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# WAYLAID BY A METAPHOR: A DEEPLY PROBLEMATIC ACCOUNT OF PRISON GROWTH

John F. Pfaff\*

A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA. By *Ernest Drucker*. New York and London: The New Press. 2011. Pp. xiv, 189. \$26.95.

## INTRODUCTION

The incarceration rate in the United States has undergone an unprecedented surge since the 1970s. Between 1925 and 1975, the U.S. incarceration rate hovered around 100 per 100,000.<sup>1</sup> Since then, that rate soared to 504 in 2009, dropping only slightly to 500 in 2010.<sup>2</sup> In absolute numbers, the U.S. prison population grew from 241,000 in 1975 to 1.55 million in 2010.<sup>3</sup> Not just exceptional by historical standards, this boom is unparalleled globally: the United States has the highest incarceration rate in the world. Despite having just 5 percent of the world's population, it houses nearly 25 percent of the world's prisoners.<sup>4</sup>

It is not surprising that academics, journalists, and policymakers have attempted to explain the causes of this growth. What is surprising, however, is the general weakness of such explanations. The formal empirical papers that tackle the issue, for example, all suffer from severe methodological shortcomings that fundamentally undermine their results.<sup>5</sup> Many of the common explanations—that prison growth is due to the war on drugs, to parole and probation violations, to longer sentences—are often asserted with little

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1. John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1239 (2010) [hereinafter Pfaff, *Micro-Macro*].

2. E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 239808, PRISONERS IN 2011, at 6 tbl.6 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>.

3. *Id.*

4. ROY WALMSLEY, INT'L CTR. 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>. Walmsley looks at the joint prison-and-jail incarceration rate, which for the United States is about 743 out of 100,000 people. The U.S. incarceration rate for prisoners alone is likely the highest in the world as well. See Pfaff, *Micro-Macro*, *supra* note 1, at 1239 n.4 (noting that China may have a higher prison-and-jail population than the United States).

5. I critically assess these empirical efforts in John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547 (2008) [hereinafter Pfaff, *Empirics*].

rigorous empirical support. And as I have pointed out before, and will continue to do so here, this conventional wisdom is frequently wrong.<sup>6</sup> A recent entry in this discussion is Ernest Drucker's *A Plague of Prisons: The Epidemiology of Mass Incarceration in America*.<sup>7</sup> An epidemiologist by training, Drucker attempts to use epidemiology's tools to shed new light on the complex causal roots of today's mass incarceration problem. While he largely fails in his efforts, he does so in a very useful way: the mistakes he makes are ones that permeate this literature, so that identifying and correcting them serves the broader goal of setting the record straight(er) about the causes and effects of prison growth.

Drucker makes four key points in his book. First, using New York State as a case study, he argues that the war on drugs has been the primary "pump" for prison growth.<sup>8</sup> Second, using the "years of life" metric that epidemiologists employ to quantify the losses from an epidemic, he claims that the prison "epidemic" is on the scale of the AIDS epidemic and other major disasters.<sup>9</sup> Much of the rest of the book is devoted to examining how the prison "epidemic" propagates itself through new arrests tied to the war on drugs (Chapter Seven), the recidivism-enhancing de jure and de facto restrictions that inmates face upon release (Chapter Eight), and the intergenerational transmission of incarceration risk (Chapter Nine). Drucker

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6. In this Review, I focus primarily on the problems with blaming the war on drugs for prison growth. In three other papers I have shown that longer sentences do not play a major role in prison growth. See John F. Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73 [hereinafter Pfaff, *Durability*]; John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13 AM. L. & ECON. REV. 491 (2011) [hereinafter Pfaff, *Correctional Severity*]; John F. Pfaff, *The Centrality of Prosecutors to Prison Growth: An Empirical Assessment* (n.d.) (unpublished manuscript) (on file with author) [hereinafter Pfaff, *Centrality*]. In *Correctional Severity* I also highlight the empirical difficulty of attributing prison growth to parole violations. Pfaff, *Correctional Severity*, *supra* note 6, at 512–13.

7. Ernest Drucker is a Scholar in Residence and Senior Research Associate, John Jay College of Criminal Justice, The City University of New York; Professor Emeritus in the Department of Family and Social Medicine, Montefiore Medical Center/Albert Einstein College of Medicine, Yeshiva University; and Adjunct Professor of Epidemiology, Mailman School of Public Health, Columbia University.

8. Chapter 5. Drucker's arguments on prisons start in Chapter 5. The first three chapters discuss the basics of epidemiology, and the fourth provides some background data on prison growth in the United States since the 1970s. Drucker often refers to drug arrests as the "pump" for incarceration, which is an allusion to a seminal nineteenth-century epidemiological study in which a doctor, John Snow, discovered that cholera spread via contaminated water (not air, as previously thought) by mapping how cholera-related deaths had clustered around a water pump on Broad Street in London.

9. Chapter 6. Due to space constraints, I will not discuss this point in depth. This methodology treats the social cost of someone spending ten years in prison as identical to that of someone dying ten years before he otherwise (statistically) would have, which both over- and underestimates prison's toll. The person in prison is not dead, and thus the costs are not as great as death. But the costs of incarceration that extend beyond the time spent in prison are not included in this metric, nor is the fact that the "death" takes place in the earlier phases of life, allowing significant collateral costs to accumulate in the future.

concludes with some recommendations on how to rein in our current reliance on imprisonment (Chapter Ten).

In this Review, I focus on four major substantive errors that run not just throughout Drucker's book but throughout the prison-growth literature more generally. As I discuss in Part I, Drucker overemphasizes the war on drugs. While Drucker sees it as the major source of growth, drug incarcerations account for only 21 percent of prison growth between 1980 and 2009. Of that growth, 67 percent comes from locking up more violent offenders (51 percent) and property offenders (16 percent).<sup>10</sup> That said, the war on drugs may play an important, albeit indirect, role (via its impact on prior convictions), but one that most commentators, including Drucker, have generally overlooked. And as a result, he makes policy suggestions that will not reduce prison growth and misses those that might.

The second error, discussed in Part II, is linked to the first: by overemphasizing the war on drugs, Drucker underemphasizes the importance of the rise in violent and property crime. Between 1960 and 1991—the heart of the boom in prison populations—violent crime rose by 371 percent and property crime by 198 percent.<sup>11</sup> Such surging crime rates surely played an important role in pushing up prison populations, but Drucker never seriously considers the relationship between incarceration and serious crime.

The third substantive error, discussed in Part III, is that Drucker treats the criminal justice system like a monolithic entity. The criminal justice “system” in the United States, however, is not a “system” at all, but rather a chaotic swirl of local, county, state, and (less frequently) federal actors, all with different constituencies and incentives. Not accounting for these jurisdictional struggles leads Drucker to overemphasize relatively minor explanations and overlook major ones.

The fourth error, discussed in Part IV, is perhaps more procedural. In the second (and more successful) half of the book, Drucker turns his attention to the challenges faced by those released from, or at risk of going to, prison. Prison inmates are drawn disproportionately from communities filled with people living socially fragile lives, and it is inarguable that incarceration exacerbates these frailties. Yet Drucker fails to provide essential baseline comparisons, making it impossible to understand the marginal contribution of incarceration. For example, he states that couples with children are much less likely to get married if one partner has been to prison (p. 143), but he does not adequately address how much of the disparity comes from incarceration, and such an approach implicitly attributes all the observed social harm to incarceration. Without a better understanding of prison's *marginal* contribution to these social ills, policymakers may overemphasize providing services to prisoners rather than to the community more broadly, or they may underestimate the extent to which the problem is one that affects nonprisoners as well. Drucker's approach may even go so far as to confuse

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10. See *infra* Table I.

11. See *infra* Figure 4A.

matters of causation, attributing *to* incarceration broader social ills that may, in fact, *drive* that incarceration (or the criminal conduct that fuels it).

A common theme ties many of these failings together: Drucker misidentifies the source of the “infection” he wishes to understand. Prison is not the real disease—*crime* is the disease, and prison is but one potential treatment. But any treatment can harm the patient when misapplied or used improperly, perhaps even leaving the patient more vulnerable to future “illness.” But by looking at prison as the disease—as the cancer, rather than the chemotherapy—Drucker overstates the importance of the war on drugs, overlooks the importance of violent and property crime, and overestimates the collateral costs of incarceration.

### I. JUST SAY NO TO OVEREMPHASIZING THE WAR ON DRUGS

In 1980, 580,900 people were arrested for drug violations, comprising 5.5 percent of all 10.5 million arrests that year; in 2009, 1.66 million were arrested on drug charges, making up 12.2 percent of that year’s 13.7 million arrests.<sup>12</sup> In total, over 38.7 million drug arrests were made between 1980 and 2009 (or 9.5 percent of the total 407 million arrests). In fact, more people are arrested each year on drug charges than are incarcerated for all crimes. These numbers certainly seem to imply that the war on drugs must have played a major role in prison growth. Not surprisingly, many people have made just this argument.<sup>13</sup>

Drucker unambiguously plants himself in this camp:

What occurred in New York State to explain [its] surge of incarceration? All signs point to a new set of drug policies, drug laws, and drug enforcement strategies—the Rockefeller drug laws [(“RDLs”)] of 1973. New York’s epidemic of incarceration, which continues to this day, began the year that [the RDLs] came into effect. . . . In an example of what would ultimately happen across the nation, [the RDLs] proved to be the “pump” responsible for the state’s epidemic of mass incarceration. (pp. 50–51)

Drucker’s core argument is justified by two figures, which I recreate (in improved form) as Figures 1A and 1B below.<sup>14</sup> Figure 1A plots the number

12. Howard N. Snyder & Joseph Mulako-Wangota, *Arrest Data Analysis Tool: U.S. Arrest Estimates; Arrests of All Persons for All Offenses*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=datool&url=/arrests/index.cfm> (queried on Nov. 5, 2012); Howard N. Snyder & Joseph Mulako-Wangota, *Arrest Data Analysis Tool: U.S. Arrest Estimates; Arrests of All Persons for Drug Abuse Violations*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=datool&url=/arrests/index.cfm> (queried on Nov. 5, 2012).

13. See sources cited *supra* note 12. Rather than provide a long string citation here, I will simply point the reader to a recent article by James Forman, Jr. reviewing Michelle Alexander’s *The New Jim Crow Era: Mass Incarceration in the Age of Colorblindness*. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012). Forman provides a detailed account of the numerous articles that focus solely on drug offenses to (incorrectly) explain the growth in prison populations.

14. Figure 1A parallels Drucker’s Figure 5.2, p. 52; 1B, his Figure 5.3, p. 54. Drucker’s Figure 5.2 runs from 1973 to 2000, and Drucker’s Figure 5.3 runs from 1980 to 2001. Drucker does not explain why he chose these start and end dates, nor why the two time ranges differ.

of prisoners serving time in New York prisons for drug charges between 1965 and 2008 (with a few missing years due to unavailable data), and Figure 1B the share of New York prisoners serving time for drug charges. Perhaps when viewed quickly, Figures 1A and 1B seem to support Drucker's claim that drug arrests contributed significantly to prison growth, since they show that both the absolute and relative numbers of drug offenders rose sharply during the 1980s; however, they do not support his statement that prison growth in New York "has a well-defined starting point, May 1973, when the new drug laws were put into place" (pp. 52–53), given the decade-long gap between passage of the RDLs and the uptick in drug incarcerations.

Ultimately, though, Drucker is wrong in at least two important ways—one broad and the other narrow. Broadly, rising drug incarcerations simply did not "pump" up prison growth, either nationally or even in New York. Narrowly, to the extent that drug incarcerations rose faster in New York relative to the rest of the country, it is a mistake to link it simply to the RDLs; other, more serious crime trends played material roles.

Start with the broad theory. Figure 2, which plots the annual percentage of all state prisoners serving time for drug offenses, indicates that drug incarcerations have not been the primary engine of prison growth. While the share rises strikingly from 6.4 percent in 1980 to almost 22 percent by 1990, nondrug offenders always constitute at least 78 percent of all prisoners, even in 1990, when the share of drug offenders peaked (at 21.8 percent). In 2009 drug offenders comprised only 17.8 percent of all state prisoners.<sup>15</sup>

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For completeness, I use the range 1965 to 2008 for my own Figures 1A and 1B. Data are from various years of the *New York State Statistical Yearbook*. The *Yearbook* was not published in all years in the 1960s and 1970s (as well as for statistical year 1988), so some observations are missing.

A quick comparison of my figures with Drucker's reveals a peculiar discrepancy: my data show a *decline* in the percentage of offenders serving time for drug offenses in the 1970s and early 1980s while Drucker's show a flat line. The most likely reason for this discrepancy is that Drucker relies on unexplained, and apparently incorrect, "estimated" data for all years before 1980 and from 1981 to 1986, while I rely on the actual data for these years, data which is publicly available in various editions of the *New York State Statistical Yearbook*.

15. Including federal prisoners, who are more likely to be drug offenders, raises the percentage from 17.8 percent to 21.8 percent. See Table 6.0023.2011: *Prisoners Under the Jurisdiction of the Federal Bureau of Prisons by Adjudication Status, Type of Offense, and Sentence Length*, SOURCEBOOK CRIM. JUST. STAT. ONLINE, <http://www.albany.edu/sourcebook/pdf/t600232011.pdf>.

FIGURE 1A  
TOTAL DRUG INMATES, 1965-2008

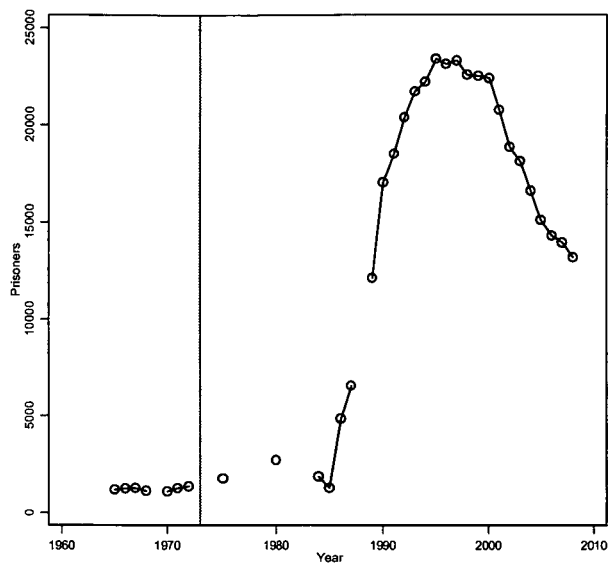


FIGURE 1B  
DRUG OFFENDERS AS PERCENTAGE OF ALL NEW YORK INMATES, 1965-2008

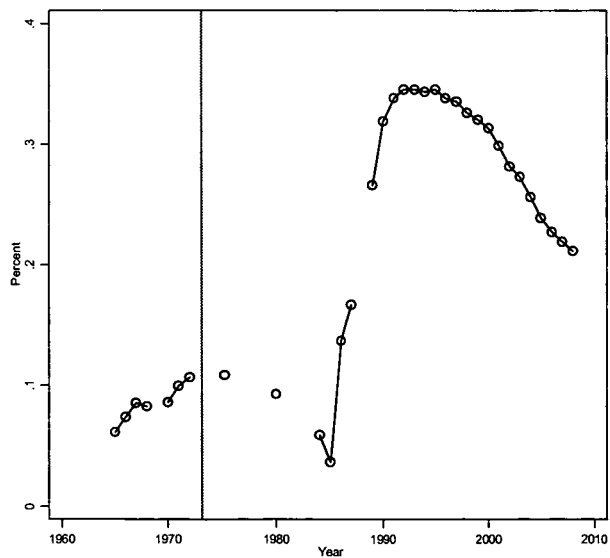
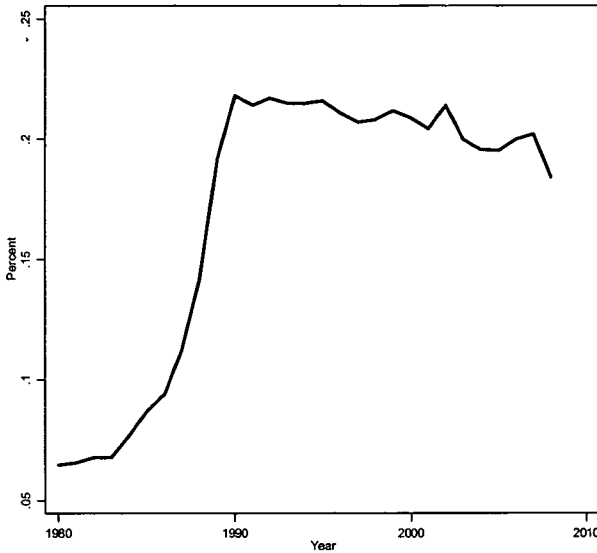


FIGURE 2  
 DRUG OFFENDERS AS PERCENTAGE OF ALL STATE INMATES, 1980–2008



Given these relatively low percentages, why are people so quick to blame drug incarcerations for prison growth? Table 1 suggests a possible answer.

TABLE 1  
 SHARE OF STATE PRISONERS BY OFFENSE TYPE, 1980 AND 2009

	1980	2009	% Change	% Contribution
<b>Violent</b>	173,300	724,300	318%	51%
<b>Property</b>	89,300	261,200	192%	16%
<b>Drug</b>	19,000	242,200	1,175%	21%
<b>Other</b>	12,400	134,500	985%	11%

Source: Bureau of Justice Statistics, National Prisoner Statistics (various years).

The *percentage change in the number* of drug prisoners dwarfs that of violent and property offenders: it is approximately 3.7 times that of violent crimes and 6.1 times that of property crimes. But base rates matter. In 1980, prisons held nearly ten times as many violent offenders as drug inmates and nearly five times as many property offenders. So while the rate of growth for violent inmates was slower than that for drug inmates, the additional 551,000 violent offenders added to state prisons between 1980 and 2009 comprise 51 percent of the 1,068,200 total prisoners added during that time; violent and property offenders combined are responsible for more than



two-thirds of that growth. Including federal prisoners does not change these results noticeably.<sup>16</sup>

Figure 2 and Table 1 thus make it clear that the incarceration of drug offenders is *not* the primary engine of prison growth. Drucker's blunt claim that "[a]rrests and incarceration under drug laws are the most important agent of transmission that creates new cases of incarceration" (p. 80) is simply not supported by the data. And focusing on drug inmates often diverts attention from the real sources of growth. Drucker, for example, spends much of his final chapter discussing the need to reduce drug incarcerations, which clearly will not have the impact he hopes.<sup>17</sup> Furthermore, overemphasizing drug incarcerations (and nonviolent incarcerations more generally) may cause us to overstate the costs of increased incarceration by understating the benefits of incarcerating violent offenders, for whom decarceration arguments are much trickier. In fact, it is by focusing on drug offenders that Drucker may have been waylaid by his metaphor, coming to view incarceration as the disease, not the problematic treatment of a deeper dilemma.

That's the broad issue. I now want to turn to the narrow: despite being wrong at the national level, is Drucker perhaps right with respect to New York? Again, no. Drug offenders have never made up more than 34.5 percent of all inmates in New York (in 1995),<sup>18</sup> and they had fallen all the way to 15.4 percent in 2011.<sup>19</sup> But I want to focus on a deeper problem with Drucker's analysis, one that occurs too often in prison (and other) research.

Drucker conceptualizes the RDLs as a form of toxic exposure, which is an acceptable methodological move. But he then makes an important error.

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16. While over half of all federal inmates are serving time for drug charges, and while the federal prison system has consistently been one of the fastest growing systems in the country, it is still relatively small: only 13 percent of all prisoners in 2010 were in federal institutions. Adding in federal prisoners raises the percentage change of drug offense in Table 1 from 1,175 percent to 1,321 percent, and drug offenders' contribution from 21 percent to 26 percent. See *Trends in U.S. Corrections*, SENT'G PROJECT (May 2012), [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf), for a summary of data on federal drug offenders.

17. Chapter 10. Drucker also makes the common error of eliding marijuana *arrests* with *incarceration*, stating, "[W]e want to prevent as many new cases of imprisonment as possible . . . especially the incarceration of nonviolent drug offenders (e.g., the millions arrested for marijuana)." P. 167. Drucker is substantially understating the seriousness of those who end up in prison on drug charges (particularly for marijuana charges). Eric Sevigny and Jonathan Caulkins, for example, report that only a small fraction of state and federal drug inmates are "unambiguously low-level": many seemingly "low-level" drug offenders are more midlevel dealers who pled guilty to lower-level offenses. Eric L. Sevigny & Jonathan P. Caulkins, *Kingpins or Mules: An Analysis of Drug Offenders Incarcerated in Federal and State Prisons*, 3 CRIMINOLOGY & PUB. POL'Y 401, 424-27 (2004).

18. THE NELSON A. ROCKEFELLER INSTITUTE OF GOV'T, STATE UNIV. OF N.Y. IN CO-OPERATION WITH THE N.Y. STATE DIV. OF BUDGET, 1995 NEW YORK STATE STATISTICAL YEARBOOK (20th ed. 1995).

19. STATE OF N.Y. DEP'T OF CORR. & CMTY. SUPERVISION, UNDER CUSTODY REPORT 12 (2011), available at [http://www.doccs.ny.gov/Research/Reports/2011/UnderCustody\\_Report\\_2011.pdf](http://www.doccs.ny.gov/Research/Reports/2011/UnderCustody_Report_2011.pdf).

To estimate the impact of exposure, it is essential to compare the exposed (or “treated”) group to an unexposed (or “control”) group. Yet Drucker never does this—he never compares the outcomes in New York to those in other states that did not pass equally tough laws at that time.<sup>20</sup> If the RDLs are driving prison growth in New York, we should see a divergence in total and drug-related incarcerations between New York and the rest of the country.

But when we compare New York to the rest of the country, we simply do not see this. Figures 3A and 3B replicate Figures 1A and 1B but plot New York’s results alongside those from the rest of the country.<sup>21</sup> Both figures undermine the link between RDLs and prison growth. As Figure 3A demonstrates, while New York’s incarceration rate grew greatly during the 1980s and 1990s, *so too did everyone else’s*—whether they had tough New York-style drug laws or not—and these common surges in incarceration all took place about a decade after the RDLs were passed. In fact, New York saw its absolute and relative incarceration rates drop steadily during the 1990s and 2000s—despite making no meaningful reforms to the RDLs until 2009.<sup>22</sup>

Figure 3B tells a slightly more complicated story. First, the fraction of drug inmates in New York prisons actually *dropped* after the passage of the RDLs. It subsequently rose around the *same time* as that fraction rose nationwide, demonstrating the importance of using control groups. That said, in the 1980s New York’s drug-prisoner share did rise more rapidly than the national trend, implying that *something* different was likely occurring in New York. But as I argue in Part II, the key difference was not the RDLs but New York’s disproportionate exposure to crack. By focusing just on laws and prisoner counts, and not on underlying crime trends, Drucker misses this explanation.

I want to conclude this Section with three short points. First, the narrow claim—that Drucker overstates the importance of the RDLs within New York—is important for reasons extending beyond New York’s borders. It is symptomatic of a deeper mischaracterization of how the criminal justice system works. As I explain in Part III, Drucker treats the criminal justice system like a coherent whole: he implicitly assumes that downstream actors will implement whatever laws legislatures pass. But that need not happen. In New York, for example, the legislature and governor enacted the RDLs for their own reasons, but county prosecutors ignored them for ten years, only using them when they finally had their own reasons to do so (and, as we will see, often evading them even then).

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20. This is not the only example of criminological research failing to think clearly about treatment and control. John Donohue and Justin Wolfers effectively criticize much of the empirical work on the deterrent effect of the death penalty for making just this omission. See John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005).

21. Due to limitations in data availability, the national data begin in 1980.

22. There were some cosmetic changes in 2004, but the major reforms occurred in 2009. For an overview of the various reforms, see Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 26, 2009, at A1, <http://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html>.

FIGURE 3A  
 DRUG INMATES, NEW YORK AND UNITED STATES, 1965–2008

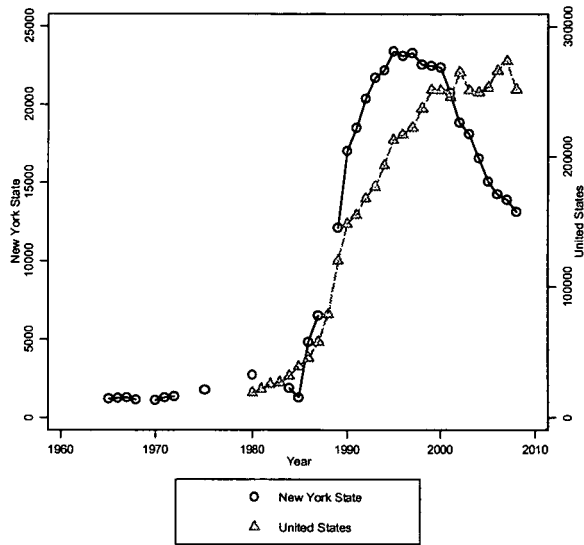
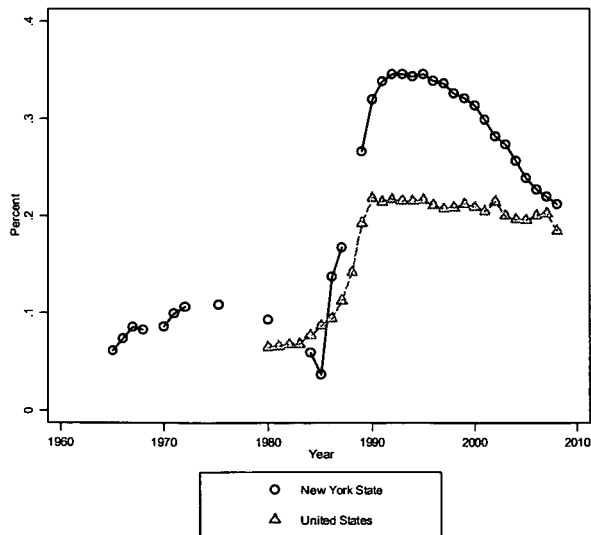


FIGURE 3B  
 PERCENTAGE DRUG INMATES, NEW YORK AND UNITED STATES, 1965–2008



Second, by focusing on drug incarcerations, analysts actually miss a subtle but important way in which the war on drugs may significantly drive prison growth. Relatively few drug arrests result in incarceration, but those

arrests and convictions remain part of a person's criminal record. So when that person is later arrested for a nondrug offense—say, theft or aggravated assault—those prior drug convictions may lead to a longer sentence for the index offense, or to incarceration rather than probation.

Detecting this effect is difficult. But using data from the seventy-five largest counties in the United States, I have shown that the average number of prior convictions has risen for defendants charged with felonies between 1990 and 2004.<sup>23</sup> The percentage of defendants with no prior record fell from 59.6 percent to 51.9 percent, while the percentage of those with three prior convictions rose from 3.9 percent to 5.9 percent, and the percentage of those with four or more rose from 7.8 percent to 14.3 percent. (The shares of defendants with one or two priors remained flat during this time, at around 13.5 percent and 8 percent respectively.) If prosecutors consistently treat repeat offenders more severely, and if the war on drugs is increasing the size of the repeat-offender pool, then the war may be indirectly driving up the prison population in a hard-to-detect way. This suggests that it may be more productive for reformers to focus on changing repeat-offender laws, not drug-sentencing laws.

And third, by focusing on drug incarcerations, Drucker fails to confront a far more challenging issue posed by the criminal conduct of drug addicts. Drucker repeatedly argues, quite correctly, that prison is not the proper environment for treating addiction. This leads him to argue that incarcerating drug offenders is self-defeating.<sup>24</sup> But that is not really the point he should be making: what bothers him is not incarcerating people on drug charges but incarcerating drug *addicts*, many of whom are serving time not for a drug offense but rather for something more serious.<sup>25</sup> It is unfortunate that Drucker attacks the straw-man claim that people convicted of drug offenses have driven prison growth rather than seriously engaging with the profoundly difficult question of how to properly handle drug addicts convicted of robbery, arson, or aggravated assault—people in need of treatment who nonetheless pose real risks to public safety.

## II. THE MISSING RISE OF CRIME

By overstating the importance of drugs, Drucker's analysis necessarily understates the importance of other crimes. But Drucker goes further, actively dismissing any link between other, more serious crimes and prison growth. He claims that "along with the increase in arrests [in the 1980s and

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23. Pfaff, *Centrality*, *supra* note 6, at 27.

24. *See, e.g.*, pp. 119–23.

25. Drug and alcohol use are high among criminals: in both 1997 and 2004, for example, nearly one-third of state inmates and one-quarter of federal prisoners admitted to being under the influence of drugs when they committed the crime that led to incarceration, and roughly half had used drugs in the month leading up to the crime. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, NCJ 213530, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 1 (rev. 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsfp04.pdf>.

1990s] came an increase in incarceration that . . . does not seem to correspond to an increase in actual crime” (p. 92), and that between 1980 and 2001, “violent crime reached historically low rates” (p. 93). As we will shortly see, these claims are simply—indeed, shockingly—incorrect.

Assertions about the tenuous link between serious crime and incarceration are frequently made in the literature on prison growth.<sup>26</sup> A partial explanation is empirical. The relationship between crime and prison is endogenous, or reciprocal: crime rates influence prison populations, but prison populations in turn influence crime rates. The simple regression models used in almost all empirical examinations of the crime–prison connection implicitly assume that such feedback loops are not present, leading to systematic and substantial underestimates of the effect of crime on prison populations.<sup>27</sup> Yet more qualitative studies can be equally skeptical of the connections between the two trends. Michelle Alexander, for example, has dismissed arguments that crime was rising by pointing to disagreements between two major measures of crime.<sup>28</sup>

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26. Most of the twenty empirical papers that I review in Pfaff, *Empirics*, *supra* note 5, at 592–94, argue that the connection between crime and incarceration is quite weak. Similar arguments can be found in sources such as Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 in *PRISONS* 17 (Michael Tonry & Joan Petersilia eds., Crime and Justice: A Review of Research vol. 26, 1999), and Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State Between Liberty and Recombination*, in *PRISONER REENTRY AND CRIME IN AMERICA* 50 (Jeremy Travis & Christy Visher eds., 2005).

27. As a result of this error, many studies suggest almost no effect of crime on prison size. See Pfaff, *Empirics*, *supra* note 5, at 592–94, for a general critique of these studies. The one study that attempts to control for endogeneity reports that a one-percent increase in crime leads to a one-percent increase in prison admissions. See Yair Listokin, *Does More Crime Mean More Prisoners? An Instrumental Variables Approach*, 46 *J.L. & ECON.* 181, 191 tbl.2 (2003). Although Listokin’s model is imperfect, it nonetheless suggests that endogeneity is a real concern. See Pfaff, *Micro-Macro*, *supra* note 1, at 1247 & nn.15–16.

28. In the first edition of her book, Alexander states the following:

Unfortunately, at the same time that civil rights were being identified as a threat to law and order, the FBI was reporting fairly dramatic increases in the national crime rate. Despite significant controversy over the accuracy of crime statistics, these reports received a great deal of publicity and were offered as further evidence of the breakdown in lawfulness, morality, and social stability.

ALEXANDER, *supra* note 13, at 41. However imperfect crime statistics are, and even if rates of reporting rose during this period, it is inarguable that crime went up significantly between the 1960s and 1990s. Furthermore, the “controversy” to which Alexander points is the seeming disagreement between the two major surveys of crime in the United States, the FBI’s *Uniform Crime Reports* (“UCR”) and the U.S. Census Bureau’s *National Crime Victimization Survey* (“NCVS”). As many criminologists have pointed out, divergence between the UCR and NCVS often reflects the different margins of crime they measure, not “errors” in data. See *UNDERSTANDING CRIME STATISTICS* (James P. Lynch & Lynn A. Addington eds., 2007).

Alexander herself apparently realized that her argument was flawed. In the 2012 edition of her book, she revised this passage to acknowledge that despite the controversy over crime statistics due to changing FBI methodology, “sociologists and criminologists agree that crime did rise, in some categories quite sharply . . . .” ALEXANDER, *supra* note 13, at 41. She adds—surely correctly—that media accounts of the rise in crime ignored plausible economic and demographic shifts such as cohorts of baby boomers entering their peak criminogenic years.

Figure 4, however, makes it clear that trends in crime almost certainly shaped trends in incarceration. Figure 4A, for example, plots national violent and property crime rates (per 100,000 people) from 1960 to 2009. Crime surged significantly between 1960 and 1991—thus refuting Drucker’s claim that crime fell during the 1980s and 1990s. During that time, violent crime rates rose by 371 percent (or 11.6 percent per year on average) and property crime rates by 198 percent (or 6.2 percent per year on average). Such increases in crime must have directly influenced prison growth from the 1970s through 1991. If anything, the rise in incarceration appears to have started *late*, nearly two decades into the crime surge; by 1977, violent crime had already risen by 257 percent since 1960, while prison populations had increased by only 31 percent, and had even decreased in absolute number every year between 1962 and 1968 (and again in 1972), just as crime rates were starting to rise.<sup>29</sup>

There are reasons to think that the crime boom influenced incarceration rates into the 1990s and 2000s as well, both indirectly and directly.<sup>30</sup> Indirectly, fear of returning to historic highs likely shaped the oft-lamented “punitiveness” of the American electorate.<sup>31</sup> In fact, the crime boom may shape punitiveness to this day. Despite two decades of steadily declining crime, the rate of violent crime in 2010 was still 151 percent higher than in 1960, and property crime 94 percent higher—thus refuting Drucker’s claim that crime reached historic lows between 1980 and 2001. For older Americans, who are still heavily represented among voters, crime rates remain stubbornly higher than when they were younger.

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But the failure of the media to properly discuss *why* crime was rising has only an indirect bearing on the degree to which that rising crime was in fact *causing* prison growth.

29. An important aside: Drucker only briefly touches on the question of whether increased incarceration reduces crime, and his summary is too simplistic. He states that “criminologists now attribute a maximum of 25 percent of the U.S. crime drop to incapacitation by imprisonment. Most suggest a much lower figure of 5–10 percent.” P. 109. At a literal level, he is basically correct: the high-end estimates are around 25 percent, the low-end around 5 percent. But the low-end studies are substantially weaker methodologically than the high-end estimates, since the low-end studies fail to control for the simultaneous relationship between prison and crime. See DON STEMEN, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME tbl.1 (2007), available at [http://www.vera.org/download?file=407/veraincarc\\_vFW2.pdf](http://www.vera.org/download?file=407/veraincarc_vFW2.pdf).

30. The following discussion is phrased speculatively because I have not encountered articles that address these issues empirically.

31. Note that the downward trend that started in 1991 was not immediately obvious. In 1994, the observed decline could not be distinguished from the flattening that occurred in the early 1980s, just before the late-1980s surge in violent crime. Tellingly, during the early 1990s numerous commentators, such as John DiIulio, James Q. Wilson, and James Fox, frequently warned about an impending resurgence in crime from a new (but ultimately unrealized) breed of juvenile “superpredator.” See JAMES C. HOWELL, PREVENTING & REDUCING JUVENILE DELINQUENCY ch. 1 (2d ed. 2009). Fears of such a resurgence likely contributed to governments adopting ever-tougher policies during a period of (ultimately) declining crime.

FIGURE 4A  
 VIOLENT AND PROPERTY CRIME RATES, 1960–2010

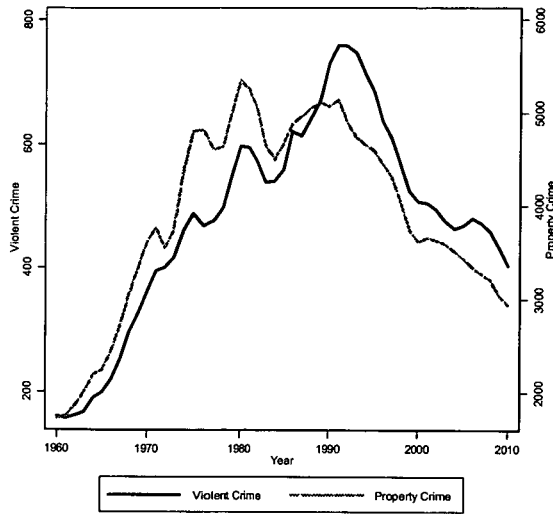


FIGURE 4B  
 “EFFECTIVE” INCARCERATION RATE, 1960–2010

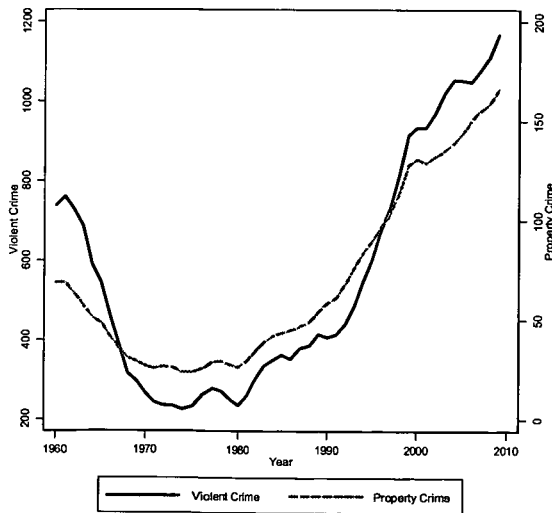


Figure 4B highlights even more strikingly the ways in which concerns about crime may have driven prison population growth, even after crime began declining in 1991. Rather than plotting prisoners per 100,000 *people*, it plots prisoners per 1,000 violent or property *crimes*. Call this the “effec-

tive incarceration rate” (“EIR”).<sup>32</sup> Strikingly, the EIR *falls* from 1960 to 1975, during the start of the longest sustained crime wave in U.S. history; it does not return to its 1960 level until the mid-1990s. William Stuntz describes the declining EIR of the 1960s and 1970s as a profound failure of criminal justice:

[B]y the early 1970s, punishment per unit crime had fallen massively, and crime had risen massively, especially in increasingly violent cities. Recovering the justice system’s ability and willingness to punish serious crimes was a legitimate goal, even a social necessity. . . . Wherever the line is between a merciful justice system and one that abandons all serious effort at crime control, the nation had crossed it. A turn toward more punishment was natural [and even inevitable].<sup>33</sup>

Such political failures surely exert lasting effects; any theory of prison growth that does not seriously account for these factors is woefully under-theorized.

Furthermore, the crime surge prior to the 1990s could have direct, but hard-to-detect, effects on prison growth in later years, similar to those I discussed with respect to the war on drugs. States tend to punish recidivists more severely, and the rise in convictions and incarcerations that attended the crime surge produced a large pool of offenders with substantial prior records. Thus consider the years 1980 and 1995: both years had roughly similar levels of violent crime, but the offenders committing those violent crimes likely had longer records in 1995 than in 1980. Even without any change in penal practices, those arrested in 1995 may have been more likely to face felony filings, be convicted of felonies, be admitted to prison, and be sentenced longer, even though the apparent “need” for punishment was the same in both years.

Hastily dismissing crime as a cause of incarceration also leads Drucker to tell an incomplete story about New York’s drug incarceration rate, a central focus of his causal story. Recall that Figure 3B demonstrated that the drug incarceration rate started increasing in New York at roughly the same time that it did elsewhere, but at an accelerated pace. Drucker focuses solely on the RDLs, but this explanation cannot say why the increase did not occur until ten years after the RDLs were enacted. What changed in the 1980s?

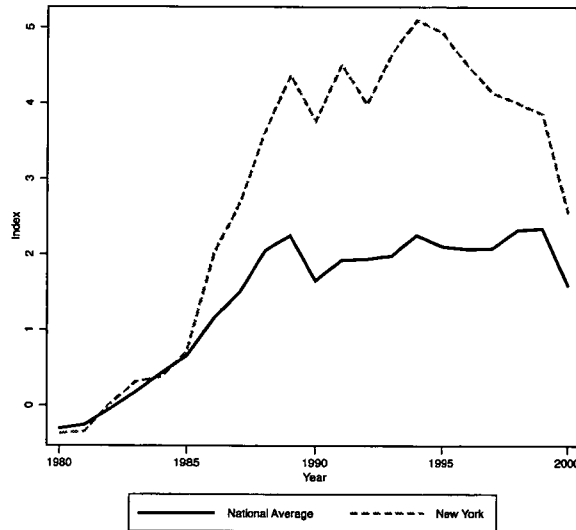
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32. Note an important approximation here. The violent “effective incarceration rate” (“EIR”) uses the total number of prisoners, not the total number of prisoners serving time *for violent offenses*, in its numerator. Thus, the EIRs for both property and violent crime have the same numerator. The available data are insufficiently granular to produce separate numerators for violent and property crime EIRs.

33. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 252 (2011).



FIGURE 5  
AN INDEX OF CRACK USE, 1980–2000



Unnoted by Drucker, the rise in drug-related incarcerations occurred roughly when crack cocaine exploded onto the national scene. Using an index of crack use developed by several economists,<sup>34</sup> Figure 5 compares crack use in New York to that nationwide; the results suggest that crack hit New York particularly hard. Some of the increase in drug incarcerations was thus likely linked to broader anticrime tactics that sought to stem the rising tide of crack-related violent crime in the late 1980s.<sup>35</sup> In other words, the drug incarcerations were not just the product of a war on drugs motivated solely by political, social, or other nonpenal ends; they were closely tied to other crime trends—some drug related—occurring at the same time.

None of this is to say that the other social factors do not matter as well. For example, U.S. and Canadian crime rates between 1981 and 2001 moved in very similar ways (although the level of violent crime rates has always been higher in the United States), but Canadian prison populations remained relatively stable, fluctuating only between 91 and 114 per 100,000 while

34. Roland G. Fryer, Jr. et al., *Measuring the Impact of Crack Cocaine* (Nat'l Bureau of Econ. Research, Working Paper No. 11318, 2005), available at <http://www.nber.org/papers/w11318>.

35. Admittedly, between 1985 and 1991, New York's violent crime rate actually grew less rapidly than the national violent crime rate (4.1 percent in New York versus 6.2 percent annual average). See *Uniform Crime Reporting Statistics*, U.S. DEP'T OF JUSTICE, <http://bjs.ojp.usdoj.gov/ucrdata/Search/Crime/State/StatebyState.cfm> (select "United States—Total" and "New York" in the first column; then select "Violent crime rates" in the second column; then select "1985" and "1991" in the third column; then click "Get Table"). But this could simply reflect the fact that New York's violent crime rate had been—and remained—consistently higher than the national average (by about 70 percent to 80 percent) before and during the crack epidemic.

those in the United States soared.<sup>36</sup> Rising crime is thus not sufficient to push up prison populations; other forces matter. But crime surely matters as well, and by ignoring it Drucker arrives at a monocausal theory of prison growth that omits critical explanatory causes.

### III. THE CRIMINAL JUSTICE “SYSTEM”

The third major error in Drucker’s work (as well as in the work of many others) is that it adopts an overly top-down view of the criminal justice system. Drucker assumes that because a law is passed it will be enforced—and enforced as written. He spends no time looking closely at how the various institutions that comprise this “system” actually interact, nor does he examine the critical fissures of misaligned incentives that run through this “system.”

The overemphasis on coordinated action is immediately clear at the start of Chapter Four, which opens with a somewhat shocking example of *reductio ad Hitlerum*: Drucker states that when we think of “mass incarceration,” we think of “Hitler’s network of diabolical concentration camps, or the vast hopelessness of Stalin’s archipelago of slave labor prison camps” (p. 38). Such a system “seems foreign to life in our democratic society,” he says, and “[y]et the facts about current-day American incarceration are stark” (p. 38). This is not just a one-off rhetorical flourish. He is drawing a direct connection between Fascist concentration camps and the U.S. prison system:

Incarceration . . . is based on a set of laws established by any state or nation to assure public safety by the separation and isolation of criminals from society. By contrast, *mass* incarceration results from policies that support the large-scale use of imprisonment on a sustained basis for political or social purposes that have little to do with law enforcement. Hitler, Stalin, and Pol Pot all employed mass imprisonment . . . . Such systems are often part of massive programs of slave labor or forced resettlement . . . . But now, for the first time, we see mass incarceration in a democratic society.<sup>37</sup>

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36. ROGER BOE, CORR. SERV. OF CAN., COMPARING CRIME AND IMPRISONMENT TRENDS IN THE UNITED STATES, ENGLAND, AND CANADA FROM 1981 TO 2001, at 9, 21 (2004), available at [http://www.csc-scc.gc.ca/text/rrsch/briefs/b29/b29\\_e.pdf](http://www.csc-scc.gc.ca/text/rrsch/briefs/b29/b29_e.pdf); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 797–99 (2010).

37. Pp. 40–41. Thus, as we can see, Drucker actually provides a much rarer *reductio ad Hitlerum*, *Stalinum et Pol Potum*. Unfortunately, Drucker is not alone in making such extreme comparisons. Adam Gopnik, for example, stated in the *New Yorker* that the six million people currently under correctional observation in the United States are more than Stalin imprisoned in his Gulag Archipelago. See Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER, Jan. 30, 2012, at 72, [http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat\\_atlarge\\_gopnik](http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik). Putting aside debates over how many people were in the gulags at any one time, Gopnik’s six million includes prisoners, jail inmates awaiting bail, parolees, probationers, those under house arrest, and so on. Ivan Denisovich would not compare being on probation in the United States to being in the gulags of Siberia.

He belabors the comparison elsewhere, such as when he compares the size of the U.S. prison population to that of Stalin's gulags (p. 45).

Such overheated rhetoric is gravely disappointing on its own terms, and Drucker's editors should have removed it.<sup>38</sup> But that reason alone would not merit discussion if it did not reflect a deeper, and more general, problem with prison research. Of the myriad differences between our system and those of Hitler, Stalin, and Pol Pot, I want to focus on one in particular: those systems were top-down, while ours is bottom-up. Drucker, like many others, implicitly views the "criminal justice system" as some sort of coherent entity. And in Fascist dictatorships, it roughly is: the police, prosecutors, courts, and prison officials work together, at least to an important degree, to advance the regime's goals.

But the U.S. system is substantially more disaggregated, with important implications. The criminal justice "system" in the United States is not a single system but a *mélange* of feuding institutions with differing constituencies and incentives: local police, county prosecutors, county or state judges (who are appointed or elected), state legislators elected at the local level, and (state) governors elected at the state level, to name just a few. And, in general, each link in the chain is fairly autonomous: prosecutors do not control the police;<sup>39</sup> legislators and judges cannot force prosecutors to bring charges;<sup>40</sup> and judges, prosecutors, and defense attorneys often circumvent or undermine legislative rules via the plea process.<sup>41</sup> Governors have little control over what downstream actors do, and presidents (and other federal officials) even less. To understand prison growth, then, we need to understand how the various actors work together. By not examining how (or whether) this sort of coordination occurs, Drucker makes two key mistakes: he focuses on the law as it is written rather than enforced, and he doesn't follow the money.

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38. His recommendation, in his final chapter on "solutions," that we adopt truth-and-reconciliation commissions of the sort used in South Africa and Rwanda, p. 187, is equally risible. His statement that we "need to acknowledge publicly the damage done by the excesses of mass incarceration and see its millions of victims as the casualties of a long civil war," p. 188, is insulting to the victims of the butchery of a real civil war like that in Rwanda. It also fails to address what we should do for the millions of victims of the *crimes* that sent most of those prisoners to prison in the first place. That Drucker mistakenly suggests prison had no effect on crime, *see* discussion *supra* note 29, perhaps led him to think that a discussion of the victims of prison did not require a parallel discussion of the victims of crime.

39. Daniel Richman gives a vivid account of the challenges that the New Orleans District Attorney's office, led by Harry Connick, Sr., faced when it tried to force the New Orleans Police Department to change its practices. Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2059–60 (2006).

40. As Judge Posner stated, citing numerous Supreme Court cases, "Prosecutorial discretion resides in the executive, not in the judicial, branch, and that discretion, though subject of course to judicial review to protect constitutional rights, is not reviewable for a simple abuse of discretion." *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992).

41. See, for example, Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783 (2008), discussed *infra* in note 42 and accompanying text.

Start with the “law as written” point. That the legislature passes a law does not mean the law will be enforced, at least as intended. Such is clearly the case with the RDLs. As shown in Figure 1, drug incarcerations in New York did not change for a decade after the RDLs were passed. Since Nelson Rockefeller lobbied for the RDLs because drug offending was salient at the time, the lack of an immediate response is likely not due to low levels of offending. Instead, it appears that downstream actors—the local police and county prosecutors in charge of enforcing the laws—did not see a need to aggressively use the RDLs until the mid-1980s. We cannot understand how the RDLs, or any penal legislation, matter without understanding how downstream agencies respond to them.

And there is ample evidence that prosecutors, defense attorneys, and judges in New York State have frequently and repeatedly evaded the RDLs. For example, Josh Bowers, a former Bronx Defender lawyer, observed that most participants in New York City’s drug courts—90 percent in Brooklyn and 95 percent in the Bronx—were not low-level addicts but offenders “charged not just with sale, but with . . . the highest level felony charge that was eligible for drug court.”<sup>42</sup> The RDLs induced this strange situation: New York City prosecutors viewed the RDLs as needlessly draconian, and so they evaded them. For felony possession charges, prosecutors accepted misdemeanor pleas. For felony sale charges, prosecutors were either unable or unwilling to accept misdemeanors pleas, so they used drug courts instead. In fact, evading the RDLs partially motivated the creation of drug courts in the first place:

As indicated by a New York State Commission (made up of prosecutors, defense attorneys, judges, and academics) that endorsed statewide drug-court expansion: “The courts, of course, do not write the state’s drug or sentencing laws . . . . The issue is thus whether there is anything—consistent with their adjudicatory role—that our state courts can do.”<sup>43</sup>

Bowers concludes that “drug courts came to welcome many drug dealers because the preexisting sentencing options were undesirable.”<sup>44</sup> Evasions like this, big and small, surely take place all the time throughout the country.<sup>45</sup> Without a rich account of institutional interactions, Drucker oversimplifies his story to the point of being incorrect.

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42. Bowers, *supra* note 41, at 794.

43. *Id.* at 796–97 (alteration in original) (quoting N.Y. STATE COMM’N ON DRUGS & THE COURTS, *CONFRONTING THE CYCLE OF ADDICTION & RECIDIVISM* (2000), available at <http://www.nycourts.gov/reports/addictionrecidivism.shtml>).

44. *Id.* at 797.

45. It certainly takes place at the federal level: when John Ashcroft was Attorney General, fears of prosecutorial evasion prompted him to issue the famous Ashcroft Memo insisting that U.S. Attorneys stop pleading around federal criminal law. Memorandum from John Ashcroft, Att’y Gen. of the U.S., to All Federal Prosecutors (Sept. 22, 2003), available at [http://www.justice.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm). On prosecutorial evasion more generally, see, for example, Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006).

The second major cost of Drucker's noninstitutional account is that he does not address, even in passing, what could be a substantially important engine of prison growth, at least since the mid-1990s: the budgetary moral hazard problem posed by prosecutors. At least since 1994, it appears that almost all the growth in prison populations has come from prosecutors' decisions to file felony charges. Crime and arrests (including those for nonmarijuana drug offenses) are down, the probability of being sent to prison once charges are filed has been steady, and time served has been fairly stable; but increases in charges filed track the growth in prison admissions and total population closely.<sup>46</sup> And while numerous factors have likely contributed to this behavior by prosecutors, one particularly important variable appears to be the misalignment of prosecutorial incentives.<sup>47</sup> Prosecutors are paid for (and elected by) the county, but prisoners are paid for by the state. A prosecutor thus reaps the full political benefit of each incarceration but does not have to pay much of the financial cost—in fact, this moral hazard problem incentivizes prosecutors to send people to prison rather than jail, since jail is a county expense as well.

Recent actions by California highlight the importance of this moral hazard problem. As part of an effort to restructure its currently unconstitutional prison system,<sup>48</sup> California has introduced the idea of "realignment." Under realignment, counties will be required to incarcerate prisoners who are called "triple-nons"—nonserious, nonviolent, nonsexual offenders—in county jails, even if their sentences are for many years.<sup>49</sup> This is a direct effort to confront the moral hazard problem by forcing county officials to better internalize the costs of locking up minor offenders.<sup>50</sup>

To be clear, I am not arguing that legislative enactments are immaterial. Even if New York prosecutors effectively ignored the RDLs for many years, they still ultimately (if not always) took advantage of them, and the RDLs

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46. See Pfaff, *Centrality*, *supra* note 6.

47. See W. David Ball, *Tough on Crime (On the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—and Why It Should*, 28 GA. ST. U. L. REV. 987, 994 (2012); Pfaff, *Micro-Macro*, *supra* note 1, at 1259.

48. Due to overcrowding in state prisons, the provision of medical and mental health care was found so inadequate as to be unconstitutional. See *Brown v. Plata*, 131 S. Ct. 1910 (2011).

49. See Ball, *supra* note 47, at 1039, 1045. Traditionally, jails have been used only for sentences of no more than one year, with sentences of a year and a day or more being served in prisons.

50. To some extent: the devil is in the details. Part of realignment involves the state subsidizing counties to handle the increase in jail inmates. If not properly structured, these subsidies could undermine much of the financial incentivization of realignment. For a discussion of the goals and purposes of realignment, see Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2133511>, and CALREALIGNMENT.ORG, <http://www.calrealignment.org/> (last visited Oct. 28, 2012).

provided leverage for extracting pleas more generally.<sup>51</sup> And the passage of tougher sentencing laws likely influences the choices prosecutors, judges, and other actors make. But as the RDLs make clear, the impact of upstream decisions is heavily mediated by complex institutional interactions.<sup>52</sup> By treating the system as a unitary whole, Drucker (like others) overemphasizes legislative and gubernatorial desires and ignores the more-local actors who are more responsible for prison growth.

#### IV. THE COLLATERAL CONSEQUENCES OF PRISON GROWTH

The latter half of Drucker's book shifts from trying to explain the macro causes of prison growth to examining closely the collateral costs of incarceration to prisoners, their families, and their communities. He does this partly to highlight the ways in which punishment continues even after release from prison (Chapter Eight), but also to demonstrate how incarceration can be a self-sustaining "epidemic" (Chapter Nine). Steady employment and a stable family life, for example, are both thought to reduce the incidence of crime, so to the extent that incarceration increases the risk of unemployment and divorce, it increases the risk of future offending and thus future incarceration.

And the collateral costs of incarceration are indeed extensive. Prison weakens future employment opportunities and social capital, undermines familial relationships, increases the risk of infectious diseases, increases the risk that an inmate's children may experience negative life outcomes (including future criminality), and so on. And many of these risks are aggravated by explicit state policies that limit ex-inmates' access to employment, housing, and support services. With more than 700,000 released prisoners returning to their communities every year,<sup>53</sup> understanding and attacking these costs is a major public policy issue, and Drucker is right to remind us of their scope.

Unfortunately, Drucker's analysis suffers from a significant flaw that leads him to generally overstate the harmfulness of incarceration. Consider the following statistics that Drucker provides about the collateral costs of incarceration:

- Unemployment among the released was as high as 60 percent one year after release, even prior to the financial crisis of 2008 (p. 134).

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51. See, e.g., Richard A. Oppel, Jr., *Sentencing Shift Gives New Clout to Prosecutors*, N.Y. TIMES, Sept. 26, 2011, at A1, <http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html>.

52. See also the experience of Harry Connick, Sr., discussed in Richman, *supra* note 39.

53. Table 6.0009.2010: *Sentenced Prisoners Admitted to and Released from the Jurisdiction of State and Federal Correctional Authorities by Region and Jurisdiction*, SOURCEBOOK CRIM. JUST. STAT. ONLINE, <http://www.albany.edu/sourcebook/pdf/t600092010.pdf>.

- Divorce rates hit 50 percent within a few years of incarceration, and unmarried couples with a child are 37 percent less likely to get married if one partner is incarcerated (pp. 142–43).
- Children of incarcerated parents appear to have worse mental health, school, and psychological outcomes, and are more likely to engage in violence and future criminal conduct (p. 150).

Taken on their own terms, these are depressing facts, and ones that suggest that incarceration begets incarceration, not just for inmates but also for their innocent children. But for each fact there is a critical piece of information missing: what are the risks for a comparable nonincarcerated person?

Prisoners are not drawn from a random sample of Americans. They are disproportionately poor and poorly educated, and they tend to come from already unstable families and communities.<sup>54</sup> In other words, the risk of unemployment and divorce (or nonmarriage) is already disproportionately high in the communities from which many prisoners come; children of prisoners may be more likely to offend because of the very factors that led to their parents' incarceration, not because of the incarceration itself. To understand the extent to which prison is self-perpetuating, we need to know prison's *marginal* contribution to these risks, an analysis Drucker does not undertake.<sup>55</sup>

And the fact is, the picture is quite muddy. Bruce Western, in a more sophisticated and nuanced analysis of prison's collateral costs, demonstrates that incarceration does seem to significantly reduce employment opportunities—even when controlling for the challenges that those who go to prison face in securing work before incarceration—but has no real long-run effect on divorce or failure to marry.<sup>56</sup> Regarding children, a survey of studies by Joseph Murray and David Farrington returns mixed results: three studies find a direct causal effect between parental incarceration and juvenile offending, but two do not.<sup>57</sup>

Drucker's failure to think about the baseline risks experienced by the (self-selected) prison population leads him to overstate the marginal impact of prison on future offending and incarceration. But again, Drucker is not

54. See, e.g., BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

55. In Drucker's defense, he does *acknowledge* this selection problem by noting, for example, that children of inmates may be more likely to offend regardless of parental incarceration. P. 150. But he does not discuss what this concession implies about the concrete numbers he reports, rendering it relatively uninformative.

56. WESTERN, *supra* note 54, at 126 fig.5.3, 127 fig.6.6.

57. See Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 133, 170 (vol. 37 2008). The Murray and Farrington study provides an important methodological contrast to Drucker's work as well. Murray and Farrington review a wide range of studies on a particular issue, allowing them to show the muddiness of the results. Drucker, on the other hand, often relies on a single study, but treats its results as generally true, despite the well-known noisiness of empirical social science research. Furthermore, many of these reports come from obscure sources or non-peer-reviewed studies with small sample sizes.

alone in making this sort of error. Too often in conversations about race and punishment people point to the fact that blacks comprise 12 percent of Americans but 50 percent of all American prisoners as evidence of racial animus.<sup>58</sup> But this is the wrong comparison: the correct one is between the percentage of all *offenders* who are black and the percentage of all prisoners who are black, and blacks offend at disproportionately higher rates.<sup>59</sup> Blacks are surely over-represented even by this baseline, but not by as much as the 12 percent / 50 percent comparison would suggest. If we are to properly understand the mechanics and implications of prison growth, it is essential that we properly control for the numerous selection effects that shape the population at risk of incarceration.

### CONCLUSION

While Drucker's book sets out to explain the causes and effects of prison growth in the United States, the story it tells is all too often incomplete or incorrect. Incarceration is not a disease. Crime and the social conditions that breed it are the diseases; incarceration is an imperfect—and perhaps at times harmful—treatment. By treating prison as the disease, Drucker's book fails as an explanation, although it provides a useful framework for looking at what is wrong with our discussions of crime and punishment.

Troublingly, the errors in this book are less the exception than the general rule in the literature on this topic. Our debates over prison growth are dominated by a conventional wisdom that, for unclear reasons, appears to be frequently incorrect. Drucker falls into several of the biggest traps,

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58. See, e.g., Jacqueline Johnson, *Mass Incarceration: A Contemporary Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301, 302 (2012); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 849, 853 (2000); Robert W. Sweet, *The Judge's Dilemma: Duty or Conscience?*, 19 CARDOZO L. REV. 1041, 1043 (1997). This fact is now out of date: by 2009 the percentage of state prisoners who were black had fallen to 42.6 percent. *Table 6.0001.2009: Estimated Number and Percent Distribution of Prisoners Under Jurisdiction of State Correctional Authorities by Offense, Sex, Race, and Hispanic Origin, United States*, SOURCEBOOK CRIM. JUST. STAT. ONLINE, <http://www.albany.edu/sourcebook/pdf/t600012009.pdf>. That portion has consistently been below 40 percent in federal prisons. See *Table 6.0022.2011: Prisoners Under the Jurisdiction of the Federal Bureau of Prisons by Selected Family and Demographic Characteristics*, SOURCEBOOK CRIM. JUST. STAT. ONLINE, <http://www.albany.edu/sourcebook/pdf/t600222011.pdf>.

59. Blacks are responsible for about 52 percent of all murders according to police arrest reports, ALEXIA COOPER & ERICA L. SMITH, *HOMICIDE TRENDS IN THE UNITED STATES, 1980–2000*, at 12 (2011), and 23 percent of all victims of violent crime report that their attackers are black (although racial identifications should be viewed with some caution), BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 227669, *CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES*, at 53 tbl.40 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus08.pdf>. Furthermore, blacks comprise 28 percent of all arrests. The overrepresentation of blacks among violent and property offenders can be seen indirectly by the fact that, in 2008, blacks were 38 percent of all prisoners and 36 percent of all nondrug prisoners, suggesting that much of the overrepresentation of blacks is driven by non-drug arrests, which are substantially less discretionary than drug arrests. See Pfaff, *Micro-Macro*, *supra* note 1, at 1270 n.59.



overemphasizing the war on drugs and missing the importance of the crime surge from 1960 to 1991.<sup>60</sup> He also overly anthropomorphizes our disjointed criminal justice system and, in doing so, overlooks the principal-agent fissures and budgetary games that appear to play major roles in prison growth. And by understating the baseline fragility of the lives led by those who go to prison, he fails to isolate the effects that prison has on their lifecycle outcomes, thus overstating the social costs of incarceration.

Controlling the size of the U.S. prison population is an issue of substantial policy importance. But for too long our understanding of prison growth has been weak. Without careful, reasoned, dispassionate analyses of prison growth, we will not be able to design policies that effectively manage this phenomenon and its collateral costs.

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60. Drucker does not make another common mistake, namely arguing that prison population growth has been driven by longer time spent in prison. But this could be because he does not address issues of time served in any depth in the book. For evidence that time served may not be a major engine of prison growth, see generally Pfaff, *Correctional Severity*, *supra* note 6; Pfaff, *Durability*, *supra* note 6; and Pfaff, *Centrality*, *supra* note 6.