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AN INFORMATIONAL APPROACH TO THE MASS IMPRISONMENT PROBLEM

Adam M. Gershowitz[†]

The United States is plagued by the problem of mass imprisonment, with its prison population having risen by 500% in the last three decades. Because the overwhelming majority of criminal cases are resolved through plea bargaining, there is room for prosecutors to reduce mass imprisonment by exercising their wide discretion. At present, prosecutors likely do not give much consideration to the overcrowding of America's jails and prisons when making their plea bargain offers. However, if prosecutors were regularly advised of such overcrowding they might offer marginally lower sentences across the board. For instance, a prosecutor who typically offers a first-time drug offender a twenty-month sentence might instead agree to an eighteen-month plea bargain if she were aware that prisons were overcrowded and incarceration rates were on the rise. A rich body of social psychology literature supports the view that informing prosecutors about mass imprisonment might cause them to offer lower sentences. Legislatures have an incentive to enact such a proposal because a reduction in incarceration would reduce the already huge and escalating costs of criminal corrections. At the same time, because legislatures would simply be instructing that prosecutors be advised of the scale of imprisonment, and not specifically advocating lower sentences, there would be no danger of legislators appearing "soft on crime."

Criminal justice in America is not a zero-sum game. When legislatures enact new criminal statutes, they are under no requirement to decriminalize old behavior.¹ And when judges sentence individuals to prison, they are under no obligation to ensure that other convicts are released. Criminal

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1. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) ("Since all change in criminal law seems to push in the same direction—toward more liability—this state of affairs is growing worse: legislatures regularly add to criminal codes, but rarely subtract from them.").

justice is, therefore, like a “one-way ratchet,”² with the possibility of incarceration increasing each year.³

To combat this one-way ratchet, the criminal justice system puts its faith in prosecutorial discretion.⁴ The overwhelming majority of prosecutors are reasonable and exercise their discretion soundly. Moreover, prosecutors’ offices have annual budgets, and those funds will only permit a certain number of prosecutions in a given year.⁵ Thus, in theory, the problems of overcriminalization and overincarceration should be limited by the reasoned judgment of prosecutors and the financial pressures they face. Yet, incarceration rates are at record levels and continue to climb.⁶

One of the key problems⁷ appears to be that while prosecutors are generally constrained by their financial resources and their reasoned

2. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005) (“[L]awmakers have a strong incentive to add new offenses and enhanced penalties, which offer ready-made publicity stunts, but face no countervailing political pressure to scale back the criminal justice system.”). A recent and provocative article disputes the widely accepted view that criminal legislation is pathologically one directional. See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007).

3. See MARC MAUER, *RACE TO INCARCERATE* 214 (rev. ed. 2006) (“The current figure of incarcerated people—more than two million—continues to climb each year”); see also Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1693 (2006) (“The U.S. incarceration rate has accelerated dramatically, increasing more than five-fold between 1971 and 2000.”).

4. See Stuntz, *supra* note 1, at 509.

As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys’ offices and police departments.

Id.

5. See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 601 (2005) (“Extreme docket pressure characterizes DAs’ offices, particularly in the large cities where crime rates tend to be highest. It follows that criminal litigation must be rationed not only based on political necessity but also based on cost.”); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2553–55 (2004) [hereinafter Stuntz, *Plea Bargaining*] (discussing pressures created by budget constraints). At the federal level, budgets are sometimes less constraining. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 443–46 (2001).

6. Between 1972 and 2003 the incarceration rate grew by more than 500 %. See MAUER, *supra* note 3, at 1.

7. There are numerous reasons for the drastic increase in incarceration over the last several decades. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 119–36 (1991) (reviewing multiple explanations for the incarceration increase and finding a lack of empirical support). I do not mean to suggest that prosecutorial discretion is the cause of skyrocketing incarceration but, instead, that providing prosecutors with information about other parts of the criminal justice system may decrease or stem the increase of incarceration.

judgment, prosecution resources are often greater than defense resources and bear little or no relation to the amount of funding for prisons and jails.⁸ On a day to day basis, most prosecutors are probably not cognizant of the lack of resources held by the rest of the criminal justice system.⁹ It is safe to assume that when prosecutors walk into court, they do not ask themselves whether there is sufficient funding to provide lawyers for all indicted defendants or whether there are enough prison or jail beds for everyone who will be convicted.¹⁰

Prosecutors rarely consider such external questions because they are focused on two threshold matters: (1) the facts of the individual case at hand; and (2) whether the prosecutor's office (as opposed to the prison warden or the public defender's office) has adequate resources to handle the case.¹¹ Accordingly, prosecutors bring the number of cases that their offices can handle, rather than the number that would be optimal from a systematic standpoint under existing budgets.¹²

8. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006) (discussing the funding imbalance between prosecutors and lawyers for indigent defendants); Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85 (2007) (same); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007) (same).

9. See JOSEPH DILLON DAVEY, *THE POLITICS OF PRISON EXPANSION* 83 (1998) ("[E]very day countless offenders are prosecuted by locally elected prosecutors and sentenced to state prison by locally elected judges who have little or no concern about how those prisons are funded."); ZIMRING & HAWKINS, *supra* note 7, at 140 ("To judges and prosecutors imprisonment may seem to be available as a free good or service or at least may be viewed as the subject of major state government subsidy."); John P. Heinz & Peter M. Manikas, *Networks Among Elites in a Local Criminal Justice System*, 26 LAW & SOC'Y REV. 831, 838, 853 (1992) (interviewing over 200 key players in the Cook County, Illinois criminal justice system and finding that "[m]ost players . . . appear to be highly specialized to their particular functions and to have little concern about the operation of the system as a whole"); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 764 (1996) ("From the prosecutors' perspective, current prison funding practices create effectively unlimited prison budgets. Prosecutors simply continue to prosecute individuals despite whether the level of imprisonment will force the state prison to spend more money than its budget permits.").

10. With respect to incarceration, Zimring and Hawkins have called this the equivalent of a "correctional free lunch" because to prosecutors the "marginal cost of an extra prisoner may be zero at the local level of government, where the decision to confine is made." ZIMRING & HAWKINS, *supra* note 7, at 211.

11. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 54 (1997). Prosecutors have less freedom with respect to the types of cases they bring. Professors Richman and Stuntz argue that state prosecutors have little room to choose the types of cases they want because they are subject to electoral and media pressures that "reinforce their tendency to concentrate on a small list of politically important crimes." Richman & Stuntz, *supra* note 5, at 602-03.

12. See Misner, *supra* note 9, at 719 (explaining that the problem with prosecutorial discretion is that it does not "force [prosecutors] to face the full cost of prosecutorial decisions").

If prosecutors convict as many people as the law (and their budget) permits, they may well convict more defendants than the prison budget can handle. Because it would be politically unpopular to release such criminals due to overcrowding, legislatures are then forced to make supplemental appropriations for prisons, thus permitting incarceration rates to climb.¹³

The purpose of this article is not to criticize the existence of prosecutorial discretion or to question the ethics of the lawyers exercising that discretion.¹⁴ Instead, I explore a less recognized problem with prosecutorial discretion, namely that we ask prosecutors to use their discretion without reference to the resources held by the other parts of the criminal justice system.

This article explores the possibility of making prosecutors more cognizant about the funding of the rest of the criminal justice system, and whether access to such information would affect prosecutors' charging,¹⁵ plea-bargaining, and dismissal decisions.¹⁶ In short, this article proposes that legislatures require that prosecutors be regularly advised about prison capacity and conditions. Prosecutors should be informed about the total number of inmates incarcerated, the percentage of prison capacity filled, the increase in prison population over the last few years, and whether any prisons in the jurisdiction are under court supervision because of overcrowding or confinement conditions. Social psychology research suggests that simply being advised of the problem of prison overcrowding

13. See, e.g., Ann Imse, *Prison Trend Costly: Inmates Enter State's Cellblocks at Rate Well Above Average*, ROCKY MOUNTAIN NEWS, June 19, 2006, at A4 ("It's going to eat up our entire budget," [a budget committee member] said when the Joint Budget Committee was told in January that it had to come up with half a billion dollars to house 7,000 more prisoners in the next five years.').

14. There is, of course, a rich body of scholarship questioning these very issues. On the sub-surface problem of prosecutorial discretion, see William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in CRIMINAL PROCEDURE STORIES 351, 377 (Carol S. Steiker ed., 2006) (explaining that giving prosecutors wide discretion to invoke lengthy punishments makes it "cheaper" for legislatures to enact such punishments and to use legislation to make symbolic statements). For a collection of how prosecutors might misuse their discretion, see JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT (3d ed. 2003).

15. For an argument that prosecutors should engage in far more rigorous screening in lieu of charge bargaining, see generally Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002). On the current lack of incentives for prosecutors to avoid overcharging, see generally Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

16. As Daniel Richman and Bill Stuntz have pointed out, a "small but important part of state criminal codes are politically mandatory. Local prosecutors do not have the option of ignoring violent felonies and major thefts." See Richman & Stuntz, *supra* note 5, at 600. However, while it would be inconceivable for prosecutors to dismiss these cases outright, they could offer less punitive plea bargains.

may serve to influence prosecutors' charging, dismissal, and plea-bargaining decisions.¹⁷ And while advising prosecutors of such information will not undo the mass imprisonment in the United States, it may serve, at least on a small scale, to begin de-escalation.¹⁸

Part I of this article briefly reviews the problem of mass imprisonment. Part II then explains how the United States Supreme Court's refusal to limit legislatures' power to criminalize behavior or impose excessive punishments prevents the judiciary from reducing mass imprisonment. Because the judiciary will not intervene, Part III considers whether legislatures might attempt to de-escalate mass imprisonment by mandating a simple informational campaign directed at prosecutors. Part III relies on social psychology literature to demonstrate that the simple act of advising prosecutors about funding problems might reduce the severity of prosecutors' plea bargain offers. Finally, Part IV asserts that the proposal is realistic. This proposal would not hinder legislators' efforts to be tough on crime because it would not alter their power to criminalize behavior or to impose stiff sanctions. In addition, the prospect of saving millions of dollars in annual criminal justice expenses provides a strong incentive for legislatures to consider the proposal.¹⁹

17. See discussion *infra* Part III.

18. Because America's prison industrial complex is entrenched, it is implausible to suggest it can be drastically altered. As Professor Marie Gottschalk has recently explained, "[n]o single factor" can bring about the demise of America's extreme incarceration problem. Gottschalk, *supra* note 3, at 1705; see also Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787, 1789-90 (2006) ("[T]he current decade would retain [the] dubious honor [of being the most punitive decade in history] even if confinement populations were to go into moderate decline.").

19. Scholars are beginning to recognize legislators' interest in cutting criminal justice costs. See, e.g., Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285-90 (2005) (explaining that states pay close attention to corrections expenditures because it makes up a significant portion of state budgets); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1345-46 (2005) (comparing state budgeting to federal, and noting that states are required to balance their budgets between schools and prisons while Congress does not have such constraints); Brown, *supra* note 2, at 233, 252; Gottschalk, *supra* note 3, at 1698 ("As the fastest growing item in most state budgets, corrections became a target for budget cutters."); Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2056, 2065 (2006) (explaining that the literature "tends to treat prosecutorial interests as monolithic" but that "state officials who have to actually pay for prisons" may be less prone to policies that increase incarceration).

I. THE PERVERSIVE PROBLEM OF MASS IMPRISONMENT²⁰A. *Imprisonment by the Numbers*

At present, there are nearly 2.2 million people incarcerated in our nation's prisons and jails.²¹ Excluding children and the elderly, nearly one in fifty people in the United States wakes up behind bars each morning.²²

The United States incarcerates more offenders per capita than any industrialized nation in the world:²³ three times more than Israel, five times more than England, six times more than Australia and Canada, eight times more than France, and over twelve times more than Japan.²⁴ Given these ratios, it is not surprising that American prisoners convicted of violent crimes are incarcerated for five to ten times as long as their European counterparts.²⁵ And while European nations rarely incarcerate nonviolent property and drug offenders, more than half of the people imprisoned in the United States have committed nonviolent crimes.²⁶

More telling than the total number of prisoners or the international comparisons is the upward historical trend in the United States. As Michael Jacobson has observed, "every state increased the size of its prison system over the last decade."²⁷ Between 1972 and 2003, the national prison

20. The term "mass imprisonment" was coined by David Garland. See David Garland, *The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1 (David Garland ed., 2001) ("Mass imprisonment implies a rate of imprisonment and a size of prison population that is markedly above the historical and comparative norm for societies of this type.").

21. See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, NCJ 215092, PRISONERS IN 2005, at 2 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>.

22. See MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 1 (2006).

23. See *id.*

24. See MAUER, *supra* note 3, at 20–21; MICHAEL JACOBSON, DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION 8 (2005) ("The United States now locks up a higher percentage of its population than any country in the world."); see also BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 30 (2006) ("Although the U.S. incarceration rate had long been higher than in most western European countries, the imprisonment gap between Europe and the United States widened significantly in the period of the prison boom [from the 1970s to the turn of the century].").

25. See GOTTSCHALK, *supra* note 22, at 21 ("Violent offenders in the United States spend five to ten times as long in prison as those in France.").

26. See *id.*

27. JACOBSON, *supra* note 24, at 33. However, the size of the increase has varied considerably among the states. See John F. Pfaff, *The Growth of Prisons: Toward a Second Generation Approach* 4 (Fordham Univ. Sch. of Law Legal Studies, Working Paper No. 976373, 2007), available at <http://ssrn.com/abstract=976373>.

population rose by 500%.²⁸ There were approximately 330,000 individuals in America's prisons and jails in 1973,²⁹ which amounted to approximately 160 inmates per every 100,000 people in the United States.³⁰ Over the next three decades, the number of inmates and the rate per 100,000 Americans steadily climbed. In 1985, 313 per 100,000 people were incarcerated.³¹ By 1995, the rate had risen to 601 per 100,000 people.³² In its most recent estimate at mid-year 2005, the Bureau of Justice Statistics placed the rate at 738 prison and jail inmates per 100,000 people.³³

The drastic increase in imprisonment has had significant financial consequences. As a result of the increase in the prison population, the United States was required to open the equivalent of one prison per week during the period from 1985 to 2000.³⁴ The cost of locking up an offender for a single year exceeds \$22,000.³⁵ In some states, the cost is double that amount.³⁶ All told, the United States spends approximately \$60 billion annually on corrections.³⁷

And it is often questionable whether counties, states, and the federal government are spending enough money to keep up with the crushing number of incarcerated individuals. Many prisons and jails throughout the country are overcrowded. A recent study by the Bureau of Justice Statistics found that federal prisons held nearly 111,000 prisoners even though the facilities were only rated to handle approximately 83,000 individuals.³⁸ On average, state prison facilities were also operating in excess of their

28. See MAUER, *supra* note 3, at 1. The dramatic increase in incarceration beginning in the 1970s stands in stark contrast to the early decades of the Twentieth Century. As Marc Mauer has explained, there was "remarkable stability in incarceration, hovering around 200,000 inmates" during the "forty-five year period leading up to the 1970s." *Id.* at 18.

29. See *id.* at 17.

30. See *id.*

31. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 488 tbl.6.13 (2003).

32. See *id.*

33. See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, NCJ 213133, PRISON AND JAIL INMATES AT MIDYEAR 2005, at 2 tbl.1 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf>.

34. See MAUER, *supra* note 3, at 1-2; see also DAVEY, *supra* note 9, at 2 ("The federal government constructed twenty-six new federal prisons in 1996, while the states were constructing ninety-five new prisons.").

35. See JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, NCJ 202949, STATE PRISON EXPENDITURES, 2001, at 1 (2004), available at <http://www.ojp.gov/bjs/pub/pdf/spe01.pdf>.

36. See *id.* at 3. Remarkably, in 2001, Maine expended more than \$44,000 to incarcerate a single offender for a single year, whereas Alabama spent approximately \$8000. *Id.*

37. See JACOBSON, *supra* note 24, at 53; MAUER, *supra* note 3, at 92.

38. See JAMES J. STEPHAN & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, NCJ 198272, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000, at 4 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/csfcf00.pdf>.

capacity.³⁹ And while the construction of new prisons across the country has reduced overcrowding, 145 of 1668 prisons in existence in 2000 were under court orders to reduce their populations.⁴⁰ This is to say nothing of the overcrowding in hundreds of the nation's jails⁴¹ that are not analyzed by the Bureau of Justice Statistics.⁴²

B. *The Roots of the Problem*

It is undisputed that incarceration rates have exploded at the federal and state level over the last few decades.⁴³ The harder question is: Why?⁴⁴ Experts have long maintained that the increase in prison population cannot easily be tied to rising crime rates.⁴⁵ Conversely, criminologists maintain the

39. *See id.*

40. *See id.* at 5 tbl.9, 9 tbl.15.

41. *See, e.g.,* Steve McVicker, *Jail Crowding: Sheriff Appealing Order, Won't Transfer Inmates*, HOUSTON CHRON., May 6, 2006, at B1 ("State inspectors have withheld certification from the downtown [Harris] [C]ounty jail system for the past three years, largely because of inmate crowding . . ."); Steve McVicker & Bill Murphy, *County Jail Conditions Condemned in Report*, HOUSTON CHRON., July 16, 2005, at A1 (explaining that 1300 inmates in the downtown Harris County jail were sleeping on mattresses on the floor and that jails in forty other Texas counties were in violation of state standards).

42. The overcrowding in turn leads to an increase in physical violence, inadequate and slow medical care, and a host of additional costly problems. *See* STEPHEN & KARBERG, *supra* note 38, at 9 (detailing how inmate-on-inmate assaults climbed by 32% between 1995 and 2000); Steve McVicker, *County Jail Deaths on Pace To Double '06 Total*, HOUSTON CHRON., Apr. 8, 2007, at A1 (discussing deaths of inmates in the Harris County jail who were awaiting trial and attributing some deaths to poor medical care); Steve McVicker & Anita Hassan, *Deaths Behind Bars*, HOUSTON CHRON., Feb. 18, 2007, at A1 ("Records and interviews show that almost one-third of the [101] deaths involve questions of inadequate responses from guards and staff, failure by jail officials to provide inmates with essential medical and psychiatric care and medications, unsanitary conditions, and two allegations of physical abuse by guards.").

43. *See, e.g.,* Luna, *supra* note 2, at 710 ("Both federal and state governments have contributed over the past quarter century to a punishment binge of unprecedented size and scope."); Gottschalk, *supra* note 3, at 1693.

44. *See* GOTTSCHALK, *supra* note 22, at 18 ("What caused the country's incarceration boom . . . ha[s] not been a major focus of social science research or public concern."); ZIMRING & HAWKINS, *supra* note 7, at 119–36.

45. *See* ZIMRING & HAWKINS, *supra* note 7, at 124 (explaining that while variations in crime are not unrelated to prison populations, there is a "lack of a direct and simple relationship that would enable us to successfully explain most fluctuations in the rate of imprisonment by reference to changes in crime rates"). More recently, see MICHAEL TONRY, THINKING ABOUT CRIME 98 (2004) ("The best available evidence shows that gross crime trends are determined by fundamental social and structural forces that affect most Western countries, and that they follow much the same broad patterns irrespective of national differences in crime control policies and punishment practices."); Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 414–15 nn.63 & 64 (2006) (collecting additional sources).

drastic increase in imprisonment has not led to a substantial decrease in crime rates.⁴⁶ Instead, observers explain the incarceration expansion by pointing to certain criminal justice policies.⁴⁷ The standard argument is that mandatory minimum statutes, three strikes laws, and the rise of determinate sentencing have resulted in a dramatic increase in the prison population.⁴⁸ Other observers point to the reduction in the use of probation and parole.⁴⁹ Still others raise concern about a variation of Parkinson's Law,⁵⁰ whereby new prison construction inevitably leads to trial-level actors simply finding

46. See WESTERN, *supra* note 24, at 185 ("Roughly nine-tenths of the decline in serious crime through the 1990s would have happened even without the prison boom."). According to Bruce Western, no more than two to five percent of the decline in serious crime from 1993 to 2001 resulted from the sixty-six percent increase in incarceration during that period. See *id.* at 191. Given that the annual cost of imprisonment is roughly \$22,000 per offender, Western maintains that the use of incarceration to accomplish a minimal reduction in crime cost \$53 billion during that period. See *id.* at 187. But see Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 177–79 (2004) (concluding that the increased prison population was one of the major causes of the dramatic drop in crime during the 1990s).

47. See DAVEY, *supra* note 9, at 47 ("How is it that crime could have become such a public obsession when . . . the crime rate hit a peak of 41 million offenses in 1981 and has been falling ever since (to around 34 million offenses in recent years)?"). As Marc Mauer has explained:

A study of the California prison population in the 1990s funded by the California legislature concluded that as many as a quarter of incoming inmates to the prison system would be appropriate candidates for diversion to community-based programs. This group would include offenders sentenced to prison for technical violations of parole, minor drug use, or nonviolent property offenses. The study estimated that diverting such offenders would save 17–20 percent of the corrections operating budget for new prison admissions.

MAUER, *supra* note 3, at 33–35.

48. See Mary Price, *Mandatory Minimums in the Federal System: Turning a Blind Eye to Justice*, 31 HUM. RTS., Winter 2004, at 8, 9 ("Mandatory minimum sentences are the sledgehammers of sentencing."). The conventional argument has been criticized on multiple grounds, including that many states which continue to maintain indeterminate sentencing schemes have experienced explosions in prison growth. See GOTTSCHALK, *supra* note 22, at 39 ("Prison populations began rising in many states long before determinate sentencing laws were enacted."); Reitz, *supra* note 18, at 1794–99 (explaining that most of the states with the largest prison growth have indeterminate sentencing schemes and that of the states that have moved to determinate sentencing schemes most have had lower prison growth than the national average).

49. See PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, NCJ 170032 TRUTH IN SENTENCING IN STATE PRISONS 3–4 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf> ("As a result of truth-in-sentencing practices, the State prison population is expected to increase through the incarceration of more offenders for longer periods of time.").

50. Parkinson's Law states that "[w]ork expands so as to fill the time available for its completion." C. NORTHCOTE PARKINSON, PARKINSON'S LAW AND OTHER STUDIES IN ADMINISTRATION 2 (1957).

new occupants for those prison cells.⁵¹ Experts also point to the expansion of private prisons in recent years,⁵² explaining that prison companies have an incentive to expand the number of prisoners in order to provide a market for their services⁵³ and that prison guard unions have a similar interest in seeing incarceration numbers climb.⁵⁴ Finally, whether privately or publicly operated, prisons provide many local communities ravaged by the loss of industry with jobs and economic stimulus that the communities will fight hard to retain.⁵⁵

In addition to the above mentioned explanations,⁵⁶ at least one scholar has suggested that prison expansion is traceable to particular actors—such as prosecutors—who have discretion to deal with criminal cases.⁵⁷ Professor Joseph Dillon Davey contends that:

The most important influence on the rapid expansion of prisons in the United States during the last two decades appears to be informal changes in the system of criminal justice, which grow out of a new attitude toward punishment. The amount of discretion exercised by street-level bureaucrats in the criminal justice system is a major, driving force in the increase in rates of imprisonment. . . . [T]he initial problem of prison overcrowding grows out of a

51. See ZIMRING & HAWKINS, *supra* note 7, at 76–77 (discussing efforts to test this hypothesis).

52. Private prisons are a billion-dollar-per-year business. See JACOBSON, *supra* note 24, at 64 (explaining that private prisons house less than six percent of the nation's inmates). Of course, the fact that private prisons account for a relatively small percentage of the nation's prison population tends to demonstrate that it is only one cause (and perhaps a small one at that) of the many factors leading to mass imprisonment. See GOTTSCHALK, *supra* note 22, at 30.

53. See JACOBSON, *supra* note 24, at 65 (“[T]he prison industry has a structural self-interest in continuing to expand the market (prisoners) in order to capture a greater market share . . .”).

54. See *id.* at 67–69. Some communities even lobby to have prisons built in their backyards because they create construction jobs and other full-time employment opportunities. See *id.* at 70–71. Put simply, “whoever provides prison services will seek to influence the political process.” *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1873 n.33 (2002).

55. See GOTTSCHALK, *supra* note 22, at 29 (describing “penal Keynesianism”); Peter T. Kilborn, *Rural Towns Turn to Prisons to Reignite Their Economies*, N.Y. TIMES, Aug. 1, 2001, at A1 (“More than a Wal-Mart or a meat-packing plant, state, federal and private prisons, typically housing 1,000 inmates and providing 300 jobs, can put a town on solid economic footing.”).

56. The list of explanations I have mentioned is certainly not exclusive. For instance, Bruce Western maintains that the reason for the incarceration of huge numbers of black youth can be traced to “the collapse of urban labor markets and the creation of jobless ghettos in America’s inner cities.” WESTERN, *supra* note 24, at 78.

57. See DAVEY, *supra* note 9, at 92–93.

change in attitude among the minions of the criminal justice system who make the majority of decisions about prison use.⁵⁸

In addition to the power held by prosecutors, Professor Davey also points to judges' sentencing discretion, probation officers' authority in writing presentence reports, and parole officers' influence in determining whether to return individuals to prison.⁵⁹ While all of these actors—particularly prosecutors—have enormous discretion, Professor Davey maintains that the exercise of that discretion is strongly affected by whether or not the state's governor has created a "law and order" atmosphere.⁶⁰ Put simply, trial-level actors have wide discretion, but that discretion can be influenced to encourage more or less punitiveness.

If Professor Davey is correct, then there is a prospect of de-escalating the mass imprisonment problem by signaling to trial-level actors that they should be more cautious about relying on incarceration. As discussed below in Part II, the Supreme Court certainly has not given such a signal. To the contrary, the Court has taken a hands off approach.

II. THE SUPREME COURT'S FAILURE TO STEP IN

A. *The Power to Criminalize Almost Anything*

Although the Supreme Court heavily regulates the criminal justice system, its regulation focuses almost exclusively on criminal *procedure*, rather than the substance of criminal law.⁶¹ Accordingly, legislatures are free to enact virtually any laws they wish without interference from the courts.

58. *Id.*

59. *See id.* For instance, as Michael Jacobson recounts: "It took only days [as the new director of the New York City] Department of Correction for me to realize that almost one of every five inmates in the entire system was there as a result of breaking one or more of the rules of being on parole." JACOBSON, *supra* note 24, at 4. "In many states, technical parole violators make up the largest single category of prison admissions." *Id.* at 40.

60. *See* DAVEY, *supra* note 9, at 95 ("It is my argument here that in the states where the executive created an atmosphere of law and order, prison populations explode, whereas in the states where the atmosphere was less intemperate, the populations grew slowly.").

61. *See* Stuntz, *supra* note 11 ("Constitutionally speaking, substantive criminal law is almost entirely unregulated."); *see also* Luna, *supra* note 2, at 724 ("The one government body that could check political excesses and curb the overcriminalization phenomenon, the American judiciary, has largely failed to do so."); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 1 (1996) [hereinafter Stuntz, *Civil-Criminal Line*] ("[T]he law of crimes is not very heavily constitutionalized . . .").

In the late 1950s and early 1960s it looked as if the Supreme Court might be willing to engage in some regulation of substantive criminal law. In *Lambert v. California*, decided in 1957, the Court struck down a law making it a crime for a convicted felon to remain in Los Angeles for more than five days without registering with the police.⁶² The Court recognized that legislators have “wide latitude” to define criminal infractions, but explained that since Lambert had no knowledge of her duty to register and had been “wholly passive,” it would violate due process to convict her of the offense.⁶³ In dissent, Justice Frankfurter predicted that the Court’s decision would turn out to be “an isolated deviation from the strong current of precedents—a derelict on the waters of the law.”⁶⁴

Although Justice Frankfurter’s prediction turned out to be correct, the Court did take one additional detour into the world of substantive criminal law a few years later. In *Robinson v. California*, the Supreme Court struck down a law making it a crime for a person to “be addicted to the use of narcotics.”⁶⁵ The Court concluded that it would be cruel and unusual punishment to convict someone for a “status” rather than a particular act.⁶⁶ The *Robinson* decision seemed to signal that there would be constitutional scrutiny of criminal blameworthiness and more rigorous oversight of strict liability crimes.⁶⁷ Yet, that rigorous oversight did not come to pass. Only a few years later, in *Powell v. Texas*, the Court refused to find unconstitutional a statute making it a crime to be “found in a state of intoxication in any public place.”⁶⁸ And since *Powell*, it is nearly impossible to find a non-capital case⁶⁹ in which the Court has restricted legislatures’ power to criminalize.⁷⁰

62. 355 U.S. 225, 229–30 (1957).

63. *Id.*

64. *Id.* at 232 (Frankfurter, J., dissenting). One scholar has remarked that Frankfurter’s comment is a “curse” that “appears to have stuck.” Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1270 (1998).

65. 370 U.S. 660, 662–67 (1962).

66. *See id.* at 667 (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”).

67. *See* Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 432 (2004).

68. 392 U.S. 514, 517, 536–37 (1968).

69. In the realm of capital cases, the Court has precluded the death penalty for the crime of raping an adult woman as well as for certain felony murders, and for juveniles and the mentally retarded. *See* Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 86–88 (2007) (discussing cases).

70. Recent criminal *procedure* cases reinforce this conclusion. *See* *Atwater v. City of Lago Vista*, 532 U.S. 318, 321–22 (2001) (rejecting petitioner’s argument that a city should not be constitutionally permitted to make a minor, fine-only infraction grounds for a custodial arrest); *Whren v. United States*, 517 U.S. 806, 806 (1996) (rejecting defendant’s contention that

Where then does that leave us? As Professor Stuntz has stated, *Lambert's* progeny is almost nonexistent and the *Powell* decision "basically undoes *Robinson*."⁷¹ In effect, the Supreme Court has completely abdicated the field of substantive criminal law.⁷² The reason for the abdication is less clear, though Professor Erik Luna may well be correct that the Court simply does not want to appear to be a "*Lochner*-esque super-legislature."⁷³ And although scholars throughout the decades have been highly critical of the Court's failure to regulate the substance of criminal law⁷⁴ and have proposed a number of ways to impose such limits,⁷⁵ all evidence indicates that the Court will continue to ignore these suggestions.

B. *The Power to Impose Almost Any Punishment*

Just as the Court has refused to limit legislatures' power to criminalize behavior, it also has been extremely wary of meddling with the punishment decisions of legislatures and juries. As explained below, the Court has made clear that, with the exception of death-penalty cases, legislatures can punish defendants as harshly as they want without fear that courts will strike down the sentences as unconstitutionally excessive.

For over a century, the Supreme Court has wrestled with the question of whether the Eighth Amendment's prohibition against "cruel and unusual punishment" permits courts to strike down prison sentences simply because they are too long. In 1892, Justice Stephen Field contended that a fifty-four year sentence for selling liquor without authority violated the Eighth Amendment.⁷⁶ Although Justice Field's position did not carry the day, a majority of the Court did subsequently find a sentence of fifteen years

automobiles are so heavily regulated that total compliance would be impossible and that a heightened standard should be imposed for traffic stops).

71. Stuntz, *Civil-Criminal Line*, *supra* note 61, at 5 n.11, 6 n.13.

72. *See id.* at 13 (explaining that the definition of crime is left entirely to the political branches).

73. Luna, *supra* note 2, at 724.

74. Most famously, see Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 431 (1958) ("What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?"); *see also* Stuntz, *Civil-Criminal Line*, *supra* note 61, at 13.

75. For two of the more prominent examples, see John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1376-79 (1979) (tying a proportionality requirement to the legislatively defined elements of the crime); Stuntz, *Civil-Criminal Line*, *supra* note 61 (advocating constitutional regulation of mens rea and use of the doctrine of desuetude).

76. *See O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).

imprisonment at hard labor to be unconstitutionally excessive for the relatively minor offense of falsifying an official public document.⁷⁷

Several decades later, the Court struggled with the proportionality of long prison sentences for a series of very minor offenses. In 1980, the Court held that a sentence of life imprisonment for a recidivist who had committed three nonviolent property felonies involving less than \$230 was constitutional because the “length of the sentence actually imposed is purely a matter of legislative prerogative.”⁷⁸ Yet, three years later, the Court seemingly reversed its position again by holding a sentence of life imprisonment without the possibility of parole for a recidivist who had committed seven nonviolent offenses to be excessive.⁷⁹

The Court’s indecisiveness on the proportionality issue came to an end in the early 1990s. In *Harmelin v. Michigan*, the Court upheld a sentence of life imprisonment without the possibility of parole for the crime of possession of more than 650 grams of cocaine.⁸⁰ While recognizing the existence of a “narrow proportionality principle,” Justice Kennedy’s plurality opinion made clear that successful challenges to long prison sentences would be extremely rare.⁸¹ And since *Harmelin* it is nearly impossible to find any federal court willing to strike down a prison sentence as disproportionate.⁸² As recently as 2003, the Supreme Court has reiterated its opposition to proportionality review when it upheld California’s “Three Strikes and You’re Out” recidivism statute.⁸³

In short, federal proportionality review of criminal punishments is all but dead. And while certain state courts have engaged in more rigorous proportionality review by looking to their own state constitutions,⁸⁴ successful excessiveness challenges are still rare. As a result, when legislatures enact lengthy sentencing ranges, mandatory minimum statutes,

77. See *Weems v. United States*, 217 U.S. 349, 357–58, 382 (1910). In addition to the imprisonment and hard labor, Weems was forbidden from becoming a parent, administering property, voting, or holding office, and he was sentenced to a lifetime of perpetual surveillance. See *id.* at 364–65.

78. See *Rummel v. Estelle*, 445 U.S. 263, 274 (1980). Shortly thereafter, the Court upheld a forty-year sentence for possession with intent to distribute nine ounces of marijuana. See *Hutto v. Davis*, 454 U.S. 370, 371, 375 (1982) (per curiam).

79. See *Solem v. Helm*, 463 U.S. 277, 282–84 (1983).

80. 501 U.S. 957, 961, 996 (1991).

81. *Id.* at 996, 1001 (Kennedy, J., concurring).

82. See Adam M. Gershowitz, Note, *The Supreme Court’s Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1276–79 (2000).

83. See *Ewing v. California*, 538 U.S. 11, 14, 20 (2003).

84. See, e.g., *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (construing the same statute that was at issue in *Harmelin* and concluding that the Michigan state constitution should be interpreted “more broadly” than the United States Constitution).

three-strikes-and-you're-out-laws, and other tough-on-crime measures, trial judges are obligated to impose those stiff sentences irrespective of the circumstances. Because there is no judicial counterbalance to increasingly punitive laws, prosecutorial discretion becomes the main outlet for relief. And when political campaigns force each candidate or legislator to be tougher on crime than his opponent, the sentencing ranges and mandatory minimums become even longer. The result is more mass imprisonment.

C. *Limited Oversight of Prison Condition Cases*

Because so many defendants are sentenced to incarceration, prison officials are forced to scramble to find enough space to house them.⁸⁵ Often there are simply not enough beds and prisons are forced to operate above capacity.⁸⁶ This in turn leads to prison overcrowding, which in turn leads to litigation.⁸⁷

The litigation manifests itself in a variety of ways. Prisoners challenge the plain existence of the overcrowding.⁸⁸ They also contend that the overcrowding has led to other problematic conditions of confinement, such as unsanitary facilities, inadequate staffing, poor medical care, heightened levels of tension and violence, and a higher incidence of sexual assault.⁸⁹

85. See Kilborn, *supra* note 55 (explaining that all of the inmates in a rural Oklahoma prison are from Wisconsin, which sends more than 4000 inmates to out-of-state prisons because it lacks the space); *Too Many Inmates, Too Little Space*, MIAMI HERALD, May 29, 2004, at 3B ("Crowding in the St. Lucie County Jail has led to a scramble to find more room for inmates, some of whom are sleeping on the floor or beneath stairs and tables."); Kevin Wack, *State Seeks Fix For Squeezed Prisons*, ME. SUNDAY TELEGRAM, Feb. 25, 2007, at B1 ("Prisoners are triple- and quadruple-bunked in cells.").

86. See HARRISON & BECK, *supra* note 21, at 7 ("At year[-]end 2005, . . . 23 States and the Federal prison system reported operating at 100% or more of their highest capacity.").

87. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 806 (2005) ("Prison capacity can be stretched only so far before the courts intervene . . ."); Susanna Y. Chung, Note, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2351–52 (2000) ("Rising inmate populations have produced overcrowded prisons, as cells originally designed for one inmate now accommodate two or three prisoners each[,] . . . [and] inmates have increasingly brought suits against prisons . . .").

88. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 340, 352 (1981) (unsuccessfully challenging the practice of "double-celling"); *Bell v. Wolfish*, 441 U.S. 520, 543 (1979) (upholding double-celling of pre-trial detainees).

89. See Chung, *supra* note 87, at 2355; see also Carla I. Barrett, Note, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 392–93 (2005). Congress has attempted to address the sexual assault problem by passing the Prison Rape Elimination Act of 2003. See 42 U.S.C. § 15601–15609 (West 2005 & Supp. 2007). Yet, prison rape remains a rampant national problem. See Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 606 (2006) (describing the new Act as a "modest" start towards reform).

Unlike the areas of substantive criminal law and excessive punishments, the Supreme Court has not taken an entirely hands-off approach to the problem of prison conditions.⁹⁰ Beginning primarily in the 1960s, the lower federal courts began to conclude that certain prison conditions were so egregious as to violate the Eighth Amendment's cruel and unusual punishment clause.⁹¹ While the lower federal courts were ahead of the Supreme Court in attacking egregious conditions, the high Court eventually followed suit.⁹² In the notable case of *Hutto v. Finney*, the Supreme Court found unconstitutional prison conditions in which as many as ten inmates were confined to unfurnished, "vandalized," eight-by-ten-foot cells for "months" while being given inadequate food and being punished with leather straps and electrical shocks.⁹³

Thus, in the 1970s and early 1980s, the federal courts, with the support of the Supreme Court, were actively supervising prison overcrowding through injunctions and court decrees.⁹⁴ Interestingly, some wardens and corrections officials welcomed the litigation because federal court

90. Prior to the 1960s, the Court was extremely reluctant to provide any relief for claims of poor prison conditions. See Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DETROIT C. L. REV. 795, 795-98; Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 211-13 (1980).

91. See *Rhodes*, 452 U.S. at 353 (Brennan, J., concurring in the judgment) ("Although this Court has never before considered what prison conditions constitute 'cruel and unusual punishment' within the meaning of the Eighth Amendment, such questions have been addressed repeatedly by the lower courts." (citation omitted)); see also Robbins, *supra* note 90, at 214 ("In short, although the Supreme Court had not yet pronounced the death sentence upon the hands-off doctrine, the lower federal courts were beginning to assume its eventual demise."); Russell W. Gray, Note, *Wilson v. Seiter, Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1344-45 (1992) ("In 1978, the Supreme Court in *Hutto v. Finney* joined the lower courts in condemning unconstitutional prison conditions by upholding a district court's order to reform a prison.").

92. For the definitive account, see generally MALCOLM M. FEELEY & EDWARD RUBIN, *JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1991). By 1981, Justice Brennan was able to point to court decisions in more than two dozen states "in which prisons or prison systems ha[d] been placed under court order because of conditions of confinement." *Rhodes*, 452 U.S. at 353 n.1 (Brennan, J., concurring in the judgment).

93. See *Hutto v. Finney*, 437 U.S. 678, 682 n.4, 683 n.5, 684 (1978). For the lengthy background story about prison conditions in *Hutto* that never made it into the Supreme Court's opinion, see FEELEY & RUBIN, *supra* note 92, at 59-73.

94. See ZIMRING & HAWKINS, *supra* note 7, at 142 ("[B]y 1986 forty-six states and U.S. territories were either under court order or involved in litigation concerning prison conditions likely to result in court orders.").

intervention slowed the flow of inmates into their facilities and mandated better, safer prisons.⁹⁵

The judiciary's involvement resulted in enormous improvements to prisons.⁹⁶ As Professor Margo Schlanger has recently observed:

Among the areas affected were staffing, the amount of space per inmate, medical and mental health care, food, hygiene, sanitation, disciplinary procedures, conditions in disciplinary segregation, exercise, fire safety, inmate classification, grievance policies, race discrimination, sex discrimination, religious discrimination and accommodations, and disability discrimination and accommodations—in short, nearly all aspects of prison and jail life, with the notable (if not quite universal) exceptions of education, custody level, and rehabilitative programming and employment.⁹⁷

Yet, while the federal judiciary has fostered enormous improvements in prison and jail conditions through structural reform litigation, the conventional wisdom is that the period of rigorous judicial reform of prisons is over or, at minimum, substantially decreased.⁹⁸ And with the judiciary's most rigorous period of reform behind it, it is noteworthy that the Supreme Court passed up the opportunity to attack the core problem of overcrowding. In *Rhodes v. Chapman*, the Court rejected a challenge to “double-ceiling” of prisoners because it did not lead to “deprivations of essential food, medical care, or sanitation. Nor did it increase violence

95. See Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 562–63 (2006) (“Prison and jail officials were frequently collaborators in the litigation. If they did not precisely invite it, they often did not contest it. And as I and others have observed, the remedies in the cases, frequently designed at least in part by the defendants themselves, very much served what at least some of those defendants saw as their interests: increasing their budgets, controlling their inmate populations, and encouraging the professionalization of their workforces and the bureaucratization of their organizations.”); see also ZIMRING & HAWKINS, *supra* note 7, at 142 (“[T]he federal judge who orders such reforms is the natural ally of correctional administrators.”).

96. Some scholars are more skeptical about the benefits of judicial intervention. For the most important work, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 305–14 (1991).

97. Schlanger, *supra* note 95, at 563–64.

98. See, e.g., FEELEY & RUBIN, *supra* note 92, at 46–47 (“Since the late 1980s, the decline of momentum in prison conditions litigation has been abundantly evident. . . . Although the Supreme Court was not a leader in creating the judicial prison reform effort, it has proved to be a leader in the retrenchment process.”); Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 525 (2004) (“[S]tructural injunctions have receded from the remedial scene.”); Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 161–63 (2003). I refer to these views as the “conventional wisdom” because, as Professor Margo Schlanger argues, “reports of the death of the structural reform injunction are greatly exaggerated.” Schlanger, *supra* note 95, at 567 (capitalization omitted).

among inmates or create other conditions intolerable for prison confinement.”⁹⁹ The Court made clear that the “Constitution does not mandate comfortable prisons,”¹⁰⁰ thus signaling that overcrowding alone would be insufficient to demonstrate an Eighth Amendment violation.¹⁰¹ Moreover, in post-*Rhodes* decisions, the Court has heightened the standards to prove unconstitutional prison conditions.¹⁰² For instance, the Court’s 1991 decision in *Wilson v. Seiter* demanded proof that poor prison conditions were the result of wanton behavior by prison officials, which in a typical situation amounts to “deliberate indifference.”¹⁰³ Thus, while the judiciary’s role in cleaning up egregious prison conditions has been substantial, and structural reform litigation continues to flourish in some areas, it is likewise clear that the Supreme Court has no appetite for eliminating the core problem of prison overcrowding except when it manifests itself in other appalling conditions.

In sum, the judiciary will not provide relief for our nation’s mass imprisonment problem. Accordingly, I now turn to the question of whether legislatures and government bureaucracy can provide relief.¹⁰⁴

III. AN INFORMATIONAL APPROACH TO REDUCING INCARCERATION

A. *Reducing Incarceration at the Margins Through Information Flow*

Because significant power in the criminal justice system is held by prosecutors who have the authority to charge, plea bargain, and dismiss

99. *Rhodes v. Champan*, 452 U.S. 337, 348 (1981). See also *Bell v. Wolfish*, 441 U.S. 520, 543 (1979) (upholding double-celling of pre-trial detainees).

100. *Rhodes*, 452 U.S. at 349.

101. See William C. Collins, *The Defense Perspective on Prison-Condition Cases*, in *PRISONERS AND THE LAW* 7-7 (Ira I. Robbins ed., 1985).

102. See Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 719 (1993).

103. 501 U.S. 294, 302 (1991) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976)).

104. As Professor Darryl Brown has explained, “the failure of judicial regulation in criminal justice” is increasingly leading scholars to “turn toward strategies of executive-branch-based regulation for criminal justice.” See Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 331-32 (2004). Professor Brown argues for a statute or at least written in-house guidelines designed to encourage prosecutors to focus on criminal justice costs beyond retribution and deterrence. See *id.* at 352-58. He argues that such a proposal could lead to improvement while still being plausible because it does not require “substantial legislative action or dramatic shifts in constitutional doctrine.” *Id.* at 371. My proposal is far less ambitious than Professor Brown’s—it does not propose a new statute or any noticeable action by legislators—and is therefore more likely to avoid any type of “soft-on-crime” label.

cases,¹⁰⁵ it makes sense to focus on prosecutors as a mechanism for reducing mass imprisonment.¹⁰⁶ Yet, as explained above, the Supreme Court has little interest in restricting prosecutorial discretion, and state legislators standing for reelection are unlikely to pass legislation that explicitly reduces prosecutors' authority to handle serious criminal activity. Accordingly, I offer a more modest proposal that relies on government bureaucracy and social psychology to influence prosecutors' charging and plea bargaining decisions.

My proposal calls on state bureaucracies, in particular the states' bureaus of prisons, to undertake an informational campaign to advise county prosecutors about state incarceration rates and prison overcrowding.¹⁰⁷ The information should convey key information that is likely to influence prosecutors' charging and plea bargaining decisions, such as: (1) the total number of incarcerated prisoners; (2) the increase (or decrease) in the number of prisoners from previous years; (3) what percentage of the prisons are full (i.e. whether operating capacity has been exceeded); and (4) whether any prisons in the state are under a court order regarding prison overcrowding. The information would be sent monthly to every prosecutor in the state and would read something like this:

TO: John Q. Smith, Springfield County Assistant District Attorney
FROM: The Bureau of Prisons
RE: Prison Overcrowding

105. See Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1414 (2003) ("Given the huge amount of discretion that American criminal codes (and sentencing systems) grant to prosecutors, the intentions of the prosecutor can matter more than the facts or law relevant to the case."); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 479–81 (1996) (explaining why "prosecutors enjoy de facto criminal law-making power").

106. See Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 697–700 (2004) (explaining that we have "a system in which many observers believe that almost all of the power resides in the hands of the executive and its agent, the prosecutor" and that the *Apprendi* doctrine's focus on jury sentencing actually has the effect of handing more power to prosecutors).

107. Over a decade ago, Professor Robert Misner offered a bolder proposal in which a state agency would determine the amount of state prison capacity, that prison space would be allocated to counties on an *ex ante* basis, and prosecutors would not be permitted to use more space than allocated. Misner, *supra* note 9, at 720–21. If a county used less than its allocated resources, it would reap a windfall to spend on education or other matters. *Id.* By contrast, if a county used more resources than allocated, then it would be required to use its own money to purchase additional prison space from the state or another jurisdiction. See *id.* Unfortunately, no legislature has adopted Professor Misner's proposal for dealing with the diffusion of responsibility between county prosecutors' charging and plea bargaining decisions on the one hand and state funding of incarceration on the other. Unlike Professor Misner's approach, mine would not require any systematic changes to the criminal justice system and therefore may have a better chance of occurring.

As of June 30, 2007, there were 25,870 persons incarcerated in prisons throughout the state. The state prisons are operating at 103% of their capacity. There are 507 more prisoners incarcerated in state prisons than on this date one year ago.

<u>Date</u>	<u>Number of Prisoners</u>	<u>Prison Operating Capacity</u>
Dec. 31, 2006	25,870	103%
Dec. 31, 2005	25,363	102%
Dec. 31, 2004	24,886 ¹⁰⁸	101%

*Of the State's 26 prisons, 6 are currently under a court order or consent decree to deal with overcrowding or other conditions of confinement.*¹⁰⁹

As you know, prosecutors can have a significant impact in reducing prison overcrowding because judges give great weight to prosecutors' sentencing recommendations.

The proposal will not drastically change how prosecutors charge, dismiss, or plea bargain cases.¹¹⁰ Presented with a murder case, prosecutors will not decline to charge suspects simply because they are well versed in the overcrowding of their state's prisons. Faced with an aggravated assault, prosecutors will not seek probation instead of prison time. Incarceration will still be the first weapon of choice for prosecutors, and they will likely dispense it in roughly the same number of cases and in roughly the same amounts as they would have in the absence of incarceration information

108. These numbers are generated based on data compiled by the Bureau of Justice Statistics through 2004. At the end of 2004, there were 1,244,311 prisoners in state prisons throughout the United States. See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, NCJ 210677, PRISONERS IN 2004, at 2 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>. Divided by the fifty states, the average state prison population was 24,866. The Bureau of Justice Statistics has found that prison populations grew at 2.6% per year during the period from 1995 through 2004. See *id.* Using this rate, I calculated the hypothetical state's prison population in 2005 and 2006.

109. These numbers are offered as a general example, but they do bear relation to the general incarceration story in the United States. In 2000, the last year for which the Bureau of Justice Statistics conducted a census on the issue, 324 of the 1320 state prisons in the United States were under a court order or consent decree. See STEPHEN & KARBERG, *supra* note 38, at iv, 9. Averaged among the 50 states, this amounts to 26.4 prisons per state with 6.5 prisons under court orders or consent decrees.

110. See Misner, *supra* note 9, at 763 ("The American criminal justice system does not respond well to suggestions for fundamental change.").

from the Bureau of Prisons. Yet, while additional information will not foster drastic behavioral changes, it is quite possible that it could change behavior at the margins, particularly with respect to nonviolent criminals who make up roughly half of the nation's prisoners.¹¹¹

For example, imagine that a hypothetical prosecutor is willing to offer a plea bargain carrying a nineteen-month sentence for a run-of-the-mill nonviolent criminal charged with drug possession.¹¹² Now imagine the prosecutor is advised of prison overcrowding before making the deal. Obviously, the prosecutor will still charge the defendant and will still want to ensure that he serves a serious prison term. However, instead of offering a bottom-line deal of nineteen months, perhaps the prosecutor will offer seventeen months because, in the back of her mind, she is thinking about prison overcrowding.

This two month decrease, alone, will not even be noticeable in a country that has more than two-million people behind bars. But changes at the margins can have a big effect when multiplied by thousands of criminal defendants each year. If the two month effect occurs in thousands of cases throughout the country it will result in a noticeable (though still not dramatic) decrease in incarceration over time.¹¹³

To visualize the idea, think of mass imprisonment as a bubble that is about to burst. The goal is not to drain all or even half the air out of the balloon but, instead, to leak a little air out of the balloon so that it is no longer on the verge of bursting. Importantly, the proposal does not *require* prosecutors to do anything. Instead, it provides prosecutors with a picture of the overinflated balloon and signals to them that they can leak some of the air out if they want to depressurize the situation.

B. Supporting Evidence from Social Psychology Literature

Although it is impossible to say for certain whether an informational campaign would have any effect on prosecutors' charging decisions, there is a body of social psychology literature that gives cause for optimism.

111. See *supra* text accompanying note 26.

112. The average drug possession sentence in federal court is about nineteen months. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.5.31 (2003).

113. Of course, as Professor Kevin Reitz has recently demonstrated, raw incarceration numbers will rise before they diminish, even assuming that there is zero incarceration growth in future years. See Reitz, *supra* note 18, at 1788–89. The reason is attributable to the lengthy sentences that have been handed down in recent years. *Id.* As Professor Reitz explains, we must think not just in terms of the number of people incarcerated, but also based on the number of “person-years” of confinement that are handed down. *Id.* In the long-run however, my proposal will reduce “person-years.”

As countless media studies have demonstrated, people are susceptible to suggestion on a huge variety of issues, not the least of which is crime and criminal justice policy.¹¹⁴ Social psychologists have long posited that increases in knowledge and persuasive efforts can affect attitudes and behavior.¹¹⁵ This should not be surprising, considering that corporations spend billions of dollars on advertising and that the government makes frequent use of public service announcements.

To evaluate whether prosecutors can be influenced by an informational campaign, one can consider social psychologists' studies which have found that public health messages can influence behavior.¹¹⁶ For example, researchers who provided beach-goers with a brochure detailing the benefits of wearing sunscreen found that those individuals were more likely to request a free bottle of sunscreen.¹¹⁷ In another experiment, researchers found that women who received a message encouraging them to take responsibility for detecting breast cancer were more likely to obtain a mammogram during the following year.¹¹⁸ Similarly, when smokers

114. See, e.g., Beale, *supra* note 45, at 442 ("[T]he media's emphasis on crime makes the issue more salient in the minds of viewers and readers, which causes the public to perceive crime as a more severe problem than real world figures indicate.").

115. See, e.g., Leandre R. Fabrigar et al., *Understanding Knowledge Effects on Attitude-Behavior Consistency: The Role of Relevance, Complexity, and Amount of Knowledge*, 90 J. PERSONALITY & SOC. PSYCHOL. 556, 557 (2006) ("One reason researchers have been interested in knowledge is that it has long been assumed that increases in knowledge are associated with greater influence of attitudes on behavior.").

116. See, e.g., Alexander J. Rothman et al., *The Systematic Influence of Gain- and Loss-Framed Messages on Interest in and Use of Different Types of Health Behavior*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1355, 1356 (1999) ("[S]tudies have similarly observed that providing people with loss-framed information is an effective way to promote the performance of or preferences for mammography, HIV-testing, amniocentesis, skin cancer examinations, and blood-cholesterol screening." (citations and footnote omitted)).

117. Jerusha B. Detweiler et al., *Message Framing and Sunscreen Use: Gain-Framed Messages Motivate Beach-Goers*, 18 HEALTH PSYCHOL. 189, 193 (1999) ("[T]here was a significant gain-frame advantage in promoting intentions among beach-goers who had no prior intention to use sunscreen.").

118. See Alexander J. Rothman et al., *Attributions of Responsibility and Persuasion: Increasing Mammography Utilization Among Women over 40 with an Internally Oriented Message*, 12 HEALTH PSYCHOL. 39, 45 (1993) ("[O]nly women who viewed the internal presentation were reliably more likely to obtain a mammogram than the average eligible woman in Connecticut."); see also Sara M. Banks et al., *The Effects of Message Framing on Mammography Utilization*, 14 HEALTH PSYCHOL. 178, 178 (1995) (finding that women who were not adhering to mammography screening guidelines were more likely to have a mammogram within one year after being exposed to messages about the risks of not obtaining a mammogram); Celeste Sugg Skinner et al., *Physicians' Recommendations for Mammography: Do Tailored Messages Make a Difference?*, 84 AM. J. PUB. HEALTH 43, 43 (1994) (finding that recipients of tailored letters were more likely to seek mammograms).

received letters from physicians describing the number of years of life that would be cut short if they did not quit, the subjects reduced smoking.¹¹⁹

An attempt to influence prosecutorial decision making would be akin to a public health campaign to reduce skin cancer, breast cancer, or smoking.¹²⁰ For decades, public service announcements have had some success at shaping behavior.¹²¹ And social psychology teaches us that there are a host of effective tactics that can be employed in a campaign to influence prosecutors.

First, social psychologists have demonstrated that information conveyed in written texts can have persuasive impact.¹²² Unlike visual or verbal messages, which go by quickly and sometimes force the audience to focus on peripheral cues such as the credibility of the person conveying the message, written texts offer readers the opportunity to review the message carefully at their own pace.¹²³ Thus, more complicated messages are

119. See Dawn K. Wilson et al., *Compliance to Health Recommendations: A Theoretical Overview of Message Framing*, 3 HEALTH EDUC. RES. 161, 167 (1988); see also Nathan Maccoby et al., *Reducing the Risk of Cardiovascular Disease: Effects of a Community-Based Campaign on Knowledge and Behavior*, 3 J. COMMUNITY HEALTH 100, 110–14 (1977) (explaining how a media campaign about cardiovascular disease led to positive behavioral changes, including decreased smoking).

120. As with teen smoking public service announcements, it might also be useful to aim the message at younger “junior” prosecutors early in their careers. Psychologists have demonstrated that the amount of information a person has about an issue “is a determinant of the extent of attitude change following exposure to new information or to a counterattitudinal communication.” Andrew R. Davidson et al., *Amount of Information About the Attitude Object and Attitude-Behavior Consistency*, 49 J. PERSONALITY & SOC. PSYCHOL. 1184, 1185 (1985); see also Richard E. Petty & Duane T. Wegener, *Attitude Change: Multiple Roles for Persuasion Variables*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 323 (D.T. Gilbert et al. eds., 4th ed. 1998) (explaining that the degree of difference between the advocated behavior and the individual’s actual behavior affects motivation to comply with the message being advocated). Thus, for an informational campaign aimed at prosecutors to have maximum effect, it should reach junior prosecutors as early as possible, before their attitudes toward incarceration are too firmly set.

121. See RICHARD M. PERLOFF, *THE DYNAMICS OF PERSUASION: COMMUNICATIONS AND ATTITUDES IN THE 21ST CENTURY* 322 (2d ed. 2003) (explaining that state anti-smoking campaigns have been effective).

122. See, e.g., P. Karen Murphy et al., *Examining the Complex Roles of Motivation and Text Medium in the Persuasion Process*, 30 CONTEMP. EDUC. PSYCHOL. 418, 425–26, 434 (2005) (explaining that “the education and persuasion literature would indicate that traditional written texts are more persuasive than other modes of delivery,” but finding in a study of college students that “differences in the mode of delivery . . . [of] texts . . . have little bearing on changes in students’ beliefs”).

123. See Loraine Devos-Comby & Peter Salovey, *Applying Persuasion Strategies to Alter HIV-Relevant Thoughts and Behavior*, 6 REV. GEN. PSYCHOL. 287, 300 (2002) (“Self-paced communications [such as written texts] lead to greater message scrutiny, whereas externally paced messages, because they provide visual prompts, increase the impact of peripheral persuasion cues such as communicator credibility and likeableness.”).

sometimes easier to convey in writing.¹²⁴ Indeed, industries that have been foreclosed from television and radio advertising—notably tobacco manufacturers—have continued to enjoy success through print advertising.¹²⁵ The fact that the Bureau of Prisons would reach prosecutors through a written memorandum should not preclude the information from being effective.

Second, the manner in which the written text is conveyed is important. Information is more likely to be effective if it is tailored in a personal fashion.¹²⁶ The note that the sample memorandum in Part III.A is therefore addressed by name to “*John Q. Smith, Springfield County Assistant District Attorney*,” rather than generically to all county prosecutors. Additionally, note that the memorandum is approximately 130 words, covers less than half-a-page of text, and features a very simple chart.¹²⁷ Researchers have demonstrated that written text that is shorter and easier to comprehend is likely to have a greater impact.¹²⁸

Third, note that the last paragraph of the memorandum encourages prosecutors to take personal responsibility for the incarceration problem and frames the issue positively by focusing on reduction of the mass imprisonment problem: “*As you know, prosecutors can have a significant impact in reducing prison overcrowding because judges give great weight to prosecutors’ sentencing recommendations.*”¹²⁹ Scholars have discovered that messages encouraging personal responsibility can be particularly

124. See William J. McGuire, *Attitudes and Attitude Change*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 233, 283 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985) (stating that written texts have more effect on attitudes); Shelly Chaiken & Alice H. Eagly, *Communication Modality as a Determinant of Message Persuasiveness and Message Comprehensibility*, 34 J. PERSONALITY & SOC. PSYCHOL. 605, 605 (1976) (finding that persuasion and comprehension of difficult messages were greater with written materials, but for easy messages videotape was more persuasive than written texts).

125. See HERBERT W. SIMONS WITH JOANNE MORREALE & BRUCE GRONBECK, PERSUASION IN SOCIETY 93 (2001).

126. See Pablo Brinol & Richard E. Petty, *Fundamental Processes Leading to Attitude Change: Implications for Cancer Prevention Communications*, 56 J. COMM. S81, S83–84 (2006) (“[B]y increasing the personal relevance of a message, people scrutinize the evidence more carefully such that if the evidence is found to be strong, more attitude change results . . .”). As scholars have explained, “[t]ailored information is more likely to be read, remembered, and perceived as more relevant than comparison communications.” Devos-Comby & Salovey, *supra* note 123, at 296; see also Skinner et al., *supra* note 118, at 45 (finding in mammography study that “tailored letter recipients were significantly more likely to read more of the content” and that the “letters were more likely to be remembered”). With hundreds or thousands of prosecutors in each state it is, of course, difficult to tailor information.

127. See ELIOT R. SMITH & DIANE M. MACKIE, SOCIAL PSYCHOLOGY 265 (2d ed. 2000) (“[T]he golden rule for most media persuasion is: Keep it simple.”).

128. See *id.*; Brinol & Petty, *supra* note 126, at S84.

129. See *supra* Part III.A.

effective when they are framed as a creating a “gain.”¹³⁰ In particular, “gain-framed” messages are most effective when the suggested action appears to involve little or no risk.¹³¹ Because offering a marginally lower prison sentence would be a low risk behavior for most prosecutors, a “gain-framed” message would likely be most successful in encouraging that behavior.¹³²

Fourth, the reference to statistics about the number of persons incarcerated, the increase in incarceration over the last year, and the percent of operating capacity, is also likely to be influential.¹³³ Although scholars debate the persuasive influence of statistics, some studies have found them to be more persuasive than narrative evidence.¹³⁴

Fifth, even if prosecutors fail to read the full one-page document, the subject line—“*Prison Overcrowding*”¹³⁵—might still have persuasive force.¹³⁶ The short subject line clearly conveys a strong message to prosecutors, even if they read no further.

Finally, there is the question of how often to distribute the message to the prosecutors. Research demonstrates that surprising messages are more likely to have an effect.¹³⁷ And researchers also have found that subjects are

130. See Peter Salovey et al., *Message Framing in the Prevention and Early Detection of Illness*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 391, 391–97 (James Price Dillard & Michael Pfau eds., 2002) (discussing literature).

131. Anne Marie Apanovitch et al., *Using Message Framing to Motivate HIV Testing Among Low-Income, Ethnic Minority Women*, 22 HEALTH PSYCHOL. 60, 60 (2003) (“[G]ain-framed messages are most persuasive for behaviors with relatively certain outcomes.”); Devos-Comby & Salovey, *supra* note 123, at 292 (“Loss frames are more persuasive when individuals consider behavioral decisions that they perceive as risky or uncertain, and gain frames are more effective in promoting [action] when they are seen as involving little or no risk.”).

132. See, e.g., Apanovitch et al., *supra* note 131, at 65 (“As predicted, we found that among those women who viewed HIV testing as having a certain outcome (with a low risk of testing positive), gain-framed messages better encouraged self-reported HIV testing than loss-framed messages . . .”).

133. See SMITH & MACKIE, *supra* note 127, at 264 (“[M]any people are particularly impressed by speeches or advertisements that contain numbers, graphs, or equations, perhaps because they convey an air of scientific objectivity.”).

134. See Rodney A. Reynolds & J. Lynn Reynolds, *Evidence*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 427, 431 (James Price Dillard & Michael Pfau eds., 2002) (“On balance, statistical evidence would seem to be the more persuasive form of evidence when compared to narrative evidence, but such effects will depend on the type and amount of cognitive processing of the evidence.”).

135. See *supra* Part III.A.

136. See DAVID OGILVY, *CONFESSIONS OF AN ADVERTISING MAN* 104 (1963) (“On the average, five times as many people read the headline as read the body copy.”).

137. See Sara M. Baker & Richard E. Petty, *Majority and Minority Influence: Source-Position Imbalance as a Determinant of Message Scrutiny*, 67 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1994) (finding that receiving unexpected information stimulates message

more likely to be persuaded through repetition,¹³⁸ but that persuasion wears out at a certain point.¹³⁹ Although there is no definitive correct answer, I propose that the bureaucracy strike the balance between repetition and saturation by sending the imprisonment information once per month as well as whenever a prison milestone occurs. Milestones would include (1) a new prison being subjected to a court order or consent decree; (2) prisons exceeding 100% capacity for the first time; or (3) whenever a 1000 increment of prisoners is reached for the first time—for example, when occupancy increases from 26,999 inmates to 27,000 prisoners.

C. *Potential Objections and Responses*

There are a number of objections and problems that could stand in the way of using incarceration information to push for a marginal decrease in imprisonment. In particular, prosecutors might offer inconsistent sentences to similarly situated defendants due to the timing of when they receive notice of the incarceration information. Similarly, there might be an inconsistency if some prosecutors remain unpersuaded by the imprisonment information, while other prosecutors in the same jurisdiction are persuaded to seek lower (or possibly even higher) sentences as a result of the information. While there is some merit to these objections, I do not believe they defeat the proposal.

processing); Stephen M. Smith & Richard E. Petty, *Message Framing and Persuasion: A Message Processing Analysis*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 257, 265 (1996).

138. See ANTHONY R. PRATKANIS & ELLIOT ARONSON, AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION 181 (2001) (discussing studies demonstrating that “all other things being equal, the more a person is exposed to an item the more attractive it is”); Xinshu Zhao, *A Variable-Based Typology and a Review of Advertising-Related Persuasion Research During the 1990s*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 495, 503 (James Price Dillard & Michael Pfau eds., 2002) (reviewing studies that found higher recall of television advertisements that had run more often).

139. See John T. Cacioppo & Richard E. Petty, *Central and Peripheral Routes to Persuasion: The Role of Message Repetition*, in PSYCHOLOGICAL PROCESSES AND ADVERTISING EFFECTS 91, 96–97 (Linda F. Alwitt & Andrew A. Mitchell eds., 1985) (“The most common empirical finding in the area of message repetition is that persuasion first increases then wears out as the number of repetitions increases.”); Gerald J. Corn & Marvin E. Goldberg, *Children's Responses to Repetitive Television Commercials*, 6 J. CONSUMER RES. 421, 424 (1980) (finding that children who saw a commercial three times preferred the product more than children who saw the same commercial one or five times).

1. Inconsistencies Among Prosecutors

At the outset, critics might suggest that even if an informational campaign could influence prosecutors, it would do so inconsistently. Some prosecutors might be willing to offer better plea bargains after reading the imprisonment information, while other prosecutors would be unaffected by the information. While there is almost certainly some truth to this charge, it proves too much. There is already significant variation in the plea bargains that prosecutors offer to similarly situated defendants.¹⁴⁰ While most prosecutors' offices have a "going rate" for common crimes—for example, an unwritten policy that most second-time DWI offenders receive a thirty-day jail sentence—the reality of charge and sentence bargaining already permits wide variations.¹⁴¹ One prosecutor can offer a thirty-day sentence, while the prosecutor in the court next door can offer fifteen days. The more lenient prosecutor might be willing to plead the defendant down to a reckless driving charge carrying a probated sentence, whereas the tougher prosecutor might demand a guilty plea to the original DWI charge. The possible reasons underlying these variations are endless. Apart from the facts of the cases at hand, one prosecutor might have been influenced by a recent newspaper article about a drunk driver who killed a family;¹⁴² one assistant district attorney might have been raised by a stricter family than the other; or one prosecutor might believe that she can strengthen her reputation and promotion prospects by demanding tougher plea bargains.¹⁴³

The key point is that information asymmetries and life experience already work variations in the charge and sentencing bargains offered by different prosecutors. So long as rigid guidelines are not imposed on prosecutors,¹⁴⁴ those variations will always exist. To be sure, providing

140. See Wright & Miller, *supra* note 105, at 1411 ("Charge bargaining also gives individual prosecutors (especially those in large, overworked offices) too much opportunity to treat similarly situated defendants differently depending on whether they plead guilty or go to a trial."); see also Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 934–35 (2006) (discussing ways in which prosecutors and other participants in the criminal justice system manipulate plea bargaining and dismissal powers to serve their own interests).

141. See Bibas, *supra* note 140, at 957.

142. For example, consider the recent front-page story in the *Houston Chronicle* detailing how an individual with three prior drunk driving convictions killed a woman and her pregnant daughter. See Cindy Horswell & Renee C. Lee, *Suspect in Fatal Crash Had 3 DWI Convictions*, HOUSTON CHRON., Mar. 28, 2007, at 1.

143. Consider also the possibility of "holiday," "weekend," or "vacation" specials, whereby prosecutors might offer marginally better plea deals to clear the dockets during times when judges, court staff, and lawyers would prefer not to be bogged down with trials.

144. See Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1262–65 (2004) (expressing concern about the enormous sentencing power

prosecutors with imprisonment statistics will certainly affect some prosecutors more than others. However, unlike many variables which touch only certain actors, an informational campaign focused on mass imprisonment at least starts from a position where *all* prosecutors are privy to the same information.

2. The Problem of Dissipating Benefits

Critics might also argue that even if a critical mass of prosecutors could be influenced by an informational campaign, any benefit from the imprisonment information would dissipate over time as prosecutors forget about the information or as they become over-saturated and ignore it. Once again, there is some obvious truth to this criticism. It is logical to expect that prosecutors might be more willing to offer better plea bargains in the hours or days after receiving the overcrowding information than many weeks thereafter.¹⁴⁵ Similarly, as memoranda about prison statistics arrive month after month, it seems likely that prosecutors will be influenced by them less and less, in the same way that consumers learn to tune out advertisements that appear too often.¹⁴⁶ Nevertheless, while these objections have merit, they should not be overstated.

Even if an informational campaign only leads prosecutors to decrease their charge and sentencing bargains for a few months, it may nevertheless create significant long-term benefits by reducing the baseline sentence for some crimes. For example, imagine that the unwritten "going rate" in a local prosecutor's office for a drug possession charge is twenty-four months. Under that going rate, prosecutors sometimes give sentences as low as twenty months or as high as twenty-eight months, but most plea deals are for twenty-four-month sentences. Now assume that the overcrowding information leads a number of prosecutors to reduce their sentencing recommendations for drug possession charges. Instead of occasionally giving a twenty-month sentence, prosecutors over a period of time begin to regularly (though certainly not always) give twenty-month plea deals. Without intending to do so, those prosecutors may reset the baseline by

held by prosecutors under the Federal Sentencing Guidelines, but explaining that full-scale reform is unlikely).

145. See Cacioppo & Petty, *supra* note 139; but see Banks et al., *supra* note 118, at 178 (finding that a loss-framed message about breast cancer influenced women to obtain a mammogram up to a year after receiving the message).

146. See generally Cacioppo & Petty, *supra* note 139.

making twenty months the going rate for drug possession charges.¹⁴⁷ Thus, even if prosecutors decline to keep lowering sentences for drug possession (and other crimes) below twenty months as further incarceration information is provided by the Bureau of Prisons, the prosecutors will already have taken steps that will reduce mass imprisonment well into the future.

Of course, for the informational campaign to have maximum effect, it would be preferable if prosecutors did not quickly begin to ignore the imprisonment information after receiving it. Recognizing that there is a saturation point at which the persuasiveness of information declines, there are steps that can be taken to keep the information at its maximum potency. First, rather than sending the imprisonment information on the same day of every month, the Bureau of Prisons might “mix it up” to ensure that the information updates arrive somewhat irregularly.¹⁴⁸ Second, in addition to sending a monthly information update, the Bureau of Prisons might also send extra documentation, packaged in a different color envelope, whenever milestones are struck. For instance, each time an additional 1000 people are incarcerated or every time prison population increases by one percent, the Bureau of Prisons might send prosecutors an additional informational letter. And by packaging the letter in a different colored envelope—for instance, the Bureau of Prisons could send a red envelope each time the prison population reaches another 1000 person milestone—prosecutors would be aware of the milestone even if they failed to open or read the letter (so long as they knew the significance of the red envelopes).

3. Will Prosecutors Ignore the Information?

A third objection to an informational campaign is that the vast majority of prosecutors would be unaffected by an informational campaign because they already know of prison overcrowding or because, even if informed, it simply would not affect their plea bargaining decisions.

While prosecutors are generally aware of prison overcrowding, at present they do not pay much attention to the problem on a daily basis. As Professors Zimring and Hawkins explained in their landmark book on American incarceration, “[t]o judges and prosecutors imprisonment may seem to be available as a free good or service”—the equivalent of a

147. See Brown, *supra* note 104, at 370 (arguing for cost-benefit analysis in criminal law and suggesting that it could “gradually contribute to a change in prosecutorial culture”).

148. See *supra* note 137 and accompanying text (noting the benefit of surprising messages).

"correctional free lunch."¹⁴⁹ Prosecutors simply do not give much thought to prison capacity when they are standing face to face with criminal defendants.

The more vexing question is what prosecutors would do if they were regularly forced to contemplate the realities of mass imprisonment. Some local prosecutors might well disclaim any responsibility to decrease their sentencing recommendations. They might contend that the State enacts the criminal laws and that the State alone bears responsibility for finding enough prison beds to house all those who have violated the laws. Local prosecutors might contend that their job requires them to enforce the exact letter of the criminal laws, regardless of prison overcrowding. While this contention sounds lofty, it ultimately rings hollow.¹⁵⁰

The very existence of plea bargaining suggests that prosecutors could not enforce the exact letter of the criminal law in all cases through trials and maximum sentences.¹⁵¹ Even the most junior prosecutor recognizes that without charge and sentencing bargaining, their courts, as currently run, would grind to a halt.¹⁵² As Judge Gerald Lynch has explained, because of the limited resources of the criminal justice system, "prosecutorial decisions

149. ZIMRING & HAWKINS, *supra* note 7, at 140, 211; see also William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 838–39 (2006) ("Because state rather than local taxpayers pay for prison beds, local prosecutors tend to 'spend' those beds more readily than they should.").

150. A less "lofty" assessment might be that prosecutors see themselves primarily as advocates, not as problem-solvers. See Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1173 (2005) ("Many prosecutors express ambivalence—or even downright hostility—about having to fulfill the problem-solver role themselves. . . . [S]ome prosecutors explicitly deny any interest in handling the non-advocacy or social work components of the job . . .").

151. See Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2137 (1998) ("[P]rosecutors must exercise judgment about which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment.").

152. See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 867 (2000) (describing plea bargaining as a "marvelously efficient relief from a suffocating workload"); Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1949 (2006) ("District Attorneys must economize, selecting their highest priority cases to receive the most time and resources from their limited budgets, while the bulk of cases must be resolved without the expense of a trial."). A handful of jurisdictions have attempted to eliminate plea bargaining, with mixed success. See Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 707–09 (2001) (discussing efforts in Alaska, California, Texas, and Arizona); Michael L. Rubinstein & Teresa J. White, *Plea Bargaining: Can Alaska Live Without It?*, 62 JUDICATURE 266 (1978) (discussing Alaska's attempts to eliminate plea bargains). Of course, as Albert Alschuler has argued, society could abandon plea bargaining if it simply decided to spend the money necessary to fully staff courts to handle more trials. See Albert N. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 937–48 (1983).

inevitably combine judgments of desert with judgments of resources allocation.”¹⁵³ Indeed, in many instances, prosecutors are eager to engage in charge or sentencing bargaining to avoid the harsh results of mandatory minimum statutes or instances where the statutory punishments for the charged crime are not a good fit for the actual conduct at hand.¹⁵⁴

Additionally, local prosecutors could say that prison overcrowding is “not my problem,” or that “it should be the prosecutor from the neighboring county, not me, who should scale back her sentences.” That tragedy of the commons¹⁵⁵ problem is a serious concern, yet it is offset by the pervasive view of prosecutors that it is their obligation to serve a higher calling to “do justice” or act for the public interest.¹⁵⁶ As such, while collective action and tragedy of the commons concerns stand in the way, it is likely that prosecutors will be influenced by an informational campaign.¹⁵⁷

153. Lynch, *supra* note 151, at 2139. The most overt mixing of desert and resource allocation occurs in potentially capital cases. See Robert Morgenthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25 (opposing the reinstatement of capital punishment in New York and contending that the death penalty “drain[s] millions of dollars from more promising efforts to restore safety to our lives”).

154. See Wright & Engen, *supra* note 152, at 1978 (offering empirical evidence demonstrating that “the crimes for which the guidelines mandate active prison sentences are the ones that are most likely to result in substantial charge reductions”). Wright & Engen’s research offers one of the few empirical demonstrations that prosecutors and defense attorneys will agree on substantial reductions when there are numerous lesser-included (and other) offenses that can be pleaded to in the criminal code. See *id.* at 1938–39 (“We compare the initial felony charges that prosecutors filed with the charges at the time of conviction and . . . [t]he evidence shows that charge reductions are common, occurring in roughly half of all felony cases that resulted in conviction and that the choice to reduce criminal charges has a large effect on average sentence severity.”).

155. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968), available at <http://sciencemag.org/cgi/reprint/162/3859/1243.pdf>.

156. See William Braniff, *Local Discretion, Prosecutorial Choices, and the Sentencing Guidelines*, 5 FED. SENT’G REP. 309, 311 (1993). Braniff, a longtime United States Attorney, states that “[t]he U.S. Attorney, as a representative of the President, has the unique responsibility of establishing prosecutorial policy. He or she is the single person in the criminal justice system who must look to the totality of criminal threats within the district, as well as the available resources to meet those threats, and fashion a prosecution response that maximizes the positive impact that can be obtained from the resources. No other person has this broad responsibility.” *Id.*; see also Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 608 (1999) (“In some sense, Southern District [of New York] prosecutors felt that they owned the concept [of the duty to do justice]. It certainly set us apart from the defense lawyers with whom we interacted.”); Lynch, *supra* note 151, at 2131. See generally Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001).

157. A final related objection, however, is that an informational campaign might actually have an unanticipated backlash effect resulting in more imprisonment. See GOTTSCHALK, *supra* note 22, at 238 (explaining that in the history of prison reform movements, “measures heralded as ‘reforms’ often have negative, unanticipated consequences”). Specifically, an informational

IV. A POLITICAL FREEBIE: DECREASING INCARCERATION WITHOUT SEEMING SOFT ON CRIME

The question often raised in opposition to reform proposals is: Why would the legislature act? In other words, why would legislators—who take contributions from corrections unions and benefit politically from being tough on crime—seek to reduce incarceration by requiring that prosecutors be advised of imprisonment data? The answer is twofold: First, legislators are willing to make criminal justice reforms when the reforms are politically neutral and do not raise red flags. Second, in times of tight budgets, legislatures have much to gain by reducing corrections costs.

A. *Non-Controversial Criminal Justice Reforms Are Regularly Enacted*

At the outset, I must acknowledge the obvious fact that legislators are loath to appear soft on crime. Accordingly, reform proposals requiring legislatures to make sweeping changes favorable to criminal defendants are highly unlikely to be enacted.¹⁵⁸ Thus, if my proposal runs the risk of exposing legislators to being labeled soft on crime, I would concede that it is highly unlikely to be put into place.

The question, therefore, is how controversial it would be to require that the Bureau of Prisons inform prosecutors about imprisonment levels and confinement conditions. I would posit that the proposal would not be controversial at all. Legislators would in no way be taking unpopular positions such as decriminalizing behavior or reducing statutory sentencing ranges.¹⁵⁹ To the contrary, legislators would be instituting a seemingly neutral policy that prosecutors regularly receive accurate factual information about prison capacity. To put it in real world language,

campaign could lead prosecutors to offer higher sentences on the belief that prison overcrowding will lead to early release of criminals. It is, of course, impossible to rule out an unanticipated backlash effect, but in this context it seems unlikely to occur. In most jurisdictions, prosecutors are well aware of the rules governing the early release of prisoners because such rules are integral to plea bargaining negotiations. In states with determinate sentencing laws, prosecutors know that statutes prevent the release of prisoners before they have served a particular percentage of their sentences. And in states with indeterminate sentencing schemes, prosecutors are already aware, and in fact rely on, the typical ratio of credit that prisoners receive for days served.

158. See, e.g., Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2021, 2041 (2006) (reviewing scholarly proposals to solve the ills of the criminal justice system and concluding that many of them require that “Congress or state legislators change criminal procedural rights via legislation,” which appears unlikely).

159. See, e.g., Stuntz, *supra* note 1, at 507 (“[L]egislatures regularly add to criminal codes, but rarely subtract from them.”).

legislators would simply be requiring that one set of government workers (bureaucrats in the Bureau of Prisons) shuffle some paperwork to another set of government workers (the county prosecutors).¹⁶⁰ It is difficult to see how the increased paper flow could be painted as soft on crime.

Indeed, the criminal justice system regularly requires that additional paperwork be exchanged between government departments or agencies. For example, when the FBI begins a preliminary inquiry in a “sensitive criminal matter[s]” such as an investigation of political corruption or malfeasance related to a religious organization or the news media, it is obligated to notify the relevant United States Attorney as soon as practicable.¹⁶¹ If the FBI terminates the investigation, it must notify the appropriate federal prosecutor within thirty days.¹⁶² And if the FBI refers a serious matter to state or local prosecutors and they decline to prosecute, the FBI is obligated to advise the relevant federal prosecutor in writing within thirty days.¹⁶³

Perhaps more relevant, legislatures are willing to implement “neutral” criminal justice reforms that generate little opposition from prosecutors and other powerful interest groups.¹⁶⁴ For example, legislatures occasionally vest sentencing commissions with the power to develop prosecutorial standards for charging and plea bargaining decisions.¹⁶⁵ When the commissions then engage in non-controversial (but still useful) projects, such as codifying preexisting prosecutorial standards, they meet little resistance.¹⁶⁶ Consider also that a number of states and localities have bucked the national trend and established salary parity between prosecutors

160. Of course, politicians often criticize each other for increasing the size of bureaucracy. It is, however, hard to think of a state politician who has lost a major election because he demanded that too much paper be exchanged between government agencies.

161. See OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 8–9 (2002), available at <http://www.usdoj.gov/olp/generalcrimes2.pdf>; see also Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 814 (2003) (discussing same).

162. See OFFICE OF LEGAL POLICY, *supra* note 161, at 11.

163. See *id.*

164. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 255–59 (2004) (utilizing public choice theory to argue that criminal legislation falls into four categories, the last of which includes legislation in which prosecutors are unlikely to dominate the legislative debate).

165. See Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1017–18 (2005) (discussing examples from Kansas and Washington in which legislatures passed laws that empowered sentencing commissions to regulate judges and prosecutors).

166. See *id.* at 1026–27 (calling such regulations the equivalent of “low-hanging fruit for regulators”).

and government funded defense lawyers.¹⁶⁷ As Professor Ron Wright explains, funding parity was put into place in these jurisdictions because the legal community—including the American Bar Association, judges, administrators, defense lawyers and many prosecutors—favor equal salaries.¹⁶⁸ Essentially, the idea is not controversial enough for interest groups and tough on crime advocates to become exercised. Additionally, as Professor Bill Stuntz has detailed, although states practically never narrow criminal liability, legislatures have offered criminal procedure protections beyond those mandated by the United States Supreme Court.¹⁶⁹ These include recent bans on racial profiling and legislation encouraging DNA-based innocence claims.¹⁷⁰ In sum, legislators are not averse to criminal justice reforms that will not carry the soft on crime label.

B. Budget Constraints Provide a Strong Incentive For Legislative Action

If I am correct that ordering prosecutors to be better informed about prison capacity would not be controversial or even noticeable to the public at large, the next question is why legislators would bother to spend their time implementing such a bland proposal that will not garner headlines. The answer is money.

While certain legislators are only interested in proposing legislation that will bring them notoriety, many legislators are motivated by more pedestrian concerns such as reducing governmental spending. For instance, consider legislators who sit on appropriations committees. By virtue of having to wallow in intricate details in search of a balanced budget, appropriations committee members may be interested in enacting administrative reforms that could reduce expenditures. And given the power that comes with sitting on appropriations committees, if a member proposed

167. See Wright, *supra* note 164, at 233.

168. See *id.* at 259–60.

169. See Stuntz, *supra* note 149, at 796.

170. See *id.* at 799–800. Professor Stuntz also points out that many of the criminal procedure protections that we think of as mandated by the judiciary—including the reasonable doubt standard, the exclusionary rule, appointed counsel for indigents, and protection against the third degree—were actually afforded by statute in many states well before the Warren Court's criminal procedure revolution mandated them. See *id.* at 801–02. In this regard, for a compelling argument that five of the Warren Court's most significant criminal procedure cases were actually quite majoritarian, see Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004).

a bill to provide more information to prosecutors, it is unlikely that other legislators would put up much, if any, opposition.¹⁷¹

When we consider that corrections expenditures cost billions of dollars per year,¹⁷² it is entirely possible that cost conscious legislators would embrace the opportunity to lower costs at the margins by indirectly influencing prosecutorial behavior. Indeed, as Professor Rachel Barkow has catalogued, there are an abundance of recent examples where legislators relied on fiscal concerns to make far more controversial changes to sentencing policy:

A Michigan legislator noted that when he first introduced bills to reduce mandatory minimum sentences, he received little support. After a conference on the state budget, however, the governor called him "to see how we can make these bills happen." Kansas's decision to require treatment instead of incarceration for first-time, nonviolent drug offenders rested in part on the fact that "those people who favor being tough on crime don't want to find the money to build more prisons." Washington passed its drug treatment diversion programs, according to one expert, because "[t]he fiscal crisis has brought together the folks who think sentences are too long with the folks who are perfectly happy with the sentences but think prison is costing too much." One Texas state representative supported treatment options for drug offenders because it was cost effective and would free prison space for more violent offenders. Several governors have ordered the early release of prisoners with the explicit goal of reducing correctional costs and addressing budget crises.¹⁷³

In recent years, numerous states have sought to reduce their corrections expenditures to save money.¹⁷⁴ A report by the Vera Institute of Justice

171. See Lianne Hart, *Texas May Require Schools to Carry Elective on Bible: Legislation Calls for an 'Objective and Nondevotional' Course*, L.A. TIMES, Apr. 15, 2007, at A26 (describing the House Appropriations Committee as the second most powerful committee in the Texas legislature); Richard G. Jones, *Lawmaker in New Jersey Is Charged With Fraud*, N.Y. TIMES, March 30, 2007, at B1 (describing the chair of the New Jersey Senate's Appropriations Committee as "one of the most powerful people in the state").

172. See JACOBSON, *supra* note 24, at 53; MAUER, *supra* note 3, at 92 (explaining that corrections costs in the United States approach \$60 billion annually).

173. Barkow, *supra* note 19, at 1287–88 (footnote omitted); see also Jennifer Steinhauer, *For \$82 a Day, Booking a Cell in a 5-Star Jail*, N.Y. TIMES, Apr. 29, 2007, at 1 (explaining that California has allowed some low-risk criminals to pay for an upgrade to a more comfortable jail, a policy that has generated hundreds of thousands of dollars a year for municipalities).

174. See JACOBSON, *supra* note 24, at 85 (discussing how 25 states reduced their corrections budgets in 2002 because of budget shortfalls); RYAN S. KING & MARC MAUER, *THE SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS IN AN ERA OF FISCAL RESTRAINT* (2002); Barkow, *supra* note 87, at 807.

found that in 2003, thirty-one states passed laws to address the skyrocketing costs of corrections.¹⁷⁵ In particular, five states passed laws reducing the lengths of sentences, a dozen states passed legislation favoring drug treatment over more expensive incarceration, six states adopted more flexible parole and probation policies, and nearly a dozen states expanded early release programs.¹⁷⁶ In total, more than two dozen states reduced their corrections budgets in 2002.¹⁷⁷ Nine states reported a net decrease in corrections expenditures in 2003 and fourteen states announced such an accomplishment in 2004.¹⁷⁸

Legislators have even become averse to spending more money on new prisons and jails.¹⁷⁹ When Colorado legislators learned that they would need to allocate \$500 million to house 7000 prisoners over the next five years, some opposed the project on the grounds that it would “eat up our entire budget.”¹⁸⁰ In Washington State, lawmakers tried to avoid building a new prison because the cost exceeded \$200 million.¹⁸¹ In Texas, which incarcerates more inmates per 100,000 residents than every state in the nation save Louisiana and Georgia,¹⁸² two prominent (and bipartisan) lawmakers recently opposed the Department of Criminal Justice’s request to construct three new prisons estimated to cost nearly \$500 million.¹⁸³ Even

175. See JON WOOL & DON STEMEN, VERA INST. OF JUSTICE, CHANGING FORTUNES OR CHANGING ATTITUDES?: SENTENCING AND CORRECTIONS REFORMS IN 2003, at 3 tbl.1 (2004).

176. See *id.* at 6–7; JACOBSON, *supra* note 24, at 90.

177. See DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INST. OF JUSTICE, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION? 2 (2002).

178. WOOL & STEMEN, *supra* note 175, at 2. Unfortunately, reducing corrections costs does not always mean decreasing imprisonment. In some instances, states cut costs by closing prisons or reducing guards, while leaving the number of inmates relatively constant. See JACOBSON, *supra* note 24, at 86. This in turn leads to more overcrowding and a worsening of confinement conditions. See *id.*; see also Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1.

179. Unfortunately, when many legislatures make long-term criminal justice policy they do not consider the long-term incarceration costs. For instance, while some states have abandoned three-strikes-and-you’re-out legislation due to the costs of constructing and operating prisons, other states adopted such statutes without fully considering the costs that would arise decades later. See Ronald F. Wright, *Three Strikes Legislation and a Sinking Fund Proposal*, 8 FED. SENT’G REP. 80 (1995).

180. Imse, *supra* note 13, at A4 (“‘It’s going to eat up our entire budget,’ [a budget committee member] said when the Joint Budget Committee was told in January that it had to come up with half a billion dollars to house 7,000 more prisoners in the next five years.”).

181. See Joseph Turner, *Huge Prison Bill on Its Way*, THE NEWS TRIB., Oct. 8, 2006, at A1 (“Lawmakers tried for several years to avoid building a full-fledged prison in Eastern Washington because of its cost—\$231 million.”).

182. See HARRISON & BECK, *supra* note 33, at 1 (stating that Texas incarcerates 976 inmates per 100,000 residents).

183. See Lisa Sandberg, *More Prisons Not Answer, 2 Texas Lawmakers Insist*, HOUSTON CHRON., Nov. 28, 2006, at B4.

more noteworthy, a Texas legislator opposed a request to spend \$267 million to build new facilities to deal with chronic overcrowding in the Harris County jails, taking the seemingly unpopular position that more defendants should simply be released on bail.¹⁸⁴ Governors across the country have even closed existing prisons in order to save money.¹⁸⁵

Recent opposition to prison funding is not surprising in times of tight budgets because many states¹⁸⁶ require a balanced budget.¹⁸⁷ As prison costs have skyrocketed, some legislators understandably have begun expressing concerns about having enough funding for other public services such as healthcare, education, and law enforcement.¹⁸⁸ A decade ago it may have been impossible to consider cutting corrections budgets, for fear of being perceived as weak on crime, today it is frequently contemplated.¹⁸⁹

In her recent (and excellent) book, Professor Marie Gottschalk expressed skepticism that the high costs of incarceration will lead legislators to take steps to decrease mass imprisonment.¹⁹⁰ Gottschalk explains that while legislators might have the desire to cut costs at the margins, the prison-

184. See Bill Murphy, *Not All Agree New Jails Needed: Lawmaker Says County Should Let Some Offenders Out on Bail To Free Up Existing Cells*, HOUSTON CHRON., Dec. 11, 2006, at A1.

185. See Judith Greene & Vincent Schiraldi, Op-Ed., *Cutting Prison Costs Is Tempting in Times of Fiscal Crisis*, SAN DIEGO UNION-TRIB., Feb. 27, 2002, at B9 ("Republican governors in Ohio, Florida, Michigan and Illinois closed prisons last year as a cost-saving measure." (emphasis omitted)).

186. My proposal is geared to state legislatures, not the federal system. As Professor Rachel Barkow has cogently explained, while about half of the states have made serious efforts to reduce their corrections expenditures in recent years, Congress has "shown little express concern with the costs of sentencing and has continued to pursue a policy of even longer sentences." Barkow, *supra* note 19, at 1304.

187. Unlike the federal government, most states have laws requiring balanced budgets. See NAT'L ASS'N OF STATE BUDGET OFFICERS, BUDGET PROCESSES IN THE STATES 33 tbl.K (2002) (listing states with balanced budget laws).

188. See JACOBSON, *supra* note 24, at 12 ("Even with a slowly recovering national economy, states simply do not (and will not) have the revenue to continue prison expansion while simultaneously supporting Medicaid, maintaining low tax rates, and adequately funding education and health systems."); Barkow, *supra* note 19, at 1309 ("If the citizens in one state would rather spend a greater proportion of their limited budget on education than the construction of new prisons, they could adjust state sentencing policy accordingly."); Fox Butterfield, *As Cities Struggle, Police Get By With Less*, N.Y. TIMES, July 27, 2004, at A10; Imse, *supra* note 13, at A4 ("The bill for prisons plays a major role in tight funding for other needs such as education and health care.").

189. See WESTERN, *supra* note 24, at 196 ("Indeed conservative governors and state legislators, facing tight budgets and declining revenues, may be more eager to close prisons than to raise taxes."); Chris Suellentrop, *The Right Has a Jailhouse Conversion*, N.Y. TIMES, Dec. 24, 2006, § 6 (Magazine) at 47 (discussing support for the Second Chance Act, which proposed nearly \$100 million in spending to assist states in returning prisoners to society).

190. See GOTTSCHALK, *supra* note 22, at 240-45.

industrial complex is too entrenched to permit dramatic change.¹⁹¹ As she puts it, “the construction of the carceral state was the result of a complex set of historical, institutional, and political developments. No single factor explains its rise, and no single factor will bring about its demise.”¹⁹² If Gottschalk is correct, and I believe she is, then legislative or bureaucratic action is unlikely to cause drastic change. Yet, the proposal I offer is not intended to trigger dramatic change, a prospect I view as unrealistic.¹⁹³ Rather, my proposal explores the possibility of reducing mass imprisonment at the margins as a way to reset the baseline over a lengthy period of time. Given recent legislative trends to trim corrections budgets, such a modest proposal may be plausible.

V. CONCLUSION

The problem of mass imprisonment in the United States took decades to create and it will not be cured overnight. Nevertheless, there are steps that can be taken to encourage the system’s most powerful actors—prosecutors—to exercise their authority in a manner likely to decrease incarceration. Social psychology research suggests that if prosecutors were better advised of escalating imprisonment numbers and the overcrowding of prisons and jails, they would likely offer marginally lower plea bargains. The marginally lower plea bargains would thereby reduce incarceration at the margins. Over time, these marginal decreases in incarceration would have a noteworthy impact on the mass imprisonment problem. Legislatures have an incentive to institute an informational campaign because it carries a low risk of being labeled soft on crime while holding out a potential benefit of significant savings on correctional costs.

191. *Id.* at 244.

192. *Id.*

193. Gottschalk, for instance, sets as her goal reducing the incarceration rate to about 110 prisoners per 100,000 people, which amounts to a decrease of 75% of the prison population. *See id.* at 238. By contrast, I would be pleased to see a decrease of 5%. *See also* WESTERN, *supra* note 24, at 198 (“The self-sustaining character of mass imprisonment as an engine of social inequality makes it likely that the penal system will remain as it has become, a significant feature on the new landscape of American poverty and race relations.”).