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## REASSESSING PROSECUTORIAL POWER THROUGH THE LENS OF MASS INCARCERATION

*Jeffrey Bellin\**

LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM. By *John F. Pfaff*. New York: Basic Books. 2017. Pp. vii, 235. \$27.99.

### INTRODUCTION

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

I did not realize it at the time, but my rogue colleague had provided a valuable lesson in the power of prosecutors in the American criminal justice system. Prosecutors like to be recognized for holding criminals to account. The real power they wield, however, is the unreviewable ability to (discreetly) open exits from an otherwise inflexible system.

The American criminal justice system has grown increasingly inflexible in the past four decades. The magnitude of the change is eclipsed only by the resulting fallout. In 1973, the United States confined approximately 200,000 people in state and federal prisons.<sup>1</sup> Our imprisonment rate was not that different from Western European countries. Since then, the nation’s incarceration rate increased rapidly until it plateaued in the 2000s at previously unimagined levels.<sup>2</sup> Currently, there are over 1.5 million people confined in

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\* Professor, William & Mary Law School. Thanks to Paul Crane, Adam Gershowitz, John Pfaff, David Sklansky, Jenia Turner, and Ron Wright for comments; Elisabeth Bruce and Fred Dingley for research assistance; and Paula Hannaford and Richard Schauffler for guidance on state court statistics.

1. NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 2 (Jeremy Travis et al. eds., 2014).

2. *Id.* at 35.

state and federal prisons, with another 700,000 held in local jails.<sup>3</sup> “The land of the free” has become the world’s largest jailer.

Americans increasingly recognize that “mass incarceration”—unprecedented incarceration levels well beyond those necessary to protect society—is a problem. Even among experts, however, few can persuasively explain how the phenomenon arose or what can be done to make it go away. These are the questions John Pfaff<sup>4</sup> grapples with in his highly anticipated book, *Locked In: The True Causes of Mass Incarceration—And How to Achieve Real Reform*. The book’s provocative conclusion is that “[p]rosecutors have been and remain the engines driving mass incarceration” (p. 206). As a result, he criticizes reform efforts that focus on legislators and judges and instead advocates new rules designed to rein in prosecutorial discretion.

Even before appearing in *Locked In*, Pfaff’s data-driven insights found a receptive audience through academic publications and prominent media outlets. David Brooks highlighted Pfaff’s views in an opinion column, explaining that “[h]is research suggests that while it’s true that lawmakers passed a lot of measures calling for long prison sentences, if you look at how much time inmates actually served, not much has changed over the past few decades.”<sup>5</sup> How did we get here? Brooks explains, “[I]t’s the prosecutors.”<sup>6</sup> Jeffrey Toobin profiled Pfaff’s empirical findings in an article<sup>7</sup> that Ninth Circuit Judge Alex Kozinski later quoted for the proposition that “prosecutors—more than cops, judges, or legislators” are “the principal drivers of the increase in the prison population.”<sup>8</sup> The first-ever law review article by a sitting President cites Pfaff’s research as demonstrating “the important role prosecutors have played in escalating the length of sentences and can play in easing them.”<sup>9</sup> Legal scholars routinely follow suit.<sup>10</sup>

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3. P. 2; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, DEPT. OF JUSTICE, PRISONERS IN 2015 1 (2016).

4. Professor of Law, Fordham University School of Law.

5. David Brooks, *The Prison Problem*, N.Y. TIMES (Sept. 29, 2015), <https://www.nytimes.com/2015/09/29/opinion/david-brooks-the-prison-problem.html> (on file with the *Michigan Law Review*).

6. *Id.*

7. Jeffrey Toobin, *The Milwaukee Experiment: What Can One Prosecutor Do About the Mass Incarceration of African-Americans?*, NEW YORKER (May 11, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> [<https://perma.cc/83BS-GBAX>].

8. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xiii & n.69 (2015).

9. Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 824 n.53 (2017).

10. See, e.g., Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1076 (2017); Darryl K. Brown, *What Can Kafka Tell Us About American Criminal Justice?*, 93 TEX. L. REV. 487, 499 (2014); Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 882 (2014); Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1076 (2016); Stephanos Bibas, *The Truth About Mass Incarceration*, NAT’L REV. (Sept. 16, 2015, 4:00 AM), <http://www.nationalreview.com/article/424059/truth-about-mass-incarceration-stephanos-bibas> [<https://perma.cc/X4LV-L7HS>].

While there are many valuable insights in *Locked In*, the enchanting empirical analysis its author relies on to conclude that the prosecutor “is the most important actor shaping prison population size” (p. 80) is flawed. As explained below, one of the two primary findings Pfaff bases his conclusion on—a finding that increased sentence lengths contributed little to mass incarceration—is strongly disputed by other empiricists. The other—a boom in state felony filings that only Pfaff has found—appears to be, at least partially, an artifact of changes in state court reporting practices. A more rigorous empirical source tracking filings over the same period finds only a 2 percent increase.<sup>11</sup>

Pfaff is doing important work highlighting the problem of mass incarceration and providing empirical insights into its endless nuances. Nevertheless, his increasingly influential misdiagnosis of the problem—exonerating the primary culprits (legislators and judges) and indicting prosecutors—leads to counterproductive solutions. The prosecutorial charging guidelines and enhanced transparency *Locked In* champions will not reduce incarceration, but the sentencing reforms and drug-decriminalization efforts Pfaff talks down will. In fact, restrictions on prosecutorial discretion are more likely to increase, than decrease, incarceration.

The flaws in the empirical foundation for *Locked In*'s argument that prosecutors drove mass incarceration should not come as a surprise. Existing checks on prosecutor power make it impossible for them to do what Pfaff claims. While prosecutors can unilaterally open exits, it takes a village to incarcerate someone; and when it comes to incarceration, the criminal justice village is full of figures with as much or more power than prosecutors.

The weaknesses in Pfaff's account call into question the legal academy's uncritical embrace of his findings. The answer lies in our increasingly caricatured view of prosecutors. While prosecutors are a new villain in the mass incarceration context, they are a familiar foil for academics. Prosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad. Paul Butler includes a chapter in his influential book rejecting the notion that “good people” should become prosecutors; like Anakin Skywalker, they cannot help but be corrupted.<sup>12</sup> On the other side are academics who think prosecutors can be redeemed but only if we tie them down with rules.<sup>13</sup> Across this spectrum, all agree that prosecutors “run[ ] the show.”<sup>14</sup> The expression of this principle gets more exaggerated with each telling, until we have widely accepted statements like: “In many (if not

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11. See *infra* note 44 and accompanying text.

12. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 20 (2009); see also Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 396 (2001).

13. Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1417 (2010) (summarizing debate).

14. Buell, *supra* note 10, at 882 (“Criminal law scholars are in near complete agreement that prosecutorial discretion now dominates the path that a particular case follows in the criminal system.”); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 405 n.74 (1992).

most) American jurisdictions, the prosecutor *is* the criminal justice system.”<sup>15</sup> My colleague Adam Gershowitz aptly summarizes the consensus, stating, “No serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.”<sup>16</sup>

The uber-prosecutor theme flows through *Locked In*. The book informs us that prosecutors are “the most powerful actors in the entire criminal justice system” (p. 133) and have used their “almost unfettered, unreviewable power to determine who gets sent to prison and for how long” (p. 70). Pfaff’s provocative thesis presents an opening to interrogate this accepted wisdom. For if mass incarceration is the defining feature of the modern criminal justice system, and prosecutors did not drive us to this point, we have greatly overestimated their wattage.

As should be clear already, this is not a traditional “book review.” It is too broad and too narrow for that. It is too narrow in that it does not do justice to the many parts of *Locked In* that do not address prosecutorial power. *Locked In* includes a clever defense of private prisons, an important emphasis on the human costs of incarceration, and a powerful plea for more spending on indigent defense. I leave those (and other) topics untouched. This essay is broader than a typical book review because it has an ulterior motive. In addition to clarifying the true causes of mass incarceration, this Review seeks to leverage its critique of *Locked In* into an assault on the caricature of prosecutors that pervades the legal academy. With respect to this second goal, I have few illusions that commentators, steeped in decades of contrary sentiment, will suddenly agree that I am right about prosecutors. My goal here is merely to instill a recognition of the need to think more deeply about prosecutors’ role in the criminal justice system and the nature of their power.

## I. THE STANDARD STORY

*Locked In* begins its account of mass incarceration by seeking to undo the damage done by what Pfaff labels the “Standard Story” (p. 5). This Standard Story is actually multiple story strands floating through academic and popular discourse that purportedly explain mass incarceration. Pfaff describes the two most important strands as the claims that (1) the “‘war on drugs’ is primarily responsible for driving up our prison populations” and (2) “increasingly long prison sentences have driven prison growth” (pp. 5–6).

Pfaff contends that these common pontifications are misconceived red herrings, obscuring the real cause of the prison population explosion: “increased prosecutorial toughness,” particularly with respect to violent offenses (pp. 6, 74). He supports this claim with two empirical findings: (1) American prisons filled through increased admissions, not longer sentences;

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15. Luna & Wade, *supra* note 13, at 1415.

16. Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 677–78 (2016).

and (2) the one variable that changed with respect to admissions was an increase in felony filings. It is from these two ingredients that Pfaff brews his provocative thesis that prosecutors—not “cops, judges, or legislators”—brought us mass incarceration.

*Locked In* can be viewed as a counterpoint to Michelle Alexander’s 2010 best seller, *The New Jim Crow*.<sup>17</sup> Alexander bases her acclaimed book on the premise that the War on Drugs drove the prison boom; she then draws on racial currents in the drug war to animate her thesis that racial animus powers mass incarceration.<sup>18</sup> Pfaff argues, to the contrary, that “the war on drugs is not the primary engine of prison growth” (p. 49). Pfaff explains that “setting every drug offender free” would only cut the prison population by 20 percent (pp. 35, 244 n.4). Thus, *Locked In* contends that unwinding mass incarceration requires that we “change the way we punish serious violent crimes” (p. 201). This is because “the majority of those in prison, and a large majority of those serving long terms, have been convicted of violence” (p. 189).

After disputing Alexander’s claim that the drug war drives mass incarceration, Pfaff pivots to prison-sentence lengths. *Locked In* argues that increasing sentence lengths did not contribute “much” to the incarceration boom (p. 52). The book stresses that there are only two ways to grow a prison population: (1) increase the number of people sent to prison (admissions), or (2) keep them there longer (time served).<sup>19</sup> In the United States, Pfaff insists, the first factor alone caused mass incarceration.<sup>20</sup> He states: “The amount of time most people spend in prison, however, is surprisingly short, and there’s no real evidence that it grew much as prison populations soared” (p. 52). As Pfaff recognizes, this is a surprising claim because during the incarceration explosion legislatures replaced rehabilitative, indeterminate sentencing regimes with punitive, determinate regimes and enacted mandatory minimum sentences and “Truth-in-Sentencing” laws—all designed to increase prison terms (pp. 52–53).

*Locked In* supports the claim that sentence lengths remained constant as American prisons filled with a straightforward Table.<sup>21</sup> The Table illustrates the time served by offenders sentenced for high-admittance crimes in 2000 and for those same offenses in 2010. It shows that time served has “been

17. MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012).

18. *Id.* at 60 (“Convictions for drug offenses are the single most important cause in the explosion of incarceration rates.”); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 45–46 (2012) (“The choice to focus on drug crimes is a natural—even necessary—byproduct of framing mass incarceration as a new form of Jim Crow.”).

19. The dichotomy blurs because an increase in prison admissions may itself reflect increased sentences.

20. P. 69 (“If sentences aren’t getting (much) longer . . . then what is causing prison growth? The obvious answer is rising admissions . . .”).

21. P. 56 (“[T]he results in Table 2.1 undermine the ‘sentences are longer’ conventional wisdom.”).

fairly stable” (p. 57). Pfaff concludes, therefore, that harsher sentencing did not swell the prison population.

The critical weakness in *Locked In*’s sentence-length argument comes from the date range. The Table referenced above reflects a comparison of state offenders sentenced over a period that largely postdates America’s incarceration boom. The nation’s prison population exploded between 1980 and 2000.<sup>22</sup> Between 2000 and 2010, prison growth slowed, and was driven almost entirely by federal increases.<sup>23</sup> It makes little sense to seek the causes of mass incarceration in state data from this period.<sup>24</sup> Pfaff’s response comes in an endnote stating that “[t]he best dataset on time served only goes back to 2000” (p. 253 n.19).

Other empiricists overcome this problem. Their analysis of a wider date range reveals a substantial increase in time served over the past decades. Allen Beck and Alfred Blumstein conclude that increases in admissions drove the prison boom in the 1980s.<sup>25</sup> In the 1990s, however, longer sentences took the baton. Between 1990 and 2000, as “the state incarceration rate grew by 55 percent,” Beck and Blumstein find that “time served replaces commitments” as the leading contributor to mass incarceration.<sup>26</sup> Another pair of sociologists, Steven Raphael and Michael Stoll, recently published a book-length empirical study of mass incarceration. They document “substantial increases in the amount of time that those sentenced to prison can expect to serve today relative to years past in both the state and federal prison systems.”<sup>27</sup> Raphael and Stoll illustrate the point with specifics: “[I]n 1984 an inmate convicted of murder or manslaughter could expect to serve 9.2 years. By 2004 this figure had increased to 14.27 years.”<sup>28</sup> Time served for rape increased from 5 to 8 years; for robbery, from 3.5 to 5 years.<sup>29</sup> Those convicted of aggravated assault served almost a full year longer in 2004 than they did in 1984.<sup>30</sup> If, as Pfaff stresses, the bulk of state prisoners are incarcerated for serious, violent crimes, these sentence-length changes are integral to the mass incarceration story. Economists Derek Neal and Armin Rick, examining the critical period of 1985 to 2005, similarly conclude that “more

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22. NAT’L RESEARCH COUNCIL, *supra* note 1, at 39.

23. *Id.*

24. ALLEN J. BECK & ALFRED BLUMSTEIN, TRENDS IN U.S. INCARCERATION RATES: 1980–2010 28 (2012) (“The final decade, 2000–2010, was a period of negligible growth (0.65%) in the overall incarceration rate in state prisons . . .”).

25. NAT’L RESEARCH COUNCIL, *supra* note 1, at 50–51.

26. BECK & BLUMSTEIN, *supra* note 24, at 28; NAT’L RESEARCH COUNCIL, *supra* note 1, at 54.

27. STEVEN RAPHAEL & MICHAEL A. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? 26 (2013).

28. *Id.* at 50.

29. *Id.* at 51.

30. *Id.*

punitive sentencing policies drove the majority of growth in prison populations.”<sup>31</sup>

In sum, the non-Pfaff scholarly consensus is that increasingly punitive sentences contributed substantially to mass incarceration.<sup>32</sup> Beck and Blumstein, probably the preeminent researchers in this area, summarize that the “entire growth over the 30 years” of the incarceration boom, 1980 to 2010, is “attributed about equally to the two policy factors—prison commitments per arrest and time served.”<sup>33</sup>

## II. THE FLAWED EMPIRICAL CASE AGAINST PROSECUTORS

*Locked In*’s case against prosecutors is not based solely on the contention that admissions, rather than time served, drove mass incarceration. The book relies on a second finding to show that “the person driving up admissions is the prosecutor” (pp. 70–71). According to Pfaff’s empirical window into the American criminal justice system, while arrests, conviction rates, and time served basically remained constant, the one thing that increased was felony filings (p. 71). And since prosecutors (usually) initiate felony filings, Pfaff surmises that “increased prosecutorial toughness when it comes to charging people” gave rise to mass incarceration (p. 6).

Pfaff discovered the felony filing increase in data gathered by the National Center for State Courts (NCSC) that was “sitting in plain view on an NCSC server but apparently overlooked by all the studies before my own” (p. 71). According to Pfaff, this data reveals that between 1994 and 2008 the number of felony cases filed in state courts “rose by almost 40 percent,” neatly paralleling the 40 percent increase in state prison admissions over that period (p. 72). This occurred, Pfaff says, at a time of decreasing crime and arrests and in a system characterized by stable conviction rates and sentence lengths (p. 72). Thus, he extrapolates from his multistate sample of NCSC data that as prison populations grew over the period, “almost all of th[e] increase was due to prosecutors bringing more and more felony cases against a diminishing pool of arrestees” (p. 73).

The date range is, again, not ideal,<sup>34</sup> but this time it covers a portion of the period of interest. And the data is intriguing.<sup>35</sup> Fortunately, I work next-door to the NCSC. So I did what any inquisitive researcher would do and

31. Derek Neal & Armin Rick, *The Prison Boom and Sentencing Policy*, 45 J. LEGAL STUD. 1, 38 (2016).

32. *Id.* at 12 (explaining that Pfaff’s work “differs from much of the related literature in three ways”).

33. BECK & BLUMSTEIN, *supra* note 24, at 27.

34. Pfaff starts with 1994, he writes, because the NCSC “changed the way it gathered the data in 1994,” preventing comparison to earlier years. P. 257 n.50. In fact, the NCSC changed its data gathering rules in 2003. NAT’L CTR. FOR STATE COURTS, STATE COURT GUIDE TO STATISTICAL REPORTING (2003), <http://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1229> [<https://perma.cc/M9LZ-M7CH>].

35. See *infra* notes 36–42 and accompanying text.



checked with the neighbors. After sitting down with the senior NCSC analysts responsible for collecting the data Pfaff relies on, I learned that the picture is far murkier than *Locked In* suggests.

The NCSC analysts do not view the data Pfaff relies on as a valid source for assessing prosecutorial behavior. For one thing, they flagged a major revision that occurred in the middle of Pfaff's 1994 to 2008 date range. In 2003, the NCSC issued a document titled "State Court Guide to Statistical Reporting," promulgating new, "qualitatively different" reporting standards to help "present a clearer picture of court workload."<sup>36</sup> The document recommended the following practices for data reporting:

1. Include "reopened" and "reactivated cases"—for example, probation or parole violations, to illustrate courts' "actual workload."<sup>37</sup>
2. Move domestic violence prosecutions from the "domestic relations" category into the criminal filings category.<sup>38</sup>
3. Count preliminary hearings that occurred in one court prior to a case being filed in another as two felony cases.<sup>39</sup>

The NCSC noted these changes in its own reports on the data. The NCSC's first annual report after 2003, *Examining the Work of State Courts, 2004*, explains that "criminal caseloads now include domestic violence cases . . . and preliminary hearings in felony cases."<sup>40</sup> It goes on to state, "Counting preliminary hearings may create a noticeable increase in some states as felony cases may appear as an incoming case in both the limited and general jurisdiction courts."<sup>41</sup> At another point, the report cautions that "some of the overall increase" in filings "is due to the inclusion of reopened and reactivated cases."<sup>42</sup>

The other red flag that surfaced in my discussions with the NCSC analysts is that the data they collect from state courts "improves every year."<sup>43</sup> This is because the NCSC cannot make state courts comply with their requests; the process of collecting accurate data involves educating and cajoling busy court administrators. These efforts gradually pay off as more

36. NAT'L CTR. FOR STATE COURTS, *supra* note 34, at intro. (emphasis omitted).

37. *Id.* at intro. ("Filings"); *id.* at 67 (explaining under header "Felony Case" that "[p]robation or parole violations are counted as reopened felony filings").

38. *Id.* at intro. Until 2003, "civil acts, such as protection orders, and criminal acts, including misdemeanors and felonies" fell under "Domestic Relations Caseloads." NAT'L CTR. FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS*, 2002, at 38 (Brian J. Ostrom et al. eds., 2003).

39. NAT'L CTR. FOR STATE COURTS, *supra* note 34, at 55; *see also* NAT'L CTR. FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS*, 2004, at 42 (Richard Y. Schauffler et al. eds., 2005) (2004) ("Incoming' cases are the sum of new filings plus reopened and reactivated cases.").

40. NAT'L CTR. FOR STATE COURTS, *supra* note 39, at 43.

41. *Id.*

42. *Id.*

43. Email from Paula Hannaford, Dir., Ctr. for Juries Studies, Nat'l Ctr. for State Courts, to author (Jan. 10, 2017) (on file with author).

administrators get on board, implement NCSC compliant software, and extend their reach to previously uncounted courts. The NCSC's success in these endeavors would look like a steady increase in filings. In sum, changes in reporting practices alongside a natural spread of voluntary collection efforts would inflate reported filings during the period Pfaff analyzed, even if the actual number of filings hardly budged.

The problems with relying on NCSC felony filing counts to assess prosecutorial behavior come into sharp relief when the NCSC numbers are considered alongside other data. The Bureau of Justice Statistics' "State Court Processing Statistics" (SCPS) series also reports felony filings in state courts.<sup>44</sup> As Pfaff acknowledges in an earlier paper, the SCPS data contradict his findings:

[T]he trends in filings in the SCPS do not track those in the NCSC data as closely as one might wish. Between 1990 and 2004, filings in the SCPS rise by 1.7%, and by only 8.8% between 1994 and 2004 (the data's trough and peak for filings). Conversely, filings in the NCSC data rise by 34.2% between 1994 and 2004.<sup>45</sup>

The difference between the two data sources is jarring. According to the SCPS, between 1990 and 2004—a period of skyrocketing incarceration rates—felony filings grew less than 2 percent. Pfaff suggests in his other paper that the divergence “may actually be informative” as it seems to pinpoint the prosecutorial-driven growth in felony filing as occurring solely in “less-urban counties.”<sup>46</sup> (SCPS statistically samples the larger counties accounting for half of the nation's crime,<sup>47</sup> as opposed to the NCSC, which aggregates data from whatever courts agree to participate.)<sup>48</sup> The other possibility is that the felony filing explosion Pfaff reports is an artifact of changes in NCSC reporting practices or other confounding factors. In fact, the NCSC analysts advised me that if the two sources diverged they would bet on the SCPS. The SCPS uses sophisticated sampling techniques to avoid just the kind of reporting discrepancies that might compromise the NCSC

44. *Data Collection: State Court Processing Statistics (SCPS)*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=DCdetail&iid=282> [<https://perma.cc/J5F4-JH9D>].

45. John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations*, SSRN 18 (July 15, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1884674](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884674) [<https://perma.cc/R8YJ-ULKW>]; see TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 1 (2008), <https://www.bjs.gov/content/pub/pdf/fdluc04.pdf> [<https://perma.cc/48JX-576K>] (57,497 filings); PHENY Z. SMITH, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1990 2 (1993), <https://www.bjs.gov/content/pub/pdf/fdluc90.pdf> [<https://perma.cc/6PT8-J5KX>] (56,616 filings).

46. Pfaff, *supra* note 45, at 18.

47. *Data Collection: State Court Processing Statistics (SCPS)*, *supra* note 44.

48. See *Court Statistics*, NAT'L CTR. FOR STATE CTS., <http://www.ncsc.org/services-and-experts/areas-of-expertise/court-statistics.aspx> [<https://perma.cc/4KFJ-NLQJ>] (describing services available to courts that opt to participate in data collection).

data; the NCSC relies on voluntary data contribution by far-flung court administrators with differing, if improving, buy in to the data-gathering mission.

The few other sources that track prosecutorial charging do not suggest any change in aggressiveness. Raphael and Stoll examined federal charging behavior between 1985 and 2009 and found “little evidence of systematic change in the rate at which U.S. attorneys prosecuted criminal suspects.”<sup>49</sup> California reports the percentage of cases presented by police but declined by prosecutors. Its publications reflect a consistent rate of prosecutor declinations between 1975 and 2008.<sup>50</sup> These data from two of the nation’s three biggest jailors look a lot like the SCPS figures. There is no sign of a sharp upswing in prosecutorial aggressiveness.

Probation and parole violations, two of the three major sources of prison admissions, further muddy the empirical case against prosecutors.<sup>51</sup> In 1980, parole violators made up 17 percent of new state prison admissions.<sup>52</sup> “By 1999, the percentage of prison admissions that were parole violators had grown to 35 percent, more than twice the rate two decades earlier.”<sup>53</sup> Thus, as incarceration rates reached an apex, parole revocations grew to over a third of new prison admissions. Raphael and Stoll estimate that probation violations account for another 10 percent of prison admissions.<sup>54</sup> This large and increasing percentage of probation and parole violators in prison admissions presents another challenge to Pfaff’s thesis. Although they can play a significant role behind the scenes, prosecutors cannot send people to prison for parole or probation violations—parole boards and judges do that.

### III. THE TENUOUS NATURE OF PROSECUTORIAL POWER

The all-powerful prosecutor motif that pervades academic writing fits neatly with *Locked In*’s conclusions. After all, if prosecutors are the most powerful actor in the criminal justice system, they must be responsible for the system’s most noteworthy product—mass incarceration. But the assumption that “prosecutors can impose particularly harsh sentences” through the application of their unreviewable discretionary powers (p. 197) is overly simplistic. Prosecutorial power is significantly more contingent and

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49. RAPHAEL & STOLL, *supra* note 27, at 62 (“[T]here is little evidence of a role for an enhanced propensity to prosecute.”).

50. See *Crime in California*, CAL. DEP’T JUST., OFF. ATT’Y GEN. <http://oag.ca.gov/cjsc/pubs> [<https://perma.cc/PTH5-85UQ>].

51. RAPHAEL & STOLL, *supra* note 27, at 35.

52. JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST., *BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA* 22 (2002), [http://webarchive.urban.org/UploadedPDF/310583\\_Beyond\\_prison\\_gates.pdf](http://webarchive.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf) [<https://perma.cc/USS9-29FS>].

53. *Id.*; see also PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, *TRUTH IN SENTENCING IN STATE PRISONS* 4 (1999), <https://www.bjs.gov/content/pub/pdf/tssp.pdf> [<https://perma.cc/4XWM-F6F5>].

54. RAPHAEL & STOLL, *supra* note 27, at 36 (2004 state data).

narrow than Pfaff and other scholars suggest. As a result, even if filings increased as Pfaff claims, that would offer only the beginning of an explanation for mass incarceration. We would have to turn the lens on other criminal justice actors to fill out the rest of the story.

Contrary to the consensus, prosecutors are not the most powerful actors in the criminal justice system. In fact, they have lots of competition:

1. Legislators are the most obvious power center in the criminal justice arena. Legislators can criminalize virtually any activity and prescribe tough punishments, or decriminalize activities and mandate leniency.<sup>55</sup>
2. The police are another strong contender. Police officers responding to a (purported) crime can question, arrest, or even shoot a suspect. Alternatively, they can let the suspect off unreported.
3. Governors in many jurisdictions can issue pardons for almost any reason.<sup>56</sup> They veto laws and, sometimes, appoint judges and parole boards.<sup>57</sup>
4. Judges possess broad discretion in conducting trials, accepting plea bargains, and determining sentences.

Prosecutors, of course, also possess substantial power. After police deliver a case to the prosecutor's office, a prosecutor decides whether to formally charge the alleged perpetrator with a crime and, if so, what crime(s). As the case proceeds, the prosecutorial charging power morphs into a power to negotiate and, ultimately, agree to concessions in exchange for a defendant's guilty plea. *Locked In* highlights these powers in a chapter titled "The Man Behind the Curtain" (Chapter Five). But this literary reference may be more revealing than intended. As with the fabled Wizard of Oz, the prosecutor turns out to be less powerful than initial appearances suggest.

Let's begin with *the charging power*. *Locked In's* primary empirical contention is that, over the past decades, "prosecutors have become more aggressive in filing charges" (p. 7). More specifically, the book asserts that mass incarceration arose from "prosecutors bringing more and more felony cases against a diminishing pool of arrestees" (p. 73). The previous Part showed that the numbers do not back up this claim. This Part explains that even if the claim were accurate, it would not explain the incarceration surge.

Prosecutors wield real power in deciding whether to bring charges and, relatedly, in deciding how to charge a suspect whose actions are forbidden by multiple laws. It is important to recognize, however, that the prosecutor's power is at its apex in deciding *not* to bring charges.<sup>58</sup> A prosecutor's decision to file a felony charge triggers a number of formal and informal checks.

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55. See *Jones v. Thomas*, 491 U.S. 376, 381 (1989).

56. See generally Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307 (2004).

57. *Governors' Powers and Authority*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/cms/management/powers-and-authority#executive> [<https://perma.cc/WD78-4XFN>].

58. See Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1249 (2011).

The opposite is true when the prosecutor declines to bring a case. As a result, when we think about American prosecutors wielding “unfettered, unreviewable” charging discretion (p. 70), we should primarily be thinking about dismissals.

*Locked In*, and most academic commentary, gives the opposite impression, but American prosecutors dismiss many of the cases recommended for prosecution by police. Ronald Wright and Marc Miller’s careful study of the New Orleans District Attorney’s office over a ten-year period from 1988 to 1999 tells the story.<sup>59</sup> Wright and Miller document that “the NODA office rejects for prosecution in state felony court 52% of all cases and 63% of all charges.”<sup>60</sup> The Bureau of Justice Statistics reported similar numbers in a series on the disposition of felony arrests in urban jurisdictions between 1979 and 1988. In 1979, prosecutors “carried forward” 50 percent of all felony arrests recommended for prosecution;<sup>61</sup> in 1988 (the last year of the series), the number was 55 percent.<sup>62</sup> Studies of the federal system find even steeper dismissal rates. In 1980, Richard Frase reported that “[l]ess than one-fifth of the matters received by the U.S. Attorney for the Northern District [of Illinois] resulted in the filing of formal charges in U.S. District Court.”<sup>63</sup>

Prosecutors do the bulk of their dismissing before a case reaches court. But they continue to dismiss cases after filing. The Bureau of Justice Statistics switched to collecting statistics regarding the dispositions of cases filed in state courts (as opposed to those brought by police to prosecutors) in 1990. These reports reveal a postfiling felony dismissal rate of 29 percent in 1990,<sup>64</sup> 27 percent in 1998<sup>65</sup> and 25 percent in 2009.<sup>66</sup> This data, much of it plucked from the heart of the incarceration boom, paints a vivid picture of the workings of unreviewable prosecutorial power. Prosecutors quietly and with little oversight usher droves of defendants out of the criminal justice system.

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59. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

60. *Id.* at 74.

61. BARBARA BOLAND ET AL., BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS, 1979, at 2 (1983), <https://www.bjs.gov/content/pub/pdf/pfa79.pdf> [<https://perma.cc/MGS2-C5D9>].

62. BARBARA BOLAND ET AL., BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS, 1988, at 3 (1992), <https://www.bjs.gov/content/pub/pdf/pfa88.pdf> [<https://perma.cc/67YB-K6YS>].

63. Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 278 (1980).

64. SMITH, *supra* note 45, at 13 tbl.15.

65. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1998, at 24 tbl.23 (2001), <https://www.bjs.gov/content/pub/pdf/fdluc98.pdf> [<https://perma.cc/39FJ-GMC6>].

66. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 24 tbl.21 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/3FP9-AMBT>].

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

The notion that prosecutorial charging decisions toughened over the past decades makes intuitive sense. Societal attitudes generally became more punitive over the course of the incarceration boom—at least with respect to certain crimes like sexual assault, drunk driving, drugs, and domestic violence. Professional policing also slowly extended to traditionally underserved communities.<sup>67</sup> It certainly seems plausible, then, that starting in the 1970s prosecutors became more likely to pursue cases they might have dismissed in an earlier era. But these changes would only be attributable to “prosecutorial aggressiveness” if they occurred independently of changes in criminal laws, reporting, police arrest decisions, jury verdicts, and judicial sentencing.

Charging decisions do not occur in a vacuum. A prosecutor’s selection of a charge is influenced, if not controlled, by other criminal justice actors. This influence can easily be overlooked because its primary manifestation is indirect. Prosecutors select charges with an eye toward future proceedings. This is basically what Wright and Miller found when they studied the reasons New Orleans prosecutors gave for declining cases: “prosecutors’ reasons most often derive from legitimate (and primarily legal) sources.”<sup>68</sup> Prosecutors dismiss cases due to “quality of evidence,” witness noncooperation, unlawful searches, and “good defense[s].”<sup>69</sup> Why? Because they weigh the charges police recommend against the rules and norms that govern at trial. “[T]he prosecutor translates the legal judgments of other institutions—legislatures that create criminal codes and courts that enforce procedural and substantive requirements—into a prosecutorial decision to refuse charges.”<sup>70</sup>

This is not to say that prosecutors do not “overcharge,” a poorly defined but common critique. The point is that overcharging has little consequence in and of itself. Prosecutor charging decisions should be understood as an expert prediction of the likely decisions of other actors in the criminal justice system.<sup>71</sup> That prediction, and its “power,” depends entirely on these other actors. The prosecutor predicts what a jury and judge will do with the

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67. See Roger Lane, *Murder in America: A Historian's Perspective*, 25 CRIME & JUST. 191, 214 (1999) (explaining that before the 1960s, “black homicides” were not “taken seriously in many jurisdictions”).

68. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 135 (2008).

69. *Id.* at 137–38.

70. *Id.* at 153; see Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 652, 682 (2001).

71. See Spohn & Holleran, *supra* note 70, at 652, 682 (summarizing studies reflecting that prosecutors file charges when “odds of conviction are high” and dismiss “where conviction is unlikely”).

case in light of laws enacted by the legislature.<sup>72</sup> If the prediction is flawed, defendants will (on balance) go to trial and win. Even if overcharged defendants lose at trial, or plead guilty, that alone would still not lead to an incarceration increase. Judges reign at sentencing. Absent a mandatory minimum sentence (discussed below), the judge can ignore the prosecutor's characterization of the criminal conduct and impose a sentence that reflects the conduct itself, rather than any inflated overcharge. As a consequence, increasing "prosecutorial toughness when it comes to charging people" (p. 6) is not a viable explanation for the prison explosion.

If changes in prosecutorial charging do not explain mass incarceration, the answer might be found instead in changes in how prosecutors wield their plea-bargaining power. Again, the claim is counterintuitive. As with prosecutorial discretion to dismiss charges, the prosecutor's broad discretion to offer concessions in exchange for guilty pleas looks, on its face, to be a means to mitigate, not increase, incarceration. That is why purportedly "tough-on-crime" prosecutors reject, rather than embrace, plea bargaining.<sup>73</sup> In many cases, there is little doubt that the defendant would be convicted if there were a trial.<sup>74</sup> A well-counseled defendant facing near-certain conviction and a lengthy sentence will seek a discounted charge from the prosecutor in exchange for a trial waiver.<sup>75</sup> Routine reliance on this practice tempers the severity of the laws and sentences dictated by the legislature and imposed by judges.<sup>76</sup>

But just as the power to offer a lenient plea deal can be used to decrease incarceration rates, its parsimonious application could increase incarceration. Here, the theory would be that over the course of the incarceration boom prosecutors offered increasingly punitive plea bargains, or no plea bargains at all, leading to more prison time for more defendants. Again, however, the actual mechanism by which prosecutors could use plea bargaining to unilaterally impose increasingly severe punishments remains surprisingly elusive, though it is an argument accepted as almost canonical in academic circles.<sup>77</sup>

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72. See *id.*

73. See, e.g., Pam Belluck, *Queens Prosecutor Bans Plea Bargaining in Felony Cases*, N.Y. TIMES (May 16, 1996), <http://www.nytimes.com/1996/05/16/nyregion/queens-prosecutor-bans-plea-bargaining-in-felony-cases.html?mcubz=3> (on file with the *Michigan Law Review*).

74. Cf. ALEXANDER, *supra* note 17, at 70 ("[P]eople who wind up in front of a judge are usually guilty of some crime.").

75. Jeffrey Bellin, *Attorney Competence in an Age of Plea Bargaining and Econometrics*, 12 OHIO ST. J. CRIM. L. 153, 156 (2014); Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 962–63 (2016).

76. See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1291–92 (1997) (reporting on regular evasion of guideline sentences through plea bargaining); 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, 1938, 1943–47 (2006) (summarizing studies).

77. See *supra* notes 6–10 and accompanying text.

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

Even if the defendant agrees to plead guilty, the prosecutor must overcome another obstacle before punishment is imposed. Judges must approve all plea deals.<sup>78</sup> If the judge believes the deal does not fairly reflect the defendant's conduct, she can reject it, even if she belatedly makes the determination at sentencing after reviewing a presentence report.<sup>79</sup> If the judge approves a deal, she typically retains final say on the sentence. While some plea agreements dictate a particular sentence, others leave the sentence to the judge. In either scenario, the judge determines the ultimate sentence by implicitly approving the parties' stipulated sentence or explicitly selecting the sentence.<sup>80</sup> Pfaff and others recognize this point but nonetheless deny judges' agency, stating, "[it is] true that judges are required to sign off on pleas and can thus reject those they find unsatisfactory, but in general, they will acquiesce to the deals struck by the prosecutors and defense attorneys."<sup>81</sup> The empirical basis for this contention is uncertain.<sup>82</sup> But even if it is an accurate assessment, a powerful check on prosecutorial plea bargaining exists. That judges routinely approve plea bargains does not mean that they are powerless. It suggests only that judges' preferences align with those of the attorneys who work in their courts.

The prosecutor's plea-bargaining power is further limited by the fact that legislators, judges, and juries fill in the backdrop against which plea deals are evaluated. By determining the results in the small percentage—but large number—of cases that go to trial, these actors guide the outcome in plea-bargained cases. While this "shadow-of-trial" theory invariably breaks down in some individual cases (incompetent defense counsel, irrational defendants, etc.),<sup>83</sup> experimental and anecdotal evidence reveals that it "appears to be quite accurate" as a model of American justice "in the

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78. Diverse rules govern guilty pleas, but my review of the rules in each jurisdiction reveals that every jurisdiction requires judicial approval. Fifty-state survey on file with author.

79. See, e.g., FED. R. CRIM. P. 11(c)(3)(A).

80. *Id.* ("[T]he court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report."); CAL. PENAL CODE § 1192.5 (West 2011); TEX. CRIM. PROC. CODE ANN. art. 26.13(a)(2) (West 1989).

81. P. 133; Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 7 (2012); Wright & Miller, *supra* note 59, at 88.

82. See, e.g., J. Langley Miller & John J. Sloan, III, *A Study of Criminal Justice Discretion*, 22 J. CRIM. JUST. 107, 119 (1994) ("Sentencing judges exercised relatively large amounts of unchecked discretionary authority to sentence felony offenders convicted by . . . plea negotiations.").

83. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467 (2004).



aggregate.”<sup>84</sup> Studies suggest that plea deals across a large number of cases reflect a predictable discount from generally agreed-upon, likely trial outcomes.<sup>85</sup>

Thus, the prosecutor’s plea-bargaining power looks a lot like the charging power. The typical plea deal reflects not the prosecutor’s unchecked preferences, but a prediction of the likely actions of other criminal justice actors—juries and judges—who, unlike prosecutors, actually have the power to directly impose sanctions on a criminal defendant. If the prediction is too severe, defendants will refuse the deal and take their chances at trial. Judge Easterbrook explains the dynamic using the unassailable logic of economics jargon. The prosecutor and defendant “bargain as bilateral monopolists” in the “shadow of legal rules that work suspiciously like price controls.”<sup>86</sup> In other words, legislatures, juries, and judges set the prices for the plea-bargaining market; prosecutors just work there.

None of this means that guilty-plea outcomes did not get worse for defendants over the past three decades. They probably did. But it is painfully simplistic to characterize this worsening as a product of prosecutorial aggressiveness. Broader criminal laws, tougher sentencing rules, harsher judges, and a diminished likelihood of release on parole all increase the probability of convictions and severe sentences. The plea deals prosecutors offer, and defendants agree to, undoubtedly reflect those changes, leading to increased prison admissions and time served. Prosecutors could have counteracted the trend toward severity, and there is some evidence that they did (including an increasing reliance on plea bargaining).<sup>87</sup> But *Locked In* is not criticizing prosecutors for failing to more fully undo the effects of an increasingly harsh criminal justice system engineered by judges, juries, and legislators. The book claims that prosecutors unilaterally made a relatively lenient system severe.<sup>88</sup> My point is that they can’t, and the data does not show that they did.

Readers may object that the preceding discussion, and particularly any blame assigned to judges, ignores the role of mandatory sentencing laws. Indeed, commentators commonly criticize mandatory sentences for over-

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84. Shawn D. Bushway & Allison Redlich, *Is Plea Bargaining in the “Shadow of the Trial” a Mirage?*, 28 J. QUANTITATIVE CRIMINOLOGY 437, 446–47 (2012).

85. *Id.*; Shawn D. Bushway et al., *An Explicit Test of Plea Bargaining in the “Shadow of the Trial”*, 52 CRIMINOLOGY 723, 741 (2014) (reporting striking similarity between defense counsel and prosecutor estimates of likely trial result and proper plea deal); Mona Lynch, *Realigning Research: A Proposed (Partial) Agenda for Sociolegal Scholars*, 25 FED. SENT’G. REP. 254, 255 (2013) (“[Studies] revealed how routine criminal matters were resolved in reference to ‘going rates’ for different offenses . . .”).

86. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992).

87. *See supra* note 76.

88. *See* p. 73 (“It’s important to be wary of ‘one thing explains it all’ theories for anything, especially for a phenomenon as complex as prison growth. These results, however, certainly support a claim of ‘one thing explains most of it’—and they rely on simple accounting, not complex statistics . . .”).

empowering prosecutors during plea bargaining (pp. 131–33). It is right to criticize mandatory minimums for dictating inflexibly harsh punishment, but the critique adds little to what has already been said about *prosecutorial* power.

Reliance on mandatory minimums as the source of prosecutorial power is especially revealing in one respect. It implicitly acknowledges that prosecutorial power is severely blunted in the absence of mandatory sentencing laws. As the iconic Bill Stuntz put it, in “discretionary sentencing jurisdictions . . . [p]rosecutors lack the power to dictate post-trial sentences.”<sup>89</sup> That is a big concession because, despite an increase in mandatory sentencing laws in recent decades, discretionary sentencing remains the rule rather than the exception. Complaints about mandatory minimums are common in the federal system.<sup>90</sup> By contrast, commentators note an “absence of widespread complaints” about this form of “prosecutorial dominance in state guidelines systems.”<sup>91</sup> One place to look for an impact at the state level would be so-called Three-Strikes laws. Yet, a study of their application in twenty-four states from 1986 to 1996 found that “the numbers of offenders sentenced under such laws are small in all states except Georgia, South Carolina, and California.”<sup>92</sup> Even in the federal system, the Federal Sentencing Commission reported in 2011 that judges retained discretion in over 75 percent of sentencings and that over the past twenty years “the proportion of those offenders convicted under an offense carrying a mandatory minimum penalty has remained relatively stable.”<sup>93</sup>

Admittedly, the relatively few cases involving the actual imposition of mandatory sentences would not tell the whole story. The mere potential for the imposition of a mandatory sentence could limit judges’ and defendants’ ability to reject plea deals proposed by aggressive prosecutors. But here the

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89. William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2560 (2004).

90. See, e.g., Shira A. Scheindlin, *I Sentenced Criminals to Hundreds More Years than I Wanted To. I Had No Choice*, WASH. POST (Feb. 17, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/02/17/i-sentenced-criminals-to-hundreds-more-years-than-i-wanted-to-i-had-no-choice/> [https://perma.cc/6TT4-DD8X].

91. Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 427, 441 (2000); accord David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196, 198 (1995) (“All of the state guidelines systems are presumptive, not mandatory, and they represent a rejection of mandatory sentences.”); Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 222, 251–52 (Michael Tonry & Richard S. Frase eds., 2001) (noting that the federal complaint about prosecutorial dominance “has not been echoed in state guideline systems—by state sentencing judges or by anyone else”).

92. Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL’Y REV. 75, 79 (1999).

93. FED. SENTENCING COMM’N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 121–22, 131, 140 (2011) (reporting that 27 percent of sentencings involved a defendant subject to a mandatory minimum and almost half of those avoided the mandatory sentence through substantial-assistance/safety-valve provisions).

phenomenon's limited scope becomes particularly evident. A prosecutor can "dictate" a sentence in the following circumstances:

1. The prosecution has a realistic chance of convicting the defendant of an offense (or enhancement) with a mandatory minimum sentence at trial;
2. The defendant is willing and able to plead guilty to a charge that does not include a mandatory sentence;
3. The parties agree to a stipulated sentence significantly under the original mandatory minimum but still higher than what the judge would otherwise impose;<sup>94</sup> and
4. The jurisdiction authorizes and the judge will approve a binding sentence stipulation as part of a plea agreement.<sup>95</sup>

The question becomes how frequently this dynamic arises. Clearly, more state-specific analysis is needed to know the answer,<sup>96</sup> but one jurisdiction that has been comprehensively studied raises doubts about mandatory sentencing's centrality to the nation's incarceration binge. Wisconsin, a state where mandatory sentences never gained traction, "preserved its judicial sentencing discretion to a much greater extent than many other jurisdictions but still experienced an above-average increase in imprisonment during the era of mass incarceration."<sup>97</sup> Another state that famously provides judges (and juries) broad sentencing discretion is Texas,<sup>98</sup> yet it has one of the highest incarceration rates and the largest correctional population.<sup>99</sup>

Most importantly, to the extent mandatory minimums inflate plea-bargained sentences, they are just another facet of the increasingly harsh criminal landscape referenced earlier (i.e., the lengthening "shadow of trial"). As the Wisconsin and Texas examples illustrate, there are plenty of harsh-sentencing judges. Stiff mandatory minimum sentences turn every judge into a harsh judge. This artificial proliferation of harsh judges undoubtedly makes defendants more inclined to seek sentencing agreements from prosecutors, but it is the sentencing rules, not the prosecutors, that became more severe.

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94. If there is no sentence stipulation, or the judge would have imposed the sentence without one, the judge, not the prosecutor, dictates the sentence and resulting effect on prison populations.

95. See, e.g., FED. R. CRIM. P. 11(c)(1)(C).

96. Cf. NAT'L RESEARCH COUNCIL, *supra* note 1, at 73 & n.3 (noting lack of state sentencing data); Rodney L. Engen, *Have Sentencing Reforms Displaced Discretion over Sentencing from Judges to Prosecutors*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 73, 84–85 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (concluding after review of empirical studies that "[i]t is not clear to what extent mandatory or presumptive sentencing laws have shifted control over sentencing to prosecutors").

97. MICHAEL O'HEAR, *WISCONSIN SENTENCING IN THE TOUGH-ON-CRIME ERA* 207 (2017).

98. MARC A. LEVIN & VIKRANT P. REDDY, *TEX. PUB. POLICY FOUND., THE VERDICT ON FEDERAL PRISON REFORM: STATE SUCCESSSES OFFER KEYS TO REDUCING CRIME & COSTS* 2 (2013).

99. CARSON, *supra* note 3, at 7–8.

IV. IF PROSECUTORS ARE NOT THE PROBLEM,  
REGULATING THEM IS NOT THE SOLUTION

The final chapter of *Locked In* presents a proposed pathway out of mass incarceration. Since the book contends that unregulated prosecutors are “the engines driving mass incarceration” (p. 206), it discourages the more natural focus on decriminalization and sentencing reform and instead advocates a potpourri of measures designed to rein in prosecutorial discretion. The chapter begins with a note of optimism: “Fortunately . . . there are numerous legislative options for reining in prosecutorial aggressiveness” (p. 206). Another passage warns, though, that “changing the attitudes of prosecutors”—“a much harder task”—will ultimately be required (p. 76).

The reform proposal that best fits *Locked In*’s empirical claims is to “follow in New Jersey’s footsteps and implement plea-bargaining guidelines” (p. 210). The book suggests that such guidelines could go beyond determining prosecutorial plea offers, but also “cover charging decisions as well” (p. 210). Pfaff offers an example to illustrate the need: “[a] drug-addicted twenty-year-old arrested for the first time and accused of stealing a laptop” (pp. 212–13).

The example is instructive but does not support the need for prosecutorial guidelines. In fact, the charging decision *Locked In* highlights is straightforward. It requires a simple comparison of the facts with the criminal code. In most jurisdictions, the code grades theft by reference to the value of the stolen property. In New Jersey, for example, if the laptop is worth more than \$500, the charge will be third-degree theft; between \$200 and \$500, fourth-degree theft.<sup>100</sup> This is how charging typically works. Prosecutors match the facts they can prove to an applicable criminal law. That is why typical offices have one-sentence-long charging guidelines. For example, “[i]t is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge . . . the most serious, readily provable offense or offenses that are supported by the facts of the case . . . .”<sup>101</sup> Commentators sometimes raise the additional wrinkle that the same conduct may be punishable by two separate laws. To the extent a prosecutor invokes two laws to cover the same criminal conduct, however, there is an easy fix. The judge can ensure that the ultimate sentence reflects the underlying conduct, not the initial charges; in extreme circumstances this is mandated by the Constitution.<sup>102</sup>

It is tempting to apply the New Jersey plea-bargaining guidelines *Locked In* champions to its theft hypothetical. But as the book acknowledges, the state’s 138-page plea-bargaining guidelines only apply to a handful of drug

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100. N.J. STAT ANN. § 2C:20-2(b)(2)–(3) (West 2015).

101. *Memorandum from Attorney General John Ashcroft Setting Forth Justice Department’s Charging and Plea Policies*, 16 FED. SENT’G. REP. 129, 130 (2003).

102. *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (recognizing the double jeopardy protection “against multiple punishments for the same offense” (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969))).

offenses that carry severe mandatory prison terms.<sup>103</sup> New Jersey does not provide specific guidelines for the bulk of criminal offenses (p. 148), probably because the complexity of such an undertaking would be enormous and the benefits unclear. Two more things to note before we follow in New Jersey's footsteps. *Locked In* informs us that the New Jersey guidelines (1) increased sentencing severity; and (2) exacerbated the state's black-white sentencing disparity, which is the highest in the nation.<sup>104</sup> All other states that have considered specific prosecutorial guidelines abandoned the effort.<sup>105</sup>

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

*Locked In* also highlights the lack of transparency in prosecutor offices and proposes reforms that would expose prosecutorial decisions to public scrutiny (p. 158). This, it says, would "help reformers and legislators identify more precisely what prosecutors are doing improperly and why they are doing it" (p. 158). Given that most of what prosecutors do out of public sight is dismiss cases, these transparency proposals are, again, more likely to increase rather than decrease incarceration levels. No one has spent more time studying prosecutors than Ronald Wright. His take on mitigating severity through prosecutorial action is the opposite of Pfaff's. Wright writes: "Perhaps the only way to remove some of the severity [of the existing system] is to allow prosecutors to operate quietly, dispensing mercy in a few cases, even if it is done inconsistently."<sup>106</sup>

Effective solutions to mass incarceration need to be based on a clear understanding of the true causes of the phenomenon. Mass incarceration is not a virus introduced into the criminal justice system by rogue prosecutors. The explanation is simpler and less exciting. Politicians passed laws designed

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103. N.J. ATTORNEY GEN., *BRIMAGE* GUIDELINES 2 (2004) [http://www.state.nj.us/oag/dcj/agguide/directives/brimage\\_all.pdf](http://www.state.nj.us/oag/dcj/agguide/directives/brimage_all.pdf) [<https://perma.cc/VRQ2-E576>].

104. Pp. 149–50; see also *State-by-State Data, Black/White Disparity*, SENT'G PROJECT, <http://www.sentencingproject.org/the-facts/#rankings?dataset-option=BWR> [<https://perma.cc/N4VZ-59UX>].

105. See Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1013 (2005) (describing state efforts).

106. Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087, 1104 (2005).

to increase incarceration, the laws did exactly that, the politicians got re-elected and passed more.<sup>107</sup> At the same time, voters (directly and indirectly) replaced judges who casually dispensed mercy with judges who studiously dropped the hammer.<sup>108</sup>

A recognition that judges and legislatures drove the increase in incarceration rates leads to prioritizing different types of reforms to undo mass incarceration. *Locked In*'s theft hypothetical provides an illustration. A drug addict who steals a \$500 laptop should not go to prison. The best way to ensure that result is to raise the statutory threshold for felony theft, as in South Carolina, where it is \$2,000.<sup>109</sup> (Pfaff endorses this reform, characterizing it as a way to “control prosecutors’ ability to send people to prison” (pp. 155–56, 159).) A second-best alternative is to convince judges who impose theft sentences to recognize that a prison term is unwarranted. By far the worst option is to ask the legislature to command prosecutors to circumvent felony-theft laws (and judges aching to impose prison terms) by charging theft defendants with loitering. The same reasoning applies to the host of more severe laws authored by legislators over the past four decades, including mandatory sentencing laws. California’s Three Strikes law is too severe. The solution is to repeal it or give judges broader discretion to deviate from its terms.

Similarly, if the plea deals offered by prosecutors (and agreed to by defendants) are too harsh, the answer is not a 138-page guidebook that attempts to steer speed-reading prosecutors to the right result.<sup>110</sup> The Federal Sentencing Commission tried to do that with “real offense” sentencing, a concept that requires guideline sentences to be based on the defendant’s conduct regardless of the charges.<sup>111</sup> Opinions on the success of this effort differ, but one thing is crystal clear—it did not blunt the incarceration rate in the federal system.<sup>112</sup>

A better response to severe plea deals is to alter the ingredients from which they are brewed. Markets are notoriously tough to regulate, but, as Judge Easterbrook observes, this peculiar market comes with “price control”

107. See NAT’L RESEARCH COUNCIL, *supra* note 1, at 70.

108. See, e.g., Benjamin Pomerance, *What “Tough on Crime” Looks Like: How George Pataki Transformed the New York State Court of Appeals*, 78 ALB. L. REV. 187, 193–94 (2014); Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 327 (2010).

109. S.C. CODE ANN. § 16-13-30 (2015) (2010 amendment).

110. Cf. Wright, *supra* note 105, at 1019 (“The prosecutor’s selection of charges . . . turn[s] on countless facts . . .”).

111. MICHAEL TONRY, SENTENCING MATTERS 68 (1996) (describing the federal guidelines approach as the “most radical” method yet proposed for restricting plea-bargaining-based evasion of sentencing regimes); James B. Burns et al., *We Make the Better Target (but the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)*, 91 NW. U. L. REV. 1317, 1335 (1997) (“[T]he prosecutor’s power to influence the sentence through the charges is significantly circumscribed.”).

112. After the Sentencing Guidelines took effect in November 1987, U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM’N 2016), federal prison population growth eclipsed state prison growth, Neal & Rick, *supra* note 31, at 34.

levers operated by legislators and judges.<sup>113</sup> Eliminate mandatory sentences, narrow overbroad laws, decrease sentencing ranges, impose lighter sentences, and plea-bargain prices will plummet. Further discounts can be offered by parole boards at the back end. Expungements could become routine. In short, the same heavy-handed laws and judicial mindsets that ratcheted up severity can ease it back down.

Another place to look for solutions is in actions that have already proven successful. Most basically, legislatures and courts should cap prison capacity. This effectively happened in 2011 when the Supreme Court ordered California to release thousands of prisoners from horrifyingly overcrowded prisons, and California complied.<sup>114</sup> California laws still authorize, and judges continue to hand down, severe sentences, but many defendants serve only a fraction of their time.<sup>115</sup> A recent profile of one California county highlighted a defendant sentenced to three years for methamphetamine trafficking who, after a “fed kick,” served only a day. The reporter notes: “Prosecutors are exasperated by cases like this, but say their hands are tied.”<sup>116</sup>

Another success story comes from the Federal Sentencing Commission. In 2014, this independent judicial agency voted to decrease the severity of federal drug sentencing guidelines and apply the change retroactively.<sup>117</sup> The under-the-radar decision resulted in the early release of 6,000 federal drug offenders and set the stage for the release of another 40,000.<sup>118</sup> Notably, these substantial bites out of the incarcerated population occurred without anyone having to thaw the frozen hearts of aggressive prosecutors.

#### CONCLUSION

Prosecutors are a tempting target. They always appear at the scene of the crime and certainly should do more to mitigate mass incarceration. But it is misleading and counterproductive to claim that they, not legislators or judges, bear primary responsibility for the phenomenon.

Although legal academics do not often recognize it, prosecutorial power is too tentative and dependent to lie at the core of mass incarceration. At the

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113. Easterbrook, *supra* note 86, at 1975.

114. *Brown v. Plata*, 563 U.S. 493 (2011); *see also* CAL. DEP’T OF CORR. & REHAB., SPRING 2016 POPULATION PROJECTIONS 3 (2016), [https://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Projections/S16Pub.pdf](https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Projections/S16Pub.pdf) [<https://perma.cc/4V2Z-DFJG>].

115. Brett Kelman, *Riverside County Jails Are So Crowded, Car Thieves and Drug Dealers Are Being Sent Home*, DESERT SUN (Oct. 5, 2016), [http://www.desertsun.com/story/news/crime\\_courts/2016/10/05/riverside-county-fed-kicks/90700106/](http://www.desertsun.com/story/news/crime_courts/2016/10/05/riverside-county-fed-kicks/90700106/) [<https://perma.cc/65E5-V26P>].

116. *Id.*

117. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(c)–(d) (U.S. SENTENCING COMM’N 2016).

118. Sari Horwitz, *Justice Department Set to Free 6,000 PRISONERS, LARGEST ONE-TIME RELEASE*, WASH. POST (Oct. 6, 2015), [https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699\\_story.html?utm\\_term=.d1270b2f9361](https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html?utm_term=.d1270b2f9361) [<https://perma.cc/Y52Y-VSNF>].

most basic level, prosecutors connect the police who initiate formal proceedings with the judges who conclude them. This facilitating nature of prosecutorial power affords little opportunity for prosecutors to unilaterally increase incarceration rates. A prosecutor cannot put anyone in prison without the direct assistance of legislators, police, and judges, and the indirect acquiescence of governors, parole boards, and grand and petit juries. All prosecutors can do by themselves is let people off—a tactic that does not lend itself to filling prisons.

Strip away the hype, and prosecutors most resemble “worker bees” toiling in the criminal justice system,<sup>119</sup> not wizards bending it to their will. Consequently, prosecutors’ motives and actions are less important than Pfaff and others suggest. Prosecutors played a supporting role in the rise of mass incarceration; they can play a supporting role in winding it down. But the real wizards, legislators and judges, must do the heavy lifting. Sure, if politicians and judges prove incapable of quitting their incarceration addiction, prosecutors can sporadically defang harsh laws and callous judges. Such efforts, which happen every day in prosecutor offices across the country, resonate with Paul Butler’s provocative advocacy for “strategic” juror nullification (but not his urging “good people” to shy away from becoming prosecutors).<sup>120</sup> We fool ourselves, though, to think we can harness this power to indirectly accomplish what legislators and judges must do directly. All that will happen if we try is that the same forces that brought us mass incarceration will wall off the few exits that remain, making the problem worse, not better.

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119. BUTLER, *supra* note 12, at 109.

120. *Id.* at 73–74, 101–03.