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August, 2007

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

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1See 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.”).

2See, e.g., Erik Luna, The Overcriminalization Phenomena, 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
To combat this one-way ratchet, the criminal justice system puts its faith in prosecutorial discretion. 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. 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.

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3 See MARC MAUER, RACE TO INCARCERATE 214 (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, Pathological Politics, 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.”).


6 Between 1972 and 2003 the incarceration rate grew by more than 500 percent. See MAUER, supra note 3, at 1.
One of the key problems\(^7\) appears to be that while prosecutors are generally constrained by their financial resources and their reasoned 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.\(^10\)

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\(^7\) 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 (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.


\(^9\) 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 __, 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 government subsidy.”); 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.”); John P. Heinz & Peter M. Manikas, Networks Among Elites in a Local Criminal Justice System, 26 Law & Soc’y Rev. 831, 853 (1992) (interviewing over 200 key players in the Cook County, Illinois criminal justice system and finding that “[m]ost players thus appear to be highly specialized to their particular functions and to have little concern about the operation of the system as a whole”).

\(^10\) 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
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) have adequate resources to handle the case. Accordingly, prosecutors bring the number of cases that their offices handle, rather than the number that would be optimal from a systematic standpoint under existing budgets.

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.

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. Instead, I zero at the local level of government, where the decision to confine is made.” ZIMRING & HAWKINS, supra note 7, at 211.

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.

See Misner, supra note 9, at 719 (1996) (explaining that the problem with prosecutorial discretion is that it does not “force [prosecutors] to face the full cost of prosecutorial decisions”).

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.”).

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 377 (Carol S.
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 modest 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, plea-bargaining, and dismissal decisions. In short, the 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 may serve to influence prosecutors’ charging, dismissal, and plea-bargaining decisions. And while advising prosecutors of such information will

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 (3rd ed. 2003).


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.
not undo the mass imprisonment in the United States, it may serve, at least on a small scale, to begin de-escalation.17

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 deescalate 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. While legislators seek to be tough on crime, the proposal would not hurt that reputation because it would not alter legislatures’ power to criminalize behavior or to impose stiff sanctions. In light of such a minimal downside, the prospect of saving millions of dollars in annual criminal justice expenses provides a strong incentive for legislatures to consider the proposal.18

17 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 (2006) (explaining that “the 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”).

18 Scholars are beginning to recognize legislators’ interest in cutting criminal justice costs. See Brown, Rethinking Overcriminalization, supra note 2; 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); Gottschalk, supra note 3, at 1698 (“As the fastest growing item in most state budgets, corrections became a target for budget cutters.”); Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 COLUM. L. REV. 1276, 1285-90 (2005) (same); Frank O. Bowman, III, The
I. The Pervasive Problem of Mass Imprisonment\textsuperscript{19}

A. Imprisonment by the Numbers

At present, there are nearly 2.2 million people incarcerated in our nation’s prisons and jails.\textsuperscript{20} Excluding children and the elderly, nearly one in fifty people in the United States wakes up behind bars each morning.\textsuperscript{21}

The United States incarcerates more offenders per capita than any industrialized nation in the world:\textsuperscript{22} 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.\textsuperscript{23} 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


\textsuperscript{19} The term “mass imprisonment” was coined by David Garland. \textit{See} David Garland, \textit{The Meaning of Mass Imprisonment} in \textit{MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES} (David Garland ed.  2001) (“Mass imprisonment implies a rate of imprisonment and size of prison population that is markedly above the historical and comparative norm for societies of this type.”).


\textsuperscript{22} \textit{See} \textit{id}.

\textsuperscript{23} \textit{See} MAUER, \textit{supra} note 3, at 20-21; \textit{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.”); \textit{see also} BRUCE WESTERN, \textit{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].”).
European counterparts.\textsuperscript{24} And while European nations rarely incarcerate non-violent property and drug offenders, more than half of the people imprisoned in the United States have committed non-violent crimes.\textsuperscript{25}

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.”\textsuperscript{26} Between 1972 and 2003, the national prison population rose by 500 percent.\textsuperscript{27} There were approximately 330,000 individuals in America’s prisons and jails in 1973,\textsuperscript{28} which amounted to approximately 160 inmates per every 100,000 people in the United States.\textsuperscript{29} 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.\textsuperscript{30} By 1995, the rate had risen to 601 per 100,000 people.\textsuperscript{31} At its most recent estimate in mid-year 2005, the

\textsuperscript{24} See GOTTSCHALK, supra note 21, at 21(“Violent offenders in the United States spend five to ten times as long in prison as those in France.”).

\textsuperscript{25} See id.


\textsuperscript{27} 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.

\textsuperscript{28} See id. at 10, 17.

\textsuperscript{29} See id. at 17.

\textsuperscript{30} See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Tbl. 6.13 (2003).

\textsuperscript{31} See id.
Bureau of Justice Statistics placed the rate at 738 prison and jail inmates per 100,000 people.\textsuperscript{32}

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.\textsuperscript{33} The cost of locking up an offender for a single year exceeds $22,000.\textsuperscript{34} In some states, the cost is double that amount.\textsuperscript{35} All told, the United States spends more than $60 billion annually on corrections.\textsuperscript{36}

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 over-crowded. 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.\textsuperscript{37} On average, state prison facilities were also operating in excess of their


\textsuperscript{33} 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.”).

\textsuperscript{34} See BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: STATE PRISON EXPENDITURES, 2001 1 (June 2004).

\textsuperscript{35} 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 $8,000. See id.

\textsuperscript{36} See JACOBSON, supra note 23, at 53; MAUER, supra note 3, at 92.

capacity.\textsuperscript{38} And while the construction of new prisons across the country has reduced over-crowding, 119 of 1,668 prisons in existence in 2000 were under court-orders to reduce their populations.\textsuperscript{39} This is to say nothing of the over-crowding in hundreds of the nation’s jails\textsuperscript{40} that are not analyzed by the Bureau of Justice Statistics.\textsuperscript{41}

\section*{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.\textsuperscript{42} The harder question is: Why?\textsuperscript{43} Experts have long maintained that the increase in prison population cannot easily be tied to rising crime

\textsuperscript{38} See id.

\textsuperscript{39} See id. at 9.

\textsuperscript{40} See, e.g., Steve McVicker, Jail Crowding: Sheriff Appealing Order, Won’t Transfer Inmates, HOUS. 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, HOUS. CHRON., July 16, 2005, (explaining that 1,300 inmates in the downtown Harris County jail were sleeping on mattresses on the floor and that jails in 40 other Texas counties were in violation of state standards).

\textsuperscript{41} The over-crowding in turn leads to an increase in physical violence, inadequate and slow medical care, and a host of additional costly problems. See CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, supra note 37, 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, HOUS. CHRON., Apr. 8, 2007, at 1 (discussing deaths of inmates in the Harris County jail who were awaiting trial and attributing some deaths to poor medical care); Steve McVicker, Cruel and Unusual Punishment for Inmates?: Over the Last 6 Years, 101 Inmates Have Died at the Harris County Jail, HOUS. CHRON., Feb. 18, 2007, at 1 (“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.”).

\textsuperscript{42} See 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.”).

\textsuperscript{43} See GOTTSCHALK, supra note 21 at 18 (“What caused the country’s incarceration boom . . . have not been a major focus of social science research or public concern.”); ZIMRING & HAWKINS, supra note 7, at 119-136 (same).
Conversely, criminologists maintain the drastic increase in imprisonment has not led to a substantial decrease in crime rates. Instead, observers explain the incarceration expansion by pointing to certain criminal justice policies. 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. Other observers point to

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44 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: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 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, 415 nn. 63 & 64 (2006) (collecting additional sources).

45 See WESTERN, supra note 23, at 185 (2006) (“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 66-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. PERSPECTIVES 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).

46 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 34-35.

47 See Mary Price, Mandatory Minimums in the Federal System, HUMAN RIGHTS 8 (Winter, 2004) (“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 Reitz, supra note 17, 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);
the reduction in the use of probation and parole.\textsuperscript{48} Still others raise concern about a variation of Parkinson’s Law,\textsuperscript{49} whereby new prison construction inevitably leads to trial-level actors simply finding new occupants for those prison cells.\textsuperscript{50} Experts also point to the expansion of private prisons in recent years,\textsuperscript{51} explaining that prison companies have an incentive to expand the number of prisoners in order to provide a market for their services\textsuperscript{52} and that prison guard unions have a similar interest in seeing incarceration numbers climb.\textsuperscript{53} Finally, whether privately or publicly operated, prisons provide many

\textsuperscript{48} See \textsc{Paula M. Ditton} \& \textsc{Doris James Wilson}, \textsc{U.S. Dep’t of Justice, Truth in Sentencing in State Prisons} 3–4 (1999) (available at \textsubscript{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.”)).

\textsuperscript{49} Parkinson’s Law states that “[w]ork expands so as to fill the time available for its completion.” See C. Northcote Parkinson, Parkinson’s Law and Other Studies in Administration 2 (1957).

\textsuperscript{50} See Zimring \& Hawkins, supra note 7, at 76-77 (discussing efforts to test this hypothesis).

\textsuperscript{51} Private prisons are a billion dollar per-year business. See Jacobson, supra note 23, at 64 (explaining that private prisons house 6\% 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 21, at 30.

\textsuperscript{52} See Jacobson, supra note 23, at 65 (“[T]he prison industry has a structured self-interest in continuing to expand the market (prisoners) in order to capture a greater market share.”).

\textsuperscript{53} 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: A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons, 115 Harv. L. Rev. 1868, 1873 n.33 (2002).
local communities ravaged by the loss of industry with jobs and economic stimulus that the communities will fight hard to retain.\textsuperscript{54}

In addition to the above-mentioned explanations,\textsuperscript{55} 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.\textsuperscript{56} 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 of rates of imprisonment . . . \textsuperscript{57} The initial problem of prison overcrowding grows out of a change in attitude among the minions of the criminal justice system who make the majority of decisions about prison use.

In addition to the power held by prosecutors, Professor Davey also points to judges’ sentencing discretion, probation officers’ authority in writing pre-sentence reports, and parole officers’ influence in determining whether to return individuals to prison.\textsuperscript{58} While all of these actors – particularly prosecutors – have enormous discretion,

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\textsuperscript{54} See GOTTSCHALK, \textit{supra} note 21, at 29 (describing “penal Keynesianism”); Peter T. Kilborn, \textit{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.”).

\textsuperscript{55} 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.” W\textit{ESTERN, supra} note 23, at 78.

\textsuperscript{56} See D\textit{AVEY, supra} note 9, at 92-93.

\textsuperscript{57} \textit{Id.} at 92-93.

\textsuperscript{58} See \textit{id}. For instance, as Michael Jacobson recounts, “[i]t 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
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.59 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.60 Accordingly, legislatures are free to enact virtually any laws they wish without interference from the courts.

parole. . . . In many states, technical parole violators make up the largest single category of prison admissions.” Jacobson, supra note 23, at 4, 40.

59 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.”).

60 See William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 54 (1997) (“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 excess 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. L. Issues 1 (1996) (“[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 the 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. 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. 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.”

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.” The Court concluded that it would be cruel and unusual punishment to convict someone for a “status” rather than a particular act. The *Robinson* decision seemed to signal that there would be constitutional scrutiny

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62 *Id.* at 242-43.


64 370 U.S. 660, 666 (1962).

65 See *id.* at 667 (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”).
of criminal blameworthiness and more rigorous oversight of strict liability crimes. 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.” And since *Powell*, it is nearly impossible to find a non-capital case in which the Court has restricted legislatures’ power to criminalize.

Where then does that leave us? As Professor Stuntz has succinctly stated, *Lambert*’s progeny is almost nonexistent and the *Powell* decision “basically undoes *Robinson*.” To put it more bluntly, the Supreme Court has completely abdicated the field of substantive criminal law. The reason for the abdication is harder to know, though Professor Erik Luna may well be correct that the Court simply does not want to appear to be a “Lochner-esque super legislature.” And although scholars throughout

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68 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. ___ (2007) (discussing cases).

69 Recent criminal *procedure* cases reinforce this conclusion. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (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 (1996) (rejecting defendant’s contention that automobiles are so heavily regulated that total compliance would be impossible and that a heightened standard should be imposed for traffic stops).


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

72 Luna, *supra* note 2, at 724.
the decades have been highly critical of the Court’s lack of regulation of the substance of criminal law\textsuperscript{73} and have proposed a number of ways to impose limits on criminal law,\textsuperscript{74} all evidence suggests that the Court will continue to be unwilling to do so.

\textbf{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.\textsuperscript{75} Although Justice Field’s position did not carry the day, a majority of the Court did subsequently find a sentence of fifteen years

\textsuperscript{73} Most famously, see Henry M. Hart, Jr. \textit{The Aims of Criminal Law}, 23 L. & CONTEM. 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, \textit{Substance Process and the Civil-Criminal Law}, supra note 60.

\textsuperscript{74} For two of the more prominent examples, see Stuntz, \textit{Substance Process, and the Civil-Criminal Line}, supra note 60 (advocating constitutional regulation of mens rea and use of the doctrine of desuetude); John Calvin Jeffries, Jr. & Paul B. Stephan III, \textit{Defenses Presumptions, and the Burden of Proof in the Criminal Law}, 88 YALE L.J. 1325 (1979) (tying a proportionality requirement to the legislatively defined elements of the crime).

\textsuperscript{75} 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.76

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 non-violent property felonies involving less than $230 constitutional because the “length of the sentence imposed is purely a matter of legislative prerogative.”77 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.78

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.79 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.80 And since *Harmelin* it is nearly impossible to find

76 See Weems v. United States, 217 U.S. 349 (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.


80 Id. at 996, 1001 (Kennedy, J., concurring).
any federal court willing to strike down a prison sentence as disproportionate. 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.

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, successful excessiveness challenges are still rare. As a result, when legislatures enact lengthy sentencing ranges, mandatory minimum statutes, 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 counter-balance 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. Often there are simply not


83 See, e.g., People v. Bullock, 485 N.W.2d 866 (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).

84 See Kevin Wack, State Seeks Fix For Squeezed Prisons, MAINE SUNDAY TELEGRAM, Feb. 25, 2007, at B1 (“Prisoners are triple- and quadruple-bunked in cells.”); 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.”); Kilborn, supra note 54 (explaining that all of the inmates in a rural
enough beds and prisons are forced to operate above capacity. This in turn leads to prison overcrowding, which in turn leads to litigation.

The litigation manifests itself in a variety of ways. Prisoners challenge the plain existence of the overcrowding. 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.

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. Beginning primarily in the 1960s, the lower federal courts began to

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85 See HARRISON & BECK, PRISONERS IN 2005, supra note 20, at 7 (Nov. 2006) (stating that “23 States and the Federal prison system reported operating at 100% or more of their highest capacity” in 2005).

86 See Rachel E. Barkow, Administering Crime, 52 UCLA L. REV. 715, 806 (2005) (“Prison capacity can be stretched only so far before 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.”).


89 Prior to the 1960s, the Court was extremely reluctant to provide any relief for claims of poor prison conditions. See Ira P. Robbins, The Cry of Wolfish in the Federal Courts: The Future of
conclude that certain prison conditions were so egregious as to violate the Eighth Amendment’s cruel and unusual punishment clause.\(^90\) While the lower federal courts were ahead of the Supreme Court in attacking egregious conditions, the high Court eventually followed suit.\(^91\) 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 punished with leather straps and electrical shocks.\(^92\)

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

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\(^90\) See *Rhodes v. Chapman*, 452 U.S. 337, 353 (1981) (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.”); see also Robbins, *supra* note 89, 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, *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.”).

\(^91\) For the definitive account, see MALCOLM M. FEELEY & EDWARD RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS (1998). By 1981, Justice Brennan was able to point to court decisions in more than two dozen states “in which prisons or prison systems have been placed under court order because of conditions of confinement.” *Rhodes v. Chapman*, 452 U.S. 337, 353 n.1 (1981) (Brennan, J., concurring in the judgment).

\(^92\) See *Hutto v. Finney*, 437 U.S. 678 (1978). For the lengthy background story about prison conditions in *Hutto* that never made it to the Supreme Court’s opinion, see FEELEY & RUBIN, *supra* note 91, at 59-73.
court decrees. Interestingly, some wardens and corrections officials welcomed the litigation because federal court intervention slowed the flow of inmates into their facilities and mandated better, safer prisons.

The judiciary’s involvement resulted in enormous improvements to prisons. 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.

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

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93 See ZIMRING & HAWKINS, supra note 7, at 142 (explaining that by 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”).

94 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.”).

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

96 Schlanger, supra note 94, at 563-64.
decreased.\textsuperscript{97} 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 \textit{Rhodes v. Chapman}, the Court rejected a challenge to “double-
celling” of prisoners because it did not lead to “deprivations of essential food, medical
care, or sanitation,” nor did it “increase violence among inmates or create other
conditions intolerable for prison confinement.”\textsuperscript{98} The Court made clear that the
“Constitution does not mandate comfortable prisons,”\textsuperscript{99} thus signaling that overcrowding
alone would be insufficient to demonstrate an Eighth Amendment violation.\textsuperscript{100}

Moreover, in post-\textit{Rhodes} decisions, the Court has heightened the standards to
prove unconstitutional prison conditions.\textsuperscript{101} For instance, the Court’s 1991 decision in
\textit{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

\textsuperscript{97} See, e.g., \textit{Feeley \& Rubin, supra} note 91, at 46-47 (“Since the late 1990s, the decline of
momentum in prison conditions litigation has been abundantly evident. . . . Although the
Supreme Court was not a leader in creating the judicial reform effort, it has proved to be a leader
in the retrenchment process.”); Marsha S. Berzon, \textit{Rights and Remedies}, 64 L.A. L. REV. 519, 525
(2004) (“structural injunctions’ have receded from the remedial scene”); Myriam Gilles, \textit{An
Autopsy of the Structural Reform Injunction: Oops... It's Still Moving!}, 58 U. MIAMI L. REV. 143,
161, 163 (2003) (same). 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, \textit{supra} note 94, at 567.

\textsuperscript{98} \textit{Rhodes}, 452 U.S. at 348. \textit{See also} Bell v. Wolfish, 441 U.S. 520 (1979) (upholding double-
celling of pre-trial detainees).

\textsuperscript{99} \textit{Rhodes}, 452 U.S. at 349.

\textsuperscript{100} \textit{See} William C. Collins, \textit{The Defense Perspective on Prison-Condition Cases} in \textit{Prisoners
AND THE LAW} 7-7 (Ira I. Robbins ed. 1985).

\textsuperscript{101} \textit{See} Susan P. Sturm, \textit{The Legacy and Future of Corrections Litigation}, 142 U. PA. L. REV. 639,
indifference.” 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, it is clear that 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.

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 cases, it makes sense to


103 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, 332 (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.

104 See Ronald Wright & Marc Miller, Honesty and Opacity in Charge Bargains, 53 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 the 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 lawmaking power”).
focus on prosecutors as a mechanism for reducing mass imprisonment. Yet, as explained above, the Supreme Court has little interest in restricting prosecutorial discretion, and state legislators standing for re-election 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’ bureau of prisons, to undertake an informational campaign to advise county prosecutors about state incarceration rates and prison overcrowding. 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

105 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).

106 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. If a county used less than its allocated resources, it would reap a windfall to spend on education or other matters. 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 Misner, supra note 9, at 720-21. 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.
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 Over-Crowding

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 this date one year ago.

<table>
<thead>
<tr>
<th>Date</th>
<th>Number of Prisoners</th>
<th>Prison Operating Capacity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec. 31, 2006</td>
<td>25,870</td>
<td>103%</td>
</tr>
<tr>
<td>Dec. 31, 2005</td>
<td>25,363</td>
<td>102%</td>
</tr>
<tr>
<td>Dec. 31, 2004</td>
<td>24,886</td>
<td>101%</td>
</tr>
</tbody>
</table>

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.

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. Presented with a murder case, prosecutors will not decline to charge

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107 These numbers are generated based on data compiled by the Bureau of Justice Statistics through 2004. At the end of 2004, there were 1,244,831 prisoners in state prisons throughout the United States. Divided by the fifty states, the average state prison population was 24,866. See U.S. DEP’T JUSTICE, PRISONERS IN 2004, at 2 (Oct. 2005). The Bureau of Justice Statistics has found that prison populations grew at 2.6% per year during the period from 1999 through 2004. See id. Using this rate, I calculated the hypothetical state’s prison population in 2005 and 2006.

108 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 1,320 state prisons in the United States were under a court order or consent decree. See CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, supra note 37, at iv, 9 (Aug. 2003). Averaged among the 50 states, this amounts to 26.4 prisons per state with 6.5 prisons under court orders or consent decrees.

109 Accord Misner, supra note 9, at 763 (“The American criminal justice system does not respond well to suggestions for fundamental change.”).
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 that they would have in the absence of incarceration information 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 non-violent criminals who make up roughly half of the nation’s prisoners.¹¹⁰

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 non-violent criminal charged with drug possession.¹¹¹ 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, in-and-of-itself, 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-

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¹¹⁰ See supra note 25.

¹¹¹ The average drug possession sentence in federal court is about 19 months. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Tbl. 5.31 (2003).
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.112

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 over-inflated balloon and signals to them that they can leak some of the air out if they want to de-pressurize 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.

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.113 Social psychologists have long posited that increases in knowledge and persuasive efforts can affect attitudes and behavior.114 This should not be surprising, considering that

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112 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. The reason is attributable to the lengthy sentences that have been handed down in recent years. 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. Reitz, supra note 17, at 1788-89. In the long-run however, my proposal will reduce “person years.”

113 See Beale, supra note 44, 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.”).

114 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
corporations spend billions of dollars on advertising and that the government makes frequent use of public service announcements.

To assess whether prosecutors could be influenced by an informational campaign, the best analogy may be instances where social psychologists have found that public health messages can influence behavior.\textsuperscript{115} For example, researchers who provided beachgoers with a brochure detailing the benefits of wearing sunscreen found that those individuals were more likely to request a free bottle of sunscreen.\textsuperscript{116} 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.\textsuperscript{117} Similarly, when smokers received letters from physicians

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\textsuperscript{115} See 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. BULLETIN 1355, 1356 (1999) ("[S]tudies have observed that loss-framed information is an effective way to promote the performance of or preference for mammography, HIV-testing, amniocentesis, skin cancer examinations, and blood-cholesterol screening.").

\textsuperscript{116} Jershua 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.").

\textsuperscript{117} 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 (1995) (finding that women who were not adhering to mammography screening guidelines were more likely to have a mammography within one year after being exposed to messages about the risks of not obtaining a mammography); Celette Sugg Skinner et al., Recommendations for Mammography: Do Tailored Messages Make a Difference?, AM. J. PUBLIC HEALTH 43 (1994) (finding that recipients of tailored letters were more likely to seek mammograms).
describing the number of years of life that would be cut short if they did not quit, the subjects reduced smoking.\footnote{See D.K. Wilson et al., Compliance to Health Recommendations: A Theoretical Overview of Message Framing, 3 HEALTH EDUCATION RESEARCH 161 (1988); D.K. Wilson et al., Framing Decisions and Selection of Alternatives in Health Care, 2 SOCIAL BEHAVIOUR 51 (1987); 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, 114 (1977) (media campaign about cardiovascular disease led to positive behavioral changes).}

An attempt to influence prosecutorial decision-making would be akin to a public health campaign to reduce skin cancer, breast cancer, or smoking.\footnote{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 counterattitudinal communication.” Andrew R. Davidson et al., Amount of Information About the Attitude Object and Attitude-Behavior Consistency, 49 J. PERSONALITY & SOC. PSYCHOL. 1184 (1990); see also Richard E. Petty & D.T. Wegener, Attitude Change: Multiple Roles for Persuasion Variables in THE HANDBOOK OF SOCIAL PSYCHOLOGY (D.T. Gilbert & S.T. Fiske eds.) (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.} For decades, public service announcements have had some success at shaping behavior.\footnote{See RICHARD M. PERLOFF, THE DYNAMICS OF PERSUASION: COMMUNICATIONS ATTITUDES IN THE TWENTY-FIRST CENTURY 322 (2nd ed. 2003) (explaining that state anti-smoking campaigns have been effective).} 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.\footnote{See P. Karen Murphy et al., Examining the Complex Role of Motivation and Text Medium in the Persuasion Process, 30 CONTEMP. EDUC. PSYCHOL. 418, 426, 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 . . . have little bearing on changes in students’ beliefs”).} 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.\footnote{122} Thus, more complicated messages are sometimes easier to convey in writing.\footnote{123} Indeed, industries that have been foreclosed from television and radio advertising – notably tobacco manufacturers – have continued to enjoy success through print advertising.\footnote{124} Thus, 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.\footnote{125} Thus, note that the sample memorandum in Part III.A is addressed by name to “\textit{John Q. Smith, Springfield}”.

\footnote{122}{See Loraine Devos-Comby \& Peter Salovey, \textit{Applying Persuasion Strategies to Alter HIV-Relevant Thoughts and Behavior}, 6 \textit{Review of General Psychol.} 287, 299 (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 cues such as communicator credibility and likeableness.”).}

\footnote{123}{See W.J. McGuire, \textit{Attitudes and Attitude Change} in \textit{Handbook of Social Psychology} (G. Lindzey \& E. Aronson eds. 1985) (stating that written texts have more effect on attitudes); Shelly Chaiken \& Alice H. Eagly, \textit{Communication Modality as a Determinant of Message Persuasiveness and Message Comprehensibility}, 34 \textit{J. Personality \& Soc. Psychol.} 605 (1976) (finding that persuasion and comprehension of difficult messages was greater with written material but that for easy messages videotape was more persuasive than written texts).}


\footnote{125}{See Pablo Brinol \& Richard E. Petty, \textit{Fundamental Processes Leading to Attitude Change: Implications for Cancer Prevention Communications}, 56 \textit{J. Communication} 581, 583-84 (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, \textit{ supra} note 122, at 296; see also Skinner et al., \textit{ supra} note 117, at 45, 47 (finding in mammography study that “tailored 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.}
"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. Researchers have demonstrated that written text that is shorter and easier to comprehend is likely to have a greater impact.

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 over-crowding because judges give great weight to prosecutors’ sentencing recommendations." Scholars have discovered that messages encouraging personal responsibility can be particularly effective when they are framed as a creating a “gain.” In particular, “gain-framed” messages are most effective when the suggested action appears to involve little or no risk. Because offering a marginally lower prison sentence would be a low risk behavior for most

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127 See Brinol & Petty, supra note 125, at 584.


129 Ann 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 122, 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.”).
prosecutors, a “gain-framed” message would likely be most successful in encouraging that behavior.130

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.131 Although scholars debate the persuasive influence of statistics, some studies have found them to be more persuasive than narrative evidence.132

Fifth, even if prosecutors fail to read the full one-page document, the subject line – “Prison Over-Crowding” – might still have persuasive force.133 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.134 And researchers also have found that subjects are more likely to be persuaded

130 See, e.g., Apanovitch et al., supra note 129, 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.”).

131 See SMITH & MACKIE, supra note 126, 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.”).

132 See Rodney A. Reynolds & J. Lynn Reynolds, Evidence in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 431 (James Price Dillard and 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.”).

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

through repetition,\textsuperscript{135} but that persuasion wears out at a certain point.\textsuperscript{136} 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 1,000 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 problem if some prosecutors remain un-persuaded by the imprisonment information, while other prosecutors in the same jurisdiction are persuaded to lower (or possibly even raise) sentences as a result of the information. While there is some merit to these objections, I do not believe they defeat the proposal.

\textsuperscript{135} See Anthony R. Pratkanis, Age of Propaganda: The Everyday Use and Abuse of Propaganda 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 503 (James Price Dillard and Michael Pfau eds. 2002) (reviewing studies that found higher recall of television advertisements that had run more often).

\textsuperscript{136} See John T. Cacioppo & Richard E. Petty, Central and Peripheral Routes to Persuasion: The Role of Message Repetition in Psychological Processes and Advertising Effects 96-97 (Linda F. Alwitt & Andrew A. Mitchell eds. 1985) (“The most common empirical finding in the area of message repetition is that persuasion increases then wears out as the number of repetitions increases); G.J. Corn & M.E. Goldberg, Children’s Responses to Repetitive TV Commercials, 6 J. Consumer Research 421 (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 un-affected 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.\(^{137}\) 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. 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;\(^{138}\) one assistant district attorney might have been raised by a stricter

\(^{137}\) See Wright & Miller, *Honesty and Opacity in Charge Bargains*, supra note 104, 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 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).

\(^{138}\) 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*, HOUS. CHRON., Mar. 28, 2007, at A1.
family than the other; or one prosecutor might believe that she can strengthen her reputation and promotion prospects by demanding tougher plea bargains.  

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, those variations will always exist. To be sure, providing 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 over-crowding information than many weeks thereafter. Similarly, as memoranda about prison statistics arrive month after month, it

139 Consider also the “holiday,” “weekend,” or “vacation” specials, whereby prosecutors 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.

140 See Marc. L. Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 STAN. L. REV. 1211, 1262-65 (2004) (expressing concern about the enormous sentencing power held by prosecutors under the Federal Sentencing Guidelines, but explaining that full-scale reform is unlikely).

141 See supra note 136; but see Banks et al., supra note 117, (finding that a loss-framed message about breast cancer influenced women to obtain a mammogram up to a year after receiving the message).
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. Nevertheless, while these objections have merit, they should not be over-stated.

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 24 months. Under that going rate, prosecutors sometimes give sentences as low as 20 months or as high as 28 months, but most plea deals are for 24-month sentences. Now assume that the over-crowding information leads a number of prosecutors to reduce their sentencing recommendations for drug possession charges. Instead of occasionally giving a 20-month sentence, prosecutors over a period of time begin to regularly (though certainly not always) give 20-month plea deals. Without intending to do so, those prosecutors may reset the baseline by making 20 months the going rate for drug possession charges. Thus, even if prosecutors decline to keep lowering sentences for drug possession (and other crimes) below 20 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

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142 See supra note 136.

143 See Brown, Cost-Benefit Analysis, supra note 103, at 370 (arguing for cost-benefit analysis in criminal law and suggesting that it could “gradually contribute to a change in prosecutorial culture”).
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. 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 1,000 people are incarcerated or every time prison population increases by 1%, 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 1,000 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 over-crowding or because, even if informed, it simply would not affect their plea bargaining decisions.

We can likely rule out the argument that most prosecutors are already aware of the overcrowding problem. As Professors Zimring and Hawkins explained in their landmark book on American incarceration, “[t]o judges and prosecutors imprisonment

144 See supra note 134 (noting the benefit of surprising messages).
may seem to be available as a free good or service” -- the equivalent of a “correctional free lunch.”

Put simply, 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. Put simply, 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 however.

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. Even the most junior prosecutor recognizes that without charge and sentencing bargaining, their courts, as currently run, would grind to a halt. As Judge Gerald


146 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… some prosecutors explicitly deny any interest in handling the non-advocacy or social work components of the job . . .”).

147 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.”).

Lynch has explained, because of the limited resources of the criminal justice system, “prosecutorial decisions inevitably combine judgments of desert with judgments of resources allocation.”149 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.150

Additionally, local prosecutors could say that prison over-crowding is “not my problem,” or that “it should be prosecutor from the neighboring county, not me, who should scale back her sentences.” That tragedy of the commons151 problem is a serious


150 See Wright & Engen, *supra* note 148, 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.”).

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. 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.

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

152 See William Braniff, Local Discretion, Prosecutorial Choices, and the Sentencing Guidelines, 5 FED. SENTENCING REP. 309, 311 (1993) (longtime United States Attorney stating 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.”); see also Bruce A. Green, Why Prosecutors Should “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.”); Bennett L. Gershman, The Prosecutor’s Duty to Truth, 14 GEO. J. L. ETHICS 309 (2001); Lynch, supra note 147, at 2131.

153 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 21, at 238 (explaining that in the history of prison reform movements, “measures heralded as ‘reforms’ often have negative unanticipated consequences”). Specifically, an informational campaign could lead prosecutors to offer higher sentences on the belief that prison over-crowding 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.
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.\textsuperscript{154} 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.\textsuperscript{155} 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, legislators would simply be requiring that one set of government workers (bureaucrats in the Bureau of Prisons) shuffle some

\textsuperscript{154} See, e.g., Susan R. Klein, \textit{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 procedure rights via legislation” which are “events [that] appear unlikely”).

\textsuperscript{155} See, e.g., Stuntz, \textit{Pathological Politics}, supra note 1, at 507 (“legislatures regularly add to criminal codes, but rarely subtract from them”).

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paperwork to another set of government workers (the county prosecutors).\footnote{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.} 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” 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.\footnote{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 www.usdoj.gov/olp/generalcrimes2.pdf); see also Daniel C. Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum. L. Rev. 749, 814 (2003) (discussing same).} If the FBI terminates the investigation, it must notify the appropriate federal prosecutor within 30 days.\footnote{See id.} 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 30 days.\footnote{See Attorney General's Guidelines, supra note 157, at 11.}

Perhaps more relevant, legislatures are willing to implement “neutral” criminal justice reforms that generate little opposition from prosecutors and other powerful interest groups.\footnote{See Ronald F. Wright, Parity of Resources for Defense Counsel and the Reach of Public Choice Theory, 90 Iowa L. Rev. 219, 259 (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).} For example, legislatures occasionally vest sentencing commissions
with the power to develop prosecutorial standards for charging and plea bargaining decisions.\textsuperscript{161} When the commissions then engage in non-controversial (but still useful) projects, such as codifying preexisting prosecutorial standards, they meet little resistance.\textsuperscript{162} Consider also that a number of states and localities have bucked the national trend and established salary parity between prosecutors and government funded defense lawyers.\textsuperscript{163} 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.\textsuperscript{164} 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.\textsuperscript{165} These include recent bans on racial profiling and legislation encouraging DNA-based innocence claims.\textsuperscript{166} In sum, legislators are not averse to criminal justice reforms that will not carry the soft on crime label.

\textsuperscript{161} 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).

\textsuperscript{162} See id. at 1026-27 (calling such regulations the equivalent of “low-hanging fruit for regulators”).

\textsuperscript{163} See Wright, Parity of Resources, supra note 160, at 233.

\textsuperscript{164} See id. at 259-60.

\textsuperscript{165} See Stuntz, The Political Constitution of Criminal Justice, supra note 145, at 796.

\textsuperscript{166} 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
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 a bill to provide more information to prosecutors, it is unlikely that other legislators would put up much, if any, opposition.167

When we consider that corrections expenditures cost billions of dollars per year,168 it is entirely possible that cost-conscious legislators would embrace the opportunity to

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).

167 See Lianne Hart, Texas May Require Schools to Carry Elective on Bible, L.A. TIMES, Apr. 15, 2007, at 26 (describing the House Appropriations Committee as the second most powerful committee in the Texas legislature); Richard G. Jones & David W. Chen, 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”).

168 See JACOBSON, supra note 23, at 53; MAUER, supra note 3, at 92 (explaining that corrections costs in the United States approach $60 billion annually).
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.169

In recent years, numerous states have sought to reduce their corrections expenditures to save money.170 A report by the Vera Institute of Justice found that in 2003, no fewer than 29 states passed laws to address the skyrocketing costs of corrections. 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

169 Barkow, Federalism and the Politics of Sentencing, supra note 18, at 1287-88; see also Jennifer Steinhauer, For $82 a Day, Booking a Cell in a 5-Star Jail, N.Y. TIMES, Apr. 29, 2007 (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).

dozen states expanded early release programs. In total, more than two dozen states reduced their corrections budgets in 2002. Nine states reported a net decrease in corrections expenditures in 2003 and fourteen states announced such an accomplishment in 2004.

Legislators have even become averse to spending more money on new prisons and jails. When Colorado legislators learned that they would need to come up with $500 million to house 7,000 prisoners over the next five years, some opposed the project on the grounds that it would “eat up our entire budget.” In Washington State, lawmakers tried to avoid building a new prison because the cost exceeded $200 million. In Texas,

171 See Jon Wool & Don Stemen, Changing Fortunes or Changing Attitudes: Sentencing and Corrections in 2003 6-7 (Vera Institute of Justice 2004); see also Jacobson, supra note 23, at 90.

172 See Daniel F. Wilhelm & Nicholas R. Turner, Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration 2 (Vera Institute of Justice 2002).

173 Wool & Stemen, supra note 171, 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 23, 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 Term Jail Terms, N.Y. Times, Nov. 10, 2003, at A1 (explaining how states have sought to marginally reduce costs by reducing the amount and quality of food served to prisoners).

174 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. Sentencing Reporter 80 (1995).

175 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.”).

which incarcerates more inmates per 100,000 residents than every state in the nation save Louisiana, 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. Even 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. Governors across the country have even closed existing prisons in order to save money.

Recent opposition to prison funding is not surprising in times of tight budgets because many states require a balanced budget. As prison costs have skyrocketed, some legislators understandably have begun expressing concerns about having enough

177 See HARRISON & BECK, supra note 32, at 1 (stating that Texas incarcerates 691 inmates per 100,000 residents).


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


181 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, Federalism and the Politics of Sentencing, supra note 18, at 1304.

182 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 (Jan. 2002) (listing balanced budget laws).
funding for other public goods such as healthcare, education, and law enforcement.\textsuperscript{183} Put simply, while it might have been impossible to consider cutting corrections budgets a decade ago, today it is frequently considered.\textsuperscript{184}

In her recent (and excellent) book, Professor Marie Gottschalk is skeptical that the high costs of incarceration will lead legislators to take steps to decrease mass imprisonment.\textsuperscript{185} Gottschalk explains that while legislators might have the desire to cut costs at the margins, the prison industrial complex is too entrenched to permit dramatic change. 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.”\textsuperscript{186} 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

\begin{itemize}
\item \textsuperscript{183} See Jacobson, supra note 23, 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, Federalism and the Politics of Sentencing, supra note 18, 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.”); 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.”); Fox Butterfield, As Cities Struggle, Police Get By With Less, N.Y. Times, July 27, 2004, at A10.
\item \textsuperscript{184} See Western, supra note 23, 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 Magazine, Dec. 24, 2006 (discussing support for the Second Chance Act, which proposed nearly $100 million in spending to assist states in returning prisoners to society).
\item \textsuperscript{185} See Gottschalk, supra note 21, at 240-45.
\item \textsuperscript{186} Id. at 244.
\end{itemize}
unrealistic. 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.

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 evidence indicates 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 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.

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187 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 23, 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.”).