Reassessing Prosecutorial Power Through the Lens of Mass Incarceration

by Jeffrey Bellin*

Abstract

Prosecutors have long been the Darth Vader of academic writing: mysterious, all-powerful and, for the most part, bad. This uber-prosecutor theme flows like the force through John Pfaff’s highly-anticipated new book, Locked In: The True Causes of Mass Incarceration – and How to Achieve Real Reform. The book concludes that police, legislators, and judges are not to blame for Mass Incarceration. Instead, “the most powerful actors in the entire criminal justice system” (prosecutors) have used their “almost unfettered, unreviewable power to determine who gets sent to prison and for how long.”

Locked In’s data-driven thesis aligns neatly with the academic consensus. If prosecutors are the most powerful actor in the criminal justice system, they must be responsible for its most noteworthy product – Mass Incarceration. The only problem is that it probably isn’t right. While Pfaff’s empirical findings have been embraced by the media, the legal academy, and even former President Obama, they are grounded in questionable data. With these flaws exposed, the familiar villains of the Mass Incarceration story reemerge: judges and, above all, legislators. This reemergence provides a very different focus for reforms designed to unwind Mass Incarceration. It also says something profound about prosecutorial power.

Prosecutors possess substantial power to let people escape from an increasingly inflexible system. But decades of academic claims suggesting that prosecutors are equally powerful when acting in the opposite direction – to dictate sanctions – fold under scrutiny. When it comes to imposing incarceration, prosecutorial power is largely contingent on the actions of other, more powerful criminal justice actors.

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“The world's first prosecutor may well have been Satan.”

Introduction

When I was a prosecutor in the early 2000s, my office deployed a variety of diversion programs to unload provable, but minor cases without going through a formal adjudicative process. One of the most popular programs was called the “Stet Docket.” A case placed on the Stet Docket sat dormant for a period of time, usually six months or a year. If, the defendant had not been rearrested at the conclusion of that period, we dismissed the case. The busy defense attorneys and line prosecutors I worked with loved the Stet Docket. Maybe a little too much. To prevent abuse, my office mandated that a line prosecutor could only place a case on the Stet Docket after obtaining approval from a department supervisor. As supervisors said yes sparingly, one prosecutor became something of a legend simply because he stopped asking. Risking his job, he covertly placed all manner of cases on his own personal Stet Docket, creating a parallel criminal justice universe alongside the formal process available to other defendants.

I didn’t realize it at the time, but my rogue colleague had offered me my first lesson in the power of prosecutors in the American criminal justice system. Prosecutors like to be recognized for holding criminals to account. The real power they wield, however, is the unreviewable ability to (discretely) open exits from an otherwise inflexible system.

The American criminal justice system has grown increasingly inflexible in the past four decades. The magnitude of the change is eclipsed only by the resulting carnage. In 1973, the United States confined approximately 200,000 people in state and federal prisons. Our imprisonment rate was not that different from Western European countries. Since then, the nation’s incarceration rate increased rapidly until it plateaued in the 2000s at previously-unimagined levels. Currently, there are over 1.5 million people confined in state and federal prisons, with another 700,000 held in local jails. “The land of the free” has become the world’s largest jailer.

2 As with most legends, the precise contours of the prosecutor’s actions remain shrouded in office lore. He acted discretely and his loose (perhaps mistaken) interpretation of office policy came to light only after the fact.
5 NRC at 35; Pfaff at 1-2.
7 Francis Scott Key, Star Spangled Banner (1814); Pfaff at 1; NRC at 36-37.
Americans increasingly recognize that “Mass Incarceration” – unprecedented incarceration levels well beyond those necessary to protect society – is a problem.\(^8\) Even among legal experts, however, few can persuasively explain how the phenomenon arose or what can be done to make it go away. These are the questions Fordham Law School professor John Pfaff grapples with in his highly anticipated book, *Locked In: The True Causes of Mass Incarceration – and How to Achieve Real Reform*. The book’s provocative conclusion is that: “Prosecutors have been and remain the engines driving mass incarceration.”\(^9\) As a result, he criticizes reform efforts that focus on legislators and judges and, instead, advocates new rules designed to rein in prosecutorial discretion.

Even before appearing in *Locked In*, Pfaff’s data-driven insights found a receptive audience through academic publications and prominent media outlets. David Brooks highlighted Pfaff’s views in a recent New York Times column, explaining that “[Pfaff’s] research suggests that while it’s true that lawmakers passed a lot of measures calling for long prison sentences, if you look at how much time inmates actually served, not much has changed over the past few decades.”\(^10\) How did we get here? Brooks explains, “it’s the prosecutors.”\(^11\) Jeffrey Toobin profiled Pfaff’s empirical findings in a New Yorker article\(^12\) that Ninth Circuit Judge Alex Kozinski later quoted for the proposition that “prosecutors--more than cops, judges, or legislators” are “the principal drivers of the increase in the prison population.”\(^13\) The first-ever law review article by a sitting President cites Pfaff’s research as demonstrating “the important role prosecutors have played in escalating the length

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\(^9\) Pfaff at 206.


\(^11\) Id.


of sentences and can play in easing them.” Legal scholars routinely follow suit. (Including me.)

While there is a lot of great stuff in Locked In, the enchanting empirical analysis its author relies on to conclude that the prosecutor “is the most important actor shaping prison population size” is flawed. As explained below, one of the two primary findings Pfaff bases his conclusion on – a finding that increased sentence lengths contributed little to Mass Incarceration – is strongly disputed by other empiricists. The other – a purported boom in state felony filings that only Pfaff has found – appears to be an artifact of changes in state court reporting practices. A more rigorous empirical source tracking filings over the same period finds no such increase.

It may be too late to stop the train, but it is important to try. Pfaff is doing great work highlighting the importance of Mass Incarceration and providing empirical insights into its endless nuances. Nevertheless, his increasingly influential misdiagnosis of one critical aspect of the problem – exonerating the true villains (legislators and judges) and indicting prosecutors – leads to counterproductive solutions. The prosecutorial charging guidelines and enhanced transparency Locked In champions will not reduce incarceration, but the sentencing reforms and drug decriminalization efforts Pfaff talks down will. In fact, restrictions on prosecutorial discretion are more likely to increase than decrease incarceration.

The flaws in the empirical foundation for Locked In’s argument that prosecutors drove Mass Incarceration should not come as a surprise. Existing checks on prosecutors’ power make it impossible for them to do what Pfaff claims. While

15 See, e.g., Angela J. Davis, The Prosecutor’s Ethical Duty to End Mass Incarceration, 44 HOFSTRA L. REV. 1063, 1076 (2016) (“Pfaff’s research demonstrates that prosecutors’ charging decisions were the single most significant factor that caused the increase in prison admissions between 1994 and 2008.”); Darryl K. Brown, What Can Kafka Tell Us About American Criminal Justice?, 93 TEX. L. REV. 487, 499 (2014) (highlighting John Pfaff’s “groundbreaking analysis of criminal justice data from the last several decades” that blames Mass Incarceration on “changes in patterns of prosecutorial charging discretion”); Samuel W. Buell, Is the White Collar Offender Privileged?, 63 DUKE L.J. 823, 882 (2014) (“The empiricist John Pfaff has produced a potentially groundbreaking study finding that the source of soaring incarceration rates in the United States has not been more arrests or longer sentences but an increase in the number and frequency per defendant of prosecutors lodging felony charges.”); Stephanos Bibas, The Truth about Mass Incarceration, NATIONAL REVIEW, Sept. 21, 2015 (citing Pfaff as “proving convincingly” that “[w]hat has driven prison populations … [o]ver the past few decades” is that “prosecutors have grown tougher”).
16 Jeffrey Bellin, The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk", 94 B.U. L. REV. 1495, 1532 (2014) (“[T]he one policing measure that did not go up is the factor John Pfaff isolates as the key to understanding America’s incarceration binge: felony charges.”).
17 Pfaff at 80.
18 See Part II.
19 See below.
prosecutors can unilaterally open exits, it takes a village to incarcerate someone; and when it comes to incarceration, the criminal justice village is full of figures with as much or more power than prosecutors.20

The weaknesses in Pfaff’s account call into question the legal academy’s immediate, uncritical embrace of his findings. The answer lies in our increasingly caricatured view of prosecutors. While prosecutors are a new villain in the Mass Incarceration context, they are a familiar foil for academics. Prosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad. Paul Butler includes a chapter in his influential book, rejecting the notion that “good people” should become prosecutors; like Anakin Skywalker, they cannot help but be corrupted.21 On the other side are academics who think prosecutors can be redeemed, but only if we tie them down with rules.22 Across this spectrum, all agree that prosecutors “run the show.”23 The expression of this principle gets more exaggerated with each telling, until we have widely-accepted statements like: “In many (if not most) American jurisdictions, the prosecutor is the criminal justice system.”24 My colleague (and friend) Adam Gershowitz aptly summarizes the consensus, stating, “No serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.”25 If there was ever any dissent on this point, it died out (with the Jedi) long ago.

The uber-prosecutor theme flows through Locked In. The book informs us that prosecutors are “the most powerful actors in the entire criminal justice system,” and have used their “almost unfettered, unreviewable power to determine who gets sent to prison and for how long.”26 Pfaff’s tour-de-force of a book provides an opportunity to interrogate this accepted wisdom. For if Mass Incarceration is the

20 See below.
21 Paul Butler, LET’S GET FREE 20 (2009); see also Abbe Smith, Can You Be A Good Person and A Good Prosecutor?, 14 GEO. J. LEGAL ETHICS 355, 396 (2001) (“My answer is both harsh and tempered: I hope so, but I think not.”)
26 Pfaff at 70, 80, 133.
defining feature of the modern criminal justice system, and prosecutors did not
drive us to this point, we have greatly overestimated their wattage.

As should be clear already, this is not a traditional “book review.” It is too broad,
too narrow, and too long for that. It is too narrow in that it doesn’t do justice to the
many parts of Locked In that do not address prosecutorial power. Locked In includes
a clever defense of private prisons, an important emphasis on the human costs of
incarceration, a powerful plea for more spending on indigent defense, and an
accurate (I think) critique of reform efforts that package relaxed sanctions for
nonviolent offenses with increased punishments for violence. I leave those (and
other) topics untouched. This essay is too broad to be a book review because it has
an ulterior motive. Apart from clarifying the true causes of Mass Incarceration, my
secondary goal is to leverage a critique of Locked In’s indictment of prosecutors
into an assault on the caricature of prosecutors that has infected the legal academy.
With respect to this second goal, I have few illusions that commentators will
suddenly agree that I am right about prosecutors. (It may take a couple more
essays…. ) My goal here is merely to instill a recognition of the need to think more
deeply about prosecutors’ role in the criminal justice system, and the nature of their
power.

I.
The Standard Story and Its Discontents

Locked In begins its account of Mass Incarceration by seeking to undo the damage
done by what Pfaff labels, the “Standard Story.”27 This Standard Story is actually
multiple story strands floating through academic and popular discourse that
purportedly explain Mass Incarceration. The two most important strands the book
takes on are:

The War on Drugs: “[A] core claim of the Story . . . is that our decision to
lock up innumerable low-level drug offenders through the ‘war on drugs’ is
primarily responsible for driving up our prison populations”28; and

Longer Sentences: “The Standard Story also argues that increasingly long
prison sentences have driven prison growth, and thus cutting back sentences
would effectively cut prison populations.”29

Locked In contends that these and other common pontifications are misconceived,
red herrings, obscuring the real cause of the prison population explosion: “increased
prosecutorial toughness,” particularly with respect to violent offenses.30 It supports
this claim with two empirical findings. Locked In reports that: (1) American prisons
filled through increased admissions, not longer sentences; and (2) the one variable

27 Id. at 5.
28 Id.
29 Id. at 6.
30 Id. at 6, 74.
that changed with respect to admissions was an increase in felony filings. It is from these two ingredients that Pfaff brews his provocative thesis that prosecutors—not “cops, judges, or legislators”—brought us Mass Incarceration.

The first step to understanding Mass Incarceration is to grapple with the most intuitive lay explanation for its emergence, crime. Violent crime increased by about 400 percent between 1960 and 1991. Assuming a functional criminal justice system that relies on incarceration as its primary sanction (i.e., the American system), an increase in serious crime predictably leads to an increase in the prison population. Thus, Locked In notes, “[o]ne clear cause” of rising incarceration rates “was rising crime.” According to Pfaff, “the best estimate of that impact suggests that rising crime over the 1970s and 1980s can explain, at most, just half of the increase in prison populations in those two decades.” An explanation of half of the Mass Incarceration phenomenon at any point is an important start. At the same time, Pfaff is correct to stress that rising crime is only the beginning of a much longer answer. Serious crime plummeted in the 1990s. Between 1993 and 2015, the violent crime rate declined from almost 80 to under 20 victimizations per 1000 persons—tantalizingly close to 1970s-era victimization rates. Yet, the incarceration rate kept climbing until the early 2000s and then plateaued. Despite slight reductions in recent years, we are closer to landing an astronaut on Pluto than we are to returning to 1970s incarceration levels.

This brings us to the War on Drugs. Locked In should be viewed as a companion to Michelle Alexander’s best-seller, The New Jim Crow. Alexander bases her acclaimed book on the premise that the War on Drugs drove the prison boom; Alexander then draws on racial currents in the drug war to animate her thesis that racial animus powers Mass Incarceration. Pfaff argues to the contrary that “the war on drugs is not the primary engine of prison growth.” It is true that drug offense imprisonment rates rose faster than those for other crimes, but that is

31 Id. at 3.
32 Id.; Stuntz, supra note 8, at 254 (describing “run-up in the prison population” as a “natural consequence” of a “thirty-or-forty-year-long-wave of violent crime”).
33 Pfaff at 3-4; Michael O’Hear, WISCONSIN SENTENCING IN THE TOUGH-ON-CRIME ERA 10 (2017) (demonstrating tight correlation in Wisconsin between violent crime rise and incarceration until 1989).
34 Jennifer L. Truman and Rachel E. Morgan, Department of Justice, Bureau of Justice Statistics, Criminal Victimization, 2015 1 (National Crime Victimization survey, showing trend since 1993); Pfaff at 3.
35 NRC at 39.
36 Pfaff at 2.
38 Id. at 59 (“Convictions for drug offenses are the single most important cause of the explosion of incarceration rates.”); James Forman, Jr., Racial Critiques of Mass Incarceration: Beyond the New Jim Crow, 87 N.Y.U. L. REV. 21, 45-46 (2012) (“The choice to focus on drug crimes is a natural—even necessary—byproduct of framing mass incarceration as a new form of Jim Crow.”)
39 Pfaff at 49.
because 1970s-era prisons held few drug offenders. Pfaff explains that, “even setting every drug offender free would cut our prison population by only about 16 percent.” (Twenty percent if you include federal prisoners.) Twenty percent is not nothing, but even if all our “drug offenders were released tomorrow, the United States would still have the world's largest prison system.” Instead, Locked In contends that unwinding Mass Incarceration requires that we “change how we punish serious violent crimes.” This is because, “the majority of those in prison, and a large majority of those serving long terms, have been convicted of violence.”

The role of crime and, alternatively, the Drug War in the Mass Incarceration story are not new areas of contention. Where Locked In’s attack on the Standard Story gets really interesting is its claim that increasing sentence lengths did not contribute “much” to the incarceration boom. This contention, along with Pfaff’s discovery of an apparent explosion of state felony filings, undergird the novel claim that prosecutors, not legislators, judges, or police, swelled prison populations.

Pfaff stresses that there are only two ways to grow a prison population: (1) increase the number of people sent to prison (admissions), and (2) keep them there longer (time served). Some function of these two variables must explain any incarceration increase. In the United States, Pfaff insists, the first factor alone caused Mass Incarceration. He states: “The amount of time most people spend in prison, however, is surprisingly short, and there’s no real evidence that it grew much as prison populations soared.” As Pfaff recognizes, this is a surprising claim because, during the incarceration explosion, legislatures replaced rehabilitative indeterminate sentencing regimes with punitive determinate regimes, and enacted mandatory minimum sentences and “Truth-in-Sentencing” laws – all designed to increase the time criminals spend in prison.

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40 NRC at 47-48.
41 Pfaff at 35.
42 Id. at 244 n.4 (“Taking into account the federal system … raises … the percentage of prisoners locked up for drug offenses four or five points.”)
43 Forman, Jr., supra note 38 at 48.
44 Pfaff at 201.
45 Id. at 52.
46 The dichotomy is blurred because an increase in prison admissions can also reflect increased sentences. Many offenders sentenced to short sentences (e.g., 30 days) serve time in jail. If the same type of offender receives a longer sentence (e.g., 30 months), that sentence will typically be served in prison. As a result, increases in prison admissions can actually be driven by increases in sentence length.
47 Id. at 52.
48 Id. at 70-71 (“If sentences aren’t getting (much) longer … then what is causing prison growth? The obvious answer is rising admissions.”)
49 Id. at 52.
50 NRC at 74-85; Pfaff at 53 (“It is hard to look at the sentencing changes over the past thirty years and not think that time served must have gone up dramatically.”)
Locked In supports the claim that sentence lengths remained constant as American prisons filled with a straightforward Table.51 The Table illustrates the time served by offenders sentenced for high-admittance crimes in 2000 and for those same offenses in 2010. It shows that time served has “been fairly stable.”52 Pfaff concludes, therefore, that harsher sentencing did not swell the prison population.

The critical weakness in Locked In’s sentence-length argument comes from the date range. The Table referenced above reflects a comparison of state offenders sentenced over a period that largely postdates America’s incarceration boom. The nation’s prison population exploded between 1980 and 2000.53 Between 2000 and 2010, prison growth slows, and is driven up almost entirely by federal increases.54 It makes little sense to seek the causes of Mass Incarceration in state data from this period. Pfaff’s response comes in an endnote stating that, “The best dataset on time served only goes back to 2000.”55

The problem of the 2000 to 2010 date range becomes particularly acute when considered alongside the findings of other empiricists. Perhaps the most prominent empirical researchers on the topic, Alfred Blumstein and Allen Beck, break the Mass Incarceration phenomenon into three distinct periods: 1980-1990, 1990-2000, and 2000-2010. They explain that: “The final decade, 2000-2010, was a period of negligible growth (0.65%) in the overall incarceration rate in state prisons, and whatever growth occurred was attributable almost totally to increases in commitments per arrest.”56 Thus, other empiricists agree with Pfaff that from 2000 to 2010, state sentence lengths did not increase. But that finding is uninteresting because by 2000, the state incarceration rate had already plateaued at a new, sky-high level.

Empiricists who explore a wider date range find a substantial increase in time served. Beck and Blumstein conclude that increases in admissions drove the prison boom in the 1980s.57 In the 1990s, however, longer sentences took the baton. Between 1990 and 2000, as “the state incarceration rate grew by 55%,” Beck and

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51 Pfaff at 56 (“the results of Table 2.1 undermine the ‘sentences are longer’ conventional wisdom”). Pfaff also includes a graph with two lines representing rising admissions and releases and suggests the relative lack of separation between the lines largely supports his claim. Id. at 58. Since the lines do separate, Pfaff’s claim depends on an assessment of degree, resulting in a Rorschach Test. Jeremy Travis uses the same graph to show the dual increases in admissions and releases, and highlights that the “difference between these two trends” is a result of “the increase in average time served.” Jeremy Travis, BUT THEY ALL COME BACK 34 (2005).
52 Pfaff at 57.
53 NRC at 39.
54 Id.
55 Pfaff at 253 n.19. Pfaff reports on earlier data in other papers, but he refers in the endnote to the earlier data as “much cruder” and says his earlier findings, which he does not otherwise reference, “should be viewed cautiously.” Id.
57 NRC at 50-51.
Blumstein find that “time-served replaces commitments” as the leading contributor to Mass Incarceration. Another pair of sociologists, Steven Raphael and Michael Stoll recently published a book-length empirical study of Mass Incarceration. They document “substantial increases in the amount of time that those sentenced to prison can expect to serve today relative to years past in both the state and federal prison systems.” Raphael and Stoll illustrate the point with specifics: “in 1984 an inmate convicted of murder or manslaughter could expect to serve 9.2 years. By 2004, this figure had increased to 14.27 years.” Time served for rape increased from 5 to 8 years; for robbery from 3.5 to 5 years. Those convicted of aggravated assault served almost a full year longer in 2004 than they did in 1984. Since, as Locked In stresses, the bulk of state prisoners are incarcerated for serious, violent crimes, these sentence-length changes are integral to the Mass Incarceration story. Economists Derek Neal and Armin Rick, examining the critical period of 1985 to 2005, similarly conclude that “more punitive sentencing policies drove the majority of growth in prison populations.”

In short, despite his growing influence, Pfaff stands alone. The non-Pfaff scholarly consensus is that increasingly punitive sentences contributed substantially to Mass Incarceration. Beck and Blumstein summarize that the “entire growth over the 30 years” of the incarceration boom, 1980 to 2010 is “attributed about equally to the two policy factors – prison commitments per arrest and time served.”

II. The Flawed Empirical Case Against Prosecutors

Locked In’s case against prosecutors is not based solely on the contention that admissions, rather than time served drove Mass Incarceration. The book relies on a second finding to show that “the person driving up admissions is the prosecutor.” According to Pfaff’s empirical window into the American criminal justice system, while arrests, conviction rates and time served basically remained constant, the one thing that increased was felony filings. And since prosecutors control felony filings, Pfaff surmises that, “increased prosecutorial toughness when it comes to charging people” gave rise to Mass Incarceration.
Pfaff discovered the felony filing increase in data gathered by the National Center for State Courts (NCSC) that was “sitting in plain view on an NCSC server but apparently overlooked by all studies before my own.” According to Pfaff, this data reveals that between 1994 and 2008, the number of felony cases filed in state courts “rose by almost 40%, from 1.4 million to 1.9 million.” This occurred at a time of decreasing crime and arrests, and stable conviction rates. Thus, Pfaff concludes, “between 1994 and 2008, the number of people admitted to prison rose by about 40 percent, from 360,000 to 505,000, and almost all of that increase was due to prosecutors bringing more and more felony cases against a diminishing pool of arrestees.”

Even Pfaff was struck by this finding. He writes: “When I first saw my own results, I stared at my computer for a few minutes in disbelief . . . [A]cross a wide number and variety of states . . . the only thing that really grew over time was the rate at which prosecutors filed felony charges against arrestees.”

The date range is, again, less than ideal, but this time it covers a significant portion of the period of interest. And it is puzzling (see below). Fortunately, I work a few hundred feet from the NCSC. So I did what any inquisitive researcher would in these circumstances. I checked with the neighbors. After sitting down with the NCSC analysts responsible for collecting the data Pfaff relies on, I learned that the picture is far murkier than Locked In suggests.

Although the NCSC analysts had no direct knowledge of Pfaff’s research, they were intimately familiar with the NCSC data set he describes in Locked In. And they do not view it as a good source for assessing prosecutorial behavior. For one thing, they flagged a major revision that occurred in the middle of Pfaff’s 1994 to 2008 date range. In 2003, the NCSC issued a document titled, “State Court Guide to Statistical Reporting,” promulgating new reporting standards to help “present a clearer picture of court workload.” The document recommended the following practices for data reporting:

1. Include reactivated cases, e.g., revocations of parole or probation, as new cases for the year of reactivation.

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68 Id. at 71.
69 Id. at 72.
70 Id. at 72-73.
71 Id. at 72.
73 Id. at introduction (first page and “Using the Guide”) and 55.
(2) Move domestic violence prosecutions from the “domestic relations” category into the criminal filings category.\textsuperscript{74}

(3) Count preliminary hearings that occurred in one court prior to a case being filed in another as two felony cases.\textsuperscript{75}

The NCSC noted the changes in their own reports on the data. The NCSC’s first annual report after 2003, “Examining the Work of State Courts, 2004,” explains that, “criminal caseloads now include domestic violence cases, …, and preliminary hearings in felony cases.”\textsuperscript{76} It goes on to state, “[c]ounting preliminary hearings may create a noticeable increase in some states as felony cases may appear as an incoming case in both the limited and general jurisdiction courts.”\textsuperscript{77} At another point, the report cautions that “some of the overall increase” in filings “is due to the inclusion of reopened and reactivated cases.”\textsuperscript{78}

The other red flag that surfaced in my discussions with the NCSC analysts is that the data they collect from state courts, “gets better every year.”\textsuperscript{79} This is because the NCSC cannot make state courts comply with their requests; the process of collecting accurate data involves educating and cajoling busy court administrators. These efforts gradually pay off as more administrators get on board, purchase NCSC compliant software, and extend their reach to previously uncounted courts. The NCSC’s success in these endeavors would look like a steady increase in filings. In sum, changes in reporting practices, alongside a natural spread of voluntary collection efforts, would inflate reported filings during the period Pfaff analyzed, even if the actual number of filings hardly budged.

The problems with relying on NCSC felony filing counts to assess prosecutorial behavior come into sharp relief when the NCSC numbers are considered alongside other data. The Bureau of Justice Statistics, “State Court Processing Statistics” (SCPS) series reports on felony filings in state courts during the period Pfaff studied. As Pfaff acknowledges in an earlier paper, the SCPS data contradict his claim that felony filings exploded. That paper states:

“[T]he trends in filings in the SCPS do not track those in the NCSC data as closely as one might wish. Between 1990 and 2004, filings in the SCPS rise

\textsuperscript{74} Id. Up until 2003, NCSC counted “civil acts, such as protection orders, and criminal acts, including misdemeanors and felonies” in a category labeled, “Domestic Relations Caseloads.” National Center for State Courts, \textit{Examining the Work of State Courts 39} (2002) (Header: “Domestic violence data will be refined in future data collection practices.”)

\textsuperscript{75} State Court Guide to Statistical Reporting at 55; National Center for State Courts, \textit{Examining the Work of State Courts, 2004: A National Perspective from the Court Statistics Project 42} (2004) (“‘Incoming’ cases are the sum of new filings plus reopened and reactivated cases. This figure provides for a more complete assessment of the work of state courts.”)

\textsuperscript{76} Id. at 43.

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} Email on file with author.
by 1.7%, and by only 8.8% between 1994 and 2004 (the data’s trough and peak for filings). Conversely, filings in the NCSC data rise by 34.2% between 1994 and 2004.”

The difference between the two data sources is jarring. According to the SCPS, between 1990 and 2004 – a period of skyrocketing incarceration rates – felony filings grew less than 2%. Pfaff suggests in the other paper that the divergence “may actually be informative” as it seems to pinpoint the prosecutorial-driven-growth in felony filing as occurring solely in “less-urban counties.” (This is because SCPS statistically samples the larger counties, accounting for half of the nation’s crime, as opposed to the NCSC which aggregates data from whatever states agree to participate.) The other possibility is that the felony filing explosion Pfaff reports is an artifact of changes in NCSC reporting practices or other confounding factors. In fact, the NCSC analysts advised me that if the two sources diverged, they would bet on the SCPS. The SCPS uses sophisticated sampling techniques to avoid just the kind of reporting discrepancies that might compromise the NCSC data; the NCSC relies on voluntary data contribution by far flung court administrators with differing, if improving, buy-in to the data-gathering mission.

The few other sources that track prosecutorial charging do not suggest any change in aggressiveness. Raphael and Stoll examined federal charging behavior between 1985 and 2009 and found “little evidence of systemic change in the rate at which U.S. attorneys prosecuted criminal suspects.” In fact, for all federal crimes except immigration, which spikes between 1985 and 2000 and then falls back, Raphael and Stoll’s data shows that federal prosecutors became less likely to charge suspects referred to them for prosecution. Increasing admissions in the federal system, they conclude, arose from an increase in arrests for drug, weapons, and immigration offenses; “there is little evidence of a role for an enhanced propensity to prosecute.” The nation’s third biggest jailor also reports a figure that should be helpful in assessing Pfaff’s charge of increased prosecutorial aggressiveness. California reports the percentage of cases presented by police but declined by prosecutors. Its publications reflect a consistent (albeit low) rate of prosecutor

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81 Pfaff, *supra* note 80 at 18.
82 According to the Bureau, “SCPS provides data on the criminal justice processing of persons charged with felonies in 40 jurisdictions representative of the 75 largest counties. These counties account for nearly half of the serious crime nationwide.” Data Collection: State Court Processing Statistics (SCPS), available at https://www.bjs.gov/index.cfm?ty=dcdetail&iid=28
84 Id.
85 Id.
declinations between 1975 and 2008. This data from the nation’s first and third biggest jailors look a lot like the SCPS figures. There is no sign of a sharp upswing in prosecutorial aggressiveness.

Parole and probation violations further complicate the empirical case against prosecutors. American jurisdictions commonly release prisoners on parole prior to the expiration of their judicially-imposed sentences. Release comes with conditions. Violations of those conditions lead back to prison. “[R]evocation of parole is not part of a criminal prosecution”; it is handled administratively by a parole board. Probation refers to non-custodial sentences of supervised release, imposed in lieu of incarceration. As with parole, probation violations lead to prison, but this time at the discretion of the sentencing judge.

Probation and parole violations are two of the three major sources of prison admissions. Parole violations are particularly important. In 1980, parole violators made up 17% of new state prison admissions. “By 1999, the percentage of prison admissions that were parole violators had grown to 35 percent, more than twice the rate two decades earlier.” Thus, as incarceration rates reached an apex, parole revocations grew to over a third of new prison admissions. Probation violation statistics are harder to come by, but Raphael and Stoll provide an estimate, based on parole and probation violations, that by 1997, parole violators accounted for 23% of prison admissions in 1985, 29% in 1990, 34% in 1994 and by 1997, 35% of admissions were parole violators.”

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87 Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (considering administrative parole revocation procedures in two states); Jeremy Travis and Sarah Lawrence, Beyond the Prison Gates: The State of Parole in America 27 (2002), available at http://webarchive.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf (“When a parolee is determined to have violated a condition of parole, the parole agency has several options. One option is to return the parolee to prison.”); O’Hear, supra note 33, at 27 (“the DOC controls revocations from probation and prison supervision”).


89 Raphael and Stoll, supra note 59 at 35.

90 Travis and Lawrence, supra note 87 at 22.

91 Id.; Dept. of Justice, Bureau of Justice Statistics, Truth in Sentencing in State Prisons 4 (1999) ("Parole violators accounted for 23% of prison admissions in 1985, 29% in 1990, 34% in 1994 and by 1997, 35% of admissions were parole violators."); Raphael and Stoll, supra note 59 at 35. Travis and Lawrence, supra note 87, provide a breakdown of technical (two thirds) versus new offense (one third) violations, but I could not trace the data underlying their assertion.
on Bureau of Justice Statistics data, that probation violations account for another 10 percent of prison admissions.\textsuperscript{92}

The proliferation of defendants admitted to prison after probation and parole violations present a further challenge to \textit{Locked In}’s thesis. Recall that the book points to two empirical trends to substantiate its charge against prosecutors: rising prison admissions and an increase in NCSC felony filings. Parole and probation violations inflate both numbers. In fact, the numbers reported above indicate that nearly half of the prison admissions that \textit{Locked In} blames on prosecutorial aggressiveness are a function of the “almost unfettered, unreviewable” decisions of completely distinct criminal justice actors.

\textit{Locked In} does not address probation; it provides a brief assessment of parole in a chapter on the Drug War, writing it off as a minor factor.\textsuperscript{93} The book further hints that prosecutors are the real driver of parole revocations, stating that “violations allow prosecutors to send someone back to prison more easily.”\textsuperscript{94} Maybe. But the large percentage of probation and parole violators in American prisons represent another “bad fact” for the case against prosecutors. Whatever their role behind the scenes, prosecutors don’t send people to prison for parole or probation violations, parole boards and judges do that.

\textbf{III. The Tenuous Nature of Prosecutorial Power}

The all-powerful-prosecutor motif that pervades academic writing fits hand-in-glove with \textit{Locked In}’s conclusions. If prosecutors are the most powerful actor in the criminal justice system, they must be responsible for the system’s most noteworthy product – Mass Incarceration. But the reverse should also be true. If prosecutors did not drive Mass Incarceration, decades of claims in the academic literature of prosecutorial predominance should be reassessed. Prosecutorial power may well be significantly more contingent and narrow than scholars recognize.

Let’s begin with my heretical claim that prosecutors are not the most powerful actor in the criminal justice system. How can I say that? Because prosecutors have lots of competition:

- \textbf{Legislators} are the most obvious power center in the criminal justice arena. Legislators can criminalize virtually any activity and prescribe tough

\textsuperscript{92} Raphael and Stoll, \textit{supra} note 59 at 36 (relying on 2004 state data).
\textsuperscript{93} Pfaff at 38-41 (“violations aren’t driving growth as much as they are being driven by it”).
\textsuperscript{94} Travis and Lawrence, \textit{supra} note 87, at 22.
punts, or decriminalize activities and mandate leniency.\textsuperscript{95} They also control budgets.

- The police are another strong contender. Police officers responding to a (purported) crime can question, arrest, or even shoot a suspect.\textsuperscript{96} Alternatively, they can let the suspect off unharmed and unreported. In fact, police power looks a lot like prosecutorial power, except police go first and pack heat.

- In many jurisdictions, a governor can pardon someone, everyone, or no one for any reason or no reason.\textsuperscript{97} Governors veto laws and, sometimes, appoint judges and prosecutors.

- A single juror can prevent a conviction or acquittal. Jurors acting collectively could bring the justice system to its knees.\textsuperscript{98}

- Judges possess broad discretion in conducting trials, accepting plea bargains, and determining sentences. They also interpret laws, control scheduling, and (frequently) yell at attorneys.

In comparison, the American prosecutor cannot enact or veto laws, appoint judges, or impose a sanction on anyone without help. Prosecutors can let people off the hook without explanation, but when it comes to incarceration, they are limited to facilitating the actions of others who actually possess the power to arrest, convict, and punish.\textsuperscript{99}

This sketch is not meant to suggest that prosecutors are toothless paper pushers. Prosecutors possess two related powers that could impact incarceration rates. After police deliver a case to the prosecutor’s office, a prosecutor decides whether to formally charge the alleged perpetrator with a crime and, if so, what crime(s). Let’s call that the prosecutorial charging power. As the case proceeds, the prosecutorial charging power morphs into a power to negotiate and ultimately agree to concessions in exchange for a defendant’s guilty plea. Let’s call this the prosecutorial plea bargaining power. Locked In highlights both powers in a Chapter titled, “The Man Behind the Curtain.” But this literary reference may be more insightful than intended. As with the fabled Wizard of Oz, the prosecutor turns out to be less powerful than initial appearances suggest.

\textsuperscript{95} Jones v. Thomas, 491 U.S. 376, 381 (1989) (recognizing that it is “the legislative branch of government in which lies the substantive power to define crimes and prescribe punishments”).

\textsuperscript{96} Tennessee v. Garner, 471 U.S. 1, 11 (1985); see O’Hear, supra note 33, at 216-17 (highlighting contribution of changes in police behavior to decreases in incarceration in Wisconsin, and other jurisdictions).


\textsuperscript{98} Butler, supra note 21, at 20 (“Jurors have an unusual power to help end mass incarceration. . . . Strategic juror nullification has the potential to revolutionize American criminal justice.”)

Let’s begin with the charging power. Locked In’s primary empirical contention is that, over the past decades, “prosecutors have become more aggressive in filing charges.” More specifically, the book contends that Mass Incarceration arose from “prosecutors bringing more and more felony cases against a diminishing pool of arrestees.” As already explained, the numbers do not back up the claim. Further complicating matters, it is difficult to pin down the mechanism through which aggressive charging could translate into an incarceration surge.

Prosecutors wield real power in deciding whether to bring charges and, relatedly, in deciding how to charge a suspect whose actions are forbidden by multiple laws. It is important to recognize, however, that the prosecutor’s power is at its apex in deciding not to bring charges. A prosecutor’s decision to file a felony charge triggers a number of formal and informal checks. The opposite is true when the prosecutor declines to bring a case. As a result, when we think about American prosecutors wielding “unfettered, unreviewable” charging discretion, we should primarily be thinking about dismissals.

Locked In, and most academic commentary, gives the opposite impression, but American prosecutors dismiss many, if not most, of the cases recommended for prosecution by police. Ronald Wright and Marc Miller’s careful study of the New Orleans District Attorney’s office over a ten-year period from 1988-1999 tells the story. Wright and Miller documented that “the NODA office rejects for prosecution in state felony court 52% of all cases and 63% of all charges.” The Bureau of Justice Statistics reported similar numbers in a series on the disposition of felony arrests in urban jurisdictions between 1979 and 1988. In 1979, prosecutors “carried forward” 50% of all felony arrests recommended for prosecution; in 1988 (the last year of the series), the number was 55%. Studies of the federal system

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100 Pfaff at 7.
101 Id. at 73.
102 See Roger A. Fairfax, Jr., Prosecutorial Nullification, 52 B.C. L. REV. 1243, 1249 (2011) (“Prosecutorial nullification deserves a more nuanced analysis, which … distinguishes nullification from prosecutorial discretion more generally.”); Austin Sarat & Conor Clarke, Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law, 33 LAW & SOC. INQUIRY 387, 387 (2008) (“The sovereign power of prosecutors is most vividly on display when they decline to bring charges where there is a legally sufficient basis for doing so.”)
103 Pfaff at 70.
105 Id. at 74 (concluding that the declination rates they observed in New Orleans “are not especially high” in light of data reported in other studies); Cassia Spohn & David Holleran, Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners, 18 JUST. Q. 651, 676 (2001) (“Prosecutions occurred in only about half of the sexual assault cases that resulted in an arrest in the two large urban jurisdictions included in this study.”)
find even steeper dismissal rates. In 1980, Richard Frase reported that “[l]ess than one-fifth of the matters received by the U.S. Attorney for the Northern District [of Illinois] resulted in the filing of formal charges in U.S. District Court.”¹⁰⁷

Prosecutors do the bulk of their dismissing before a case reaches court. But they continue to dismiss cases after filing. The Bureau of Justice Statistics switched to collecting statistics regarding the dispositions of cases filed in state courts (as opposed to those brought by police to prosecutors) in 1990. These reports reveal a post-filing felony dismissal rate of 29% in 1990, 27% in 1998 and 25% in 2009.¹⁰⁸

This data, much of it plucked from the heart of the incarceration boom, paints a vivid picture of the workings of unreviewable prosecutorial power. Prosecutors quietly and with little oversight allow droves of defendants to escape the criminal justice system without formal sanctions.

Although the massive dumping of cases makes prosecutors look like the surprise hero rather than the villain in the Mass Incarceration story (more Severus Snape than Voldemort), it also hints at a possible avenue of support for Locked In’s thesis. Perhaps prosecutors in the 1960s were quicker to decline cases brought to them by police. If the dismissal instinct weakened over time, felony filings would grow, potentially leading to more incarceration.

The notion that prosecutorial charging decisions toughened over the past decades makes intuitive sense. Societal attitudes generally became more punitive over the course of the incarceration boom, at least with respect to certain crimes like sexual assault, drunk driving, drugs, and domestic violence.¹⁰⁹ Professional policing also slowly extended to traditionally underserved communities.¹¹⁰ It certainly seems plausible, then, that starting in the 1970s, prosecutors became more likely to bring cases they might have dismissed in an earlier era. But these changes would only be attributable to “prosecutorial aggressiveness” if they occurred independently of

¹⁰⁷ Richard S. Frase, The Decision To File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion, 47 U. Chi. L. Rev. 246, 278 (1980) (adding that “it seems very unlikely that even one-half of the ‘state prosecution’ declinations are successfully prosecuted in state court”).

¹⁰⁸ The series can be accessed at https://www.bjs.gov/index.cfm?ty=pbse&sid=27.

¹⁰⁹ See Department of Justice, Bureau of Justice Statistics, Crime and Justice in the United States and in England and Wales, 1981-96 (“The U.S. rape conviction rate rose sharply (.099 in 1981 rising to .212 in 1995)).” available at http://www.bjs.gov/content/pub/html/cjusew96/cpp.cfm; Berkemer v. McCarty, 468 U.S. 420, 432 (1984) (“the offense of driving while intoxicated is increasingly regarded in many jurisdictions as a very serious matter”); Gottschalk, supra note 23 at 198 (describing war on sex offenders); Stuntz, supra note 8, at 264 (explaining that changes in “substantive criminal law,” driven by a “long backlash that followed in the wake of … rising crime,” “contributed substantially to the punitive turn”).

changes in criminal laws, reporting, police arrest decisions, jury verdicts, and judicial sentencing.

Contrary to the academic consensus, prosecutorial charging decisions are strongly susceptible to the powerful influence of other criminal justice figures. This is because unlike prosecutorial dismissals, prosecutorial charging is regulated. When commentators suggest otherwise, they mean that charging is not regulated enough. As everyone recognizes, felony charges require either an indictment by a grand jury or a probable cause finding by a judge. In addition, ethics rules prohibit the prosecution of a charge that is not supported by probable cause.

More importantly, there are powerful, indirect checks on charging. Prosecutors only care about charges to the extent they lead to convictions. As a result, prosecutors charge with an eye on future proceedings. This means that, in light of a clear increase in the harshness of other criminal justice actors, we would expect charges to become more severe over the past four decades without any change in prosecutorial aggressiveness. For example, if legislatures broadened sexual assault offenses, victims became more likely to report, police became more likely to arrest, juries became more likely to convict, and judges became more likely to sentence (or any one of those things), prison commitments for those crimes would increase, without a change in prosecutorial aggressiveness. Prosecutors would be acting as they always have, assessing cases based on the likely outcome – i.e., the actions of other, more powerful, criminal justice actors – and charging accordingly.

This is basically what Wright and Miller found when they studied the reasons New Orleans prosecutors gave for declining cases: “prosecutors' reasons most often derive from legitimate (and primarily legal) sources.” Prosecutors dismiss cases due to the “quality of evidence,” witness-non-cooperation, unlawful searches, and the presence of “good defenses.” Why? Because they weigh the charges police recommend against the rules and norms that govern at trial. “[T]he prosecutor translates the legal judgments of other institutions—legislatures that create criminal codes and courts that enforce procedural and substantive requirements—into a prosecutorial decision to refuse charges.”

This is not to say that prosecutors do not “overcharge,” a poorly defined, but common critique. The point is that overcharging has little consequence in and of itself. Prosecutor charging decisions should be understood as an expert prediction.

112 See ABA Model Ethics Rule 3.8 Special Responsibilities Of A Prosecutor.
113 Marc L. Miller & Ronald F. Wright, The Black Box, 94 IOWA L. REV. 125, 135 (2008).
114 Id. at 138-39.
115 Id. at 153; Spohn & Holleran, supra note 105, at 652, 682.
116 Pfaff at 73 (“upcharging”).
of the likely decisions of other actors in the criminal justice system.\textsuperscript{117} That prediction, and its “power,” depends entirely on these other actors. The prosecutor predicts what a jury and judge will do with the case in light of laws enacted by the legislature. If the prediction is flawed, defendants will (on balance) go to trial and win. Even if overcharged defendants lose at trial, or plead guilty, that alone would not lead to an incarceration increase. Judges reign at sentencing. Absent a mandatory minimum sentence (discussed below), the judge can ignore the prosecutor’s characterization of the criminal conduct and impose a sentence that reflects the conduct itself, rather than any inflated overcharge. All a prosecutor accomplishes by overcharging – i.e., charging an offense that a jury will reject and a judge will discount at sentencing – is an increased risk of pretrial dismissal and a defendant who insists on a trial. As a consequence, the mechanism by which increasing “prosecutorial toughness when it comes to charging people”\textsuperscript{118} unilaterally hikes prison populations remains elusive.

Another point undermines the theory that incarceration rates skyrocketed because “prosecutors have become more aggressive in filing charges.”\textsuperscript{119} As Locked In repeatedly stresses, the defendants serving prison terms are typically convicted of relatively severe, often violent crimes.\textsuperscript{120} We would expect fluctuations in prosecutorial dismissal rates to affect these defendants least of all.\textsuperscript{121} A prosecutor who received a provable murder, rape, or aggravated assault case in 1970 probably proceeded similarly – at least in terms of whether to file a charge – to a prosecutor who receives an equivalent file today.

If changes in prosecutorial charging aggressiveness do not explain Mass Incarceration, the answer might be found instead in changes in how prosecutors wield their plea bargaining power. Indeed, while Pfaff’s data points to charging, most academics target plea bargaining as the arena where prosecutorial aggressiveness operates.\textsuperscript{122}

Again, the academic claim is counterintuitive. As with prosecutorial discretion to dismiss charges, the prosecutor’s broad discretion to offer concessions in exchange

\textsuperscript{117} See Spohn & Holleran, supra note 105, at 652, 682 (summarizing studies reflecting prosecutors’ “filing charges in cases where the odds of conviction are high and … rejecting charges in cases where conviction is unlikely” and finding same pattern in sexual assault charging decisions).

\textsuperscript{118} Id. at 6.

\textsuperscript{119} Id. at 7.

\textsuperscript{120} Id. at 11, 187; 74 (“an increasing prosecutorial focus on violent offending”).

\textsuperscript{121} Vorenberg, supra note 111, at 1527 (“For the most serious crimes, prosecutors generally will charge the most severe offense the facts seem to support and will bolster the charge with some available related offenses.”)

\textsuperscript{122} See, e.g., Marc L. Miller, Domination & Dissatisfaction: Prosecutors As Sentencers, 56 Stan. L. Rev. 1211, 1252 (2004) (arguing that the claim that federal prosecutors possess “virtually absolute power” is demonstrated by “one simple and awesome fact: Everyone pleads guilty.”); Stuntz, supra note 8 at 295 (describing prosecutors as “exercising their power chiefly through plea bargaining”).
for guilty pleas looks, on its face, to be a means to mitigate not increase incarceration. That is why purportedly “tough-on-crime” prosecutors reject rather than embrace plea bargaining. More often than not, a suspect’s guilt is clear from the moment of arrest. A well-counseled defendant facing near-certain conviction and a lengthy sentence will seek a discounted charge from the prosecutor in exchange for a trial waiver. Routine reliance on this practice tempers the severity of the laws and sentences dictated by the legislature and imposed by judges.

But just as the power to offer a lenient plea deal can be used to decrease incarceration rates, its parsimonious application could increase incarceration. Here, the theory would be that over the course of the incarceration boom, prosecutors offered increasingly punitive plea bargains, or no plea bargains at all, leading to more prison time for more defendants. Again, however, the actual mechanism by which prosecutors could use plea bargaining to unilaterally impose increasingly severe punishments proves difficult to nail down.

Right at the start, we run into the same complication that derailed the charging-to-incarceration narrative. While the prosecutor’s ability to offer leniency in a plea (essentially a close cousin of outright dismissal) is virtually unchecked, efforts to ratchet up severity run into a variety of obstacles. The primary check on a prosecutor’s ability to impose punishment through plea bargaining is that any plea deal requires the defendant’s agreement. The Constitution guarantees every

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123 See, e.g., Pam Belluckmay, Queens Prosecutor Bans Plea Bargaining in Felony Cases, N.Y. Times, May 16, 1996. http://www.nytimes.com/1996/05/16/nyregion/queens-prosecutor-bans-plea-bargaining-in-felony-cases.html (“Barring plea bargaining is attractive to many prosecutors and some judges because they believe that letting defendants plead guilty to lesser charges makes them appear too lenient.”); Cal. Penal Code § 1192.7(a) (expressing intent to ensure longer sentences by prohibiting plea bargaining in certain circumstances).

124 Alexander, supra note 37, at 69 (“the people who wind up in front of a judge are usually guilty of some crime”).


defendant the right to reject even the most generous plea offer and proceed to trial.\textsuperscript{127}

Even if the defendant agrees to plead guilty, the prosecutor must overcome another obstacle before punishment is imposed, the judge. Judges approve all plea deals.\textsuperscript{128} If the judge believes the deal does not fairly reflect the defendant’s conduct, she can reject it – even if she belatedly makes the determination at sentencing after reviewing a presentence report.\textsuperscript{129} If the judge approves a deal, she typically retains final say on sentence. While some plea agreements dictate a particular sentence, others leave the sentence to the judge.\textsuperscript{130} In either scenario, the judge determines the ultimate sentence by implicitly approving the parties’ stipulated sentence, or explicitly selecting a sentence.\textsuperscript{131} Pfaff and others recognize this point, but nonetheless deny judges agency, stating: “It is true that judges are required to sign off on pleas and can thus reject those they find unsatisfactory, but in general, they will acquiesce to the deals struck by the prosecutors and defense attorneys.”\textsuperscript{132} The empirical basis for this contention is uncertain.\textsuperscript{133} But even if it is an accurate assessment, a powerful check on prosecutorial plea bargaining exists. Judges might not exercise that check as often as critics wish. But that is either because defendants are largely agreeing to rational plea deals, or because judges are “complicit” in plea bargaining.\textsuperscript{134} (In some jurisdictions, judges participate in the plea negotiations.)\textsuperscript{135}

\textsuperscript{127} See U.S. Const., Fifth (self-incrimination), Sixth (right to jury trial), and Fourteenth Amendments (applying rights against States).

\textsuperscript{128} See Santobello v. N.Y., 404 U.S. 257, 262 (1971). While a diverse range of rules govern America’s pleas, every jurisdiction requires judicial approval of plea agreements. See, e.g., People v. Segura, 188 P.3d 649, 656 (2008); Fifty-state survey on file with author. Judicial approval is most obviously required for any agreement regarding sentencing. See, e.g. ARIZ. R. CRIM. P. 17.4(d) (“The court shall not be bound by any provision in the plea agreement regarding the sentence …”), CO. R. CR. P. 11(f)(5) (“Notwithstanding the reaching of a plea agreement …., the judge in every case should exercise an independent judgment in deciding whether to grant charge and sentence concessions.”)


\textsuperscript{130} See generally Fed. R. Crim. Proc. 11.

\textsuperscript{131} See, e.g., Fed. R. Crim. Proc. 11(c)(3)(A) (“the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report”); Tex. Crim. Proc. Code Ann. Art. 26.13(a)(2) (court cannot be bound by prosecutor’s recommendation as to sentence); Cal. Penal Code § 1192.5 (permitting plea agreements to specify the punishment, except with respect to certain serious offenses, but requiring court approval which can be withdrawn any time prior to sentencing).

\textsuperscript{132} Pfaff at 133; Richard A. Bierschbach & Stephanos Bibas, Notice-and-Comment Sentencing, 97 MINN. L. REV. 1, 7 (2012) (“Judges usually rubber-stamp these deals for a variety of reasons…”); Wright & Miller, supra note 104, at 88 (same).

\textsuperscript{133} See, e.g., J. Langley Miller & John J. Sloan, III, A Study of Criminal Justice Discretion, 22 J. CRIM. JUST. 107, 119 (1994) (concluding from empirical study of felony cases in an undisclosed prosecutor’s office that “[s]entencing judges exercised relatively large amounts of unchecked discretionary authority to sentence felony offenders convicted by means of either bench trial or plea negotiations”).

\textsuperscript{134} Bibas, supra note 23, at 65.

Either way, judicial approval rates, whether high or low, reflect an application of judicial, not prosecutorial power.

The prosecutor’s plea bargaining power is further limited by the fact that legislators, judges, and juries fill in the landscape in which plea deals are evaluated. By determining what will occur in the small percentage, but large number, of cases that go to trial, these actors guide the outcome in plea bargained cases. While this “shadow of trial” theory invariably breaks down in some individual cases (incompetent defense counsel, irrational defendants, etc.), experimental and anecdotal evidence reveals that it “appears to be quite accurate” as a model of American justice in the aggregate. Studies suggest that plea deals across a large number of cases reflect a predictable discount from generally agreed-upon, likely trial outcomes.

The legislative and judge-jury control of the rules that apply in the absence of agreement, required judicial approval of any plea agreement, and the necessity of the defendant’s assent all take a healthy bite out of the prosecutor’s plea bargaining power. A prosecutor may be Maleficient at heart, but she is going to have to scheme like Machievelli to get anything through the plea bargaining process that isn’t preordained by the legislature, judge, and jury.

Thus, the prosecutor’s plea bargaining power looks a lot like the charging power. The typical plea deal reflects not the prosecutor’s unvarnished preferences, but a prediction (by both parties this time) of the likely actions of other criminal justice actors – juries and judges – who, unlike prosecutors, actually have the power to directly impose sanctions on a criminal defendant. If the prediction is too severe,

(describing “surprising findings” regarding significant judicial involvement in plea bargaining in ten-state empirical study); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 238 (2006) (“The current ABA Standards on Criminal Justice and more than a dozen states provide for a limited role for judges during the plea negotiations.”)


defendants will refuse the deal and take their chances at trial. Judge Easterbrook explains the dynamic using the unassailable logic of economics jargon. The prosecutor and defendant “bargain as bilateral monopolists” in the “shadow of legal rules that work suspiciously like price controls.” In other words, legislatures, juries, and judges set the prices in the plea bargaining market; prosecutors just work there.

None of this means that plea deals did not get worse for defendants over the past three decades. They probably did. But there is no reason to view the worsening as a product of prosecutorial aggressiveness. Broader criminal laws, tougher sentencing rules, harsher judges, a diminished likelihood of release on parole, all increase the likelihood of convictions and stiffer sentences. The plea deals prosecutors offer, and defendants agree to, undoubtedly reflect those changes – leading to increased prison admissions and time served. Prosecutors could perhaps have counteracted the trend toward severity, and there is some evidence that they did (including an increasing reliance on plea bargaining). But Locked In is not criticizing prosecutors for failing to more fully undo the effects of an increasingly harsh criminal justice system engineered by judges, juries, and legislators. It claims that prosecutors unilaterally made a relatively lenient system severe. My point is that they can’t, and the data does not show that they did.

Readers may object that the preceding discussion, and particularly any blame assigned to judges, ignores the role of mandatory sentencing laws. Indeed, commentators commonly criticize mandatory sentences on the ground that they over-empower prosecutors during plea bargaining. It is right to criticize

139 Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 STAN. L. REV. 989, 1033 (2006) (“For most defendants, the deal offered by the government will likely be in their interests.”)
141 Cf. Bibas, supra note 23, at 962 n.9 (“harshness is primarily a matter of legislative policy, rather than prosecutorial discretion in apportioning punishment”); James B. Burns et. al., We Make the Better Target (but the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution), 91 NW. U. L. REV. 1317, 1325 (1997) (arguing that complaints about severity should be aimed at sentencing rules “with fewer allegedly draconian sentences and lower or fewer mandatory minimum sentences”); Darryl Brown, Prosecutors and Overcriminalization: Thoughts on Political Dynamics and A Doctrinal Response, 6 Ohio St. J. CRIM. L. 453, 460 (2009) 6 OHIO ST. J. CRIM L. 453, 460 (2009) (“Incarceration rates are in large part functions of legislative and gubernatorial policy making. But prosecutors play a role as well, …”)
142 See sources cited in note 126, supra, and note 150, infra.
143 See Máximo Langer, Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure, 33 AM. J. CRIM. L. 223, 279, 282 (2006) (decrying system for giving prosecutors the power to “set sentences” through plea bargaining; recognizing a weakness of this claim – that, even in the context of plea bargains, “sentencing is essentially a judicial function” – but maintaining that “in a number of American criminal justice systems, the judges may not legally exercise this type of discretion”); see also Bibas, supra note 23, at 971; Alexander, supra note 37, at 86-87; Stuntz, supra note 8, at 259; Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. PA. L. REV. 550, 578 (1978) (anticipating critique prior to the developments that created it).
mandatory minimums for dictating overly-harsh punishment, but the critique adds little to what has already been said about prosecutorial power.

Reliance on mandatory minimums as the source of prosecutorial power is especially revealing in one respect. It implicitly acknowledges that, in the absence of mandatory sentencing laws, prosecutorial power is severely blunted. As the iconic Bill Stuntz put it, in “discretionary sentencing jurisdictions, . . . [p]rosecutors lack the power to dictate post-trial sentences.”

That is a big concession because despite an increase in mandatory sentencing laws in recent decades, discretionary sentencing remains the rule rather than the exception. Complaints about mandatory minimums are common in the federal system. By contrast, commentators note an “absence of widespread complaints” about this form of “prosecutorial dominance in state guidelines systems.” One place to look for an impact at the state level would be so-called “Three-Strikes” laws. Yet, a study of their application in 24 states from 1986 to 1996 found that “the numbers of offenders sentenced under such laws are small in all states except Georgia, South Carolina, and California.” Even in the federal system, the Federal Sentencing Commission reported that judges retain discretion in over 75 percent of sentencings.

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144 William J. Stuntz, Plea Bargaining and Criminal Law’s Disappearing Shadow, 117 HARV. L. REV. 2548, 2560 (2004); Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 CAL. L. REV. 1471, 1502 (1993) (“Prior to the introduction of the [federal] sentencing guidelines, plea bargaining took place in the shadow of judicial sentencing, which restricted the ability of the prosecutor to act as a monopsonist, to be a faithless agent, or to use the rules of plea bargaining to his advantage.”).

145 See below.


149 Federal Sentencing Commission, 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, at 121-22, 131 (reporting that 27% of sentencings involved a defendant subject to a mandatory minimum and almost half of those still avoided the mandatory sentence through substantial assistance and safety valve provisions), http://www.uscourts.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system The report also states that over the past 20 years, “the
Admittedly, the relatively few cases involving the actual imposition of mandatory sentences would not tell the whole story. The mere potential for the imposition of a mandatory sentence could limit judges’ and defendants’ abilities to reject plea deals proposed by aggressive prosecutors. But here the phenomenon’s limited scope becomes particularly evident. A prosecutor can “dictate” a sentence in the following circumstance: (i) the prosecution has a realistic chance of convicting the defendant of an offense (or enhancement) with a mandatory minimum sentence at trial; (ii) the defendant is willing and able to plead guilty to a charge that does not include a mandatory sentence; (iii) the parties agree to a stipulated sentence significantly under the original mandatory minimum, but still higher than what the judge would otherwise impose; and (iv) the jurisdiction authorizes, and the judge will approve, a binding sentence stipulation as part of a plea agreement. The question becomes how frequently this dynamic arises. Clearly, more state-specific analysis is needed to know the answer, but the one jurisdiction that has been comprehensively studied raises doubts about mandatory sentencing’s centrality to the nation’s punitive turn. Wisconsin, a state where mandatory sentences never gained traction, “preserved its judicial sentencing discretion to a much greater extent than many other jurisdictions but still experienced an above-average increase in imprisonment during the era of mass incarceration.” Why? Probably because it is not the prosecutors (or mandatory sentences) after all.

Evidence of this dynamic can be teased out of a study of Washington State’s strict drug sentencing laws, see Rodney L. Engen & Sara Steen, The Power to Punish: Discretion and Sentencing Reform in the War on Drugs, 105 Am. J. Soc. 1357 (2000), and a similar Pennsylvania study, Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences, 44 J. RES. CRIME & DELINQ. 427, 448 (2007), but not in a study of Minnesota, Miethe, supra note 86.

Without a significant sentence concession, the defendant has no incentive to plead guilty. If the judge would have imposed a higher sentence even without the mandatory, the prosecutor gains nothing through this gambit; the judge’s sentencing preference prevailed. Without a binding sentence stipulation, the prosecutor, again, cedes control of the ultimate sentence to the judge. True, the prosecutor still gets a conviction, but the judge determines whether to add the defendant to the prison population.


Cf. NRC at 73 & n.3 (noting lack of comprehensive data on state sentencing).


Id. at 207.
More importantly, to the extent mandatory minimums inflate plea bargained sentences, they are just another facet of the increasingly harsh criminal landscape referenced earlier (i.e., the lengthening “shadow of trial”). As the Wisconsin study illustrates, there are plenty of harsh sentencing judges. Stiff mandatory minimum sentences turn every judge into a harsh judge. This Matrix-like proliferation of harsh judges undoubtedly makes defendants more inclined to seek sentencing agreements from prosecutors, but it is the sentencing rules, not the prosecutors, that became more severe.156

Finally, if the distortions created by mandatory minimums are all that remain to support claims of prosecutorial superpowers, then the real villain is unmasked, and it is not the prosecutor. The solution is also plain. State and federal legislatures enacted mandatory minimum sentences, and legislators should abolish them.157 Federal Judge Jed Rakoff gets to the heart of the issue in a scathing insider profile of Mass Incarceration that barely mentions prosecutors. Instead, Rakoff points the finger at legislators and in the mirror, explaining that while harsh sentencing is sometimes “mandated by the legislature, it is we judges who mete it out.”158

IV.
If Prosecutors Are Not the Problem, Regulating Them is Not the Solution

The final chapter of Locked In presents a proposed pathway out of Mass Incarceration. Since the book contends that unregulated prosecutors are “the engines driving mass incarceration,”159 it discourages the more natural focus on decriminalization and sentencing reform and instead advocates a potpourri of measures designed to rein in prosecutorial discretion. It begins with a note of optimism: “Fortunately, . . ., there are numerous legislative options for reining in prosecutorial aggressiveness.”160 (Another passage warns, though, that “changing the attitudes of prosecutors,” – “a much harder task” – will ultimately be required.)161

The reform proposal that best fits Locked In’s empirical claims is to “follow in New Jersey’s footsteps and implement plea bargaining guidelines.”162 The book suggests that such guidelines could go beyond determining prosecutorial plea offers, but also “cover charging decisions as well.”163 Pfaff offers an example to illustrate the need:

156 The Matrix (Warner Bros. 1999).
159 Pfaff at 206.
160 Id.
161 Id. at 76.
162 Id. at 210.
163 Id.
“A drug-addicted twenty-year-old arrested for the first time and accused of stealing a laptop.”\textsuperscript{164} He asks: How should the “second-year prosecutor, just a few years out of law school” decide what the defendant should be charged with and whether to recommend drug court?\textsuperscript{165}

The example is instructive, but does not support the need for prosecutorial guidelines. First, it presents an overly simplified picture of prosecutor offices. Charging decisions, at least in larger offices, are often centralized so that more senior prosecutors select initial charges.\textsuperscript{166} These offices also strive for internal consistency through formal guidance, training, and norms.\textsuperscript{167} Even in smaller offices, it is likely rare that something like eligibility for drug court or other diversion programs would be left to seat-of-the-pants determinations of novice prosecutors.\textsuperscript{168} (Admittedly, I cannot speak to all 2344 prosecutor offices.)\textsuperscript{169} Drug courts often have admittance rules that mirror prosecutor policies.\textsuperscript{170} These rules will almost certainly permit a drug addict who commits a minor property crime to enter drug court (or other diversion program).\textsuperscript{171} The line prosecutor who resists will be fielding angry questions from the judge, the defense attorney, and an annoyed supervisor.

Second, the charging decision Locked In presents to illustrate the need for guidelines is not difficult. It requires a simple comparison of the facts with the criminal code. In most jurisdictions, the code grades theft by reference to the value of the stolen property. In New Jersey, for example, if the laptop is worth more than

\textsuperscript{164} Id. at 212-13.
\textsuperscript{165} Id.
\textsuperscript{166} Frase, supra note 107, at 254 (U.S. Attorney’s Office for the Northern District of Illinois); Miller & Sloan, supra note 133, at 109 (undisclosed prosecutor’s office).
\textsuperscript{167} Ronald F. Wright, Prosecutorial Guidelines and the New Terrain in New Jersey, 109 PENN ST. L. REV. 1087, 1099 (2005) (“Written guidelines for line prosecutors are quite common, particularly in larger offices where bureaucratic realities prevent the elected prosecutor from monitoring all the work of the office closely.”); O’Hear, supra note 33, at 18 (discussing proliferation of guidance and relaying complaint that prosecutors have become “just another functionary in the system”).
\textsuperscript{168} Butler, supra note 21, at 107-08 (“rather than having ‘power,’ line prosecutors have delegated authority that is subject to several layers of review”); Smith, supra note 21, at 385 (“The truth is most prosecutors have very little discretion.”)
\textsuperscript{171} See sources cited in note 170, supra; America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform 22 (National Association of Criminal Defense Lawyers 2009) (reporting on varying drug court eligibility criteria).
$500, the charge will be third degree theft; between $200 and $500, fourth degree theft.\textsuperscript{172} This is how charging typically works. Prosecutors match the facts they can prove to an applicable criminal law. That is why typical prosecutors offices have one-sentence-long charging guidelines. For example, “It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge … the most serious, readily provable offense or offenses that are supported by the facts of the case…”\textsuperscript{173} Commentators sometimes raise the additional wrinkle that the same conduct may be punishable by two separate laws. To the extent a prosecutor invokes two laws to cover the same criminal conduct, however, there is an easy fix. The judge can ensure that the ultimate sentence reflects the underlying conduct, not the initial charges; in extreme circumstances this is mandated by the Constitution.\textsuperscript{174} If Locked In’s rookie prosecutor charges the defendant with theft and attempted murder (because who can live without their laptop?), and the defendant somehow pleads guilty to those charges, the judge will raise an eyebrow and sentence the defendant to probation, with a call to the prosecutor’s supervisor to follow.

It is tempting to apply the New Jersey plea bargaining guidelines Locked In champions to its theft hypothetical. But as the book acknowledges, the State’s 138-page plea bargaining guidelines only apply to a handful of drug offenses that carry severe mandatory prison terms.\textsuperscript{175} New Jersey does not provide specific guidelines for the bulk of criminal offenses, probably because the complexity of creating such a document would be enormous and the benefits unclear. Two more thing to note before we follow in New Jersey’s footsteps. Locked In informs us that the New Jersey guidelines: (1) increased sentencing severity; and (2) exacerbated the state’s black-white sentencing disparity, which is the highest in the nation.\textsuperscript{176}

The only other State that purports to have plea bargaining guidelines is Washington. Under Washington’s criminal code, stealing a laptop worth less than $750 is third degree theft, a misdemeanor; between $750 and $5,000, second degree theft, a felony.\textsuperscript{177} Washington’s guidelines require plea deals to reflect “charges which adequately describe the nature of [the defendant’s] criminal conduct,” with allowances for “[e]videntiary problems,” criminal history, cooperation, the victim’s

\textsuperscript{172} N.J. Stat 2C:20-2.
\textsuperscript{174} Schiro v. Farley, 510 U.S. 222, 229 (1994) (recognizing constitutional double jeopardy protection “against multiple punishments for the same offense”); United States v. Throneburg, 921 F.2d 654, 657 (6th Cir. 1990) (explaining that separate counts for possession of gun and ammunition would “merge for purposes of sentencing”).
\textsuperscript{175} Pfaff at 148; New Jersey, Division of Criminal Justice, Attorney General’s Brimage Guidelines, http://www.state.nj.us/oag/dcj/agguide/directives/brimage_all.pdf
\textsuperscript{176} Pfaff at 149-50; Sentencing Project, State-by-State Data, Black/White Disparity, http://www.sentencingproject.org/the-facts/#rankings?dataset-option=BWR
\textsuperscript{177} Rev. Code of Washington 9A.56.040 and 9A.56.050.
well being, and the “nature and seriousness of the offense or offenses charged.” In other words, the guidelines instruct prosecutors to think about exactly the things they couldn’t help but think about in the absence of guidelines. Not surprisingly, the Washington “standards have had no noticeable effect on prosecutorial discretion.” All other states that have considered prosecutorial guidelines abandoned the effort.

The problem is not just impracticality. The lessons of New Jersey and the infamous Federal Sentencing Guidelines is that rules like those proposed by Locked In are more likely to exacerbate incarceration rates than reverse them. As discussed above, the unregulated power Pfaff aims to constrain is really the power to dispense leniency. There are already a series of rules that restrict prosecutors’ ability to “impose” incarceration. Grand juries screen felony charges, petit juries determine guilt, judges impose sentences, and defendants must agree to any plea deal. Those are as powerful a set of rules as anything reformers can conjure up. The one thing existing rules don’t constrain is prosecutorial leniency, the ability to quietly open exit doors. Mandatory charging and plea bargaining guidelines would change that.

Locked In also highlights the lack of transparency in prosecutor offices and proposes reforms that would expose prosecutorial decisions to the all-seeing public eye. This, it says, would “help reformers and legislators identify what prosecutors are doing improperly and why they are doing it.” Given that most of what prosecutors do out of public sight is dismiss cases, these transparency proposals are again more likely to increase rather than decrease incarceration levels. If legislators and the public had a better sense of what prosecutors are doing (i.e., dropping cases brought to them by the police), they might react by restricting that dismissal power. No one has spent more time studying prosecutors than Ronald Wright. His take on mitigating severity through prosecutorial action is the opposite of Pfaff’s. Wright writes: “Perhaps the only way to remove some of the severity [of the existing system] is to allow prosecutors to operate quietly, dispensing mercy in a few cases, even if it is done inconsistently.”

Effective solutions to Mass Incarceration need to be based on a clear understanding of the true causes of the phenomenon. Mass Incarceration is not a virus introduced

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179 Boerner, supra note 147, at 198.
181 Pfaff at 197.
182 Id. at 157-59; 209-10; see also J. R. R. Tolkien, LORD OF THE RINGS (1968).
183 Pfaff at 158-59.
185 Wright, supra note 167, at 104.
into the criminal justice system by rogue prosecutors. The explanation is simpler and less exciting. Politicians passed laws designed to increase incarceration, the laws did exactly that, the politicians got reelected and passed more.186 At the same time, voters (directly and indirectly) replaced judges who casually dispensed mercy with judges who studiously dropped the hammer.

A recognition that judges and legislatures drove the increase in incarceration rates leads to prioritizing different types of reforms to undo Mass Incarceration. *Locked In*’s theft hypothetical provides an illustration. A drug addict who steals a $500 laptop should not go to prison.187 The best way to ensure that result is to raise the statutory threshold for felony theft, as in South Carolina, where it is $2000.188 (In fairness, Pfaff endorses this particular reform, characterizing it as a way to “control prosecutors’ ability to send people to prison.”)189 A second best alternative is to convince judges who impose theft sentences to recognize that a prison term is unwarranted. By far the worst option is to ask the legislature to command prosecutors to circumvent felony theft laws (and judges aching to impose prison terms) by charging theft defendants with loitering. The same reasoning applies to the host of more severe laws authored by legislators over the past 4 decades, including mandatory sentencing laws. California’s Three Strikes law is absurd. The solution is to amend or repeal it, and give judges broader discretion to deviate from its terms. If those solutions prove impossible, we can turn in desperation to prosecutors to nullify these laws and undercut judicial severity – assuming their hands aren’t tied by mandatory guidelines.

Similarly, if the plea deals offered by prosecutors (and agreed to by defendants) are too harsh, the answer is not a 138-page guidebook that attempts to steer speedreading prosecutors to the right result.190 The Federal Sentencing Commission tried to do that with “real offense” sentencing, a concept that requires guideline sentences to be based on the defendant’s conduct regardless of the charges.191

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186 NRC at 70 (“In the 1980s and 1990s, state and federal legislators passed and governors and presidents signed laws intended to ensure that more of those convicted would be imprisoned and that prison terms for many offense would be longer.”); Zimring et al., *supra* note 126, at 22 (“Every strategic decision in the California [Three Strikes] scheme was a conscious effort to maximize the law’s impact on the length of prison sentences and time served in California.”)


189 Pfaff at 155-56, 159.

190 Cf. Wright, *supra* note 180, at 1019 (“The prosecutor's selection of charges and the resolution of those charges turn on countless facts, …”)

191 Michael Tonry, SENTENCING MATTERS 68 (Oxford 1996) (describing federal guidelines approach as the “most radical” method yet proposed for restricting plea bargaining-based evasion of sentencing regimes); Burns et. al., *supra* note 141, at 1335 (pointing out that by virtue of the sentencing guidelines, “the prosecutor's power to influence the sentence through the charges is significantly circumscribed”);
Opinions on the success of this effort differ, but one thing is crystal clear—it did not blunt sentence lengths or the incarceration rate in the federal system.

A better response to severe plea deals is to alter the ingredients from which they are brewed. Markets are notoriously tough to regulate, but, as Judge Easterbrook observes, this peculiar market comes with “price control” levers operated by legislators and judges. Eliminate mandatory sentences, narrow overbroad laws, decrease sentencing ranges, impose lighter sentences, and plea bargain prices will plummet. Further discounts can be offered by parole boards at the back end. Expungements should become routine. In short, the same heavy-handed laws and judicial mindsets that ratcheted up severity can ease it back down.

Another place to look for solutions is in actions that have already proven successful. Most basically, legislatures and courts should cap prison capacity. This effectively happened in 2011, when the Supreme Court ordered California to release thousands of prisoners from horrifyingly overcrowded prisons, and California complied. California laws still authorize, and judges continue to hand down, severe sentences, but many defendants serve only a fraction of their time. A recent profile of one California county highlighted a defendant sentenced to three years for methamphetamine trafficking who, after a “fed kick” (affectionately named for the court that capped the prison population), served only a day. The reporter notes: “Prosecutors are exasperated by cases like this, but say their hands are tied.”

Another success story comes from the Federal Sentencing Commission. In 2014, this independent judicial agency voted to decrease the severity of federal drug sentencing guidelines, and apply the change retroactively. The under-the-radar

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195 See Covey, *supra* note 125, at 968 (advocating “abolishing mandatory minimum sentences, habitual offender and three strikes laws, and the like, and reducing maximum sentences across the board”); Langer, *supra* note 143, at 278 (“Reducing the harshness of the criminal justice system is then a way to reduce the extent of the Prosecutorial Adjudication System in state and federal plea dispositions.”); William J. Stuntz, *Reply: Criminal Law’s Pathology*, 101 MICH. L. REV. 828, 831 (2002) (“prosecutorial power can be reined in, by reining in substantive criminal law”).


198 Id.
decision resulted in the early release of 6,000 federal drug offenders in Fall 2015 and set the stage for the release of another 40,000.\footnote{Sari Horwitz, \textit{Justice Department Set to Free 6,000 Prisoners, Largest One-Time Release}, \textit{WASH. POST}, October 6, 2015.} Notably, these substantial bites out of the federal and California incarcerated populations occurred without anyone having to thaw the frozen hearts of aggressive prosecutors.

\textbf{Conclusion}

Few people get to prison without the involvement of a prosecutor. The same can be said for the bailiff, the prison bus driver, and the corrections officer who operates the gate. Prosecutors always appear at the scene of the crime and, unlike those other actors, certainly should have done more to mitigate Mass Incarceration. But it is misleading to claim that they – not legislators or judges – bear primary responsibility for the phenomenon.

Although legal academics don’t often recognize it, prosecutorial power is too tentative and dependent to lie at the core of Mass Incarceration. At the most basic level, prosecutors connect the police who initiate formal proceedings with the judges who conclude them. This facilitating nature of prosecutorial power affords little opportunity for prosecutors to unilaterally increase incarceration rates. A prosecutor cannot put anyone in prison without the direct assistance of legislators, police, and judges, and the indirect acquiescence of governors, parole boards, and grand and petit juries. All prosecutors can do by themselves is let people off – a tactic that does not lend itself to filling prisons.

None of this is to say that prosecutors get up each morning seeking to save defendants from a harsh criminal justice system. Some do, most do not. The point is that prosecutors are primarily “worker bees” who toil in the system, rather than wizards bending it to their will.\footnote{Butler, \textit{supra} note 21, at 109.} Consequently, their motives and actions are less relevant than Pfaff and others seem to believe. Prosecutors played a supporting role in the rise of Mass Incarceration; they can play a supporting role in winding it down. But the real wizards – legislators and judges – must do the heavy lifting. Sure, if politicians and judges prove incapable of quitting their incarceration addiction, prosecutors can sporadically defang harsh laws and callous judges. Such efforts, which happen every day in prosecutor offices across the country, resonate with Paul Butler’s provocative advocacy for “strategic” juror nullification (but not his urging “good people” to shy away from becoming prosecutors).\footnote{Id. at 72-73.} We fool ourselves, though, to think we can harness this power to indirectly accomplish what legislators and judges must do directly. All that will happen if we try is that the same forces that brought us Mass Incarceration will wall off the few exits that remain, making the problem worse, not better.

\begin{itemize}
\item Sari Horwitz, \textit{Justice Department Set to Free 6,000 Prisoners, Largest One-Time Release}, \textit{WASH. POST}, October 6, 2015.
\item Butler, \textit{supra} note 21, at 109.
\item Id. at 72-73.
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