

AMBITION AND FRUITION IN FEDERAL CRIMINAL LAW: A  
CASE STUDY

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*This Article explores a recurrent puzzle in federal criminal law: why do the outcomes of a law—who ultimately gets prosecuted, and for what conduct—diverge, sometimes markedly, from lawmakers’ and enforcers’ aims? This disconnect between law’s ambition and fruition is particularly salient in federal drug enforcement, which has focused on capturing the most high-value offenders—large-scale traffickers, violent dealers, and the worst recidivists—yet has imprisoned large numbers of offenders outside these categories. In this respect, federal drug enforcement is a case study in the ambition/fruition divide.*

*Among the divide’s contributing factors, I focus here on organizational dynamics in enforcement: the pressures and incentives among and within the organizations that collectively comprise the federal drug enforcement enterprise. These pressures and incentives operate along three vectors: between the enforcers and the enforced; across and within federal enforcement institutions; and between federal and local enforcers. Together, they create a system that stymies focus on the most culpable even as it makes apprehending them a principal aim. This insight carries important implications for reform, both within drug enforcement and outside it. Changing who, and how many, we prosecute requires attention not only to laws, but also the lower-visibility spaces in which enforcement patterns take root. In the new political landscape, these lower-visibility spaces are federal criminal justice reform’s next frontier.*

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#### INTRODUCTION

AMONG federal criminal law's puzzles is this: why does the law's ambition so often diverge from its results? More often than we might realize, how federal criminal laws play out in practice—who is punished, and for what—departs, sometimes radically, from lawmakers' aims in enacting the laws and prosecutors' and agents' goals in enforcing them.<sup>1</sup>

The dynamic is transsubstantive. Terrorism-fighting laws capture a small number of terrorists, and a much larger number of persons posing

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<sup>1</sup> I frame this as a puzzle of federal criminal law not because the problem is absent at the state and local level (it is not), but rather because a number of factors unique to the federal system make it particularly salient there. These include a relatively high level of enforcement discretion; a high degree of overlap between federal and state substantive law, permitting federal focus on more serious offenders; and more detailed legislative history, allowing ready comparison between legislative aims and criminal enforcement outcomes.

little public safety risk.<sup>2</sup> Laws intended to protect investors and financial markets do neither very well,<sup>3</sup> but they do at times ensnare unintended targets.<sup>4</sup> Child exploitation laws are rarely invoked against child pornography producers, but frequently wielded against consumers.<sup>5</sup>

Perhaps nowhere is the mismatch between federal criminal law's aspirations and results more salient than in federal drug enforcement. Over the last four decades, drug enforcement has become the federal criminal justice system's primary project,<sup>6</sup> aiming to choke drug supply and its attendant violence by focusing on the most high-value targets: the kingpins, cartel leaders, and manufacturers; the violent gang leaders; the career retail dealers. Yet in practice, the project has only partially realized this ideal. To a far greater degree, it has absorbed the trade's relatively lower-value participants. Of drug offenders in federal prisons, a significant portion are lower-level, first-time, nonviolent offenders.<sup>7</sup>

This Article examines federal drug enforcement as a case study in the mismatch between federal criminal law's ambition and fruition. Drug

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<sup>2</sup> See Jesse J. Norris & Hanna Grol-Prokopczyk, Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases, 105 J. Crim. L. & Criminology 609, 616 (2015) (an empirical study of post-9/11 terrorism cases, finding "only a small percentage of terrorism prosecutions involve a serious threat to public safety").

<sup>3</sup> See Daniel C. Richman, Corporate Headhunting, 8 Harv. L. & Pol'y Rev. 265, 265–72 (2014) (discussing and responding to criticism of the DOJ's failure to prosecute high-level precipitators of the 2008 financial crisis).

<sup>4</sup> See *id.* at 274; see also, e.g., *Yates v. United States*, 135 S. Ct. 1074, 1078–79 (2015) (involving use of the Sarbanes-Oxley Act of 2002, designed to combat financial fraud, to prosecute fisherman).

<sup>5</sup> See U.S. Sentencing Comm'n, Federal Child Pornography Offenses 247–48, 248 fig.9-1 (2012) (observing vast difference in numbers of child pornography production as compared to nonproduction cases against consumers and electronic distributors of child pornography, with producers comprising only 10.8% of federal child pornography offenders sentenced in 2010).

<sup>6</sup> Drug offenders comprise the single largest portion of the federal prison population, see Fed. Bureau of Prisons, Statistics: Inmate Offenses (June 24, 2017), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) [<https://perma.cc/LV4R-JVZP>] (calculating drug offenders as 46.3% of the federal prison population as of March 2017), as well as the largest category of offenders prosecuted in the federal system. See Admin. Office of the U.S. Courts, Table D-3. U.S. District Courts—Criminal Defendants Filed, by Offense and District, During the 12-Month Period Ending September 30, 2016 (Sept. 30, 2016), [http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d3\\_0930.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_d3_0930.2016.pdf) (in 2016, 24,638 federal criminal defendants were charged with drug offenses; the next most common offense category was immigration, with 20,762 defendants charged).

<sup>7</sup> For detailed data on numbers and characteristics, see *infra* Section I.B.

enforcement presents an important window into this dynamic, both because of its scope (drug offenders account for nearly half of the federal prison population<sup>8</sup>) and perplexity. For nearly four decades, drug enforcement has been a signal priority of both Congress and the Executive branch, which together have devoted intense deliberation and resources to tackling the problem. If the federal criminal justice system falls short of its aspirations in this context, it's worth asking why.

The answers are not readily apparent. The narrative of broad, punitive criminal laws leveraged against the relatively less deserving<sup>9</sup> by overzealous (or at least unthinking) federal enforcers has caught on in the literature,<sup>10</sup> but it comes up against some hard-to-reconcile facts,

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<sup>8</sup> See *supra* note 6.

<sup>9</sup> In referring to concepts of desert, I draw on modified just desert theory (alternately known as “limiting retributivism”), a theory most closely associated with Norval Morris’s philosophy and which has evolved, particularly as applied by sentencing commissions, to blend concepts of offense seriousness and incapacitation of high risk offenders. See Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 *Crime & Just.* 363, 365–78 (1997) (discussing the application of Morris’s theories in Minnesota sentencing guidelines); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 *Am. Crim. L. Rev.* 19, 51–54 (2003) (discussing same with respect to federal sentencing guidelines). In federal drug trafficking sentencing, offense seriousness takes into account the amount of drugs the offender was responsible for selling; the offender’s role in the distribution chain; and the offender’s use of a weapon or other means (or threat) of violence in connection with the offense. See U.S. Sentencing Comm’n, *Guidelines Manual*, §§ 2D1.1 & 3B1.1 (Nov. 2016). Incapacitation of high risk offenders takes into account the offender’s prior criminal history, in particular his history of violent crime. See *id.* § 4.

<sup>10</sup> The narrative appears in varying forms throughout a voluminous literature on overcriminalization in the federal sphere. Examples include Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869 (2009) (discussing the breadth of federal prosecutorial power and severity of criminal punishment); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *Hastings L.J.* 1135 (1995) (examining the motives for and consequences of the federalization of American criminal law); and William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505 (2001) (discussing the overbreadth of American criminal law and power it gives to law enforcers, particularly in the federal context). For counternarratives, see Samuel W. Buell, *The Upside of Overbreadth*, 83 *N.Y.U. L. Rev.* 1491 (2008) (arguing that broad criminal laws are necessary to sanction culpable yet elusive defendants, but require appropriate prosecutorial discretion to be so limited), and Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757 (1999) (arguing that notwithstanding broad criminal laws, Congress limits federal enforcement discretion in other ways, such as through appropriations and agency oversight).

particularly in the drug enforcement context. In fact, the Drug Enforcement Administration—the federal government’s primary enforcer of the drug laws—has for decades endeavored to create internal metrics designed to focus enforcement on those at the highest levels of the drug trafficking chain.<sup>11</sup> United States Attorneys, the primary prosecutors of federal drug offenses, have likewise utilized charging and declination protocols designed to limit federal prosecutions to the most high-level or dangerous drug offenders.<sup>12</sup> Federal appropriations, both at the macro level (from Congress to agencies) and the micro level (from agencies to field offices) direct greater resources to higher-impact cases, and seek to enhance states’ capacity to prosecute the relatively lower-impact cases.<sup>13</sup> Yet despite these efforts, the majority of federal drug offenders do not fit federal enforcers’ own idealized profile.<sup>14</sup>

Why? Among the possible contributing factors—and there are surely more than a few—I focus here on organizational dynamics: the pressures and incentives among and within the organizations that collectively comprise the federal drug enforcement enterprise. I chose this focus for three primary reasons.

First, the field is under-studied. Not since the late 1970s and early 1980s have scholars given sustained attention to organizational influences in drug enforcement.<sup>15</sup> Yet much has changed since that time—namely, the explosion of the drug war and a nascent movement to scale it back—requiring our renewed attention. Second, these dynamics are influential. They help drive, in ways both intentional and inadvertent, the exercise of federal drug enforcement discretion. This is not to discount the importance of other factors, such as race<sup>16</sup> or

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<sup>11</sup> See *infra* Subsection II.B.3.

<sup>12</sup> See U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-27.230 (Jan. 2017), <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.730> [<https://perma.cc/M2AS-86MD>] (directing federal prosecutors to consider, when deciding whether to initiate federal charges, among other things the nature and seriousness of the offense, the offender’s degree of culpability both in the abstract and relative to others, and the offender’s criminal history).

<sup>13</sup> See *infra* Section I.A.

<sup>14</sup> See *infra* Section I.B.

<sup>15</sup> For the seminal work on the subject, see James Q. Wilson, *The Investigators: Managing FBI and Narcotics Agents* (1978).

<sup>16</sup> See, e.g., Sonja B. Starr & Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 *Yale L.J.* 2, 25–30 (2013)

monetary incentives,<sup>17</sup> but rather to draw attention to an overlooked yet fruitful source. Third, organizational dynamics have purchase not only within the arena of drug enforcement, but also outside it. Indeed, my account exposes a challenge endemic across bureaucratic organizations, particularly those in the business of enforcement: how do we align agents' incentives with an organization's goals, when goal achievement is nearly impossible to measure? The robust literature on organizational design, rational choice theory, and the principle-agent (or "multitasking") problem has enriched our understanding of how internal dynamics can incentivize or disrupt an organization's external goals.<sup>18</sup> This Article brings those lessons to bear on the federal drug enforcement enterprise—and, by extension, federal criminal enforcement more generally.

In this sense, the Article bridges two important literatures, one on the influence of law enforcers' discretion relative to penal laws, and the other on how we do (and how we should) measure enforcement efficacy. Some scholars have exposed the degree to which prosecutors' discretionary enforcement decisions—whom to prosecute, and with what crimes—affect penal populations.<sup>19</sup> Others interrogate the metrics by

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(documenting racial disparities in federal prosecutorial charging practices outside the context of drug cases, for which type and quantity data at charging stage are insufficiently documented, but observing racial disparities deriving from application of mandatory minimum sentences in drug cases); see generally Michelle Alexander, *The New Jim Crow* (2010) (examining the criminal justice system's role in creating and perpetuating a racial hierarchy by barring a large portion of African-Americans from mainstream society). The racial breakdown of first-time, nonviolent federal drug prisoners, however, is quite different from that of the federal drug prisoner population at large. African-Americans make up nearly 39% of federal drug prisoners, and 14% of first-time, nonviolent drug offenders; Caucasians make up 22% of all federal drug prisoners, and 18% of first-time, nonviolent drug offenders; and Latinos make up 37% of all federal drug prisoners, and 65% of first-time, nonviolent drug offenders. See E-mail from Mark Motivans, Bureau of Justice Statistics, to author (Oct. 20, 2016) (on file with author).

<sup>17</sup> See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 *U. Chi. L. Rev.* 35, 68–72 (1998) (arguing that asset forfeiture laws incentivize law enforcement to target cash rather than drugs, and provide up-chain, asset-rich defendants with relatively greater plea-bargaining leverage than down-chain, asset-poor defendants).

<sup>18</sup> See, e.g., Pascal Courty & Gerald Marschke, *Dynamics of Performance-Measurement Systems*, 19 *Oxford Rev. Econ. Pol'y* 268, 270–75 (2003) (reviewing the literature).

<sup>19</sup> See, e.g., John F. Pfaff, *Locked In: The True Causes of Mass Incarceration—And How to Achieve Real Reform* 69–74 (2017) (claiming that such decisions almost single-handedly

which we measure prosecutorial efficacy, and envision alternative incentive structures.<sup>20</sup> This Article considers how organizational dynamics (including but not limited to efficacy measurement) incentivize the discretionary enforcement decisions that determine who our federal drug prisoners will be. And it broadens the lens beyond prosecutors, to the agents and agencies whose discretionary decisions and policies shape prosecutors' choices.

There are multiple organizational actors within the federal drug enforcement sphere—federal, state, and local enforcers, their internal and external overseers, and the offenders themselves—each having organizational ripple effects on another. To appreciate those effects, it is analytically helpful first to disaggregate them. My account therefore explores organizational dynamics along three vectors: (i) between the enforcers and the enforced; (ii) across and within federal enforcement institutions; and (iii) between federal and local enforcers.

Along the first vector, the organizational dynamics of drug trafficking itself—the lack of victim reporting and assistance; the inverse relationship between offender culpability and evidential strength; and the reactive nature of investigations—functionally depress enforcers' impetus and ability to limit prosecutions to the highest levels and most violent members of the distribution chain. Along the second vector, the impulses of institutional actors (agencies, field offices, U.S. Attorneys' Offices) to further agency mission, protect autonomy, and maintain political and financial support, combined with the difficulties of quantifying enforcement success in a political environment that demands it, generate institutional objectives that may undermine larger enforcement aims. Along the third vector, the political and institutional

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account for increase in the national incarceration rate since the early 1990s, eclipsing the role of penal laws); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *Yale L.J.* 1420, 1422–23, 1430–31 (2008) (discussing federal prosecutors' charging discretion and its effect on defendants' ultimate sentences under the previously mandatory guidelines regime). For a critique of the theory that prosecutors control criminal justice outcomes, see Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, *Mich. L. Rev.* (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2930116](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930116) [<https://perma.cc/AC83-XJ8W>].

<sup>20</sup> See, e.g., Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 *Ohio St. J. Crim. L.* 441, 441–42 (2009); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 *Ohio St. J. Crim. L.* 581, 581–83 (2009); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *Stan. L. Rev.* 29, 61–66 (2002).

pressures both created and relieved by vertical cooperation ultimately divert federal enforcers' attention toward the lower rungs of the drug distribution chain.

Together, these dynamics create a system that stymies focus on the most deserving offenders even as it makes apprehending them a principal aim. This insight carries important implications for federal criminal justice reform, which has focused almost exclusively on penalty reduction. Reducing penalties, or rejiggering the statutory taxonomies that generate them, will result in fewer prisoners in federal prison at a given point in time; but it will not significantly change the desert-based characteristics of the prisoner population. If we care not only about how long people spend in federal prison, but also which people go there to begin with—that is, if we want federal criminal law's outcomes to align with its aims—then we must look beyond law, to the structures and mechanisms by which law is enforced. True reform requires change not only to laws, but also to the lower-visibility spaces where enforcement patterns take root—from how agencies document enforcement to how congressional overseers evaluate it to how enforcers interrelate, both within and across jurisdictions. As penalty reduction in the federal system confronts new political challenges,<sup>21</sup> these lower-visibility spaces will become federal criminal justice reform's next frontier.

The Article proceeds as follows. Part I sets out the puzzle, contrasting the ambitions of legislators and enforcers and the resulting federal drug prisoner population. Part II considers federal narcotics enforcement through the lens of organizational theory, exploring the ways in which organizational dynamics inadvertently push federal drug enforcement down the trafficking chain. Part III discusses the implications of my analysis both for drug policy reform and for federal criminal enforcement more broadly. It concludes with some suggestions for reforms, with application within the drug enforcement context and outside it.

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<sup>21</sup> See Carl Hulse, *Unity Was Emerging on Sentencing. Then Came Jeff Sessions*, N.Y. Times (May 14, 2017), <https://www.nytimes.com/2017/05/14/us/politics/jeff-sessions-criminal-sentencing.html>; Carl Hulse, *Why the Senate Couldn't Pass a Crime Bill Both Parties Backed*, N.Y. Times (Sept. 16, 2016), [http://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html?\\_r=0](http://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html?_r=0).



## I. THE FEDERAL DRUG OFFENDER POPULATION: WHAT WE AIMED FOR AND WHAT WE HAVE

Drug offenders comprise nearly half of the federal prison population,<sup>22</sup> and over the last three decades have been the single largest contributor to the eight-fold growth in the federal prison population.<sup>23</sup> Federal drug offenders also represent a large slice (approximately thirty percent) of all convicted drug prisoners in the United States.<sup>24</sup>

Who are these federal drug prisoners? And how well do they represent the primary targets both lawmakers and enforcers intended to capture? Section A of this Part considers the second question; Section B, the first.

### A. *The Ambition of Federal Drug Legislation*

The Comprehensive Drug Abuse Prevention and Control Act of 1970<sup>25</sup> birthed the modern era of federal drug enforcement. Designed primarily to bring together what had been a disparate and ad hoc approach to federal drug regulation,<sup>26</sup> the statute ultimately accomplished three major tasks. First, it created a classification system

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<sup>22</sup> See Fed. Bureau of Prisons, *supra* note 6 (calculating drug offenders as 46.2% of the federal prison population as of June 2017). The next closest offense category is weapons-related offenders, which comprise 17.0% of the federal prison population. *Id.*

<sup>23</sup> The federal prison population increased by 735% between 1980 and 2015. See Nathan James, Congressional Research Serv., R42937, *The Federal Prison Population Buildup: Options for Congress Table A-1* (2016) (data from Federal Bureau of Prisons). The federal incarceration rate (prisoners per 100,000 people) has increased nearly apace. See Bureau of Justice Statistics, *Imprisonment Rates 1978-2015*, <http://www.bjs.gov/index.cfm?ty=nps> [<https://perma.cc/3XSW-QRJQ>] (511% rise in imprisonment rate between 1980 and 2015). Analysis by the Bureau of Justice Statistics and the Urban Institute calculates that 42% of the growth in the federally sentenced population between 1998 and 2010 owes to an increase in the number of drug offenders in prison. See Kamala Mallik-Kane et al., *Urban Inst., Examining Growth in the Federal Prison Population, 1998 to 2010*, at 4 (2012). No other offense category comes close; the next largest contributors to the federal prison growth rate were the growth of weapons-related offenders (accounting for 24% of growth) and immigration-related offenders (accounting for 17% of growth). *Id.*

<sup>24</sup> See Peter Wagner & Bernadette Rabuy, *Prison Policy Initiative, Mass Incarceration: The Whole Pie* (2017), <http://www.prisonpolicy.org/reports/pie2017.html> [<https://perma.cc/T2LB-VH3M>].

<sup>25</sup> Pub. L. No. 91-513 (1970).

<sup>26</sup> David T. Courtwright, *The Controlled Substances Act: How a “Big Tent” Reform Became a Punitive Drug Law*, 76 *Drug & Alcohol Dependence* 9, 10 (2004).

for controlled substances, laying out which substances were to be regulated or prohibited according to their danger, addictive potential, and medical need.<sup>27</sup> Second, it generally reduced the penalties for violations of federal drug laws.<sup>28</sup> And third, it set out an approach to federal drug regulation that aimed to devote resources to both supply and demand reduction.<sup>29</sup>

Over the next several years, rates of drug abuse and crime both rose, prompting Nixon in 1973 to declare a federal “war on drugs.”<sup>30</sup> The statutory ammunition for that war, however, did not expand markedly until the late 1980s, when two bills, enacted in short succession, sought to remake the federal government’s battle plan. It is in these formative statutes, and their copious legislative history, that we find the animating principles and aims of the laws used to prosecute drug offenders in the federal system.

The first of these statutes, the Anti-Drug Abuse Act of 1986,<sup>31</sup> was born (as much federal criminal legislation tends to be) of an incident that shocked and galvanized the American public: the cocaine overdose death of Len Bias, an All-American basketball star who had just joined the NBA as the second-overall pick in the 1986 draft by the Boston Celtics.<sup>32</sup> Within weeks, Congress had drawn up a comprehensive, bipartisan plan to fight the scourge of drug trafficking and abuse. Like the earlier statute it amended, the 1986 Act sought to fight the war on two fronts: demand and supply. But it amplified the effort on both fronts, funneling enormous resources and legal authority to those agencies on the front lines. On the supply side, the statute sought to strengthen domestic criminal enforcement, border interdiction, and

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<sup>27</sup> *Id.* at 11–12; see also Lisa N. Sacco, Congressional Research Serv., R43749, Drug Enforcement in the United States: History, Policy, and Trends 5–6 (2014) (explaining the statutory framework of the Controlled Substances Act).

<sup>28</sup> Courtwright, *supra* note 26, at 12.

<sup>29</sup> *Id.* at 11.

<sup>30</sup> See Sacco, *supra* note 27, at 5–6.

<sup>31</sup> Pub. L. No. 99-570 (1986).

<sup>32</sup> See, e.g., 132 Cong. Rec. 22,660 (1986) (statement of Rep. Michel) (“The death of basketball star Len Bias shocked us into action.”); 1986 NBA Draft, First Round, [http://www.nba.com/draft2002/history/history\\_86draft.html](http://www.nba.com/draft2002/history/history_86draft.html) [<https://perma.cc/UP27-5E47>] (last visited July 22, 2017).

production reduction, the latter through crop eradication and fiscal and diplomatic pressure on drug-producing nations.<sup>33</sup>

With respect to domestic criminal enforcement, the statute did three principal things. First, it provided for harsher penalties against certain drug traffickers, both expanding the maximum possible sentences allowed and mandating minimum terms for dealers of specified drug quantities and so-called career criminal traffickers.<sup>34</sup> Second, it introduced new money laundering provisions.<sup>35</sup> Third, it provided resources to federal, state, and local drug enforcers, allowing for robust enforcement of both federal and state drug laws and greater vertical cooperation among enforcers.<sup>36</sup>

Collectively, these provisions sought to enhance criminal enforcement at every level of the drug trade. But they also made clear—as Congressional floor statements and committee reports confirmed—that *federal* drug enforcement (as opposed to state and local, or vertically cooperative enforcement) should focus on the most serious offenders. Thus it was that the new penalty provisions came out of a House committee that “strongly believe[d] that the Federal government’s most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs,” with a secondary focus on “serious traffickers,” defined as “managers of the retail level traffic,” responsible for packaging and marketing “substantial street quantities.”<sup>37</sup> The Senate Judiciary Committee’s analysis of those penalties likewise envisioned

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<sup>33</sup> See Pub. L. No. 99-570, tits. I, II, III & IX; see also 132 Cong. Rec. 22,664–65 (statement of Rep. Gilman) (summarizing bill’s major supply-reduction efforts as focused on incentivizing foreign nations to cooperate with the United States on crop eradication; increasing interdiction capability; and increasing domestic enforcement by, among other things, raising penalties and imposing mandatory minimum penalties for “serious” and “major” offense categories).

<sup>34</sup> Pub. L. No. 99-570, tit. I, subtit. A, F, G & I.

<sup>35</sup> Id. tit. I, subtit. H.

<sup>36</sup> Id. tit. I, subtit. J & K.

<sup>37</sup> See H.R. Rep. No. 99-845, pt. 1, at 11–12 (1986). The Committee noted that the quantities triggering application of mandatory minimum penalties reflected the Committee’s assessment, based on input from prosecutors and drug enforcement agents, of those quantities that would be possessed by these higher-level traffickers. Id.

their use against “[t]he most serious drug traffickers, so-called ‘drug kingpins.’”<sup>38</sup>

Similarly, both House and Senate floor debate reflected a collective sense that effective federal drug enforcement required focusing on the highest levels of the drug trafficking chain: by stemming the manufacture of drugs abroad; choking international supply routes; and deterring the domestic sale of drugs by going after the market leaders, their financial enablers, and their profits.<sup>39</sup> With respect to street dealers, federal enforcement would focus on managers and supervisors as well as so-called “career offenders,” traffickers for whom three prior felony convictions of serious trafficking crimes or crimes of violence had not served as a deterrent.<sup>40</sup> Other street dealers would be left primarily to state and local prosecution.<sup>41</sup>

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<sup>38</sup> See 132 Cong. Rec. 26,473.

<sup>39</sup> See 132 Cong. Rec. 22,664–65 (statement of Rep. Gilman) (“[T]his bill seeks to intensify eradication and enforcement activities at the source . . . [,] dramatically increases our interdiction capability . . . [and] responds to the need for increased drug law enforcement by further increasing penalties and by providing mandatory minimum sentences for ‘serious’ and ‘major’ drug offense categories.”); id. at 22,669 (statement of Rep. Wolf) (“[T]he bill’s provisions to stiffen penalties for drug offenders, including establishing minimum mandatory . . . terms for major drug trafficking, are critical. Combating drugs at the source is also an important part of the war on drugs and the legislation includes provisions to enhance international narcotics-control and increase drug-interdiction efforts. An essential element in drug-interdiction efforts is the bill’s provisions on money laundering, which attack the drug kingpins who are profiting from the flow of drugs into our country.”); id. at 22,675 (statement of Rep. Mikulski) (“The most powerful aspect of the bill will help wipe out drugs at their source. We must recognize that the ultimate battle against drugs will be won through crop eradication.”); id. at 22,696 (statement of Rep. McCollum) (“The Columbian drug kingpins are worth much more today than any American Mafia families have ever been worth. We have to get at that profit, and we have to get at it through the kind of legislation we have here . . .”).

<sup>40</sup> 132 Cong. Rec. 22,702 (statement of Rep. Wyden) (“[T]he vast majority of serious, violent crime in this country is committed by a small percentage of offenders known as career criminals. . . . [I]t’s high time for the criminal justice system to make it a top priority to go after these career drug criminals. . . . [This] legislation . . . would allow the Federal and local prosecutors to team up and prosecute the worst drug traffickers in Federal court.”); id. at 22,703 (statement of Rep. Biaggi) (“With the ability to focus in on them [career criminals], we will be able to extract them from society at large and be able to really take the heart out of the entire operation.”).

<sup>41</sup> 132 Cong. Rec. 22,670 (statement of Rep. Rinaldo) (“Federal offenses in the areas of money laundering and designer drugs will facilitate prosecutions. Assistance would also be provided to State and local law enforcement authorities which must deal with narcotics violations as street crimes.”); id. at 22,662 (statement of Rep. Rangel) (“[I]f we really want

Two years later, Congress followed up with the Anti-Drug Abuse Act of 1988,<sup>42</sup> which was directed primarily at organizing and directing enforcement efforts toward areas of perceived need. Among other things, it consolidated federal drug control efforts under an Office of National Drug Control Policy; allocated funds for enhanced enforcement of civil forfeiture provisions; and provided mechanisms to funnel additional resources to state and local enforcers and multijurisdictional enforcement teams working in high-intensity drug trafficking areas or building cases against drug trafficking organizations.<sup>43</sup> The 1988 Act also enhanced certain trafficking penalties, namely for drug offenses involving use of a weapon; offenses by career offenders; drug offenses on federal lands, and offenses involving minors.<sup>44</sup>

With both the 1986 and 1988 Acts, Congress clearly envisioned more federal prosecutions of drug dealers: both bills provided resources for hiring more Drug Enforcement Administration (“DEA”) agents and Assistant U.S. Attorneys, and the 1986 bill also provided for building more federal prisons (which were already severely overcrowded).<sup>45</sup> But the bills, floor statements, and conference reports also reveal a distinct desire on Congress’ part for those prosecutions to focus on the most high-value targets, namely, large-scale drug trafficking organizations and their leaders; career drug traffickers; and violent drug traffickers. Indeed, these materials reveal the distinction drawn between those portions of the bills meant to express congressional disapproval (for instance, penalties for personal use of drugs),<sup>46</sup> and those for which Congress desired and endeavored to bring about intense federal enforcement.

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to find out where the troops are coming from, we have to look to local and State law enforcement officials, because if we look to the Drug Enforcement Agency we can only find some 2,000 dedicated men and women, but certainly not enough to take care of the international and national problems that we face. This bill addresses itself to that problem . . . . [by making] certain that we give our local law enforcement and criminal justice system the tools that are necessary if indeed we are going to wage a battle.”)

<sup>42</sup> Pub. L. No. 100-690 (1988).

<sup>43</sup> *Id.* tit. I, VI.

<sup>44</sup> *Id.* tit. VI.

<sup>45</sup> Pub. L. No. 99-570, tit. I, XIV (1986); Pub. L. No. 100-690, tit. I, VI.

<sup>46</sup> Pub. L. No. 100-690, tit. V.

Enforcers clearly understood those aims and shared them, as they do to this day. Before and since the enactment of these statutes, the DEA (the principal federal agency tasked with reducing drug supply) has deemed its primary focus the interstate and international traffickers at the drug trade's highest levels.<sup>47</sup> When, in the mid-1990s, the DEA expanded its investigative activities to the retail levels of the trade and enhanced its cooperation with state and local enforcers, it did so to combat violent street gangs.<sup>48</sup> The DEA, along with federal prosecutors, have by and large endeavored to focus on stemming both the flow of drugs closest to the source point, and community-depleting violence.

To the extent this endeavor has fallen short—and as the next Section shows, it has—some might lay the blame with penal laws themselves, which allow enforcers to aggregate drug weight across dealers and over time.<sup>49</sup> And particularly in the crack context, the quantities deemed indicative of “serious” or “major” trafficking were simply not so—as subsequent Congresses recognized and ultimately mitigated.<sup>50</sup> But while

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<sup>47</sup> See U.S. Gen. Accounting Office, GAO/GGD-99-108, *Drug Control: DEA's Strategy and Operations in the 1990s*, at 32 (1999) [hereinafter GAO 1999 Report] (“Since its establishment, DEA has directed its resources primarily toward disrupting or dismantling major organizations involved in interstate and international drug trafficking. DEA has concentrated on investigating those traffickers functioning at the highest levels of these enterprises, often by developing conspiracy cases for U.S. Attorneys to prosecute and seizing the traffickers’ assets. Federal drug control policymakers considered this investigative approach to be the most effective for reducing the illegal drug supply in the United States.”); Drug Enf’t Admin., FY 2016 Performance Budget Congressional Submission 2 [hereinafter DEA FY 2016 Performance Budget] (“DEA focuses its resources on disrupting and dismantling the world’s ‘Most Wanted’ drug traffickers, identified as Consolidated Priority Organization Targets (CPOTs) as well as other Priority Target Organizations (PTOs) that have the most significant impact on the U.S. drug market.”).

<sup>48</sup> GAO 1999 Report, *supra* note 47, at 33 (“[T]he Administrator emphasized that DEA was to target the highest level drug traffickers and their organizations, as well as violent, street-level drug gangs operating in communities.”).

<sup>49</sup> See 21 U.S.C. § 846 (2012). As applied in drug cases, a conspiracy charge holds a defendant accountable for the reasonably foreseeable amount of drugs sold during the course of the defendant’s participation in the conspiracy. See, e.g., *United States v. Turner*, 604 F.3d 381, 385 (7th Cir. 2010) (“[I]n a drug conspiracy, each conspirator is responsible not only for drug quantities directly attributable to him but also for amounts involved in transactions by coconspirators that were reasonably foreseeable to him.”) (citation and internal quotation marks omitted).

<sup>50</sup> See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). Raising the threshold quantities for crack offenses did not ultimately change the type of dealers prosecuted under the law. See *infra* notes 196–98 and accompanying text.

these aspects of the laws explain why relatively low-level dealers serve long sentences, they do not alone explain why such dealers were targeted for enforcement in the first place. Indeed, targeting lower-level dealers who technically meet these thresholds undermines legislators' and enforcers' clear and expressed desire to use federal resources in the most effective possible way: by disrupting the highest levels and most violent aspects of the drug trade.

### *B. Desert-Based Characteristics of Federal Drug Offenders*

The results of federal drug legislation are by no means divorced from its ambitions. Federal drug enforcement has focused nearly exclusively on traffickers rather than users.<sup>51</sup> It has successfully apprehended drug kingpins, disrupted large and violent trafficking organizations, intercepted and seized large-scale international shipments of drugs, and eaten into traffickers' profits.<sup>52</sup> It has targeted career criminals and violent drug offenders.<sup>53</sup> And yet, as the following data show, the majority of federal drug prisoners fall outside these categories. In this

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<sup>51</sup> See Sam Taxy et al., Bureau of Justice Statistics, *Drug Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data 1* (Oct. 2015) (reporting that 99.5% of federal drug prisoners were convicted of trafficking offenses).

<sup>52</sup> See, e.g., GAO 1999 Report, *supra* note 47, at 51–53 (describing international seizures and apprehensions of drug kingpins in the 1990s); DEA FY 2016 Performance Budget, *supra* note 47, at 9, 15 (describing, among other things, the arrest of Mexican drug lord Joaquin “El Chapo” Guzman Loera, a seizure of an \$11 million interstate heroin shipment, and other drug and cash seizures).

<sup>53</sup> One-quarter of federal drug prisoners are serious recidivists (falling into the highest criminal history category), and over a fifth have a serious history of violence or have used a gun in connection with the offense. See Taxy et al., *supra* note 51, at 4 tbl.4, 5 tbl.5; Charles Colson Task Force on Federal Corrections, *Who Gets Time For Federal Drug Offenses?* 1 fig.1 (Nov. 2015). The data from the Taxy et al. study derives from a dataset of 94,678 federal drug offenders sentenced between 1994 and 2012. See Taxy et al., *supra* note 51, at 7 (describing methodology and dataset). The Charles Colson Task Force data derives from an analysis of 95,305 federal prisoners sentenced between 1994 and 2014 for whom a drug offense was the most serious offense of conviction. See Charles Colson Task Force, *supra*, at 1. In keeping with the methodology of these datasets, my use of the terms “federal drug prisoners” and “federal drug offenders” throughout this Article refers to federal prisoners for whom the most serious offense of conviction was a drug offense. This is the vast majority—92.4%—of all prisoners convicted of any drug offense between 1994 and 2012. Taxy et al., *supra* note 51, at 9 tbl.11.

respect, a large bulk of federal drug enforcement outcomes is out of sync with its aims.

As of 2012 (the most recent accounting of detailed characteristics of the entire federal prison population), over one-third of federal drug prisoners had minimal criminal history, and over a quarter had no quantifiable criminal history at all.<sup>54</sup> The majority of federal drug prisoners (56%) have no history of violence.<sup>55</sup> Over three-quarters of drug prisoners did not possess a weapon in connection with the offense.<sup>56</sup> Just 14% used or threatened violence.<sup>57</sup> And only 14% played some sort of higher-level role in the offense.<sup>58</sup>

Recently convicted federal drug offenders tend to run even more counter to federal drug enforcement goals than does the federal drug prisoner population at large. Of federal drug offenders sentenced in 2016, nearly half had minimal or no criminal history; just 18% possessed a weapon in connection with the offense; and just 8% played some sort of aggravating role in the offense.<sup>59</sup>

A more detailed analysis by the United States Sentencing Commission on federal drug offenders' roles paints an even starker

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<sup>54</sup> Taxy et al., *supra* note 51, at 4 tbl.4. These criminal history descriptions are based on the categories assigned by the Federal Sentencing Guidelines, under which, as of 2012, 34.5% of all federal drug prisoners were in the lowest category (having one or less criminal history point) and 27.4% had zero criminal history points. *Id.* Under the Guidelines, criminal history points are assigned based on the sentence imposed for prior convictions. A person in Category I will have been convicted of no more than one crime in the last fifteen years, for which he or she was sentenced to less than sixty days in prison. A person with no criminal history points will have not been convicted and sentenced of a felony crime (or, with limited exceptions, a misdemeanor crime) at any time in the last ten years. See generally U.S. Sentencing Comm'n, *Guidelines Manual 2016 ch. 4* (2016) (criminal history taxonomy).

<sup>55</sup> Charles Colson Task Force on Federal Corrections, *supra* note 53.

<sup>56</sup> See Taxy et al., *supra* note 51, at 5 tbl.5. The 24.1% of drug offenders who used a weapon does not include the 5,894 federal prisoners sentenced for drug crimes between 1994 and 2012 for whom a weapons offense (rather than a drug offense) was the most serious offense of conviction. *Id.* at 5 tbl.5, 9 tbl.11. Those prisoners comprise 5.8% of the total number of federal prisoners sentenced between 1994 and 2012. *Id.* at 9 tbl.11. Putting these two figures together, 29.9% of federal prisoners convicted of a drug offense were simultaneously convicted of a weapons-related offense.

<sup>57</sup> This figure is based on the dataset described in *supra* note 53.

<sup>58</sup> *Id.* By this, I am referring to the higher-lever roles—manager, leader, supervisor, or organizer—categorized in the Federal Sentencing Guidelines.

<sup>59</sup> U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics 2016*, at tbls.37, 39, 40, <http://www.ussc.gov/research/sourcebook-2016> [hereinafter 2016 Sourcebook].



picture. That analysis, of a representative sample of drug defendants sentenced in 2009, found that just 11% of those offenders were high-level suppliers or importers of drugs.<sup>60</sup> In contrast, 23% (representing the highest percentage of offenders) were low-level couriers, transporting drugs for others; 17% were street-level dealers, distributing small quantities directly to users; and 21% were mid-level wholesalers, buying or selling more than an ounce of drugs at a time, or selling to other dealers.<sup>61</sup> Given the drug weight-amplifying tools at prosecutors' disposal—conspiracy charges allow prosecutors to aggregate drug weight across conspirators and over time, and the Sentencing Guidelines advise sentencing courts to take into account uncharged but “relevant” criminal conduct—these statistics are revealing.<sup>62</sup> They offer a rare glimpse into federal drug prisoners' *actual* roles in the offense for which they are convicted.

As with all data, it is worth bearing in mind the limitations. One is the reporting of characteristics in isolation rather than in aggregate. Thus, for example, we know that more than 50% of federal drug prisoners have no history of violence and more than 75% played no aggravating role; but how many offenders fall into both these categories? Aggregate characteristic data is important, yet absent from public reports (by the Sentencing Commission and others) on federal drug offenders. Indeed, the only datasets reporting the characteristics of all federal drug prisoners (as opposed to the yearly statistics of sentenced offenders kept by the Sentencing Commission) are not publicly available.<sup>63</sup> Still, though, there are strong indications that aggregate statistics would not significantly change the picture. For instance, aggregate statistics provided on offenders with minimal criminal history and nonuse of a weapon reveal that over 25% of federal drug offenders fall into both

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<sup>60</sup> See U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 166–67 (Oct. 2011).

<sup>61</sup> *Id.*

<sup>62</sup> And indeed, because of these weight-amplifying tools, the Sentencing Commission has observed little correlation between drug weight ascribed at sentencing and an offender's actual role in the offense. See *id.* at 169.

<sup>63</sup> See E-mail from Mark Motivans, *supra* note 16.

categories.<sup>64</sup> And an earlier Department of Justice (“DOJ”) study cross-referencing prisoner characteristics found over one-third of federal drug prisoners to be, *in aggregate*, low-level, nonviolent, first-time offenders.<sup>65</sup>

Another important limitation of this data is that it is sentencing data—that is, it derives from findings a federal judge makes at sentencing. Those findings stem almost entirely from the Probation Department’s report, which in turn is heavily influenced by the parties. This is particularly so in cases of a negotiated plea, which form the vast majority of federal case dispositions.<sup>66</sup> Thus, for instance, if the prosecution and defense have agreed upon not ascribing the defendant an aggravating role, the prosecution will never make the case to the probation department for finding such a role; the probation department, which gets nearly all of the facts about a case from the prosecution, will almost certainly not find an aggravating role; and accordingly, neither will the judge.

Yet even with this caveat, sentencing data is worth close attention. First, offender characteristics are only malleable in certain respects, and even then, only to a degree. Criminal history, for instance, is what it is; no amount of plea negotiations can change (or hide) it. And in a system in which prosecutors wield enormous power, readily provable characteristics linked with offense seriousness—such as use of violence or a weapon—will not be blithely bargained away.<sup>67</sup> Second, sentencing

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<sup>64</sup> See *id.* (demonstrating that of the 94,678 federal drug offenders comprising the dataset used in the Taxy et al. study, *supra* note 51, at 1, 24,859, or 26.2%, both did not use a weapon and fell into the Guidelines’ lowest criminal history category).

<sup>65</sup> See U.S. Dep’t of Justice, *An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories 2* (Feb. 4, 1994) (finding that 36.1% of federal drug prisoners were “low-level,” defined as having “no current or prior violence in their records, no involvement in sophisticated criminal activity and no prior commitment”). For further information on this study, see *infra* note 70.

<sup>66</sup> In 2016, 98% of drug cases ended in guilty pleas. 2016 Sourcebook, *supra* note 59, at tbl.38.

<sup>67</sup> Because charge bargaining goes unreported, there are few empirical studies documenting its use. A study by Professor Brian Johnson found that charge bargaining occurred in approximately 12% of federal cases between 2003 and 2006, and that drug cases were second only to immigration cases in infrequency of charge bargaining. See Brian D. Johnson, Nat’l Inst. of Justice, *The Missing Link: Examining Prosecutorial Decision-Making Across Federal District Courts* 56, 63, 71–72 (2014). An earlier, qualitative study of Federal Sentencing Guidelines circumvention practices in ten districts found that Guidelines

data is the only firm and recent data we have, and could conceivably ever get, on the desert-based characteristics of federal drug offenders.<sup>68</sup> Third, precisely because it is the only data we have on federal drug offender characteristics, sentencing data has become, for better or worse, the “facts” about federal drug prisoners. If those facts were wrong, one would expect the DOJ to correct the misimpression. Yet it has not; to the contrary, the DOJ has relied on this data in its policymaking.<sup>69</sup> And in previous decades it has verified the data, finding that it accurately and reliably documented over one-third of federal drug offenders as low-level, nonviolent, first-time offenders.<sup>70</sup>

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circumvention occurred in approximately 20% to 35% of cases resolved by guilty plea, and that of the various methods of circumventing Guidelines and mandatory penalties, charge bargaining was “the most important.” See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 *Nw. U. L. Rev.* 1284, 1290–94 (1997).

<sup>68</sup> Indeed, until several recent studies linking charging and sentencing data across federal (non-drug) cases, sentencing data was the only data available to researchers on federal offender characteristics. See Starr & Rehavi, *supra* note 16, at 16–24 (discussing lack of available presentencing data in federal cases). But even these more recent attempts to quantify presentencing decision making can only examine (as all of them do) demographic characteristics. See, e.g., *id.* at 31–38; Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 *Just. Q.* 394, 396–401 (2010); Johnson, *supra* note 67, at 110–12. In contrast, desert-based characteristics, such as an offender’s role in the offense or use of violence or the quantity and type of drugs involved, are not recorded at earlier stages in the adjudicative process. See Starr & Rehavi, *supra* note 16, at 31–33. Thus, it would be impossible to see, for instance, whether an offender not ascribed an aggravating role at sentencing, or not deemed to have used violence in connection with the offense, nevertheless was deemed a manager or leader or a violent offender by prosecutors at an earlier stage in the proceeding.

<sup>69</sup> See Press Release, Dep’t of Justice, *New Smart on Crime Data Reveals Federal Prosecutors Are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants* (Mar. 21, 2016), <https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal-prosecutors-are-focused-more-significant-drug-cases-and> [<https://perma.cc/TJW6-NXNF>] (discussing the DOJ’s charging and sentencing initiatives and changes, based on data from the U.S. Sentencing Commission, in characteristics of federal drug defendants).

<sup>70</sup> See U.S. Dep’t of Justice, *An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories*, *supra* note 65, at 2. The researchers based this finding on sentencing data, but verified that data in two ways. First, they cross-referenced the sentencing data of a statistically representative sample of 767 federal drug offenders sentenced in 1992 with more detailed information, culled from presentence investigation reports, on the offenders’ criminal history and functional role in the offense. *Id.* at 26–31. Using this method, approximately 8% of defendants appeared to be “manufacturers” or “higher-level” dealers, seemingly meriting an aggravating role adjustment though none had been applied at

In short, while the sentencing data will never capture federal offender characteristics with perfect accuracy, it does so reliably enough. And what it shows is a federal drug prisoner population that differs, in some respects markedly, from what legislators and enforcers envisioned. In the federal drug enforcement context, this is the central disconnect between law's ambition and fruition. The next Part explores the dynamics that help fuel it.

## II. ORGANIZATIONAL DYNAMICS IN FEDERAL DRUG ENFORCEMENT

Among the potential influences on federal drug enforcement patterns, I focus on organizational dynamics for three primary reasons elaborated on in more detail above and repeated briefly here.<sup>71</sup> First, they are relatively understudied. Second, they are influential. And third, they offer an untapped source for effective and achievable reform. By recognizing these dynamics we can correct for them—bringing the law's outcomes closer to its aims.

The following three Sections explore these dynamics as they exist, and interact, along three vectors: between the enforcers and the enforced; across and within federal enforcement institutions; and between federal and local enforcers.

### *A. Dynamics Between Enforcers and Offenders*

The drug trade is a highly linked, ordered, and violent enterprise.<sup>72</sup> These three aspects dictate both drug traffickers' and law enforcers'

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sentencing. *Id.* at 31. Upon further review, however, the DOJ researchers determined that more than half of these “manufacturers” had grown only marijuana, and that almost all of the “higher-level” dealers were not at the top of the drug distribution chain's charged offenders. *Id.* at 31–32. The second method used to verify the accuracy of the sentencing data cross-referenced that data for a statistically representative sample of 126 federal drug offenders sentenced in 1992 with descriptive information provided by the Assistant U.S. Attorneys who had prosecuted those offenders. *Id.* at 36. Using this method, the researchers found only a few cases where prosecutors' description of an offender's role differed markedly from that described in the sentencing data. *Id.* at 36–37.

<sup>71</sup> See *supra* notes 15–18 and accompanying text.

<sup>72</sup> See generally Philippe Bourgois, *In Search of Respect: Selling Crack in El Barrio* (1995) (describing the street culture and crack economy of East Harlem); Audhir Alladi Venkatesh, *American Project: The Rise and Fall of a Modern Ghetto* (2000) (describing the deterioration of the Robert Taylor Homes, a public housing project in Chicago).

strategies. Those strategies in turn feed upon each other, influencing federal investigative and charging patterns.

Consider how a federal drug investigation begins. Unlike most other crimes, the majority of drug crimes' victims<sup>73</sup> are also perpetrators. This includes both end users as well as traffickers subject to drug-related violence. End users do not report drug crimes<sup>74</sup> both because they are complicit in the crime and because, as users, they have a vested interest in ensuring the continuity of their drug supply. Traffickers do not report crimes of violence against them because the perpetration of violence is imperative to their own success as traffickers; to them, the only feasible response to an act of violence is retaliation.<sup>75</sup> And the noncomplicit victims—innocent bystanders caught in the cross fire, or neighborhood residents subject to a degraded quality of life—generally do not report out of fear of retaliation, mistrust of law enforcement, or both.<sup>76</sup>

As a result, drug cases begin primarily in one of two ways. Either law enforcement agents intercept and seize a drug shipment by way of an administrative or consent search in the ordinary course of drug enforcement “patrol”—for instance, an administrative search at the border or airport, or a consent search had by way of a traffic or pedestrian stop—or they obtain and act on information from witnesses willing to exploit their ties to the trade—accomplices or paid informants. Of course, investigators may elect to follow certain initial leads and decline others. But those decisions are heavily influenced by their own identification and prioritization of targets, itself an artifact of information obtained either by way of ordinary-course interdiction or willing witnesses.

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<sup>73</sup> By “victims” I mean all those actually victimized by drugs or drug trafficking, not just those the law recognizes as victims.

<sup>74</sup> See Venkatesh, *supra* note 72, at 141; see also Paul J. Goldstein, *Drugs and Violent Crime*, in *Pathways to Criminal Violence* 16, 35–36 (Neil Alan Weiner & Marvin E. Wolfgang eds., 1989).

<sup>75</sup> See generally Bourgois, *supra* note 72, at 22–28 (discussing role of violence in drug trafficking).

<sup>76</sup> Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 *Yale L.J.* 2236, 2281–82 (2014) (discussing link between intimidation and witness noncooperation in drug cases); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?* 6 *Ohio St. J. Crim. L.* 231, 234, 264–65 (2008) (discussing link between community trust in police and reporting of crimes); Venkatesh, *supra* note 72, at 141 (discussing threats to witnesses).

The origins of federal and local drug investigations differ in some respects. Federal seizures are more likely than local seizures to occur at a border or port of entry; likewise, federal seizures are more likely to involve greater quantities of drugs. But the nature of case origination is a difference of degree, not kind: like their local counterparts, federal drug agents do not truly choose their targets at the initial stage.

In the highly linked, highly ordered economy of drug trafficking, where every supplier has a supplier, this creates a unique enforcement incentive. Once provided an evidentiary lead (either via a seizure or a witness), a federal investigator could, *in theory*, systematically build a case further and further up the supply chain. With no real ability to dictate where he begins in that chain, every initial lead thus presents a choice: should the investigator follow it in the hope that it will ultimately lead to an up-chain payout? Or should he save his investigatory resources for potentially more promising, but as-yet unknown, future leads? Viewed in context of the federal investigator's directives and overall agency mission,<sup>77</sup> close ties with local authorities<sup>78</sup> (available to take on a case ultimately declined by the federal investigators), and a preference for known over unknown risk,<sup>79</sup> the reality is there are relatively few leads that federal drug enforcement agents opt not to pursue through prosecution.<sup>80</sup>

Just as it is difficult in practice to turn away from leads, so, too, is it difficult to develop them successfully. The practicalities of evidential proof at trial dictate trafficking organizations' structure and organization. The most powerful, unassailable proof is tangible physical evidence: the drugs, found in a trafficker's possession. As a result, trafficking organizations maintain an inverse structure between position

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<sup>77</sup> See *infra* Section II.B.

<sup>78</sup> See *infra* Section II.C.

<sup>79</sup> Behavioral economists call this "ambiguity aversion," a concept demonstrated by Daniel Ellsberg's famous study testing participants' preference for known over unknown probability ratios. See Daniel Ellsberg, *Risk, Ambiguity, and the Savage Axioms*, 75 *Q.J. Econ.* 643, 650–57, 666 (1961); Nabil I. Al-Najjar & Jonathan Weinstein, *The Ambiguity Aversion Literature: A Critical Assessment*, 25 *Econ. & Phil.* 249, 250–52 (2009) (explaining the term).

<sup>80</sup> Between 2000 and 2015, the DEA opened 354,349 cases, of which just 52,309—14.7%—were not referred for prosecution. Letter from Katherine L. Myrick, DEA FOIA Records Mgmt. Section Chief to author, Aug. 22, 2016 (on file with author).

in the organization and proximity to the product. Street dealers have relatively small amounts of drugs on them nearly all the time. Wholesale distributors come into contact with much larger quantities less often. Those who obtain shipments from abroad come into contact with ton-weight quantities infrequently. Then there are the managers and facilitators—the organizers, the bankers, the “kingpins”—who make the enterprise possible but do so at a sizable distance from the drugs themselves.

For an organized criminal enterprise, moreover, the single most precious asset is information about its activities and structure that could lead to the arrests of its members and seizure of its product.<sup>81</sup> To protect itself, then, the organization compartmentalizes: it restricts the number of its members; it shares information among members only to the extent necessary to permit each member to do his job; and it limits its internal communications to forms less susceptible to law enforcement surveillance.<sup>82</sup>

All of these organizational tactics by drug traffickers and trafficking organizations make it difficult, in practice, for law enforcement to build cases up the trafficking chain. In the best case scenario, enforcers will seize a sizable amount of drugs from a dealer with some knowledge of his organization’s supply chain that he is willing to share. Even then, additional corroboration is required to establish probable cause for a search or an arrest. And even if corroboration is obtained, a search may not always be productive (or at least, not nearly as productive as anticipated).<sup>83</sup> High-level drug traffickers adapt to enforcers’ investigative methods, frustrating enforcers’ attempts at evidence collection and functionally requiring an enormous investment of investigative resources (time, manpower, and money).<sup>84</sup> In short, while

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<sup>81</sup> See Peter Reuter, *Disorganized Crime: The Economics of the Visible Hand* 113–19 (1983); Mittie D. Southerland & Gary W. Potter, *Applying Organization Theory to Organized Crime*, 9 *J. Contemp. Crim. Just.* 251, 253 (1993).

<sup>82</sup> See Reuter, *supra* note 81, at 113–19; Southerland & Potter, *supra* note 81, at 253.

<sup>83</sup> For an illustrative account of the challenges and difficulties of building up-chain, large-scale federal narcotics cases, see Jim McGee & Brian Duffy, *Main Justice: The Men and Women Who Enforce the Nation’s Criminal Laws and Guard Its Liberties* (1996).

<sup>84</sup> See *id.*; see also David Epstein, *ProPublica*, *How DEA Agents Took Down Mexico’s Most Vicious Drug Cartel*, *Atlantic* (Jan. 2016), <http://www.theatlantic.com/magazine/archive/2016/01/drug-enforcement-agency-mexico-drug-cartel/419100/> [https://perma.cc/

every investigatory lead holds out the tantalizing promise of an up-chain payout, in reality such payouts are difficult to come by.

The challenges of case building are magnified in the case of drug-related crimes of violence, where victims of violence are often also perpetrators of it, and those who would cooperate with law enforcement—victims, perpetrators, or noncomplicit eyewitnesses—face an omnipresent threat of retaliation. Not only are these cases difficult to build, but they tend also to reside among the lowest-level participants in the drug trade: the street dealers and their immediate bosses or “enforcers” who use violence to further and secure the organization’s position.<sup>85</sup> Position-enforcing violence or its threat can, of course, be found at all levels. But at least in the domestic context, it is the violence at the trade’s lowest levels that is felt most acutely by the law-abiding members of a community: the shootings or beatings on street corners, in bodegas, and in apartment stairwells.<sup>86</sup> Indeed it is precisely the salience of drug-related violence to communal life, and the difficulties of successfully prosecuting it, that has drawn federal law enforcement to the “street crime” sphere.<sup>87</sup>

But how are federal investigators to build these cases? Consider the typical scenario. Local police have scores of crime reports—shootings, murders, and beatings. Based on the victims and the locations, they surmise these acts of violence were perpetrated by members of competing drug trafficking organizations. But neither victims nor witnesses will talk. Nor will members of the organizations the police suspect of involvement.

The best way—perhaps the only way—for law enforcement to get an investigatory foothold in this circumstance is to target members of the organization who actively sell drugs to customers. These targets provide easy access to an informant or undercover agent, and are also likely to

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NPP6-EHZT] (describing the DEA’s fifteen-year quest to apprehend the leaders of Mexico’s Arellano Félix Organization).

<sup>85</sup> Bourgois, *supra* note 72, at 23–25.

<sup>86</sup> See generally Bourgois, *supra* note 72, at 34–35 (describing the “traumatic nature and prominent public visibility” of street culture’s violence); Venkatesh, *supra* note 72, at 139–40 (discussing how drug-related violence led to a reduced sense of safety among tenants in a Chicago public housing complex).

<sup>87</sup> See Ouziel, *supra* note 76, at 2253, 2280–81; see also *infra* Section II.C.



have basic knowledge of the organization's structure and the roles of its members. In choosing which street-level dealers to target, enforcers will seek out those with the most to lose from a federal criminal charge: either prior felony drug trafficking offenders, for whom mandatory penalties are doubled under the federal drug statutes,<sup>88</sup> or (somewhat paradoxically) first-time offenders, for whom the prospect of any prison sentence is likely to serve as a substantial inducement. And agents will seek out targets that present a low risk of government-sponsored harm: that is, those unlikely to commit crimes of violence. In short, for a variety of reasons endemic to the challenges of case building, federal enforcers not infrequently end up targeting low-level, nonviolent, first-time offenders.

In all these ways, the organizational strategies of drug traffickers and law enforcers are mutually reinforcing. They function, both intentionally and inadvertently, to perpetuate a system in which both sides benefit by sacrificing low-level, nonviolent, first-time offenders.

### *B. Dynamics Across and Within Federal Enforcement Institutions*

Federal drug enforcement is the work of numerous federal agencies,<sup>89</sup> all operating within a narrow policy space. As the work of public administration scholars has demonstrated, government agencies have three core concerns. One is to define and successfully execute the agency's *mission*—that is, to achieve agreement on its primary existential purpose, and to define and then perform its purpose-critical tasks.<sup>90</sup> A second is to ensure *organizational autonomy*, often defined as the freedom from extra-agency constraints.<sup>91</sup> And a third is to increase *external support* for the agency, both political and financial.<sup>92</sup>

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<sup>88</sup> See 21 U.S.C. § 841(b)(1) (2012).

<sup>89</sup> I use the term agency here and throughout to encompass federal governmental organizations, regardless of whether they go by the nomenclature of “agency,” “department,” “bureau,” or “office.”

<sup>90</sup> See James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 25–26 (1989).

<sup>91</sup> See Patricia Rachal, *Federal Narcotics Enforcement: Reorganization and Reform* 40 (1982).

<sup>92</sup> See Wilson, *supra* note 90, at 48–49 (describing the need of government agencies “to acquire and maintain external support” as “so great as to divert all but the ablest and most energetic executives from careful task definition”).

Interacting with these agency-level concerns are the incentives of the agency's frontline workers—the “operators”<sup>93</sup> or “street-level bureaucrats.”<sup>94</sup>

This Section considers how agency concerns and individual incentives interact to affect the exercise of federal drug enforcement discretion, inadvertently pulling federal drug enforcement down to the relatively lower levels of the trade.

### *1. Mission*

In the drug enforcement context, one cannot consider an agency's defined mission apart from the practical realities of achieving it. Take the DEA, whose stated mission is to

enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system of the United States, or any other competent jurisdiction, those organizations and principal members of organizations, involved in the growing, manufacture, or distribution of controlled substances appearing in or destined for illicit traffic in the United States; and to recommend and support non-enforcement programs aimed at reducing the availability of illicit controlled substances on the domestic and international markets.<sup>95</sup>

What does it mean, in practical terms, to “enforce the controlled substances laws” and to bring to justice those “organizations and principal members of organizations” involved in drug manufacture and distribution? As the prior Section showed, successful organizational prosecutions are incredibly challenging; more so are those aimed at an organization's leadership. Thus, the practical reality is that, while the DEA will *aim* to prosecute those at the highest levels of the trafficking

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<sup>93</sup> See Wilson, *supra* note 90, at 33–34.

<sup>94</sup> Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* 3 (1980) (describing “street-level bureaucrats” as “[p]ublic service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work,” and identifying law enforcement personnel as typical street-level bureaucrats).

<sup>95</sup> Drug Enf't Agency, *DEA Mission Statement*, <https://www.dea.gov/about/mission.shtml> [<https://perma.cc/Q4CP-FHAL>].

trade, the nature of drug trafficking organizations requires the agency to begin that effort at a much lower level.

As it does so, moreover, its primary mission—enforcing the federal drug laws—can work at cross purposes. What, for instance, is an agent to do when he hears over a wiretap that a group of relatively lower-level distributors is about to receive a kilo shipment, which it intends immediately to put out to the street dealers? Doing nothing while those drugs travel downstream into the hands of customers is not “enforcing the controlled substances laws”; on the other hand, maintaining the covert investigation may enable the agent to identify additional suppliers that would otherwise be tipped off once a seizure and arrests were made. In practice, in other words, the DEA’s missions can work at odds, forcing the agency to make choices between the two. In such situations, the agency inevitably opts for the primary and immediate mission (interception and seizure) over the longer-term goal (building a case against the larger organization).<sup>96</sup>

To understand why the DEA prioritizes its missions in this manner, one need look no further than the recent “gunwalking” episode at the Bureau of Alcohol, Tobacco and Firearms (“ATF”). The decision by the ATF’s Phoenix field division to permit illegal firearms sales in the hopes of tracking the guns to cartel leaders proved politically perilous when it was revealed that the agency had lost track of more than 2,000 firearms, a number of which were ultimately found by authorities at crime scenes—including two recovered at the scene of a U.S. Border Patrol agent’s murder.<sup>97</sup> The ensuing political firestorm of congressional hearings, subpoenas, and an internal DOJ investigation ultimately led to the resignation of the ATF’s director, the reassignment of top ATF officials, and the hobbling of an already politically beleaguered

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<sup>96</sup> The DEA distinguishes proceeds of drug trafficking from contraband—drugs or weapons—which present an immediate public safety risk. See Ginger Thompson, U.S. Agents Launder Mexican Profits of Drug Cartels, *N.Y. Times* (Dec. 3, 2011), <http://www.nytimes.com/2011/12/04/world/americas/us-drug-agents-laundry-profits-of-mexican-cartels.html>. Nevertheless, DEA operations laundering drug proceeds in an attempt to follow the money to its source have generated some soul-searching within the agency. *Id.*

<sup>97</sup> Richard A. Serrano, *Emails Show Top Justice Department Officials Knew of ATF Gun Program*, *L.A. Times* (Oct. 3, 2011), <http://articles.latimes.com/2011/oct/03/nation/la-na-atf-guns-20111004> [<https://perma.cc/5CAX-4P4B>].

agency.<sup>98</sup> Operation “fast and furious,” as it was known within the ATF, is an object lesson in the perils of a criminal enforcement agency prioritizing long-term goals over immediate directives.<sup>99</sup>

In the drug enforcement context, then, it is enforcement realities that dictate how operators interpret their mission, rather than the converse. This is precisely as public administration scholars have described in accounts of the process by which public agencies define their mission-critical tasks.<sup>100</sup> When agencies have vague or inconsistent goals—as is often the case in “street-level” bureaucracies such as law enforcement<sup>101</sup>—the tasks and decisions of frontline operators will be shaped by the on-the-job circumstances they encounter, their beliefs and experiences, and external pressures.<sup>102</sup> In this way, so will the agency’s actual mission.<sup>103</sup>

So it is with federal drug enforcers. Faced with vague and sometimes competing goals, enforcers’ priorities become dictated by operational realities and political pressures. The result is the prioritization of immediate public safety threats over long-term investigatory aims, in turn resulting in greater arrests of lower-level participants in the drug

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<sup>98</sup> Richard A. Serrano, ATF Officials Reassigned in Latest Fast and Furious Fallout, *L.A. Times* (Oct. 5, 2011), <http://www.latimes.com/nation/politics/politicsnow/la-pn-atf-personnel-20111005-story.html> [<https://perma.cc/SM6H-U95B>].

<sup>99</sup> The missions of other federal agencies operating in the drug enforcement sphere lean even more directly toward the immediate than the long term. The Bureau of Customs and Border Protection (“CBP”), for instance, defines as its mission the protection of America’s borders from dangerous materials and persons—necessarily prioritizing immediate seizures of contraband and the arrest of those carrying it. See U.S. Customs & Border Prot., About CBP (Nov. 21, 2016), <https://www.cbp.gov/about> [<https://perma.cc/L7RB-BGPQ>] (“CBP exists . . . [t]o safeguard America’s borders thereby protecting the public from dangerous people and materials while enhancing the Nation’s global economic competitiveness by enabling legitimate trade and travel.” (alteration in original)). The ATF defines its primary goal as protecting the public from crimes involving firearms. See Bureau of Alcohol, Tobacco, Firearms & Explosives, About, <https://www.atf.gov/about> [<https://perma.cc/K75U-GW7E>] (“ATF protects the public from crimes involving firearms, explosives, arson, and the diversion of alcohol and tobacco products; regulates lawful commerce in firearms and explosives; and provides worldwide support to law enforcement, public safety, and industry partners.”). In fact, it was in part the deliberate relegation of its immediate protective mission that made Operation Fast and Furious so self-destructive for the agency.

<sup>100</sup> See Lipsky, *supra* note 94, at 40–48; Wilson, *supra* note 90, at 33–34.

<sup>101</sup> Lipsky, *supra* note 94, at 40.

<sup>102</sup> Wilson, *supra* note 90, at 33–34.

<sup>103</sup> Lipsky, *supra* note 94, at 13–18.

trafficking trade. And because an organization's culture is ultimately defined by frontline operators' interpretation of their primary mission,<sup>104</sup> the effect is cumulative. Thus it is that at the DEA, for example, seizures and arrests are highly valued, even as they might conflict, at times, with long-term investigative goals set by the agency's leadership.<sup>105</sup>

## 2. *Organizational Autonomy*

What is organizational autonomy? At the very least, it implies an exclusive jurisdiction over a coherent set of tasks—a concept more colloquially known as “turf.”<sup>106</sup> But the true organizational autonomy agencies seek involves more than just turf. It is freedom from constraints imposed by other political institutions.<sup>107</sup>

This freedom is difficult to achieve in narcotics enforcement, a space overflowing with competing institutional actors. The White House counts twelve different executive departments with jurisdiction over drug control, some of which in turn task multiple internal agencies to that end.<sup>108</sup> To protect tasks within their core competencies, agencies will battle institutional rivals fiercely. In fact, it was precisely such a battle that in 1973 gave birth to the DEA, an agency designed in an effort to overcome the bitter rivalry between the Bureau of Narcotics and Dangerous Drugs and the U.S. Customs Service for the lead role over federal narcotics enforcement.<sup>109</sup> Similar institutional battles between drug enforcers (most notably the DEA and the FBI) have periodically led to calls for further agency reorganization, with the DEA managing, at least thus far, to fend off its demise.<sup>110</sup>

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<sup>104</sup> Wilson, *supra* note 90, at 33–34.

<sup>105</sup> See *id.* at 47–48. This dynamic, and its interaction with external and internal performance pressures, is further explored in Part III.

<sup>106</sup> Rachal, *supra* note 91, at 42; Wilson, *supra* note 90, at 26–27.

<sup>107</sup> Rachal, *supra* note 91, at 42.

<sup>108</sup> See, e.g., Office of Nat'l Drug Control Policy, FY 2016 Budget and Performance Summary (Nov. 2015) (compiling drug control budgets of the Departments of Defense, State, Justice, Education, Health and Human Services, Homeland Security, Interior, Transportation, Treasury, Labor, Housing and Urban Development, Agriculture, and Veterans Affairs, in addition to the Office of National Drug Control Policy).

<sup>109</sup> Rachal, *supra* note 91, at 53–72.

<sup>110</sup> *Id.* at 140–42; McGee & Duffy, *supra* note 83, at 35–40.

For the multiple enforcement agencies that play a role in drug cases,<sup>111</sup> then, and for the DEA in particular (an episodic target of reorganizational efforts) there is a strong and abiding need to demonstrate superior performance of critical tasks. Thus, on top of the drug trade's effects on those critical tasks,<sup>112</sup> the agency's process of task definition is fueled by its instincts for self-preservation. In the arena of drug enforcement, this can serve to undermine larger enforcement goals.

As an example, consider the effects of a long-running competition between the DEA and the Bureau of Immigration and Customs Enforcement ("ICE") (and their predecessor agencies) regarding investigations stemming from drug seizures at the border and ports of entry. For as long as they have existed, drug enforcers and customs inspectors have feuded over which agency would take on investigations stemming from these seizures, prized for their direct links to international sources of supply.<sup>113</sup> These battles resulted in a series of memorandums governing the two agencies' relationships in such cases, the effects of which ultimately served to undermine investigative potential.<sup>114</sup> ICE balked at the notion of DEA agents supervising their investigations.<sup>115</sup> ICE agents deliberately limited information sharing with the DEA, handicapping higher-level investigations,<sup>116</sup> and froze out the DEA from internationally linked investigations, tarnishing the DEA's relationships with foreign law enforcement. At the same time, the DEA required that it approve any international informants run by ICE, limiting ICE's ability to develop drug-smuggling intelligence.<sup>117</sup>

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<sup>111</sup> These include the DEA, the Bureau of Customs and Border Protection, the Bureau of Immigration and Customs Enforcement, the United States Coast Guard, the Office of Counternarcotics Enforcement (within the Department of Homeland Security), and the Bureau of International Narcotics and Law Enforcement Affairs (within the State Department). See Office of Nat'l Drug Control Policy, FY 2016 Budget and Performance Summary, *supra* note 108.

<sup>112</sup> See *supra* Section II.A.

<sup>113</sup> See Gov't Accountability Office, GAO-09-63, Drug Control: Better Coordination with the Department of Homeland Security and an Updated Accountability Framework Can Further Enhance DEA's Efforts to Meet Post-9/11 Responsibilities 28 (2009).

<sup>114</sup> *Id.* at 29.

<sup>115</sup> *Id.* at 30.

<sup>116</sup> *Id.* at 46–48.

<sup>117</sup> *Id.* at 30–31.

This state of affairs hobbled both agencies' autonomy and investigative efficacy.

A 2009 effort to reset and more clearly define the relationship between ICE and the DEA has led to greater autonomy.<sup>118</sup> But it may also, inadvertently, have served to push each agency further down the rungs of the trafficking trade. ICE now exercises enforcement dominion over cases with a clearly articulable nexus to the U.S. border and ports of entry, while the DEA reigns over the rest of the trafficking trade.<sup>119</sup> This clearer delineation of investigative authority is also a narrowing of it. Without a decrease in investigative resources and manpower—and there has been no such decrease<sup>120</sup>—the agencies' dockets risk expanding at the bottom rungs of the drug trade rather than the top.<sup>121</sup> The risk is particularly acute for cross border smuggling, in which even relatively low-level quantities of drugs result in arrest and prosecution, and where mules—among the trade's least culpable and most vulnerable offenders—abound.<sup>122</sup>

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<sup>118</sup> Gov't Accountability Office, GOA-11-763, *Combatting Illicit Drugs: DEA and ICE Interagency Agreement Has Helped to Ensure Better Coordination of Drug Investigations* 10–11 (2011).

<sup>119</sup> *Id.*

<sup>120</sup> Narcotics smuggling operations as a percentage of ICE's investigative operations has slightly increased since 2009. Compare *id.* at 7 (stating that between 2006 and 2009, narcotics smuggling investigations constituted nearly a quarter of ICE's investigative operations, the largest single investigative category), with ICE Office of Inspector General, OIG-16-31, *Review of U.S. Immigration and Customs Enforcement's Fiscal Year 2015 Detailed Accounting Submission 2* (2016) (stating that narcotics investigations comprised nearly 27% of ICE's investigative operations in 2015). DEA's investigative manpower has also grown during this time. Compare Brian A. Reaves, Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2008*, at 2, tbl.1 (June 2012) (stating that the DEA had 4,308 agents in 2008), with Drug Enf't Admin., *DEA Factsheet* (March 2015) <https://www.dea.gov/docs/factsheet.pdf> [<https://perma.cc/YV2U-KQ6M>] (stating that the DEA had over 4,600 agents in 2015).

<sup>121</sup> See *supra* Section II.A (explaining how the trade itself naturally pushes enforcement in that direction).

<sup>122</sup> Indeed, in the years since ICE clarified its jurisdiction over border drug smuggling cases, the number of lower-level marijuana trafficking cases—often so low level they are pled down to simple possession cases—has increased by nearly 400%, almost entirely on account of enforcement at the border in Arizona and Texas. U.S. Sentencing Comm'n, *Weighing the Charges: Simple Possession of Drugs in the Federal Criminal Justice System* 1 (Sept. 2016).

The tradeoff between autonomy and investigative efficacy can be felt even where agencies have not battled so openly. Among the DEA's responsibilities, for instance, are nonenforcement methods of supply reduction, such as crop eradication and training of foreign officials in detection and eradication. The DEA has generally steered away from these tasks, which are closer to the core competencies of the Defense and State Departments.<sup>123</sup> Yet the Defense and State Departments are multi-mission agencies; drug supply-reduction may not always be among their top priorities. As a result, these nonenforcement methods of supply-reduction may be underutilized, even as they were touted by legislators as among the best and most effective ways to choke drug supply.<sup>124</sup>

Prosecutors, too, want organizational autonomy. For federal prosecutors, who have a broad jurisdictional portfolio, autonomy most often means the freedom to allocate time and resources according to their professional agenda. This is true at both the U.S. Attorney level—as when U.S. Attorneys seek to advance specific enforcement priorities<sup>125</sup>—and at the line level, where Assistant U.S. Attorneys may

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<sup>123</sup> See Tony Payan, *Cops, Soldiers and Diplomats: Explaining Agency Behavior in the War on Drugs* 74–80 (2006).

<sup>124</sup> See *supra* note 39 and accompanying text; see also 132 Cong. Rec. 22,670 (remarks of Rep. Downey) (“Traditionally, our efforts to stem the supply of drugs into the United States have been focused on our borders. But this strategy has not been very effective. We need to expand our fight and attack the problem at its source by taking aim at those responsible for creating the supply of drugs that find their way into our country.”); *id.* at 22,675 (remarks of Rep. Mikulski) (“The most powerful aspect of the bill will help wipe out drugs at their source. We must recognize that the ultimate battle against drugs will be won through crop eradication. We must fight the drug war before it reaches our borders and streets. We must go to the root of the problem, where drugs are grown, manufactured, and refined.”).

<sup>125</sup> Preet Bharara's concerted efforts towards rooting out public corruption and securities fraud in the Southern District of New York is but one example. See Massimo Calabresi, *Prosecutor Preet Bharara in His Own Words: Battling 'a Creeping Culture of Corruption,'* *Time* (Feb. 6, 2012), <http://swampland.time.com/2012/02/06/prosecutor-preet-bharara-in-his-own-words-battling-a-creeping-culture-of-corruption/> [<https://perma.cc/MCE6-P2NA>] (describing Bharara's decision to emphasize public corruption and insider trading prosecutions in part to help deter the conduct and in part to expose “a vein of quite substantial criminality and corruption on the part of, in many cases, really privileged and moneyed people who should have known better”); see also Melissa Healy, *Making Federal Case Out of Guns*, *L.A. Times* (Jan. 20, 2000), <http://articles.latimes.com/2000/jan/20/news/mn-55833> [<https://perma.cc/2C7V-E4YW>] (describing the priority of then-U.S.



have their own professional goals, such as securing trial experience, or amassing expertise in a field (such as white collar crime) that is highly valued in the private sector.<sup>126</sup>

Yet for all that is said about federal prosecutors' charging discretion and relative lack of political accountability,<sup>127</sup> federal prosecutors are not immune from oversight. U.S. Attorney's Offices, after all, need money, and federal funds are not forthcoming—either from Congress in the first instance or Main Justice in the subsequent allocation<sup>128</sup>—without some measure of demonstrated performance. For federal prosecutors, the relevant performance metrics are defendants charged and convicted.<sup>129</sup> Both of these metrics determine the lump sum congressional appropriation for all ninety-three U.S. Attorneys' Offices across the country,<sup>130</sup> while individual offices' caseloads largely determine the

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Attorney for the Eastern District of Virginia James Comey to root out gun violence in the city of Richmond, and his strategy to do so).

<sup>126</sup> See James Eisenstein, *Counsel for the United States: U.S. Attorneys in the Political and Legal Systems* 197–206 (1978) (discussing federal prosecutors' career-maximizing incentives); Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 *Am. L. & Econ. Rev.* 259, 272–73 (2000) (empirically modeling effect of career-maximization incentives on federal prosecutors' selection of drug cases, finding evidence that such incentives influence case selection); William J. Stuntz, *Self-Defeating Crimes*, 86 *Va. L. Rev.* 1871, 1884–85 (2000) (arguing that federal prosecutors tend to seek out marginal cases because a prosecutor's value in the private market is enhanced by trial experience).

<sup>127</sup> See, e.g., Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *Colum. L. Rev.* 583, 611 (2005) (“Little responsibility and vast jurisdiction mean that federal law enforcers must exercise an extraordinary degree of investigative and prosecutorial discretion in deciding when, and against whom, to invoke that jurisdiction.”); William J. Stuntz, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 *Harv. L. Rev.* 842, 861–63 (2001) (describing differences in political pressures and accountability between state and federal prosecutors).

<sup>128</sup> For U.S. Attorneys appropriations, Main Justice submits a request to Congress for a total lump sum amount, which is then disbursed among U.S. Attorneys Offices by the DOJ's Executive Office for United States Attorneys (“EOUSA”) according to demonstrated need. U.S. Dep't of Justice, *U.S. Attorneys, FY 2014 Performance Budget Congressional Submission* 1, 15.

<sup>129</sup> See *id.* at 22–24 (detailing relevant performance measures for U.S. Attorneys' Offices as the total number of defendants terminated (regardless of outcome), the total number found guilty, and the percentage of cases “favorably resolved”).

<sup>130</sup> See *id.* at 1. In 2014, it was roughly \$2 billion.

allocation of those funds among the offices.<sup>131</sup> In short, case volume and prosecutorial success dictate a U.S. Attorney's Office's budget allocation.

High-profile, complex cases may carry greater professional value for federal prosecutors, and greater value for the DOJ's overall mission, but they don't easily satisfy volume-based or success-based performance metrics. Such cases take time to investigate and build, and are often challenging to prove. Federal prosecutors, in short, must underwrite those more "desirable" cases with ones that will more easily feed performance metrics. Drug cases, and particularly cases against lower-level drug offenders, do that: they tend to be relatively quick and easy to bring and resolve favorably,<sup>132</sup> freeing prosecutors' resources to devote to other cases. In short, lower-level drug cases buy autonomy.

In this way, prosecutorial desires with respect to autonomy, both at the organizational and individual levels, can amplify those of drug enforcement agencies and agents. The overall effect functions to incentivize drug prosecutions. And, because of the dynamics between enforcers and offenders,<sup>133</sup> this incentive in turn fuels the arrest and charging of greater numbers of relatively lower-level offenders.

### 3. *External Support*

Organizational autonomy is closely linked to external support: without the support of Congress, the President, and the public, an agency would have little hope of exercising unfettered reign within its jurisdictional arena. And so, as the agency battles its competitors, it also must court its enablers: those who write its checks and give it the political space in which to thrive.<sup>134</sup>

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<sup>131</sup> See *id.* at 15 (describing system of allocating funds to individual offices based on "demonstrated need"); Dep't of Justice, Office of Inspector Gen., Audit Div., Audit Report 09-03, Resource Management of United States Attorneys' Offices 7-10 (Nov. 2008) (describing allocation process among US Attorneys' Offices, which depends heavily on caseloads of each office).

<sup>132</sup> See generally Ouziel, *supra* note 76, at 2255-56 (discussing relative ease of securing convictions in federal drug cases).

<sup>133</sup> See *supra* Section II.A.

<sup>134</sup> Wilson, *supra* note 90, at 235-56 (discussing Congress's role in agency autonomy and appropriations).

Both of these functions require demonstrating performance. But how does one do so in the context of drug enforcement? For as long as the federal government has been in the business of drug enforcement, it has struggled with how to monitor and assess the results of those efforts. Drug demand and supply is notoriously difficult to measure; drug use and trafficking is, after all, a covert enterprise. Resource limitations, reliance on users' self-reporting, and traffickers' efforts to hide reliable supply measures (such as crop cultivation) impede accurate estimates.<sup>135</sup> As a result, the successes of federal drug control efforts—both on the demand and supply fronts—are difficult to evaluate.<sup>136</sup> Notwithstanding these enormous impediments, performance measurement is critical to policymaking, appropriations, and budget expenditures.<sup>137</sup>

The natural result is a devolution to proxies: performance measures, are, in effect, a function of what can be measured. On the enforcement side, the most readily measurable proxies for performance are arrests and the seizures that accompany them.<sup>138</sup> Because federal policymakers are focused on disrupting drug supply at the highest levels of the trafficking chain, though, arrest-based performance measures can be counterproductive, leading enforcers to focus on outputs at the expense of outcomes.<sup>139</sup> In a laudable effort to resist that fate, drug enforcement agencies have attempted to measure outcomes. And yet, because outcomes in drug enforcement are so difficult to measure, they are inevitably output measures in disguise.

Consider the federal government's most recent effort at outcome measurement: the tabulation of "Priority Target Organizations"

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<sup>135</sup> See Office of Nat'l Drug Control Policy, Drug Availability Estimates in the United States 1–2 (2012) [hereinafter Drug Availability Estimates].

<sup>136</sup> See Office of Nat'l Drug Control Policy, National Drug Control Strategy Performance Reporting System Report 9 (2015) [hereinafter Performance Report] (describing "the inadequacy of data on the outcomes of drug control activities" as "[o]ne of the greatest impediments to acquiring a clear understanding of drug trends").

<sup>137</sup> See Drug Availability Estimates, *supra* note 135, at 2, 10–11.

<sup>138</sup> See GAO 1999 Report, *supra* note 47, at 72 ("Over the years, DEA has used arrest and seizure data (drugs and assets) along with examples of significant enforcement accomplishments, such as descriptions of successful operations, to demonstrate its effectiveness in carrying out its enforcement programs and initiatives.").

<sup>139</sup> *Id.*; see also Wilson, *supra* note 90, at 174–75 (describing the risks of output-based performance measures).

(“PTOs”) that are “disrupted or dismantled.”<sup>140</sup> In practice, the only means by which federal drug enforcers can “disrupt or dismantle” trafficking organizations is to arrest their members and seize their assets.<sup>141</sup> Outputs (arrests and asset seizures) thus become proxy measures of outcomes (“disruption or dismantlement” of trafficking organizations).

If the outcome-based performance measure is disruption or dismantlement of priority trafficking organizations, and if arrests and asset seizures are the measure’s calculus, it becomes imperative for drug enforcers to distinguish among those arrested.<sup>142</sup> In 2001, the DEA, together with the Office of National Drug Control Policy, began its most recent in a long line of efforts in that regard, categorizing targets based on relative position in the trafficking chain.<sup>143</sup> Under what is known as the Priority Target Organization system, suspects linked in some way to a Consolidated Priority Organization Target (“CPOT”) are of the highest value, signifying associations with “heads of drug or money laundering organizations, clandestine manufacturers or producers, and major transporters and distributors.”<sup>144</sup> Suspects linked to a Regional Priority Organization Target (“RPOT”) are of next highest value, signifying associations with entities or persons whose drug trafficking or money laundering activities are considered to have “a significant impact” on a designated regional area.<sup>145</sup> In addition to these categorizations are those at the case level: investigations that qualify for the DOJ’s Organized

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<sup>140</sup> See Office of Nat’l Drug Control Policy, Performance Measures of Effectiveness: A System for Assessing the Performance of the National Drug Control Strategy, 1998–2007, at 68–69 (1998); Dep’t of Justice, Office of Inspector Gen., The Drug Enforcement Administration’s Implementation of the Government Performance and Results Act 13 (Sept. 2003) [hereinafter DEA’s Implementation of GPRA].

<sup>141</sup> See GAO 1999 Report, supra note 47, at 71 (describing as a performance measure “the percentage of designated drug trafficking organizations dismantled or significantly disrupted *either through the incarceration of their principal leaders or through the substantial seizure of their assets or the incarceration of their network key associates*, measured annually” (emphasis added)); DEA’s Implementation of GPRA, supra note 140, at 13–14 (discussing the use of arrests as proxies for disruption and dismantlement).

<sup>142</sup> See Office of Nat’l Drug Control Policy, Performance Measures of Effectiveness, supra note 140.

<sup>143</sup> See GAO 1999 Report, supra note 47, at 78.

<sup>144</sup> Performance Report, supra note 136, at 29.

<sup>145</sup> Id.

Crime and Drug Enforcement Task Force (“OCDETF”) or the congressionally mandated High Intensity Drug Trafficking Area program (“HIDTA”), both of which channel earmarked funds to drug enforcement agencies for high-priority investigations.<sup>146</sup>

What, though, determines these categorizations? How does one, in other words, measure the measure? Here is where enforcement performance becomes highly malleable. As a 2011 audit of the DEA by the DOJ’s Inspector General made clear, target and case designation is only as useful a performance measure as the data comprising it.<sup>147</sup> That audit found that while the DEA had over the course of the last decade substantially increased the percentage of agent time spent on investigations linked to PTOs, in fact much of this increase owed to a focus on targets considered priorities because of their regional and local impact at the expense of those higher-level organizations linked to international supply sources.<sup>148</sup> Moreover, the qualifications necessary to deem a given group of actors a “priority organization”—and to deem a given target “linked” to it—is highly malleable. As the most recent in a series of audits of the DEA’s performance measurements found,<sup>149</sup> there are no agreed-upon criteria utilized for categorizing priority organizations, let alone for assessing the sufficiency of a target’s “links” to them.<sup>150</sup>

The dearth of uniform criteria for case prioritization is perhaps a symptom of a larger organizational dynamic within the DEA: its relatively high degree (at least as federal law enforcement agencies go) of decentralization. This is in no small part a function of the drug trade itself. Drug trafficking patterns vary substantially by region, and a

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<sup>146</sup> U.S. Dep’t of Justice, Organized Crime and Drug Enforcement Task Forces, FY 2015 Interagency Crime and Drug Enforcement Congressional Budget Submission 4–5, 9; Office of Nat’l Drug Control Policy, HIDTA Program Budget and Policy Guidance 2-1 to 2-2 (2012).

<sup>147</sup> See Office of Inspector Gen., Audit of the Drug Enforcement Administration’s Personnel Resource Management and Casework (2011) [hereinafter 2011 DEA Audit].

<sup>148</sup> *Id.* at 29–35.

<sup>149</sup> Audits of the adequacy of the DEA’s performance measurements by the Government Accounting Office and the Officer of Inspector General (“OGI”) have, for the most part, been highly critical. See DEA’s Implementation of GPRA, *supra* note 140, at 3–5 (summarizing prior audits).

<sup>150</sup> See *id.* at 11–13.

nimble enforcement response must account for that reality. As a result, what qualifies as a priority target in a district with direct links to international supply sources (Miami or New York, for example) is different than what qualifies in an area further down the distribution chain. Field office competition for agency resources compounds this dynamic, rendering one office's declination another's priority case.<sup>151</sup> Such down-chain cases—while perhaps of *relative* importance within a given field division—in the main are probably not the sort of cases the DEA intended to capture by its priority designation system.

The malleability of that system, moreover, becomes apparent when one considers the trajectory of its use. Since the DEA first began utilizing this categorization system, both the number of agents working on PTO-linked cases and the number of PTO-linked arrests have substantially increased.<sup>152</sup> From year to year, the DEA overshoots its target of PTO “disruption or dismantlement” by large margins.<sup>153</sup> And yet, while these outputs have soared, there has been no similar trajectory

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<sup>151</sup> See *id.* at 11–12; see also 2011 DEA Audit, *supra* note 147, at 7–9, 30–31 (discussing how the DEA allocates resources among its field divisions and the degree to which headquarters monitors PTO work hours to evaluate field districts).

<sup>152</sup> On agent designation, see 2011 DEA Audit, *supra* note 147, at 29–43. On arrests, see DEA arrest data obtained pursuant to DEA FOIA request No. 16-00367-F (on file with author).

<sup>153</sup> See, e.g., Drug Enf't Admin., FY 2016 Performance Budget Congressional Submission 60 (reporting that the DEA exceeded its FY 2014 targets for disrupting and dismantling highest-level PTOs by 117 and 44, respectively, a 43% and 40% respective increase over projections, and for next highest-level PTOs by 368 and 143, respectively, a 29% and 25% respective increase over projections); Drug Enf't Admin., FY 2015 Performance Budget Congressional Submission 58 (reporting that the DEA exceeded its FY 2013 targets for disrupting and dismantling highest-level PTOs by 44 and 48, respectively, a 16% and 44% respective increase over projections, and for next-highest level PTOs by 218 and 102, respectively, a 17% and 18% respective increase over projections). Prior years also show increases over projections. This data could indicate one of two things: either the DEA is underestimating the number of priority targets susceptible to apprehension, or it is using the categorization liberally.

It should be noted that the data herein relies on the DEA's initial accounting. In 2017, the DEA announced it would begin excluding from its count of dismantled PTOs those PTOs for which dismantlement was pending but not yet completed. See Drug Enf't Admin., FY 2017 Performance Budget Congressional Submission 51. Due to this accounting change, the DEA then restated its reported numbers for fiscal years 2011–15, but did not adjust its targets for those years. *Id.* at 50. Because I am comparing reported to targeted results, I cite here to the initial rather than the restated numbers. For future years, the DEA has lowered its targets to reflect its new accounting method. *Id.* at 50–51.

for outcomes—that is, a reduction in the supply of drugs.<sup>154</sup> By any method of measurement, the trends for supply of the major illicit drugs in the United States—cocaine, heroin, and methamphetamine—have increased rather than decreased.<sup>155</sup> Of course, the above-discussed caveats to accurate supply measurement apply,<sup>156</sup> and it is impossible to know to what extent the targeting of PTOs mitigated what would have been a worse supply trajectory. But given what we do know about the federal drug prisoner population—namely, that it consists of a great many low-level, nonviolent, nonrecidivist offenders—it seems highly unlikely that the PTO system has served as an effective proxy measure for the apprehension of high-level traffickers.

Nor is this a new dynamic. While these particular designations were implemented in 2001, the effort to classify cases by their relative importance within the supply chain is as old as the DEA itself (and its predecessor, the Bureau of Narcotics and Dangerous Drugs (“BNND”)). At its inception, the DEA had attempted to push its agents to focus on higher-level traffickers by discarding the BNDD’s “systems approach” (which classified drug trafficking organizations according to their relative significance) in favor of what became known as the “G-DEP” system of categorization.<sup>157</sup> Through G-DEP, offenders were classified into four groups according to relative position in the drug trafficking enterprise; Class I offenders were the highest level, and Class IV the lowest. Then, as now, federal drug enforcers were subject to criticism for the relatively high numbers of seemingly lower-level offenders prosecuted.<sup>158</sup>

All of this is not to say that the DEA, or any other drug enforcement agency, is defined or motivated solely by its performance measures. As noted, federal drug enforcers have had some prized successes in the drug war—capturing cartel leaders, kingpins, and the most violent members of the retail drug trade.<sup>159</sup> Such successes elide performance metrics and yet generate a tremendous investment of time and resources, a clear

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<sup>154</sup> See Drug Availability Estimates, *supra* note 135.

<sup>155</sup> *Id.* at 3–8.

<sup>156</sup> See *supra* notes 135–136 and accompanying text.

<sup>157</sup> Wilson, *supra* note 15, at 113–14.

<sup>158</sup> *Id.* at 115–20.

<sup>159</sup> See *supra* notes 52–53 and accompanying text.

testament to the multifaceted motivations of federal enforcers and their agencies. And since the internal audit of some years ago, it is possible the DEA has corrected for some of its measurement shortcomings, at least in terms of its internal designations and processes.<sup>160</sup> But the external measures used for congressional appropriations (for both the DEA and U.S. Attorney's Offices) remain in place. And those measures place a premium on arrests and convictions.

Professor James Wilson has famously categorized agencies according to the feasibility of measuring outcomes and outputs.<sup>161</sup> "Procedural" agencies are those for which only outputs can be measured.<sup>162</sup> If we define drug enforcers' outputs as arrests, seizures, and convictions, and their outcomes as the availability and prevalence of drugs and drug-related violence, then drug enforcement agencies are squarely procedural. There are two principle risks within procedural organizations. One is low morale, a product of operators' resentment of the agency's constant monitoring of outputs.<sup>163</sup> The other, most important here, is the effect on frontline workers' incentives: a focus on outputs incentivizes operators to conform to rules that detract from attaining an agency's outcome-oriented goals.<sup>164</sup>

This is precisely what happens in federal narcotics enforcement organizations. Gaining external support, in the form of both appropriations and autonomy, requires demonstrating performance. In the federal drug enforcement context, outcome-based performance metrics *aim* to measure the importance of cases rather than the sheer number of them—effective drug enforcement is, after all, what Congress demands and therefore what agencies endeavor to supply.<sup>165</sup> But because

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<sup>160</sup> Records of the DEA's internal investigative decision making processes are not publicly available. The 2011 OIG report, *supra* note 147, is thus the most recent publicly available material on the DEA's internal case-prioritization processes.

<sup>161</sup> Wilson, *supra* note 90, at 158–59.

<sup>162</sup> *Id.* at 163–64.

<sup>163</sup> *Id.* at 174–75.

<sup>164</sup> *Id.*

<sup>165</sup> Indeed, drug enforcers highlight to Congress their most significant cases, marketing them as illustrations of the agency's high-level successes. See, e.g., Drug Enf't Admin., FY 2016 Performance Budget Congressional Submission 9 (highlighting the arrest of Mexican kingpin Joaquin "El Chapo" Guzman Loera); *id.* at 15 (highlighting the seizure of an \$11 million shipment of heroin en route from New York City to New England).



quality is so difficult to measure in the aggregate, performance measures invariably devolve into more easily measured outputs: arrests and seizures. The pressure on agents to meet these performance metrics necessarily impedes efforts to distinguish the metrics' capacity to achieve the agency's desired outcomes. Put more concretely: where drug enforcers are given measures to meet, they will meet them—even when those measures are an imperfect proxy for, and may ultimately detract from, the agency's long term goals.

The corollary of this tale of organizational pressures, adaptations, and incentives is its effect on who is charged. As noted, arrests of high-level drug traffickers are extremely hard to come by.<sup>166</sup> An agency (and agents) tasked with reducing the level of drug supply but incentivized to demonstrate measurable achievement of that goal thus faces a dilemma. The realities of drug enforcement, and the need for external support, effectively dictate how that dilemma is solved. The result is a federal drug prisoner population that does not entirely align with drug enforcers' own accounting.

### *C. Enforcement Dynamics in a Federalist System*

Pressures on drug enforcers derive not only from their targets, their competitors, and their funding sources; they also come from the public. Drug trafficking is a national problem, but its most pernicious and palpable effects are felt at the local level. It is therefore local officials—mayors, county executives, police departments, and district attorneys—who feel public pressure on drug enforcement most acutely, and a need to produce tangible results. Yet endemic drug trafficking and violence can easily overwhelm local police departments, and the constant supply of drugs from without city and state lines can quickly unmake local enforcers' inroads.<sup>167</sup>

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<sup>166</sup> See *supra* Section II.A.

<sup>167</sup> Indeed, the challenges to local law enforcement were a recurrent theme in the legislative history of the Anti-Drug Abuse Act of 1986. See, e.g., 132 Cong. Rec. 22,661 (statement of Rep. Rodino) (“We all know that State and local law enforcement agencies bear a disproportionate share of our Nation’s drug efforts. Yet their resources are limited. This bill shows that the Federal Government is behind them by providing the first of what should be many more grants to help them do their jobs.”); *id.* at 22,668 (statement of Rep. Brown) (“The drug problem in this country is truly a national problem which demands

Local enforcers, in short, need federal assistance.<sup>168</sup> At the same time, though, federal enforcers tasked with helping in local drug hotspots cannot function effectively without understanding local trafficking patterns, dealer rivalries, and customer bases.<sup>169</sup> Drug enforcement thus fuels an interdependent cross-jurisdictional relationship, one that relieves public pressure on local enforcers as it amplifies it on the federal enforcers.<sup>170</sup> This dynamic serves in a variety of ways, often inadvertently, to focus federal attention on relatively lower-level offenders.

Consider, for instance, congressional enforcement directives. Congressional representatives are accountable to their local constituents, who in turn may pressure politicians (on the local, state, and federal levels) to see “results” on crime in general and drugs in particular. Congress, though, exerts direct control only over federal criminal enforcement. The most effective and efficient way, then, for Congress to try to steer enforcement priorities on the local level is to earmark federal agency funds to support local law enforcement with respect to specific

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national action. Although State, local, and private agencies must, among others, share the burden of addressing drug abuse, it is beyond the physical or financial capability of these sectors to effectively address the problem.”). In 1989, Representative Charles Rangel took to the pages of the *Stanford Law and Policy Review* to lament the Reagan Administration’s subsequent cuts to state and local enforcement grants, arguing that “[o]ur state and local police officers put their lives on the line every day but continue to be understaffed and outgunned against the heavy artillery of the drug traffickers and their agents. . . . Federal resources for state and local officers are badly needed.” Charles Rangel, *Our National Drug Policy*, 1 *Stan. L. & Pol’y Rev.* 43, 53 (1989). As is well known, federal assistance to state and local drug enforcers—in money and in kind—skyrocketed over the course of the 1990s and early 2000s. See Daniel C. Richman, *The Past, Present and Future of Violent Crime Federalism*, 34 *Crime & Just.* 377, 399 (2006).

<sup>168</sup> See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 783–84 (1999) (discussing benefits to local law enforcement of federal assistance in investigating and prosecuting violent and drug crimes). For a discussion of how such federal assistance also builds and maintains local law enforcement support for federal drug enforcement priorities, see Michael M. O’Hear, *Federalism and Drug Control*, 57 *Vand. L. Rev.* 783, 815–20 (2004).

<sup>169</sup> See Ouziel, *supra* note 76, at 2262 (discussing federal reliance on local law enforcement expertise in drug and gun cases).

<sup>170</sup> See O’Hear, *supra* note 168, at 809 (arguing that shift from local to federal accountability in drug enforcement has effectively prioritized federal drug enforcement policies over local ones); Richman, *supra* note 168, at 783–84 (discussing accountability shift that inures from federal intervention in traditionally “local” crime).

crimes.<sup>171</sup> This is precisely what Congress has done, through the use of state and local task forces,<sup>172</sup> mobile enforcement teams,<sup>173</sup> High Intensity Drug Trafficking Areas,<sup>174</sup> and even the direct allocation of funds for specific enforcement aid to state and local law enforcement.<sup>175</sup> Among other things, these federally funded, locally directed earmarks have enabled federal law enforcement agencies to appropriate local

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<sup>171</sup> See Richman, *supra* note 167, at 401 (“[T]he essence of the violent [and drug] crime targeted by the [federal] enforcement and funding programs was local. . . . [T]he thrust of these programs was to dispatch federal dollars and manpower to their constituencies. And with each conspicuous deployment—be it a funding grant or enforcement program—a legislator’s press release could take some credit.”).

<sup>172</sup> The use of combined teams of federal, state, and local drug enforcers first began in the 1970s and was institutionalized and formalized under the 1986 Anti-Drug Abuse Act; Congress now provides appropriations for the program. See Drug Enf’t Admin., DEA Programs: State & Local Task Forces, <https://www.dea.gov/ops/taskforces.shtml> [<https://perma.cc/QGK3-Z8LA>].

<sup>173</sup> The DEA’s Mobile Enforcement Team, or MET program, was established in 1995 to aid state and local law enforcement in combatting violent drug-related crime. See Dep’t of Justice, Office of Inspector Gen., Audit Div., Audit of the Drug Enforcement Administration’s Mobile Enforcement Team Program, at i (Dec. 2010). METs are deployed upon local law enforcement’s demonstration of need; they are focused primarily on street-level drug sales, and assist mostly through the use of informants and undercover drug buys. *Id.* at i, 8. Notably, Congress has appropriated funds for the MET program even when the DOJ has not requested it, explicitly rejecting the Administration’s plan to end the program. *Id.* at 2–3 (detailing history of congressional appropriations); see also S. Rep. No. 110-124, at 67 (2007) (“Furthermore, the Committee believes the Administration’s proposal to eliminate the Mobile Enforcement Teams (MET) program and reduce further the number of DEA agents and support staff to be ill-advised, and has therefore restored the \$20,578,000 the administration proposed for elimination. This will enable the DEA to retain an additional 80 Special Agents . . . allowing DEA to continue assisting State and local law enforcement in their fight against methamphetamine and other dangerous drugs.”).

<sup>174</sup> This program, known as HIDTA, began in 1988 when Congress authorized the Office of National Drug Control Policy to designate regions with serious drug trafficking problems; federal, state, and local law enforcement within these areas may receive earmarked funds to be used to establish cooperative efforts towards drug enforcement. See U.S. Dep’t of Justice, Office of the Inspector Gen., Evaluation and Inspections Div., Coordination of Investigations by Department of Justice Violent Crime Task Forces 8 (May 2007).

<sup>175</sup> A recent example of this is Congress’s earmarking of over \$35 million to the DOJ for use in assisting state and local law enforcement in combatting violent gangs. Congress based this enforcement directive largely on the connection between gangs and drug trafficking, noting that “[w]hile the primary responsibility for combating gang crime falls on local jurisdictions, the Federal government has a critical leadership, coordination, and intelligence-sharing role to play.” See H.R. Rep. No. 111-366, at 659 (2009) (Conference Report).

police detectives within their ranks as “deputized” federal agents.<sup>176</sup> Within the DEA’s state and local task forces, there are now more state and local law enforcement agents than federal agents.<sup>177</sup>

In interaction with other enforcement dynamics, these resource allocations have cascading effects on the desert-based characteristics of federal drug prisoners. As an example, consider the PTO designations discussed earlier. As it turns out, this designation is not limited to organizations with links to international suppliers; to the contrary, a large number of organizations the DEA has categorized as priorities, and has actively targeted, operate at the lower rungs of the trafficking chain.<sup>178</sup> Taking into account the public pressures on local law enforcement largely explains this federal focus: after all, it is the crimes of those at the bottom of the supply chain—the sales to end users, the turf-protecting violence—felt most by the law-abiding. And yet, the enforcement challenges endemic to these sorts of prosecutions result, even if inadvertently, in arrest and prosecution of those at the periphery of these targeted groups.<sup>179</sup>

By the same token, those arrests and prosecutions need not happen at the federal level; federal enforcers could, after all, assist local enforcers to bring these cases in the state courts. But it is precisely those local jurisdictions plagued most by drug crime in which prosecutions have

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<sup>176</sup> See DEA Programs: State & Local Task Forces, *supra* note 172. Deputized state and local agents are funded by the DEA to varying degrees. See *id.* For an example of such a funding agreement, see Program-Funded State and Local Task Force Agreement Between Drug Enforcement Administration and the City of Glendale (Sept. 30, 2015), <https://www.glendaleaz.com/clerk/Contracts/10297.pdf> [<https://perma.cc/K9QZ-MDTU>] (setting forth agreement between the DEA and the Glendale, Arizona Police Department for detailing two local police officers to join three DEA agents to comprise the DEA Phoenix task force).

<sup>177</sup> See Office of Nat’l Drug Control Policy, FY 2015 Budget and Performance Summary 190 (July 2014) (describing state and local task forces as a “key component” of the DEA’s domestic enforcement activities, consisting of 1,812 DEA Special Agents and 2,157 deputized state and local officers dedicated full time to the task force and with full federal authority).

<sup>178</sup> See 2011 DEA Audit, *supra* note 147, at 32–34 (noting that organizations designated as PTO-linked have varying levels of priority, with local PTO-linked organizations at the lowest level, and observing that much of PTO-allocated DEA manpower was used for these lowest prioritized cases).

<sup>179</sup> See *supra* Section II.A.

founded, for a variety of reasons I have discussed elsewhere.<sup>180</sup> This, too, pushes both federal and local enforcers to channel the products of their cooperative investigations to the federal courts.

It would be a mistake, moreover, to characterize all public pressure on federal enforcers as coming by way of local officials. While much of it does, federal enforcers outside Main Justice perceive a responsibility to their local “community,” as geographically broad as it may be.<sup>181</sup> This is particularly so for U.S. Attorneys, who, unlike their federal agent counterparts, Special Agents in Charge (“SACs”), often spend much, if not all, of their professional lives within the district over which they preside.<sup>182</sup> U.S. Attorneys with political ambitions have reason to be acutely attuned to the local electorate.<sup>183</sup> And the crimes voters most care about are those they see and feel. Relatively lower-level drug trafficking and its criminal offspring (violence and gun trafficking) are high on that list.<sup>184</sup> Unlike other crimes at the forefront of public

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<sup>180</sup> See generally Ouziel, *supra* note 76 (discussing the variety of factors contributing to the phenomenon, including relatively lower penalties, fewer resources, and less favorable procedural rules in some local jurisdictions as compared to the federal system, and advancing as well a theory of asymmetric legitimacy as between federal and some local systems).

<sup>181</sup> On the geographic breadth of federal districts, see Ouziel, *supra* note 76, at 2287.

<sup>182</sup> See Richard T. Boylan, Salaries, Turnover, and Performance in the Federal Criminal Justice System, 47 *J.L. & Econ.* 75, 78–79 (2004) (finding, in a study of U.S. Attorneys’ turnover between 1969 and 1999, that 89% of U.S. Attorneys held a position within the district prior to appointment, and 87% held a position within the district after completing their term). In most federal law enforcement agencies, including the DEA, CBP, and FBI, agents and the Special Agent in Charge (the field office’s leader) come from outside the geographic area. Indeed, in the FBI this is a job requirement for all agents. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *Colum. L. Rev.* 749, 788–89 (2003) (discussing the nomadic nature of federal law enforcement employment).

<sup>183</sup> For discussion of the political ambitions of U.S. Attorneys and the potential relation to local political constituencies and charging decisions, see Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?* 110 *Harv. L. Rev.* 469, 486–87 (1996).

<sup>184</sup> A prime example of this dynamic was then-U.S. Attorney Rudy Giuliani’s “federal day” program in the 1980s, in which the U.S. Attorney’s Office for the Southern District of New York randomly picked a day of the week in which they would adopt large numbers of the NYPD’s buy-and-bust cases involving small amounts of drugs. See Michael Winerip, *High Profile Prosecutor*, *N.Y. Times Mag.* (June 9, 1985), <http://www.nytimes.com/1985/06/09/magazine/high-profile-prosecutor.html?pagewanted=all> (observing that, “[i]n a city where people are fed up with street crime . . . Giuliani[’s federal day initiative] struck a responsive chord”). Giuliani subsequently became New York City’s mayor.

consciousness, such as the alleged financial and mortgage frauds blamed for the 2008 financial crisis, drug crimes are far more straightforward to investigate, charge, and prove.<sup>185</sup> In short, even when federal enforcers are not catering to local enforcers, they may well be catering to local interests.

Cooperative federalism, and the pressures it creates for federal drug enforcers, explains in part why drug cases are among the least likely to be declined by federal prosecutors.<sup>186</sup> Standing alone, a case might appear relatively low level; but these cases come to federal prosecutors as part of a larger initiative into areas that have proven particularly impervious to local enforcement efforts. Once a federal commitment has been made, it is difficult, practically speaking, for federal prosecutors to decline as a matter of jurisdictional sorting preferences.

Cooperative federalism's long-term aims in the drug enforcement context are eminently sensible.<sup>187</sup> The project brings federal resources to bear on problems national in scope yet local in impact; it marries the federal enforcement infrastructure with local enforcement expertise, leveraging the best of each; and it generates a level of political accountability otherwise lacking at the federal level. Yet in part because of challenges endemic to drug enforcement and to prosecution in state courts, and in part because of the political and performance pressures on federal and local enforcers, its practical effect has been a steady growth in the number of low-level, nonviolent, first-time drug offenders in federal prisons.

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<sup>185</sup> See Ouziel, *supra* note 76, at 2256.

<sup>186</sup> See Johnson, *supra* note 67, at 59, 66–67 (finding, in a study of federal cases from 2003–06, that drug and immigration offenses were far less likely to be declined than other major offense categories, and that the declination likelihood between drug and immigration offenses was statistically indistinguishable).

<sup>187</sup> Of course, there has been no shortage of criticism of the project—though the criticism has focused mostly on the penalty divergence between federal and state prosecutions of similarly situated drug offenders, rather than the aims of the program or the desert-based characteristics of those prosecuted federally. See, e.g., Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 *Colum. L. Rev.* 1276, 1312–14 (2005); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 *S. Cal. L. Rev.* 643, 668–69 (1997); Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, *Crim. Just.*, 2006, at 16, 18.

### III. IMPLICATIONS AND REFORMS

The foregoing account carries a number of implications. One is for reform of federal drug enforcement. Penalty reduction alone, without a corresponding focus on organizational pathologies, will fall short of achieving large-scale and lasting changes to the status quo. That status quo, moreover, is less the product of misguided discretion on the part of prosecutors or agents than the natural and inevitable consequence of the surrounding organizational structures. To say that federal drug enforcers have exercised poor discretionary choices is somewhat like saying McDonald's customers make an unhealthy decision in ordering a Value Meal. They surely do, but that decision is a consequence of multiple surrounding structures: the limited McDonald's menu; the dearth of healthier food establishments in the neighborhood; the low price of the Value Meal; the government agricultural subsidies that enable that low price and also depress production of healthier food products; the customer's increasing work and child-care responsibilities, which make fast food an appealing option; and the multibillion-dollar advertising campaign that influences the customer's choices.<sup>188</sup> If we want to change decision making, we should consider the broader environment in which decisions are made.

Another implication is for government accountability more generally. Devolution to the relatively lower-level offenders within a federal enforcement space is not unique to drug enforcement. But it is in drug enforcement that we see some of the common contributing pathologies quite clearly: the difficulties of building up-chain cases in linked criminal enterprises; the perverse incentives wrought by well-intentioned management and oversight; and the diminished accountability of interjurisdictional collaboration. To varying degrees, these are features of federal criminal enforcement generally. We need to recognize and then correct for them.

This Part considers each of these implications in turn. It then offers some thoughts on future reform.

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<sup>188</sup> See Scott Fields, *The Fat of the Land: Do Agricultural Subsidies Foster Poor Health?*, 112 *Env'tl. Health Persp.* A820, A821 (2004) (summarizing debate on causes of American obesity epidemic).

*A. The Inadequacy and Peril of Recent Reform Efforts*

Recent reform efforts have, for the most part, focused on penalty reduction. Whether directed at the front end (proposed legislation that would reduce the scope and degree of mandatory penalties),<sup>189</sup> the middle (directives to federal prosecutors to avoid charging low-level, nonviolent offenders with mandatory-minimum carrying offenses),<sup>190</sup> or the back (President Obama's clemency initiative, and legislative proposals aimed at retroactive sentence reductions),<sup>191</sup> the conversation has revolved around how to limit prison time for lower-level, nonviolent, first-time drug offenders. This is understandable. An increase in the time drug prisoners serve has been a significant contributor to the growth of the federal prison population.<sup>192</sup> And of course, punishment should be commensurate with the crime and the risk posed by the offender.

But given the aims of the federal drug enforcement project, it is also worth asking why these offenders are in federal prison to begin with. The disconnect between aspirations and outcomes has implications for both population size and prisoner desert, too<sup>193</sup>: prosecution of lower-level, nonviolent drug offenders both enlarges the federal prison population and delegitimizes the system that creates and sustains it. Penalty reduction alone will not solve those problems.

Start with population size. To truly lower it, we must reduce both the time prisoners serve *and* the number of prisoners admitted. Even drastic

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<sup>189</sup> For an overview of proposed federal drug reform legislation in the 114<sup>th</sup> Congress, see Frank O. Bowman III, *Good Enough to be Getting On With? The State of Federal Sentencing Legislation*, December 2015, 28 Fed. Sent'g Rep. 105 (2015).

<sup>190</sup> Memo from Eric Holder, U.S. Att'y Gen., to The United States Att'ys and Assistant Att'y Gen. for the Criminal Division, Re: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [<https://perma.cc/4PAD-YZWP>].

<sup>191</sup> See Bowman, *supra* note 189, at 106; U.S. Dep't of Justice, *Clemency Initiative* (Apr. 23, 2014), <https://www.justice.gov/pardon/clemency-initiative> [<https://perma.cc/5DC3-6MDT>].

<sup>192</sup> Mallik-Kane et al., *supra* note 23, at 3 (finding the increase in time served for drug offenders to be the single largest contributing factor to federal prison population growth between 1998 and 2010, contributing to one-third of total growth).

<sup>193</sup> Again, I refer here to modified just desert theory. See *supra* note 9.



penalty reductions—reducing prisoners’ length of incarceration to half of current levels—will not make a significant dent in population size without reducing admissions of prisoners by an equivalent degree.<sup>194</sup> And in fact, reducing admissions will reduce the federal drug offender population far more rapidly than penalty reduction.<sup>195</sup>

Likewise, penalty reduction alone is unlikely to change the desert-based characteristics of federal drug prisoners. Consider the effects of the Fair Sentencing Act of 2010<sup>196</sup> (the “FSA”) on enforcement patterns in crack cases. The FSA effectively lowered the mandatory minimum sentences for “low-level” crack dealers by raising the drug weights that trigger these minimums.<sup>197</sup> Yet since the FSA’s effective date, there has been no change to the characteristics of convicted crack offenders. While the total number of federally prosecuted crack offenders has continued on a downward trajectory that began two years before the FSA’s enactment, the percentage of low-level crack offenders out of the total pool, as estimated both by drug weights and role in the offense, has remained roughly the same, as has the percentage of offenders with minimal or no criminal history and the percentage using a weapon.<sup>198</sup> Penalty reduction is a poor tool for redirecting enforcement discretion.

It is also, at least in the federal system, unlikely to be achieved. Political dysfunction in Congress has hobbled even penal reform bills garnering widespread bipartisan support.<sup>199</sup> And after the election of

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<sup>194</sup> See Ryan King et al., *Urban Inst., How to Reduce the Federal Prison Population* (Oct. 2015), <http://webapp.urban.org/reducing-federal-mass-incarceration/> [https://perma.cc/52WQ-8A27] (calculating a reduction of 36,608 federal drug prisoners, or 18% of the federal prison population, if drug offenders’ length of stay was reduced by 50%, and a reduction of 35,280 federal drug prisoners, or 17% of the population, if drug offender admissions were reduced by 50%).

<sup>195</sup> Reducing by half the number of drug offenders we send to federal prison would result in 4,600 fewer federal prisoners than merely reducing drug penalties by an equivalent degree. *Id.* (calculating 185,563 prisoners in September 2016 if admissions were halved, and 190,127 if penalties were halved).

<sup>196</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220 (2010).

<sup>197</sup> *Id.*

<sup>198</sup> See U.S. Sentencing Comm’n, *Report to the Congress: Impact of the Fair Sentencing Act of 2010*, at 15–19 (Aug. 2015).

<sup>199</sup> See Carl Hulse, *Why the Senate Couldn’t Pass a Crime Bill Both Parties Backed*, N.Y. Times (Sept. 16, 2016), [http://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html?\\_r=0](http://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html?_r=0).

President Donald Trump and the appointment of Attorney General Jeff Sessions—both hostile to penalty reduction<sup>200</sup>—advancement on federal penal reform seems unlikely. Reducing the time drug prisoners serve is more readily achieved by routing offenders to state systems, many of which have achieved significant drug penalty reforms in recent years.<sup>201</sup> Such a shift would have salutary effects on federal criminal enforcement, too. Reducing the number of lower-level drug prosecutions would redirect resources to more serious crimes, reinforcing public perceptions of the federal criminal justice system's legitimacy—a necessary component of its effectiveness and success.<sup>202</sup>

Focusing exclusively on penal reform has a cost, as well: it risks obscuring the more complex and entrenched dynamics that have also contributed to the explosion of the federal drug offender population. On its own, penal reform is a bandage on a festering wound. By masking deep-rooted organizational pathologies, it ends up enabling the very outcomes it aims to ameliorate.

### *B. Criminal Enforcement and Government Accountability*

Government must be accountable to the taxpayers. This is a fairly unobjectionable concept, yet its effective execution is not so obvious. Accountability requires external review, whether by another branch of government (a congressional appropriations committee or the General Accounting Office) or the public (by way of published research or media reports). External review in turn requires measurable benchmarks. Yet not every form of government service is susceptible of measurement. We cannot truly measure the extent of schoolchildren's knowledge, for instance, or national security, or economic well-being. But because we need some way of assessing the government's success at educating our

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<sup>200</sup> See Carl Hulse, *Unity Was Emerging on Sentencing. Then Came Jeff Sessions*, N.Y. Times (May 14, 2017), <https://www.nytimes.com/2017/05/14/us/politics/jeff-sessions-criminal-sentencing.html>.

<sup>201</sup> For an overview of state drug law reforms, see Ram Subramanian & Rebecka Moreno, *Vera Inst. of Justice, Drug War Détente? A Review of State-Level Drug Law Reform, 2009-2013* (Apr. 2014).

<sup>202</sup> See Ouziel, *supra* note 76, at 2272, 2310–11, 2315–16 (discussing how federal criminal enforcement succeeds in part off a reservoir of citizen trust, which can be depleted when public views diverge from the federal enforcement agenda).

young, keeping us safe, and spurring economic growth, we use proxies: standardized test scores; battlefield successes; the unemployment rate.

Measurement by proxy entails two primary risks. The first is that those subject to the measurement will try to game it<sup>203</sup>: teachers and administrators may misreport test scores;<sup>204</sup> armies may overstate military successes;<sup>205</sup> labor departments may underreport the number of jobless.<sup>206</sup> The second is that the external evaluators, and, as a result, the government agents themselves, will come to value the proxy over the larger goal it is supposed to represent: teachers will “teach to the test”; armies will focus on achieving immediate, tangible victories at the cost of building strategies against longer-term threats; policymakers will take actions to generate measurable job growth while neglecting the less measurable aspects of economic (and noneconomic) well-being. As Donella Meadows famously described it: “We try to measure what we value. We come to value what we measure.”<sup>207</sup>

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<sup>203</sup> Pascal Courty & Gerald Marschke, *Dynamics of Performance-Measurement Systems*, 19 *Oxford Rev. Econ. Pol’y* 268, 268–70 (2003) (discussing “gaming responses” to performance measures).

<sup>204</sup> Valerie Strauss, *How and Why Convicted Atlanta Teachers Cheated on Standardized Tests*, *Wash. Post* (Apr. 1, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/04/01/how-and-why-convicted-atlanta-teachers-cheated-on-standardized-tests/> [perma.cc/US22-G87E].

<sup>205</sup> Mark Mazzetti & Matt Apuzzo, *Inquiry Weighs Whether ISIS Analysis Was Distorted*, *N.Y. Times* (Aug. 25, 2015), <http://www.nytimes.com/2015/08/26/world/middleeast/pentagon-investigates-allegations-of-skewed-intelligence-reports-on-isis.html> (reporting on Defense Department’s internal investigation into the United States Central Command’s alleged altering of official intelligence assessments on successes of the U.S.-led campaign in Iraq against the Islamic State).

<sup>206</sup> Paul Vigna, *Why the Good Jobs Numbers Are Misleading*, *Wall St. J.* (May 21, 2015), <http://blogs.wsj.com/moneybeat/2015/05/21/why-the-good-jobs-numbers-are-misleading/> (discussing state labor departments’ underreporting of unemployment, and the U.S. Labor Department’s noninclusion of unemployed workers who have ceased looking for employment and inclusion of part-time workers in its official tally).

<sup>207</sup> Donella Meadows, *The Sustainability Inst., Indicators and Information Systems for Sustainable Development 2* (Sept. 1998). Some of the examples I use here—test scores as a proxy for learning, and GDP as a proxy for a nation’s well-being—come from Meadows. See also Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 *Harv. Envtl. L. Rev.* 1, 12 n.30 (2009) (collecting citations for the general principle across various fields).

Both risks are particularly acute in the realm of federal enforcement.<sup>208</sup> The regulatory literature is replete with accounts of agencies utilizing perverse performance indicators, misrepresenting achievement of those indicators, or both. The SEC both exercises enforcement discretion and tailors its enforcement statistics for political consumption, resulting in poor resource allocation and a misleading representation of the state of securities enforcement.<sup>209</sup> The agencies principally responsible for enforcing the civil rights laws in the areas of housing and employment discrimination—the Department of Housing and Urban Development, the Equal Employment Opportunity Commission, and the DOJ—tend to pursue smaller, easier, more routine cases, leaving the heavy lifting to private litigants—precisely counter to these agencies’ ostensible missions and goals.<sup>210</sup> The Environmental Protection Agency has suffered from similar perverse performance incentives and reporting inaccuracies, as has the Federal Trade Commission and Commodity Futures Trading Commission.<sup>211</sup> It is unclear whether the Government Performance and Results Act of

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<sup>208</sup> See Richman, *supra* note 3, at 274 (“With sprawling jurisdiction, limited resources, and political masters seeking short-term evidence of achievement, federal enforcement agencies—whether dealing with workplace safety, environmental threats, corruption, or narcotics trafficking—have long struggled with the tension between quantity and quality.”).

<sup>209</sup> See Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 *Harv. J.L. & Pub. Pol’y* 639, 639 (2010) (“[T]he SEC tends to pursue high profile matters, to change its priorities frequently in accordance with public opinion, and perhaps most significantly, to pursue readily observable objectives, often at the expense of more important but less observable objectives. . . . This inclination to value only what can be easily measured has not served the SEC well.”); Urska Velikonja, *Reporting Agency Performance: Behind the SEC’s Enforcement Statistics*, 101 *Cornell L. Rev.* 901, 904 (2016).

<sup>210</sup> See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 *UCLA L. Rev.* 1401, 1404 (1998) (“[O]n average, the government seeks and obtains less monetary relief for plaintiffs than does the private bar and fails to address cutting edge issues, choosing instead to concentrate its efforts on small, routine cases. . . . As a result, the government’s enforcement strategies seemingly defy logic: The federal government, with its broad resources, pursues small, politically inoffensive, and easy cases, leaving the private bar to tackle the difficult and important discrimination claims.”).

<sup>211</sup> Office of Inspector Gen., *Envntl. Prot. Agency, Report No. 2006-P-00006, EPA Performance Measures Do Not Effectively Track Compliance Outcomes* 40 (2005); David L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement*, 93 *N.C. L. Rev.* 1, 47–48 (2014); Velikonja, *supra* note 209, at 904–05.

1993—which requires federal agencies to articulate strategic objectives, develop measures of those objectives, and report progress made on those measures—has strengthened performance measurement or unintentionally exacerbated its perverse effects. That law has surely made government more accountable, but perhaps for the wrong things entirely.

In this sense, the case study explored here is but one manifestation of a larger challenge. This is both daunting and heartening news. On the one hand, the organizational dynamics here identified are, at least in some respects, outgrowths of ingrained structural flaws. On the other, we can gain important insights from other fields that have identified and sought to address similar challenges. And, by identifying the organizational pathologies that contribute to undesirable enforcement patterns, we can attempt to correct them. The final Section considers ameliorative goals in the drug enforcement context in particular. The Article then concludes by reflecting on its application to other areas of federal enforcement.

### *C. The Path Forward*

The account offered here of federal drug enforcement patterns and their contributing causes belies easy policy proposals. That is, indeed, largely the point: simple and isolated fixes, such as amendments to penal laws, are unlikely to generate a sea change in enforcement patterns. This realization alone is a significant step on the path to more meaningful reform. But of course, it begs the question of alternatives.

Perhaps one way to envision those alternatives is by identifying broader goals aimed at disrupting current organizational patterns in federal drug enforcement. This Section begins that task, tentatively sketching three aspirational goals for unsettling the status quo. First, enhance transparency. Second, alter enforcer incentives. And third, reconceptualize federal drug enforcement as an inevitable tradeoff between costs and benefits. While I discuss each of these goals in the context of drug enforcement, all are applicable to federal criminal enforcement more generally.

*1. Enhancing Transparency*

As noted, some of the organizational dynamics I have identified at play in federal drug enforcement—namely, the need to demonstrate performance, the difficulties of doing so, and a resultant reliance on imperfect and manipulable proxy measures—exist elsewhere in government. But federal drug enforcement, and federal criminal enforcement generally, is unique in at least one important respect: the external check on enforcers offered by way of public, easily accessible sentencing data. It is an external check that has been underutilized. And it highlights the benefits that could inure from more expansive data collection and dissemination.

The United States Sentencing Commission, an independent agency within the federal government's judicial branch, tracks and reports aggregate data on sentenced federal offenders. The data it compiles and reports is relatively extensive. Indeed, it is precisely because of this data that researchers, the media, and federal policymakers have identified the relatively large percentages of low-level, nonviolent, first-time drug offenders in the federal system.<sup>212</sup> But while this readily available sentencing data has revealed the problem's existence, it has not served to ameliorate it. This is both because we have insufficiently leveraged the Sentencing Commission as an oversight mechanism, and because the data the Commission keeps, while enlightening, is in many ways insufficient to redirect enforcement efforts.

Consider first the possibilities of Commission oversight. As it now stands, the statistical enforcement data Congress uses to appropriate funds comes entirely from drug enforcement agencies themselves—the DEA, the U.S. Attorney's Offices, the Bureau of Customs Enforcement, and so forth.<sup>213</sup> Yet Sentencing Commission data provides a ready check on agency statistics. As noted, there is a vast discrepancy between the DEA's estimate that over the last decade it has disrupted or dismantled

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<sup>212</sup> See *supra* Section I.B.

<sup>213</sup> See *supra* Subsection II.B.3, discussing drug enforcers' budgetary submissions to Congress. Of course, self-reporting is not unique to drug enforcers; it is standard practice for all federal agencies in the budgeting process. See Michelle D. Christensen, Congressional Research Serv., R42633, *The Executive Budget Process: An Overview* 5 (2012); Congressional Research Serv., RS20268, *Agency Justification of the President's Budget* (2008).

thousands of PTOs—what are supposed to signify the highest-level drug traffickers—and the Sentencing Commission’s tally of the desert-based characteristics of the federal drug offender population.<sup>214</sup> Perhaps there is an explanation for the discrepancy: as I have postulated,<sup>215</sup> plea-bargaining and the sentencing process may underrepresent the culpability of some federal drug offenders. My point is about process. To the extent there is an explanation for data disparities, drug enforcers should provide it—backing up their explanation with more detailed internal data on the desert-based characteristics of sentenced defendants, and specifically the nature of their links to higher-level or violent trafficking organizations. If there is no explanation, the Commission data should serve as a useful check on executive branch enforcers’ internal accountings.

Useful, but insufficient—which is the second point about Commission data. The Commission keeps detailed records of so-called “sentencing facts”: the Guidelines-pertinent facts found by the judge at sentencing, such as drug type and weight, criminal history, and aggravating or mitigating role. But this data is two-dimensional; it lacks the narrative details that would flesh out the nature of the offense and the offender’s part in it. Those details are contained in the Presentence Report (“PSR”) prepared by the Probation Department (like the Sentencing Commission, an arm of the Judicial branch). PSRs are kept under seal.

In a system dominated by guilty pleas to bare-bones indictments, PSRs are often the only detailed official recounting (typically agreed upon, with limited exceptions, by both sides) of what the defendant actually did and the nature of his prior contacts with the drug trade and the criminal justice system.<sup>216</sup> Aggregate collection, analysis, and dissemination of this sort of information could give us a far clearer

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<sup>214</sup> Compare data discussed in *supra* notes 152–53 and accompanying text, with data discussed in *supra* Section I.B.

<sup>215</sup> See *supra* note 66 and accompanying text.

<sup>216</sup> Under the Federal Rules of Criminal Procedure, the Probation Department prepares a draft of the PSR, which is then provided to the prosecution and the defense, either of whom may object and suggest corrections. The final PSR is then prepared and shared with the Court prior to sentencing, at which point either party may again object to any of its provisions. The judge then resolves the parties’ objections (if any) and finalizes the PSR. See Fed. R. Crim. P. 32; see also 18 U.S.C. § 3552 (2012) (setting out the PSR process).

picture of the desert-based characteristics of federal drug offenders. Yet because PSRs are sealed, this information is hidden from view.

To be sure, many parts of a PSR should remain private—principally, a defendant’s identifying information, or private information lacking significant bearing on the nature of the offense, such as the defendant’s medical conditions or his family history. But there are compelling reasons to make public those parts of the report disclosing the detailed nature of the offense, the offender’s role in it, and his criminal history. Doing so would provide another window into the characteristics of our federal drug offender population, one from an external evaluator. Of course, the offense-relevant information in PSRs is derived largely from executive branch enforcers (prosecutors and agents). But the defendant’s opportunity to object and seek to refute the draft report’s account offers a built-in check against any overstatements by enforcers. The final PSR, a product of defense objections and judicial findings, could, if made public, provide yet another check on the data collection and reporting of executive branch drug enforcers.

There is no statutory bar against making public PSRs. The practice of sealing them derives from the notion that the reports are not court documents, but instead private documents prepared for the court’s benefit for purposes of sentencing.<sup>217</sup> Accordingly, many districts require their sealing by local rule, while sealing in others occurs as a matter of course. It would not be difficult, in most cases, to disclose those limited sections of the report bearing on the desert-based characteristics of the defendant, redacting any details that could serve to identify the defendant or disclose personal private information. The prosecution and defense could work together with the Probation Department on the disclosures, which could then be compiled and analyzed in aggregate by a research arm of the judicial branch, much as is now done by the United States Sentencing Commission. Indeed, the Sentencing Commission itself, which already has a research staff, could

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<sup>217</sup> See, e.g., *In re Siler*, 571 F.3d 604, 610 (6th Cir. 2009) (holding that PSRs are not public court documents); *United States v. McKnight*, 771 F.2d 388, 391 (8th Cir. 1985) (“Generally, pre-sentence reports are considered as confidential reports to the court and are not considered public records, except to the extent that they or portions of them are placed on the court record or authorized for disclosure to serve the interests of justice.”).



analyze and report on the Probation Department's data, using it as a check on its own data collection.

Sentencing Commission data and PSRs are not the only leverage points for enhancing transparency. Enforcement agencies' overseers—Congress and the White House (through the Office of Management and Budget and the Office of National Drug Control Policy)—could enhance self-reporting, as well, by demanding more detailed information from drug enforcement agencies. For instance, agencies could be required to back up aggregate offender data with more specific details. Thus, for example, for every offender it classifies as having links to a PTO, the DEA could be required to provide information on the nature of those links. This could be done without revealing sensitive information, or it could be provided to overseers privately, or both.<sup>218</sup> Strengthening drug enforcers' self-reporting would require no change in laws. Rather, it would simply build upon existing oversight leverage through Congress's appropriations power and the White House's budgetary processes.<sup>219</sup>

Whether in these ways or others, enhancing transparency would make drug enforcement patterns more visible. Visibility, in turn, would accomplish two tasks. First, it would give not only the overseers (Congress and the public), but also the enforcers themselves better insight into existing enforcement patterns. To ameliorate undesirable patterns, enforcers must see and understand them more clearly in the first place. Second, greater public visibility into federal drug enforcement would help to deter undesirable enforcement patterns and incentivize more desirable ones. The specter of a jury trial serves this regulatory function to a degree,<sup>220</sup> but it is both imperfect and, in a

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<sup>218</sup> Indeed, congressional oversight committees are routinely given access to classified national security information for the purpose of conducting robust oversight in that arena. See generally Frederick M. Kaiser, Congressional Research Serv., RS20748, *Protection of Classified Information by Congress: Practices and Proposals* (2011) (providing overview of process by which congressional oversight committees and their members guard classified or otherwise sensitive intelligence information).

<sup>219</sup> On the immense power of the White House's Office of Management and Budget ("OMB") to mold agency policy through budgetary processes, see Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 *Yale L.J.* 2182, 2186 (2016).

<sup>220</sup> See Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 *Notre Dame L. Rev.* 691, 696–708 (2016).

system dominated by guilty pleas, insufficient.<sup>221</sup> In what has become largely an administrative system of criminal enforcement,<sup>222</sup> we need more robust administrative oversight.

## 2. *Altering Incentives*

Transparency's deterrent and incentivizing effects, while helpful, are limited. To truly alter the organizational dynamics that fuel enforcement patterns we must more directly alter enforcers' incentives, by changing the metrics with which we measure enforcement success.

Because we cannot measure what we value, we end up valuing what we measure. And because we value what we measure, we endeavor to "meet the measure"—or to give the impression that we do. Drug enforcers value arrests, seizures, indictments, and convictions because these are the proxies we use to measure their performance. And when we try to measure the quality of enforcement rather than just the quantity of it—for instance, by classifying offenders based on relative importance in the drug trafficking chain—we introduce more malleable criteria and, with it, the risk of inaccurate measurement.

Enforcement metrics therefore must achieve two primary goals: first, incentivizing desired enforcement patterns; and second, minimizing the risk of manipulation. This, of course, is easier said than done. We cannot accurately measure our true enforcement goals, the reduction of both drug supply and demand.<sup>223</sup> But there are other proxies we could consider utilizing.

For instance, we could consider certain reported violent crimes as a proxy measurement of drug trafficking (or in any event, of the sort of drug trafficking we most want to eradicate). It is an imperfect proxy: not all violent crimes are drug-related and not all drug-related violent crimes are reported. But at least in some neighborhoods, violent crimes such as

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<sup>221</sup> See *id.* at 733–34; see also Daniel Richman, Framing the Prosecution, 87 S. Cal. L. Rev. 673, 675 (2014) (“Were enforcers to start thinking of trials as the only assessment of their work that matters, the insensitivity of this mechanism would surely promote overconfidence and sloth.”).

<sup>222</sup> See generally Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117 (1998) (describing the American system of criminal justice as closer to a nonadversarial, administrative model than an adversarial model).

<sup>223</sup> See *supra* notes 135–136 and accompanying text.

shootings and armed robberies are typically drug-related,<sup>224</sup> and those that occur in public spaces are nearly always reported. Using such crimes as a proxy measurement of drug enforcement success has two key benefits. First, unlike arrests or convictions, which are measures of outputs, the rate of reported violent crimes is an outcome measure. As such, it hews more closely to drug enforcers' overarching mission. Second, such outcome data is less susceptible to manipulation than self-reported outputs.

We could also envision new data sources for performance measurement—data that are not yet kept, but could be. Why not track, in a given geographic radius, the number of street corners in a square radius without drug deals transpiring over a one-month period; the number of public parks in which mothers will take their children to play; the number of public housing establishments where residents don't report fear of being in stairwells or hallways; or the number of children who graduate high school? All of these measures are proxies for effective drug enforcement, but they incentivize the kind of enforcement that generates sustained change in the quality of public life and safety. Arresting members of a drug trafficking organization that controls drug sales within a multiblock area will not keep those blocks (or the park, or the public housing stairwell) dealer free for a month, much less a week or even a day, nor will it change the local economy so drastically as to lower school drop-out rates. Generative change requires higher-level investigations, arrests, and convictions. In fact, it more likely requires *fewer* overall arrests and convictions and greater attention to community engagement, educational support, and vocational opportunity.<sup>225</sup>

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<sup>224</sup> Moreover, local police departments could, where possible, disaggregate drug-related from non-drug-related violent crimes. For instance, the National Incident-Based Reporting System ("NIBRS"), a national registry of data from over 5,000 law enforcement agencies nationwide, reports not only the nature and types of offenses in the incident, but also, among other things, the characteristics of the victim(s) and offender(s) and the types and value of property stolen and recovered. See U.S. Dep't of Justice, Nat'l Inst. of Justice, Sources of Crime Data: Uniform Crime Reports and the National Incident-Based Reporting System (Dec. 14, 2009), <http://www.nij.gov/topics/crime/pages/ucr-nibrs.aspx> [<https://perma.cc/SPR2-NBYU>].

<sup>225</sup> See Tracey Meares, Barrock Lecture on Criminal Law, The Legitimacy of Police Among Young African-American Men, 92 Marq. L. Rev. 651, 664–65 (2009) (discussing success of drug enforcement officers in eliminating the open-air drug market in High Point, North Carolina by gathering evidence against the dealers and then calling the dealers in to a

Some may dismiss outcome-based performance measures such as these, on the theory that drug enforcement alone cannot make communities safer; we also need greater investments in education, jobs, support for single-parent households and working families, and other big-ticket items. Just so. If drug enforcement does not or cannot detectably advance the ball on its purported public safety mission, we should confront that reality rather than disguise it behind less meaningful metrics. In recent years, the field of economics has been upended by a call to discard GDP—a metric that has dominated for more than a half-century—in favor of more useful proxy measures of a nation’s well-being.<sup>226</sup> This work has opened a rich conversation about the relationship between goals, measures, and outcomes.<sup>227</sup> The same conversation can and should be had in the field of drug enforcement, and in criminal enforcement more broadly.

Such a conversation might lead us to eliminating, or at least minimizing the importance of, the proxies we currently use. Imagine if the performance of U.S. Attorneys were no longer assessed, and budgetary dollars were no longer allocated, based on each office’s total indictments or total defendants charged. This would ameliorate a number of organizational pathologies. At a basic level, it would disincentivize the charging of offenders solely to meet quotas. This would, in turn, free federal prosecutors to focus on more complex crimes without having to balance them with indictment-generating, lower-level drug cases. It would also allow federal prosecutors to more easily decline prosecution in favor of local authorities.

Note the counterintuitive relationship between cooperative federalism and the “federalization” of drug crime. While conventional accounts

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community forum where they were shown the evidence, threatened with prosecution if they did not cease dealing, and then provided with services to help them secure legitimate employment).

<sup>226</sup> See Joseph E. Stiglitz et al., Report by the Commission on the Measurement of Economic Performance and Social Progress, at para. 21 (2009); see also Justin Fox, The Economics of Well-Being, *Harv. Bus. Rev.* 79, 80 (Jan.-Feb. 2012) (observing that the challenge to GDP measurement’s “growing credibility in important circles could give it a real impact on economic policy”).

<sup>227</sup> See Fox, *supra* note 226 (summarizing the discussions and literature).

assume a necessary link between the two,<sup>228</sup> the former can exist without (or with a lesser degree of) the latter. Indeed, enhanced federal-local collaboration, coupled with a tweaking of prosecutorial performance indicators, could even reduce the number of drug cases prosecuted federally. The reality, as I have discussed, is that many federal drug investigations set out to target high-level drug trafficking organizations but end with the prosecution of their lower-level members. Cases of this type could be more often brought in state courts.<sup>229</sup> Federal-local cooperation in drug enforcement, in other words, should be *more* expansive, encompassing greater cooperation between federal agents and local prosecutors. We could enhance such cooperation if we measured federal prosecutors less by the number of cases or defendants charged and more by the relative importance of the cases they choose to bring.

Indeed, an Obama-era initiative by the DOJ asked federal prosecutors to refocus their charging discretion in precisely that way,<sup>230</sup> and this change correlated with both a reduction in federal narcotics prosecutions<sup>231</sup> and a reduction in the number of low-level, nonviolent

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<sup>228</sup> See, e.g., John S. Baker Jr., *State Police Powers and the Federalization of Local Crime*, 72 *Temp. L. Rev.* 673, 681 (1999) (discussing cooperation between state and local law enforcement and resultant rise of federal drug prosecutions); O’Hear, *supra* note 168, at 810–13, 818–20 (discussing cooperative federalism and the resultant push of “local” drug cases into federal courts).

<sup>229</sup> Some already are. See Ouziel, *supra* note 76, at 2320 (discussing New York’s Office of the Special Narcotics Prosecutor, which routinely brings cases in state court investigated by federal agents). This sort of cross-jurisdictional collaboration should be the norm, not the exception.

<sup>230</sup> See U.S. Dep’t of Justice, *Smart on Crime: Reforming the Criminal Justice System for the 21st Century* (Aug. 2013) [hereinafter *Smart on Crime*], <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> [<https://perma.cc/2ARN-MPP4>] (calling for “the development of district-specific guidelines for determining when federal prosecutions should be brought,” which “necessarily will mean focusing resources on fewer but the most significant cases, as opposed to fixating on the sheer volume of cases” and prioritizing the prosecution of national security threats, violent crimes, fraud, and crimes against vulnerable victims).

<sup>231</sup> For analysis of federal drug prosecutions on a monthly basis during the years 2000–14 see Transactional Records Access Clearinghouse Reports, *Federal Drug Prosecutions Fall to Lowest Level in 13 Years* (Mar. 18, 2014), <http://trac.syr.edu/tracreports/crim/347/> [<https://perma.cc/WVJ3-J7W8>] (detailing a 9.3% reduction between 2009 and 2014). Between 2014 and 2016, federal drug prosecutions decreased by 1.5%. See Admin. Office of U.S. Courts, *Judicial Business of the United States District Courts 2016 tbl.5* (2016)

drug offenders.<sup>232</sup> It is unclear whether these reductions are direct effects of this initiative; an overall downward trend in federal narcotics prosecutions began in 2009, coinciding with fiscal pressures on the DOJ.<sup>233</sup> And even if there is a causal effect between the DOJ initiative and federal charging patterns, it is inconsistent. The overall reduction in narcotics cases belies much variation among offices, some of which have seen reductions in narcotics prosecutions while others have seen increases.<sup>234</sup> Indeed, as the DOJ's Inspector General has found, Attorney

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<http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2016> [<https://perma.cc/2W7V-BJB8>]; Admin. Office of U.S. Courts, Judicial Business of the United States District Courts 2015 tbl.5 (2015) <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2015> [<https://perma.cc/XE3U-YC5S>].

<sup>232</sup> Of drug offenders sentenced in federal court in the year before the DOJ's policy change, 53% had minimal or no criminal history, 6.6% played some sort of higher-level role in the offense, and 15% used a weapon in connection with the offense. See U.S. Sentencing Comm'n, U.S. Sentencing Commission's 2012 Sourcebook of Federal Sentencing Statistics tbls.37, 39, 40 [hereinafter 2012 Sourcebook], <http://www.ussc.gov/research/sourcebook/archive/sourcebook-2012> (covering the 2012 fiscal year, which ran from October 1, 2011, to September 30, 2012). In the first full fiscal year after the policy change, 48.6% had minimal or no criminal history, 7.1% played a higher-level role, and 16.2% used a weapon in connection with the offense. U.S. Sentencing Comm'n, Sourcebook of Federal Sentencing Statistics 2014 tbls.37, 39, 40 [hereinafter 2014 Sourcebook] (covering the 2014 fiscal year, which ran from October 1, 2013 to September 30, 2014). Fiscal years 2015 and 2016 saw little improvement over 2014. See U.S. Sentencing Comm'n, Sourcebook of Federal Sentencing Statistics 2015 tbls.37, 39, 40 [hereinafter 2015 Sourcebook]; 2016 Sourcebook, *supra* note 59, tbls.37, 39, 40. While the percentage changes are small, it is worth noting that the total number of offenders with minimal or no criminal history decreased by about a quarter between 2012 and 2016, representing the largest decrease across all criminal history categories. Compare 2016 Sourcebook, *supra* note 59, tbl.37, with 2012 Sourcebook, *supra*, tbl.37.

<sup>233</sup> See Transactional Records Access Clearinghouse Reports, *supra* note 232.

<sup>234</sup> Twenty-eight federal districts saw increases in the number of total drug cases filed between fiscal years 2013 and 2016. Compare Admin. Office of the U.S. Courts, Table D-3. U.S. District Courts U.S. District Courts—Criminal Defendants Commenced, by Offense and District, During the 12-Month Period Ending September 30, 2016 (Sept. 30, 2016), [http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d3\\_0930.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_d3_0930.2016.pdf) [<https://perma.cc/4QVW-8MKR>], with Admin Office of the U.S. Courts, Table D-3. U.S. District Courts U.S. District Courts—Criminal Defendants Commenced, by Offense and District, During the 12-Month Period Ending September 30, 2013 (Sept. 30, 2013), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/D03DSep13.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/D03DSep13.pdf) [<https://perma.cc/WAL4-X7ZY>]. The increases affect a range of jurisdictions, from the densely populous (including the Southern District of New York, Eastern District of Virginia and Southern District of Florida) to the sparsely-populated (including the districts of North and South Dakota, Wyoming and

General Holder's charging directives were implemented inconsistently across U.S. Attorney's Offices, with a number of offices simply not implementing the directives at all.<sup>235</sup> Asking or even directing drug enforcers to reallocate enforcement discretion is one thing;<sup>236</sup> altering the performance metrics used to allocate budgetary dollars is another. If we want to alter the exercise of federal investigative and prosecutorial discretion on a deep and systemic level, we must alter the structures that incentivize it.

### *3. Reconceptualizing Enforcement as a Cost-Benefit Tradeoff*

Finally, we must recognize the organizational realities of drug trafficking and drug enforcement. Primary among them is the zero-sum relationship between enforcement success and offender desert. The road to apprehending the drug trade's chieftains is paved with the arrests, attempts at cooperation, convictions, and prison terms of its lower-level laborers. We will never be able to succeed from an enforcement standpoint—that is, to apprehend, prosecute, and convict the trade's kingpins—without also imprisoning vast numbers of less-deserving offenders.

The question, then, is this: in the inevitable trade-off between benefits (reducing drug supply) and costs (the imprisonment of less-deserving offenders), what is the optimal level of enforcement? This is a markedly broader conceptualization of costs than the mere budgetary costs of

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Montana) to those in between (including the districts of New Jersey, Maryland, Massachusetts, and all three districts in Louisiana).

<sup>235</sup> See U.S. Dep't of Justice, Office of the Inspector General, Review of the Department's Implementation of Prosecution and Sentencing Reform Principles under the Smart on Crime Initiative (June 2017), <https://oig.justice.gov/reports/2017/e1704.pdf#page=1> [<https://perma.cc/WF3G-RNFS>], at 11–17 (finding that 21% of U.S. Attorney's offices did not update their charging policies to reflect Main Justice's charging directives in drug cases, and that compliance with those charging directives in these offices was hard to assess; and 20% of U.S. Attorney's offices did not work with law enforcement partners to develop and update district-specific guidance for the exercise of charging discretion in drug cases, as required by Main Justice).

<sup>236</sup> On the difficulty of controlling line prosecutors' discretion by way of a head prosecutor's directives, see Daniel Richman, Institutional Coordination and Sentencing Reform, 84 Tex. L. Rev. 2055, 2055–58 (2006).

imprisonment, cited profusely as an impetus for penal reform.<sup>237</sup> The imprisonment of low-level, nonviolent, first-time drug offenders exacts a unique cost on the federal justice system's legitimacy and, as a result, on federal criminal enforcement power itself.<sup>238</sup>

Conceptualizing drug enforcement—and criminal enforcement more broadly—as a cost-benefit trade-off helps crystallize the choices enforcers must make in any and every investigation and prosecution. It opens a different window on the enforcement enterprise, one in which enforcers might begin to think of some arrests and convictions as downsides rather than successes, as costs to be minimized rather than benefits to be maximized. And it would force a discussion about the costs we, as a society, are willing to bear in the service of public safety and well-being. The last few years have seen the beginnings of a national discussion on drug penalties and a recognition of their costs.<sup>239</sup> Enforcement (in the drug context and elsewhere) carries its own distinct costs; it is time we began considering them.

How would such a cost-benefit approach manifest on a practical level in the drug-enforcement context? One example is in enforcement budgets. Two White House offices oversee and determine drug enforcers' budgets: the Office of Management and Budget, which oversees all agency budgetary requests; and the Office of National Drug Control Policy, which reviews and recommends budgetary allocations for drug control-related expenditures across the federal government. Budgetary processes could be utilized more robustly to direct enforcement discretion under a cost-benefit approach to drug enforcement.<sup>240</sup> Consider the DOJ's budgetary request for this year, which asked for, among other things, funding to support four new groups dedicated to heroin enforcement and to support thirty-six new

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<sup>237</sup> For a sampling of conservative policymakers' voices making the fiscal case for penal reform, see Right on Crime, *What Conservatives Are Saying About Criminal Justice Reform & Right on Crime*, <http://rightoncrime.com/the-conservative-case-for-reform/what-conservatives-are-saying/> [https://perma.cc/89EK-6TNU].

<sup>238</sup> Ouziel, *supra* note 76, at 2310–11.

<sup>239</sup> See *supra* notes 189–191 and accompanying text.

<sup>240</sup> Indeed, as Professor Eloise Pasachoff has shown, the OMB's agency budgetary processes are an important means of agency policy development. See Pasachoff, *supra* note 219, at 2186.



positions dedicated to drug enforcement along the southwest border.<sup>241</sup> Both of these budgetary allocations could be pegged to specific criteria designed to limit such enforcement to higher-level offenders. Such limitations would send a strong message to enforcers that some drug prosecutions are simply not worth the federal government's resources. Coupled with enhanced reporting requirements to ensure enforcers' compliance,<sup>242</sup> budgetary limitations could help steer enforcers away from the drug trade's lower-hanging fruit.

#### CONCLUSION

More often than we might realize, the results of federal criminal enforcement diverge from its aims. I have explored this dynamic in the field of federal drug enforcement and have sought to address the ways in which organizational dynamics—between drug enforcers and those they enforce, among and across enforcement institutions, and between federal, state, and local enforcers—play a role. I have offered an account of a federal drug-enforcement bureaucracy endeavoring to apprehend the trade's most culpable participants, but sweeping up large numbers of relatively less culpable offenders.

Attention to reforming federal drug penalties, while important, has obscured the more complex dynamics behind the number of low-level, nonviolent drug offenders in the federal prison system. This is both daunting and heartening. On the one hand, these dynamics are deep rooted, and some of them intractable. On the other, changing them does not depend on sweeping penal reform—an unlikely proposition in the current political climate—but instead on leveraging and tweaking existing structures in ways that will disrupt enforcement patterns.

Importantly, such changes are possible even in an administration that has expressed hostility to drug law reform. The real work to be done will take place in lower-visibility spaces: compiling and disseminating more data (much of which is held by the judicial branch); changing the performance metrics used for congressional appropriations (which can be implemented by the relevant congressional committees); and reorienting the calculus of career servants on the frontlines. If the

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<sup>241</sup> See U.S. Dep't of Justice, FY 2017 Budget Request 4 (Feb. 9, 2016).

<sup>242</sup> See *supra* notes 218–219 and accompanying text.

Probation Department, congressional oversight committees, and career enforcers are invested in better aligning federal drug enforcement's outputs with its aims—and there's no reason to suspect otherwise—these things can be achieved even absent investment at the political levels of the executive branch.

Finally, many of the organizational dynamics discussed here—the difficulties of building higher-value from lower-value cases; the perverse incentives created by performance measurement; and the diminished accountability of interjurisdictional collaboration—exist in varying forms and degrees across federal criminal enforcement. Likewise, the potential solutions offered here—enhanced transparency and reporting; altering incentive structures; and reconceptualizing enforcement as a tradeoff between costs and benefits—can be applied across criminal enforcement arenas (and likely civil enforcement arenas, as well). If we recognize the organizational dynamics that serve to separate enforcement's results from its aims, we can hopefully correct for them. This will not fully align federal criminal law's ambition and fruition, of course; there are surely other forces at play. But it will bring us closer.