Introduction

A System out of Whack

Devon Harrison had a drug problem. Heroin had gotten under his skin early in his adult life. By the time he landed in federal court, he was stuck in an all-too-common cycle of addiction.[1] To maintain his habit, he occasionally sold or traded several rocks of crack cocaine—the prevailing drug market in the mid-sized southern city where he was born and raised—a solution of expedience. He was not getting rich. He was not blazing new territory. In our nation's war on drugs, he was not the public enemy for whom we imagine the most draconian, least forgiving consequences of the federal criminal justice system are reserved.

In that fateful summer of 2004, Devon had reignited a friendship with Charles, a former high school classmate. By this time, Charles was a relatively large-scale local crack dealer, his distribution network many orders of magnitude greater than Devon's sporadic, piecemeal sales. Charles regularly made runs to his supplier, who was located in a town about 150 miles southwest; Charles's girlfriend, Marina, often helped by renting a transport car. Unbeknownst to either Charles or Marina, federal law enforcement had been actively surveilling the couple for months, thanks to a tip from a confidential informant. Agents had documented the near-weekly trips to the same supplier, including Marina's car-rental patterns. In late August, just weeks after the old classmates had reconnected, Charles and Marina invited Devon and his girlfriend along for the ride. It was a bad idea. But as the surveillance operation confirmed, this was the one and only time Devon accompanied his friend on a run. This was also the night that federal agents had decided to take down Charles.

The group headed back to the city well past midnight, after Charles had purchased close to a kilogram of crack from his supplier. Alert to the possibility of being tailed by law enforcement, Charles twice ditched the drugs en route, each time deciding he was not being followed after all. The second time, he enlisted Devon's help in finding the stash. Devon retrieved the small Foot Locker bag of crack from the brush on the roadside, then tucked it under the front passenger seat near his feet. Back on the highway, they were soon pulled over by a state patrol officer, who

searched the car with the aid of a trained dog and found the drugs. The official reason for the stop was for speeding, but the trooper was working with the federal agents to initiate the arrest. Those agents, who had been tracking the car all night, swarmed in and arrested its four occupants.

Less than twelve hours later, three of the four suspects—Charles, Marina, and Devon—were making initial appearances in federal court, about to face charges of conspiracy to distribute crack cocaine.[2] Eight months later, the three federal defendants stood convicted and sentenced. Marina received a term of federal probation and home confinement. Charles was sentenced to twenty years in prison (later reduced to about fifteen). And Devon, who had just gone along for the ride, got a sentence that eclipsed them all: life without parole.

How could it be that the person with the least culpability—a fact not disputed by anyone in this case—would end up receiving the gravest sentence? It was not only merely possible, it was in fact the near-inevitable result once Devon was charged in federal court and declined to plead guilty. Indeed, nearly every aspect of Devon's experience exemplifies the most troublesome features of the federal criminal justice system, from how he ended up charged in federal court in the first place to the legal provisions that allow for a life-without-parole sentence for his tangential participation in this crime.

Ultimately, Devon's story illustrates the consequences of the extreme power imbalance between the adversarial parties, which was the result of numerous criminal justice developments since the 1970s. These developments created the conditions under which prosecutors can wield the law to obtain the outcomes they seek, and wield it even more forcefully in the face of defendants' noncompliance. Devon's case thus throws into sharp relief the ideals of fairness that are supposed to underpin our justice system, and the inequities that come from affording an overabundance of power to prosecutors.

Devon, who had done two short stints behind bars for drug-related state convictions in his twenties, ended up with a life-without-parole sentence because the prosecutor had the absolute power to compel it. Even the sentencing judge could not have altered that outcome. Devon's case demonstrates a fundamental perversion of due process that underlies contemporary criminal justice: the costs of asserting one's rights in criminal court are so high few people dare take the risk. Devon properly exercised his constitutional right to a jury trial, and, as we will see, he had good reason for doing so. Yet his unwillingness to knuckle under was the key factor in his ultimately being condemned to the custody of the Bureau of Prisons for the rest of his life.

This book is about the power to punish and its consequences. I use the case of federal criminal law—in particular, the set of formidable drug

laws that were enacted in the 1980s—as a window into the contemporary life of penal power. Two distinct components of this expansion of power help explain how and why the criminal law has been wielded so forcefully against defendants such as Devon in recent years. The first has to do with the institutional conditions—the rules of the game, as it were—by which criminal justice actors operate. Those conditions have changed dramatically in the federal justice system.[3] The seeds were planted well before the 1980s, but it took a confluence of structural factors to realize their potential.

The most significant structural factor was sentencing reform. Aiming to completely overhaul how criminal defendants were punished in the federal system, Congress passed the Sentencing Reform Act of 1984, which authorized the development of a mandatory sentencing-guidelines system designed to constrain judicial discretion.[4] Also in the 1980s, Congress directly enacted a bevy of mandatory minimum sentencing statutes, including the Anti–Drug Abuse Act of 1986, which mandated multiyear sentences for a panoply of drug offenses. Most infamously, a provision of the Anti–Drug Abuse Act incorporated a 100-1 powder-crack cocaine disparity in the drug weight triggering mandatory minimums. Under the new law, for example, a distribution offense involving just 5 grams of crack cocaine triggered the same five-year mandatory minimum sentence as an offense involving 500 grams of powder cocaine. This law armed authorities with a hugely powerful weapon for obtaining long prison sentences even in cases with relatively small amounts of drugs.[5]

These new laws set in motion dramatic changes in day-to-day federal criminal justice operations, largely by shifting a massive amount of discretionary power from judges to prosecutors.[6] Under the new regime, the federal prosecutor in effect subsumed most traditional judicial functions to become, in practice, "the adjudicator—making the relevant factual findings, applying the law to the facts, and selecting the sentence or at least the sentencing range."[7] The shift in power catalyzed a rush of activity in districts across the nation, where vastly more defendants were brought into federal court and charged by prosecutors fortified with the new powers.

Overall criminal caseloads grew, and the number of drug cases skyrocketed. Federal prosecutors filed felony drug charges against about eight thousand defendants in 1980, before the sentencing reforms. By 2000, that number had grown to nearly twenty-nine thousand.[8] The explosion in caseload size in turn fueled considerable institutional growth, including increased resource allocations to federal criminal justice. We now have a formidable federal law enforcement machine, with thousands of front-line prosecutors initiating criminal cases in federal courts across the country.

The second critical piece—indeed, the core—of the story told in this book is the human element of power's deployment, including the variety of ways that those given the power to punish put it to use. Legal actors not only use the force of criminal law to obtain desired outcomes but also use their myriad tools to suppress defiance and punish noncompliance. And the more unequal the power relations are between the prosecution and the defense, the worse it gets for those who do not go along with the program. So for defendants like Devon Harrison, who was prosecuted in a place, and at a time, that was especially hostile to the defense, the ultimate punitive tools available to prosecutors have been wielded with relative frequency. The creative, coercive, on-the-ground deployment of drug laws as it occurs in specific contexts and moments in time is detailed and illuminated in chapters 3 to 6.

To tell this story about the coercive use of power, I examine the day-to-day drug case adjudication practices in three federal court districts, which I call Northeastern District, Southeast District, and Southwestern District.[9] I traveled to the three districts between late 2012 and summer 2014, visiting courthouses in each jurisdiction and observing firsthand how cases in all three places were negotiated and sentenced. I conducted in-depth interviews with defense attorneys, current and former federal prosecutors, judges, and others. I also reviewed and analyzed case file materials, including sentencing memoranda, plea agreements, hearing transcripts, and other documents from sentenced drug cases in the districts. And I used the official data specific to the districts from the Executive Office for U.S. Attorneys, the courts, and the U.S. Sentencing Commission (an independent agency in the judicial branch of the government) to put my observations in the larger historical context of drug law deployment in each site.

In each of the case studies, I look behind the scenes to understand the logic of who gets brought to federal court on drug charges in the first place, and how those choices influence the way cases are resolved. I show how, in each locale, federal drug defendants are under immense pressure to waive their Fifth and Sixth Amendment rights, including their rights to appeal any part of the judgment or sentence, and plead guilty to charges that will usually bring long prison sentences. By following cases as they unfold, I reveal how prosecutors, judges, and others deploy those very laws that were supposed to tame discretionary excesses to obtain their desired outcomes.

But each district has its own norms and imperatives, so cases that may look alike on paper have very different trajectories depending upon where they are prosecuted. In some courts, guilty pleas are derived through prosecutors' demands for "cooperation" in exchange for plea deals; the prosecutors simultaneously threaten to increase the defendant's exposure to a longer sentence if he or she declines the deal. In other courts,

the pressure is time and expediency; plea offers will be taken off the table if the defendants drag their feet about accepting the plea deal or ask for too much due process. For those who do not succumb to the pressure to plead guilty, like Devon Harrison, the consequences are almost always magnitudes worse for having asserted their rights in federal court.

My goal with this book is to reveal the deep risks to our system of justice when the power to punish is not kept in check. Therefore, I examine on-the-ground legal action because it offers a view into a core challenge of democratic life: how power is authorized, negotiated, used, and abused in modern institutional operations. Indeed, the deployment of criminal law is among the most obvious, explicit, and extreme exercises of institutional power in modern democratic societies, a tool openly wielded to dominate, coerce, and control.

Power, the French philosopher Michel Foucault reminds us, "brings into play relations between individuals (or between groups)," and those relations constitute the crux of sociality: ever-present, in motion, and shifting as a function of time, place, people, and context.[10] Accordingly, dominance, as produced by power relations, can be best understood by examining the social conditions in which it is produced.[11] Through an examination of the dynamics of power—resistance to the force of power as well as the strategic games played in power struggles—we can discover deeper insights about how and why social relations take the shape they do in different contexts.[12]

In the context of criminal case negotiations, the powerful potential of law on the books can be put into action in a variety of ways, depending upon the players involved, the local norms and constraints, and the particular strategies marshaled. Changes in the federal laws that took place in the 1980s amplified the potential for extreme punishment outcomes, especially since mandatory minimums deepened the imbalance in power relations among the key actors.[13] The opportunities for wielding power are vast in contemporary federal criminal law, and the agents of power, especially law enforcement officers and prosecutors, embody roles that are imbued with enormous potential to compel the submission of criminal suspects to the legal system. And no matter how objective and by-the-book it may be portrayed, the exercise of such power is always selective. The question I grapple with here, then, is not whether power is in play, but rather why is it in play in the shape that it takes at any given time and place?

I could have chosen many other sites to examine how the coercive power of criminal law is deployed, but there were compelling reasons for examining the federal system. At first glance the federal system may seem like an odd choice, since it is a relatively small player in American criminal justice. According to the most recent available data, federal courts

account for only about 6.5 percent of the nation's felony drug convictions.[14] For a large number of drug cases brought into federal court, state-level courts would seem to be the more logical venue for prosecution. Each of the states has ample criminal law available to prosecute drug possession, manufacturing, and trafficking, and local and state agencies have enforced those laws with considerable zeal. Yet analyzing how drug cases live in the federal system can offer some critically important lessons about the force with which criminal law is wielded in our contemporary justice system.

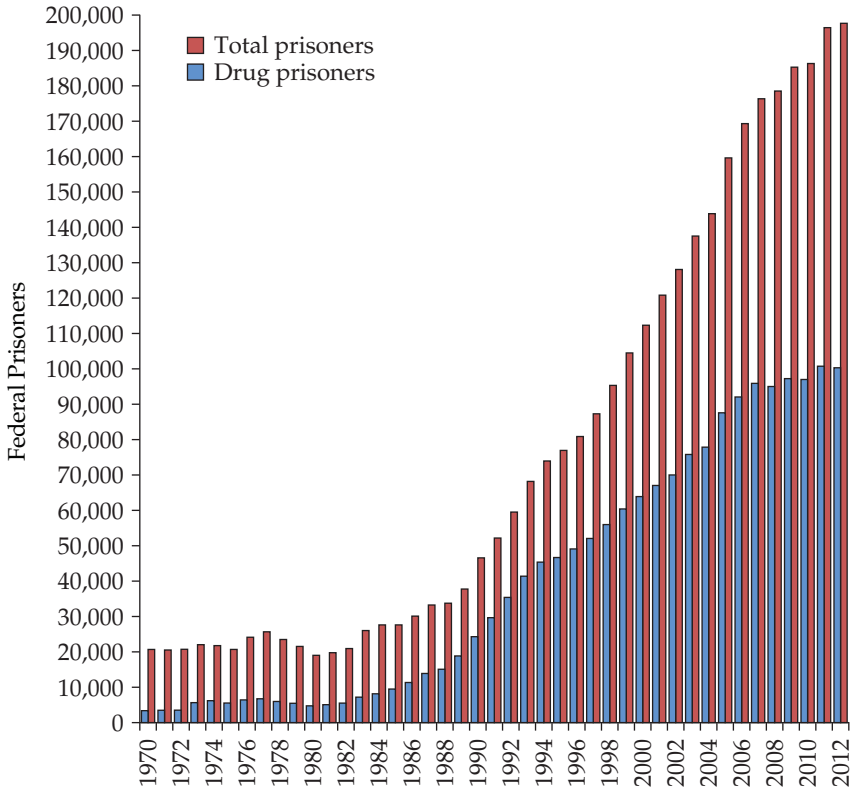
Because federal prosecutors' drug caseloads are usually very discretionary as to case selection, examining these prosecutions provides a clear view of the choices made by legal actors. We can make stronger inferences about the decisionmaking that constructs those caseloads, especially as they vary from district to district. The balance of criminal case types in a given district, the way charges are filed, and the particular mechanisms used in the adjudication process all expose the policy choices and practical norms of local actors and their organizations. Thus, these comparative case studies offer new insights into the durable features of institutional life to answer the questions of how and why social institutions—such as trial-level courts and the interconnected offices and agencies that constitute them—develop their own particular sets of logics, motivations, and practices.

And the federal "drug war" constitutes an important case of the late twentieth-century "mass imprisonment" phenomenon in its own right.[15] The federal deployment of modern criminal drug laws has been spectacular in its scope, its racially disproportionate impact, and the extent of its growth, outdoing the states on many measures of punitiveness. This was most evident in the dramatic rise in the relative share of the federal criminal caseload composed of drug cases. From 1940 through 1960, only 5 percent or fewer of federal criminal cases annually involved drug defendants. That share began to edge up over the next two decades: In 1980, 17 percent of federal defendants were convicted on drug charges. By 1990, once the sentencing-guidelines system was up and running, that share had more than doubled: 39 percent of federal defendants were convicted of drug offenses. Drug defendants have since accounted for 30 percent or more of all federal convictions each year, even as the overall number of federally convicted defendants also grew.[16]

Furthermore, under the sentencing guidelines and mandatory minimums, almost all who were convicted of drug charges have been sentenced to lengthy prison sentences. As a result, the growth in the federal imprisonment rate outpaced that of the states. Between 1980 and 2010, the federal prison population grew ninefold, nearly double the growth rate of state systems. A disproportionate share of that increase in the federal system was made up of sentenced drug defendants (see figure I.1).

Nor has the federal drug war been evenly distributed among the potential population of defendants. The sentencing guidelines and man-

Figure I.1 Federal Prison Growth Attributable to Sentenced Drug Defendants, 1970 to 2012



Source: Author's compilation. Data from 1970 to 2004 is based on University at Albany, Sourcebook of Criminal Justice Statistics, table 6.57. Data for 2005 to 2012 is based on Bureau of Justice Statistics, Federal Justice Statistics, table 7.9.
Note: Annual single-day population counts.

datory minimums contributed to a dramatic demographic shift among the federal drug defendant population. In 1986, on the eve of the implementation of sentencing reform, 58 percent of federally sentenced drug defendants were white; by 2013, just 23 percent were white.[17] This demographic skewing is not simply attributable to differences in offending. Rather, it reflects district-level enforcement policies and practices: how law enforcement resources are deployed and where law enforcement looks for illicit drug activity, what kinds of contraband are prioritized, and who is identified as being an appropriate target for the heavy hammer of federal drug prosecution.[18]

Some, but not all, of the demographic shift was due to the extreme racial disparity in federal prosecutors' choices as to whom to charge under the disproportionately punitive crack cocaine laws. For instance, white defendants have consistently constituted a mere 5 to 10 percent of the annual federal sentenced defendant population for crack offenses, even though whites make up the overwhelming majority of crack users in the United States.[19] Conversely, blacks have been vastly overrepresented as crack defendants, making up 80 to 95 percent of the annual sentenced population for federal crack convictions. Defendants in crack cases have also been disproportionately likely to end up with life sentences; more than half of all federal defendants sentenced to life for drug offenses were convicted of crack offenses. Like Devon Harrison, 94 percent of those crack-offense-sentenced lifers have been African American. Latinos have also accounted for an increasing share of all federally sentenced drug defendants in the guidelines era, accounting for nearly half of the overall drug-sentenced population in 2014.[20] One source of this increase has been stepped-up immigration enforcement along the southern border (discussed in detail in chapter 5).

But to fully explain the legal, political, and human impacts of the 1980s sentencing revolution requires more than just documenting its quantifiable results. The guidelines imposed by the U.S. Sentencing Commission represented a major shock to the entire federal system and set many institutional actions in motion, some visible in outcome data, others not. This structural change played a critical role in the subsequent proliferation of criminal cases entering the system, especially drug cases, and it catalyzed punitive legal innovations in how cases were adjudicated, above and beyond its intended effects of both toughening formal sanctions and constraining judicial sentencing discretion.

The guidelines—which aimed to "provide certainty and fairness . . . by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar offenses"—seem on their face to have come up short in at least half that goal.[21] They do provide certainty of punishment, but disparities in sentencing persist, diverging over time and as a function of place.[22] A close examination of adjudication practices reveals why policy "failures" like these are neither wholly unintended nor wholly unpredictable.

This leads to the normative importance of appraising the federal system, and my situating of the study within trial-level courts. The federal government has often followed rather than led in policy trends, but it was right out front on drug prosecutions, especially in regard to the innovation of the crack-powder disparity.[23] The fine-grained distinctions made between drug types in the new federal drug laws institutionalized racism in the system of punishment, which was revolutionary in the post–civil rights era.[24] Thirteen states directly followed suit by

building a crack-powder disparity into their drug laws.[25] More treacherously, crack's highly publicized, elevated seriousness in the federal system gave rise to a new era of aggressive, racially targeted frontline law enforcement.[26]

Furthermore, myriad other legal tools, such as a defendant's criminal history, are used by prosecutors in this system to enhance punishment and foreclose mitigation that also institutionalize racial disparities in sentences. By uncovering the mechanics of how these legal strategies have been variously deployed, we can assign responsibility for their effects. Prosecutorial ethics—as a systemic concern—and the power bestowed on the prosecutorial role lie at the heart of the normative questions I raise here. It will be impossible to significantly reform the justice system without first constraining and reorienting the prosecutorial power that has accumulated. Although the federal system may be qualitatively different than most state systems in its relative resources and its particular role in crime fighting, the structural shift in power to the prosecutor is emblematic of changes that have occurred in jurisdictions nationwide.[27] Indeed, empirical studies "consistently identify the same institutional actor as the central engine of [state] prison admission growth: the prosecutor."[28]

Because of the nature of how power works in legal institutions, we need to beware of complacency as the political ethos around the drug war, and the larger war on crime, begins to change. At first glance, a reversal appears under way, with several legal and policy developments signaling a taming of these "wars." For instance, in the 2005 case *United States v. Booker,* the United States Supreme Court rendered the federal sentencing guidelines advisory rather than mandatory, thereby giving judges more leeway to deviate from guidelines-determined sentences in all federal criminal cases, including drug cases.[29] Although mandatory minimums are still in force, judicial sentencing in cases not subject to mandatory minimums has been considerably liberated.[30]

A few years later, after decades of refusing to take action, Congress tempered the harsh crack cocaine mandatory minimum statutes when it passed the Fair Sentencing Act of 2010, which reduced the crack-powder disparity from 100:1 to 18:1. Since then, Congress has demonstrated some willingness to reconsider, across the board, the punitive nature of the federal drug laws. This is driven in part by fiscal concerns and prison overcrowding, and in part by justice considerations. Thus, there remains broad (although not full) bipartisan support for modest sentencing reforms that have been proposed—but not yet passed—in recent years.[31] In light of this changing political tenor, the U.S. Sentencing Commission reformulated the guidelines by reducing drug offense levels across the board, a move Congress assented to in 2014. The practical effect of this change was

to reduce the advisory guideline minimum sentences by anywhere from six months to more than sixty months, depending on the offense level and the criminal history category of the defendant.

The executive branch has also gotten on board with tempering the punitive reach of federal drug laws. In 2013, then attorney general Eric Holder directed U.S. attorneys across the nation to revise their criminal charging policies so that low-level drug defendants, even if legally eligible, would no longer be charged with offenses that "impose draconian mandatory minimum sentences."[32] Beginning in 2014, the attorney general's office has also partnered with the White House to implement a clemency initiative that offers those convicted of drug offenses who have served at least ten years in prison with no major disciplinary problems an opportunity to petition for release. Although only a small share of those petitioners have successfully earned sentence commutations so far, this effort represents a significant shift in recent presidential clemency policy.[33]

These developments have generated praise and excitement among activists, advocates, members of the press, and the public, yet optimism about the ability of such reform efforts to meaningfully rein in the power of federal drug laws may be misplaced.[34] The legal changes of the 1980s created the capacity and incentive for astounding growth of the federal justice system, in ways that render contraction very difficult. Legal scholars Kate Stith and Jose Cabranes warned us of this about ten years into the guidelines regime: "History teaches that it is always easier to create a bureaucracy than it is to reform or dismantle one."[35] This time around, a number of vested stakeholders, including some federal prosecutors as well as federal, state, and local law enforcement coalitions, have already mobilized to protect and maintain the punitive drug laws, working with members of Congress in these efforts.[36] This is no surprise, given that institutions like the federal justice system are inhabited by people whose livelihoods, professional identities, and in many cases ideological and moral commitments motivate them to maintain, if not enhance, the size and stature of their professional homes.

Moreover, the recent reforms have largely left intact a body of substantive law that subverts legal standards related to proof and evidence, ensuring that prosecutors can easily secure guilty pleas and convictions. The law also equips prosecutors with a stockpile of enhancements and add-ons they can wield to exponentially increase potential sentences, as well as a set of incentives (most notably for "substantial assistance" to the government) that they can dangle to extract guilty pleas. So although the reform movement now gaining momentum has much potential to make a dent in the overproduction and harsh punishment of federally imprisoned drug defendants, a more comprehensive dismantling of the legal

machinery responsible for that overproduction is a much more daunting and distant goal.

Ultimately, as I hope to convey in the coming pages, it will take more than tweaking to undo the broader human and institutional damage inflicted by a system whose balance of power is so out of whack. The erosion of core legal ideals, along with the steep human costs exacted by the adjudication practices I document here, threaten the very legitimacy of our system of justice for a large and growing share of our society.[37]