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## Procedural Rules under Washington's Public Records Act: The Case for Agency Discretion

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## PROMOTING DEMOCRACY IN PROSECUTION

Russell M. Gold\*

*Abstract:* Voters were meant to check prosecutors' decisions, but that check has eroded because voters lack the information necessary to cast meaningful votes in prosecutor elections. Voters' lack of an effective political check on prosecutors causes two related problems: (1) inefficient allocation of prosecutorial resources and (2) divestment of democratic sovereignty from the people. Prosecutors currently need not consider expenditures for incarceration or public defense because voters never see these costs and thus cannot hold their prosecutors accountable for them. Accordingly, these costs become an externality in the prosecutorial decision-making process, causing prosecutors to spend resources in socially inefficient ways.

To reinvigorate the political check on prosecutors, this Article proposes requiring state and local prosecutors to disclose costs of all prosecuted cases and all cases not prosecuted in which an arrest was made and sufficient evidence existed. Such disclosures would sweep broadly to include prosecutors' wages, public defense costs, and incarceration costs in cases resulting in a conviction. Voters would then have concrete, monetized evidence of prosecutorial priorities. This greater information flow would allow voters, through the ballot box, to meaningfully supervise their prosecutors' exercise of delegated sovereign authority. Knowing that voters wield this information, prosecutors would then internalize this externality by taking these previously disregarded costs into account when they determine whether to charge crimes, what crimes to charge, and what sentences to recommend. Creating a mechanism that urges prosecutors to consider this broader set of costs would promote a more socially efficient outcome. Finally, this Article considers what an efficient allocation of prosecutorial resources might look like. It postulates that many constituencies would rather spend less on small-scale drug prosecutions to save cash-strapped state budgets.

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## INTRODUCTION

State budgets are in crisis, and state prisons are a big reason why. As of 2009, the total number of inmates in state prisons and local jails across the nation reached nearly 2.2 million.<sup>1</sup> State inmates cost significant sums of money—figures reach as high as \$62,595 per inmate per year.<sup>2</sup> One 2008 study estimated that state prisons in the United States cost more than \$44 billion every year,<sup>3</sup> including \$8.8 billion in California alone.<sup>4</sup> Neither the \$44 billion figure nor the \$8.8 billion figure includes spending to house three-quarters of a million people in local jails.<sup>5</sup> These staggering figures prompt the question: would a well-informed populace<sup>6</sup> choose to incarcerate so many at so high a cost?<sup>7</sup>

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1. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS AT YEAREND 2009—ADVANCE COUNTS 6 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/py09ac.pdf> (state prisons); TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES 4 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf> (local jails).

2. A recent study by the New York City Department of Correction calculated the average annual cost for a New York inmate as \$62,595. Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 244 (2009).

3. David Simpson, *National Report on Prisons: Behind Bars: In Georgia, for Every \$1 Spent on Higher Education, 50 Cents is Spent on Incarceration*, ATLANTA JOURNAL-CONSTITUTION, Feb. 29, 2008, at A1 (citing JENIFER WARREN, PEW CTR. ON THE STATES, PUB. SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 11, 30 (2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf)).

4. WARREN, *supra* note 3, at 11, 30.

5. *Id.* at 27; MINTON, *supra* note 1, at 4.

6. This Article relies in part on Ronald Dworkin's "more sophisticated version of the majoritarian conception" of democracy, which provides that a viewpoint cannot reflect majority will unless the people are well informed and have had opportunity to deliberate on the issue. RONALD DWORGIN, SOVEREIGN VIRTUE 357 (2000).

Some responsibility for these massive prison costs rests with the charging decisions of local prosecutors.<sup>8</sup> Locally elected officials and their employees make these charging decisions while wielding broad discretion meant to be exercised in the public interest. These officials must stand for election to preserve the people's check on that broad discretion. But that check no longer functions properly because voters lack the information necessary to meaningfully evaluate their prosecutors' decisions. The absence of a political check poses problems of inefficient resource allocation and divested democratic sovereignty.

Because prosecutors act on the public's behalf, their decisions should reflect their constituents' preferences. The efficiency of their decisions should be judged by the social costs and benefits to their constituencies. Thus, an efficient allocation of prosecutorial resources is one in which prosecutions are brought only when their marginal social benefit to a prosecutor's constituency is equal to or greater than their marginal social cost to that constituency. But voters' lack of information regarding how prosecutors spend public funds (and the priorities that information demonstrates) causes an inefficient allocation of prosecutorial resources.

Lack of a meaningful political check on prosecutors diminishes popular sovereignty.<sup>9</sup> Prosecutors rarely face electoral opposition.<sup>10</sup> In

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7. In last year's State of the State Address, California Governor Arnold Schwarzenegger criticized his state for spending too much on incarceration and too little on education, proposing a constitutional amendment to prevent this relative allocation from recurring. Governor Arnold Schwarzenegger, State of the State Address (Jan. 6, 2010), *available at* <http://www.govspeech.org/wwwdata/resources/files/19694d.pdf>. Governor Schwarzenegger explained:

The priorities have become out of whack over the years. I mean, think about it. 30 years ago 10 percent of the general fund went to higher education and three percent went to prisons. Today, almost 11 percent goes to prisons and only 7.5 percent goes to higher education.

Spending 45 percent more on prisons than universities is no way to proceed into the future. What does it say about our state? What does it say about any state that focuses more on prison uniforms than on caps and gowns? It simply is not healthy.

*Id.*

8. This Article's mandatory cost disclosure proposal may appear to blame prosecutors alone for what this Article hypothesizes is an over-prosecution of nonviolent crime. While prosecutors are responsible to some extent, they are by no means solely responsible. State legislatures wove a broad net, and law enforcement officials exercise great control over how to cast that net before prosecutors even enter the picture. Nonetheless, because prosecutors have the last clear chance to stop the criminal justice mechanism, this proposal seeks to reinvigorate the voice of the people in prosecutorial decision-making.

9. See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582-83 (2009) ("[T]he reality of prosecutor elections is not so encouraging. . . . Uncontested elections short-circuit the opportunities for voters to learn about the incumbent's performance in office and to make an informed judgment about the quality of criminal enforcement in their district. . . . Incumbents and challengers have little to say about the overall pattern of outcomes that attorneys in the office produce or the priorities of the office."); see also KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 207-08 (2d prtg. 1970).

the rare contested election, campaigns focus on a few high-profile cases rather than address genuine prosecutorial priorities or articulate alternative visions for prosecution.<sup>11</sup> Voters' choices of candidates in such elections hardly fit the "sophisticated version of the majoritarian conception" of democracy that requires a well-informed populace with opportunity to deliberate.<sup>12</sup>

More abstractly, sovereignty also suffers because a decision not to prosecute when cause exists and resources are available embodies an essential aspect of sovereignty.<sup>13</sup> Such a decision exempts someone from the purview of otherwise applicable law—a decision at the heart of sovereignty.<sup>14</sup> In a democracy, sovereignty rests with the people. Because voters lack information about the full costs of prosecution, however, they cannot meaningfully check their prosecutors and thus lose ultimate sovereign authority over prosecutorial decisions.<sup>15</sup>

Unlike many previous articles and books that have quarreled with the breadth of prosecutorial discretion,<sup>16</sup> this Article does not propose a new mandatory constraint on which cases prosecutors can or must prosecute but instead proposes strengthening the intended political check. This Article takes issue with the banality of prosecutor elections and offers a specific proposal to improve the metrics of prosecutorial performance.<sup>17</sup> It argues that specific information should be provided to voters and challengers in prosecutor elections to fix the information deficit that

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10. Wright, *supra* note 9, at 582–83.

11. *Id.*; Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) ("District attorneys' electoral contests are rarely measured assessments of a prosecutor's overall performance. At best, campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal." (citing Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923–31 (2006))).

12. DWORKIN, *supra* note 6, at 357.

13. See Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 391, 410–11 (2008); see also GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 17–18 (Daniel Heller-Roazen trans., 1998).

14. Sarat & Clarke, *supra* note 13, at 391, 410–11; see also AGAMBEN, *supra* note 13, at 17–18.

15. Carol S. Steiker, *Passing the Buck on Mercy*, WASH. POST, Sept. 7, 2008, at B7 ("Our Founding Fathers understood the importance of checks and balances, but no one is checking or balancing the decisions causing our prisons to overflow.").

16. See, e.g., DAVIS, *supra* note 9, at 190; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 895–906 (2009); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 371 (2004); Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 65–72 (2008); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1560–72 (1981).

17. See Wright, *supra* note 9, at 606–08; see also Bibas, *supra* note 11, at 961, 979–96.

prevents accountability in the office of the prosecutor.<sup>18</sup> Prosecutors should be required to disclose the full panoply of costs the public bears for each case that was or could have been prosecuted.<sup>19</sup> Such disclosures would include expenditures on prosecution, public defense, and incarceration.<sup>20</sup> Also unlike previous scholarship, this Article examines the problem of prosecutorial accountability in terms of economic efficiency, revealing externality problems that require mandatory cost disclosure legislation to achieve optimality.

When voters see the cost side of the prosecutorial efficiency calculus, they can consider whether their tax dollars are being properly spent. Knowing that voters will have the information they need to make their own judgments about prosecutorial efficiency, lead prosecutors who want to keep their jobs will be forced to consider previously overlooked costs and move toward a more socially efficient allocation of prosecutorial resources. Line prosecutors who work for lead prosecutors will do the same lest they be fired or their bosses voted out.<sup>21</sup>

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18. See Bibas, *supra* note 11, at 961, 979–96; Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 373 (2010) (“The first step, then, is to make discretion transparent. . . . [That] mean[s] publishing better statistics about initial charges, final charges, recommended sentences, and reasons for charges, plea bargains, sentences, and related deals.”); Wright, *supra* note 9, at 582–83.

19. In some respects this proposal is similar to Bibas’s because he too advocates greater information to stakeholders in the criminal process, Bibas, *supra* note 11, at 979–96, but this Article proposes a specific process for disclosing the relevant information. Moreover, this Article explores the economic efficiency created by greater flow of information and considers democratic theory implications of such a proposal. Lastly, it does not purport to dictate effective procedures for prosecutors’ offices but allows each office to structure itself to respond to voters’ preferences.

20. Law enforcement expenditures comprise a significant component of government spending on criminal law. Prosecutors may control much of law enforcement spending, and thus there may be good justifications to build such spending into a mandatory disclosure regime. But whether the portion of law enforcement spending due to prosecutorial decision-making can be feasibly separated from the rest of law enforcement spending and thereby checked in prosecutor elections is beyond the scope of this Article. For purposes of this Article, law enforcement spending is excluded from mandatory cost disclosures.

21. Although line prosecutors may be career people with greater loyalty to the office than to the lead prosecutor, line prosecutors nonetheless seem best served by adhering to processes that will help their bosses avoid hotly contested elections. First, having a lead prosecutor in a tough election battle might make for a less than ideal work environment. Second, lead prosecutors might fire line prosecutors who hurt their chances of reelection. See Bibas, *supra* note 18, at 373–74; William T. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535 (2001) (“District attorneys are likely to seek to manage their offices in ways that win them public support. To some degree, line prosecutors will seek to do that too, because that is their bosses’ goal, and they must satisfy their bosses in order to keep their jobs.”). Moreover, each newly elected prosecutor brings the possibility of a personnel shake-up, particularly if this shake-up succeeds in focusing public attention on prosecutorial decision-making.

To perfect democratic control over prosecutorial discretion and to efficiently allocate prosecutorial resources, state and local prosecutors should be required to disclose total government expenditures or estimated expenditures for each prosecution. Prosecutors should also be required to disclose what charges they brought in each case or, in cases in which the police made an arrest but prosecutors opted not to proceed, what charges they could have brought.<sup>22</sup>

Part I of this Article briefly explains the relevant history of locally elected prosecutors and the current state of prosecutorial discretion. It further discusses the economic-efficiency and sovereignty problems resulting from voters' lack of information about this discretion. Lastly, Part I discusses the intersection of voters' political check on prosecutors with other democratic checks in the criminal justice system.

Part II proposes a mandatory disclosure regime to increase the flow of information between prosecutors and the public they serve. It also acknowledges the costs associated with this proposal and situates the proposal in the context of previous proposals for reforming prosecutorial discretion.

Part III explores the implications of mandatory cost disclosures, beginning with an explanation of how the increased information would reach voters and could thus be brought to bear in the voting booth. It next discusses why disclosing costs would increase prosecutorial resource efficiency and improve democratic sovereignty. Finally, Part III considers what a more efficient prosecutorial resource allocation might look like in practice, postulating, for example, that many constituencies would rather spend less on small-scale drug prosecutions to save cash-strapped state budgets.

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22. This proposal is limited to state and local prosecutors because the political check on federal prosecutors is weaker in that the people are further removed from the decision-makers. Yet, United States Attorneys are democratically accountable because they serve at the pleasure of the democratically elected president. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865–66 (1984). There may be good reason, then, to apply the same mandatory disclosure regime to federal prosecutors. That topic, however, must be left for another day.

## I. THE EVOLUTION OF PROSECUTORIAL DISCRETION AND PROBLEMS OF DEMOCRATIC ACCOUNTABILITY

### A. *History and Evolution of Prosecutorial Discretion*

Prosecution by locally elected officials is “an American innovation of European ancestry.”<sup>23</sup> In the eighteenth-century English system, almost all crimes were prosecuted privately by the victim.<sup>24</sup> The beginnings of a public prosecution system did not even begin to emerge in England until the end of the nineteenth century.<sup>25</sup>

During the revolutionary period, the American colonies began the transition from private prosecution to public prosecution by county officials.<sup>26</sup> By the late nineteenth century, public prosecution was well established in America.<sup>27</sup>

The next critical development in the United States after the appearance of public prosecutors was the requirement that they stand for election.<sup>28</sup> With this transition, the public vested locally elected prosecutors with authority to act on its behalf and exercise control that private citizens previously held. Yet, the people retained the ultimate check on these elected prosecutors.<sup>29</sup>

Locally elected prosecutors embodied the colonial American preference for local governmental control and suspicion of an overly powerful central government.<sup>30</sup> By design, citizens remained close to the

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23. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 728 (1996).

24. David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 475 (1995).

25. *See id.* at 476–78.

26. Misner, *supra* note 23, at 729.

27. Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS. L. REV. 411, 432–33 (2009); cf. Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995) (describing movement toward public prosecution in the nineteenth century, even though it was often rudimentary).

28. *See* Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1327–28 (2002).

29. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 58 (1998); Peggy Nicholson, *The Public Outrage Phenomenon and Limits on Remedying the Effect of Implicit Racist Attitudes on Capital Charging Decisions*, 18 VA. J. SOC. POL’Y & L. 133, 135 (2010).

30. William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1342 (1993). Pizzi describes the relationship between local control and aversion to centralized government in America:



prosecutors making decisions on their behalf so that prosecutors were more likely to understand and respond to their constituents' preferences.<sup>31</sup> The transition to elected prosecutors was designed to hold prosecutors accountable to local voters.<sup>32</sup>

Despite the intent of this transition to elected prosecutors, modern prosecutors have broad discretion unhinged from any meaningful check. Judicial review could have constrained prosecutorial discretion, but the U.S. Supreme Court has squarely foreclosed that avenue.<sup>33</sup> This lack of

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But prosecutorial discretion in the American legal system must be seen as part of a political tradition that is built on a preference for *local control* over political power and on an aversion to strong centralized governmental authority and power. There is no better example than our federal system in which each state retains the power to make its own criminal laws and even to determine its own system of criminal procedure, consistent with the U.S. Constitution. This aversion to strong centralized governmental power runs deep in the American political tradition. It is not an accident that in the United States, in strong contrast with European countries, something as important as education remains not a state matter, but a local matter, and different localities may adhere to quite different educational philosophies and objectives.

*Id.* (emphasis in original) (citations omitted).

Alexis de Tocqueville recognized that local government was more trusted because it was closer to the people, but he also supplied another reason for strong local government: "Local freedoms . . . constantly bring men closer to one another, despite the instincts that separate them, and force them to aid each other." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 487 (Harvey C. Mansfield & Delba Winthrop eds. & transs., Univ. of Chicago Press 2000) (1835). "[T]he same individuals are always in contact and they are in a way forced to know each other and to take pleasure in each other," and in this respect the familiarity of local government helps people realize that it is in their own self-interest to withdraw from themselves and engage in the broader community. *Id.* De Tocqueville referred to this notion as "self-interest well understood." *Id.* at 501. Whether the mistrust of large central government or the desire to structure self-interest and individualism into a healthy tension was the origin of their design, the framers vested authority in local governments.

31. Local election of prosecutors makes particularly good sense from a Tocquevillian perspective because locally elected prosecutors are most familiar with the constituencies they serve. *See* DE TOCQUEVILLE, *supra* note 30, at 501. Further, a small local constituency is most familiar with local offenses and offenders and has the greatest self-interest in prosecutorial decisions. This self-interest should engage the people to exercise their check over the use of prosecutorial power at the voting booth. But voters must see how many of their tax dollars are spent on prosecutions and criminal punishment to act meaningfully in their "self-interest well understood" and to supervise the exercise of that authority.

As Ronald Wright recently wrote, "There are reasons to believe that elections could lead prosecutors to apply the criminal law according to public priorities and values. Voters choose their prosecutors at the local level, and they care enough about criminal law enforcement to monitor the work of an incumbent." Wright, *supra* note 9, at 582.

32. DAVIS, *supra* note 9, at 207 ("[The lead prosecutor] is usually an elected official, and the theory is that he is responsible to the electorate."); *see also* Ramsey, *supra* note 28, at 1328.

33. *Wayte v. United States*, 470 U.S. 598, 607 (1985); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980).

[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

judicial review is reinforced by recognition of absolute prosecutorial immunity for activities “intimately associated with the judicial phase of the criminal process.”<sup>34</sup> So it is that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.”<sup>35</sup>

The structure of locally elected prosecutors that our founders created remains largely intact. More than ninety-five percent of lead state and local prosecutors in the United States are elected.<sup>36</sup> Despite the U.S. Supreme Court’s recognition that “courts [could be] especially well qualified to appoint prosecutors,”<sup>37</sup> we have not adopted prosecutorial appointment by the judiciary or elected executives because we place our faith instead in the political check.<sup>38</sup>

Local election of prosecutors is a distinctly American creation that evolved away from a private prosecution system. This system of local elections represents a choice to vest the public’s trust in a single official

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*Wayte*, 470 U.S. at 607; *see also* *Morrison v. Olson*, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting) (“[T]he balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion.”); DAVIS, *supra* note 9, at 24 (“Whether to prosecute or to refrain from prosecuting X may involve questions of justice, law, facts, policy, politics, and ethics.”). In *Newman v. United States*, the D.C. Circuit explained that “while [prosecutorial] discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors. . . . [I]t is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers.” 382 F.2d 479, 482 (D.C. Cir. 1967).

34. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

35. Robert H. Jackson, *The Federal Prosecutor—His Temptations*, 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940); *accord* Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, CRIM. JUST., Spring 2008, at 24, 25–26 (“Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official.”); *see also* *Wayte*, 470 U.S. at 607 (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

36. Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 335 (2002).

37. *Morrison*, 487 U.S. at 676 n.13 (majority opinion).

38. An empirical study confirms this intuition that the political check can rein in prosecutorial discretion. Ramsey, *supra* note 28, at 1392. That study examined murder cases in the New York District Attorney’s Office in the late nineteenth century, concluding that the prosecutions brought reflected the values of lay society in New York at the time. *Id.*

to prosecute on behalf of the people, but the people closely restrain that authority by requiring the prosecutor to run for office.<sup>39</sup>

*B. Voters' Lack of Information*

Poor information flow between prosecutors and the public renders the political check ineffective. Because prosecutors know that voters lack sufficient information to check their exercise of authority after the fact, prosecutors need not account for voter preferences. With no fear of meaningful reproof from voters, why bother?

Voters currently have insufficient information to meaningfully check their prosecutors. News stories and press conferences by prosecutors and defense attorneys allow some measure of evaluation,<sup>40</sup> but such information is unavailable in the vast majority of cases.<sup>41</sup> Rather,

[t]he reality is that nearly all [the lead prosecutor's] decisions to prosecute or not to prosecute, nearly all of the influence brought to bear upon such decisions, and nearly all his reasons for decisions are carefully kept secret, so that review by the electorate is nonexistent except for the occasional case that happens to be publicized.<sup>42</sup>

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39. *Id.*; see also Wright, *supra* note 9, at 581 (“At the end of the day, the public guards against abusive prosecutors through direct democratic control. In the United States, we typically hold prosecutors accountable for their discretionary choices by asking the lead prosecutor to stand for election from time to time. This is not true in most places around the globe. In the various civil law systems in other countries, the idea of electing prosecutors is jarring.”).

40. Gordon & Huber, *supra* note 36, at 336.

41. See Bibas, *supra* note 11, at 961 (“[P]rosecution is a low-visibility process about which the public has poor information and little right to participate. District attorneys’ electoral contests are rarely measured assessments of a prosecutor’s overall performance. At best, campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal. The advantages of incumbency and name recognition are also huge.” (citing Bibas, Essay, *supra* note 11, at 923–31)); Davis, *supra* note 29, at 58–59 (“The electorate has very little information about a prosecutor’s specific charging and plea bargaining practices or how he plans to exercise his discretion before electing him to office . . . Elected prosecutors typically run on very general ‘tough on crime’ themes with no information about specific office policies.”); Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 751 (2008) (“Although well-publicized cases exist as obvious exceptions, prosecutors make the vast majority of their charging decisions without any opportunity for public review.”); Wright, *supra* note 9, at 582–83 (“[S]tatements [in the typical prosecutor election campaign] . . . dwell on outcomes in a few high visibility cases, such as botched murder trials and public corruption investigations. Incumbents and challengers have little to say about the overall pattern of outcomes that attorneys in the office produce or the priorities of the office.”); *id.* at 592 (“[T]he campaign rhetoric offers only poor measures of competence and few measures of values or priorities.”).

42. DAVIS, *supra* note 9, at 207–08; accord Davis, *supra* note 35, at 26 (“Even elected prosecutors, who presumably answer to the electorate, escape accountability, in part because their

Voters may have access to conviction rates, the number of cases resulting in pleas, or the proportion of cases brought to trial,<sup>43</sup> but these aggregated data obscure the significance of the individual cases.<sup>44</sup> Moreover, these data do not reveal genuine prosecutorial priorities. Members of the media similarly lack access to this information.

In the abstract, the benefits of criminal prosecution to voters are obvious.<sup>45</sup> For violent or other high-profile offenders, citizens see dangerous people locked up and fewer criminals roaming the streets. The associated costs, however, are far less apparent.<sup>46</sup> An average citizen does not and cannot know how much it costs to charge, prosecute, and incarcerate a criminal.<sup>47</sup>

### *C. Problems Caused by Lack of Information*

Allowing prosecutors to discount the will of the people presents problems of both efficiency and democratic sovereignty. First, and most directly, prosecutorial resources may be spent inefficiently, that is, spent in ways in which the marginal cost to the voting public exceeds the marginal benefit. Second, the ability of prosecutors to remain indifferent to public opinion about costs divests the people of sovereignty.

#### *1. Inefficient Allocation of Prosecutorial Resources*

Because American prosecutors are elected officials trusted to act on the public's behalf,<sup>48</sup> their resource allocation decisions should be those

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most important responsibilities—particularly the charging and plea bargaining decisions—are shielded from public view.”).

43. Gordon & Huber, *supra* note 36, at 337.

44. Even the data Wright advocates to solve the information deficit are aggregated beyond the point of usefulness. See Wright, *supra* note 9, at 606–08.

45. See, e.g., Brown, *supra* note 16, at 342. Admittedly, monetizing and particularizing these benefits to particular cases is difficult.

46. *Id.* at 342.

47. Although statistics regarding the cost of incarceration are ascertainable, the cost of prosecutorial resources expended to review a case, charge it, plea bargain or go to trial, respond to an appeal, and pay a public defender is far more opaque. As Douglas Berman explains, “Long missing [from our criminal justice system] has been a sober realization that even if we get significant benefits from incarceration, that comes at a significant cost.” Monica Davey, *Touching Off Debate, Missouri Tells Judges Cost of Sentences*, N.Y. TIMES, Sept. 19, 2010, at A1.

48. See *supra* Part I.A.; see also Wright, *supra* note 9, at 581 (“When government officials have discretion, the rule of law also requires that they be accountable. This ideal carries even into the world of criminal justice, where the individual prosecutor’s power dominates the scene. We hope that every exercise of prosecutorial discretion takes place within a framework of prosecutorial accountability.”).

that their constituents would make. Resource decisions that match constituents' cost-benefit preferences are socially efficient. By efficiency, this Article refers to the traditional economic definition: marginal benefit equals or exceeds marginal cost. An efficient allocation of prosecutorial resources is one in which a prosecution is brought only when its marginal benefit to the public equals or exceeds its marginal cost. An inefficient prosecutorial resource allocation, then, is one in which voters would prefer that their resources be spent differently.<sup>49</sup>

With the historical shift to public prosecution, the complexity of the decision whether to prosecute a particular person for a particular offense increased dramatically. In a private prosecution system, the decision-maker was the most significant stakeholder and made his prosecutorial decisions out of self-interest.<sup>50</sup> Public prosecutors, however, must approximate popular will and account for the interests of a broad constituency.<sup>51</sup> The public prosecutor's decision-making process should address a far broader spectrum of considerations than a victim's does. Instead of examining their own preferences to determine whether a prosecution would be worth its cost to them individually, prosecutors are saddled with the responsibility to make calculated decisions on behalf of their communities.

This added complexity engendered a potential private efficiency loss but a social efficiency gain. In a system of private prosecution, efficiency was achieved through the aggrieved individual's private decision. If prosecuting was worth at least as much to the aggrieved party as the cost of the prosecution, then the aggrieved would pursue the case. When the primary stakeholder was the person making the decision, the cost-benefit calculation was simple (albeit deceptively simple in

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49. A skeptical reader might wonder whether this notion of voters' cost-benefit analysis mischaracterizes the way that the public views criminal law and overestimates voters' concern for the costs of law enforcement. But this Article contends that voters do not always desire more arrests and prosecutions; rather, it contends that voters exposed to cost information might decide that certain prosecutions are a waste of money. For a more detailed explanation, see *infra* Part III.

50. Broader societal interests were neglected in this decision, but the largest stakeholder's interests were naturally accounted for. The grand jury also functioned as a backstop to determine whether charges could go forward in serious cases, see Friedman, *supra* note 24, at 476, but cases could not proceed without the victim's assessment that the case was worth bringing.

51. Victims' interests continue to play a role in prosecutors' decisions. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.2(h) (1993), available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_newsletter\\_home/crimjust\\_standards\\_pfunc\\_blk.html#3.2](http://www.americanbar.org/publications/criminal_justice_section_newsletter_home/crimjust_standards_pfunc_blk.html#3.2); Jean Ferguson, *Prosecutorial Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation*, 4 CRIM. L. BRIEF, Summer 2009, at 3, 7. Thus, the prosecutorial decision has not been wholly wrested from the victim's hands, but ultimate decision-making now rests with a disinterested official.

failing to account for the external costs and benefits to other stakeholders). In a public prosecution system, prosecutors estimate and aggregate the benefits to their constituencies—including victims—but estimation leaves room for error and thus inefficiency. Although this public prosecution model may achieve less efficient outcomes from victims' private perspectives, it accounts for benefits exogenous to the private prosecutorial model, including public safety and general deterrence.

Under our current system, the monetary costs of prosecution are multifaceted. How much public funding went into the prosecution or would have gone into the prosecution had it been pursued? How much was spent or would have been spent on a publicly funded defense? What will incarceration cost for the sentence imposed or what would it have cost for a likely sentence?<sup>52</sup> How much did appeals or collateral review cost? Although these costs are not generally quantified for the public, they are largely quantifiable.

The benefits in the current system, however, are considerably more amorphous and more difficult to objectively monetize. The benefits of prosecution are those traditionally considered the animating concerns of criminal law: incapacitation, deterrence, retribution, rehabilitation, and comfort to victims.<sup>53</sup> But the benefits of a particular prosecution to residents of a particular county can only be weighed and valued by each resident individually.

Voters currently see only a vague abstraction of prosecution's benefits, and they lack concrete cost information. Voters may thus erroneously perceive prosecutions as costless, or at least far less costly than they actually are. Because voters do not fully perceive the costs of prosecution, lead prosecutors need not fear that voters will consider costs in upcoming prosecutor elections. Prosecutors thus need not

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52. Admittedly, when no mandatory minimum sentence is in play, this estimate takes a good deal of guesswork by prosecutors. But perfection is not necessary. That prosecutors must estimate and consider these costs and then reveal their thinking to voters achieves the efficiency and democratic accountability goals of this Article.

Considering the cost of each individual prosecution might seem odd because many prosecutors are not paid for each case individually. Rather, lead prosecutors receive an upper bound on expenditures, and they are free to make decisions so long as they do not exceed that funding limit. Lead prosecutors may even have a fixed number of employment positions to fill or fixed salary levels. But the particular allocation of funds or the number of prosecutors in a particular office are fixed costs only in the short run. In the long run, they are variable. If prosecutorial budgets are sufficiently large that cases are brought in which voters view their marginal cost as exceeding their marginal benefit, voters will seek to tighten prosecutorial budgets in future years.

53. See, e.g., Brown, *supra* note 16, at 325.

consider voters' efficiency preferences when determining which cases to pursue.<sup>54</sup>

Prosecutors presumably already analyze costs and benefits when making charging or other decisions, but they have no incentive to include the full panoply of costs in this calculus. They instead would rationally limit their costs to only those that their offices would incur or their constituencies would see. This constriction creates an externality problem: prosecutors may impose undue costs on their constituencies that prosecutors are not forced to internalize in their decisions because they do not fear reproof from voters. Absent sufficient information about prosecutors' performance, not only are citizens unable to cast informed votes, but there cannot be meaningful electoral incentives for prosecutors to conform their decisions to their constituents' actual preferences.<sup>55</sup>

Voters' lack of information about prosecutorial costs helps explain the one-way ratchet of ever-tightening American criminal law enforcement.<sup>56</sup> Increased enforcement continues "even in the face of expert opinion that harsher sentences may not produce additional deterrence and that other approaches may be more fruitful."<sup>57</sup> The most powerful criminal justice interest groups seek harsher treatment of crime;<sup>58</sup> however, countervailing desires for cost control could strengthen opposing interest groups.<sup>59</sup>

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54. This Article's proposal helps to remedy a situation in which "opacity and insularity allow prosecutors to avoid serving victims and the public faithfully." Bibas, *supra* note 11, at 963.

55. *See id.* at 989 ("Better information might also help voters to monitor their agents.").

56. *E.g.*, Stuntz, *supra* note 21, at 509 ("How did criminal law come to be a one-way ratchet that makes an ever larger slice of the population felons, and that turns real felons into felons several times over? The conventional answer is politics. Voters demand harsh treatment of criminals; politicians respond with tougher sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions."); *see also* Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 29 (1997) ("The epithet 'soft on crime' is the contemporary equivalent of 'soft on Communism.'"); Brown, *supra* note 16, at 330-31 ("[T]he particular interest group pressures on criminal law aggravate the trend toward harsh punitivism and the criminal justice administration's failure to respond rationally. Prosecutors face pressure mostly from victims and a public concerned about becoming victims; legislators face lobbying from that same public, as well as from prosecutors. Save for the occasional public scandal from prosecutorial overreaching (consider wrongful conviction cases or publicity of punishments far outside public sentiment), there is little effective pressure from the defense side to moderate government policy on criminal justice.").

57. Beale, *supra* note 56, at 31.

58. Brown, *supra* note 16, at 330-31.

59. Defense-oriented groups such as the American Civil Liberties Union and Families Against Mandatory Minimums could benefit greatly from increased information flow regarding criminal law enforcement. Moreover, groups promoting legalization and decriminalization of marijuana may gain

Prosecutorial discretion without available information necessary for an effective political check lacks a mechanism to create efficient resource allocations.<sup>60</sup> It is possible that the benefits of every case currently prosecuted are so high that the costs would not offset them in voters' minds, but that accidental efficiency outcome flies in the face of prevailing scholarship and seems unlikely given the strength of crime-control interest groups.<sup>61</sup>

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increasing traction as these movements come to be seen as revenue generators or at least cost savers in times of difficulty for state budgets.

60. That an efficient allocation of prosecutorial resources is desirable does not rest merely on economics' constant striving for efficiency. Desire for a more socially efficient use of prosecutorial resources perhaps partially animated the move from private to public prosecution. In this regard, consider Justice Scalia's dissent in *Morrison v. Olson*:

Mr. Olson may or may not be guilty of a crime; we do not know. But we do know that the investigation of him has been commenced, not necessarily because the President or his authorized subordinates believe it is in the interest of the United States, in the sense that it warrants the diversion of resources from other efforts, and is worth the cost in money and in possible damage to other governmental interests; and not even, leaving aside those normally considered factors, because the President or his authorized subordinates necessarily believe that an investigation is likely to unearth a violation worth prosecuting.

487 U.S. 654, 703 (1988) (Scalia, J., dissenting). Just as the independent prosecutor did not face the same responsibility to consider all the costs and benefits of a prosecution, recent literature has criticized the inefficiency of privately brought qui tam suits. See, e.g., Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN. ST. L. REV. 625 (2007) (arguing that inefficiency in qui tam suits results because the prosecutor is not a public official who brings a case when the benefit to the public is greater than or equal to its cost, but rather a private citizen who balances only the costs and benefits to himself, leaving a highly inefficient social outcome); see also Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1251 (2008) (raising similar concerns).

61. E.g., PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 19 (2009) ("There is a tipping point at which crime increases if too many people are incarcerated. The United States is past this point. If we lock up fewer people, we will be safer."); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1091 (2008) ("[A]ny further increases in incarceration beyond [2008] levels would actually create more crime than they would prevent."); *Rough Justice*, ECONOMIST, July 24, 2010, at 13 (arguing that in the United States "the cost of imprisoning criminals often far exceeds the benefits"); *Too Many Laws, Too Many Prisoners*, ECONOMIST, July 24, 2010, at 26, 26 ("Justice is harsher in America than in any other rich country."); see also *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520, C01-1351, 2009 WL 2430820, at \*83-85 (E. & N.D. Cal. Aug. 4, 2009) (overcrowded prisons threaten rather than protect public safety), *enforced*, 2010 WL 99000 (E. & N.D. Cal. Jan. 12, 2010), *appeal docketed sub nom. Schwarzenegger v. Plata*, No. 09-1323 (U.S. Apr. 14, 2010), and *consideration of juris. postponed*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3413 (2010); Beale, *supra* note 56, at 31 (harsher enforcement continues even in the face of evidence that harsher sentences do not produce additional deterrence).



## 2. *Divestment of Sovereignty*

The combination of broad prosecutorial discretion and uninformed voters also presents a democratic sovereignty problem.<sup>62</sup> Prosecutors exercise sovereign authority when they determine who may be punished for legal transgressions and who will not. Allowing prosecutors to exercise this delegated sovereign authority is acceptable in a democracy only insofar as the people retain the ultimate authority to oust prosecutors if they disapprove of their decisions.<sup>63</sup> When the people lack the information necessary to meaningfully check their prosecutors, prosecutors become unjustifiably powerful.

Prosecutors face a constant stream of decisions regarding whom to prosecute and for what crimes from amongst many cases in which there is sufficient evidence to bring charges. Prosecutors lack sufficient resources to bring all charges supported by probable cause in all cases.<sup>64</sup> Accordingly, prosecutors must decide whom not to prosecute even though they have sufficient cause. That decision exempts certain people from the valid reach of the law.<sup>65</sup>

Deciding whom to exempt from the reach of valid legislative enactments is the essence of sovereign prerogative.<sup>66</sup> Prosecutorial

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62. See *Morrison*, 487 U.S. at 728 (Scalia, J., dissenting) (“Under our system of government, the primary check against prosecutorial abuse is a political one.”). Although Justice Scalia was referring to federal prosecutors, that the primary check is a political one holds also for state and local prosecutors.

63. See *Davis*, *supra* note 35, at 29–30 (“Everyone who believes in democracy has a vested interest in assuring that no one individual or institution exercises power without accountability to the people. For some reason, we have given prosecutors a pass—allowing them to circumvent the scrutiny and accountability that we ordinarily require of those to whom we grant power and privilege while affording them more power than any other government official.”).

64. *Fairfax*, *supra* note 41, at 732 (“Discretion is the backbone of the criminal justice system. The administration of criminal justice is not wooden and mechanical—there are far too many criminal laws and far too many offenders for society’s limited police, prosecutorial, judicial, and penological resources. Therefore, actors in the criminal justice system must exercise some discretion in deciding which individuals to arrest, prosecute, convict, and punish.”); see also *DAVIS*, *supra* note 9, at 164 n.4 (“[R]eform of existing criminal statutes is an obvious prerequisite to substantially full enforcement. Anything approaching full enforcement of present statutes would be unthinkable.”).

65. That prosecutors possess such power to discretionarily choose not to proceed likely has its origins in the writ of *nolle prosequi*. Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIRCUIT REV. 1, 18–25 (2009); Sarat & Clarke, *supra* note 13, at 401.

66. “Decisions of prosecutors are quintessentially sovereign acts in that they are moments when officials can decide who shall be removed from the purview of the law.” Sarat & Clarke, *supra* note 13, at 410–11; see also *AGAMBEN*, *supra* note 13, at 17–18.

discretion is thus an essential aspect of sovereignty.<sup>67</sup> Under this theoretical framework of prosecutorial discretion as a core aspect of sovereignty, prosecutors act as agents of the sovereign—or as surrogate sovereigns<sup>68</sup>—within a democratic government because their discretionary authority not to prosecute exempts citizens from the reach of the law.<sup>69</sup>

Conceptualizing prosecutors as surrogate sovereigns appears—at first glance—to be in substantial tension with the notion that sovereign authority in a democracy rests with the people.<sup>70</sup> Yet having elected prosecutors who exercise discretion has long been a facet of American criminal law.<sup>71</sup> This American tradition embodies a conscious choice to delegate sovereign authority to locally elected prosecutors to pursue criminals in the public’s interest.<sup>72</sup>

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67. Sarat & Clarke, *supra* note 13, at 391 (“By declining prosecution even when there is probable cause, prosecutors have the power to create exceptions to the reach of valid law—a power that signals the kind of lawlessness that is at the heart of sovereignty.”); *see also* Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) (“The Executive has the power (whether or not it has the right) effectively to nullify some provisions of law by the mere failure to prosecute—the exercise of so-called prosecutorial discretion.”); Fairfax, *supra* note 27, at 431 (citing Sarat and Clarke for the principle that democratic authority is a “fragment of sovereignty”); Andrew B. Loewenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351 (2001).

68. Sarat & Clarke, *supra* note 13, at 406 (discussing Montesquieu and Locke conceptualizing the prosecutor as a “surrogate sovereign”).

69. *Id.*; *see also* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 77, 80–81 (Thomas Nugent trans., Hafner Publishing Company 1949) (1748) (“In monarchies, the prince is the party that prosecutes the person accused, and causes him to be punished or acquitted. . . . [T]he prince, who is established for the execution of the laws, appoints an officer in each court of judicature to prosecute all sorts of crimes in his name.”); *cf.* Vorenberg, *supra* note 16, at 1557 (the prosecutor acts as the government’s representative). Many scholars have described the prosecutor through this agency lens. *See* Bibas, *supra* note 11, at 979 (discussing other authors applying the same lens).

70. “When one wants to speak of the political laws of the United States, it is always with the dogma of the sovereignty of the people that one must begin.” DE TOCQUEVILLE, *supra* note 30, at 53. There is something rather American about embracing this notion of popular sovereignty at the root of our democracy:

In America, the principle of the sovereignty of the people is not hidden or sterile as in certain nations; it is recognized by mores, proclaimed by the laws; it spreads with freedom and reaches its final consequences without obstacle.

If there is a single country in the world where one can hope to appreciate the dogma of the sovereignty of the people at its just value, to study it in its application to the affairs of society, and to judge its advantages and its dangers, that country is surely America.

*Id.*

71. *See supra* Part I.A.

72. Pursuit of the public interest is the essential function of the prosecutor. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 792 (2000). While at present prosecutors may not act perfectly in conjunction with the prosecutorial preferences of their constituencies, they nonetheless attempt to

This choice reflects an American preference for political control over public officials rather than internal hierarchical controls.<sup>73</sup> “If someone is to decide which laws will be aggressively enforced, which laws will be enforced occasionally, and which laws will never be enforced, it makes sense that the person who has to answer to the voters will make those determinations.”<sup>74</sup>

Ceding discretionary authority to a delegate is logistically necessary and beneficial,<sup>75</sup> but if this authority runs unchecked, it risks degenerating into “absolute arbitrary power, or governing without settled standing laws.”<sup>76</sup> From a Lockean perspective, such power is anathema to good government.<sup>77</sup>

Preserving this great sovereign power in the hands of all rather than allowing it to rest in the hands of one protects against arbitrary governance.<sup>78</sup> An elected official gained day-to-day authority to exercise

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exercise their authority to serve the public’s interest. See MONTESQUIEU, *supra* note 69, at 81 (“The public prosecutor watches for the safety of the citizens.”).

73. Pizzi, *supra* note 30, at 1338.

74. *Id.* at 1339.

75. See *infra* Part II.A.

76. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, THE SECOND TREATISE OF GOVERNMENT § 137, at 185 (Mark Goldie ed., Everyman 1993) (1690).

77. “[M]en would not quit the freedom of the state of nature for” a situation in which their lives, or perhaps their liberties, were at equal or greater risk. *Id.*; accord Sarat & Clarke, *supra* note 13, at 405.

It cannot be supposed that they should intend, had they a power so to do, to give to any one, or more, an absolute arbitrary power over their persons and estates, and put a force into the magistrate’s hand to execute his unlimited will arbitrarily upon them: this were to put themselves in a worse condition than the state of nature, wherein they had a liberty to defend their right against the injuries of others, and were upon equal terms of force to maintain it, whether invaded by a single man, or many in combination.

LOCKE, *supra* note 76, § 137, at 185. Locke described the state of nature, that is, the “state all men are naturally in,” in part as a state of perfect freedom to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man:

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that creatures of the same species and rank promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the lord and master of them all, should by any manifest declaration of his will set one above another, and confer on him by an evident and clear appointment an undoubted right to dominion and sovereignty.

*Id.* § 4, at 116.

78. LOCKE, *supra* note 76, § 137, at 185. This Article does not advocate democratic control over the office of the prosecutor in the sense that political influences, as Vorenberg feared, “enter into the decisions prosecutors make and that they may deal harshly or gently with particular individuals for political reasons.” Vorenberg, *supra* note 16, at 1558. There is a critical distinction here between “political influences” in the negative sense of prosecuting or refraining from prosecuting certain individuals versus political influences in the positive sense of prosecutors targeting certain types of

sovereign power, but this delegation remained consistent with the notion of the people as the democratic sovereign because voters were meant to closely check this authority.<sup>79</sup> Without a meaningful political check, “[n]o uniform, pre-announced rules inform the defendant and control the decision-maker; a single official can invoke society’s harshest sanctions on the basis of ad hoc personal judgments.”<sup>80</sup> Without a political check, a mere technical violation could rise to the level of an indictable offense;<sup>81</sup> crimes that voters abhor but that are expensive to prosecute could go uncharged. But this fear of a single prosecutor’s arbitrary whims is dispelled somewhat when a meaningful political check exists because the prosecutor will not then possess untrammelled sovereign authority.<sup>82</sup>

*D. Other Mechanisms of Democratic Accountability Fail to Control Prosecutorial Discretion*

Electing prosecutors is not the only democratic check on enforcement of the criminal law, though other existing checks are not alone sufficient.

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offenses that their constituencies consider particularly heinous. See Sandra Caron George, *Prosecutorial Discretion: What’s Politics Got to Do with It?*, 18 GEO. J. LEGAL ETHICS 739, 751–52 (2005).

79. Wright, *supra* note 9, at 589 (“Note that democratic control of prosecutors takes its most powerful form: local control. . . . The local prosecutor remains close to the community, where democratic accountability is thought to be strongest.”); see also *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 386 (2004) (“The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice.”); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) (“Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.”).

80. Vorenberg, *supra* note 16, at 1555.

81. *Morrison v. Olson*, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting).

82. DAVIS, *supra* note 9, at 98 (“Openness is the natural enemy of arbitrariness and a natural ally in the fight against injustice.”); see also LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY* 62 (1933) (“Sunlight is said to be the best of disinfectants.”).

Vorenberg’s concerns regarding the lack of due process afforded to defendants by this system of broad ad hoc prosecutorial discretion are alleviated in part by the mandatory cost disclosure proposal because prosecutors have greater incentive to act in accordance with their constituents’ views. Nonetheless, implementing majority will is no guarantee of due process for particular defendants. See DE TOCQUEVILLE, *supra* note 30 (discussing tyranny of the majority). Thus, the scope of this proposal, while directed at enhancing democracy, is not coextensive with Vorenberg’s or Davis’s due process concerns.

The voice of the people also emerges through grand and petit juries, further demonstrating that the people were meant to retain ultimate control over who should suffer the moral approbation and liberty deprivation of a criminal conviction. Nonetheless, the grand and petit juries were not meant to and cannot carry the torch of democratic accountability alone. Voters' choice of a local prosecutor remains a necessary feature of preserving democracy in criminal prosecution.

Several articles have persuasively argued that the grand jury was meant to inject the citizen's voice into the criminal charging process. The relevant history demonstrates that the grand jury was intended to provide a democratic check.<sup>83</sup> "Where the grand jury truly adds value is through its ability to exercise robust discretion not to indict where probable cause nevertheless exists—what might be termed 'grand jury nullification.'"<sup>84</sup> This democratic check includes authority to take issue with the wisdom of a particular criminal law and prevent its application in any context or to "determine that its application to a particular defendant or in a particular community is unwise."<sup>85</sup> A "grand jury might nullify in response to what it perceives to be an unfair or unwise allocation of limited prosecutorial resources."<sup>86</sup> The grand jury has also been described as the "injection of the laypeople's perspective—the voice of the community—into the charging process."<sup>87</sup>

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83. See Fairfax, *supra* note 41, at 729 (identifying the grand jury as a vehicle for local input and power); *id.* at 720 ("[T]he grand jury is not limited—by either tradition or constitutional design—to merely screening criminal cases for probable cause . . .").

84. *Id.* at 706 (emphasis omitted).

85. *Id.* at 713.

86. *Id.* "[T]he grand jury may exercise its discretion to send the Executive a message about its preferred allocation of law enforcement and prosecutorial resources. This discretion also can be brought to bear on exercises of prosecutorial discretion in specific cases." *Id.* at 728.

87. Susan W. Brenner, *The Voice Of The Community: A Case For Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 121 (1995). Case authority supports this description of the grand jury's role. See Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (explaining that the grand jury's role is broader than merely determining probable cause and encompasses discretionary decisions regarding which crimes to charge); United States v. Calandra, 414 U.S. 338, 343 (1974) (discussing the grand jury's "special role in insuring fair and effective law enforcement"); *id.* ("It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." (quoting Blair v. United States, 250 U.S. 273, 282 (1919))). *But see* Bracy v. United States, 435 U.S. 1301, 1302 (1978) (Rehnquist, J., denying stay) (stating that the grand jury's role is limited to assessing probable cause); United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1394 (9th Cir. 1983) (same); United States v. Udziela, 671 F.2d 995, 1000 (7th Cir. 1982) (same); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (same).

Although the grand jury was historically intended to serve as a democratic check, it is far from adequate to hold prosecutors accountable.<sup>88</sup> First, the United States Constitution does not provide a right to grand jury indictment prior to state prosecution,<sup>89</sup> and no such right exists in many states.<sup>90</sup> Moreover, the grand jury is comprised of a small group of people who may not provide a fair cross-section of the populace such that the grand jury's will represents that of the people overall.<sup>91</sup> Further, a prosecutor who fails to secure a grand jury indictment can present the case to another grand jury and hope that it will return a true bill, repeating this process until the prosecutor succeeds because jeopardy does not attach before the grand jury.<sup>92</sup> For these

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88. Niki Kuckes labeled the grand jury's somewhat hybrid role as that of "democratic prosecutor." Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1300 (2006). Much of the conception Kuckes advances of the grand jury derives from a dissent written by the now-Chief Justice of the U.S. Court of Appeals for the Ninth Circuit, Alex Kozinski. See *United States v. Navarro-Vargas*, 367 F.3d 896, 900–01 (9th Cir. 2004) (Kozinski, J., dissenting in part).

Working from the insights Judge Kozinski suggested and Judge Hawkins endorsed, this Article argues that modern criminal procedure would benefit from a conceptual clarification of the federal grand jury's role—from an express recognition that the grand jury serves, in a sense, as a "democratic prosecutor." This clarification suggests that the grand jury is best seen, in the words of Judge Learned Hand, simply as the "voice of the community accusing its members." Kuckes, *supra*, at 1300 (quoting *In re Kittle*, 180 F. 946, 947 (S.D.N.Y. 1910)).

89. *Hurtado v. California*, 110 U.S. 516, 538 (1884).

90. In more than half the states in the country, indictment by grand jury is merely one available mechanism for charging non-capital cases. ARIZ. CONST. art. II, § 30; ARIZ. R. CRIM. P. 2.2; ARK. CONST. amend. 21, § 1; CAL. CONST. art. I, § 14; CAL. PENAL CODE §§ 737, 859 (West 2008); COLO. CONST. art. II, § 8; COLO. REV. STAT. § 16-5-101 (2006); CONN. GEN. STAT. §§ 54-45, 54-46 (2001); FLA. CONST. art. I, § 15; HAW. CONST. art. I, § 10; HAW. REV. STAT. § 801-1 (2007); IDAHO CONST. art. I, § 8; ILL. CONST. art. I, § 7; 725 ILL. COMP. STAT. 5/111-2 (2006); IND. CODE § 35-34-1-1 (1998); IOWA CODE § 813.2, Rules 4, 5 (2003); KAN. STAT. ANN. § 22-3201 (1995); LA. CONST. art. I, § 15; MD. CONST. DECL. RTS. art. 21; MD. CODE ANN., CRIM. PROC. § 4-103 (LexisNexis 2008); MICH. COMP. LAWS § 767.1 (2000); MINN. R. CRIM. P. 17.01; MO. CONST. art. I, § 17; MONT. CONST. art. II, § 20; MONT. CODE ANN. § 46-11-101 (2009); NEB. CONST. art. I, § 10; NEB. REV. STAT. § 29-1601 (1995); NEV. CONST. art. I, § 8; N.M. CONST. art. II, § 14; N.D. R. CRIM. P. 7; OKLA. CONST. art. II, § 17; R.I. CONST. art. I, § 7; S.D. CONST. art. VI, § 10; S.D. CODIFIED LAWS § 23A-6-1 (2004); UTAH CONST. art. I, § 13; VT. R. CRIM. P. 7; WASH. CONST. art. I, § 25; WIS. STAT. ANN. § 967.05 (1998); Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting The Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1174 (2008). Of these thirty states, four guarantee grand jury rights in capital cases. FLA. CONST. art. I, § 15; LA. CONST. art. I, § 15; MINN. R. CRIM. P. 17.01; R.I. CONST. art. I, § 7. Because many states do not afford a grand jury right, defendants can only hope that this democratic check is available in their particular cases. In many cases, however, grand jury indictment will not be available and thus will provide no democratic check, further supporting the need for a meaningful democratic check elsewhere.

91. Roger Fairfax's recent article notes that there is no guarantee that grand juries and petit juries would nullify in the same case because the members of each group will consist of different individuals with different perspectives. Fairfax, *supra* note 41, at 756.

92. *United States v. Williams*, 504 U.S. 36, 49 (1992); Fairfax, *supra* note 41, at 743.

reasons, the grand jury alone cannot sufficiently inject the will of the people into charging decisions.

Other commentators discuss the petit jury as a democratic check on prosecutorial discretion.<sup>93</sup> Yet, the petit jury's role is less effective at protecting defendants from the ineffective allocation of prosecutorial resources than is the grand jury. Perhaps the greatest weakness of the petit jury as a check is the great number of criminal cases that end in plea bargains.<sup>94</sup> A prosecutor can anticipate that a petit jury would not intercede to block an inefficient resource allocation in most cases. The prosecutor thus need not work to avoid that check. Moreover, by the time a petit jury is called upon, a defendant has already been charged and undergone a criminal trial, so that even if acquitted, many resources have already been expended and the defendant has already suffered practical consequences.<sup>95</sup> Although prosecutors may exercise some

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93. Paul Butler argued that petit jury nullification provides jurors a way to exercise their conscience and counteract racial injustices. Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995).

Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge's instructions regarding the law. Instead, the jury votes its conscience.

In the United States, the doctrine of jury nullification originally was based on the common law idea that the function of a jury was, broadly, to decide justice, which included judging the law as well as the facts. If jurors believed that applying a law would lead to an unjust conviction, they were not compelled to convict someone who had broken that law. Although most American courts now disapprove of a jury's deciding anything other than the "facts," the Double Jeopardy Clause of the Fifth Amendment prohibits appellate reversal of a jury's decision to acquit, regardless of the reason for the acquittal. Thus, even when a trial judge thinks that a jury's acquittal directly contradicts the evidence, the jury's verdict must be accepted as final. The jurors, in judging the law, function as an important and necessary check on government power.

*Id.* at 700–01 (citations omitted). Jury nullification has an old history, dating back most famously to *Bushell's Case*, where the English Court of Common Pleas determined that a juror could not be punished for acquittal even when the trial judge believed the verdict contradicted the evidence. *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670). Butler goes so far as to argue that when African-American jurors consider a case with an African-American defendant, "in cases involving nonviolent, *malum prohibitum* offenses, including 'victimless' crimes like narcotics offenses, there should be a presumption in favor of nullification." Butler, *supra*, at 715. For these purposes it is sufficient to note that the petit jury can serve as a democratic check in the criminal justice system.

94. See Barkow, *supra* note 16, at 882 ("As a result of [the pressure to plea bargain] and costs of exercising trial rights, the trial is an insufficient check on prosecutorial power."); Bibas, *supra* note 11, at 983; see also Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (Supp. 2006) (stating that more than 95% of cases end in plea bargains).

95. That practical consequences arise merely by being indicted underlies the ABA Model Rule of Professional Conduct regarding duties of the prosecutor. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 4 ("[T]he announcement of an indictment, for example, will necessarily have severe consequences for the accused . . ."). This is the same stigma that former defendants face following an acquittal. Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L.

modicum of charging restraint anticipating the petit jury as a check, that anticipation does not provide sufficient democratic accountability to justify prosecutors in exercising delegated sovereign power.

Accordingly, the combination of grand and petit juries does not sufficiently check prosecutorial resource allocation. Were these juries sufficient, democratic election of prosecutors would never have been necessary. But the Framers chose to place the prosecutorial power in the hands of an elected official, thus adding an additional structural check. Electing prosecutors created a political check meant to support and supplement the grand and petit juries in allowing the people to retain control of the criminal justice system. Thus, despite the role of the grand and petit juries in creating some measure of democratic accountability, mandatory cost disclosures are necessary to return voters to their intended role of making informed choices in checking prosecutors.

## II. MANDATORY COST DISCLOSURE AS A MEANS OF ENHANCING PROSECUTORIAL ACCOUNTABILITY

Although inefficiency and divestment of sovereignty are significant concerns, these concerns do not lead necessarily to the conclusion that prosecutorial discretion should be eliminated. Instead, this Article seeks a return to the intended origins of prosecutorial discretion, arguing for a stronger political check on its exercise by requiring prosecutors to divulge their case-by-case expenditures to the public. This information would then find its way into the public eye in distilled form through prosecutor election campaigns and the news media.

### A. *Prosecutorial Discretion Is Necessary and Beneficial*

Prosecutorial discretion is both necessary and beneficial in our current criminal justice system. Much of its necessity derives from overlapping provisions in criminal codes.<sup>96</sup> Prosecutors necessarily have broad authority over which charges to select when several can apply.<sup>97</sup> The

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REV. 1297, 1305 (2000) (“For most innocent defendants, it does not take long to realize that the stigma associated with an arrest and criminal charge does not easily wash away. Those close to the defendant might know the truth, but neighbors, acquaintances and co-workers may always wonder about the real basis of the acquittal or dismissal.”).

96. As Angela Davis writes, “One of the reasons prosecutorial discretion is so essential to the criminal justice system is the proliferation of criminal statutes in all 50 states and the federal government.” Davis, *supra* note 35, at 28.

97. This would not hold true if prosecutors were required to charge all applicable offenses, but that is certainly not the case. As Judge Gerard Lynch put it:



breadth of criminal statutory law that necessitates prosecutorial discretion derives from the temptation to pass ever more crime-control legislation.<sup>98</sup> Because there is no political benefit from appearing soft on crime and because there may be quite a cost,<sup>99</sup> politicians compete for the tough-on-crime label<sup>100</sup> by continually “enacting ever more numerous, more severe, and more expansive criminal laws.”<sup>101</sup>

Because the government plays a significant role in criminal sentencing, prosecutorial discretion substantially impacts the length of

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So long as our criminal codes contain too many prohibitions, the contents of which are left to be defined by their implementation, or which cover conduct that is clearly not intended to be punished in every instance, or which provide for the punishment of those who act without wrongful intent, prosecutors must exercise judgment about which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment. (And, given the number of legitimate cases that could be brought, so long as crime rates remain high and the resources devoted to criminal justice remain inadequate to deal with them all, prosecutors must also make decisions about which cases constitute the best use of limited judicial and law enforcement resources.)

Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2136–37 (1998) (citations omitted).

The overlapping criminal codes and the related decision of which crime to charge do not comprise the only dimension of prosecutorial discretion. Enmeshed in the decision of which of several overlapping statutes to charge, and perhaps subsumed by that decision in part, is the decision whether to charge any crime at all. Both decisions place great authority in prosecutorial hands, and both decisions thus find themselves at the center of this Article.

98. *Id.* at 2137; see also Stuntz, *supra* note 21, at 509 (“How did criminal law come to be a one-way ratchet that makes an ever larger slice of the population felons, and that turns real felons into felons several times over? The conventional answer is politics. Voters demand harsh treatment of criminals; politicians respond with tougher sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions.” (citations omitted)); Wright, *supra* note 9, at 585 (“Instead of confining the work of prosecutors, criminal codes add to their power. As the years pass, the legislature expands the legal tools available to prosecutors. Criminal codes tend to cover more behavior and increase the range of punishments that could attach to conduct that is already declared criminal.”). Some attribute the peak of the crime-control wave to the tremendously successful Willie Horton campaign ad in 1988. Laura Sullivan, *Shrinking State Budgets May Spring Some Inmates*, *NAT’L PUB. RADIO* (Mar. 31, 2009), <http://www.npr.org/templates/story/story.php?storyId=102536945>.

99. “[S]oft on crime’ is the contemporary equivalent of ‘soft on Communism.’” Beale, *supra* note 56, at 29. The political cost of the soft-on-crime label has received no shortage of discussion. See, e.g., Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 *TEX. L. REV.* 1203, 1250 n.179 (2006); Pritikin, *supra* note 61, at 1105–06.

100. Barkow, *supra* note 16, at 880 (“Congress continues to pass mandatory minimum sentencing laws even though there is uniform agreement by experts—including the United States Sentencing Commission—that these laws are unwise and lead to greater disparity in practice because of the power they vest in prosecutors. Members of Congress support these laws because they do not want to be viewed as soft on crime or resistant to prosecution demands.” (citations omitted)); Lynch, *supra* note 97, at 2137–38.

101. Lynch, *supra* note 97, at 2137.

sentences.<sup>102</sup> Where mandatory minimum sentences exist, the discretionary charging decision essentially controls what sentence a particular defendant will receive.<sup>103</sup> Three-strikes laws vest similar authority with prosecutors.

Prosecutorial discretion is also beneficial. It provides an alternative to full enforcement, which would be impossible given limited prosecutorial, judicial, penological, and law enforcement resources.<sup>104</sup> Even if it were possible, full enforcement of current criminal codes could prove disastrous given their broad reach.<sup>105</sup>

Beyond the practical necessity for discretion to implement broad-sweeping criminal codes, prosecutorial discretion also allows criminal justice enforcement to change with changing societal preferences. Discretionary authority allows prosecutors to treat cases individually, “tailoring results to unique facts and circumstances of particular cases.”<sup>106</sup>

But just because discretion is necessary and beneficial does not mean that *unfettered* discretion is necessary or consistent with democratic

102. Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 88 (2003).

103. Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 324 (2009) [hereinafter *Punishment Theorists*]; Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & CIV. RTS. L. REV. 377, 384–85 (2010) [hereinafter *Advisory Guidelines*]; see also Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 399 (2009) (discussing prosecutorial authority in determinate sentencing schemes); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals For “Fixed” and “Presumptive” Sentencing*, 126 U. PA. L. REV. 550, 565–76 (1978) (same).

104. Fairfax, *supra* note 41, at 732 (“Discretion is the backbone of the criminal justice system. The administration of criminal justice is not wooden and mechanical—there are far too many criminal laws and far too many offenders for society’s limited police, prosecutorial, judicial, and penological resources. Therefore, actors in the criminal justice system must exercise some discretion in deciding which individuals to arrest, prosecute, convict, and punish.” (citations omitted)).

105. DAVIS, *supra* note 9, at 164 n.4 (“[R]eform of existing criminal statutes is an obvious prerequisite to substantially full enforcement. Anything approaching full enforcement of present statutes would be unthinkable.”). In the four decades since Davis’s book was first published, the scope of criminal statutes has assuredly not decreased.

106. *Id.* at 17; see also *id.* (“Even when rules can be written, discretion is often better.”); *id.* at 25 (“Discretion is a tool, indispensable for individualization of justice. . . . Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice. . . . Discretion is a tool only when properly used. . . .”); Bibas, *supra* note 18, at 370 (“Even in a world of unlimited resources and sane criminal codes, discretion would be essential to doing justice. Justice requires not only rules but also fine-grained moral evaluations and distinctions.”).

governance.<sup>107</sup> When voters lack meaningful information with which to check the exercise of prosecutorial discretion, efficiency and sovereignty problems arise.<sup>108</sup> This proposal targets that lack of information regarding use of prosecutorial resources.

### B. *Contours of Mandatory Cost Disclosures*

To enhance the democratic check on prosecutorial discretion and increase the efficiency of prosecutorial resource allocation, this Article proposes that states adopt mandatory cost disclosure statutes. Such a statute would require prosecutors to disclose cost information for all prosecutions actually brought and for potential prosecutions in which an arrest is made and cause exists to proceed but no charges are brought. These costs would include both monetary and non-monetary costs. Such cost disclosures would provide concrete, monetized data on prosecutorial priorities so that voters could meaningfully assess their local prosecutors' decisions.<sup>109</sup>

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107. Vorenberg, *supra* note 16, at 1522 (“[It is] anomalous at best that, in a system dedicated to due process, great and essentially unreviewable powers are vested in the prosecutor.”).

Davis acknowledges that discretion is necessary but argues that a lesser degree of discretion would be both preferable and plausible. DAVIS, *supra* note 9, at 188–93. His basis for concluding that lesser discretion is plausible rests on a questionable comparison to the European model. *Id.* Comparisons to the European model run the risk of obscuring the primary difference between the American and European models—the accusatorial versus inquisitorial system. William Pizzi persuasively argues that this difference requires a greater degree of discretion in the American system. Pizzi, *supra* note 30, at 1352–53 (“Judicial review of prosecutorial power is workable in the civil law tradition because the roles of the judge and the prosecutor are very different in that tradition and because the nature of criminal trials are different in that tradition. First of all, judicial review of a prosecutor’s decision to charge or not to charge faces no separation of powers principle in the civil law tradition. . . . There is thus no separation of powers problem in putting a civil law judge in the position of closely supervising the prosecutor and, given the civil law judge’s responsibility to develop the evidence at trial, it seems natural to give the civil judge the power to control charging discretion. This power extends even to reshaping the charges to more accurately fit the evidence at trial.”). To fill a void that would exist if broad prosecutorial discretion were restricted, a judge would necessarily be required to exercise broader authority over charging decisions, a feature incompatible with our accusatorial system. *Id.* at 1353 (“To ask that an American judge play a similarly aggressive role with respect to charging decisions raises serious separation of powers problems and runs contrary to the adversary tradition in which judges are assigned a neutral and passive role with respect to charging decisions and the development of evidence at trial. If we wish to limit prosecutorial power and ‘reform’ our prosecutors to fit the civil law model, we would have to reform our concept of judicial power to fit the civil law model as well.” (citations omitted)).

108. *See supra* Part I.C.

109. Mandatory cost disclosures also serve the same purpose as the Government in the Sunshine Act. *See* Pub. L. No. 94-409, § 3(a), 90 Stat. 1241 (1976); *id.* § 2 (“[T]he public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government.”); H.R. Rep. No. 94-880(I) (1976) (discussing making government “fully accountable

When a prosecutor charges a case, the required disclosure should begin with the result of the prosecution. If the prosecution was pursued to verdict, what was the verdict? Cases appealed should include the fact of the appeal, who brought it, and its disposition.

Required disclosures should include an itemized list of all costs to the public. This cost accounting begins with the money spent paying the prosecutor.<sup>110</sup> Although prosecutors are often not paid hourly, adequate disclosure would require each prosecutor to approximate an hourly wage and apply that wage to the number of hours spent on each case.

For defendants represented by appointed counsel, the cost disclosure should include the cost of the defense attorney, itemized separately from the prosecutor's actual or approximated wage. For public defenders, these costs will require a similar prorating of an attorney's hourly wage multiplied by the number of hours the attorney spent on the case. For appointed counsel working on a contractual basis, wages might be paid hourly, and thus the cost calculation would not require additional work. Fees paid to or time spent by an investigator should also be disclosed. For both the prosecution and defense, costs of trial logistics such as preparation of exhibits should be included. Disclosures should include any public funds expended on transportation costs for the prosecutor, defense attorney, or the defendant.

Another cost to disclose is money paid to witnesses. Many expert witnesses are paid hourly, so the cost of their testimony will be easy to calculate. For witnesses such as police officers or other government employees not retained solely to testify in court, the cost of their testimony would be any additional amount beyond their usual salary that

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to [the people] for the actions which it supposedly takes on their behalf"). The procedural, information-forcing statute proposed in this Article is meant to facilitate an effective democratic check and parallels the Freedom of Information Act (FOIA) and the National Environmental Policy Act (NEPA). *See* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970); Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966); *see also* Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976) ("[T]he basic purpose of the Freedom of Information Act [is] to open agency action to the light of public scrutiny." (quotation omitted)); Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 *ECOLOGY L.Q.* 707, 732 (2002) ("The public notice and participation requirements of NEPA have a strong democratic element in their emphasis on direct citizen participation."); Lorna Jorgensen, Note, *The Move Toward Participatory Democracy in Public Land Management Under NEPA: Is it Being Thwarted by the ESA?*, 20 *J. LAND RESOURCES & ENVTL. L.* 311, 315 (2000) ("NEPA's strength lies in its democratization of Federal administrative law. NEPA mandates public and interagency involvement. It thereby empowers citizens with the information they need to meaningfully contribute to the environmental decision making process." (quoting 139 Cong. Rec. E2342 (daily ed. Oct. 5, 1993) (statement of Rep. Owens))).

110. As explained above, whether and how to build law enforcement costs into this model falls outside the scope of this Article. *See supra* note 20.

they are paid to testify or to prepare to testify. For witnesses on the public payroll whose occupations consist solely of testifying and preparing to testify, their approximate hourly wage should be calculated using the method described above for prosecutors and public defenders.

For cases resulting in a conviction, subsequent disclosures should include the likely public expenditures following conviction, including incarceration. After sentencing, the prosecutor can better calculate the likely duration of the defendant's sentence and can accordingly make a revised determination of the likely costs of incarceration. Appellate costs, when applicable, should also be disclosed. But because appeals are not filed in some cases and because some appeals require much more attorney time than others, appellate costs should not be disclosed until they are sufficiently definite and certain, perhaps only once they have already been incurred. Appellate costs should also include costs of collateral review. All disclosures in a case need not occur simultaneously, but later disclosures should be cumulative of earlier disclosures.<sup>111</sup>

The non-monetary costs of every prosecution should also be disclosed. Because by definition these disclosures cannot be objectively monetized, the required reporting should be in non-monetary terms to allow each voter to weigh these costs individually. Non-monetary costs include collateral consequences such as whether the defendant is a parent, and, if so, whether the defendant is a custodial parent. Even for non-custodial-parent defendants, there may be a cost of lost child support that they will be unable to afford if incarcerated. Ideally, such reporting would include the added caretaking costs the state incurs upon incarcerating a custodial parent, but those costs may be too nebulous to ascertain given the variety of caretaking situations that might arise.<sup>112</sup>

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111. That these disclosures might not be complete for several years after the case is completed appears at first glance to present a bit of a weakness in the cost disclosure proposal. After a several year period, individual prosecutors might not be in the same job such that voters can hold them easily accountable. But opportunities for accountability remain on two fronts. First, those same statistics could still be brought to bear in campaigns against those prosecutors if they are running for higher office. Second, in prosecutorial campaigns in the same jurisdiction, the candidates could be asked to evaluate the earlier cost-benefit decisions, and voters could consider their candidacies accordingly.

112. Whether a parent should serve a lesser sentence than a non-parent for the same crime is by no means an easy question of punishment theory, nor is the answer assumed in this discussion. Rather, the answer will emerge through the aggregation of informed voter sentiment in each community. In other words, if voters think a parent of a small child should serve a lesser sentence than a similar offender without a child, they can vote out their prosecutor for treating the two offenders similarly. Or perhaps voters might wish these two offenders be treated similarly and hold their prosecutor accountable for treating them differently. Whatever the preferences of each local constituency, there is hardly a reliable way to discern voter sentiment without the disclosures

Most of these required disclosures are sufficiently definite and easily monetized, but it is essential for voters to understand which prosecutions were foregone in favor of others. This aspect of prosecutorial discretion—those cases a prosecutor does not bring—is most hidden from public scrutiny.<sup>113</sup> Thus, prosecutors should also be required to disclose information similar to that described above for prosecutions that they opt not to pursue despite an arrest and sufficient evidence.

Cases that prosecutors opt not to pursue after an arrest fall into two categories: cases of insufficient evidence and cases with sufficient evidence not worth the cost to pursue. Prosecutors need not report the cases that they chose not to prosecute for lack of evidence or cases in which no arrest is made. The threshold decision of whether probable cause exists to believe that an accused has committed a crime does not require prosecutors to assess social costs and benefits or exercise what is typically viewed as prosecutorial discretion. Moreover, assessing probable cause is not an exercise of sovereign authority because it does not remove people from the reach of otherwise applicable laws.<sup>114</sup>

Determining probable cause is the necessary first step in evaluating whether any laws may apply to particular conduct. Only after satisfying this threshold requirement do prosecutors exercise sovereign authority by exempting some people from the reach of otherwise applicable law when they decide not to prosecute.<sup>115</sup> Mandatory cost disclosures seek to check this latter step—the genuinely discretionary exercise of sovereign authority. Thus, mandatory cost disclosures need not include cases in which prosecutors concluded that they lacked sufficient evidence to proceed with charges.

For cases in which an arrest was made and sufficient evidence existed but the prosecutor opted not to paper the case or to drop charges later, the disclosure report should first indicate the charges that could have

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proposed here. Those voter preferences are likely ignored at present because they are exogenous to a prosecutor's charging calculus.

113. DAVIS, *supra* note 9, at 189–91; *see also* Gordon & Huber, *supra* note 36, at 336.

114. “Decisions of prosecutors are quintessentially sovereign acts in that they are moments when officials can decide who shall be removed from the purview of the law.” Sarat & Clarke, *supra* note 13, at 410–11; *see also* AGAMBEN, *supra* note 13, at 17–18.

115. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.8 (“The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”).

been filed or were filed but later dropped.<sup>116</sup> Second, it should indicate at what point the prosecution was terminated. Third, it should include estimated costs based on the likely expenditures on the prosecutor and, where applicable, on publicly funded defense counsel. Fourth, based on the charges that could have reasonably been brought, the report should indicate the estimated cost of incarceration had the case resulted in conviction. Disclosures in cases not brought will provide perhaps the greatest insight into prosecutorial priorities. These disclosures should exclude identifying information to avoid creating public records of people who could have been but were not prosecuted.<sup>117</sup>

### C. *Costs of Cost Disclosures*

Requiring prosecutors to disclose the costs of each prosecution is not itself costless, though the benefits are sufficient to overcome the added costs. Relevant costs include publicizing the reported data and preparing the reports. Although publication costs would be largely insignificant,<sup>118</sup> the added time costs are not negligible, though that time would be spent improving democratic governance.

Prosecutors will likely spend more time than before weighing the benefits of a particular prosecution against a broader set of costs to estimate constituent preferences. But prosecutors already make resource allocation judgments,<sup>119</sup> so this proposal does not add a requirement of whole cloth; it merely adds to an existing process.

It is perhaps impossible to quantify the added time costs of this proposal without actually implementing it in some pilot capacity. The point cannot be lost, however, that prosecutors would spend this added time considering how to wisely use scarce government resources to satisfy constituent preferences. Thus, while there are added transaction costs, those costs are generated in service of the democratic process.

Admittedly, the cost-benefit calculus is difficult and carries some uncertainty, which itself can be seen as a cost. How is a prosecutor to know a likely sentence for a particular offense in advance? How is a

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116. Because of overlapping criminal codes, numerous charges could be brought on most sets of facts. See *supra* Part II.A. Nonetheless, prosecutors should list all charges that could have been supported by the evidence but were not filed.

117. See Leipold, *supra* note 95, at 1305 (discussing the stigma of a charged defendant).

118. Reporting itself need not be costly. Cost disclosure reports can be posted on the internet to save a great deal on paper and ink. An online posting would also make the data easier to access.

119. Lynch, *supra* note 97, at 2139. As one commentator framed this cost-benefit analysis, prosecutors will prosecute only where the cost of pursuing the prosecution and the harm to the public do not outweigh the harm caused by the defendant. Rich, *supra* note 60, at 1253.

prosecutor to monetize the societal benefit from convicting and incarcerating any given offender? Voters face a tough enough task attempting to monetize their own preferences. Prosecutors are one step removed from the public's monetary valuation of these costs and benefits, but they must nonetheless estimate and evaluate the relevant voter preferences.

In assessing the potential costs of cost disclosures, it is important to remember that this proposal does not require disclosure of every case a prosecutor ever considered papering. Prosecutors should only be required to disclose information regarding cases they actually pursued and cases they opted not to pursue despite an arrest and sufficient evidence. This proposal is narrowly tailored to address the truly discretionary sovereign decisions that prosecutors make. Moreover, the benefits of promoting an informed populace and a meaningful check on prosecutorial authority, thereby returning ultimate sovereign authority to the people, outweigh these costs.

#### *D. Distinguishing Previous Proposals*

Numerous scholars have unsuccessfully urged prosecutorial discretion reform,<sup>120</sup> but this mandatory cost disclosure proposal has several less intrusive facets than its predecessors. Importantly, it provides increased democratic accountability, giving it a greater chance of political success. Further, this proposal focuses on the costs of prosecution. And because cost savings are more alluring now than at any time in recent memory given the struggling economy, troubled state budgets, and fiscal austerity measures, the proposal offers lawmakers one potential way to limit government expenditures.

Requiring disclosure of information from particular cases is far less burdensome to prosecutors than requiring them to create prospective policy statements.<sup>121</sup> Prosecutors need only evaluate each case to ensure that they or their bosses could defend it in an election campaign. Mandatory cost disclosures need not compel any consistent policy.

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120. See, e.g., DAVIS, *supra* note 9, at 189–90; Barkow, *supra* note 16, at 895–906; Brown, *supra* note 16, at 371; Gershowitz, *supra* note 16, at 65–72; Vorenberg, *supra* note 16, at 1560–72.

121. See Bibas, *supra* note 11, at 962 (“[M]ost [scholars] favor external regulation of prosecutors by other institutions. One strand of this scholarship, exemplified by James Vorenberg’s work, favors legislation to restrict prosecutorial discretion *ex ante*. . . . [T]hese external, institutional controls have proven to be ineffective. Legislation is too crude, and *ex post* review of individual cases is too narrow, to attack the deeper, systemic problems with patterns of prosecutorial discretion.”); see also Vorenberg, *supra* note 16, at 1562–63 (urging prosecutors to create specific guidelines explaining how they will exercise discretion given a particular set of facts).



Rather, prosecutors can assess each case individually without weaving it into a broader framework or policy.

Legislating for all potential cases in advance requires prescience and is thus impractical if not impossible.<sup>122</sup> Using prior prosecutorial decisions as binding precedent would also bind prosecutors' hands too tightly.<sup>123</sup> Perhaps it seems fairer to force prosecutors to make all decisions consistently, but prosecutors need flexibility to make different decisions as circumstances or political preferences change—an essential benefit of prosecutorial discretion.<sup>124</sup>

This proposal intrudes less on prosecutorial prerogatives than its predecessors. It does not require the legislature to force prosecutors into certain decisions.<sup>125</sup> It instead necessitates legislative action only to require prosecutors to inform voters of their decisions and the accompanying costs.<sup>126</sup> Mandatory cost disclosures leave prosecutors free to make discretionary decisions that may have repercussions if voters disagree.

Further, mandatory cost disclosures would not overly limit prosecutorial discretion, forcing judges to fill the remaining vacuum with more expansive judicial power<sup>127</sup>—a role inconsistent with

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122. See DAVIS, *supra* note 9, at 37 (“Beyond the intellectual power of any judges or legislators is the capacity to write rules that will be satisfactory for all future cases without knowing the facts of such cases.”).

123. See *id.* at 190 (raising possibility of a system of prosecutorial precedent). Using prosecutorial actions as “guidelines and policies” is far less burdensome and encourages the free flow of information necessary for democratic governance. Bibas, *supra* note 18, at 374–75. Nonetheless, this Article does not advocate memoranda explaining deviations from prior precedent. See *id.* When voters are concerned or an election challenger questions an incumbent prosecutor regarding a particular case, the prosecutor would then be forced to defend her actions in that case, and this additional discourse would provide voters a sufficient stream of information without imposing a greater burden than necessary on prosecutors.

124. See *supra* Part II.A. Perhaps it is not surprising that this Article’s proposal diverges sharply from Davis’s or Vorenberg’s because this proposal seeks democratic accountability and efficiency rather than protection of due process. That a democratic result can slight due process is hardly controversial. See DE TOCQUEVILLE, *supra* note 30, at 239–64 (discussing tyranny of the majority). Due process concerns are beyond the objectives of this Article.

125. See Brown, *supra* note 16, at 371.

126. Once legislatures see prosecutorial expenditure statistics, they may opt to exercise greater oversight authority and control via legislation. This too would be an improvement from a democratic theory perspective because a representative body would control the broader policy decisions. Admittedly, legislation might diminish prosecutorial discretion in individual cases, which could force prosecutors into making inefficient decisions. But even if such decisions are inefficient individually, the broader scheme of prosecutorial priorities would more likely embody voter preferences as the voters would no longer face cost blindness, and thus implementation of prosecutorial priorities would be more efficient overall.

127. A shift of discretionary power from prosecutors to judges would reflect the axiom that power abhors a vacuum.

separation of powers.<sup>128</sup> This proposal therefore constrains discretion without violating separation of powers.<sup>129</sup>

Also unlike one previous proposal, mandatory cost disclosures do not rely on social psychology in the hope that prosecutors will change their decision-making when presented with additional information about the conditions of their states' prisons.<sup>130</sup> Instead, mandatory cost disclosures align prosecutors' incentives with voters' interests. Depending on the psychology of each individual prosecutor to alter her behavior based on additional information is largely undependable because it lacks any meaningful external enforcement mechanism.<sup>131</sup> Our prosecutorial system was designed to rest ultimate authority in the people's hands by allowing local voters to check their prosecutors' decisions. Mandatory cost disclosures return voters to that intended position.

Legislators should have greater motivation to adopt this proposal than its predecessors because it enhances democracy, does not overly restrict prosecutors, and can save money.<sup>132</sup> Legislators can pitch these cost disclosures to their constituents by emphasizing that they give voters

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128. Pizzi, *supra* note 30, at 1353 ("To ask that an American judge play a similarly aggressive role with respect to charging decisions raises serious separation of powers problems and runs contrary to the adversary tradition in which judges are assigned a neutral and passive role with respect to charging decisions and the development of evidence at trial.").

129. Such separation of powers concerns derive from the premise that the prosecutorial function is traditionally executive. *See Morrison v. Olson*, 487 U.S. 654, 705–06 (1988) (Scalia, J., dissenting). Mandatory cost disclosures risk neither legislative overreaching into prosecutorial decisions, the very concern animating the Bill of Attainder Clause, U.S. CONST. art. I, § 9, cl. 3, nor judicial overreaching incompatible with the adversarial system.

130. *See Gershowitz, supra* note 16, at 67 ("Although it is impossible to say for certain whether an informational campaign would have any effect on prosecutors' charging decisions, there is a body of social psychology literature that gives cause for optimism."). Gershowitz suggests alleviating prison overcrowding by requiring state bureaucracies to inform prosecutors about (1) the total number of incarcerated prisoners, (2) the change in number from previous years, (3) the percentage of prisons at or exceeding capacity, and (4) whether any prisons are under court orders regarding overcrowding. This added information, he suggests, will alter prosecutorial decision-making—a proposition that he supports largely through social psychology literature. *Id.* at 65–72.

131. *See Vorenberg, supra* note 16, at 1525 ("Even when bargaining is not involved, however, there are good reasons to see prosecutors' virtually unlimited control over charging as inconsistent with a system of criminal procedure fair to defendants and to the public. This is especially true because the recent and successful attacks on the discretion of sentencing judges and parole and corrections authorities have had the effect of increasing prosecutors' powers.").

132. As a general matter, Bibas seems correct that "legislatures lack the interest and incentive to check prosecutors vigorously; they would rather be seen as prosecutors' allies in the fight on crime." Bibas, *supra* note 11, at 968. But legislatures do have an incentive to pass legislation that empowers voters (so long as the added power does not come at the expense of legislatures) because voters seem to like the idea that they control their government. This incentive could trump legislatures' general reluctance to regulate prosecutors.

more control over their government.<sup>133</sup> This proposal does not tie prosecutors' hands by requiring them to adhere to formal guidelines or replicate previous decisions. Moreover, it has the potential to save state and local governments money that is now spent in ways voters may not approve. In a time when states already divert offenders into alternative courts to avoid costly incarceration and California is releasing prisoners under court order,<sup>134</sup> these savings seem increasingly desirable.

### III. IMPLICATIONS OF MANDATORY COST DISCLOSURES

#### A. *From Disclosure Reports to the Voting Booth*

Publishing reports on the costs of prosecution puts the democratically necessary information into circulation, but questions remain: How will this information reach voters and how might they use it in the voting booth? It seems unlikely that many people will read countless pages of itemized cost disclosures even if they are widely available on the internet. But voters will nonetheless receive the information contained in those pages. Challengers in prosecutor elections, the news media, and certain interest groups have strong incentives to read these disclosure reports and publicize their findings. These groups will distill the relevant information or concentrate on particular cases, giving voters more digestible data.

Challengers to incumbent prosecutors have a powerful incentive to comb cost data for inefficient cost-benefit decisions or for evidence of prosecutorial priorities out of line with those of the voters. Such instances would provide fodder for a meaningful campaign attack on the incumbent's decisions or priorities. Just as a government's priorities are best revealed through its budget, so too are a prosecutor's priorities best

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133. This proposal does not run afoul of Bibas's criticism:

[H]oping for legislatures to rein in prosecutorial discretion is a pipe dream. Legislatures have strong incentives to give prosecutors freedom and tools to maximize convictions and minimize costs. For example, legislatures broaden criminal liability, pass overlapping statutes, and raise punishments to give prosecutors extra plea-bargaining chips. By doing so, they drive down the cost and increase the certainty and expected value of each conviction. Prosecutors can thus convict more defendants and procure longer sentences for the same amount of time and money. This increase in efficiency serves legislators' interest in being tough on crime and prosecutors' interest in maximizing convictions while minimizing workloads.

Bibas, *supra* note 11, at 966.

134. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520, C01-1351, 2009 WL 2430820, at \*116 (E. & N.D. Cal. Aug. 4, 2009), *enforced*, 2010 WL 99000 (E. & N.D. Cal. Jan. 12, 2010), *appeal docketed sub nom. Schwarzenegger v. Plata*, No. 09-1323 (U.S. Apr. 14, 2010), and *consideration of juris. postponed*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3413 (2010); Act of Oct. 11, 2009, ch. 28, 2009 Cal. Stat. 4392.

revealed by examining how she allocates her funds. With this information available, prosecutor election campaigns could provide a forum for meaningful discourse about crime-control priorities.<sup>135</sup> Contrast such campaign discourse with that of current prosecutor election campaigns comprised of vague attacks on the conviction rate—a statistic that reveals little about prosecutorial priorities—or discussion of one high-profile case from the past term.<sup>136</sup> Also, when prosecutors run for higher office, challengers could use those prosecutors' previous disclosures to reveal their priorities to the voters.

State and local governments have made significant budget cutbacks to compensate for depressed tax revenues resulting from the recession. They have cut funding for social services, education, police, and countless other areas. In a cost-cutting climate, voters are more sensitive to government waste. Media outlets have an incentive to monitor government waste to capitalize on this sensitivity (and on the usual distaste for government waste) by publicizing particularly egregious instances.<sup>137</sup> Mandatory cost disclosure reports would provide one source for these stories of waste. When a newspaper reporter sees hundreds of thousands or even millions of dollars spent to enforce a three-strikes or mandatory minimum law for possession of a small bag of marijuana, it makes sense to run an article highlighting the opportunity costs of that decision. It is not difficult to imagine a local newspaper spread with photos of shuttered schools, laid-off police officers, and foster parents unable to put food on the table juxtaposed with a photo of a "dime bag" of marijuana.

Many interest groups also have incentives to cull cost disclosure reports to generate statistics or capture anecdotes that advance their respective causes. Teachers' unions could pick out an expensive case and question whether prosecuting one individual was worth laying off a dozen teachers. They could question whether putting a few more drug users behind bars is really worth forcing elementary schools to put thirty students in kindergarten classes.<sup>138</sup> Social service agency directors could use these disclosure reports and statistics generated based on the reports

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135. See Wright, *supra* note 9, at 582–83.

136. See *id.*

137. See, e.g., Sam Allen & Abby Sewell, *Bell is Not the Only Big Spender*, L.A. TIMES, Aug. 15, 2010, at A33; Jeff Gottlieb & Ruben Vives, *Is a City Manager Worth \$800,000?*, L.A. TIMES, July 15, 2010, at A1. Just as with FOIA disclosures, the media would channel information to the public eye. See Michael Russo, *Are Bloggers Representatives of the News Media Under the Freedom of Information Act?*, 40 COLUM. J.L. & SOC. PROBS. 225, 227 (2006).

138. See *Sacramento Schools to Cut 430 Jobs, Increase Class Sizes*, ABC NEWS 10 (Mar. 5, 2010), <http://www.news10.net/news/local/story.aspx?storyid=76603>.

to lobby for budget increases. Drug legalization or decriminalization groups could discern the average cost of a drug prosecution or publicize particularly expensive prosecutions to promote their cause. These and other interest groups would gain the concrete information necessary to launch meaningful public campaigns to shift budgetary priorities, potentially combating the trend of continually increased law enforcement. Even though voters may not have personally read prosecutors' cost disclosure reports, they would get distilled versions of this cost information from these interest group campaigns. This distilled information could meaningfully impact voters' choices at the ballot box in the next prosecutor election.

Voters could benefit from the meaningful debates about crime-control priorities that cost disclosures would promote. These debates would arise in the media, in prosecutor election campaigns, and in public interest group campaigns as groups vie for scarce government funding or public support. Using information from these sources, voters could then meaningfully assess whether their elected prosecutor is spending their money as they wish or whether someone else would likely do better.

## *B. Efficiency and Sovereignty Improvements*

### *1. Efficiency*

Mandated disclosures would inform the voting public and force prosecutors to account for the full panoply of societal costs. This calculated anticipation would thus help prosecutors reach a socially efficient allocation of resources. Prosecutors already weigh costs and benefits before making charging decisions, but the factors in their current calculus are unduly limited. Prosecutors currently need only account for three constraints: What will make the public happy? What will remain under budget? Is this case worth my time?<sup>139</sup>

Voters' lack of information creates an externality problem for prosecutors' decisions on how to use their scarce resources. Prosecutors need only consider their own private costs, but other relevant marginal social costs of prosecution include public defense costs, incarceration costs, and collateral consequences. Because voters lack data regarding these costs, they cannot hold prosecutors accountable for them. These costs thus remain external to prosecutors' cost-benefit decisions.

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139. See Vorenberg, *supra* note 16, at 1547 (explaining that prosecutors currently consider "whether the probability of a successful prosecution is worth the time and resources that must be invested in the case").

Nonetheless, prosecutors can be forced to internalize these externalities and thus make socially efficient rather than merely privately efficient decisions. Once voters have cost information, they can meaningfully assess whether their prosecutor's preferences match their own and whether their prosecutor is spending their money wisely. Voters can then hold prosecutors fully accountable. Because of the increased accountability, prosecutors must anticipate voters' reactions to this broader accounting of costs and add them to their cost-benefit determinations. This proposal therefore addresses "[t]he current flaw in the evolving power of the prosecutor[:] . . . the failure to force her to face the full cost of prosecutorial decisions."<sup>140</sup>

Prosecutorial resource allocation is socially efficient when prosecutors bring a case only if all the benefits of incarcerating a particular defendant for the likely sentence on a particular charge outweigh all the costs. With mandatory disclosures, a prosecutor's initial decisions of whether to charge an offender and for what crimes would rest on whether the societal benefits of successful prosecution would likely outweigh the costs of charging, prosecuting, and incarcerating the offender on a particular charge or set of charges. This analysis must account for the likelihood of recidivism and harm that a particular offender is likely to cause if not incarcerated, as well as for the potentially safer feeling that citizens experience when more criminals are incarcerated.<sup>141</sup> As cases progress, prosecutors should continue to reweigh this calculus to determine whether to accept a plea bargain, take a case to trial, or drop or modify pending charges. After obtaining a conviction, prosecutors should consider the costs of incarceration against its benefits when recommending a sentence. This process will help allocate prosecutorial resources to reflect community preferences. Mandatory cost disclosures would encourage prosecutors to follow this process or risk losing their jobs.

With mandatory cost disclosures, prosecutors would have strong incentives to use full cost accounting not only when deciding whom to charge but also for what crimes and what sentences to recommend.

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140. Misner, *supra* note 23, at 719.

141. This calculus is complicated by the cross-cutting pressure that overcrowded prisons "perpetuate a criminogenic prison system that" threatens, rather than protects, public safety. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520, C01-1351, 2009 WL 2430820, at \*83–85 (E. & N.D. Cal. Aug. 4, 2009), *enforced*, 2010 WL 99000 (E. & N.D. Cal. Jan. 12, 2010), *appeal docketed sub nom. Schwarzenegger v. Plata*, No. 09-1323 (U.S. Apr. 14, 2010), *and consideration of juris. postponed*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3413 (2010); *accord* Pritikin, *supra* note 61, at 1058. In *Coleman*, California officials conceded that prison overcrowding threatens public safety. 2009 WL 2430820, at \*86.

When criminal statutes overlap, as they often do,<sup>142</sup> prosecutors choose between charging offenses that will likely lead to varying lengths of incarceration. Because of mandatory minimum sentences and three-strikes laws in effect in many states, decisions on what charges to file heavily influence the resulting sentence.<sup>143</sup> Thus, efficient resource allocation in sentencing must begin at the charging stage. When a prosecutor determines that charging a particular defendant would reap a societal benefit at least as great as its cost, the prosecutor should consider whether a particular charge would carry a mandatory minimum or trigger a three-strikes law and thus raise the expected cost of incarceration. Absent a mandatory minimum, prosecutors should consider the costs of incarceration when recommending a sentence.<sup>144</sup>

A reader might understandably be concerned that prosecutors could be unfairly held to account for expenses beyond their control such as public defense or incarceration costs. It is certainly true that a prosecutor cannot control how much time a public defender will spend on a given case, how much money that public defender makes, how much prison will cost, or (in any absolute sense) how long each particular defendant's sentence will be, and thus cannot completely regulate the magnitude of the expense. But even though prosecutors cannot precisely modulate these expenses, they can control the binary decision of whether the expenses occur at all. Prosecutors can decide not to charge a defendant so that no public defense or prison costs are incurred. Or prosecutors can charge a lesser offense than the maximum one that the evidence may support, knowing that less public defense time and a shorter resulting sentence will likely follow. Thus, while prosecutors cannot absolutely control some of the expenses for which they will be held to account, they do have some control over these expenses.

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142. *See supra* Part II.A.

143. Simons, *Punishment Theorists*, *supra* note 103, at 324 (arguing that mandatory minimums shift a great deal of power to prosecutors); Simons, *Advisory Guidelines*, *supra* note 103, at 384–85; *see also* BUTLER, *supra* note 61, at 107 (“Sentencing guidelines and mandatory minimum sentences have reduced the discretion that judges used to have to fit the punishment to the crime. The prosecutor can circumvent required sentences simply by charging a different crime, or leaving out some of the evidence.”). Three-strikes laws are no different for these purposes. This is particularly true with “wobblers,” crimes that can be charged as either felonies or misdemeanors. *See* *Ewing v. California*, 538 U.S. 11, 16 (2003). Only when charged as a felony do wobblers trigger a three-strikes penalty. *Id.* Thus, wobblers trigger a hefty mandatory sentence only when a prosecutor so desires.

144. Missouri recently recognized the importance of considering cost at sentencing. Its sentencing commission created a system that allows judges to see and consider the costs of various sentencing options for a particular offender. Davey, *supra* note 47. Judge Michael Wolff of the Supreme Court of Missouri explains that judges had been asking for such data. *Id.*

With mandatory cost disclosures, prosecutors who ignore or poorly estimate their constituents' preferences will likely be voted out of office by informed voters. Moreover, once full cost information is placed in the public eye, political preferences might change. Voters might decide that certain types of cases are not worth their costs. As preferences change, prosecutorial discretion allows enforcement decisions to shift quickly with negligible cost. Prosecutorial resource allocation can move toward a point where prosecutions are brought only when their marginal social benefits equal or exceed their marginal social costs.<sup>145</sup> A rigidly controlled regime governed only by prospective rulemaking could not quickly adjust to match changes in voter preferences and would lead to tremendous inefficiencies.

Concerns might arise that this proposal expects voters to monetize their preferences for criminal law enforcement—a difficult task. Worse still, even if each voter could appraise his or her preferences, there is no market or other mechanism for prosecutors to aggregate their constituencies' preferences. At best then, prosecutors might be forced to play guessing games with their jobs as wagers. But the system of locally elected prosecutors that our framers created accounts for these concerns. Prosecutors are locally elected to act on behalf of and serve local constituencies.<sup>146</sup> Prosecutors remain—as intended in colonial times—close to their constituencies.<sup>147</sup> Some 2089 lead prosecutors serve populations of fewer than 250,000 people.<sup>148</sup> More than 1000 lead prosecutors serve populations of 36,500 people or fewer.<sup>149</sup> With constituencies of these sizes, it is far easier to accept the notion that prosecutors could effectively approximate the preferences of their local constituencies and implement those preferences in their decision-making processes.

Locally electing prosecutors also preserves the heterogeneity of American communities and allows for different locally efficient allocations to match varied preferences. As an example, consider that out of every 100,000 residents, Minnesota imprisons only 300 and Maine

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145. Lynch, *supra* note 97, at 2139 (“Discretion in enforcement permits rapid adjustment of priorities as the extent and perceived obnoxiousness of such offenses wax and wane.”).

146. See JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 38 (1980) (describing prosecutors' role as “local representation applying local standards to the enforcement of essentially local laws”).

147. See *supra* Part I.A.

148. Judith N. Phelan & Michael D. Schrank, *The Future of Local Prosecution in America*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 248 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008).

149. *Id.*



273,<sup>150</sup> while Texas imprisons 1000 and Louisiana 1138.<sup>151</sup> “[I]t is almost guaranteed that prosecutors who are elected in highly rural counties will have quite different constituencies and will face very different criminal problems from those prosecutors elected in heavily urban counties.”<sup>152</sup> For instance, rural prosecutors may be more likely to seek the death penalty than urban prosecutors.<sup>153</sup>

Mandatory cost disclosures would help to overcome the greatest obstacle to efficient allocation of prosecutorial resources—the public’s lack of information.<sup>154</sup> Efficiency requires the flow of information.<sup>155</sup> Only when well informed can people be expected to make decisions that accurately track their marginal costs and marginal benefits.<sup>156</sup>

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150. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1.

151. *Id.*

152. Pizzi, *supra* note 30, at 1344; cf. Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 100–02 (2005) (recognizing geographic variation in federal sentencing).

153. Heather Ratcliffe, *Crime’s Locale May Sway Decision to Seek Death Penalty*, ST. LOUIS POST-DISPATCH, July 6, 2008, at A1. A detailed empirical study confirmed the disparity of death sentences in rural versus urban Missouri. Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 307 (2009) (“[T]here are large disparities in the decision-making process and in outcomes depending on the place of the prosecution. . . . [D]efendants in Missouri’s two largest cities—St. Louis and Kansas City—are less likely to face capital trials and less likely to be sentenced to death than defendants in the rest of the state.”). That result derives from the fact that “prosecutors in St. Louis City and Jackson County [which encompasses Kansas City] filed capital charges much less frequently than prosecutors in the rest of the state.” *Id.* at 344.

A reader might wonder whether the fact that urban prosecutors seek the death penalty less often than rural prosecutors indicates that prosecutors already attempt to satisfy their constituents’ preferences. That is probably true. Yet prospects for actually adhering to voter preferences on a large scale would improve if those constituencies were well informed regarding the costs of prosecution and the relative priorities that information demonstrated.

154. See *supra* Part I.B; see also Bibas, *supra* note 11, at 983 (“Though in theory prosecutors serve the public interest, the public cannot monitor whether they are in fact serving the public well. Voter turnout is low, especially in local elections. Members of the public have sparse and unreliable information about how well prosecutors perform. Most public information about criminal justice comes from crime dramas or novels, reality television shows, or sensational, unrepresentative news stories. As a result, the public suffers from chronic misperceptions about how the criminal justice system actually works. The public also has very little power to influence criminal justice.” (citations omitted)).

155. See ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 368 (1995) (“The presence of *privately held* (or *asymmetrically held*) information can confound both centralized (e.g., quotas and taxes) and decentralized (e.g., bargaining) attempts to achieve optimality.” (emphasis in original)); HAL R. VARIAN, MICROECONOMIC ANALYSIS 466–69 (3d ed. 1992).

156. Allowing a perfectly competitive market to reach equilibrium is presumably why simple economic models assume perfect information. MAS-COLELL ET AL., *supra* note 155, at 716 (“Up to now we have concentrated the analysis on a model where spot trading for goods occurs under conditions of perfect information about the state of the world. In this section, we relax this feature

Contrasting a high-profile case with more typical prosecutions demonstrates the difference that information makes. Voters learn about expenditures in high-profile cases through the news media,<sup>157</sup> but they learn little or nothing about the routine cases.<sup>158</sup> In a current prosecutor election campaign, a challenger can only point to an exceptional case costing millions of dollars as an example of wasteful spending. But fueled with mandatory cost disclosure information, challengers could confront incumbent prosecutors about these more routine decisions by synthesizing the relevant data for voters. Challengers can mount such offensives only if they have these data.<sup>159</sup> Mandatory cost disclosures thus exponentially increase the number of arrows in a challenger's quiver and help close the information gap between the run-of-the-mill cases and the high-profile ones.<sup>160</sup>

Voters check only lead prosecutors directly at the ballot box, and thus only lead prosecutors have a direct incentive to appease voters. But the chain of command within each prosecutor's office will ensure that line prosecutors too are concerned with voter preferences.<sup>161</sup> Line prosecutors are responsible to the lead prosecutor and could face

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by considering the possibility that this information is not perfect. In doing so, we shall see that there is a key difference between the case of *symmetric* information (all traders have the same information), which is largely reducible to the previous theory, and the case of *asymmetric* information, where a host of new and difficult conceptual problems arise." (emphasis in original)).

157. See Vorenberg, *supra* note 16, at 1526–27. Vorenberg seems correct that in high-profile cases prosecutors' discretion is already checked to a certain extent by their electorates. See *id.*

158. See Wright, *supra* note 9, at 602 ("The candidates talk a great deal about last year's notorious case. . . . [But] an outcome in one big case tells us little about the quality of prosecution work more generally."); see also Vorenberg, *supra* note 16, at 1526–27 ("Prosecutors exercise the least discretion over those crimes that most frighten, outrage, or intrigue the public, such as murder, rape, arson, armed robbery, kidnapping, and large-scale trafficking in hard drugs, particularly when the circumstances make the crime unusually heinous. Since visibility focuses greater scrutiny on the prosecutor, only a prosecutor whose political position is unusually secure can disappoint expectations that are part of the climate in which he works. Of course, what is seen as outrageous varies with time and place.").

159. Lack of usable information seems to account for the two failures of prosecutor elections. "First, they do not often force an incumbent to give any public explanation at all for the priorities and practices of the office. Second, even when incumbents do face challenges, the candidates talk more about particular past cases than about the larger patterns and values reflected in local criminal justice." Wright, *supra* note 9, at 583.

160. This attempt to force information into voters' hands scores with Wright's suggestion that better informed voters would make better choices. *Id.* at 606.

161. See DAVIS, *supra* note 9, at 143 ("Possibly the most important check of discretionary action is simply the normal supervision of subordinates by superiors."); Stuntz, *supra* note 21, at 535 ("District attorneys are likely to seek to manage their offices in ways that win them public support. To some degree, line prosecutors will seek to do that too, because that is their bosses' goal, and they must satisfy their bosses in order to keep their jobs.").

consequences in either of two ways if they slight efficiency. First, to save their own jobs, lead prosecutors might fire line prosecutors. Second, a lead prosecutor might be voted out of office and the new lead prosecutor might not retain the line prosecutor.

Mandatory cost disclosures would empower voters to make informed decisions in prosecutor elections. Knowing that voters would be armed with such information, prosecutors would internalize what were previously external costs by assessing their decisions in light of the broad swath of costs and benefits at all stages of a prosecution, beginning with the charging decision. Such calculated considerations will achieve a more socially efficient allocation of prosecutorial resources.

## 2. *Sovereignty*

In addition to increasing efficiency, mandatory cost disclosures allow elected prosecutors to remain true to their democratic origins.

The key check on prosecutorial discretion is the public, the constituency the prosecutor serves. As an elected officer of the state, the prosecutor must answer to the public. If the constituency of the jurisdiction is not satisfied with the performance of the elected prosecutor, then there is an opportunity, depending on the electoral cycle of the jurisdiction, to make changes. . . . But it is the public nature of the office, where the prosecutor's track record is available for all to see, that serves as the ultimate check on prosecutorial discretion.

A prosecutor's credibility is dependent upon the transparency of the office and his or her effectiveness as a case processor.<sup>162</sup>

Prosecutorial discretion is not inherently inconsistent with democratic sovereignty. Rather, prosecutorial discretion stares down the barrel of autocracy only when voters lack information about its use. Prosecutorial discretion need not destroy democratic accountability by blocking voters' access to information on the decisions that prosecutors make on

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162. Phelan & Schrank, *supra* note 148, at 250–51. Related to the effective democratic check on the prosecutor is the notion that “prisons [are] a rough reflection of the societies that create and maintain them—that is, that nations get the prison systems they want or deserve.” Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87, 90 (2008). Winston Churchill similarly observed that the “mood and temper of the public in regard to the treatment of crime and criminals is one of the most unflinching tests of the civilization of any country.” WINIFRED A. ELKIN, *THE ENGLISH PENAL SYSTEM* 277 (1957) (quoting a Winston Churchill speech before the House of Commons). In *Coppedge v. United States*, the Court explained that “[t]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.” 369 U.S. 438, 449 (1962).

the people's behalf.<sup>163</sup> Yet democratic checks cannot function effectively absent a well-informed populace.<sup>164</sup> This proposal would force the relevant information into the public domain.

The public needs information to improve governance, and the people have a right to this knowledge in our democracy.<sup>165</sup> Otherwise, voters make arbitrary decisions based on minimal information that cannot be said to reflect their actual preferences.<sup>166</sup>

This argument that an effective democratic check on prosecutorial discretion can be achieved admittedly assumes that voters will actually vote prosecutors out of office if they wield their power ineffectively or inefficiently. Justice Blackmun expressed his faith in that check, and several commentators have expressed similar sentiments.<sup>167</sup>

163. See Vorenberg, *supra* note 16, at 1559 (“The results are disheartening for one who believes that the legislature and the public should have sufficient information to improve the way government works. Prosecutorial discretion precludes access to such information. For example, a prosecutor may have an unannounced practice of holding in abeyance charges for most first-offense larceny cases against youthful offenders, while being very tough on sales of even small amounts of drugs. Typically there is no way of testing the effects of reversing the practice, or of determining whether this approach reflects the public’s wishes. The fact that prosecutors or their appointing authorities must seek election is small comfort in view of the low visibility with which they exercise their discretion.”).

164. “[A]n informed public is the essence of working democracy.” Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue, 460 U.S. 575, 585 (1983). This was the same principle animating Judge Learned Hand’s democratic wager—“democracy is best protected by a principle that forbids government to limit or control political speech in any way for the purpose of protecting democracy.” DWORKIN, *supra* note 6, at 353. Ronald Dworkin’s “sophisticated version of the majoritarian conception” of democracy echoes the notion that democracy requires an informed populace, “insist[ing] that the majority’s opinion does not count as its will unless citizens have had an adequate opportunity to become informed and to deliberate about the issues.” *Id.* at 357.

Layered on top of this concern about the functioning of a democratic check absent information is that “[t]he nature of the democratic process may not lend itself to meaningful policy dialogue between those in power and the populace.” Fairfax, *supra* note 41, at 742; accord SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 43–64 (2006). Such a lack of dialogue presents difficulties in preservation of popular sovereignty, a notion deeply entwined with democracy. See DWORKIN, *supra* note 6, at 365.

165. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (plurality opinion); *id.* at 592–97 (Brennan, J., concurring in judgment); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964); *In re Oliver*, 333 U.S. 257, 270 n.24 (1948); see also JOHN HART ELY, DEMOCRACY AND DISTRUST 73–104 (1980); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 150–54 (1980).

166. DWORKIN, *supra* note 6, at 357.

167. *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting) (“[I]t is healthful to keep charging practices visible to the general public, so that political bodies can judge whether the policy being followed is a fair one.”); see also Misner, *supra* note 23, at 763 (prosecutors who use their resources inefficiently will be voted out of office); Weinstein, *supra* note 102, at 103 n.69 (prosecutors who abuse their power or use it ineffectively will be voted out). Fred Zacharias advocated using the political check to rein in prosecutorial misconduct, but his trust in the

Greater information about how prosecutorial resources are spent would also mitigate the problem of whom voters should blame for mistakes in the criminal justice system. It may presently be difficult for voters to scrutinize the actions of any one responsible individual.<sup>168</sup> With cost disclosures, voters will be better positioned to focus criticisms or praise on the lead prosecutor who bears ultimate authority over who is prosecuted and for what charges.

“Because [lead] prosecutors are virtually always elected officials, the extent to which they are accountable to the public is an essential component of democratic governance.”<sup>169</sup> Mandatory disclosures would push allocation of prosecutorial resources toward greater efficiency and restore democratic sovereignty over the exercise of sovereign prosecutorial power.

### C. *Envisioning Practical Results*

What might a more efficient and democratic allocation of prosecutorial resources look like in practice? One likely possibility is fewer prosecutions, particularly of nonviolent victimless crimes.<sup>170</sup> Although some might be skeptical about whether greater information

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effectiveness of the check applies equally in the broader context of checking all exercise of prosecutorial discretion. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 765 (2001).

168. Misner, *supra* note 23, at 717 (“In theory, the electorate holds decision-makers responsible for their actions. However, because of the current diffusion of responsibility, the electorate cannot easily scrutinize the actions of any one official or hold that official independently accountable for the successes or failures of the entire system. In fact, no one is currently held accountable for the successes or failures of the criminal justice system.”). This concern echoes in part Justice Scalia’s concern that the independent counsel was not accountable to the public. *Morrison v. Olson*, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting).

169. Gordon & Huber, *supra* note 36, at 349–50.

170. BUTLER, *supra* note 61, at 4 (“In the United States, the rush to punish is out of control. In addition to the violent creeps I put away, I sent hundreds of other people to prison who should not be there.”). Supreme Court of Missouri Judge Wolff explained recently that “sentencing costs would never be a consideration in the most violent cases, just in circumstances where prison is not the only obvious answer.” Davey, *supra* note 47.

The three-judge panel decision in *Coleman v. Schwarzenegger* bears on this prediction insofar as it relies on evidence that “conclusively showed that public safety would not be adversely affected by releasing low-risk, nonserious, nonviolent offenders from the prison system without placing them on parole supervision.” Nos. CIV S-90-0520, C01-1351, 2009 WL 2430820, at \*103 (E. & N.D. Cal. Aug. 4, 2009), *enforced*, 2010 WL 99000 (E. & N.D. Cal. Jan. 12, 2010), *appeal docketed sub nom. Schwarzenegger v. Plata*, No. 09-1323 (U.S. Apr. 14, 2010), and *consideration of juris. postponed*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3413 (2010). That supervising these offenders would not contribute to public safety also indicates that the benefit of prosecuting and incarcerating such offenders is not terribly high. Moreover, these crimes were not included on Vorenberg’s list of high-profile crimes likely to stir up public interest. Vorenberg, *supra* note 16, at 1526–27.

would actually push voters to demand fewer prosecutions, the recent recession may drive voters to reconsider their fiscal priorities and turn away from incarceration.<sup>171</sup> Perhaps this reevaluation of priorities would mean diversion or alternative programs in place of incarceration for minor offenses.

Before considering how the allocation of prosecutorial resources might change under this proposal, it is important to examine the status quo. The United States has a higher incarceration rate than any other country in the industrialized world.<sup>172</sup> Americans are locked up for crimes that would rarely produce prison sentences in other countries.<sup>173</sup> “Excluding children and the elderly, nearly one in fifty people wakes up behind bars each morning.”<sup>174</sup> One in thirty-one adults is either incarcerated, on probation, or on parole.<sup>175</sup> Over the past thirty years, the prison population has risen 500%.<sup>176</sup> In the last fifty years it has increased nearly 700%.<sup>177</sup> Perhaps the American political climate differs dramatically from those of other countries and we genuinely value these high rates of incarceration, but given the massive costs of these choices, we should be sure.<sup>178</sup>

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171. Missouri’s sentencing commission recently concluded that costs of sentences are a relevant factor in fashioning an appropriate sentence. *See* Davey, *supra* note 47.

172. Gershowitz, *supra* note 16, at 52 (“The United States incarcerates more offenders per capita than any industrialized nation in the world: three times more than Israel, five times more than England, six times more than Australia and Canada, eight times more than France, and over twelve times more than Japan.”).

173. Liptak, *supra* note 150; *Rough Justice*, *supra* note 61 (“No other rich country is nearly as punitive as the Land of the Free.”).

174. Gershowitz, *supra* note 16, at 52.

175. Sullivan, *supra* note 98.

176. Gershowitz, *supra* note 16, at 47.

177. Steiker, *supra* note 15. The incarceration rate remained steady from the mid-1920s through the mid-1970s, a period encompassing “the Roaring Twenties, the Great Depression, the run up to World War II, World War II itself, its aftermath, the Korean War, the civil rights movement, the tumultuous 1960s, and the Vietnam War.” Haney, *supra* note 162, at 102. “But in the mid-1970s everything began to change. Thus, after a half century of near-perfect stability, the rate of incarceration began its unprecedented and unremitting climb. Over the next twenty-five years alone, from the mid-1970s until 2000, a previously stable rate increased more than fivefold.” *Id.*

178. *Too Many Laws, Too Many Prisoners*, *supra* note 61, at 26 (“Justice is harsher in America than in any other rich country.”). Craig Haney has identified what he terms a “War on Prisoners.” Haney, *supra* note 162, at 89. He contends that “we declared this War on Prisoners as a matter of political choice or preference, not necessity.” *Id.* at 102. Moreover, “governmental spending priorities shifted to accommodate the new prison realities.” *Id.* at 105. Yet, one cannot help but wonder whether, given the lack of effective political check, this is indeed our societal choice or merely a political choice meant to avoid the potential costs of appearing soft on crime. *See* Beale, *supra* note 56, at 29 (“The epithet ‘soft on crime’ is the contemporary equivalent of ‘soft on Communism.’”).

Some crime-control advocates might see these incarceration statistics as glowing achievements and would think it dangerous to reduce prosecutions and convictions. Local communities may want to keep this status quo or may even want more prosecutions. In either case, mandatory cost disclosures would legitimize these local preferences as democratically desired and would serve the interests of those seeking more prosecution even in the face of substantial criticism of over-prosecution in America.<sup>179</sup> But if having fewer prosecutions better reflects the desires of a local community, then fewer prosecutions would likewise be a democratic improvement. In the end, “[h]eeding this community conception of justice is crucial to maintain the criminal law’s compliance, efficacy, and legitimacy in the public’s eyes.”<sup>180</sup>

If voters actually knew the costs of all prosecutions undertaken in their name and the subsequent incarceration costs, some of the practices making America the world’s great prison warden would probably wane. Do Phoenix voters genuinely wish to spend \$11 million every year on a nine-block area of the South Mountain neighborhood?<sup>181</sup> Evidence on voter crime-control preferences under the counterfactual scenario of greater information is admittedly scarce, but the South Mountain statistic might give even Maricopa County voters pause.

Some readers might be skeptical that understanding the costs of prosecution would affect voters’ preferences given the tough-on-crime stance of many politicians. But there are two reasons to think that voters would desire less criminal law enforcement if aware of its actual costs. First, the gut-level desire for ever-greater levels of criminal law enforcement may actually make people less safe rather than more.<sup>182</sup> “What the War on Drugs means is that we’ve taken nonviolent

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179. *E.g.*, BUTLER, *supra* note 61, at 4; *Too Many Laws, Too Many Prisoners*, *supra* note 61, at 26; *Rough Justice*, *supra* note 61, at 13.

180. Bibas, *supra* note 11, at 982.

181. Gary Fields, *Hidden Costs: Communities Pay Price of High Prison Rate—Phoenix Neighborhood’s Missing Men*, WALL ST. J., July 10, 2008, at A1.

182. *See* BUTLER, *supra* note 61, at 19 (“There is a tipping point at which crime increases if too many people are incarcerated. The United States is past this point. If we lock up fewer people, we will be safer.”); *id.* at 31 (“[H]igher rates of incarceration were not a deterrent and may in fact have produced more criminals.”); Pritikin, *supra* note 61, at 1091 (“[A]ny further increases in incarceration beyond [2008] levels would actually create more crime than they would prevent.”); *see also* Coleman v. Schwarzenegger, Nos. CIV S-90-0520, C01-1351, 2009 WL 2430820, at \*83–85 (E. & N.D. Cal. Aug. 4, 2009) (overcrowded prisons threaten rather than protect public safety), *enforced*, 2010 WL 99000 (E. & N.D. Cal. Jan. 12, 2010), *appeal docketed sub nom.* Schwarzenegger v. Plata, No. 09-1323 (U.S. Apr. 14, 2010), *and consideration of juris. postponed*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3413 (2010); Beale, *supra* note 56, at 31 (arguing that harsher enforcement continues even in the face of evidence that harsher sentences do not produce additional deterrence).

offenders, exposed them to violent ones, and then reintroduced them to our communities.”<sup>183</sup> Although this mandatory cost disclosure proposal will not bring this criminological effect of incarceration to the fore, as more literature emerges on this topic<sup>184</sup> more voters may begin to question whether their tax dollars are being wisely spent if they are less safe as a result.

Second, the “great recession” has unearthed interest in saving money by incarcerating fewer people. The district attorney for Contra Costa County, California announced that many misdemeanors and some felony drug crimes involving only small quantities of drugs will not be prosecuted.<sup>185</sup> In Richmond, Virginia, the commonwealth’s attorney indicated that he is considering not prosecuting many misdemeanor and traffic offenses.<sup>186</sup> Atlanta attempted to save money by cutting jobs in the public defender’s office, but a one-sided cutback could require fewer prosecutions to not run afoul of the Sixth Amendment right to counsel.<sup>187</sup> Perhaps for that reason, Atlanta also cut resources devoted to prosecution by furloughing employees in its district attorneys’ offices one day each month.<sup>188</sup> Furloughs of district attorneys have not been limited to Atlanta.<sup>189</sup> Cutting back on prosecution resources potentially

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183. BUTLER, *supra* note 61, at 46. “Department of Corrections data show that about a fourth of those initially imprisoned for nonviolent crimes are sentenced for a second time for committing a violent offense. Whatever else it reflects, this pattern highlights the possibility that prison serves to transmit violent habits and values rather than to reduce them.” Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Experiment*, 53 AM. PSYCHOLOGIST 709, 720 (1998); accord Pritikin, *supra* note 61, at 1054–55.

184. See, e.g., BUTLER, *supra* note 61.

185. Henry K. Lee, *Many Contra Costa Crooks Won’t Be Prosecuted*, S.F. CHRON., Apr. 22, 2009, at B1, available at [http://articles.sfgate.com/2009-04-22/bay-area/17194086\\_1\\_prosecute-deputy-district-contra-costa-county](http://articles.sfgate.com/2009-04-22/bay-area/17194086_1_prosecute-deputy-district-contra-costa-county). Crimes not prosecuted will include assaults, thefts, and burglaries. Contra Costa County may continue to prosecute some misdemeanors such as domestic violence, driving under the influence, firearms offenses, vehicular manslaughter, sex crimes and assault with a deadly weapon. *Id.* Similar decisions have been made in Ventura County, California, where prosecutors are treating possession of small amounts of marijuana and a handful of other misdemeanors as infractions subject only to a monetary fine. Theresa Rochester, *Misdemeanors Becoming Infractions Under New County Guidelines*, VENTURA COUNTY STAR, Mar. 17, 2009, <http://www.vcstar.com/news/2009/mar/17/misdemeanors-becoming-infractions-under-new/>.

186. Wesley P. Hester, *Chesterfield Prosecutor Says He Needs Additional Funds*, RICHMOND TIMES DISPATCH, Mar. 24, 2009, at B1, available at [http://www2.timesdispatch.com/news/2009/mar/24/pros24\\_20090323-223024-ar-48533/](http://www2.timesdispatch.com/news/2009/mar/24/pros24_20090323-223024-ar-48533/).

187. Lynda Edwards, *Justice Systems Sent Reeling*, A.B.A. J., Jan. 2009, at 60, 61.

188. *Id.* at 61.

189. See, e.g., Malaika Fraley, *Overwhelmed Contra Costa Prosecutors Pained by Looming Furloughs*, CONTRA COSTA TIMES, Dec. 13, 2010, [http://www.contracostatimes.com/news/ci\\_16836846](http://www.contracostatimes.com/news/ci_16836846); Press Release, Elizabeth A. Egan, Fresno County District Attorney, Statement by the District Attorney to the Fresno County Board of Supervisors (June 22, 2010),



leads to fewer new prisoners incarcerated. Government officials who made these cuts must have considered that possibility and yet opted to make the cuts nonetheless. Even the Republican former governor of California recently criticized his state for spending too much on incarceration and too little on education.<sup>190</sup>

Voters might be less tolerant of expenditures on small-time victimless crimes if they understood the costs of prosecution, defense, and incarceration.<sup>191</sup> Even without a surge of voter support, some states have recently reduced budgetary strain from the penal system. Some states have extended good-time programs to allow for earlier release of certain offenders.<sup>192</sup> State legislatures in South Carolina and Utah have considered early release for thousands of inmates.<sup>193</sup>

Several states have eliminated or reduced mandatory minimum sentences for drug offenses.<sup>194</sup> Maine decriminalized possession of up to 2.5 ounces of marijuana, leaving a monetary fine as the only possible punishment.<sup>195</sup> Some of these reform measures have arisen in politically conservative states. Perhaps early release has gained traction even in these states because half of the people imprisoned in America have committed nonviolent crimes.<sup>196</sup> Perhaps it is because the fifty states

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[http://www.co.fresno.ca.us/uploadedFiles/Departments/District\\_Attorney/062210 - DA Egan Speaks to BOS About Budget Cuts.pdf](http://www.co.fresno.ca.us/uploadedFiles/Departments/District_Attorney/062210_-_DA_Egan_Speaks_to_BOS_About_Budget_Cuts.pdf) (speaking out against how budget cuts have forced the Fresno DA to reduce the size of her office); Becky Purser, *District Attorney's Office Not Immune from Furloughs*, MACON.COM, Mar. 30, 2009, <http://www.macon.com/2009/03/30/666154/district-attorneys-office-not.html#>.

190. Schwarzenegger, *supra* note 7.

191. A recent article contends that voters' support for tougher sentencing relies on voters' lack of awareness of costs. 2007 *California Criminal Legislation: Meaningful Change, or Preserving the Status Quo*, 13 BERKELEY J. CRIM. L. 97, 110–11 (2008). Fully informed voters might think differently.

192. Act of July 1, 2009, Act No. 266, 2009 La. Acts 2287; Act of Mar. 3, 2009, ch. 316, 2009 Miss. Legis. Serv. 58; Act of June 19, 2009, ch. 1251, 2009 Tex. Gen. Laws 3979.

193. Sullivan, *supra* note 98. California was judicially ordered to release inmates. Coleman v. Schwarzenegger, Nos. CIV S-90-0520, C01-1351, 2009 WL 2430820, at \*83–85 (E. & N.D. Cal. Aug. 4, 2009) (overcrowded prisons threaten rather than protect public safety), *enforced*, 2010 WL 99000 (E. & N.D. Cal. Jan. 12, 2010), *appeal docketed sub nom.* Schwarzenegger v. Plata, No. 09-1323 (U.S. Apr. 14, 2010), *and consideration of juris. postponed*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3413 (2010). The California legislature has complied. Act of Oct. 11, 2009, ch. 28, 2009 Cal. Stat. 4392.

194. Act of May 15, 2009, ch. 83, 2009 Minn. Laws 1024 (creating safety-valve from mandatory minimums); Act of Apr. 7, 2009, ch. 56, 2009 N.Y. Sess. Laws 128 (McKinney) (allowing for shorter sentences on drug crimes and expanding availability of substance abuse treatment programs to additional offenders); Act of Nov. 13, 2009, ch. 346, 2009-4 R.I. Gen. Laws Adv. Legis. Serv. 742 (LexisNexis) (eliminating mandatory minimum sentences for drug possession charges).

195. Act of Sept. 12, 2009, ch. 67, 2009 Me. Laws 138.

196. Gershowitz, *supra* note 16, at 52 (citing MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 1* (2006)).

spent a combined \$49 billion on corrections in 2008, an increase from less than \$11 billion twenty years earlier.<sup>197</sup> Maybe these expenditures are not worth the money to people from across the political spectrum. Based on these recent legislative actions, fully informed voters would probably not condone the current levels of spending on prosecution and incarceration.<sup>198</sup>

If fully informed voters began to show intolerance toward these massive prosecutorial and penal expenditures, the first push to lessen prosecution would likely target small quantity drug possession offenses.<sup>199</sup> Recent legislation supports that prediction. Kentucky passed a law diverting hundreds of drug offenders away from prisons and into treatment programs.<sup>200</sup> Similar programs are emerging in Kansas, Montana, and Pennsylvania.<sup>201</sup> Given this recent legislation and debates about the costs of incarceration,<sup>202</sup> many state legislators now seem to think that voters would rather spend less money incarcerating drug offenders.

Yet voters are hardly going to wish for, or even tolerate, the non-prosecution of murders or violent crimes with identifiable victims, despite the costs of these prosecutions. As one article explained it, “When a habitual rapist is locked up, the streets are safer. But the same is not necessarily true of petty drug-dealers . . . .”<sup>203</sup> Because they seem to present the least societal harm, small quantity drug possession cases

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197. Simpson, *supra* note 3.

198. Butler argues that massive incarceration expenditures are one reason why voters should care about the frequency with which we imprison people. BUTLER, *supra* note 61, at 34 (implying that voters care about the costs and opportunity costs of criminal law enforcement spending).

199. Attempting to predict which crimes would be less often prosecuted relies on the notion that “[t]here is indeed core agreement on ranking which offenders deserve the most punishment.” Bibas, *supra* note 11, at 982. Admittedly, this is less than an exact science.

Nonetheless, this prediction relies on the dramatic increase in incarceration of drug offenders over the past 30 years. “The number of people in jail and prison for drug violations increased from 50,000 in 1980 to almost 500,000 today.” Robert G. Lawson, *Drug Law Reform—Retreating From an Incarceration Addiction*, 98 KY. L.J. 201, 201 (2010) (quoting Ethan A. Nadelmann, *Criminologists and Punitive Drug Prohibition: To Serve or to Challenge?*, 3 CRIMINOLOGY & PUB. POL’Y 441, 442 (2004)). “[D]rug offenders constituted 20% of state prison inmates in 2006 and 52% of federal prison inmates in 2008.” THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2010), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_factsAboutPrisons\\_Dec2010.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_factsAboutPrisons_Dec2010.pdf).

200. Sullivan, *supra* note 98; Act of Mar. 24, 2009, ch. 96, 2009 Ky. Acts 1072, 1072 (“WHEREAS, over 80 percent of the persons involved in the Kentucky Criminal Justice System are there as a result, either directly, or indirectly of drug abuse.”).

201. Sullivan, *supra* note 98.

202. *Id.*

203. *Too Many Laws, Too Many Prisoners*, *supra* note 61, at 26.

provide the most likely target for decreased prosecution. Such small quantity drug possession offenders represent a substantial number of those currently incarcerated.<sup>204</sup>

Allocating prosecutorial resources away from small-time drug offenders could also reduce racial disparity in the criminal justice system. Because drug crime incarceration more disproportionately impacts African-Americans than does incarceration for other crimes,<sup>205</sup> prosecuting fewer drug crimes could lessen this disparity. In some neighborhoods, like Phoenix's South Mountain, fewer prosecutions of small-scale drug offenders could mean significant changes. Almost an entire generation of men from this nine-block residential area is incarcerated, costing nearly \$11 million per year.<sup>206</sup> As one neighborhood activist said, "It's sad but we have men who are over 35 and we have young people under 17. . . . The ones in between are missing."<sup>207</sup>

Fewer drug related prosecutions, convictions, and incarcerations could also result in more parents free to raise their children. "There is little evidence that we are winning the war on drugs this way but a great deal of evidence that we are destroying the lives of thousands of people."<sup>208</sup> A staggering number of children—1.7 million—had a parent

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204. At the end of 2006 (the year of the most recent statistics available from the Bureau of Justice Statistics), drug offenders comprised approximately 20% of state prison inmates. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2008, at 37 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>. In New York, in 2005, drug offenders represented 35.7% of the prison population. Weissman, *supra* note 2, at 249.

205. See SABOL ET AL., *supra* note 204, at 37 (stating that African-Americans comprise 44.2% of state prison inmates incarcerated on drug charges but only 36.7% of state prison population incarcerated on other charges as of year-end 2006).

206. Fields, *supra* note 181.

207. *Id.*

208. Weinstein, *supra* note 102, at 98. A recent article aptly recognized the tremendous non-monetary costs of what the author calls the "War on Prisoners," including the indirect costs on inmates' dependents. Haney, *supra* note 162, at 88–90. The author expounds on these very human costs:

The sheer number of people who have been touched by the experience of imprisonment is enormous. They are the direct and collateral casualties of the War on Prisoners that we have waged. For example, there are over one million people who come out of our prisons and jails each year, as a slightly larger number enters them. . . .

In addition to the enormous number of people who go in and out of our prisons each year, and the unprecedented number that languish for long sentences inside, there are numerous relatives and loved ones—including many children—who are directly impacted by their incarceration. They, too, struggle with the financial, familial, and interpersonal instability brought about by the incarceration of persons close to them. Personal, social, and economic resources are stretched thin as families, government agencies, and community organizations struggle to fill the void created by incarceration and to absorb the consequences of prisoners' eventual transition back into the neighborhoods where they once lived.

in prison as of July 1, 2007.<sup>209</sup> That number represents a 79% increase from 1991 to 2007.<sup>210</sup> Moreover, drug offenders (particularly men) more frequently have children than most other offenders.<sup>211</sup> Children of incarcerated parents suffer tremendous difficulties.<sup>212</sup> These hidden costs of prosecution cannot be adequately monetized by a market, but they nonetheless merit voter and prosecutor consideration.<sup>213</sup> For these reasons, mandatory disclosures could return parents to their children's lives.

Fewer prosecutions of small-scale drug offenders need not mean drug amnesties. Rather, alternative sentences might strike a better cost-benefit balance.<sup>214</sup> One alternative method is that adopted by Hawaii Judge Steven Alm. Instead of long delays after a probation violation, Judge Alm revokes probation and locks up violators immediately for a shorter time.<sup>215</sup> Immediate incarceration has led to 80% fewer violations.<sup>216</sup>

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*Id.* at 89–90. More direct consequences attach to the inmates. *Id.* at 107 (“[M]ost prisoners cannot leave the psychic scars of these experiences miraculously behind them upon release, just as most people cannot simply chose [sic] to set aside the aftereffects of damaging, traumatic events.”); *Id.* at 111 (“The stress of prison overcrowding likely interacts with and amplifies the pre-existing problems that prisoners may bring into the prison setting. For example, we know the risk factors and various forms of trauma that predispose persons to a range of psychological problems (including substance abuse, criminality, and violence), are prevalent in the pre-prison lives of incarcerated men and women.”).

209. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>; Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice (Aug. 26, 2008). These are the most recent statistics available from the Bureau of Justice Statistics.

210. GLAZE & MARUSCHAK, *supra* note 209, at 1.

211. *Id.* at 4 (“Among male state prisoners, violent (47%) and property (48%) offenders were less likely to report having children than public-order (60%) and drug (59%) offenders. . . . For women held in state prison, violent (57%) offenders were less likely than drug (63%), property (65%), and public-order (65%) offenders to be a mother.”).

212. Attorney General Eric Holder, in a 2009 speech, discussed some of these difficulties. Eric Holder, Att’y Gen., Attorney General Eric Holder at the Fatherhood Town Hall (Dec. 15, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091215.html> (“And we know that children of incarcerated parents suffer from: the physical and emotional separation; the stigma associated with having a parent detained; the loss of financial support; and the disruption caused by introducing new caregivers into a child’s life, no matter how well meaning those caregivers may be. As a result, children of incarcerated parents often struggle with anxiety, depression, learning problems, and aggression, undermining their own chances of future success.”).

213. Haney’s recent article explained the long-term consequences that children of prisoners face. Haney, *supra* note 162, at 124.

214. See Brown, *supra* note 16, at 326. Missouri judges are now able to attempt to strike a better cost-benefit balance at sentencing because they now have available information comparing the costs of various sentencing options for a particular defender. Davey, *supra* note 47.

215. Sullivan, *supra* note 98.

Immediacy of consequences bolsters effectiveness, and the program saves money because of the shorter incarceration.<sup>217</sup> It provides a clear efficiency improvement by decreasing marginal cost and increasing marginal benefit.<sup>218</sup> But without a well-informed populace, there are no political pressures for genuine social efficiency, and thus our justice system may not move toward a more efficient allocation of resources.

Other alternatives to incarceration include drug courts or diversion programs focused on monitoring and treatment rather than long-term incarceration.<sup>219</sup> One such program is the DIVERT Court in Dallas, Texas, where first-time offenders accept greater monitoring in a rehabilitative program in exchange for avoiding a conviction.<sup>220</sup> Statistical evidence shows the efficiency improvements of DIVERT Court over traditional incarceration. Recidivism is 68% lower than in the

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216. *See id.*

217. *See id.*

218. *See id.*

219. The Center for Court Innovation estimates that there are 2500 problem-solving courts in the U.S. Eileen Libby, *Watch What You Ask For*, A.B.A. J., Apr. 2009, at 24. Similar programs have gained popularity in Taiwan recently, where prosecutors can defer prosecution conditioned on compliance with certain obligations. Margaret K. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT'L L. 651, 676 (2009). This Taiwanese practice, placing the deferred prosecution decision in the hands of the prosecutor rather than a judge, was modeled after a similar Japanese practice and is used in approximately 13% of cases. *Id.* at 676–78.

A Canadian study concluded:

[P]lacing low-risk offenders in often overcrowded high-security facilities resulted in high rates of reincarceration. The rates were significantly higher than those of comparable low-risk offenders who had been placed in halfway houses. The researchers concluded that the failure to properly divert low-risk offenders from high- to low-security facilities—something that overcrowded prison systems often lack the capacity to do—“may actually increase the risk of future recidivism.”

Haney, *supra* note 162, at 120 (quoting James Bonta & Laurence L. Motiuk, *The Diversion of Incarcerated Offenders to Correctional Halfway Houses*, 24 J. RES. CRIME & DELINQ. 302, 311–12 (1987)). In addition to the psychological consequences, increased recidivism also results from medical conditions developed during incarceration in an overcrowded penal system and negative employment consequences resulting from long-term removal from the workforce and the stigma of conviction. *Id.* at 119, 122. If our incarceration choices cause more crime, see BUTLER, *supra* note 61, at 46; Pritikin, *supra* note 61, at 1091, then broad reconsideration of the cost-benefit analysis underlying these choices is necessary.

Bibas considers the flourishing of such alternative programs as “reflecting the public’s willingness to soften enforcement.” Bibas, *supra* note 11, at 990. That may be true, but they also evidence a public concerned about *effective* law enforcement.

220. DIVERT stands for Dallas Initiative for Diversion and Expedited Rehabilitation and Treatment. Wade Goodwyn, *Texas Court Aims to ‘Divert’ First-Time Offenders*, National Public Radio (Aug. 15, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=93614135>.

traditional Texas criminal courts.<sup>221</sup> Every dollar spent in DIVERT Court saves nine dollars in future costs.<sup>222</sup> Moreover, without such programs, Texas correctional facilities would be bursting even further at the seams. There were 157,000 inmates in Texas prisons in August 2008.<sup>223</sup> Without changes to the level of incarceration, 17,000 more beds will be necessary in the next year and a half.<sup>224</sup> With wider adoption of alternative programs like DIVERT Court nationally, significant improvements in both costs and benefits of criminal law enforcement are possible, alleviating long-term financial strain on states. DIVERT Court is one of eighty problem-solving courts in Texas. If these programs can find support in the law-and-order state of Texas, it is hard to imagine that the American crime-control ethos might hinder wider adoption of such programs elsewhere.

Drug courts follow a similar model to Texas's DIVERT Court but focus on drug offenses.<sup>225</sup> These drug courts provide a more effective alternative to the traditional venue for the war on drugs.<sup>226</sup> Graduates of the Chesterfield/Colonial Heights drug court in Virginia have a recidivism rate six times lower than similarly situated offenders not in the drug court program.<sup>227</sup> Similar results would likely hold true across the country if criminal law enforcement shifted more toward monitoring and rehabilitation for less serious offenses. Even for those students who

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221. *Id.* Perhaps this recidivism rate is lower partly because DIVERT Court participants are first-time offenders, but that fact does not seem to account for the entire disparity. Rather, there is good reason to think that imprisoning nonviolent offenders increases recidivism. *See* BUTLER, *supra* note 61, at 46 (“What the War on Drugs means is that we’ve taken nonviolent offenders, exposed them to violent ones, and then reintroduced them to our communities. . . . [P]rison serves to transmit violent habits and values rather than to reduce them.”); Pritikin, *supra* note 61, at 1054–55.

A study by the New York City Criminal Justice Agency showed that participants in alternatives to incarceration programs “were significantly less likely to be rearrested than people who received jail sentences.” Weissman, *supra* note 2, at 243 (2009). Only 41% of alternative program participants were “rearrested, compared to fifty-three percent of people released from jail.” *Id.*

222. Goodwyn, *supra* note 220.

223. *Id.*

224. *Id.*

225. A drug court is a “special court given responsibility to handle cases involving drug-addicted offenders through extensive supervision and treatment programs. . . . Rather than focusing only on the crimes drug offenders commit and the punishments they receive, drug courts attempt to address and solve the underlying causes of addiction.” Frederick G. Rockwell III, *The Chesterfield/Colonial Heights Drug Court: A Partnership Between the Criminal Justice System and the Treatment Community*, 43 U. RICH. L. REV. 5, 7–8 (2008).

226. Several studies have concluded that participating in drug courts reduces recidivism. *See id.* at 16.

227. *Id.*

participate in but do not graduate from the Chesterfield/Colonial Heights program, the rate of subsequent conviction drops significantly.<sup>228</sup>

Thus, incarcerating fewer drug offenders need not mean loss of crime control. To the contrary, implementing alternative programs such as Judge Alm's probation revocation system, Texas's DIVERT Court, and the Chesterfield/Colonial Heights drug court into the law enforcement system could result in significant efficiency gains because costs would decrease while benefits increased. Yet without public pressure to save money and reduce recidivism, government officials have little motivation to increase the use and visibility of these programs at risk of appearing soft on crime.

Mandatory cost disclosures could also result in fewer death penalty prosecutions because death penalty cases are expensive.<sup>229</sup> North Carolina could have saved \$21.6 million had it abolished the death penalty for fiscal years 2005 and 2006.<sup>230</sup> In tight economic times, some jurisdictions tend not to seek the death penalty in all but the most heinous cases.<sup>231</sup> That trend has proven true recently on a national level.<sup>232</sup> New Mexico recently repealed its death penalty statute, and Maryland has strictly limited its use of the death penalty.<sup>233</sup>

If prosecutors are forced to internalize the cost of public counsel in their charging decisions because voters have access to that cost information, prosecutors may view retained counsel cases as relatively cheaper than appointed counsel cases. Prosecutors might then choose at the margins to prosecute defendants who can afford counsel because those cases would look cheaper on their disclosure forms. Such incentive might alleviate the pervasive equity concern in criminal law that defendants get as much justice as they can afford.<sup>234</sup>

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228. Non-graduates were convicted of 250% fewer offenses than were similarly situated offenders outside the program. *Id.*

229. One recent estimate calculates the cost as at least \$3 million per case. Martin Kaste, *Opponents Focus on Cost in Death Penalty Debate*, NAT'L PUB. RADIO (Apr. 1, 2009), <http://www.npr.org/templates/story/story.php?storyId=102570588>.

230. Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498, 526 (2009).

231. Ratcliffe, *supra* note 153.

232. Kaste, *supra* note 229.

233. *Id.*

234. This concern stands in stark contrast to the eighteenth-century English system in which poor criminals had an advantage over wealthy ones because they were judgment proof. Friedman, *supra* note 24, at 490. Moving away from a system where wealthy defendants are less likely to face incarceration would be a clear improvement from a Rawlsian perspective because a person behind the veil of ignorance would not know whether she would be rich or poor and would thus hope for equal justice for those two populations. See JOHN RAWLS, A THEORY OF JUSTICE 10–15 (rev. ed.

While it is difficult to precisely predict the practical results that may follow from mandatory cost disclosures, a more informed public will instill greater efficiency concerns within prosecutors' offices and promote greater accountability. Rather than bringing small drug possession cases through the expensive, traditional prosecutorial system that so frequently requires more spending on incarceration, this Article hypothesizes that there is a greater place in America for alternative programs that show promise for improving efficiency in criminal law enforcement. Although there is room to question whether the American people would tolerate a lower prison population and fewer traditional prosecutions, recent state legislative action to modify these traditional approaches seems to indicate that we would.<sup>235</sup>

## CONCLUSION

Voters currently have woefully insufficient information about their local prosecutors when they vote in prosecutor elections. Perhaps voters hear a television ad reciting an overall conviction rate or read about a high-profile case in the news media, but having these few data points is a far cry from being thoroughly informed about concrete prosecutorial priorities and resource expenditures. This lack of information defeats the purpose of vesting the people's prosecutorial authority in an elected official because there is no meaningful political check on the official's exercise of that authority. Moreover, absent this check, prosecutors have an incentive to consider only their own internal costs in determining whether to file charges, what charges to file, and what sentences to later recommend. If voters knew the full costs of criminal prosecution, such as public defender expenses and prison costs, prosecutors would feel compelled to internalize these costs when making cost-benefit decisions. Accordingly, mandatory cost disclosures would improve the efficiency of prosecutorial resource allocation and return sovereign authority over criminal prosecution to the people. These disclosures could also help control the cost explosion in state penal systems yet allow legislators to avoid being branded with the toxic "soft on crime" label.

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1999). Although most do not subscribe to this strict Rawlsian conception of justice, it seems quite likely that most Americans do nonetheless consider disparity between the amount of legal fairness afforded to rich and poor an injustice.

235. It bears reiterating here that prosecutors are not solely to blame for the current state of criminal law enforcement. *See supra* note 8. Nonetheless, this Article has focused on their decision-making processes as the last clear chance to halt the criminal justice mechanism.



Prosecutorial discretion is necessary in our current system but should be employed to serve the people's law enforcement preferences. Returning to a criminal justice system in which voters have meaningful authority over what crimes are prosecuted in their names requires a strengthened political check that is possible only when prosecutors disclose the costs and details of their work to their constituents.