

# An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining

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**AN OVERLOOKED KEY TO REVERSING MASS  
INCARCERATION: REFORMING THE LAW TO REDUCE  
PROSECUTORIAL POWER IN PLEA BARGAINING**

Cynthia Alkon\*

*“Mass incarceration makes our country worse off, and we need to do something about it...”<sup>1</sup>*

- President Barack Obama, July 14, 2015

The need to “do something” about mass incarceration is now widely recognized. When President Obama announced plans to reform federal criminal legislation, he focused on the need to change how we handle non-violent drug offenders and parole violators.<sup>2</sup> Previously, former Attorney General Eric Holder announced policies to make federal prosecutors “smart on crime.”<sup>3</sup> These changes reflect, as President Obama noted, the increasing bipartisan consensus on the need for reform and the need to reduce our incarceration rates.<sup>4</sup>

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\* Professor of Law, Texas A&M University School of Law. Thank you to Professors Catherine Hancock, Renée McDonald Hutchins, and Sanjay Chhablani. Thank you also to the other participants in the South Eastern Association of Law Schools (SEALS) Discussion Group on *Reversing Mass Incarceration: What Reforms are Working (or Could Work) and Why?* for their useful comments and insights on the topic, including Aliza Plener Cover, Roger Fairfax, David Grey, Janet C. Hoeffel, Vida B. Johnson, Melanie Reid, Stephen I. Singer, Neil L. Sobol, Donald Tibbs, and Michael Vitiello.

<sup>1</sup> Roberta Rampton, *Obama Calls for Criminal Justice Reform by End of Year*, REUTERS (July 14, 2015), <http://www.reuters.com/article/2015/07/14/us-usa-justice-obama-idUSKCN0PO2UO20150714#7sf80tcKS4JFA1iJ.97>.

<sup>2</sup> See generally Barack Obama, President of the U. S., Remarks at the NAACP Conference (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

<sup>3</sup> Eric Holder, Att’y Gen., Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

<sup>4</sup> See Obama, *supra* note 2 (“In fact, today, back in Washington, Republican senators from Utah and Texas are joining democratic senators from New Jersey and Rhode Island to talk about how Congress can pass meaningful criminal justice reform this year.”); see also Eliza Collins, *Chris Christie Calls for “Fresh Approach” to Criminal Justice*, POLITICO (July 16, 2015), <http://www.politico.com/story/2015/07/chris-christie-criminal-justice-reform-2016->

However, proposals about what to reform, such as President Obama's, tend to focus on some parts of criminal sentencing and on prosecutorial behavior as stand-alone issues. These reform suggestions do not consider the fact that ninety-four to ninety-seven percent of criminal cases are resolved through plea bargains<sup>5</sup> and how the use of this process influences incarceration rates. Prosecutors hold extraordinary power in the criminal justice system. They not only decide what cases get filed, they also decide what charges and enhancements are added, and whether there will be a plea offer.<sup>6</sup> The structures of our criminal justice system, at both the state and federal level, strengthen prosecutorial power and create a plea bargaining environment with extreme power imbalances.<sup>7</sup> Prosecutors use this power to put pressure on defendants to accept plea deals, which contribute to the high incarceration rates in the United States. Therefore, any reform intended to make a meaningful reduction in incarceration rates should recognize the power that prosecutors hold and include reform aimed at changing this underlying structure.

As is well documented, the United States has high incarceration rates<sup>8</sup> and imprisons more people than any nation in the

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120228.html, for a discussion on a prominent Republican politician calling for criminal justice system reform.

<sup>5</sup> See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citing Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics, Table 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf>).

<sup>6</sup> In limited circumstances defendants can plead open to the court, but in those cases there will be no charge bargaining as the defendant will need to "plead to the sheet." See Kyle Graham, *Crimes Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CAL. L. REV. 1573, 1589 (2012).

<sup>7</sup> See Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 598-601 (2014) (discussing the power imbalances in plea bargaining).

<sup>8</sup> The incarceration rate in the United States is 698 per 100,000 people. *Highest to Lowest Prison Population Rate*, THE INT'L CTR. FOR PRISON STUDIES, [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) (last visited Sept. 22, 2015). Likewise, the U. S. incarcerates 2.2 million people. *Incarceration, SENTENCING PROJECT*, <http://www.sentencingproject.org/template/page.cfm?id=107>. The Seychelles has a higher incarceration rate than the United States at 868 per 100,000. *Id.* However, as of 2008, the population of the Seychelles was just over 82,000 people. *Seychelles*, CIA WORLD FACTBOOK, <http://www.ciaworldfactbook.us/africa/seychelles.html> (last visited Sept. 22, 2015).

world.<sup>9</sup> African American and Latino communities suffer even higher incarceration rates.<sup>10</sup> Our incarceration rates increased dramatically in the 1980s and into the 1990s. Some commentators identify the “war on drugs” as a major contributor to increasing incarceration rates during this period.<sup>11</sup> Others suggest that the increase is due to a number of factors including changes in criminal codes that increased potential penalties for crimes across the board, not only for drug crimes.<sup>12</sup> One scholar, John F. Pfaff, concludes that the single biggest reason for increased incarceration rates since 1990 is not an increase in arrests, or harsher sentencing, or the drug war, but instead is an

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So the total number of people incarcerated, 734, is a fraction of the 2.2 million in the United States.

<sup>9</sup>The U. S. incarcerates 2.2 million people. *Incarceration*, SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107>. In comparison, China incarcerates 1.65 million, however, these numbers may not be complete. *China*, INT’L CTR. FOR PRISON STUDIES, <http://www.prisonstudies.org/country/china> (“The Deputy Procurator-General of the Supreme People’s Procuratorate reported in 2009 that, in addition to the sentenced prisoners, more than 650,000 were held in detention centers in China. If this was still correct in mid-2014 the total prison population in China was more than 2,300,000.”).

<sup>10</sup> See, e.g., Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. OF BOOKS, May 21, 2015, <http://www.nybooks.com/articles/archives/2015/may/21/mass-incarceration-silence-judges/> (noting “[o]ver 840,000, or nearly 40 percent of the 2.2 million US prisoners are African-American males. Put another way, about one in nine African-American males between the ages of twenty and thirty-four is now in prison. . . . Approximately 440,000 or 20 percent of the 2.2 million US prisoners are Hispanic males.”).

<sup>11</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 59 (2010); see also Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 24 (2009).

<sup>12</sup> See, e.g., Alkon, *supra* note 7, at 585–87; See also MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015), for a political analysis of the variety of factors responsible for mass incarceration and the challenges this poses to reform. Gottschalk notes:

For those seeking to dismantle the carceral state, the key challenge is not trying to determine what specific sentencing and other reforms would slash the number of people in jail and prison. The real challenge is figuring out how to create a political environment that is more receptive to such reforms and how to make the far reaching consequences of the carceral state into a leading political and public policy issue.

*Id.* at 2.

increase in the percentage of felony filings per arrest.<sup>13</sup> Pfaff concludes that the reason there are more filings is because prosecutors are filing a higher percentage of cases and therefore prosecutors are the predominate reason for mass incarceration.<sup>14</sup>

This article will begin by briefly describing how plea bargaining works and the often coercive atmosphere of plea bargaining that contributes to mass incarceration. This article will then discuss Pfaff's conclusions, based on his empirical studies, that prosecutors are the key reason for mass incarceration. Building on Pfaff's conclusions on the key role prosecutors play in mass incarceration, this article will discuss how the current structure of both state and federal codes reinforce prosecutorial power, particularly in the plea bargaining process. This article will then discuss two proposals for legislative reform that could decrease the coercive atmosphere of plea bargaining. First, this article will recommend revising how crimes are defined, reducing the number of crimes that can be charged as both misdemeanors and felonies and reducing some felonies to misdemeanors. Second, this article will recommend reducing potential punishment ranges by eliminating mandatory minimums for most crimes and for enhancements. Legislative change alone will not reverse mass incarceration, but targeted legislative reform could help to change the overly coercive atmosphere of plea bargaining. This effort can help to change the prosecutorial culture that surrounds plea bargaining and contribute to reducing incarceration rates.<sup>15</sup>

## I. PLEA BARGAINING CULTURE

Plea bargaining, is a form of negotiation with structural power imbalances.<sup>16</sup> Essentially, prosecutors can decide what charges to file,

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<sup>13</sup> John. F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1242 (2012) [hereinafter Pfaff, *Causes of Prison Growth*].

<sup>14</sup> *Id.* at 1241.

<sup>15</sup> Other reforms that could have far-reaching effect include better internal regulation by prosecutor offices. *See generally* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008) (advocating for better internal regulation by prosecutors). Miller & Wright state, "Indeed, we believe that internal regulation can deliver even more than advocates of external regulation could hope to achieve." *Id.*

<sup>16</sup> *See* Alkon, *supra* note 7, at 582–87 (discussing prosecutorial power as it impacts pleas bargaining).

what enhancements to file, and what plea offer to make.<sup>17</sup> In fact, our criminal justice system consists of a variety of players who exercise discretion at every level from police officers through to judges.<sup>18</sup> However, prosecutors hold the greatest discretionary power as they decide what charges and enhancements to file and those decisions determine how much pressure the defendant faces to accept a plea offer.<sup>19</sup> Once a prosecutor makes a plea offer, defendants are often faced with few choices beyond taking the deal or rejecting it and getting a worse deal or worse sentence after trial.<sup>20</sup> Defendants are pressured by the barriers to fighting their case and the possibly severe sentences they could face after trial.<sup>21</sup> For example, they may not be able to raise the bail, and therefore have to decide between pleading

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<sup>17</sup> *Id.* at 582. See also Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2124 (1998) (describing prosecutorial power as more administrative in nature and criticizing the failure to recognize this and regulate prosecutors). The author states, “because our governing ideology does not admit that prosecutors adjudicate guilt and set punishments, the procedures by which they do so are neither formally regulated nor invariably followed.” *Id.*

<sup>18</sup> See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 88–96 (1969), for a more complete analysis of discretion in the legal system. See also Cynthia Alkon, *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?* 19 *TRANSNAT’L L. & CONTEMP. PROBS* 355, 390 (2010). See John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 *MICH. L. REV.* 1087, 1089 (2013), for a stronger statement. Pfaff states, “[t]he criminal justice “system” in the United States is not a single system, but a mélange of feuding institutions with differing constituencies and incentives.” *Id.*

<sup>19</sup> See, e.g., Angela J. Davis, *The American Prosecutor*, 23 *CRIM. JUST.* 24, 27–30 (2008) (discussing prosecutorial discretion and how prosecutors can misuse this power). Individual prosecutors, due to their broad discretionary power, can handle similar cases in vastly different ways. See, e.g. Robert J. Smith, *America’s Deadliest Prosecutors*, *SLATE* (May 14, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/05/america\\_s\\_deadliest\\_prosecutors\\_death\\_penalty\\_sentences\\_in\\_louisiana\\_florida.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/america_s_deadliest_prosecutors_death_penalty_sentences_in_louisiana_florida.html) (reporting how a “handful of disproportionately deadly prosecutors” in only a “few isolated counties” around the country are continuing to seek the death penalty, while most no longer seek death sentences even in cases that might otherwise qualify.).

<sup>20</sup> See Alkon, *supra* note 7, at 603–04 (discussing trial penalty); see also *An Offer You Can’t Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty*, *HUMAN RIGHTS WATCH* (Dec. 2013), [http://www.hrw.org/sites/default/files/reports/us1213\\_ForUpload\\_0\\_0\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf) [hereinafter *An Offer You Can’t Refuse*].

<sup>21</sup> See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) (describing how difficult it is for defendants to fight even the most minor of criminal cases).

guilty and getting out of jail immediately or spending months in jail awaiting their trial.<sup>22</sup>

Over the last three decades, Congress and state legislatures amended laws to add more potential charges, enhancements, and stiffer penalties. Legislatures amended criminal codes intending to give prosecutors more power in the plea bargaining process.<sup>23</sup> As a result, extraordinary prosecutorial power is embedded into criminal codes at both the state and federal level. Prosecutors can threaten to file charges with increased maximum penalties and enhancements, and they can decide to charge substantially similar offenses as misdemeanors or felonies. A 2013 Human Rights Watch report on plea bargaining in the United States gave numerous examples of prosecutors exerting pressure on defendants to plead guilty, concluding that “coercive plea bargaining tactics abound in state and federal criminal cases.”<sup>24</sup>

The Supreme Court has not yet decided a case that prevents prosecutors from using coercive practices. Instead, the Court has sanctioned these practices. For example, the Court held that it is not a due process violation for a prosecutor to threaten to seek the death penalty if the defendant rejects the plea deal, as the death penalty could be lawfully imposed.<sup>25</sup> The Court also held that it is not a violation if the prosecutor threatens to re-indict the defendant with more serious charges if the defendant rejects the plea deal.<sup>26</sup>

The end result of the case law and the structure of criminal codes around the country is that prosecutors hold significantly more power, and they can, and do, put pressure on defendants to accept plea

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<sup>22</sup> This is one reason that bail reform, and releasing defendants on their own recognizance can also contribute to lowering incarceration rates as fewer defendants may be pressured to accept the deal. *See, e.g.*, Alexander Shalom, *Bail Reform as a Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921, 926–27 (2014).

<sup>23</sup> Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1128 (2011); *see also* William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–07 (“The definition of crimes and defenses . . . empower[s] prosecutors, who are the criminal justice system’s real lawmakers.”).

<sup>24</sup> *An Offer You Can’t Refuse*, *supra* note 20, at 3.

<sup>25</sup> *Brady v. U.S.*, 397 U.S. 742, 755 (1970).

<sup>26</sup> *Bordenkircher v. Hayes*, 434 U.S., 357, 364 (1978).

deals.<sup>27</sup> Complicating the situation, prosecutors' offices regularly evaluate prosecutors based on their conviction rates—a practice that can encourage a range of problematic practices, such as discovery violations, which sometimes goes hand-in-hand with coercive plea bargaining practices.<sup>28</sup> The decision to file charges<sup>29</sup> has been described as “the most dangerous power of the prosecutor”<sup>30</sup> and is one that is rarely subject to review.<sup>31</sup> Criminal codes are structured to allow prosecutors wide latitude in deciding what to file.<sup>32</sup> Prosecutors routinely use this power to pressure defendants to take deals or face harsher penalties. Prosecutors operate in a culture where they know that once they file charges, the charges will stand, and they will likely get convictions through guilty pleas. This gives prosecutors few

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<sup>27</sup> See, e.g., Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L. J. 513, 545 (2012) (“Because a prosecutor can use a single criminal episode involving multiple offenses to threaten to pursue all charges possible, he or she can significantly raise the defendant’s potential sentence. When one further considers potential sentencing enhancements and mandatory minimums for many crimes, the prosecutor can make the cost of going to trial incredibly steep . . . As charges are harder to defend against, the prosecutor can create a substantial bargaining chip to coerce a plea by overcharging in order to make the cost of losing at trial much greater.”).

<sup>28</sup> See, e.g., Carrie Leonetti, *When The Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutor’s Offices*, 22 CORNELL J. L. & PUB. POL’Y 53, 69 (2012) (describing internal evaluation and reward structures that focus on conviction rates and proposing “the disqualification of entire prosecutorial offices from the prosecution of cases when there is an inherent, actual conflict of interest arising from the structure of promotion and compensation decisions”); see also Davis, *supra* note 19, at 11.

<sup>29</sup> In some jurisdictions, such as Texas, felony charges are filed through Grand Jury Indictments. Although this process is different and arguably acts as a check on prosecutorial power, prosecutors can control the Grand Jury Indictment process as the defense role is extraordinarily limited. See, e.g., TEX CODE CRIM. PROC. ANN. CH. 20.21 (West 2015); TEX CODE CRIM. PROC. ANN. CH. 21.01 (West 2009).

<sup>30</sup> Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L. J. 1259, 1260 (2011) (quoting J. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940)).

<sup>31</sup> *Id.*

<sup>32</sup> Due to the structure of the codes it is complicated to define when a prosecutor has abused their discretion in filing decisions. See *id.* at 1279–81 (discussing overcharging in the context of drafting revisions to the ABA Criminal Justice Standards for the Prosecution Function).



incentives not to file charges.<sup>33</sup> These factors contribute to a prosecutorial culture that supports, or at the very least, doesn't discourage increased filing of charges, and, as will be discussed below, this might be the single most important contributing factor to dramatically increased incarceration rates.<sup>34</sup>

## II. PROSECUTORS AND MASS INCARCERATION

One scholar examining the data surrounding incarceration rates in the United States is John Pfaff.<sup>35</sup> Pfaff's work focuses on the state-level data provided by just over thirty states. Examining state-level data is important, as that is where most incarceration happens. For example, federal incarceration accounts for only 12 percent of the total incarcerated population in the United States.<sup>36</sup> Pfaff has drawn several key conclusions from his empirical work. The first is that drug offenses are not the main reason that incarceration rates have soared as they account for only 17 percent of those incarcerated.<sup>37</sup> Pfaff acknowledges that drug offenses can drive up incarceration rates as they may, for example, be the first offense that is then used for heavier sentences in future offenses.<sup>38</sup>

Pfaff disagrees that longer sentences are a significant cause of mass incarceration as the amount of time served "has remained relatively stable over many years."<sup>39</sup> Pfaff found that median

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<sup>33</sup> See, e.g., Rapping, *supra* note 27, at 543 ("This unchecked discretion to make charging decisions, coupled with an ever-expanding criminal code, broader criminal liability, and harsher sentences, give the prosecutor unprecedented power over citizens. It has become relatively easy for the prosecutor to seek and secure criminal convictions and ensure those condemned pay dearly.").

<sup>34</sup> See *infra* Part III.

<sup>35</sup> See Pfaff, *Causes of Prison Growth*, *supra* note 13; John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173 (2015) [hereinafter Pfaff, *War on Drugs*]; John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go from Here*, 26 FED. SENT. RPTR. 264 (2014) [hereinafter Pfaff, *Escaping from the Standard Story*]; John F. Pfaff, *The Durability of Prison Populations*, 73 U. CHI. LEGAL F. 73 (2010) [hereinafter Pfaff, *Durability of Prison Populations*].

<sup>36</sup> See, e.g., Pfaff, *Escaping from the Standard Story*, *supra* note 35, at 270 n.3.

<sup>37</sup> *Id.* at 265.

<sup>38</sup> *Id.* at 265–66.

<sup>39</sup> *Id.* at 267.

sentences are “two to four years, with three-fourths of all inmates released in about six to eight years,”<sup>40</sup> and that such sentences are not “throw-away-the key long.”<sup>41</sup> However, Pfaff’s data focuses more on Northern states, which may not be fully representative.<sup>42</sup> Pfaff does not disagree that some defendants are serving longer sentences and for crimes that did not have such lengthy sentences in the past. Instead, Pfaff acknowledges the problem of longer sentences, and what he terms long-serving inmates, in contributing to the overall incarceration rates, but does not recommend that this is the place to focus attention as reducing admissions to prison would have a greater overall impact on reducing the incarceration rates.<sup>43</sup> Pfaff concedes that the current laws give “prosecutors bigger hammers to wield during the plea bargaining process . . . [which] may enable them to extract guilty pleas more quickly.”<sup>44</sup>

Pfaff states that violence and property crimes are more important as drivers of mass incarceration than drug related offenses.<sup>45</sup> As Pfaff explains, unlike crime rates in other categories that have been decreasing, violent and property crime rates grew. For example, “violent crime grew by 371 percent and property crime by 198 percent” from 1960-1991.<sup>46</sup> What is unclear from these figures—and which Pfaff doesn’t address—is how much of this increase is due to criminal codes changing their definitions of crimes and making something that might have been a misdemeanor a felony or a violent felony.

Pfaff concludes that the main driver for mass incarceration is prosecutors who are filing more felony charges.<sup>47</sup> As Pfaff explains, the admission to prison rate per criminal filing has not changed, what has changed is that a higher percentage of people arrested are ultimately charged with crimes as prosecutors decide to file felony charges more frequently than they did in previous eras.<sup>48</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Pfaff, *Causes of Prison Growth*, *supra* note 13, at 1241.

<sup>43</sup> Pfaff, *Durability of Prison Populations*, *supra* note 35, at 109.

<sup>44</sup> Pfaff, *Escaping from the Standard Story*, *supra* note 35, at 267.

<sup>45</sup> *Id.* at 266.

<sup>46</sup> *Id.*

<sup>47</sup> Pfaff, *Causes of Prison Growth*, *supra* note 13, at 1252.

<sup>48</sup> *Id.* at 1243.

Pfaff offers some theories as to why prosecutors are charging more cases. One theory is that increased incarceration rates are due to “political shifts” where politicians use “tough on crime” approaches to voters.<sup>49</sup> Pfaff argues that these theories are “less salient” today due to lower crime rates.<sup>50</sup> Pfaff also examines the theory that mass incarceration is a reaction against the civil rights movement.<sup>51</sup> However, there have been few empirical studies of how prosecutors make decisions about what charges to file or how they approach plea bargaining.<sup>52</sup> As Pfaff observed, “prosecutors have become substantially more aggressive over the past 25 years, for reasons that are not yet understood.”<sup>53</sup>

Pfaff’s work challenges the predominant narrative that mass incarceration is due to the war on drugs and longer prison sentences. Pfaff doesn’t examine whether changes in the law and the embedded power imbalances may be contributing to this prosecutorial culture of increasing criminal filings. Pfaff also doesn’t examine how plea bargaining may contribute to mass incarceration and how certain reforms may change bargaining behavior by reducing power imbalances and thereby contribute to reducing mass incarceration. Nor is Pfaff alone. Michelle Alexander also only briefly touches on the relationship between plea bargaining and mass incarceration.<sup>54</sup> Although Pfaff disagrees with Alexander’s conclusion about the impact of the war on drugs on mass incarceration,<sup>55</sup> both agree that prosecutors are the key players. As Alexander states, “the prosecutor holds the cards” in plea-bargaining.<sup>56</sup> One reason that prosecutors may be filing a higher percentage of cases than in previous eras is that they can expect cases to be easily resolved in the plea bargaining process. This is due, in no small part, to how the laws are currently

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<sup>49</sup> *Id.* at 1261.

<sup>50</sup> *Id.* at 1264.

<sup>51</sup> *Id.* at 1239.

<sup>52</sup> For one notable recent exception, see Ronald F. Wright & Kay Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1065 (2014).

<sup>53</sup> Pfaff, *War on Drugs*, *supra* note 35, at 198.

<sup>54</sup> ALEXANDER, *supra* note 11, at 84–89, 185–87.

<sup>55</sup> Pfaff, *War on Drugs*, *supra* note 35, at 179 (stating that the New Jim Crow is “deeply flawed” and that Alexander’s assertion that “the direct incarceration of defendants for drug crimes has driven up prison growth is blatantly false”).

<sup>56</sup> ALEXANDER, *supra* note 11, at 86.

structured, allowing prosecutors to get away with being highly aggressive with few checks or limits on that power.

### III. LEGISLATIVE REFORM TO REDUCE PROSECUTORIAL POWER IN PLEA BARGAINING

As long as prosecutors hold unfettered power, there is little incentive for them to not charge people with crimes when they have the evidence to support a conviction.<sup>57</sup> Simply asking for prosecutors to exercise more discretion to return to earlier filing rates, and file fewer cases, is unlikely to have the necessary far-reaching impact.<sup>58</sup> This means that legislative change, aimed at reducing some prosecutorial power, and aimed at making high filing rates less attractive, should be part of any meaningful discussion about how to reduce incarceration rates. This is not to suggest that legislative reform would be quick or easy,<sup>59</sup> although some states have started to make some of the changes discussed in this section.<sup>60</sup> This is also not

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<sup>57</sup> See, e.g., Miller & Wright, *supra* note 15 at 134–148 (reporting data from New Orleans detailing reasons that prosecutors declined to file charges). The top reasons included problems with the evidence and, depending on the type of case, concerns about how the evidence was collected. *Id.* at 136–39. For crimes such as homicide and theft, prosecutors declined to file charges due to “law-based judgements,” looking at the evidence and whether it fit the legal definition of the crime. *Id.* at 145.

<sup>58</sup> Arguably the implementation of Realignment in California is one example of asking prosecutors to behave differently. California moved responsibility for “supervising, tracking, and imprisoning . . . non-serious, non-violent, non-sexual” offenders at the county level, with the hope that it might reduce the number of cases, or at least reduce incarceration rates. Realignment has the potential to cost local counties more money, as convicted defendants in these categories are no longer sent to state prisons, but kept locally. However, at least one early report found that prosecutors did not change their charging behavior and still look to “traditional severity factors” in deciding what to charge. W. DAVID BALL & ROBERT WEISBERG, *THE NEW NORMAL? PROSECUTORIAL CHARGING IN CALIFORNIA AFTER PUBLIC SAFETY REALIGNMENT*, 7–15 (2014).

<sup>59</sup> As Michael Vitiello suggests, statewide commissions on criminal justice reform can be a useful way to build widespread support for legislative reform. Discussion Group on Reversing Mass Incarceration: What Reforms are Working (or Could Work) and Why?” at the South Eastern Association of Law Schools conference in Boca Raton, Florida (July 29, 2015) (notes on file with author).

<sup>60</sup> *The State of Sentencing 2014: Developments in Policy and Practice*, SENTENCING PROJECT, 1 (2014), [http://sentencingproject.org/doc/publications/sen\\_State\\_of\\_Sentencing\\_2014.pdf](http://sentencingproject.org/doc/publications/sen_State_of_Sentencing_2014.pdf) (“At least 16 states and the District of Columbia authorized legislation to address sentencing policy, including statutory penalties that limit lengths of confinement.”).

to suggest that legislative reform alone will dramatically change how prosecutors approach their jobs. But, legislative reform in a few key areas could reduce the pressure put on defendants to accept plea deals and might, therefore, help to reduce the number of cases that prosecutors file, as extracting guilty pleas will not be as easy. The first suggested category for reform is to change how crimes are defined to reduce the number of crimes that can be charged as both misdemeanors and felonies and to reduce some felonies to misdemeanors. The second category is to reduce potential punishment ranges by eliminating mandatory minimums for most crimes and for enhancements. These reforms would reduce the pressure that prosecutors now routinely put on defendants to plead guilty.<sup>61</sup>

#### A. *Revise How Crimes Are Defined*

If a crime is a felony, or potentially a felony, the consequences of conviction are more severe. This can mean more time in jail or prison, and the collateral consequences are significantly more serious for felony convictions. Prosecutorial discretion determines which charges will be filed, as so many acts can be punished as both felonies and misdemeanors. The threats of re-filing as a felony or reducing to a misdemeanor are both powerful threats. To avoid a felony conviction, a defendant may agree to plead guilty to a misdemeanor, even if they are innocent or otherwise have a strong defense.<sup>62</sup> One way to help prevent this type of pressure from prosecutors is to redefine crimes both by reducing the number that can be charged as both felonies and misdemeanors and by reducing some felonies to misdemeanors.

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<sup>61</sup> I make this suggestion aware that there may be unintended consequences, especially as making these legislative changes will not, on their own, change the underlying prosecutorial cultures. In reality there is no one single prosecutorial culture, and prosecutors change how they approach their job over their professional lifetimes. See Wright & Levine, *supra* note 52, at 1068 (“[E]xperienced prosecutors say they regret the highly adversarial, even cartoonish, posture they adopted in the early years of their careers.”).

<sup>62</sup> See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 285 (2011).

### 1. Reducing the Number of Acts that Can Be Charged as Either Felonies or Misdemeanors

Theft offenses and assaults are two common types of crimes that can be charged as both misdemeanors and felonies, depending on the seriousness of the offense. For example, an assault that includes serious bodily injury is more likely to be a felony.<sup>63</sup> Likewise, a theft that involves property that is worth over a certain amount of money (for example, \$2,500.00) is often a felony.<sup>64</sup> Prior offenses can also be a factor. For example, petty theft with a prior conviction can be charged as a felony or a misdemeanor in California, regardless of the value of the stolen property.<sup>65</sup>

Some of these distinctions make sense and shouldn't be eliminated. For example, a spousal battery where there is serious bodily injury is clearly a more serious crime than a simple punch or single slap. But some of these distinctions simply allow prosecutors to exert pressure during the plea bargaining process to encourage defendants to take the plea deal.<sup>66</sup> In addition, if a prosecutor has more options and can file the same case as either a felony or a misdemeanor, it may mean that they are more likely to file the case, thereby contributing to the increase in the percentage of case filings from arrests.<sup>67</sup> Legislatures should review the full list of criminal

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<sup>63</sup> See, e.g., TEX. PENAL CODE ANN. § 22.01(b) (West 2015) (stating that an assault is a misdemeanor unless it is carried out against certain categories of people, such as a public servant); *id.* at § 22.02 (defining an aggravated assault as a felony when there is "serious bodily injury").

<sup>64</sup> *Id.* at § 31.03(e)(4) defines theft generally and under § 31.03(e) lists what qualifies as misdemeanors and felonies. For example, § 31.03(e)(4)(A) defines theft as a state jail felony when "the value of the property stolen is \$2,500 or more but less than \$30,000, or the property is less than 10 head of sheep, swine, or goats or any part thereof under the value of \$30,000."

<sup>65</sup> *Id.* at § 22.01(b-1)(2).

<sup>66</sup> One empirical study found that when there are more options to choose from in the criminal code, prosecutors are more likely to reduce the charges, which may mean that more serious charges are likely used as leverage to encourage defendants to take the better deals. See Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C.L. REV. 1935, 1940 (2006).

<sup>67</sup> It is also possible that prosecutors may make worse deals if they have fewer options embedded into the codes, particularly if they don't reduce the number of cases that are filed. See *id.*

charges that can be filed as both misdemeanors or felonies and make sure the distinctions support a real public policy objective and are not simply there to add to the arsenal of charges that prosecutors can file. One simple proposal is to eliminate petty theft with a prior as a felony charge. If the amount stolen is a small amount and not enough to rise to the level of a felony, it should stay a misdemeanor, regardless of the record of the defendant.

## 2. Reducing Felonies to Misdemeanors

Related to reducing or eliminating crimes that can be both misdemeanors and felonies is reducing crimes from felonies to misdemeanors. For example, Proposition 47, which passed in California in November 2014, reduced some felonies to misdemeanors, including drug and property crimes.<sup>68</sup> It is still too early to evaluate the long-term impact. Early reports indicate that arrests are down dramatically for narcotics offenses, which are no longer felonies.<sup>69</sup> Overall, in Los Angeles County, narcotics arrests decreased by 30 percent and overall bookings into the Los Angeles County Jail were down by 23 percent in the initial months after the adoption of Proposition 47.<sup>70</sup> It is unclear how Proposition 47 is impacting plea bargaining or prosecutorial behavior. If the long-term impact is a reduction in arrests, this would reduce the number of cases that prosecutors can ultimately file, although without prosecutorial involvement or impacting the relative power that prosecutors hold in the system. One unknown is the impact that having fewer arrests, and thereby fewer potential cases to file, may have on prosecutors' institutional culture. Will seeing fewer cases reduce the punitive approach by prosecutors? It is clear that if California's initial experience continues, and there are fewer arrests, this change in law

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<sup>68</sup> Marisa Gerber et al., *Prop 47 Brings a Shift to Longer Time Spent Behind Bars*, L.A. TIMES (Jan. 28, 2015), <http://www.latimes.com/local/crime/la-me-early-release-20150128-story.html#page=1>. Proposition 47 also allowed those who have already been sentenced to be re-sentenced under the new law. See, e.g., J. RICHARD COUZENS & TRICIA A. BIGELOW, PROPOSITION 47: "THE SAFE NEIGHBORHOODS AND SCHOOLS ACT" 33–64 (2014), [http://www.adi-sandiego.com/pdf\\_forms/PROPOSITION\\_47\\_by\\_Couzens\\_and\\_Bigelow\\_December\\_2014.pdf](http://www.adi-sandiego.com/pdf_forms/PROPOSITION_47_by_Couzens_and_Bigelow_December_2014.pdf) (explaining to judges, in part, how to apply the retroactive portions of the law both in terms of re-classifying offenses as misdemeanors and re-sentencing.).

<sup>69</sup> See Gerber, *supra* note 68.

<sup>70</sup> *Id.*

will reduce incarceration rates, albeit for reasons not necessarily envisioned by the voters who likely thought Proposition 47 would just reduce felony convictions rates, not arrest rates.<sup>71</sup>

### *B. Eliminate Most Mandatory Sentences*

Both state and federal criminal codes include a large number of mandatory minimum sentences both for the underlying criminal charge and for added enhancements.<sup>72</sup> If a defendant is convicted at trial of a crime or an enhancement that includes a mandatory minimum sentence, the judge usually has no choice but to impose the sentence.<sup>73</sup> The practical effect of mandatory minimums is to give prosecutors more power as the threat of adding an enhancement with a mandatory minimum or proceeding on a charge with a mandatory minimum can mean that the defendant will get significantly more time if they are convicted and do not accept the plea deal.<sup>74</sup> In all but the most serious of crimes, legislatures should remove mandatory minimums from criminal codes both for the underlying offense and for enhancements.

#### 1. Eliminating Mandatory Minimum Sentences in Most Charges

Mandatory minimums should be reserved for only the most serious crimes.<sup>75</sup> Currently, mandatory minimums exist for everything

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<sup>71</sup> The arguments in favor of Proposition 47 in the Voter Information Guide did not include that it would reduce arrest rates. *See* California Secretary of State, *Proposition 47*, OFFICIAL VOTER INFORMATION GUIDE, <http://www.voterguide.sos.ca.gov/en/propositions/47/arguments-rebuttals.htm> (last visited Oct. 16, 2015).

<sup>72</sup> *See, e.g.*, R. Michael Cassidy, *(Ad)Ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L. J. 981, 987–91 (2014).

<sup>73</sup> Judges, particularly federal judges, regularly complain about mandatory sentences. *See, e.g.*, Rakoff, *supra* note 10 (“As stated in a September 2012 letter to Congress submitted by the Judicial Conference of the United States . . . ‘For sixty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentences and has supported measures for their repeal or to ameliorate their effects.’”).

<sup>74</sup> *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

<sup>75</sup> *See, e.g.*, Cassidy, *supra* note 72, at 999–1001 (arguing that since ABA Model Rule 3.8 states that prosecutors, as “ministers of justice,” should take “special precautions” to prevent the conviction of innocent people, prosecutors have an ethical duty to actively advocate for the “repeal of most mandatory sentences”).



ranging from less serious misdemeanors to murder. For example, driving under the influence of alcohol, if the blood alcohol level is over a certain amount, often includes mandatory jail time.<sup>76</sup> At the other extreme is California's three-strike law, which mandates a term of 25 years to life for conviction of a third strike offense.<sup>77</sup> For the purposes of this discussion, to aid in reducing mass incarceration, the concern is about mandatory minimums that carry significant potential time in prison. For a variety of reasons, including practical political constraints, it may make sense to continue to have mandatory minimums for violent crimes<sup>78</sup> such as murder in the first degree.<sup>79</sup> The clear category of crimes to focus on first is to remove mandatory minimums for non-violent offenses.<sup>80</sup> This would mean focusing on drug cases and theft cases. Pfaff's research supports focusing on property offenses as he identifies this category of offenses as being part of the reason for increased incarceration rates because of the overall increase in property crime rates.<sup>81</sup> Each state should carefully

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<sup>76</sup> For example, Idaho has a mandatory minimum of ten days in jail, 48 hours to be served consecutively, for anyone convicted of driving under the influence of alcohol with a blood alcohol content over .20. IDAHO CODE ANN. § 18-8004C (West 2015).

<sup>77</sup> CAL. PENAL CODE § 667(e)(2) (West 2015).

<sup>78</sup> See, e.g., Dana Goldstein, *Too Old to Commit Crime?*, N.Y. TIMES (Mar. 20, 2015), [http://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html?\\_r=0](http://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html?_r=0) (noting that although some reformers argue that there is no need for longer sentences even in the most serious crimes, most people "age out" of criminal conduct and are therefore far less likely to reoffend).

<sup>79</sup> First degree murder carries three possible sentences in California: twenty-five years to life in prison; life in prison without the possibility of parole; and the death penalty. CAL. PENAL CODE §§ 189-190 (West 2015).

<sup>80</sup> See Obama, *supra* note 2 (President Obama suggested this focus for federal legislative reform); see, e.g., GOTTSCHALK, *supra* note 12, at 262–63 (noting that others argue that only looking at non-serious, non-violent, non-sexual offenders leaves out too many types of offenses to meaningfully reduce incarceration rates).

<sup>81</sup> But see, John Pfaff, *For True Penal Reform, Focus on the Violent Offenders*, WASH. POST (July 26, 2015), [https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7\\_story.html](https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7_story.html) ("[F]or all the talk about nonviolent offenders, a majority of our prisoners have been convicted of a violent act and even more have some history of violence. . . . [A]t some point we are going to have to reduce the punishments that violent offenders face if we really want to cut our breathtaking prison population down to size."); see also GOTTSCHALK, *supra* note 12, at 195 (analyzing the background and challenge of considering reform for more serious cases and arguing that "meaningful penal reform" requires also reforming the long sentences for serious and violent offenses and not considering certain categories of crimes to be off-limits to sentencing reform).

examine how non-violent property crimes and drug crimes are punished and eliminate mandatory minimums in these categories.

## 2. Eliminating Mandatory Minimum Sentences in Enhancements

Prosecutors routinely threaten to add enhancements, such as the use of a gun, that include mandatory minimum sentences in order to put pressure on defendants to plead guilty. Although at first glance many enhancements support clear policy goals, such as discouraging the use of a gun during the commission of a felony, the mandatory sentences often exceed the stated reason for the enhancement. For example, the use of a gun regularly carries mandatory minimums of a decade or more in prison.<sup>82</sup> There are questions about what is added, from a public policy point of view, by these enhancements. For example, if a gun is used and causes serious bodily injury, the underlying offense—assault with serious bodily injury—would include increased punishment for the injury. In that example, the gun use enhancement simply acts to put additional pressure on a defendant to take a deal, as the penalty can be so much more severe. Most codes allow for a great variety of enhancements based on where the crime was committed (i.e. was the defendant in a school zone?);<sup>83</sup> what was used (a gun or other deadly weapon?);<sup>84</sup> and whether the defendant has prior convictions.<sup>85</sup> Legislative reform needs to include a full overhaul of which enhancements are allowed, eliminate mandatory sentences, and reduce the time for enhancements. Mandatory minimums in enhancements give prosecutors tremendous power to pressure defendants to plead guilty in exchange for an offer to strike the enhancement or not add it in the first place.

## CONCLUSION

Can legislative reform help to change the culture of plea bargaining and thereby help to reduce mass incarceration? The simple

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<sup>82</sup> See, e.g., FLA. STAT. ANN. § 775.087(2) (West 2015) (noting that the “[D]ischarge [of] a “firearm” or “destructive device” as defined in § 790.001 shall be sentenced to a minimum term of imprisonment of 20 years.”).

<sup>83</sup> See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 481.134 (West 2015).

<sup>84</sup> See, e.g., CAL. PENAL CODE § 12022 (West 2015).

<sup>85</sup> See, e.g., TEX. PENAL CODE ANN. § 12.42 (West 2015).

answer is yes. If prosecutors don't have the option to file a felony charge, it reduces the pressure they can put on a defendant to plead guilty. Likewise, if prosecutors cannot add enhancements that include mandatory prison time, the pressure put on defendants to plead guilty might be reduced. And, if prosecutors don't have the option to charge the same offense as a misdemeanor or a felony, but must charge it as a misdemeanor, the pressure put on defendants to plead guilty will be reduced. This could mean fewer cases are filed and reducing filing rates could help to reduce overall incarceration rates.

In addition, reducing the pressure on defendants to plead guilty can result in higher trial rates. This means that prosecutors will in turn have to be prepared to spend time and resources to try cases that may be weak, rather than relying on defendants nearly always taking the deal. Threatening trial is often the only real power that a defendant has to put leverage on the prosecutor to make a better deal or dismiss the case. However, under current laws, many defendants cannot risk a trial due to mandatory minimums, enhancements, or threats to file the charge as a felony.<sup>86</sup> Reforming criminal codes to reduce when and how prosecutors can make these threats can contribute to changing how prosecutors approach their jobs.

Clearly these are not quick fixes. Prosecutors have had decades to use these extraordinary powers and the institutional cultures within many prosecutorial agencies will likely resist moving beyond punitive approaches. Nonetheless, although simple legislative change is not a cure-all, it is one approach to change the deeply embedded structural power imbalances in the plea bargaining process that contribute to the problem of mass incarceration.

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<sup>86</sup> See Alkon, *supra* note 7, at 605–08 (discussing the reasons defendants often cannot use trial as leverage, including the potential trial penalty).