

THE EFFICIENCY MINDSET AND MASS INCARCERATION

THEA JOHNSON*

Abstract

Efficiency often carries a positive connotation. To be efficient, especially in a job, is to get things done quickly and with little wasted effort. As such, it makes sense that lawyers and judges see efficiency, especially in the form of plea bargaining, as a normative good, particularly since it can be used in individual cases to achieve fair results in an often unfair system. But this view of efficiency masks the darker side of the efficient administration of justice, which has contributed to some of the underlying causes of mass incarceration.

To combat mass incarceration, reformers must think seriously about how to break lawyers and judges of their efficiency mindset. Legal culture change in criminal courts is unlikely to be driven by legislation, court action, or lawyers and judges themselves. Instead, this Essay suggests other sources of power that may break the efficiency mindset. By examining these sources of power—both inside and outside of the legal culture—the Essay hopes to offer some ideas for how legal actors might start to, or be forced to, re-envision their role in mass incarceration.

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* Thea Johnson is an Associate Professor of Law at Rutgers Law School. A special thanks to Stephanie Didwania, Avlana Eisenberg, Kathryn Miller, and Dale Rappaneau for their comments on this Essay. Thank you also to Julia Pickett for her excellent research assistance.

Introduction

Mass incarceration, like mass production of any kind, requires a critical level of efficiency. The dramatic increase in cases in the criminal legal system over the last several decades required legal actors to adopt efficient methods of case resolution—namely, mass plea bargaining.¹ But the rise of plea bargaining as a substitute for adjudication by trial also required legal actors to adopt a mindset that normalized churning out pleas in criminal courts across the country. That mindset embraced efficiency as a fundamental value that has, for the most part, come to trump other seemingly more traditional values, like the pursuit of truth or public access to the legal system. But as other scholars have argued, while mass plea bargaining appeared to be an effective way to deal with heavy caseloads, it also, counterintuitively, contributed to those heavy caseloads by allowing the system to process many more cases cheaply and efficiently.² The efficient administration of criminal justice increased the number of cases, the length of sentences, and the overall punitiveness of the criminal system.

To challenge mass incarceration, then, one must tackle the efficiency mindset that is now deeply engrained among judges, prosecutors, defense attorneys, probation officers, court clerks, and other system actors—lawyers or otherwise—who touch the criminal legal system. The efficiency mindset is often associated with productivity strategies in the business context,³ but here I use the term to mean a belief that efficiency is a normative good within the criminal legal system. This concept of efficiency further encompasses the theory that, because it is a normative good, efficiency should be pursued, particularly through plea bargaining. In the criminal justice system, lawyers and courts seek to resolve cases efficiently, without wasting time or resources reaching a conclusion.⁴ One can point to the many conditions or beliefs that make efficiency so attractive to legal actors: caseload pressures, scarcity of

1. See Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005) (reviewing GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003)).

2. See *infra* Part II.

3. A search of the “efficiency mindset” on Google leads to many posts and articles associated with the benefits and drawbacks of an “efficiency mindset” for business leaders. See, e.g., Arjun Vijeth, *How Organization Could Incorporate an Environment Which Is Conducive to Flow*, LINKEDIN (Jan. 9, 2021), <https://www.linkedin.com/pulse/flow-workplace-arjun-vijeth/> (discussing the difference between an efficiency and productivity mindset).

4. The dictionary definition of “efficiency” is “the ability to do something or produce something without wasting materials, time, or energy.” *Efficiency*, BRITANNICA, <https://www.britannica.com/dictionary/efficiency> (last visited Apr. 20, 2022).

resources, the belief that defendants are guilty and therefore procedures should be dispensed with quickly, or even a fear of going to trial, among other reasons. Whatever the underlying motive, there now exists a cultural norm in criminal courthouses to resolve cases efficiently.

Nothing has proved to be so powerfully efficient for resolving cases as the plea bargain. In misdemeanor courts across the country, but particularly in large cities that process thousands of cases weekly, most defendants stand before a judge for mere minutes before pleading guilty.⁵ Pleas are taken quickly and with minimal discussion between the defendant and the court,⁶ and sometimes even with minimal discussion between the defendant and her lawyer.⁷ The same often rings true at formal plea hearings, despite the fact that these hearings are meant to establish that the defendant understands her rights, that she is waiving them knowingly and voluntarily, and that a factual basis exists for the conviction.⁸ One can see this efficiency mindset on full display in courtrooms at the U.S.-Mexico border, where judges have accepted pleas from groups of fifty to a hundred defendants *at the same time*.⁹ Indeed, the government gave these mass prosecutions a special efficiency-oriented name: “Operation Streamline.”¹⁰

5. See, e.g., ALISA SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIM. DEF. LAWS., THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 14–15 (2011).

6. Thea Johnson & Emily Arvizu, *Proving Prejudice After Lee v. United States: Ineffective Assistance of Counsel in the Crimmigration Context*, 25 HARV. LATIN AM. L. REV. 11, 48–49 (2022); Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH. L. REV. 197, 257 n.334 (2021) (reviewing literature on the plea hearing length and finding that most plea hearings last eight to ten minutes). This remains true as many courts have moved to a seemingly more efficient online process. As Turner observed in her work on plea hearings in Texas and Michigan, many of the online plea hearings last under seven minutes. *Id.* at 256.

7. Johnson & Arvizu, *supra* note 6, at 48–49. “Even in serious cases, defense attorneys may only speak to their clients for a few hours.” *Id.* at 49.

8. See generally *Brady v. United States*, 397 U.S. 742, 748 (1970) (establishing the constitutional standard for a valid guilty plea).

9. *Court: Mass Immigration Guilty Pleas Illegal*, KRWG (Dec. 3, 2009, 10:05 AM MST), <https://www.krwg.org/post/court-mass-immigration-guilty-pleas-illegal>. Although the Ninth Circuit held in 2009 that the practice of mass pleas violated federal law, there is evidence that such mass pleas still occur. *United States v. Roblero-Solis*, 588 F.3d 692, 700–01 (9th Cir. 2009); *Fact Sheet: Prosecuting People for Coming to the United States*, AM. IMMIGR. COUNCIL 3 (Aug. 23, 2021) [hereinafter *Prosecuting People for Coming to the U.S.*], <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions> (“[The government] conducts group prosecutions, sometimes prosecuting as many as 80 people at once in the same hearing.”).

10. See Joanna Lydgate, *Policy Brief: Assembly-Line Justice: A Review of Operation Streamline*, CHIEF JUST. EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY 1 (Jan. 2010),

Of course, one could look at the examples above and easily attribute them to what might be called a cruelty mindset—that is, a belief that individual defendants do not deserve full process or, even at a basic level, a chance at a just resolution of their cases. As Alec Karakatsanis has compellingly argued, lawyers have become party to the “usual cruelty” of the criminal system, which allows them to avoid questioning the many brutal aspects of the modern criminal system.¹¹ Cruelty—and indifference—often play into the criminal legal system. But the desire for efficiency (i.e., getting things done quickly) is likely a greater overt motivator for many lawyers and judges than malice or indifference. This is, at least in part, because maximizing efficiency has been legitimized as a norm, even among those who see its risks.¹²

But efficiency and its progeny, plea bargaining, have very real costs. As other scholars have argued, plea bargaining is tied to the rise of mass incarceration specifically because it allows parties to efficiently process cases.¹³ As in business, where efficiency means you can get more bang for your buck, so too in the criminal justice system we have seen that quickly resolving cases corresponds with an increase in cases, sentence length, and punitiveness in general.¹⁴ The criminal system took its efficiency gains and converted them into more criminal cases, just as a business would convert efficiency into growth.¹⁵ And the participation of lawyers and courts made this efficiency-based growth possible.¹⁶

Legal actors like plea bargaining because it is efficient for them in individual cases or as a means of handling their individual caseloads. In the aggregate, these individual decisions likely contributed to the rise of mass

https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf; *Prosecuting People for Coming to the U.S.*, *supra* note 9, at 3.

11. ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 149 (2019) (“The legal profession and the doctrines that it produces exhibit a willful blindness to the extent of the physical and psychological punishments that we perpetrate.”).

12. Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 211 (2014) (“The pervasive adoption of adjudication strategies in service of efficiency, especially plea bargaining, helps to redefine the norms that inform . . . ideas of adjudication’s purposes . . .”). Brooke Coleman makes a similar point about legal actors in the civil system. Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015).

13. *See infra* Part II.

14. *See infra* text accompanying notes 54–59 (increased caseload); *infra* text accompanying notes 46–50 (sentence severity and punitiveness).

15. *See* Brown, *supra* note 12, at 189–94 (comparing efficiency gains in industry to those in adjudication).

16. *See infra* text accompanying note 60.

incarceration.¹⁷ But because efficiency drove individual rather than global decisions, it may be difficult to convince legal actors that they caused and now sustain mass incarceration. And ironically, plea bargaining has become a primary way to avoid some of the worst features of our mass incarceration system. It is through pleas that defendants can avoid harsh mandatory minimums or devastating collateral consequences.¹⁸ This makes plea bargaining appear not only efficient but also, at times, just. In addition, for many legal actors, plea bargaining has become a matter of survival. As one prosecutor put it, “That’s my water. . . . I can’t swim without it.”¹⁹ Like water for fish, plea bargaining is fundamental to the survival of lawyers and judges in the modern American criminal system.²⁰

If plea bargaining is indeed responsible for creating some of the system’s worst aspects, even as it counterintuitively helps avoid them in individual cases, then legal actors must reevaluate their addiction to plea bargaining. A significant part of that reevaluation necessarily involves breaking the efficiency mindset as lawyers learn to seek justice without the quick fix of plea bargaining. In this context, cultural change among legal actors is as important, if not more so, than any legislative or judicial fix one can envision (and, as I note in Part III, I do not think either of these fixes is likely forthcoming).

But changing legal culture is hard.²¹ As public defender Jonathan Rapping has described it (using another water metaphor), “Culture is like the current

17. See, e.g., Brown, *supra* note 12, at 202–04 (suggesting a cause-and-effect trend between plea bargaining and mass incarceration).

18. I have written in other works about the role of plea bargaining as a means of alleviating these injustices. See Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855 (2019) [hereinafter Johnson, *Fictional Pleas*]; Thea Johnson, *Lying at Plea Bargaining*, 38 GA. ST. U. L. REV. 673 (2022) [hereinafter Johnson, *Lying at Plea Bargaining*].

19. Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2001 (2022) [hereinafter Crespo, *No Justice, No Pleas*].

20. *Id.* (noting that the prosecutor in question, by his own admission, “cling[s] to plea bargaining as a survival instinct”).

21. This Essay takes for granted that legal cultures exist, particularly within the criminal courthouse. Although I do not explore it in this Essay, there is a rich literature regarding legal culture in criminal practice, particularly how the “courtroom workgroup” shapes procedures and outcomes in the criminal courtroom. See generally Marcia J. Lipetz, *Routine and Deviations, The Strength of the Courtroom Workgroup in a Misdemeanor Court*, 8 INT’L J. SOCIO. L. 47 (1980); JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977); MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1977).

of a mighty stream,” and fighting against that current is difficult.²² Those attached to the efficiency mindset (current judges and lawyers) are unlikely to engage in meaningful cultural change.

So where might this change come from? In this Essay I suggest two sources of power for shifting the efficiency mindset. The first comes from legal actors not yet fully acculturated to the current model: law students. While I propose integrating plea bargaining into criminal law curriculum and training students on the risks of coercive plea bargaining, my focus here is less proposal than observation. There is good evidence that law students are already primed to change the system. Younger generations of public defenders see their role more holistically than prior generations, and more young lawyers are entering the ranks of progressive prosecutors’ offices with a different vision of what constitutes justice.²³ But even beyond those students interested in pursuing criminal law, law students of all interests may be resituating themselves in relation to the criminal system in ways that will lead to broader change.

The second source of power comes from non-legal actors—namely, defendants and their communities. Here I draw from the work of Jenny Roberts, Andrew Manuel Crespo, and Michelle Alexander²⁴ to suggest that collective action stemming from outside the system may force lawyers to change their perceptions and understanding of plea bargaining. Current efforts by the Institute to End Mass Incarceration and community organizers to coordinate plea strikes²⁵ may force system actors to reckon with their addiction to the efficient resolution of cases. As Michelle Alexander

22. JONATHAN RAPPING, *GIDEON’S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE* 82 (2020). Rapping continues with the following apt and compelling metaphor:

Culture is like the current of a mighty stream. The force of the current determines where the water will go. If a person wants to swim against the current, they may be able to for a while. But only for so long. Over time, the pull of the current will wear them down. The person will either get out of the water or be carried by its flow.

Id.

23. *See infra* Section III.B.

24. *See infra* Section III.C.

25. *See generally* *What Does the End of Mass Incarceration Look Like?*, INST. TO END MASS INCARCERATION, <https://endmassincarceration.org/what-does-the-end-of-mass-incarceration-look-like/> (last visited June 23, 2022) (“[W]e aim to support and to help build authentic, robust, grounded community power that will enable the people most harmed by mass incarceration to author the terms of its end.”).

famously noted ten years ago in her op-ed for the *New York Times*, *Go to Trial: Crash the Justice System*,

The system of mass incarceration depends almost entirely on the cooperation of those it seeks to control. If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation. . . . [T]he system would crash—it could no longer function as it had before.²⁶

One way then to shift legal culture is to shift the conditions that make the culture possible. Legal actors are attached to efficiency because they can be. Plea strikes may have the power to change conditions and the culture growing from those conditions.

This Essay proceeds in three parts. Part I gives an example of the efficiency mindset in practice and uses it as a case study to explain why the efficiency mindset thwarts even modest changes to plea practice. Part II explores the literature on why efficiency and plea bargaining contributed to and now sustain mass incarceration. Part III then examines the sources of power that may break the efficiency mindset. By examining these sources of power—both inside and outside of the legal culture—the Essay hopes to offer some ideas for how lawyers and judges might start to, or be forced to, re-envision their role in mass incarceration.

I. The Efficiency Mindset in Practice

To begin, what is efficiency? Definitions vary, but for the purposes of this Essay, efficiency in the criminal system is often defined as producing something—in this case, convictions or other case resolutions—at the lowest possible cost, including the minimal use of resources and time.²⁷ In this sense, the criminal system has adopted a production definition of efficiency, where the system gets more for less.²⁸ One can resolve many more cases through plea bargaining than trial.

This obvious fact has become something of a mantra for criminal attorneys and judges. Indeed, as William Ortman noted in his historical work on plea

26. Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html>.

27. Others have done much more work defining the efficiency mindset in the context of litigation. For a fuller description of such definitions, see Brown, *supra* note 12, at 189–93, and Coleman, *supra* note 12, at 1795–1802.

28. Brown, *supra* note 12, at 189–93.

bargaining, the clear efficiency of the practice was at least one of the reasons that lawyers and scholars eventually embraced it as a norm in the 1950s and 1960s after decades of skepticism about plea bargaining from those in the field.²⁹ And Carissa Byrne Hessick argues in her book on plea bargaining that the drive for efficiency eventually transformed into a plea-bargain culture, where lawyers and judges “expect[ed] cases to plea bargain,” even as crime or caseloads dropped.³⁰ This Part explores just one example of this efficiency mindset among lawyers and judges in practice.

The Michigan Supreme Court recently proposed changes to the rules of criminal procedure that would require the parties to establish a factual basis for the charge of conviction.³¹ The court’s motivation for this proposal was to avoid fictional pleas by defendants to crimes they did not commit.³² In its request for public comment, the court asked interested parties to address the impacts of fictional pleas on the truth-seeking process, sentencing goals (including rehabilitation and crime deterrence), and the constitutional separation of powers, among other issues.³³

Stakeholders from across the spectrum submitted letters, including the state prosecutors’ association, several defense attorneys, the State Bar of Michigan, and the Michigan Judges Association.³⁴ Every one of these

29. Will Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1484, 1486–87 (2020).

30. CARISSA BRYNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 29 (2021) (drawing from the work of Milton Heumann).

31. Order Seeking Comment on Proposed Amendments of Rule 6.302 and Rule 6.610 of the Michigan Court Rules, ADM File No. 2018-29 (Mich. Mar. 25, 2021) [hereinafter Order Seeking Comment on Proposed Amendments of Rule 6.302 and Rule 6.610], <https://perma.cc/H6B7-6LYK>.

32. *Id.* As I have noted in other work, a fictional plea is a plea to a crime the defense counsel and prosecutor know the defendant did not commit but that they allow to achieve some other result, usually the avoidance of severe collateral or immigration consequences. Johnson, *Fictional Pleas*, *supra* note 18, at 859.

33. Order Seeking Comment on Proposed Amendments of Rule 6.302 and Rule 6.610, *supra* note 31.

34. *See, e.g.*, Email from Anna C. White, Assistant Pub. Def. III, Ottawa Cnty. Off. of the Pub. Def., to ADMcomment@courts.mi.gov (Apr. 21, 2021, 9:09:05 AM), https://www.courts.michigan.gov/4a5545/contentassets/0bfa5a1e17f441c59ed928da0b1f0047/approved/2018-29_2021-04-21_commentfromannawhite.pdf; Letter from Janet K. Welch, Exec. Dir., State Bar of Mich., to Larry S. Royster, Clerk of the Ct., Mich. Sup. Ct. (June 28, 2021), https://www.courts.michigan.gov/4a5693/contentassets/0bfa5a1e17f441c59ed928da0b1f0047/approved/2018-29_2021-06-28_commentfromsbm-boc.pdf; Letter from Martha Anderson, President, Mich. Judges Ass’n, to Larry S. Royster, Clerk, Mich. Sup. Ct. (May 6, 2021), https://www.courts.michigan.gov/4a55f1/contentassets/0bfa5a1e17f441c59ed928da0b1f0047/approved/2019-06_2021-05-06_commentfrommja.pdf.

stakeholders objected to the rule change.³⁵ In many ways, the objections made sense given the risks of the rule change to the current system.³⁶ Fictional pleas serve as a safety valve in a system packed with mandatory sentencing and collateral consequences that, many times, even prosecutors find unnecessary to serve justice.³⁷ Some letters noted the interest-of-justice purpose behind such pleas,³⁸ but many of the letters from lawyers and judges returned to the same theme: the *need* for efficient plea bargaining.³⁹

To illustrate, here is a sampling of the objections:

Changing the rule and requiring facts only for the [crime charged] will make the options for a plea more limited and make settlement more difficult. While having more trials may not always be a bad thing, it will serve to frustrate the just, speedy, and economical determination of every action.⁴⁰

The benefits of negotiated plea agreements to resolve criminal cases short of trial are numerous and well-known to this Court. . . . Trial courts may move cases expeditiously through the system,

35. *See supra* note 34.

36. Because fictional pleas are a prior topic of my scholarship, I also submitted comments. In the letter I, like nearly all other stakeholders, objected to the change because it would likely lead to harsher outcomes for criminal defendants in the system as it currently exists. But my letter also gave the court numerous suggestions for how to improve the system so that fictional pleas could eventually be eliminated. The letter also acknowledged the deep problems with a system built on fictional pleas. Letter from Thea Johnson, Assoc. Professor of L., Rutgers L. Sch. & Russell Covey, Professor of L., Georgia State Univ. Coll. of L., to Larry S. Royster, Sup. Ct. Clerk, Mich. Sup. Ct. (June 17, 2021), https://www.courts.michigan.gov/4a5647/contentassets/0bfa5a1e17f441c59ed928da0b1f0047/approved/2018-29_2021-06-17_commentfromtheajohnson-russellcovey.pdf.

37. *See Johnson, Fictional Pleas, supra* note 18, at 859.

38. Email from Anna C. White to ADMcomment@courts.mi.gov, *supra* note 34 (“Allowing prosecutors discretion in charging, and defendants an incentive and opportunity to plead guilty and accept responsibility for a crime are a way to maintain the integrity and efficacy of our system.”); Email from Michael G. Roehrig, Prosecuting Att’y, Off. of Prosecuting Att’y, Monroe Cnty. Courthouse, to ADMcomment@courts.mi.gov (Oct. 1, 2019, 11:30:38 AM), *in State Bar of Mich., Agenda: Public Policy Committee Via Zoom Meetings* (June 11, 2021) [hereinafter *Agenda*] (“These proposed changes would . . . create a problem by impeding plea agreements for (factually unsubstantiated) lesser offenses because the defendants would not be able to establish a factual basis to satisfy the elements of the less serious offense. This would inure to the detriment of both defendants and the interests of justice.”), https://www.michbar.org/file/generalinfo/pdfs/6-11-21_PPC_agenda.pdf.

39. *See, e.g.*, Letter from Martha Anderson to Larry S. Royster, *supra* note 34.

40. Email from K. Edward Black, Alpena Cnty. Prosecuting Att’y, to ADMcomment@courts.mi.gov (Sept. 26, 2019, 8:54:00 AM), *in Agenda, supra* note 38.

allowing those defendants whose guilt is not at issue to waive their right to trial and be sentenced quickly.⁴¹

Eliminating the possibility of taking proofs regarding the original charge will make it more difficult to negotiate resolutions to some cases. The busy schedules of many judges would be negatively impacted by a court rule change that makes it more difficult for attorneys and defendants to negotiate guilty pleas to reduced charges.⁴²

The proposed amendments would have the effect of upending the current judicial system by reducing the number of plea agreements accepted and dramatically increasing the number of cases that will go to trial well beyond the capacity of our current system.⁴³

Across the spectrum of legal actors, a clear thread emerged that a rule change requiring defendants to submit a factual basis for the crime with which they were convicted would dramatically curtail plea bargaining and, as a result, the efficient administration of justice. Indeed, only a few letters addressed the court's concerns over fictional pleas, with some providing a mostly cursory response. The letters did not address why false and fictional pleas are needed, nor did the letters question the problems with a system that relies on them. The rewards subsume the risks.

Of course, these lawyers and judges work in the trenches of criminal court, and their responses make sense to those who practice in those same courtrooms. Lawyers are not tasked with examining the normative implications of fictional pleas; they focus on the real-world impact those pleas have on their cases. And yet, even with this caveat, when lawyers and judges are not pressed to think more broadly about the system in which they operate, they are absolved of their "special responsibility" to consider and maintain the "quality of justice" they dispense.⁴⁴ The Michigan Supreme Court encouraged lawyers to consider the conflicting obligations and outcomes that arise when defendants plead guilty to crimes they did not

41. Letter from William J. Vaillencourt et al., President, Prosecuting Att'ys Ass'n of Mich., to Justs., Mich. Sup. Ct. (Jan. 7, 2020), *in* Agenda, *supra* note 38.

42. Letter from Julie H. Reincke, Chair, Mich. Dist. Judges Ass'n, to Ms. Boomer (Nov. 1, 2019), *in* Agenda, *supra* note 38.

43. Crim. Juris. & Prac. Comm., State Bar of Mich., Public Policy Position: ADM File No. 2018-29 – Proposed Amendments of MCR 6.302 & 6.610, at 1 (May 7, 2021), *in* Agenda, *supra* note 38.

44. See MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 1983).

commit.⁴⁵ But in single-mindedly resisting these reforms, the letters provide a compelling portrait of how strongly efficiency motivates practice, even in the face of these other conflicts.

It is likely that many of the stakeholders who objected to the court's proposal—and its impact on their individual caseloads—also object to the rise of mass incarceration in Michigan and throughout the country. And in so many ways, plea bargaining in local practice achieves goals at odds with the rise in mass incarceration. For instance, one response to my critique is surely that plea bargaining provides a means of achieving lower sentences and avoiding the worst of the criminal system. If not for plea bargaining, defendants face the maximum penalty, which is often an extreme mandatory sentence that no stakeholder considers just. Rather than increasing sentences, plea bargaining decreases sentences for individual defendants.

Another likely response to my critique of the efficiency mindset is that legal actors care so much about quickly dispensing with cases because new cases arrive daily. The efficiency mindset is a survival strategy to handle the relentless wave of criminal cases in most courtrooms. As I note in the Introduction, plea bargaining is the water in which lawyers and judges must swim to survive.

When these two justifications combine, plea bargaining can look very appealing, as it seems to achieve justice while efficiently dealing with massive caseloads. But as Part II makes clear, these justifications at the practice level obscure how plea bargaining contributes to our system of mass incarceration.

II. The Costs of the Efficiency Mindset

As several scholars have compellingly argued, plea bargaining may contribute to mass incarceration by both increasing the punitiveness of sentences and producing more cases for the system to handle. As Albert Alschuler argued in *Plea Bargaining and Mass Incarceration*, “[P]lea bargaining produces more severe sentences than would exist without it,” because all sentences have been inflated to produce those guilty pleas through bargaining.⁴⁶ In this sense, the notion that a defendant receives a bargain from the “fair” sentence that would be imposed after trial is simply a mirage to

45. See Order Seeking Comment on Proposed Amendments of Rule 6.302 and Rule 6.610, *supra* note 31.

46. Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205, 205–06 (2021).

support the plea regime.⁴⁷ No one believes the sentence after trial is necessarily the fair one.⁴⁸ So, while the plea sentence might be reduced—sometimes by many magnitudes—from the possible post-trial sentence, the post-trial sentence is actually much higher than sentences for the same crime even a few decades ago.⁴⁹

Further, Alschuler makes the point that plea bargaining increases the number of convictions, resulting in more people in prison.⁵⁰ This part of the plea process is deeply tied to its efficiency gains: “According to many of its boosters, the chief virtue of plea bargaining is that it produces more punishment bangs for the buck. . . . And by reducing the cost of imposing criminal punishment, plea bargaining has given America more of it.”⁵¹ Carissa Byrne Hessick makes a similar point: “By eliminating trials, our current system makes punishment cheap, simple, and predictable. So it should not be a surprise that we punish more and more people; we’ve made it very easy to do so.”⁵² Research by John Pfaff on the causes of mass incarceration aligns with the idea that the roots of the problem stem from more and more people being incarcerated, even if for short periods.⁵³ Plea bargaining makes it possible for the system to process more cases and produce more sentences.

As Darryl Brown argues in *The Perverse Effects of Efficiency in Criminal Process*, despite the common wisdom that rising plea bargaining was necessary to meet rising caseloads,⁵⁴ plea bargaining itself may actually *increase* caseloads: “Criminal prosecutions are a variable that may be partially *dependent* on adjudicative capacity. If so, efficiency gains in some part *contribute* to the rise in caseloads, rather than the rise in caseloads creating a need for greater efficiency.”⁵⁵ This is particularly true because, as

47. *See id.* at 206.

48. *See* *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (“To coerce guilty pleas . . . prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate.”).

49. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 52 (2017)

50. Alschuler, *supra* note 46, at 210.

51. *Id.*

52. HESSICK, *supra* note 30, at 33–34; *see also id.* (“The spike in new case filings that appears to have driven mass incarceration happened at the same time that trials all but disappeared.”).

53. PFAFF, *supra* note 49, at 74.

54. *See* Brown, *supra* note 12, at 187.

55. *Id.* at 195.

Brown notes, caseloads are not a fixed value.⁵⁶ They can be shaped by a variety of factors unrelated to the commission of crime, including the local charging policy.⁵⁷ Given this factor, at least one plausible theory is that mass plea bargaining—made possible by the adoption of the efficiency mindset—drives mass incarceration because it increases the demand for criminal prosecutions, regardless of crime rates.⁵⁸ This can be true, even as prosecutors and other system actors feel overwhelmed by their caseloads. The two aspects of the system feed into each other. Legal actors figure out ways to process their own cases cheaply and efficiently without figuring out how to decrease those caseloads systematically, so the cases keep rolling in.⁵⁹

Brooke Coleman made similar arguments about the negative impacts of efficiency in the civil system. As Coleman argues, lawyers, judges, and policymakers adopted an “efficiency norm” over the decades that narrowed in on “making each litigation moment cheaper,” without considering the broader harms of those cost savings at the individual level.⁶⁰ As her work demonstrates, the efficiency mindset and its harms are not limited to criminal practitioners.

When viewed in light of these costs, the arguments by detractors of the Michigan rule change, although understandable from a day-to-day practice perspective, are troubling from a global policy perspective. If we want to move the needle on mass incarceration, we must tackle the pervasiveness of plea bargaining. But how can reformers confront plea bargaining when even the slightest rule change sparks such universal objection among lawyers and judges? As Part III argues below, shifting legal culture is difficult, but there is hope for change in some unusual places.

56. *See id.* at 199.

57. *See id.*

58. *See id.* at 186. In addition, as John F. Pfaff has shown, incarceration rates continued to climb even as crime rates went down. *See* PFAFF, *supra* note 49, at 9.

59. As Bill Stuntz noted, prosecutors aim “to reduce or limit their workload where possible,” including by “convert[ing] potential trials into guilty pleas,” which are “enormously cheaper” than trials. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535–37 (2001). *See generally* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 290 (2011) (describing the impact of prosecutors’ “excessive caseloads” on the incentives for innocent defendants to plead guilty).

60. *See* Coleman, *supra* note 12, at 1821.

III. Breaking the Efficiency Mindset

If breaking the efficiency mindset—and the corresponding addiction to plea bargaining—is critical to ending mass incarceration, then the question is, how do we root out a mindset engrained among criminal lawyers and judges? As I argue here, reforms via legislation and caselaw are unlikely to reorient lawyers away from plea bargaining. Instead, we need to examine how legal culture might shift in ways that help, or even force, lawyers and judges to re-envision a future where efficiency is not the prize.

A. What Will Not Work

Breaking the efficiency mindset is about changing legal culture, but such change is unlikely to result from either legislative or court action. Coincidentally, neither is likely forthcoming. Let's start with legislation. Even in places where plea bargaining has been banned through legislation or rule change, plea bargaining remains in some form, and often the worst parts of the practice continue to thrive.⁶¹ This is because legal actors can and do find ways around the boundaries of the law. I have no doubt that even if Michigan were to successfully change the rules on plea bargaining to limit pleas to crimes for which there is a factual basis, lawyers would continue to find ways, surreptitiously or not, to proceed with pleas when there is no factual basis for the alleged crime. As long as lawyers and judges on the ground remain captured by the efficiency mindset, the rules will only provide road bumps—not blockades—to reaching the desired end.

Nevertheless, legislation can have salutary effects on plea bargaining practice and, by extension, contribute to the end of mass incarceration. As Cynthia Alkon argues, legislative reforms that limit prosecutorial power in plea bargaining are one way to fight mass incarceration.⁶² She suggests, however, several other avenues for legislative reform, including revising how crimes are defined, reducing felonies to misdemeanors, and eliminating most mandatory sentences.⁶³ All these solutions are important and should be implemented because they lessen the state's ability to coerce defendants into a plea bargain.⁶⁴ However, these solutions are unlikely to break the efficiency mindset engrained in legal culture, because the conditions and beliefs that encourage the mindset remain.

61. *See infra* text accompanying notes 101–07.

62. Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 191, 201–08 (2015).

63. *Id.*

64. *Id.* at 207–08.

Furthermore, these proposals and other significant overhauls of plea bargaining are likely not in the cards—at least as a legislative matter. For instance, despite wide bipartisan support for criminal justice reform efforts, there have been many roadblocks to meaningful legislative change. While the First Step Act, passed by Congress in 2018, was a huge achievement, it focused on piece-meal corrections, like fixing archaic aspects of the federal sentencing regime.⁶⁵ It will not produce transformative change in the way people think about the criminal system. Indeed, when it comes to plea bargaining, the First Step Act’s changes to some mandatory minimum laws may impact the prosecutor’s leverage at plea bargaining in certain cases, but it is unlikely that the bill will change how most plea bargains work.⁶⁶ Although criminal justice reform continues to be a focus of many state legislative efforts, plea bargaining reform—or other reforms that would slow down the pace of the system—are often not on the table.

Court action is also unlikely to make a difference. There are, to be sure, places where courts could make meaningful changes to plea practice. For instance, the Supreme Court could reconsider *Bordenkircher v. Hayes*, which allows prosecutors to threaten grave penalties if the defendant refuses to accept a plea deal.⁶⁷ This sort of hard bargaining can be very persuasive in convincing defendants to give up their right to trial. And although the Supreme Court has acknowledged the risks of plea bargaining, it shows no commitment to expanding the scope of due process rights at the plea phase.⁶⁸ Similarly, lower courts also allow some of the most egregious forms of coercive bargaining and do not seem poised to make changes any time soon.⁶⁹ Even if courts were willing to take up the cause of plea bargaining, as with legislative action, it is still unclear whether piece-meal regulation would shift the efficiency mindset.

65. See Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, SENT’G PROJECT (Dec. 17, 2019), <https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/>.

66. See generally *id.*

67. *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59, 365 (1978).

68. See *Lafler v. Cooper*, 566 U.S. 156, 185–86 (2012) (Scalia, J., dissenting) (“In the United States, we have plea bargaining aplenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime.”).

69. *E.g.*, *United States v. Seng Cheng Yong*, 926 F.3d 582, 591 (9th Cir. 2019) (holding that the government’s offer of leniency to a child is proper in exchange for a plea).

The final question is whether lawyers and judges—on their own and not pushed by changes to the law—will wean themselves off plea bargaining to tackle mass incarceration. Scholars have argued about the role different stakeholders play in ending mass incarceration.⁷⁰ Prosecutors, in particular, have received attention because of their power in the system.⁷¹ As Angela J. Davis argued in *The Prosecutor's Ethical Duty to End Mass Incarceration*, prosecutors must seek to reduce mass incarceration as a matter of professional ethics.⁷² Davis focuses specifically on how prosecutors' charging power at plea bargaining has contributed to mass incarceration, and she encourages prosecutors to use that same discretion to mitigate the harms of the current system.⁷³ Andrew D. Leipold similarly argues that ending mass incarceration requires prosecutors to be on board.⁷⁴ As I discuss more in the next section, Jenny Roberts has argued that defense attorneys can and should play a role to “crash” the “mass misdemeanor” system by directing resources towards misdemeanor representation and empowering their clients to reject pleas.⁷⁵ And Anne R. Traum has called on judges to consider mass incarceration while sentencing defendants in individual cases as a method of reform.⁷⁶

While there are many compelling arguments in the scholarship that lawyers and judges should reflect on mass incarceration in their day-to-day decision-making, it's less clear that they actually do (at least on a grand scale). Given that the efficiency mindset appears to allay many of the harms of mass incarceration, focusing on efficiency as a means of tackling mass incarceration might even seem counterproductive to many stakeholders. And for this reason, although there is much that lawyers and judges could do now to start shifting culture, it seems unlikely those currently practicing will be the most inclined to revolutionize long-standing norms.⁷⁷

70. See, e.g., Crespo, *No Justice, No Pleas*, *supra* note 19 (identifying community members as key stakeholders in the fight against mass incarceration).

71. See, e.g., Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063 (2016).

72. *Id.* at 1064, 1077–79.

73. *Id.* at 1070–77, 1081–84.

74. Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1611–20 (2019).

75. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1097 (2013).

76. Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 425 (2013).

77. I am not totally hopeless that lawyers and judges can push themselves beyond the efficiency mindset. Indeed, I am the Reporter for the American Bar Association's Criminal

But ultimately, shifting away from plea bargaining as a norm will require the stakeholders operating the criminal justice system to fundamentally reorient themselves to that system. If plea bargaining remains business-as-usual on the individual level, nothing is likely to change at the global level. And for that reason, this Essay looks to other sources of power that may move the needle on plea bargaining. I argue there are two potential sources of power that could encourage change in this arena: law students and new lawyers challenging the status quo from within, and defendants and their communities challenging the status quo from outside.

B. Changing Culture from Within: Law Students and New Lawyers

The first potential source of power to break the efficiency mindset is the next generation of lawyers. While law students have been co-opted in some ways by the efficiency mindset,⁷⁸ law students today are likely more aware of the horrors of mass incarceration than students even a decade ago. They have grown up in what has been often called the “era of mass incarceration.”⁷⁹ Students are engaged in movements that push not just for

Justice Section Plea Bargain Task Force, and much of the Task Force’s work focuses on how to shift culture to make plea bargaining fairer and more transparent. I, of course, have some hope that our recommendations will have meaning for current lawyers and judges. The Task Force Report will be published Fall 2022. For more on the Task Force, see *ABA CJS Plea Bargaining Task Force*, AM. BAR ASS’N, https://www.americanbar.org/groups/criminal_justice/committees/taskforces/plea_bargain_tf/ (last visited June 23, 2022). In addition, for a list of my recommendations on how to make plea bargaining fairer and more transparent with discrete reforms, see Johnson, *Lying at Plea Bargaining*, *supra* note 18, at 729–31.

78. In a prior work, I surveyed law students about their perceptions of plea bargaining and found that

[r]espondents focused on the role of plea bargaining as an efficiency mechanism. As one respondent noted, the “main goal of plea bargains is to ‘unclog’ the courts.” This was a common theme. Forty-one respondents [out of 239] mentioned the terms—efficiency, time savings, cost savings, or ease—or some combination of these terms, as the purpose or benefit of plea bargaining.

Thea Johnson, *Public Perceptions of Plea Bargaining*, 46 AM. J. CRIM. L. 133, 152 (2019).

79. Just a sample of works from the last fifteen years shows how frequently the “era of mass incarceration” is invoked by authors, journalists, and scholars. See, e.g., Christopher Wildeman & Hedwig Lee, *Women’s Health in the Era of Mass Incarceration*, 47 ANN. REV. SOCIO. 543 (2021); Olivia Exstrum, *The Era of Mass Incarceration Isn’t Over. This New Report Shows Why.*, MOTHER JONES (June 14, 2018), <https://www.motherjones.com/crime-justice/2018/06/the-era-of-mass-incarceration-isnt-over-this-new-report-shows-why/>; Nicole D. Porter, *Unfinished Project of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 WAKE FOREST J.L. & POL’Y 1 (2016); Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*,

legal change but for transformative cultural change outside of the legal system. Abolitionism, once outside of mainstream discourse, has become increasingly present on college and law school campuses and among new lawyers.⁸⁰ And if law students and new lawyers fundamentally understand the criminal justice system in different terms, they may be positioned to challenge the status quo.

There is precedent for young lawyers leading cultural change in the profession. For instance, efforts in Latin America to move from an inquisitorial to an adversarial model of justice have required a profound culture change in the local legal communities.⁸¹ Regardless of whether one thinks the move from an inquisitorial to an adversarial model is a good idea—and the irony, of course, is that such a move introduced plea bargaining and its ills into these newly developing adversarial legal systems—it was recent law school graduates that led the charge in evolving the new culture.⁸² For instance, in Ecuador, the office of the public defender was created in 2008⁸³ and from its inception was populated mostly by recent law graduates.⁸⁴ As the chief of that office explained, the criminal justice system experienced a “total cultural change.”⁸⁵ And it was young attorneys—especially at the newly formed public defenders’ office—that many considered in the best position to embrace this change, especially because they hadn’t been exposed to the prior system.⁸⁶ This has been true in similar legal transplant

33 N.Y.U. REV. L. & SOC. CHANGE 235 (2009); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2009).

80. *E.g.*, Mary Retta, *The Cops Off Campus Coalition’s Abolition May Is Underway*, TEEN VOGUE (May 11, 2021), <https://www.teenvogue.com/story/cops-off-campus-abolition-may> (discussing the movement on college campuses to remove police from campuses). In June 2022, the *UCLA Law Review* hosted a symposium titled “Toward an Abolitionist Future” that focused on abolition in its many forms. *UCLA Law Review Symposium: Toward an Abolitionist Future*, UCLA LAW, <https://www.law.ucla.edu/events/ucla-law-review-symposium-toward-abolitionist-future> (last visited June 24, 2022).

81. Thea Johnson, *Latin Justice: A New Look*, WORLD POL’Y J., Sept. 1, 2013, at 57, 60.

82. *Id.* at 59–60.

83. *See id.* at 60 (noting that Ecuador had no public defenders before 2007).

84. *Id.*

85. *Id.* at 59–60.

86. *Id.* at 59 (“This lack of institutional memory is one of [these young lawyers’] greatest assets.”). *But see* John D. King, *The Public Defender as International Transplant*, 38 U. PA. J. INT’L L. 831, 859 (2017) (arguing that in Chile, lawyers in the public defenders’ office had trouble “transitioning from the inquisitorial culture and expectations to an adversarial culture”).

movements.⁸⁷ And while today’s American law students are not entering a profession being transformed in the same way, the hope is that they can foster their own transformation—one in which they feel directly responsible for reassessing the norms and culture that allowed for the development of mass incarceration.

Further, generational shifts in culture are already observable in other facets of criminal practice. For instance, the heralded organization Gideon’s Promise, which trains new public defenders from around the country, is focused as much on culture change as it is skill-building.⁸⁸ The founder, Jonathan Rapping, has written extensively on the need to change culture within public defender offices to make them more resistant to the quotidian pressure to constantly “plead out” clients.⁸⁹ As he argues, when leaders want to shift culture, the newest members of a team are generally the ones least devoted to the prior culture and most ready to embrace and push for change.⁹⁰ Although Rapping writes about how leaders may utilize young lawyers to develop a new institutional culture,⁹¹ there is good reason to believe that, even without an institutional commitment to culture change, young lawyers are still posed to be in the best position to move the needle on these issues. Indeed, in my prior work, I have observed that even in so-called traditional public defender offices, younger lawyers are more likely to take a holistic view of the job—one in which they focus on all the harms that flow from the criminal case, and not just the criminal case alone.⁹²

87. In his article on public defenders in Chile, John D. King noted that after the public defenders’ office was first established, the initial batch of lawyers was highly motivated and committed to the mission of public defense. *See King, The Public Defender as International Transplant*, *supra* note 86, at 857–59. Unfortunately, the job has transformed over time into more of a “civil service job” that no longer attracts as many idealistic lawyers. *Id.* at 878. As King argues, the lack of an adversarial culture is a major weakness of the current public defender system. *Id.* at 859, 879.

88. *See RAPPING, supra* note 22, at 81 (“As I came to better understand the forces that influence culture, I began to think about how public defenders could be organized into a force to actually transform it.”).

89. *Id.* at 104–25.

90. *See id.* at 84–85.

91. *Id.*

92. I conducted in-depth interviews with twenty-five public defenders about how they approach plea bargaining. Thea Johnson, *Measuring the Creative Plea Bargain*, 92 *IND. L.J.* 901, 903 (2017). In my sample, public defenders with more experience tended to view their role as more traditionally focused on the criminal case alone. *See id.* at 928. Other work by Ronald F. Wright and Kay L. Levine has looked at how prosecutors develop over their careers. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 *ARIZ. L.*

Furthermore, there is a role here for law students and young lawyers who do not practice, nor ever intend to practice, criminal law. It is not only future public defenders and prosecutors who are steeped in the many movements for racial, social, and economic justice of the moment. In addition, future corporate or environmental lawyers are as likely as future criminal lawyers to have heard debates about abolition, even if they may be less likely to engage in them. As lawyers of all kinds become more attuned to the horrors of mass incarceration, it is likely that their attention will change the broader legal culture, which in turn may shape the culture inside criminal courtrooms.

To be clear, academia can and should play a role in this transformation. This is particularly true since, as Alice Ristroph argues, the traditional criminal law curriculum offered by law schools for the last many decades has played a role in the development of mass incarceration.⁹³ For instance, courses in criminal law have “legitimized criminal law by placing it in a framework of supposed constraints and identifying the law’s rational principles,” when criminal law has never functioned in this idealized way.⁹⁴ Further, criminal law professors focus their students’ attention on the “the minds . . . of criminal defendants, [but not on] the minds or acts of enforcement officials.”⁹⁵ As these students enter the legal world, they do so with a mindset, language, and orientation provided to them in law school that told them the criminal law is just, legal, and serves an important societal purpose, even when the evidence says otherwise.⁹⁶

As such, law professors today have an obligation to correct the record, so to speak, and to reshape their curriculums in ways that reflect the reality of the criminal justice system. Part of that obligation is to highlight for students the connections between daily, normalized practices, like plea bargaining, and the rise of mass incarceration. By connecting the individual decisions students will make as future lawyers to larger societal harms, law professors can help law students see hidden pressure points in the current system.

REV. 1065, 1065 (2014). Wright and Levine find that with experience, prosecutors become less adversarial and more pragmatic in their approach to the job. *Id.* at 1099–1113.

93. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1685–90 (2020).

94. *See id.* at 1688.

95. *See id.* at 1689–90.

96. A different sort of critique of law school that is also relevant here is that it fails to teach the actual skills that students will need when they enter practice, especially with regard to negotiation skills that are critical to plea bargaining. Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1495–98 (2016); Cynthia Alkon & Andrew Kupfer Schneider, *How to Be a Better Plea Bargainer*, 66 WASH. U. J.L. & POL’Y 65, 67 (2021).

Indeed, one of the most insidious parts of plea bargaining is that it is pervasive but hidden. As a result, many law students fail to understand the problems with the practice and how it might relate to mass incarceration. Luckily, law professors have many models, including Ristroph's article, for how to highlight these issues in the classroom.⁹⁷

And yet, there are limits on the role that law professors will play in these changes. Many criminal law professors were formerly criminal justice stakeholders who were also steeped in a particular culture. In my own academic career, I have struggled to separate the norms I learned in practice from the ideals I want my students to pursue. And so, while I and others must participate in the culture change, I doubt that law schools as institutions will lead the charge.

Instead, it is likely that any push for change from inside the legal world will come from these new lawyers that are developing their professional selves in the context of broader social movements around racial and economic justice, and the abolition of the criminal justice system itself.

C. Changing Culture from Without: Community Organizing and Plea Strikes

Mass incarceration is so deeply rooted in our criminal justice system that challenging it takes radical ideas. In this section, I explore how one such radical idea—plea strikes—might be a fruitful path to ending the efficiency mindset that facilitates mass incarceration. The idea behind a plea strike is for defendants to refuse to plead guilty as a way to achieve fewer pleas and more trials. The concept has been around for some time. In 2012, Michelle Alexander suggested the idea in the *New York Times*.⁹⁸ A year later, Jenny

97. The Guerrilla Guides to Law Teaching are a terrific tool to explore the intersection of mass incarceration and several core doctrinal law courses. See GUERRILLA GUIDES TO LAW TEACHING, <https://guerrillaguides.wordpress.com> (last visited June 24, 2022). Andrew Manuel Crespo and John Rappaport have a forthcoming textbook, *Criminal Law and the American Penal System: An Introduction*, which was created in response to the failure of traditional criminal law courses to respond to the modern ills of American criminal justice, particularly mass incarceration. @AndrewMCrespo, TWITTER (Sept. 22, 2020, 2:46 PM), <https://twitter.com/andrewmcrespo/status/1308492901022924802>. The book will directly tackle the relationship between mass incarceration and the substantive criminal law, rather than leaving mass incarceration as an ancillary matter. See @AndrewMCrespo, TWITTER (Sept. 22, 2020, 2:46 PM), <https://twitter.com/AndrewMCrespo/status/1308492902524489728> (“We come to the project motivated by a frustration, which we know many share, with course materials . . . that treat mass incarceration and police power as at best secondary themes.”).

98. Alexander, *supra* note 26 (discussing how the idea took root after a conversation with Susan Burton, a formerly incarcerated organizer).

Roberts applied Alexander's idea to the crisis in misdemeanor courts, suggesting defense attorneys create the conditions to make it possible for "more defendants [to] choose trial over a guilty plea."⁹⁹ More recent work and advocacy by Andrew Manuel Crespo and Premal Dharia at the Institute to End Mass Incarceration at Harvard Law School has brought the topic back into focus, directing attention to how policed communities can assert power through plea strikes.¹⁰⁰ This section draws heavily from the work of these scholars and advocates, and connects it to strategies for breaking lawyers and judges of the efficiency mindset.

As the saying goes, one way to try to stop an addiction is to quit cold turkey. If we apply this logic to plea bargaining, then one way to break our addiction to plea bargaining is simply to get rid of it. Stakeholders have tried in the past to get rid of plea bargaining. For instance, there are examples of judge-imposed bans in different jurisdictions.¹⁰¹ States have also attempted to implement bans.¹⁰² Alaska, for example, forbade plea bargaining in 1975 in the face of strong resistance from judges and lawyers.¹⁰³ Somewhat ironically, plea bans are sometimes put in place to fight both perceived leniency towards defendants and to combat overly punitive measures towards

99. Roberts, *supra* note 75, at 1099.

100. Crespo and Dharia, along with community activist Brittany White, spoke about the Institute's work in community organizing and plea strikes at the National Association of Criminal Defense Lawyers' Presidential Summit on the topic of the movement to end the trial penalty agenda. *The Constitutional Right to Trial: Organizing a National Movement to End the Trial Penalty Agenda*, NAT'L ASS'N CRIM. DEF. LAWS. (Jan. 24, 2022), https://www.nacdl.org/document/111621_TrialPenaltySummitAgenda. For more on the Institute to End Mass Incarceration, see *Institute to End Mass Incarceration Clinic*, HARV. L. SCH., <https://hls.harvard.edu/dept/clinical/impact-defense-initiative/> (last visited June 24, 2022). In addition, Crespo has written an article about plea strikes, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, which I draw from throughout this Essay. See, e.g., *supra* notes 19–20.

101. In a pair of opinions, Judge Joseph Goodwin, a federal judge in West Virginia, noted that he would not allow charge bargaining, the most common form of plea bargaining, in cases that came before him unless he was persuaded that the plea was in the public interest. *United States v. Stevenson*, 425 F. Supp. 3d 647, 648 (S.D. W. Va. 2018); *United States v. Walker*, 423 F. Supp. 3d 281, 282, 291–98 (S.D. W. Va. 2017). Prosecutor offices have also attempted to implement plea bans. For instance, judges in El Paso, Texas, initiated their own plea ban. See generally Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 267–68 (1987).

102. See Teresa White Carns & John Kruse, *A Re-Evaluation of Alaska's Plea Bargaining Ban*, 8 ALASKA L. REV. 27, 27 (1991).

103. *Id.* at 27–28.

defendants.¹⁰⁴ And some of these bans were “successful” in that they largely curtailed charge bargaining, the most common form of plea bargaining.¹⁰⁵ But that did not always translate into fewer guilty pleas. In Alaska, evidence suggests that there was no noticeable change in the number of guilty pleas.¹⁰⁶ This indicates that these bans were not implemented with defendants in mind and did not seem to slow down the number of guilty pleas. But, as many commentators noted, the bans were also unsustainable.¹⁰⁷ Eventually, most bans gave way to business-as-usual plea bargaining.

But plea strikes are fundamentally different from plea bans because they are meant to transfer power from judges and lawyers to defendants and their communities of support. Michelle Alexander made this point when she wrote that “[t]he system of mass incarceration depends almost entirely on the

104. The El Paso ban was instituted in response to concerns that prosecutors were being overly harsh in their sentencing recommendations. For instance, prosecutors refused to offer probation for burglary, “even if a seventeen-year-old boy with no record had broken into a laundromat and stolen cigarettes.” Weninger, *supra* note 101, at 274–75, 274 n.36. On the other hand, Alaska’s ban was put in place to deal with what were perceived as overly lenient sentences for criminal defendants. See Carns & Kruse, *supra* note 102, at 42 (citing officers’ concern “that criminals were not being prosecuted and that victims were not receiving redress”).

105. Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2343 (2006) (“[W]hen Alaska introduced a total ban on plea bargaining, charge bargaining as an institution was substantially curtailed as long as policy makers remained committed to the ban. Similarly, a study of the plea bargaining for felony cases in El Paso, Texas also concluded that charge bargaining was practically abolished, with a few authorized exceptions.” (footnote omitted)).

106. Bryan C. McCannon, *Alaska’s Plea Bargaining Ban 4* (Jan. 7, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3761990 (“I show that there is no measurable change in the difference between the rate at which civil cases and criminal cases are resolved prior to trial after the policy is implemented. . . . [T]he pleas bargaining rate is not affected. . . .”); see also MICHAEL L. RUBINSTEIN ET AL., ALASKA JUD. COUNCIL, THE EFFECT OF THE OFFICIAL PROHIBITION OF PLEA BARGAINING ON THE DISPOSITION OF FELONY CASES IN ALASKA CRIMINAL COURTS 204–05 (1978) (finding that, after implementation of Alaska’s plea-bargaining ban, sentences remained the same for serious offenses but became more severe for offenders without criminal records and those charged with less severe offenses). In 1980, Alaska began to allow plea bargaining again in certain cases, despite the official policy that plea bargaining was prohibited. See Carns & Kruse, *supra* note 102, at 35–36 (“The most general understanding of the policy . . . is that sentence bargains are prohibited absent special circumstances, but that charge bargaining is allowed.”).

107. See, e.g., Douglas D. Guidorizzi, Comment, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 776 (1998) (“Alaska’s experience demonstrates the difficulty in maintaining a complete, long-term ban on plea bargaining.”).

cooperation of those it seeks to control.”¹⁰⁸ Jenny Roberts noted that, while lawyers obviously cannot force their clients to opt for trials over pleas, they can “invite” those clients to “participate in a collaborative effort to change the system by forcing it to bear some of the real costs of mass misdemeanor processing.”¹⁰⁹ In his piece *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, Andrew Crespo focuses on how individual defendants and their communities might end plea bargaining, not through plea bans or defense attorney strategy, but rather through their collective action.¹¹⁰ In this scenario, defendants would reject pleas, knowing that they were supported in that endeavor by their communities.¹¹¹

Of course, defendants have an interest in an efficient system as well. Thus far, this Essay has focused on legal actors, but defendants also often benefit in individual cases from an efficient system. One might say that a misdemeanor defendant—guilty or innocent—who will likely be held pre-trial on bail benefits from a misdemeanor courtroom that prizes the efficient resolution of cases and early “good” offers to defendants. Indeed, many lawyers and judges would likely point to this scenario as an example of the benefits of plea bargaining to fight unfair sentencing and bail procedures. There are many other examples of defendants who are advantaged by efficiency, including clearly guilty defendants who may get what could be considered lenient treatment.¹¹²

But often, one can understand the benefits bestowed by efficiency on defendants as a means of avoiding overly harsh punitive practices embedded in the system. Meaning, what looks like a benefit is only a benefit in light of the cruel system in which the benefit is doled out. Further, even where individual defendants may benefit, as Part II discusses, the efficient administration of justice negatively impacts defendants as a group. As Crespo notes in his article, defendants often come from the same communities, which means that their collective treatment carries collective harm.¹¹³

108. Alexander, *supra* note 26.

109. Roberts, *supra* note 75, at 1100.

110. Crespo, *No Justice, No Pleas*, *supra* note 19, at 2002–04.

111. *Id.*

112. For more on how plea bargaining avoids many of the harms associated with the criminal system, see Jeffrey Bellin, *Plea Bargaining’s Uncertainty Problem*, 101 TEX. L. REV. (forthcoming 2023).

113. Crespo, *No Justice, No Pleas*, *supra* note 19, at 2007–09.

But the fact that defendants come from the same communities is one of the key features of Crespo's proposal: if communities use collective action to support large groups of defendants who refuse to plead guilty, they can force change on the system that imposes such harms.¹¹⁴ And in this sense, plea strikes may change the conditions under which legal actors function, thereby pushing them to rethink their dependence on efficiency. This, of course, would only happen in the jurisdiction in which plea strikes take place, but to the extent that plea strikes were successful in drastically slowing down the court system, efficiency would have to cede to other values. Part of the advantage of relying on defendants, rather than lawyers, to initiate plea strikes is because lawyers, even well-intentioned ones, are steeped in the culture of efficiency and benefit from it. While lawyers, as Jenny Roberts suggests, can and should aid plea strikes, they likely need a groundswell of community support for such collective action to advance a culture change among legal actors.

Of course, critics are likely to see plea strikes as creating worse outcomes for defendants. Such action could lead to more pre-trial incarceration or long post-trial sentences in cases that would have otherwise been resolved through plea bargaining. Part of the reason that community support is so critical to this endeavor is that individual defendants are taking risks by participating in a plea strike, and their communities will need to provide a safety net to help support them if those bad outcomes materialize.

But we should recognize that this critique of plea strikes is steeped in the efficiency mindset, which limits the range of vision for legal stakeholders. Part of the reason that lawyers and judges believe that plea bargaining is necessary is because they have created a system in which it *is* necessary, and they have trouble envisioning what a different system might look like. Plea strikes force these actors to view the system differently, not as a matter of thought experiment, but as a matter of practice.

Although there are obvious challenges to such collective action, if they were successful, they could in individual jurisdictions provide a test of what it looks like if you stopped the efficient—often frenetic—administration of justice and asked tough questions about what is fair and right in each individual case for each individual defendant. In the long term, such a slowdown might mean a transformation of how legal actors approach plea bargaining.

114. *Id.* at 2008–09.

Conclusion

Efficiency often carries a positive connotation. To be efficient, especially in a job, is to get things done quickly and with little wasted effort. As such, it makes sense that lawyers and judges see efficiency as a normative good, particularly since it can be used in individual cases to achieve fair results in an often unfair system. But this view of efficiency masks the darker side of the efficient administration of justice, which has contributed to some of the underlying causes of mass incarceration. To combat mass incarceration, reformers must think seriously about how to break lawyers and judges of their efficiency mindset. As this Essay suggests, new lawyers not yet steeped in the efficiency mindset might push for change within the system, while defendants organizing through collective action can exert pressure from outside the system.