



A 25-Year Quagmire: The War on Drugs and Its Impact on American Society

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OVERVIEW

No issue has had more impact on the criminal justice system in the past three decades than national drug policy. The “war on drugs,” officially declared in the early 1980s, has been a primary contributor to the enormous growth of the prison system in the United States during the last quarter-century and has affected all aspects of the criminal justice system and, consequently, American society. As a response to the problem of drug abuse, national drug policies have emphasized punishment over treatment, and in a manner that has had a disproportionate impact on low-income minority communities. After millions of people arrested and incarcerated, it is clear that the “war on drugs” has reshaped the way America responds to crime and ushered in an era of instability and mistrust in countless communities.

By the mid-1990s, the climate regarding drug policy in the United States had shifted somewhat, reflecting a growing frustration with the “lock ‘em up” strategy to addressing drug abuse and growing support for the treatment model of combating drug abuse. The result was the proliferation of drug courts and other alternative sentencing strategies that sought to divert low-level drug offenders from prison into community-based treatment programs. Despite the expansion of these options over the last decade, the punitive sentencing provisions of the 1980s remain in effect across the United States, resulting in a record number of arrests, convictions, and sentences to prison for drug offenses.

Key indicators of the impact of the "war on drugs" on American communities include:

- Drug arrests have more than tripled in the last 25 years, totaling a record 1.8 million arrests in 2005;
- In 2005, 42.6% of all drug arrests were for marijuana offenses, and marijuana possession arrests accounted for 79% of the growth in drug arrests in the 1990s;
- Drug offenders in prisons and jails have increased 1100% since 1980. Nearly a half-million (493,800) persons are in state or federal prison or local jail for a drug offense, compared to an estimated 41,100 in 1980.
- Nearly 6 in 10 persons in state prison for a drug offense have no history of violence or high-level drug selling activity;
- African Americans comprise 14% of regular drug users, but are 37% of those arrested for drug offenses and 56% of persons in state prison for drug offenses;
- African Americans serve almost as much time in federal prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months), largely due to racially disparate sentencing laws such as the 100-to-1 crack-powder cocaine disparity;
- Persons in prison with a history of regular drug use are less than half as likely to be receiving treatment as in 1991. Only 14.1% of persons in state prison in 2004 who had used drugs in the month prior to their arrest had participated in treatment compared to 36.5% in 1991. In federal prison, these proportions declined from 33.7% in 1991 to 15.2% in 2004.

DRUG POLICY AND THE CRIMINAL JUSTICE SYSTEM

Drug Arrests Have More Than Tripled Since 1980

Between 1987 and 2005, the proportion of all arrests comprised of drug abuse violations increased from 1 in 14 to 1 in 8.

Responding to a perceived problem of high rates of drug abuse in the late 1970s, the Reagan administration officially launched a “war on drugs” policy in 1982. Within a few years, both funding for drug law enforcement and the political focus on the drug war had increased substantially. As a result, there was a surge of arrests for drug offenses beginning in the 1980s, which continues today. Between 1987 and 2005, the proportion of all arrests comprised of drug abuse violations increased from 1 in 14 to 1 in 8. The total of 581,000 arrests in 1980 more than tripled to a record high of 1,846,351 in 2005.¹ 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.² During the 1990s, 79% of the total growth in drug arrests was attributable to marijuana possession.³ While overall arrests were decreasing by 3% in the 1990s, marijuana arrests increased by 113%.⁴

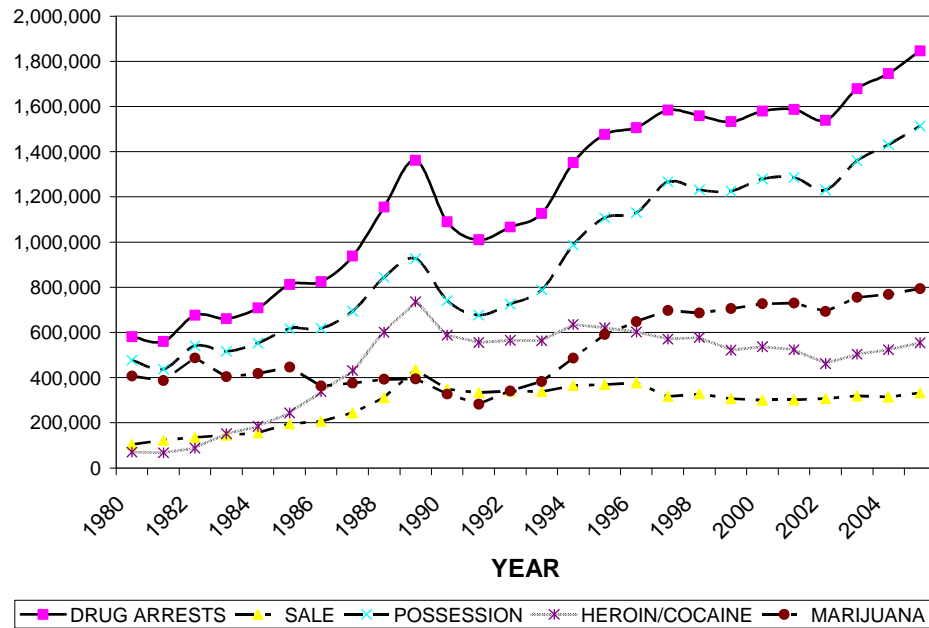
¹ FBI, *Crime in the United States*, various years.

² FBI, *Crime in the United States, 2005*, Arrest Table, available online: <http://www.fbi.gov/ucr/05cius/arrests/index.html>, visited June 26, 2007.

³ Ryan S. King and Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, The Sentencing Project, 2005.

⁴ *Ibid*

FIGURE 1
DRUG ARRESTS, 1980-2005



While rates of drug use were relatively high in 1979, they had begun to decline even prior to the formal inception of the “war” several years later. This decline parallels similar reductions in smoking, as many Americans became increasingly interested in leading a healthy lifestyle. The heightened level of drug arrests continued even as drug use further declined and then stabilized. Government household surveys of drug use indicate that 14.1% of the population were monthly drug users in 1979. This figure declined by more than half to 6.6% by 1991 and has risen slightly to its current level of 8.1% of the population.⁵ Against this overall decline, the number of arrests continues at record levels. However, in recent years there has been a demonstrable shift toward enforcement of marijuana possession offenses and away from cocaine and heroin.⁶

⁵ Office of Applied Studies. (2006). *Results from the 2005 National Survey on Drug Use and Health: National Findings* (DHHS Publication No. SMA 06-4194, NSDUH Series H-30). Rockville, MD: Substance Abuse and Mental Health Services Administration, at Table 1.28B.

⁶ King and Mauer, *supra* note 3.

The "War on Drugs" Distorts Law Enforcement Priorities in Fighting Crime

Since there are no "cost-free" choices in public policy, the emphasis on drug enforcement since the early 1980s has created a set of consequences for overall crime policy as well. First, it has diverted law enforcement resources away from other crime problems. Increased law enforcement attention to low-level drug offenders inevitably results in fewer resources devoted to other types of offenses. Economists at Florida State University found that a 47% increase in drug arrests by Illinois law enforcement officers between 1984 and 1989 coincided with a 22.5% decline in arrests for drunk driving.⁷ They concluded that increased traffic fatalities could result from the more limited attention devoted to drunk driving. A Florida study revealed that every additional arrest for a drug crime resulted in an increase of 0.7 Index (serious) crimes,⁸ and a one percent increase in drug arrests resulted in an .18% increase in Index crimes.⁹

Secondly, the incentives created by asset forfeiture laws threaten civil liberties and lead to a misallocation of law enforcement resources. As a result of federal asset forfeiture legislation passed by Congress, both federal and local police agencies can seize any "drug-related" assets of suspected drug dealers and use any seized funds to augment law enforcement agency budgets even if the suspect is never charged with a crime. By 1994, local police forces had received almost \$1.4 billion in assets,¹⁰ while 80% of asset seizures failed to result in a criminal conviction.¹¹ By depositing funds directly into law

⁷ Bruce L. Benson and David W. Rasmussen, *Illicit Drugs and Crime*, The Independent Institute, 1996, at 32.

⁸ David W. Rasmussen and Bruce L. Benson, *The Economic Anatomy of a Drug War: Criminal Justice in the Commons*, Lanham, MD: Rowman and Littlefield, 1994.

⁹ Bruce L. Benson, David W. Rasmussen, Iljoong Kim, "Deterrence and Public Policy: Trade-Offs in the Allocation of Police Resources," *International Review of Law and Economics*, Vol. 18, 77-100, 1998.

¹⁰ Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, University of Chicago Law Review, Vol. 65, No. 1, 1998, at 64.

¹¹ *Ibid* at 77.

Economists at Florida State University found that a 47% increase in drug arrests by Illinois law enforcement officers between 1984 and 1989 coincided with a 22.5% decline in arrests for drunk driving.

enforcement accounts, asset forfeiture laws create an incentive for police agencies to favor drug law enforcement over other categories of crimes. A recent study found an 18% increase in drug arrests among agencies in which the department is permitted to retain a portion of seized assets, while drug arrests as a portion of total arrests increased by 20%.¹²

In 2000, Congress passed the *Civil Asset Forfeiture Reform Act*, which now requires law enforcement agencies to demonstrate by “a preponderance of the evidence,” rather than merely a showing of “probable cause,” that the property to be seized is linked to criminal activity. Moreover, the government now has the burden of proving that property was involved in a crime, rather than the previous standard under which the owner was required to prove that the property was not the product of criminal involvement.

¹² Brent D. Mast, Bruce L. Benson, and David W. Rasmussen, “Entrepreneurial Police and Drug Enforcement Policy” *Public Choice*, Vol. 104, (3), 285-308, 2000.

Harsher Federal Sentencing Contributes to an Increasing Number of Drug Offenders in Prison

Along with the stepped-up pace of arrests in the 1980s, legislatures throughout the country adopted harsher sentencing laws in regard to drug offenses. The federal system, in particular, led the way with the passage of the Anti-Drug Abuse Act of 1986 and the Anti-Drug Abuse Act of 1988. Among a number of provisions, these laws created a host of severe mandatory minimum sentencing laws for drug offenses and affected the calibration of the federal Sentencing Guidelines, which were being formulated simultaneous to these statutory changes. The result of these developments was to remove discretion from the sentencing judge to consider the range of factors pertaining to the individual and the offense that would normally be an integral aspect of the sentencing process, thereby increasing the number of individuals in federal court exposed to a term of incarceration for a drug offense.

Largely as a result of these laws, the chance of receiving a prison term in the federal system after being arrested for a drug offense has risen dramatically. The proportion of defendants convicted of a drug offense who were sentenced to prison increased from 79% to 93% between 1988 and 2004.

Largely as a result of these laws, the chance of receiving a prison term in the federal system after being arrested for a drug offense has risen dramatically. The proportion of defendants convicted of a drug offense who were sentenced to prison increased from 79% to 93% between 1988 and 2004.¹³ Overall trends in the federal court system reflect an ever more punitive approach for drug offenders. Between 1988 and 2004, the average prison sentence for all offenses increased by 8%, while the average prison sentence for a drug offense increased by 17%.¹⁴ Moreover, the expansion of mandatory minimum sentencing and the abolition of parole have resulted in persons *-serving* much longer sentences for drug offenses than in the past. For example, drug offenders released from prison in 1986 who had been sentenced before the

¹³ Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2004*, December 2006, NCJ 213476.

¹⁴ *Ibid* at 2; and, Bureau of Justice Statistics, *Federal Criminal Case Processing, 1998*, September 1999, NCJ 169277, at 1.

adoption of mandatory sentences and sentencing guidelines had served an average of 22 months in prison. Offenders sentenced in 2004, after the adoption of mandatory sentences, were expected to serve almost three times that length, or 62 months in prison.¹⁵

While the duration of time served in prison has continued to increase at the federal level, the severity of the charged conduct has not increased commensurately. In 1994, 99.1% of defendants in United States District Court convicted of a drug violation and sentenced to prison had been charged with a trafficking offense. By 2002, the proportion had declined to 92.3% of defendants,¹⁶ even as time served in the federal system was increasing.

The potential of facing a mandatory minimum or a Guideline range sentence that is significantly longer than what one would face in state court increases the likelihood that a defendant will accept a plea bargain.

The prosecution of many drug offenders is discretionary and can be subject to either state or federal jurisdiction. Frequently, state cases are transferred to federal prosecutors in order for the defendant to face stiffer penalties in the federal system. The potential of facing a mandatory minimum or a Guideline range sentence that is significantly longer than what one would face in state court increases the likelihood that a defendant will accept a plea bargain. In recent years there has been a dramatic increase in the number of drug prosecutions brought in federal court, a rise of 144% in the period of 1985-2002.¹⁷ This shift in emphasis resulted in drug prosecutions comprising a growing proportion of the criminal caseload. In 1982, one of five defendants was facing a drug charge. By 2004, this ratio had decreased to one in three defendants.¹⁸ This has led to more persons being brought under the scope of the mandatory minimum penalties adopted by Congress in 1986 and 1988, among the most severe in the nation. These laws require a mandatory five-

¹⁵ Bureau of Justice Statistics, *Federal Criminal Case Processing, 2002*, January 2005, NCJ 207447, at 1.

¹⁶ *Ibid* at 32.

¹⁷ Bureau of Justice Statistics, *Federal Drug Case Processing, 1985-91*, March 1994, at 1; and, Bureau of Justice Statistics, *supra* note 15, at 10.

¹⁸ Bureau of Justice Statistics, *supra* note 13.

year prison term for possessing as little as five grams of crack cocaine (the weight of two pennies).

Drug Offenders Represent a Substantial Proportion of the Jail, Prison, and Probation Population

As a direct result of the punitive movement in drug law enforcement and sentencing policy, the number of drug offenders in prison and jail has skyrocketed since 1980. As seen in Figure 2 below, in 1980 there were 19,000 offenders in state prisons for drug offenses and 4,900 in federal prisons, representing 6% and 25% of all inmates respectively.¹⁹ By 2003, a more than twelve-fold increase in drug offenders in state prisons resulted in a total of 250,900, constituting 20% of the inmate population.²⁰ Dramatic increases occurred in the federal system as well, as the number of drug offenders rose to 87,000, representing 55% of all inmates.²¹

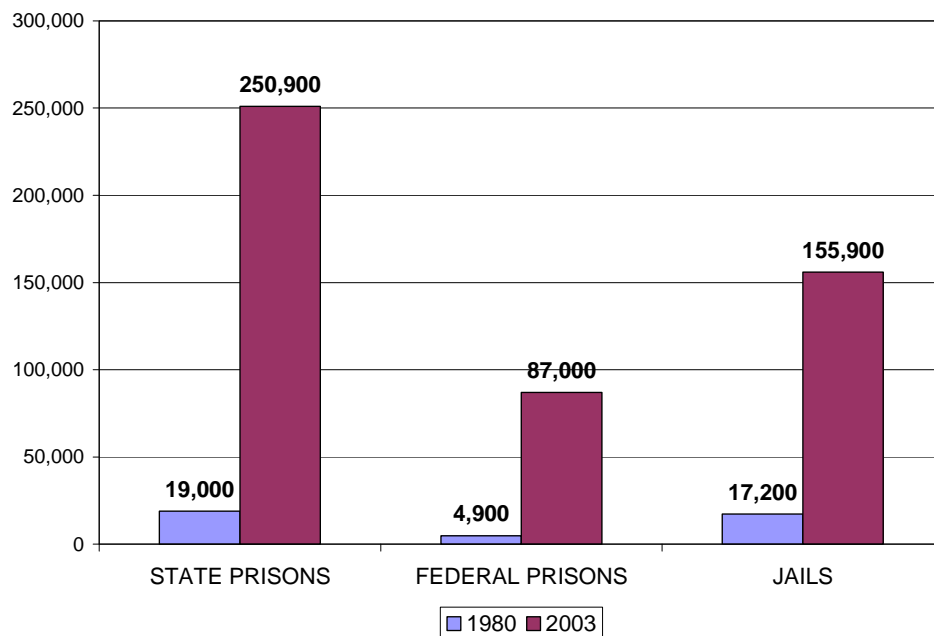
¹⁹ Bureau of Justice Statistics, *Correctional Populations in the United States, 1997*, November 2000, NCJ 177613.

²⁰ Paige M. Harrison and Allen J. Beck, *Prisoners in 2005*, Bureau of Justice Statistics, November 2006, NCJ 215092, at 9.

²¹ Ibid

Local jails experienced a dramatic rise in the number of people being detained for serving a drug offense, increasing from an estimated 17,200 in 1980²² to 155,900 – one in four persons in jail– by 2003.²³ Overall, the number of drug offenders in prison or jail increased to nearly half a million, rising by 1100% from 41,100 in 1980 to 493,800 in 2003.

FIGURE 2
DRUG OFFENDERS IN PRISONS AND JAILS, 1980 AND 2003



²² Estimates derived from Louis W. Jankowski, *Jail Inmates 1991*, Bureau of Justice Statistics, June 1992, at 3; and, Caroline Wolf Harlow, *Drugs and Jail Inmates, 1989*, Bureau of Justice Statistics, August 1991, at 2.

²³ Doris J. James, *Profile of Jail Inmates, 2002*, July 2004, NCJ 201932.

An increasing number of probationers are being supervised for drug offenses as well. More than one in four probationers – 1,165,500 – are currently serving a sentence for a drug offense.²⁴ While there has been a leveling off in the states regarding the proportion of felony convictions comprised of drug offenses during the last decade, national data suggests that an increasing proportion of the arrests for drug offenses are adjudicated through community supervision. In 1992, 70% of drug felony convictions resulted in a sentence to prison, or jail.²⁵ By 2002, that proportion had declined to 66%.²⁶

²⁴ Lauren E. Glaze and Thomas P. Bonczar, *Probation and Parole in the United States, 2005*, November 2006, NCJ 215091.

²⁵ Patrick A. Langan and Helen A. Gradziadei, *Felony Sentences in State Courts, 1992*, January 1995, NCJ 151167, at 2.

²⁶ Matthew R. Durose and Patrick A. Langan, *Felony Sentences in State Courts, 2002*, December 2004, NCJ 206916, at 2.

MANY DRUG OFFENDERS ARE INAPPROPRIATELY INCARCERATED

Most Drug Offenders in Prison Are Not Kingpins

A primary rationale provided for federal prosecution of high-level drug offenses is that the federal system is equipped with the resources necessary to handle these types of sophisticated cases. The key goal of the mandatory sentencing structure that was crafted by legislators in the mid-1980s was to “create the proper incentives for the Department of Justice to direct its ‘most intense focus’ on ‘major traffickers’ and ‘serious traffickers.’”²⁷ These laws were intended to target individuals who operate a manufacturing or distribution network, or who manage street-level sales in “substantial street quantities.”²⁸ The intent was for the federal government to bring its ample resources to bear on sophisticated drug selling enterprises.

One would therefore expect that federal drug cases on average should be composed of high-level offenders. However, research on cocaine defendants conducted by the U.S. Sentencing Commission undermines this premise. Among powder cocaine defendants, one in three was categorized as a courier or mule, while only 1 in 13 was classified as an “importer/high-level supplier.”²⁹ Among crack cocaine defendants, more than 60% were either street-level dealers, couriers, or low-level assistants.³⁰ This prevalence of low-level defendants in the federal system is inconsistent with a criminal justice system that was designed to harness the resources of the national government and combat the most serious interstate and international crimes, offenses that

²⁷ William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Arizona Law Review 1233, 1252 (1996).

²⁸ Ibid

²⁹ United States Sentencing Commission, *Cocaine and Federal Sentencing Policy*, May 2007, at 19.

³⁰ Ibid

local law enforcement was ill suited to address. In reality, the majority of federal criminal justice resources are directed to the types of low- and mid-level crimes to which state and local governments are ideally situated to respond.

The prevalence of low-level offenders in the federal system is mirrored in the state prison system. A 2002 report found that the criminal history of three-quarters of drug offenders in state prison consists of only drug or non-violent offenses and 58% overall have no history of violence or high-level drug selling activity.³¹ An analysis of the roles persons in state prison played in the drug trade prior to incarceration reveals that, at most, 28.5% of individuals were engaged in high-level drug activity.³² The report identifies 125,000 persons in state prison who have never engaged in violent conduct or high-level drug activity, and who could be considered as appropriate candidates for diversion into a non-custodial setting.³³

The law enforcement emphasis on low-level drug offenses has had a profound impact on women and children in particular.

A Growing Number of Women are Affected by the “War on Drugs”

The law enforcement emphasis on low-level drug offenses has had a profound impact on women and children in particular. Women in prison are considerably more likely than men to have been convicted of a drug offense. As of 2005, 29% of women in prison had been convicted of a drug offense, compared to 19% of men,³⁴ and two-thirds had children under 18.³⁵ Women

³¹ Ryan S. King and Marc Mauer, *Distorted Priorities: Drug Offenders in State Prison*, The Sentencing Project, September 2002.

³² *Ibid* at 7.

³³ *Ibid* at 8.

³⁴ Harrison and Beck, *supra* note 20.

³⁵ Christopher J. Mumola, *Incarcerated Parents and Their Children*, Bureau of Justice Statistics, August 2000, NCJ 182335.

were also more likely to have used drugs at the time of their offense,³⁶ been a victim of physical or sexual abuse prior to incarceration,³⁷ or suffered from a mental health problem.³⁸ All of these issues raise unique concerns and challenges for the criminal justice system as women comprise a growing proportion of the correctional population. Moreover, legislative developments have created barriers to reentry that further challenge women. For example, as a result of the federal welfare legislation of 1996, there is now a lifetime ban on the receipt of welfare benefits for anyone convicted of a drug felony, unless a state chooses to opt out of this provision. As of 2006, 15 states were fully enforcing the provision,³⁹ which means that drug offenders will have an even more difficult transition back into the community than ex-offenders generally. This has a particularly pronounced impact for women and mothers, who, along with their children, are the primary recipients of this type of aid.

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A Substantial Portion of Prison Inmates Have a History of Substance Abuse . . .

While nearly 500,000 inmates in prison and jail are currently incarcerated for a drug offense (possession or sale of drugs), additional numbers are incarcerated for drug-related offenses. These could include a burglary committed to obtain money to buy drugs or an assault committed under the influence of drugs. More than half (56%) of state prison inmates in 2004 had used drugs in the month prior to their arrest, and about one-sixth committed

³⁶ Lawrence A. Greenfeld and Tracy L. Snell, *Women Offenders*, Bureau of Justice Statistics, December 1999, NCJ 175688, at 8-9.

³⁷ *Ibid* at 8.

³⁸ Doris J. James and Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics, September 2006, NCJ 213600, at 4.

³⁹ The Sentencing Project, *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses: Executive Summary*, updated April 2006.

their offense in order to obtain money to buy drugs.⁴⁰ For property and drug offenders these proportions are even higher, with one in three property offenders and one in four drug offenders reporting committing their offense in order to subsidize their drug use.⁴¹

. . . Yet, Prison Inmates Are Increasingly Less Likely To Be Receiving Drug Treatment

Despite nearly one in five persons in state prison reporting the motivation for their offense as the need to fund a drug habit and more than half (53%) suffering from substance abuse and/or dependence, the services provided to address substance abuse and related problems have not been expanded accordingly. In state prisons in 2004, one in seven (14.1%) persons in prison who used drugs in the month before their offense had participated in treatment since admission to prison.⁴² That rate was down substantially from one in three (36.5%) inmates in 1991.⁴³ Similar declines occurred in the federal prison system, with only 15.2% of persons who had been regular drug users receiving treatment, as compared to 33.7% in 1991.⁴⁴

⁴⁰ Christopher J. Mumola and Jennifer C. Karberg, *Drug Use and Dependence, State and Federal Prisoners, 2004*, Bureau of Justice Statistics, October 2006, NCJ 213530.

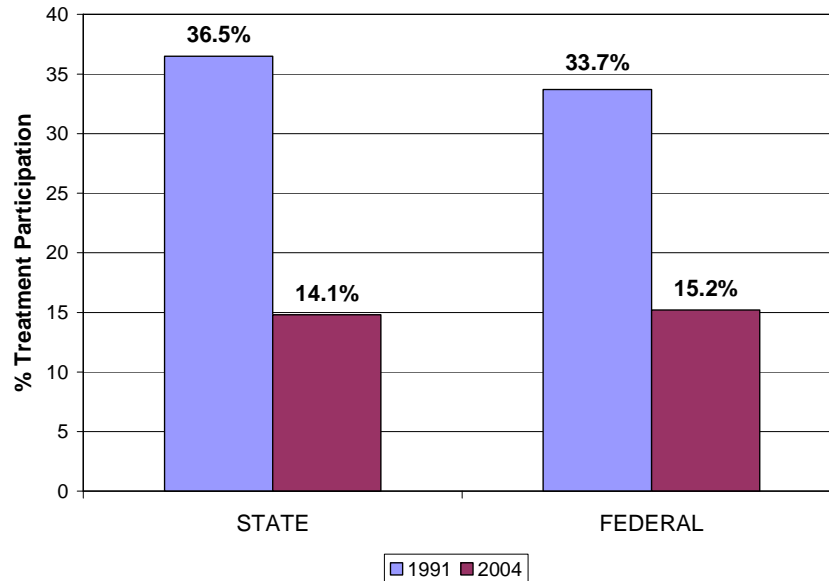
⁴¹ Ibid

⁴² Ibid at 9.

⁴³ Ibid; and, Christopher J. Mumola, *Substance Abuse and Treatment, State and Federal Prisoners, 1997*, Bureau of Justice Statistics, January 1999, NCJ 172871.

⁴⁴ Ibid

FIGURE 3
DRUG TREATMENT IN PRISON, 1991 and 2004



While the federal government points to increases in the number of drug users taking advantage of “prison-based programs” between 1997 and 2004, it is critical to note that all of this increase is in the area of self-help groups and peer counseling. Although these are important ingredients to a well-balanced treatment regimen, there is no substitute for professionally designed and implemented programming. Despite this fact, most individuals with an identified drug abuse problem are receiving peer counseling (28%, state) and/or drug abuse education classes (17.8%, state), while only one in seven is receiving professional treatment.⁴⁵ Of all persons in prison meeting the criteria as drug abusers or drug dependent, only 40.3% of persons in state prison and 48.6% of persons in federal prison have received *any* treatment or programming since admission.⁴⁶ Thus, the country’s prisons remain full of

⁴⁵ Mumola and Karberg, *supra* note 40, at 9.

⁴⁶ *Ibid*

hundreds of thousands of persons with demonstrable drug dependencies who have not yet received any services to address their addiction.

Drug Treatment Is More Cost Effective Than Mandatory Sentencing

A series of studies in recent years have demonstrated that drug treatment – both within and outside of the criminal justice system – is more cost-effective in controlling drug abuse and crime than continued expansion of the prison system. An evaluation of drug court programming found a reduction in drug use and criminal offending and cost savings relative to incarceration.⁴⁷ A recent analysis of substance abuse treatment programs in California concluded that every dollar spent on substance abuse treatment resulted in a savings of seven dollars in reduced crime and increased earnings.⁴⁸ A RAND analysis of these issues concluded that whereas spending \$1 million to expand the use of mandatory sentencing for drug offenders would reduce drug consumption nationally by 13 kilograms, spending the same sum on treatment would reduce consumption almost eight times as much, or by 100 kilograms.⁴⁹ Similarly, expanding the use of treatment was estimated to reduce drug-related crime up to 15 times as much as mandatory sentencing.⁵⁰ Moreover, there is some evidence that simply warehousing individuals in prison may have a criminogenic effect, as research has found higher rates of recidivism for persons sentenced to prison rather than probation.⁵¹

A recent analysis of substance abuse treatment programs in California concluded that every dollar spent on substance abuse treatment resulted in a savings of seven dollars in reduced crime and increased earnings.

⁴⁷ Steven Belenko, *Research on Drug Courts: A Critical Review 2001 Update*, The National Center on Addiction and Substance Abuse at Columbia University, June 2001.

⁴⁸ Susan L. Ettner, David Huang, Elizabeth Evans, Danielle Rose Ash, Mary Hardy, Mickel Jourabchi, and Yih-Ing Hser, “Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment ‘Pay for Itself,’” *Health Services Research*, Vol. 41, (1), 192-213, 2006.

⁴⁹ Jonathan P. Caulkins, C. Peter Rydell, William Schwabe, and James Chiesa, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers’ Money?*, RAND, 1997, at xvii-xviii.

⁵⁰ Ibid

⁵¹ Cassia Spohn and David Holleran, “The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders,” *Criminology*, Vol. 40, (2), 329-357, 2002.

Among individuals who are incarcerated, studies of drug treatment in prisons have also concluded that treatment significantly reduces recidivism. One of the oldest such programs is the Stay'n Out program in New York State, established in 1977 as a prison-based therapeutic community. Evaluations of the program have found that 27% of its male graduates are rearrested after parole, compared with 40% of inmates who received no treatment or only counseling.⁵² Women's rearrest rates were generally lower than for men.

⁵² Center on Addiction and Substance Abuse, *Behind Bars: Substance Abuse and America's Prison Population*, 1998, at 130.

THE “WAR ON DRUGS” AND COMMUNITIES OF COLOR

The impact of greater emphasis on law enforcement and incarceration of drug offenders has had a dramatic impact on African American communities as a result of three overlapping policy decisions: the concentration of drug law enforcement in inner city areas; harsher sentencing policies, particularly for crack cocaine; and, the drug war’s emphasis on law enforcement at the expense of prevention and treatment. Given the shortage of treatment options in many inner city areas, drug abuse in these communities is more likely to receive attention as a criminal justice problem, rather than a social problem.

Drug Enforcement in the African American Community

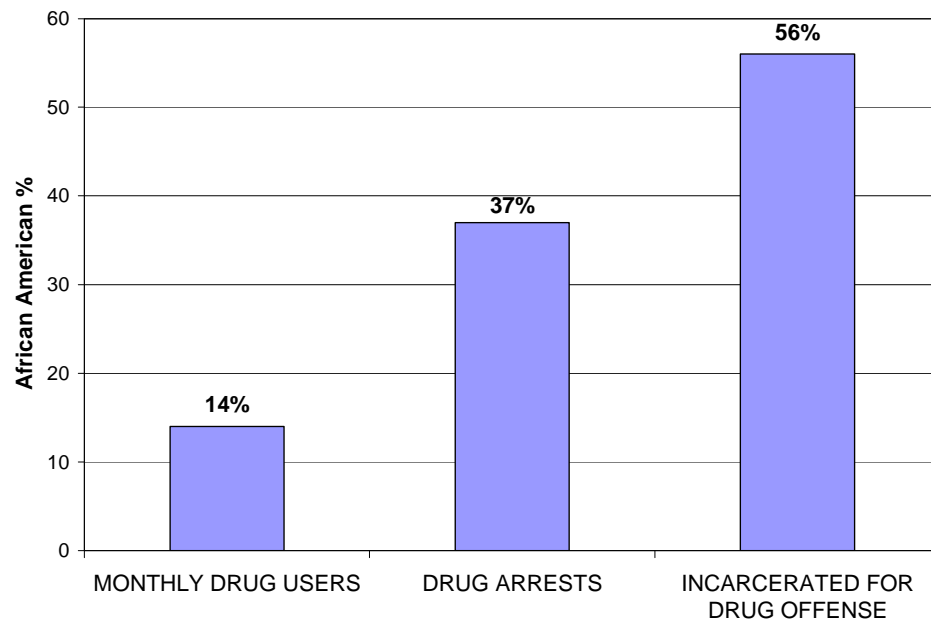
While African Americans use drugs at a modestly higher rate than other groups (9.7% for current users compared to 8.1% for whites and 7.6% for Hispanics),⁵³ their smaller numbers in the population result in their comprising 14% of monthly drug users. Non-Hispanic whites represent 69.2% of users and Hispanics 12.4%. These rates of use generally reflect the racial and ethnic distribution of the general population of the United States, which is 66.9% non-Hispanic white, 12.8% black, and 14.4% Hispanic.⁵⁴ Thus, an analysis of drug use patterns in the United States does not suggest any disproportionalities along racial or ethnic lines that would support commensurate racial disparities in the criminal justice system.

⁵³ Office of Applied Studies, *supra* note 5, at Table 1.28B.

⁵⁴ U.S. Census Bureau: State and County QuickFacts. Data derived from Population Estimates, Census of Population and Housing, Small Area Income and Poverty Estimates, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits, Consolidated Federal Funds Report, May 2007.

Despite average rates of drug use among the general population, African Americans who use drugs are more likely to be arrested than other groups. And this disparity extends throughout the criminal justice system. While African Americans constitute 14% of the nation's monthly drug users, they represent 37% of those persons arrested for a drug offense and 56% of those in state prison for a drug conviction.⁵⁵

FIGURE 4
AFRICAN AMERICAN PROPORTION OF DRUG OFFENSES



⁵⁵ Arrest data from Federal Bureau of Investigation, File UCR91300, March 2002; prison data from King and Mauer, *supra* note 31, at 11.

Higher arrest rates of African Americans generally reflect a law enforcement emphasis on inner city areas, where drug sales are more likely to take place in open-air drug markets and fewer treatment resources are available.⁵⁶ However, research suggests that visible manifestations of drug selling activity are not accurate indicators of drug use and dependency in neighborhoods and fuel widely held misperceptions about patterns of drug abuse in American society.⁵⁷ In fact, simply relying upon *visible* drug sales as a means of measuring the level of drug distribution in a neighborhood greatly overestimates the degree to which African Americans are involved in the drug trade and discounts the active drug selling economy in majority white communities that tends to take place behind closed doors and out of public view.

Despite the fact that two-thirds of regular crack cocaine users are white or Latino, 82% of defendants sentenced in federal court for crack offenses are African American.

The Role of Sentencing in Exacerbating Racial Inequalities: Crack Cocaine Policy

Once in the criminal justice system, African American drug offenders are often treated more harshly than other racial groups. The best documented area in which this takes place is in regard to sentencing for crack cocaine offenses. Crack cocaine and powder cocaine have the same chemical composition, but crack is marketed in less expensive quantities and is incorrectly perceived to be used predominantly by African Americans. Despite the fact that two-thirds of regular crack cocaine users are white or Latino,⁵⁸ 82% of defendants sentenced in federal court for crack offenses are African American.⁵⁹ While data on drug selling are more limited, the available evidence suggests that most drug users purchase their drugs from someone of

⁵⁶ Leonard Saxe, Charles Kadushin, Andrew Beveridge, David Livert, Elizabeth Tighe, David Rindskopf, Julie Ford, and Archie Brodsky, "The Visibility of Illicit Drugs: Implications for Community-Based Drug Control Strategies," *American Journal of Public Health*, Vol. 91, (12), pp. 1987-1994, 2001.

⁵⁷ *Ibid* at 1990.

⁵⁸ Office of Applied Studies, *supra* note 5, at Table 1.43a.

⁵⁹ United States Sentencing Commission, *supra* note 29, at 16.

their own race.⁶⁰ Thus, the caseload of African Americans coming through the federal court system reflects racially disparate patterns of law enforcement, rather than merely differential trends in drug abuse.

Under federal law, and similar statutes in some states, offenders convicted of crack cocaine offenses are punished more severely than those convicted of powder cocaine offenses. Thus, in federal court an offender selling five grams of crack cocaine receives the same five-year mandatory minimum sentence as does an offender selling five hundred grams of powder cocaine. This low five gram threshold means that crack cocaine offenses are punished more severely than any other type of drug offense. In fact, crack cocaine is the only drug that carries a mandatory minimum sentence for simple possession. As a result, two similarly situated defendants, one convicted of selling crack cocaine and one convicted of selling powder cocaine, can expect to serve dramatically different terms of imprisonment. Data from the United States Sentencing Commission show that the average crack cocaine defendant received a sentence of 122 months in 2006, or three years longer than the 85-month sentence for powder cocaine.⁶¹

Because of drug sentencing laws such as these, which target neighborhoods of color and result in the imprisonment of hundreds of thousands of young black men and women, African Americans now serve almost as much time in prison for a drug offense in the federal system (58.7 months) as whites do for a violent offense (61.7 months).⁶² Between 1994 and 2003, the average time served by African Americans for a drug offense increased by 62%, compared

⁶⁰ K. Jack Riley, *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six Cities*, National Institute of Justice, December 1997, at 1.

⁶¹ United States Sentencing Commission, *supra* note 29, at 61.

⁶² Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, NCJ 210299, October 2005, at 112.

... two similarly situated defendants, one convicted of selling crack cocaine and one convicted of selling powder cocaine, can expect to serve dramatically different terms of imprisonment.

with an increase of 17% for white drug offenders.⁶³ In short, the discretionary nature of drug enforcement practices, focused predominantly in low-income communities of color, coupled with drug sentencing laws, have created catastrophic consequences for these neighborhoods.

The Failure of a Reactive Approach to Drug Abuse

The above data do not suggest that drug abuse and sales have not had negative consequences for many communities of color. As noted above, most resources in communities of color that have been targeted to address drug abuse come in the form of law enforcement intervention. This reactive approach sends police officers into communities to respond to drug sales through a process of “buy and bust.” Meanwhile, far fewer resources are invested in a proactive approach of prevention and treatment. The “resource deprivation” in communities of color means that the problems of drug abuse and sales have an amplified effect in these neighborhoods.⁶⁴ Limited access to adequate education, training, and economic opportunities creates an unstable employment atmosphere in many communities of color, meaning that addiction can have a pronounced impact on an individual’s financial situation. In addition, publicly subsidized treatment facilities are scarce and often require a substantial waiting period for limited bed space. This failure in the provision of services increases the risks of relapse and other consequences of drug abuse. These are very different issues than those faced by middle- and upper-income drug users, who are better situated to access private treatment options and weather unstable periods of earnings. The institutional response to drug addiction in communities of color would benefit from a shift away from the reactive approach of policing, and toward

⁶³ Ibid; Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 1994*, NCJ 163063, April 1998, at 85.

⁶⁴ Jeanette Covington, “The Social Construction of the Minority Drug Problem,” *Social Justice*, Vol. 24, (4), 117-147, 1997.

proactively identifying the underlying challenges leading to or complicating drug abuse, while investing in evidence-based preventative strategies.

NEED FOR A CHANGE IN DRUG POLICY

Evolving Momentum for Reform

In recent years there have been modest signs of legislative bodies reconsidering the wisdom of mandatory sentencing laws. In 1994, Congress adopted a “safety valve” provision that applies to federal drug cases. Under this statute, judges are permitted to sentence offenders below the applicable mandatory minimum penalty (though not less than two years in prison) if the offender has a minimal prior record, there is no involvement in violence in the offense, and if the offender provides “substantial assistance” to the prosecution. Since the adoption of this provision, 25% of federal drug cases where mandatory sentences would otherwise apply are now sentenced in this way, providing an indication of the degree to which low-level offenders are being prosecuted.⁶⁵

In 1998, the Michigan Legislature substantially scaled back a twenty-year-old law that mandated imprisonment of life without parole for distribution of 650 grams of cocaine or heroin. The penalty was the same as for first-degree murder in Michigan and applied even to first offenders. After more than 200 offenders were sentenced under the law, changes were enacted that now permit parole consideration after fifteen years. In 2007, the legislatures in both Delaware and Rhode Island strongly considered legislation to repeal mandatory minimum sentencing for drug offenses. In Delaware, the legislation passed the House, but was not brought to a vote in the Senate. In Rhode Island, legislation was passed in both the House and Senate, but was vetoed by the governor.

⁶⁵ United States Sentencing Commission, *2006 Sourcebook of Federal Sentencing Statistics*, March 2007, at Table 44.

Between 2004 and 2006, at least 13 states either established or expanded drug treatment and diversion sentencing options.⁶⁶ Maryland, for example, established a diversion program by which a defendant can enter treatment in the community and have the entry of judgment struck by the court upon successful completion of the program. Other states created alternatives to incarceration for persons sentenced to community supervision who have violated technical requirements such as failing a drug screen. Technical violations represent one of the primary generators of revocation back into custody from community supervision, and efforts like those in Arizona to establish sanctions while keeping individuals in the community represent opportunities for significant cost savings to the state without having to rely on additional periods of incarceration.

Although many of these changes are modest compared to the elaborate structure of federal and state sentencing laws passed over the preceding decades, these legislative developments represent an acknowledgement that the past strategy of reactive enforcement has failed to stem the tide of drug abuse, while creating unsustainable growth in the correctional system. They also offer the promise of future opportunities for legislative and policy reform. Additionally, the expansion of drug courts, from their inception in 1989 to 1,662 in 2007 illustrates the country's evolving commitment to treatment as a sensible response to drug abuse.⁶⁷

⁶⁶ Ryan S. King, *Changing Direction? State Sentencing Reforms 2004-2006*, The Sentencing Project, 2007.

⁶⁷ Census of drug courts current as of January 1, 2007; *Drug Court Activity Update: Composite Summary Information*. BJA Drug Court Clearinghouse. American University.

More Rational Drug Policies Could Readily Be Implemented

A substantial body of research now exists that documents the injustices and inefficiencies of drug policies that emphasize enforcement and incarceration over prevention and treatment. The war on drugs has contributed substantially to a vastly expanded prison system and exacted a heavy toll on minority communities in particular. Despite advances in treatment and innovations such as drug courts, nearly one in three persons sentenced to state prison each year has been convicted of a drug offense.

Policymakers have the opportunity to effect a substantial shift in approach to the drug problem. The elements of such a change should include the following:

Despite advances in treatment and innovations such as drug courts, nearly one in three persons sentenced to state prison each year has been convicted of a drug offense.

Shift funding priorities – Since the 1980s, two-thirds of federal anti-drug funds have been devoted to law enforcement and just one-third to prevention and treatment. Although the federal drug budget is comprised of various appropriations, a coordinated effort by the Office of National Drug Control Policy and Congress could result in a shift toward a more proactive and preventive strategy.

Repeal mandatory sentencing laws – The legislative modifications to mandatory sentencing in Michigan and through the federal “safety valve” demonstrate that overly harsh sentencing laws can be altered without legislators suffering political consequences. Given that 25% of federal drug offenders subject to mandatory minimums are now sentenced under the safety valve, Congress should, at a minimum, examine the potential for expansion of that provision to additional offenders. In addition, with growing momentum for reform of the federal crack cocaine laws both for their disproportionately severe treatment of low-level defendants and their exacerbation of racial inequities in society, the climate is right for a broader reconsideration of the

damage caused by mandatory minimum sentencing. At both the federal and state levels, legislators should reassess the wisdom and necessity of mandatory sentencing laws when other proven sentencing and treatment options exist.

Increase treatment options within the criminal justice system – An increasing proportion of prison admissions in recent years consists of probation and parole violators, often as a result of drug use. More than one-third (34%) of offenders admitted to prison in 2004 consisted of such violators, double the rate (17.6%) in 1980.⁶⁸ While political leaders in recent years have issued calls for mandatory drug testing of offenders under community supervision, in many jurisdictions treatment resources for this group are very inadequate.

Drug courts that divert defendants into treatment have expanded considerably in recent years, with more than 1,600 such courts now in operation and empirical evaluations demonstrating their effectiveness at reducing recidivism coupled with reduced costs when compared with incarceration. In addition to the expansion of the drug court model, a number of states have increased alternative sentencing options for judges while funding expanded treatment capacity. These are promising developments and states should continue to ambitiously seek out new models of diversion while also thinking more broadly about the offense categories that are eligible for these alternative sentencing models. Most states have traditionally drawn narrow boundaries regarding the categories of defendants eligible for diversion, often limited to first- or second-time offenders convicted of drug possession or sale in small quantities with no history of violence. The problem with these criteria is that they rely on inflexible offense categories established by legislatures that fail to address the question of whether particular defendants can benefit from treatment and whether such diversion can help reduce recidivism. A person convicted of a burglary who broke into a store with the intent of selling the

In addition to the expansion of the drug court model, a number of states have increased alternative sentencing options for judges while funding expanded treatment capacity.

⁶⁸ Paige M. Harrison and Allen J. Beck, *Prison and Jail Inmates at Midyear, 2005*, Bureau of Justice Statistics, NCJ 213133, May 2006, at 6; and, Bureau of Justice Statistics, *Correctional Populations in the United States, 1995*, NCJ 163916, May 1997, at 13.

stolen items to buy drugs or an individual convicted of assault as a result of a dispute over purchasing drugs may be just as likely to benefit from a treatment intervention as a person arrested for a first-time offense of possession of cocaine.

Fund defense intervention services – Defender offices often provide the first opportunity for criminal justice personnel to assess defendant needs. Far too many such offices lack the resources to prepare adequate assessment and service plans for their clients. State and county officials can fund enhanced defender services that can aid the court system in directing appropriate substance-abusing defendants into treatment services either as a diversion from the court system or as a component of a sentencing plan.

Approach drug abuse primarily as a community problem – Although there are laudable programs within the criminal justice system for responding to problems of substance abuse, the criminal justice system was never designed as a social services agency. While substance abusers with adequate resources generally make use of private treatment providers to address their problems, low-income drug users are more likely to become involved in the criminal justice system due in part to the shortage of treatment options available to them. The public health model favored by middle class persons is one that could be extended to all communities given the political will to do so. Federal and state funding could be expanded to make treatment more widely available without the prerequisite of arrest and involvement in the criminal justice system.

FURTHER READING

Federal Crack Cocaine Sentencing

<http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=573>

Distorted Priorities: Drug Offenders in State Prisons

<http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=321>

Uneven Justice: State Rates of Incarceration by Race and Ethnicity

<http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=593>



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