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Abstract

Numerous scholars have described how the 'war on drugs' has played a central role in US penal change, especially its racialized impact. Yet there remain aspects of this 'war' that are under-explored in punishment and society scholarship. This article delineates five distinct modes by which the contemporary regulation of drugs in the USA speaks to penal change, and in so doing suggests that its reach is much more diffuse, insidious, and variegated than suggested by prevailing conceptualizations of the drug war–punishment relationship.

Keywords

policing, punishment, race, sentencing, war on drugs

The 'war on drugs' has been implicated as a key driver in mass incarceration and corollary punitive developments in the United States, and rightly so. A number of scholars have documented how transformed drug laws and policies have significantly contributed to increased incarceration rates, which have disproportionately harmed poorer, non-White offenders (Alexander, 2010; Mauer, 2006; Provine, 2007, 2011; Reinerman and Levine, 1997; Tonry, 1996, 2011; Tonry and Melewski, 2008). Tonry and Melewski (2008: 29) put it bluntly: 'so many more blacks than whites are in prison [for drug offenses] because police officials have adopted practices, and policy makers have enacted laws, that foreseeably treat black offenders more harshly than white ones'.

Punishment and society theorists similarly identify the 'war on drugs' as central to understanding the contemporary US penal landscape. One line of theorizing identifies punitive drug policies as a central feature of a larger campaign to neutralize the risk posed by members of the urban minority underclass to the global neo-liberal economic project

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(Wacquant, 2009). Harsh drug laws are a *tool* for isolating, containing, and excluding (via imprisonment) the inner-city poor in the neo-liberal post-social world, rather than either a rational policy response to drug use or dealing, or a purely expressive, morally infused punitive sanction. Moreover, some suggest that neo-liberalism has increasingly pushed marginalized segments of the population into trading in the illicit drug market as a result of limited opportunities in the new global economy, thereby creating a larger pool of targeted subjects (Reynolds, 2008).

A second prevailing account situates the 'war on drugs' within the broader 'war on crime', which emerged in late modern democracies in response to the deteriorating welfare state (Garland, 2001; Simon, 2007). This strategy of governance distracts the public from seeing the state's failures in providing security and other obligations. Thus, punitive drug laws, among other law and order measures, help prop up the 'myth of a sovereign state' (Garland, 2001: 109) through the 'knowing and cynical manipulation of the symbols of state power and of the emotions of fear and insecurity which give these symbols their potency' (Garland, 1996: 459–460).

Scholarship that more explicitly deals with the racialized aspects of mass incarceration has likened the contemporary US criminal justice system to a 'racial caste system' (Alexander, 2010: 12) of social control that has replaced de facto exclusionary laws and policies (see also Wacquant, 2000). Alexander, Tonry, and others implicate contemporary drug laws as doing much of the work in that regard (Alexander, 2010; Tonry, 1996, 2011). This line of theorizing historicizes US race relations, and identifies racial subjugation as the end goal, even if it is achieved through the ostensibly non-racial means of punitive policies. Thus, the maintenance of racial hierarchies is made possible through the use of a 'color-blind' criminal justice system (Alexander, 2010; Dvorak, 2000).

Existing empirical and theoretical scholarship on the war on drugs and its punitive consequences has been very insightful on many levels. Theoretical treatments have illuminated, in particular, the front end of the war on drugs; that is, the political origins of (and capital of) the war on drugs. Another extensive body of work has focused on the other end, demonstrating its ultimate effects, particularly how its harshest features have affected people of color. Yet some important questions about the drug war–racialization–punishment nexus remain, which will be addressed in this article.

Through a narrative about criminal justice institution-building and innovation, I will trace how the 'war on drugs' has played a role in the larger process of racialized penal expansion in the USA. I will first analyse the federal 'war on drugs' to map out the better-known route by which we moved from political declaration(s) of a war on drugs to significant increases in the use of prison for drug offenders. I will then delineate other ways that the US drug war has reshaped punishment, both prior to and outside of formal legal punishment, as well as through softer and more diffused forms of punishment than the prison. Within these accounts, I will focus on the precise mechanisms at work that have resulted in the racially disproportionate effects of contemporary drug policies.

The article proceeds as follows: after justifying my focus on drug policy, I will present five key processes through which the 'war on drugs' has reshaped punishment. First I will discuss the most straightforward process: the implementation of beefed-up criminal statutes that authorize (or mandate) substantial prison sentences for drug felonies. Changes to federal sentencing are an exemplary case, so I will focus on the federal system to illustrate

the direct line of action from policy change to mass incarceration. Second, I will describe changes in state-level drug law implementation against the cascade of offenders caught up in the war on drugs, who are managed with combinations of local jail time, felony probation, actual or suspended prison sentences, fines, programs, and so on. In this case, while those convicted are not necessarily sent directly to prison, many aspects of their experience reflect important new modes of punitiveness.

Next, I will explore the implementation of 'softer' sets of drug policies and their implications for punishment, including local-level drug courts and drug diversion programs. Here again, I will argue that their alternative-to-prison status is at times just a stop-over on the road to prison, as they function in a way that can be especially harmful to defendants of color, women, and the poor. I will then examine the changes to policing that were ushered in with the war on drugs, and that have substantially increased the intrusiveness of law enforcement in multiple domains (Alexander, 2010). Close examination of policing practices is crucial since they are largely responsible for driving the population explosion of drug offenders in courts, jails, and prisons.

The fifth and final process I will discuss is the backlash against the drug war from some states and local jurisdictions, epitomized by a burgeoning decriminalization movement. This pushback reveals not only the fractured and variegated nature of the war on drugs, but also suggests some pathways out. I will conclude the article by returning to the question of theory, asking whether an expanded view of punishment better captures the scope of harms caused by the war on drugs, and whether the messy, multiply stranded approach offered here can bring something to the theoretical table.

Why the drug war?

The regulation of drugs is a useful lens through which to examine contemporary US penalty for at least three reasons. First, in virtually all law enforcement jurisdictions, its deployment is substantially and proactively shaped by institutional choices, more so than any other category of 'imprisonable' offense (Tonry and Melewski, 2008: 6). In the case of crimes involving victims (e.g. burglaries, robberies, assaults, homicides) law enforcement is generally reactive, responding once notified of the criminal incident. With drug crimes (particularly distribution offenses), police agencies utilize a range of practices—'buy-bust' operations, cultivation of 'snitches', pretext stops, various surveillance techniques, house raids and stings—to uncover offenses and make arrests.¹ Examining how drug laws are put into action therefore has the potential to reveal institutional behavior much more directly than in most other felony law enforcement.²

Second, and relatedly, because the war on drugs is especially implicated in the over-punishment of minorities in the contemporary era, an exploration of how it has been operationalized on the ground can add to our theoretical understanding of the relationship between race and punishment in the USA. The key here is to clarify how stages of criminal justice processing cumulatively and interactively affect defendants as a function of race and institutionalized forms of racism, and how these processes intersect with gender. Since the 1970s, women, especially women of color, have experienced sky-rocketing rates of drug arrests and imprisonment for drug convictions, significantly outpacing men in terms of increases (Lenox, 2011; Mauer et al., 1999). Women have also experienced additional

sanctions and collateral harms in the war on drugs that men have not faced, primarily as a result of being pregnant and/or mothers (Beckett, 1995; Fentiman, 2009; Lenox, 2011; Roberts, 1991). Thus, an examination of the varied ways that drug crime control policy has been deployed can help contextualize our understanding of contemporary (gendered) racism within criminal justice institutions.

Third, throughout the mass incarceration era, the regulation of drugs has been characterized by a set of contradictory philosophical tenets and practical approaches. State and local-level jurisdictions vary widely in how they categorize the seriousness of drug offenses (King, 2008); drug courts and alternative treatment options have proliferated at the same time that sentence severity for some drug offenses has increased; and the public has expressed increased willingness to decriminalize, or at least differently regulate, some kinds of drug offenses over the same period. Within this hodge-podge, and relatively unique to the USA, is a renewed tension between the jurisdictional power of federal versus state government, particularly with respect to the regulation of marijuana (Hussein, 2000). Consequently, struggles over federalism and drug law enforcement further reveal the complexities of contemporary US crime control and punishment. So while US drug policy plays a central role in the rise of mass incarceration, it also raises interesting questions about the contested nature of governance. From a theoretical standpoint, it challenges some of the categorical assertions that have been made about the nature of contemporary US crime control.

The policy-change-to-prison pipeline—the federal case

The iconic case of the punitive US war on drugs is the one waged by the federal government. The federal jurisdiction metes out arguably the harshest drug sentences for otherwise-similar offenses of all US jurisdictions, largely as a result of dramatic changes to sentencing statutes made by Congress in the 1980s. Most infamously, those statutes mandated especially long prison sentences for those convicted of crack cocaine crimes, the vast majority of whom have been people of color.

Although the transformation of federal drug laws in the 1980s was dramatic, it was not fully unprecedented; nor was it an isolated phenomenon. There were several preceding legislative campaigns, including those culminating in the Harrison Narcotics Act of 1914³ and the Prohibition (as ratified in the 18th Amendment of the Constitution in 1919), that set the stage for the kind of racialized, moralizing rhetoric that drove the 1980s campaign (Dvorak, 2000; Provine, 2007). Additionally, the most problematic sentencing innovation of the 1980s—mandatory minimums—was in some sense a retread of the 1951 Boggs Act that introduced the first mandatory minimums for drug offenses, which were on the books until the 1970s. Another significant factor that, somewhat ironically, created the capacity for the 1980s federal war on drugs was the 1970 Controlled Substances Act, which solidified the federal government's direct interest in drug law enforcement in several key ways (Courtwright, 2004; see also Simon, 2007).

Specifically, the 1970 Controlled Substances Act consolidated the disparate and piecemeal body of federal law concerning drugs, and it created the 'scheduling' table that assigned prohibitive weight to substances as a function of their combined medical value, harmfulness to health, and addictive properties. The law was, in many respects, 'liberal' (Courtwright, 2004: 12) because it contained provisions for treatment and other public

health approaches to drug problems. It also eliminated the mandatory minimum drug statutes, and dramatically decreased the maximum sentences allowed for possession crimes (McLaughlin, 1973). But it also set the stage for the punitive turn that evolved over the next two decades. For one, the drug scheduling scheme provided the means by which new substances could be easily incorporated into the prohibition framework. Most significantly, though, it led to the rapid expansion of dedicated drug law enforcement at the federal level. Consequently, drug crimes quickly became the single largest category of offense in federal criminal courts (US Sentencing Commission, 2004), and in fact have steadily decreased in relative proportion since the 1980s.⁴

The 1980s war on drugs emerged within a broader sentencing revolution at the federal level that was realized in two distinct ways. First, the entire federal sentencing structure was dramatically transformed when Congress established the United States Sentencing Commission (USSC) in 1984, and directed it to develop a set of sentencing guidelines that would help decrease disparities in sentence outcomes across federal jurisdictions, and ensure consistency and certainty throughout the system. The Commission drafted an intricate and rigid set of guidelines (the 'Guidelines') that was put into effect on 1 November 1987.⁵

Beginning in 1984, Congress also directly passed a set of mandatory minimum sentencing statutes that required lengthy prison sentences for a range of drug, weapons, and violence offenses. The best known of these legal changes was a provision of the Anti-Drug Abuse Act of 1986 in which Congress specified that crack cocaine be treated significantly more severely than any other drug. Under the 1986 Act, it took a trafficking offense involving 500 grams of powder cocaine to trigger a mandatory minimum sentence equal to that involving 5 grams of crack cocaine.⁶ Two years later, Congress intensified its disparate treatment of crack: a provision of the Omnibus Anti-Drug Abuse Act of 1988 specified that mere possession of crack cocaine triggered a mandatory prison sentence of five years whereas no other possession offense required a prison sentence at all (*a maximum* of one year was specified).

These transformations caused imprisonment rates at the federal level to explode. State use of imprisonment was also rapidly expanding over the same period, but the federal rate of growth outstripped the aggregated state rate of growth due to three factors: many more criminal cases overall were prosecuted in federal courts than had been in the pre-Guidelines era; many more of those prosecuted received a prison sentence; and sentences were much longer. These factors were especially pronounced for drug offenses. In 1984, prior to the implementation of the Guidelines, 80 percent of convicted drug offenders received a prison sentence in the federal system; within several years of their implementation 95 percent of them went to prison (USSC, 2004). Average sentence lengths across all offense types more than doubled upon implementation of the Guidelines, and average drug trafficking offense sentence lengths (time actually served) nearly tripled, increasing from less than 30 months to about 80 months in a seven-year period (USSC, 2004).⁷

The racial disproportionality of the defendant population in the federal system has also significantly increased. The 1995 US Sentencing Commission annual report pointed out that the proportion of White drug defendants had steadily declined since the Guidelines' implementation, while correspondingly increasing for racial minorities (USSC, 1995). Furthermore, in its study of the first 15 years of the Guidelines, the Commission indicated that although Whites and Blacks were subjected to similar average sentence lengths in

the pre-Guidelines federal system, within 10 years of the Guidelines' implementation the average length of sentence for Black defendants had quadrupled, while it had only doubled for White defendants (USSC, 2004).

The Commission suggested that the crack cocaine provisions of the Guidelines were directly responsible for the racially disparate drug sentencing in the federal system because of the high proportion of crack cases sentenced and the extreme racial disproportionality in the federal crack cocaine caseload (USSC, 2004; see also USSC, 1995, 1997, 2002). Since the crack cocaine mandatory minimums have been enacted, federal courts have sentenced thousands of people per year for crack offenses, peaking in 1998 with more than 9500 sentences imposed for crack offenses. Of those sentenced, fewer than 10 percent have been White, and between 80–90 percent each year have been Black.⁸

The federal case thus represents the quintessential 'war on drugs'. It has been exceptionally punitive, meting out prison sentences in the overwhelming majority of drug cases, and it has over-targeted minorities through its policies regarding crack cocaine, its definitions of relevant sentencing factors under the Guidelines, and by over-selecting people of color for federal prosecution. Yet, the federal system is unrepresentative of the more general US case in two important regards: first, it deals with only a small percentage of known drug offenses.⁹ Second, the federal drug offense caseloads are highly discretionary and represent, even more than those in state and local courts, matters of prosecutorial policy decision making. Because virtually every state has a body of criminal law devoted to drug offenses—from infractions to major felonies—the federal government generally has no fundamental 'crime fighting' obligation to prosecute drug offenses in its jurisdiction. Rather, the federal code functions more as an overlay to the myriad state codes. Consequently, it is often a matter of district-level US Attorneys' offices cherry-picking those cases that have overwhelming evidence, that involve certain types or amounts of illegal substances, or that otherwise pique prosecutorial interest (Heller, 1997). This quality of the federal system is made evident by the wide variance between federal districts as to the number, rate, and type of drug offenses prosecuted (Lynch and Omori, 2011).

This version of the US war on drugs most clearly illustrates both the political processes that gave rise to it, and the extreme consequences of its deployment, but it is also an incomplete picture of the relationship between the politics of drug law making, law enforcement in action, and punitive consequences. From a theoretical standpoint, over-relying on the case of federal sentencing transformations as support for larger arguments about penal change—either in the political realm or in terms of its consequences—raises several problems, beyond that of unrepresentativeness.

First, the concept of punishment is easily conflated with, and isolated to, the prison sentence. This is a byproduct of the public politics by which this system became so punitive; legislative debates and negotiations over sentencing reform explicitly targeted how prison sentences would be increased for drug offenders. The Guidelines and mandatory minimums also deal in a currency of prison sentences—by months—and nearly all convicted drug offenders in the federal system serve substantial prison sentences as their punishment. Although the imprisonment explosion, at both the federal and state levels, is central to understanding contemporary punishment, it is not the only metric of punitive change of consequence. Inherent in this is the question of whether aspects of the drug war outside of formal sanctioning are punitive. The focus on the politics, then consequences of federal sentencing reform unduly constricts that view.

Second, the formalized, systematic, top-down nature of the federal system's transformation is not necessarily the modal process by which 'drug wars' have reshaped the penal field. Criminal justice policy and practice have changed more haphazardly at the state and local levels, in part due to the wide variations between state-level jurisdictions (and even intra-jurisdictional variations) (Lynch, 2011a). Few jurisdictions underwent the same degree of sentencing statute revamping, and even those that came close have often been more loosely implemented in practice. Moreover, some state and local entities have adopted seemingly contradictory policies regarding drug offenses that raise a number of interesting questions about the conditions under which hard or soft (or even no) interventions are deemed appropriate.

Third, as I detail later in this article, the federal government is at least as implicated, if not more so, in the proliferation of the drug war due to its influence in drug law policing and other pre-sentencing innovations, relative to its sentencing laws. Federal funding, in particular, helped define drugs as a crime problem that local law enforcement should prioritize; police agencies across the country have thus complied so as to obtain directed grants, training, equipment, and other tangible resources. Federal law enforcement has also developed a number of powerful investigative tools that have been imported into state and local systems. Consequently, the federal government is much more enmeshed in the war on drug's diverse forms than merely as a sentencing extremist.

Assembly-line justice and its many add-ons

The bulk of drug law enforcement, including policing, prosecution, and the formal sanctioning processes, happens in thousands of state and local jurisdictions. Typically, cases are charged as lower-level felonies or misdemeanors, involve more equivocal evidence, and defendants in such cases rarely assert their full range of rights due to the production-line quality of case processing (see Bach, 2010 and Natapoff, 2012 on this more generally).

As in the federal system, states have also, on the whole, increased the likelihood and lengths of prison sentences for those convicted of drug offenses since 1980 so a notable portion of incarceration growth at the state level is due to more punitive drug sentencing laws and policies (King and Mauer, 2002). But while states have engaged in the direct drug policy-to-prison pipeline, it has been with somewhat less force and frequency than in the federal system. The most recent survey of sentencing in state courts indicates that 38 percent of those convicted of drug felonies were sentenced to prison; the remainder were sentenced to one or more lesser sanctions, including local jail time of less than one year, probation, fines, community service, and drug treatment. Of those sentenced to prison, the mean imposed sentence length was 44 months (time served in most states is 15–50 percent shorter) (Rosenmerkel et al., 2009). Like the district-level variation in the federal system, states' use of imprisonment for drug offenders varies dramatically, even by county-level jurisdiction within states (Fleury-Steiner and Smith, 2011; Lynch, 2011a).

The consequences of the war on drugs for defendants at the state level are much more pervasive than the above statistics suggest, however. Local courts are flooded with an ongoing stream of misdemeanor and felony drug defendants, which has exacerbated the kind of assembly-line justice that already typifies the processing of mundane criminal offenses. Defendants charged with drug offenses face enormous pressure to plead out to

the 'going rate' (Nardulli et al., 1988) for the charged offense before they even have the opportunity to consult meaningfully with legal counsel, and guilt is generally presumed for those arrested (Alexander, 2010; Natapoff, 2012). Drug courts emerged partly as a response to the crush of the war on drugs—courts simply could not manage the volume of cases and an efficient alternative that allowed for expedited processing was needed (Lurigio, 2008).

Even with drug courts and other alternatives, criminal courts continue to process a huge volume of drug offenses and mete out punishments that have both directly and indirectly contributed to mass incarceration. As noted above, fewer than four out of 10 state drug felony defendants are sentenced directly to prison. The remaining felony defendants who are not diverted to drug court are sentenced to relatively standardized sets of penalties that include felony probation (which usually mandates regular drug testing and a number of other requirements) and typically some jail time, as well as a host of fines and fees, including probation fees. Sometimes, a 'suspended' prison term is also tacked on, which can be imposed if the defendant does not complete the requirements of the sentence.

Many jurisdictions tax drug offenders especially severely with financial punishments. For example, Harris et al. (2011) found that drug offenders in the state of Washington received the largest monetary sanctions of all felony defendants, and Latinos convicted of drug offenses received the largest of those. Arizona's penal code specifically mandates fines for those convicted of drug offenses that amount to 'not less than one thousand dollars or three times the value as determined by the court of the dangerous drugs involved in or giving rise to the charge, whichever is greater' (Arizona Criminal Code, 2011: section 13–3407). These fines are in addition to probation costs, court fees, and other charges imposed in criminal matters in the state. While offenders cannot be incarcerated for *inability* to pay imposed fines and fees, they can be for 'willful' nonpayment if deemed able to afford it (Beckett and Harris, 2011). The standards for financial ability are so low that most with any income at all are deemed able to pay (Beckett and Harris, 2011).¹⁰ Consequently, a 'nontrivial portion of probation and parole violations' that result in incarceration are for willful nonpayment of criminal fees and fines (Beckett and Harris, 2011: 524).

The amalgam of non-prison sanctions imposed on drug defendants in state courts has therefore served as a more circuitous conduit to prison. In 1991, 23 percent of the drug offenders in prison were there for a probation violation (rather than new conviction), and they served an average of one and a half years for that violation (Cohen, 1995). This outcome is not surprising, given the push and pull of requirements imposed, especially to the extent that compliance on some conditions can actually be counterproductive to success, such as burdensome financial obligations that impede the ability to pay household bills (Beckett and Harris, 2011) and some reporting and participation requirements that interfere with work and family obligations (Warren, 2009). These kinds of requirements are particularly burdensome for women, who are more likely than men to be primary caregivers.

Drug offenders are also subject to ostensibly non-criminal sanctions that should indeed be conceptualized as punishment (Beckett and Murakawa, this issue). Convicted drug offenders in several states are subject to registration requirements of the sort that proliferated for sex offenders in the 1990s. California's drug offender registration law dates back to 1972: it requires offenders to register with their local police until five years after they have been officially discharged from prison, parole, or probation (see CA Penal Code, 2011: H&S 11590). Failure to register is a crime in itself, and can land offenders in custody

even if they were not originally sentenced to jail or prison. More recently, several states have followed in the footsteps of Tennessee, which in 2005 established a methamphetamine offender registry that is available to the public (Shafer, 2006). Those convicted of drug offenses are also specifically excluded from a range of public benefits and services, including housing assistance, financial aid for education, food stamps, and other social welfare (Travis, 2004). These kinds of laws have primarily been promulgated at the federal level, but with the off-loading of social welfare functions to states, the main enforcers of them are state agencies, and many jurisdictions have additional bans on state-level benefits (Rubinstein and Mukama, 2003). Mothers and their minor children have especially experienced the burden of these collateral sanctions (Lenox, 2011).

Finally, the emergence of drug testing technology has been an important tool of state criminal justice agents in the war on drugs, increasingly enmeshing those accused of drug offenses within the system. It extends the reach of the state into women's healthcare and parental rights during pregnancy. Healthcare providers increasingly use drug tests on pregnant women, and are incentivized by federal funding rules to turn those who are drug dependent over to state authorities (Flavin and Paltrow, 2010). This has had especially punitive implications for pregnant women who are poor and of color, as they rely on public healthcare systems that are particularly pressured to report drug use. In some jurisdictions, pregnant, drug-using women face being placed in 'protective custody' and having medical treatment imposed on them to ensure the health of their fetuses (Cherry, 2007: 162). Many of these policies and practices emerged as a consequence of the frenzy around crack cocaine, and particularly the cultural trope about 'crack babies' born to addicted women of color. As a result, local prosecutors in a number of states began to prosecute and jail drug-using pregnant women for child abuse and neglect of their fetuses (Beckett, 1995; Cherry, 2007; Fentiman, 2009).

Drug testing has also emerged as a pretrial prediction and monitoring tool to decide who can be released and stay out of custody prior to adjudication. As such, 'failure' to remain law abiding can be detected and used punitively against defendants before their original case is even adjudicated (see Hannah-Moffat and Maurutto, this issue, for this phenomenon in the Canadian context). Post-conviction, drug testing came to partially supplant traditional surveillance techniques in parole (Simon, 1993), and drug test failures have emerged as primary fodder for revocations. The rise of drug testing is also heavily implicated in the increasing rates of probation violations and other 'failures' of community sanctions (Wodahl et al., 2011), often resulting in stints of imprisonment. Moreover, the drug test has become the premiere, purportedly objective, measure for evaluating 'success' of criminal justice interventions for drug-involved constituencies. It is now fundamental to local-level penal management, imbued with scientific status, and central to the correctional agent-offender relationship. This surveillance commodity also serves as a class and race-based sorting mechanism, in that private drug testing kits are marketed to (and used by) middle class parents as a way to privately, out of the State's gaze, manage their children's drug consumption (Moore and Haggerty, 2001). Thus, the drug test can be conceptualized as simultaneously deepening the reach of the State for some, while eliding state intervention for others.

Taken together, prototypical state-level sentencing and punishment practices are theoretically important in two regards. First, they suggest that there are both direct and indirect

paths by which drug sentencing laws and policies have contributed to mass incarceration. Only a minority of state-level convicted felony drug defendants (and no convicted misdemeanants) are sentenced directly to prison for their offenses. Nonetheless, those who avoid state prison at sentencing may come to experience it upon 'failures' or 'violations' at the local level, and at this point without many of the due process protections in place prior to the original sentencing (Beckett and Murakawa, this issue). This raises questions about where the power to punish resides (in this case, it is especially imbued in pretrial, probation, and parole officers); about the extent to which informal changes to penal practices (rather than formal law-change) are a driving force in mass incarceration; and about the quality of justice that underlies our prison build-up.

Second, they highlight how a number of punishment practices, apart from prisons, are under-theorized in the punishment and society literature. In particular, the ubiquitous place of local jails in punishing drug and other defendants has been largely ignored in the literature. Nonetheless, jails are significant sites of punishment for low-level offenders of all sorts, including a large proportion of drug offenders. Jails can be even more chaotic and resource-deprived than prisons, and often function in multiple, competing ways. In smaller jurisdictions, the county jail will house defendants awaiting trial, usually on serious felony charges, in the same facilities as the low-level post-sentence convicts. Even in counties with dedicated post-sentence facilities, county budgets preclude investments in programs and other rehabilitative resources, particularly since jails are viewed as short-term facilities.¹¹ Indeed, they have been at the forefront of fee-based custodial practices (i.e. charging for room and board, medical care, participation in work-release, etc.) that have seeped into prison operations (Krauth and Stayton, 2005; Lynch, 2009). Probation is also under-theorized despite its central place in the management of drug offenders; and fines, fees, and other monetary impositions on convicted defendants are just beginning to get significant attention (Beckett and Harris, 2011; Beckett and Murakawa, this issue; Harris et al., 2011; see also O'Malley, 2009 more generally on fines). The blurring of lines between non-criminal sanctions and criminal ones, as well as between pre-trial and post-conviction interventions is especially ripe in state-level drug crime regulation. As such, we need an expanded description of the contours of punishment and penal change that extends beyond the paradigmatic 'mass incarceration'.

'Hug a thug' programs¹²

Criminal justice innovations such as drug courts and diversion treatment programs have also, ironically, played a role in the US punitive turn. Although such alternatives to incarceration are ostensibly less punitive than more traditional sanctions, they represent a case of net-widening and ensnarement that has indirectly expanded the reach of state punishment. Drug courts are the preeminent alternative sanction for drug offending in the USA. The first one was established in Miami in 1989, and others rapidly followed in all 50 states over the next two decades (Gross, 2010). The prototypical drug court has both efficiency and therapeutic goals. They are typically used for low-level offenders with minimal prior criminal records, and require those accepted to plead guilty, then participate in a series of activities, including treatment, frequent drug testing, regular court appearances, and various sorts of counseling. Despite their success for those who are able to participate and

graduate, drug courts have had three interconnected effects on penal expansion and even mass incarceration.

First, research indicates that the presence of a drug court increases the number of drug offenders arrested in a given jurisdiction (Gross, 2010). Police are more likely to arrest in low-level cases where they otherwise would not have bothered, on the assumption that drug courts will provide positive intervention (Gross, 2010). The same 'high crime' areas that already garner disproportionate police surveillance are over-targeted for such arrests, contributing to the racial disproportionality in criminal justice intervention. Such targeting may become even more deliberate, as some urban jurisdictions define, as a matter of policy, the troubled areas in which to launch particularly intensive intervention efforts.

Such is the case in San Francisco, which has the second-highest rate of racial disproportionality in drug arrests in the nation (Lynch et al., 2011). The city piloted a seemingly progressive, but ultimately controversial 'community justice court' diversion program in a section of the city characterized by a 'disproportionate percentage of residents who were unemployed, living in single-room-occupancy hotels, or homeless ... [and] home to a large number of people under supervision by community corrections agencies, whether probation or parole' (Center for Court Innovation, 2008: 4). The area, known as the Tenderloin, has a high concentration of racial and ethnic minorities, and has traditionally been a target of intense drug law policing. Because this court offered a dedicated option for those arrested in the designated area, it has placed the Tenderloin even further under the law enforcement microscope. Police have reinitiated intensive undercover 'buy-bust' drug operations in the area; arrest practices differ from the rest of the city in that rates of formal arrests and bookings for drug crimes in the Tenderloin have skyrocketed; and law enforcement has become increasingly aggressive in its strategies. Most recently, police were discovered to have systematically entered into the hotel rooms of Tenderloin residents in a number of SRO hotels, without warrants or just cause, to conduct 'narcotics investigations' (Walter, 2011).

Drug courts and other diversion alternatives also serve as a sorting mechanism for drug offense defendants brought into the system, due to their relatively stringent eligibility criteria. Structural inequalities that exist above and beyond the courts ensure that this sorting process pushes relatively more indigent defendants and those of color to the non-drug court tract, while White and more affluent defendants qualify for drug court (Gross, 2010). Once accepted to drug court, poor participants who are disproportionately of color are less able to succeed, given the need for a relatively expansive set of practical resources—including transportation, money, time, and social support resources to complete all of the requirements. Research from drug courts around the nation indicates that Whites have significantly higher success rates than non-Whites (Dannerbeck et al., 2006; see also Mackinem and Higgins, 2010 on how staff help 'produce' failure in drug courts). Women are often especially burdened by the demands of drug court. The majority of drug courts mandate interventions that are one-size-fits-all, but women are less likely than men to have the social and structural supports needed to succeed. Mothers, in particular, are impeded by inadequate childcare resources and other competing parenting demands and the majority of treatment programs do not serve pregnant women (Prendergast et al., 1995, 2011).

For those who do not graduate successfully from drug court, the consequences can be worse than if they had not participated at all. Evaluation research of New York's drug courts indicates that those who 'fail' drug court are much more likely to be incarcerated

and for much longer periods than either those who successfully complete drug court, or those who met eligibility criteria but did not participate (Rempel et al., 2003). Law professor and former criminal defense attorney Josh Bowers (2008: 786) has thus argued that,

drug courts are 'contraindicated' for genuine addicts and for other disadvantaged groups that have traditionally filled prisons as part of the war on drugs. The consequent adverse effects may be atypically long prison sentences for the very defendants that drug courts were supposed to keep out of prison and off of drugs ... Accordingly, drug courts may regressively tax communities already strained by the incarceration boom, and thereby exacerbate preexisting racial and socioeconomic criminal-justice 'tilts'.

As Hannah-Moffat and Maurutto (this issue) argue, the on-the-ground operation of specialized courts, like drug courts, challenge those theoretical accounts of 'neo-liberal' or 'late modern' punishment that attempt to dichotomize and contrast punishment/welfare (e.g. Garland, 1996; Wacquant, 2009) by demonstrating how practices of welfare, treatment, and punishment have been reassembled. Moreover, Hannah-Moffat and Maurutto (this issue) demonstrate that specialized courts should not be seen as eroding or mitigating punishment, and indeed may broaden the field of penal agents and techniques through their novel 'assemblages of punishment'. Such is the case with US drug courts. While the language, tools, and techniques differ from traditional criminal courts, they reinforce and reaffirm structural inequalities, reproduce (and sometimes exacerbate) patterns of race, class, and gender-based disparate treatment by the State, and ultimately play a role in mass incarceration through their broad reach coupled with the production of failed drug court subjects.

Expansive and intrusive policing

The intensification and expansion of drug law enforcement resources is perhaps the most important aspect of the racialized nature of the war on drugs; yet it is often partitioned off from punishment scholarship. As noted at the start of this article, law enforcement agency policies, organizational priorities, and on-the-ground practices play a huge role in who becomes subject to arrest, prosecution and punishment. Those policy choices have resulted in an explosion of drug arrests in the nation. In 1982, police made approximately 676,000 drug arrests, of which 75 percent were for drug possession; by 2007, police had made about 1,840,000 arrests, of which nearly 80 percent were for possession (Bureau of Justice Statistics, 2012). Suspected drug offenses now comprise the single largest category of arrests in the nation (Snyder, 2011).

Indeed, drug offenses are the only category of crime in which arrest rates have exponentially increased since 1980; the arrest rates for all property crime, weapons crime, and violent crime except assault (which grew only slightly) have substantially fallen (Snyder, 2011). Disparities between rates of drug arrests between Blacks and Whites have also grown with the explosion in arrest numbers; Blacks have been especially targeted for arrests in both possession and trafficking during the drug war expansion (Snyder, 2011). In contrast, racial disparities for all other categories of serious crime have decreased over time (Snyder, 2011). Moreover, despite the relative increase in possession arrests rather than the more serious trafficking offenses, policing practices have become increasingly aggressive and intrusive over the same period.

Expanded drug law policing was partly a consequence of structural changes to specialized drug law enforcement at the federal level, which began in the 1960s during then President Johnson's administration. In 1968, federal drug law enforcement was consolidated in the Bureau of Narcotics and Dangerous Drugs (BNDD), which was particularly concerned with heroin use and trade. The reach of the BNDD was both local and global: it introduced the first multi-jurisdictional (federal, state, and local) drug enforcement task forces that were established in major urban areas in the USA, the first in New York City (US Department of Justice, 2008a). Such task forces have played a key role in state-level drug sentencing increases (Fleury-Steiner and Smith, 2011). The BNDD also expanded US involvement in policing international sources of US drug trade, setting up 26 new foreign offices in nations around the globe (US Department of Justice, 2008a).

Five years later, in 1973, then-President Nixon declared 'an all-out global war on the drug menace' (US Department of Justice, 2008a: 13) and received congressional approval to establish the Drug Enforcement Administration (DEA), which replaced the BNDD. DEA agents were trained by the FBI to use tactics developed to fight organized crime, and the agency developed an expansive 'intelligence division' that included former CIA personnel who brought with them new techniques to fight the war on drugs. The DEA also expanded its enforcement efforts in crimes involving drugs other than heroin, including cocaine, PCP, and marijuana.

These federal developments changed law enforcement in key ways that have reshaped local police and prosecutorial practices. First, they helped define 'dangerousness' both through the scheduling system, which is managed by the DEA, and through the accretion of expert status for law enforcement on the problem of drugs. The scheduling system, with its scientific veneer,¹³ was widely adopted by states, and sanctions were then linked to the federal ranking of the 'danger' of various substances (Quinn and McLaughlin, 1972). More fundamentally, with the establishment of the DEA, law enforcement as the national drug policy became hegemonic, and federal resources to address end-users' addiction problems, which had been one of the driving forces in the more fractured and diversified national drug policy throughout the 20th century, were diminished over time (Musto and Korsmeyer, 2002). Furthermore, specialized drug law enforcement officials began to supplant medically trained officials as experts on the nature of the US drug problem and best approach to the problem (Musto and Korsmeyer, 2002).

Several loose strands of drug policing practices became institutionalized by the DEA and were then formally and informally dispersed to state and local law enforcement. The notion of drug enforcement as a specialized field emerged; techniques used in other, highly intrusive areas of governance (such as intelligence techniques and organized crime fighting strategies) were fully adopted in the drug regulation arena and the privileging of penal responses to drug trafficking was solidified. The passage of the federal sentencing guidelines and mandatory minimums in the 1980s also made informing on others one of the only ways for defendants to mitigate very long sentences, so a culture of 'snitching' in drug law enforcement rapidly developed and spread beyond the federal system (Natapoff, 2009).¹⁴

These transformations subsequently played out in locales throughout the USA. For instance, in 1974, the DEA invented the concept of the 'drug courier profile', which was initially used at airports to stop those fitting the profile, even in the absence of specific suspicious behavior (Greene and Wice, 1982). This conceptualization led to more pervasive forms of racialized profiling that have since been deployed on the highways and roadways,

on public transportation, and in public spaces everywhere. Those who fit law enforcement-defined drug offense 'profiles' have become subject to invasive personal searches and aggressive police intervention, and the Supreme Court has consistently allowed this by approving even the flimsiest versions of 'reasonable suspicion' (Alexander, 2010). Consequently, as Capers (2009: 66) argued, one effect of such policing is that it maintains racial segregation, as police may use the 'racial incongruity' of a racial minority in a predominantly White area (and vice versa) as one element of 'reasonable suspicion' that criminal activity is taking place, thereby justifying stops, questioning, frisks, and searches.

Thus, law enforcement agents at all levels of government, including housing, school, and transit police, regularly stop, frisk, and search citizens (and their belongings), most of whom have done nothing wrong, all in the name of the war on drugs (Alexander, 2010). For example, an analysis of the *New York Police Department (NYPD) Stop, Question, and Frisk Database, 2006* revealed that New York city police made nearly 60,000 stops of individuals for suspected drug activity in 2006, of which only 3770 (6 percent) resulted in an arrest. Of those stopped, only 11 percent were White; 72 percent were Black.

Different versions of aggressive and racially biased policing of 'suspected' drug activity have been documented in other cities, including Seattle (Beckett, 2008; Beckett et al., 2005, 2006), Cleveland (Lynch, 2011b), New York (Geller and Fagan, 2010; Harcourt and Ludwig, 2007), and San Francisco (Lynch et al., 2011). In all of these cases, deliberate policy decisions are made to target certain geographic areas within the city and/or to target certain kinds of illegal substances (such as crack cocaine in Seattle and Cleveland), which ensures over-representation of minorities among those stopped, frisked, and arrested. The practice of shooting 'fish in a barrel' (Connolly, 2006: 11) in designated 'high crime' areas to round up low-level drug arrestees does not extend to college dorms or other such locales where drug use, and drug dealing, is often prevalent, but where those who occupy the spaces are generally not racially and economically marginalized (Mohamed and Fritzvold, 2010). Moreover, evidence suggests that these policing tactics against low-level suspects in predominantly minority neighborhoods impede serious crime control rather than enhance it (Harcourt and Ludwig, 2007).

Following the wide political acceptance of drugs as a legitimate threat to the American way of life, extreme tactics were borrowed from other security fields to aid in the fight against them. The use of aggressive para-military SWAT teams in drug law enforcement is now commonplace; and drug crime-fighting is their most frequent assignment (Balko, 2006). First introduced in California in the 1960s, their original use was limited to volatile situations involving the threat of violence, such as hostage situations and hijackings. But federal funding streams that provided local jurisdictions with resources to develop para-military operations in their drug-fighting arsenal transformed SWAT from an extraordinary policing resource to a central one in drug law enforcement (Balko, 2006). Consequently, SWAT team invasions of homes, schools, and local businesses suspected of housing drug activity began to be regular features of urban and even small-town life, especially in poorer, minority communities (Alexander, 2010).

Another import to the drug war law enforcement arsenal is the government tactic of asset forfeiture, which was originally conceived of as a tool for fighting organized crime. The Organized Crime Control Act of 1970, which allowed the federal government to seize and retain all assets obtained directly or indirectly from, and/or used to further continuing

criminal enterprises, always included drug trafficking crimes, but the law was mainly deployed only in organized crime cases into the 1980s. In 1981, a Government Accounting Office (GAO) report characterized asset forfeiture as 'a seldom used tool in combatting drug trafficking' (General Accounting Office, 1981: 1). Three years later, however, Congress expanded its applicability to allow criminal asset forfeiture in all drug felony cases (Smith, 1988). Nonetheless, because the forfeiture was deemed 'criminal', the higher standard of proof meant that this 'tool' was still used sparingly.

In 1988, Congress authorized the use of *civil* asset forfeiture in *criminal* drug cases (Durkin, 1990), a clear end-run around the protections afforded those in criminal proceedings (Beckett and Herbert, 2008; Beckett and Murakawa, this issue). Under the civil standard of proof, the Government merely needs to show that there is 'reasonable ground to believe' that a connection exists between the property and the criminal activity (Durkin, 1990: 689), and then the burden of proof shifts to the property owner.¹⁵ At the same time, Congress also established the Asset Forfeiture Fund, which allowed local law enforcement agencies to benefit from the forfeiture gravy train: the federal government would kick back a percentage of any seized assets obtained in joint endeavors to the local agency involved. Consequently, between 1979 and 1990, the value of property seized in drug cases increased from less than \$10 million to more than \$460 million (Miller and Selva, 1994). In 2000, over the objections of the Clinton administration, Congress instituted several minor reforms to make it slightly more difficult for the Government to seize property. Nonetheless, the Asset Forfeiture Fund now takes in over \$1 billion annually, of which a significant portion comes from drug cases (US Department of Justice, 2011). While some states have also codified asset forfeiture schemes, in many instances local law enforcement opts to cooperate with the federal program because those profits go directly to the agency, often circumventing state law regarding forfeiture procedure, profit allocation, or both (Benson et al., 1995).

The myriad innovations in policing in the drug war effort have had several effects that are key to understanding the relationship between drug regulation, racialization, and penal change. First, the shift in law enforcement priorities to drug arrests and away from more serious crime has changed the face of punishable subjects. The pool of criminal defendants and convicts that populate the US criminal justice system is significantly larger overall, poorer, less white, and more likely to be facing drug charges.

Second, this 'war' has allowed law enforcement to maintain and even expand its institutionalized place in American social life, despite dramatic decreases in crime in the USA. Because of the highly discretionary nature of drug law enforcement, the sustained prioritization of drug crime has allowed police agencies to expand their force size and budgets. While non-drug arrests fell dramatically from 1992–2008, the nation's pool of sworn police officers grew by 26 percent, and costs for local policing (excluding federal) doubled from \$131 per US resident annually to \$260 per resident in the 14 years from 1993 to 2008.

Finally, many of the law enforcement practices that have emerged from the war on drugs may be de facto punishment, and so challenge our concept of 'punishment'. Asset forfeiture provides the clearest example of this. While cynically labeled a civil process, it functions as a monetary sanction that can be devastating in its reach, confiscating homes, cars, cash, and other assets purported to be the products of even unproven drug offenses. More pervasively, the intrusive policing that constitutes proactive drug law enforcement

knowingly generates a number of psychological, physical, and economic harms for those subject to it even if no arrest comes of the contact.

Drug war contradictions

Overlaying all of the forces that have made the drug war central to punitive expansion and innovation has been a notable and sustained pushback by the electorate, and even some elected officials, particularly in western states. Part of the pushback has led to the expansion of the softer sorts of programs epitomized by the various drug court regimes, while others have, at least indirectly, taken drug offenses off the table in the criminal justice system. Voters in Arizona (1996) and California (2000), for instance, passed initiatives that prevent courts from sending first and second time drug possession defendants to jail or prison if the defendants opt for treatment.

These laws, which have since been emulated by dozens more states (Gardiner, 2011), are distinguished from drug courts and other diversion programs because they remove much power from judges to mete out incarceration for noncompliant eligible offenders (although see Burns and Peyrot, 2008 for how this is subverted by judges). California's initiative, Proposition 36, was opposed by many in the criminal justice system, including law enforcement, prosecutors, and judges, because it eroded the system's power to punish (Gardiner, 2011). This development provides an interesting counter-case to the drug court phenomenon, which has simply reshaped the power to punish.

Perhaps the most intriguing development, though, has been the trend of legalizing medical marijuana in states across the USA. It began in the West: California passed a voter initiative in 1996 that legalized medical use, possession, and cultivation with a doctor's approval. The states of Oregon and Washington followed two years later, again with medical marijuana laws that were enacted through direct democracy voter initiatives. Currently, 17 states and the District of Columbia have versions of medical marijuana laws; 10 of those laws were passed directly by voters in initiative or referenda elections.

These laws have since spawned two theoretically fascinating but distinct phenomena. First, as noted above, they catalyzed a renewed and transformed fight over federalism (Everett, 2004; Sullivan, 2006) that has flipped 'state's rights' on its head in terms of political advocacy, and generated some strange bedfellows in the legal and political realms in the process. It has challenged courts to consider whether the federal government has the right to supersede state law and prosecute users and growers who comply with their state medical marijuana laws, but under federal drug prohibition laws are considered to be engaged in criminal acts.

The second interesting by-product has been the economy of medical marijuana. California, with the longest-standing and farthest-reaching medical marijuana law, has spawned a huge 'nonprofit' industry around medical marijuana, involving billions of dollars. Dispensaries alone are estimated to produce sales of over \$1 billion a year in California (canorml.org); corollary businesses, including growing equipment manufacturers and distributors, paraphernalia retailers, medical cannabis clinics, and marijuana 'universities' that train those who want to enter the industry, generate millions more (Gieringer and Lee, 2006; Patton, 2011). The State has benefitted from income, sales, and payroll tax revenue, and municipalities throughout the State have realized that they too can benefit fiscally by imposing various

regulatory taxes and fees on dispensary sales (Patton, 2011). In light of the state and local budget problems, marijuana is increasingly cast by members of the public and some elected officials as a financial solution to public financial woes. This was aptly captured in the title of a recent closely watched, but ultimately unsuccessful ballot initiative, the *Regulate, Control and Tax Cannabis Act of 2010*.¹⁶

These kinds of developments clearly complicate the top-down conceptualizations of the politics of drug regulation. They also demonstrate a relatively large fissure in the political structure that may provide one avenue out of punitive criminalization of drug use and even manufacturing (Lynch, 2011a). As such, lessons from this incipient drug war backlash might be fruitfully mined for use in efforts to combat inequality and injustice in other arenas, both within and outside of the criminal justice system.

So what, theoretically speaking?

Some might accuse me of missing the ‘big picture’ of how the war on drugs played a role in US penal change by focusing so much on the grounded, disparate, and diverse examples of its many forms. My response would be that the multiple strands and processes of this war ultimately constitute a different enough ‘big picture’ that they warrant a closer look. Implicit in the ‘war on drug’ narrative described above is that changes to sentencing statutes (i.e. the State’s formal punishment capacity) only explain a fraction of how the war on drugs contributed to mass incarceration and other penal transformations in the USA.

To begin with, the innovations in policing that were catalyzed by the drug war have been especially consequential despite their silo-ing in criminological literature. Highly discretionary, aggressive drug law policing is at least as responsible for the dramatic increases in punishment of convicted drug offenders as the changes to sentencing statutes. The institutionalized expansion of policing tools and incentives, coupled with the relative freedom afforded police by courts with regard to how they carry out stops, searches, seizures, and arrests against suspected drug offenders has made for a highly productive front-end of the system. In more cases than not—given the nature of drug offenses—most drug arrests would not be made without stepped-up, proactive policing. In addition, drug law policing often entails punitive elements in and of themselves, including shame and humiliation of those subject to intervention and arrest; the risk of physical harm through the use of force; infringements on privacy and autonomy in heavily policed communities; financial burdens due to confiscation of property; and work and family disruptions caused by arrests and detention. Once enmeshed in the system, the chances of ending up in prison dramatically increase, and it becomes nearly impossible for arrestees, defendants, and convicts to extricate themselves from the system (see Alexander, 2010).

Indeed, analyses that look closely at the politics, policy making, and practices of the war on drugs can enrich broader theoretical accounts of contemporary punishment. Proponents of neo-liberal (and political economy) theories would benefit from attending more closely to the economic minutia of the war on drugs. Particularly relevant is the massive federal investment in local drug law enforcement through targeted funding, as well as the re-imagining of the Asset Forfeiture Program and Fund, which maintains ‘Equitable Sharing’ agreements with partner agencies to incentivize arrests and property seizures (US Department of Justice, 2008b). Conversely, the financial benefits for state

and local jurisdictions that are now being generated via some drug legalization schemes may be a fruitful line of inquiry about the many forms that neo-liberalism may take with regard to drug regulation.¹⁷

Theories that characterize the war on drugs as a new form of punitive governance can be improved by focusing on how the different forms of political action give rise to contradictory policies. In this regard, the recent direct democratic measures that are intended to tame the sting of punitive drug laws, particularly in western states, say something about the importance of sub-national socio-political culture. Initiatives and referenda played a role in punitive build-up in several states including California (Barker, 2009) and Arizona (Lynch, 2009), but may also have significant effects on pushback. The content, form, and outcome of the drug initiatives raise questions about macro-level theoretical models of penal change and governance. Moreover, they provide further evidence that treating the USA as a single case loses more in empirical accuracy than it gains in parsimony (see Lynch, 2009 and 2011a for a more in-depth discussion of this issue). Throughout the war on drugs, the relationship between the federal government and state and local justice structures has also been contested, as well as reciprocal in sharing innovations and operational norms, throughout the war. As in many areas of federal policy, it might be more appropriate to conceptualize the federal government's major role in the drug wars as a facilitator and catalyst to diffusion, rather than as a pure innovator (Nicholson-Crotty, 2004; Welch and Thompson, 1980).

Variants of the war on drugs also suggest that the simple theoretical model of the system's racial targeting inadequately fleshes out how and why persons of color are particularly likely to bear the brunt of its arsenal. In other words, there is not a singular strategy to deploy the prison in response to a 'crumbling of the urban ghetto as a physical container for undesirable dark bodies' (Wacquant, 2009: 61). Rather, racisms of different forms are at play in various settings. First, structural inequalities and opportunity roadblocks play out in different ways (Contreras, 2011). These help create the economic conditions for illicit drug markets. They also shape law enforcement resource allocation; drug offending is easier for police to observe in (disproportionately minority) poorer neighborhoods that lack the kinds of spatial and social barriers to outsiders (even police) that often characterize wealthier areas. The disproportionate attention to marginalized neighborhoods not only results in increased likelihood of arrests for their residents, but creates and perpetuates institutionalized stereotypes and expectations about 'high crime' areas.

This, in turn, can erode police respect for, and deference to, residents' rights and dignity, and may help justify the use of dangerous and highly intrusive policing tactics in those targeted areas. Profiles of prototypical drug offenders get further institutionalized as they are processed through the system, so the influx of arrestees from certain neighborhoods, and possessing certain demographic characteristics, contribute to taken-for-granted racialized 'scripts' (Haney López, 2000) about who offenders are, and about their presumed guilt (Lynch, 2011b). Structural inequalities also affect the 'success' of drug defendants who are handled by local-level interventions, and indirectly contribute to inequalities in incarceration.

Once derogated by structural and systemic processes, the prototypical drug offender is afforded no individualized empathy as s/he is processed through the criminal justice system (Lynch, 2011b). Consequently, the kinds of economic incentives that drive drug

law enforcement, whether it is ‘collars for dollars’ (Levine and Small, 2008; Lynch, 2011b) that simply increase individual officers’ paychecks through overtime, the seduction of federal grants to pursue aggressive enforcement (Alexander, 2010; Fleury-Steiner and Smith, 2011), or billion-dollar enterprises like the Asset Forfeiture Fund, can proliferate with little concern within the system about the implications for equal justice.

The variations of the war on drugs also reveal that punishment needs to be more broadly conceived than it usually is in punishment and society literature. Policing tactics that have been innovated and widely deployed in pursuit of the war on drugs have highly punitive effects in their own right for those who are ultimately arrested and charged as well as for the many more who are subject to often-aggressive, hostile police intervention without any grounds for arrest (Capers, 2009). Every jurisdiction in the nation has egregious cases that highlight the psychological and physical brutality that is, at times, systematically meted out by law enforcement in furtherance of drug arrests (see Alexander, 2010).

Second, punishment and society scholars can sharpen their analyses of the role played by the war on drugs in penal expansion by focusing on the more mundane and even soft side of drug regulation. The highly politicized and draconian federal system has received an enormous amount of scholarly attention, with good reason, but more work remains to be done on the many ways that drug law enforcement in action affects different forms and targets of punishment. To do so necessitates more on-the-ground empirical studies of the routine practices of policing, criminal and drug courts, programs, and correctional institutions.

Finally, analyses beginning with the localized, messy, and sometimes contradictory modes of drug regulation, as deployed, can provide us with better tools for use in efforts to roll back mass incarceration and other punitive innovations. In other words, by clarifying how the *practices* of the drug war occur in different settings, we can aim for focused, tailored intervention that may actually change local practices (Lynch, 2011b). Because criminal law as practiced is really a local endeavor, efforts at reform must take into account those localized practices. State-level criminal law on-the-books is given its force by local actors: municipal or regional law enforcement agencies, and county-level prosecutors and judges. Even federal criminal law is very much shaped by local district court actors, so reform efforts that *only* aim at statutory change will not necessarily address a number of injustices in outcomes. Inequalities resulting from state and federal law, like those underpinning the US war on drugs, are ultimately produced by localized practices. Thus, consideration of those local practices is central to successful social change strategies aimed at all structural levels.

Notes

1. This is not to say that there is no reactive policing in the case of drug arrests; police do respond to complaints lodged by citizens about using and dealing. However, relative to other offenses, this category of felony is the most directly influenced by policy/resource choices within law enforcement agencies.
2. There are other areas of felony law enforcement where police also use proactive methods, but their impact on incarceration is relatively smaller than in the case of drug law enforcement. At the state level, uncovering other forms of vice that rise to felony status (prostitution rings, gambling operations) is often a matter of proactive policing, and at the federal level, crimes

- such as distribution of child pornography and insider trading are often uncovered through proactive law enforcement, but the number of arrests pale in comparison to drug arrests.
3. This law required that opium and cocaine products be regulated through taxation, registration, and restriction of doctors' ability to prescribe these substances to addicts. It was not a prohibition law per se, but ended up functioning as one because it specified criminal charges for possession by non-registered people.
 4. At the time of implementation of the Guidelines, drug offenders comprised 50 percent of the federal criminal caseload (USSC, 2004); by 1995 that proportion had dropped to 40 percent (USSC, 1996); in 2009, the proportion of sentenced drug offenders was 30 percent (USSC, 2010). The number of immigration offenses has correspondingly increased over the same period; thus, the federal 'war on drugs' has been supplemented by an expanding 'war on immigrants'.
 5. According to Murakawa (2006), even this dramatic and seemingly abrupt transformation had a longer, racialized genesis tied to congressional campaigns to reign in 'liberal' judges who had destabilized the racial order via civil and procedural rights.
 6. This ratio was lowered by Congress to 18–1 in 2010 when it passed the Fair Sentencing Act.
 7. One exception was 'economic crimes' (primarily white-collar offenses). Post-Guidelines, the likelihood of receiving a prison sentence increased significantly, but average sentence length was cut in half from about 30 months to 15 months (USSC, 2004).
 8. Despite the US Sentencing Commission's multiple reports on this troubling consequence of the crack/powder sentencing differential, and their repeated recommendation to Congress to change the crack sentencing policy, Congress steadfastly refused to decrease the 100:1 ratio until 2010, when it reduced it to 18:1.
 9. Despite its notoriety in the war on drugs, the federal system is actually a very small player in the US context. For instance, in 2004, federal law enforcement made 27,454 drug arrests (Compendium of Federal Justice Statistics, 2004), while state and local law enforcement made 1,746,570 drug arrests (US Department of Justice, 2004), which means that only 1.5 percent of all drug arrests were federal that year. About 6–7 percent of all *felony* drug convictions occur in the federal system.
 10. For example, in what was characterized as an experimental day fine scheme that was *sensitive* to offenders' ability to pay a person making \$50/day to support a family of four was fined \$23/day, leaving \$27 for living expenses (Turner and Greene, 1999). For more extreme examples, see Beckett and Harris (2011).
 11. This tension is currently at a high point in California because the State's strategy to comply with the population reduction orders mandated in *Brown v. Plata* (2011) has been to offload those sentenced to prison for three years or less to county jails and probation offices. Now, any convicted defendant whose presumptive prison sentence falls between one and three years will do his/her time in county jail (no prison sentence is less than one year).
 12. This slangy, cynical label was coined by politicians and practitioners to refer to alternative programs that use non-incarceration interventions, including drug courts (see, for example, Schoofs, 2006; Skowronek, 1996).
 13. Its science credentials are, in fact, highly problematic, as many scholars have noted. See, for example, Cohen (2009) on the classification of marijuana as Schedule 1, which means it is deemed to have no medical value and the greatest potential for harm and abuse.
 14. This has come at a substantial cost to criminal defendants who are arrested based on informants since the evidence provided by snitches under such conditions is highly unreliable. See Natapoff (2009) for a full discussion.
 15. No criminal conviction is needed, so the Government may dismiss a case for lack of evidence but still successfully seize and retain the property of the accused. See Worrall and Kovandzic (2008: 219) for a detailed discussion of asset forfeiture as 'policing for profit'.

16. This measure would have broadly legalized marijuana use, cultivation, and commercial trade in the state for those 21 and older. A similar measure is on the November 2012 ballot in Colorado.
17. For example, Oakland, California has already come to rely on the business license tax generated on medical marijuana dispensaries, which the city has characterized as 'significant revenue' in its annual budget (City of Oakland, 2009). Likewise, the state of California now receives between \$50–100 million in income tax revenue generated by the medical marijuana business.

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