

# Are the Drug Wars De-Escalating?

## Where to Look for Evidence

Ever since the late 1980s, when it became common to refer to criminal enforcement of narcotics laws as a “war on drugs,” public concern about these crimes supported large enforcement budgets. Prosecutors and judges gave the cases high priority. However, subtle signs of change have appeared in the last few years, showing that the public’s enthusiasm for criminal enforcement of drug laws might be slipping. These signs were present before the September 11 attacks, but those events may have strengthened the movement. If that trend continues, it will raise some interesting questions about the politics of crime. Can levels of enforcement move down as easily as they can move up? Which institutions respond most quickly to a shift in public priorities away from enforcement of drug crimes?

In this essay, I suggest the places that are most likely to show the first signs of changing enforcement priorities. My hypothesis has three parts. First, the earliest evidence of changing priorities should appear in the prosecutor’s office before it affects the legislature.<sup>1</sup> Second, there are reasons to believe that such changes happen first in the state systems rather than in the federal system. And finally, the early signs of change ought to show up in the charges that prosecutors file rather than in the sentences imposed.

### I. Drug Wars in Popular Culture

The signs seem to appear everywhere in popular culture: enthusiasm for criminal enforcement of the drug laws is ebbing. One can find traces of this view in Hollywood movies such as Steven Soderbergh’s *Traffic*, a successful film with a skeptical (although not hostile) view to criminal drug enforcement. More reliable evidence comes from several public opinion polls.

Since 1939, periodic Gallup polls have asked people to name the nation’s “most important problem.” When President Bush the Elder started to emphasize a “war on drugs” in his public remarks in 1989, 68% of the respondents listed “illegal drugs” as the most important problem. The figure drifted down from that temporary high point, but it remained at 17% in January 1997. By January 2001, only 7% of the people polled listed illegal drugs as the most important problem, behind such other problems as education, moral decline, and the economy in general. In June 2001, the number slipped to 5%. As one might expect, since September 2001

“terrorism” has dominated all other problems listed, and as of December 2001 only 1% of the people named illegal drugs as the most important problem facing the nation.<sup>2</sup>

Another Gallup poll tells a similar story. In 1996, 31% of the public declared that the nation had “made progress” in coping with illegal drugs. By 2000, the number of people holding this optimistic view increased to 47%. The number of people with more pessimistic views on drug policy (those who believe the country has “lost ground” in coping with illegal drugs) declined during the same four years.<sup>3</sup>

A different measure of public priorities counts the number of news stories published on the subject.<sup>4</sup> The absolute number of stories about the “war on drugs” in the Nexis database went up only modestly during the 1990s, from 2300 in 1991 to 4500 in 1999. This is surprising, given the huge growth in these databases during this time — Nexis covers far more newspapers today than it did in 1991. It is possible to calculate how many stories one might expect in these growing databases, and to compare the number of “expected stories” to the actual number of stories in the database.<sup>5</sup> As Table 1 shows, the number of actual news stories since 1991 about the war on drugs has fallen further and further behind the expected rate — except for rebounds in the number of stories during the national election years of 1996 and 2000.

We must depend on sociologists rather than legal scholars to offer more definitive proof of changes in public attitudes. For present purposes, these scattered indications are enough to establish this preliminary point. The American public treats illegal drugs as a less pressing priority today than they did in the early and mid-1990s.

### II. Drug Penalty Legislation

Do any changes in the criminal justice system reflect this apparent change in public mood about the war on drugs? We know that legislators, under lots of circumstances, respond to changes in the mood of the electorate. In theory, they might de-emphasize drug enforcement if their constituents are doing so.

Several state legislatures within the last year or so have indeed reduced the penalties available for some drug crimes. In Connecticut in 2001, the legislature granted judges authority to depart from mandatory



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**Table 1**

Year	Nexis-U.S. Stories About War on Drugs	Estimated Growth in Database Since 1991 (%)	Expected Stories	Difference Between Actual and Expected Stories	Percent Below Expected Stories
1991	2287	—	2287	0	—
1992	2341	6	2424	-83	4
1993	2371	24	2836	-465	16
1994	2360	80	4117	-1757	43
1995	2520	110	4803	-2283	48
1996	5165	135	5374	-209	4
1997	4656	151	5740	-1084	19
1998	4014	163	6015	-2001	33
1999	4513	184	6495	-1982	31
2000	6354	195	6747	-393	6

minimum sentences for certain drug crimes, such as first-time sales or possession within 1500 feet of a school. A 2001 Indiana law eliminated mandatory 20-year sentences for cocaine dealers (anyone caught with more than 3 grams of cocaine). Last year, Louisiana repealed mandatory sentences for some simple possession and other non-violent drug offenses.<sup>6</sup> Additional high-profile jurisdictions such as New York are also debating possible reductions in available drug crime penalties.<sup>7</sup>

But a few legislatures reducing the authorized sentences for some drug crimes do not fully represent what is going on in the country. There are also examples in the late 1990s of legislatures increasing the available drug penalties. At the same time Indiana repealed some mandatory minimum sentences, it also increased penalties for methamphetamine.<sup>8</sup> Legislatures have increased penalties lately for “ecstasy.”<sup>9</sup> Despite many voices of caution about the dangers of mandatory minimum penalties, legislatures pass new mandatory penalties as “exceptions” or as a way to create more “uniform” sentences.

While legislatures are quick to respond with new criminal penalties when the public perceives a new danger (say, crack cocaine), they have reasons to respond more slowly when the public shows less urgency about a crime. Others have pointed out that criminal codes are sticky downward.<sup>10</sup> Crimes go into the code, but they never come out. Penalties go up at the first sign of public concern, but they do not come back down so easily.

Legislative debates result in abstract pronouncements about drug crimes.<sup>11</sup> Statutes that criminalize drug use, and (more important) those that set penalties for drug use, embody our public aspirations about drug enforcement, our message about “what we *might* do if we catch you.”<sup>12</sup> The setting makes it difficult for legislators to compare illegal drugs to other social priorities competing for limited public funds. When debating illegal drugs in isolation from other issues, public officials do not want to signal that drugs are unimportant. Legislative debates about a possible new criminal sanction frame the question as follows: “Are

drugs worth addressing through criminal enforcement?” Debate over the single criminal provision leaves lawmakers unlikely to ask the more useful comparative question: “Are drugs now a lower priority relative to the enforcement of other criminal laws?”

This is most clearly a feature of the debate when the legislature first decides to criminalize a drug, such as ecstasy. Yet the focus on a single topic also influences legislative debate about whether to increase penalties for existing crimes. Granted, legislators will recognize that the choice before them has collateral budgetary consequences. But the costs of increased penalties remain abstract and unquantified during most legislative debates. They are difficult to appreciate because the bill comes due so many years in the future, as offenders serve the last additional months or years of their sentences.<sup>13</sup>

Legislators do sometimes talk about this comparative question, particularly when they debate the rules of the sentencing system overall. In a few states, the legislature receives specific prison cost estimates for every proposed crime bill. The relative priorities of different crimes might also figure into debates about corrections budgets. The comparison happens wherever public officials talk about budgets rather than aspirations. But this budgetary frame of mind, while present from time to time in the legislature, still is more the exception than the rule during debates about drug penalties.

### III. State and Federal Drug Charges Filed

The important social choices in criminal justice priorities are made today through prosecutorial budgets. Prosecutors discuss their budgetary issues in terms of the time available for attorneys rather than the money available for the office, but the basic task of setting priorities is always near at hand. To be sure, prosecutors do not think strictly about public priorities as they select the cases to file. They set priorities based partly on an internal professional judgment about what crimes ought to be prosecuted to make the community safer. This is, nevertheless, budgetary thinking. The public’s priorities remain an important part of the prosecutor’s calculations about how best to use office resources.

For the earliest signs that the legal system is responding to changing public opinion, we should look to prosecutorial charging discretion. What matters is not what charges the criminal code authorizes, but how often the prosecutor with a limited budget selects a given charge.

The "Three Strikes" law in California illustrates this point. California's legislature authorized a major use of prison resources for defendants convicted of a third felony. Not many have appreciated, however, how much prosecutorial discretion remains in this law, and how much variety there is around the state. At this point, the prosecutor matters more than the legislative debate, at least in the short run. Steve Cooley recently won election as the new District Attorney in Los Angeles on a platform of more screening of three strikes cases.<sup>14</sup> Since Los Angeles is one of the major sources of three strikes cases, Cooley's policy could make an enormous difference in the state's crime budget.<sup>15</sup>

A quick sample of charging statistics from around the country suggests that many prosecutors are giving drug crimes lower priority today than in the mid-1990s. Let's start with the absolute number of drug charges filed. Federal prosecutors filed larger absolute numbers of drug cases throughout the 1990s. In 1994, federal prosecutors filed 20,275 narcotics cases; by 1999, the number rose to 29,306.<sup>16</sup>

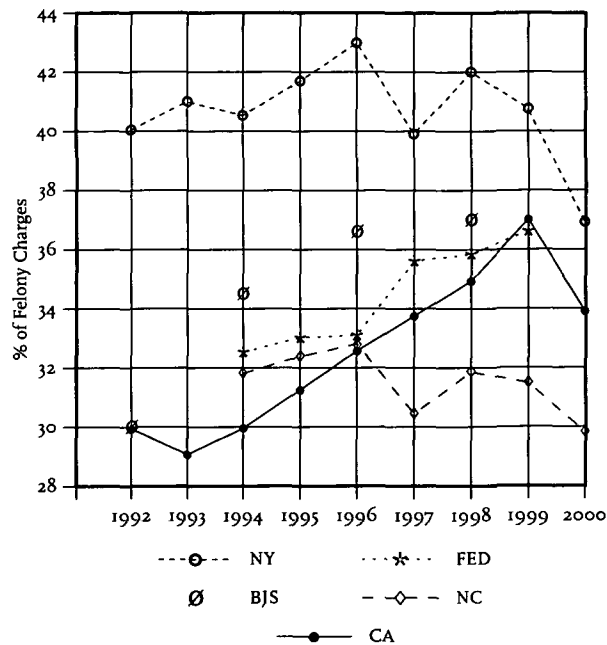
The picture looks different in the states. Taking a few representative states, the recent trend is downward. The numbers in New York and California went down steadily throughout the decade. In California, complaints in drug cases dropped from 84,132 in 1994 to 73,197 in 2000; for New York, drug indictments went from 28,861 in 1994 down to 19,124 in 2000. North Carolina's number of drug charges went up overall, but dropped more recently; the cases climbed from 26,532 in 1994 to a high of 30,113 in 1998, but then fell again to 28,612 by 2000.<sup>17</sup>

In a world where most types of crimes are falling and the absolute number of felony convictions is either flat or dropping, it is no surprise that drug charges have dropped some places. The decline in absolute numbers does not answer our question about the relative importance of drug crimes to prosecutors, when compared to other crimes. We must look instead at drug charges as a proportion of the total charges.

The answers here are also different in the federal and state systems, as Figure 1 shows. In the federal system, the percentage of total charges filed that deal with drug crimes has moved up steadily throughout the decade. However, in New York and North Carolina, the trends were pretty steadily down. In California, the proportion went up steadily through the mid-1990s, but dropped in the most recent year. The data from these three states do not necessarily show a downward trend nationwide. In a Bureau of Justice Statistics survey of urban counties,

the percentage climbed every two years, but flattened more recently (1996 to 1998). Perhaps the figures from 2000, when they become available, will show a downward trend nationally, matching the recent downward trend in the three states sampled here. But even the numbers now available demonstrate a difference between federal and state systems. Overall, the trend for charges in the federal system is up, while the recent trend in the states is flat.

Figure 1



Why do we see continued increases in drug charges in the federal system, while drug charges are no longer increasing in importance in the states? Do state prosecutors more closely reflect short-term changes in public priorities? State prosecutors are mostly elected rather than appointed. This suggests they remain more aware of public opinion and priorities than the appointed U.S. Attorneys.

State prosecutors also have more to lose from misallocated enforcement budgets. The state systems are much larger than the federal. Although the federal system ranks among the largest individual systems, the states together still dwarf the federal system: in 1998, federal courts handled only 9% of all U.S. felony trafficking convictions, and a mere 1.2% of all U.S. felony possession cases. And this ignores the huge numbers of drug misdemeanors handled in the state systems.<sup>18</sup> Moreover, the costs of prosecution occupy a larger proportion of the state budget than the federal budget.<sup>19</sup>

State prosecutors also face more stark choices than federal prosecutors when they fail to adapt to the public's new priorities. Unlike federal prosecutors, the

state prosecutors do not have another court system to back them up if the public wants certain crimes prosecuted as a priority. If the public believes that robberies are now more important relative to drug crimes than they were five years ago (or if the number of robberies really does go up), a state prosecutor must prosecute the robberies. Given a fixed budget, state prosecutors must abandon the lower-level drug cases and other less important crimes to pursue those robbery cases (or whatever the priority has become). By contrast, a federal prosecutor has the choice to change more slowly. The U.S. Attorney can count on somebody else (the state prosecutors) to address the public's new priority in the short run. If a federal prosecutor wants to continue strong drug enforcement in the face of changing public priorities, the robberies will not be ignored. Somebody else will still pursue them.

A final factor makes states more capable and inclined to respond quickly to changed public priorities: Congress passes lots of specific budgetary limitations on the Department of Justice. It creates line items for drug prosecutors, for gun prosecutors, for organized crime, for terrorism. The U.S. Attorney, unlike the typical state District Attorney, does not have complete budgetary authority to reassign prosecutors if public priorities change.

#### IV. Drug Sentences Imposed

We now have seen a few clues pointing to decreases in drug charges, one of the key determinants of resources used in drug enforcement. Let's move now to a second key point in deciding how much of our criminal justice budget will be devoted to illegal drug crimes: the sentences actually imposed and served (as opposed to the sentences authorized). The decisions here are spread among several actors: prosecutors, judges, and coordinating panels such as sentencing commissions or parole authorities. But their collective choices determine how much of our criminal system resources we will direct towards drug cases.

The federal story here is interesting, but others have told it. Frank Bowman and Michael Heise recently documented some changes in federal drug sentences.<sup>20</sup> They recount the more commonly-known part of the story: we are using prison more often all the time in the federal courts as the sentence of choice for drug defendants. The proportion of drug defendants sent to federal prison each year has increased very steadily, from 78 % in 1986 to 96 % in 1999. Second, the length of sentences also went up early in the "Drug Wars": from 60 months in 1984 to 80 months in 1990.

But the surprising and interesting thing about the length of sentences is what happened next. Between 1992 and 1999, the average length of a prison sentence in a federal drug case went down from 88 months to 75 months, a drop of about 15 %. Bowman and Heise look

more closely at this trend, asking who is responsible. Some of the change happened because of the discretionary choices of prosecutors and (to a much lesser extent) sentencing judges, not because of rules changes imposed by Congress or the Commission.

Is something similar happening in state sentencing for drug cases? Do we find signs of less emphasis on drug cases in the state sentencing budgets, either at the disposition stage (in-out), or at the duration stage? The quick answer is, "Only in some states."

On the in-out question (incarceration versus some other sanction), a survey of two states with exceptionally good sentencing data gives us mixed results. In Pennsylvania, a declining proportion of drug defendants received a prison or jail term during the 1990s: down from 86 % in 1991 to 72 % in 1999. But in North Carolina, the percentage of felony drug defendants receiving an active term went up from 14 % to 22 %. And in a national cross-sample of data collected by BJS, the proportion stayed pretty flat between 1992 and 1998, around 70 %.<sup>21</sup>

The same inconclusive story shows up when we look at the *duration* of prison sentences served. Recall that in the federal system, the duration has fallen noticeably since 1992. But in the state systems, there is no comparable overall trend. The minimum active term for drug felonies in North Carolina remained in the range of 10–12 months, with perhaps a slight upward trend. In Pennsylvania, we find a slight downward trend, moving from a high of 18 months (in 1994) to about 15 months today. The nationwide average duration for drug felonies (gathered by BJS) stayed mostly flat, although maybe the trend moves down a bit on average time served. The average time served stood at 21 months in 1992; the average for 1998 was 19 months.

#### V. Charges Before Sentences

Our quick sample of drug enforcement budgeting in state systems suggested stronger effects in charges than in sentences. The trends on state drug charges look like they are now heading down in some jurisdictions; nationwide, they stopped increasing by 1998. The trends on drug *sentences* in state systems look more muddled. Neither the proportion of prison sentences nor the durations changed much at the national level during the 1990s.

Why might that happen? After all, in the federal system, just the opposite has happened. Federal drug *charges* have continued to grow in importance relative to other federal charges; the downward federal trend appears in the *sentence durations* rather than the charges.

Despite the federal trend, I believe charges are generally the best place to look. Charging decisions are more squarely in the hands of one decision maker. The prosecutor acts alone in deciding how to allocate the

available attorney hours and courtroom slots. Sentences, on the other hand, require lots of interaction among prosecutors, judges, defense lawyers, parole authorities, sentencing commissions, and legislators. Only some of these actors respond right away to public opinion about the urgency of drug crimes.

The federal changes in sentence durations tell us more about the federal sentencing rules than about the way the federal system registers changes in public priorities. The rules that Congress created and the federal Sentencing Commission reinforced produce sentences that are longer than what federal prosecutors believe is necessary or just for some cases. Federal prosecutors are whittling away at the durations. They have been doing so since the 1992, before any change in public priorities appeared.

## VI. Conclusion

There is surprisingly little drama in the state systems now. The fact that the charging trends in state court are recent and rather small might point to a disconnect between popular debate and prosecution patterns. This could mean that prosecutors are not blown by the winds of public sentiment. They do what they do, and it takes something more substantial than an ephemeral shift in the public mood for these bureaucratic organizations to change their ways. It may require a few election cycles. The disconnect between popular debate and prosecution patterns also may suggest that crime enforcement (just like crime legislation) is sticky when moving down. Once the prosecutors establish a specialized unit within the office or set a priority, they do not quickly abandon that practice.

Perhaps it is a good thing that prosecutors respond only to the longer-term and more deeply felt changes in priority among the voters. It will be worth watching the charging and sentencing patterns over a longer time frame. Given enough time, we might see more responsiveness among prosecutors to a changed public mood. If the September 11 events have rearranged our priorities in the long run, we could see more permanent drops in the resources devoted to drug crimes.

## Notes

- <sup>1</sup> Both the prosecutor's practices and legislatures should respond more quickly than courts. While it is true that public opinion influences courts in the long run ("The Supreme Court follows the election returns"), judges are expected to respond more slowly to public opinion.
- <sup>2</sup> See <http://www.gallup.com/poll/topics/>. Our real and current war shows us that the "war on drugs" was not truly a war, where people with fundamentally conflicting values and ambitions aim to kill one another. The war rhetoric now seems profoundly misplaced.
- <sup>3</sup> *Id.*
- <sup>4</sup> This calculation builds on the work of Marc Miller, who first tracked the number of news stories dealing with the "war on drugs" and found a major shift up in the number of stories after 1989. Marc Miller, *Cells vs. Cops vs. Classrooms*, in THE

CRIME CONUNDRUM 27 (Lawrence Friedman & George Fisher, eds. 1997).

- <sup>5</sup> For details on estimating the growth in the Nexis database, see Ronald F. Wright, *The Abruptness of Acton*, 36 CRIM. L. BULL. 401 (2000). An identical exercise in the Westnews database produces similar results.
- <sup>6</sup> See Fox Butterfield, *States Ease Law on Time in Prison*, N.Y. TIMES, Sept. 2, 2001; Cory Havens, *Indiana Lawmakers Crack Down on Methamphetamine*, SOUTH BEND TRIBUNE, Oct. 14, 2001 (House Bill 1892, eliminates 20-year mandatory minimum); Randy McClain, *Policy Shift for Nonviolent Offenders Tops Session*, BATON-ROUGE SUNDAY ADVOCATE, June 24, 2001 at 1A; Dale Wetzel, *Mandatory Drug Sentences Revisited*, BISMARCK TRIBUNE, Feb. 2, 2001, at 3C.
- <sup>7</sup> See James C. McKinley, Jr., *Proposals for Overhaul Of New York Drug Laws*, N.Y. TIMES, Sept. 2, 2001 at A20; Neil A. Lewis, *Justice Department Opposes Lower Jail Terms for Crack*, N.Y. TIMES, Mar. 20, 2002, at A24 (debate over proposal by Republican Senators Hatch and Sessions to reduce mandatory penalties for crack cocaine while raising penalties for powder cocaine).
- <sup>8</sup> Havens, *supra* note 6.
- <sup>9</sup> Ben Kieckhefer, *Bill Would Increase Penalties for Dealing Ecstasy*, THE STATE JOURNAL-REGISTER (Springfield, Ill.), May 11, 2001 at 16.
- <sup>10</sup> See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 55-60 (1997).
- <sup>11</sup> See Marc Miller & Daniel J. Freed, *The Chasm Between the Judiciary and Congress Over Mandatory Minimum Sentences*, 6 FED. SENTENCING REP. 59 (1993).
- <sup>12</sup> Even if the legislature passes mandatory minimum sentences, the statute leaves the prosecutor room to decide whether to file charges under the mandatory penalty statute, some other statute, or none at all. See Stephen Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).
- <sup>13</sup> See Ronald F. Wright, *Three Strikes Legislation and a Sinking Fund Proposal*, 8 FED. SENTENCING REP. 80 (1995).
- <sup>14</sup> Cooley appealed both to the public's perception that the law was creating unjust outcomes, and the need to concentrate resources on more truly serious offenses. See Twila Decker, *Lawyers Say D.A. Breaking Three-Strikes Pledge*, L.A. TIMES, Jan. 22, 2001, at B1 (policy described as means of reserving mandatory sentences for most serious felonies); Twila Decker & Paul Lieberman, *Cooley's Early Actions Hint at a Decisive, Individual Style; County's Top Prosecutor Takes Hard Line on Police Misdeeds While Ordering Limits on Use of Three Strikes Law*, L.A. TIMES, Jan. 16, 2001, at B1.
- <sup>15</sup> Indeed, one prosecutor could single-handedly muzzle Three Strikes laws nationwide. California's Three Strikes law has far more impact than all the other states combined, and Los Angeles County has the largest impact in California. See Ronald F. Wright, *Three Strikes Legislation and Sentencing Commission Objectives*, 20 LAW & POLICY 429, 457 (1998) (discussing dominant impact of California law).
- <sup>16</sup> Bureau of Justice Statistics, *Federal Drug Offenders, 1999 with Trends 1984-99* (2001) (NCJ 187285).
- <sup>17</sup> See <http://caag.state.ca.us/cjsc/datatabs.htm>; <http://www.criminaljustice.state.ny.us/crimnet/ojsa/areastat/areast.htm>; North Carolina Sentencing and Police Advisory Commission, *Structured Sentencing Statistical Report for Felonies and Misdemeanors* (Fiscal Years 1995-2000); Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 1998* (2001) (NCJ 187232). These sources also provide the basis for Figure 1.
- <sup>18</sup> Bureau of Justice Statistics, *Felony Sentences in State Courts*,

1998 (2001) (NCJ 190103).

- <sup>19</sup> Criminal justice occupies less than 1 % of the total federal budget, and much of that figure is devoted to prisons. At the state level, budgetary calculations are complicated by the fact that much of the prosecutor's budget in many jurisdictions is funded at the local rather than the state level.
- <sup>20</sup> Frank O. Bowman & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043 (2001); Frank O. Bowman & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the*

*District Level*, 87 Iowa L. Rev. No. 2 (March 2002).

- <sup>21</sup> Pennsylvania Commission on Sentencing, *Sentencing in Pennsylvania: Annual Data Report (1991–2000)* (<http://pcs.la.psu.edu/>); North Carolina Sentencing and Policy Advisory Commission, *supra* note 17; Bureau of Justice Statistics, *supra* note 17. The North Carolina system places a smaller proportion of felony drug defendants into active prison terms as part of a deliberate strategy to use "intermediate" punishments and to conserve prison space for violent offenders. See Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 29 CRIME & JUSTICE 155 (2002).