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Article

## Why the Policy Failures of Mass Incarceration Are Really Political Failures

John F. Pfaff<sup>†</sup>

### INTRODUCTION

In his new book, *The Insidious Momentum of Mass Incarceration*, Franklin Zimring tackles one of the biggest policy issues in the United States today: how can we effectively scale back our outsized reliance on incarceration? As his title suggests, Zimring is not particularly optimistic that we *can*, at least not in the short term. He argues that outcomes in a few states, such as California, suggest that large-scale shifts are possible if people *want* them, but that as a general matter the public is fairly content with high levels of incarceration, and that there are few if any ways to really change people’s “hearts and minds” on the issue.<sup>1</sup>

That said, Zimring is not content to simply throw up his hands in despair, but commendably tries to see if there are policy fixes we can implement that can rein in mass incarceration, even if the political will for punishment remains high. Zimring chooses to focus on a serious policy failure that I have elsewhere called the “prosecutorial moral hazard” problem.<sup>2</sup> Put simply,

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<sup>†</sup> Professor of Law, Fordham University School of Law. Copyright © 2020 by John F. Pfaff.

1. See FRANKLIN E. ZIMRING, *THE INSIDIOUS MOMENTUM OF MASS INCARCERATION* (forthcoming 2020) (manuscript ch. 5 at 17, ch. 8 at 18) (on file with author). He is skeptical even of how far California is willing to go. *Id.* (manuscript ch. 5 at 23). While by 2017 California’s prison population had dropped by 25% from its 2006 peak, that 2017 population (~130,000) was still over six times larger than its 1978 population (21,000). See E. Ann Carson & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Prisoners*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=nps> [<https://perma.cc/4H5T-VM7N>] (providing a dynamic tool showing changes over time in California’s prison population).

2. See JOHN PFAFF, *LOCKED IN* 54 (2017).

prosecutors are county officials who have the ability to draw on state resources—namely, the state-funded prison system—without having to take into account any of the costs they impose on the state. Like any moral hazard problem, this leads to overuse. His decision to focus on this defect is surely tied to the fact that his home state of California has experienced the largest declines in prison populations since 2010, due in no small part to being the only state to directly confront this moral hazard problem.

I am certainly sympathetic to the argument Zimring is putting forth here; I've argued myself that we should work to close off this moral hazard problem. But I lack Zimring's confidence that such reforms would be relatively easy for state legislatures to adopt (they weren't in California); I'm concerned that even if adopted, local officials could easily subvert them (as California shows). And I think he understates both the plausibility and the efficacy of more-local reform efforts, particularly the rise of the so-called "progressive prosecutor." The politics of punishment *are* changing, and in important ways that Zimring undersells.

A common theme ties my critiques here together. Zimring views mass incarceration primarily as a *policy* failure, while I believe that it is important to frame it first and foremost as a *political* or *ideological* failure. It is hard to fix a policy failure when that failure is aligned with the prevailing ideology—as is the case with the prosecutorial moral hazard problem in particular and mass incarceration more broadly. And while perhaps not true in all areas of policy, at least when it comes to mass incarceration and mass punishment policy, fixes without ideological shifts will likely be easy to subvert and upend.

#### I. THE BACKSTORY: PROSECUTORIAL MORAL HAZARD AND CALIFORNIA'S SOLUTION

Although we often talk about our "criminal justice system," it is a misleading phrase. It suggests, by using "system" in the singular, that what we have is a unified institution working to achieve some coherent set of goals. This is manifested, for example, when reformers say things along the lines that "the system isn't broken, it's doing what it was designed to do."

What we have, however, is not a system but a set of systems—plural—that span city, county, state, and federal governments, and which have been haphazardly—and often ineptly—strung together into some sort of legal Rube Goldberg machine we call the "Criminal Justice System." And one major cog in this sprawling, ill-designed set of systems is the prosecutor. There

are approximately 2,200 prosecutor offices nationwide, almost all of which operate at the county level, and almost all of which rely on that county's electorate to vote for its chief district attorney.<sup>3</sup> While the specifics of funding for prosecutors vary from state to state, by and large the county that elects them pays for them as well; in 2005, counties contributed over 80% of district attorney budgets, with nearly one-third of all offices funded entirely by the county.<sup>4</sup>

Prosecutors have nearly unfettered discretion about whether to charge people with crimes at all, and what crime to charge them with if pushing forward with a case. And given how expansive—and expansively written—our criminal codes are, prosecutors often have a remarkably wide range of choices to pick from when charging a defendant, including whether to charge a lower-level misdemeanor or a higher-level felony.<sup>5</sup> Misdemeanors are usually punishable by no more than one year behind bars, with the time served in a county jail, while felonies are generally defined as at least one year, to be served in state prison.

This is where the moral hazard problem arises. Being harsher by charging the felony isn't just better politics—even in our reformist period, being tough on crime remains relatively politically safe—but is fiscally *cheaper*. Jail terms increase the costs borne by the county, and it is county officials who set the prosecutor's budget. Prison sentences, on the other hand, are

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3. See *Prosecutors Offices*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=27> [<https://perma.cc/68CH-82XY>]. There are fewer prosecutor offices than counties (of which there are 3,142) because in some states prosecutors represent multi-county judicial districts. District attorneys are elected by their districts in 46 states. District attorneys are appointed in three states (Alaska, Connecticut, and New Jersey), and in Delaware the state-elected attorney general is also officially the district attorney for the state as a whole.

4. See STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PROSECUTORS IN STATE COURTS, 2005* (July 2006), <https://www.bjs.gov/content/pub/pdf/psc05.pdf> [<https://perma.cc/3L9N-K2HM>]. Unfortunately, 2005 is the last year for which there is clear data from the BJS, an all-too-common problem with criminal justice data. See John Pfaff, *How Zombie Crime Stats, Phantom Stats and Frankenstats Paint a Misleading Picture on Crime*, APPEAL (Mar. 1, 2018), <https://theappeal.org/how-zombie-crime-stats-phantom-stats-and-frankenstats-paint-a-misleading-picture-on-crime-fddb2c2070cd/> [<https://perma.cc/4H5T-VM7N>].

5. A given act may violate the statutes for attempted manslaughter, aggravated assault, and reckless endangerment. The first could be a serious felony, the last merely a misdemeanor. A prosecutor is free to charge all three or to pick just one (or none), subject to no review outside of periodic elections.

paid for by the state-level department of corrections, and thus have no impact on local budgets. Harsher, for the prosecutor, is cheaper.

This moral hazard problem helps explain some of the more persistent and problematic defects we see in our criminal justice system(s). It is clear from the data, for example, that policing deters crime far more than tougher sentences: people respond much more to the certainty of punishment than its severity.<sup>6</sup> Yet our common response to shockingly-low “clearance” rates (the fraction of reported crimes that result in an arrest) is to push for tougher *sanctions*, not more policing or enforcement.<sup>7</sup> This errant focus makes more sense in light of the moral hazard problem, which applies to local policing as well. Cities already spend something on the order of one-fourth to one-third of their budgets on policing—hiring more police is fiscally challenging, but calling for tougher prison sentences is a “free” way to still appear tough on crime.<sup>8</sup>

Zimring’s proposal, then, is to figure out how to make local government actors—here, county prosecutors—pay attention to the costs they impose on the state. This was how California responded to recent demands that it cut its prison populations. Since 1991, California had been embroiled in federal litigation over conditions in its overcrowded prisons, and in 2009 the Ninth Circuit Court of Appeals ordered that California cut its prison population to reduce its capacity usage from nearly 200% to 137.5%.<sup>9</sup> California responded in 2011 by adopting Assembly Bill 109, the “2011 Realignment Legislation Addressing Public

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6. See, e.g., Daniel S. Nagin, *Deterrent Effects of the Certainty and Severity of Punishment*, in *DETERRENCE, CHOICE, AND CRIME* 157 (Taylor & Francis eds., 2018).

7. Senator Tom Cotton (R-Ariz.) made this point explicitly when he opposed the federal First Step Act. He pointed out, correctly, that our clearance rates are very low, and then used that point to argue—less convincingly—that that meant our incarceration rate was too *low*, not too *high*. See Nick Gass, *Sen. Tom Cotton: U.S. Has ‘Under-Incarceration Problem,’* POLITICO (May 19, 2016), <https://www.politico.com/story/2016/05/tom-cotton-under-incarceration-223371> [<https://perma.cc/3Z2N-BKEU>].

8. See Niall McCarthy, *How Much Do U.S. Cities Spend Every Year on Policing*, FORBES (Aug. 7, 2017), <https://www.forbes.com/sites/niallmccarthy/2017/08/07/how-much-do-u-s-cities-spend-every-year-on-policing-infographic/#46a1740de7b7> [<https://perma.cc/ZD6B-MB49>].

9. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P (E.D. Cal. Sept. 15, 2008).

Safety,” which generally goes by the name “Realignment.” Realignment is a sprawling, complicated law, but two aspects of it are central to the discussion here. First, it greatly restricted the ability of local governments to send those on parole or serving probation sentences back to state prison. And second, it instructed that people classified as “triple-nons”—people convicted of non-violent, non-serious, non-sex *felony* offenses—could not be sent to state facilities, but had to serve their time at the *county* level.<sup>10</sup>

The immediate impact of Realignment was significant. During its first year, the state prison population fell by about 30,000 people.<sup>11</sup> After that, however, the prison population held steady until three years later, when an unrelated reform proposition led to another sharp drop. Nonetheless, that 30,000 decline was substantial: between 2010 and 2015, the decline in *just* the state of California was responsible for about *half* the net decline in prison populations *nationwide*.<sup>12</sup> Counties suddenly had to pay for prisoners, and suddenly . . . fewer people went to prison.

This seemingly optimistic outcome is what motivates Zimring’s central policy recommendation here. But as I will show in the sections ahead, there are real reasons to be wary of how likely states are to adopt Realignment, and how successful it would be if adopted, absent broader ideological shifts. We cannot escape the issue of hearts and minds.

## II. THE TRICKY FINANCES AND POLITICS OF REALIGNMENT

My first concern with Zimring’s proposal is that he is too optimistic about the chances that other states will adopt Realignment-like policies. He never provides any real discussion about the politics of adopting such a law, instead just asserting that it could be done as a “simple two-step”: first change the fiscal in-

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10. For specifics on exactly which crimes fall within the triple-non category, see CAL. PENAL CODE § 1170(h) (West 2020).

11. See Magnus Lofstrom & Steven Raphael, *Prison Downsizing and Public Safety: Evidence from California*, 15 CRIM. & PUB. POL’Y 349, 352 (2016).

12. E. ANN CARSON, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/PF6S-WNTE>]; PAUL GUERINO ET AL., U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONS IN 2010 (2011), <https://www.bjs.gov/content/pub/pdf/p10.pdf> [<https://perma.cc/G4NH-P77D>].

centives prosecutors face, and then the local prosecutors' behavior will change accordingly.<sup>13</sup> As we will quickly see, neither part of this two-step is simple at all. In this section, I want to point out why we should expect significant resistance from legislators who have tolerated—if not benefited from—the moral hazard problem for decades.

In fact, California itself is a clear cautionary tale. It did not eagerly seek out Realignment, but had to be brought to it kicking and screaming. California struggled against oversight for nearly twenty years before the Ninth Circuit order compelled them to cut prison capacity to 137.5%, and then the state fought the order up to the Supreme Court, adopting Realignment in 2011 only after its narrow 5–4 loss before the Court in *Brown v Plata*.<sup>14</sup>

That it fought the Ninth Circuit order so aggressively is telling, because by the time that court imposed the order, California was openly admitting that the conditions in its prisons were simply inhumane. During the course of the litigation over the order, the state acknowledged that overcrowding so overtaxed the prisons' health care facilities that one person in prison died from an otherwise-preventable death every six or so days: an annual preventable death toll of sixty people, at a time when the nation as a whole was executing only about forty people per year.<sup>15</sup> In fact, that inexcusable death count surely played a major part in California's defeat in *Plata*. It is remarkably hard these days for people in prison to sue in federal court, thanks to restrictions put in place by the Prison Litigation Reform Act (PLRA). The dissenters in *Plata*, in fact, felt that the PLRA should have blocked the prisoners' claims, despite the lethality of California's prisons, but the majority argued that California's prisons were simply too deadly.<sup>16</sup>

All of which is to say: California grudgingly adopted Realignment under intense political pressure, pressure that other states are far less likely to experience. If nothing else, it seems unlikely that federal courts will be able to force other states to follow in California's footsteps. As of 2017, only two states' capacity-use rates came close to the 137.5% line barely upheld in

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13. ZIMRING, *supra* note 1 (manuscript ch. 8 at 19).

14. *Brown v. Plata*, 563 U.S. 493 (2011).

15. *See id.* at 505 n.3; TRACY L. SNELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2017: SELECTED FINDINGS (2019), <https://www.bjs.gov/content/pub/pdf/cp17sf.pdf> [<https://perma.cc/6D2Z-9WVM>].

16. *Plata*, 563 U.S. at 550 (Scalia, J., dissenting); *id.* at 565 (Alito, J., dissenting).

*Plata*, and at most one was close to the 200% rate that triggered the 137.5%-ruling in the first place.<sup>17</sup> Given the barriers put in place by the PLRA, if states are going to adopt Realignment-like policies, the political pressure is going to have to come from within, not without.

And there are several reasons to think that state legislatures will not feel that necessary pressure to change, and in fact may actively oppose any such efforts. To start, there is little fiscal incentive to act, as recent state behavior (perhaps somewhat surprisingly) indicates. Despite the enormous fiscal impact of the 2008 credit crisis, and despite the austerity-laced rhetoric that has infused debates about criminal justice reform since then, states actually spent *more* on prisons in 2015 and 2016, at least in nominal terms, than ever before; spending did decline a bit from 2010–2013, but it has been rising since.<sup>18</sup> Real spending on prisons is down a bit, but it too has been rising in recent years, and it was higher in 2016 than it was in 2005.<sup>19</sup> As a share of total state expenditures, correctional spending has declined somewhat, but only a bit: from 3.6% of all direct spending in 2005 to 2.9% of all direct spending in 2016.<sup>20</sup> All told, it is a story of relative stability.

That the austerity talking points have shown up in rhetoric far more than in practice is not so surprising, once we realize how relatively *little* states spend on corrections. At only about

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17. To be clear, *Plata* did *not* argue that there was any Eighth Amendment significance to a capacity-use rate of 137.5%. It simply upheld the Ninth Circuit panel's imposition of such a line. *See id.* at 544–45. The two states with the highest capacity-use rates in 2017 were Alabama (at 167%) and Delaware (at 150%), although the Bureau of Justice Statistics measures capacity in two different ways, and only Delaware had a use rate above 100% (at 110%) using the more generous definition. *See* JENNIFER BRONSON & E. ANN CARSON, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/Z7KA-ZRDL>].

18. All fifty states spent about \$49 billion on prisons in 2016, a 6.5% increase from its nadir of \$46 billion in 2010. In nominal terms, spending in 2016 is 20% higher than it was in 2005, when it was about \$38 billion, and about 2% higher than its peak in 2009 at \$47.8 billion. Data are from the Census Bureau's Annual Survey of State and Local Government Finances, available on-line at *Annual Survey of State and Local Government Finances*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/gov-finances/data/datasets.2016.html> [<https://perma.cc/3L3U-YH5M>].

19. In 2005 dollars, spending in 2016 was down around 8% from its 2009 peak, but it had risen by about 3.5% since hitting its low in 2013. Compared to 2005, real prison spending in 2016 was up by over 3%. *See id.*

20. *Id.*



3% of state spending, even deep cuts to corrections will not change the fiscal bottom line all that much. So as long as there are other reasons to keep that spending high—and there are—it seems unlikely that there will be much countervailing pressure to rein it in.

And when we look at *why* spending on corrections has been rising, even after the credit crunch, we immediately see a major political barrier to Realignment. A major factor pushing up spending has been wages. Even though prison *staffing* has fallen along with declines in prison populations, to such an extent that the officer-prisoner ratio has stayed almost constant since 2010, total real spending on employment has risen significantly, by about 16%.<sup>21</sup> This payroll spending in turn creates a strong base of resistance when it comes to Realignment.

While prison jobs are often quite unpleasant, with shockingly high rates of PTSD and suicidal ideation,<sup>22</sup> they are also often among the few well-paying jobs in the relatively remote places where states have often built most of their prisons.<sup>23</sup> Legislators with prisons in their districts are unlikely to want to jeopardize what could be one of the few well-paying jobs in the area. The desire to protect those jobs surely rises with the size of the payroll, especially in times when outside employment likely remains weak in many of these communities.

Moreover, in most states, legislators in rural districts *without* prisons also have a strong incentive to resist policies that will cut prison populations to any significant degree. In forty-two states, people confined to prisons count as “living” in those prisons for the purposes of drawing legislative districts, even though they are not allowed to vote.<sup>24</sup> Given that people in prison are disproportionately people of color from urban areas, and that

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21. John Pfaff (@JohnFPfaff), TWITTER (Aug. 21, 2018, 3:12 PM), <https://twitter.com/JohnFPfaff/status/1031997397960941569> [<https://perma.cc/2LJG-MDFX>].

22. John F. Pfaff, *Locked Up*, BAFFLER (July 2019), <https://thebaffler.com/salvos/locked-up-pfaff> [<https://perma.cc/DS7H-32FD>].

23. See, e.g., JOHN M. EASON, *BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION* (2017).

24. In two states, Maine and Vermont, people in prison are counted as living in the prison but are allowed to vote. In six states—Delaware, California, Maryland, New York, Nevada, and Washington—people in prison are counted (or will count at the next Census) as living in their last known address (and cannot vote while incarcerated). That means in the remaining forty-two states, people in prison “live” in their prisons but cannot vote. John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 *FORDHAM U. L.J.* 571, 588–89 (2018).

prisons tend to be disproportionately located in more rural places, this counting practice, widely known as the “prison gerrymander,” effectively transfers Democratic-leaning voters to Republican-leaning districts while denying them the franchise.<sup>25</sup> It is, in many ways, a *five-fifths* compromise.

In other words, *all* Republican legislators have a strong incentive to resist a policy like Realignment, which by requiring people to serve prison terms in local jails would shift people away from more Republican districts and put them in more Democratic ones, thus undermining the Republican Party’s overall state strength. One study of Pennsylvania, for example, found that undoing the gerrymander there would likely mean that four rural districts would suddenly have too few people to satisfy equal-representation laws, and the new maps would likely create at least one or two new majority-minority districts in Philadelphia, which would likely flip those seats (and possibly a few others) from Republican to Democratic.<sup>26</sup> (Tellingly, the only states to reverse the prison gerrymander have done so when the Democrats have controlled both chambers of the legislature and the governor’s mansion.)<sup>27</sup>

So why would any Republican politician undermine the gerrymander—especially when the prisons are providing not just votes but jobs, and the overall fiscal costs are pretty slight?

None of this means that Realignment is impossible, or that it is not a fight worth having. But as this section shows, Zimring’s efforts to separate out the “easy” policy fixes from the “hard” political work of changing hearts and minds elides the fact that the policy defects exist *because of* their partisan *politi-*

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25. *Id.* at 589.

26. Jonathan Lai, *How ‘Prison Gerrymandering’ Shifts Political Power from Urban Pennsylvanians of Color to White, Rural Ones*, PHILA. INQUIRER (July 11, 2019), <https://www.inquirer.com/politics/pennsylvania/prison-gerrymandering-pa-2021-redistricting-census-20190725.html> [<https://perma.cc/7Q98-964C>]; Brianna Remster & Rory Kramer, *SHIFTING POWER: The Impact of Incarceration on Political Representation*, CAMBRIDGE CORE (Apr. 16, 2019), <https://www.cambridge.org/core/journals/du-bois-review-social-science-research-on-race/article/shifting-power/3C54A4F45E8E7129B1AEFCB0B7B15432> [<https://perma.cc/VF8R-GWFK>]. As of 2019, the Republicans have a 110–98 majority in the House; just switching two seats shifts that to 108–100, and switching four would nearly flip control, at 106–102.

27. John Pfaff (@JohnFPfaff), TWITTER (Oct. 31, 2019, 11:36 PM), <https://twitter.com/JohnFPfaff/status/1189944193411616768> [<https://perma.cc/B47V-TS2R>].

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*cal* appeal. Tellingly, no state has followed in California's footsteps in any real sense, despite the fact that the state adopted Realignment nearly a decade ago. Given all the fiscal-austerity rhetoric in criminal justice today, that silence is telling.

### III. THE LIKELY LOCAL SUBVERSION OF REALIGNMENT

If "reducing mass incarceration" is to mean anything, it must mean reducing the number of people in all types of cages, not just the specific sort that we call "prisons." So for Realignment to succeed, by almost any sense of that term, it must be that it leads to fewer people in both prisons *and* jails, not just prisons.<sup>28</sup> So it is worth asking how local officials will in fact react to cost internalization: will they incarcerate fewer people, or will they spend more money (and perhaps cut other services) to ensure that lots of people still spend time behind bars? The evidence, such as it is, is mixed.

California's own experience with Realignment provides, once again, an important cautionary tale. Over the first year of Realignment, state prison populations fell by slightly less than 30,000, at which point things leveled out until the state adopted Proposition 47 a few years later, which was an unrelated reform that led to a second decline in prison populations. Yet over that same three-year period between the implementation of Realignment and the passage of Prop 47, average daily jail populations in the state grew by 10,000—thus offsetting nearly one-third of Realignment's impact on prison populations.<sup>29</sup>

These partially-offsetting trends suggest that while local governments may not wish to offset state declines at a one-to-one ratio, they are certainly willing to expend additional resources to preserve *some* of decarceration brought about by Rea-

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28. It is, of course, possible to support Realignment without seeking out decarceration. It is perfectly consistent to argue that incarceration is an acceptable policy, but counties should have to pay for it themselves. It is also possible to argue that my definition of "cages" is too small. Everything from electronic monitoring to denying certain people employment opportunities can be seen as ways that the criminal justice system "cages" people. Here, however, I will just focus on prisons and jails.

29. MAGNUS LOFSTROM & BRANDON MARTIN, PUB. POLICY INST. OF CAL., PUBLIC SAFETY REALIGNMENT: IMPACTS SO FAR (2015), <https://www.ppic.org/publication/public-safety-realignment-impacts-so-far/> [<https://perma.cc/H54B-L5RU>].

lignment-like reforms, and that the total prison-plus-jail population in a state that follows in California's lead will decline by less than the simple take on California's prisons suggests.<sup>30</sup>

One risk with Realignment-like policies, then, is that local governments may cut other services to fund the increase in local incarceration costs. Here, too, experiences in California illuminate the risk. Capital cases do not implicate the prosecutorial moral hazard to nearly the same degree as any other type of crime, because a much bigger chunk of the cost of a capital case is the prosecution itself. And in some cases, counties in California appear to have made steep cuts to everything else to maintain their ability to bring these sorts of capital charges:

In Sierra County, California authorities had to cut police services in 1988 to pick up the tab of pursuing death penalty prosecutions. The County's District Attorney, James Reichle, complained, "If we didn't have to pay \$500,000 a pop for Sacramento's murders, I'd have an investigator and the sheriff would have a couple of extra deputies and we could do some lasting good for Sierra County law enforcement. The sewage system at the courthouse is failing, a bridge collapsed, there's no county library, no county park, and we have volunteer fire and volunteer search and rescue." The county's auditor, Don Hemphill, said that if death penalty expenses kept piling up, the county would soon be broke. Just recently, Mr. Hemphill indicated that another death penalty case would likely require the county to lay off 10 percent of its police and sheriff force.<sup>31</sup>

This is a clear reminder that it is impossible to divorce policy from politics: if the ideology remains unchanged, people will work around whatever changes they face. The framing here is particularly worth paying attention to. The district attorney does not say that he is choosing to file the capital charges that are pushing his county towards bankruptcy, but rather that these legal costs are just somehow inevitable and unavoidable; and, importantly, not in need of any real justification.

Tellingly, there is already evidence that local governments are spending a significant amount on local jail construction in California. Partly this reflects the persistence of an ideological

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30. ZIMRING, *supra* note 1 (manuscript ch. 2). Zimring acknowledges this offset, but describes it using an index graph that makes it hard to see the magnitude by which jail populations appear to have replaced prison ones.

31. Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 1, 1994), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/millions-misspent-what-politicians-dont-say-about-the-high-costs-of-the-death-penalty#the-financial-costs-of-the-death-penalty/> [https://perma.cc/V5Y5-BDVC].

commitment to prisons and jails, but it comes with an important twist that points to another way local officials will work to undermine Realignment. It turns out that the counties were able to quickly cut back on at least some of Realignment's financial bite. In the wake of adopting Realignment, the state government provided the counties with millions of dollars in aid to help build out jails, starting from \$400 million in the first nine months, and rising to over \$1 billion by 2013.<sup>32</sup> During this time, in 2012, the voters in California adopted Proposition 30, which among other things wrote some of these subsidies into the state constitution; as of 2018, these permanent subsidies come to about \$1.3 billion.<sup>33</sup> To put that in perspective, the entire annual budget for the California Department of Corrections and Rehabilitation is about \$12 billion.<sup>34</sup>

So, on the one hand, perhaps the prison-to-jail shift seen in California would be less prevalent in a state that imposed Realignment but eschewed the subsidies. On the other hand, perhaps the lesson from California is that local governments will be effective at lobbying the state to help bail them out.

It is important, however, to not oversell this last concern. California had to be forced by the Ninth Circuit to impose significant cuts in its prison populations; given the lack of volition on California's part, perhaps it is not surprising that Sacramento was willing to help local governments continue to lock people up. A state that adopted Realignment-like policies more voluntarily may be less willing to continue to preserve mass incarceration at the local level.

Still, any sort of Realignment policy has to confront the clear willingness on the part of all levels of government—city, county, and state—to commit significant resources to locking people up,

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32. MIA BIRD & JOSEPH HAYNES, PUB. POLICY INST. OF CAL., *FUNDING PUBLIC SAFETY REALIGNMENT* tbl.1 (2013), [https://www.ppic.org/content/pubs/report/R\\_1113MBR.pdf](https://www.ppic.org/content/pubs/report/R_1113MBR.pdf) [<https://perma.cc/Y8SH-E27W>].

33. For some background on Prop 30, see CAL. DEP'T OF FIN., 2011 PUBLIC SAFETY REALIGNMENT AND PROPOSITION 30, at 2 (2011) <https://www.cdss.ca.gov/cdssweb/entres/pdf/2011RealignmentProp30.pdf> [<https://perma.cc/T3D3-P3PQ>]. For current allocations, see, for example, RURAL CTY. REPRESENTATIVES OF CAL., *GOVERNOR'S 2018-19 PROPOSED BUDGET: THE RURAL RUNDOWN* (2018), [https://www.rcrcnet.org/sites/default/files/useruploads/Documents/Resources/Misc/RCRCAnalysis\\_2018\\_19\\_ProposedBudget.pdf](https://www.rcrcnet.org/sites/default/files/useruploads/Documents/Resources/Misc/RCRCAnalysis_2018_19_ProposedBudget.pdf) [<https://perma.cc/H49T-DYCP>].

34. *Budget Information: CDCR's Budget for Fiscal Year 2018-2019*, CAL. DEP'T OF CORR. & REHAB., <https://www.cdcr.ca.gov/budget/> (last visited Mar. 22, 2020).

and to criminal justice more broadly. Cities, for example, already dedicate a significant portion of their budgets to policing, often on the order of one-quarter to one-third.<sup>35</sup> Counties are likely willing to dedicate significant spending to criminal justice as well—perhaps even more so, given that county governments tend to be more conservative than city ones. All of which suggests that they may often be willing to cut other spending to maintain their jail populations, at least on the margin.

#### IV. ONE POLICY TRAP: THE COMPLICATED ECONOMICS OF VIOLENCE

Zimring also overstates the ease of designing an internalization policy, even if the politics of doing so were straightforward. Here, once again, California itself provides a useful warning. California's Realignment did not require that local jails house *all* people convicted of state felonies, just the non-violent, non-sexual, non-serious "triple-nons." It's a limitation that could make sense, but needs to be unpacked a little bit.

On the one hand, it appears to defeat much of the goal of Realignment. In California, about half of all people admitted to prison are admitted for violence, and over 70% are admitted for homicide, physical or sexual assault, robbery, burglary, or firearms.<sup>36</sup> If you look at those serving long sentences (those in the top 10% of time served), over 95% nationwide are in for *serious* violence, and in California something close to half are in *just for homicide*.<sup>37</sup> Nationwide, our incarceration rate *just* for those convicted of homicide and sex offenses is roughly the same as the all-crimes incarceration rates almost anywhere else in the world.<sup>38</sup> There will be no fundamental, radical change in incarceration rates, in California or the U.S. more broadly, unless we

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35. See McCarthy, *supra* note 8. Of course, given the complicated nature of intergovernmental transfers and obligations, those high percentages may reflect in part that the city simply isn't responsible for major expenditures. New York City's share to policing is lower than most places, for example, in part because it has control over more aspects of its spending than many places do.

36. *California's Prison Population*, PUB. POLICY INST. OF CAL., <https://www.ppic.org/publication/californias-prison-population/> [https://perma.cc/J2Q3-PD57].

37. *Demographics: The Unequal Burden of Long Prison Terms*, URBAN, <https://apps.urban.org/features/long-prison-terms/demographics.html> [https://perma.cc/Y767-A3FB]; John Pfaff, (@JohnFPfaff), TWITTER (July 20, 2017, 10:01 AM) <https://twitter.com/JohnFPfaff/status/888051281381687296?s=20> [https://perma.cc/Z2HU-CJK3].

38. Pfaff, *supra* note 22.

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cut the number of people admitted for violence and the amount of time they spend behind bars. And these are the very crimes that Realignment *excludes* from internalization.

Yet there is a certain logic to Realignment's exclusions. Communities that suffer from elevated levels of violence often suffer from a wide range of other adverse social outcomes as well, such as poverty and poor public health.<sup>39</sup> In fact, the relationship between these can be highly endogenous: poverty can lead to violence and crime, but violence itself contributes to the poverty by, say, reducing employment and educational opportunities. Perhaps we don't *want* to force poorer counties with higher rates of violence *and* other social challenges to have to shoulder even more of the cost of reducing crime. Perhaps we *want* wealthy suburbs and cities to subsidize poorer areas that struggle with a host of challenges.

In other words, the problem is more complex than just "there's a moral hazard," because, to some extent, the moral hazard could be a form of desirable cross-subsidization. Perhaps the issue is more about *how* the counties have exploited the moral hazard, or about the sort of moral hazard problem we have created. If poorer counties had free access to state-funded hospitals and "over-used" them, thereby reducing higher infant mortality rates, I doubt we'd see people pushing to shut off access. And so perhaps the goal should be less about bluntly focusing on how to make counties internalize costs, and more about figuring out how to make sure that what we are subsidizing is something more effective and humane than prisons. And to be fair, Realignment did try to do some of this, by encouraging (but not requiring) counties to build out treatment rather than cells. But the shift in *how* money is spent rather than *who* is spending it is something that deserves far more attention than it's gotten.

## V. THE POTENTIAL OF PROGRESSIVE PROSECUTORS

Finally, I want to address head-on Zimring's skepticism about progressive prosecution. Zimring's concern is really one about bottom-up solutions more broadly: we need the state to fix things from the top, he argues, because we cannot expect the local governments to fix things from the bottom. As he clearly states: "bottom up strategies of attitude change are probably

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39. See, e.g., Graham C. Ousey, *Crime Is Not the Only Problem: Examining Why Violence & Adverse Health Outcomes Co-Vary Across Large U.S. Counties*, 50 J. CRIM. JUST. 29, 30 (2017).

both unnecessary and inefficient. It is much easier to alter power relations and incentives in criminal case dispositions than to change hearts and minds . . . .”<sup>40</sup> Of course, as I have been arguing so far, that argument glosses over the question of *why* state officials with unchanged hearts and minds would change things in the first place, or why recalcitrant local officials would not undermine those changes as soon as they were adopted.

Here, however, I want to tackle this claim from the opposite direction: not to argue that changing hearts and minds is *necessary*, but that it is also *feasible*, and in fact is already underway, and perhaps working more efficiently than we could expect from top-down reforms. I think there are two key missteps to how Zimring characterizes progressive prosecution that leads him to significantly understate its efficacy. First, and less important, he mischaracterizes what prosecutors in fact are doing. Second, and more important, his political model of criminal justice reform overly homogenizes the electorate in ways that lead his analysis astray.

To begin, his description of prosecutors and how they see their jobs is somewhat peculiar. He views them as bloodthirsty and uncontrollable, in literally animalistic terms. He starts by saying that: “In adversarial systems of criminal justice, the public prosecutor is *supposed to* emphasize the guilt of those they rightfully accuse of crime and the importance of severe punishment in the achievement of retributive and utilitarian objectives.”<sup>41</sup>

There is certainly some truth to this claim. But Zimring then goes further, to completely absolve prosecutors of any responsibility for making such choices. “Other officials and other legal institutions,” he continues, “are supposed to counteract the hard-line sentiments of prosecutors to bring balance to the system . . . . Why blame only prosecutors for acting just as we expect prosecutors to act . . . ?”<sup>42</sup>

To drive the point home, he then equates prosecutors to predatory coyotes who kill unfenced sheep, and he argues that to blame prosecutors for mass incarceration is like blaming the coyotes, not the ranchers who didn’t build fences. “The coyotes . . . were behaving just like coyotes always behave when

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40. ZIMRING, *supra* note 1 (manuscript ch. 8 at 18).

41. *Id.* at 21.

42. *Id.* at 18.



sheep are freely available, and this could not have come as a surprise to the sheep ranchers. Fences were expensive but available.” He concludes this analogy by asking, “Who was most at fault?”<sup>43</sup>

That’s easy. The prosecutors. Just because I leave my house unlocked does not in any way absolve the burglar for *choosing* to break in. And prosecutors are people who make choices, not wild animals driven purely by instinct and the scent of blood.

But let’s leave aside the remarkable moralistic problems with this argument.<sup>44</sup> Even as an *empirical* claim, Zimring’s take is deeply problematic. Rather than bloodthirsty coyotes, William Stuntz describes prosecutors in far more nuanced terms:

Prosecutors are not like civil plaintiffs: they are not paid by the conviction, with bonuses for each additional month the defendant spends in prison. [Thus] extra months in prison are not like marginal dollars in civil cases. Once the defendant’s sentence has reached the level the prosecutor prefers . . . adding more time offers no benefit to the prosecutor. Indeed, prosecutors may actually value “extra” prison time negatively. . . . A civil plaintiff has the incentive to take every dollar he can, just as the defendant wishes to pay as little as possible. In criminal cases, one of the two parties is like that: the defendant almost always prefers freedom to incarceration and less incarceration to more. The prosecutor’s utility function, though, is much more complicated.<sup>45</sup>

Stuntzian prosecutors, unlike Zimringian ones, have much greater potential for reform. And I believe that Stuntz’s model of prosecutors is the more accurate one.

Now, to be fair, there surely are some prosecutors out there who are more Zimringian than Stuntzian, but it is important to think about *where* those prosecutors might be, and what that geography means for the possibility of bottom-up reforms. This brings us to the second problem with Zimring’s take on progressive prosecution.

There are two recent trends in the geography of mass incarceration that deserve attention, one that Zimring notes but the other that he does not. The first, which he does point out, is that the “national” decline in prison populations is actually just a decline in about half the states. Only twenty-six states were holding fewer people in prison in 2016 than in 2009, and over 35% of

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43. *Id.*

44. Although please do not take my silence as acceptance. Zimring is excusing prosecutors from taking responsibility, an excuse prosecutors would never offer a defendant charged with a far less serious crime than “causing mass incarceration.”

45. William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554 (2004).

the decline in those twenty-six states was just California; nearly 60% of the nation's decline occurred in just the five biggest-declining states (California, New York, Texas, New Jersey, and Connecticut).<sup>46</sup>

The second trend, however, which Zimring does not examine, is the more important. Outside of just a few states (one of which is, admittedly, California), even these state declines were not really *state* declines, but rather were *urban-county* declines. Mass incarceration has not been immune to the urban-rural fragmentation that runs through so many different aspects of life and policy these days. As a general matter, higher-population counties are now sending fewer people to prison while smaller counties are sending more, and what looks like a state decline (or increase) is usually a case in which the more urban counties declined by more (or less) than the more rural ones rose.<sup>47</sup>

In other words, much of the decline, at least outside of California, has in fact been the product of non-state, local-government, bottom-up change in high-population counties. A clear example of this is New York State, which, unlike California under Realignment, did not experience a sharp one-year decline followed by stasis, if not growth, but rather witnessed the longest and largest sustained prison decline in modern U.S. history. Between 2000 and 2016, New York prisons shrunk by over 22,000 people, a decline of over 30%. California's decline from 2010–2012 was numerically bigger, at just over 30,000, but in percentage terms it was barely half the New York decline, at 18%.<sup>48</sup>

Yet New York's was not a *state* decline. In fact, by 2011, most counties in the state were sending *more* people to prison than they had in 2000—only twelve of the state's sixty-two counties saw declines, and in half those counties the decline was fewer than 200 people. But four of those counties were the four biggest counties of New York City, which collectively cut the number of residents in prison by over 19,000.<sup>49</sup> In other words, New York

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46. Carson & Mulako-Wangota, *supra* note 1.

47. Josh Keller & Adam Pearce, *A Small Indiana County Sends More People to Prison than San Francisco and Durham, N.C., Combined. Why?*, NY TIMES (Sept. 2, 2016), <https://www.nytimes.com/2016/09/02/upshot/new-geography-of-prisons.html> [<https://perma.cc/2W9X-4EZW>]; Pfaff, *supra* note 22.

48. Carson & Mulako-Wangota, *supra* note 1.

49. *New York Prison Population*, DEMOCRAT & CHRONICLE, <http://rochester.nydatabases.com/database/new-york-prison-population> [<https://perma.cc/PG5J-927M>]. Staten Island's prison population declined as well, but by fewer than 200 people, which comprised under 1% of the City's total decline. *Id.*

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*State* did not experience a push towards decarceration over the 2000s; New York *City* did, and did so without any meaningful policy changes.<sup>50</sup> It was the decisions by four local prosecutors (and one city police department) to change how they charged people in response to New York's steady decline in crime. New York's remarkable success was almost entirely a bottom-up, not top-down, enterprise.

Another feature of New York's success demands attention as well. Unlike California, New York reduced its prison population gradually. The largest single-year decline, from 2000–2001, was 2,700 people, and the average annual decline was only 1,305—the state simply maintained that decline for sixteen years, with modest declines every year except 2007. That stands in sharp contrast to California, in which Realignment led to a sharp one-year drop followed by . . . not much. This seems to be a pattern that emerges from top-down legislative fixes: there are big immediate declines followed by stability. New York, however, suggests that bottom-up shifts may lead to more fundamental transformation, if perhaps at a slower rate.

The lesson from New York and elsewhere—that urban counties are decarcerating while rural counties incarcerate—thus illuminates the second limitation with Zimring's approach, which is that not all hearts and minds are the same. As we will see, the progressive prosecutor movement is less about changing hearts and minds, and more about giving voice to more-urban, more-minority voters: those whose hearts and minds are not the same as more punitive, rural White voters, but whose say has been historically curtailed.

Yet this is not at all how Zimring describes the progressive prosecutorial movement, however, and what he says is surprisingly dismissive. He states:

Changing hearts and minds of prosecutors one at a time is what can be called a "bottom up" reform strategy of reform [sic], a combination of legal ethics curriculum and a course in empirical criminology to create what would be from the reformers' perspective, a better class of prosecutor in thousands of county criminal courts in the United States.<sup>51</sup>

This description is both remarkably condescending and inaccurate. Progressive prosecution efforts have focused far less on

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50. John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 217 (2014). There were some reforms to the state's harsh Rockefeller Drug Laws, but the impact of these reforms on prison populations appears to be slight. *See id.*

51. ZIMRING, *supra* note 1 (manuscript ch. 8 at 18).

tweaking educational practices in law schools, and far more on investing millions of dollars and thousands of hours into finding progressive-leaning candidates and then hitting the ground to mobilize previously-disinclined voters in extensive get-out-the-vote campaigns, as well as on educational campaigns aimed at voters to help them understand the oft-overlooked power prosecutors wield.<sup>52</sup>

Tellingly, the biggest progressive prosecutor successes have been in urban counties, such as Larry Krasner in Philadelphia, PA, Rachael Rollins in Suffolk County, MA (Boston), Kim Foxx in Cook County, IL (Chicago), Chesa Boudin in San Francisco, CA, and Eric Gonzalez in Kings County, NY (Brooklyn), although recently we have seen successes in more suburban counties as well, such as the wave of reform-leaning commonwealth attorneys elected in Virginia in November of 2019.<sup>53</sup> This urban clustering should not surprise us, especially when we take into account the populations that these get-out-the-vote programs focused on.<sup>54</sup> Both crime and punishment tend to be disproportionately concentrated in larger counties, which means a greater fraction of their residents are keenly aware of the costs—both in terms of excessive punishment and inadequate responses to violence—that come with overly-harsh prosecutorial practices. There was little need to change hearts and minds here. If anything, what the progressive prosecutor movement has done is mobilize those whose hearts and minds were already different to ensure that their political voice is heard.

Contrast this with state legislatures, where non-urban voices are far louder. Cities may still have a large share of the legislative voice, but they will nonetheless be required to negotiate with more-punitive suburban counties and distinctly more punitive rural ones. No such negotiation is required when electing the local prosecutors. And as we saw above, there are very good reasons for state legislatures to resist passing the laws that Zimring describes as being easy to adopt.

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52. Benjamin Wallace-Wells, *The A.C.L.U. Is Getting Involved in Elections—And Reinventing Itself for the Trump Era*, NEW YORKER (June 8, 2018), <https://www.newyorker.com/news/news-desk/the-aclu-is-getting-involved-in-elections-and-reinventing-itself-for-the-trump-era> [https://perma.cc/2FE8-8S4Z]; *Hey: Meet Your DA*, ACLU OF CAL., <https://meetyourda.org/> [https://perma.cc/T8NY-ELBN].

53. Alex Yablon, *The Suburbs Aren't Scared of Criminal Justice Reform*, SLATE (Feb. 7, 2020), <https://slate.com/news-and-politics/2020/02/virginia-suburbs-progressive-prosecutors.html> [https://perma.cc/XKU4-DHUE].

54. See, e.g., Wallace-Wells, *supra* note 52.

And while the push for progressive prosecution has not stretched that much into rural America (although there were some gains even there in November of 2019), shifts in urban counties can have outsized effects. In 2007, the last year for which the Bureau of Justice Statistics provided reliable data, the top 1% of counties in terms of population processed over 25% of felonies cases, and the top 10% processed almost 60%.<sup>55</sup> Those numbers may have declined a bit since 2007, as urban counties have embraced reforms and smaller counties have not, but given how densely clustered the U.S. population is as a whole, the general pattern surely still holds.

### CONCLUSION

Zimring's new book is right to highlight the importance to mass incarceration of rather mundane, technocratic, and bureaucratic systems that are easily overlooked. The death penalty and fifty years for a minor drug conviction are fascinating cocktail-party conversation topics; moral hazard problems that arise from implicit intergovernmental transfers are... not. Yet it is often these far more invisible defects that play major roles, and Zimring does a service to shine light on one of the more significant ones.

Unfortunately, when he turns to how to correct the problem, he makes two important missteps. First, he substantially understates the complicated politics of the problem. The moral hazard problem has persisted for years not because legislators and prosecutors and corrections officials were simply unaware of it, but because it was—and remains—politically *beneficial* to many of them. Getting them to undo it will not be easy. Second, by adopting a state-level perspective, he overlooks that significant variation across counties *within* a state, which leads him to overstate how hard bottom-up reforms are.

A final observation demonstrates why these two important errors are so significant. Since California grudgingly adopted Realignment under intense Federal scrutiny, *no* other state has enacted this “easy” top-down reform. Yet during the same time, many counties across the country have succeeded in pulling off the “hard” bottom-up reform of electing progressive prosecutors.

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55. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES 1 tbl.1, 5 tbl.4 (2011) <https://www.bjs.gov/content/pub/pdf/psc07st.pdf> [<https://perma.cc/NN85-ZZWM>].

To be clear, I am not saying that the moral hazard problem is irrelevant, nor that the politics of fixing it are impossible so we shouldn't even try. But it is critical to understand why adopting Realignment-like laws will be hard, in order to figure out how to approach the politics of such reforms. And it is important that we take a both-and, not either-or, perspective on top-down vs. bottom-up reforms.