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The debate on whether financial cost should be a factor in sentencing can be looked at from two angles, one theoretical and the other pragmatic. The theoretical angle examines whether the use of cost in sentencing can be justified under any theory or theories of punishment. The pragmatic angle looks at whether using cost in sentencing actually makes any difference to how judges sentence, that is, whether it will bring about any good results. In another article, a companion to this shorter piece, I focus mainly on the theoretical side.¹ There, I argue that cost should be treated as a disfavored factor in sentencing, because there is no sound theoretical justification for it. If we believe in retributivism, especially, it will be hard to see how cost should figure in determining what punishment the offender deserves (at least at the time of sentencing). But even if we are not strict retributivists about sentencing, it is hard to fit cost assessments into any of the traditional justifications for punishment, including deterrence and rehabilitation.

In this brief essay, I focus mainly on the pragmatic side, asking about what goals adding cost as a sentencing factor is supposed to achieve, and whether it will in fact achieve those goals. I ask three questions in particular: (1) Will including cost in the Missouri Sentencing Assessment Reports (SARs) actually change judicial behavior in the ways supporters of the reform favor? (2) Will judges use cost as a factor in a consistent and uniform way? and (3) Are judges in the best position to make cost decisions in sentencing, or should this be left to the legislature? Some of these questions, especially the first, have a substantial empirical component. We cannot know, at least without further time and study, whether including cost on SARs will appreciably change judicial behavior. Nor will we know whether judges will use cost in any predictably uniform way until we have some data.

But the uncertainty on these empirical issues may suggest ways in which the legislature is (ideally) superior as the main agent of change for sentencing.² Legislatures can enact more sweeping reforms—reducing sentences in one fell swoop rather than piecemeal—and they can also do so more uniformly. There are also good reasons why we might want to insulate judges, especially elected judges, from having to decide issues of fiscal policy.

Elected judges might feel pressure to base decisions on cost in tough budgetary times, which may mean they might sentence less than they otherwise would. Alternatively, judges who *do* decide (or are suspected of deciding) based on cost might face greater popular opposition for being too soft on criminals, by trying to save money at the expense of public safety.

The motivation for including cost in sentencing is in one way inarguable: sentences should at some level be determined by taking into account all relevant information, and sentences should be, broadly, “cost effective”: they should achieve their goals at the lowest feasible cost. But it is a separate question which *institution*—the legislature, the executive branch, or the judiciary—should be making decisions about cost. There are of course difficulties in getting legislatures to act in ways that are cost effective, especially when dealing with punishment. Still, things are starting to change, and we might hope that sentencing reform from the top down will happen, and happen sooner rather than later. Sentencing commissions should push legislatures to take this responsibility, and not, as is the case with giving judges the power to make sentencing decisions, give the legislature a way to shirk that responsibility.

I. Will the Reform Make Any Difference?

Those who defend the change in the SAR (whom I’ll call, simply, “reformers”) frequently make two claims. The first claim tries to minimize the impact of the reform by saying that cost is simply one more piece of information that judges might consider and that they could just as easily ignore.³ What, then, is the harm in including that additional information?

The second claim some reformers make is more ambitious, which is that allowing judges to figure cost in their sentencing decisions will push judges to imprison less, and by the same token, reduce the overall price to the state of punishing criminals. At least, this is the hope in financially stressed times: prison is expensive, and alternatives to prison are not only cheaper, they may also be a lot better (or as good) at reducing crime. But the second claim stands in some tension with the first, because for reform actually to save the state money, cost must not only be one more piece of information for judges to

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consider, it must also move some judges to choose the less expensive punishment who wouldn't have otherwise chosen it.

Will judges actually use the cost data that is now available to them? The assumption that judges make cost assessments *already* is one that needs to be tested empirically. The fact that judges may consider such things as general or specific deterrence doesn't automatically mean that they are considering such things as fiscal impact when they pass down sentences. The goal of saving money seems to be a different kind of goal than the traditional penological ones of preventing, deterring, and justly punishing crime.

But the new SAR might have a dynamic effect: it might prompt some judges who otherwise wouldn't think about the cost of a sentence to think about it. Whether it has this effect will be determined, in part, by whether judges will see the making of cost as an explicit factor as either ratifying past practice or representing a new (and possibly unwarranted) departure from it. Certainly judges might feel emboldened to consider cost now that they have specific (and putatively credible) numbers on the price of individual sentences, numbers that come with the imprimatur of the Missouri Sentencing Commission. But other judges might be adamant in *not* using cost, saying that this would be a violation of their duty to sentence based on desert and other traditional punishment rationales, and not on factors exogenous to punishment, such as cost. Indeed, some judges have already said so.⁴

There are also different possibilities in how judges will end up using cost as a sentencing factor. Some judges might set out, explicitly, the lower cost of probation as a reason for giving someone probation rather than a prison term. Other judges might not factor cost explicitly, but the presence of cost listed on the SAR might work on them unconsciously. They may even deny that they are using cost to decide a sentence, or that they looked at the costs of sentences at all, but it may factor in their decisions nonetheless. (This, incidentally, might make it hard to measure what work the reform is doing.)

For the reform to be effective, something like the above possibilities has to happen—that is, judges have to explicitly or implicitly start using cost in making sentencing decisions. Moreover, in at least some cases, cost has to be not only a considered factor but a deciding one. As I mentioned earlier, some defenders of the reform have said that including cost simply means that judges simply have more information; this is undoubtedly true. But for the reform to lead to different sentences, or to lower costing sentences, the information must be doing some work in changing judges' minds about what sentence to give. That is, it has to be possible that a judge who might otherwise decide on a longer sentence will decide on a shorter sentence, or probation over prison, *because that sentence costs less*. Otherwise, putting cost on the SAR will simply add an extra wheel that does no part in moving the sentencing machinery.

In this regard, we might worry that those judges who are inclined to let cost figure in a sentencing decision are those who are already predisposed to give lighter sentences or to favor alternatives to prison. This may be either because they already included the cost of a sentence in deciding how to sentence, or because they were going to give the lighter or alternative sentence anyway and the cost simply offered no barrier to doing so (and indeed may even have confirmed their initial judgment). If most judges who are inclined to consider cost are like this, then the point of the reform from a pragmatic point of view will have been missed, because it will not change judicial behavior, or at least not enough judicial behavior to make any fiscal difference.

Or consider another possibility. Perhaps those cases where the cost savings would be the greatest are those cases where judges will be least likely to let cost make a difference. More serious crimes, such as murder or armed robbery, would probably fall into this category. For a judge sentencing in such a case, the idea that the cheaper sentence should win out *because it is cheaper* will seem anathema.⁵ This could be another way in which cost will only do at best minimal work, because in the most serious cases, cases where the price difference between many years in prison and many years on probation is great, cost will be bracketed. Only time and further study will tell if this is what happens. But there seem to be some plausible reasons to doubt that the reform will have any but a modest impact on reducing the cost of sentences, or in making sentencing more cost effective.

II. Will Judges Use the Numbers Consistently?⁶

But suppose that at least some judges do use the numbers. If they do, we might have another reason to worry: judges may use the numbers differently, which will lead to disparities in sentencing. There are several ways in which judges might differently factor cost into a sentencing decision. I want to explain how variations based on cost could occur before going on to explain why I think variation in sentencing based on cost is problematic.⁷

First, there might be a lack of consistency in who uses the numbers. Maybe when cost is listed as a sentencing factor, all judges will use it in their sentencing decisions. Then again, maybe only some will. Some judges might take a principled stand against using cost in sentencing, and so ignore the numbers on the SAR. Other judges might gladly use the cost figures (these may be the judges who had always, in a rough way, used cost as a factor in considering the proper sentence). Still others might slowly warm to the idea of using cost. In any event, there is no reason to believe that *all* judges across the board will use cost to determine the right sentence. The more likely possibility is that some judges will use cost and some won't.

Second, even among the judges who do consider cost, there might be differences in the way they use it. Some may use it in every type of case; others may use it only in

minor nonviolent offenses. Some judges may weigh cost very heavily in deciding an appropriate sentence; others may have cost enter in only at the margins, that is, in a way that would rarely be decisive. So we might have a further variation among those judges who use sentencing numbers, both in terms of what cases they use the numbers to decide and how heavily they weigh cost when they do use it as a sentencing factor. We could imagine there being profound variation in the ways judges use cost; some may use it aggressively, others may use it rarely, if at all.

Third, even one judge across time might not be consistent in how he or she considers cost. A judge may on some days consider cost very heavily (perhaps unconsciously in response to news about the state's dire fiscal straits!) but on other days be less inclined to have cost make any difference to who gets what sentence. Or again, he or she may use cost only in minor cases, and ignore cost altogether when it comes to violent offenses or serious property crimes. So even if we take one judge across time, that judge might use cost differently.

There is, then, some reason to believe that how cost is used will vary between judges and even in the same judge. But why should this sort of inconsistency matter? After all, when presented with *any* information—the offender's past history, or even the nature of the offender's crime—different judges will come to different determinations of how that factor should cut, and how far it should cut. That is in some way the beauty of a system that allows judicial discretion: judges are allowed to use their judgment as to how to assess different factors in sentencing, and how to weigh them in deciding what punishment is appropriate. Unless we eliminate judicial discretion entirely, we have to accept the fact that different judges may sentence differently, even when presented with roughly similar crimes and criminals.⁸

But cost might be different than other sentencing factors. Cost is not usually considered to be a paradigmatic sentencing factor, or even a permissible one, certainly not under the federal sentencing guidelines.⁹ It is easy to see why. Cost, considered solely as the *financial* cost of a punishment, is largely exogenous to the traditional rationales for punishing people: rehabilitation, deterrence, and especially retribution.¹⁰ It is a factor that is more familiar in legislative budgetary conversations than in punishment theory. Surely the burden should be on defenders of the reform to explain why it should be relevant in deciding how much, or in what way, to punish offenders. Why should the cost of a sentence, of all things, be capable of tipping the balance in favor of one sentence rather than another?

Imagine a prisoner who is sentenced to a longer prison term than another solely because one judge took cost into account and his judge did not. That is, one judge considered the cost of the sentence, and the other didn't, and it is on that basis alone that the two sentences diverge—not because one crime was worse than another, or because

one criminal was a less likely candidate for rehabilitation.¹¹ Doesn't the prisoner with the higher sentence have not just a complaint, but a *legitimate* complaint? It is one thing to explain to a prisoner that his judge is less generous in believing offenders can be rehabilitated and that is why he has a longer sentence. It is another thing, I think, to explain to a prisoner that the reason why he has a longer sentence is that his judge is not as zealous a cost cutter as other judges. If cost cutting is a concern, it should apply in a way that is uniform across all sentencing decisions: it is not something that should be left to the discretion of judges, who may use cost differently, or not at all.

And the larger the difference in sentences between similarly situated offenders (when the difference is based on cost), the greater force the claim of unfairness has. If, to take an extreme case, one offender is given probation and the other is sentenced to prison only because one judge likes cheaper sentences, then the offender facing prison has a good moral if not legal case that his sentence is unfair vis-à-vis the other offender. By including cost as a sentencing factor, we invite this type of rather arbitrary and unfair treatment.

Uniformity in sentencing is not the highest good, of course. We might want to tolerate some deviations from uniformity if this at least means *some* offenders get lower penalties (with the idea that sentences in general are too high). I might be open to such a pragmatic argument, especially given the overlong sentences for many crimes in the status quo.¹² If we can reduce the harshness of a sentence in one instance, why does it matter that it does not extend to all equally situated offenders? But we should not be blind to the possibility of unfairness, especially when it is unfairness due to something outside of the usual reasons *why* we punish. Certainly we would not accept such a pragmatic argument for a lower sentence if one of the reasons the judge decided for a lower sentence was because the offender was white! Cost is not race, certainly, but it is a factor that, like race, is unrelated to the traditional purposes of punishment. For this reason, the unfairness that using cost might engender should make us wary of decisions reached on that basis.

III. Are Judges Best Situated to Make Reforms Based on Cost?

To the previous two sections, the response of the reformer might be to say, simply: What's the real harm in including information about cost on SARs? The reformer might concede that, yes, it is unlikely that many judges will take the new information into account when sentencing. Perhaps not many judges will be moved to consider cost, because of their understanding of the judicial role. Perhaps the cases where the greatest cost savings could be achieved—several years probation rather than several years in jail—will be the ones where judges will be *least* likely to let cost be determinative. Perhaps the cost savings even where a judge *is* moved to base his or her decision on costs will be merely a blip on the state's overall financial picture. All of this the

reformer may concede, and then use the concession to his advantage. For then the reformer may say, what's the big deal? Some judges may use cost, and this may save the state some money. If it does not save money, then there is really no harm done.

I have already highlighted one potential problem with the use of cost, a problem that exists even if cost is used only rarely: sentences will be different for an almost arbitrary reason, and this is unfair. I think this is a real harm, however small, but again the reformer may claim that it is, at best, *de minimis*. Given the unfairness at all stages of the criminal justice system (who gets caught, who gets charged, who is found guilty), this is surely at the minor end of the scale, something we should not worry too much about.

But *even if* cost is used only rarely and *even if* the unfairness that may result is minor and not too pervasive, I still think that judges using cost is a bad idea. Putting the onus on judges to reduce cost may distract from the main place where cost cutting can occur, and tough decisions about the cost of sentences *should* be made, *viz.*, the legislature. Indeed, putting judges in the position of cost cutters could have backlash effects of a pernicious sort, especially in a state like Missouri that elects many of its trial judges, and where all judges are subject to retention elections.¹³ Judges may be *pressured* to use cost as a sentencing factor, if citizens demand financial accountability in addition to judicial accountability from their judges. Here, the risk is not that cost will be used to tip the balance in favor of a sentence, but may *drive* the sentencing decision, to the exclusion of other traditional sentencing factors.

Or the incentives might work, even more perniciously, in the other direction. One could imagine all sorts of Willie Horton–inspired ads against the judge who gave a criminal probation because it saved the state a couple of thousand dollars, and the criminal went on to reoffend. I think we have good reason to try to insulate judges from this type of pressure, by not encouraging them to use cost as a sentencing factor, which is what the new SARs tacitly do.¹⁴ We normally don't want judges to act like politicians, or to be subject to the same pressures that politicians are subject to, to pander to what people want.¹⁵ Asking judges to make budgetary decisions in sentencing is just another way of asking them to be politicians: it asks them to try to save money for the state. It does not merely ask them to do justice.

But the institutional point goes further than this. If the goal of letting judges consider costs is to make a dent in criminal justice system spending, then doing it piecemeal, on the retail level, is inefficient. Better to do it wholesale: reduce sentences across the board, rather than leaving it to the chance, individual decisions of judges. And not only is the legislature better suited to make the kind of sweeping changes that would actually reduce costs in sentencing in a real and perceptible way, it is also better situated to do so fairly.¹⁶ Legislatures can set reduced or alternative sentences uniformly, and so eliminate the unfairness that can come with judges sometimes deciding to use cost to

reduce sentences and sometimes not. Having *judges* determine costs has the wrong institution pursuing what is undoubtedly a worthy social goal.

It may be that the reform to the SARs was borne out of frustration with the Missouri legislature's failure to take criminal justice reform seriously. And on this level, the Sentencing Commission cannot be faulted. There is a lot to be frustrated about in Missouri's system of criminal justice. And the recurring threats to abolish the Missouri Sentencing Commission are certainly wrongheaded. The Commission is right to highlight the problems facing the criminal justice system, and the increasing cost of punishment has a good claim to be problem number one. But it is an open question (in part, an open empirical question) whether letting judges use cost as a sentencing factor is the best way to go about trying to reduce the cost of criminal justice, and whether it will cause more harm than good.

Notes

- * Thanks to Jud Matthews for comments on a much earlier draft. I also wish to thank the many people who have discussed this issue with me, including David Svolba, Dan Brudney, Lynn Branham, Douglas Berman, Doug Williams, Michael Wolff, Sam Jordan, Eric Miller, Matt Hall, William Baude, Christopher Bradley, SpearIt, Christopher Jones, and Dan Markel as well as audiences at Saint Louis University School of Law, DePaul University School of Law, and the University of Indiana–Indianapolis School of Law. Sam Dickhut provided his usual superlative (and timely) research assistance. All errors are my own. Initial work on this project was supported by a summer research grant from Saint Louis University.
- 1 Chad Flanders, *Cost as a Sentencing Factor: Missouri's Experiment*, 77 Mo. L. Rev. (forthcoming 2012).
- 2 The emphasis on *ideally* is important here. Legislatures have to a great extent neglected their role in managing sentencing in a fiscally responsible manner. See Chad Flanders, *Prison Bills Come Due*, ST. LOUIS BEACON, Nov. 16, 2011, available at <http://www.stlbeacon.org/voices/in-the-news/114151-prison-bills-come-due>. For some indications that this is beginning to change, see Charlie Savage, *Trend to Lighten Harsh Sentences Catches on in Conservatives States*, N.Y. TIMES, Aug. 13, 2011, A14; Sean Murphy, *Oklahoma House Speaker Kris Steele Eyes Criminal Justice Changes*, THE OKLAHOMAN, Nov. 8, 2011, available at <http://newsok.com/article/3621069>.
- 3 "Obviously, at the end of the day, it is up to the judge to decide the sentence. They are just more informed with this data." Heather Ratcliffe, *Missouri Judges Get Penalty Cost Before Sentencing*, ST. LOUIS POST-DISPATCH, Sept. 14, 2010, available at http://www.stltoday.com/news/local/crime-and-courts/article_924097a5-9f4d-54bb-80ca-4cc4160dde7c.html (quoting Michael Wolff); "This is one of a thousand things we look at—about the tip of a dog's tail, it's such a small thing." Monica Davey, *Missouri Tells Judges Cost of Sentences*, N.Y. TIMES, Sept. 18, 2010, at A1, available at <http://www.nytimes.com/2010/09/19/us/19judges.html> (quoting Judge Gary Oxenhandler).
- 4 See, e.g., Andrew Goug, *What Is the Cost of Justice?*, ST. JOSEPH NEWS-PRESS, 2010, available at <http://www.newspressnow.com/localnews/25943274/detail.html> ("I just don't see the financial consideration being anything that comes into play for me. . . . I understand the fiscal issues that are going on right now. That really can't drive this." (quoting Judge Daniel Kellogg)).

- ⁵ As several advocates of the reform have stressed. See Ariane De Vogue, *Should a Judge Consider the Cost of a Sentence?*, ABC News, <http://abcnews.go.com/Politics/judge-cost-sentence/story?id=11647286> (Sept. 16, 2010) (“If it is a particularly heinous crime . . . then cost is irrelevant.” (quoting Michael Wolff)); Davey, *supra* note 3 (“And as Judge Wolff sees it, sentencing costs would never be a consideration in the most violent cases, just in circumstances where prison is not the only obvious answer”); Deniz Koray, *New Sentencing Matrix Shows Missouri Judges the Cost of Prison*, COLUMBIA MISSOURIAN, Sept. 29, 2010, available at <http://www.columbiamissourian.com/stories/2010/09/29/new-sentencing-matrix-shows-judges-cost-prison/> (“In any felony with an injury, the cost is not taken into consideration. . . . It is not how we make our decision.”) (quoting Judge Gary Oxenhandler).
- ⁶ For more on this topic, with which I am in considerable agreement, see Ryan Scott’s essay in this issue, *How (Not) to Implement Cost as a Sentencing Factor*, 24 FED. SENT’G REP. 172 (2012).
- ⁷ I elaborate on this last point in Flanders, *supra* note 1.
- ⁸ At the same time, the more factors we invite judges to consider, the greater the risk of variation in sentences between similarly situated defendants.
- ⁹ See, e.g., *U.S. v. Molina*, 563 F.2d 676, 678 (8th Cir. 2009) (“We doubt that sentencing courts have the authority to impose lesser sentences based on the cost of imprisonment.”); *U.S. v. Wong*, 127 F.3d 725, 728 (8th Cir. 1997) (“The decision whether tax dollars should be used to pay for lengthy sentences is a congressional determination, not one to be made by federal courts.”); *U.S. v. Tapia-Romera*, 523 F.3d 1125, 1126 (9th Cir. 2008) (“Congress had not made the cost to society of a defendant’s imprisonment a factor [that] a sentencing judge should consider under [18 U.S.C.] § 3553(a) in determining the appropriate term of imprisonment under 18 U.S.C. § 3553(a).”).
- ¹⁰ I am grateful to Doug Williams for this way of putting the point.
- ¹¹ Obviously, including cost in this way is different than, say, making the punishment for a theft of \$25,000 greater than for a theft of only \$50. Here basing a difference in sentence on money alone would obviously be perfectly appropriate.
- ¹² See Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87 (2010).
- ¹³ Michael Wolff, *Law Matters: How We Choose Missouri Judges*, MISSOURI SUPREME COURT CHIEF JUSTICE COLUMNS, Nov. 21, 2005, available at <http://www.courts.mo.gov/page.jsp?id=1083>.
- ¹⁴ On this, see also Chad Flanders, *The Cost of Justice*, ST. LOUIS BEACON, Sept. 17, 2010, available at <http://stlbeacon.org/content/view/104956/74/>.
- ¹⁵ Of course, the solution here is to not elect judges. But so long as we do, we should not subject them to additional electoral pressures—by turning them into legislators writ small.
- ¹⁶ For a helpful overview of state reforms in the area of sentencing, see Daniel F. Wilhelm, *Sentencing Policy in Tough Budget Times: What Are States Doing?*, VERA INSTITUTE OF JUSTICE: WISCONSIN FAMILY IMPACT SEMINARS (2005). The ACLU has also recently proposed ways in which states can sensibly reduce the cost of sentencing. See AM. CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES (2011), available at http://www.aclu.org/files/assets/smartreformispossible_web.pdf#page=6.