

# CONSOLIDATING LOCAL CRIMINAL JUSTICE: SHOULD PROSECUTORS CONTROL THE JAILS?

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## INTRODUCTION

Prosecutors hold most of the power in the American criminal justice system.<sup>1</sup> After making the initial decision to charge a suspect, prosecutors have a wide menu of offenses to choose from.<sup>2</sup> A large number of potential charges and huge authorized sentences then give prosecutors the leverage to pressure defendants to plead guilty.<sup>3</sup> The criminal justice system runs on plea bargaining, and prosecutors have the stronger hand in plea negotiations.<sup>4</sup> A defendant's eventual sentence is therefore likely to be closer to the prosecutor's starting point than the defense attorney's proposal.<sup>5</sup> No

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1. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408–15 (2001) (cataloging the enormous power of prosecutors and opportunity for abuse of that power).

2. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19 (2001).

3. See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 857 (2015). In the federal system, on average, the trial penalty is three times the plea bargained sentence. *Id.*

4. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PENN. L. REV. 959, 961 (2009); Stuntz, *supra* note 2, at 538 (“[B]roadening criminal liability makes it easier, across a range of cases, to induce a guilty plea—precisely because the prosecution is so likely to win if the case goes to trial.”).

5. See Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 11 (2012) (“The prosecutor’s charging decisions control [the sentencing] range to begin with.”); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1478–80 (1993). Of course, other factors are at play as well. See Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1953–57 (2006) (examining how the structure of criminal codes, including sentencing ranges and the number of different offenses, affects plea bargaining and sentencing).

serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.<sup>6</sup>

Another obvious truth about the American criminal justice system is mass incarceration. Incarceration in America has quintupled since the 1970s.<sup>7</sup> At present, the United States incarcerates more people than any other nation in the history of the world—in excess of two million.<sup>8</sup> Numerous official policies have undoubtedly contributed to the incarceration explosion. Some blame likely lies in harsh drug sentences.<sup>9</sup> Three-strikes laws have seemingly also had an impact.<sup>10</sup> And the widespread abolition of parole at the federal and state level has contributed to the overcrowding of prisons as well.<sup>11</sup>

This Essay does not focus on the official policies and statutory enactments that have contributed to mass incarceration, however. Rather, this Essay attempts to look behind the curtain at the

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6. With the exception of the Supreme Court, which has remarked that prosecutors and defense attorneys “arguably possess relatively equal bargaining power.” *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting)).

7. MARC MAUER, *RACE TO INCARCERATE 1* (2d ed. 2006).

8. See MICHAEL JACOBSON, *DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION 8* (2005) (“The United States now locks up a higher percentage of its population than any country in the world.”); Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1713 (2006) (“In 2004, the number of individuals incarcerated in the United States exceeded the two million mark.”).

9. See Barkow, *supra* note 8, at 1713 n.5. Professor John Pfaff rejects the argument that prison growth has been driven by longer sentences. See John F. Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73, 109 (“Prison populations do not appear to be particularly durable, so yesterday’s decisions do not shape tomorrow’s prison populations as strongly as may have been thought.”); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1243 (2012) (“[S]entence lengths have generally remained relatively short, and evidence suggests that sentence lengths do not explain much of the increase in the U.S. prison population.”); John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13 AM. L. & ECON. REV. 491, 491 (2011) (contending that admissions practices, not sentence lengths, have driven increased incarceration). I do not take a position on the definitive cause of prison growth, because I am not sure of the answer. Rather than debate the historical cause over the last four decades, this Essay explores an avenue to decrease incarceration moving forward.

10. See RYAN S. KING & MARC MAUER, *THE SENTENCING PROJECT, AGING BEHIND BARS: “THREE STRIKES” SEVEN YEARS LATER 11* (2001), <https://www.opensocietyfoundations.org/sites/default/files/agingbehindbars.pdf>.

11. See MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 7* (2007), <http://www.sentencingproject.org/wp-content/uploads/2016/01/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf>. Professor Kevin Reitz has questioned this common assertion, however. See Kevin R. Reitz, *Don’t Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787, 1794–99 (2006).

underlying problem that fails to constrain prosecutors' behavior—the so-called correctional free lunch.<sup>12</sup> Put briefly, prosecutors do not have to internalize the costs of their sentencing decisions because they do not have to run and pay for the prisons and jails.<sup>13</sup> That responsibility falls to the wardens who run the prisons and the sheriffs who run the jails.<sup>14</sup> In short, prosecutors effectively hold the power to sentence inmates, but not the responsibility to pay for the consequences.<sup>15</sup> As such, the criminal justice system does not create an incentive for prosecutors to offer lenient plea bargains.<sup>16</sup>

Consider a defendant charged with theft. Under our current “system,” the prosecutor has no responsibility for dealing with the defendant after he leaves the courtroom.<sup>17</sup> So the prosecutor can decide to be tough and demand that the defendant serve a six-month sentence.<sup>18</sup> After all, the sheriff runs the jail, so the sheriff will have to find a cell for the inmate and the money to fund his incarceration for six months.

But what if the prosecutor had to deal with the inmate after the conviction was entered? What if the prosecutor had to worry about

12. The term comes from Professors Zimring and Hawkins. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991). More recently, Professor David Ball has tackled the problem from multiple angles. See W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060, 1062–63 (2014) [hereinafter Ball, *Defunding State Prisons*] (arguing for block grants to even out imprisonment by counties); W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—and Why It Should*, 28 GA. ST. U. L. REV. 987, 991–97 (2012) [hereinafter Ball, *Tough on Crime*] (analyzing the correctional free lunch at the county level in California); W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 77–78 (2014) [hereinafter Ball, *Why State Prisons?*] (tracing the historical origins of state prison funding); see also Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 50–51 (2008) (arguing for prison population statistics to be regularly delivered to line prosecutors so that they will consider them during plea bargaining negotiations); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 720–21 (1996) (proposing that states allocate funding to counties to prosecute cases, while allowing the counties to keep the surplus they do not use or requiring them to fund any overages at the county level).

13. See ZIMRING & HAWKINS, *supra* note 12, at 140.

14. See *infra* notes 65–67 and accompanying text.

15. Cf. Misner, *supra* note 12, at 720 (“[L]ocal prosecutors effectively dictate the level of spending that the state legislature must maintain.”).

16. See *id.* at 720–21.

17. Cf. U.S. DEPT' OF JUSTICE, *A SECOND LOOK AT ALLEVIATING JAIL OVERCROWDING: A SYSTEMS PERSPECTIVE* 8–11 (2000), <https://www.ncjrs.gov/pdffiles1/bja/182507.pdf> (setting forth a “Flowchart of Criminal Justice Decision Points and Options”).

18. See BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS – 2003*, at 451 tbl.5.48 (2003), <https://www.ncjrs.gov/pdffiles1/Digitization/208756NCJRS.pdf> (noting a six-month mean sentence for larceny defendants sentenced to jail).

overcrowded jails and correctional budget shortfalls?<sup>19</sup> The prosecutor might then think twice about the six-month sentence. Perhaps she would be willing to plea bargain down to a four-month sentence to slightly reduce the jail population and the accompanying expenses.

This Essay explores how to force prosecutors to have “skin in the game” after convictions are entered. The problem I tackle is limited to local jails. And the answer I offer is that local prosecutors should bear responsibility for their local jails. Prosecutors should be responsible for checking inmates in and out of the local jails, and they should be in charge of the overall jail budgets. Consolidating criminal justice to put prosecutors in charge of jails should have at least three benefits.

First, and most obviously, prosecutors would be incentivized to offer more lenient plea bargains in misdemeanor cases. If prosecutors were responsible for jail budgets, they would want jails to be less crowded, less expensive, and easier to manage. Because misdemeanor defendants almost always serve their time in local jails,<sup>20</sup> prosecutors would want to shorten the length of misdemeanor sentences to reduce jail overcrowding. Thus, a prosecutor who typically demands a six-month sentence for the average theft defendant might instead be willing to plead the case to four months.

Second, and relatedly, prosecutors would also downgrade or dismiss charges so as to limit jail admissions. For example, in some jurisdictions, a defendant found with a crack pipe containing a trace amount of cocaine will be charged with possession of a controlled substance and will ultimately be sentenced to jail time.<sup>21</sup> If prosecutors had to pay for those jail beds, however, they very well might agree to a charge of possession of drug paraphernalia, which typically carries a maximum sentence of a fine.<sup>22</sup>

Third, and far less obviously, putting prosecutors in charge of local jails might also spur lower plea bargain offers in felony cases.<sup>23</sup>

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19. Sheriffs are forced to confront this problem repeatedly. *See, e.g.*, James Pinkerton, *County Jail Cited for Dangerous Overcrowding*, HOUS. CHRON. (Oct. 10, 2011, 8:25 PM), <http://www.chron.com/news/houston-texas/article/County-jail-cited-for-dangerous-overcrowding-2212138.php> (discussing Harris County Jail, which had 355 more inmates than the facility was authorized to hold, and quoting the Sheriff as saying that he had requested funding for 260 jailers but that he was turned down).

20. *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 290 (2011).

21. *See infra* Part III.A.2.

22. *See id.*

23. There is a risk that in borderline cases—those where the prosecutor could either plead the case down to a misdemeanor carrying a year in jail, or push for a felony conviction that would send the defendant to a state prison—putting prosecutors in charge of the jails would incentivize them to push for the

Felony defendants typically serve their time in state prisons.<sup>24</sup> But that does not mean felony defendants are completely disconnected from local jails. Most felony defendants are incarcerated in local jails while they await trial.<sup>25</sup> If prosecutors were responsible for jail budgets, they would have an incentive to move felony defendants through the system more quickly in order to move them out of local jails where they are awaiting trial and into state prisons where they would serve their sentences at state expense.<sup>26</sup> The easiest way to move felony defendants through the system would be to plea bargain their cases faster.<sup>27</sup> And the easiest way to plea bargain cases faster would be to offer defendants more lenient plea deals.<sup>28</sup>

If I am correct that putting prosecutors in charge of jails would lower up-front sentences and thus begin to reduce mass incarceration in jails (and, to a lesser extent, prisons), the next question is whether it would be legal to do so. The answer is yes. There is no separation of powers problem or constitutional impediment to giving prosecutors responsibility for jails. However, legislatures across the country would have to amend their statutes. At present, most state statutes specifically place sheriffs in charge of county jails.<sup>29</sup> States would have to alter their statutory frameworks to consolidate (even more) criminal justice power in the hands of prosecutors.<sup>30</sup>

tougher sentence to move an inmate out of the jail and into the state prison where he would be on the State's balance sheet. *See infra* Part III.A.2.

24. This Essay does not propose that county prosecutors be put in charge of state prisons.

25. In 2009, the median time from arrest to adjudication for detained defendants was sixty-eight days. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 22 (2013), <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

26. *See* W. David Ball, "A False Idea of Economy": Costs, Counties, and the Origins of the California Correctional System, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Mar. 2016, at 26, 27.

27. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1122–23 (2008).

28. *See id.*

29. *See, e.g.*, ARK. CODE ANN. § 12-41-502 (2016) ("The county sheriff of each county in this state shall have the custody, rule, and charge of the jail within his or her county . . ."); COLO. REV. STAT. § 30-10-511 (2016) ("[T]he sheriff shall have charge and custody of the jails of the county, and of the prisoners in the jails, and shall supervise them himself or herself or through a deputy or jailer."); IDAHO CODE § 20-601 (2016) ("The common jails in the several counties of this state are kept by the sheriffs of the counties in which they are respectively situated . . ."); NEV. REV. STAT. § 211.030(1) (2015) ("The sheriff is the custodian of the jail in his or her county . . . and shall keep the jail personally, or by his or her deputy, or by a jailer or jailers appointed by the sheriff for that purpose, for whose acts the sheriff is responsible."). While the language in each state's statute differs, they all effectively place the sheriffs in charge of the jails.

30. Sheriffs' departments would likely oppose the change, and local prosecutors would likely be hostile as well. It is therefore an uphill climb, but of

This Essay proceeds in three parts. Part I briefly reviews the well-known mass incarceration problem in the United States, with particular attention to jails. Part II describes the “correctional free lunch” that enables prosecutors to demand tough sentences without having to pay for the costs of incarceration. Part III then sets forth a framework in which prosecutors would be in charge of jail budgets and the intake and release of prisoners, while leaving discipline and day-to-day safety of the jails under the control of sheriffs’ departments. Part III also responds to the objection that such a division of labor between prosecutors (budget control) and sheriffs (ensuring safety) would be problematic.

### I. MASS INCARCERATION IN THE UNITED STATES

The United States is plagued by the problem of mass incarceration. While there is some debate as to the official policies and laws that have led to mass incarceration in the United States, there is little debate that the problem exists.<sup>31</sup> The statistics are familiar and troubling.

The United States incarcerates about 2.2 million individuals.<sup>32</sup> One out of almost every one hundred adults is incarcerated at any given time in the United States.<sup>33</sup> And that does not include the nearly five million non-incarcerated people who are otherwise under control of the criminal justice system because they are on probation or parole.<sup>34</sup>

To put matters in perspective, the United States’ incarceration rate is three times that of Israel, five times that of England, six times greater than Australia and Canada, eight times that of France, and twelve times greater than Japan.<sup>35</sup>

It was not always this way. For most of the twentieth century, incarceration was far lower and comparable to European nations.<sup>36</sup> As recently as the 1970s, there were only 326,000 inmates incarcerated in the United States.<sup>37</sup> In the 1970s, 160 of every

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course most systemic improvements to the criminal justice system are not easily accomplished.

31. See *supra* notes 8–11 and accompanying text.

32. See JACOBSON, *supra* note 8, at 8.

33. The number in 2012 was one out of every 108 adults. LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 1 (2013), <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.

34. See DANIELLE KAEBLE ET AL., U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATION IN THE UNITED STATES, 2014, at 2 tbl.1 (rev. ed. 2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>.

35. Gershowitz, *supra* note 12, at 52.

36. See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 13–15 (2006).

37. See MAUER, *supra* note 7, at 17.

100,000 people were incarcerated.<sup>38</sup> By 1985, that number climbed to 313 of every 100,000 people.<sup>39</sup> A decade later the number nearly doubled to 601 per 100,000 people.<sup>40</sup> And the ratio peaked shortly after the turn of the century at 751 per 100,000 people in 2008.<sup>41</sup>

When scholars focus on mass incarceration, they understandably devote most of their attention to prisons.<sup>42</sup> Over two-thirds of all inmates—about 1.5 million people—are convicted felons who are incarcerated in prisons.<sup>43</sup> Yet, while prison populations deserve considerable attention, it is important not to overlook America's jails. On any given day, nearly three-quarters of a million people are incarcerated in jails throughout the country.<sup>44</sup> And just like prisons, jail populations have grown exponentially since the 1970s. In 1978, there were 158,394 inmates in American jails.<sup>45</sup> By 1988 that number had climbed to 343,569 inmates.<sup>46</sup> In 1998 it was 592,462 inmates.<sup>47</sup> And by 2008 there were 785,533 people in jail.<sup>48</sup>

Not surprisingly, exponential jail growth led to overcrowded facilities. A 2000 report from the Justice Department noted that:

In the 1-year period ending June 30, 1998, the nation's jails operated at 97-percent capacity, despite the addition of 26,216 beds during the preceding 12-month period and some 250,000 beds during the preceding 10 years. Jails with the largest

38. *Id.*

39. BUREAU OF JUSTICE STATISTICS, *supra* note 18, at 488 tbl.6.13.

40. *Id.*

41. Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html>. There is some cause for optimism, though. In recent years, incarceration in the United States has come down slightly. The total number of prisoners dropped by nearly 90,000 between 2008 and 2014. See KAEBLE ET AL., *supra* note 34, at 2 tbl.1. This amounts to an average of a 1% decline every year since 2007. *Id.* at 1. The drop is obviously modest, however, given the historical story.

42. See, e.g., Gershowitz, *supra* note 12, at 51 (proposing the “de-escalat[ion] [of] mass imprisonment by mandating a simple informational campaign directed at prosecutors”).

43. See E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014, at 1 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

44. See KAEBLE ET AL., *supra* note 34, at 2 tbl.1.

45. LOUIS W. JANKOWSKI, U.S. DEP'T OF JUSTICE, JAIL INMATES 1991, at 3 tbl.5 (1992), <http://www.bjs.gov/content/pub/pdf/ji91.pdf>.

46. *Id.*

47. ALLEN J. BECK & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2000, at 6 tbl.7 (2001), <http://www.bjs.gov/content/pub/pdf/pjim00.pdf>.

48. TODD D. MINTON, U.S. DEP'T OF JUSTICE, CENSUS OF JAILS: POPULATION CHANGES, 1999–2013, at 8 tbl.2 (2015), <http://www.bjs.gov/content/pub/pdf/cjpc9913.pdf>. Jail populations peaked in 2008. *Id.* In the last few years, the number of inmates has fallen modestly to between 730,000 and 745,000. *Id.*

average daily populations—1,000 or more inmates—reported operating at 103 percent of rated capacity.<sup>49</sup>

By 2014, jails were far less full nationwide, with incarceration levels having fallen to 84% of capacity.<sup>50</sup> In part, however, this was because rated capacity had increased so much.<sup>51</sup> As of mid-2014—the last year for which the Bureau of Justice Statistics has data—America’s jails were equipped to handle nearly 900,000 inmates.<sup>52</sup>

Even as jail capacity has grown substantially on a national basis, some jails still remain chronically overcrowded.<sup>53</sup> This includes, most prominently, several large jails. For example, in Houston, Texas, the local jail recently had to ship one hundred inmates to another jurisdiction because of lack of space.<sup>54</sup> In Santa Barbara, California, the jail is rated to hold about 700 inmates but regularly houses between 800 and 1000.<sup>55</sup>

While large jails have attracted a lot of attention, it has actually been jail populations in smaller facilities that have grown the most. In a 2015 study, the Vera Institute of Justice found that “mid-sized and small counties—which account for the vast majority of jails—have largely driven growth, with local jail populations increasing by 4.1 times in mid-sized counties and 6.9 times in small counties.”<sup>56</sup>

In many smaller counties, overcrowding has become a crisis because the number of jail beds has not kept pace with inmate growth. For instance, in Yellowstone County, Montana, the jail was built to hold 286 inmates but was holding about 480 inmates in late

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49. U.S. DEPT OF JUSTICE, A SECOND LOOK AT ALLEVIATING JAIL CROWDING: A SYSTEMS PERSPECTIVE 1 (2000) (footnote omitted), <https://www.ncjrs.gov/pdffiles1/bja/182507.pdf>.

50. See TODD D. MINTON & ZHEN ZENG, U.S. DEPT OF JUSTICE, JAIL INMATES AT MIDYEAR 2014, at 6 (2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf>.

51. See *id.*

52. *Id.*

53. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887 (2009) (“Correctional facilities across the country are chronically overcrowded . . .”).

54. See Michael Barajas, *Why the Harris County Jail Is Overcrowded with Legally Innocent People*, HOUS. PRESS (July 1, 2015, 10:40 AM), <http://www.houstonpress.com/news/why-the-harris-county-jail-is-overcrowded-with-legally-innocent-people-7555627>. The sheriff’s office and state officials have publicly fought over the need to add more beds. See Kiah Collier, *State: Harris County Has Not Done Enough to Cut Jail Population*, HOUS. CHRON. (Feb. 10, 2014, 12:39 PM), <http://www.houstonchronicle.com/news/politics/houston/article/State-Harris-County-has-not-done-enough-to-cut-5222788.php>.

55. David Minsky, *A Tale of Two Jails: Will the Northern Branch of the Santa Barbara County Jail System Finally Get Built?*, SANTA MARIA SUN (June 23, 2015), <http://www.santamariasun.com/cover/13346/a-tale-of-two-jails-will-the-northern-branch-of-the-santa-barbara-county-jail-system-finally-get-built/>.

56. RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, IN OUR OWN BACKYARD: CONFRONTING GROWTH AND DISPARITIES IN AMERICAN JAILS 8 (2015), <http://www.vera.org/sites/default/files/resources/downloads/incarceration-trends-in-our-own-backyard.pdf>.

2014.<sup>57</sup> In Bangor, Maine, the jail has 143 beds but sometimes houses 180 inmates.<sup>58</sup> In Boulder County, Colorado, the sheriff has had to strike deals with other counties to take inmates because the Boulder County jail is at capacity.<sup>59</sup> In Franklin County, Arkansas, the jail has beds for twenty-six inmates, but has housed double that number.<sup>60</sup> During 2015, the Vanderburgh County jail in Indiana repeatedly housed over 600 inmates even though its capacity was 540; in October 2015 the jail was operating at 115% capacity.<sup>61</sup>

Overcrowding has significant consequences for the inmates. For instance, in the Buchanan County jail in Missouri—which should house no more than 180 inmates, but regularly has a population over 200—some inmates are forced to sleep on the floor.<sup>62</sup> In Hamilton County, Tennessee, which regularly operates at 110% capacity, some inmates sleep side-by-side on the floor and others make due with no toilet paper.<sup>63</sup> In Fulton County, Georgia, broken locks allowed dangerous inmates to wander around the jail.<sup>64</sup>

The overcrowding places sheriffs in a difficult position. Jailers do not decide how many people will be arrested or sentenced, and they are not in a position to refuse new inmates.<sup>65</sup> So, they must

57. Eddie Gregg, *Safely Easing Jail Overcrowding: Judge Believes Program Could Save Millions*, BILLINGS GAZETTE (Oct. 1, 2014), [http://billingsgazette.com/news/local/crime-and-courts/safely-easing-jail-overcrowding-judge-believes-program-could-save-millions/article\\_232484c4-d20d-50d4-8dbe-c49b32eedefe.html](http://billingsgazette.com/news/local/crime-and-courts/safely-easing-jail-overcrowding-judge-believes-program-could-save-millions/article_232484c4-d20d-50d4-8dbe-c49b32eedefe.html).

58. Daniel Hartill, *LePage Calls Jail Summit as Sheriffs Warn of Overcrowding, Budget Crisis*, BANGOR DAILY NEWS (Apr. 28, 2013, 6:50 AM), <http://bangordailynews.com/2013/04/28/politics/lepage-calls-jail-summit-as-sheriffs-warn-of-overcrowding-budget-crisis>.

59. Joe Rubino, *Boulder County Sheriff May Cut Deal to House Overflow Inmates in Broomfield*, DAILY CAMERA (July 29, 2014, 1:38 PM), [http://www.dailycamera.com/boulder-county-news/ci\\_26236025/boulder-county-sheriff-talking-broomfield-about-longterm-jail](http://www.dailycamera.com/boulder-county-news/ci_26236025/boulder-county-sheriff-talking-broomfield-about-longterm-jail).

60. Thomas Saccente, *Franklin County to Address Jail Problems*, TIMES REC. (Apr. 3, 2016, 12:17 AM), <http://www.swtimes.com/news/franklin-county-address-jail-problems>.

61. John Martin, *Jail Overcrowding Becoming Major Concern, Officials Say*, EVANSVILLE COURIER & PRESS (Jan. 2, 2016), <http://www.courierpress.com/news/local/jail-overcrowding-becoming-major-concern-officials-say-280ba511-1449-45c8-e053-0100007f28d4-364029061.html>.

62. *Buchanan Co. Commissioners Discuss Budget, Jail Population*, STJOECHANNEL.COM (Jan. 4, 2013, 1:09 PM), <http://www.stjoechannel.com/news/buchanan-co-commissioners-discuss-budget-jail-population>.

63. Shelly Bradbury, *Overcrowded and Understaffed Hamilton County Jail Leaves Inmates Without Basic Necessities*, CHATTANOOGA TIMES FREE PRESS (Mar. 5, 2016), <http://www.timesfreepress.com/news/local/story/2016/mar/05/behind-bars-hamiltcounty-jail-inmates-caught/353582>.

64. Rhonda Cook, *Fulton Jail No Longer Under Court Oversight*, ATLANTA J.-CONST. (Apr. 23, 2015, 7:57 PM), <http://www.myajc.com/news/news/fulton-jail-no-longer-under-court-oversight/nk2sp>.

65. See MARK A. CUNNIFF, U.S. DEPT' OF JUSTICE, JAIL CROWDING: UNDERSTANDING JAIL POPULATION DYNAMICS 16 (2002), <http://static.nicic.gov>

plead for additional funding. But legislators sometimes turn a deaf ear. For instance, in Maine, county sheriffs repeatedly requested additional funding to hire guards, but legislators refused on the ground that “[e]veryone else lives within their budget, [so sheriffs should not] keep coming back and asking for a supplemental [budget].”<sup>66</sup>

Inmates and advocacy organizations such as the ACLU have brought litigation about overcrowding and the resulting poor confinement conditions.<sup>67</sup> The result in some jurisdictions has been consent decrees,<sup>68</sup> Department of Justice supervision,<sup>69</sup> independent monitors,<sup>70</sup> and court oversight of jails.<sup>71</sup> In some instances, monitoring persists for over a decade.<sup>72</sup> And some judges have gone so far as to order sheriffs to reduce inmate populations<sup>73</sup> and to

/Library/017209.pdf. There are exceptions. In early 2015, the sheriff in Greene County, Missouri, refused to accept any more municipal inmates—those convicted of low-level municipal crimes—because he lacked the space. Harrison Keegan et al., *Sheriff: Jail Can't Hold City Inmates, Let Serious Criminals Go*, SPRINGFIELD NEWS-LEADER (Apr. 3, 2015, 8:24 PM), <http://www.news-leader.com/story/news/local/ozarks/2015/04/03/sheriff-jail-will-longer-accept-city-prisoners/25237529>. Shortly thereafter, the city sued him. Harrison Keegan, *Sheriff Arnott 'Disappointed' that City Sued Him*, SPRINGFIELD NEWS-LEADER (July 16, 2015, 7:58 PM), <http://www.news-leader.com/story/news/politics/2015/07/16/sheriff-arnott-disappointed-city-sued/30268539>.

66. Peter McGuire, *Crowded, Budget-Crunched County Jails to Ask Maine Legislature for Help*, PORTLAND PRESS HERALD (Oct. 4, 2015), <http://www.pressherald.com/2015/10/04/crowded-budget-crunched-county-jails-to-ask-maine-legislature-for-help>.

67. See, e.g., *Cano v. City of New York*, 119 F. Supp. 3d 65, 70–71 (E.D.N.Y. 2015); Press Release, Am. Civil Liberties Union, ACLU Lawsuit Challenges Grossly Inadequate Conditions at Canyon County Jail (Jan. 9, 2009), <https://www.aclu.org/news/aclu-lawsuit-challenges-grossly-inadequate-conditions-canyon-county-jail>.

68. See, e.g., John Simerman & Ramon Antonio Vargas, *Orleans Parish Prison Consent Decree is Blueprint for Reforms at Troubled Facility*, TIMES-PICAYUNE (Dec. 11, 2012, 6:25 PM), [http://www.nola.com/crime/index.ssf/2012/12/orleans\\_parish\\_prison\\_consent.html](http://www.nola.com/crime/index.ssf/2012/12/orleans_parish_prison_consent.html).

69. See, e.g., Carrie Napoleon, *Deal Near to End Federal Oversight of Lake Jail*, CHI. TRIB. (May 28, 2015, 5:09 PM), <http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-lake-jail-oversight-st-0528-20150528-story.html> (describing four-year supervision by Department of Justice).

70. See, e.g., Mark Lungariello, *Deal Reached over Inmate Conditions at Westchester Jail*, LOHUD (Nov. 25, 2015, 6:35 AM), <http://www.lohud.com/story/news/crime/2015/11/25/deal-reached-over-inmate-conditions-westchester-county-jail/76334538>.

71. See, e.g., Cook, *supra* note 64 (discussing a decade of federal oversight of Fulton County jail).

72. See Brian Lawson, *Fourteen Years Later Madison County Jail Still Under Federal Court Order to Provide Medical Care*, AL.COM (Oct. 21, 2014, 4:59 PM), [http://www.al.com/news/huntsville/index.ssf/2014/10/madison\\_county\\_jail\\_still\\_unde.html](http://www.al.com/news/huntsville/index.ssf/2014/10/madison_county_jail_still_unde.html).

73. See, e.g., Jameson Cook, *Macomb County Sheriff Releases 104 Jail Inmates to Reduce Overcrowding*, MACOMB DAILY (June 19, 2015, 11:42 AM), <http://www.macombdaily.com/article/MD/20150619/NEWS/150619594> (“The

threaten county commissioners with jail if they do not take action.<sup>74</sup> Yet, bold actions are the exception. Litigation has made only a small dent in the jail overcrowding problem and successful reform through civil rights litigation is more difficult now than in decades past.<sup>75</sup>

In short, jails, like prisons, are overcrowded across the United States.<sup>76</sup> The overcrowding is dangerous and results in poor confinement conditions for the inmates. The sheriffs who run the jails would, in most cases, like nothing better than to eliminate the overcrowding.<sup>77</sup> Unfortunately, sheriffs have little control over how many inmates they receive, and they must plead for funds to pay for the inmates sent to them by prosecutors. Part II below explains this correctional free lunch problem in greater detail.

## II. THE CORRECTIONAL FREE LUNCH AND THE DIFFICULTY OF ELIMINATING IT

In a 1991 book, Professors Zimring and Hawkins identified a troubling phenomenon that they called the correctional free lunch.<sup>78</sup> The concept was simple yet deeply problematic: prosecutors make charging decisions and have enormous power over sentencing, but they do not have to pay for the financial ramifications of their decisions.<sup>79</sup> Prosecutors typically operate at the county level, but prison beds are paid for by the state.<sup>80</sup> Thus, as Professor David Ball has colorfully put it, prosecutors get to be tough on crime on the state's dime.<sup>81</sup> The same problem exists at the local level, albeit

releases were in response to Chief Judge James Biernat on Wednesday ordering a 25-percent sentence cut for certain inmates . . . ."); Jennifer Feehan, *U.S. Judge Orders Jail to Cap, Reduce Inmates by Dec. 30*, *BLADE* (Nov. 6, 2014, 11:47 AM), <http://www.toledoblade.com/Courts/2014/11/06/U-S-judge-orders-jail-to-cap-reduce-inmates-by-Dec-30.html>.

74. See Cook, *supra* note 64.

75. See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 273 (2015).

76. Cf. SUBRAMANIAN ET AL., *supra* note 56, at 4 ("Jails—with 11 million admissions annually and a third of all Americans behind bars on a given day—are increasingly recognized as a key engine of mass incarceration.").

77. See, e.g., Cristina Flores, *Sheriff Unveils New Plan to Manage Overcrowding at Salt Lake County Jail*, *KUTV.COM* (Mar. 4, 2016), <http://kutv.com/news/local/sheriff-unveils-new-plan-to-manage-overcrowding-at-salt-lake-county-jail>.

78. ZIMRING & HAWKINS, *supra* note 12, at 140.

79. See *id.* at 140, 211–15.

80. See *id.* at 211.

81. Ball, *Tough on Crime*, *supra* note 12, at 1004; see also JOSEPH DILLON DAVEY, *THE POLITICS OF PRISON EXPANSION* 83 (1998) ("[C]ountless offenders are prosecuted by locally elected prosecutors . . . who have little or no concern about how those prisons are funded."); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 *HARV. L. REV.* 781, 838–39 (2006) ("Because state rather than local taxpayers pay for prison beds, local prosecutors tend to 'spend' those beds more readily than they should.").

with different actors. Local prosecutors have control over charging and plea bargaining, but local sheriffs are responsible for the jails.<sup>82</sup>

The correctional free lunch is a widespread problem that likely results in prosecutors pursuing (and procuring) tougher sentences than they would seek if they had to pay the bills themselves. A run-of-the-mill plea bargaining example helps to illustrate the problem. Consider a robbery defendant who has previous felony convictions and was caught dead-to-rights leaving the scene of the crime. In a jurisdiction where the maximum sentence for robbery is ten years, a clearly guilty defendant will not want to go to trial because of the harsh possible penalty and the low chance of prevailing.<sup>83</sup> The stiff maximum sentence thus gives the prosecutor a huge amount of bargaining leverage.<sup>84</sup> What cabins that enormous leverage? The answer is not money.<sup>85</sup> The moment the defendant pleads guilty, the prosecutor will no longer have any skin in the game. The convicted individual becomes the state's problem because the state pays for the cost of incarcerating the inmate in a state prison.<sup>86</sup>

The only real restraint cabining the prosecutor's plea negotiations is the sentence that the trial judge would likely mete out if the defendant refused to plea bargain.<sup>87</sup> Let's say, for example, that most lawyers in the jurisdiction presume the judge would hand down a six-year sentence for a robbery defendant with prior felonies. As long as the prosecutor offers a sentence noticeably lower than six years, she knows that the defendant will likely accept it because it is better than what the defendant would get from the judge.<sup>88</sup> So, for purposes of our hypothetical, let us assume that the

82. See ZIMRING & HAWKINS, *supra* note 12, at 139–40.

83. See Davis, *supra* note 1, at 408–09 (observing that defendants are typically “not willing to run the risk of additional and more serious convictions and more prison time” by going to trial).

84. See Stuntz, *supra* note 2, at 537 (“[M]ost prosecutors insist on bargains very early in the process, and punish defendants who resist settlement until shortly before trial.”); see also Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254 (2008) (observing that prosecutors often overcharge defendants “because of the bargaining leverage it provides”).

85. In other aspects of the criminal justice system, money does restrain actors. See, e.g., William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1277–80 (1999) (explaining how the cost of Fourth Amendment compliance influences police officers, primarily by driving them to poorer communities); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1821–23 (1998) (same).

86. See ZIMRING & HAWKINS, *supra* note 12, at 211.

87. See Covey, *supra* note 84, at 1246–47 (describing “plea bargaining’s pricing mechanism” in terms of “the probability of conviction,” the “anticipated sentence upon conviction at trial,” and the “resources saved by avoiding trial”).

88. To play out the game theory, the prosecutor would likely have to come in sufficiently below six years to ensure that a criminal defendant (who might not be as risk averse as average law-abiding citizens) will not gamble in the hopes of getting lucky and receiving a lenient sentence from the judge.

prosecutor offers (and the defendant feels compelled to accept) a five-year plea bargain.

Perhaps five years is the “right” result. From a retributive perspective, the defendant might deserve five years. Or from a deterrence perspective, five years might maximize general deterrence and prevent other robberies. Maybe five years is the right amount of time to incapacitate this particular defendant. If five years is the correct length of incarceration, then there is no problem for us to solve. The prosecutor is using her power and discretion to achieve the best result for the criminal justice system. The state is paying for five years of incarceration because that is what is best for society.

There are reasons to be skeptical that five years is the best result, however.<sup>89</sup> First, society has not determined an optimal sentence for robbery from a retributive, deterrence, or incapacitation perspective. There is likely widespread agreement that murder-for-hire should typically be punished by life imprisonment or death.<sup>90</sup> And, conversely, nearly everyone agrees that jaywalking does not merit any incarceration. There is no widespread acceptance, however, on the appropriate sentence for robbery.<sup>91</sup> Certainly society does not agree on a granular level that robbery should carry a five-year sentence as opposed to a four-year sentence.<sup>92</sup>

With no intuitively correct sentence, it is difficult to say that five years is the obviously correct result. Perhaps five years is too low. Prosecutors may be selling the case at a lower amount simply because their office is overburdened and they need to clear their dockets.<sup>93</sup> More likely however, the five-year agreement is too high.

89. Implicit in this discussion is that it is impossible to know what the “right” sentence should have been. See Ball, *Defunding State Prisons*, *supra* note 12, at 1065.

90. See, e.g., 18 U.S.C. § 1958(a) (2012) (providing a sentence of life imprisonment or death for murder-for-hire that results in death).

91. Compare, e.g., CAL. PENAL CODE § 213 (West 2016) (providing a sentencing range of two to nine years), with N.Y. PENAL LAW § 70.02(1)(a)–(b), 3(a)–(b) (McKinney 2016) (providing a sentencing range of three and a half to twenty-five years).

92. Indeed, scholars differ somewhat on whether society even agrees on the ordinal ranking of the seriousness of different crimes. Compare Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1854–55 (2007) (“[P]eople tend to agree on the relative degree of blameworthiness among a set of cases.”), with Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 119 (2013) (“Our research confirms that consensus about the ranking of core crimes exists, but it also shows that utilitarian concerns can change that ranking in ways inconsistent with desert.”).

93. There is certainly some indication that excessive caseloads affect plea offers. See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 290–92 (2011) (documenting massive caseloads of large prosecutors’ offices); Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay*

Perhaps the elected district attorney has nudged sentences up in an effort to look tough and to propel himself to higher office.<sup>94</sup> Or, more likely, perhaps the line prosecutor has internalized an office culture in which success is defined in terms of conviction rates and tough sentences.<sup>95</sup> If that is correct, perhaps the prosecutor has, consciously or not, demanded a tougher-than-optimal sentence in order to meet the office's definition of success. There is some indirect support for this theory. In a recent study of California's correctional system, Professor David Ball found that California counties use state prison resources at very different rates and that the counties that send the largest portion of inmates to state prisons actually have below-average crime rates.<sup>96</sup>

A second reason to be skeptical that the five-year sentence is optimal is the existence of the mass incarceration problem itself. In a nation with 2.2 million people incarcerated and another 5 million people under the supervision of the criminal justice system,<sup>97</sup> there is strong reason to think that prosecutors are not imposing the optimal up-front sentence, at least for retributive and deterrence purposes. Put simply, if there is a strong argument that the United States is too punitive and overuses prisons writ large, then we can logically infer that the most powerful actor in the system—the prosecutor—is demanding up-front sentences in run-of-the-mill cases that may simply be too high.

All of this is not to say that prosecutors are behaving unethically; most line prosecutors are extremely diligent, hard-working, and conscientious lawyers. I am certainly not suggesting that prosecutors are intentionally over-punishing in an effort to be promoted or to exact unjustified vengeance on criminal defendants. Rather, the problem is that when prosecutors are unconstrained by the financial costs of their decisions, they demand tougher plea bargains than they would seek if they had to stomach the financial costs.<sup>98</sup> Setting aside cases like murder and jaywalking, in which the right sentence is apparent, there is quite a bit of play in the

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*on the Political Economy of Pretextual Prosecutions*, 105 COLUM. L. REV. 583, 601 (2005) ("Extreme docket pressure characterizes DAs' offices . . .").

94. See Stuntz, *supra* note 2, at 534 ("[A]t the most basic level, elected legislators and elected prosecutors are natural allies. Both need to please voters in order to survive, and for both, pleasing voters means essentially the same thing: punishing people voters want to see punished.").

95. Cf. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134-35 (2004) ("Prosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally.").

96. Ball, *Tough on Crime*, *supra* note 12, at 1023.

97. KAEBLE ET AL., *supra* note 34, at 2 tbl.1.

98. See DAVEY, *supra* note 81, at 83; ZIMRING & HAWKINS, *supra* note 12, at 211.

sentencing joints throughout the criminal justice system.<sup>99</sup> If prosecutors do not internalize the financial costs, it stands to reason that they will push sentences above where they would be if costs were part of the equation.

Assuming that the correctional free lunch is driving sentences up, there are two follow-up questions: First, why have states subsidized the free lunch? And second, what can be done about it?

The answer to the first question is likely historical. Professor David Ball recently posited that the free lunch stems from the prison reform movement and the economics of prison labor:

Penal reformers in the 1800s promoted the establishment of state prisons as a means of professionalizing and rationalizing correctional treatment. Reformers were not opposed to prison labor; indeed, they viewed labor as crucial to rehabilitation. State governments were only too happy to take on prisoners, since their labor generated revenue for the state. . . . The correctional free lunch started out as a catered lunch for the state.<sup>100</sup>

Of course, times are very different today. The prison population has exploded and states are now spending a fortune on imprisonment.<sup>101</sup> Like other government programs, it is very difficult to take away a subsidy once it has become entrenched.

Thus, the second question has become even more important: what can be done to eliminate the correctional free lunch and reduce incarceration? Despite the enormity of the problem, it has attracted only a modest amount of attention from scholars.

On the more modest end, I proposed in an earlier article that state prison boards notify prosecutors about prison overcrowding and trends in admissions.<sup>102</sup> This “informational approach” advocated that the bureau of prisons send a monthly letter to each county prosecutor that succinctly stated:

(1) the total number of incarcerated prisoners [in the state]; (2) the increase (or decrease) in the number of prisoners from previous years; (3) what percentage of the prisons were full (i.e. whether operating capacity has been exceeded); and (4) whether any prisons in the state are under a court order regarding prison overcrowding.<sup>103</sup>

99. See *supra* notes 90–92 and accompanying text.

100. Ball, *Why State Prisons?*, *supra* note 12, at 78.

101. It is hard to estimate the exact costs of state prisons, but we do know that states are spending nearly \$50 billion per year on corrections. See TRACEY KYCKELHAHN, U.S. DEPT OF JUSTICE, STATE CORRECTIONS EXPENDITURES, FY 1982–2010, at 1 (2012), <http://www.bjs.gov/content/pub/pdf/scefy8210.pdf>.

102. See Gershowitz, *supra* note 12, at 65–66.

103. *Id.* at 65.

The idea was that if prosecutors better understood how full prisons were, they would modestly reduce their plea bargain offers.<sup>104</sup> My proposal did not directly tackle the correctional free lunch or put explicit pressure on prosecutors to alter their behavior. Rather, it relied on subtle psychological techniques to nudge prosecutors toward more lenient sentencing.<sup>105</sup> Other scholars have gone further.

Over two decades ago, Professor Robert Misner lamented the unrivaled power of prosecutors and offered a proposal to force prosecutors to internalize the costs of their charging and sentencing decisions. He suggested that a state agency determine the amount of prison space available for the upcoming year.<sup>106</sup> Then, based upon past practices and other demographic information, the prison resources would be allocated to each prosecutor's office for use during the following year.<sup>107</sup> If the district attorney used fewer resources than allocated, the county could keep the remaining funds.<sup>108</sup> If the chief prosecutor needed additional resources, the county would have to provide its own local funds to pay for the prison beds.<sup>109</sup>

Professor David Ball has gone further by recently advocating that states stop funding prisons.<sup>110</sup> In place of state prison funding, he suggests two possibilities. First, states could give counties block grants to spend as they see fit (including on prison beds if they wanted).<sup>111</sup> States would administer the prisons, but the counties would have to pay for each inmate they send.<sup>112</sup> In a second proposal, Professor Ball goes even further and suggests ending state control of prisons and instead shifting responsibility for incarceration to local criminal justice entities.<sup>113</sup>

There are problems with each of these proposals, unfortunately. Although I remain convinced that better information flow to prosecutors could influence them to lower their plea bargains at the margins, critics are correct that it does not impose any binding constraints on prosecutors.<sup>114</sup> On the flip side, the more ambitious

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104. *Id.* at 67.

105. *See id.* at 66–67 (noting that the proposal would not drastically change prosecutorial behavior and that, in comparing mass imprisonment to an overinflated balloon, the proposal would only seek to “leak a little air out of the balloon so that it is no longer on the verge of bursting”).

106. *See Misner, supra* note 12, at 720.

107. *Id.* at 720–21.

108. *Id.* at 721.

109. *Id.*

110. Ball, *Defunding State Prisons, supra* note 12, at 1071–72.

111. *Id.* at 1072.

112. *Id.*

113. *Id.*

114. *See id.* at 1078 (noting that under my approach “rational actors could try to ‘free ride’ on the more abstemious behavior of their colleagues across the state”).

proposals advocated by Professors Misner and Ball would face considerable political obstacles.<sup>115</sup> Figuring out the correct allocation of prison beds for each county would be difficult to do and would leave many counties unhappy with their distribution.<sup>116</sup> Defunding state prisons altogether would be an enormous restructuring of the criminal justice system.<sup>117</sup> Both approaches might be better than the status quo, but they are politically unlikely. I accordingly offer an intermediate proposal below in Part III.

### III. CONSOLIDATING LOCAL CRIMINAL JUSTICE

#### A. *Prosecutors as Jail CEOs, and Sheriffs as Public Safety Officers*

At present, local prosecutors make charging and plea bargaining decisions that send misdemeanor defendants to local jails.<sup>118</sup> But the prosecutors do not run the local jails. The sheriffs run the jails.<sup>119</sup> I suggest ending that diffusion of responsibility by placing local prosecutors in charge of their local jails. Prosecutors, not sheriffs, should be responsible for checking inmates in and out of the local jails. And prosecutors, not sheriffs, should be in charge of the overall jail budgets.

While two-thirds of those incarcerated in the United States are in prisons,<sup>120</sup> that does not mean jails are insignificant. At any given time, more than 700,000 people are confined in jails.<sup>121</sup> And a considerable number of jails are overcrowded.<sup>122</sup> Placing local prosecutors in charge of their jails should accomplish three things: (1) more lenient plea bargain offers in misdemeanor cases; (2) fewer jail admissions because of charge reductions to fine-only offenses and more dismissals; and (3) faster and more lenient disposition of felony cases.

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115. See Leon Neyfakh, *How to Stop Overzealous Prosecutors*, SLATE (Feb. 25, 2015, 8:44 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/02/overzealous\\_prosecutors\\_hold\\_them\\_accountable\\_by\\_defunding\\_state\\_prisons.html](http://www.slate.com/articles/news_and_politics/crime/2015/02/overzealous_prosecutors_hold_them_accountable_by_defunding_state_prisons.html) (observing that these proposals “could potentially introduce political pressure on prosecutors that they currently don’t have to deal with”).

116. See, e.g., Leigh Dethman & Josh Loftin, *Counties Unhappy with Jail Payments*, DESERET NEWS (Jan. 22, 2006, 12:00 AM), <http://www.deseretnews.com/article/635178220/Counties-unhappy-with-jail-payments.html>.

117. See Ball, *Defunding State Prisons*, *supra* note 12, at 1076.

118. See Roberts, *supra* note 20, at 306–07.

119. See *supra* note 29 and accompanying text.

120. KAEBLE ET AL., *supra* note 34, at 2 tbl.1.

121. MINTON, *supra* note 48, at 1.

122. See *supra* Part I.

### 1. *More Lenient Misdemeanor Sentences*

First, and most obviously, if prosecutors were responsible for jail budgets, they would have strong incentives to offer more lenient plea bargains in misdemeanor cases. If prosecutors were on the hook for jail overcrowding, they would want jails to be less populated, less expensive, and easier to manage. Because misdemeanor defendants almost always serve their time in local jails,<sup>123</sup> prosecutors would want to reduce the length of misdemeanor sentences to reduce jail overcrowding.

For example, instead of insisting on a six-month sentence for a theft defendant, the prosecutor might agree to a four-month sentence. If a similar dynamic applied across the board, the results could be significant. Just as average jail stays have crept up over the last few decades—in 1978 the average length of stay was nine days, but by 2014 it was twenty-three days<sup>124</sup>—it could begin to slide back down.

### 2. *Fewer Jail Admissions Because of Charge Reductions*

Placing prosecutors in charge of local jails would also likely lead to fewer jail admissions. In marginal cases, prosecutors would be incentivized to dismiss cases or to opt for lower charges. Trace drug cases are a compelling example. In some jurisdictions—Texas is a good example—the criminal code has separate offenses for possession of drug paraphernalia and possession of very small amounts of controlled substances. In Texas, the paraphernalia charge is a Class C misdemeanor<sup>125</sup>—the lowest level crime in the criminal code—and it carries a maximum sentence of a fine.<sup>126</sup> The possession charge,<sup>127</sup> by contrast, is a higher-level misdemeanor offense and often results in jail time.<sup>128</sup> The prosecutor therefore has a choice. She can effectively fine drug offenders in trace cases by filing the Class C paraphernalia charge, or she can send them to jail by filing the possession of a controlled substance charge.

For many years, prosecutors in Houston, Texas, routinely filed the tougher controlled substance charges.<sup>129</sup> Perhaps they did this because of pressure from the Houston police union, which argued that sending the trace case defendants to jail prevented them from

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123. See Roberts, *supra* note 20, at 290.

124. SUBRAMANIAN ET AL., *supra* note 56, at 11.

125. TEX. HEALTH & SAFETY CODE ANN. § 481.125 (West 2015).

126. See TEX. PENAL CODE ANN. § 12.23 (West 2015).

127. TEX. HEALTH & SAFETY CODE ANN. § 481.115 (West 2015).

128. See TEX. PENAL CODE ANN. § 12.35 (West 2015).

129. Cf. Brian Rogers, *Harris County DA's Easing of Crack Pipe Policy Stirs Storm*, HOUS. CHRON. (Dec. 8, 2009, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Harris-County-DA-s-easing-of-crack-pipe-policy-1613537.php>.

committing burglaries and other drug crimes.<sup>130</sup> In 2009, however, Houston residents elected a new district attorney—Patricia Lykos—who changed the office policy so that prosecutors would only file Class C paraphernalia charges if the crack pipe had less than a hundredth of a gram of drugs.<sup>131</sup> According to Lykos, the policy change was designed in part to reduce jail overcrowding.<sup>132</sup> While the Houston law enforcement community was very upset about the change, not surprisingly, the sheriff who oversaw the jail favored the new policy.<sup>133</sup>

The change was short-lived, however. In 2012, a former judge, Mike Anderson, ran against Lykos in the Republican primary and campaigned against the policy of using the paraphernalia charge to dispose of trace cases.<sup>134</sup> Despite jail overcrowding, Anderson took the position that a trace amount of drugs was still possession of a controlled substance and should be prosecuted as such.<sup>135</sup> Anderson defeated Lykos in the election.<sup>136</sup> Shortly thereafter, he circulated an internal memorandum instructing prosecutors to bring controlled substance charges for trace amounts of drugs found not only on crack pipes but also “[b]rillo pads, syringes, baggies, mirrors, straws, razor blades, etc.”<sup>137</sup>

The counter-factual question is whether Anderson would have taken such a hard-line position if he were in charge of not just prosecuting the trace cases but also finding space and money to incarcerate the defendants. If forced to fully internalize the costs of his prosecutions, perhaps he would have hesitated to pursue the controlled substance charges.<sup>138</sup>

The trace drug cases are only one of many possible examples. As Professor Jenny Roberts has explained, there are many minor misdemeanor cases—such as disorderly conduct, public urination, loitering, and marijuana possession, to name a few—in which

130. *Id.*

131. *Id.*; see also William Martin, *The Policy and Politics of Drug Sentencing*, TEX. MONTHLY (May 5, 2013), <http://www.texasmonthly.com/politics/the-policy-and-politics-of-drug-sentencing>.

132. Rogers, *supra* note 129.

133. *See id.*

134. Martin, *supra* note 131.

135. *See id.*

136. *Id.*

137. David Jennings, *Harris County DA Mike Anderson: If It Looks Like Drugs, Arrest 'Em!*, BIG JOLLY POL. (Jan. 23, 2013), <http://bigjollypolitics.com/harris-county-da-mike-anderson-if-it-looks-like-drugs-arrest-em>.

138. Or perhaps he would have added his voice to those encouraging the Texas legislature to change the penal code to make trace amounts a lesser offense. *See* Martin, *supra* note 131 (noting that Harris County’s longest-serving felony judge writes to each Houston legislator prior to each legislative session urging them to lower the penalty for trace cases).

prosecutors could decline to prosecute offenders.<sup>139</sup> Professor Roberts suggests that more rigorous misdemeanor representation by defense lawyers could push prosecutors to decline to charge these low-level cases.<sup>140</sup>

There is considerable room for prosecutors to dismiss lower-level misdemeanor charges.<sup>141</sup> Research by Professor Josh Bowers indicates that prosecutors actually decline to prosecute *less* often in public order offenses than in serious felonies and misdemeanors.<sup>142</sup> Bowers discovered data about misdemeanor charging and declination rates in New York and Iowa.<sup>143</sup> That data showed, for example, that Iowa prosecutors declined to prosecute in 3.21% of violent misdemeanor cases but only 1.31% of public order misdemeanors.<sup>144</sup> In New York City, prosecutors declined to proceed in homicide charges “at more than twice the rate . . . that they declined turnstile hops or prostitution.”<sup>145</sup> Prosecutors do not have to carefully screen low-level misdemeanors because they know that the system will force defendants to plead guilty.<sup>146</sup>

At present, the criminal justice system does not effectively pressure prosecutors to decline low-level charges against poor defendants who will be unable to make bail.<sup>147</sup> Prosecutors charge those defendants and allow the fact of detention to pressure the defendants to plead guilty.<sup>148</sup> Matters might be different if the prosecutors were responsible for the costs of the jails. Prosecutors

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139. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1106–07 (2013).

140. *Id.* at 1107. It could also influence legislators to move them out of the criminal justice system entirely. *Id.* Professor Roberts’ approach would force prosecutors to reassess their charging decisions, although at greater cost (defense lawyer time is expensive) than my approach of placing prosecutors in charge of jails. Either of our proposals, if successful at reducing incarceration, might also reduce the impact of zero-tolerance policing that falls on minority communities. See K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 286–87 (2014) (describing the problem of aggressive zero-tolerance policing and prosecution in minority communities and advocating that prosecutors “decline to prosecute minor offenses where arrest patterns show a disparate impact on racial minorities”).

141. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1713–16 (2010).

142. *Id.* at 1716–17.

143. *Id.* at 1715–18. This type of data is unfortunately quite difficult to locate.

144. *Id.* at 1717.

145. *Id.* at 1718–19.

146. *Id.* at 1705–10. In particular, see *id.* at 1709 (“A charge leads almost inevitably and quickly to some adjudication of guilt.”); see also MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 30–31 (1979).

147. See Bowers, *supra* note 141, at 1710–11.

148. See *id.* at 1711.

could still use pre-trial incarceration as leverage, but they would have to pay for it, rather than foisting the costs and responsibilities onto the sheriffs who pay the bills for the jails. Placing prosecutors in charge might therefore result in prosecutors declining charges in low-level misdemeanor cases much more often.

### 3. *Faster and More Lenient Disposition of Felony Cases*

A less obvious benefit of putting prosecutors in charge of local jails is that it might spur lower plea bargain offers in felony cases. Felony defendants typically serve their time in state prisons,<sup>149</sup> but that does not mean felony defendants are never inmates in local jails. Most felony defendants spend months in local jails before they agree to a plea bargain (or, in rare cases, before proceeding to trial).<sup>150</sup> If prosecutors ran the jails, they would have an incentive to move felony defendants to their new homes in state-funded facilities as quickly as possible. The easiest way to move felony defendants off of the prosecutors' balance sheets and into state prison beds would be to plea bargain their cases faster. And the easiest way to plea bargain cases faster would be to offer defendants more lenient plea deals.<sup>151</sup> While the downward trend in sentences could not last forever,<sup>152</sup> it might slightly reset the "going rate" for certain offenses at a lower level and thus reduce up-front sentences moving forward.

### B. *The Continued Role of Sheriffs*

Placing prosecutors in charge of jails would not entirely eliminate sheriffs from the picture. The sheriff would still be in charge of hiring jailers, deciding how many guards to staff on each

149. See Ball, *Why State Prisons?*, *supra* note 12, at 93.

150. See *supra* note 25 and accompanying text. The average time from arrest to disposition for incarcerated defendants in felony cases exceeds two months. *Id.*

151. Prosecutors could also speed up the processing of felony cases by increasing the number of prosecutors who work with grand juries. Prosecutors ordinarily are not under intense pressure to quickly indict suspects. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 17.151 (West 2015) (requiring release from custody only if no indictment is issued within 90 days for felony charges). If prosecutors increased grand jury staffing, indictments would come faster and cases would plead more quickly. See, e.g., Jim Walsh, *Camden County Jail Overcrowded Again*, COURIER-POST (Aug. 11, 2014, 3:21 PM), <http://www.courierpostonline.com/story/news/local/south-jersey/2014/08/10/camden-county-jail-overcrowded/13874379> (explaining that, in an effort to reduce jail overcrowding in Camden County, New Jersey, the district attorney "bolstered its staff to accelerate the handling of inmates' cases," and "stepped up efforts to move cases toward a grand jury and an inmate's potential indictment"). Of course, increasing staffing in the grand jury division would cost money.

152. Prosecutors must stand for re-election, and there is only so far they can go in reducing felony sentences before lighter plea bargains become a political liability. See Richman & Stuntz, *supra* note 93, at 603–04.

shift, and determining how to discipline inmates.<sup>153</sup> Day-to-day responsibility for running the jail would still remain in the sheriffs' hands. All that would change is that the prosecutors—not sheriffs—would have ultimate responsibility for budgeting and the paperwork of inmates entering and leaving the jails.

By way of analogy, think of the F.B.I. The director of the F.B.I. runs day-to-day operations. The director is responsible for hiring and firing agents and for resource allocation within the bureau.<sup>154</sup> But the F.B.I. is not a completely autonomous agency. It has long been under the umbrella of the Department of Justice.<sup>155</sup> Indeed, the F.B.I. was created in 1908,<sup>156</sup> but was not a paragon of integrity in its initial years.<sup>157</sup> In the mid-1920s, Attorney General Harlan Stone moved to reign in the bureau by having the director report directly to the Attorney General.<sup>158</sup> When errors or problems occur at the F.B.I., the Attorney General cannot say the Department of Justice bears no responsibility.

Consolidating local power in the hands of one entity (prosecutors) rather than separating it between two local departments (prosecutors and sheriffs) would result in two key changes. First, sheriffs would no longer be forced to petition county commissioners for funds to run the jails.<sup>159</sup> Rather, prosecutors would be responsible for negotiating the jail budget with the county commissioners. No longer would sheriffs and prosecutors be pointing fingers at each other about who is responsible for jail

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153. Cf. MARK D. MARTIN & PAUL KATSAMPES, U.S. DEP'T OF JUSTICE, SHERIFF'S GUIDE TO EFFECTIVE JAIL OPERATIONS 5–6 (2007), <http://info.nicic.gov/nicrp/?q=system/files/021925.pdf> (noting a sheriff's leadership, management, and supervisory role).

154. See *FBI Oversight: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 283 (2006) (statement of Robert Mueller, Director of the FBI) (“[W]e continue to reshape our human resources program to recruit, hire, train, and retain quality individuals.”).

155. See FED. BUREAU OF INVESTIGATION, *Frequently Asked Questions*, <https://www.fbi.gov/about/faqs/when-was-the-fbi-founded> (last visited July 26, 2016).

156. *Id.*

157. See ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 149 (1956) (“When I became Attorney General,” Stone recalled in 1937, . . . [t]he Bureau was filled with men with bad records . . . . The organization was lawless, maintaining many activities which were without any authority in federal statutes, and engaging in many practices which were brutal and tyrannical in the extreme.”).

158. See *id.* at 150.

159. See, e.g., *Houston Holding Cells Are Jam Packed, Inspectors Say*, TEX. JAIL PROJECT (Oct. 21, 2011), <http://www.texasjailproject.org/2011/10/houston-jail-is-jam-packed-fails-inspection> (describing sheriff's unsuccessful request for funding and quoting a county commissioner as saying it is the sheriff's job “to make it clear to the courts that we are having too many people in the holding cells, and we can't bring more over until they clear them out”).

conditions and overcrowding.<sup>160</sup> Second, because the prosecutors would be in charge of the budget, as well as the ministerial task of checking inmates in and out of the jail, they would be better informed about jail budgets and overcrowding and would be incentivized to adjust their plea bargain offers accordingly. In short, consolidating local criminal justice power would result in a unified budget and prosecutorial decisions that take account of that budget.

### C. Responding to Objections

There are two major objections to a proposal to make prosecutors responsible for jail budgets. One concern is that prosecutors will shortchange the safety budget and spend more money on prosecuting inmates than funding guards and guaranteeing safety. A second worry is that prosecutors would seek to increase charges in borderline cases in order to convict inmates of felonies (rather than misdemeanors) and send them to state-funded prisons rather than prosecutor-managed jails. I take these objections in turn.

#### 1. Will Prosecutors Shortchange the Security Budget?

First, and most importantly, critics might question whether placing prosecutors at the top of the organizational chart for jails would compromise the safety of the inmates and the sheriffs' deputies who are running the day-to-day operations of the jails. The argument would go like this: Prosecutors want credit for imposing tough sentences. When jail funds dry up, prosecutors would not want to drop cases or negotiate lighter sentences, so they would skimp on jail safety. They would continue to incarcerate the same number of inmates, but they would allocate less money for hiring guards and paying overtime. The jails would then become less safe, and the conditions of confinement would deteriorate.

This parade of horrors is ultimately unpersuasive. Because prosecutors would be at the top of the organizational chart and have official responsibility for the jails, they would bear political responsibility for overcrowding and safety problems. At present, when a jail inmate dies in custody because of inadequate medical care or because of violence due to overcrowding, the local television stations and newspapers turn to the sheriff and demand answers.<sup>161</sup> If prosecutors held final responsibility for the jails, the news media

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160. See, e.g., *id.*

161. There are hundreds of stories to choose from. For a recent example, see Frank S. Abderholden, *Lake County Jail Inmate Dies: Sheriff's Office*, CHI. TRIB. (Mar. 4, 2016, 6:21 PM), <http://www.chicagotribune.com/suburbs/lake-county-news-sun/crime/ct-lns-lake-county-jail-inmate-dies-st-0305-20160304-story.html>.

would instead turn to the chief prosecutor for an explanation.<sup>162</sup> The prosecutor might try to slough off responsibility by saying the sheriff is in charge of day-to-day security. But the prosecutor would know that the sheriff can turn to the media and say that she was denied proper funding by the prosecutor. The sheriff would explain that she requested funding for guards and that the prosecutor refused it. What would have been a one-day story would then occupy multiple news cycles, with the media ferreting out “who is to blame.” In short, if the prosecutor were identified as the top jail official, it would be difficult for her to say the problems are “not my fault.”

Relatedly, prosecutors would find it difficult to divert money previously used for jail safety and instead invest it in more jail beds. Jail facilities are only so large and can only physically hold so many inmates. And jails are supervised and certified by state agencies.<sup>163</sup> Prosecutors would find it no easier than sheriffs to permanently flout the capacity rules.

Of course, prosecutors could get around the capacity problem by filling up all the beds in the local jails and then contracting with out-of-jurisdiction jails to take excess inmates. Some sheriffs presently do this.<sup>164</sup> The problem is that contracting with other facilities is very expensive.<sup>165</sup> Prosecutors would likely have to go back to the county commissioners to seek extra funding.<sup>166</sup> And while prosecutors might have marginally more luck than sheriffs in shaking loose funds, they are unlikely to fare much better. Prosecutors already struggle to adequately fund their offices,<sup>167</sup> so it is difficult to see how they would convince county commissioners to be more generous in jail funding. Moreover, the logistics of transporting inmates back and forth to another county are onerous<sup>168</sup> and prosecutors would want to avoid any added complications in running the jails.

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162. Moreover, prosecutors would also be named in lawsuits that are now typically filed against sheriff's departments. Again, there are hundreds of examples to choose from. For a recent one, see St. John BARNED-SMITH, *Galveston County Sheriff Faces Federal Lawsuit After Inmate's Death*, HOUS. CHRON. (Mar. 14, 2016, 12:46 PM), <http://www.chron.com/news/houston-texas/article/Parents-sue-Galveston-County-Sheriff-s-Office-6888759.php>.

163. See Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1755–56 (2010).

164. See *supra* notes 54, 59 and accompanying text.

165. See Rubino, *supra* note 59.

166. Cf. *id.* (noting that the sheriff's request for a nearly \$500,000 budget increase was in part due to the expensive cost of transporting inmates).

167. See Gershowitz & Killinger, *supra* note 93, at 265.

168. See, e.g., Caitlin VanOverberghe, *Inmate Transfer Program Hits Legal Snag*, DAILY REP. (June 16, 2016), [http://www.greenfieldreporter.com/2016/06/16/inmate\\_transfer\\_program\\_hits\\_legal\\_snag/](http://www.greenfieldreporter.com/2016/06/16/inmate_transfer_program_hits_legal_snag/) (reporting that plans to

To turn back to the F.B.I. analogy, the American public is not less safe because the F.B.I. is housed inside of the Department of Justice. To the contrary, one would hope that the F.B.I. works more closely with other Justice Department agencies because they are under the same umbrella. It is of course possible that putting prosecutors in charge of jail budgets would undermine jail safety. But given that most prosecutors are elected officials<sup>169</sup> and that the media already focuses on jail overcrowding,<sup>170</sup> it is difficult to see how prosecutors could undermine safety without risking serious reputational repercussions.<sup>171</sup>

2. *Would Prosecutors Try to Turn Misdemeanors into Felonies to Send Defendants to State Prisons?*

A second, and quite serious, objection to a proposal to put prosecutors in charge of jails is that it would incentivize them to push for felony convictions when they would otherwise have been satisfied with misdemeanor convictions. In other words, if prosecutors have to pay for jails, they might seek to have borderline defendants (those who could have served jail time for misdemeanor convictions) plead to felonies that will result in prison time paid for by the state. Prosecutors might push harder for felony convictions to shift incarceration costs to the state.

For example, imagine that two intoxicated men—Victor and Dan—have been verbally antagonizing each other in a bar. Victor goes a little too far—perhaps he makes a derogatory remark about Dan’s girlfriend—and Dan responds by punching Victor in the face and breaking his nose. Under most criminal codes there are at least two ways to resolve this case.<sup>172</sup> Dan could be guilty of aggravated assault—a felony—because Victor has suffered serious bodily injury.<sup>173</sup> On the other hand, it is not clear that a broken nose

transfer inmates from an overcrowded jail in southern Indiana were “stalled” while “county officials debate[d] potential liability issues”).

169. This, of course, is not to say that prosecutor elections actually deliver better results. See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 581–82 (2009).

170. See, e.g., Adam Banner, *The Economics of Incarceration: Overcrowded Prisons and Overcharged Prisoners*, HUFFINGTON POST (Mar. 9, 2016, 1:13 PM), [http://www.huffingtonpost.com/adam-banner/the-economics-of-incarcer\\_b\\_9408800.html](http://www.huffingtonpost.com/adam-banner/the-economics-of-incarcer_b_9408800.html).

171. Moreover, any cost-benefit analysis would have to consider not just the risk that prosecutorial control of jails could negatively affect safety, but also the possibility that it could ameliorate current safety problems. Presently overcrowded jails already pose a safety risk to guards and inmates. If placing prosecutors in charge might reduce the jail population (and hence the safety risk) then we must consider this in calculating the risk.

172. Assault is a “deep” type of crime with numerous different offenses. See Wright & Engen, *supra* note 5, at 1959–61.

173. See, e.g., N.J. STAT. ANN. § 2C:12-1(b)(1) (West 2015).

amounts to serious bodily injury in all instances,<sup>174</sup> so a charge of simple assault—a misdemeanor—might be more appropriate.<sup>175</sup> What would a prosecutor ordinarily do in this situation? Given that Victor and Dan had both been drinking, and given that Victor had escalated the situation by insulting Dan's girlfriend, the prosecutor might agree to a simple assault charge. If Dan pled guilty to that charge, he would serve his time in the local jail. Arguably, this would be the most just outcome. But if the prosecutor had to pay for Dan's incarceration because she runs the jail, the prosecutor might insist on the aggravated assault charge so that Dan would serve his time in state prison.

This borderline-felony problem is a serious concern, and not one that would be limited to assault cases. Prosecutors would likely face the same calculus in cases involving theft, evading arrest, and a host of other offenses. I cannot deny that this situation would occur, but there are reasons to think it would not pose an enormous problem.

First, plea bargains are determined in the shadow of trial and judicial sentencing.<sup>176</sup> If juries would not convict a defendant of aggravated assault in broken nose cases, then prosecutors will be unable to compel defendants to plead guilty to those felony charges.<sup>177</sup>

Second, and related, the plea bargain system works efficiently because there are "going rates" for situations that regularly occur.<sup>178</sup> For instance, even though DWI carries an authorized sentence of six months or longer in many jurisdictions, it is well known that defendants will ordinarily receive a sentence of time-served if they plead guilty.<sup>179</sup> The going rate is determined in the shadow of trial and is typically well established.<sup>180</sup> If a prosecutor insists on a penalty above the going rate, she would need a credible threat that a

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174. Compare, e.g., *Commonwealth v. Alexander*, 383 A.2d 887, 888–89 (Pa. Super. Ct. 1978) (holding that a broken nose was insufficient to support an aggravated assault charge), with *Pollard v. State*, 495 S.E.2d 629, 630–31 (Ga. Ct. App. 1998) (holding that evidence of a broken nose was sufficient to support an aggravated battery conviction).

175. See, e.g., N.J. STAT. ANN. § 2C:12-1(a) (West 2015).

176. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992). For a more complicated assessment of the factors that affect plea bargains, see generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004).

177. Cf. Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 596–97 (2014) ("Juries offer [a] potential source of accountability for prosecutors because they enforce the legal requirement of proof beyond a reasonable doubt. Prosecutors who take charges to trial without the facts to back them up can expect to lose.")

178. See Bibas, *supra* note 176, at 2481.

179. Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 978, 985 (2011).

180. See Bibas, *supra* note 176, at 2467, 2481.

judge would impose a higher penalty than the plea offer.<sup>181</sup> And if the trial judge suspects that the prosecutor is getting tougher in order to push inmates out of the local jail and into the state prison, the judge may very well resist by issuing lighter sentences in cases that go to trial.<sup>182</sup>

#### CONCLUSION

The United States is plagued by the problem of mass incarceration. Of the 2.2 million people who are incarcerated, more than 700,000 are in local jails.<sup>183</sup> Prosecutors have enormous power to charge defendants, which leads to their pre-trial incarceration in jails. And prosecutors have tremendous leverage to pressure defendants to plead guilty to misdemeanors that will result in jail sentences. Yet, once defendants leave the courtroom, prosecutors no longer have to worry about them. Prosecutors do not have to internalize the costs of their charging and plea bargain decisions because sheriffs run the jails. When prosecutors send inmates to jails, sheriffs must find beds for them to sleep in and funds to pay for their food, security, and medical care. The so-called correctional free lunch is not just a problem involving county prosecutors and state prisons. Prosecutors get a free lunch when they send inmates to local county jails that are just down the street.

This Essay proposes taking a bite out of the correctional free lunch by placing prosecutors in charge of their local jails. Prosecutors should be at the top of the organizational chart. Not only should they be responsible for the overall jail budget, but they should also be responsible for the logistical task of checking each inmate in and out of the jail. These financial and logistical responsibilities should hopefully lead to a gradual decline in incarceration. Jail populations should decrease because prosecutors would offer more lenient plea offers and downgrade or dismiss charges in an effort to make jail populations more manageable. And there may be spillover effects in felony cases as prosecutors seek to move pre-trial detainees out of local jails and into state prisons by offering better plea deals that will encourage defendants to more quickly plead guilty.

As with prisons, it has taken decades for jail populations to rise to their current high levels. Placing prosecutors in charge of local jails would not return jail populations to the considerably lower levels of the 1970s. But it would be a productive step toward slowly decreasing incarceration in jurisdictions across the United States.

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181. See Covey, *supra* note 84, at 1246.

182. Cf. Bibas, *supra* note 176, at 2520 (observing that “judges seem to be just as susceptible as laymen to anchoring and egocentric biases”).

183. MINTON, *supra* note 48, at 1.

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