

UCLA

UCLA Criminal Justice Law Review

Title

Reducing Mass Incarceration Through Cost Salience: Why Juries Should Be Told the Cost of Incarceration

Permalink

<https://escholarship.org/uc/item/0tw4h5qp>

Journal

UCLA Criminal Justice Law Review, 5(1)

Author

Conklin, Michael

Publication Date

2021

DOI

10.5070/CJ85154809

Copyright Information

Copyright 2021 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

REDUCING MASS INCARCERATION THROUGH COST SALIENCE: Why Juries Should Be Told the Cost of Incarceration

Michael Conklin*

Abstract

One of the flaws in the operation of the criminal justice system is not only the failure to be attentive to cost, but an arrogance that somehow you can never put a price on justice.¹ Even if incarceration provides significant benefits, the sober realization that it comes at a significant cost has been long missing from judge and jury decisionmaking.²

Table of Contents

INTRODUCTION	104
I. EXISTING POLICIES INCENTIVIZE MASS INCARCERATION	107
II. REFUTING ARGUMENTS AGAINST INCARCERATION-COST SALIENCE... 108	
A. <i>Irrelevance of Cost</i>	108
B. <i>Legislature is the Proper Place for Incarceration Costs to Be Considered</i>	109
C. <i>Jurors Lack the Information to Make Decisions About Nuanced Cost Factors</i>	111
D. <i>Unfairly Stacks the System in Favor of the Defense</i>	111
E. <i>Would Lead to More Sentencing Disparities</i>	115
III. ADDITIONAL BENEFITS OF INCARCERATION-COST SALIENCE.....	117
IV. RESEARCH METHODOLOGY	118
V. RESEARCH RESULTS AND DISCUSSION	120
A. <i>Gender</i>	121

* Powell Endowed Professor of Business Law, Angelo State University.

1. Monica Davey, *Missouri Tells Judges Cost of Sentences*, N.Y. TIMES (Sept. 18, 2010), <https://www.nytimes.com/2010/09/19/us/19judges.html> [<https://perma.cc/95A7-WP-KZ>] (quoting Ohio State University law professor Douglas A. Berman).

2. *Id.*

B. Age	122
C. Political Affiliation	122
D. Race	124
VI. FUTURE RESEARCH	125
CONCLUSION	125
APPENDIX	125

Introduction

Judges and juries in certain jurisdictions should consider the cost of incarceration in their sentencing. Doing so is consistent with the goals of the criminal justice system, and the arguments against the practice do not hold up under scrutiny.³ Furthermore, the practice of judges considering incarceration cost has been shown to reduce mass incarceration.⁴

Some states like Texas allow juries to decide the sentence of a convicted defendant.⁵ This provides an opportunity for such juries to consider incarceration at sentencing. This Article advocates for incarceration-cost salience among both juries and judges involved in sentencing a defendant. The same benefits that are present when judges can consider incarceration cost would also be present when juries are afforded the same information. The case for jury incarceration-cost salience is even stronger because there are additional benefits incurred when juries consider cost that are not present when only judges engage in the practice.⁶ Arguing for juror incarceration-cost salience may seem extreme, given that most judges are not even provided imprisonment costs to consider. However, as this Article explains, the practice is both practical and ideal. Some district attorneys have even been advocating for juror incarceration-cost salience.⁷

3. See *infra*, Part II.

4. *Infra* note 21.

5. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (West 2019) (“[I]n other cases where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury”); See Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004) (“Today, in six states, felons convicted by juries are routinely sentenced by juries [including Virginia,] Kentucky, Missouri, Arkansas, Texas, and Oklahoma”).

6. For example, it will lead to a populace that is more informed regarding the costs of incarceration. Juror incarceration-cost salience also provides cover for politicians who are afraid of being labeled “soft on crime.” This is because reductions in sentencing that result from jury incarceration-cost salience are directly attributable to decisions of citizens, not any politician.

7. Samantha Michaels, *Should Judges Have to Weigh the Price Tag of Sending Someone to Prison?*, MOTHER JONES (Jan. 8, 2020), <https://www.motherjones.com/crime-justice/2020/01/judges-cost-incarceration-district-attorney-biberaj-krasner-boudin> [<https://perma.cc/6YY2-L7SW>] (mentioning the examples of Buta Biberaj, Larry Krasner, and Chesa Boudin).

The claims made in this Article in favor of juror incarceration-cost salience are supported by empirical research. This Article reports the findings of a first-of-its-kind study conducted to measure how incarceration-cost salience would affect jury sentencing. The results are also analyzed at the demographic level to further illuminate potential motivating factors behind juror decisionmaking. The results indicate that—across nearly all demographic factors—incarceration-cost salience results in reduced sentences. Furthermore, the results indicate that jurors consider incarceration costs as only one of many factors.

The need for this common-sense reform is more evident now than ever before. There is currently widespread agreement that the criminal justice system over-punishes,⁸ which results in rare, bipartisan support for reducing mass incarceration.⁹ With the drastic budgetary issues faced by states due to the COVID-19 pandemic,¹⁰ the cost savings from reductions in incarceration are desperately needed.¹¹ The change would be simple to implement, as incarceration costs are already documented.¹² With recent increases in murder rates,¹³ the benefits of incarceration-cost salience are highly prescient. Finally, when it comes to decreasing mass incarceration, jury incarceration-cost salience is likely a more palatable method for

-
8. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 188 (2017) (“Today, there is widespread agreement that America as a whole overpunishes.”).
 9. Davey, *supra* note 1 (“[Missouri’s policy of informing judges of incarceration costs] has been lauded nationally by a disparate group of defense lawyers and fiscal conservatives, who consider it an overdue tool that will force judges to ponder alternatives to prison more seriously.”); Ryan W. Scott, *How (Not) to Implement Cost as a Sentencing Factor*, 24 FED. SENT’G REP. 172, 172 (2012) (“In many states, fiscal conservatives have joined forces with progressives to highlight the staggering economic and social costs of mass incarceration.”); Emily M. Grant, *Cost Conscious Justice: The Case for Wholly-Informed Discretionary Sentencing in Kentucky*, 100 KY. L.J. 391, 407 (2011) (explaining the “unlikely bedfellows” of defense lawyers and fiscal conservatives that have allied in support of informing judges of the cost of incarceration).
 10. *States Grappling with Hit to Tax Collections*, CTR. ON BUDGET & POL’Y PRIORITIES (Nov. 6, 2020), <https://www.cbpp.org/research/state-budget-and-tax/states-grappling-with-hit-to-tax-collections> [<https://perma.cc/KAH5-6QK6>] (explaining that COVID-19 has resulted in decreases in state tax revenues and increases in state expenses).
 11. Scott, *supra* note 9, at 172 (making the connection between state budgetary issues following the great recession of 2007–2008 and the 2010 Missouri Sentencing Advisory Commission [MOSAC] decision to inform judges as to the cost of imprisonment); SpearIt, *Economic Interest Convergence in Downsizing Imprisonment*, 75 U. PITT. L. REV. 475, 488 (2014) (explaining that cost savings is the main driving force behind criminal justice reform).
 12. See, e.g., *State-by-State Data*, SENT’G PROJECT, <https://www.sentencingproject.org/the-facts/#map> [<https://perma.cc/PQ7B-4RH7>].
 13. Jeff Asher, *Murders Are Rising. Blaming a Party Doesn’t Add Up.*, N.Y. TIMES (Sept. 28, 2020), <https://www.nytimes.com/2020/09/28/upshot/murders-2020-election-debate.html> [<https://perma.cc/J6DM-86H4>] (referencing how, after four straight years of violent crime decreases, murder rates increased in 2020).

politicians who fear being labeled “soft on crime.”¹⁴ This is because it indirectly decreases sentences and entrusts the citizenry with the decision.

The notion that sentencing decisions should be based in part on costs is nothing new. Jeremy Bentham—in the late eighteenth century—argued that governments should not implement punishments if they are ineffective, too expensive, or more expensive than suitable alternatives.¹⁵ Since the 1960s, economists have argued that the cost of incarceration should be considered when determining the ideal prison sentence.¹⁶

In 2010, the Missouri Sentencing Advisory Commission (MOSAC) made Missouri the first state to systematically provide incarceration costs in judges’ sentence advisory reports.¹⁷ This policy is aligned with MOSAC’s statutorily defined mission statement to “encourage rational use of correctional resources consistent with public safety.”¹⁸

Despite its novelty, this MOSAC policy is a modest one. It provides incarceration-cost information to judges but does not require the information to be considered in sentencing decisions.¹⁹ While the policy is not without its detractors, many legal experts have praised it.²⁰ The results in the Missouri criminal justice system illustrate that such praise is warranted. Information-cost salience for judges resulted in not only a decreased state prison population and corresponding decreased costs but also in a declining recidivism rate.²¹

Part I of this Article describes how existing policies incentivize mass incarceration. Part II provides the arguments that have been offered against incarceration-cost salience, accompanied by responses to these arguments. Part III provides additional support for incarceration-cost salience. Part IV presents the methodology for this research. Part V provides the results of the research overall and at the demographic level,

14. See, e.g., Maurice Chammah, *A Look at this Year’s Soft-on-Crime Attack Ads*, MARSHALL PROJECT (Nov. 1, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/11/01/a-look-at-this-year-s-soft-on-crime-attack-ads> [<https://perma.cc/D3JG-JVFZ>].
15. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 134–39 (Batoche Books 2000) (1781).
16. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968).
17. Chad Flanders, *Cost as a Sentencing Factor: Missouri’s Experiment*, 77 MO. L. REV. 391, 391–92 (2012); Davey, *supra* note 1 (“Legal experts say no other state systematically provides such information to judges . . .”).
18. *Details on Board of Commission*, MO. SENT’G ADVISORY COMM’N, <https://boards.mo.gov/userpages/Board.aspx?115> [<https://perma.cc/Q8UG-H8DA>]. Furthermore, incarceration-cost salience is consistent with MOSAC’s stated goal to “achieve a sentencing system that is fair, protects the public and uses corrections resources wisely.” *Purpose & Goals*, MO. SENT’G ADVISORY COMM’N, <https://www.courts.mo.gov/page.jsp?id=45401> [<https://perma.cc/QYC3-TUXE>].
19. Bierschbach & Bibas, *supra* note 8, at 228.
20. Davey, *supra* note 1.
21. Press Release, Missouri Sent’g Advisory Comm’n, Report Shows Missouri’s Use of Recommended Sentences Reduces Recidivism Rates, Prison Population (Oct. 15, 2007), <https://www.courts.mo.gov/file.jsp?id=45463>.

as well as a discussion regarding the relevance of these results. Part VI looks at future research that could be conducted regarding this subject. This Article concludes by summarizing the implications of this research. Finally, an Appendix with the complete language used in the survey for this research is provided.

I. Existing Policies Incentivize Mass Incarceration

The current cost structure of the criminal justice system creates a perverse incentive in favor of incarceration because state criminal cases are tried at the local (typically county) level, while felony incarceration costs are borne at the state level.²² This results in what commentators have accurately described as a “correctional free lunch.”²³ Further exacerbating this problem, the costs of imposing an alternative to incarceration—such as drug treatment or probation—are often borne at the local level.²⁴ This system allows for responsibility and accountability to be obscured.²⁵ And it allows law enforcement and prosecutors to diffuse the costs of their actions from the community level to the state level.²⁶

The significance of this “correctional free lunch” is illustrated by the drastic effects on incarceration when the incentives are restructured. For example, in 1996, California’s Juvenile Justice Realignment shifted the costs of juvenile incarceration from the state to the county level.²⁷ This resulted in counties having to pay up to \$2,600 per month to incarcerate a juvenile offender compared to the \$25 per month counties were paying.²⁸ Furthermore, the juvenile incarceration costs that counties were now responsible for depended upon the crime committed.²⁹ Counties only had to pay \$150 a month to incarcerate a juvenile for a serious offense, \$1,300 for a minor offense, and \$2,600 for a misdemeanor or parole violation.³⁰ This further incentivized counties not to incarcerate those guilty of less serious crimes. Counties responded to these incentives as expected. While juvenile arrests stayed constant, juvenile incarceration decreased dramatically.³¹ This is consistent with the basic economic notion that consumers of a good will overconsume it if the costs of their consumption are diffused among a larger group.³²

22. Michaels, *supra* note 7.

23. Bierschbach & Bibas, *supra* note 8, at 191–92, 219.

24. Michaels, *supra* note 7; Bierschbach & Bibas, *supra* note 8, at 190 (“The mish-mash of jurisdictions, agencies, and funding exacerbates agency costs.”).

25. Bierschbach & Bibas, *supra* note 8, at 190.

26. *Id.*

27. *Id.* at 196.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 197.

32. See Ryan Young, *Concentrated Benefits and Diffused Costs Explain the Persistence of Tariffs*, FOUND. FOR ECON. EDUC. (Sept. 15, 2018), <https://fee.org/articles/concentrated-benefits-and-diffused-costs-explain-the-persistence-of-tariffs> [<https://perma.cc/X7A6-KHV8>] (explaining the economic principle of

Additionally, politicians face strong incentives against the enactment of common-sense criminal justice reform. Namely, it is a potent political weapon to label one's opponent "soft on crime."³³ There is also a well-connected prison industrial complex with vested interests in maintaining the current status quo of mass incarceration.³⁴

II. Refuting Arguments Against Incarceration-Cost Salience

The position that incarceration-cost salience should be allowed for judges and juries is not without its detractors. The following are arguments against the practice, followed by a response.

A. Irrelevance of Cost

Those opposed to incarceration-cost salience claim criminal sentencing should be based only on what a defendant deserves, not on the cost of imprisonment.³⁵ "The cost of punishment is an irrelevant consideration when deciding a criminal's fate"³⁶ Even some judges have voiced their opinion that they do not want to know the cost of imprisonment out of fear that it would bias their sentencing.³⁷ Simply put, "[j]ustice isn't subject to a mathematical formula."³⁸

Regardless of empty assertions such as "you can't put a price on justice," the consideration of cost is inherently intertwined with the criminal justice system. No criminal justice system can operate independently of cost considerations. Prison guards will not volunteer to work for free, nor will construction companies volunteer to build new prisons for free. Such fiscal restraints on criminal justice were on display in *Brown v. Plata*, in which the U.S. Supreme Court ordered California to reduce its prison

"concentrated benefits and diffuse costs"). This same phenomenon is present in other areas of criminal justice. For example, some of the state and local law enforcement costs are subsidized at the federal level. Just like with incarceration costs, this incentivizes overconsumption. Bierschbach & Bibas, *supra* note 8, at 197.

33. Bierschbach & Bibas, *supra* note 8, at 194, 239–40. Consistent with the political principle that "if you're explaining, you're losing," it is easy to accuse a political opponent of being soft on crime, and such an accusation would require a lot of careful explaining to rebut.
34. SpearIt, *supra* note 11, at 477; Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (April 28, 2015, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about> [<https://perma.cc/LAQ7-KHQR>].
35. Scott, *supra* note 9, at 172–73 ("[S]ome scholars and prosecutors have suggested that cost ought to be irrelevant at sentencing because it bears no relation to the severity of the offense, the harm caused to victims, or the blameworthiness of the offender.").
36. Davey, *supra* note 1.
37. Michaels, *supra* note 7.
38. Douglas A. Berman, *Are Costs a Unique (and Uniquely Problematic) Kind of Sentencing Data?*, 24 FED. SENT'G REP 159, 159 (2012) (quoting a statement from Robert P. McCulloch).

population by almost 35,000 inmates. The Court found that prison overcrowding caused by the state's fiscal shortfalls violated inmates' Eighth Amendment rights.³⁹

Judges and juries already consider numerous systemic factors in crafting their sentences. These include respect for the law, just punishment, and public safety.⁴⁰ Courts are also authorized and well-suited to consider the impacts of mass incarceration at sentencing.⁴¹ Since the issue of incarceration cost is inseparable from the issue of mass incarceration, there is no logical explanation for why courts should be allowed to consider the latter and not the former.

Finally, deterrence is a widely recognized and legitimate consideration in sentencing decisions.⁴² The issues of deterrence and incarceration cost are intrinsically related. Public funds spent on incarceration are then unavailable for programs that deter crime, such as job training, diversion, mental health treatment, education, and addiction treatment.

B. *Legislature is the Proper Place for Incarceration Costs to Be Considered*

Detractors of incarceration cost salience further claim it is the responsibility of state legislatures—not judges and juries—to efficiently allocate funds in the criminal justice system. They theorize that judges are likely ignorant as to the intricate fiscal big picture that legislatures consider.⁴³ In *Gore v. United States*, the Supreme Court agreed that questions regarding the apportionment, severity, and efficacy of punishment are “peculiarly questions of legislative policy.”⁴⁴

But this claim is faulty because informing judges and juries as to the cost of imprisonment does not diminish their ability to meet sentencing objectives laid out by the legislature. To the contrary, sentencing objectives are enhanced by such a practice.⁴⁵ Furthermore, pointing out how

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

40. Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 447 (2013) (citing 18 U.S.C. § 3553(a)(2) (2006)).

41. *Id.* at 453 (noting that this consideration is allowed “under § 3553(a), which provides a framework for individualizing sentencing in light of systemic concerns”). The Supreme Court in *Pepper v. United States* reiterated the principle that sentencing courts have “wide discretion in the sources and types of [information used to determine their sentences].” *Pepper v. United States*, 562 U.S. 476, 488 (2011) (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949)).

42. Peter J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, 61 WAYNE L. REV. 27, 31 (2015) (“One of the primary justifications for imposing a prison term after a conviction is that it will deter both the defendant (called ‘special deterrence’) and those similarly situated (called ‘general deterrence’) from engaging in the future violations because the cost of committing a crime will exceed the benefit.”).

43. Flanders, *supra* note 17, at 398.

44. *Gore v. United States*, 357 U.S. 386, 393 (1958).

45. Lynn S. Branham, *Follow the Leader: The Advisability and Propriety of Considering Cost and Recidivism Data at Sentencing*, 24 FED. SENT’G REP. 169, 170 (2012).

legislatures are focused more on the big picture of criminal justice is also an argument in favor of incarceration-cost salience, not against it. State legislatures make broad budgetary decisions. They are not informed regarding every minute detail in every criminal trial. The judges and juries in those cases, however, are aware of the unique and nuanced aspects of the cases before them. Similarly, a state legislature is far less in tune with the local community interests than the judges and juries who live in those communities.⁴⁶

This critique is further misguided because legislatures commonly pass overbroad criminal justice legislation with the intention that most of the implementation issues will be delegated to those at the local level, such as police, prosecutors, and judges.⁴⁷ Expecting judges and juries to make sentencing decisions without considering the costs would be like asking prosecutors to make decisions on whom to prosecute with no consideration of the costs.

It is true that the Supreme Court held in *Gore* that the proper apportionment of punishment is “peculiarly [a] question[] for legislative policy.”⁴⁸ However, this was stated in the context of a case involving legislative intent.⁴⁹ The appellant was convicted of multiple violations, all from a single illegal drug transaction and was arguing that he was improperly charged with separate wrongdoings.⁵⁰ The case had nothing to do with the ability of a judge to consider the financial cost of incarceration. More recently in the case of *Mistretta v. United States*, the Supreme Court explicitly stated that “the sentencing function long has been considered a peculiarly shared responsibility among the Branches of government and has never been thought of as the exclusive constitutional province of any one Branch.”⁵¹

Finally, the attempt to draw a distinction between cost considerations by the legislature and those by judges and juries is largely irrelevant. The results of the study presented in Part V of this Article reveal that cost considerations are unlikely to have a drastic effect on sentencing outcomes. Additionally, judges and juries are bound by the sentencing guidelines set by the state legislature. Therefore, if state legislatures perceive that judges and/or juries are implementing sentences that have diverged from the legislature’s goals, they are free to alter the sentencing guidelines accordingly.

46. Bierschbach & Bibas, *supra* note 8, at 243 (discussing the “highly localist traditions” of localism in criminal justice and the importance of “local norms, lay input, and giving effect to the ‘conscience of the community’ in the administration of criminal justice”).

47. *Id.* at 190.

48. *Gore*, 357 U.S. at 393.

49. *Id.* at 393.

50. *Id.* at 387.

51. *Mistretta v. United States*, 488 U.S. 361, 390 (1989).

C. *Jurors Lack the Information to Make Decisions About Nuanced Cost Factors*

Another possible argument against incarceration-cost salience is the following: While judges generally have the experience and training to debate and consider incarceration costs, jurors often lack these necessary qualifications to make informed decisions regarding such complex calculations.

This argument fails to consider that the U.S. legal system places a great deal of trust in the ability of juries to consider far more complicated matters than the straightforward cost of incarceration. Juries make factual determinations based on competing and often contradictory witness testimony. They assess nuanced issues of DNA, blood-splatter analysis, and psychological evaluations. Juries are even sometimes entrusted with the determination of whether to execute a defendant. Meanwhile, through the passage of mandatory minimum sentencing laws, society allows legislators to make sentencing decisions on cases that have not yet even occurred. There is no logical explanation for why juries—who have intimate knowledge of the case before them—should not be allowed to consider the cost of incarceration. Finally, the adversarial system ensures that juries are exposed to arguments from both sides in informing any potential sentencing decisions.

D. *Unfairly Stacks the System in Favor of the Defense*

Another argument against incarceration-cost salience states that by allowing judges and juries to consider the cost of incarceration, an unjustifiable and significant advantage is provided to the defense over the prosecution.⁵² While incarceration costs are easy to quantify, counterbalancing costs to society for under-imprisonment—and the resulting increased crime—are more speculative and amorphous.⁵³ For example, what is the dollar value on the psychological costs to a citizen who was the victim of a crime because the perpetrator was not incarcerated? And exactly how much money does society spend on security guards, alarm systems, and increased policing due to high crime rates? If the costs of

52. Michaels, *supra* note 7 (“The presentencing reports [which included the cost of incarceration] made it harder for [prosecutors] to influence the narrative and the outcome of the case.”).

53. David S. Abrams, *The Prisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 918–20, 940 (2013) (referring to the determination of the costs of crime as the figure with “perhaps the greatest uncertainty” in criminal law cost-benefit analysis); Scott, *supra* note 9, at 173 (“[W]hile acknowledging the importance of cost considerations, some prosecutors and advocates for victims have expressed concern that information about punishment costs will be a distraction. Prison carries serious costs for the state, they agree, but so does crime. In some cases, a prison sentence might produce a net savings by preventing future crime, whether through incapacitation or deterrence. The concern is that giving judges exact projections of punishment costs risks over-emphasizing the costs and underemphasizing the benefits of imprisonment.” (citation omitted)).

incarceration are to be considered, then the costs of increased crime due to a lack of specific deterrence,⁵⁴ general deterrence,⁵⁵ and incapacitation⁵⁶ must also be considered.⁵⁷ Otherwise, considering only the costs of incarceration results in a biased, one-sided calculus favoring the defense.

But again, the argument above ignores the fact that judges and juries are already asked to weigh a number of nuanced, unquantifiable factors. There is no reason to assume that they would not be able to consider the rather straightforward, objective financial cost of incarceration in an unbiased manner. Informing judges and jurors of the cost of incarceration does not result in a ban on the consideration of counterbalancing costs, such as the cost to society of having a convicted felon who reoffends. Judges and juries remain free to consider these costs in their sentencing calculations. It is true that these costs are more amorphous and therefore more difficult to quantify than incarceration costs. It would make for a very odd principle to refuse to consider easily quantifiable costs, such as incarceration, because hard-to-quantify costs also exist.

Furthermore, these hard-to-quantify costs are not limited to the prosecution. Both under-incarceration and over-incarceration result in hard-to-quantify costs that need to be considered. Examples of such costs of mass incarceration include the dismantling of the family structure in minority communities,⁵⁸ negative consequences of increased stigma imposed on the spouse and children of the incarcerated,⁵⁹ increased risk of HIV infection in the offender,⁶⁰ and decreased average life span of the offender.⁶¹ Spending money on mass incarceration also incurs economic opportunity costs.⁶² This is because money spent on incarceration could

54. Specific deterrence occurs when an offender who has been caught, convicted, and incarcerated is then disincentivized from committing subsequent offenses. *Id.* at 917.

55. General deterrence occurs when the expectation of punishment causes members of society to be deterred from committing crimes. *Id.* at 916.

56. Incapacitation occurs when an inmate is unable to commit crimes on members of the public due to their confinement. *Id.* at 917.

57. Davey, *supra* note 1 (“Others, like Paul Cassell, a law professor at the University of Utah, argue that Missouri’s plan counts certain costs but fails to measure others . . .”).

58. Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 230, 233–36 (2009) (explaining how people who were incarcerated are less likely to cohabitate with their children upon release).

59. *Id.* at 238.

60. The rate of HIV infection in the prisoner population is five to seven times that of the population at large. *Prisons and Jails*, CTR. FOR HIV L. & POL’Y, <https://www.hivlawandpolicy.org/issues/prisons-and-jails> [<https://perma.cc/AQA9-5G6E>].

61. Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL’Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy [<https://perma.cc/QRG5-BKHA>] (“Each year in prison takes 2 years off an individual’s life expectancy. With over 2.3 million people locked up, mass incarceration has shortened the overall U.S. life expectancy by 5 years.”).

62. Opportunity cost is “the forgone benefit that would have been derived by an option not chosen.” Jason Fernando, *Opportunity Cost*, INVESTOPEEDIA (Dec. 27,

have otherwise been spent on education, crime prevention, community policing, job training, infrastructure, public health, etc.

Thus far, this response has conceded the claim that is implicit in this objection: that reductions in prison sentences will result in increases in crime. There is little evidence to support this claim. The following examples illustrate how high levels of incarceration function to increase crime, not reduce it.

Mass incarceration contributes to diminished public perceptions of law enforcement.⁶³ This leads to members of the public becoming unwilling to assist law enforcement in criminal investigations, which results in decreased crime clearance rates and increased crime.⁶⁴ Mass incarceration causes an increased probability that children of the incarcerated will go on to commit crimes.⁶⁵ Mass incarceration results in a loss of job prospects for the formerly incarcerated.⁶⁶ This is the result of the inability to accumulate job experience while incarcerated,⁶⁷ loss of professional licenses,⁶⁸ loss of driver's licenses necessary to drive to work,⁶⁹ loss of automobiles,⁷⁰ loss of previous gainful employment, and increased difficulty of finding new employment due to the stigma of being a convicted felon.⁷¹ Mass incarceration may even contribute to the production of a more violent person post-incarceration.⁷²

2020), <https://www.investopedia.com/terms/o/opportunitycost.asp> [https://perma.cc/R362-3WCS].

63. Bierschbach & Bibas, *supra* note 8, at 188 (“[M]any Americans resent and mistrust the bloated American carceral state [which results in] the system los[ing] legitimacy.”).
64. See, e.g., Rod K. Brunson, *Protests Focus on Over-Policing. But Under-Policing Is Also Deadly*, WASH. POST (June 12, 2020, 6:10 AM), https://www.washingtonpost.com/outlook/underpolicing-cities-violent-crime/2020/06/12/b5d1fd26-ac0c-11ea-9063-e69bd6520940_story.html [https://perma.cc/2SB9-ATDQ].
65. Western & Wildeman, *supra* note 58, at 241.
66. Brett C. Burkhardt, *Criminal Punishment, Labor Market Outcomes, and Economic Inequality: Devah Pager's Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*, 34 L. & SOC. INQUIRY 1039, 1043–45 (2009).
67. Bierschbach & Bibas, *supra* note 8, at 188.
68. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 UNIV. ST. THOMAS L.J. 387, 389 (2005).
69. Anne Kim, *You're Out of Prison. Now You Have to Get Your Driver's License Back.*, WASH. POST (Apr 4, 2019, 4:15 PM), https://www.washingtonpost.com/outlook/youre-out-of-prison-now-you-have-to-get-your-drivers-license-back/2019/04/04/9e8325f8-5651-11e9-8ef3-fbd41a2ce4d5_story.html [https://perma.cc/H4GY-S8WC].
70. This could be due to the inability to make lease payments while incarcerated or the inability to pay exorbitant impounding fees.
71. Elena Holodny, *'It Still Haunts Me': What It's Like to Get a Job After Prison in America*, BUS. INSIDER (July 30, 2017, 6:03 AM), <https://www.businessinsider.com/finding-job-after-prison-2017-7> [https://perma.cc/DGR4-9NHQ].
72. While the research on this topic is underdeveloped, existing studies “may suggest that incarceration could in fact exacerbate violence in some cases, both within the prison walls and in the broader community.” ELEANOR TAYLOR-NICHOLSON & BARRY KRISBERG, *CONTAGION OF VIOLENCE* (2013), <https://www.ncbi.nlm.nih.gov/books/NBK207242> [https://perma.cc/GCS9-BSTC].

Empirical evidence also supports the proposition that high levels of incarceration do not function to reduce crime rates. A 2011 study found that spending time in prison has a criminogenic effect, increasing the probability of recidivism.⁷³ A 2012 study concluded that “[d]espite being used on a massive scale and consuming huge amounts of the public treasury, prisons have largely failed to reduce offender recidivism.”⁷⁴ An unrelated 2012 study analyzing data of over 100,000 Florida felons either sentenced to state prison or sent to a Community Control program revealed that prison had a criminogenic effect rather than a rehabilitative one.⁷⁵ As discussed in the introduction to this Article, Missouri’s implementation of incarceration-cost salience led to a reduced recidivism rate.⁷⁶ Even if mass incarceration did not result in increased crime and instead had no net effect, the clearly prudent course of action would be to reduce mass incarceration. This is because if the benefit of reduced crime is not present, then the high costs of incarceration are clearly not justified.⁷⁷

The harmful effects of repeat offenders as a result of mass incarceration are likely worse for juvenile offenders because incarceration halts their accumulation of human and social capital at such an important developmental stage in their lives.⁷⁸ A 2015 study found that, among similarly situated juveniles convicted of a crime, incarceration results in a significant increase in the probability of a later incarceration as an adult.⁷⁹

Unfortunately, minority communities bear the brunt of these negative effects from mass incarceration.⁸⁰ This results in a compounding effect in which the harms of mass incarceration are multiplied. While one family may be able to persevere through the hardships of having an incarcerated family member by relying on their social network, if too many families in a community need to rely on the same social network, the strain on the social network may become too great.⁸¹

73. Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring the Science*, 91 PRISON J. 48S, 51S (2011).

74. Francis T. Cullen et al., *The Accountable Prison*, 28 J. CONTEMP. CRIM. JUST. 77, 77 (2012).

75. William D. Bales & Alex R. Piquero, *Assessing the Impact of Imprisonment on Recidivism*, 8 J. EXPERIMENTAL CRIMINOLOGY 71 (2012).

76. Press Release, Missouri Sent’g Advisory Comm’n, *supra* note 21.

77. The only argument left available for one to claim that the marginal costs of mass incarceration are justified is a retributivist one. But this is a difficult argument to make, as it requires one to posit that the psychic benefits of retribution outweigh, at a minimum, the marginal financial costs of incarceration. Daniel P. Mears et al., *Incarceration Heterogeneity and Its Implications for Assessing the Effectiveness of Imprisonment on Recidivism*, 26 CRIM. JUST. POL’Y REV. 691, 692 (2015).

78. Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, 130 Q.J. ECON. 759, 760 (2015).

79. *Id.* at 787.

80. Western & Wildeman, *supra* note 58, at 235 (noting that Black children are almost eight times more likely to have a father in prison than white children).

81. Traum, *supra* note 40, at 435.

The objection that incarceration-cost salience is biased in favor of the defense implies that incarceration is more expensive than most people realize. After all, judges and juries are surely aware that incarceration is not free. Therefore, if incarceration was less expensive than predicted, then informing the decisionmaker of this fact should not result in shorter sentences. The reality that informing judges of the actual financial cost of incarceration results in decreased sentences is evidence that these decisionmakers view the costs as higher than they expect.⁸²

Two potential misunderstandings occur when this objection is made. First, statistics allegedly showing a decrease in crime attributable to the incapacitation effect of incarceration are misleading. This is because crimes committed by an inmate while incarcerated are not counted in crime statistics.⁸³ Secondly, even if one assumes that incarceration-cost salience is biased against the prosecution, it should be noted that this would only be considered in the sentencing phase of the trial, not the guilt-finding phase.

E. *Would Lead to More Sentencing Disparities*

Another argument in opposition of incarceration-cost salience concerns a potential increase in sentencing disparity. “A decision to sentence based on cost is less likely to be uniform across judges than, say, the nature of the offense.”⁸⁴ “[C]irculating information about punishment cost might fuel inter-judge sentencing disparity, driven not by legitimate differences between offenses and offenders but by different attitudes among judges about the proper role of costs in determining a sentence.”⁸⁵

The notion that incarceration-cost salience would introduce disparities into an otherwise uniform system is demonstrably false. The standard legal advice for trial lawyers to, first and foremost, “know your judge”⁸⁶ is illustrative of how trial outcomes are inherently disparate. Additionally, well-documented sentencing disparities exist based on race of

82. Bierschbach & Bibas, *supra* note 8, at 211. The implementation of a cost-benefit analysis is a useful transparency device. *Id.* “[I]t brings to the surface, and forces a decisionmaker to confront, a range of costs that otherwise are not considered, *without dictating that the decisionmaker choose a particular course of action.*” *Id.* (emphasis added).

83. Josh Voorhees, *US Crime Statistics Completely Ignore What Happens in Prisons*, BUS. INSIDER (July 6, 2014, 4:44 PM), <https://www.businessinsider.com/us-statistics-ignore-crime-in-prisons-2014-7> [<https://perma.cc/MQX8-NY7C>].

84. Flanders, *supra* note 17, at 395.

85. Scott, *supra* note 9, at 172.

86. Hon. Joseph A. Greenaway Jr., *The Evidence Rules Every New Trial Lawyer Should Know*, A.B.A. (July 22, 2019), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2019/july-2019/evidence-rules-every-new-trial-lawyer-should-know [<https://perma.cc/3NT9-ZUDD>] (“One piece of advice I learned early in my career that bears repeating now is “Know your judge.” A simple axiom, but one that is critical to your success [as a trial attorney].”).

the defendant,⁸⁷ gender of the defendant,⁸⁸ race of the judge,⁸⁹ and jury demographics.⁹⁰ Other trial outcome disparities can be attributable to factors such as quality of legal representation, availability of witnesses to testify, law enforcement conduct in gathering evidence, the decision of a bench trial or a jury trial, lack of prosecutorial resources, the decision of the defendant to testify, etc. Even factors as trivial as the weather,⁹¹ how hungry the judge is,⁹² and the recent performance of a local sports team⁹³ have been shown to affect trial outcomes.

Uniformity is not necessarily something to be desired in sentencing. Indeed, every time a legislature alters sentencing guidelines for a particular crime, uniformity is diminished because defendants sentenced before and after the change are not treated uniformly. But this is not per se undesirable. Furthermore, the results of this study indicate that any changes in sentencing due to cost consideration would be measured and therefore would not have a drastic effect on existing sentencing disparities.

It is interesting to note that inherent in this objection is the assumption that longer sentences are somehow intrinsically more just than shorter ones. For example, imagine that one judge refuses to consider the cost of incarceration and sentences a drug dealer to 38 months while another judge with a similarly situated defendant only renders a verdict of 34 months after considering the financial cost of incarceration. In order

-
87. M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014).
 88. David Dagan, *Women Aren't Always Sentenced by the Book. And Maybe They Shouldn't Be.*, FIVE THIRTY EIGHT (Mar. 30, 2018, 1:37 PM), <https://fivethirtyeight.com/features/women-arent-always-sentenced-by-the-book-maybe-men-shouldnt-be-either> [<https://perma.cc/Y3MZ-7ERS>] (“A 2015 study from the University of Michigan Law School found that . . . sentences for men are on average 63 percent longer than sentences for women.”).
 89. Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 Soc. Sci. Q. 749, 749 (2001) (“[B]lack judges were more likely to sentence both [B]lack and white offenders to prison.”).
 90. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1017 (2012) (concluding that differences in trial outcomes based on jury demographics “imply that the application of justice is highly uneven and raise[s] obvious concerns about the fairness of trials in jurisdictions with a small proportion of [B]lacks in the jury pool”).
 91. Anthony Heyes & Soodeh Saberian, *Temperature and Decisions: Evidence from 207,000 Court Cases*, 11 AM. ECON. J.: APPLIED ECON. 238, 240 (2019) (finding that a 10°F increase in outdoor temperature reduced favorable outcomes by 6.55 percent, despite the judgments being made indoors).
 92. Kurt Kleiner, *Lunchtime Leniency: Judges' Rulings Are Harsher When They Are Hungrier*, SCI. AM. (Sept. 1, 2011), <https://www.scientificamerican.com/article/lunchtime-leniency> (finding that judges are significantly more likely to grant a parole request when they are not hungry).
 93. Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, 10 AM. ECON. J.: APPLIED ECON. 171 (2018) (finding that an unexpected loss from a prominent team in the state increased length of sentences handed down the following week).

to maintain a logically coherent objection as to how this is unjust, one must first assume that 38 months was a just sentence while 34 months was unjustly lenient.⁹⁴ Furthermore, existing evidence on the effects of mass incarceration on society⁹⁵ do not support the conclusion that longer sentences are generally more just than shorter ones. If anything, the evidence supports the opposite conclusion: that in our current system of mass incarceration, slightly shorter sentences are generally more just than longer ones.

Additionally, the purpose of incarceration-cost salience is not *per se* to reduce sentencing lengths.⁹⁶ Rather, it is to make punishments more cost-effective.⁹⁷ There are alternatives to imprisonment to punish a defendant. These include probation, house arrest, community service, revocation of driver's license, revocation of government benefits,⁹⁸ loss of voting rights,⁹⁹ and restitution. Therefore, while incarceration-cost salience will likely result in reductions in prison sentences, that is not necessarily the equivalent of a reduction in punishment.

III. Additional Benefits of Incarceration-Cost Salience

In addition to the benefits of incarceration-cost salience mentioned in the previous Part, there are further benefits. For some defendants, hearing the incarceration costs that they are imposing on society may cause additional remorse for their actions and a sense of debt to society. Informing jurors about the costs may also have the positive effect of a better-informed populace regarding incarceration costs. This could lead to a more accurate weighing of both sides of public policy issues, such as three-strikes laws, mandatory minimums, probation, funding job training programs, overcriminalization, etc.

The effects of mass incarceration on families of incarcerated individuals may be a driver for both higher crime rates¹⁰⁰ and diminished public perceptions of law enforcement.¹⁰¹ But there are other harms of mass incarceration that would be ameliorated by the shorter prison

94. Or at least that the sentence of 34 months is more unjustly lenient than the sentence of 38 months.

95. See Tony N. Brown & Evelyn Patterson, *Wounds from Incarceration That Never Heal*, NEW REPUBLIC (June 28, 2016), <https://newrepublic.com/article/134712/wounds-incarceration-never-heal>; *The Ripple Effects of Mass Incarceration*, PSYCH. TODAY (Mar. 13, 2019), <https://www.psychologytoday.com/us/blog/evidence-based-living/201903/the-ripple-effects-mass-incarceration.html> [<https://perma.cc/UNU6-JJVH>].

96. Scott, *supra* note 9, at 172 n.5 (explaining that the stated purpose of MOSAC is “to help Missouri judges, attorneys and probation officers identify sentences that . . . are most cost-effective”).

97. *Id.*

98. Jacobs, *supra* note 68, at 389.

99. *Id.* at 390.

100. See *supra*, notes 73–75 and accompanying text.

101. Christopher Muller & Daniel Schrage, *Mass Imprisonment and Trust in the Law*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 139 (2014).

sentences that result from incarceration-cost salience. These may stem from the harms to communities from the lack of young men.¹⁰²

Incarceration-cost salience could also indirectly contribute to reductions in—and possibly even the abolishment of—the death penalty. Given existing death penalty case law¹⁰³ and the current makeup of the Supreme Court,¹⁰⁴ death penalty abolitionists currently have little chance of achieving their goal of entirely abolishing the death penalty through the judiciary. Because many people erroneously believe that life in prison is more costly than the death penalty,¹⁰⁵ juror incarceration-cost salience—which would educate jurors as to the actual costs—might result in a reduction in capital sentences.¹⁰⁶ Incarceration-cost salience could also lead to the consideration of cost becoming more acceptable, which would also favor death penalty abolition.

IV. Research Methodology

This Part describes the survey conducted to analyze how incarceration-cost salience affects juror decisionmaking. The survey was administered online through the Qualtrics platform in the summer of 2020. A total of 596 respondents participated in the survey. The average

102. Bierschbach & Bibas, *supra* note 8, at 188.

103. *See, e.g.*, *Glossip v. Gross*, 576 U.S. 863 (2015) (holding that there was insufficient evidence that lethal injections performed with the drug midazolam entail a substantial risk of severe pain in violation of the Eighth Amendment and that the burden is on the inmate to produce an alternative method of execution that presents a significantly lower risk of pain); *Kansas v. Marsh*, 548 U.S. 163 (2006) (holding that even when mitigating and aggravating factors are equally balanced, the death penalty may be imposed); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that statistical evidence of racial discrimination in capital cases is not evidence of Eighth and Fourteenth Amendment violations if there is no evidence of purposeful discrimination against the defendant raising the claim).

104. The three most recently appointed justices—Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—are far from anti-death penalty advocates. *See, e.g.*, Elie Mystal, *Neil Gorsuch Just Made Death Worse*, NATION (April 3, 2019), <https://www.theadvocate.com/article/archive/neil-gorsuch-death-penalty-bucklew> [<https://perma.cc/Y5GM-CJE3>]; Andy Amsler, *Kavanaugh, SCOTUS, and Criminal Justice*, DEATH PENALTY FOCUS (Oct. 12, 2018), <https://deathpenalty.org/blog/the-focus/kavanaugh-scotus-criminal-justice> [<https://perma.cc/TA3Y-2EC3>]; Annika Russell, *Supreme Court Nominee Judge Amy Coney Barrett and the Death Penalty*, A.B.A.: PROJECT BLOG (Oct. 26, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_blog/amy-coney-barrett-and-the-death-penalty [<https://perma.cc/JDP8-9GHD>] (“During her nomination ceremony, Judge Barrett described the ‘incalculable influence’ her former mentor Justice Antonin Scalia had on her life, stating, ‘his judicial philosophy is mine too.’”).

105. *Costs*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/costs> [<https://perma.cc/4WLD-YUDJ>] (“Many people assume that the state saves money by employing the death penalty But in the modern application of capital punishment, that assumption has been proven wrong.”).

106. However, note that the MOSAC program explicitly does not calculate the cost of implementing capital punishment. *See Davey, supra* note 1.

age of the participants was 32.9.¹⁰⁷ Male participants comprised 59 percent of the respondents, and female participants comprised 41 percent. After a consent form, the survey asked four demographic questions covering sex, age, race, and political affiliation. Then, the survey asked one of the following six randomly generated questions (see the Appendix for the full text of each question):

1. Sentencing decision in murder trial with incarceration cost provided
2. Sentencing decision in murder trial with incarceration cost not provided
3. Sentencing decision in embezzlement trial with incarceration cost provided
4. Sentencing decision in embezzlement trial with incarceration cost not provided
5. Mandatory minimum determination for heroin possession with incarceration cost provided
6. Mandatory minimum determination for heroin possession with incarceration cost not provided

This 3×2 methodology allowed for the single variable of incarceration-cost salience to be isolated in each of the three scenarios (murder, embezzlement, heroin possession). It was hypothesized that incarceration-cost salience would result in reduced sentences for all three scenarios. It was further hypothesized that—while there would exist some variation as to how significantly incarceration-cost salience would affect sentencing—it would reduce sentences among all demographic cohorts. For example, while both liberals and conservatives were hypothesized to give reduced sentences when informed of the costs, it was further hypothesized that conservatives would be more affected by the cost.

The questions in this survey that informed the participant of incarceration costs used \$40,000 as the annual cost of incarceration. While costs vary significantly from state to state, this is a rough average.¹⁰⁸ It is important to note that this survey only provided the annual cost of incarceration rather than the total incarceration cost, as is the case in the sentencing information provided by MOSAC.¹⁰⁹

107. In an effort to protect anonymity, age ranges were provided instead of asking for the participant's exact age. Therefore, the survey average age of 32.9 is an approximation.

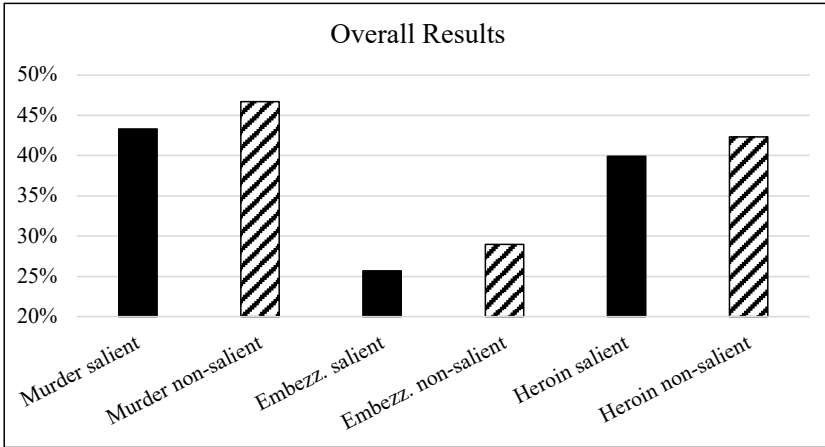
108. In 2015, average annual inmate costs ranged from \$14,780 in Alabama to \$69,355 in New York. See, *Prison Spending in 2015*, VERA: THE PRICE OF PRISONS (May 2017), <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> [<https://perma.cc/6GEY-UHB9>]. For juvenile offenders, the costs are even greater. See, e.g., JUST. POL'Y INST., STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION 3 (2014) (noting that a survey of forty-six states revealed that, on average, confinement for juveniles costs \$148,767 per year).

109. Davey, *supra* note 1 (providing examples of the sentencing cost information a Missouri judge would receive from MOSAC).

V. Research Results and Discussion

As predicted, incarceration-cost salience resulted in reduced sentences overall for all three scenarios. See Chart 1 below.

Chart 1: Overall Results



Note that the results of this study are represented by percentage of maximum punishment option available instead of actual incarceration length. This is because the scales for the prison sentence lengths in the answer selections were different for each of the three categories of crime. For the purposes of this research, it is the percentage change between the two variations in each of the three categories that is relevant, not the ultimate sentence length.

The consistency with which incarceration-cost salience decreased sentencing lengths is of note. For the murder, embezzlement, and heroin possession prompts, the decreases were 3.4 percentage points, 3.3 percentage points, and 2.4 percentage points, respectively. This consistency indicates that, at least on average, jurors who are informed regarding the cost of incarceration engage in a careful weighing of the factor. The fact that these changes attributable to incarceration-cost salience are not extreme further indicates that jurors are carefully considering this factor and not engaging in a brash, emotionally driven response. In other words, these results indicate that jurors are not using cost as the primary factor in sentencing decisions. This is consistent with the explanation provided by judge and MOSAC member Gary Oxenhandler, who explained about incarceration-cost salience, “This is one of a thousand things we look at, about the tip of a dog’s tail, it’s such a small thing.”¹¹⁰

The fact that this survey provided annual incarceration costs and not total incarceration costs may have also affected results. Providing total costs likely would have resulted in an even greater disparity between sentencing from those who were told the financial incarceration

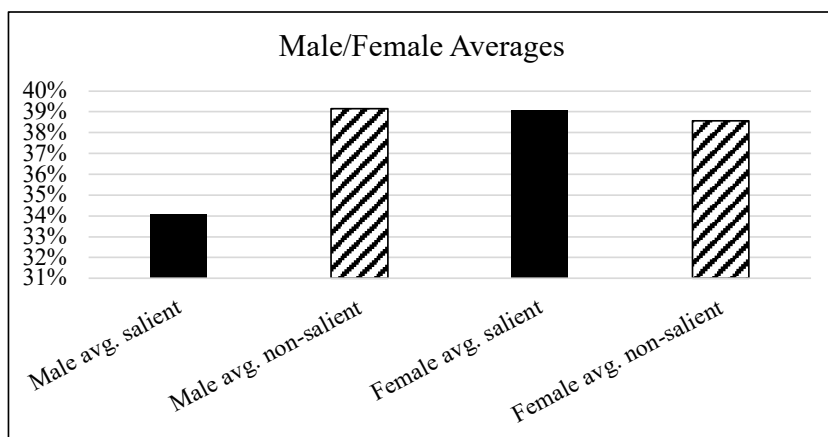
110. *Id.*

costs and those who were not. This is because a respondent imposing a sentence of, say, eighteen years would be confronted with the staggering figure of \$720,000, as opposed to just the \$40,000 annual figure. In the latter case, the respondent would then have to make the connection on his/her own as to the total cost.

A. Gender

The reduction of sentences as a result of incarceration-cost salience remained constant among all demographic factors analyzed except gender. There, males returned noticeably significantly shorter sentences when informed of the incarceration cost, while females returned slightly longer sentences when informed of the incarceration cost. See Chart 2 below.

Chart 2: Male/Female Results



An explanation for this anomalous result is somewhat difficult to produce. Perhaps reducing government spending is a higher priority among males. Studies do reveal that males are more likely than females to prefer a “smaller government [with] fewer services.”¹¹¹ Perhaps females are more likely than males to view justice independently from cost. The reality that males are significantly more likely than females to be incarcerated¹¹² may also play a factor. For example, perhaps males are

111. *Little Public Support for Reductions in Federal Spending*, PEW RES. CTR. (Apr. 11, 2019), <https://www.pewresearch.org/politics/2019/04/11/little-public-support-for-reductions-in-federal-spending> [<https://perma.cc/8BDH-H9XP>] (finding that 59 percent of males and 36 percent of females say they would rather have “smaller government, fewer services”).

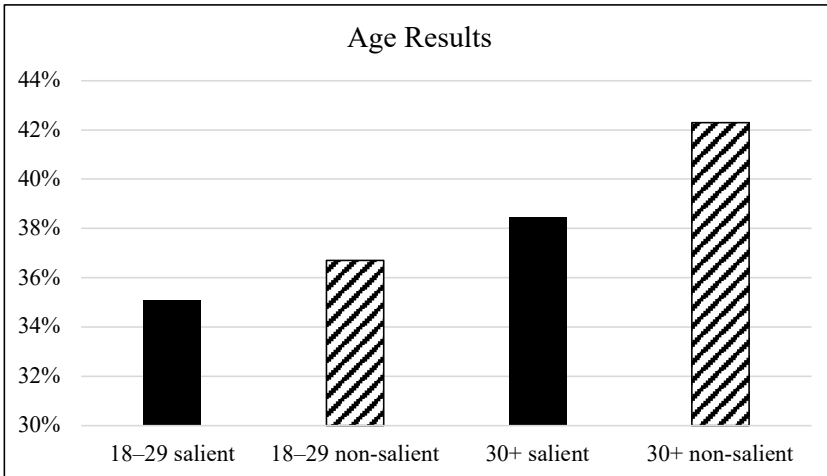
112. Dyfed Loesche, *The Prison Gender Gap*, STATISTA (Oct. 23, 2017), <https://www.statista.com/chart/11573/gender-of-inmates-in-us-federal-prisons-and-general-population> [<https://perma.cc/B9GU-9FSK>] (“93.2 percent of the approximately 185,500 federal inmates are men, and only 6.8 percent are women . . . [L]ess recent figures released by the Bureau of Justice Statistics (BJS) from 2015 show that this ratio was similar for the overall U.S. prison and jail population (90.6 male to 9.4 female) two years ago.”).

more sympathetic to the plight of those who face incarceration and therefore more eager to find an excuse to lessen the sentence they receive.

B. Age

Age data was analyzed based on the two categories of 18 to 29 and 30 and over. While both age cohorts returned lower average sentences when incarceration cost was presented, this effect was more pronounced in the older age cohort. See Chart 3 below.

Chart 3: Age Results



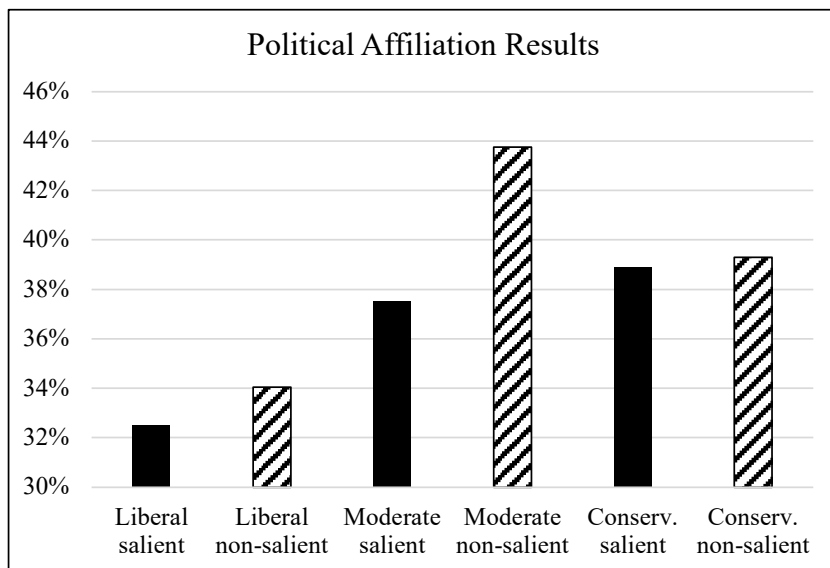
The finding that older participants were more likely to be affected by incarceration-cost salience is likely due to more support among older demographics for reducing government spending.¹¹³ This outlook may also be the result of the greater wealth present among older populations.¹¹⁴

C. Political Affiliation

The survey recorded participants' political affiliation based on a 0 to 100 Likert scale. For purposes of this analysis, liberal was defined as 0 to 33, moderate as 34 to 66 and conservative as 67 to 100. All three cohorts returned lower average sentences when incarceration cost was provided. Surprisingly, the effects of incarceration cost were most pronounced with moderates and least pronounced with conservatives. See Chart 4 below.

113. *Little Public Support for Reductions in Federal Spending*, *supra* note 111.

114. *The Rising Age Gap in Economic Well-Being*, PEW RES. CTR. (Nov. 7, 2011), <https://www.pewsocialtrends.org/2011/11/07/the-rising-age-gap-in-economic-well-being> [<https://perma.cc/4X7H-NWS2>]. Note that this survey did not inquire about participant income.

Chart 4: Political Affiliation Results

While every political affiliation category was affected by incarceration-cost salience as expected, the disparity between how much they were affected is surprising. Because conservatives are more likely to support reductions in government spending,¹¹⁵ one would expect that being made aware of the high costs of incarceration would have the largest effect on them. Perhaps this same antigovernment spending attitude among conservatives results in a pessimistic outlook whereby conservatives presuppose that the cost of incarceration is high. In this way, being informed of the actual cost would have minimal effect on their sentencing because those who were not told the financial cost of incarceration would already have factored in a high cost of incarceration. This explanation may also help explain why incarceration-cost salience had the biggest effect on moderates. Namely, political moderates are likely to be less informed about such issues than liberals and conservatives,¹¹⁶ and therefore the gap between what the nonsalient group thought the cost was and what the salient group was made aware of was likely a larger gap than for conservatives and liberals.

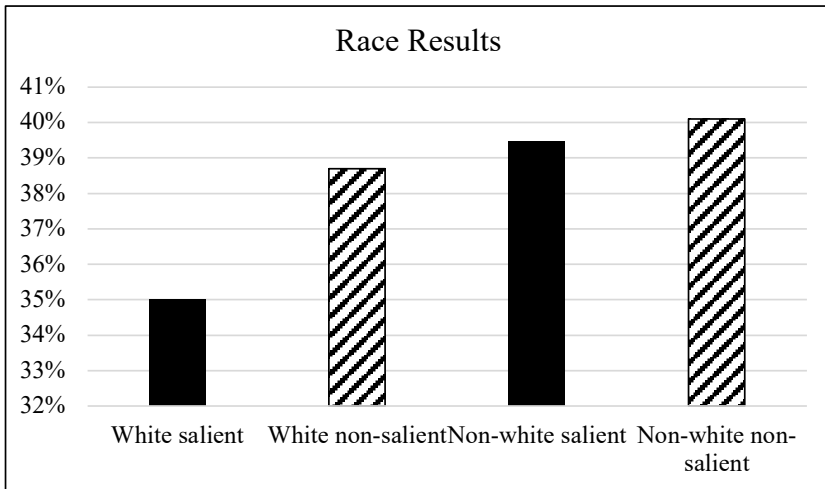
115. *Little Public Support for Reductions in Federal Spending*, *supra* note 111.

116. John Wihbey, *The Profile of Undecided Voters: Research Roundup*, JOURNALIST'S RESOURCE (Oct. 24, 2012), <https://journalistsresource.org/studies/politics/ads-public-opinion/profile-undecided-voters-research-roundup> [<https://perma.cc/78QL-P65J>] (“As a general rule, political scientists find that undecided voters are . . . less informed on issues . . .”).

D. Race

Due to a limited number of nonwhite participants, analysis based on participant race is only able to be broken down along the categories of white and nonwhite. While whites demonstrated considerable sensitivity to incarceration-cost salience, nonwhites demonstrated very little. See Chart 5 below.

Chart 5: Race Results



It is unclear exactly what could explain this disparity between whites and nonwhites. Perhaps more experience with the criminal justice system among the nonwhite group resulted in more principled sentencing decisions that were not affected by cost. While the purpose of this research is to measure percentage changes between jurors who were informed of incarceration cost and those who were not, it is interesting to note the peculiar result that the nonwhite group rendered longer sentences on average. This is somewhat contradictory to studies that show Black and Hispanic individuals (who made up 82 percent of the nonwhite category in the present research) are disproportionately less punitive than whites.¹¹⁷

It is possible that underlying the miniscule difference from incarceration-cost salience demonstrated in the nonwhite group are counterbalancing differences from the races within that group. The sample size of nonwhite participants in this research is simply too small to be able to make such determinations.¹¹⁸

117. NAZGOL GHANDNOOSH, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 3 (2014) (“Whites are more punitive than [B]lacks and Hispanics even though they experience less crime.”).

118. The breakdown of nonwhite participants in this research was 55 percent Black, 27 percent Hispanic, 18 percent Asian, and less than 1 percent Native American.

VI. Future Research

The results of this research invite replication with variation in future research. Such research—combined with the results presented here—will further illuminate the issue of incarceration-cost salience and juror decisionmaking psychology. Helpful variations in future research could include changes to the stated cost of incarceration to see if lower incarceration costs result in a diminished effect—i.e., less of a decrease in sentencing. Future studies could also gather additional demographic information to measure how such factors affect sentencing. For example, personal criminal history and criminal history of immediate family members could inform jurors as to the perceived value of longer sentences. Relatedly, living in a high-crime area may affect perceptions of incarceration costs. Another demographic factor that could be measured is income level. Studies show that higher income levels correlate with an increased preference for reductions in government spending.¹¹⁹ Perhaps this means that higher income levels will also result in more sensitivity to incarceration costs.

Conclusion

Before this survey, it was only speculated that jury incarceration-cost salience would result in reduced sentences.¹²⁰ The results of this robust study emphatically demonstrate that this is in fact the case. Additionally, the consistent and measured nature of the results indicate that jurors are able to carefully consider incarceration cost among many other relevant factors.

This Article also includes analysis of the arguments for and against judge and jury incarceration-cost salience. Such consideration results in a clear preference for the practice. It would save valuable state resources that could then be invested into more productive programs. It would likely lead to a reduction in crime rates due to the criminogenic effect of incarceration.¹²¹ And it would benefit not only incarcerated individuals but also their families and communities.¹²² These benefits of the practice, combined with the promising results of this survey and the near-perfect converging of political interests in favor of prison reform,¹²³ all point to a climate that is ideal for jury incarceration-cost salience.

Appendix

Survey question text

1. Sentencing decision in murder trial with incarceration cost salient

119. *Little Public Support for Reductions in Federal Spending*, *supra* note 111.

120. Michaels, *supra* note 7 (“Lauren-Brooke Eisen, a former prosecutor who now works at the Brennan Center [says that] [i]f more district attorneys followed suit . . . it could go a long way toward lowering prison populations.”).

121. *See supra* notes 73–75 and accompanying text.

122. *See supra* notes 80–81 and accompanying text.

123. *See supra* notes 8–14 and accompanying text.

2. Sentencing decision in murder trial with incarceration cost not provided
3. Sentencing decision in embezzlement trial with incarceration cost salient
4. Sentencing decision in embezzlement trial with incarceration cost not provided
5. Mandatory minimum determination for heroin possession with incarceration cost salient
6. Mandatory minimum determination for heroin possession with incarceration cost not provided

1. You are serving on a jury involving a murder. The prosecution witnesses explain that the victim had \$10,000 cash on hand and that two hours after his death, the defendant deposited \$9,000 cash in his bank account. A text message shows that the defendant knew the victim was carrying a large sum of money on him that day. The defendant is 6'6" tall with a full beard. Video surveillance footage shows someone around that height with a full beard following the victim immediately before he was killed. The defendant had cuts and bruises on his knuckles consistent with the manner of death of the victim and has no alibi for where he was at the time of the murder.

The defense witnesses explain that the defendant sold a used car nine months prior for \$12,000 and so the \$9,000 bank deposit could have been from that. The murder happened in a big city where the defendant would not have been the only tall person with a full beard. No explanation for the cuts and bruises on the defendant's knuckles were provided.

To convict someone in criminal court you must be "beyond a reasonable doubt" as to their guilt. In the current case, would you convict the defendant and if so, how many years would you sentence him to? Note that the cost of imprisoning him would be about \$40,000 per year.

2. You are serving on a jury involving a murder. The prosecution witnesses explain that the victim had \$10,000 cash on hand and that two hours after his death, the defendant deposited \$9,000 cash in his bank account. A text message shows that the defendant knew the victim was carrying a large sum of money on him that day. The defendant is 6'6" tall with a full beard. Video surveillance footage shows someone around that height with a full beard following the victim immediately before he was killed. The defendant had cuts and bruises on his knuckles consistent with the manner of death of the victim and has no alibi for where he was at the time of the murder.

The defense witnesses explain that the defendant sold a used car nine months prior for \$12,000 and so the \$9,000 bank deposit could have been from that. The murder happened in a big city where the defendant would not have been the only tall person with a full beard. No explanation for the cuts and bruises on the defendant's knuckles were provided.

To convict someone in criminal court you must be “beyond a reasonable doubt” as to their guilt. In the current case, would you convict the defendant and if so, how many years would you sentence him to?

3. You are serving on a jury involving embezzlement (stealing money from an employer). The prosecution shows that the business had \$80,000 in cash stolen over the course of two years. The defendant started working for the company just one month before the cash started to be stolen. The only other two employees who had access to the cash had been working at the business for over ten years and were cleared by police after an investigation. The police seized \$60,000 cash from the defendant’s house in denominations consistent with what was stolen from the business. A friend of the defendant testified that he bragged about stealing money from his work.

The defendant claims that he found the \$60,000 in a duffel bag at the park and that he was joking when he told his friend that he was embezzling money.

To convict someone in criminal court you must be “beyond a reasonable doubt” as to their guilt. In the current case, would you convict the defendant and if so, how long would you sentence him to? Note that the cost of imprisoning him would be about \$40,000 per year.

4. You are serving on a jury involving embezzlement (stealing money from an employer). The prosecution shows that the business had \$80,000 in cash stolen over the course of two years. The defendant started working for the company just one month before the cash started to be stolen. The only other two employees who had access to the cash had been working at the business for over ten years and were cleared by police after an investigation. The police seized \$60,000 cash from the defendant’s house in denominations consistent with what was stolen from the business. A friend of the defendant testified that he bragged about stealing money from his work.

The defendant claims that he found the \$60,000 in a duffel bag at the park and that he was joking when he told his friend that he was embezzling money.

To convict someone in criminal court you must be “beyond a reasonable doubt” as to their guilt. In the current case, would you convict the defendant and if so, how long would you sentence him to?

5. You are tasked with determining the mandatory minimum sentence for possessing 1kg (2.2 pounds) of heroin. The approximate street value for such amount would be \$35,000. Judges are allowed to impose longer prison sentences but this would be the absolute minimum sentence they could impose. Note that it costs about \$40,000 a year to incarcerate someone.

Which best describes the mandatory minimum sentence you would impose?

6. You are tasked with determining the mandatory minimum sentence for possessing 1kg (2.2 pounds) of heroin. The approximate street

value for such amount would be \$35,000. Judges are allowed to impose longer prison sentences but this would be the absolute minimum sentence they could impose.

Which best describes the mandatory minimum sentence you would impose?