it does not actually require shorter sentences for any defendant or category of defendants, but reform advocates should latch on it because it will ultimately have that effect in the aggregate. Furthermore, it makes use of the cost-saving argument that has been successful in other criminal justice reform campaigns.

B. COST ESTIMATES: CHOOSING THE AGENCY RESPONSIBLE

Two questions must be resolved to determine the cost estimates that prosecutors will use: who will do the calculation, and what factors will they consider? The answer to the first question is a state executive agency with relevant expertise. If calculations are done at the county level, either by county board or county prosecutors, then unjust discrepancies will arise, as in New Jersey before *Brimage*.[88] Also, most costs will be the same from county to county, so such a system would duplicate work. An executive agency is the best political option because it insulates legislators (who must pass the enacting legislation) and most of the costs are borne by executive agencies.

Several natural candidates emerge. A state sentencing commission is the most obvious choice, since it is most familiar with the trajectory of convicts. In most cases, the commissioners will have the best expertise to predict what municipal,

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86. This policy would not fully eliminate Riechle's moral hazard—only the costs after the initial sentencing hearing would be counted, not the initial litigation costs. But prosecutors seeking the death penalty would still have partial deterrence, which is better than the status quo.

Pfaff observes: "Prosecutors may be likely to over-incarcerate because they don't bear the costs of incarceration: those are state offenses, and they are county officials. But . . . prosecutors are often indifferent to the impacts of their choices on *county* budgets as well." PFAFF, Sentencing Policy, *supra* note 8, at 429.

Furthermore, voters will still face moral hazard. The majority of voters in one county may prefer to seek unduly high punishments if they know the taxpayers across the state are paying for the sentence and their county, or a victim in their county, directly benefits. But again, partial deterrence is better than none.

87. Francis T. Cullen, Cherly Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011).

88. In New Jersey before *Brimage*, model state guidelines and a mandate for uniformity still could not prevent vast inter-county disparities when the policies were determined at the county level. *Brimage*, 153 N.J. at 15 ("Although the Introduction to the Guidelines recognizes the need to 'guard against sentencing disparity,' the Guidelines actually generated such disparity.").

county, and state services will be affected by a given sentence. One reason to avoid this choice is that the cost estimates are supposed to serve as a check on excessive guideline sentences; on the other hand, coming up with cost estimates may improve the sentencing commission's choices in the same way it improves prosecutors' choices.

The attorney general, as the state's chief law enforcement officer, would also have this expertise, and would avoid the potential conflict of interest of the sentencing commission.[89] One state (New York) has an office dedicated to prosecutorial oversight.[90] Such an agency would certainly be an appropriate choice, but, outside of New York, states would have to create the agency. A state budget office is well equipped to make financial predictions and has a broad understanding of state revenues and expenditures. For the same reason, a comptroller or treasurer could make the calculations.

Any of these are valid options for a state to pick. A state that wishes to enact this proposal can opt for the agency in its own government structure that will best be able to accomplish the task. But states should not assign this task to a subject-specific agency, like a bureau of prisons, that will prioritize its own costs over those of other agencies.

C. COST ESTIMATES: WHAT FACTORS TO CONSIDER

The next question that must be answered is how those costs should be calculated. The final goal is to estimate the total cost to the public fisc, at all levels of government. Anything less would still allow prosecutors to free ride off of other levels of government.[91] Costs to society (such as replacement costs for the defendant's employer) should not be considered, since they go beyond the interest in public money and are better classified as private grievances.[92] Costs to the defendant should not be counted, since two of the goals of sentencing (deterrence and retributivism) are achieved by giving the defendant a costly sentence.[93]

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89. The New Jersey Attorney General wrote the Brimage Guidelines, a comparable task. Brimage Guidelines, supra n. 38.

90. N.Y. Judiciary Law § 499-a (McKinney).

91. Larry Krasner's office policy falls far short of this. He instructs his assistant district attorneys to use what he calls "a conservative estimate" of the cost of imprisonment, which does not include many relevant costs, such as prison guard's pensions and benefits, and does not include secondary costs such as increased benefits to dependents. Krasner Memo, *supra* note 81. Such an estimate may make sense for a district attorney's office that does not have the resources or authority to audit state agencies and calculate a full result. But when a better number is available, the better number should be used.

92. Another alternative would be to consider this cost. However, this policy proposal is intended as an analogy to accounting practices. The alternative option would lose the justification that government agencies should guarantee that they are effectively using public money, instead focusing on the money of individuals, such as the defendant's family, who the public may not care to help.

93. Counting the costs to the defendant would also skew the results to benefit the criminal over everyone else. Especially in the case of jailtime, the criminal is most directly affected, so the cost to him will likely outweigh the costs to others.

The most direct cost that must be accounted for is the cost of enforcing the sentence. If a defendant is sentenced to one year in prison, a common way of measuring cost is average cost per inmate.[94] This can provide an estimate of the marginal cost to the state for maintaining an extra prisoner. Salaries of prison employees are the largest cost, but prisons also spend on healthcare, meals, and administrative services, as well as fixed costs such as capital investments and pensions.[95] In 2015, states spent between $15 and $70,000 per prisoner, with an average of $33,000.[96]

Alternatives to prison are far less costly. Drug diversion programs are often paid in part by the defendant, and, in some cases, by private grants, but still incur costs to the state or county. These programs vary widely in how they are set up, who pays them, and exactly what services they offer. In some cases, they may be less costly than prison; in others, more. But for the most part, they have proven more effective than prison and reducing recidivism rates.

Probation, drug treatment programs, and other forms of rehabilitation are alternative methods of punishment, often far less costly than prison.[97] Furthermore, as convicts stay, for the most part, in broader society, they are less likely to lose the social skills they need to survive without committing crimes.[98] In many cases, these punishments will not be enough due to the nature of the crime or the defendant's criminal history. However, the government is paying a premium to imprison these convicts rather than a non-incarceratory sentence. Prosecutors and judges should have to weigh the relative cost and benefits before defaulting to the harsher, more expensive sentence.

Then, too, are the indirect effects. What government revenue or costs will be affected by not having the defendant out in society for the duration of his incarceration? What gains will come from the deterrent effect of the sentence to prevent future crimes? These costs are harder to forecast, but they may generally include: lost tax revenue from the lack of employment while in prison and diminished employment prospects after prison, increased welfare payments to the prisoner's dependents, and decreased costs of responding to future crimes. Conservative estimates are appropriate due to the uncertainty of these estimates. Yet it is still worth including them: these costs are real, they are borne by the public, and they should be a part of the sentencing decision.

These costs should be formatted in a chart, similar to the guideline sentences or the Brimage guidelines. As with those, they should be broken down into cases

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94. Vera Institute, *Prison Spending in 2015*, https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending [https://perma.cc/5ZLQ-WASG].

95. *Id.*

96. Differences between states are mostly driven by regional salary differences and the density of the jail population. States that spend less per prisoner may be more efficient, but may also overcrowd their prisoners, leading to unsafe conditions. *Id.*

97. *See* PFAFF, Locked In, *supra* note 22, at 230.

98. *See* PFAFF, Sentencing Policy, *supra* note 8, at 429, 490, 674.

based on the relevant factors. Exactly which factors are in the chart can be left to the discretion of the responsible agency, but they should certainly include the nature of the crime, and the defendant's age, criminal history, family status & dependents, employment, housing, drug history, health (including mental health), and community ties. Attorneys will be able to argue some of these points (such as certain features of the crime), but for the most part, they will be objective and easy to identify. While extensive work will be required to put this chart together, once it is done, attorneys and judges will easily be able to look up the estimated cost of the recommended sentence.[99,100]

D. REQUIREMENTS FOR PROSECUTORS

With charts in hand, prosecutors can include cost estimates in their recommended sentences. They will have a legal duty to consider the cost when coming up with their recommendation. This requirement is itself unenforceable, but it can, at least, be demonstrated in court. It may be met by each office coming up with an office-wide policy on how to select sentences.

Then, in their sentencing memo, they must include the estimated cost of their recommended sentence and explain why the cost is justified. One way of doing this would be to reference the estimate at the top, then address it throughout the memo, explaining why each new fact justified a longer sentence. Another way is to address it in its own section. At the sentencing hearing, prosecutors must read the estimated cost of their recommended sentence into the public record and state for the court why the sentence is justified.

Most importantly, prosecutors are not required to recommend shorter sentences. If an individual prosecutor believes that it is worth the cost to keep administering the same sentences, she can keep seeking the same sentences. This will only change the prosecutor's recommended sentence if the prosecutor is convinced that cost matters, and that she should advocate for a shorter or non-incarceratory sentence. As discussed in Section 1, this will also affect charging decisions, as prosecutors often decide on an ideal sentence, then charge the crime accordingly.

E. REQUIREMENTS FOR JUDGES

So far, I have primarily discussed this policy as it affects prosecutors, since they have unique discretion in the criminal justice system. But of course, in many cases, it is the judge who chooses from a wide range of possible sentences and the judge's decision that must be swayed. Furthermore, while prosecutors advocate

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99. The cost of compiling this chart should be more than made up for by the savings from shorter and fewer prison sentences. *See*, *infra* Section IV.A.

100. Some of these factors, if made public, would reveal sensitive personal information about defendants. But judges retain their authority to redact personal information and close hearings as necessary. Only the final cost estimate *must* be made public, and this number derives from so many different factors that it is unlikely to be easily deconstructed.

for a certain sentence, they cannot know what sentence the judge will ultimately choose. Therefore, this policy will apply equally to judges as to prosecutors.

Judges must consider the cost of incarceration when deciding upon a sentence. As with prosecutors, they are not required to administer shorter sentences. They simply must state the sentence, state its estimated cost, and explain why the cost is justified. This is similar to their duty to consider the guideline sentence range. That, too, is nonbinding, but it is a part of every sentencing hearing, and must always be addressed by the judge.[101] This will create a public record of the predicted cost of sentence and why that cost is warranted.

F. RIGHTS OF DEFENDANTS

Defendants (and their attorneys) are the natural choice to enforce these requirements on prosecutors and judges. First, they will almost always prefer a less expensive sentence, as that usually means less jail time, so their interest aligns with the public interest. Second, they already have a built-in mechanism to challenge decisions of prosecutors or judges: they can appeal the sentence. Therefore, the enacting legislation should include a right of defendants to go through this process. This could be understood either as a defendant's right to receive an optimal sentence (rather than one based on moral hazard), or as the public granting its right to appeal the verdict to the defendant. Either way, this will guarantee that prosecutors and judges are following through on their new duties, without the need for an outside watchdog.

IV. THE RESULT: LIKELY EFFECTS OF THE POLICY

The most important effect of enacting this policy is that sentences should get cheaper over time. Just as important, public accountability will allow voters to see—and academics to study—how prosecutors do their job. An argument against this policy is that crime may rise, but this is unlikely, and, in some cases, may still be worthwhile. Opponents will also point to increased burden on the judicial system, but the net saving due to shorter sentences makes this, too, worthwhile. These effects and arguments are discussed below.

A. CHEAPER SENTENCES

By measuring the cost of sentences, prosecutors and judges will place a higher value on cost relative to other factors. Similar effects can be seen in the strong anchoring of guideline sentences and are the basis of Stuntz's proposal to mandate reporting of plea bargains.[102] Importantly, even if the prosecutors who are now in charge are set in their ways, those that are just starting out will learn that

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101. *See Booker*, 543 U.S. at 220 (holding that although guideline sentences cannot be mandatory, judges must consider the guideline range during sentencing).

102. *See generally* Stuntz, *supra* note 57, at 351–359.

sentencing is a balance of benefits and costs. This should lead to a long-term, institutionalized change in how sentences are perceived.

Proponents of the current system may point to a fear of over-reduction of sentences, where prosecutors are afraid to spend as much money as they should on long prison terms. Such fears are not warranted. First, the status quo is so skewed toward over-punishment that such a scenario is distant. Second, cost-saving considerations are unlikely to outweigh the strong political forces that drive the status quo. Prosecutors will still fear a Willie Horton scenario.[103] They will still deal with the victims, who often seek strong retributive punishments. And they are still a self-selecting group of people who believe that punishment is warranted: they are, after all, prosecutors.[104]

Therefore, we should expect to see shorter prison terms and more alternatives to prison that are cheaper for the state to implement. This will keep people out in society, leading to positive secondary effects such as improved social deterrence and better economic prospects for prisoners when they complete their sentence. This is accomplished without curbing prosecutorial discretion, so in the rare case when a long sentence is truly necessary to incapacitate a violent criminal or deter heinous crimes, then the prosecutor can easily make that argument and the judge can approve it.

B. PUBLIC ACCOUNTABILITY

Another key result of this policy is that it will be far easier to measure and hold accountable the decisions of prosecutors. Much of what they do, such as plea bargains, will still be a black box. But each recommended sentence will include a new, objective component: the estimated cost, and a subjective component: the reasons for that sentence. This can lead to public accountability from press and political opponents for misusing public money.[105] It can also provide the basis for future study, comparing the decisions of prosecutors in different counties, identifying which reasons prosecutors or judges believe are most important to sentencing, or building a state-wide data set of how much we spend administering criminal sentences. Furthermore, the knowledge that their decision-making *will* be public is likely to encourage prosecutors to make decisions that take into account a broader range of stakeholders in the first place.[106]

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103. *Cf.* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009).

104. Ronald F. Wright, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667–1710 (2018).

105. It is easy to imagine, for example, a local government reporter or politician publishing a report to the effect that "Your District Attorney wasted XXX million dollars of your money locking up non-violent marijuana users instead of spending it on grants to keep those kids in school."

106. *Cf.*, Galle, Brian & Seidenfeld, Mark, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1959–60 (2008) (finding federal agencies that must submit a cost-benefit analysis to the public, and who may have to justify their decisions in court, have a strong incentive to take into account public disagreement at an early stage of the process).

C. EFFECTS ON CRIME RATE

The biggest risk in enacting this policy is the risk that it will increase crime, either by returning criminals to society who commit crimes when they would otherwise be in jail, or by decreasing the general deterrence effect that long sentences have on the general population. Unfortunately, very little is known about the causal effects of expected punishment on crime—especially general deterrence.[107] But a few key points suggest that this may have crime-reducing effects that may be stronger than any decrease in deterrence. First, our current long sentences may actually increase the likelihood of recidivism, as they socialize prisoners into criminal behavior and make it harder to return to work in the legal economy.[108] Second, our current state of mass incarceration inhibits social deterrence by normalizing prison and disrupting social networks.[109] By reducing our prison population, we may see a natural decrease in crime due to social deterrence. Finally, this policy will save the government money that can be spent on other social needs such as health, education, and investments in infrastructure. These investments may improve the economy generally, which is the biggest determinant of long-term crime.[110]

But this policy should be enacted even if it does risk an increase in crime. As Pfaff writes, "some reforms are justifiable even if they *do* lead to more crime. It's true that crime is costly—but so, too, is punishment, especially prison."[111] We could end speeding tomorrow if every time drivers were caught speeding, they were sentenced to a year in jail—but that would be a ridiculous disruption to society and a waste of resources. We do not and should not seek the punishment that best deters the crime. We should seek the punishment that makes the best use of resources in deterring the crime.

D. INCREASED LITIGATION AND COURT COSTS

One sure downside of the policy is the cost of implementation. The agency that makes the cost chart will have a substantial start-up cost and some ongoing costs. Then, prosecutors, defense attorneys, and judges—all of whom are already overburdened—must spend more time on each sentencing hearing addressing the cost of the sentence. This time will decrease as the practice becomes routine, but it will still place an extra burden on the system. The start-up costs should be considered an investment that will make its money back many times over very quickly, with continued, long-term benefits. The increased burden on the system should be offset by additional expenditures on prosecution, public defenders, and judges. This will again be paid for by the cost-savings of shorter sentences.

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107. PFAFF, Sentencing Policy, *supra* note 8, at 40.
108. *Id*. at 578.
109. *Id*. at 581.
110. *Id*. at 582
111. PFAFF, Locked In at 107.

V. THE CONCLUSION

Our criminal justice system is plagued by a key problem: prosecutors and, to a lesser extent, judges face moral hazard. They are personally incentivized to seek as long prison sentences for most crimes, and they are insulated from the cost of those sentences, including the steep costs to the public fisc. Existing criminal justice reform efforts deal with this problem by curbing prosecutorial or judicial discretion in a variety of ways, including reducing the statutory allowable punishments for crime or creating rules for what plea bargains prosecutors can offer. Recently, a movement to elect prosecutors who will voluntarily seek shorter sentences has emerged, but such prosecutors have been elected in less than 0.1% of America's counties.[112]

To address this problem, I propose that states require prosecutors and judges to consider the cost of a sentence when recommending it and handing it down. The cost will come from charts put together by a state agency that account for a variety of relevant factors about the crime and the defendant's life that will affect his trajectory. Prosecutors must then include the estimated cost of the sentence they seek in their sentencing memo and justify why it is worth the cost. At the hearing, they must read this into the record. Judges must address the cost on the record when handing down the sentence.

This will encourage the actors with discretion over sentences to search for the optimal sentence, rather than the highest one available. The likely effects will be a reduction in the cost of sentences—either because prosecutors seek shorter prison sentences, or they opt for non-incarceratory sentences, avoiding prison altogether. It will also create public records as to what prosecutors and judges are willing to spend on sentencing criminals and why. These records can provide the basis for academic research on the value of sentencing and public accountability via press coverage or political opposition to elected prosecutors. The proposal should not lead to an increase in crime, since cheaper alternatives to our current sentences are often just as—or more—effective at reducing recidivism. There will be implementation costs, and they are worth paying to get the far greater savings that are likely to result from the policy. By implementing this policy, states can encourage prosecutors and judges to seek optimal sentences.

112. *Supra* Section II.E.