The Drug Court Paradigm

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THE DRUG COURT PARADIGM

Jessica M. Eaglin*

ABSTRACT

Drug courts are specialized, problem-oriented diversion programs. Qualifying offenders receive treatment and intense court-supervision from these specialized criminal courts, rather than standard incarceration. Although a body of scholarship critiques drug courts and recent sentencing reforms, few scholars explore the drug court movement’s influence on recent sentencing policies outside the context of specialized courts.

This Article explores the broader effects of the drug court movement, arguing that it created a particular paradigm that states have adopted to manage overflowing prison populations. This drug court paradigm has proved attractive to politicians and reformers alike because it facilitates sentencing reforms for low-level, nonviolent drug offenders that provide treatment-oriented diversions from incarceration. Though reforms adopted within the drug court paradigm have contributed to stabilizing prison populations and have created a national platform to discuss mass incarceration, this paradigm has limits that may prevent long-term reductions in prison populations. This Article identifies three limitations of the drug court paradigm: First, by focusing exclusively on low-level drug offenders, the approach detrimentally narrows analysis of the problem of mass incarceration; second, by presenting a “solution,” it obscures the ways that recent reforms may exacerbate mass incarceration; third, by emphasizing a focus on treatment-oriented reforms, this paradigm aggressively inserts the criminal justice system into the private lives of an expanding mass of citizens.

This Article locates the current frame’s origin in the drug court movement. Identifying this connection is important for two reasons: First, it provides new insight to how we define “success” in criminal justice, and why. Second, it illuminates a growing tension between government actors and the general public’s appetite for criminal justice reforms that meaningfully reduce mass incarceration.

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INTRODUCTION

The United States finds itself on the precipice of a distinct transformation in the criminal justice system. State and federal lawmakers are implementing or considering major sentencing reforms aimed at managing growing prison populations. This Article argues that these sentencing reforms conform to a developing frame of reform herein referred to as “the drug court paradigm.” Influenced by the drug court movement, this frame shapes the way lawmakers are responding to mass incarceration beyond simply through the expansion of drug treatment programs. While this frame has successfully produced policy changes and helped to stabilize incarceration across the country, it also suffers from obscured pitfalls. This Article identifies the frame, exposes the pitfalls, and provides new insight into the significance of criminal justice policies in shaping political questions on why and how we punish.

This Article first explores the defining characteristics of current sentencing reforms and locates their origins in the drug court movement. Drug courts are specialized court diversion programs created in the late 1980s to provide qualifying offenders with treatment to address drug addiction and court supervision in lieu of long incarceration terms. The “drug court paradigm” refers to the influence of the drug court movement in framing recent sentencing policies. To facilitate sentencing reforms, lawmakers frame their policies to address the severe punishment of low-level, nonviolent (drug) offenders. They justify these policy changes based on evidence of effectiveness and efficiency. This Article demonstrates the pervasiveness of this frame by analyzing recent reform efforts in three


3. History: Justice Professionals Pursue a Vision, NAT’L ASS’N OF DRUG COURT PROF’LS, http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history (last visited Sep. 3, 2014) (noting that the first drug court was established in 1989, and today more than 2734 drug courts operate in all fifty states and U.S. territories); see also infra Section I.

4. See infra Section II.

5. See infra Section II.
“jurisdictions”—the Justice Reinvestment (JRI) states, California, and the federal system.7

The drug court paradigm has surface appeal: reforms adhering to its frame have modestly reduced reliance on incarceration in some states.8 However, the drug court paradigm suffers critical shortcomings that may actually perpetuate overreliance on incarceration in the status quo and exacerbate flaws in the criminal justice system. This Article identifies three particular limitations. First, by narrowing the scope of the problem to just the lowest level offenders, this frame excludes most offenders from the benefits of justice reforms.9 As states continue to adopt reforms designed to reduce incarceration and save money, their impact is often so limited by eligibility requirements that relatively few offenders in the system actually benefit from key changes being implemented. Second, the drug court paradigm obscures reforms that continue to increase sentence length for most offenders in the system. The focus on identifying low-level, nonviolent offenders for distinct, treatment-oriented interventions are often coupled with rhetoric and legislation that increases sentence severity for all other types of offenders. These coupled sentencing changes threaten to exacerbate mass incarceration long-term.10 Finally, and perhaps most critically, the drug court paradigm encourages treatment-oriented criminal justice interventions. Though facially benign, such reforms expand the scope of state control over the lives of those entangled in the justice system. Increasing opportunities to intervene in private lives through the justice


7. See infra Parts II.A–C.

8. See JEREMY TRAVIS ET AL., NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 345 (2014), http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes (“Although the precise impact of . . . [recent sentencing reforms] has yet to be determined, it is reasonable to assume that they contributed to the overall decline in incarceration rates among the states.”).


10. See infra Part III.B.
system may actually increase the number of people touched by the system, thereby undercutting efforts to reduce the negative effects of mass incarceration.\textsuperscript{11}

Few scholars critically examine why recent sentencing reforms are being formulated within this paradigmatic frame.\textsuperscript{12} Instead, most scholars seek to improve current reforms\textsuperscript{13} or to provide theoretical foundations that can guide reforms going forward.\textsuperscript{14} This Article seeks to fill the critical gap in current scholarship concerning \textit{why} recent reforms are designed to focus on low-level, nonviolent offenders through an effectiveness lens. It does so by connecting the body of scholarship on drug courts as an institutional response to mass incarceration with the developing scholarship on recent legislative and policy reforms to manage prison populations. By exploring the connection between drug courts and the current paradigm of criminal justice reform driving recent sentencing policies in the states, this Article demonstrates the significant influence that previous innovations in criminal justice provide in shaping current efforts to reduce mass incarceration. It also provides new insights on how lawmakers choose to understand and respond to mass incarceration.

More broadly, exposing the influence of drug courts on recent reforms challenges current perceptions about \textit{why} particular criminal justice interventions are salient for both lawmakers and the public. It is generally accepted that budgetary constraints drive the bipartisan incentives to address incarceration.\textsuperscript{15} This Article joins several scholars in identifying a deeper, political motivation to this convergence. Consistent with sociologist David Garland’s observations in \textit{The Culture of...}

\begin{thebibliography}{9}
\bibitem{11} See infra Part III.C.
\bibitem{12} Scholars do focus on questions of why sentencing reforms are occurring now. \textit{See, e.g.,} Cecelia Klingele, \textit{The Promise and Perils of Evidence-Based Practices}, 91 NOTRE DAME L. REV. 537, 547–51 (2016) (discussing impact of social and fiscal costs on criminal justice policies); Rachel E. Barkow, \textit{Federalism and the Politics of Sentencing}, 105 COLUM. L. REV. 1276, 1297–99 (2005) (discussing the impact of fiscal costs on sentencing policy). Scholars generally take for granted that reforms focus on low level, nonviolent drug offenders. Even in instances where scholars do address questions of what sentencing reforms look like, they often fall back on references to the War on Drugs as the basis for reforms. \textit{See, e.g.,} Mary D. Fan, \textit{Street Diversion and Decarceration}, 50 AM. CRIM. L. REV. 165, 170–178 (2013) (explaining why states are seeking “smarter solutions” to the War on Drugs). \textit{But see} MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 166–68 (2015) (discussing how the war against the War on Drugs shaped penal policy more broadly).
\bibitem{15} \textit{See} Barkow, supra note 12, at 1305–06 (discussing the role of budgetary constraints on reshaping the politics of punishment); Eaglin, supra note 9, at 202–203 (same).
\end{thebibliography}
neoliberal perspectives on government failure drove institutional actors and the public to lose faith in the state’s ability to ensure criminal justice and public safety. The repercussions of that disillusionment continue to play a pivotal role in penal policy. This Article argues that it drives the current shift towards “evidence-based practices and policies” as a central tenet of “successful” criminal justice policy that drug courts helped establish. These empirically researched approaches to criminal justice policy and practice, including the use of actuarial risk and needs assessment instruments and graduated sanctions, are supported by data demonstrating measurable, positive outcomes that promote public safety. Reforms adhering to the drug court paradigm endorse and proliferate these evidence-based interventions.

Evidence-based practices and policies within the drug court paradigm also transform the politics of punishment. While government actors adopt such policies to manage public skepticism, this Article suggests that the public may perceive the government’s policies differently. Reforms embraced by the public but not by government actors—such as California’s Proposition 47—rhetorically adhere to the drug court paradigm but move beyond some of its critical limitations. This Article concludes that, to the public, perceptions of the government’s failures include skepticism about mass incarceration. Government actors’ strict adherence to the drug court paradigm suggests that this is a point that the government is not yet willing to concede. The drug court paradigm thus illuminates the divide between public and governmental appetites for criminal justice reform—a line that should be pressed by advocates seeking to reduce mass incarceration.

Section I of this Article gives background on the development of drug courts as a way to address the United States’ growing prison population. Section II explains the drug court paradigm, and describes recent policy reforms promulgated to address systemic overreliance on incarceration. It focuses on sentencing reforms adopted in three different categories of jurisdictions: the JRI states, California, and the federal system. Section III identifies three shortcomings in adopting the drug court paradigm as a long-term solution to mass incarceration: narrowing of the frame, obscuring the problem, and expanding the criminal justice system’s reach without normative considerations about expanding the state’s control over private lives. Section IV discusses the origin of this paradigm within the drug court movement and reflects on how this origin complicates the politics of punishment. This Article concludes by suggesting that drug courts, as with recent criminal

17. See infra note 87 and accompanying text.
18. See infra notes 96–99 and accompanying text (describing evidence-based policies and practices, such as the use of risk assessment tools and graduated sanctions); see also Klingele, supra note 12, at 555–58 (noting the rise of evidence-based practices in the American criminal justice system).
19. See infra Part IV.B.
justice reforms focused on evidence-based policies, provide piecemeal options to reduce incarceration rather than wholesale solutions to mass incarceration.

I. DRUG COURTS AS THE ALTERNATIVE TO MASS INCARCERATION

Between 1972 and 2010, the U.S. prison population increased from less than 200,000 prisoners to more than 1.6 million.\textsuperscript{20} Including jails, the United States incarcerates approximately 2.3 million people on any given day, as of 2015.\textsuperscript{21} The exponential increase in the U.S. incarcerated population created the social phenomenon referred to as “mass incarceration.”\textsuperscript{22}

In order to understand the challenges of mass incarceration and the subsequent attempt to address such issues through the creation of drug courts, it is first necessary to understand what caused the exponential growth in the incarcerated population in the first place. While several factors contributed to state and federal prison population growth over the past few decades,\textsuperscript{23} scholars and policymakers primarily blame the War on Drugs.\textsuperscript{24} Announced in the 1970s under President Richard Nixon and expanded by every U.S. President since, the War on Drugs changed the scope and face of the American criminal justice system.\textsuperscript{25} The War on Drugs, as part of a larger-scale war on crime, transformed justice systems with its “tough on crime” approach to all offenders, and drug offenders in particular.\textsuperscript{26} State and federal legislators passed new laws providing funding to

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\item BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISONERS 1925–81 tbl.1 (1982), http://www.bjs.gov/content/pub/pdf/p2581.pdf (reporting 196,092 prisoners in federal and state institutions in 1972); CARSON, supra note 2, at 2 tbl.1 (reporting 1,613,803 prisoners in federal and state prisons in 2010).
\item For detailed background on the origin of the term mass incarceration, see JONATHAN SIMON, MASS INCARCERATION ON TRIAL 3 (2014). For examples of its prevalent use, see id.; Eaglin, supra note 9, at 191 n.7.
\item See, e.g., TRAVIS ET AL., supra note 8, at 118 (explaining the shift towards harsher criminal justice policies in the U.S. and noting that “the war on drugs . . . has been an important contributor to higher U.S. rates of incarceration”); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 81 (1995) (noting that drug offenses are “the single most important cause of the trebling of the prison population in the United States since 1980”).
\item See general TRAVIS, supra note 8, at 118 (explaining the shift towards harsher criminal justice policies in the U.S. and noting that “the war on drugs . . . has been an important contributor to higher U.S. rates of incarceration”); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 48–57 (2010) (describing the passage of severe crime legislation between the 1980s and mid-1990s with a focus on drug legislation in particular); see also Jonathan Simon, Ian Haney López & Mary Louise Frampton, Introduction, in AFTER THE WAR ON CRIME: RACE, DEMOCRACY AND A NEW RECONSTRUCTION 1, 7 (Mary Louise
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buttress local and state police anti-drug enforcement, incentivizing more arrests and prosecutions of drug offenders. Federal legislation decreased judicial discretion in determining criminal penalties by implementing expansive mandatory minimum penalties to get tough on high-level drug trafficking and violent offenses. As a result, the War on Drugs is attributed with increasing sentencing severity and increasing police and prosecutorial discretion. These policies also opened the door to exacerbated racial disparities at every stage of the criminal justice system. As a result, the War on Drugs—and mass incarceration—is associated with vast racial inequity as well.

The dramatic expansion of the penal state provides minimal benefits that are accompanied by unsustainable economic costs. Studies demonstrate that increased incarceration had little effect on the drop in crime in the past thirty years. At the same time, however, the massive increase in incarceration costs billions of dollars to maintain—by 2015, taxpayers spent $260 billion to sustain the criminal justice system. Mass incarceration requires a large increase in the amount of money allocated to corrections, which results in decreases in funding for other government responsibilities that affect the broader public, like education. Additionally,
prison systems across the country suffer from overcrowding because more people are incarcerated than the systems can currently maintain.\footnote{Notoriously, California’s prison overcrowding problem led to the Supreme Court’s 2011 decision affirming a lower court order for the state to reduce its prison population pursuant to the Eighth Amendment’s Cruel and Unusual Punishment Clause. See Brown v. Plata, 131 S. Ct. 1910, 1947–50 (2011). The state still struggles to meet the requirements imposed on it, and numerous other states suffer from similar, though not as visible, overcrowding issues. See Reid Wilson, \textit{Prisons in these 17 States are Over Capacity}, WASH. POST (Sept. 20, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/20/prisons-in-these-17-states-are-filled-over-capacity/. This includes the federal system. See \textit{Gov’t Accountability Office, Federal Prison System: Justice Could Better Measure Progress Addressing Incarceration Challenges} 1 (2015), http://www.gao.gov/assets/680/670896.pdf (“Despite a decline of about 8,500 inmates since the end of fiscal year 2013 . . . [The Federal Bureau of Prisons] reports that its institutions remain about 30 percent overcrowded, housing considerably more inmates than they were designed to hold.”).}


Isolation from society—through barriers to employment, voter disenfranchisement, and exclusion from public housing—additionally prevents successful reentry to society.\footnote{See Klingele, \textit{supra} note 12, at 548–49 (describing the risks of reincarceration and distinguishing those risks from recidivism due to the commission of a new crime); \textit{Roeder et al., supra} note 23, at 25 (describing the criminogenic effect of mass incarceration, meaning that prison “can increase the criminal behavior of prisoners upon release.”).} Mass incarceration negatively affects whole urban communities, not just those individuals entangled in the justice system.\footnote{See \textit{Matthew R. Durose et al., Bureau of Justice Statistics, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010} 1 (2014), http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf; Klingele, \textit{supra} note 12, 12 at 548–49 (describing the risks of reincarceration and distinguishing those risks from recidivism due to the commission of a new crime); \textit{Roeder et al., supra} note 23, at 25 (describing the criminogenic effect of mass incarceration, meaning that prison “can increase the criminal behavior of prisoners upon release.”).}

For example, traditional family structures are weakened and democratic power is diluted as significant portions of specific communities are removed.\footnote{See \textit{Todd R. Clear & Natasha Frost, The Punishment Imperative: The Rise and Failure of Mass Incarceration in America} 26–27 (2014) (describing the concentration of incarceration among young black males from impoverished inner-city neighborhoods).} These realities have a destabilizing effect that creates
a paradoxical reality whereby more incarceration can create more crime as well.\footnote{Paul J. Larkin, Jr., Crack Cocaine, Congressional Inaction, and Equal Protection, 37 Harv. J.L. & Pub. Pol'y 241, 290 (2014) (observing that the destabilizing effect of mass incarceration “erodes a community’s ability to maintain the informal social controls serving as the first line of defense against crime and discord”); see also ROEDER ET AL., supra note 23, at 27 (finding that “8 of the 10 states that experienced increases in violent crime in the 2000s also saw increases in imprisonment”).} In short, mass incarceration creates detrimental effects on society that cannot be maintained in the long-term; whatever benefits were previously experienced by this phenomenon are quickly being outweighed by its increasing costs.

Well-intentioned judges and practitioners identified the detrimental effects of mass incarceration first, and responded to the social and economic pressures created by the War on Drugs with the creation of the drug court.\footnote{Michael C. Dorf & Charles F. Sabel, Drug Treatment Courts and Emergent Experimentalist Government, 53 Vand. L. Rev. 831, 870–71 (2000) (“[D]rug treatment courts use coercion as only one of many tools in helping the addict cope with his addiction . . . . [D]rug courts represent as effective a response to the problem of addiction as possible under current law.”); Breaking the Cycle of Drugs and Crime, Office of Nat’l Drug Control Policy (1999), https://www.ncjrs.gov/ondcppubs/publications/policy/99adcs/iv-d.html (“Drug courts seek to reduce drug use and associated criminal behavior by retaining drug-involved offenders in treatment.”); Eaglin, supra note 9, at 209.} “Drug courts” refer to a variety of diversionary programs, run through criminal courts, which divert certain drug offenders from standard sentences and instead require participation in drug treatment programs.\footnote{Josh Bowers, Contraindicated Drug Courts, 55 UCLA L. Rev. 783, 784 (2008).} Regardless of the drug court model chosen, the ultimate goal of drug courts is to provide certain offenders with treatment to cure their drug addiction—the rationale being that successful treatment will stop the cycle of “drug use and associated criminal behavior.”\footnote{Rewards may include encouragement and praise from the bench, ceremonies to acknowledge completion of different stages in the process, and tokens of progress. See Miller, supra note 43, at 1498–99 (internal citations omitted); Dorf & Sabel, supra note 44, at 870–71. Oppositely, sanctions for noncompliance that come short of incarceration will also be issued. These may include verbal warnings and admonishment from the bench in open court, demotion to a previous stage, or confinement in the courtroom or jury box. Miller, supra note 43, at 1497, 1499.} The process is non-adversarial; several actors of the criminal justice system work together to identify and assign the offender to treatment as an alternative to incarceration.\footnote{Eric J. Miller, Drugs, Courts, and the New Penology, Stan. L. & Pol’y Rev. 417, 421 (2009).} The judge plays an active and integral role in connecting the offender to a treatment program and monitors the progress of the offender through that treatment regimen.\footnote{Eric J. Miller, Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism, 65 Ohio St. L.J. 1479, 1481, 1489 (2004) (drug courts may offer pre- or post-trial intervention to divert offenders from sentences of incarceration).} Where the offender is successful in treatment, the court will grant rewards.\footnote{Dorf & Sabel, supra note 44, at 845.} Completion of the drug court program results in either the dismissal of charges (pre-adjudication model) or a no-time sentence on pleas to lesser charges (post-
Where the offender fails to adequately progress in the program, though, the court imposes graduated sanctions. Failure to complete the program ultimately results in a return to the traditional criminal justice system, where offenders may receive longer punishment terms than those offenders who declined to enter drug court at all.

While drug courts vary in form, most share two main characteristics relevant to this Article. First, drug courts limit eligibility by defined characteristics. Due to limited resources and capacity, drug courts are available for only a small subset of the offender population. Eligibility for drug courts varies, but generally the courts accept low-level, nonviolent drug offenders. In this instance, “low-level” tends to refer to both first-time offenders and those offenders who are charged with drug possession offenses. Few courts accept offenders charged with non-possession drug-related crimes. In addition, offenders with prior convictions for violent felonies are typically screened out of drug courts. Prosecutors and judges preclude offenders with long or serious criminal records due to concern about their

49. Dorf & Sabel, supra note 44, at 847–48 (drug courts impose graduated sanctions in the event of relapse or other rule infractions). Graduated sanctions may include increased surveillance through treatment sessions, status hearings, urine tests, and even incarceration for a period of days. Id. at 848; Miller, supra note 43, at 1499.
50. Eaglin, supra note 9, at 218–19; Bowers, supra note 46, at 792 (“[T]he sentences for failing participants in New York City drug courts were typically two-to-five times longer than the sentences for conventionally adjudicated defendants.”).
51. See BUREAU OF JUSTICE ASSISTANCE, DEFINING DRUG COURTS: THE KEY COMPONENTS 5 (2004), https://www.ncjrs.gov/pdffiles1/bja/205621.pdf (explaining in Component 3 that “[e]ligible participants are identified early and promptly placed in the drug court program”); Miller, supra note 43, at 1539 (“All drug courts use some form of screening procedure to weed out classes of offenders as unsuitable or ineligible for the rehabilitation program.”).
52. Bowers, supra note 46, at 784 (noting that drug courts’ general operating pattern includes “participation of nonviolent drug offenders”).
55. Miller, supra note 43, at 1539–40. Screening happens twice: first when the prosecutor refers the defendant to the drug court, and second when the drug treatment provider decides to accept the defendant into a program. Eligibility criteria are statutorily proscribed, but providers have discretion to further narrow the eligibility criteria for a specific program. Id. at 1539–42; see sources cited supra note 53.
supervision in the community.\textsuperscript{56} Drug treatment providers tend to exclude such offenders because they are less likely to successfully complete the program.\textsuperscript{57}

Demonstrating effectiveness is a central component of a drug court.\textsuperscript{58} While traditional courts measure effectiveness through case processing time, number of cases, time to disposition, and the like,\textsuperscript{59} drug courts point to statistical data as the primary evidence of their success—specifically focusing on recidivism reduction and cost.\textsuperscript{60} Programs invite evaluators to measure their outcomes.\textsuperscript{61} The argument surrounding how much these programs reduce the likelihood of recidivism revolves around data.\textsuperscript{62} Advocates use cost-effectiveness as a measure of success for court implementation.\textsuperscript{63} Comparing criminal justice dollars spent on drug courts with the cost of other programs and/or incarceration is common in analyzing the relative effectiveness of drug court programs.\textsuperscript{64}

Drug courts have garnered widespread support from both conservatives and progressives for converging reasons. Conservatives are drawn to the “tough love”


57. See Eaglin, supra note 9, at 209; Morris B. Hoffman, The Drug Court Scandal, 78 N.C. L. REV. 1437, 1462 (2000); Miller, supra note 43, at 1541–42 (noting that treatment programs have little incentive to admit into the program offenders who will not actually complete it); see also Richard C. Boldt, The “Tomahawk” and the “Healing Balm”: Drug Treatment Courts in Theory and Practice, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 45, 54–55 (2010) (offenders with fewer prior involvements in the criminal system are more likely to complete drug court programs).


60. See, e.g., The Verdict Is In: Drug Courts Work, NAT’L ASS’N DRUG COURT PROF’LS, http://www.nadcp.org/learn/how-well-do-drug-courts-work/facts-figures (last visited Apr. 14, 2016) (pointing to cost savings ranging from $3,000 to $13,000 per client diverted from prison; citing to studies demonstrating seventy-five percent of drug court graduates remain arrest-free for two years after leaving the program).

61. See The Verdict Is In: Drug Courts Work, supra note 60, which notes that:

Our nation’s scientific community put Drug Courts under its microscope. After all of their rigorous testing and research they concluded that Drug Courts work. Better than jail or prison. Better than probation or treatment alone. Drug Courts significantly reduce drug use and crime and are more cost-effective than any other proven criminal justice strategy.

Id.


63. Hoffman, supra note 57, at 1480.

aspect of drug courts—in other words, the “this is still punishment” aspect of the courts and their ability to use incarceration and other methods to induce specific behavior.\textsuperscript{65} Progressives are drawn to the programs because they reintroduce an aspect of rehabilitation into American penal practice.\textsuperscript{66} The use of scientifically-driven data on the drug courts’ effectiveness at reducing both recidivism and costs appeals to all politicians, regardless of political leanings, because it provides a depoliticized platform to address drug crimes.\textsuperscript{67} The rhetoric focuses on how these programs place responsibility on the individual to alter his or her conduct.\textsuperscript{68} Defendants are expected to transform in their home communities, regardless of external social ills. The rhetoric does not place an onus on the government to address the politically-divisive underlying social and economic ills exacerbated by mass incarceration.\textsuperscript{69}

Drug courts have proliferated in the United States as a successful model of criminal justice reform. Between 1990 and 2000, more than two thousand drug courts were established in jurisdictions across the United States.\textsuperscript{70} Today, there are nearly three thousand drug courts in the United States.\textsuperscript{71} These courts are generally considered a leading alternative to incarceration.\textsuperscript{72} Drug courts also serve as a model—either in strategy or in implementation—for numerous other problem-oriented courts.\textsuperscript{73} Mental health courts, domestic violence courts, community courts, homeless courts, truancy courts, reentry courts, and veterans’ courts all

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  \item 66. Miller, supra note 42, at 425; see, e.g., Cory Booker, End of One-Size-Fits-All Sentencing, in BRENNAN CTR. FOR JUSTICE, SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE 7, 8 (Inimai Chettiar & Michael Waldman eds., 2015), https://www.brennancenter.org/sites/default/files/analysis/Solutions_American_Leaders_Speak_Out_On_Criminal_Justice.pdf (“Or we could spend this money [used to incarcerate] to empower those who break the law—from the drug addicted to youth offenders—to succeed.”).
  \item 67. Miller, supra note 42, at 427; see also Frumin, supra note 65.
  \item 68. David Garland describes this as a “responsibilization” strategy. GARLAND, supra note 16, at 124. “The primary objective [of the responsibilization strategy] is to spread responsibility for crime control onto agencies, organizations, and individuals that operate outside the criminal justice state and to persuade them to act appropriately.” Id. at 124–25. Eric Miller applies this analysis to drug courts. He argues that the responsibilization aspect of drug courts explains why both conservatives and progressives embrace these programs as a response to mass incarceration. Miller, supra note 42, at 425–27.
  \item 69. Miller, supra note 42, at 425–27.
  \item 70. NAT’L DRUG COURT INST., TIMELINE OF DRUG COURTS AND OTHER PROBLEM-SOLVING COURTS IN THE UNITED STATES (2008), http://www.nadcp.org/sites/default/files/nadcp/Timeline.pdf.
  \item 72. See Roger K. Warren, A Tale of Two Surveys: Judicial and Public Perspectives on State Sentencing Reforms, 21 FED. SENT’G REP. 276, 277 (2009) (noting that a 2006 survey by the National Center for State Courts described the expansion of drug courts as “among the leading current sentencing reform efforts in the states”).
  \item 73. See John S. Goldkamp, The Drug Court Response: Issues and Implications for Justice Change, 63 ALB. L. REV. 923, 929 (2000) (“The drug court methodology has been adapted to grapple with other problems associated with court populations, including community issues, domestic violence, and mental health, and has directly and indirectly spawned a variety of related innovations . . . .”).
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acknowledge the influential role of drug courts in their formation.\footnote{See id. at 950–61.}

II. THE DRUG COURT PARADIGM AND SENTENCING REFORMS TO ADDRESS MASS INCARCERATION

Though drug courts are considered a leading response, states have implemented a variety of sentencing reforms in the last decade to address the fiscal and political pressures of mass incarceration. This Article argues that these reforms generally approach mass incarceration through a particular frame derived from drug courts and herein referred to as the “drug court paradigm.” “Framing” is “an active, processual phenomenon that implies agency and contention at the level of reality construction.”\footnote{Robert D. Benford & David A. Snow, Framing Processes and Social Movements: An Overview and Assessment, 26 ANN. REV. SOC. 611, 614 (2000).} Said differently, the way a social issue is framed shapes reality, because the frame influences normative decisions concerning how to define a problem and how to select a solution.\footnote{Id. at 614 n.3.} This Article asserts that the drug court paradigm extends beyond framing how to address drug addiction; it also shapes how lawmakers conceptualize the problems of and solutions to mass incarceration more broadly.

The contours of the drug court paradigm are simple: low-level, nonviolent offenders should not be incarcerated for long terms because it is neither cost-efficient nor an effective method of punishing them. This frame drives the success of drug courts; it also shapes other policy reforms designed to reduce reliance on incarceration at the state and federal level. Three aspects from the drug court movement define the paradigm: “low-level offenders,” “nonviolent offenders,” and “effectiveness.”

“Low-level” signifies several different types of offenders. The Uniform Crime Report’s delineation between Part I and Part II offenses serves as a general proxy for “serious” versus “low-level” offenses.\footnote{See Thomas Cohen et al., Nat’l Ctr. For State Courts, Examining the Work of State Courts: A Renewed Interest in Low-Level Crime, 6 CASELOAD HIGHLIGHTS 1 (2000), http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/40.} Part I offenses include “serious violent and property” crimes such as criminal homicide, forcible rape, robbery, aggravated assault, burglary and larceny-theft, motor vehicle theft, and arson.\footnote{Id. at 5; FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, 2009—OFFENSE DEFINITIONS (2010) [hereinafter CRIME IN THE U.S. 2009], https://www2.fbi.gov/ucr/cius2009/about/offense_definitions.html. For these offenses, law enforcement submit information to the Uniform Crime Reporting Program on the number of offenses known by police, the number of offenses cleared by arrest or exceptional means, and the age, sex, and race of each person arrested for the offense.} Part II, or “less serious,” offenses include fraud, embezzlement, drug abuse (possession and
Despite this categorization, low-level offenders are commonly understood as something different from low-level offenses. Recent sentencing policy changes delineate between “low-level” offenders as opposed to “serious” offenders. The general understanding of “low-level” includes nonviolent drug offenders, though the scope of the term has been used to incorporate numerous other types of offenders and offenses. At times, loitering, drug trafficking, and theft may be considered “low-level.” The connotation associated with this term is that such offenders do not necessarily threaten public safety, but are incarcerated nonetheless.

“Nonviolent offenders only” is another characteristic of the drug court paradigm. Drug courts excluded violent offenders initially as a measure to encourage political buy in. The exclusionary nature of drug courts similarly extends to most specialized courts. Admittance of violent offenders to any specialized court is the exception, not the rule. Legislatures and policymakers are now following the lead in efforts to divert only low-level, nonviolent drug offenders from incarceration.

Finally, “effectiveness” is an important feature of the drug court paradigm. Drug courts justified their existence and expansion on the basis that it is more effective than long-term incarceration both in cost and in reducing recidivism. Today, criminal justice reforms are driven by the larger shift towards “evidence-based policies and practices,” or EBPPs. EBPPs use empirically researched approaches to criminal justice that are proven to have measurable, positive outcomes that


82. See McLeod, supra note 13, at 1625 (“[I]n the view of some advocates, ‘in many cases, the current system works just fine’ such as in handling ‘murders, rapes, and robberies;’ they believed that alternatives for prosecution of more serious offenses would be inappropriate.”) (internal citations omitted).

83. Id.

84. See, e.g., Erica Goode, Coming Together to Fight for a Troubled Veteran, N.Y. Times (July 17, 2011), http://www.nytimes.com/2011/07/18/us/18vets.html; McLeod, supra note 13, at 1606–08 (describing variety of eligibility requirements for admission to different specialized courts, and noting that some courts admit defendants with serious felony records while others do not).

85. See Eaglin & Solomon, supra note 53, at 30–31 (discussing the prevalence of eligibility requirements for diversion programs designed to keep low level offenders out of jail and prison); Gottschalk, supra note 12, at 165 (discussing the rise of reforms that address non-violent, non-serious, non-sex offenders only).

86. Nolan, supra note 62, at 58–59 (noting that utilitarian sentiments such as cost-effectiveness remain a major source of structural explanation and justification for the drug court movement); supra notes 64–68.
promote public safety.\textsuperscript{87} Such policies and practices are measured according to their cost-effectiveness and their ability to reduce recidivism. These measures increase the government’s efficiency and its ability to ensure public safety by reducing risk of future criminal behavior that threatens society at large. The shift towards EBPP is a critical part of the drug court paradigm. As the following subsections will demonstrate, the two prongs of effectiveness—cost-effectiveness and reduced recidivism rate—once used to justify drug courts are now used to legitimize and advance criminal justice policy reforms more broadly.

Having established the key aspects of the drug court paradigm, the following Parts provide examples of recent sentencing reforms shaped by the drug court paradigm. Part A discusses reforms adopted in the “Justice Reinvestment Initiative” states, meaning states where the Justice Reinvestment Initiative entered to review and propose sentencing policies to reduce pressures created by mass incarceration. Part B discusses reform efforts in California. Part C discusses criminal justice reforms at the federal level.

A. “Justice Reinvestment Initiative” States

Originating in 2001, the Justice Reinvestment Initiative (“JRI”) is a joint public-private coalition of the U.S. Department of Justice, the Pew Charitable Trust, the Center for State Governments, and the Vera Institute of Justice.\textsuperscript{88} This coalition analyzes state data, recommends ways to reduce prison populations, and “generate[s] savings for reinvestment in local high incarceration communities . . . .”\textsuperscript{89} JRI also helps state policymakers quantify savings for reinvestment in affected communities, as well as other prevention-oriented strategies.\textsuperscript{90} In 2004, the U.S. Department of Justice’s Bureau of Justice Assistance provided financial support to allow JRI to expand its reach by offering technical assistance to states interested in reducing their prison populations.\textsuperscript{91} In 2010, Congress further endorsed JRI, providing increased funding through the 2010 Omnibus Consolidated Appropriations Act.\textsuperscript{92} The savings realized by JRI reforms theoretically will be “reinvested in evidence-based efforts to support additional public safety

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\item \textsuperscript{88} Klingele, supra note 12, at 539.
\item \textsuperscript{89} AUSTIN ET AL., supra note 6, at 6.
\item \textsuperscript{92} Id. at 6.
\end{itemize}
improvements” in those communities.\textsuperscript{93}

By 2014, JRI has assisted twenty-seven states in addressing growing prison populations.\textsuperscript{94} Eighteen of these states have implemented JRI legislation.\textsuperscript{95} JRI’s collection of data and recommendations continually proved pivotal to the passage of reforms that stabilized state prison population growth. Though each state receives an individualized assessment on the local dynamics driving prison growth, the recommendations for solutions tend to be similar. Typically, JRI urges states to adopt EBPPs, including the use of risk and needs assessments,\textsuperscript{96} problem-solving courts,\textsuperscript{97} graduated sanctions,\textsuperscript{98} and programs to monitor and measure effectiveness.\textsuperscript{99} These policies are designed to specifically “improve the efficiency of [a state’s] criminal justice system and allocate limited justice system resources effectively.”\textsuperscript{100}

JRI strategically focuses on low-level, nonviolent offenders in its data collection and recommendation process. Since its inception, the initiative targeted “low hanging fruit[s]” to attract bipartisan support, a key element to the initiative’s success.\textsuperscript{101} From 2002 to 2008, this included back-end reforms, such as reducing

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\item \textsuperscript{93} See Klingele, supra note 12, at 563–64 (citing LAVIGNE ET AL., supra note 91, at 3) (noting that the savings come from “averted operating costs as a result of incarcerating a smaller population and averted construction costs as a result of not having to build new facilities to incarcerate larger justice system populations”).
\item \textsuperscript{94} The twenty-seven states participating in JRI are as follows: Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wisconsin. AUSTIN ET AL., supra note 6, at 1 n.1.
\item \textsuperscript{95} AUSTIN ET AL., supra note 6, at 1 n.1 (listing the eighteen states that have implemented JRI legislation).
\item \textsuperscript{96} “Risk and needs assessments” have been adopted in sixteen JRI states. Id. (listing these sixteen states). These assessments “help predict a person’s risk to reoffend through the identification of criminal risk factors.” LAVIGNE ET AL., supra note 91, at 2. The assessments, derived from statistical data on characteristics of offenders in the prison population, are used to inform decisions about detention, sentencing, release and allocation of supervision and treatment resources. See id.
\item \textsuperscript{97} Six JRI states have created or expanded problem-solving courts. These courts “use an evidence-based approach to provide treatment for offenders with specific needs,” usually related to substance abuse (drug courts) or mental health disorders (mental health courts). LAVIGNE ET AL., supra note 91, at 2. In addition, eleven JRI states have developed or expanded “community based treatment” programs. Though not exactly the same, these programs also focus on providing treatment (e.g., substance abuse treatment) to offenders in the community. Id.
\item \textsuperscript{98} “Intermediate and graduate sanctions” provide alternatives to long terms of incarceration for technical violations of probation or parole. Id. Technical violations refer to violations of the terms of community supervision that do not encompass the commission of new crimes, so instances where offenders fail drug tests or fail to attend probation officer meetings. These alternative “graduated” responses include short jail stays, increased drug testing, or other interventions that introduce accountability and certainty of punishment without sending offenders directly to prison. Fifteen JRI states have adopted these types of reforms. See id.
\item \textsuperscript{99} Other programs may include introduction of accountability measures like mandatory reporting, ensuring use of EBPPs, and developing data reporting requirements. See id.; Evidence-Based Practices, JUST. REINVESTMENT INITIATIVE, https://www.bja.gov/programs/justicereinvestment/evidence_based_practice.html (last visited Mar. 8, 2016).
\item \textsuperscript{100} Evidence-Based Practices, supra note 99.
\item \textsuperscript{101} AUSTIN ET AL., supra note 6, at 6.
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For example, Texas and Kansas, two states celebrated for their prison population reductions with JRI, both adopted reforms focused on reducing recidivism amongst offenders. In Kansas, 2007 legislation focused on reducing technical violations by offenders who were on community supervision. The legislation introduced risk assessment instruments to identify medium- and high-risk offenders, created intermediate sanctions, and incentivized creation of evidence-based community correction services, including drug and mental health treatment program. In Texas, the reforms focused on creating non-incarcerative alternative sanctions for technical violations of parole or probation, increasing drug and mental health treatment programs in prisons, and shifting certain offenders from prisons to jails.

Consistent with the drug court paradigm, the focus on low-level, nonviolent offenders continued as the initiative grew in popularity. For example, South Carolina adopted sentencing reforms that aimed to reduce its low-level, nonviolent offender population. The state adopted JRI-recommended reforms, like integrated risk assessment tools, into probation and parole supervision practices. It also eliminated mandatory minimum penalties for drug possession. Georgia adopted JRI-recommended reforms focused on diverting lower-level offenders as well. There, Georgia lawmakers enacted JRI legislation in 2012 that revised penalties for certain drug offenses, expanded problem-oriented courts, and introduced graduated degrees of burglary and forgery levels for theft offenses. The legislation should stabilize Georgia’s prison population growth.

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102. See id. (citing to multiple states in which this occurred, including Arizona (2008); Connecticut (2004); Kansas (2007) (technical violations); Rhode Island (2008); Texas (2007) (technical violations and good time credits)).


104. See AMERICAN CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES, 20–21 (2011), https://www.aclu.org/files/assets/smartreformispossible.pdf; see also Eaglin, supra note 9, at 206 (“[Texas reforms included] assigning nonviolent offenders to mental health and drug treatment programs instead of prison, placing those serving less than two years in short-term jails, and engaging in early intervention . . . .”).


106. AMERICAN CIVIL LIBERTIES UNION, supra note 104, at 9.


110. Georgia, supra note 108 (estimating a reduction from 55,933 prisoners in FY 2012 to 54,690 prisoners in FY 2018, while averting the anticipated eight percent increase).
In Indiana, JRI’s efforts failed to result in specific legislation, despite efforts to push sentencing reforms within the JRI framework. There, JRI entered the state in 2009. In 2010, the Council of State Governments Justice Center released a report suggesting that too many low-level offenders were incarcerated in the state of Indiana. Following the report’s recommendations, the Indiana state legislature introduced legislation that created a graduated sentencing structure for drug possession and dealing offenses, expanded problem-solving courts, and incorporated risk assessment tools in probation determinations. Shortly thereafter, the Indiana University Public Policy Institute released a report on the types of offenders affected by the legislation. The report indicated that most of these offenders were repeat offenders. Prosecutors seized upon this data to support their assertion that offenders benefiting from the legislation should not qualify for diversion from long terms of incarceration, as these offenders were not “low-level.” Largely due to prosecutorial opposition, the JRI bill failed. In 2014, the state implemented new reforms that reduced punishment for some drug offenses, while increasing penalties for habitual and violent offenders. Indiana’s reform efforts illustrate the power of the drug court paradigm and the dangers in breaking from its mold. The JRI reforms failed because the “low-level nonviolent


115. See Jarjoura et al., supra note 114, at 4 (finding that “86 percent of D felony cases and 90 percent of C felony new commitment cases involved offenders with prior community supervision experience”).


117. Indiana, supra note 111.

118. See H. 1006, 118th Gen. Assemb. Reg. Sess. (Ind. 2013), http://www.in.gov/legislative/bills/2013/HE/HE1006.1.html. The bill, which went into effect in July 2014, revised the criminal code and reduced sentences for fraud, intellectual property, and auto theft offenses. It also permits the courts to reduce or suspend sentences for some drug offenses. At the same time, the bill created new mandatory penalties, increased the advisory sentence range for most offenders, and prohibited “credit restricted felons” from obtaining sentence modifications. Id.
offender” frame did not withstand attack from state prosecutors. New legislation adopted in the state took a much narrower approach to reform, potentially reducing sentences for a smaller subset of drug offenders only.\textsuperscript{119} It also increased sentence severity for most offenders.\textsuperscript{120}

The JRI experience demonstrates the strength of the drug court paradigm. JRI recommendations address low-level, nonviolent offenders using the rhetoric of recidivism reduction and cost effectiveness. Unsurprisingly—since JRI sentencing reform is no doubt shaped and affected by the drug court paradigm—recidivism reduction and cost-effectiveness have become central tenets of the initiative’s approach to devising criminal justice reform recommendations.\textsuperscript{121}

\textbf{B. California}

California is an important state in the battle to reduce mass incarceration in the United States. It has one of the largest state prison populations in the country,\textsuperscript{122} and it adopted some of the most severe sentencing reforms in the country during the tough-on-crime era.\textsuperscript{123} California’s struggles to address persistent and systemic prison overcrowding issues\textsuperscript{124} resulted in a 2011 Supreme Court order to reduce the state’s prison population by forty thousand people within two years.\textsuperscript{125} The state introduced a number of reforms to address its mass incarceration problem, focusing on the expansion of drug courts and implementation of the Public Safety Realignment Act.\textsuperscript{126} More recently, California voters supplemented these efforts by approving two propositions designed to reduce the state’s incarcerated population. This Part analyzes these reforms to demonstrate their general adherence to the drug court paradigm.

\textsuperscript{119} House Enrolled Act 1006 reclassified felonies from Class A-D to Level 1-6. The new scheme increased levels for some violent offenses while decreasing levels for some non-violent offenses. It also increased the amount of time served for “credit restricted” felons, from fifty percent to seventy-five percent of assigned sentence. \textit{See} Ind. Code 35-31.5-2-72 (2016).

\textsuperscript{120} Id.

\textsuperscript{121} \textit{AUSTIN ET AL., supra note 6, at 7; Justice Reinvestment, Council of State Gov’ts, Justice Ctr., http://csgjusticecenter.org/jr} (last visited Mar. 9, 2016).

\textsuperscript{122} \textit{See LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 5 tbl.5 (2013), http://www.bjs.gov/content/pub/pdf/cpus12.pdf.}

\textsuperscript{123} \textit{See JONATHAN SIMON, MASS INCARCERATION ON TRIAL 17–22 (2014) (“California is to incarceration what Mississippi was to segregation—the state that most exemplifies the social and legal deformities of the practice.”).}

\textsuperscript{124} Joan Petersilia, \textit{California’s Correctional Paradox of Excess and Deprivation, 37 CRIME & JUST. 207, 252–54 (2008)} (describing California’s “catch-and-release” system where numerous offenders churn in and out of the system).

\textsuperscript{125} \textit{Brown v. Plata, 563 U.S. 493 (2011)} (affirming three judge panel’s order requiring California to reduce its state prison population because the overcrowded prisons prevented the state from providing constitutionally required medical and mental health care pursuant to the Eighth Amendment).

California embraced drug courts quickly.\textsuperscript{127} Oakland, California established one of the first drug courts in the country.\textsuperscript{128} In 1997, the state codified its “deferred entry of judgment” program, authorizing courts to divert certain first-time drug possessors to obtain treatment rather than go to trial.\textsuperscript{129} In 2000, California voters approved Proposition 36.\textsuperscript{130} This law required courts to place certain nonviolent drug possessors on probation, rather than impose jail time.\textsuperscript{131} It also spurred the expansion of drug treatment programs in the state—more than 700 new programs were initiated in the four years after the proposition’s passage.\textsuperscript{132} Under the Proposition, qualifying defendants must complete a drug treatment program as a condition of probation.\textsuperscript{133} Though controversial amongst drug court advocates, Proposition 36—combined with other legislation focused on drug treatment—helped decrease the drug-possession prison population and slowed overall prison population growth in the state.\textsuperscript{134} California built upon these reforms by establishing several other types of “collaborative justice” programs—like problem-oriented courts—to address increasing pressures in the state.\textsuperscript{135}

The Public Safety Realignment Act also comports with the drug court paradigm’s focus on addressing low-level, nonviolent offenders through an effectiveness lens. In response to a federal mandate to reduce the state prison population,
Governor Jerry Brown signed the Act (AB 109) into law in 2011.136 This legislation shifted responsibility to punish and supervise non-serious, non-violent, and non-sex offenders (with no history of serious convictions) from the state to the county.137 Whether those individuals are diverted to community supervision or incarcerated in county jails depends on the individual county’s approach.138 So far, several counties have increased incarceration in county jails.139 Nevertheless, the legislation emphasized community supervision as the preferred method of addressing influxes in offenders headed to counties rather than state prison.140

In recent years, Californians have notoriously approved two propositions designed to address the state’s prison population crisis.141 In 2012, California voters approved Proposition 36, reducing the severity of the state’s Three Strikes Law.142 California’s Three Strikes Law, enacted in 1994, required sentencing enhancements for repeat offenders, and was considered one of the harshest sentencing laws in the country.143 By 2008, a quarter of the state’s prison

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136. See Simon, supra note 123, at 135 (noting that the Public Safety Realignment legislation was adopted expressly to comply with the Brown mandate to reduce the state’s prison population).  
138. Realignment simply requires that counties, rather than the state, are responsible for the non-serious, non-violent, non-sex offenders. The legislation gives each of California’s fifty-eight counties the opportunity to choose alternatives to custody for these “realignment offenders.” Susan Turner et al., RAND Corp., Public Safety Realignment in Twelve California Counties 2 (2015), http://www.rand.org/content/dam/rand/pubs/Research_Reports/RR800/RR872/RAND_RR872.pdf. As Turner noted, “[o]ptions available to counties include day reporting centers (DRCs), core-model day reporting programs for smaller counties, electronic monitoring programs, in-custody programs residential reentry programs, and local jail credits modeled on those previously available in state prisons.” Id. at 1–2. Most counties originally pursued a variety of alternative sanctions, primarily focusing on the expansion of drug courts and other specialized collaborative courts, as well as flash incarceration, community service and electronic or Global Positioning System monitoring. Id. at 2–3.  
139. Quan et al., supra note 137.  
140. Eaglin, supra note 9, at 208 n.126.  
143. Under the law, the sentence term doubled for those convicted of a second felony. For third strikers, any felony conviction, whether for a serious or violent offense or not, resulted in a sentence of between twenty-five years and life imprisonment if a prosecutor pursued the three strikes enhancement. Legislative Analyst’s Office, supra note 142.
population was sentenced under the Three Strikes Law. Californians initially considered reforming the law in 2004 with Proposition 66—until a bipartisan media campaign framed the reform as releasing 26,000 dangerous criminals. The campaign argued that three-strikers were not the type of low-level, nonviolent offenders deserving diversion from severe sentencing. Californians enacted a scaled down version of the three strikes reform in 2012 with Proposition 36. This bill limited the scope of the reform by requiring a serious and/or violent felony offense for the third strike conviction. This time, advocates framed the reform within the strictures of the drug court paradigm, focusing on the costs of incarcerating three-strike offenders and emphasizing that any felony—serious, violent, or otherwise—triggers the third strike. The initial ballot measure promised to “restore the original intent of [California’s Three Strikes law], which was to lock away violent career criminals for life, without unjustly throwing away the lives of small-time, nonviolent offenders.” Advocates discussed the reform in mostly efficiency language—three strikes cost California billions, and reducing its breadth would reserve resources for the most serious offenders.

Here, the success of Proposition 36 demonstrates the success of the drug court paradigm while also illustrating an important deviation as well. The proposition severely restricts the number of prisoners eligible to benefit from the reform.

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146. See, e.g., Edward J. Erler & Brian P. Janiskee, Three-Strikes Law Hits Its Target, L.A. Times (Sept. 28, 2004), http://articles.latimes.com/2004/sep/28/opinion/oe-erler28 (“It is difficult to see the injustice of [25-to-life sentences] for career criminals who have been given multiple chances to reform,” even if the third offense is stolen vitamins or videotapes). Proposition 66 would have required a serious or violent felony—as opposed to any felony—to trigger the third-strike. Id. In addition, it would have reduced the number of crimes that qualified as “serious” or “violent,” thus limiting the reach of the statute. Id. A contentious debate surrounded the proposed bill’s exclusion of residential burglary from the list of “strikeable” offenses. See id.


148. Id.


151. Vaughn, supra note 145.

152. The new law requires that the new felony committed be serious or violent, see Cal. Penal Code § 667(d)-(e) (West 2016), but it also permits designated offenders already serving three-strikes sentences to petition the court for resentencing. These offenders must demonstrate that their third offense was non-serious,
Only certain defendants whose third-strike offense is non-serious and nonviolent are precluded from exposure to the three strikes law.\textsuperscript{153} In addition the proposition contains provisions that remove judicial discretion to sentence strike offenders to concurrent rather than consecutive terms of incarceration.\textsuperscript{154} As a result, only a small subset of the 42,000 prisoners already sentenced under California’s strikes law qualifies for resentencing.\textsuperscript{155} Even where prisoners are eligible for resentencing, judges may prevent certain offenders from the benefits of the proposition based on public safety concerns.\textsuperscript{156} Consistent with the paradigm, Proposition 36 supporters justified its passage based upon its anticipated cost-saving effect.\textsuperscript{157} Reports since its passage continue to emphasize this point.\textsuperscript{158} The Proposition deviates on one key point—the reform applies to people who are, by definition, repeat offenders. Nevertheless, the zeroed in focus on providing alternatives for

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\item non-violent and they would have qualified for a second offense sentencing in the first instance. See COUZENS \& BIGELOW, supra note 147, at 5–8, http://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf (including full text of Proposition 36, and describing its effect).
\item Even where the new felony is not serious or violent, defendants will still be sentenced to 25-years-to-life as a third strike offender in two instances. First, where the current felony of conviction is a serious drug offense (drug trafficking in excessive amounts or drug possession of crack cocaine or heroin), sex offense, violent offense (offenses committed with a firearm), or if the offender is convicted as a felon in possession of a firearm. See CAL. PENAL CODE § 667(e). Second, defendants previously convicted of sexually violent offenses; child abuse offenses; homicide offenses; or serious or violent offenses punishable in California by life imprisonment or death, do not qualify for the benefits of Proposition 36. See CAL. PENAL CODE § 667(d).
\item California’s Three Strikes law includes two components: second and third strike sentence enhancements. “Second strike” offenders refer to those offenders that had one previous serious or violent felony conviction then sentenced for a new felony conviction (not just serious or violent). See LEGISLATIVE ANALYST’S OFFICE, supra note 142, at 5. Second-strike offenders will receive twice the term otherwise required by law for the new conviction. Id. In contrast, third strike offenders had two or more previous serious or violent convictions at the time of sentencing. Id. at 6. There, any new serious or violent felony convictions will result in a twenty-five years to life sentence. Id. The tension referenced in the text concerns the Three Strikes law requirement to sentence strike offenders to consecutive rather than concurrent terms of imprisonment for multiple offenses. Id. at 6–7. The California courts have been creative in avoiding this provision, requiring that consecutive sentences should be imposed only when not committed on the same occasion or out of the same set of operative facts. See People v. Hendrix, 16 Cal. 4th 508, 513 (1997). The new amendments introduced by Proposition 36 prevent such interpretations. See CAL. PENAL CODE § 1170.12(a)(7)-(8) (West 2016); COUZENS \& BIGELOW, supra note 147, at 28–31 (discussing tension between § 1170.12(a) and § 667(c)).
\item See Proposition 36, LEGISLATIVE ANALYST’S OFFICE (July 18, 2012), http://www.lao.ca.gov/ballot/2012/36_11_2012.aspx (estimating that, as of March 2012, 33,000 inmates were second strikers and 9000 inmates were third strikers). Some are excluded because they are ineligible, others are excluded because the new rules on concurrent versus consecutive sentencing would expose them to longer sentences now than they already received. Id.
\item See CAL. PENAL CODE § 1170.126(f) (West 2016) (permitting the court to reject requests for resentencing if it would pose an “unreasonable risk of danger to public safety”).
\item In the ballot initiative supporting Proposition 36, the sponsors stated that “[p]recious financial and law enforcement resources should not be improperly diverted to impose life sentences for some non-violent offenses. Prop. 36 will help stop clogging overcrowded prisons with non-violent offenders, so we have room to keep violent felons off the streets.” COUZENS \& BIGELOW, supra note 147, at 9.
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the most sympathetic third strikers resonates with the characteristics of the drug court paradigm.

The most recent California reform—Proposition 47\(^{159}\)—goes further in exposing a break between rhetorical adherence to the drug court paradigm and scope of implementation. This Proposition, which California voters approved by a majority vote in November 2014, reclassifies several low-level, nonviolent offenses as misdemeanors rather than wobblers.\(^{160}\) “Wobblers” are offenses that can be charged as misdemeanors or felonies dependent upon the discretion of the county prosecutor. This distinction is significant, as felonies can result in longer sentences and more severe collateral sanctions. Misdemeanors are limited to sentences less than a year. Proposition 47 does impose eligibility requirements, but these restrictions are not as narrowly defined as other California reforms. State prosecutors must charge the reclassified offenses as misdemeanors unless the defendant has a prior conviction for certain, enumerated serious offenses.\(^{161}\) Proposition supporters assert that the reform will save California millions of dollars. Anticipated state savings from the reform are earmarked for crime-prevention programs, including substance abuse services, truancy and dropout prevention and victim services.\(^{162}\) Implementation of this reform is attributed with further reducing the state’s prison and jail populations.\(^{163}\)

California’s criminal justice reforms provide valuable insight into the drug court paradigm. For the most part, state and voter-created reforms adhere—at least rhetorically—to the paradigmatic focus on low-level, nonviolent offenders, cost, and—to a lesser extent—recidivism reduction to justify their passage. At the same time, state created reforms more strictly adhere to the paradigm’s narrow focus.


\(^{161}\) These include murder, rape, and certain gun or sex offenses. See CAL. PENAL CODE § 667(e)(2)(c)(iv) (West 2016).

\(^{162}\) The California Legislative Analyst’s Office estimates annual savings may range from $100 million to $200 million. Mac Taylor, Legislative Analyst Office, Implementation of Proposition 47, 3–4 (2015), http://www.lao.ca.gov/reports/2015/budget/prop47/implementation-prop47-021715.pdf. Sixty-five percent of the savings are directed towards mental health and substance use treatment services; twenty-five percent are allocated towards truancy and dropout prevention; and ten percent of the savings are allocated to the Victim Compensation and Government Claims Board. Id. at 4.

\(^{163}\) See Cindy Chang et al., Unintended Consequences of Proposition 47 Pose Challenge for Criminal Justice System, L.A. TIMES (Nov. 6, 2015), http://www.latimes.com/local/crime/la-me-prop47-anniversary-20151106-story.html (noting that since voters approved Proposition 47, the state’s prison population is down 3.8% and statewide jail population down 11.7%).
Legislation like Public Safety Realignment shifts responsibility for low-level offenders, but it does little to require shifts in how those offenders are punished in the system. Voter-initiated reforms like Proposition 36 and 47 have the potential to reach much further, as they restructure sentencing laws to reduce sentences directly. Though eligibility requirements remain, these voter-initiated reforms provide insight to potential shifts in advocacy tactics discussed in Section IV below.

C. The Federal Government

Reforms introduced at the federal level to address mass incarceration tend to adhere to the drug court paradigm as well. When considering federal reforms, one must consider both what the federal government pushes at the state level and what reforms it adopts to apply to the federal system. The federal government funds the JRI, discussed above. Moreover, Congress supported drug court development in the states since 1994 through federal funding. In 2002, President Bush included $50 million in the budget to support local drug courts and the National Drug Court Institute. Congress continued to support the development, implementation, and expansion of drug courts through the Drug Court Discretionary Grant Program. To the extent that drug courts created a frame to address mass incarceration, the federal government contributed to that development.

The federal system, however, is the largest incarcerator in the country, and the efforts to address mass incarceration at the federal level demonstrate the prevalence of the drug court paradigm. Between 2014 and 2015, two very different sets of bipartisan bills were introduced to reform aspects of the federal justice

system. First, bills were introduced that would reduce the severity of mandatory minimum penalties. For example, the Smarter Sentencing Act (SSA), sponsored by Senators Dick Durbin and Mike Lee, would reduce mandatory minimum sentences for drug offenders and modestly expand the statutory safety valve. The bill also renders the Fair Sentencing Act of 2010 (FSA)—which reduced the disparity between drug weights in crack versus powder cocaine offenses triggering mandatory sentences—retroactive. DOJ estimated in July 2014 that SSA would provide $7.4 billion in fiscal savings from averted spending.

The second set of bills introduced to Congress focus on increasing access to EBPPs that would reduce recidivism. In February 2015, Senators John Cornyn and Sheldon Whitehouse introduced the Corrections, Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System (CORRECTIONS) Act. This bill directs the Federal Bureau of Prisons to assess each federal prisoner’s risk of recidivism and risk of violence regularly. That information would be used to calculate the number of earned credit days to reduce a prisoner’s sentence through participation in rehabilitative programming—low-risk offenders can earn ten days of credit per month, while medium risk offenders


171. The drug weight triggering mandatory minimum penalties differs depending on the type of controlled substance at issue. Though crack and powder cocaine are the same chemical substance in different forms, punishment for possession and trafficking in the two drugs differs greatly. Prior to the Fair Sentencing Act of 2010, five grams of crack cocaine triggered a statutorily mandated five-year sentence, as compared to 500 grams of powder cocaine. This disparity is referred to as the 100:1 ratio. The Fair Sentencing Act increased the weight triggering mandatory minimum penalties for crack cocaine offenses, thus reducing the disparity between the two drug weights treatment from 100:1 to 18:1. See The Fair Sentencing Act, S. 1789, 111th Cong. (2010). The Smarter Sentencing Act would make the new drug weights retroactive, thus permitting some prisoners sentenced under the old law to petition for a reduced sentence. See Smarter Sentencing Act, S. 502.


174. S. 467.

175. See S. 467, § 3(a) (requiring creation of the “Post-Sentencing Risk and Needs Assessment System” to “assess and determine the recidivism risk level of all prisoners and classify each prisoner as having a low, moderate, or high risk of recidivism”).
can earn five days per month.\textsuperscript{176} Sex offenders, terrorism offenders, violent offenders, repeat offenders, major organized crime offenders, and major fraud offenders would be prohibited from earning credits under the program.\textsuperscript{177} The bill also introduces a supervised release pilot program to reduce recidivism and improve recovery from drug abuse.\textsuperscript{178}

The first set of bills center on decreasing sentence severity for certain qualifying, low-level, nonviolent drug offenders, while the second seek to increase treatment opportunities based upon evidence of effectiveness at reducing recidivism. Supporters of the sentencing bill and the recidivism reduction bill argue over their respective merits through a cost-savings lens. Both sets of bills fit within the drug court paradigm, even if they seek to build on different aspects. Each has detailed eligibility criteria and each focuses on evidence of efficiency and effectiveness. Additionally, both bills focus reforms on drug offenders.

Though the Senate Judiciary Committee did not approve the previously discussed bills, it did approve a new, comprehensive bill to improve the federal justice system in November 2015. The Sentencing Reform and Corrections Act combines aspects of the earlier, competing bills. It reduces mandatory sentences for certain drug offenses, expands the drug safety valve, and makes the Fair Sentencing Act retroactive.\textsuperscript{179} It also incentivizes prisoners to complete treatment programs to reduce their risk of recidivism through good time credits that would lead to alternative supervision circumstances.\textsuperscript{180} This measure uses risk assessment tools—an EBPP—to allocate federal correctional resources.\textsuperscript{181} As with predecessor recidivism reduction bills, the Sentencing Reform and Corrections Act would limit earned time credits to eligible inmates, again providing the most incentive to low risk inmates.\textsuperscript{182} It also creates mandatory minimum penalties for domestic violence resulting in death and providing weapons to terrorists.\textsuperscript{183} This bill fits within the paradigm, as it uses exclusionary qualification criteria to apply its benefits to certain low-level, nonviolent offenders. It emphasizes EBPPs and cost

\textsuperscript{176} S. 467 § 2(6)(A)(i) (unspecified risk-level prisoners receive five days of time credit per thirty days while low risk prisoners receive an additional five days of time credit in the same period). Interestingly, the bill would not reduce the sentencing restriction that requires all federal prisoners to serve eighty-five percent of their sentences. \textit{Id.} As such, the credits earned would be limited by the overall cap at fifteen percent of a sentence.


\textsuperscript{178} S. 467 § 7(c).

\textsuperscript{179} Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. § 101 (reducing mandatory minimums for prior drug felons); § 102 (broadening the existing safety valve to include offenders with up to four criminal history points); § 106 (rendering Fair Sentencing Act retroactive).

\textsuperscript{180} S. 2123 § 202 (requiring the creation of statistically validated recidivism reduction programming and incentivizing completion of programs through earned time credits).

\textsuperscript{181} \textit{See id.;} S. 2123 § 203 (requiring the Attorney General to develop a risk and needs assessment system to classify inmates as high, moderate, or low risk of recidivism).

\textsuperscript{182} \textit{See S.} 2123 § 202.

\textsuperscript{183} \textit{See S.} 2123 §§ 107-08.
effectiveness to justify its passage.\textsuperscript{184}

The U.S. Department of Justice’s “Smart on Crime” Initiative implemented and supported several reforms that adhere to the drug court paradigm. Announced in August 2013, this initiative calls on federal prosecutors to avoid seeking mandatory minimum sentences for lower level nonviolent drug offenders.\textsuperscript{185} The basis of this reform lies at the intersection of a 2012 Supreme Court decision and prosecutorial discretion. In \textit{Alleyne v. United States}, the Supreme Court declared that a jury must find the weight of drugs that trigger the mandatory minimum penalty beyond a reasonable doubt.\textsuperscript{186} Practically, this means that prosecutors must specify the weight of drugs in their plea deals, and if they do not, then the mandatory minimum penalty cannot be triggered.\textsuperscript{187} As part of the Smart on Crime initiative, former Attorney General Eric Holder issued revised charging memoranda demanding each district refrain from using mandatory minimum penalties, even as bargaining chips for low-level, nonviolent drug offenders.\textsuperscript{188} This initiative was justified through an effectiveness frame. As the internal report explained, the system of mass incarceration “is disruptive to families, expensive to the taxpayer, and may not serve the goal of reducing recidivism. We must marshal resources, and use evidence-based strategies, to curb the disturbing rates of recidivism by those reentering our communities.”\textsuperscript{189} Consistent with the drug court paradigm, the need for more effective policies drives the shift in approach.

As part of that initiative, the U.S. Department of Justice supported a significant amendment to the U.S. Sentencing Commission’s Federal Sentencing Guidelines in 2014.\textsuperscript{190} In April 2013, the Sentencing Commission proposed a new amendment

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\textsuperscript{186} \textit{Alleyne v. United States}, 133 S. Ct. 2151, 2163–64 (2013).


\textsuperscript{188} \textit{Id.} at 1 (“[W]e now refine our charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders.”).

\textsuperscript{189} \textit{U.S. Dep’t of Justice, supra note 185, at 1.}

referred to as “drugs-minus-two,” which would modestly reduce sentences for seventy percent of federal drug offenders.191 Designed after Amendment 706,192 the proposed amendment would reduce federal sentencing guideline section 2D1.1’s base offense level by two levels for all drug trafficking offenders.193 The Sentencing Commission estimates that this amendment, applied prospectively, would reduce sentences by an average of eleven months, or seventeen percent, for offenders affected by the change.194 This reform would reduce the federal prison population by 6,550 prisoners over the course of five years.195 The U.S. Department of Justice actively supported this amendment.196

Interestingly, the Sentencing Commission diverged from the Justice Department’s view on retroactivity in ways that demonstrate a break from the drug court paradigm. The Commission faced the internal decision whether to apply the drugs-minus-two amendment retroactively, which could apply to as many as 51,000 prisoners’ sentences.197 The Justice Department proposed limitations to retroactive application of the amendment so that it applied to only “lower level, nonviolent drug [trafficking] offenders without significant criminal histories.”198 Specifically, it proposed carve-outs for individuals with Category III or above criminal history scores, individuals with sentences increased for possession or use of a weapon, or for those offenders who obstructed justice, played an aggravating role, or used threat of violence in the commission of the offense.199 Consistent with the drug court paradigm, these reforms introduced qualification criteria that limited the reform’s benefits to primarily low-level, nonviolent drug offenders. The Sentencing Commission rejected this limitation, though, making the amendment retroactive and leading to the October 2015 release of nearly six thousand

196. Id.
199. Id. at 7–8.
prisoners. Full retroactive application of the drugs-minus-two amendment is expected to alleviate federal prison overcrowding in the coming years.

Recent reforms adopted or introduced in the federal system illustrate consistency with the drug court paradigm’s central tenets. From legislative bills to executive policies to sentencing guideline revisions, the reforms both rhetorically and substantively focus on low-level, nonviolent offenders through an effectiveness lens. Though the Commission’s eligibility requirements were much broader than other reforms introduced—a matter discussed further below—the clear thrust of federal reforms suggests that a small subset of the current prison population would be better served through different criminal justice interventions other than simply incarceration. The acceptance of this frame in the federal context mirrors the image projected in the states as well. Though beneficial to setting the stage for addressing flaws in the criminal justice system, Section III illustrates limitations within this particular frame of reform.

III. SHORTCOMINGS OF THE DRUG COURT PARADIGM

The drug court paradigm organizes the social and political response to certain offenders in the face of economic and political pressure to manage prison populations. This frame has created space for the sentencing reforms discussed above. These reforms—specifically aimed to address low-level, nonviolent offenders through cost-effective, evidence-based alternatives to incarceration—contribute to recent declines in the U.S. prison population.

And yet, this frame suffers from shortcomings. That frame prefers treatment and supervision in lieu of other solutions. Though the frame captures some reforms that are necessary and beneficial, it stands to damage the criminal justice system in the long term by obscuring other, necessary interventions to reduce incarceration. The primary concern is that the drug court paradigm occupies the criminal justice reform “field” — in the face of mass incarceration, the single approach to reducing mass incarceration captured by drug courts is being replicated.

This Section exposes three limitations to the drug court paradigm. Part A discusses how the drug court paradigm pushes reforms that exclude the types of prisoners currently maintaining large incarcerated populations. Part B demonstrates how the drug court paradigm facilitates reforms that exacerbate sentence


201. See Horwitz, supra note 200.

202. CARSON, supra note 2, at 1–2.
lengths for some offenders, a causal factor driving prison population growth. Part C explains how this paradigm obscures normative concerns about the expansion of the justice systems’ reach.

A. The Narrowed Frame

The drug court paradigm narrows the “problem” of mass incarceration to a very specific, small category of offenders. The majority of reforms implemented within this frame shorten prison stays only for low-level, nonviolent offenders either through diversionary programs, statutory amendments, or discretionary policy prioritization. The narrow frame results in reforms that either sidestep the large offender populations or it disqualifies so many people from the benefits of the reform that it negates the potential effect of the reform.

Despite the paradigm’s framing to the contrary, very few inmates in prison constitute “low-level drug offenders.” The Bureau of Justice Statistics calculates that approximately sixteen percent of state prisoners are drug offenders. Despite the paradigm’s framing to the contrary, very few inmates in prison constitute “low-level drug offenders.” The Bureau of Justice Statistics calculates that approximately sixteen percent of state prisoners are drug offenders. However, a 2004 study estimated that only six percent of state inmates and less than two percent of federal inmates qualify as “unambiguously low-level” drug offenders. According to one survey, four out of five state inmates serving time for a “nonviolent” offense meet criteria that qualify them as a “serious” offender. The “serious” offender criteria in the survey includes an offender who carried or used a weapon in the current offense, had a prior violent conviction, committed the current offense while under correctional control, or had two or more prior sentences. These offenders do not fit into the paradigmatic definition of low-level, nonviolent offenders implemented in most sentencing reforms.

Examples abound where reforms reach only a narrow sliver of the offender population. For example, California recently adopted Proposition 36 to reduce the severity of its three strikes legislation. In total, this reform is estimated to affect between a few hundred to just 2000 of the more than 42,000 inmates serving sentences under the Three Strikes Law. In the federal system, a “Smart on Crime” oriented Justice Department advocated for a restricted retroactive applica-
tion of the Sentencing Commission’s modest guideline amendment. While the amendment would apply to all offenders sentenced under section 2D1.1, the U.S. Department of Justice asked the Sentencing Commission to narrow retroactive application of the amendment to include only a small category of low-level, nonviolent drug offenders. As Sally Yates, then-U.S. Attorney for the Northern District of Georgia explained, this caveat would ensure that retroactivity would “apply only to the category of drug offender who warrants a less severe sentence and who also poses the least risk of reoffending.” Of the 51,000 offenders estimated to have sentences affected by retroactive application of the guidelines amendment, more than half would have been excluded based on the Justice Department’s proposed carve-outs.

Reforms focus almost exclusively on low-level, nonviolent drug offenders because the paradigm frames this narrow subpopulation as the driver of mass incarceration. From the federal system to the states, policymakers are zeroing their focus on drug offenders in particular. In reality, the driver of state and federal incarceration has shifted. Frank Zimring proposes that prison population growth fits into distinct phases of expansion. From 1985 to 1992, increased prosecution of drug offenders, and the subsequent increased length of stay for those offenders, increased prison populations across the country. But during the mid-1990s, the driver of incarcerated populations shifted back to the general population of offenders, not drug offenders. Marie Gottschalk notes, for example, that from 1994 to 2006, defendants convicted of violent crimes accounted for almost two thirds of

210. See supra Part II.C.
211. See supra notes 201–05 and accompanying text.
213. See Memorandum from the Office of Research and Data and Office of Gen. Counsel to U.S. Sentencing Comm’n, supra note 197, at 13–14. According to the U.S. Sentencing Commission’s impact analysis, nearly 24,000 defendants would be excluded based upon their criminal history category. See id. at 13. Nearly 15,700 defendants would be excluded due to enhancements for possession or use of a weapon. Id. Nearly 2,500 defendants would be excluded because their sentence lengths were lengthened for obstruction of justice adjustments. Id. And nearly 8,000 would be excluded based upon an aggravating role in the offense. Id.
214. Compare Obama, supra note 81 (“But here’s the thing: Over the last few decades, we’ve also locked up more and more nonviolent drug offenders than ever before, for longer . . . than ever before. And that is the real reason our prison population is so high.”), with John Pfaff, For True Penal Reform, Focus on the Violent Offenders, WASH. POST (July 26, 2015), https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/a626371a-1e5-973c-30a35567b2d9_story.html (“This claim [that nonviolent drug offenders drive mass incarceration] is simply wrong . . . . And contrary to Obama’s claim, drug inmates tend to serve relatively short sentences. It is the inmates who are convicted of violent crimes who serve the longer terms.”). 
the overall growth in state prisoners. By the 2000s, scholars recognized that drug crimes alone could not explain continued prison population growth. As Marie Gottschalk explains, because “the contribution of violent offenders to the prison population now significantly dwarfs the contribution of drug offenders,” ending the war on drugs “will not necessarily end mass incarceration.” Even if the goals of the drug court paradigm are achieved—namely that low-level, nonviolent drug offenders were treated more effectively through diversion programs—the U.S. prison population would still be far out of proportion to other countries. It would also remain out of proportion to the average prison size maintained in the United States for the majority of the 20th century.

B. The Obscured Sentence Length Problem

The drug court paradigm also obscures an underlying issue that drives prison population growth today: increased sentence length. Treatment-oriented reforms can obscure the need for sentence length reductions. Worse still, the paradigm can facilitate reforms that can exacerbate sentence length further while removing the political will to address mass incarceration generally.

Increased sentence length drives today’s prison population growth. Starting in the 1980s, the length of sentences increased for offenders across the board. Partially, this was a result of the War on Drugs and harsher drug sentences. But the increase in sentence length applied to property and violent offenders also. Between 1991 and 2003, the Supreme Court issued a series of decisions that eliminated the Eighth Amendment’s check on non-death penalty sentence disproportionality analysis. At the same time, the passage of recidivist


217. See Travis et al., supra note 8, at 54–55 (2014) (defining the period from 2000–2010 as one of negligible growth in the prison system, and attributing prison population increases to imprisonments per arrest across all crime types, particularly non-drug crimes); Clear & Frost, supra note 39, at 31–34 (while the War on Drug explains early phases of prison expansion, later growth has more to do with increased length of stay for the general offender population).

218. Gottschalk, supra note 216, at 167.


220. See Jessica M. Eaglin, Improving Economic Sanctions in the States, 99 Minn. L. Rev. 1837, 1843 (2015) (showing that “the current rate of incarceration remains far outsized in comparison to the average pre-1980s rate, and to the rates of other countries with similar political and economic structures”).

221. Pew Ctr. on the States, Time Served: The High Cost, Low Return of Longer Prison Terms 2 (2012) ("[O]ffenders released in 2009 served an average of almost three years in custody, nine months or 36 percent longer than offenders released in 1990.").


223. Pew Ctr. on the States, supra note 221, at 3.

224. See Ewing v. California, 538 U.S. 11, 30 (2003) (holding that a life sentence for shoplifting three golf clubs under California’s three strikes law was not unconstitutionally excessive); Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (holding that a life sentence for stealing four video tapes under habitual offender law was not
amending statutes and extended sentence ranges ratcheted up sentence length for a broad range of offenses. Between 1990 and 2009, the length of sentence for drug offenders increased by thirty-six percent; the length of sentence for violent offenders increased by thirty-seven percent; the length of sentence for property crimes increased by twenty-four percent. Moreover, the United States is witnessing a massive increase in prisoners serving life or de facto life sentences. Today, more than 140,000 people are serving some form of life imprisonment.

One in every nine prisoners is serving a life sentence. Since 2008, life sentences increased by almost twelve percent and Life Without Parole ("LWOP") sentences increased by twenty-two percent. In the last two decades, the use of LWOP sentences has increased by 300%. Moreover, with the abolition of discretionary parole systems in sixteen states and the federal system, a large proportion of those sentenced to life are ineligible for release. "De facto" life sentences, or sentences where inmates serve long sentences or consecutive sentences that outlast the person’s natural life expectancy, are also on the rise.

Reforms adopted within the drug court paradigm rarely focus on reducing sentence length directly. Because the paradigm frames the mass incarceration problem as an issue of more effectively addressing offenders through treatment and supervision, reforms focus on providing evidence of recidivism reductions. Reductions in incarceration are framed as cost-effective by-products of treating offenders differently. For example, JRI explicitly focuses on decreasing parole and probation revocation reforms and creating treatment-focused diversionary programs. These efforts depress the numbers of offenders reentering prison, but the reforms do little to shorten sentences for the majority of offenders who are incarcerated. This leads to short-term decreases in prison populations and long-term growth as

unconstitutionally excessive); Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (holding that sentencing a first time drug offender to mandatory life sentence for possession of 672 grams of cocaine was not unconstitutionally excessive under the Eighth Amendment).

225. These include, for example, California’s Three Strikes Law. See supra notes 143–45.
226. PEW CTR. ON THE STATES, supra note 221, at 3.
227. Id.
228. Id.
230. Id.
233. Id.
235. See supra Section II; LA VIGNE ET AL., supra note 91, at 19–21.
sentence lengths remain untouched. The Kansas JRI experience evidences this point. There, the Council of State Governments Justice Center (an earlier iteration of JRI) entered the state in 2006 to analyze criminal justice system drivers. In 2007, the state adopted JRI legislation focusing on recidivism reduction for low-level offenders. These reforms stabilized the Kansas prison population in 2008, before it grew by between eight and nine percent between 2009 and 2012. JRI reentered the state in 2012 with new recommendations focused on cost-effective responses to probation violations, graduated sanctions, and risk assessments in community supervision. Enacted in 2013, the legislative reforms will avert $56 million in prison operating costs, but they will not reduce the state’s prison population.

California’s Public Safety Realignment Plan does the same. It explicitly avoids shortening sentences for offenders already serving sentences in state prison, despite federal orders to do just that. Moreover, the reform does not require shorter sentences for the nonviolent, non-serious, non-sex offenders falling within the scope of the legislation. Lawmakers hope that Realignment’s focus on rehabilitative services will reduce the number of offenders reentering state prison and spur the use of alternatives to incarceration for more offenders. Studies on current implementation demonstrate that most offenders are being shifting from prison to county jail without the accompanying shortening terms of incarceration.

Reforms introduced at the federal level avoid reducing sentence length for most offenders while proposing new penalties that may increase sentence length for some. The Sentencing Reform and Corrections Act introduces new mandatory minimum penalties for domestic violence and terrorist related offenses, even while

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236. The JRI legislation focused on reducing parole revocation rates and increasing credits for incarcerated offenders completing rehabilitative programming. Lavigne et al., supra note 91, at 73.


238. See generally Justice Reinvestment in Kansas, supra note 237, at 5–11.

239. Lavigne et al., supra note 91, at 73 (“JRI reforms are projected to save Kansas an estimated $125 million in averted construction costs and $56 million over five years by slowing the prison growth rate from 9 percent to 4 percent between 2013 and 2018.”).

240. See supra Part II.B.

241. See id.

242. These offenders are referred to colloquially as the “non-non-nons.” See, e.g., Gottschalk, supra note 12, at 165.


244. See id. at 348, 350 (noting that most stakeholders are concerned that more individuals are serving long sentences in jail rather than prison).
reducing mandatory penalties for some drug offenses.\textsuperscript{245} The CORRECTIONS Act seeks to increase access to treatment for certain categories of offenders, but it does nothing to reduce the length of sentence.\textsuperscript{246} Even those who could qualify for additional earned credit would not receive a reduction in the amount of the annual cap on earned time credit per year.\textsuperscript{247} This means that such inmates could receive more treatment but could not reduce the length of their sentence further for earning those credits. Other bills that would reduce mandatory minimum penalties have been opposed as “misguided,”\textsuperscript{248} or they have been obscured on the grounds that more treatment is also vitally necessary to the system.\textsuperscript{249} Though Congress continues to debate the contours of a comprehensive criminal justice reform bill, reductions in mandatory minimum penalties remain controversial.\textsuperscript{250}

In addition, the drug court paradigm does more than obscure increasing sentence lengths; it actually exacerbates the problem by encouraging reforms that expand these populations. Support for easing up on drug offenders and other nonviolent offenders implicitly or explicitly means freeing resources in order to get tough on the “really bad guys.”\textsuperscript{251} As a result, the reforms adopted within the paradigm produce policies that decrease punishment for certain offenders while often increasing punishment for other categories of offenders.\textsuperscript{252} Marie Gottschalk refers to this trend in reform as “split policy verdicts.”\textsuperscript{253} Another scholar recently referred to it as a “bifurcation strategy.”\textsuperscript{254} For example, in South Carolina, legislators adopted a penal reform package in 2010 that eliminated mandatory minimum sentences for simple drug possession, expanded parole eligibility for

\begin{thebibliography}{99}
\bibitem{246} See supra note 173 and accompanying text.
\bibitem{247} Id.
\bibitem{248} See Chuck Grassley, Letter to the Editor, Sentencing Reform: 3 Senators Speak Out, N.Y. TIMES (Feb. 23, 2015), http://nyti.ms/1DJdiXx (“The reality is that reductions in federal mandatory minimum sentences are misguided. These sentences are vital in obtaining the cooperation necessary to prosecute leaders in the drug trade.”).
\bibitem{249} See John Cornyn & Sheldon Whitehouse, Letter to the Editor, Sentencing Reform: 3 Senators Speak Out, N.Y. TIMES (Feb. 23, 2015), http://www.nytimes.com/2015/02/23/opinion/sentencing-reform-3-senators-speak-out.html (“We agree that we should reform other aspects of our criminal justice system. But no one should minimize the importance of ending the cycle of recidivism, reducing prison costs and helping inmates succeed upon release.”).
\bibitem{250} See Steinhauer, supra note 1 (detailing current debate on sentencing reform and suggesting that a new comprehensive bill will likely expand safety valves but not reduce mandatory minimum penalties).
\bibitem{251} See Obama, supra note 81 (“But every dollar [DOJ] has[s] to spend keeping nonviolent drug offenders in prison is a dollar they can’t spend going after drug kingpins, or tracking down terrorists, or hiring more police and giving them the resources that would allow them to do a more effective job community policing.”).
\bibitem{252} See, e.g., COUZENS \\& BIGELOW, supra note 147, at 8, (“Since the mandatory provisions of Proposition 36) remove any of the court’s discretion to sentence concurrently, the punishment is increased for crimes sentenced under [section 1170.12(a)(7)].”); Eaglin, supra note 9, at 220; see supra notes 152–58 and accompanying text.
\bibitem{253} GOTTSCALK, supra note 12, at 167.
\end{thebibliography}
offenders convicted of certain felonies, and increased alternatives to incarceration for first-time offenders convicted of nonviolent drug trafficking offenses.\(^{255}\) The package also reclassified twenty-two new crimes as violent crimes that qualify for enhanced sentencing penalties and expanded the list of crimes that qualify for life without parole.\(^{256}\) In Indiana, proposed JRI legislation included severe new mandatory minimums.\(^{257}\) Though JRI’s legislation failed, the state’s revision to the criminal code in 2014 was accompanied by a series of increased penalties for violent and habitual offenders to increase their sentence lengths automatically.\(^{258}\) In addition, even where sentences may be reduced to community supervision rather than incarceration, the length of supervision may remain the same or even increase. For example, California’s Public Safety Realignment does not shorten sentences, it shifts the location and method of surveillance for low-level offenders.\(^{259}\) Similarly, the expansion of treatment-oriented programs as alternatives to incarceration continue to impose intrusive state-controlled surveillance on individuals.\(^{260}\) Neither of these alternatives are as initially offensive as incarceration, but they do continue state control and expose individuals to constant and intrusive contact with the state.\(^{261}\)

That these intrusions are obscured by the drug court paradigm’s emphasis on evidence-based interventions is a matter discussed in more detail in Part C below.

C. The Justice System’s Expanding Reach

The drug court paradigm encourages reforms that expand the justice system’s reach. Recent reforms adopted within the frame provide rehabilitative treatment, but they often increase surveillance as well. Increased community supervision extends state control over individuals and exposes low-level offenders to the potential for harsher punishment in the future. For example, Texas adopted reforms in 2007 that emphasized treatment in the community rather than in prison.\(^ {262}\) It also reduced the maximum probation term for drug and property felony offenses from ten to five years and mandated that judges review probation length after two and a half years.\(^ {263}\) But defendants who fail to complete court-ordered counseling

\(^ {255}\) Eaglin, supra note 9, at 220.
\(^ {256}\) Gottschalk, supra note 12, at 167.
\(^ {257}\) See Eaglin, supra note 114, at 878–79.
\(^ {258}\) See supra note 123.
\(^ {259}\) See supra notes 140–44 and accompanying text.
\(^ {260}\) See Clear & Frost, supra note 39, at 24 (suggesting that “growth in surveillance and other ostensibly community based sanctions served to fuel growth in incarceration” because it “enhanced [the] ability to detect failure and . . . increased [the] chance of incarceration as a result of those failures”).
\(^ {261}\) See Natapoff, supra note 13, at 1095–97 (explaining how drug courts and decriminalization continue social control through payment of fines, attendance at meetings and enrollment and completion of treatment programs); Klingele, supra note 12, at 574 (suggesting that evidence-based practices focused on surveillance are forms of “less-than-benign social control”).
\(^ {262}\) H.B. 1678, 80th Leg., Reg. Sess. §§ 1, 6, 7, 8 (Tex. 2007).
\(^ {263}\) Id.
or treatment are not eligible for shortened supervision terms, even if they did not commit a new offense.\textsuperscript{264} Defendants who fail to pay for their treatment are not eligible for shortened terms either.\textsuperscript{265} In those instances, the community supervision lasts for a full period equal to the minimum term of imprisonment. While the specific conditions of community supervision may vary, they range from submitting for drug testing to electronic monitoring to confinement in jail.\textsuperscript{266} Such requirements function to extend the state’s control over the individual beyond the determination of guilt. And while the punishment appears less punitive than incarceration, it remains incapacitative in nature.\textsuperscript{267} This exposes people on supervision to an increased likelihood of incarceration in the future, as they are more likely to commit technical violations of supervision conditions like failing drug test or missing a court appointment.\textsuperscript{268} Numerous states have similar requirements for community supervision.\textsuperscript{269}

Mass incarceration represents one way of addressing social ills (for example, homelessness, mental health issues, drug abuse issues, etc.). The rise in crime was real, as was the growing economic stratification, disinvestment in urban communities, and lack of employment opportunities for undereducated citizens.\textsuperscript{270} Lawmakers chose to respond to these crises with a “tough on crime” focus, and increases in policing and prisons.\textsuperscript{271} Drug court paradigm reforms do not contest this response outright, and they do not demand a reduction in the criminal justice system’s reach. These reforms do not, standing alone, respond to the underlying social causes of crime and mass incarceration; instead they introduce new opportunities to use the criminal justice system to respond to social ills.\textsuperscript{272} Rather than using incarceration, government officials may choose to pursue this avenue by collapsing public policy strategies like drug treatment into criminal justice strategies.\textsuperscript{273}

\begin{flushleft}
\textsuperscript{265} Id.
\textsuperscript{266} Id. at 79.
\textsuperscript{267} See Miller, supra note 43, at 1558; Natapoff, supra note 13, at 1087–89.
\textsuperscript{268} See generally Eaglin & Solomon, supra note 53, at 20–22.
\textsuperscript{269} See generally Robina Inst., supra note 264, at 78–80.
\textsuperscript{270} See Clear & Frost, supra note 39, at 58 (mass incarceration as a policy response to crime, and the underlying social and ecological causes of crime).
\textsuperscript{271} See id. at 47–70 (presenting mass incarceration as a “grand social experiment” used to deal with crime as a social problem).
\textsuperscript{272} Darryl K. Brown, The Perverse Effects of Efficiency in Criminal Process, 100 Va. L. Rev. 183, 220 (2014) (“[Efficiency] contributes . . . to the larger-scale norms and policy choices regarding what social problems should be addressed with criminal law, and whether criminal law or an alternative policy intervention is most appropriate to address a wide range of problems . . . .”).
\textsuperscript{273} See id. at 200 (“[A]s greater efficiency reduces the overall cost of criminal law enforcement, it makes it less costly for legislators to create new offenses, and more tempting to choose criminal enforcement over other public policy strategies to address social problems or regulatory agendas.”); Eric J. Miller, Foreword to Jane Donoghue, Transforming Criminal Justice? Problem-Solving and Court Specialisation, at xx (2014).
\end{flushleft}
The drug court paradigm’s focus on effectiveness may obscure normative questions on policy developments as well. Whether social ills should be addressed through the criminal justice system may be overlooked when evidence demonstrates that social ills can be addressed through the criminal justice system. Scholars have grappled with this dilemma for some time—should criminal justice sanctions be used to induce treatment?\textsuperscript{274} This drug court paradigm’s focus on effectiveness may compound this dilemma. Reforms adopted within the paradigm seek to answer questions about efficiency and effectiveness. How efficient can we be at providing services? How much money does it save? This focus obscures the normative question underlying the policy developments: should certain services be provided through the criminal justice system? States can reduce their incarcerated population and shift spending to other public services; or increase criminal justice capacities by reducing incarceration for some types of offenders. Trends in state incarceration rates suggests that most states have chosen the latter option—modestly alter the method of supervision for some offenders to increase criminal justice services, like policing, probation, and punitive treatment programs. Rather than reducing reliance on criminal justice to resolve social ills, states can simply change the way they use their correctional resources. Reforms adopted within the drug court paradigm’s frame tend to demonstrate this point. JRI states are now using justice reinvestment savings to fund community corrections and law enforcement agencies.\textsuperscript{275} JRI reforms encourage the creation of punitive treatment programs as an alternative to incarceration, along with other EBPPs that increase surveillance while potentially decreasing incarceration.\textsuperscript{276} California’s Public Safety Realignment similarly encourages surveillance mechanisms like GPS monitoring and drug treatment programs to manage the influx of offenders directed to local jails rather than state prisons.\textsuperscript{277} Efficiencies in these states can stabilize the justice system’s costs without meaningfully detracting its reach.\textsuperscript{278} Studies on efficiency gains in court adjudication support this dichotomy in responses as well.\textsuperscript{279} The paradigm’s focus on efficiency, then, hides a deeper tension about whether moving away from mass incarceration requires relinquish-


\textsuperscript{275} Austin et al., supra note 6, at 6.

\textsuperscript{276} See supra notes 96–100 (describing typical JRI reforms).

\textsuperscript{277} See supra note 138 (discussing reforms adopted in different California counties in response to Public Safety Realignment).

\textsuperscript{278} Public Safety Realignment reduced California’s state prison population, but it did not reduce the overall incarcerated population in the state. Georgia’s popular JRI reforms adopted in 2013 successfully led to reductions in the state’s prison population, but the state’s probation and parole population continues to rise. See supra notes 101–04 (discussing Kansas and Texas reforms).

\textsuperscript{279} See Brown, supra note 272, at 194–95.
IV. ON REIMAGINING PUNISHMENT

Drug courts were the leading innovation and intervention created in response to the pressures mass incarceration placed on criminal justice actors. This Article demonstrates how this innovation shaped and influenced current, different criminal justice “interventions.” Previous Sections expose systemic shortcomings inherent to the frame of reform that shape the current wave of criminal justice reform. More than simply the result of a political tradeoff, this paradigm frames mass incarceration in a way that is spurring a new conceptualization of who and how to punish.

Identifying the frame provides new insight into the direction of criminal justice reform. Part A argues that the current frame’s focus on evidence of recidivism reduction and cost-efficiency represents the success of drug courts in reshaping definitions of government “success” in criminal justice context. Part B explores the meaning of this shift for the politics of punishment.

A. Redefining “Success” in Reforms

The drug court paradigm captures an approach to justice reform whose origins lie in government disillusionment in its criminal justice capacities. In 2001, sociologist David Garland observed a unique bifurcation in the U.S. government’s response to high crime rates and its own inability to control crime: state agencies responded to indictments of government failure by “scaling down expectations, . . . redefining their aims, and seeking to change the criteria by which failure and success are judged” in the context of criminal justice.281 Politicians, on the other hand, began the expressive and well-documented tough on crime campaigns to increase punishment severity.282

In shifting the criteria used to define success in criminal justice, drug courts reflect an agency response to government failure. Criteria of success once turned on social goals—like crime rates and catching offenders.283 Starting in the 1980s, the government sought to be evaluated by performance indicators over which they had more control, like measures of economy and efficiency, regardless of whether these had effects on crime or convictions.284 Drug courts represent one example of the numerous “micro-interventions at the local and community level to change the behavior of individuals” in response to disillusionment with government failures

280. Natapoff, supra note 13, at 1089 (describing a “deep struggle within modern American penal culture” as tension between “the urge to move away from mass incarceration on the one hand and the system’s reluctance to relinquish criminal control over even the most minor offenders on the other”).
281. GARLAND, supra note 16, at 119.
282. Id. at 134–35.
283. Id. at 119.
284. Id. at 120.
in criminal justice.\textsuperscript{285} Drug courts evaluate themselves based upon internal, measurable goals like efficiency and effectiveness rather than broader social goals like reduced incidences of crime.\textsuperscript{286} Additionally, the government shifts responsibility for outcomes onto the defendants themselves, introducing a new personal accountability aspect to the success of treatment programs.\textsuperscript{287} This innovative reform did more than simply facilitate treatment in communities; it also advanced a broader shift in how the government chose to measure success.

Drug courts illustrate the dangerous dichotomy of the dual governmental responses described by Garland. While redefining measures of success, drug courts facilitated an increasingly punitive criminal justice system.\textsuperscript{288} Perhaps the most interesting aspect of drug courts lies not in how it changed the system; rather, it is how it markedly left criminal justice policies the same. Drug courts provided a response to increased court caseloads and prison overcrowding as a result of the War on Drugs, but the courts did not dismantle the retributive prosecutorial model that characterizes the incarcerative justice system.\textsuperscript{289} Drug arrests increased exponentially as drug courts expanded across the states.\textsuperscript{290} Drug courts simply provided an alternative response to incarceration for the commission of drug crimes, without actually decriminalizing drug use.\textsuperscript{291} These programs “provide[d] a safety valve for the cycle of incarceration-release-recidivism that filled prisons with low-level drug users” while allowing prosecutors to continue expansive charging practices.\textsuperscript{292} To the extent that drug courts shifted the focus away from the government’s inability to achieve traditional criminal justice goals, the new success measures actually advanced a criminal justice system more capable of expansion. Drug courts left untouched enforcement of increasingly punitive drug policies. In fact, drug courts may have incentivized police and prosecutors to expand the number of individuals processed within the system for drug offenses due to the well-meaning belief that the justice system would offer better treatment.\textsuperscript{293}

\begin{itemize}
  \item \textsuperscript{285} GOTTSCHALK, supra note 12, at 18.
  \item \textsuperscript{286} See supra notes 58–64.
  \item \textsuperscript{287} See Miller, supra note 42, at 425.
  \item \textsuperscript{288} See supra Section I (explaining that drug courts were created in 1989 but prison populations continued to grow for another decade).
  \item \textsuperscript{289} See Miller, supra note 42, at 421.
  \item \textsuperscript{290} Arrests of adults for drug abuse increased from 1,008,300 in 1990 (the year after drug courts were created) to 1,375,600 in 2000 (with 665 drug courts in existence) to 1,693,100 in 2006 (with 1,756 drug courts in existence). See Tina L. Dorsey & Priscilla Middleton, Bureau of Justice Statistics, Drugs and Crime Facts, http://www.bjs.gov/content/pub/pdf/dcf.pdf; Nat’l Drug Court Inst., supra note 70; see also Miller, supra note 42, at 420 n.20.
  \item \textsuperscript{291} Nolan, supra note 62, at 53 (“[T]he drug courts essentially circumvent the legalization debate. The drug courts embrace a disease view of addiction, but this does not remove from the state its role in controlling drug use.”); Dorf & Sabel, supra note 44, at 832.
  \item \textsuperscript{292} See Miller, supra note 42, at 417.
  \item \textsuperscript{293} O’Hear, supra note 54, at 483 (quoting one local drug court judge as stating that “the very presence of drug courts is causing police to make arrests in, and prosecutors to file, the kinds of ten- and twenty-dollar hand-to-hand drug cases that the system would not have bothered with before”) (internal citations omitted).
\end{itemize}
The laser focus on effectiveness and efficiency at the heart of the drug court paradigm expands upon a new “measure of success” in criminal justice. By focusing on what can be quantified, these measures resonate with internally applied governmental agency measures. Recidivism reduction and cost-effectiveness are connected to public safety indirectly, unlike some pure-outcome measures like number of arrests or cases processed (though such measures are still used, too). Still, these measures are susceptible to substantive critiques. For example, the EBPPs underlying JRI reforms also focus on outcomes over process. While these reforms are heavily criticized for their failure to actually improve communities most affected by mass incarceration policies, such critiques fall outside the paradigm’s frame and offer little salience with lawmakers or the public. Similarly, attacks about how recidivism is measured—whether it includes re-arrests, technical violations, or just convictions for new offenses—lack salience, too. This Article’s analysis demonstrates why: these reforms build from the initial government strategy to change measures of success. That change insulates the government from criticism about larger social failures.

To the extent that this frame permits reforms that come short of reducing mass incarceration, the frame’s origin in drug courts explains that too. Though drug courts helped create a political environment capable of identifying and empathizing with certain low-level, nonviolent offenders, the programs did more to change measures of success than they did to check political punitiveness. Now, even as states begin to advance policy reforms focused on evidence of effectiveness, these reforms continue to permit and obscure additional reforms that expand the criminal justice net and increase punitiveness for large swaths of offenders.

It is not business-as-usual in the justice system as states are transforming the tenets of success in administering criminal justice. Yet analysis of the drug court paradigm demonstrates that these reforms have done more to redefine how we measure “success” than they have done to actually reduce reliance on the criminal justice system to address social ills. This frame, and the reforms adopted within it, continues to shift how we measure success in criminal justice. Through it, the new wave of EBPPs are spreading across the country, changing how we punish certain offenders, but it does little to challenge notions about who should be punished and

294. See Chettiari et al., supra note 27, at 4 (discussing how state and local agencies use indicators focused on the number of arrests or the amount of drugs seized as performance measures).
295. See Austin et al., supra note 6, at 6–7 (criticizing JRI); Gottschalk, supra note 12, at 101–103 (same).
297. Garland, supra note 16, at 120.
why. Whether these reforms increase traditional notions of social justice is simply a by-product of a larger shift in managing expectations about crime control.

B. Reconsidering the Politics of Punishment

Transforming success measures proved central to launching a new, depoliticized discourse on criminal justice reform. It is well documented that being perceived as “tough on crime” created political capital for politicians, judges, and prosecutors at the end of the twentieth century. Today, there is growing political value in being “smart on crime” that originally appeared in response to budgetary constraints experienced by states during the Great Recession. Pundits from across the political spectrum now engage in “smart on crime” politics. Justice Reinvestment states like Texas are heralded for finding solutions on criminal justice reform. Association with that success has translated into national notoriety for some politicians.

The drug court paradigm demonstrates that “smart” on crime policies reach beyond budgetary concerns. The drug court paradigm resonates with so many people because it addresses an underlying disillusionment with the government’s efficacy, and quells divisive socioeconomic issues. By the 2000s, solutions to mass incarceration were politically mired in issues of race and class. As Eric Miller explains, the drug courts’ success lies partially in its ability to “disaggregate the problem of drug crime from social and governmental forces.” The drug court paradigm builds upon this strategy by taking the emphasis off race and class, replacing that discourse with an emphasis on evidence of effectiveness and

299. Stuntz, supra note 28, at 254–56 (“To the local voters who elect those officials, and hence to the officials they elect, prison sentences are nearly a free good.”).
300. Barkow, supra note 12 at 1305–06 (explaining how cost constraints create a more balanced process in sentencing policy).

304. Miller, supra note 42, at 427.
efficiency. This disaggregation is central to the “smart on crime” approach consistent with the drug court paradigm.

The shortcomings of the drug court paradigm cast doubt on whether depoliticized reforms can end mass incarceration. Endorsing and advancing policy changes that are based in data-driven evidence proving effectiveness or efficiency removes the political aspect of addressing mass incarceration. Removing the political aspects of mass incarceration proved valuable in stabilizing prison populations, an important achievement. Analysis of this frame suggests that it does little to address the hard questions that sustain mass incarceration. To the extent that the drug court paradigm rejects this discourse, it helps to sustain mass incarceration even though its reforms are directly responding to the outcomes of these issues.

Despite the depoliticizing aspect of the drug court paradigm, analyzing the origin of this frame provides insight to a growing tension between the public and governmental actors around the scope of criminal justice reforms. As explained above, the drug court paradigm is a response to the discourse on government failings in criminal justice. To governmental agencies and now, through this frame of reform, politicians, this failure revolves around the government’s limited ability to control crime in the face of rising crime rates. There is some evidence that the public perceives “government failure” more broadly than governmental actors intended. For example, California’s struggle to address its systemic prison overcrowding problems led to the adoption of both Proposition 36 and Proposition 47, two reforms that break the drug court paradigm mold in important ways. Additionally, some connect recent marijuana decriminalization reforms to the public’s perception about government failures in the face of mass incarceration.

Increasingly, “government failure” includes mass incarceration itself. Government actors changed their success measures to manage expectations about the government’s ability to ensure public safety. These efforts may have simultaneously prepared the public for messaging about the government’s inability to respond to the detrimental social effects of mass incarceration—like recidivism, unemployment and isolation. In these states, the public has appetite for more reform than the government itself can accept.

The drug court paradigm may provide insight into this tension. Politicians are not prepared to view mass incarceration as a government failure. Their perspective is more limited to the government’s ability to control crime. But the public is getting a myriad of messages, circling around costs, government failure, reduced recidivism, and dropping crime rates. The public may be mixing the more nuanced perspective of government officials with the new measures that the government is advancing itself (cost savings).

305. See supra Part II.B.
306. See Natapoff, supra note 13, at 1077.
Reforms that break the drug court paradigm provide examples. In California, Proposition 47 received broad opposition from government actors, but not from the public. 307 The public can support Proposition 47 because it responds to unnecessary incarceration and saves money. The government, meanwhile, can oppose the reform because it goes beyond prisoner diversion due to overcrowding or budgetary pressures, instead reducing correctional supervision often perceived as necessary. Less obvious and more awkward, the U.S. Sentencing Commission’s decision to reduce prison sentences under the drugs-minus-two amendment presses this tension point as well. There, the Justice Department opposed efforts to apply the drugs-minus-two amendment to the entire federal prison population, calling for a more restrictive retroactive application of the Sentencing Commission’s amendment. 308 The Sentencing Commission, bolstered by the 80,000 letters largely supporting broad application of the amendment, denied the Justice Department’s narrow approach. 309 Why? Perhaps this agency, like the public itself, is more inclined to take the governmental call for cost-savings and evidence-based practices at its word.

Not surprisingly, these reforms that break from the drug court paradigm’s frame also stand to reduce mass incarceration most quickly and completely because they affect broad swaths of offenders already incarcerated. These reforms also contract the reach of the criminal justice system. Going forward, advocates should continue to push this tension between what the public can accept and what the government wants within the drug court paradigm’s depoliticized frame to explore different reforms that would reduce the harsh social and economic effects of mass incarceration. This tension creates the space for opportunity.

CONCLUSION

Drug courts provided a valuable and necessary alternative framework to understand and combat mass incarceration. These diversionary courts spurred a rethinking of “justice” in an increasingly punitive criminal system. But beyond simply inspiring the proliferation of specialized courts, drug courts have influenced criminal justice reform by creating a paradigm to address overcapacity and underfunded prison systems generally. While there is much to celebrate in this influence, the drug court movement was never intended to serve as a template for


308. See supra Part II.C.

309. See Horwitz, supra note 200.
reducing mass incarceration, nor, as a policy matter, should we now overextend its influence.

The drug court paradigm carved out the political space for a new frame of reform that comes with a high cost. This Article exposes several of those costs. At the same time, the pervasiveness of the frame provides valuable insights to addressing mass incarceration. In defining the drug court paradigm and tracing its persistent limitations, this Article demonstrates how the shifting definition of “success” in the criminal justice system presents an opportunity to confront mass incarceration through policies focused on effectiveness and efficiency. Most reforms within the drug court paradigm do little to practically change who we punish. The most meaningful criminal justice reforms break from the paradigm on this critical front—they redefine how we treat people with limited criminal records. Continuing to push reforms in this direction provides a promising avenue to reduce not only the costs of mass incarceration, but also the deleterious effects of the phenomenon.