SYMPOSIUM: DRUG POLICY REALITY AND REFORM

THE WAR ON DRUGS AND PRISON GROWTH: LIMITED IMPORTANCE, LIMITED LEGISLATIVE OPTIONS

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I. INTRODUCTION

The dramatic rise in imprisonment in the United States over the past forty years is hard to understate. Decades of stable incarceration ended suddenly in the mid-1970s, as the U.S. prison population soared from about 300,000 to 1.6 million inmates, and the incarceration rate from 100 per 100,000 to over 500 per 100,000. The incarceration boom is unprecedented in American history, and unseen anywhere else in the world; traditionally indistinguishable from its peers, the United States is now the world's largest jailer, both in absolute numbers and in rate. Home to only five percent of the world's population, it now houses over twenty percent of its prisoners.

Not surprisingly, academics, policymakers, and journalists alike have attempted to ferret out the causes of this carceral explosion. Though explanations differ, almost all analysts agree that a major cause has been the "War on Drugs." The argument is intuitive and straight-forward: the prison boom has been driven by increases in the arrest, conviction, and incarceration—often for quite long terms—of perhaps often low-level drug offenders as part of federal, state, and local efforts to combat drug use and trafficking.[1] And Figure 1 suggests why this claim is so easy to accept: U.S. incarceration rates started to set new records around the time the Reagan-era War on Drugs got underway.

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[1] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

FIGURE 1: STATE INCARCERATION RATES, 1925–2012

Note: Data from the Bureau of Justice Statistics' National Prisoner Statistics ("NPS").[2]

Given the widespread acceptance of the centrality of the drug war to prison growth, it is not surprising that recent efforts by state and federal governments to rein in prison growth have focused on drug enforcement. New York state, for example, has weakened its notorious Rockefeller Drug Laws.[3] The U.S. Congress has reduced the severity of its sanctions for crack-related offenses, while President Barack Obama has commuted the sentences of several inmates serving long sentences for drug crimes to symbolize the need for broader drug-policy reform.[4] California enacted a bill to reduce crack sentences,[5] and Missouri recently reduced the first-time possession of

[2] "In Custody" and "Under Jurisdiction" are fairly similar ways of counting prisoners. The BJS changed approaches in 1977. All state- and national-level data on prison populations, admissions, and releases are available on-line through the BJS's Data Analysis Tool for NPS data. E. Ann Carson & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) – Prisoners*, BUREAU OF JUST. STAT. [hereinafter BJS/NPS Data], http://www.bjs.gov/index.cfm?ty=nps (last visited Oct. 30, 2014), *archived at* http://perma.cc/X79Z-WYLB.

[3] Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES (Mar. 25, 2009), *available at* http://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html, *archived at* http://perma.cc/NHM7-M5JM.

[4] David Nakamura, *Obama Commutes Sentences of 8 Inmates with Crack Cocaine Convictions, Citing 2010 Law*, WASH. POST (Dec. 19, 2013), *available at* http://www.washingtonpost.com/politics/obama-commutes-sentences-of-8-inmates-with-crack-cocaine-convictions-citing-2010-law/2013/12/19/758d2848-68da-11e3-a0b9-249bbb34602c_story.html, *archived at* http://perma.cc/M5AE-VDQV.

[5] *See* S.B. 1010, 2013-2014 Leg., 2013-2014 Sess. (Cal. 2014) (amending Sections 11351.5 and 11470 of the Health and Safety Code, and amending Section 1203.073 of the Penal Code, relating to controlled substances); *see also* Patrick McGreevy & Melanie Mason, *California Lawmakers Pass Education and Drug Bills, Strike Prop. 187*, L.A. TIMES (Aug. 21,

no more than ten grams of marijuana from a class A misdemeanor (which could result in up to a year in jail) to a class D misdemeanor (which faces no time at all).[6]

Yet despite its widespread popularity, the argument pinning prison growth to the War on Drugs oversimplifies the connection between the two. This article starts to develop a more sophisticated analysis of how the War on Drugs shapes prison populations, and examines its implications for the options available to legislatures seeking to better manage prison growth. My conclusions run contrary to the conventional wisdom and, when it comes to reform, will not be particularly optimistic: the role of the War on Drugs is greatly exaggerated, and the areas where it matters most are likely the ones over which legislatures have the least control.

There are two broad issues I want to address here. Part II closely examines the empirical validity of various theoretical connections between the War on Drugs and prison growth, focusing in particular on five potential pathways. There appears to be little empirical support for any of them—or, at the very least, whatever effects the War on Drugs has had are indirect and hard to measure. And these indirect effects are generally caused by actors who operate fairly independently of state legislatures.

Nonetheless, even if the War on Drugs does not drive much of the growth in incarceration, valid reasons remain for trying to rein in its reach, and there still exist steps that legislatures can take. So Part III turns its attention to what legislatures can and cannot accomplish. But again, the conclusions are not optimistic. The tools most readily available to the legislature—such as adjusting what drugs are illegal and the sentences that attach to drug offenses—likely will not have much effect on prison populations, even just for drug offenders. Efforts that regulate prosecutorial behavior more directly may be more effective, but they are also harder to design and raise more complicated political issues; that a handful of states have adopted such reforms, however, does prove that such reforms are more than just thought experiments.

The five means by which the War on Drugs can drive up incarceration rates (or punishment more generally) considered in Part II are (1) the direct incarceration of drug offenders, (2) the re-incarceration of all types of offenders due to drug-related parole violations, (3) the impact of drug incarcerations on prison admissions instead of prison populations, (4) the extent to which prior drug offenses trigger repeat-offender enhancement, even for non-drug crimes, and (5) the effects of large-scale drug arrests and incarcerations on neighborhood social cohesion, and the connections between social stability and incarceration. As noted above, despite the theoretical plausibil-

2014), *available at* http://www.latimes.com/local/education/la-me-pol-legislature-20140822-story.html, *archived at* http://perma.cc/89ZF-X4HF.

[6] *See* MO. REV. STAT. §§ 558.011, 579.015.4 (2013).

ity of all five, the data cautions against putting too much weight on any of them.

While the first two theories—that drug incarcerations and drug-related parole violations drive growth—have received the most attention, they are also the easiest to debunk. For all the talk about drug incarcerations driving up prison populations, drug offenders comprise only 17% of state prison populations and explain only about 20% of prison growth since 1980. As for parole violations, it may be unfair to attribute any prison growth to parole admissions in the first place, since rising parole admissions could simply reflect rising parole releases. But even putting that issue aside, drug-related parole violations make up a relatively small percentage of all admissions—and even a smaller percentage of just parole-revocation admissions. Furthermore, perhaps as many as a third of those returning due to technical violations are also returning because of something more substantive, like a new offense. In short, however logical and intuitive these theories may appear, empirical support is severely lacking.

The third theory is somewhat off the beaten path of drug-war scholarship. Despite all the "throw-away-the-key" rhetoric that surrounds drug punishment, it turns out that almost all drug offenders serve relatively short sentences. So while drug offenders make up a relatively small share of the prison population, they could make up a much larger share of prison admissions. And while we tend to focus on the total stock of prisoners as our measure of punitiveness, the fact that most prisoners serve relatively short sentences and return home may imply that the flow of people through the system is a more relevant measure of punitiveness. Until recently, it was hard to estimate this flow accurately, but recent advances in data-gathering make it easier to calculate. Perhaps surprisingly, even here the impact of drug incarceration is slight—as with the stock of prisoners, only about 20% of the flow comes from drug-related admissions.

The fourth possible pathway from the drug war to mass incarceration returns to looking at total incarceration levels. Perhaps drug incarcerations are relatively short but ultimately trigger much longer sentences for future non-drug crimes via repeat offender laws. The available data make it clear that prior drug incarcerations do not seem to play any important role in future non-drug incarcerations. But problematic gaps in that data make it impossible to observe either (1) how non-incarcerative prior criminal justice contacts, such as arrests or felony convictions without prison time, influence formal sentencing policies such as recidivist statutes, or (2) how these non-incarcerative contacts influence informal decisions, such as the police's willingness to arrest a suspect, the prosecutor's willingness to prosecute a defendant, or even the type of charges chosen by the prosecutor. In other words, are the police more willing to arrest someone with a long list of prior drug arrests/convictions for a relatively minor non-drug crime, and is the prosecutor more willing to indict him, and to invoke more serious charges when she

does (e.g., felony over misdemeanor, or felony with mandatory time over one without such a minimum)?

In all these scenarios, prior criminal justice contacts due to the War on Drugs may shape subsequent punishments, but their impact is almost invisible in the data. But it is invisible for a reason, and one that can be resolved: almost no data is gathered on prosecutorial behavior, making it impossible to understand what shapes prosecutors' decisions to file what charges against what types of defendants. There is police agency-level data on crimes and arrests, individual-level data from some states on prison admission, but almost nothing on prosecutors. There is no reason such data cannot be gathered, but until it is we remain blind to the decision-making process of the most powerful actor in the criminal justice system.

The final pathway considered here is a more macro-level one, and a more speculative one as well. Concentrated enforcement, whether via arrests or incarceration, can be a mixed blessing for a community. On the one hand, it removes dangerous people from the neighborhood, and that improves social cohesion and neighborhood social capital. On the other hand, if enforcement sweeps too wide a net, it can detain relatively non-violent offenders whose removals impose net losses on neighborhood stability. The most obvious connection between instability and incarceration would be through rising crime rates, but crime rates have fallen since 1991, so any increased instability caused by drug arrests or incarcerations has likely not translated into any (gross) increase in crime.[7] But there are other ways in which social instability can contribute to rising incarceration rates, even in a time of falling crime. The primary possibility considered here is the nexus between prosecutorial punitiveness and social instability. Increased incarceration, at least since the early 1990s,[8] has been driven almost entirely by an increased willingness on the part of prosecutors to file felony charges against arrestees. Perhaps this punitiveness is inspired in no small part by a desire to use the criminal justice system (perhaps poorly) to try to rectify structural problems in relatively high-crime communities.

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[7] By relying primarily on state-level models, the results do not rule out that concentrated drug enforcement has led to gross increases in crime (and thus punishment) in smaller geographic areas, the evidence of which is drowned out by broader declines elsewhere in the state. But urban areas, where such localized effects are most likely, have generally seen sharp declines in crime over the past several decades, suggesting that any such effect is likely small.

[8] The phrase "at least since the early 1990s" appears dozens of times in this paper, so it may be helpful to explain the two key reasons why this limitation is invoked so often. First, crime rose steadily from 1960 to 1991 (with a brief pause in the early 1980s), and it then fell steadily from 1991 to today. There is no reason to assume that the causes of prison growth during a period of rising crime are the same as those during a period of declining crime. But—and this is the second reason—there are important limitations in the available data (specifically, data on prosecutorial behavior) that make it hard to look back past 1994. Thus the qualified restriction: some of the effects discussed here could also have played similar roles prior to 1994, but there currently is a lack of sufficient data to see if they in fact did. *See* JOHN F. PFAFF, THE CENTRALITY OF PROSECUTORS TO PRISON GROWTH (forthcoming) (discussing both the limitations in the data and the importance of looking at prosecutors).

Taken together, these findings suggest that the effects of the War on Drugs are often relatively slight compared to other causes, and that they are certainly not as big as many often assert. In reality, a majority of prison growth has come from locking up violent offenders, and a large majority of those admitted to prison never serve time for a drug charge, at least not as their "primary" charge.[9] These results pose a challenge to those who wish to aggressively scale back incarceration, since the current politics of reducing sanctions for drug offenders is less complicated than that for reducing punishment for violent or property offenders. Reforming drug statutes is easier, but doing so will likely not effect significant change in the overall incarceration rate.

Yet policymakers and the public may still want to reduce the scope of the War on Drugs. At any given point over 200,000 people are in prison on drug charges, and perhaps as many as 1.6 million inmates passed through state prisons between 2000 and 2012 on drug convictions. States spend several billion dollars a year incarcerating drug offenders, and the personal, familial, and social costs to inmates and their families are greater still; it is unlikely that these costs are justified by whatever benefit drug enforcement produces, especially on the margin. Even if reducing the scope of the War on Drugs has surprisingly little impact on overall prison populations, the collateral benefits of such a roll-back could justify the efforts.

Thus, Part III considers the options available to state legislatures. The findings here are somewhat pessimistic. Legislatures have a limited set of tools. The two primary ones are the reduction of sentence lengths and the decriminalization of drug offenses. But drug offenders already serve relatively short sentences—in the sample of disproportionately-Northern and disproportionately-liberal states used here, the median stay in prison for a drug offender is generally about a year. And relatively few people appear to be in prison on marijuana charges, which is the drug most amenable to decriminalization. Legislatures also have control over how recidivist statutes are written and the conditions that trigger parole violations, but neither of these seem to play a major role in prison growth either, at least with respect to drug offenders.

Furthermore, the ways in which the War on Drugs might matter the most are the ones over which the legislature have little control: police decisions about who to arrest, and prosecutorial choices about who to charge and with what specific crimes. Police respond to city officials, and the district attorney is typically a county-elected official with little or no higher-level oversight. Moreover, police and prosecutors are granted significant discretion, and courts are loath to second-guess their decisions. That is not to say

[9] Technically speaking, the claim that "a large majority of those admitted to prison never serve time for a drug charge" means that for that majority of inmates the most serious charge was never a drug charge. Many inmates are convicted of multiple charges, and someone convicted of a violent or property offense along with a drug charge will be classified as a "violent" or "property" offender, not a "drug" offender.

that legislatures cannot influence police and prosecutorial behavior, and I will consider a few options below, but the options are much more complicated to adopt.

Finally, this article concludes by acknowledging the implications of an important definitional choice this paper makes. Throughout, "drug offender" refers to someone convicted of a drug offense, not someone who commits crimes while on drugs or in furtherance of a drug habit, nor someone who commits violent crimes as a result of the disruptions caused by drug enforcement. These last two categories are both theoretically valid definitions of "drug offenders," and it is important to acknowledge the implications of using a narrower, albeit still wholly legitimate, definition. That said, this definitional choice does not in any way undermine the core thrust of this paper, namely that the impact of the war on drugs on prison growth is significantly overstated throughout academic, journalistic, and policy debates on prison growth.

II. The Various (Surprisingly Weak) Links Between the War on Drugs and Prisons

Michelle Alexander, in her deeply flawed *The New Jim Crow*,[10] unambiguously lays out the standard account of the connection between the War on Drugs and prison growth:

> The impact of the drug war has been astounding. In less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million, with drug convictions accounting for a majority of the increase.[11]

Alexander is not an outlier, but rather represents the mainstream perspective on prison growth. This section, however, will point out that this claim is wrong in multiple ways. Part II.A shows that the simple point Alexander (and most others) are making, that the direct incarceration of defendants for drug crimes has driven up prison growth, is blatantly false. The remaining sections then demonstrate that even adopting more sophisticated perspectives on the link between drug enforcement and prison growth fails to salvage the mainstream perspective.

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[10] *See* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21 (2012) (highlighting many of Alexander's significant structural flaws); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 Mich. L. Rev. 1087 (2013) (discussing the empirical shortcomings of Alexander's argument); *see also*, 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'g Rep. 265 (2014).

[11] Alexander, *supra* note 1, at 6.

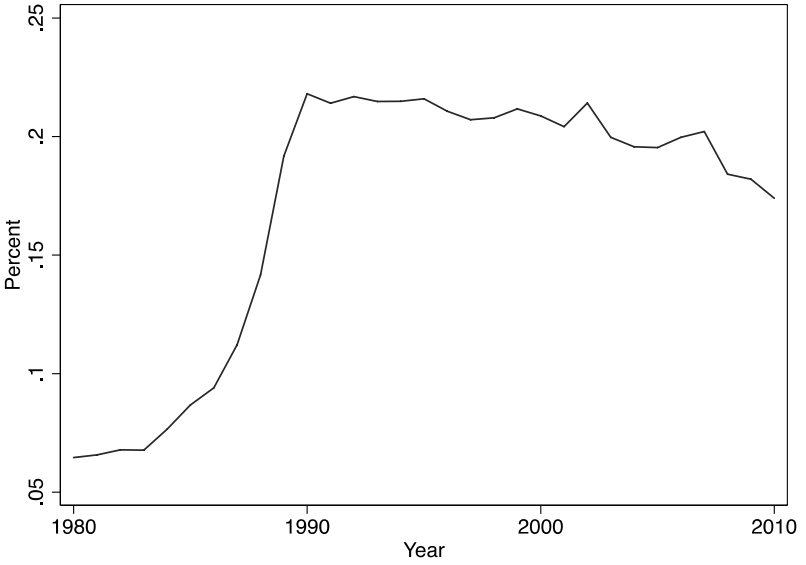
A. The Minor Direct Impact of Drug Incarcerations

Basic statistics about prison populations rebut the claim that drug incarcerations have driven America's prison boom. Figure 2 plots the share of state prisoners[12] whose primary charge[13] was a drug offense. Several features stand out. First, the sharp relative rise in drug offenders begins about five to ten years after the slow, steady rise in incarceration began. Second, at the relative peak of drug incarcerations, in 1990, approximately 22% of all inmates were drug offenders—or, phrased more starkly, over three-quarters of all state prisoners were serving time primarily for non-drug offenses. And third, since about 1990, even as prison populations continued to rise, the share of drug inmates has actually slowly declined, hitting about 17% by 2010. Each of these features clearly discredits the argument that drug incarcerations have driven overall incarceration.

[12] The focus on state offenders is appropriate here because (1) nearly 90% of all prisoners are state offenders, (2) the federal system disproportionately targets drug offenders due to its limited criminal jurisdiction, and (3) the budgetary and political pressures on federal criminal agencies differ so widely from those on state criminal justice actors that it is impossible to extrapolate federal outcomes to state ones. That said, little changes by including the federal system. While about 50% of federal prisoners are serving time for drug offenses, only 11% of US prisoners are in the federal system. So adding in the federal prison system raises all the percentages here by about five points (i.e., if 17% of state prisoners in 2010 were serving time for drug crimes, then 22% of all US prisoners were doing so).

[13] Since offenders can be convicted of multiple charges, some sort of rule is needed to determine whether someone incarcerated for arson and heroin trafficking is a "violent" or "drug" offender. The rule employed by the NPS (the aggregate state-level prison counts) and the Survey of Inmates in State and Federal Correctional Facilities is that any violent offense trumps any property crime, and any property crime outranks drug offenses. Results derived from National Corrections Reporting Program ("NCRP") data classifies an offender by the offense that carries the longest sentence, under the assumption that that is most likely the most serious one.

FIGURE 2: PERCENT OF PRISONERS SERVING TIME FOR DRUG OFFENSES, 1980–2010



Note: Data from NPS.[14]

The relative unimportance of the War on Drugs can be seen another way. Between 1980 and 2009, state prisons added approximately 1.07 million prisoners, as the prison population shot up from 294,000 to 1.36 million.[15] Table 1A disaggregates the growth across four types of offenses: violent, property, drug, and other.

TABLE 1A: VARIOUS OFFENSES' CONTRIBUTION TO STATE PRISON GROWTH, 1980–2009

	1980	**2009**	**% Change**	**% Contribution**
Total	294,000	1,362,000	363%	
Violent	173,300	724,300	318%	52%
Property	89,300	261,200	192%	16%
Drug	19,000	242,200	1175%	21%
Other	12,400	134,500	985%	11%

Note: Data from NPS.[16]

[14] *See* BJS/NPS Data, *supra* note 2.

[15] *Id.* During the sample period, California becomes an extreme outlier in its use of parole violations. Given that it houses approximately 10% of all U.S. prisoners, it can skew national-aggregate statistics.

[16] *Id.*

While drug prisoners had the fastest rate of growth, that is because their initial base rate was so low: fewer than 1/15 the number of violent prisoners in 1980. Their overall contribution to total population growth, however, is small. Between 1980 and 2009, state prisons added a net 223,200 drug inmates, which is only 21% of the total net increase of 1,068,000.[17] Conversely, the additional 551,000 violent offenders—an increase 2.4 times larger than that for drug offenders, despite a small percentage change—contributed over half of the net increase in prisoners; violent and property offenders combined contributed more than two-thirds.[18] In other words, if no one was admitted to prison on a drug charge between 1980 and 2009, then the state prison population in 2009 would have been 1.12 million instead of 1.36 million: a 3.7-fold increase rather than a 4.5-fold one (assuming, of course, all else constant).

There is a valid criticism, however, that can be leveled against Table 1A: by focusing on the entire period of 1980-2009, I stack the deck against drug offenses, which peaked in relative importance in 1990 (at 22% of all state inmates). Could they have contributed much more to growth up through 1990, even if not such much beyond then? To assess this, Table 1B breaks Table 1A up into two periods, 1980-1990, and 1990-2009:

TABLE 1B: VARIOUS OFFENSES' CONTRIBUTION TO STATE PRISON GROWTH, 1980–1990, 1990–2009

	1980	**1990**	**2009**	**% Contrib, 1980 – 90**	**% Contrib, 1990 – 2009**
Total	294,000	681,400	1,362,000		
Violent	173,300	316,600	724,300	36%	60%
Property	89,300	173,700	261,200	22%	13%
Drug	19,000	148,600	242,200	33%	14%
Other	12,400	45,500	134,500	9%	13%

Note: Data from NPS.[19]

The results here do shift a bit. Drug offenses are still not the dominant contributor to prison growth, even during the first stage of rising incarcera-

[17] The math: 223,200 = 242,200 – 19,000, and 1,068,000 = 1,362,000 – 294,000.

[18] Failing to account for base rates is a common mistake. For example, people often point to the fact that women are the fastest rising segment of prison populations, which is true: between 1978 and 2008, the year that the number of women in U.S. prisons peaked, the number of women in prison grew by 818%, the number of men by 410%. Yet, at the same time, the increased incarceration of men was responsible for over 92% of the overall increase in incarceration. The reason is simply that there were so few women in prison in 1978—11,583, compared to 282,813 men—that a relatively small absolute increase (to 106,358 in 2008) translates into a relatively large percentage change.

[19] *See* BJS/NPS Data, *supra* note 2.

tion, but their role in the 1980s is on a par with the locking up of violent offenders. When the crime drop begins, however—which is when one might expect drug offenses to become more important, since they are more discretionary—the importance of drug offenses declines precipitously, and the incarceration of violent offenders dominates. In other words, whatever the historical importance of drug offenses to prison growth, the incarceration of drug offenders is not a central causal factor today.[20]

Also, consider the following important side-note: that drug offenders comprise only a relatively small share of prison populations also undermines another common criticism of the War on Drugs, namely that drug incarcerations explain the racial imbalance in prison populations. Consider Table 2, which summarizes the most recent statistics on race and incarceration from the *Sourcebook of Criminal Justice Statistics*.[21]

TABLE 2: RACIAL DISTRIBUTION OF STATE PRISONERS, 2010[22]

		Number			Percent for Category		
Offenses	**Totals**	**White**	**Black**	**Hispanic**	**White**	**Black**	**Hispanic**
All	1,362,028	468,529	518,763	289,429	34.4%	38.1%	21.2%
Violent	725,000	231,800	286,400	164,200	32.0%	39.5%	22.7%
Property	249,500	110,800	76,300	41,900	44.4%	30.6%	16.8%
Drug	237,000	69,500	105,600	47,800	29.3%	44.6%	20.2%
Other	150,400	56,400	50,500	35,600	37.5%	33.6%	23.7%

Note: Data from NPS.[23]

Putting aside the debate over what constitutes a "proportionate" incarceration rate across races,[24] and regardless of how "right" or "wrong" it is

[20] This is particularly true since, as Part II.A2 shows below, drug offenders serve fairly short sentences, so almost none of those admitted for drug violations in the 1988–1990 period remain in prison today.

[21] *Estimated Number and Percent Distribution of Prisoners Under Jurisdiction of State Correctional Authorities*, SOURCEBOOK OF CRIM. JUST. STAT. ONLINE (2013), http://www.albany.edu/sourcebook/pdf/t600012010.pdf, *archived at* http://perma.cc/E4XK-KCJT.

[22] *Id.* Note that percentages do not necessarily sum to one since other races are omitted. Also, while "Hispanic" is technically an ethnicity, not a race, the data separate out non-Hispanic whites from Hispanics. In the incarceration data used here, almost all Hispanics (well over 90%) identify as white, not black, when asked about race.

[23] *See* BJS/NPS Data, *supra* note 2.

[24] The core challenge with such a debate is that blacks appear to commit violent crimes, especially serious violent crimes, at higher rates than whites, and the racial composition of drug dealers (as opposed to users) is unknown. For example, about 50% of all murderers are black, and blacks comprised about 50% of all murderers in prison in 2010 (70,100 out of 166,700—if anything, at 42% blacks seems somewhat under-represented). As crimes become less severe, however, declining reporting rates and more discretionary arrest decisions make racial breakdowns harder to compute, so one should be wary of generalizing murder results to lesser offenses. *See* HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 32–35, 103–04 (2006). As for drug offending, it is widely noted that drug use appears to be racially proportionate, although the sources of data on drug use (household and

for 38% of prisoners to be black, Table 2 demonstrates that scaling back the incarceration of drug offenders will have little effect on overall racial disparity. If we were to release every inmate serving time for a drug offense in 2010, the total prison population would fall from 1,362,028 to 1,125,028, and the percentage of that population that was white/black/Hispanic would change from 34.4%/38.1%/21.2% to 35.5%/36.7%/21.5%. In other words, the percent of the prison population that is black would fall by only 1.4 percentage points (from 38.1% to 36.7%), and the white-black gap would narrow only slightly, from 3.8 percentage points (34.3% vs. 38.1%) to 1.2 percentage points (35.5% vs. 36.7%). The minor effect of drug incarcerations on the racial compositions of prisons should not be surprising, given that drug offenses make up such a relatively small fraction of all offenders. In short, there simply are not enough drug offenders in prison to move the numbers substantially.

B. Drugs and Technical Parole Violations

Even if direct drug admissions are not driving up prison populations, perhaps "indirect" ones are, namely drug-related parole violations. A parolee (for any crime) returned to prison due to, say, failing a drug test could be seen as a victim of the War on Drugs, or at least of the punitive attitudes toward drug use that fuel the war. And some have expressed concern about the increasing impact of "technical" revocations—such as those due to failing a drug test—on prison populations. This section examines both the "big" and "small" versions of this argument. The "big" argument is that parole violations in general play a major role in prison growth, and the "small" is that technical violations drive parole revocations. Both arguments are wanting.

My disagreement with the "big" point is perhaps more philosophical than empirical. It is true that revocations are rising, but the causal connection likely runs in the opposite direction: parole revocations are rising because prison populations are rising, not the other way around. After all, not only are parole revocations rising, but so too are parole releases. If, say, 40% of all prisoners are paroled each year, and 75% of all parolees violate back to prison within a year of release, then if the prison population rises from 100,000 to 150,000, the number of parole revocations could rise from 30,000 to 45,000—not as the cause, but as the result of prison growth.

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school surveys, emergency room admissions for overdoses) may be biased in ways that correlate with race. *See, e.g.*, David M. Ledgerwood et al., *Comparison Between Self-report and Hair Analysis of Illicit Drug Use in a Community Sample of Middle-age Men*, 33 ADDICTIVE BEHAV. 1131, 1136 (2008) (reporting that African-American men tend to under-report cocaine use). But even if users are racially proportional, that does not mean that dealers need be (though they could be). And, unfortunately, there is almost no data on the racial composition of dealers outside of arrest data, and the pool of arrestees could reflect racial biases in enforcement, either due to individual officer bias or to structural effects in how police are deployed more broadly.

The problems with the "small" point are more empirical. There simply are not enough technical violators returning to prison for such revocations to play a significant role pushing up the number of returning violators, much less prison populations more generally. This argument becomes even stronger when we realize that many of those whose parole is revoked for technical violations are also guilty of non-technical violations, such as new substantive offenses, at the same time.

1. The "Big" Point: The Epiphenomenon of Increasing Parole Revocations

That people posit a link between parole revocations and prison growth is understandable. Consider Figure 3A, which plots the number of prisoners released onto parole and the number of parolees violated back to prison for all fifty states except California. As the prison population rose, so too do did the number of parole releases and parole revocations: between 1978 and 2012, prison populations grew by 376%, parole releases by 339%, and parole revocations by 606%.[25] Parole revocations rose much more quickly than the population as a whole, which at first glance implies that they may have played a role in pushing populations up—although, as always, base rates matter.[26]

Figures 3B and 3C, however, quickly complicate that simple narrative. Figure 3B plots both annual releases (whether onto parole or otherwise) as a percent of total prison population and annual parole releases as a percent of all releases. What Figure 3B shows is that about 45% to 50% of the total prison population is consistently released each year, and that parole releases are consistently about 70% of all releases. In other words, as prison populations marched steadily upwards from the 1980s into the 2010s, a relatively constant fraction of inmates was released each year, and a relatively constant fraction of those released were released onto parole.[27]

Figure 3C then attempts to estimate the extent to which the risk of parole revocation changes over time, by computing—roughly—the fraction of a year's parole releases that are revoked the following year. For example, the y-axis measures, say, the number of parole revocations in 1990 divided by the number of parole releases in 1989; the lag is used to capture the fact that

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[25] *See* BJS/NPS Data, *supra* note 2. During the sample period, California becomes an extreme outlier in its use of parole violations given that it houses approximately 10% of all U.S. prisoners, it can skew national-aggregate statistics.

[26] *Id*. The base rate for parole revocations in 1978 was 1/13 that for prison populations and 1/5 that for parole releases: 19,830 parole revocations in 1978 compared to a prison population of 256,148 and 88,830 parole releases.

[27] *Id*. Both the share of releases and parole's share of those releases declines somewhat in the mid-1990s, which is likely due to the adoption of parole-restricting policies such as Truth-in-Sentencing Laws in the wake of the Violent Crime Control Act of 1994. Note, though, that both rebound a bit in the 2000s and the total drop for each is about five points.

parole revocations are not immediate.[28] This rough estimate of the risk of revocation does trend upwards from the late 1970s to the early 1990s, but over the course of the 1990s and 2000s it is generally stable, if somewhat noisy.

Taken together, then, these figures tell an interesting story: while parole revocations have risen, this rise seems to be the result of prison growth, not its cause. As prison populations have risen, a relatively constant fraction of prisoners have been released in general, and released onto parole in particular. And at least since the 1990s, the risk that these parolees would be violated back to prison has remained fairly constant as well. These results strongly suggest that at least from the 1990s on, prison growth has driven up parole revocations, not the other way around.

The claim that growth is causing revocations rather than revocations driving growth is further supported by Figure 3D, which plots the percent of prison admissions that are parole revocations. As admissions grew over the course of the prison boom, the share of parole revocations in each admissions cohort has been fairly stable, again at least since the early 1990s. And even before then, it only rose by about ten percentage points over fifteen years. In other words, while admissions rose by 28% between 1994 and 2012, the share of admissions due to parole revocations rose by about one percentage point, from 25.7% to 26.7%. Note, too, that prison growth appears to be driven entirely by admissions,[29] not by time served; that parole violations are not driving up admissions implies that they are not driving up prison populations overall.

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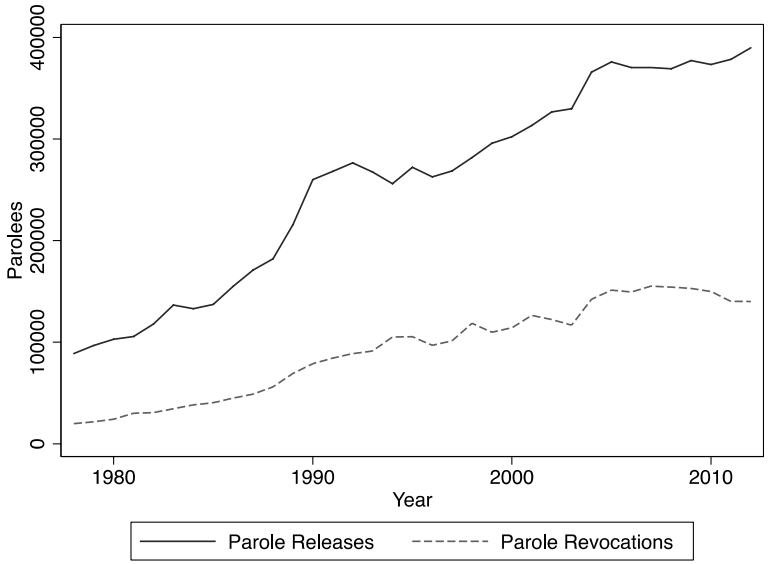
[28] *Id*. The core assumption here is that if 30,000 inmates are paroled in 1989 and 20,000 are violated back in 1990, then all those 20,000 come from the 1989 cohort of parole releases; this estimates the risk of revocation for the 1989 release cohort as 2/3. This is, of course, not entirely realistic, since many parole revocations take place more than one year after release. But a comprehensive BJS study did find that a large percent of revocations occur within the first three years of release. *See* PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUST. STAT., RECIDIVISM OF PRISONERS RELEASED IN 1994 (June 2002), *available at* http://www.bjs.gov/content/pub/pdf/rpr94.pdf, *archived at* http://perma.cc/Q7N7-Q85Z. I considered more complicated approaches to account for the fact that revocation takes time, such as looking at the ratio of parole revocations in year *t* to a weighted average of parole releases in years *t*-1, *t*-2, and *t*-3. But the results were consistently similar, suggesting that this simple approximation is an effective representation of what was taking place.

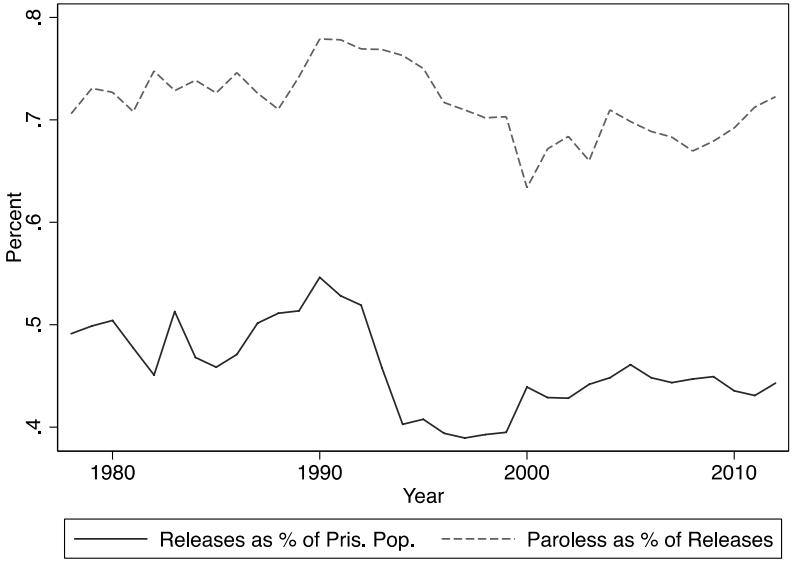
[29] *See* John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1242 (2012); *see also* PFAFF, CENTRALITY, *supra* note 8; Pfaff, *Escaping*, *supra* note 10. Between 1994 and 2008 (endpoints dictated by limitations in the data), arrests fell, and both the probability that a felony case resulted in a prison admission and the time served for that admission remained flat. But the probability that an arrest resulted in a felony filing in the first place (and thus ultimately in an admissions) soared.

FIGURE 3A: PAROLE RELEASES AND PAROLE REVOCATIONS



Note: Data from NPS, excluding California.[30]

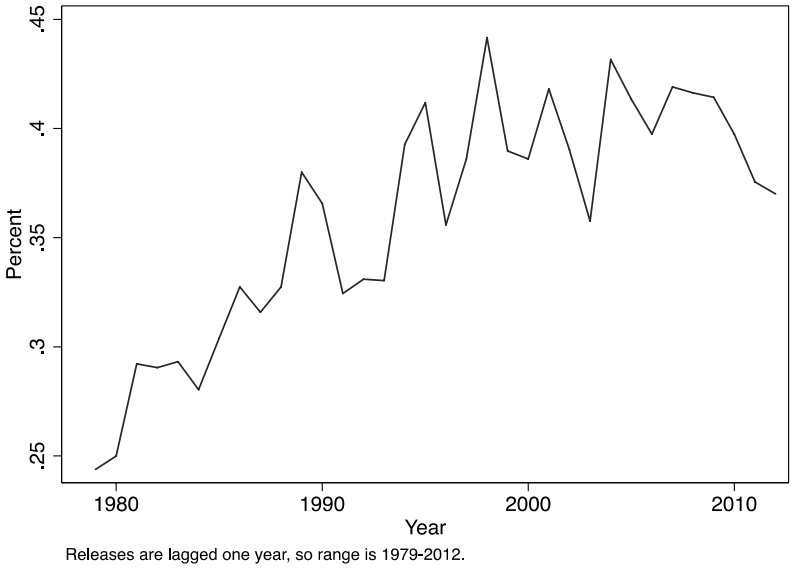
FIGURE 3B: PAROLE AND RELEASE SHARES



Note: Data from NPS, excluding California.[31]

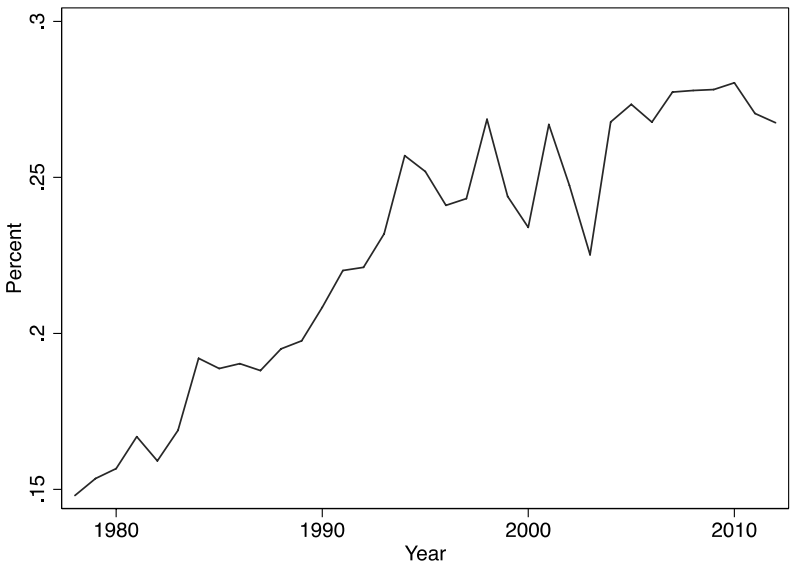
[30] *See* BJS/NPS Data, *supra* note 2.
[31] *Id.*

FIGURE 3C: PERCENT OF PAROLE RELEASES RESULTING IN REVOCATIONS



Note: Data from NPS, excluding California.[32]

FIGURE 3D: PAROLE REVOCATIONS AS PERCENT OF ALL ADMISSIONS



Note: Data from NPS, excluding California.[33]

[32] *Id.*
[33] *Id.*

The argument here can be summarized with a simple metaphor. Assume there is a boat filling up with water, and someone is trying to bail it out with a bucket. But the bucket has a vertical crack along its side, so a fixed percent of the water that goes into the bucket falls out again back into the boat. Is the water from that crack causing the boat to fill with water? It feels as though the answer should be "no"; something else is causing the water levels in the bucket to rise, and the increase in water that leaks is merely a result of that.

That is the "big" critique. But even if one remains convinced that parole revocations are important—and it is true that prison growth would have been slower had there been fewer revocations—it is still possible to argue that whatever role parole revocations are playing, drug-driven parole revocations, specifically technical violations, are not an important part of that role.

2. The Minor Effect of Technical Violations

Not all parole violations are created equal: some parolees return to prison after committing new, serious offenses, others after more "technical" violations such as failing drug tests or failing to satisfy other more-regulatory conditions of parole. Most of the datasets on prison admissions gathered by the Bureau of Justice Statistics record that an admission is due to parole revocation, but rarely why parole was revoked. The exceptions here are the periodic Survey of Inmates in State Correctional Facilities and the Survey of Inmates in Federal Correctional Facilities.[34] The most recent wave of the survey, conducted in 2004, interviewed a nationally-representative sample of 14,499 inmates in state prisons across the country. Among the hundreds of questions it asked each inmate was whether that inmate had had parole revoked and, if so, why.[35]

Table 3 summarizes the 2004 Survey's results for its questions about what, if anything, an inmate did to trigger a parole revocation. The first column gives the percentage of all inmates reporting the various reasons for revocation, the second column the percentage of all inmates who were admitted for violating parole.[36]

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[34] BUREAU OF JUST. STAT., THE SURVEY OF INMATES IN STATE CORRECTIONAL FACILITIES AND THE SURVEY OF INMATES IN FEDERAL CORRECTIONAL FACILITIES QUESTIONNAIRE (2004) [hereinafter SURVEY OF INMATES], http://www.bjs.gov/content/pub/pdf/sisfcf04_q.pdf, *archived at* http://perma.cc/JGZ4-J47W.

[35] *Id.* That the Survey's sampling method is restricted to national-level estimates is obviously a serious limitation, given that outcomes vary widely and importantly across states and even counties, but the Survey provides the most detailed picture of those serving time in prison and one of the few comprehensive sources on the causes of parole revocations.

[36] Given the sample size, the error bars around the estimates are sufficiently small that they are omitted here. Note that the percentages in the second column sum to more than 100% because some people report more than one reason for being sent back. *Id.*

TABLE 3: REASONS FOR RETURNING TO PRISON

Reason	Percent of All Inmates	Percent of Violated Inmates
New arrest/offense	10.1%	68.3%
Failed drug test	1.5%	9.3%
Drug possession	1.0%	5.9%
Failed to take drug test	0.4%	2.3%
Failed to report to drug/alcohol treatment	0.4%	2.2%
Failed to report for other counseling	0.4%	2.3%
Failed to report to parole officer	2.7%	17.1%
Left jurisdiction without permission	0.7%	4.3%
Failed to find/maintain employment	0.2%	1.0%
Failed to pay fines	0.3%	1.7%
Contact with known felons	0.2%	1.1%
Possession of gun	0.3%	1.7%
Other reason	1.6%	10.3%

Note: Data from the 2004 wave of the Survey of Inmates in State and Federal Correctional Facilities.[37]

These statistics demonstrate that drug-related technical violations—failing a drug test, failing to take a drug test, or failing to report to treatment—play minimal roles in overall admissions, and even fairly minor roles within the pool of parole revocations. And Table 3 actually overstates the role of technical violations since, as mentioned above, inmates often reported multiple reasons for being violated back. And revocation for a new offense—arguably the least technical of all violations—is reported by 26% of those who also failed a drug test, 29% of those who also failed to report to a drug test, 31% of those who also failed to report to treatment, 36% of those who also failed to report to other treatment, and so on.[38] Moreover, for over half of those who reported both a new offense violation and a drug test violation, the new offense was something more serious than a drug crime—either a violent or property offense. Only 22% of those who reported failing parole due to both a technical drug violation and a new offense reported that the new offense was a drug crime.

Furthermore, new drug offenses do not appear to be triggering parolee violations at a significant rate. Among those violated back for a new offense, a drug offense was the top new charge in only 20.3% of the cases. Violent

[37] *See* SURVEY OF INMATES, *supra* note 34.

[38] Given some irregularities in the data, the estimates of technical violators who also have non-technical, new-substantive-offense violations likely understate these values, perhaps somewhat substantially. *See id.*

and property offenses comprised 60.3% of all revoking new offenses: 37.5% violent, 22.8% property.[39] As with so many of the other potential connections between the War on Drugs and prison growth, despite intuitive links between rising incarceration rates and parole revocations, and technical revocations in particular, the data seem to imply that any such effect simply is not that strong.

C. The Role of Admissions: The Apocryphal Revolving Door

When we talk about incarceration in the United States, we tend to focus on the stock of prisoners in prison on any given day, not the flow of prisoners through the system. The claim that the United States has the highest incarceration rate in the world, for example, rests on comparing the one-day prisoner count in the United States to that in other countries.[40] But despite all the rhetoric about long sentences, most prisoners in the United States serve fairly short sentences,[41] so looking only at prisoner counts provides a potentially incomplete picture of the size, scope, and distribution of incarceration in the United States, since the total population on any one day reflects only a fraction of those passing through.

The severity of this oversight depends on who exactly is serving the short sentences. Consider a prison system in which each person serves one year in prison, and over a ten-year period the country incarcerates one million people per year. If each person is only admitted once, then the one million people in prison in the tenth year represent only one-tenth of the ten million people who passed through prison during that decade. On the other hand, if the same million people are admitted each year, then the total population in the tenth year is equal to the number of people who have passed through over that decade. In the latter case, it is not so much that sentences are short as it is that inmates are serving long sentences on, as some commentators put it, "the installment plan."[42] Moreover, if different categories of offenders serve different length terms in prison, then one-day counts provide a skewed picture of who is passing through prisons.[43]

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[39] Approximately 7.5% of those claiming a parole revocation with a new offense do not report the type of new offense, but even if all those are drug offenses the basic results here do not change. *Id.*

[40] *See, e.g.*, ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (9th ed. 2011), *available at* http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf, *archived at* http://perma.cc/MKV2-CFC2.

[41] *See* John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence From the National Corrections Reporting Program*, 13 AM. L. & ECON. REV. 491, 506 (2011); *see also* PFAFF, CENTRALITY, *supra* note 8, 28–35; Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73, 76 (2010).

[42] *See, e.g.*, Sara Steen & Tara Opsal, *"Punishment on the Installment Plan": Individual-Level Predictors of Parole Revocation in Four States*, 87 PRISON J. 344, 345 (2007).

[43] The following example shows how the bias can arise. Assume that drug offenders each serve one-year sentences and violent offenders (murderers, say) serve 50-year terms. In year 1, the state admits one drug offender and one violent offender, and year 2 two drugs offenders

From a policy perspective, understanding whether we are cycling the same people through time and time again or admitting a host of people for just one or two terms is important, as is understanding whether year-end counts poorly estimate the distribution of offenders flowing through prison. Incarceration imposes a host of collateral costs on offenders and their families: reduced future income, adverse health effects, reduced marital options, strained familial relationships more generally, and so on.[44] And many of these costs occur after only the first one or two stints in prison. In order to make an accurate cost-benefit analysis of our incarceration policies—which would also take into account the costs of being a victim and the extent to which reducing those costs via incarceration offsets the costs imposed on offenders—we need to better understand exactly how many people pass through prison gates, and the types of offenses of which they are guilty. This is especially true when it comes to drug offenders, where the costs to victims are more indirect, and thus where the direct collateral costs are more relevant.[45]

Identifying whether prisons were admitting the same people over and over again or not was, until recently, almost impossible due to a lack of data. But a recent revision to a major prisoner-level Bureau of Justice Statistics dataset now allows us to do just that: by introducing inmate-specific identifiers, it is possible to determine whether an inmate admitted in 2007 is, say, the same one admitted in 2002 or someone serving his first term in prison.[46] The data cover only the years 2000–2012, and only eight states (the Tier A states) provide consistently reliable data, with another seven (the Tier B states) providing data that is slightly less reliable.[47] And as the list of states

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and one violent offender, in year 3 three drug offenders and one violent offender, and so on. In year 50 there are one hundred prisoners: 50 violent offenders (serving 50-year terms) and 50 drug offenders (serving one-year terms). During that time, though, the state admitted 50 violent offenders but 1,274 drug offenders. So drug offenders comprise 50% of the prisoners in year 50 but 98% of the admissions to date.

[44] One of the leading works in this area is BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006). *See also* COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING THE CONSEQUENCES (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (review of the collateral costs of incarceration).

[45] Drug offenses are generally referred to as "victimless crimes," although drug use imposes real costs on its users (at least for more-serious drugs), and thus drug sellers are not exactly engaged in a victimless trade. But the nature of victim-ness is less clear in drug cases than in clearly-nonconsensual violent and property crimes.

[46] Data derived from NCRP. It has always been possible to observe that a state admitted 1,000 inmates per year over a ten-year period. But now we can observe that the state admitted 5,000 people once, 700 people twice each (for a total of 1,400 admissions), 400 people three times each (for a total of 1,200 admissions), and 600 people four times each (for a total of 2,400 admissions).

[47] The Tier A states are California, Colorado, Kentucky, Missouri, New York, Oklahoma, Pennsylvania, and Utah. The Tier B states are Georgia, Iowa, Michigan, North Dakota, Tennessee, Oregon, and West Virginia. "Reliability" is measured by comparing the total number of annual admissions in the NCRP to those gathered by the BJS's National Prisoner Statistics program, which gathers annual aggregate (rather than offender-level) prison population data. To qualify for Tier A, the number of NCRP admissions had to be roughly within +/- 10% of

in note 47 makes clear, there is an unfortunate northern/urban/industrial bias to these states, suggesting that some caution should be taken before extrapolating these results too broadly. But Tiers A and B nonetheless provide a comprehensive overview of admissions in the United States. Between 2000 and 2012, 8.42 million prisoners were admitted to all state prisons in the United States, with 2.76 million (or 33% of all state admissions) in Tier A states, and 3.78 million (or 45% of all state admissions) in Tiers A and B combined.

Table 4A reports the basic findings about how inmates cycle through prison. The table gives the results for all inmates and then groups them into three mutually exclusive categories: those who are never incarcerated for a drug offense, those who are only incarcerated for drug offenses (perhaps multiple times), and those with multiple incarcerations for both drug and non-drug offenses. The first six rows report the number of unique offenders: the 265,587 people admitted two times in Tier A states (the second row of the "All Admits" column) represent 531,174 admissions (two per person). "Total Offenders" measures the number of unique people who enter prison over the entire 13-year sample (and is thus just the sum of the first six rows of the table). "Total Admissions" measures the number of admissions, counting a single person entering three times as three admissions.[48]

TABLE 4A: DISTRIBUTIONS OF REPEAT ADMISSIONS, 2000–2012: TIER A STATES

Times Admitted	All Admits	Never Drugs	Only Drugs	Some Drugs
1	875,345	673,414	201,931	x
2	265,587	192,894	49,449	23,244
3	129,354	90,973	22,202	16,179
4	70,205	47,592	11,725	10,708
5	39,871	26,479	6,514	6,878
More than 5	62,628	40,200	8,912	13,516
Total Admissions	2,755,790	1,962,256	513,505	280,029
Total Offenders	1,442,810	1,071,552	300,733	70,525

Note: Data from NCRP.[49] Tier A states are listed in note 47.

the NPS admissions count for every year. Tier B states have at least a few years where the two counts diverge more significantly.

[48] The value in total admissions is greater than the number of offenders multiplied by the number of times admitted, since the data here are censored. For concision, all those admitted more than five times are clustered into one category. But the data indicate the exact number of times each inmate was admitted for those in the "more than five" category, and the value for "total admissions" reflects these real (uncensored) values.

[49] The NCRP data is on file with the author [hereinafter NCRP Data].

TABLE 4A: DISTRIBUTIONS OF REPEAT ADMISSIONS, 2000–2012: TIER B STATES

Times Admitted	All Admits	Never Drugs	Only Drugs	Some Drugs
1	368,958	297,178	71,780	x
2	103,478	76,590	17,309	9,579
3	36,713	25,621	5,205	5,887
4	12,539	8,479	1,492	2,568
5	3,789	2,512	411	866
More than 5	1,416	928	149	339
Total Admissions	764,162	579,622	130,983	53,557
Total Offenders	526,893	411,308	96,346	19,239

Note: Data from NCRP.[50] Tier B states are listed in note 47.

Several major points stand out in Table 4A. First, most inmates admitted since 2000 served just one term, and almost 90% served no more than three (though we will consider a slight caveat to that claim below).[51] This makes clear that prison is much more a flow than a stock: we need to pay more attention to admissions and less to total population. Second, offenders tend to "specialize" when it comes to drugs: most convicted of drug offenses are only convicted of drug offenses, even if they are incarcerated multiple times. And third, most offenders are non-drug offenders.

This last point is perhaps the most surprising. Drug inmates' share of unique offenders is basically the same as their share of inmates: about 20%, or 26% if we count those convicted of both drug and non-drug offenses as "drug offenders," compared to 17% of the total stock.[52] No matter whether looking at the stock of prisoners in prison or the flow of admissions through the prison gates, violent offenders remain the primary engine of growth. This is a tricky issue for reformers because the politics of decarcerating violent offenders is much more treacherous than that of reducing drug offenders. Not all violent offenders are murderers and serious assaulters, and many would likely be better served by not being incarcerated, but the optics and political risks of violent-offender decarceration are much tougher to navigate than those for drug offenses. It is worth noting that aggregate statistics confirm the finding here that looking at the flow of prisoners is as important, if not more important, than looking at the stock. Between 2000 and 2012, the

[50] *Id.*

[51] In Tier B states, the effect is even stronger: over 90% (472,426 out of 526,893) serve no more than two terms in prison.

[52] Tier A states admitted 1,442,810 unique offenders, of which 371,258—or 25.7%—are either just-drug (300,733 or 20.1%) or some-drug (70,525 or 4.6%) offenders.

United States as a whole added slightly more than 100,000 prisoners to the stock of inmates, as the prison population rose from 1.5 million to 1.6 million. But during that same time, states admitted nearly 8.4 million people to prison.[53] States admitted five prisoners for every one they held—and as the results here indicate, these were not just the same people returning over and over again.

That is the broad overview. But one more technical point deserves some attention before moving on to the next drug-incarceration pathway. The results above may understate the number of terms the median prisoner serves. What we really care about is how many terms the average offender serves, not how many terms those admitted between 2000 and 2012 serve. Table 4A, however, reports only the latter and surely underestimates the former. At least some of those who serve just one term during the sample period are admitted for the first time toward the end of that period and are destined to be readmitted sometime after 2012. To see if this potential error is a serious concern, Table 4B recreates Table 4A, but it restricts itself to just the 2000 entry cohort. The thirteen-year follow-up period for that cohort enables us to better see how readmissions play out over a large portion of a person's criminally active life. The results in Table 4B indicate that Table 4A does understate the number of times inmates return to prison, but not by much. The median number of admissions for all offenses rises from one to two, and the number of terms served by 90% of all inmates changed from three to fewer than six. But drug offenders remain about 23% of all admittees, or 32% if we include the some-drugs category in that count.

TABLE 4B: DISTRIBUTIONS OF REPEAT ADMISSIONS, 2000: TIER A

Times Admitted	All Admits	Never Drugs	Only Drugs	Some Drugs
1	77,390	54,807	22,583	X
2	40,210	27,639	9,234	3,337
3	25,203	16,906	5,144	3,153
4	16,627	10,932	3,090	2,605
5	10,601	6,745	1,947	1,909
More than 5	19,813	11,745	3,026	5,042
Total Admissions	510,854	330,703	101,526	78,625
Total Offenders	189,844	128,774	45,024	16,046

Note: Data from NCRP.[54] Tier A states are listed in note 47.

[53] Perhaps most striking, between 2000 and 2012, New York state's prison population fell every year for a total decline of 16,000, even as it admitted over 198,000 unique people to prison (out of almost 327,000 total admissions).

[54] *See* NCRP Data, *supra* note 49.

TABLE 4B: DISTRIBUTIONS OF REPEAT ADMISSIONS, 2000: TIER B

Times Admitted	All Admits	Never Drugs	Only Drugs	Some Drugs
1	24,053	19,394	4,659	X
2	11,883	8,441	2,125	1,317
3	6,357	4,238	961	1,158
4	2,943	1,939	357	647
5	1,143	752	127	264
More than 5	502	329	60	113
Total Admissions	87,671	62,604	14,276	10,734
Total Offenders	46,881	35,093	8,289	3,499

Note: Data from NCRP.[55] Tier B states are listed in note 47.

D. Drug Convictions and Repeat Offender Laws

Another potentially important, albeit generally under-studied, link between the War on Drugs and incarceration is the possible interaction between drug convictions and repeat offender laws. The intuition here is simple. Drug convictions may not result in long sentences themselves, but they may provide the necessary predicate offenses for later non-drug crimes to trigger recidivist enhancements. All states employ various sorts of repeat-offender statutes, including the infamous, if rarely-used, "three strikes" laws,[56] so this would appear to be a fairly easy way for drug convictions to push up incarceration rates.

The data in Table 4, however, highlight a serious limitation with this claim: most inmates serve only a few stints in prison. In particular, very few inmates serve time for both drug and non-drug offenses, which are the cases in which drug convictions could act as recidivist "triggers" for more serious non-drug crimes.[57] National aggregate statistics from the 2004 Inmate Survey yield similar results: over 80% of inmates report no prior incarcerations. No matter how powerful such recidivist statutes are, they seem to be applied to only a small fraction of prisoners.

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[55] *Id.*

[56] Although about half of all states have three strikes laws, it appears that about 90% of all three-strike sentences are imposed in a single state, California. *See* FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001).

[57] In fact, Table 4 overstates the number of such "triggerable" inmates, since the "some drug" category does not differentiate the order of convictions. Thus someone convicted first of heroin trafficking and then armed robbery is included in that category, as is someone first convicted of armed robbery and then heroin trafficking, even though only for the first inmate could the drug conviction "trigger" the recidivist enhancement.

That said, there are two major limitations to the National Corrections Reporting Program ("NCRP") (and, similarly, the 2004 Inmate Survey) that complicate the claim that prior drug convictions do not matter much. The first, and most obvious, is that what we observe in both the NCRP and 2004 Inmate Survey are prior incarcerations,[58] not prior felony convictions, and recidivist enhancements care about the latter. At first blush, incarceration seems like a fair proxy for felony conviction, since felonies generally demand prison time. But many defendants may accept felony plea deals that limit incarceration to the often lengthy time served in jail awaiting trial, and such cases may not appear in the NCRP or the Inmate Survey. And unlike offender-level prisoner data, offender-level conviction data is not available due to an absence of comprehensive prosecutorial data, an issue this article will address in more depth shortly.

The second shortcoming is that even focusing on the impact of prior convictions on subsequent punishments may miss the more important—but more indirect and much harder to detect—ways in which prior drug convictions trigger tougher sanctions. The more relevant triggers may not be formal recidivist-enhancement statutes but informal decisions by police and prosecutors about which defendants to target and how harshly to treat them. In other words, police may respond more aggressively to crimes believed to be committed by those with more extensive (perhaps drug-related) prior records, or they may simply find it easier to clear such crimes since the offenders are more likely to be under greater surveillance by parole or probation officers. And prosecutors may charge repeat offenders more seriously and not necessarily via repeat-offender statutes. For example, prosecutors may charge aggravated assault more often than simple assault in borderline cases, or adopt less compromising positions during plea bargain negotiations (perhaps in part because of the shadows cast by the repeat-offender laws).

That said, the police-severity point may not be that important, at least for overall prison growth, simply because arrests have declined even as prison populations have risen, at least since the 1990s.[59] One interesting feature of policing in the United States is that for all the changes in crime rates and law enforcement tactics and technology over the years, clearance rates—the fraction of reported crimes for which police make an arrest—have remained fairly stable since the 1970s for serious (i.e., index) violent and property crimes, except that for murders, which has dropped by about 20 points to around 60%.[60] So arrests for index offenses have declined with the

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[58] The Survey asks inmates about their ten prior commitments to prison, but not about convictions that do not result in prison time.

[59] *See, e.g.*, PFAFF, CENTRALITY, *supra* note 8. The results concerning arrests, prosecutions, and prison admissions used in this section all come from this paper unless otherwise indicated.

[60] Pfaff, *Micro and Macro*, *supra* note 29, at 1249. Clearance rates are computed only for the index of violent and property offenses, but then these are the crimes most likely to result in prison time. It should be noted that clearance rates, like all estimates derived from the Uniform Crime Reports ("UCR"), should be treated with some caution, given the well-documented

drop in crime. Even including arrests for serious drugs, which did rise somewhat in the mid-2000s, combined arrests for index offenses and serious drugs declined by about 10% between 1994 and 2008.[61]

Changes in prosecutorial behavior, however, deserve more attention. The primary engine of prison growth, at least since crime began its decline in the early 1990s, has been an increased willingness on the part of district attorneys to file felony charges against arrestees.[62] During that time, crime has declined, total arrests for index offenses and non-marijuana drug offenses have declined, and both the probability that a felony case results in a prison admission and the time spent in prison if admitted have been stable. Yet prison admissions, and thus total prison populations, have both steadily increased, because the probability that an arrest for a serious crime results in a felony case has risen dramatically. In other words, prosecutors have become substantially more aggressive over the past 25 years, for reasons that are not yet understood.[63]

The connection here between the War on Drugs, longer criminal records, and increased prosecutorial aggressiveness is fairly straightforward. Increased drug enforcement results in defendants with longer felony records and prosecutors may be more aggressive against such defendants. They may be less willing to plead down felonies to misdemeanor, or to drop cases altogether; to divert to an alternative program, or to drop more serious charges. They may also be more willing to select charges that carry mandatory minimums even when there are viable alternate charges that carry no minimum. Such harshness could reflect increasingly punitive attitudes on the part of prosecutors, perhaps in response to rising crime rates from the 1960s to the 1990s, or to other political and social factors. Or it could be that prosecutors have maintained a relatively constant approach toward charging repeat offenders, but the number of arrestees with long records has grown, thanks in part to drug-related convictions. Note, too, that prosecutors need not be more aggressive just toward those with more convictions, but perhaps also toward those only with more prior arrests, even if some of those arrests never resulted in convictions.

It is almost impossible, however, to empirically assess what shapes prosecutorial charging decisions—both whether to file in the first place and the types of charges chosen—due to a striking absence of data. While there are extensive datasets on crime (UCR, National Crime Victimization Survey), arrests (UCR), and prisoners (National Prisoner Statistics, NCRP), there is no real equivalent for prosecutorial outcomes. The National Prosecu-

problems with UCR data. *See, e.g.*, Michael D. Maltz, *Look Before You Analyze: Visualizing Data in Criminal Justice*, *in* THE HANDBOOK OF QUANTITATIVE CRIMINOLOGY (Alex R. Piquero & David Weisburd eds., 2010).

[61] "Serious" drugs here mean non-marijuana drugs, a restriction made to reflect the fact that marijuana arrests rarely result in prison time. *See* PFAFF, CENTRALITY, *supra* note 8.

[62] *Id.* at 5–22.

[63] They are not yet understood because this central impact of prosecutors is only newly discovered; my paper appears to be the first to highlight it so sharply.

tors Survey sounds promising but only provides national-level data—despite the fact that trends in prison growth are likely explained by county-level variations in prosecutorial behavior—and only looks at administrative issues (staffing size, etc.), not charging behavior.[64] And the BJS's State Court Processing Statistics ("SCPS") looks at cases from filing to disposition and thus has the ability to shed some light on prosecutorial choices, but it too fails to provide usable data on charging decisions.[65] In theory, one could at least partially glean what is happening in prosecutors' offices by comparing distributional differences in arrestee and inmate populations, but arrest and prison datasets are not sufficiently detailed or comparable to do so.[66] So while it is certainly plausible that prosecutors are punishing recidivists more aggressively via informal, but important, charging decisions, detecting any such effect is essentially impossible with the currently available data.

E. Drug Enforcement and Neighborhood Stability

Intense criminal enforcement—whether via arrests or incarcerations—has a complex relationship with community stability. Removing violent offenders likely increases neighborhood social cohesion, but incarcerating relatively nonviolent offenders can have a negative impact on community social capital.[67] Families are weakened both during and after incarceration, and ex-inmates find it hard to find employment and maintain relationships,

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[64] *See* STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2007—STATISTICAL TABLES (2011), *available at* http://www.bjs.gov/content/pub/pdf/psc07st.pdf, *archived at* http://perma.cc/56ED-TJLA.

[65] There are several limitations with the SCPS. First, by picking up cases once charges are filed, the SCPS cannot measure what shapes the decision to file charges in the first place, which may be the primary engine of prison growth. *See* PFAFF, CENTRALITY, *supra* note 8. Second, it has scant information about characteristics that may factor heavily in prosecutorial decisions, such as prior criminal history. And the data are gathered in a sufficiently peculiar way that the BJS itself has issued a warning not to use the dataset for causal analysis. *See* STATE COURT PROCESSING STATISTICS DATA LIMITATIONS, BUREAU OF JUST. STAT. (2010), *available at* http://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf, *archived at* http://perma.cc/BAU7-2BWT.

[66] For example, one could draw some inferences about how prosecutors take prior criminal history into account by observing the distribution of prior histories in the pool of those who are arrested and comparing it to the distribution of those admitted to prison. It may not be fair to attribute all of any such difference to prosecutorial case selection—sentencing laws and judicial behavior would matter as well—but the greater the gap, the more likely prosecutors are taking prior records into account somehow. But the UCR provides only aggregate agency-level counts of arrests per type of crime broken out by only a few demographic variables (age and race-and-sex). And the NCRP does not provide data on prior criminal history (except indirectly, as shown above in Part II.D, and then only from 2000 onward). So the UCR provides data in too aggregated a form to see the distribution of prior criminal histories, and the NCRP provides data at a better level of (dis)aggregation, but in insufficient detail.

[67] *See, e.g.*, Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 173-174 (2008).

both of which can contribute to future reoffenses and other social ills.[68] Even arrests without incarceration can disrupt individuals' lives. An extensive criminological literature suggests, for example, that even just arresting delinquent youth can, in certain contexts, increase future adult offending by "labeling" the youth as a delinquent.[69] All these effects can undermine neighborhood stability.

There is, however, a chicken-and-egg problem here that is difficult to empirically disentangle. On the one hand, the collateral costs of drug arrests and incarcerations could contribute to higher unemployment rates, higher single-parenthood rates, and other weakened social outcomes that tend to define high-crime, heavily-policed neighborhoods. On the other hand, those neighborhoods often see an increased reliance on drug sales in part *because of* these social pathologies. Estimating the extent to which higher drug enforcement is *causing* social disorder rather than *responding to it*, or its symptoms, is quite difficult, and well beyond the scope of this paper. That said, in this period of generally low rates, it is likely that the scale of drug enforcement is inefficient, and that enforcement in high-enforcement areas, on the margin at least, is creating more harm than good.[70]

The most obvious connection between drug-enforcement instability and prison growth would be through crime: more instability leads to more crime, and more crime leads to larger prison populations. However, whatever marginal effects on crime that drug enforcement may have, over the past twenty years crime has fallen sharply while prison populations have risen steadily. If instability is contributing to rising incarceration rates, it cannot be through increased offending.

So how then might it be? One potential answer requires looking again at the actor most responsible for prison growth in recent years, the prosecutor. As outlined above, the primary engine for prison growth since the 1990s has been the increased willingness of prosecutors to file felony charges against arrestees.[71] During a time of falling crime, prosecutors became more and more aggressive against offenders. Prosecutorial behavior is rarely studied and poorly understood, but one possibility for why it may have changed

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[68] *See, e.g.*, JOHN H. LAUB & ROBERT J. SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70 (2003).

[69] *See, e.g.*, Anthony Petrosino et al., *The Impact of Juvenile System Processing on Delinquency*, *in* LABELING THEORY: EMPIRICAL TESTS 113, 114 (David P. Farrington & Joseph Murray eds., 2014).

[70] Note, though, that this is a historically contingent claim. James Forman, for example, has done an excellent job pointing out that activists in minority, high-crime neighborhoods often lobbied for tough drug sentencing laws, including the Rockefeller Drug Laws, because they bore the brunt of drug markets' costs. Forman, *supra* note 10, at 36. In making this argument, Forman significantly complicates the "New Jim Crow" hypothesis, which posits that drug enforcement was designed to curtail minority rights in a post-Civil Rights era.

[71] PFAFF, CENTRALITY, *supra* note 8. Between 1994 and 2008, felony filings rose by 37%, as the probability an arrest would lead to a felony case soared from 0.37 to 0.57; this rise appears to explain most to all of the rise in incarceration, with admissions rising by a similar 40% over that time. *Id.*

is that prosecutorial aggressiveness stems from frustration over broader social ills. While crime in poor urban areas may be falling, these areas remain socially disadvantaged in many ways, and prosecutors may be acting more aggressively in a perhaps ill-advised effort to "help" those communities develop stronger social capital. In other words, arrests that in the past would have resulted in dismissal or misdemeanor charges may now be treated as felonies by prosecutors who think that these lower-level offenses are contributing to general social disorder and who are frustrated by the disorder's persistence even in an era of relatively low crime rates. Of course, if drug arrests and convictions contribute to lower social capital (at least on the margin), then there is a bitter irony to this enforcement approach.[72]

Again, given the paucity of rigorous evidence about the drivers of prosecutorial behavior, this is nothing more than a provocative hypothesis. But it does provide at least a plausible explanation for why prosecutors have become more punitive even as crime rates have declined. And regardless of whether this exact theory is correct, it is important to think about the complicated relationship between law enforcement and social disorder, especially when it comes to offenses like drug crimes where police and prosecutors alike have more discretion and more alternatives. Even if drug enforcement does not send that many people to prison, if it ultimately destabilizes neighborhoods more than it supports them, it may contribute to further enforcement—and enforcement costs—in those areas in ways that are perhaps hard to directly evaluate.

F. To Summarize

What, then, are the takeaways from all this? There are a few broad claims that deserve highlighting:

1. Drug incarcerations do not contribute significantly to prison populations, at least not directly. The numbers here are clear: Only 17% of all prisoners are serving time for drug offenses. The increase in drug offenders in prison explains only about 22% of prison growth. And the results are roughly the same when we look at admissions: individual drug offenders comprise only about 20% to 25% of those admitted to prison.

2. Drug violations do not contribute significantly to parole revocations. And that is before even determining whether increasing parole violations are a cause or effect of increased incarceration.

[72] A further irony could be that increased drug enforcement could make the neighborhood appear more disordered than it otherwise would. Greater enforcement can become ideologically self-perpetuating, if it goes searching for crime, and finds it.

3. None of these numbers means that people should necessarily be indifferent to whether the War on Drugs continues. Even if scaling back drug enforcement does not significantly reduce prison populations, or at least not to the extent hoped for by reformers on both sides of the aisle, it still could be a net social plus. Leaving money on the table is unwise, even if it is not as much as reformers would like it to be.

4. The War on Drugs may have a more powerful effect in ways that are harder to observe, particularly through its impact on prosecutorial behavior. Prosecutorial filing decisions appear to drive prison growth in recent decades, and it is an open question as to what has fueled prosecutors' increased aggressiveness. But longer arrest or conviction records could play a role, and drug enforcement actions that do not necessarily result in more prison time may nonetheless contribute to these records.

5. The War on Drugs may contribute to the collateral costs of incarceration such as reduced health, earnings, and familial stability, in ways that are more avoidable than those associated with violent or property crimes, simply because the decision to use arrest and incarceration is more discretionary for drug offenses. Furthermore, these collateral costs may contribute to general community instability that leads either to a greater desire on the part of police and prosecutors to punish violators even in a time of generally-declining crime.

Particularly because of Points 3 and 5, it is worth asking what legislatures still can do should they wish to rein in the reach of the War on Drugs.

III. The Options Available to Legislatures

On any given day, there are over 200,000 inmates serving time in state prisons on drug charges,[73] and something on the order of 1.1 million individuals have passed through state prisons since 2000 on at least one drug conviction.[74] Scaling back drug enforcement could yield significant social

[73] Sourcebook, *supra* note 21.

[74] This number simply crudely extrapolates the NCRP results developed in Part II to all fifty states. A total of 486,843 unique individuals were admitted to prison in Tier A and B states between 2000 and 2012 for at least one drug offense (i.e., either all or some of their admissions were for drug crimes), and Tier A and B states admitted about 45% of all admissions to state prisons during that time. Assuming Tier A and B states are a representative sample of all states, then a simple extrapolation yields a national drug admission number of 1.1 million (mathematically, 486,843/0.45 = 1,081,873). Of course, the assumption that Tier A and B states are a random sample of all states may well be incorrect, given that they appear to be disproportionately urban, industrialized, and liberal. It is likely impossible to accurately adjust this simple extrapolation to account for the imbalance in the data, but the 1.1 million figure is likely a reasonable approximation.

benefits, even if doing so will not significantly reduce the scale of incarceration in the United States. Moreover, regardless of the normative appeal of reining in the War on Drugs, as a factual matter it is a goal with wide bipartisan support,[75] so it is worth considering what legislatures can do to limit its scope.

Unfortunately, legislative options, at least straight-forward ones, are limited. The tools available to legislatures are fairly blunt and most of the decisions driving drug-related sanctions are made by more-local actors over whom legislatures have little direct oversight or control. The primary approaches that legislatures can take are decriminalization, sentence reduction, and amending the rules for technical parole violations. Within these broad parameters set by the criminal code and its sentencing provisions, however, police, prosecutors, and parole officers and parole boards have wide discretion to act.

This section will begin by showing that these parameters are already not "binding" on police and prosecutors, and thus adjusting them should not be expected to be particularly effective. Legalizing drugs—specifically marijuana, the only drug for which decriminalization is currently politically feasible—or reducing the official sanction will likely have little direct effect on prison populations, since few marijuana cases result in prison time already, even for distribution, and most drug offenders serve relatively short terms in prison. And Part II.B already established that parole reform will have only minor effects. None of which is to say that decriminalization, sentence reduction, or parole reform will have no impact, only that whatever effects they have will be indirect and likely less effective than expected.

Given that the conventional reform efforts will probably have surprisingly little effect on incarceration overall, and even on the incarceration of drug defendants in particular, this section will also highlight some more radical legislative approaches that could prove promising. The first is the possibility of imposing charging guidelines on prosecutors, and second would target the financial incentives of prosecutors in an effort to discourage them from focusing too much on drug offenders. Such tactics could actually be successful—particularly those that take aim at a peculiar aspect of most state budgeting arrangements that make prison effectively "free" for prosecutors—and all are politically viable. For instance, New Jersey employs charging guidelines, and California has aggressively attacked the budgetary moral hazard problem. That they are viable, however, does not mean that they are

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[75] *See, e.g.*, AM. CIV. LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES (2011), *available at* https://www.aclu.org/files/assets/smartreformispossible.pdf, *archived at* http://perma.cc/8WAZ-CL9; Tom Keane, *From the Right, Common Sense on Drug Policy*, BOSTON GLOBE (Aug. 9, 2014), *available at* http://www.bostonglobe.com/opinion/2014/08/08/right-wing-takes-lead-reforming-crime-policy/zHD2ZJTsziq5qpEfKQHzML/story.html, *archived at* http://perma.cc/D7PZ-2B48.

easy to implement: the political risks are greater than more-traditional approaches, and so far New Jersey and California remain outliers.

A. Decriminalization and Sentence Reduction

The two most direct tools available to the legislature are decriminalizing drug offenses and reducing the sentences that attach to various drug violations. Unfortunately, neither alternative is likely to make much of a dent in drug-related incarcerations. First, consider decriminalization. Although countries such as Portugal have received significant attention for adopting public-health based decriminalization policies for a wide range of serious drugs,[76] at least in the United States the debate over decriminalization remains generally limited to marijuana. And as this section will make clear, marijuana offenses simply do not result in prison time.

Consider data from the NCRP, focusing here solely on the Tier B states for reasons that are wholly opaque, none of the Tier A states provide usable data on the type of drug for which someone is incarcerated.[77] Figure 4A plots the percent of drug (not all) inmates serving time for marijuana offenses in Tier B states over the period 2000–2012. It is true that the share of marijuana traffickers rose, but only to 10%; that of possessors fell to barely 0.6%. And drug offenders comprise only about 20% to 25% of all inmates in Tier B states, so that reduces the share of marijuana offenders to 2% and 0.1% of the overall prison populations in those states.

One note of caution, though, is that for approximately 25% of all drug offenders in Tier B states, the drug of conviction is classified as "unspecified," with about 20% of those for trafficking and 5% for possession. If all of these "unspecified" drug offenders are unclassified marijuana offenders, then the pool of marijuana inmates obviously rises significantly, particularly for trafficking. There is no reason to assume that they are all marijuana offenders, but this gap in the data does suggest that the results in Figure 4A represent a lower bound on the extent to which marijuana decriminalization would reduce prison admissions. However, even in the extreme and unrealis-

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[76] *See, e.g.*, Michael Specter, *Getting a Fix*, NEW YORKER (Oct. 17, 2011), *available at* http://www.newyorker.com/magazine/2011/10/17/getting-a-fix, *archived at* http://perma.cc/6FG8-SB7D. Of course, one must be careful about extrapolating results in Portugal to the United States, given that Portugal is a culturally, ethnically, and religiously homogenous country with a population barely more than that of New York City alone (10.5 million vs. 8.8 million). *See* INSTITUTO NACIONAL DE ESTATÍSTICA, CENSOS 2011: RESULTADOS DEFINITIVOS PORTUGAL 18 (2012), *available at* http://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_publicacoes&PUBLICACOESpub_boui=148275789&PUBLICACOEStema=5414321&PUBLICACOESmodo=2, *archived at* http://perma.cc/9TLX-NVN7.

[77] The NCRP disaggregates drug offenses into heroin, cocaine/crack, marijuana/hash, other, or unspecified. Without any explanation, every Tier A state classifies almost every drug offense as either "other" or "unspecified." This is surely impossible: it cannot be the case that almost every drug inmate in New York State is serving time for something other than heroin or crack/cocaine (or marijuana). But it is also impossible to back out what the real drug offenses are for such inmates.

tic case where the full 25% of "unspecified" offenders are marijuana offenders, over two-thirds of all inmates serving time for drug offenses are still incarcerated for non-marijuana crimes.

FIGURE 4A: PERCENTAGE OF DRUG OFFENDERS SERVING TIME FOR MARIJUANA OFFENSES, TIER B STATES, 2000–2011.

Note: Data from NCRP.[78] Tier B states are listed in note 47.

While marijuana decriminalization may not significantly reduce drug-related incarcerations, the story is slightly different when it comes to drug-related arrests. Figure 4B plots the share of drug arrests for marijuana charges over the period between 1982 and 2012. Although the fraction of drug arrests for marijuana dropped significantly during the 1980s, as attention turned to heroin and crack/cocaine, by the end of the 2000s about half (48%) of all drug arrests were for marijuana. Even if most of these arrests are for possession and never result in any real jail time—in 2012, for instance, there were seven possession arrests for every sale arrest[79]—as noted above, they can still be destabilizing.

[78] *See* NCRP Data, *supra* note 49.

[79] In 2012, 42% of all drug arrests were for marijuana possession, 6% for marijuana sale. And at no point in the sample period do marijuana sale arrests top 10% of all drug arrests.

FIGURE 4B: PERCENTAGE OF DRUG ARRESTS FOR MARIJUANA OFFENSES, 1982–2012

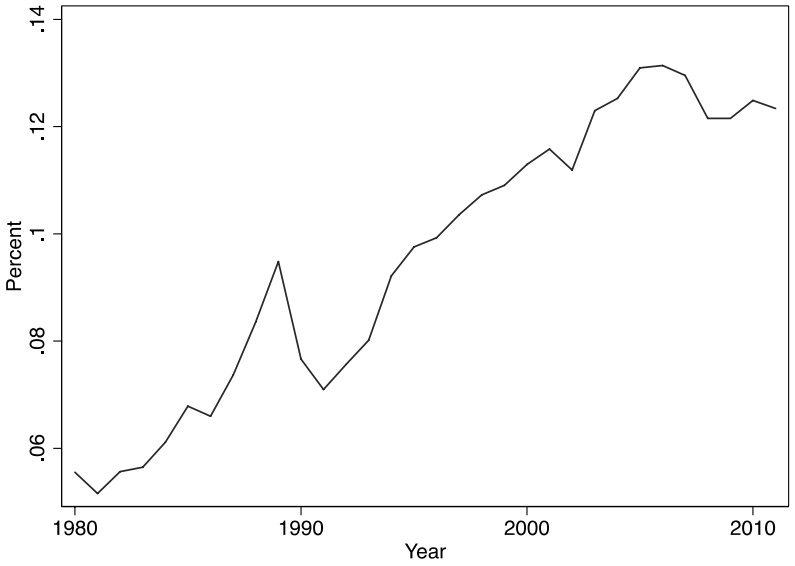
Note: Data from Sourcebook of Criminal Justice Statistics.[80]

So while decriminalization will not have a significant direct effect on drug-related incarceration, it could have a real impact on drug-related arrests. Yet the impact of such a reduction should not be overstated. Figure 4C plots the percent of all arrests that are drug-related, whether for possession or sale. As a share of all arrests, drug arrests increase until the 2000s, at which point they level out at around 12% or 13%.[81] Thus the legalization of all marijuana offenses—which exceeds even what has taken place in Colorado and Washington, the two states to have legalized marijuana most aggressively—would reduce drug arrests by about 48%, but drug arrests are just 12% of all arrests. The total decline in arrests due to marijuana decriminalization would thus be about 6%. Given that 12.4 million people were arrested in 2011, that translates into nearly 720,000 fewer arrests: a significant number, but one that is somewhat less impressive than expected given the 48%-of-all-drug-arrests figure.

[80] *See Percent Distribution of Arrests for Drug Abuse Violations*, SOURCEBOOK OF CRIM. JUST. STAT. (2013), http://www.albany.edu/sourcebook/pdf/t4292012.pdf, *archived at* http://perma.cc/4ZQ6-82C5.

[81] The same pattern holds if limited to serious arrests, i.e., sale/manufacture as a percentage of sale/manufacture, index violent crime arrests, and index property crime arrests.

FIGURE 4C: DRUG ARRESTS AS PERCENT OF ALL ARRESTS, 1980–2011



Note: Data from the Arrest Data Analysis Tool.[82]

As with decriminalization, sentencing reductions sound promising, but such reforms are not likely to deliver the changes desired. The main issues are that (1) inmates generally serve relatively short sentences in the first place, and (2) drug offenders serve shorter sentences than average prisoners. This is illustrated in Figure 5, which provides several perspectives on time-to-release in all Tier A states in the NCRP, excluding California.[83] Figure 5A plots the median time to release for drug offenders and non-drug offenders for each entry cohort between 2000 and 2011.[84] Figures 5B and 5C plot the 75th percentile and 90th percentile times to release, respectively.[85]

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[82] *Arrest Data Analysis Tool*, BUREAU OF JUST. STAT., http://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm (last visited Oct. 30, 2014), *archived at* http://perma.cc/YV8K-YSKZ.

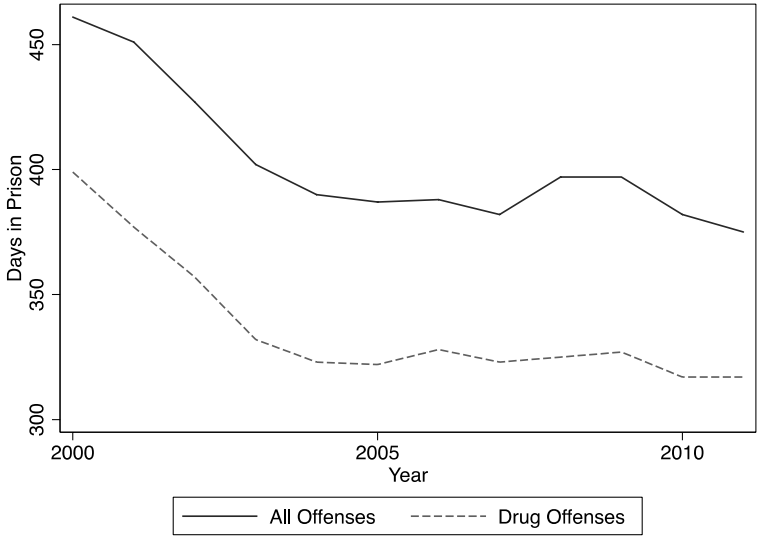
[83] Californian inmates serve disproportionately short stints in prison, in no small part due to California's historically disproportionate reliance on parole releases and violations to manage its prison population prior to Realignment. California comprises nearly half of the Tier A observations—1.52 million admissions over the sample period. Given this and its outlier status, it is important to treat California separately.

[84] In other words, half of all inmates admitted in 2000 were released in slightly more than 500 days, and half of all drug offenders admitted in 2000 were released in just under 400 days. The figure stops in 2011 since too few prisoners had been released from the 2012 entry cohort to compute enough of the variables of interest. Tellingly, even with data only through 2012, the median time served by inmates admitted as late as 2011 can be computed, which only strengthens the claim that time served is relatively short.

[85] Not all years have 75th and 90th releases, since in some cases those inmates were not released as of 2012, the last year of available data.

As is clear in Figure 5, drug inmates (as well as non-drug offenders) serve fairly short terms in prison. The median time is on the order of about one year, with 75% of all drug offenders released in under two years, and 90% generally out in slightly more than three. It thus seems that in most cases the official maximum sentences for drug offenses are not binding. This is not to say that cutting the statutory sentence length will have no effect on incarceration rates—district attorneys may use the threat of long sentences to induce pleas more quickly, for example—but it does mean that any sort of effect will be indirect and will operate in ways that are not fully understandable given the lack of empirical data on how the plea bargain process operates.

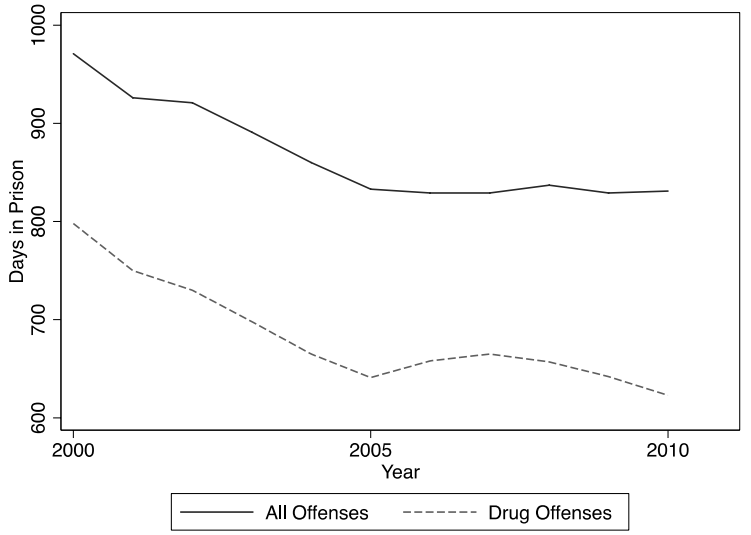
FIGURE 5A: MEDIAN TIME TO RELEASE, TIER A STATES, 2000–2011.



Note: Data from NCRP.[86] Tier A states are listed in note 47.

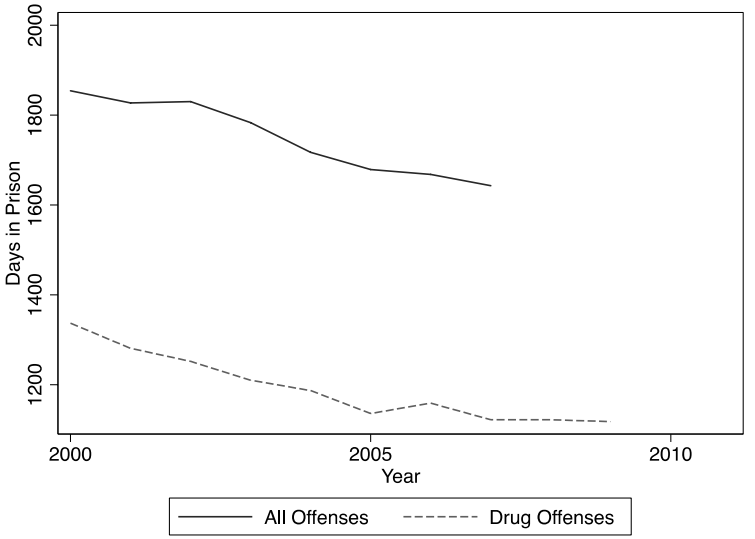
[86] NCRP Data, *supra* note 49.

FIGURE 5B: 75TH PERCENTILE TIME TO RELEASE, TIER A STATES, 2000–2011.



Note: Data from NCRP.[87] Tier A states are listed in note 47.

FIGURE 5C: 90TH PERCENTILE TIME TO RELEASE, TIER A STATES, 2000–2011.



Note: Data from NCRP.[88] Tier A states are listed in note 47.

[87] *Id.*
[88] *Id.*

Thus, decriminalization and sentence reduction will have only nominal, direct effects on incarceration in general—and likely on the incarceration of drug offenders alone. Yet both could still have some impact, although calculating the scope of that impact is quite difficult. Decriminalization, for example, could significantly alter the scope of drug arrests, though its impact on total arrests would be much less.[89] And sentence reduction could alter the threats prosecutors are able to bring to bear during the plea bargain process. Both of these effects could be significant, but there is simply a lack of empirical knowledge at this point as to whether that would be the case.

B. Parole Reform

Reforming parole procedures is another avenue legislatures could pursue to reduce incarceration in general, and drug-related incarceration in particular, but this approach too will likely not have a significant impact. While the decision to grant parole is made by a state-level executive office (parole boards are generally appointed by the governor) and the decision when to revoke parole is made by local probation officers, it is the legislature that defines the restrictions placed on parolees (such as the need to attend drug treatment) and the violations that trigger revocation back to prison (such as failing a drug test). Thus, for example, North Carolina recently made it easier for probation officers to use non-incarcerative alternatives to deal with parolees who commit technical violations such as failing a drug test.[90] In this case, the legislature may be relying on the discretion of probation officers not to violate offenders back to prison (i.e., parole officers can, but need not, use alternatives). However, one could easily imagine a legislature mandating that certain low-level violations, such as certain types of drug-test failures, cannot result in revocation back to prison. That said, the results in Part II.B. above caution against putting too much weight on such changes. At least at a national level, technical violations are relatively unimportant; national results mask significant state-by-state variation, however, so parole reform may be more effective in some outlier states.

C. Regulating the Prosecutor

The challenge that state legislatures face is that the actor most responsible for determining the scale of incarceration—the prosecutor—is one over

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[89] The Prohibition-like arguments in favor of decriminalization—that it would reduce non-drug offenses like murder by legalizing currently-illegal drug markets and reducing the need to resolve disputes in them with violence—likely do not apply with much force to the decriminalization of marijuana. *See, e.g.*, Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. Econ. Persp. 175, 178 (1995).

[90] *See, e.g.*, Lauren-Brooke Eisen & Juliene James, Vera Inst. of Just., Reallocating Justice Resources: A Review of 2011 State Sentencing Trends 10 (2012), *available at* http://www.vera.org/sites/default/files/resources/downloads/reallocating-justice-resources.pdf, *archived at* http://perma.cc/B9BK-NPXU.

whom they have almost no direct control. In 47 states, district attorneys are directly elected, and generally at fairly local levels; in the three states without direct elections,[91] they are appointed by the state Attorney General, who is generally a directly-elected executive official (and thus again relatively autonomous from the legislature).[92] Furthermore, the budgets for prosecutors are determined at the local/county level, so legislative control over the state budget does not provide the legislature with direct control either (although its control over intergovernmental transfers may be important).

Actually, the fiscal situation is worse; not only do legislatures not have direct control over prosecutorial budgets, but also they have effectively granted prosecutors almost unfettered access to state budgets.[93] Locally elected prosecutors determine whom to charge with felonies, crimes that result in time spent in state-funded prisons. This creates an obvious moral hazard problem, which is amplified by the fact that lesser sanctions such as jail time, probation, or diversion are often paid for by the county.[94] Thus incarceration in prison is actually "cheaper" for the prosecutor than something less severe.

Yet despite the political and fiscal autonomy of prosecutors, there are steps that legislatures could take to rein in their independence. First, they could try to regulate their behavior directly by imposing prosecutorial guidelines. After all, judges are often relatively independent of legislatures as well, yet judicial guidelines have often been effective at regulating judicial sentencing practices.[95] And such prosecutorial guidelines are not entirely unheard of. As discussed below, New Jersey has adopted them, at least for pleading out drug cases. Admittedly, New Jersey is the only state to implement such guidelines, and they were developed by the Attorney General (not the legislature) as the result of judicial (not legislative) pressure in a state where the Attorney General has more control than most over local district attorneys. Nonetheless, prosecutorial guidelines are worth at least some attention.

A more indirect, but perhaps more politically viable, approach is to target prosecutors' financial incentives for going after drug offenders. If felony drug cases become more "expensive" to prosecutors, prosecutors will

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[91] These states are Alaska, Connecticut, and New Jersey. *See* STEVEN W. PERRY, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2005 2 (2006), *available at* http://www.bjs.gov/content/pub/pdf/psc05.pdf, *archived at* http://perma.cc/B6RJ-CF3X.

[92] State attorneys general are elected in forty-five states, with the governor (a directly-elected executive official) appointing the AG in three others. *See* Matt Friedman, *An Elected Attorney General? Lawmaker Wants to Let Voters Choose, Not Christie*, NJ.COM (Mar. 11, 2014, 10:35 AM), http://www.nj.com/politics/index.ssf/2014/03/an_elected_attorney_general_lawmaker_wants_to_let_voters_pick_not_christie.html, *archived at* http://perma.cc/8FKD-BHSQ.

[93] *See* WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE, at location 3059 (Kindle ed. 2013).

[94] *See id.*

[95] *See, e.g.*, John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235 (2005).

likely pursue them less frequently. And if prosecutors are less inclined to prosecute drug cases, police may reduce their focus on drug arrests.[96] Here the most striking effort can be seen in California, whose "Realignment" process has attempted to push much of the financial obligation of convicting and incarcerating drug offenders onto the counties (and thus onto the prosecutors).

1. Direct Regulation: Prosecutorial Guidelines

Almost all states impose almost no substantive controls on prosecutors, even those with comprehensive judicial sentencing guidelines, despite the tremendous power prosecutors wield. The one exception is New Jersey, which has experimented with imposing rigorous plea bargaining guidelines on prosecutors, primarily for drug cases. Over the course of the 1990s, the New Jersey Supreme Court held that prosecutorial discretion to invoke charges that carried mandatory minimums in drug cases, combined with restrictive sentencing guidelines, violated the state's separation of powers doctrine.[97] To remedy this problem, the court instructed the state Attorney General to draw up guidelines to regulate prosecutorial plea bargaining in drug cases. The current guidelines, called the "Brimage Guidelines,"[98] run to over one hundred pages and instruct prosecutors about acceptable discounts, including aggravating and mitigating situations that permit lesser or greater discounts. Trial courts have the authority to review plea decisions under an "arbitrary and capricious" standard.[99]

The Brimage Guidelines look very much like sentencing guidelines. They have a plea bargain grid with offense severity on one axis and prior criminal history on the other, and a list of aggravating factors (including that the defendant resisted arrest and the crime occurred in a "quality of life" zone) and mitigating factors (including that the defendant is enrolled in a treatment program or has no prior court involvement) for prosecutors to consider. Based on the offense, prior history, and adjustments due to aggravators and mitigators, the prosecutor is given a plea range that he is allowed to offer. There are a host of exceptions, such as when the crime is

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[96] This would be true at least to some extent. In some cases low-level drug arrests may be used more as a means of order-maintenance, not drug control, with the primary goal being to temporarily detain the arrestee, not to necessarily convict him. These arrests would be relatively unaffected by a change in prosecutorial behavior.

[97] *See, e.g.,* State v. Brimage, 706 A.2d 1096 (N.J. 1998); State v. Vasquez, 609 A.2d 29 (N.J. 1992); State v. Lagares, 601 A.2d 698 (N.J. 1992).

[98] Named after *Brimage*, 706 A.2d 1096, the case that invalidated prior guidelines and led to the most recent set of revisions.

[99] *See* ST. OF N.J. DIV. OF CRIM. JUST., REVISED ATTORNEY GENERAL GUIDELINES FOR NEGOTIATING CASES UNDER N.J.S.A. – EFFECTIVE FOR OFFENSES COMMITTED ON OR AFTER SEPTEMBER 15, 2004 [hereinafter Brimage Guidelines 2], *available at* http://www.njdcj.org/agguide/directives/brimage_all.pdf (last visited Oct. 30, 2014), *archived at* http://perma.cc/MYP5-FM3K; *see also* Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087, 1104 (2005).

particularly heinous or when a conviction is difficult to secure,[100] but the guidelines impose structure on when and how prosecutors secure plea bargains, and judicial oversight appears to encourage compliance with the guidelines.

Obviously, the Brimage Guidelines are a limited case. They were spurred by state supreme court resistance to sentencing guidelines, imposed in a fairly liberal state that is one of the few whose district attorneys report to the state Attorney General, and apply to only a narrow set of crimes. Yet it is interesting to note that the scope of covered crimes has expanded beyond drug cases, as the state Attorney's General office has already developed guidelines for sex offender registration among other offenses.[101] There is clearly at least some support for such guidelines in New Jersey.

And there is no obvious reason—absent aggressive lobbying by politically-powerful prosecutors' offices—why legislatures could not impose such guidelines themselves.[102] In many cases judicial guidelines have been quite effective at regulating fairly autonomous judges, and there is no *a priori* reason to believe that similar guidelines could not regulate prosecutors as well. That said, the absence of guidelines outside of New Jersey suggests that states are generally reluctant to impose such restrictions, even though in an era of low crime and tight state budgets, the political power of prosecutors to resist any and all oversight in the name of being "tough on crime" may be waning.[103]

2. *Indirect Regulation: Targeting Budget Constraints*

A more indirect approach that legislators could take would be to make incarceration less "free" for the prosecutor. Long theorized,[104] the approach has become the foundation of California's "Realignment" efforts to cure constitutional deficiencies with its prison system. In *Brown v. Plata*, the

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[100] *See, e.g.*, Brimage Guidelines 2, §§ 3.11-13.

[101] *See* Wright, *supra* note 99, at 1097 n.46; ST. OF N.J. DIV. OF CRIM. JUST., ATTORNEY GENERAL GUIDELINES, *available at* http://www.state.nj.us/lps/dcj/agguide.htm (last visited Oct. 30, 2014), *archived at* http://perma.cc/Z8ZU-SC5F.

[102] Prosecutors may be better positioned than judges to resist guideline adoption. Even in states where judges are directly elected in partisan elections, they are considered less "political" actors than prosecutors and thus less able to publicly lobby for or against legislation. And judges may in fact be ethically restricted from doing so. Prosecutors face no such limitations.

[103] For example, in a 2011 poll of 800 politically active Republicans in Florida, 65% said they would vote for a prosecutor who was "smart on crime" over one who was "tough on crime." *See* FL. TAXWATCH, SMART JUSTICE POLL RESULTS 5 (2012), *available at* http://www.floridataxwatch.org/resources/pdf/SmartJusticePoll11912.pdf, *archived at* http://perma.cc/9ZZ8-RRSS. Such results suggest that the tough-at-any-cost approaches of past years (to the extent they were more than rhetorical flourishes) are coming to an end.

[104] *See, e.g.,* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996), which advocated for allotting each district attorney a given number of state prison bed-years each year that he or she could use. So a District Attorney given 100 bed-years for 2014 could send 100 people to prison for one year each or two people to prison for fifty years.

United States Supreme Court held that overcrowding in California's massive prison system, and the attendant breakdown in health and mental health services, rose to the level of an Eighth Amendment violation, and it affirmed a lower-court decision ordering California to reduce its prison population.[105]

California's answer was "Realignment," a complicated system designed to make county officials internalize the costs of incarceration. The process itself is quite complex, and working through its particulars are beyond the scope of this article, but at its heart is the rule that if felony convicts classified as "triple-nons"—non-violent, non-sexual, non-serious offenders[106]—are going to be imprisoned, that sentence must be served in the county jail in the county in which they are convicted, regardless of the length of the sentence. In other words, California imposes no limit on how county prosecutors choose to manage relatively low-level cases, but by requiring such defendants to serve any term in county jail, Realignment forces those county officials to internalize the cost of punishment.[107]

At least so far, Realignment seems to be having a dramatic effect on California prison populations. Although California's incarceration levels had started to decline in 2006, about the time that federal courts began to actively monitor confinement conditions in the state, between 2006 and 2010 its prison population dropped by only 10,000, from 175,000 to 165,000.[108] Realignment went into effect on October 1, 2011, and by the end of that year California's prison population had dropped by over 15,000 to slightly less than 150,000. By the end of 2012 it had dropped another 15,000 to under 135,000.[109] California is just one state, and other states without the same combination of excessive overcrowding, aggressive federal judicial oversight, and political culture may not be able to adopt a similar plan, or may not see similar outcomes. But California's results at least indicate that in some settings directly targeting the moral hazard problem could lead to significant reductions in incarceration.

Legislatures could also experiment with less comprehensive approaches, such as taxing counties for the convicts they send to state prisons

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[105] Brown v. Plata, 131 S.Ct. 1910 (2011).

[106] "Non-sexual" means that the offender does not need to register as a sex offender, and "serious" offenders are those convicted of serious violent or destructive crimes such as murder or arson or carjacking as defined in Cal. Penal Code § 1192.7(c).

[107] This is at least true in theory. In practice, Realignment has also involved providing counties with subsidies to partially offset the unexpected, increased costs of having to lock up triple-nons. If not managed properly, such subsidies could undermine the entire goal of forcing counties to internalize the costs of incarcerating these low-level offenders. The state has been experimenting with various ways to provide the subsidies, in part to try to avoid this very problem. *See* Mia Bird & Joseph Hayes, Pub. Pol'y Inst. of Cal., Funding Public Safety Realignment (2013), *available at* http://www.ppic.org/content/pubs/report/R_1113MBR.pdf, *archived at* http://perma.cc/4ZES-GHW6.

[108] BJS/NPS Data, *supra* note 2.

[109] Not surprisingly, jail populations have risen, but in theory those are being paid for out of local budgets and thus (properly) reflect local priorities—putting aside the subsidization concerns raised in note 107.

or, conversely, offering a rebate for those that they do not send. The tax-per-prisoner idea is straight-forward, though it raises obvious political concerns: a local state legislator could face opposition from a district attorney who argues that public safety is being impeded when the county "can't afford" to send a serious offender to prison. A rebate could achieve similar results—to send a defendant to prison is to forego a rebate—but with better political optics. It would also raise some trickier implementation issues, such as determining the proper baseline below which counties would be subsidized, and making sure the rebate is calibrated such that counties don't have a positive incentive to convict-and-divert defendants.[110] But some sort of policy to fiscally incentivize prosecutors to rely on more local, and likely cheaper and more efficient sanctions could certainly be developed.

Legislators could also scale back policies that give local enforcement officials an incentive to go after drug offenders. The most obvious example are asset forfeiture laws, which often allow local police departments to keep assets seized in drug raids. Such laws were drafted with the goal of encouraging drug interdiction and repealing or reducing them would likely lead police to focus their attention elsewhere, at least on the margin.[111] But despite some of the alarm commentators have raised over the effects of such laws,[112] their impact can be overstated. One recent empirical paper, for example, found that local governments offset police funding by about 25 to 40 cents on the dollar: for every dollar a police department received under an asset forfeiture law, its budget was reduced by 25 to 40 cents.[113] The study's evidence also indicated that police took these reductions into account when making choices.[114] Given the offsets, reforming these laws will not have quite the punch in practice that it might seem on paper.

As should be clear by now, my conclusions here are somewhat skeptical about the impact many legislative reforms could have on prison growth. The tools most readily available to the legislature—decriminalization, sentence reduction, parole reform—seem unlikely to have a strong immediate impact on prison populations in general, and drug incarcerations in particular. Other approaches such as prosecutorial guidelines and budgetary re-

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[110] For example, this policy ought to avoid situations in which a county receives $1,000 for not sending certain felons to prison, yet an available diversion program costs only $750.

[111] There have only been limited efforts along these lines. *See, e.g.*, Nick Sibilla, *Minnesota Now Requires a Criminal Conviction Before People Can Lose Their Property to Forfeiture*, FORBES (May 7, 2014), http://www.forbes.com/sites/instituteforjustice/2014/05/07/minnesota-forfeiture-reform/, *archived at* http://perma.cc/6DHG-BWJR.

[112] *See, e.g.*, MARIAN R. WILLIAMS ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE (2010), *available at* http://www.ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture-4, *archived at* http://perma.cc/PYS7-DZ7B.

[113] Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2125 (2007). Their results actually indicate that the 25 to 40 cent reduction is when police take advantage of state asset forfeiture programs. When the police rely on a nominally more generous parallel federal program, the local governments wholly offset the forfeitures on a one-for-one basis.

[114] *Id.* at 2135.

forms may be more effective, but are politically more challenging and much more difficult to design and implement. It is telling that many states are reducing time served and decriminalizing marijuana, but none seem to be following in the footsteps of New Jersey and California.

However, to end on an optimistic note for those hoping to rein in drug enforcement, even if the legislature's powers are relatively weak or hard to take advantage of, drug decarceration can still occur. Just because the moral hazard problem persists does not mean that police and prosecutors will always take (full) advantage of it. Consider Figure 7, which plots the number of drug offenders in New York State prisons over time. The three vertical lines indicate the years when the Rockefeller Drug Laws were adopted (1973), and when the Laws were reformed, first toothlessly (2004) and then more substantively (2009).[115]

Two clear features stand out. First, just because a state legislature passes tough laws does not mean police and prosecutors take advantage of them right away; drug incarcerations actually fell in the wake of the Rockefeller Drug Laws' passage, and they did not rise until crack exploded on the scene. Second, and more relevant here, drug incarcerations have declined steadily since 1997 not because of any real change in the state law, but because police and prosecutors simply changed their priorities. The decline began well before the hollow 2004 reforms and continued unabated after their passage and after the passage of the more-substantive 2009 reforms. And while this change in priorities was not constant across the state—the state-wide drop in drug incarcerations was driven by the five counties that comprise New York City, with New York state's remaining counties continuing to increase the number of drug offenders they sent to prison[116]—the decline nonetheless shows that downstream actors can change their choices even when the legislature is inactive on the issue.

For reformers, the lessons from New York are clear: it may be more effective to engage with the downstream actors directly rather than to lobby legislatures. Working to elect mayors and district attorneys who pledge not to aggressively prosecute drug cases may have a much bigger impact than trying to change the state drug laws. However, such city-by-city and county-by-county campaigns are potentially more expensive and time consuming than lobbying the legislature, especially in states unlike New York where crime and enforcement are less concentrated in just a few cities and counties, even though the results of the campaigns might be much more significant.

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[115] 1973 N.Y. Laws chs. 276–78, 676, 1051; 2004 N.Y. Laws ch. 738; 2009 N.Y. Laws ch. 56.

[116] *See* JAMES AUSTIN & MICHAEL JACOBSON, BRENNAN CTR. FOR JUST., HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf, *archived at* http://perma.cc/B3LY-BDWJ, which points out that the rest of the counties in New York continued to be more punitive toward drug offenders and non-drug offenders alike, but that their increased punitiveness was more than offset by declining aggressiveness among New York City prosecutors.

FIGURE 7: DRUG INMATES IN NEW YORK PRISONS, 1965–2013

Notes: Data from the New York State Statistical Yearbook, various years.[117]

3. A Brief Note on Drug Addiction and Drug Market Violence

So far, the phrase "drug offenders," has referred to those punished for possessing or selling drugs. But there are two other types of offenders who could be considered "drug offenders" and whose punishment could be at least partially attributed to the War on Drugs: (1) those who commit non-drug offenses while on drugs, and (2) those who commit non-drug, violent offenses in the furtherance of drug trafficking. Taking this expanded view of "drug offenders" complicates, at least to some degree, the general point that the War on Drugs is relatively unimportant and so it requires at least a brief discussion.

First, consider the significance of classifying those who commit non-drug crimes while on drugs as "drug offenders." Such offenders are numerous. In the 2008 NCVS, for example, 9% of all violent crime victims, and nearly 17% of all rape victims in particular, thought that their assailants had been under the influence of drugs or drugs and alcohol at the time of the crime.[118] And this is surely a lower floor on drug use since nearly 50% of all

[117] *See* NEW YORK STATE STATISTICS, ROCKEFELLER INST. OF GOV'T, STAT. YEARBOOK, *available at* http://www.rockinst.org/nys_statistics/, *archived at* http://perma.cc/J2FW-3P49. The Yearbook was not published every year during the 1960s and 1970s, as well as during statistical year 1988. The figure includes the data for all years in which the Yearbook was published.

[118] CRIMINAL VICTIMIZATION IN THE UNITED STATES, U.S. DEP'T OF JUST. 2008 STATISTICAL TABLES, Table 32 (2011), *available at* http://www.bjs.gov/content/pub/pdf/cvus08.pdf,

respondents said they did not know or could not tell whether their assailants were under the influence of drugs or alcohol, and the Victimization Survey provides no information about those who commit property crimes.[119] Similarly, in the 2004 Inmate Survey, 56% of state prisoners admitted to using drugs in the month prior to their offenses, and 32% at the time of the crime; 17% of state offenders claimed they committed their instant offenses to get money for drugs.[120] Although many of these offenders committed non-drug crimes, drugs played a central role in their offenses.

Why, however, should society attribute an assault committed under the influence of drugs or a theft to feed a drug habit to the War on Drugs? If nothing else, the public's insistence on viewing drug use as a criminal rather than a public health issue likely precludes it from adopting more treatment-based approaches that target the underlying addiction fueling the criminal behavior. It is true that there has been a rising interest in drug courts in recent years, but it is telling that such courts require the defendant to go through the criminal justice process to secure treatment. Defendants are still generally required to plead guilty and continuously face the risk of criminal sanction during their time in treatment. Refusing to view drug addiction—and its attendant anti-social conduct—as a public health concern constrains the options available to deal with that addiction. To the extent that criminal-based approaches are less efficient at addressing the causes of addiction than civil or medical-based ones, the resulting social ills are, to some extent, caused by the War on Drugs and the attitudes that motivate it.

The second, broader definition of drug-related offending would account for a wider range of offenses caused by the War on Drugs. Edward Shepard and Paul Blackley lay out the possible links between drug enforcement and (marginal) increases in crime rates:

> (1) distribution networks are disrupted, leading to disputes over market share and informal contractual arrangements within these drug markets; (2) disruptions in the market lead drug sellers to switch to other forms of economic crime that are considered substitutes, such as robbery or burglary . . . ; (3) drug users resort to crime as a result of physical or psychological withdrawal, or from behavioral changes resulting from ending their self-treatment of medical conditions; (4) prices and profits increase for remaining sellers, providing more incentive for potential suppliers to engage in crime to obtain a share of the market and leading to more eco-

archived at http://perma.cc/E68Q-JAGE. At a more disaggregated level, 16.5% of rape victims, 16% of robbery victims, 10% of aggravated assault victims, and 7% of simple assault victims reported that their assailants were on drugs. Another 14% thought their assailants were under the influence of alcohol alone. *Id.*

[119] *Id.*

[120] Christopher J. Mumola & Jennifer C. Karberg, Bureau of Just. Stat., Drug Use and Dependence, State and Federal Prisoners 1 (2006), *available at* http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf, *archived at* http://perma.cc/3GNT-NQ9M.

> nomic crime by users who need to obtain income to support a habit; (5) resources spent on drug enforcement are diverted from investigations and arrests for other types of crime that may increase as a result . . . ; and (6) the imprisonment of drug users and sellers takes prison cells that are in short supply, resulting in the early release of other criminals, prison overcrowding, or new prison construction.[121]

A recent meta-analysis purports to show a positive (marginal) relationship between drug enforcement and crime rates, with more drug enforcement leading to more crime.[122] However, it appears that few if any of the studies included in the meta-analysis account for the risk of endogeneity. While drug enforcement may influence crime rates, crime rates surely influence drug enforcement as well. And if drug enforcement rises with crime rates,[123] then studies that fail to account for this reciprocal relationship will overstate the extent to which drug enforcement raises crime rates. In fact, they may even get the sign wrong (i.e., report that drug enforcement raises crime rates when it actually lowers them), though there is no real way to estimate the magnitude of the bias.

In other words, while the theoretical concerns are quite valid, the empirical evidence in support of it is quite weak—although absence of evidence should not be read here as evidence of absence, especially given the methodological challenge of estimating the relationship between drug enforcement and crime rates. That said, the connection between drug enforcement and violence is likely weaker today than in the past: violence overall is lower than it has been in forty years, yet drug consumption and drug markets are still operating at levels comparable to those in the much more violent 1980s.[124] While enforcement may have a marginal effect on violence—mar-

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[121] Edward M. Shepard & Paul R. Blackley, *Drug Enforcement and Crime: Recent Evidence from New York State*, 86 Soc. Sci. Q. 323, 327 (2005).

[122] *See* Dan Werb et al., *Effect of Drug Law Enforcement on Drug Market Violence: A Systematic Review*, 22 Int'l J. of Drug Pol'y 87, 87 (2011). Again, this is a marginal claim, so the fact that crime has fallen even as drug enforcement has risen does not disprove it: it could be that crime rates would have fallen *even faster* but for drug enforcement.

[123] At first blush, it may seem that rising crime rates should lead to less drug enforcement, since officers would be diverted from drug offenses to focus on more serious crimes. But officers may use drug arrests as easy pretextual ways to get violent offenders off the street, and the increased presence of officers in high-crime areas may have the collateral effect of producing more drug arrests as well.

[124] *See, e.g.*, Ronald G. Fryer, Jr., et al., Nat'l Bureau of Econ. Stat., Measuring the Impact of Crack Cocaine (2005), *available at* http://pricetheory.uchicago.edu/levitt/Papers/FryerHeatonLevittMurphy2005.pdf, *archived at* http://perma.cc/WZQ4-J9H3, which argues that prohibition-related violence associated with crack distribution declined over the course of the 1990s, even as crack markets remained relatively robust (at about 65% to 70% of their peak 1980s scale). Perhaps the statistic that most clearly suggests drug-related violence has declined is that the homicide rate for young people age 18 to 24 has dropped from about 25 per 100,000 in the early 1990s to about 13 per 100,000 by 2008; for black males aged 18 to 24, who bore the brunt of crack-related violence, from approximately 200 per 100,000 in the early 1990s to about 90 per 100,000 in 2008. *See* Alexia Cooper & Erica L. Smith, Bureau of

kets would be even more stable and violence even lower still but for current levels of enforcement—whatever destabilizing effect enforcement has is not strong enough to offset other forces pushing violence down.

In other words, defining "drug offenders" solely as those convicted of drug crimes is not as objectively correct as it might initially seem. Although certainly a valid and useful definition, there are other ways to think about what counts as the product of drug enforcement that may alter estimates of the impact of the War on Drugs. Furthermore, this section should establish that scaling back the War on Drugs can have collateral effects—such as changing how society manages addiction or how enforcement interacts with drug-market violence—that are not immediately apparent when simply looking at arrest or incarceration rates.

IV. Conclusion

With crime rates low and budgets tight, states have been seeking ways to reduce incarceration rates. One common suggestion has been to roll back the incarceration of drug offenders. Such an approach, however, will likely be disappointing, since drug-related incarcerations have not driven prison populations as much as conventional wisdom holds. Drug offenders do not make up a large enough share of all prisoners or (unique) admissions for drug reform alone to significantly reduce incarceration rates, nor do prior drug incarcerations seem to trigger repeat offender laws in large numbers. Neither do parole revocations appear to be driven by drug-related technical violations.

That does not, however, render drug enforcement irrelevant. Consider drug arrests, which could play an important role, for example, by contributing to neighborhood disorder that fuels prosecutorial aggressiveness. And treating drug use as a criminal rather than public health issue may foreclose more effective treatment options, or force treatment to be imperfectly wedged into pre-existing criminal justice institutions, as is the case with drug courts.

Furthermore, if legislators decide that reducing drug enforcement is still a net social good, regardless of its impact on prison populations, the tools at their disposal are limited. Criminal justice enforcement in the United States is highly disaggregated across a wide range of institutions operating relatively independently of each other. At least right now, prison growth is driven by prosecutorial aggressiveness, and legislatures have little control over locally elected, locally funded prosecutorial offices. Legislative success may require unconventional yet viable approaches, such as adopting charging or pleading guidelines or making efforts to push the cost of felony incarceration onto county budgets.

Just. Stat., Homicide Trends in the United States, 1980-2008 (2011), *available at* http://www.bjs.gov/content/pub/pdf/htus8008.pdf, *archived at* http://perma.cc/4T8A-T5GJ.