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Escaping from the Standard Story: Why The Conventional Wisdom on Prison Growth Is Wrong, And Where We Can Go From Here

John F. Pfaff*

Abstract

Whether as a result of low crime rates, the financial pressures of the 2008 credit crunch, or other factors, policymakers on both sides of the aisle are trying to rein or even reduce the US incarceration rate after an unprecedented forty-year expansion. Unfortunately, reforms are hampered by the fact that we do not have a solid empirical understanding of what caused the explosion in the first place. In fact, the “Standard Story” of prison growth generally overemphasizes less important factors and overlooks more important ones. This essay thus does two things. First, it points out the flaws in five key aspects of the Standard Story: its argument that the War on Drugs is of central importance, that trends in violent and property crimes are relatively unimportant, that longer sentence lengths drive growth, that the “criminal justice system” is a fairly coherent entity advancing specific goals, and that the “politics of crime control” is uniquely dysfunctional. And second, it argues that an increased willingness of the part of prosecutors to file charges—a causal factor almost completely overlooked by the Standard Story—is likely the most important force behind prison growth, at least for the past two decades.

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Key words: Incarceration, Incarceration Rates, Sentencing, Criminal Justice, Crime, Crime and Punishment, Prosecutors

The past four decades have witnessed an unprecedented surge in the US incarceration rate. Stable for nearly fifty years at about 100 per 100,000, it started surging in the mid-1970s to nearly 500 per 100,000 today. It is an explosion unprecedented here or abroad: with only 5% of the world's population, the US is now home to more than 20% of its prisoners.

But relatively low crime rates and tight state budgets have led to a fairly bipartisan desire to reduce the scale of US incarceration. Reform efforts, however, are hampered by a serious limitation, namely that we don't really understand what caused this growth in the first place. Actually, the problem is worse: policymakers, journalists, academics, and the wider public all generally accept a conventional wisdom—what I will call the “Standard Story”—that is *simply incorrect*. It is a situation worse than ignorance.

In this short essay I want to correct several of the more durable myths or misconceptions that are at the heart of the Standard Story, focusing on five problematic claims in particular: (1) the War on Drugs drives prison growth, (2) trends in violent and property crimes are relatively unimportant, (3) longer sentences drive prison growth, (4) the “criminal justice system” is a fairly coherent entity with identifiable goals, and (5) the politics of crime are uniquely dysfunctional. There are other aspects of the Standard Story that are also empirically problematic—such as claims tying prison growth to private prisons or to increased parole violations (particularly technical violations)¹—but these five are

¹ According to Bureau of Justice Statistics, only about 8% of state prisoners are held in private prisons. And while parole violations have gone up, so too have parole *releases*, thanks to rising prison populations. Parole releases and parole

among the most important claims, and my space here is limited. After pointing out the deep flaws with these five claims, I will highlight some of the more empirically plausible explanations, emphasizing in particular the importance of prosecutors and their willingness to file felony charges.

Five Problematic Explanations of Prison Growth

The Standard Story comes in many different forms, but across a wide range of commentators a fairly consistent—and flawed—story emerges. Here I consider five common, incorrect aspects of that Story.

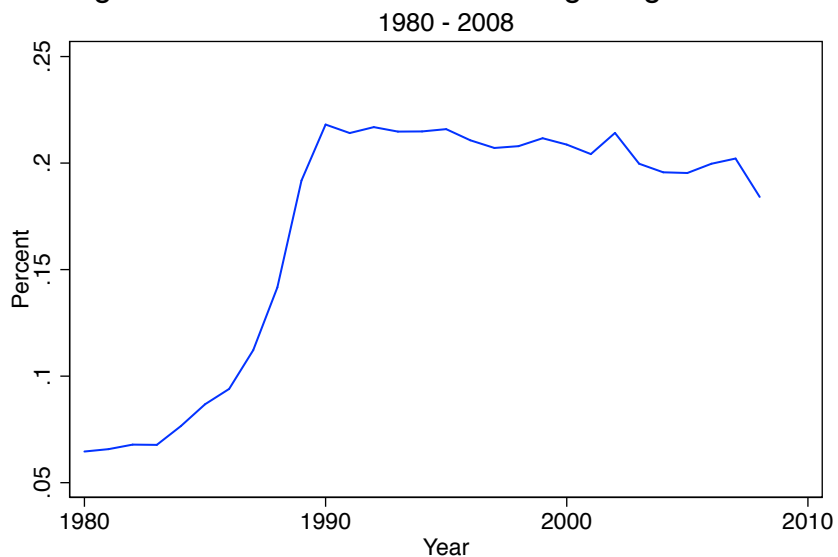
The War on Drugs. This is perhaps the most common and durable explanation. It is also easy to dismantle. Figure 1 plots the percent of state prisoners over time whose primary offense was a drug crime.² Yes, the percent rises sharply from 1980 to 1990, when it peaks at 22%. But that's *only* 22%: nearly four-fifths of all state prisoners in 1990 were not drug offenders.³ By 2010 the percent of state prisoners serving time for drug offenses was down to just over 17%.

violations move in relative sync (with states releasing more than they violate back), suggesting that parole violations are less the cause of but more the symptom of prison growth. See John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program*, 13 AM. L. & ECON. REV. 491 (2011).

² The national statistics on imprisonment prioritize offenses, ranking violent ahead of property and property ahead of drugs. So someone sentenced for arson and drug possession would appear just as a “violent offender.”

³ About half of all federal prisoners are serving time for drug offenses due to the federal system's limited jurisdiction, but only about 12% of all prisoners are federal inmates. So adding in the federal system raises the percentages by about five percentage points, not enough to change the qualitative story here.

Fig. 1: Percent of Prisoners Serving Drug Sentences



The relative unimportance of drug incarcerations can be illuminated even more strikingly. Between 1980 and 2009, state prisons added 1,086,200 prisoners, as the prison population rose from 294,000 to 1,380,200. This increase consisted of 551,000 more violent offenders, 171,900 more property offenders, and only 223,000 more drug offenders (with the rest committing public-order and other miscellaneous crimes). In other words, the increase in drug incarcerations explains only 21% of the growth in state prison populations.⁴ The increase in violent offenders alone explains 51%—*more than half*—of the overall growth, and that in violent and property offenders explains 67%. When someone like Michelle Alexander argues in *The New Jim Crow* that drugs in-

⁴ 223,000 is 21% of 1,086,200.

carcerations are the primary source of prison growth she is simply, categorically wrong.⁵

That said, it is possible that the war on drugs could have important *indirect* effects. First, drug arrests may not result in incarceration, but they can disrupt the offender's life (relationships, employment, etc.) in ways that may lead to future criminality: a future burglary or aggravated assault could be the product in part of the social disruption from a prior drug arrest. Second, drug arrests and convictions increase a defendant's criminal history, resulting in tougher sanctions or treatment for future non-drug offenses.⁶ Third, prohibition itself can lead to violence and other crimes, whether by destabilizing drug markets, by increasing the returns on illegal activity, by making it harder to treat drug *addiction* as a public health problem instead of a criminal one, etc.

The policy implications here are clear. Reducing the admissions of drug offenders will not meaningfully reduce prison populations. Addressing the collateral costs of the war on drugs—such as longer criminal records or the social destabilization of arrest—may be more productive. But it is much more likely that meaningful reform must look at how we treat violent and property offenders, to whom I turn now.

The Importance of Violent and Property Crimes. One surprising aspect of the Standard Story is that it downplays the impact of violent and property crime trends on incarceration rates. Its insistence that the war

⁵ This is not a strawman argument, nor an overstatement of what she says: "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.*" Michelle Alexander, *The New Jim Crow* 6 (2012) (emphasis added). It should be clear by now that this assertion is fundamentally, indeed distressingly, incorrect.

⁶ Some preliminary results from the 1997 and 2004 waves of the National Survey of Inmates in State and Federal Correctional Institutions, however, cautions against putting too much weight on this theory as well.

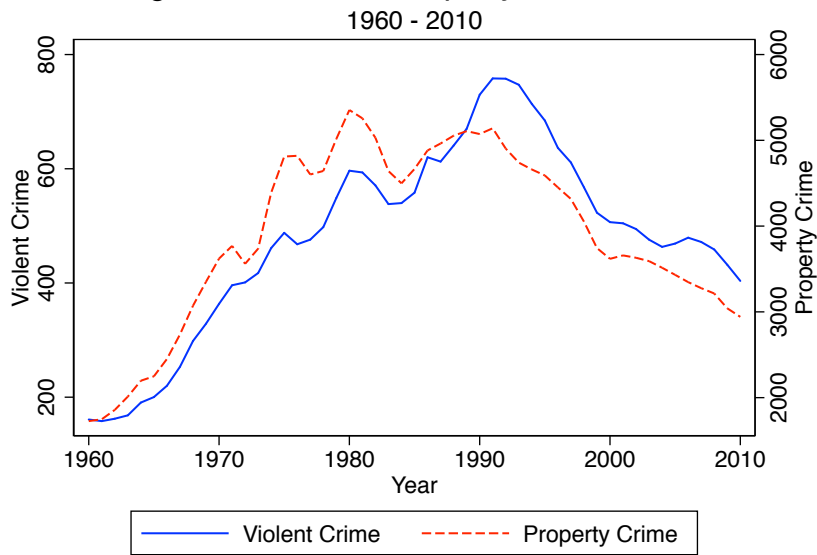
on drugs is the primary engine of prison growth surely explains this to some extent. Yet this is a serious error in the Standard Story's account.

Figure 2 plots violent and property crime rates since 1960. Between 1960 and 1991, violent crime grows by 371% and property crime by 198% (from a baseline ten times as high). Like the subsequent expansion in prison populations, this was an historically unprecedented explosion in crime. Such soaring criminality surely changed people's attitudes towards punishment, but it also likely had a direct impact on incarceration level. Empirically estimating the impact of crime on incarceration is actually quite tricky,⁷ but one of the more sophisticated—albeit still quite problematic—estimates suggests that a 1% increase in crime may lead to an approximately 1% increase in incarceration.⁸ If so, rising crime explains half the prison growth up through 1991. Of course, that means other factors explain the other half, but these results nonetheless place changes in violent and property crime at the heart of changes in incarceration.

⁷ Perhaps another reason the Standard Story downplays the role of violent and property crime comes from the trends in Figure 2. Prison populations grew when crime rates were rising (1960 to 1980, 1984 to 1991), falling (1991 to the present), and flat (1980 - 1984), suggesting that prison populations grew independently of crime rates. Yet simple correlations like these can be deceptive.

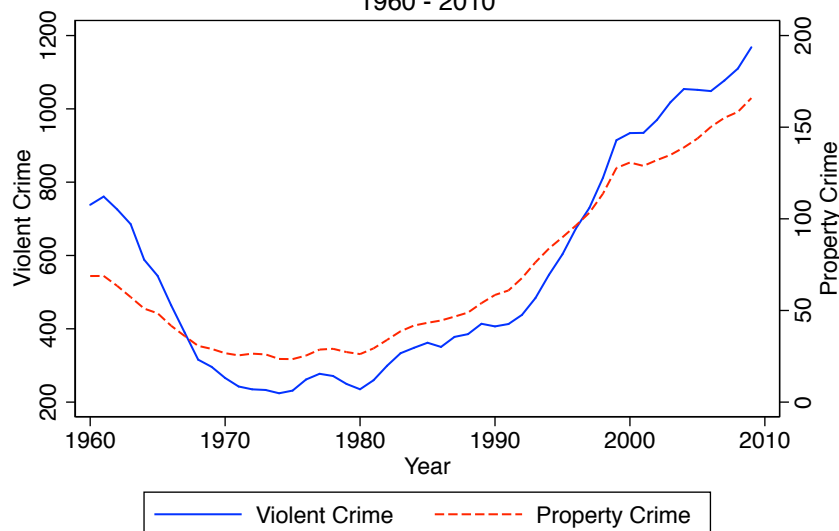
⁸ Yair Listokin, *Does More Crime Mean More Prisoners? An Instrumental Variable Approach*, 46 J. L. & ECON. 181 (2003). The concerns with Listokin's results are technical in nature: Listokin uses abortion as an instrument for crime, which requires abortion to be otherwise uncorrelated with incarceration. This is likely not true since, for example, increased abortion could free up female labor supply leading to higher tax returns, higher state revenue, and thus an increased willingness to incarcerate. The likely absence of strict exogeneity dictates that we treat these results with some caution.

Fig. 2: Violent and Property Crime Rates



In fact, Figure 2 may actually *undersell* the psychological impact of the crime boom of 1960 to 1991. Figure 3 provides an alternate version of the US incarceration rate, not in terms of prisoners per person, but in terms of prisoners per *crime*; call this the “effective” incarceration rate. What is striking is the significant *decline* in the effective incarceration rate from 1960 to 1980: as crime rates soared, the incarceration rate—and in some years the absolute number of prisoners—fell or stayed flat.

Fig. 3: Viol. and Prop. Crime Rates Per 1,000 Prisoners
1960 - 2010



Note: Data from the Uniform Crime Report and National Prisoner Statistics

Whether the decline in effective incarceration was good policy is immaterial. It could be that an increase in effective incarceration would have led to more crime, or that no reasonable increase in incarceration could counteract the broad social and demographic upheavals that pushed up crime in the 1960s. But what may really matter is that the Baby Boomers—a large, politically powerful bloc of voters—saw crime soar while prison populations fell and thought a causal connection existed. And this perception, whatever the true causal relationship, likely influences the politics of punishment to this day.

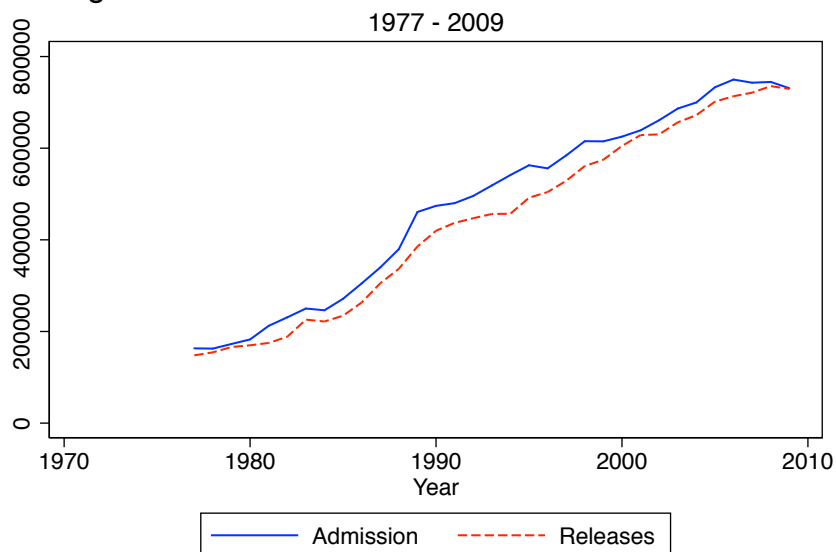
The (un)importance of longer sentences. Another core argument of the Standard Story is that longer sentences have driven up prison populations. We are, according to some leading criminologists, in a “throw away the key” era. Yet despite anecdotes of bracingly long sentences for relatively minor offenses, the evidence suggests that time served has remained relatively stable over many years. In fact, not only is time

served stable, but at least for many Northern states (which provide more reliable data), it is surprisingly short: median sentence lengths are on the order of two to four years, with three-fourths of all inmates released in about six to eight years. Two or six years in a state prison is a serious sanction, but such sentences are not throw-away-the-key long.

Figure 4 provides intuitive evidence that sentence length has not grown noticeably over time. All Figure 4 plots is the total annual number of admissions to and releases from state prisons. Were sentence lengths growing systematically tougher, we should expect releases to grow at an increasingly flatter rate relative to admissions. And while there is some such flattening in the early 1980s, over the rest of the period the two lines track each other closely—and they even *converge* in the 2000s. More rigorous studies using various forms of inmate- and state-level data appear to confirm this intuition.⁹

⁹ Pfaff, *The Myths and Realities of Correctional Severity*, supra note 1; John F. Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73 (2010); and John F. Pfaff, *The Centrality of Prosecutors to Prison Growth: An Empirical Analysis* (unpublished manuscript, 2014).

Fig. 4: Admissions and Releases from State Prisons



This is an admittedly bold claim, and I want to note a few reservations. First, that time served has been stable does not mean tougher sentencing laws are irrelevant. As I will discuss below, at least since the early 1990s the primary engine of prison growth has been an increased willingness on the part of prosecutors to file felony charges. By giving prosecutors bigger hammers to wield during the plea bargaining process, tougher sentencing laws may enable prosecutors to extract guilty pleas more quickly from defendants (by offering *not* to use the tougher law). Thus convicted defendants may serve the same amount of time as before, but more defendants plead out (rather than, say, risking a trial or having their cases dismissed or knocked down to a misdemeanor).

Second, admissions have been rising during a time of declining crime, which means that states must be admitting increasingly marginal offenders. If so, perhaps we should have expected time served to *fall*, not stay flat. That time served has remained stable could reflect that we are imposing harsher sentences on less-serious offenders than before.

Tests for this effect seem to confirm that it is present, but not necessarily that it is particularly strong.

The criminal justice system is not a system. The Standard Story also treats the criminal justice system like some sort of coherent entity with defined goals; at the very least, it posits that those at the top of the political hierarchy—governors, presidents, political parties—use “the system” to accomplish certain objectives, such as reducing crime or regulating and controlling minority populations. In fact, this is a common view of criminal justice in many areas of research and policy. But it is a deeply flawed one.

The criminal justice system is not a “system” at all, and treating it as such can lead analysts to overlook important causes of prison growth. This alleged “system” is actually a poorly thought out, sprawling mélange of competing institutions with different constituencies and incentives, and which at times do not work well together. It consists of local police, county district attorneys, county or state judges (who are either appointed or elected, and if elected are chosen in partisan or non-partisan elections), state-level governors and parole boards, and hybrid state legislators (who hold state-level office but often represent hyper-local districts), not to mention various federal bureaucracies, county sheriffs, regional task forces, state sentencing commissions, and so on. And not only is authority divided across these actors, but there is often no clear logic to why authority is divided the way it is.

Consider one clear example of a poorly-reasoned allocation of authority and its costs. Jails and probation offices are funded by counties, prisons by states. This creates a significant moral hazard problem for county prosecutors: their constituents don’t pay the full cost of the felony convictions they secure, although the prosecutors reap the full tough-on-crime political benefits. In fact, prosecutors are incentivized to charge borderline cases as felonies, since misdemeanors resulting in jail or probation accrue less political benefit *and* increase county costs. A

model that treats the criminal justice system as a coherent entity will miss such moral hazard issues—which is exactly the trap into which the Standard Story falls.

By ignoring these institutional factors, the Standard Story fails to identify *who* is driving prison growth: are police arresting more offenders, district attorneys charging more, judges convicting and sentencing more, judges (or legislators) sentencing them to longer sentences, or, say, parole officers restricting releases? The Standard Story glosses over these questions and generally relies on broad state- or federal-level discussions. This oversight imposes two serious costs.

First, and more technically, non-institutional empirical models yield relatively uninformative results, even if the models are methodologically sound (which they almost never are).¹⁰ What does it mean if a study reports that a 1% increase in young black men in a state leads to a 1.2% increase in the prison population? Is it because police are biased? DAs? judges? And in urban counties? rural ones? or high-crime rural or low-crime urban? A state-level model that does not account for the various institutional actors involved simply yields an uninterpretable average of all sorts of local effects, and there is absolutely no reason to assume that the effect is the same across all institutions, or across all types of counties.

Second, and more significantly, non-institutional models provide little insight into where to target reforms. For example, without understanding who is driving prison growth, it is unclear how important it is to revise state sentencing laws. Consider the recent history of punishment in New York State. The Rockefeller Drug Laws (RDLs) were passed in 1973, yet the percent of drug offenders in New York State prisons remained flat or fell until 1984. County DAs simply ignored the RDLs for

¹⁰ I point out the substantial methodological flaws with almost all empirical papers on prison growth in John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547 (2008).

over a decade, since whatever national-level politics inspired Nelson Rockefeller to advocate for them didn't matter at their local level. And then drug incarcerations started to decline steady from 1997 on, even though the legislature did not amend the RDLs until 2004 (weakly) and 2009 (more seriously). In other words, the county DAs also *stopped* relying on the RDLs well before Albany got around to modifying them.¹¹

In fact, in a recent paper I demonstrate that at least since 1994, the primary force behind prison expansion has been an increased willingness on the part of district attorneys to file felony charges: crime is down, arrests per crime are generally flat or falling, prison admissions per felony case are flat, as is time served, but filings per arrest have soared.¹² These results indicate, then, that reforms targeting prosecutors are more important than those looking at legislators, or at least that legislative reforms are important only insofar as they alter how prosecutors—over whom legislators have no direct authority—behave.¹³

Moreover, this institutional approach demonstrates that we need to study punishment at the county level, not the state or federal, since district attorneys are county officials who respond to county incentives. And once we start looking at counties, interesting features that the Standard Story simply cannot detect emerge. One, obviously, is the moral hazard problem noted above. Another is that counties can differ in systematic ways. New York State, for example, has witnessed a long-running decline in both its overall prison population and the percent of

¹¹ To be clear, the RDLs were not immaterial: local DAs could not have been as harsh in the 1980s and 1990s had the legislature not given them that option.

¹² Pfaff, *The Centrality of Prosecutors to Prison Growth*, supra note 9.

¹³ Other examples of these sorts of agency problems abound. Dan Richman, for example, pointed out that the New Orleans Police Department effectively thwarted the New Orleans' DA's efforts to avoid pleading out cases by refusing to improve the quality of its investigations, and thus the quality of the cases the DA's office could mount. See Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055 (2006).

inmates serving time for drug offenses. Both declines are due primarily to New York City: while the City's five counties have been sending fewer total people and relatively fewer drug offenders to prison, the less-urban counties of the state have been doing the opposite. Other studies have yielded similar rural-urban distinctions. These results raise interesting questions about how to structure and design reforms that state-level analyses cannot help but miss.

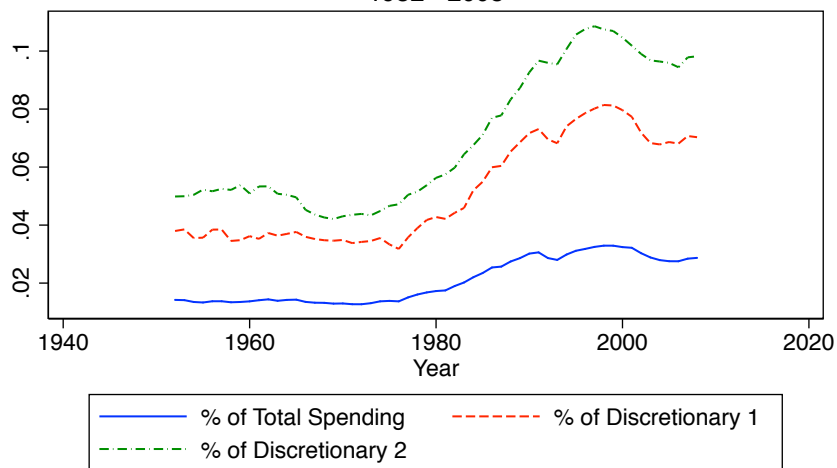
Of course, we don't want to overstate the disaggregate nature of criminal justice in the US. While police chiefs, district attorneys, judges, and governors are all relatively autonomous and responsive to different constituencies, they also all still read the same op-eds in the same papers and are buffeted by the same broad cultural winds. Thus they are all likely influenced by, say, the rise of the "nothing works" attitude in the 1970s or the increased interest in re-entry or problem-solving approaches today. At the same time, they likely respond to these changes differently, and any model of criminal justice outcomes that fails to account for the diffuse nature of authority and responsibility will miss important explanations for what is happening.

The "politics" of crime are not that unique. The final erroneous aspect of the Standard Story that I want to address is its broad assertion that the politics of criminal justice are uniquely dysfunctional. It is an admittedly intuitive claim: while most policy issues have clearly defined antagonistic sides—labor vs. management, greens vs. industry, pro-life vs. pro-choice—there does not appear to be anyone to counter the "tough on crime" side. Furthermore, numerous criminologists and sociologists have argued that crime control is a uniquely effective election-eering topic in today's political environment, leading politicians to focus

on it to a disproportionate degree.¹⁴ Taken together, these observations suggest we should see a one-way ratchet of ever-tougher crime policies.

And it is true that politicians have generally not rolled back criminal statutes or weakened sentencing laws. Yet the story is more complicated than that. Consider Figure 5, which plots correctional spending as a share of state budget outlays. Correction's share of the budget rises from the 1970s through the early 1990s—which coincides with the crime boom—but then remains relatively flat during from the mid-1990s onward. In other words, once crime leveled out in the early 1990s, *so too did relative correctional spending*.

Fig. 5: Correctional Share of State Budgets
1952 - 2008

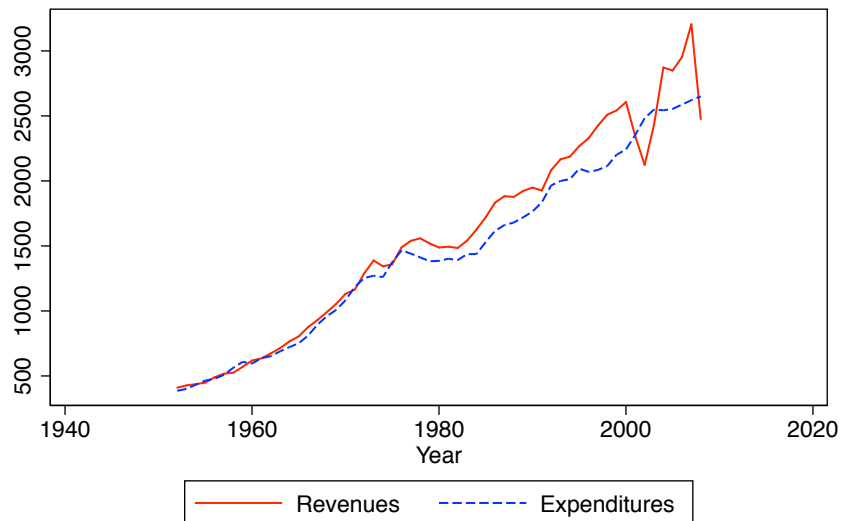


Notes: Data from the Census Bureau's Annual Survey of Government Finances. Discretionary 1 and Discretionary 2 refer to two separate ways of calculating state discretionary spending. More details are available in John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 Ga. St. L. Rev. 1239 (2011).

¹⁴ Surprisingly, these researchers rarely explain *why* crime has been such a powerful electoral topic, or at least why politicians have favored it over other potential issues. A likely explanation is that our high rates of *crime itself* made crime control a salient political issue, but as noted above the Standard Story generally downplays the violent and property crime surge that started in the 1960s.

It is true that absolute correctional spending rose steadily during the 1990s and 2000s, from almost \$20 billion in 1991 to nearly \$50 billion in 2008 (a 159% nominal increase, although only a 63% real increase, and only a 35% real increase per capita). But look at Figure 6, which plots real per-capita state revenues and expenditures from 1952 to 2008: state fiscal capacity grew steadily over that time, and spending moved in lockstep with revenues. States were spending more on *everything*, including corrections. In fact, for all the talk of “crowding out,” correctional spending is generally positively correlated with spending on welfare, education, transportation, etc.¹⁵

Fig. 6: Real Per Capita State Revenues and Expenditures
1952 - 2008



Note: Data from the Census Bureau's Annual Survey of Government Finances.

In other words, spending on corrections ultimately does not appear to be as exceptional as it seems at first blush. Once crime began falling

¹⁵ Of course, there is crowding out *on the margin*: perhaps educational budgets would have grown *even faster* had states spent less on corrections. But all budget lines have tended to grow with rising state budgetary power.

in 1991, spending on corrections simply maintained pace with growing overall spending. Of course, that the percent of the budget given over to corrections stayed flat—rather than fell—during a time of falling crime is perhaps somewhat surprising, and it suggests that correctional systems have been effective at staving off budget cuts.¹⁶ Yet it seems likely that many government agencies, not just departments of correction, are able to fight off retrenchment in situations like these.

That the relative size of prison budgets remained fairly stable since 1991 actually is not that surprising, since the Standard Story's claim that tough-on-crime policies face no meaningful opposition mischaracterizes the nature of state budgetary politics. State budgets are much more restricted than the federal budget, since states are often subject to balanced-budget provisions (of varying degrees of effectiveness), must borrow money at less favorable rates, and cannot print their own money. In short, state budgeting is much more a zero-sum game than federal budgeting, creating clear antagonists to tough-on-crime policies: not "soft on crime" groups, but schools, hospitals, departments of transportation, and everyone else clamoring for a piece of a fixed pool of money. Every dollar that goes to a prison doesn't go to a school, and at the state level, lobbies like the National Education Association are quite powerful. In light of these political realities, we should be concerned that the Standard Story overemphasizes the extent to which "crime is different."

Where Do We Go From Here?

¹⁶ New York State, for example, has seen its prison population drop steadily by about 1% per year for over a decade, yet until very recently it has had a hard time closing prisons that are almost entirely empty now. See <http://www.nytimes.com/2010/02/17/nyregion/17about.html> and <http://www.nytimes.com/2012/05/28/nyregion/closed-new-york-prisons-prove-hard-to-sell.html>.

It is relatively straight-forward to summarize the Standard Story's core assertions: prison populations have been pushed up by a relatively coherent and politically powerful criminal justice system that has chosen to target drug offenders and to rely on increasingly long sentences. And while none of these claims is necessarily *wrong*, as shown above each has profound weaknesses and, taken together, provide a highly misleading account of prison growth. The path forward, however, should be fairly clear as well. A few quick, representative suggestions:

1. Focus less on drug inmates and more on violent and property offenders. That a majority of prison growth since 1980 has come from locking up violent offenders does not mean our prisons are overflowing with murderers and arsonists: many of these violent offenders may be guilty of low-level acts of violence that would have resulted in probation ten or fifteen years ago, and who may not pose serious public safety risks. But the politics of dialing back enforcement against violent offenders is qualitatively different than that looking at drug offenders.

2. Focus less on sentence length and more on admissions. At one level, the distinction here may be slight: any new admission can be thought of as raising the time served from zero to non-zero. A new mandatory minimum could be seen as both a time served-side and an admission-side policy. That said, it should be clear that our attention should be on figuring out what is driving up felony filings and thus admissions: is this simply a change in prosecutorial attitudes; is it due to (short) mandatory minimums denying probation to defendants without making them serve much time; is it that prosecutors use massively longer sentences as effective hammers to bang out pleas; or something else?

3. Develop richer institutional accounts. It seems likely that prison growth is less the product of some coherent plan and more the unin-

tended result of actions taken by numerous, relatively autonomous bureaucracies, many situated in relatively small geographic areas such as cities and counties (which should only emphasize the uncoordinated nature of growth). It is impossible to explain how growth has occurred—and thus how to adjust it—without understanding the interaction of various agencies' decisions. Unfortunately, we have very little data on these interactions yet at this point, since widespread adherence to the Standard Story has caused most social scientists to design only state- and federal-level models.

Reforming penal practices in the United States is impossible without a solid, rigorous understanding of the key forces at play. Unfortunately, we are currently saddled with a conventional wisdom that is truly inadequate. Hopefully we will be able to move beyond it before the opportunity for meaningful reform passes.