Drug Law Reform--Retreating from an Incarceration Addiction

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INTRODUCTION

The so-called “war on drugs” was officially declared by President Reagan in 1982, although it had started earlier under the pressure of public concerns about drug abuse. The label “war” is appropriate, for it has involved very aggressive law enforcement, very harsh punishments, and an absolute horde of prisoners. It would be difficult to overstate the “war’s” contribution to the nation’s inmate population, which now stands at 2.31 million, the highest in the world:

The number of people in jail and prison for drug law violations increased from 50,000 in 1980 to almost 500,000 today. That total is greater than the total number of people incarcerated for all criminal offenses in western Europe (whose population exceeds that of the United States by roughly 100 million).
The most striking pattern... is the growth in the incarceration of drug offenders. Over the seventeen year range of our analysis, drugs evolved from being an offense with nearly the fewest prisoners to the one with by far the most prisoners...  

The "war" has been waged through laws that aim their harshest punishments at big time players in the illegal drug business but miss most of those targets and produce an inmate population that is overwhelmingly dominated by drug abusers and bit players in the illegal drug trade:

It has been noted... that drug arrests have tripled since 1980, with more than four-fifths being for simple possession violations;... and that most of the women and men in federal prisons for drug offenses are first-time, nonviolent offenders, who were arrested for having small amounts of drugs for personal use...  

In 2005, four of five (81.7%) drug arrests were for possession and one of five (18.3%) for sales. Overall, 42.6% of drug arrests were for marijuana offenses...  

The "war on drugs" has been blamed for great differences in the imprisonment of black and white citizens and for an explosion in the

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8 Recent incarceration rates (inmates measured against the population) show the nation holding one white male above age eighteen for every 106 white adults in the population while holding one black male above age eighteen for every fifteen black adults in the population. See PEW CENTER ON THE STATES, supra note 3, at 6 (citing William J. Sabol ET AL., BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR...
female population of jails and prisons:

The explosion of both the prison population and its racial disparity are largely attributable to aggressive street-level enforcement of the drug laws and harsh sentencing of drug offenders . . . .

Women now represent the fastest growing group of incarcerated persons. In 2001, they were more than three times as likely to end up in prison as in 1974, largely due to their low-level involvement in drug-related activity and the deeply punitive sentencing policies aimed at drugs . . . .

The "war" is fostered by a substantial public appetite for illegal drugs. It is fueled by a belief that harsh punishments can dampen that appetite and reduce or eliminate the devastating damage to offenders, families, and communities that is caused by drug abuse. This approach has survived for more than thirty years because of the legitimacy of its objective and not because of the wisdom of its strategy.

Doubts about the wisdom of using harsh punishment as a way of dealing with the nation's drug problem have prevailed in some circles from the onset of the "war," partly because of the sheer magnitude of the problem:

In 1991, there were over 6 million cocaine users, 5.7 million users of hallucinogens and inhalants, and approximately 700,000 heroin users. According to one estimate, only about one-eighth of the hard-core cocaine and heroin abusers are now incarcerated. If we add the "non-user" offenders to these "user" offenders, there are so many offenders that it is fiscally and practically unrealistic to incarcerate more than a small number of them.

Such doubts continue to dominate the thoughts of most scholars, although they are now more likely to be tied to the difficulty of fighting the "war" than to the size of the abuser population and the magnitude of the problem:

The key distinction between drug incarcerations and the use of prison for

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11 Margaret P. Spencer, Sentencing Drug Offenders: The Incarceration Addiction, 40 Vill. L. Rev. 333, 339 (1995) ("A 1991 survey revealed that 74.4 million (36.2%) of Americans aged twelve and older reported using an illegal drug at least once during their lifetime. . . . For those adults under the age of twenty-five, an estimated 15.8% have used cocaine at least once, and for those between the ages of twenty-six and thirty-four, an estimated 25.2% have used cocaine.").
12 Id. at 367–68 (internal citations omitted).
most other offenses relates to the “replacement effect” that comes into play in drug cases. In an extreme case, when a serial rapist is incarcerated there are no additional rapists produced to take on the opportunity to engage in these violent offenses. But when a street corner drug seller is imprisoned, it is far from clear that there is any immediate impact on drug selling. As long as a market for drugs exists in that neighborhood, there is an almost endless supply of potential sellers willing and able to enter this potentially lucrative market.\textsuperscript{13}

Now, thirty years into the “war,” views about the law’s reliance on punishment to fix the drug problem are less conciliatory and more absolute: “[t]he notion that ‘the drug war is a failure’ has become the common wisdom in academic . . . circles.”\textsuperscript{14} Those who have most closely studied the results of the “war” believe that it has “accomplished little more than incarcerating hundreds of thousands of individuals whose only crime was the possession of drugs.”\textsuperscript{15} More importantly, they believe that it has had little if any effect on the drug problem: “Despite the fact that the number of persons in prison or jail today for drug offenses is more than ten times the number in 1980, drug use rates remain substantial, with data indicating a general increase over the past few years.”\textsuperscript{16} Needless to say, these scholars urge law and policy makers to chart a different course.

The “war on drugs” has an almost identical history in the state of Kentucky. It reared its head in the early 1970s and appears to have involved some early conflict over the wisdom of using extraordinary punishment in an effort to control illegal drug use. The conflict occurred during the course of separate initiatives aimed at reforming then-existing drug laws (one of which was part of a much larger reform effort that involved all of the state’s criminal laws).\textsuperscript{17} The two initiatives produced virtually identical recommendations on the kinds of drugs that would bring the criminal law

\textsuperscript{13} Marc Mauer, \emph{Thinking About Prison and Its Impact in the Twenty–First Century}, 2 Ohio St. J. Crim. L. 607, 613 (2005).


\textsuperscript{15} Inciardi, \textit{supra} note 6, at 397.

\textsuperscript{16} Ryan S. King, Marc Mauer & Malcolm C. Young, \emph{Sentencing Project, Incarceration and Crime: A Complex Relationship} 6 (2005), available at http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf. \textit{See also Austin et al., supra note 10, at 24 (“Notwithstanding our extraordinary effort to discourage the use and sale of illegal drugs, they remain widely available and widely used.”).}

\textsuperscript{17} One initiative involved a task force of the Kentucky Crime Commission and the Legislative Research Commission that was formed for the purpose of drafting a new comprehensive penal code for the state and the other initiative involved a group acting under authority of the Kentucky Department of Health that focused solely on criminal laws dealing with controlled substances. \textit{See Robert G. Lawson, Difficult Times in Kentucky Corrections – Aftershocks of a “Tough on Crime” Philosophy}, 93 Ky. L.J. 305, 352–54 (2004).
into play and the types of conduct that would be subject to prosecution but moved in very different directions in fixing punishments for drug offenders. In one initiative, recommended penalties were moderate by standards of the time\textsuperscript{18} and "stopped far short of sending a message that the state was about to wage a war on the drug epidemic;"\textsuperscript{19} in the other, recommended penalties were higher than existing penalties for both drug and other types of crimes and high enough to show a new determination to use the power of punishment in the fight against illegal drugs. The General Assembly had both sets of recommendations on its agenda in 1972 when its members decided that it was time to get tougher with drug offenders, firing the first of many shots in a "war on drugs" that was destined to last for at least three decades.\textsuperscript{20}

In this early move, the General Assembly did not target all drug offenders for extraordinary punishment. The 1972 law fixed punishments for drug offenders at levels that were substantially in line with punishments imposed on other kinds of offenders at the time.\textsuperscript{21} But it departed from its moderation in this regard by enacting sentencing laws that provided for tougher punishment of drug offenders who had prior drug convictions (so-called "two-strikes" laws),\textsuperscript{22} a departure from proportional punishment that was meant to manifest a commitment to toughness over tolerance and to launch Kentucky's version of the "war on drugs" a decade ahead of President Reagan's widely-known proclamation. And to say the least, there was substantially more of the same medicine (toughness, intolerance, disproportionate punishment) beyond the horizon.

\textsuperscript{18} See id. at 354 ("The penalties for possessing illegal drugs for personal use were at the misdemeanor level (maximum of twelve months in jail) except for possession of narcotics drugs listed in the two highest schedules . . . which was punished as a class D felony (with a penalty range of one to five years). The penalties for trafficking in illegal drugs were fixed at the misdemeanor level for the least dangerous drugs . . . at the class D felony range for more serious drugs . . . and at the class C felony range (from five to ten years) for the most serious drugs . . . .")

\textsuperscript{19} Id.

\textsuperscript{20} In the 1972 session, the legislature enacted two major pieces of criminal law legislation. This session repealed virtually all of the existing criminal statutes, enacted a new comprehensive penal code, but deferred the effective date for two years (and then reenacted the new comprehensive code in 1974). See Kentucky Penal Code, ch. 385, 1972 Ky. Acts 1653-1783; Act of Apr. 2, 1974, ch. 406, 1974 Ky. Acts 831-89. The legislature pulled from the new comprehensive code all provisions concerning the illegal use of drugs and enacted a separate and independent set of statutes defining drug crimes. See Kentucky Controlled Substances Act of 1972, ch. 226, 1972 Ky. Acts 938-66.

\textsuperscript{21} The penalty ranges were five to ten years in prison for trafficking in high-level narcotics, one to five years for trafficking in high-level non-narcotics, a maximum of one year in jail for trafficking in low-level drugs and marijuana, one to five years in prison for possession of high-level narcotics, and a maximum of one year in jail for possession of other types of drugs. See Kentucky Controlled Substances Act § 31.

\textsuperscript{22} Id.
The "war" has had the same kind of impact in Kentucky as it has had in the country. In the early 1970s, the state had about 3000 inmates in custody, had two prisons for men and a small prison for women, and had a corrections budget of no more than $10 million. In the spring of 2008, the state had an inmate population of 22,719 and a very substantial and growing number of drug offenders within that population, owned and operated thirteen state prisons and had inmates in three private prisons, and had a corrections budget of about $450 million. Under the pressure of a budget crisis of unprecedented proportions, the state has used an early release program (under its power over parole) to reduce the inmate population by about 1000, so that by mid-year 2009 it had in custody 21,565 inmates (about seven times as many as it had at the outset of its war on drugs). Driven mostly by the budget crisis, law and policy makers have shown some exhaustion with the "war on drugs," but have yet to do anything to soften the very harsh laws that have flooded the state's prisons and jails with drug offenders. Without movement in that direction, notwithstanding crisis-driven early release programs, they will find very little, if any, meaningful relief from the incarceration addiction that is reflected in the above numbers.

The state's drug laws have not been overhauled since 1972 and can fairly be described as a potpourri of disjointed parts, with the most disjointed of all being the provisions that are used to send drug offenders to prison for long periods of time. A case can be made for junking the whole set of laws and starting anew from a clean slate, but, in a lawmaking climate still dominated by a tough-on-crime philosophy, an easier case can be made for selective reform aimed at the most indefensible and harmful of these provisions. In pursuit of the latter objective, I write in this Article about drug law reforms that could be achieved without jeopardizing public safety, that would slow and maybe reverse unsustainable growth in the state's inmate population, and that might provide some momentum for a different attack on the drug epidemic. As a first step toward these ends, I start with a discussion of an official acknowledgement that harsh punishment is not

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23 See Lawson, supra note 17, at 325 fig.3.
24 See id. at 322 (describing pre-1970 prison construction in Kentucky).
25 Id. at 331 fig.5.
30 See supra notes 17–22 and accompanying text.
the only way to confront the tide of illegal drug abuse.

I. THE DRUG COURT MOVEMENT

A. Introduction

One of the earliest signs of exhaustion with the country’s predominant drug abuse strategy was the arrival and very rapid expansion of drug courts. Drug courts differ to some extent from program to program but most of them look and act something like this:

Most drug court programs last at least one year. During that time substance abusing offenders are assessed and placed into an appropriate treatment program. The court monitors both the drug court participant’s progress in treatment and abstinence. By the informed use of sanctions and rewards, the court motivates the offender to remain in treatment and complete the program.

A drug court disposition is similar to probation and conditional discharge but contemplates “closer supervision of the drug–using offender” and extraordinary participation in that disposition by the trial judge:

The advent of drug courts signaled a sea-change in American courts—a paradigm shift from court practices designed for speed and efficiency in dispensing penalties to court practices designed to prevent future crime by addressing problems that increase the risk of criminal activity. This shift to problem-solving courts is based on the premise that courts should try to advance public safety by preventing future crime among offenders at high risk of recidivism.

A drug court disposition merely defers and suspends an ordinary sentence in return for successful completion of the treatment program. No one doubts that a percentage of participants will fail the program and end up in prison or jail for service of sentence. Still, the drug court movement is more therapeutic than the strategy it replaces and has at least some chance of reducing both inmate populations and drug abuse. Nevertheless, it has not been universally accepted as effective and appropriate.

31 MAUER & KING, supra note 2, at 26 (noting the increase in the number of courts “from their inception in 1989 to 1,662 in 2007”).
33 Id. at 179.
B. Criticism and Support

Some of the most respected criticisms of drug courts come from doubts about the benefits of drug treatment obtained under threat of incarceration and from doubts about the propriety of judicial involvement in activities that would seem to be more appropriate for social services agencies:

Treatment and rehabilitative programs tend to be most effective when they are disassociated from government coercion. Someone who doesn't want to be rehabilitated is not a promising candidate for being rehabilitated. Requiring someone to sit through a program designed to deal with dependence on alcohol or drugs may lead to resentment and shammed participation. It is not likely to bring about the inner transformation that will end involvement in crime.35

Uncommitted participants were not seen as the only problem. Judges expressed skepticism as well:

It is easy in retrospect to overlook how dramatic a departure from prevailing judicial philosophy Miami's drug court represented in 1989... In the larger national court community, Judge Klein's endorsement of treatment as a court strategy... was met with an uncomfortable silence. Many judges... regarded adopting such a philosophy... as idealistic and impractical. Probably more judges believed that such court-based treatment intervention was inappropriate because it appeared to conflict with the judiciary's mission to serve as neutral arbiter. Further, the helping aim of the drug court struck many judges as asking the judge to be a "social worker," in essence calling for an activist, advocacy role that many judges believed would undermine the professional detachment needed for resolving criminal cases fairly.36

Some of the strongest criticism of the drug court movement is based on a yet-to-be-substantiated belief that such courts have inflated rather than deflated the inmate population (through a practice called "net widening"):  

Drug courts don't work, and never have. They don't reduce recidivism or relapse. Instead, they trigger such massive net widening that they end up sending many more drug defendants to prison than traditional criminal courts ever did. Their failures have resulted in a quiet refocusing, from pre-adjudicative treatment to post-adjudicative treatment. That is, they have become officially what they have always been unofficially: a form of

35 AUSTIN ET AL., supra note 10, at 16 (footnote omitted).
glorified, and terribly expensive, probation.  

Drug courts don’t work for everyone and never will. A certain percentage of drug court defendants will fail the program and go to prison, and a certain percentage will pass the program only to go to prison on a later date for new crimes. But the popularity of the movement continues to grow, in the face of such criticism as described above and a shortage of reliable research data on recidivism rates for drug court participants.  

General assessments of the effectiveness of drug courts are very difficult because of the challenge of tracking participants long enough to determine if participation has produced lasting effects. Most studies report positive results from drug court participation but quite often sound warnings against unrealistic expectations:

The Drug Court Clearinghouse and Technical Assistance Project, funded by the (U.S.) Department of Justice, has catalogued the experience of these programs over their first decade of existence in the 1990s. Their conclusion is that “drug court programs are experiencing a significant reduction in recidivism among participants,” citing rates that range from 5–28%, in comparison to recidivism rates in the range of 50% for non-drug court drug possession defendants. Similarly, they report that drug use among drug court participants is “substantially reduced and significantly lower than that reported for non-drug court defendants.”

The results should also remind policy makers that drug courts, although effective for some offenders, are not a magic bullet. . . . A recent study of over 2,000 drug court graduates from a national sample of drug courts found that 16% had been rearrested within a year and 27% within two years. The message is that we need to be realistic in our expectations about drug court impact.

In other words, say the studies, the drug court is better than the failed incarceration policies of the “war on drugs” but not a panacea for the drug epidemic and the mass incarceration that has accompanied it.

38 See Harrell, supra note 34, at 207 (“Despite the popularity of drug courts, the scientific basis for assessing their impact on public safety, efficient use of criminal justice resources, and therapeutic outcomes for participants has been weak.”).
39 King & Mauer, supra note 4, at 15.
40 Harrell, supra note 34, at 208 (citation omitted).
C. The Kentucky Experience

The drug court made its initial appearance in Kentucky in the mid-1990s, has experienced rapid growth, and now exists in forty-three Circuit Courts (covering 115 of the state's 120 counties).\textsuperscript{41} It is described as a "specialty court"\textsuperscript{42} and appears to operate like drug courts in other jurisdictions, seeking to substitute drug treatment for incarceration and requiring "judges to step beyond their traditionally independent and objective arbiter roles and develop new expertise."\textsuperscript{43} It is open to persons who commit nonviolent "drug or drug-related crimes," lasts for a period of eighteen months (for those who graduate), and like other such programs involves a submission to drug treatment under a threat of incarceration.\textsuperscript{44}

The Court of Justice (on its Web site) says that its drug courts have graduated 2148 individuals (as of June 30, 2007) and then claims in unequivocal terms that "drug court works."\textsuperscript{45} It reports that drug court is less costly than incarceration ($3083 for a year in drug court versus $17,194 for a year in prison) and significantly more effective in controlling crime (20% recidivism rate after two years for drug court graduates versus 57% rate for drug offenders placed on regular probation), all leading to its conclusion that drug courts are "a shining example of Kentucky's success in specialty courts."\textsuperscript{46}

In assessing these results, drug court critics will notice that a very significant portion of the participants in the drug court program do not graduate\textsuperscript{47} and that the court's recidivism comparisons do not extend beyond the two years after graduation, factors that have caused the best authorities on drug courts to warn against expecting too much from the drug court alternative to incarceration. Still, given the fact that "two-thirds of drug


\textsuperscript{43} Id.; Ky. Court of Justice, 10 Key Components of Drug Court, http://www.courts.ky.gov/stateprograms/drugcourt/components.htm (last visited Oct. 29, 2009).

\textsuperscript{44} See Ky. Court of Justice, \textit{supra} note 42.


\textsuperscript{46} Id. at 1–2.

\textsuperscript{47} The Court's most recent data shows a graduation rate of about 41% (with 7876 participants, 4531 terminated or administratively discharged, and 3219 graduates). See E-mail from Connie M. Payne, Executive Officer, Kentucky Drug Court, to Robert G. Lawson, Professor of Law, University of Kentucky College of Law (Sept. 23, 2009, 14:23 EST) (on file with author).
Defenders leaving state prison will be re-arrested within three years,\textsuperscript{48} the court seems justified in seeing drug courts as an attractive alternative to using prisons and jails as a solution to the drug epidemic.

\textbf{D. Conclusion}

The drug court is a promising development, if only because it reflects a major change of attitude toward drug offenders and some recognition of the drug war's failure. But it would be a huge mistake to see the drug court as anything more than a tiny retreat from the laws and policies that have filled our prisons and jails with low-level drug offenders. In an important study entitled \textit{Unlocking America}, the JFA Institute issued a reminder that deserves and needs more attention and appreciation in law reform circles than it usually gets:

\begin{quote}
This generation-long growth of imprisonment has occurred not because of growing crime rates, but because of changes in sentencing policy that resulted in dramatic increases in the proportion of felony convictions resulting in prison sentences and in the length-of-stay in prison that those sentences required. Prison populations have been growing steadily for a generation, although the crime rate is today about what it was in 1973 when the prison boom started.\textsuperscript{49}
\end{quote}

We incarcerate more people than any country on earth, says this Institute, because our criminal penalties are harsher than they have ever been and harsher than penalties in other parts of the world;\textsuperscript{50} "it is important to be clear about this"\textsuperscript{51} when thinking about law reform, says the Institute, and even more important to be clear about this:

The fundamental and most powerful reform that must occur if we are to

\textsuperscript{48} Doug McVay, Vincent Schiraldi & Jason Ziedenberg, Justice Policy Inst., \textit{Treatment or Incarceration? National and State Findings on the Efficacy and Cost Savings of Drug Treatment Versus Imprisonment} 18 (2004). \textit{See also} Cassia Spohn & David Holleran, \textit{The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders}, 40 Criminology 329, 350–51 (2002) ("[W]e found compelling evidence that offenders who were sentenced to prison had higher rates of recidivism and recidivated more quickly than offenders placed on probation. Consistent with the conclusions of McGuire and Priestly (1995), our findings suggest that punitive measures like incarceration 'have a net destructive effect, in that they serve primarily to worsen rates of recidivism.'").

\textsuperscript{49} Austin et al., supra note 10, at 1.

\textsuperscript{50} \textit{Id.} at 4 ("For the same crimes, American prisoners receive sentences twice as long as English prisoners, three times as long as Canadian prisoners, four times as long as Dutch prisoners, five to 10 times as long as French prisoners, and five times as long as Swedish prisoners.").

\textsuperscript{51} \textit{Id.} at 15.
have any hope of reversing the imprisonment binge is to reduce the severity of the sentences [criminal defendants] are given.\textsuperscript{52}

The drug court movement reduces the need for this kind of reform to some extent, for it provides relief from incarceration for at least some drug offenders. But it provides no such relief for a much larger number (the two-thirds who flunk drug court, the 20% who recidivate within two years of graduation, and the many who are not eligible to participate) and leaves this number subject to the very harsh penalties of existing drug laws. The number of drug offenders in the state’s inmate population has continued to grow by leaps and bounds since the start of Kentucky’s drug court,\textsuperscript{53} leaving no doubt that a more “powerful reform” of drug laws will be needed for reversal of this important part of Kentucky’s “imprisonment binge.”\textsuperscript{54}

II. A Sketch of the Drug Laws

A. Introduction

Since the early 1970s, the Kentucky General Assembly has given the state’s drug laws the same kind of attention it has given to the rest of the state’s criminal laws, plenty of ad hoc legislation sponsored by tough-on-crime advocates and enacted under a belief that harsh punishment is the right answer (and the only answer) to the drug problem. Lawmakers have delivered to crime fighters most of the sentencing weapons requested and in so doing have created a hodgepodge of broad, overlapping, and sometimes senseless crimes. The end product is a set of laws that are brutally harsh, destined to produce lengthy imprisonments for large numbers of people who pose very little risk to others, and come together to form a very powerful engine for prison growth.

B. The Foundation

The state’s drug laws have roots that go back to the 1972 enactment described above and beyond that to a model statute known as the Uniform Controlled Substances Act that came into existence in 1970 and underpins the drug laws of most states.\textsuperscript{55} The 1972 General Assembly borrowed from

\textsuperscript{52} Id. at 23.

\textsuperscript{53} See charts infra pp. 260–61.

\textsuperscript{54} Id.

\textsuperscript{55} Compare Kentucky Controlled Substances Act of 1972, ch. 226, 1972 Ky. Acts 938, with UNIF. CONTROLLED SUBSTANCES ACT §§ 101–710, 9 U.L.A. 13 (1994). The Uniform Controlled Substances Act was adopted in 1970 by the National Conference of Commissioners of Uniform State Laws. It was last modified in 1994 but is still the foundation for the drug laws of most states.
the model statute most of what then constituted the foundation of the state’s criminal law on drugs: (1) an identification of the drugs that bring the criminal law into play, (2) a classification of these drugs in accordance with their potential for abuse (“Schedules”), and (3) provisions defining criminal law prohibitions against the sale and use of such drugs (so-called basic drug crimes) and fixing penalties for violations. The 2009 drug laws rest on the same foundation (and a more recent model still called the Uniform Controlled Substances Act).

The existing statutes list all drugs that are subject to criminal penalties, rank them against each other according to their potential for abuse, and use this ranking to create five schedules that are then used to define crimes and set penalty ranges. Schedules I and II are filled with drugs having “high potential for abuse,” Schedule III consists of drugs having less “potential for abuse,” and Schedules IV and V include drugs having a “low potential for abuse.” Schedules I and II contain the drugs that are most likely to be abused (heroin, cocaine, amphetamine, methamphetamine, morphine, and marijuana), most likely to produce criminal prosecutions, and most likely to produce lengthy periods of imprisonment.

The existing statutes create two sets of basic drug crimes: one that is aimed at the sale or distribution of drugs, and one that is aimed at drug users. The first set includes three degrees of trafficking in controlled substances (the highest degree for Schedule I and II narcotic drugs, the next highest for Schedule I and II non–narcotic drugs and Schedule III drugs, and the lowest for Schedules IV and V drugs) and a special trafficking offense for marijuana. The sentencing regime for these and other drug offenses is identical to the regime that governs offenses defined in the Penal Code (a penalty range for each offense and authority to sentence a defendant to any penalty within that range); ordinary penalties for trafficking crimes (unenhanced as discussed below) are substantial at the highest level (five to ten years for first degree), moderate at the lowest level (a maximum of twelve months in jail for third degree), and generally in line with the penalties for other types of crime.

The legislature has done much the same in its creation of crimes aimed

56 See Kentucky Controlled Substances Act.
57 Ky. REV. STAT. ANN. §§ 218A.040, .060 (LexisNexis 2007).
58 Id. § 218A.080.
59 Id. §§ 218A.100, .120.
60 Id. §§ 218A.050, .070.
61 Id. §§ 218A.1415, .1416, .1421, .1422.
62 Id. §§ 218A.1412–.1414.
63 Id. § 218A.1421.
64 Ky. REV. STAT. ANN. § 532.060 (LexisNexis 2008).
65 See id.
66 See id. § 532.090.
at drug users. The statutes define three degrees of possession of controlled substances and then define a special possession offense for marijuana. They impose felony penalties (one to five years in prison) on only the most serious of these offenses (committed by possession of narcotic drugs from Schedules I and II) and punish the rest as high-level misdemeanors (maximum penalty of twelve months in jail). The penalties for possession (unenhanced) are lower across the board than the penalties for trafficking (unenhanced) and, if left alone, would send more inmates to jail than to prison and would send them to jail for short stays (no more than one year). Not many have been left alone.

C. Bulking Up the Foundation

1. Introduction.— The drug law foundation described above was put in place in the early 1970s when the state of Kentucky had about 3000 inmates and no addiction to incarceration. It is unimaginable that the “trafficking” and “possession” crimes of this time (and described above) could have produced an inmate population capable of filling several prisons for men and one for women. But this we can never know, for the state has spent much of the last thirty-five years building stronger weapons for use against drug offenders and a vastly different landscape for drug prosecutions. It has done a wide variety of things to extend the already long arms of the drug laws, and in so doing has virtually guaranteed an explosive growth of the state’s inmate population.

2. Extended Coverage.— “Trafficking” and “possession” reach far enough into the pool of illegal drug activities to ensnare manufacturers, wholesalers, retailers, possessors, users, and accomplices (or, to put it differently, to blanket the entire pool). But in pursuit of harsher punishments for certain types of traffickers and possessors, drug enforcers have sought and obtained special crimes to supplement the “moderate” punitive punch of the basic coverage drug crimes. Longer prison terms and more inmates for state incarceration (and very significant contributions to the state’s inmate explosion) are traceable to these crimes, sometimes well in excess of what might have been anticipated by lawmakers.

The offenses of selling drugs to a minor and trafficking in drugs within 1000 yards of a school are very good examples of such crimes. The first

68 Id. § 218A.1422.
69 See id.; see also id. §§ 218A.1415–.1417.
70 Lawson, supra note 17, at 325.
72 Id. § 218A.1411.
one prohibits a sale or transfer of drugs to a minor by an adult (to one under eighteen by one over eighteen), conduct covered by the basic trafficking crimes described above and punished severely for the most abusive drugs (as a Class C felony), moderately for less abusive drugs (a Class D felony), and lightly for the least abusive drugs (a Class A misdemeanor).\textsuperscript{73} The special offense is punished severely without regard to the type of drug involved in the transaction (as a Class C felony),\textsuperscript{74} thus it generates longer prison terms for offenders who sell or transfer moderately abusive drugs to minors, and it generates more inmates for state incarceration by converting misdemeanor penalties (twelve months in jail) into Class C felony penalties (five to ten years in prison) for offenders who sell the least abusive drugs to minors (including any amount of marijuana).\textsuperscript{75} In other words, it has the capability of enhancing punishments ten-fold for certain offenders, from a maximum of twelve months in jail to a minimum of five years and a maximum of ten years in prison, numbers that are capable of filling prison beds rapidly.

The offense of trafficking in drugs within 1000 yards of a school is a close cousin to selling drugs to a minor, aimed at the same objective (protecting children from drug sellers) and enacted into law in the same piece of legislation.\textsuperscript{76} Like its cousin, it duplicates coverage of the basic trafficking crimes and is significant because of its impact on punishment (some of which is obvious and anticipated and some of which is probably not). It criminalizes drug sales and transfers and possessions with intent to sell or transfer ("trafficking"), creates but one offense for all controlled substances (making no distinction between highly abusive and lowly abusive drugs), and classifies it as a Class D felony (one to five years in prison) unless it would be punished at a higher level by the basic trafficking offenses.\textsuperscript{77} Its effect, obvious and anticipated, is to convert conduct that would ordinarily be punished as misdemeanor crimes (third degree trafficking and trafficking in small amounts of marijuana) into felony crimes, sending offenders to prison for long terms rather than sending them to jail for short terms.

In providing this weapon, lawmakers must surely have been thinking about drug dealers peddling drugs to school children (for they named it "trafficking in or near a school"). But look at what they did in defining the offense:

1. It covers persons transferring drugs to fifty-year-old drug addicts having no connections to a school.
2. It covers illegal drug activities that occur within 1000 yards (or ten

\textsuperscript{73} See supra notes 62--66 and accompanying text.
\textsuperscript{74} § 218A.1422.
\textsuperscript{75} Id.
\textsuperscript{77} § 218A.1411.
football fields or ten city blocks) of a school or, to put it realistically, that occur anywhere inside the city limits of Lexington, Louisville, Covington, Owensboro, etc.

3. It covers not just drug peddlers but also persons found in possession of drugs within 1000 yards (or within ten city blocks) of a school and subject to an accusation that they have intent to transfer them to somebody (perhaps a fifty-year-old addict having no connection to a school) at some point in the future.

4. It can be used in conjunction with its "cousin" (selling drugs to a minor) to obtain two felony convictions (and two separate punishments) for a single act of selling or giving low-level drugs or small amounts of marijuana to a minor within ten city blocks of a school.78

Lawmakers almost surely did not mean to open the door to these expansive uses (or exploitation) of the offense and to elevated punishments for offenders having very little, if any, resemblance to persons peddling drugs on school grounds. But they did open that door and, as discussed in Part IV, drug law enforcers have entered.

Some of the special crimes in the drug laws seem to serve almost no purpose other than the enhancement of punishment for drug offenders. The offense called theft of a controlled substance79 is an example. It is defined exactly as the general offense of theft is defined (unlawful taking of another's property with an intent to steal 80) except that it requires a taking of controlled substances, meaning that any person committing the special crime would simultaneously commit general theft. Without the special crime, such a taking could be prosecuted as theft and punished as thefts are punished (as a Class D felony if the property was worth $500 and a Class A misdemeanor if worth less than $500);81 with the special offense, the taking is prosecuted as theft of a controlled substance and punished as a Class D felony no matter what it was worth and as a Class C felony if found to be worth $300 or more.82 Did lawmakers see a need for greater protection of the property interests of illegal drug possessors (the reason for theft offenses) or did they find in the theft an excuse for greater punishment of drug possessors?

In all cases in which this offense is committed (by taking another's property), the offender commits the offense of illegal drug possession. If prosecuted as a possession crime, the taker would be punished as a Class D felon if he had in his possession the most abusive of all illegal drugs

78 See the “Double Counting” discussion in this subpart of the Article, infra notes 116-131 and accompanying text.


81 Id.

82 § 218A.1418.
(narcotics from Schedules I and II and some others)\(^3\) and as a Class A misdemeanor if he had in his possession less abusive substances (from Schedules I through V).\(^4\) If prosecuted as theft, the taker would be subject to the same punishment in a few instances (for a taking of less than $500 worth of the most abusive drugs) but to significantly greater punishment in most instances; in some cases, Class D felonies would convert into Class C felonies (for a taking of $300 worth of the most abusive drugs), while in others Class A misdemeanors would convert into Class D felonies (producing longer sentences and time in prison rather than jail for possessors of low-level drugs and small amounts of marijuana). And there is some extra enhancement of punishment probably not anticipated by lawmakers, resulting from the fact that a single act of unlawful taking of an illegal drug would simultaneously support two convictions and two sentences (one for theft of the drug and one for possession of the same drug).\(^5\)

The list of special drug crimes extends beyond these three to include all of the following: theft of anhydrous ammonia (a substance used in methamphetamine),\(^6\) knowingly receiving stolen anhydrous ammonia,\(^7\) forgery of a prescription,\(^8\) possession of a forged prescription,\(^9\) theft of a prescription blank,\(^10\) criminal conspiracy to traffic in a controlled substance,\(^11\) and controlled substance endangerment to a child.\(^12\) They duplicate crimes that are generally defined in the penal code,\(^13\) overlap the drug crime of possession in some instances,\(^14\) and appear to exist mostly if not solely for enhancement of punishment for persons involved in illegal drug activities. Like the three situations described earlier, they produce longer sentences

\(^{83}\) See id. § 218A.1415.

\(^{84}\) See id. §§ 218A.1416, 1417, 1422.

\(^{85}\) See the “Double Counting” discussion in this subpart of the Article, infra notes 116–131 and accompanying text.


\(^{87}\) Id. § 514.110(3)(b), amended by Act of Mar. 27, 2009, ch. 106, § 13, 2009 Ky. Acts 1177, 1182–83 (renumbering subsection (3)(b) as (3)(d)).


\(^{89}\) Id. § 218A.284.

\(^{90}\) Id. § 218A.286.

\(^{91}\) Id. § 218A.1402.

\(^{92}\) Id. §§ 218A.1441–1444.

\(^{93}\) For example, the crimes of forgery of a prescription and possession of a forged prescription are carbon copies of the crime of forgery in the third degree and criminal possession of forged instruments in the third degree. Compare § 218A.282, and § 218A.284, with Ky. Rev. Stat. Ann. § 516.040 (LexisNexis 2008), and id. § 516.070.

for some offenders, prison rather than jail for others, and unquantifiable but undeniable increases in the state's inmate population.

D. Multiplying Punishments

1. *Repeat Offenders.*— If there existed no repeat offender laws applicable to drug offenders, a defendant standing convicted of possession of cocaine (or some other highly abusive drug) would be subjected to the penalties imposed by the state's penal code on Class D felons; a sentencing authority (jury or judge) would work from the penalty range for Class D felonies (one to five years) in sentencing the defendant to a fixed term of years within the range (e.g., two years), and the defendant would be committed to prison to serve that term (unless earlier released by action of parole authorities).

Similarly, a defendant standing convicted of trafficking in small amounts of marijuana (or possession of some lowly abusive drug other than marijuana) would be subject to penalties imposed by the penal code on Class A misdemeanants; a sentencing authority would work from the penalty range for these offenses (maximum of twelve months in jail) in sentencing the defendant to a fixed term within the range (e.g., six months), and the defendant would be committed to jail to serve that sentence. In these scenarios and all others involving drug offenders, the penal code's use of penalty ranges provides room for the imposition of greater punishment on repeat offenders (e.g., five years for the possessor of cocaine and twelve months in jail for the trafficker in small amounts of marijuana), without assistance from special repeat offender laws that now dominate the state's drug statutes.

Both of the crimes described above (possession of cocaine and trafficking in small amounts of marijuana) are subject to a special repeat offender law (covering anyone convicted of a "second or subsequent [drug] offense"), the effect of which is to push the convicted defendant into a higher penalty range for purposes of sentencing. Upon a second conviction, the possessor of cocaine is subject to the penalties imposed by the penal code on Class C felons (five to ten years), meaning that his sentencing authority would have to give him five years in prison and could give him as many as ten.

And the convicted trafficker in small amounts of marijuana is subject to the penalties imposed by the penal code on Class D felons (one to five years in prison), meaning that he is headed for prison rather than jail and

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96 Id. § 532.090(1).
97 Ky. Rev. Stat. Ann. § 218A.010(35) (LexisNexis 2007) (liberally defining a prior conviction for purposes of drug laws as any conviction "under this chapter, or under any statute of the United States, or of any state relating to substances classified as controlled substances").
99 § 532.060(2)(d).
potentially for a period that could be five times as long as the maximum penalty that could have been imposed on him as a first time drug offender. And the punishment enhancements for these hypothetical offenders are very much the rule rather than the exception under Kentucky law, for the General Assembly has attached repeat offender provisions like these to virtually all of its drug crimes, even those that exist for no purpose other than enhancement of punishment (e.g., selling drugs to a minor). The end result is a very substantial contribution to the size and growth of the state’s inmate population, some by producing longer sentences and some by converting misdemeanors into felonies.

2. Double Enhancements.— The state’s drug statutes, sometimes alone and sometimes in conjunction with other laws, authorize or tolerate the practice of enhancing already enhanced punishments. One of the most important of such enhancements, and probably the most indefensible, flows from the combined effect of the state’s persistent felony offender (PFO) law and the “two-strikes” provisions of the drug statutes. When put together, the two laws totally destroy the principle of proportional punishment (“an eye for an eye and a tooth for a tooth”) and send drug offenders to prison for periods that used to be reserved for society’s worst actors. They do so as described below.

As stated above, a convicted possessor of cocaine (or some other highly abusive drug) is ordinarily punished as a Class D felon (a term of not less than one nor more than five years in prison) and a convicted trafficker in small amounts of marijuana is punished as a Class A misdemeanant (jail confinement for no more than twelve months). As also stated above, with an earlier drug conviction, the cocaine possessor is punished as a Class C felon (not less than five nor more than ten years) and the trafficker in small amounts of marijuana is punished as a Class D felon (not less than one nor more than five years). Should the defendants have on their records a felony conviction not used for the first enhancement (such as theft, forgery, knowingly receiving stolen property, etc.), they face the possibility of prosecution under the persistent felony offender law and a second enhancement of their punishments: the convicted cocaine possessor would now be punishable as a Class B felon (not less than ten nor more than twenty years in prison) and the small-amount marijuana trafficker would be punishable as a Class C felon (not less than five nor more than

101 § 532.060(2)(d).
103 § 532.060(2)(c).
104 § 532.060(2)(d).
Although the “two–strikes” laws of the drug statutes are exact duplicates of the “two–strikes” provision of the persistent felony offender law, the Kentucky Supreme Court ruled in 1985 that the two can be used independently to enhance punishments. Through inaction, the General Assembly has put its seal of approval on that decision and also on one approving the use of the two statutes where the defendant’s prior convictions were both for drug crimes (with one enhancing under the “two–strikes” drug law and the other enhancing under the persistent felony offender law).

A more extensive form of double enhancement is hidden in some of the special crimes enacted during the “war on drugs” in an attempt to provide for tougher penalties on targeted groups of traffickers and possessors. For example, if a person sells a lowly abusive drug (from Schedule IV or V) to a minor, he commits the offense of selling drugs to a minor and is subjected to the penalties imposed on Class C felons (five to ten years in prison); if he had sold this drug to an adult, he would have committed third degree trafficking and would have been punished as a Class A misdemeanor (maximum of twelve months in jail), showing that sellers to minors suffer a major enhancement of punishment as a targeted group of drug traffickers. And, should he commit this offense after a prior drug conviction, he finds himself facing a second enhancement and a penalty range that is reserved for Class B felons (ten to twenty years in prison), a result that produces a sentence that is at least ten times and maybe as much as twenty times the maximum punishment that could have been imposed without the enhancements. Significant growth in the inmate population is an inevitable consequence of multiple enhancements like this one, and selling drugs to a minor is not the only special drug offense with this characteristic.

Then, on top of this, adding enhancement to enhancement, is a statute that pushes penalty ranges for all drug crimes one level higher for all offenders who possess firearms during the commission of drug offenses. Should our seller to a minor have both an earlier drug conviction (qualifying him for a ten to twenty year sentence) and possession of a gun...
when concluding the sale, he moves into the penalty range reserved for
Class A felons and is subject to imprisonment for not less than twenty nor
more than fifty years, or life imprisonment. The firearm enhancement
provision extends to all drug offenders (and especially to all traffickers and
possessors), allows for the enhancement of multiple offenses committed
during a single course of conduct (e.g., possession of cocaine, possession
of marijuana, and possession of some drug paraphernalia, plus possession of a
single firearm), and to an unquantifiable extent adds significantly to the
high percentage of drug offenders in the state’s inmate population.

3. Double Counting.— In a number of areas, the state’s case law facilitates
aggressive prosecution and punishment of drug offenders and earns some
credit for filling the state’s prisons and jails to capacity and beyond. As
explained above, the case law permits duplicate “two-strikes” laws to be
used to doubly enhance punishment of drug offenders, allows possession
of a gun to be used over and over to enhance punishment, and drops
very few if any obstacles to the use of punishment enhancements in drug
prosecutions. Beyond the enhancement area, there is a long list of decisions
that tilt unfavorably to the defense in drug cases, none more important
than those that authorize the prosecution to obtain multiple convictions
and punishments from a single act, episode, or course of criminal conduct
(known in some circles as “double counting”).

At one time, the state’s law was relatively unreceptive to “double
counting,” deploying a “single impulse” test to measure the extent of a
defendant’s criminality from a single course of criminal conduct. The
controlling authority for this test was Ingram v. Commonwealth, a drug case
in which the Kentucky Supreme Court was presented with the question of
whether a defendant who had made a single drug sale could be convicted
of both selling drugs to a minor and trafficking within 1000 yards of a school

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114 KY. REV. STAT. ANN. § 532.060(2)(a) (LexisNexis 2008).
117 See Adams, 931 S.W.2d at 468.
118 An important example of such case law is a set of decisions describing the proof re-
quirements for an illegal possession prosecution (the most common of all drug prosecutions):
these decisions allow conviction without proof that the defendant had enough drugs for either
personal use or for transfer to another for personal use (requiring no more than a “trace” or
“residue” of the controlled substance). See, e.g., Commonwealth v. Shively, 814 S.W.2d 572,
574 (Ky. 1991) (presence of cocaine residue in test tube is sufficient to support a possession
charge); Bolen v. Commonwealth, 31 S.W.3d 907, 909 (Ky. 2000) (not even a “measurable
amount” is required).
119 See, e.g., Timothy Cone, Double Jeopardy, Post-Blakely, 41 AM. CRIM. L. REV. 1373,
1383–84 (2004); Jacqueline E. Ross, Damned Under Many Headings: The Problem of Multiple
120 Ingram v. Commonwealth, 801 S.W.2d 321, 321 (Ky. 1990).
(where evidence of the sale proved all of the elements of both crimes). "[A] single impulse [or] a single act," said the court, cannot be used to obtain dual convictions even if the defendant's behavior "was offensive to two criminal statutes." Needless to say, while it lasted, Ingram imposed a significant limitation on the power of the prosecution to break conduct into pieces in pursuit of harsh punishments. It was overruled in 1996.

In Commonwealth v. Burge, the Kentucky Supreme Court replaced the "single impulse" test with one that leaves the prosecution with substantially more room to lengthen punishments by carving up a single course of conduct into multiple crimes. Borrowing from a well-known federal case, the court held that a defendant can be convicted of multiple crimes from one course of conduct, so long as each crime has an element the other does not have. Judged by this standard, the convictions of Ingram would have survived the challenge, for each of the two crimes in question (selling drugs to a minor and trafficking within 1000 yards of a school) had an element the other did not have. This outcome illustrates the long reach of Burge and shows the special vulnerability of drug offenders to a "double counting" of crimes.

Even under Ingram, drug offenders were vulnerable to count manipulation, redundant charges, and punishments with little if any relationship to the moral blameworthiness of the conduct for which they were imposed. The following cases were decided by the Kentucky Supreme Court before Burge:

1. Grenke v. Commonwealth; The defendant sold a quantity of cocaine to an undercover police officer for $1100 and about fifteen minutes later, in the same vicinity and at the same meeting, gave the same officer a sample of crack cocaine. He was indicted for trafficking in cocaine (for the sale) and for transferring cocaine (for the gift), was convicted of both offenses, was sentenced to ten years in prison for each offense, and was then ordered to serve the two terms consecutively. In reacting to his complaint about redundant charges, the Kentucky Supreme Court said "the appellant committed two distinct criminal acts, and was for each legitimately subject to prosecution, conviction, and punishment."

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121 Id. at 324.
123 See Blockburger v. United States, 284 U.S. 299, 304 (1932) (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)); see also Morey v. Commonwealth, 108 Mass. 433, 434 (1871) ("A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.").
124 See supra notes 78–83 and accompanying text.
125 Grenke v. Commonwealth, 796 S.W.2d 858, 858 (Ky. 1990).
126 Id. at 859.
2. *Brooks v. Commonwealth:*\(^{127}\) The defendant was found in possession of a quantity of methamphetamine in his home along with "a methamphetamine lab."\(^{128}\) He was prosecuted for manufacturing the drug and for trafficking in the drug (possession with intent to sell), was convicted of both crimes, and was sentenced to thirty years in prison (consecutive terms of twenty years for the first conviction and ten years for the second). His argument that he had committed but one crime fell on deaf ears in both the trial and appeals courts.

3. *Kroth v. Commonwealth:*\(^{129}\) Being in possession of a large quantity of pills in his home, the defendant was prosecuted for trafficking in drugs (through possession with intent to sell). Because the pills were listed on two separate drug law schedules (Schedules III and IV), he was charged with two counts of trafficking for his single act of possession, was convicted of both counts, and got from the convictions two separate sentences to prison (which can be accumulated at the discretion of the judge). The Kentucky Supreme Court was not impressed with his argument that he had committed only one crime, except for dissenting Justice Leibson who expressed serious concern about the great potential for use and abuse of such decisions as this:

> Once again our Court has opted for an unduly harsh interpretation of the double jeopardy principle. We should resist, rather than assist, prosecutorial efforts to break up a single criminal transaction into as many different crimes as possible, thus imposing a greater punishment than would be otherwise authorized.

\[\ldots\]

\[\ldots\text{Simply because this single trafficking offense involved two different types of pills, the appellant has been found guilty of two separate violations of KRS 218A.140, which makes it a crime to "traffic in any controlled substance." It would be equally sensible to break this single criminal transaction into 3,765 offenses because a total of 3,765 pills were recovered.}\(^{130}\)

Perhaps in his last statement Justice Leibson exaggerates the threat to defendants from redundant charges. But there is in his observation a pointed reminder that limitations on punishment ought to rest in the law

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\(^{127}\) *Brooks v. Commonwealth,* 217 S.W.3d 219, 221, 223 (Ky. 2007).

\(^{128}\) *Id.* at 221.

\(^{129}\) *Kroth v. Commonwealth,* 737 S.W.2d 680, 680–81 (Ky. 1987).

\(^{130}\) *Id.* at 682 (Leibson, J., dissenting).
and not in the hands of the prosecution.

Under the authority of these cases and others, a defendant who sells drugs to the same undercover agent seven times in a day (or seven times in a week) can be charged with and convicted of seven counts of trafficking, a defendant found in possession of marijuana plants can be convicted of both cultivating marijuana and trafficking in marijuana, and a defendant found with a small quantity of marijuana, a residue of cocaine, a Xanax pill, and a cocaine pipe can be convicted of four possession crimes for his single act of possession. In these situations, the defendant is at the mercy of the trial court as to whether he will serve concurrent or consecutive terms in prison for his convictions. Punishments pile up in these situations, proportionality between punishment and moral blameworthiness gets lost in the shuffle, society gets more punishment than it needs, offenders who pose very little if any threat to public safety get very long prison terms, and the state’s overcrowded and underfunded correctional facilities get more pressure.

E. Conclusion

The objective in this part of the Article has been to show that the state’s drug laws are an unqualified “mess” (even more so than the state’s broader penal code). They have earned this label through about thirty-five years of tough-on-crime advocacy and a pattern of lawmaking that is anything but extraordinary in the criminal law area:

[T]he legal rules that define crimes and sentences tend to err on the harsh side – not because of anyone’s ideological stance, but because of the way the lawmaking process works. . . . Every generation has its high-profile crime stories and media frenzies, which leave behind a trail of new criminal prohibitions. Some of those prohibitions are good ideas; others aren’t. All of them – the bad ideas as well as the good ones – tend to remain in place, permanently.\footnote{132 William J. Stuntz, \textit{Plea Bargaining and Criminal Law's Disappearing Shadow}, 117 \textit{Harv. L. Rev.} 2548, 2558 (2004).}

The “crime stories” in the drug arena have been general rather than specific (“marijuana is a gateway drug,” \footnote{133 \textit{See Peter J. Cohen, \textit{Drugs, Addiction, and the Law: Policy, Politics, and Public}}...
the earth,"134 and "methamphetamine use has reached epidemic levels"135), but they have had familiar effects — very few good ideas, lots of bad ones, and drug violation penalties that make a total mockery of our promise of "just and appropriately preventive punishments."136

Lawmakers have grown weary of the costs of incarceration (in all areas, but especially the drug area), are more skeptical of demands for more crime-fighting weaponry than they have been for a long time, and have now heard from an unimpeachable source that Kentucky has an unusually high rate of growth in its inmate population.137 Whether or not these circumstances could open the door to meaningful reform of the state's drug laws remains to be seen, for it is clear that lawmakers have not declared the "war on drugs" a lost cause, have not shelved any of the sentencing weapons used against drug offenders, and have not to any extent drawn back from the tough drug laws described above. But at no point during the last thirty-five years (the "war" period) have they faced a more pressing need to weigh the costs and benefits of incarcerating large numbers of people who pose no real threat to public safety. This reality could perhaps lead to some examination and scrutiny of the drug laws that has not occurred since 1972, if ever, and maybe to some renewed appreciation for what used to be basic moral principles:

Criminal penalties should not cost more than the benefits they achieve or cause individual or social harms which outweigh their crime-controlling effects or other benefits. Punishment should also be efficient. Penalties should not be more severe or more costly than necessary; if the same crime-control and other benefits can be achieved with less severe or less costly


135 See Eric Lichtblau, L.A. Region Still Key Gateway for Drugs, Study Says, L.A. Times, Dec. 16, 1999, at B1 (quoting Drug Czar Barry McCaffrey as stating "[w]e do not just have a national drug problem. What we really have is a series of local drug epidemics"); see also Scotti, supra note 134, at 146–47 (noting the use of the word "epidemic" to describe methamphetamine).


137 Lawson, supra note 27, at 3. In the year 2008, "the Pew Center on the States reported a growth rate for Kentucky's inmate population for year 2007 of 12 percent, the highest in the nation . . . ." Id.
methods, those methods should be preferred.138

III THE DRUG LAWS IN ACTION

A. Introduction

Beyond the fact that they have produced a large population of inmates, little is known about the manner in which the drug laws described above are applied in the state’s courtrooms. It is obvious that the laws deliver to prosecutors a very wide array of options in the handling of individual cases and subsequently give enormous influence to the prosecution over who is to be incarcerated and for how long. Hoping for a clearer picture of the impact of these laws on the state’s justice system, I conducted field studies of drug prosecutions in the circuit courts of two adjoining counties.

In the first part of the study, I examined all prosecutions that were conducted in the Fayette Circuit Court during the calendar year 2003 (choosing this year so that cases had time to move through the court system to a conclusion). In this evaluation, and in the Scott County evaluation described below, I limited my study to the contents of court files, knowing that in so doing I would get a partial glimpse and not a complete portrait of how the state’s drug laws are being implemented.139 At the conclusion of this effort, I conducted an identical study of criminal prosecutions in Scott Circuit Court except that in this smaller jurisdiction I examined all cases processed over a two-year period (calendar years 2002 and 2003) so that I would have reasonably comparable studies from the two courts. I hoped at the end of the joint study to have a better understanding of how the drug laws and prosecutorial practices under those laws have produced about 5000 inmates for the state’s overcrowded corrections system.140

B. The Fayette Study

1. Introduction.—Grand juries returned approximately 1600 indictments in Fayette County in 2003 (all producing case files reviewed for this study). About 1,400 cases moved through the court system to a final disposition


139 The court files contained enough information to reveal the nature of the criminal conduct under scrutiny, the charges filed against defendants, some of the criminal history of defendants, and the outcome of the prosecutions. Most cases ended in negotiated settlements and guilty pleas, with the court files showing little about this part of the process. See Robert G. Lawson, Summary of 2003 Kentucky Fayette Circuit Court Case Files (unpublished notes, on file with author) [hereinafter Lawson, Fayette Summary].

140 See infra notes 296–99 and accompanying text.
and thus provided helpful information for the study (while the rest were either sent to lower courts or ended without final disposition for one reason or another). Almost twenty-five percent of the total caseload involved the prosecution of drug charges (344 out of 1400), a statistic that may explain why a substantial part of the state's inmate explosion has been credited to the "war on drugs."

2. **Offenders.**— In almost two-thirds of the cases examined for the study, defendants were charged with drug trafficking (212 out of 344), and in slightly more than half of these cases, defendants were convicted of trafficking (110 out of 212), statistics that might seem to suggest a high level involvement of the offender group in the illegal drug business. Upon a closer examination, however, the group looks more like drug abusers and bit players in the drug business than big-time profiteers who stand outside the drug epidemic and exploit for personal gain the misfortune of the abusers.

Less than one-third of the trafficking cases involved a sale or transfer of drugs by defendants, and even in these cases most of the defendants had a history of illegal drug activities and looked more like "mules" than "kingpins." Most of the rest of the trafficking cases were based on accusations that defendants possessed drugs with intent to sell, made easy by the fact that the drug laws say nothing about the quantity of drugs that must be possessed in order to support such a charge and conviction (except for the laws on marijuana). In a few of the possession–with–intent cases, the defendants looked like marginally high–level offenders (not kingpins), but in most cases they looked like users and abusers, as in

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141 Only cases in which drug charges predominated over other charges were included in this calculation; not included were nineteen additional cases in which drug charges appeared to play a minor role in the prosecutions. See Lawson, Fayette Summary, supra note 139.

142 See Robert G. Lawson, Notes on 2003 Kentucky Fayette Circuit Court Case Files (unpublished notes, on file with author) [hereinafter Lawson, Fayette Notes].

143 See Eric L. Sevigny & Jonathan P. Caulkins, *Kingpins or Mules: An Analysis of Drug Offenders Incarcerated in Federal and State Prisons*, 3 CRIMINOLOGY & PUB. POLY 401, 410 (2004) ("Combining data for federal and state inmates, retail sellers (37%) and peripheral role offenders (35%) were particularly likely to have committed their offenses for money to buy drugs or to obtain drugs for their personal use.").

144 Compare Ky. REV. STAT. ANN. §§ 218A.1412–1414 (LexisNexis 2007), with id. § 218A.1421(5).

the following set of illustrative cases:

1. Robert Welch: He was arrested while in possession of cocaine, marijuana, and amphetamine pills and was prosecuted for trafficking, marijuana possession, amphetamine possession, and drug paraphernalia possession. He pleaded guilty to four offenses and was sent to prison for seven years.

2. Cecil Russell: He was approached by police and found to be in possession of crack cocaine, was prosecuted for trafficking in cocaine, was convicted upon a guilty plea, and was sent to prison for five years.

3. Dean Martin: He was stopped in his car under suspicion of drunk driving and was found to be in possession of a small amount of crack cocaine. He was charged with first degree trafficking, driving under the influence, and second degree persistent felony offender. He entered guilty pleas to drug possession, DUI, and second degree PFO, and was sent to prison for seven years.

A very high percentage of all drug offenders in the study looked like this illustrative group and a very high percentage ended up in prison or jail (as described below), some for lengthy periods of incarceration.

3. Enhancements.— It is fair to say that the state’s drug laws are saturated with penalty enhancements, and it is easy to see from the study that they deliver extraordinary power over punishments to the prosecution. The prosecution pursued penalty enhancement in 144 cases (out of the 344 total), not counting enhancements from the special offense of trafficking within 1000 yards of a school (which is separately discussed below). It used the persistent felony offender law in ninety-eight cases, the “two-strikes” provisions of the drug laws in forty-two cases, and gun enhancement in twenty-four cases (with about sixteen of these cases involving a use of more than one of the enhancement provisions of the law).

The persistent felony offender law is a very powerful sentencing weapon that was used heavily and effectively in the drug prosecutions of this study.
The following cases illustrate its operation and effect on punishments:

1. George Henderson:¹⁵¹ He had cocaine in his possession, ran from the police, and attempted to conceal the cocaine. He was charged with trafficking, tampering with evidence, and first degree PFO (with prior convictions for wanton endangerment and trafficking). He was convicted of drug possession and first degree PFO, got four years and an enhancement to ten under the PFO law, and was sent to prison for ten years.

2. Robert Dawson:¹⁵² He was arrested for drunkenness and upon booking was found in possession of one gram of cocaine. He was charged with possession and first degree PFO (prior convictions for possession, bail jumping, and handgun possession by a convicted felon), was convicted of both, got five years for drug possession and an enhancement to twenty under the PFO law, and was sent to prison for twenty years.

3. Raymond Alden Harris:¹⁵³ After arrest for possession of less than a gram of cocaine and a baggy of marijuana, he was charged with cocaine possession, marijuana possession, and second degree PFO (prior conviction for trafficking in marijuana). He pleaded guilty to possession of cocaine and second degree PFO, got one year in prison for cocaine possession and an enhancement to five years under the PFO law, and was sent to prison for five years.

4. Ray Welch:¹⁵⁴ He was stopped for driving under the influence and was found in possession of marijuana and a marijuana pipe. He was charged with trafficking within 1000 yards of a school, drug paraphernalia possession, and first degree PFO (prior felony convictions for DUI). He pleaded guilty to marijuana trafficking, possession of paraphernalia, and first degree PFO, got one year for the drug crimes, had this term enhanced to ten years for the PFO conviction, and was sent to prison for ten years.

5. Jose Crooks:¹⁵⁵ He was arrested for public intoxication, was found to be in possession of cocaine and marijuana, was prosecuted for cocaine trafficking, marijuana possession, and first degree PFO (prior trafficking convictions), was convicted of all charges, was sentenced to seven years for the drug crimes, got an enhanced sentence of fifteen years under the PFO law, and was sent to prison for fifteen years.

6. Wuan Carlos Jones: Police went to the scene of a disturbance and upon arrival found a bag of crack cocaine lying on the ground near where the defendant stood. He was charged with trafficking, possession of paraphernalia, and first degree PFO (because of two prior drug convictions). He pleaded to possession of cocaine, possession of paraphernalia, and first degree PFO, got five years for the drug crimes and an enhancement to ten years for the PFO charge, and was sent to prison for ten years.

7. Adrian Richardson: He ran from the police while in possession of a plastic bag containing a small amount of cocaine. He was charged with trafficking, resisting arrest, fleeing from police, possession of drug paraphernalia, and first degree PFO (based on prior convictions for drug possession). He pleaded guilty to cocaine possession and second degree PFO, got five years for the drug offense and an enhancement to ten under the PFO law, flunked out of drug court, and was sent to prison for ten years.

8. Shannon Oxner: He was arrested for a violation of parole, was found in possession of one gram of cocaine, was charged with cocaine possession and first degree PFO, pleaded guilty to both charges, got one year for the possession crime and an enhancement to ten under the PFO law. For possession of the gram of cocaine he was sent to prison for ten years.

The PFO law is meant to produce disproportionate punishment and certainly accomplishes that objective in drug cases, delivering in routine fashion penalties that are five to ten times higher than normal. And it makes such enhancements possible in a very high percentage of cases in which it is employed, shown by the fact that PFO convictions (and accompanying enhancement) occurred in about three-fourths of the cases (seventy-two out of ninety-eight) in which a PFO enhancement was sought. In most cases, it is fair to conclude that there is no defense to PFO charges once a defendant is found guilty of his or her most recent offense for which enhanced punishment is sought.

In many of the PFO cases in the study, the prosecution used prior drug convictions in pursuit of its enhancement objective, meaning that in these situations it might have pursued penalty enhancement under one of the many repeat offender provisions of the drug laws (rather than the PFO laws of the state’s general penal code). In some instances, it may have used

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159 Lawson, Fayette Notes, supra note 142.
160 The PFO law has a longer reach than the repeat offender provisions of the drug laws,
the PFO law in order to get around an important limitation on the "two-strikes" enhancement under the drug laws\textsuperscript{161} and in others it may have used the PFO law to obtain still greater enhancement of penalties.\textsuperscript{162} In a few cases in the study, the two repeat offender laws were used together (in conjunction with each other) to achieve still greater punishment (through so-called double enhancement), as illustrated by the following cases:

1. \textit{Edward L. West}.\textsuperscript{163} He was stopped for driving on a suspended license with cocaine on his person. He had an earlier drug conviction that was used to enhance this charge from a Class D to a Class C felony and had a prior flagrant nonsupport conviction that was used for a second degree PFO prosecution. Upon guilty pleas, he was sentenced to five years for possession, had this enhanced to ten years under the PFO law, and was sent to prison for ten years.

2. \textit{Paul Taylor}.\textsuperscript{164} He was prosecuted for trafficking in a simulated controlled substance which is normally punished as a misdemeanor offense (maximum of twelve months in jail).\textsuperscript{165} He had one prior drug conviction that enhanced this crime to the felony level (which served to qualify him for PFO prosecution), had a second drug conviction that was used for a second degree PFO charge and conviction, got a one year sentence for the trafficking offense enhanced to five years by the PFO conviction, and was sent to prison for five years.

3. \textit{Kevin Mayes}.\textsuperscript{166} He was apprehended and found to be in possession of small amounts of crack cocaine and marijuana. He was charged with

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allowing for enhancement on the basis of a prior conviction for any felony offense. \textit{See} Ky. Rev. Stat. Ann. \textsection 532.080 (LexisNexis 2008). Meanwhile, the repeat offender provisions of the drug laws allow for enhancement on the basis of prior convictions for drug crimes only. \textit{See} Ky. Rev. Stat. Ann. \textsection 218A.010(35) (LexisNexis 2007). In a different respect, the repeat offender provisions of the drug laws have a longer reach, for they sometimes allow for enhancement of misdemeanor crimes on the basis of prior misdemeanor convictions, which is not possible under the PFO law. \textit{See id.} \textsection 218A.1417.

\textsuperscript{161} In defining "second or subsequent offense" for enhancement purposes, the drug laws prohibit the use of a possession conviction to enhance the penalty for a trafficking offense, obviously because of already-enhanced punishment for the latter. \textit{See} \textsection 218A.010(35).

\textsuperscript{162} The PFO law and the drug laws provide the same kind of penalty enhancement for so-called "two-strike" offenders (those with only one prior conviction). But for drug offenders with more than one prior conviction ("three-strike" offenders), the PFO law authorizes more enhancement in some instances than do the drug laws (partly through a prohibition against parole for ten years for some PFO offenders). \textit{See} Ky. Rev. Stat. Ann. \textsection 532.080(6) (LexisNexis 2008).


\end{footnotesize}
cocaine possession (enhanced from a Class D to a Class C felony by a prior drug conviction), marijuana possession, and second degree PFO (because of a prior burglary conviction). He pleaded guilty to all three charges, had a one year sentence for cocaine possession enhanced to ten years by the second degree PFO conviction, and was sent to prison for ten years.

In a greater number of cases, the repeat offender provisions of the drug laws were used on their own to elevate punishments to higher levels, either by enhancing the classification of felony crimes (from Class D to Class C, for example) or by converting misdemeanor crimes (and penalties of no more than twelve months in jail) into felonies (with penalties of one to five years in prison), such as these:

1. **Otis Ragland III**: He obtained prescription drugs by fraud on three occasions, was prosecuted for obtaining drugs by fraud (three counts), and pleaded guilty to one count of fraud. He had a prior drug conviction that enhanced the crime to which he pleaded guilty from a Class D to a Class C felony. He was sentenced to ten years in prison, flunked out of drug court, and was sent to prison for ten years.

2. **Jeff Powell**: The defendant was apprehended while in possession of a cocaine pipe and was charged with possession of drug paraphernalia (a misdemeanor). He pleaded guilty to this offense and was sentenced as a repeat drug offender to one year in prison. He flunked out of drug court, and was sent to prison for a year.

In the cases described in this and the preceding paragraph, the defendants suffered explicit punishment enhancement as repeat offenders either under the PFO law or the “two–strikes” provisions of the drug laws. In many other cases in which charges were made under these laws, defendants entered guilty pleas without repeat offender findings and accepted punishments that were oftentimes affected to some extent by the dismissed repeat offender charges (adding to the total effect of these laws on punishment of drug offenders).

As stated above, the study included twenty–four cases in which gun possession by the drug offender was used in pursuit of greater punishment. The law provides for enhancement when a gun is possessed “at the time of the commission of the offense and in furtherance of the offense,” and if applicable, the law qualifies defendants for punishments at one level above

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Most if not all of the gun enhancement cases of the study looked very much like the illustrative cases that are set out below:

1. *Anita Renfro.* She had marijuana (more than eight ounces), Xanax pills, and a gun in her residence. She was charged with marijuana trafficking (elevated from D to C felony because of the gun) and Xanax trafficking (elevated from misdemeanor to felony because of the gun), entered guilty pleas to both charges, and was sentenced to consecutive terms of one and five years in prison. After a period of failed probation, she was sent to prison for six years.

2. *Anthony Jackson.* He possessed a gun and 9.4 grams of crack cocaine in his pickup truck. He was charged with cocaine trafficking (elevated by the gun), pleaded guilty to cocaine possession (elevated by the gun), and was sent to prison for five years.

3. *Antwan Bates.* He possessed in his pockets a small bag of cocaine and a gun. He was prosecuted for cocaine possession (with a gun) and for PFO in the second degree (prior assault conviction). He pleaded guilty to both charges, received five years for possession and an enhancement to ten years for the second degree PFO, and was sent to prison for ten years.

4. *Martin Rojas.* The defendant was arrested in a residence located near a day care center. He had in his possession a small quantity of marijuana and a gun, which was found in a trash can. He was charged with trafficking near a school (with a gun), trafficking in marijuana (with a gun), and possession of drug paraphernalia. He entered guilty pleas to trafficking near a school and trafficking in marijuana (with a gun), was given a one–year term for the first and a five–year term for the second, and was sent to prison for five years.

There was a form of “double counting” in the gun enhancement cases of the study, i.e., the use of one gun to elevate more than one crime, both in formulating charges, as in *Rojas,* and in rendering convictions, as in *Renfro.*

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171 For example, a Class D felony (one to five years) is elevated by gun possession to a Class C felony (five to ten years), and misdemeanors (maximum of twelve months in jail) are elevated to Class D felonies (one to five years). See id. § 218A.992(1).
176 Although the statute does not authorize such practices, a decision of the Kentucky Court of Appeals does. Adams v. Commonwealth, 931 S.W.2d 465, 468 (Ky. Ct. App. 1996). The Kentucky Supreme Court has yet to render a decision on the subject. See *Rojas,* No.
Additionally, there was some double enhancement of punishment in the cases, i.e., from use of the gun enhancement provision in combination with one of the repeat offender laws, as in *Bates.* More importantly, in every single gun enhancement case of the study, there was a total absence of proof that the gun was involved in any fashion in the commission of the drug crime. In every case, gun possession appeared to be a mere coincidence of the defendant's drug offense and was treated more like an "excuse" than a "reason" for harsher punishment of drug offenders.  

4. *Trafficking Near a School.*— This special drug offense is in the nature of a punishment enhancement, i.e., it provides the basis for an extra conviction from a single event ("double counting"). It also works to elevate misdemeanor offenses (like trafficking in marijuana or other low-level drugs) to felonies.  

As discussed above, the offense has a reach that extends far beyond its most legitimate rationale (protecting children from illegal drug activities) and may lead to highly questionable, if not abusive, prosecutions. It gives the police and prosecution a very usable weapon (because it extends to virtually all illegal drug activities that occur within 1000 yards, or ten city blocks, of a school), and in almost any aggressive fight against illegal drugs, it is likely to get heavy use, as it did in Fayette County in 2003. Over 12% of all drug prosecutions during this period (forty-two out of 344 cases) involved the offense of drug trafficking within 1000 yards of a school, enough to suggest that illegal drug dealers had local schools under siege.  

Looking beyond the numbers in this set of cases, one finds an absolutely remarkable similarity in the drug activities used in support of the prosecutions, with not even a hint of danger to schools or schoolchildren.

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177 The statute does not authorize nor prohibit such practices, and neither of the state’s appeals courts has spoken on the issue (although the state’s case law has generally been receptive to double enhancements). Ky. Rev. Stat. Ann. § 218A.992 (LexisNexis 2007). See *Bates,* No. 03–CR–00995.  

178 In 2003 (the year of the study), the gun enhancement statute required only that a gun be possessed during commission of the drug offense. The Kentucky Supreme Court had by this time said that there had to be a "nexus" between possession of the gun and commission of the drug offense in order for enhancement to be appropriate, Commonwealth v. Montague, 23 S.W.3d 629, 632 (Ky. 2000), but had also said that there could be enhancement ("nexus") if the gun and illegal drugs were found in the immediate control of a defendant. Johnson v. Commonwealth, 105 S.W.3d 430, 436–37 (Ky. 2003). In 2005 (subsequent to the study), the General Assembly amended the statute to require that a defendant must possess the gun "in furtherance of the offense." Act of Mar. 18, 2005, ch. 150, § 12, 2005 Ky. Acts 1354, 1362. Whether or not this addition will make it harder to use the statute for penalty enhancement remains to be seen, for it is not clear that the new language adds much to the "nexus" requirement imposed by the case law described in this footnote.  

179 See supra notes 76–78 and accompanying text.  

180 Lawson, Fayette Notes, supra note 142.
The following cases are illustrative of the whole group:

1. Chazaray Mefford: He was stopped in a vehicle near the location of a school, possessed a small amount of marijuana and drug paraphernalia, was charged with trafficking near a school, possession of paraphernalia, and an unlawful transaction with a minor. He pleaded guilty to all charges, got one year for the trafficking offense, twelve months (concurrent) for the paraphernalia, and one year (consecutive) for the unlawful transaction with a minor. He was sent to prison for two years.

2. John Hayden: He was stopped for reckless driving and was found to be in possession of marijuana and a gun. He was charged with trafficking near a school, carrying a concealed weapon, and reckless driving, pleaded guilty to all charges, and after revocation of probation was sent to prison for one year and thirty days.

3. David Caudill: He possessed marijuana (fifty-five cigarettes) in his home (which happened by chance to be located within 1000 yards of a school). He was charged with trafficking near a school, pleaded guilty to the charge, and after revocation of probation was sent to prison for one year.

4. Maurice Williams: He was arrested for public intoxication upon leaving a bar located within 1000 yards of a school, had marijuana on his person, was charged with trafficking near a school and public intoxication, pleaded guilty as charged, and was sent to prison for one year.

5. Michael Bishop: He had a single marijuana plant growing inside his residence which was located near a school. He was prosecuted for trafficking near a school, cultivating less than five marijuana plants, and possession of paraphernalia. He pleaded guilty to all charges, got one year in prison for the first offense and twelve months for each of the other two, and after a period of probation was sent to prison for a year.

In only two of the forty-two cases was the “trafficking” charge based upon an actual sale of drugs. In all the others, the charge was grounded in the possession of drugs “with intent to sell” (and in many instances with intent to sell what was a very small quantity of drugs). None of the forty-two cases involved a sale of drugs to schoolchildren or a sale on school...
grounds. Furthermore, in none of the forty-two cases was there possession of drugs on school grounds or in the general vicinity of schoolchildren. In an extraordinarily high percentage of the cases involving this charge, the conduct of the defendants was identical to the conduct of the defendants in the illustrative cases: namely, illegal drug possession in a vehicle that happened by chance to be stopped by police within 1000 yards of a school or illegal drug possession in a residence that happened to be located within 1000 yards of a school. In virtually every case, the fact that the conduct occurred within 1000 yards of a school was nothing more than a coincidence of the defendant's offense and, once again, much more of an "excuse" than a "reason" for the harsher punishment of defendants.

5. Double Counting.— This label is used by scholars to describe the practice of separating a defendant's conduct into segments in order to prosecute for multiple crimes. Double counting has undoubtedly played a role in the growth of inmate populations, is especially prominent in drug prosecutions, and is easily the most common characteristic of the 344 cases of the Fayette study (with very few cases involving single-offense prosecutions). It is liberally allowed by the law (especially in drug prosecutions) and is used at the unbridled discretion of the prosecution. In the cases comprising this study, it was clearly used aggressively. The following cases provide examples:

1. Bernadine Jackson: She possessed crack cocaine, marijuana, and drug paraphernalia when she was arrested. She was charged with trafficking in cocaine, marijuana possession, and paraphernalia possession. She pleaded guilty to cocaine possession and paraphernalia possession, and was sent to prison for three years (and twelve months concurrent).

2. Raymond Kidd: He was observed by police sitting in his parked car without lights on and threw cocaine and a pipe under the car as the officer approached. He was prosecuted for possession of cocaine and possession of paraphernalia (second offense), pleaded guilty to both charges, got consecutive terms of one year for each offense, and was sent to prison for two years.

3. Brian Crutchfield: He was sleeping in a vehicle containing 2.5 grams of cocaine and a bag of marijuana, was prosecuted for cocaine trafficking,

186 See Lawson, Fayette Notes, supra note 142.
187 See Cone, supra note 119; see also Ross, supra note 119.
marijuana possession, and drug paraphernalia possession. He pleaded guilty to cocaine possession and marijuana possession, was sentenced to four years (plus ninety days), received probation that was later revoked, and was sent to prison for four years.

4. Nathan Abner. The defendant was found to be cultivating marijuana and at the same time possessing a firearm. On the basis of this event, he was charged with trafficking in marijuana, cultivating marijuana (less than five plants), and possession of marijuana, with his gun possession used to enhance two of the three counts. He entered guilty pleas to all charges and was sent to prison for ten years.

In the Abner case, the prosecution took advantage of both double counting and penalty enhancement, which is permitted by the law and was found to have been used in many of the cases in the study (including some double enhancements). The following cases demonstrate this proposition:

1. Darrell Damons. He was stopped for drunk driving, was found to be in possession of a small amount of cocaine and marijuana (and drug paraphernalia), and was charged with cocaine possession, paraphernalia possession, trafficking in marijuana, and drunk driving. He had a prior possession conviction that was used to elevate the cocaine possession and paraphernalia possession charges and to support a second degree PFO charge. He pleaded guilty to four charges (possession of cocaine, paraphernalia, and marijuana, and drunk driving) and to the second degree PFO charge, was sentenced to five years for the four offenses, and was sent to prison for ten years under the PFO charge.

2. James Wheeler III. He was stopped for having loud music in his vehicle, resisted the officer, tried to conceal cocaine that he possessed at the time, and was found upon arrest to possess marijuana (three grams) and rolling papers. He was charged with cocaine trafficking, tampering with evidence, marijuana trafficking (less than eight ounces), possession of paraphernalia, and first degree PFO (because of prior drug convictions). He pleaded guilty to drug possession, marijuana trafficking, paraphernalia possession, and second degree PFO, got five years (plus twelve months twice) for the drug offenses, and under the PFO law was sentenced to ten years. The sentence was suspended and he was placed on probation for five years.

3. Dudley Bell III: He was apprehended while in possession of cocaine, methadone, hydrocodone, marijuana, and two guns; he was charged with gun possession as a convicted felon (for a prior drug conviction), possession of cocaine (with a gun), possession of methadone (with a gun), possession of hydrocodone (with a gun), possession of marijuana (with a gun), and with second degree PFO for a prior flagrant nonsupport conviction. He pleaded guilty to gun possession (as a felon), possession of drugs (one count), and second degree PFO, was given five years for the possession convictions, had this enhanced to ten years by the PFO law, and was sent to prison for ten years.

The overall effect of double counting on penalties for drug offenders is incalculable, for there is no regularity in the use of consecutive sentences and no reliable way to measure the full impact of multiple convictions on ultimate sentences. Double counting is clearly a source of pressure on defendants in the plea bargaining process (which fixes punishments in most cases). It is also a significant piece of the almost unlimited power over punishment that now rests with the prosecution and on its own can generate much greater punishment than individual defendants deserve. If used in conjunction with one of the law's enhancement provisions, it produces punishments that is grossly disproportionate to the conduct for which it is imposed (as in the three cases described above). If there is ever to be meaningful reform of the state's drug laws, the practice of double counting will have to be addressed as a priority item.

6. Drug Paraphernalia Possession.— Nearly 30% of the cases in the study (101 out of 344) involved, or included, charges of possession of drug paraphernalia. A very high percentage of the cases involved double counting (with possession of drug paraphernalia almost always attached to drug possession and trafficking charges). About one-third of the cases involved penalty enhancements (thirty-one for prior drug convictions and three for possession of a gun), and about two-thirds produced drug paraphernalia convictions (sixty-six out of 101). In a few cases, the prosecutions looked like legitimate efforts to punish preparatory conduct (something akin to an attempt to commit a drug offense in the future), but in most of the cases, the prosecutions looked like superfluous charges that would add pressure to defendants in the plea bargaining process and, in this way and others, add a few more ounces of punishment to punishments that are already excessive for most drug offenders. Looking at this study, one could easily conclude that the state's drug crime fighters could live without a drug paraphernalia possession crime or at least could live with

195 Lawson, Fayette Notes, supra note 142.
196 Id.
one that looked more like an attempt crime than does the existing one.

7. Conclusion.— More than 95% of the drug prosecutions in the study ended with convictions of the defendants for one or more drug offenses (328 out of 344), almost always by virtue of guilty pleas to lesser (or fewer) crimes than charged. About one-third of those convicted (107 out of 328) were sentenced to probation, shock probation, or conditional discharge, and a few others (nineteen out of 328) were sentenced to relatively short terms in local jails. Thirty-nine convicted defendants were sentenced to drug court and twenty-nine were subsequently removed from drug court and sent to prison, leaving no doubt that drug court (although a good sentencing alternative) is not a "magic bullet" in the battle against drug abuse. Most importantly, over 60% of the convicted defendants (202 out of 328) were sentenced to prison or jail for significant terms of incarceration (at least one year and usually more). In other words, "the drug laws in action" sent to the state's overcrowded, underfunded jails and prisons 202 inmates in a single year from a single county (out of 120).

C. The Scott Study

1. Introduction.— In this study, all criminal prosecutions for two years (2002 and 2003) were examined as they were examined in the prior study (with court files being reviewed from indictment to final disposition). The total number of cases reviewed was 175 for year 2002, 169 for year 2003, and 344 for the whole period (or about 25% of the total number of cases reviewed for the Fayette study). The number of cases involving drug charges (solely or predominantly) was sixty-five (or about 19% of the total). This was a high percentage of all prosecutions but less than the percentage of drug prosecutions in the Fayette study, in which almost 25% of the cases, 344 out of 1400, involved exclusive or predominant reliance on the drug laws.

2. Offenders.— In thirty-nine of sixty-five cases, defendants were prosecuted for trafficking in drugs (just slightly below the frequency of these charges in the Fayette study, 60% in Scott versus 62% in Fayette); in only eight of these cases did the prosecution rely on drug possession with intent to sell to support its allegations (rather than an actual sale of drugs), well below the findings drawn from the Fayette study (20% in Scott versus 66% in

\[197\] Id. The conviction rate would have been even higher but for the fact that some cases ended with successful motions to suppress evidence (and in one instance after request for the identity of a confidential informant).

\[198\] Id.

\[199\] See Robert G. Lawson, Notes on 2002-o3 Kentucky Scott Circuit Court Case Files (unpublished notes, on file with author) [hereinafter Lawson, Scott Notes]; see also Lawson, Fayette Notes, supra note 142.
Fayette). Unsurprisingly, given this difference, there flowed from the Scott prosecutions a substantially higher trafficking conviction rate than flowed from trafficking prosecutions of Fayette (80% in Scott and about 50% in Fayette).  

Nonetheless, the drug offenders of Scott looked much like those of Fayette: users and abusers rather than profit-takers. In a small number of cases, defendants looked like relatively active players in the business (but not kingpins by any stretch of the imagination), such as these:

1. John Amos: He had packaged cocaine, packaged marijuana, baggies, and scales in his vehicle. He was prosecuted for trafficking in cocaine, trafficking in marijuana, possession of paraphernalia, and second degree PFO. He pleaded guilty to cocaine possession, marijuana trafficking, and possession of paraphernalia, and was sent to prison for five years.

2. Osvaldo Torres-Cabellera: He possessed on his premises 1.4 pounds of cocaine, scales, plastic baggies, and $13,000 in cash. He was prosecuted for possession of cocaine, marijuana, and paraphernalia, pleaded guilty to possession of cocaine, was sentenced to two years in prison, but was sent to immigration agents for deportation.

A removal of defendants such as these from the community might slow the sale and use of illegal drugs (at least momentarily), while a removal of most of the others would only supply inmates for incarceration and leave the illegal drug business fully intact. The more typical case from Scott looked like this:

1. Charles Dingler: He was stopped by police for traffic violations and was found to be in possession of a marijuana pipe with marijuana residue. He was charged with possession of marijuana and possession of paraphernalia (enhanced by a prior drug conviction), pleaded guilty to both, got sentences of twelve months and one year, and was credited with time served of one year.

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200 See Lawson, Fayette Notes, supra note 142; Lawson, Scott Notes, supra note 199. Where trafficking charges are based on possession with intent to sell (as was common in Fayette County) rather than actual sales (as was the case in Scott County), there is sure to be bargaining for the reduction of charges to drug possession (especially in cases involving small amounts of drugs) and a higher level of agreement for such reductions in return for pleas of guilty. Thus, as one would expect, many of the trafficking prosecutions of Fayette that did not produce trafficking convictions produced convictions by agreement for drug possession.


As discussed below, defendants of this type (users, abusers, and bit players) were far less likely to become inmates if sentenced from Scott than if sentenced from Fayette (36% in Scott and 62% in Fayette).  

3. Enhancements.— As described in Part III above, the state’s drug laws (in conjunction with its general repeat offender law) contain punishment enhancement provisions that deliver to the prosecution enormous leverage over defendants and punishments, the use of which rests almost totally within the discretion of individual prosecutors. The prosecution chooses whether to include enhancements in the charges and, free of restrictions under the law, decides whether to pursue those charges in the bargaining process, conditions that can easily distort the fairness and equality of punishments.

As stated and detailed above, the prosecution engaged in a very aggressive use of these provisions in Fayette County, formulating charges to obtain the advantage of punishment enhancement in 142 cases (42% of all the drug prosecutions in the study) and in a few cases even formulated the charges so as to take advantage of double enhancements. The prosecution in Scott County seemed at first glance to be just slightly less aggressive in its formulation of charges against drug offenders, seeking punishment enhancement in twenty-one cases (32% of the sixty-five drug prosecutions found in the study) and double enhancements in none of the cases. But beyond the raw numbers there emerges a very different picture of punishment enhancement in the two counties, both in the formulation of charges and in the production of convictions.

The most telling differential comes from the uses made of the most lethal of all enhancement provisions, the persistent felony offender laws of the general penal code. In Fayette County, the prosecution pursued this form of enhancement in ninety-eight cases (or 28% of the 344 total) and obtained PFO convictions and the enhancements that go with them in seventy-two of those cases (73%); in many of these cases, the enhancement worked to send defendants to prison for ten years (from five to ten times the normal sentence). In Scott County, the prosecution filed PFO charges in eight of its cases (or 12% of the sixty-five total) and most importantly obtained PFO convictions and the enhancements that go with them in none of the cases (seventy-two in Fayette; zero in Scott). An equally telling differential between the two counties appears in the findings on gun possession enhancements. The prosecution in Fayette County sought enhancement under the gun enhancement law in twenty-four cases and

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204 See Lawson, Fayette Notes, supra note 142; Lawson, Scott Notes, supra note 199.
205 See discussion supra Part IV(B); see also cases cited supra notes 163–66.
206 See Lawson, Scott Notes, supra note 199.
207 Lawson, Fayette Notes, supra note 142.
208 Lawson, Scott Notes, supra note 199.
obtained it in eighteen, while the prosecution in Scott County alleged gun possession for punishment enhancement in only one case and obtained such enhancement in zero cases.\textsuperscript{209}

Regarding the use of a third type of punishment enhancement (the "two–strikes" provisions of the state's drug laws), the findings of the two studies are more similar than different but do show a slightly greater reliance on punishment enhancement in Fayette County than in Scott. In both counties, the "two–strikes" laws were used overwhelmingly to elevate misdemeanor charges to felony charges (in twelve out of twelve cases in Scott County and in thirty–four out of forty–two cases in Fayette);\textsuperscript{210} in virtually all of the cases in both counties, the enhancements under these laws were sought for the crime of drug paraphernalia possession and in a high percentage of the cases had a very modest effect on punishments.\textsuperscript{211} The difference in the use of these enhancement laws in the two counties involved prosecutorial efforts to use the "two–strikes" provisions for enhancement of punishments for felony crimes. In Scott County, the prosecutor made no use of the laws for this purpose (limiting his reliance on this kind of enhancement to misdemeanor cases, as described above); in Fayette County, the prosecutor filed charges under these laws in eight cases (and in five of the eight employed other enhancement weapons to achieve double enhancement), obtained enhanced convictions in six cases (double enhancements in five), and in all six cases pushed felony punishments to significantly higher levels.\textsuperscript{212}

4. Trafficking Near a School.— This offense was heavily used in Scott County (in eleven of the sixty–five drug cases or 18%), always for the purpose of converting drug transactions involving marijuana and other low–grade substances from misdemeanors to felonies. The transactions supporting these prosecutions were different in one respect from the transactions used in Fayette County to pursue such charges; in every case, the prosecution was based upon an actual sale of drugs, while in most of the Fayette cases (forty out of forty–two) prosecution was based on a possession of drugs with intent to sell. The transactions involved in the Scott prosecutions were identical to the ones involved in the Fayette prosecutions in a far more

\textsuperscript{209} See id.; see also Lawson, Fayette Notes, \textit{supra} note 142.

\textsuperscript{210} Lawson, Fayette Notes, \textit{supra} note 142; Lawson, Scott Notes, \textit{supra} note 199.

\textsuperscript{211} In many of these cases, especially in Fayette County, the paraphernalia charge looked like an add–on to more serious charges and simply disappeared in the plea bargaining process without convictions; in those cases that produced convictions of the elevated offense, in both counties punishment was almost always set at one year in prison rather than the punishment that would have flowed from the misdemeanor offense (incarceration in the county jail for a period of no more than twelve months).

\textsuperscript{212} In one case, the defendant was sentenced to five years in prison. In four cases defendants were sentenced to ten years in prison. In another case, the defendant was sentenced to more than ten years in prison.
important respect; in not a single case was there any indication that the defendant's conduct involved sales of drugs to school children or sales of drugs on school grounds. 213

5. Double Counting.— The practice of double counting (alleging multiple crimes by separating a drug episode into several parts) was substantially less prominent in Scott County than it was in Fayette. In a few cases, the double counting that occurred was similar though somewhat less aggressive than the double counting that occurred in Fayette, such as these cases:

1. George Robinson III: 214 He was found to be in possession of marijuana plants (more than five plants), cocaine, and rolling papers. He was charged with marijuana cultivation, cocaine possession, paraphernalia possession, and second degree PFO. He pleaded guilty to drug paraphernalia possession (all other charges were dismissed), and was sentenced to serve twelve months in jail.

2. Buddy Wagner: 215 He was stopped in a vehicle for drunk driving, had in his possession some packaged marijuana and prescription medications (Xanax and Oxycontin), was charged with trafficking in marijuana and two counts of drug possession, entered pleas to three counts of possession, and was sentenced to pretrial diversion for two years.

3. William Hughes: 216 In a search of his home, he was found to be in possession of cocaine, marijuana, and paraphernalia. He was prosecuted for possession of cocaine, marijuana, and paraphernalia (separate counts), pleaded guilty to possession of cocaine and drug paraphernalia, was sentenced to one year in prison, and was given probation for three years conditioned upon drug treatment.

In most of the double counting cases in Scott County, defendants were found in possession of marijuana (or cocaine) and paraphernalia needed for use, were charged with possession of both, entered guilty pleas to one or both charges, and were sentenced in most instances to no more than one year in prison and usually less. 217

213 See Lawson, Fayette Notes, supra note 142; Lawson, Scott Notes, supra note 199.
217 See, e.g., Commonwealth v. Wise, No. 02–CR–00014 (Ky. Scott Cir. Ct. Feb. 2, 2002) (defendant possessed marijuana, papers, baggies, and a pipe, was prosecuted for marijuana possession and paraphernalia possession, pleaded guilty to both, and was sentenced to pretrial diversion); Commonwealth v. Burgess, No. 02–CR–00102 (Ky. Scott Cir. Ct. Jan. 6, 2003).
6. Conclusion.—In more than ninety-eight percent of the drug prosecutions in this study (sixty-four of sixty-five cases) defendants were convicted of drug crimes, in all cases (sixty-four out of sixty-four) as a consequence of guilty pleas by the defendants; in this regard, the results of the “drug laws at work” in Scott were almost identical to the results in Fayette (where about 95% of the prosecutions ended with convictions). But beyond this there is little similarity in the results of the two studies. In two-thirds of the cases in Scott that produced convictions (forty-one out of sixty-four), defendants were sentenced to probation, conditional discharge, or pretrial diversion; in the other twenty-three cases, defendants were sentenced to relatively short periods in jail or prison (sixteen for no more than one year, five for terms of five years in prison, and none for terms of more than five years).

In almost two-thirds of the Fayette cases that produced convictions (202 of 328), defendants were given terms of incarceration in prison or jail (for more than one year in 125 cases); from this county, defendants were sent to prison for at least five years (between five and ten) in sixty-seven cases, were sent to prison for ten years in thirty cases, and were sent to prison for more than ten years in three cases.

D. Conclusion

The defendants in these counties committed the same crimes, were governed by the same criminal laws, and were called to task for their crimes in the same judicial system (same rules, same protections, same decision makers). They were entitled to equal justice under the law but were treated instead to what is called “justice by geography” (harsher punishment in Fayette than in Scott for the exact same conduct). Such treatment casts a dark cloud over the drug laws that support it and the justice system that tolerates it.

The “justice by geography” exposed by the findings of these studies is an unintended consequence of the many laws we have enacted under an incarceration obsession and a blindness to the evils of unnecessary punishment. The most significant change (and the most troubling) is described in scholarly statements that are not meant to be complimentary:

The prosecution has seen its hand strengthened, making prosecutions

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218 See Lawson, Fayette Notes, supra note 142; Lawson, Scott Notes, supra note 199.
219 Lawson, Scott Notes, supra note 199.
220 Lawson, Fayette Notes, supra note 142.

cheaper and trials less frequent and easier to win when they do occur. The
difficult decisions would be made not in courtrooms, but in the private
offices of prosecutors, as they determine charging decisions and set plea
bargains.222

The overwhelming and dominant fact of the federal sentencing system
... is the virtually absolute power the system has given prosecutors over
federal prosecution and sentencing. There is a lot of evidence to support
this claim, but it can be demonstrated with one simple and awesome fact:
Everyone pleads guilty.223

Defendants chose trial over bargaining in slightly less than 2% of the
cases in Scott County (one trial in sixty-five cases) and did the same in
about 4% of the cases in Fayette (fourteen trials in 344 cases). And in the
bargaining that determined the fate of so many defendants the weaponry
was overwhelmingly one-sided:

[C]riminal law and the law of sentencing define prosecutors’ options, not
litigation outcomes. They are not rules in the shadow of which litigants
must bargain. Rather, they are items on a menu from which the prosecutor
may order as she wishes. She has no incentive to order the biggest meal
possible. Instead, her incentive is to get whatever meal she wants, as long
as the menu offers it. The menu does not define the meal; the diner does.
The law—on—the—street —the law that determines who goes to prison and for
how long — is chiefly written by prosecutors, not by legislators or judges.224

The drug laws provide an incredible array of weapons for drug prosecutions
(a very long menu), outcomes are determined first and foremost
by the aggressiveness with which the weapons are used, and, at least across
jurisdictional lines, those outcomes are absolutely sure to test the promise
of equal justice under the law.

IV. MEANINGFUL REFORM IDEAS

A. Introduction

From one end to the other, Kentucky’s drug laws authorize punishments
that are harsh, disproportionate, and unprincipled. They have failed

222 Robert P. Mosteller, New Dimensions in Sentencing Reform in the Twenty–First Century,
223 Marc L. Miller, Domination & Dissatisfaction: Prosecutors as Sentencers, 56 STAN. L. REV.
224 William J. Stuntz, Plea Bargaining and Criminal Law’s Disappearing Shadow, 117 HARV.
miserably in their efforts to separate low- and high-level offenders from each other for purposes of punishment and have opened the courthouse doors to punishment disparities like the ones described in this Article. With few exceptions, the drug laws (and the sentencing practices they permit) need a complete and careful reexamination by parties committed to fair, just, consistent, and necessary punishment, all with full appreciation for a truth stated above and repeated here because of its great importance: "The ... most powerful reform that must occur if we are to have any hope of reversing the imprisonment binge is to reduce the severity of the sentences [defendants] are given." If committed to such reform, Kentucky's lawmakers would have no difficulty finding ways to reduce sentences for drug offenders without jeopardizing the safety, health, and general welfare of the people.

B. Drug Quantity Sentencing

In its efforts to separate serious and less serious drug offenders, Kentucky law distinguishes between "traffickers" and "possessors" (uniformly punishing the former more severely than the latter) and then separately distinguishes between drugs that are highly abusive and those that are regarded as less abusive (punishing transactions involving the former more severely than those that involve the latter). In so doing, it closely tracks the law of other states. In one other way in which serious and less serious drug offenders are separated, Kentucky's law fails to track the law of many, if not most, states and, in that failure, misses what is perhaps the best chance of distinguishing between abusers and petty distributors on the one hand and profit-takers on the other.

The drug statutes of other states are full of models for what can be called "drug quantity sentencing." The following approach from the drug laws of Vermont is illustrative of how many states attempt to use this factor to separate low- and high-level offenders for purposes of punishment:

Cocaine

1. Possession of any amount – maximum of 1 year.
2. Possession of 2.5 grams or more – maximum of 5 years.
3. Possession of 1 ounce or more – maximum of 10 years.
4. Possession 1 of pound or more – maximum of 20 years.

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225 Austin et al., supra note 10, at 23.
Depressants/Stimulants

1. Possession any amount – maximum of 1 year.
2. Possession of 100 times a benchmark unlawful dosage – maximum of 5 years.
3. Possession of 1000 times a benchmark unlawful dosage – maximum of 10 years.
4. Possession of 10,000 times a benchmark unlawful dosage – maximum of 20 years.

The intent is to provide adequate, predictable punishments for low-level actors (users and petty distributors) and to target for enhanced punishments those offenders who pose the greatest danger to society (punishments proportionate to the conduct of defendants).

The Kentucky law uses “drug quantity sentencing” only for marijuana crimes and even here makes no use of it for crimes of possession. Consequently, a possessor of cocaine is subject to the same penalty range (one to five years or five to ten years for a second offense) without regard to whether he possessed a mere trace of the drug or one pound of it; and a possessor of one of the lower level drugs (like Xanax) is subject to the same penalty range (maximum of twelve months in jail or one to five years in prison for a second offense) without regard to whether she possessed one dose or 1,000 doses. In this approach (which is also used for the trafficking crimes), there is too much risk of excessive punishment, too much potential for punishment disparities, and too much control over punishment in the hands of the prosecution.

C. Penalty Enhancements

1. Introduction.— For most of four decades, we have chosen to err on the harsh side in providing for the punishment of criminals; we have tended to set penalties that fit atypical cases but then use them for run-of-the-mill cases, resulting in more punishment than necessary in a large percentage of cases. We have acted as though the harshness of punishment is all that matters, have largely ignored reliable findings that “certainty of punishment is more important than severity,” have veered away from the principle that the punishment should fit the crime ("offenders should receive their

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228 Id. tit. 18, § 4234(a) (amended 2009).
230 It is well settled under Kentucky law that any amount of a drug, even a residue, is enough for conviction of drug possession. See Jacobs v. Commonwealth, 551 S.W.2d 223, 225 (Ky. 1977); Commonwealth v. Shivley, 814 S.W.2d 572, 573–74 (Ky. 1991).
232 See id. § 218A.1417.
233 Tonry, supra note 136, at 53.
particular deserts – no more and no less\textsuperscript{234}, and, without regard for costs, have enacted punishment provisions that deserve most of the blame for a sevenfold increase in the state's inmate population. And in the drug law area, we have engaged in these practices to the extreme, adopting ordinary penalties that are anything but soft on drug offenders and then adding a stream of enhancements that have pushed ordinary penalties to levels that are exceptionally punitive, unwarranted, and unproductive.

2. PFO Enhancements.— The most lethal of the enhancement laws used against drug offenders is one that is not even contained in the state's drug statutes. It is located in the state's general penal code,\textsuperscript{235} is called the persistent felony offender law, and may have never been intended for use to lengthen punishments for drug offenders.\textsuperscript{236} The drug laws exist separate and apart from the state's general criminal statutes and have their own repeat offender provisions (as discussed below). Why would lawmakers pull the drug laws from the coverage of the state's penal code (as they did in 1972\textsuperscript{237}) and then open the door to the use of a repeat offender provision from that code after putting repeat offender provisions in the drug statutes? Without answering (or even considering) this question, courts have allowed the PFO law to be used against drug offenders. Legislators have concurred through many years of silence, and state prosecutors have rushed through the open door (with ninety-eight PFO prosecutions out of 344 drug cases in Fayette County in one year).\textsuperscript{238}

A great deal of criticism has been leveled against repeat offender statutes like the Kentucky version,\textsuperscript{239} mostly because they reach far beyond the especially dangerous and incorrigible offenders they once targeted.\textsuperscript{240}

\textsuperscript{234} Frase, Punishment Purposes, supra note 138, at 76.
\textsuperscript{236} Drafters of the state's penal code made the following statement about what are called "two-strikes" penalty provisions: "[T]he proposed provisions [on drug crimes] contain no specific reference to . . . separate penalty provisions for second offenses. It was felt that the degree structure for offenses and penalties adequately treated these problems." Ky. Crime Comm'n & Legislative Research Comm'n, Kentucky Penal Code Final Draft 291 (1971).
\textsuperscript{237} In other words, the penalty range for cocaine possession would be one to five years in prison, a range that is wide enough to provide for harsher punishments for repeat offenders (one or two years for the first offense and four or five years for the second offense), and that eliminates the need for an enhanced punishment of repeat offenders.
\textsuperscript{238} See supra note 20 and accompanying text.
\textsuperscript{239} See Lawson, Fayette Notes, supra note 142.
\textsuperscript{240} Ky. Crime Comm'n & Legislative Research Comm'n, supra note 236, at 348. Drafters of the original version of Kentucky's law described it as a "last resort idea". Id. They also took great care to guarantee that the law would be used rarely and not routinely (only against defendants convicted twice and incarcerated twice for felony crimes before committing a third felony). See Lawson, supra note 27, at 11–12.
Unlike the PFO laws of many, if not most states, the Kentucky statute casts a penalty enhancement net over a huge pool of repeat offenders (all who commit a felony crime after one felony conviction) and deserves much credit or blame for the state's inmate explosion:

The long reach of this law absolutely guarantees inmate population growth and resulting stress for prisons and jails. It once produced a mere handful of inmates saddled with long sentences (79 in year 1980) but now delivers a handful of such inmates to the corrections system every week of every month of every year (with a cumulative total of 4187 by year 2004); and its impact extends beyond the numbers who arrive in the system as PFO inmates to include an untold number who accept higher than normal penalties in return for dismissal of PFO charges. It can be used against violent offenders (who would qualify for severe punishment without the law) but is far more likely to be used against felony offenders who pose very little if any threat to public safety (shoplifters, auto thieves, low-level burglars, drug users, etc.).

There are a few drug offenders who need and deserve very harsh punishment and there are many who do not. The PFO law applies to both groups, produces punishment that is more severe than necessary, and pushes the risk of disparity in sentencing to a much higher level. Most importantly, it puts into the hands of prosecutors more ultimate power over punishment than they should have. Punishment is too important to depend upon whether a given defendant faces aggressive or unaggressive use of the PFO law, and for that reason alone it should be removed from the sentencing menu in drug prosecutions. This is especially so since penalty enhancement of repeat drug offenders is addressed in the drug statutes themselves.

3. "Two–Strikes" Drug Laws.—The drug statutes are literally full of repeat offender provisions like the PFO law: so-called "second or subsequent offense" provisions ("two–strikes") that elevate penalties for drug offenders who have prior convictions for drug offenses. Like the PFO law, these “two–strikes provisions” are capable of producing disproportionate, unnecessary, and uneven punishment. These laws will need to be reexamined by lawmakers if there is to be meaningful reductions in sentence severity for drug offenders. There are several issues that will need to be included within this reexamination, the most important of which is whether or not


242 Lawson, supra note 27, at 31 (emphasis added).
indiscriminate punishment enhancement for repeat offenders (which is close to what the law now provides) is consistent with sensible sentencing policies and objectives.

The existing law defines a repeat offender nearly as liberally as it can be defined and then uses that definition for the penalty enhancement of virtually all drug crimes (except for possession of marijuana). It is inclusive enough to allow for the use of misdemeanor convictions to enhance penalties for felony crimes. For example, a conviction for possession of drug paraphernalia (punishable by no more than twelve months in jail in Kentucky and no more than thirty days in jail in Wisconsin) can be used under Kentucky law to enhance the crime of cocaine possession (from ordinary penalties of one to five years to enhanced penalties of five to ten years). It is also inclusive enough to allow for a prior conviction involving a lowly abusive drug to be used to enhance penalties for a conviction involving a highly abusive drug; for instance, a conviction for possession of a depressant drug from Schedule IV or V (punishable as a misdemeanor) can be used for enhancement of penalties for possession of a highly abusive drug like heroin or cocaine (elevating one to five years in prison to five to ten years) and a prior conviction for trafficking in marijuana (punishable as a misdemeanor for small amounts) can be used to enhance already very high penalties for trafficking in heroin or cocaine (elevating a five to ten years penalty range to a ten to twenty years range). In one respect, the General Assembly attempted to avoid the kind of indiscriminate enhancement described above; it prohibited the use of drug possession convictions to enhance drug trafficking convictions but then lost much of the benefit of that prohibition through a silent approval of the use of the PFO law for penalty enhancement in drug cases.

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243 See Ky. Rev. Stat. Ann. § 218A.010(35) (LexisNexis 2007) ("[f]or the purposes of this chapter an offense is considered as a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this chapter, or under any statute of the United States, or of any state relating to substances classified as controlled substances . . . , except that a prior conviction for a nontrafficking offense shall be treated as a prior offense only when the subsequent offense is a nontrafficking offense.").

244 See id. § 218A.1422.

245 See id. § 218A.500(5).


248 Id. § 218A.1417(2)(a).

249 See id. § 218A.1415(2).

250 Id. § 218A.1421(2).

251 See id. § 218A.1412(2).

252 See id. § 218A.010(35) (defining "second and subsequent offense").

253 For example, a conviction of cocaine possession (a Class D felony) could not be used under the "two-strikes" provisions of the drug laws to elevate penalties for cocaine trafficking; but since the first conviction is for a felony crime it can be used under the PFO law to enhance
In their pursuit of the long “war on drugs,” state lawmakers have taken the easy route in dealing with repeat drug offenders, choosing to elevate penalties on virtually all repeat offenders rather than striving to identify the ones who pose the greatest danger to public safety. In this regard, they have followed the lead of some of our sister states but have ignored the efforts of others to engage in a more discriminating use of “second or subsequent offense” enhancement in drug cases. In Virginia, for instance, the drug laws contain repeat offender enhancement for traffickers but not possessors. In New York, the statutes provide for penalty enhancement of repeat offenders charged with drug felonies but not those charged with drug misdemeanors. In Iowa, there is penalty enhancement for traffickers convicted of a second drug offense but enhancement for possessors only upon a conviction of a third offense. In Colorado, the drug laws allow for penalty enhancements for repeat offenders but not for prior drug convictions of a magnitude that is below that of the charged offense. There is a better separation of serious and non-serious offenders in these laws than under Kentucky’s law. There is a rejection of the assumption that extraordinary punishment is necessary and warranted for virtually all repeat drug offenders, and most importantly there is recognition of a need to direct more of our limited law enforcement resources at those who promote and perpetuate the drug epidemic for purposes of personal profit.

In assessing the worth and wisdom of the many “two-strikes” provisions of Kentucky’s drug laws, there is a need for renewed appreciation of the fundamentals of sentencing under the system that has been used in this state since 1974:

In using penalty ranges for sentencing, the 1974 Code was designed to promote proportionality . . . without depriving sentencing authorities of the flexibility needed for proper consideration of matters peculiar to individual offenders (age, employment history, drug and alcohol use, mental capacity, etc.) and, most importantly, criminal histories. In every felony classification, the penalty range was [and still is] wide enough for a separation of high and low rate
offenders and for significantly harsher punishment for deserving repeat offenders. 260

If one year in prison is enough for a first-time cocaine possessor and five years is possible for a second time possessor without any enhancement (one to five years for a Class D felon), what is the need and justification for a provision authorizing a ten-year sentence for the latter? This we must ask about every “two-strikes” law in the drug statutes if there is to be meaningful reform of the state’s drug laws.

4. Firearm Possession.— All drug crimes are enhanced one level if defendants possess firearms during and in furtherance of the offense (misdemeanors become felonies, Class D felonies become Class C felonies, etc.). 261 Those in support of firearm enhancements argue that such defendants are more culpable and dangerous than those who commit drug crimes without firearms and thus need and deserve harsher punishments (like armed robbers 262 and armed burglars 263). Opponents of such enhancements argue that there are weapons crimes already punishing the defendant’s possession of firearms and that the connection between drug activity and firearm possession is too tentative and insignificant to affect punishment (e.g., cocaine possessors and heroin traffickers need no firearms to complete their crimes).

As now construed, 265 the authorizing statute requires no use of the firearm in the commission of the offense. In the prosecutions described in Part IV above, 266 prosecutors and judges used the statute mostly, if not exclusively, to elevate punishments for drug possessors who were found to be simultaneously in possession of drugs and firearms in either an automobile or a residence (with firearm possession hardly connected to the drug offense at all and creating the appearance of an excuse, rather than a reason, for punishment enhancement). As it now exists (even with the “in furtherance of the offense” words the legislature added in 2005), prosecutors are far more likely to use the statute to pressure defendants into plea bargaining rather than to support higher punishments that the use of a weapon in the commission of a drug crime justifies.

Many and probably most states have steered clear of penalty enhancement for firearm possession, perhaps out of concern for overuse and abuse. 267 Many of those that have not steered clear of the enhancement

260 Lawson, supra note 27, at 10 (emphasis added).
263 Id. § 511.020.
264 See, e.g., id. § 527.020 (carrying concealed deadly weapon); id. § 527.040 (possession of firearm by convicted felon).
265 See discussion and sources cited supra note 178.
266 See supra text accompanying notes 170–78.
have attempted to provide safeguards against misuse. In California, for example, the law limits this kind of enhancement to drug activities involving only the most dangerous of drugs (e.g., heroin and methamphetamine) and then requires a showing that the defendant had the firearm "available for immediate offensive or defensive use." \(^{268}\) In North Dakota, the law requires a showing that the defendant had the firearm in his or her "actual possession at the time of the offense." \(^{269}\) In Utah, the law requires a showing that a firearm "was used, carried, or possessed on [defendant's] person or in his immediate possession" during commission of the offense. \(^{270}\) And in Maryland, the law provides for enhancement of penalties only for trafficking crimes and only when it is shown that the firearm had a "nexus to the drug trafficking" or was used, worn, carried, or transported by the defendant. \(^{271}\) There are some assurances in these laws that the firearm will be more than a mere coincidence of the drug crime (more than a mere "excuse" for harsher punishment of drug offenders), assurances that the Kentucky statute is missing and that the legislature needs to add if they intend to retain firearm enhancement at all.

**D. Double Counting**

The problem of double counting, or punishing one offense as though it were two, is especially prominent in the drug crime area. A defendant is subject to multiple charges, multiple convictions and, in most instances, multiple punishments if he or she possesses multiple drugs when caught, sells multiple drugs in one transaction, or sells drugs on successive days to one undercover police officer. Double counting is more likely to thwart than advance sentencing objectives, produces punishment that is disproportionate to both the culpability of defendants and the seriousness of their conduct, and adds to the great difficulty of imposing consistent punishments among defendants; \(^{272}\) above all else, it increases the
prosecution’s already enormous power to determine sentencing outcomes and robs the justice system of basic principles and policies that ought to govern the incarceration of citizens.

Most legislatures (here and elsewhere) have tilted toward letting courts deal with the question of what constitutes (or does not constitute) an offense and whether or not one course of conduct can be divided into multiple offenses. The practice of double counting has generally flourished under court decisions rendered in this state (especially in drug prosecutions), and the General Assembly will need to give it some attention if double counting is determined to be unacceptable. In looking for guidance on this important issue, lawmakers might find some appeal in discarded Kentucky case law that governed the issue during most of the twentieth century, case law in which the state’s high court formulated a yardstick (“one impulse”) that one may refine and convert into a statutory prohibition against punishing single acts as though they are two (or three or four) acts. They might also find some appeal in a provision contained in the drug laws of Texas that requires concurrent sentencing for multiple crimes arising out of a “criminal episode” if prosecuted in a single action.

E. Trafficking Near a School

1. Introduction.— For good and obvious reasons, the state’s lawmakers have targeted schoolchildren for special protection from drug dealers. They have drawn an exceedingly wide circle around schools (so-called “drug free zones”) and have created a special felony offense for all trafficking activity that occurs within the zone (“trafficking near a school”). In pursuit of this sound objective, they have created an offense that extends far beyond its legitimate purpose (as described earlier in this article) and have delivered to the prosecution a weapon that they will almost surely use (and misuse) to enhance punishments for low-level drug offenders.

When one transfers drugs to any person within the “drug free zone” (not just school children), they commit an offense. This offense covers possession of drugs with intent to transfer and extends to all types of illegal drugs (highly and lowly abusive alike). The offense is punished in a way that renders it totally insignificant to high-level drug offenders (traffickers in drugs like heroin, cocaine and the like) and that makes it especially

273 See supra notes 116–31 and accompanying text.
274 Tex. Health & Safety Code Ann. § 481.132 (Vernon 2003) (where “criminal episode” is defined to include multiple offenses from one transaction as well as multiple offenses that repeat the commission of the same or similar offense).
276 It is punished as a Class D felony (one to five years in prison) unless there is a more
harsh for low-level drug offenders (traffickers in the lowly abusive drugs found in Schedules IV and V and small amounts of marijuana).\textsuperscript{277} It looks on its face like a crime that is aimed at drug distributors but in its real-life application strikes almost exclusively at drug possessors (mostly possessors with quantities more suitable for personal use than distribution), as was so clearly shown by the field studies described in Part IV above. It has flaws that the legislature can easily fix without jeopardizing the legitimate objective of protecting school children from drug dealers.

2. Drug Free School Zone.— The drug laws of Kentucky provide for the widest “drug free school zone” in America – 1000 yards from any building used for classroom instruction (which is wide enough to cover most areas of sizeable cities). The drug laws of many states, probably a majority, use 1000 feet to describe the protected zone around schools (consistent with a provision in the Uniform Controlled Substances Act\textsuperscript{78}), although a number of states have adopted a smaller zone in order to avoid abusive use of the offense. For example, in Vermont the protected zone includes only school grounds and school buses,\textsuperscript{279} in Arizona the zone is an “area within three hundred feet of a school,”\textsuperscript{280} and in Alaska\textsuperscript{281} and Wyoming\textsuperscript{282} it includes areas within 500 feet of school grounds. A reduction in the protected zone, to at least 1000 feet, would provide some protection against overuse of the Kentucky offense but not enough to remedy the problems the field studies described above reveal.

3. Exclusions/Defenses.— In its use, the Kentucky statute is made to look like an “excuse” rather than a “reason” for higher punishment by extending its coverage to defendants who possess drugs inside a personal residence located within the “drug free school zone” or inside an automobile that is stopped by police within that drug free zone.\textsuperscript{283} In order to protect against

\begin{itemize}
\item 277 Low-level trafficking is classified as a Class A misdemeanor (maximum of twelve months in jail) but if committed within the drug free zone around schools is classified as a Class D felony (giving defendants a five-fold increase in punishment at the high end of the penalty range). \textit{See id.} §§ 218A.1411, .1412.
\item 278 \textit{See Uniform Controlled Substances Act} § 409, 9 U.L.A. 712 (1994).
\item 279 VT. STAT. ANN. tit. 18, § 4237 (2002).
\item 282 WYO. STAT. ANN. § 35–7–1036(b) (2009).
\item 283 As described in Part IV of this Article, the offense was very heavily used in Fayette County (forty-two cases out of 344 drug prosecutions), and in most cases it was used to obtain
\end{itemize}
this perceived misuse of the offense, a substantial number of states exclude from their coverage drug activities that occur within the protected zone but inside the private residence of a defendant (some only if there was at the time of the act no minor present and others only if there was no profit involved in the defendant’s activity), while some other states exclude acts of mere drug possession and punish only actual sales and transfers that occur within the protected zone. At least one state has excluded acts that occur within a school zone because of actions of the police (such as drug possession in a car stopped for purposes of making an arrest).

4. Conclusion.— With a significant reduction in the size of the protected zone and adoption of exclusions for possessors of drugs in private residences and vehicles, the Kentucky offense would be true to its name (trafficking near a school) and fully compatible with the purpose for which it exists (the protection of school children from drug dealers). It would be more than a mere excuse for harsher punishment of drug offenders.

F. Possession of Drug Paraphernalia

None of the drug law’s offenses were used more routinely than this one in the drug prosecutions described in Part IV above (used in almost one-third of the drug prosecutions in Fayette County in 2003). The defining statute criminalizes both possession of drug paraphernalia for personal use and possession for the manufacture or delivery, and adopts a single penalty range for both types of violators (twelve months in jail or one to five years in prison for offenders with prior drug convictions). So...
defined, it is almost always committed by defendants who possess illegal drugs and thus opens the door to multiple charges and multiple convictions for single acts of drug possession. It reaches farther and punishes harder than many of its counterparts in the drug laws of other states, and it could benefit from some protections against overuse by aggressive prosecutors and against punishments that are duplicative in many cases and excessive in most.

Lawmakers could draw two valuable components from the paraphernalia possession laws of other states that would fix most, if not all, of the shortcomings of the Kentucky statute. The first would involve a reduction in coverage of the statute through the adoption of an exclusion for persons who are in possession of paraphernalia for purposes of drug use. Believing that such persons are adequately punished by drug possession statutes, a growing number of states limit the coverage of the offense to persons who are found to be involved in either the manufacture or delivery of paraphernalia (aiming the statute at those who are involved in drug activities for profit). The second would involve reduced punishments for the paraphernalia possession offense that would bring Kentucky’s law in line with punishments found in the paraphernalia laws of other states. In some states the offense is punished by fine or short incarcerations (especially in those that have no exclusion for persons possessing for use only), and in many (if not most) of the others it is punished at substantially lower levels than in Kentucky (especially for Kentucky offenders who have earlier drug convictions). Not much of the incentive to overuse the Kentucky statute would survive the adoption of either of these changes.

G. Others

The drug law reform agenda could easily be expanded beyond the one

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discussed above. For example, there is a need at some point to examine the widespread practice of charging offenders with drug trafficking on the basis of possession of drugs with intent to sell or transfer, a charge that can be easily made in cases in which the quantity of drugs possessed by defendants is exceedingly small.292 A second item that needs to be on a reform agenda at some point involves the penalty (or penalty structure) for offenders found in possession of small amounts of marijuana. The offense is already one of the state's least serious offenses (being one of the few crimes exempt from enhanced punishment for repeat offenders),293 but still carries a punishment that is out of line with penalties imposed on such offenders in many if not most states.294

V. CONCLUSION

With a pause or two along the way, lawmakers have toughened Kentucky's drug laws for more than thirty years, always believing that tougher punishment would curtail the illegal drug epidemic. They have had unqualified public support for this strategy, have worried little if any (until recently) about the monetary and human costs of harsher punishments, have shown minimal appreciation at best for the real "punitive-ness" of prison and jail incarceration, and have not been deterred by the existence of overcrowded and difficult conditions in correctional facilities. They have seen a serious drain on the state's treasury, worsening conditions in the state's prisons and jails, and very marginal effects if any on the state's drug problem. Yet, they have spoken very softly about the need for change,

292 For example, trafficking charges were filed in Fayette Circuit Court in 212 cases (out of a total of 344 prosecutions) and in a full two-thirds of those cases the charge was based not on a sale of drugs but on possession with intent to sell or transfer, and in some if not many of those cases the quantity of drugs possessed by defendants was not substantial. See Lawson, Fayette Notes, supra note 142.

293 The offense is classified as a Class A misdemeanor (carrying up to twelve months in jail and a $500 fine) but under certain circumstances can become a felony crime (with one to five years in prison). As discussed in Part IV above, possession of marijuana seems regularly to be used in support of the offense of trafficking near a school (a Class D felony). See supra notes 181-85 and accompanying text.

294 See, e.g., CAL. HEALTH & SAFETY CODE § 11357 (West 2007 & Supp. 2009) ($100 fine for possession of 28.5 grams or less and maximum of six months for possession of more than 28.5 grams); COLO. REV. STAT. §§ 18-18-406 (2008) ($100 fine for possession of one ounce and $100 fine and fifteen days in jail for possession of more than one but less than eight ounces); NEV. REV. STAT. § 453.336 (2007) ($600 fine for possession of one ounce or less, $1,000 fine for a second offense, and no more than one year in jail for third offense); N.Y. PENAL LAW § 221.05 (McKinney 2008) ($100 fine for first offense, $200 fine for second offense, and $250 fine and fifteen days in jail for third offense); OR. REV. STAT. § 475.864 (2007) (fine of $500 to $1,000 for possession of less than one ounce); S.C. CODE ANN. §§ 44-53-370 (2002 & Supp. 2008) ($200 fine and thirty days for possession of one ounce); VA. CODE ANN. § 18.2-250.1 (2009) ($500 and thirty days for first offense, and $2,500 and twelve months for second offense).
if at all, and have shown very little enthusiasm for a significantly different strategy.

They have provided for some drug treatment of state inmates in a few county jails, have expanded drug courts to some extent, have taken some action to encourage pre-trial diversion of drug offenders (in return for drug treatment), and have loosened some restrictions on parole. But they have changed virtually none of the tough laws enacted during the thirty-year-old “war on drugs,” leaving intact a set of laws that has flooded the corrections system with non-violent offenders and that has contributed to a state budget that currently rests on the outer edge of fiscal disaster. What these laws have done (and what they are capable of doing) is vividly revealed by data obtained from the state and charted in Figure 1 below:

For perspective on these numbers (especially the tripling of the drug inmate population in just fifteen years), it is worth knowing that during the onset of the drug war in the early 1970s, the state had about 3000 inmates in its prison system and not enough drug offenders to even take notice. Now, as I write, the state has 21,565 inmates (seven times as many) and a drug inmate population of about 5000 (enough to fill every bed in five of

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295 E-mail from Craig Thatcher, IT Branch Manager, Kentucky Department of Corrections, to Robert G. Lawson, Professor of Law, University of Kentucky College of Law (July 10, 2009, 12:18 EST) (on file with author).
296 Lawson, supra note 17, at 325.
297 Ky. DEP'T OF CORR., supra note 29.
298 No one should be misled by the drug inmate number for year 2009 (showing 4833 drug inmates), for it reflects a reduction attributable solely to the fact that the state engaged in
the state's prisons — Blackburn, Green River, Luther Luckett, Little Sandy, and Northpoint before its destruction by fire). And, as shown by recent data from the Corrections Department and charted in Figure 2 below, the state has growth in the drug offender part of its inmate population that is not matched by any other:

\[\text{Figure 2}
\text{Drug Offenders in Inmate Population}
\text{(Percentages) – 1995–2009}
\]

The words "budgetary heedlessness" might be fairly descriptive of this development, an expenditure of as much as $100 million per year for incarceration of 5000 inmates consisting mostly of drug users and marginal participants in the drug business in return for uncertain benefits at best (maybe in return for more harm than help).

In all probability, if we stay mad at drug offenders for another decade, the 5000 number will become 6000 and then 7000 and then more, and the $100 million in incarceration costs will jump to $150 million and beyond. Maybe, in these numbers and predictions, we can find a way to admit that we lost our way in the fight against drug abuse, that we enacted laws and policies that have overloaded our prisons and jails with people who have done more harm to themselves than others, and that we live with a drug epidemic that is probably worse than when we began. A more productive step toward drug law reforms that would matter might be hard to find.

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299 E-mail from Craig Thatcher, IT Branch Manager, Kentucky Department of Corrections, to Robert G. Lawson, Professor of Law, University of Kentucky College of Law (July 10, 2009, 11:40 EST) (on file with author).

300 Id. (violent offenders dropped from 38% to 36% of the total population during the period from 1995 to 2009, sex offenders dropped from 12% to 10%, property offenders dropped from 26% to 24%, and other offenders dropped from 11% to 6%).

done more harm to themselves than others, and that we live with a drug epidemic that is probably worse than when we began. A more productive step toward drug law reforms that would matter might be hard to find.