

**Report of the Task Force on the Use of Criminal Sanctions
to the King County Bar Association Board of Trustees**

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**King County Bar Association
Drug Policy Project**

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Introduction

The Task Force on the Use of Criminal Sanctions was formed as part of the King County Bar Association's Drug Policy Project to examine current criminal sanctions, both in Washington and on the federal level, related to the non-medical use of drugs. The Task Force was charged with assessing the effectiveness of criminal sanctions in reducing both illegal drug use and drug-related crime, and also assessing the public costs associated with the use of criminal sanctions.

The principal focus of this Task Force, and of the King County Bar Association's Drug Policy Project as a whole, is the class of substances that is currently the target of the "War on Drugs." Therefore, this report mainly discusses those drugs whose possession and sale are prohibited by current law.¹ Alcohol, tobacco and prescription drugs are mentioned in passing, particularly for the purpose of comparing policy responses to drug use.

In addition to assessing the effectiveness and cost of drug-related criminal sanctions, the Task Force evaluated the extent to which those criminal sanctions are satisfying the objectives of the criminal law.² Further, the Task Force reviewed the harmful side effects of the War on Drugs and recent attempts to reform the prevailing drug policy. The Task Force drew specific conclusions regarding the state response to drug use and the provision of drug addiction treatment; and, anticipating that statutory changes will be considered, the Task Force formulated a set of principles to guide the development of an alternative approach to the problem of drug abuse that is more effective, less expensive and more humane.

¹ The word "drug" has been defined in its most general sense as "any substance other than food, which by its chemical nature affects the structure or function of the living organism." See Raymond P. Shafer *et al.* (1973), *Drug Use in America: Problem in Perspective*, Second Report, National Commission on Marijuana and Drug Abuse, USGPO, Washington, D.C., p. 9. For the purpose of public policy analysis, the word "drug" has been more narrowly defined as "any psychoactive substance capable of being used recreationally." Franklin E. Zimring and Gordon Hawkins (1992), *The Search for Rational Drug Control*, Cambridge University Press, Cambridge, p. 31. These definitions make no distinction between licit and illicit substances, because of the confusion inherent in attempting to make legality a criterion for classifying a substance as a "drug." *Ibid.*, p. 32. However, for purposes of the discussion in this report, the word "drug" should be understood in an even narrower sense, as any psychoactive substance whose sale and possession are prohibited by current law. This, essentially, describes those substances that are the focus of the "War on Drugs."

² As a guide to this analysis, the Task Force looked to the stated purposes of Washington's Sentencing Reform Act, which include:

- 1) proportionality of punishment to the seriousness of the offense;
- 2) promotion of justice and respect for the law;
- 3) commensurate treatment of similarly-situated offenders;
- 4) protection of the public;
- 5) opportunities for offenders to improve themselves;
- 6) frugal use of state and local resources; and
- 7) reducing the risk of re-offending in the community.

See RCW 9.94A.010.

Findings and Conclusions

The Task Force engaged in a comprehensive review of available information related to the use of criminal sanctions as a means to discourage drug use and to address the problems arising from drug abuse, and arrived at the following findings:

Current Criminal Sanctions Related to Drugs

- Criminal sanctions imposed in Washington for the possession and sale of drugs are severe, more severe than in many other states.
- First-time, non-violent offenders convicted of selling *any amount* of heroin, cocaine or methamphetamine are subject to a two-year prison sentence in Washington, which is four times as long as sentences for some common violent offenses, such as second-degree robbery and assault, and longer than sentences for many other violent crimes and crimes against other persons.
- Non-violent drug offenders with prior drug convictions face especially long sentences because of unique sentencing rules in Washington that make drug-related penalties particularly harsh. Repeat drug offenders may receive a prison sentence of up to *twenty years*, even without any violent offenses in their conviction history.
- A large number of drug offenders now being sentenced to prison in Washington are indigent and homeless and are arrested for selling very small amounts of drugs to support their own drug dependency.
- At the federal level, mandatory minimum sentences for drug offenses have resulted in extremely long prison terms, longer on average than for any other federal offenses except homicide and robbery.
- Contrary to the presumption that federal drug control efforts focus on the most “serious” offenders, one third of federal drug offenders have never been previously arrested, two thirds of federal drug offenders have had no prior felony convictions, and 90 percent of federal drug convictions are for non-violent offenses. Only 11 percent of federal drug offenders are classified as high-level dealers.
- As a result of amendments to federal and state drug laws in the late 1980s, the average prison time served for many drug offenses has doubled, as has the percentage of prison inmates whose most serious charge is a non-violent drug offense.
- Alternative sentences for some drug offenders are now available in Washington, whereby prison time is reduced and addiction treatment is provided. However, fewer than 25 percent of all drug offenders receive that option, and thousands of drug offenders in Washington continue to be incarcerated without any treatment.

Assessing the Effectiveness of Drug-Related Criminal Sanctions

- In the last dozen years, since the toughening of drug-related criminal sanctions at both the state and federal levels, rates of drug use and drug abuse have either remained relatively steady or have increased.
- Rates of drug use, especially of marijuana and cocaine, actually declined *before* the recent intensification of drug-related law enforcement and incarceration, and then increased *after* the imposition of harsher criminal sanctions.
- Total public costs related to substance abuse in Washington have continued to rise over the last decade. However, *alcohol* is responsible for the greatest amount of public health and associated economic costs, accounting for the vast majority of emergency room visits and the incidence of disease and premature death (from overdose and motor vehicle accidents).
- Rising costs related to illegal drugs have been due to increased drug law enforcement and incarceration of drug offenders, *not* to any increased demand for medical or social services. Even after factoring in law enforcement and incarceration costs related to illegal drugs, alcohol continues to account for the majority – 59 percent – of the total economic costs in Washington for drug and alcohol use combined.
- Crime related to drugs, including the possession and sale of drugs and “acquisitive” property crimes resulting from the need to support drug dependency, has increased since the toughening of criminal sanctions over a decade ago. While arrest rates for other crime categories have held steady or risen only modestly over the last 15 years, arrests for drug offenses have increased by 345 percent in Washington.
- *Violent* crime is associated with alcohol far more than with any illegal drug, including cocaine, “crack” cocaine and heroin. Alcohol is a factor in over 40 percent of murders and over 50 percent of assaults; in Washington, alcohol-related assaults outnumber assaults related to other drugs by a thirteen-to-one margin.
- The cost of criminal justice in connection with the War on Drugs has skyrocketed in the last decade, including more than a doubling of the cost of incarceration for drug offenders in Washington during that period. Combined federal and state expenditures on an annual basis for drug law enforcement have risen from about \$10 billion in the mid-1980s to about \$35 billion today.
- The increasing arrest and incarceration of drug offenders and the lengthening of their sentences have not only failed to reduce the prevalence of drug use, the problem of drug abuse or the incidence of drug offenses and drug-related crime, but have also failed to satisfy the core objectives of the criminal justice system. The toughening of drug-related penalties has not resulted in enhanced public safety, nor has it succeeded in deterring drug-related crime or in reducing recidivism by removing drug offenders from the community (the “incapacitation effect”).

Collateral Harm from the “War on Drugs”

- The War on Drugs has promoted crime at the local, national and international levels. The drug trade is exempt from regulation and control, and high profits from inflated drug prices (reflecting the risk of having to evade law enforcement) create stronger incentives to continue doing business. Increased law enforcement efforts have spawned higher levels of violence. Even as retail prices have declined, especially for cocaine and heroin, the international business in illicit drugs generates about \$400 *billion* in trade each year.
- The criminalization of drugs has undermined public health in many ways, including AIDS transmission through unclean needles, the distribution of impure and hazardous substances and the development of higher potency and synthetic substances that may be more easily concealed, but are much more harmful to health. In addition, the risk of criminal sanctions has, arguably, prevented drug users from seeking medical attention, especially for addiction, and physicians are inhibited from providing effective pain treatment due to federal auditing of prescribed controlled substances.
- Drug cases have clogged the courts and caused delay in the processing of other criminal and civil matters. At least half of King County’s criminal caseload is drug-related, and the recent increase in the active pending criminal caseload is due in significant part to controlled substances cases, which account for the highest number of pending criminal cases (even excluding drug court).
- The War on Drugs has taken a particularly hard toll on economically disadvantaged communities, both through the massive incarceration of poor young men and through the sense of danger and disorder brought about by heavy police presence, open-air retail drug sales and the threat of violent turf battles. Incarceration of drug offenders has disrupted their families, interfered with their educational and employment opportunities and deprived them of the right to vote, perpetuating and exacerbating the social conditions that gave rise to drug abuse in the first place.
- Citizens’ constitutional rights have been compromised as a result of stepped-up drug law enforcement, as street sweeps, wiretaps and home searches have impinged upon individual privacy. Persons convicted of drug offenses lose the right to vote, the right to hold public office and the right to serve as a juror, and getting those rights restored after completion of the sentence is very difficult. The U. S. now leads the world in *per capita* imprisonment, and many of those prisoners are non-violent drug offenders.
- Corruption among criminal justice officials has risen dramatically during the War on Drugs, as the payoffs are high and the risks are low. Enormous profits from the drug trade have also corrupted foreign nations, particularly where the raw materials for illegal drugs are cultivated and processed. U. S.-led efforts to eradicate crops and to fight drug enterprises have brought about political and economic destabilization and environmental destruction.

Current Drug Policy Reforms

- Citizens in Arizona and California have approved statewide initiatives that mandate treatment instead of incarceration for non-violent drug offenders. Evidence from Arizona reveals that mandating treatment as the primary response to drug use has resulted in significant cost savings to the state and has reduced recidivism rates; early estimates from California indicate the same encouraging trend.
- “Drug courts” have been an important part of the recent paradigm shift from punishment to rehabilitation that is beginning to take hold, as courts work with health and treatment providers to address offenders’ drug dependencies. Drug courts have saved public costs and reduced recidivism rates among their “graduates,” but only a small percentage of drug offenders (about ten percent in King County) participate in these programs. Drug courts still operate firmly within the criminal justice system, using criminal sanctions as tools to try to modify behavior. Ultimately, the drug court model cannot resolve the underlying problems of treating drug use as a criminal matter rather than as a health matter
- Some states have reduced the severity and expense of incarceration for some drug offenders, including Washington, which expanded its Drug Offender Sentencing Alternative program to reduce prison time and provide drug treatment for almost one quarter of all drug offenders. Other states have begun to roll back prison terms due to fiscal pressures, but no state, including Washington, has yet shifted the primary responsibility for addressing drug-related harms from the criminal justice system to the public health system.

Based on these findings, the Task Force arrived at the following conclusions:

- 1) The use of criminal sanctions is an ineffective means to discourage drug use or to address the problems arising from drug abuse, and it is extremely costly in both financial and human terms, unduly burdening the taxpayer and causing more harm to people than the use of drugs themselves.
- 2) Rather than criminally punish persons for drug use *per se*, any state sanction or remedy should be aimed at reducing the *harm directly caused to others by persons using drugs*. Civil remedies, supported by a court’s contempt power, are already available to be imposed on persons who use drugs to the detriment of others.
- 3) Criminal sanctions should continue to be imposed upon persons who commit *non-drug* criminal offenses, but those offenders should have the opportunity to receive drug treatment, especially if their crimes are related to chemical dependency.
- 4) The state should significantly expand its investment in drug addiction treatment, drug education and drug abuse prevention programs, which have consistently been shown to be much more cost-effective responses to the problems created by drugs in society. Funding for those programs could be obtained from the substantial cost savings that will accrue from no longer relying on the use of criminal sanctions.

Future Considerations – More Effective Regulation of Drugs

Although the vast majority of citizens acknowledge the failure of the War on Drugs, there is no consensus on any alternative policy. Furthermore, an impediment to any fundamental drug policy reform is the breadth of federal drug law. The Task Force concluded that federal law should permit the states to develop their own drug control strategies and structures, using our federal system to allow the states to be laboratories for change and improvement of public laws and institutions. Allowing Washington and other states to experiment with different drug control strategies and systems will permit the development of more effective means to deal with the problems created by drugs in our society.

As a framework for this effort, the Task Force offers the following set of guiding principles:

- 1) Any public policy toward drug use should result in no more harm than the use of the drugs themselves.
- 2) Any public policy toward drug use should address the underlying causes and the resulting harms of drug abuse instead of attempting to discourage drug abuse through the use of criminal sanctions.
- 3) The state should regulate the use of drugs in a manner that recognizes a citizen's individual liberties while answering the need to preserve public health, public safety and public order.
- 4) The state should regulate the use of drugs in a manner that uses scarce public resources as efficiently as possible.

Using these principles as a guide, the Task Force believes the people of Washington can fashion a drug policy that is fiscally responsible and that effectively balances the exercise of civil liberties with the maintenance of public order, while also providing compassionate treatment to those in need.

I. Criminal Sanctions for Drug Offenses: Current State of the Law

The statutory underpinning of current drug policy in the United States is the federal Comprehensive Drug Abuse Prevention and Control Act of 1970, popularly known as the “Controlled Substances Act.”³ Complementary state legislation, the Uniform Controlled Substances Act, drafted in 1970 by the National Conference of Commissioners on Uniform State Laws, was adopted by Washington on May 21, 1971.⁴ The Uniform Controlled Substances Act has been adopted by 45 other states.

The goal of the uniform federal and state controlled substances statutes is to prevent the “illegitimate manufacture, distribution and possession” of drugs, including the unauthorized and unregulated diversion of drugs from “legitimate” sources, *i.e.*, pharmaceutical manufacturers. The statutes distinguish “improper” uses of controlled substances from uses that are “essential for public health and safety.”⁵

The uniform controlled substances statutes are intended to provide a foundation for a coordinated system of drug control. However, although the statutes describe prohibited activities in detail, they allow for state discretion in prescribing specific fines and/or sentences, and thus the criminal sanctions for violating those statutes differ between the federal and state levels and among the states.

Drug Offender Sentencing in Washington State

The criminal sanctions imposed in Washington for the sale and possession of illegal drugs are severe, more severe than those imposed for drug offenses in many other states.⁶ Only the possession of 40 grams or less of marijuana is a misdemeanor.

Felony sentencing in Washington is governed by a determinate sentencing system intended to ensure that offenders who commit comparable crimes and have comparable criminal histories receive equivalent sentences.⁷ The discretion of sentencing courts is guided by a “grid” of standard range sentences, constructed with one axis representing the seriousness of the offense and the other axis representing the conviction history of the offender.⁸ The more serious the offense, and the more convictions in the offender’s criminal history (also known as the offender “score”), the longer the sentence. Courts are

³ Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1236. The stated premise for passage of the legislation was that “the illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.” 21 U.S.C. § 801.

⁴ 1st Ex. Sess., c. 308, Laws of 1971; codified in chapter 69.50 RCW.

⁵ See Prefatory Note to the Uniform Controlled Substances Act (1970), U.L.A. vol. 9, part IV, pp. 644-45.

⁶ Drug-related criminal penalties are most harsh in New York, Michigan, Nevada, Louisiana and other states in the South, and Washington’s drug laws also impose stiff penalties. For example, the possession of small amounts of illegal drugs is a misdemeanor under federal and most state laws, but drug possession offenses in Washington are felonies irrespective of the amount of drugs possessed.

⁷ Sentencing Reform Act of 1981, c. 137, Laws of 1981; codified in chapter 9.94A RCW.

⁸ Washington sentencing “grid” may be found at RCW 9.94A.510, Table 1 and felony sentences are ranked by their level of seriousness in RCW 9.94A.515, Table 2. The rules for “scoring” an offender’s criminal history are found in RCW 9.94A.525.

permitted to impose “exceptional” sentences outside the prescribed standard range, but in practice, 95 percent of all sentences fall within the standard range.⁹

In Washington’s felony sentencing grid, the legislature has assigned “seriousness levels” for some drug offenses¹⁰ that are significantly higher than for other, non-drug offenses, including some violent offenses. The following is a comparison of current sentence lengths for various offenses committed by **first-time offenders**:

Seriousness Levels and Standard Range Sentences – Selected Felonies

<i>Offense</i>	<i>Seriousness Level</i>	<i>Standard Range*</i> <i>(midpoint)</i>
Methamphetamine Manufacture (any amount)	X	5 years
Kidnapping 1^o (“serious violent” offense)	X	5 years
Child Molestation 1^o (violent offense)	X	5 years
Robbery 1^o (violent offense)	IX	3 years
Heroin/Cocaine Delivery (any amount)	VIII	2 years
Arson 1^o (violent offense)	VIII	2 years
Burglary 1^o (violent offense)	VII	1.5 years
Drive-by Shooting (violent offense)	VII	1.5 years
Unlawful Possession of a Firearm	VII	1.5 years
Incest 1^o	VI	1.08 years
Robbery 2^o (violent offense)	IV	6 months
Assault 2^o (violent offense)	IV	6 months

*assumes no conviction history and thus an offender “score” of 0.

As this comparison shows, the sentence for a first-time conviction for methamphetamine manufacture is ten times as high, and the sentence for delivery of heroin or cocaine is four times as high, as the sentence for second-degree robbery or assault, regardless of the amount of drugs involved in the drug offense.¹¹ A first-time conviction in Washington for delivery of heroin, cocaine or methamphetamine in *any* amount will result in a longer prison sentence than a first-time conviction for bribery, second-degree child molestation, first-degree incest, intimidation of judges, juries and witnesses, theft of a firearm, first-degree extortion, vehicular assault and many crimes against other persons.¹²

⁹ State of Washington, Sentencing Guidelines Commission (2001), *Fiscal Year 2000 Statistical Summary of Adult Felony Sentencing*, Olympia, WA, p. vii.

¹⁰ For technical reasons related to sentencing calculation, the term “drug offense” is defined under Washington law to *exclude* possession of controlled substances and forged prescriptions. RCW 9.94A.030(20)(a). However, in this report, unless otherwise stated, the term “drug offense” should be understood, by its plain meaning, to include all drug crimes, including the manufacture, sale *and* possession of illegal drugs.

¹¹ Both second-degree robbery and assault are classified as violent offenses, and both are also included on the list of offenses that constitute “strikes” in an offender’s criminal history record, under Washington’s “three strikes and you’re out” law (c. 129, Laws of 1995). The “three strikes” provision requires life imprisonment without the possibility of release after three convictions of “most serious offenses,” which includes Robbery 2^o and Assault 2^o, but not drug any offenses. Nevertheless, an individual conviction of Robbery 2^o or Assault 2^o carries only a six-month jail sentence for a first-time offender.

¹² See the felony rankings in RCW 9.94A.515, Table 2.

All offenders with prior convictions receive much longer sentences under Washington’s determinate system, but drug offenders with any prior drug convictions receive especially long sentences. The legislature has lengthened sentences for drug offenses by assigning multiple “points” for prior drug convictions, thus increasing the offender’s criminal history score. This is called “triple scoring.” For most offenses, a prior conviction counts for one point, but many drug offenses count for three points, which significantly ratchets up the sentence lengths for drug offenders.¹³ For example, multiple convictions for heroin or cocaine delivery would prompt the following sentences, *regardless of the amount of drugs involved in each case*:

Heroin/Cocaine Delivery¹⁴	Prison Sentence (midpoint of standard range)
First offense	2 years
Second offense	3.5 years
Third offense	6.5 years
Fourth offense and beyond	10.5 years

The standard statutory *maximum* sentence for drug offenses in Washington is ten years, but the statutory maximum is doubled upon the second conviction for a drug offense such as heroin or cocaine delivery. Thus, a non-violent drug offender may receive a sentence of up to twenty years in prison.¹⁵

A number of systemic factors lead to sentence lengths that the Task Force believes are disproportionate to the social harm cause by drug offenses. Drug offenders, as a group, have the highest recidivism rate among all classes of offenders,¹⁶ and therefore, are routinely exposed to “triple scoring.” In addition, the law imposes other drug offender sentence enhancements, often causing drug offenders to serve longer sentences than non-drug offenders, including violent offenders.

¹³ Along with drug offenses, violent and sex offenses are assigned more than one point per conviction. Prior violent offenses such as robbery and assault earn two points and prior “serious violent” offenses, such as Murder 1° and Rape 1°, count for three points, as do most prior sex offenses. Otherwise, most offenses score only one point. *See* RCW 9.94A.525.

¹⁴ “Manufacture, Delivery or Possession with Intent to Deliver Heroin or Cocaine,” RCW 69.50.401(a)(1)(i).

¹⁵ RCW 69.50.408. A drug offender could receive such a long sentence in cases where other prior felony convictions result in a higher criminal history score and where the offender is concurrently convicted and sentenced for one or other felonies.

¹⁶ A recent study by the Washington Sentencing Guidelines Commission found not only that drug offenders have the highest recidivism rate, but also that they tend to commit further drug offenses and non-violent property offenses, rather than crimes of violence. *See* State of Washington, Sentencing Guidelines Commission (2000), *Recidivism of Adult Felony Offenders*, Olympia, WA.

A look at some average sentences imposed in Washington reveals the following:¹⁷

Average Sentences Imposed in Washington – Selected Felonies (2000)

<i>Offense</i>	<i>Avg. Sentence Length</i>	<i>Number of Cases</i>
Heroin/Cocaine Delivery w/ School Zone Enhancement¹⁸	5 years, 7.8 mon.	36
Methamphetamine Manufacture	4 years, 10.4 mon.	40
Arson 1^o (violent offense)	4 years, 1.8 mon.	19
Heroin/Cocaine Delivery – repeat offense	4 years, 0.3 mon.	374
Child Molestation 1^o (violent offense)	3 years, 5.1 mon.	120
Drive-By Shooting (violent offense)	2 years, 5.8 mon.	35
Heroin/Cocaine Delivery – first offense	2 years, 4.3 mon.	490
Robbery 2^o (violent offense)	1 year, 9.4 mon.	276
Theft of a Firearm	1 year, 6.4 mon.	53
Assault 2^o (violent offense)	1 year, 5.9 mon.	757
Residential Burglary	1 year, 4.9 mon.	714

This comparison shows how hundreds of drug offenders with a prior history of drug offenses are serving periods of incarceration considerably longer than those served by many violent offenders convicted of robbery and assault.

Non-violent offenders are eligible for “earned early release” from prison that can amount to a 33 percent reduction in confinement time.¹⁹ However, even after their term of confinement, drug offenders are required to be supervised after their release for a nine- to twelve-month period.²⁰ This period of “community custody,” supervised by the state Department of Corrections, can include frequent reporting to community corrections officers, prohibitions on alcohol and other substance use, mandatory drug addiction treatment, drug testing and other conditions.²¹ Sanctions are imposed, including imprisonment, for violations of conditions of community custody.²²

According to judges and attorneys on the Task Force, many drug offenders are indigent and homeless, and sell small amounts of drugs to support their own drug dependency. For those offenders the provisions of Washington’s sentencing law can be especially harsh. The combination of “triple scoring” for prior drug offenses, the school

¹⁷ State of Washington, Sentencing Guidelines Commission (2001), *op. cit.*, pp. 12-20.

¹⁸ The “school zone enhancement” does not require the defendant to be accused of selling drugs to minors. That is a separate offense. This “enhancement” lengthens the prison term for drug offenses committed *near* schools, as well as school bus stops and public parks. RCW 69.50.435(a)(3). The use of the school zone enhancement is available for prosecutors to use against accused drug offenders in almost every part of Seattle, since there are very few areas, if any, that are not within a designated “protected” zone. Task Force members expressed particular concern about the school zone enhancement, noting that there is little or no notice of the physical boundaries of such zones and that the sentence enhancement applies even during non-school hours and days. Task Force members noted that the possible addition of 2 years to a defendant’s sentence is often used by prosecutors to induce a plea agreement, even when the accused has an available defense but must avoid the risk of receiving the sentence enhancement, should the state prevail at trial.

¹⁹ RCW 9.94A.728

²⁰ Chapter 437-20 WAC, Community Custody Ranges.

²¹ RCW 9.94A.715; RCW 9.94A.720.

²² RCW 9.94A.737

zone “enhancement” and the absence of any link between the amount of drugs sold and the severity of the criminal sanction results in extremely long prison sentences for many impoverished, drug-addicted individuals who are repeatedly arrested, convicted and sentenced for selling very small amounts of drugs.

Federal Drug Offender Sentencing

The federal sentencing system is similar to Washington’s, with determinate sentences imposed according to the seriousness of the offense and the conviction history of the offender.²³ However, as distinguished from Washington, the types and amounts of drugs involved are considered in determining the seriousness of the offense and the sentence imposed. Federal law also provides for many more mandatory minimum sentences for drug offenses than Washington does.

Federal mandatory minimum sentences have long been criticized for their arbitrariness, especially from the federal bench.²⁴ For drug offenses in particular, mandatory minimums were enacted by Congress in 1986 with no formal fact-finding: “No hearings were held No experts on the relevant issues, no judges, no one from the Bureau of Prisons or from any other office in the government, provided advice Only a few comments were received on an informal basis.”²⁵ Examples of mandatory minimum sentences for federal drug offenses include the following:

Federal Drug Minimum Penalties – Selected Offenses²⁶

<i>Drug Offense</i>	<i>Quantity</i>	<i>First Offense</i>	<i>Second Offense</i>
Heroin	1 kg. or more	10 years	20 years
Trafficking	less than 1 kg.	5 years	10 years
Powder Cocaine	5 kg. or more	10 years	20 years
Trafficking	less than 5 kg.	5 years	10 years
Crack Cocaine			
Possession ²⁷	5 grams or more	5 years	10 years
Marijuana	1,000 kg.	10 years	20 years
Trafficking	100-1,000 kg.	5 years	10 years

²³ Sentencing Reform Act of 1984, Pub.L. 98-473, Oct. 12, 1984, 18 Stat. 1987, codified at 18 U.S.C. Chapter 227.

²⁴ See, e.g., Hon. Margaret P. Spencer (1995), “Sentencing Drug Offenders: The Incarceration Addiction,” 40 *Villanova L. Rev.* 2, pp. 335-381.

²⁵ Public Broadcasting System (2000), *Frontline* program entitled “Snitch.” Comment from Eric Sterling, counsel to the U.S. House Judiciary Committee when the mandatory minimum drug sentences were enacted.

²⁶ 21 U.S.C. Chapter 13, Part D; see also United States Sentencing Commission (2001), *Guidelines Manual*, Chapter 2, Part D “Offenses Involving Drugs.”

²⁷ Federal law distinguishes between powder cocaine and “crack” cocaine, with a 100-to-1 ratio in the severity level between the two substances, so that the penalty for five grams of crack cocaine, for instance, is equivalent to the penalty for half a kilo of powder cocaine. Currently a federal offender convicted of *simple possession* – not trafficking – of five or more grams of crack cocaine is subject to a five-year minimum sentence. This controversial provision has long been criticized as having a disproportionately adverse effect on the inner-city poor and racial minorities. However, even in the face of equal protection and due process challenges, the law has been upheld in the federal courts. See, e.g., *U.S. v. Frazier*, 981 F.2d 92 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1661 (1993); *U.S. v. Harding*, 971 F.2d 410 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1025 (1993); and *U.S. v. Watson*, 953 F.2d 895 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1989 (1992).

In addition to imprisonment, federal drug offenders can be fined in amounts up to \$8 million for an individual or up to \$20 million for organizations or enterprises.

Because of the lengthy mandatory minimum sentences for federal drug offenses, many non-violent drug offenders have served as much or more time in prison than violent offenders:

Average Time Served in Federal Prison – Selected Felonies (1997)²⁸

<i>Offense</i>	<i>Mean</i>	<i>Median</i>
Murder/Manslaughter	61.7 months	40.1 months
Robbery	59.9 months	50.5 months
Drug Trafficking	43.2 months	40.1 months
All Drug Offenses	42.5 months	40.0 months
Assault	28.2 months	18.3 months
Burglary	20.4 months	15.7 months
Auto Theft	19.1 months	15.7 months

The average period of imprisonment of drug offenders convicted in federal courts in Washington has been longer than the national average. In the U. S. District for Eastern Washington, the mean sentence length for drug offenders is about 54 months, while in the U. S. District for Western Washington, the mean sentence length is about 68 months.²⁹ Consistent with national trends, average sentences for federal drug offenders in Washington are longer than for any other federal offenses except murder and robbery.

It might be assumed that sentences for federal drug offenses are so long because they are more “serious” than drug offenses under state law, or that they involve larger amounts of drugs and/or the involvement of hard-core criminals or organized criminal enterprises. However, a closer look at federal drug offender sentencing reveals a different picture. According to the U. S. Sentencing Commission, 55 percent of all federal drug defendants are low-level offenders, such as street sellers, and only 11 percent are classified as high-level dealers.³⁰ In 1999, one third of federal drug offenders had never been previously arrested, and two out of three federal drug offenders had no prior felony convictions. Ninety percent of convictions on federal drug charges that year were for non-violent offenses.³¹

Federal efforts at drug control have also not been confined to the most potent or deadly substances. In 1999, marijuana offenses accounted for 31% of all federal drug cases, compared with 28% for powder cocaine, 15% for crack cocaine, 15% for methamphetamine and only 7% for all opiates, including heroin.³²

²⁸ U.S. Department of Justice (1999), *Compendium of Federal Justice Statistics, 1997*, Urban Institute and Bureau of Justice Statistics, Washington, D.C., p. 88.

²⁹ U.S. Sentencing Commission (2001), 2000 Datafile, OPAFY00, Washington, D.C.

³⁰ U.S. Sentencing Commission (1995), *Special Report to Congress: Cocaine and Federal Sentencing Policy*, Washington, D.C., Table 18.

³¹ U.S. Department of Justice (2001), *Federal Drug Offenders, 1999, With Trends 1984-99*, Bureau of Justice Statistics, Office of Justice Programs, Washington, D.C.

³² *Ibid.*

Legislative Amendments – Longer Sentences and Alternative Sentences

The relatively long prison terms for drug offenses result, in part, from amendments to the controlled substances statutes made during the 1980s. For example, the Anti-Drug Abuse Act of 1986 established the federal mandatory minimum sentences for drug offenses.³³ In 1988 Congress established the same mandatory minimum sentences for those convicted of conspiring to commit a drug offense.³⁴ In Washington, the Omnibus Drug Act of 1989 significantly lengthened sentences by raising the “seriousness level” of heroin and cocaine delivery offenses, adding the “triple scoring” provision for prior drug offenses and establishing the 2-year sentence “enhancement” for drug offenses in the vicinity of schools, parks and bus stops.³⁵

As a result of these statutory changes, the number of persons in prison for drug offenses has grown enormously, as has the average confinement time. Between 1984 and 1999, the average prison time served by federal drug offenders more than doubled.³⁶ In Washington, the changes in the law also resulted in a doubling of some prison terms, including those for one of the most common drug offenses – heroin or cocaine delivery.³⁷

Since 1989, Washington’s prison population has increased by over 125 percent, far exceeding the 22 percent increase in the state general population during the same period. This population growth was fueled in significant part by increased prison admissions for drug offenses and property offenses related to drugs, as well as by the longer sentences served by drug offenders.³⁸ According to the state Department of Corrections, a non-violent drug crime is the most serious charge for about 24 percent of current prison inmates, compared with about 17 percent of inmates in 1990.³⁹

Some recent amendments to the controlled substances statutes have had the effect of reducing prison time for some drug offenses. At the federal level, certain exemptions from mandatory minimum sentences have been created more recently in the recognition that low-level drug offenders are serving prison terms grossly disproportionate to the seriousness of their offenses. The Violent Crime and Law Enforcement Act of 1994 exempted certain first-time, non-violent drug offenders from statutory minimum penalties and also provided the opportunity for early release (up to one year) of eligible offenders who successfully complete a drug treatment program while incarcerated.⁴⁰

³³ Pub.L. 99-570, Oct. 27, 1986, 100 Stat. 3207.

³⁴ Pub.L. 100-690, Nov. 18, 1988, 102 Stat. 4181.

³⁵ E2SHB 1793, c. 124, Laws of 1989.

³⁶ Federal prosecutors charged 29,306 people with drug offenses in 1999, compared to 11,853 in 1984. The average prison term for federal drug offenders increased from 2.5 years in 1984 to 5.5 years in 1999. U.S. Department of Justice (2001), *Federal Drug Offenders*, *op. cit.*, p. 7.

³⁷ Before 1989, first-time offenders convicted of heroin or cocaine delivery faced a 12- to 14- month prison sentence. Today, such first-time offenders are subject to a 21- to 27-month prison term. More recently, the legislature has also increased penalties for other drug offenses. For instance, a first-time conviction for manufacturing methamphetamine now calls for a five-year prison sentence. HB 2628, c. 290, Laws of 1998.

³⁸ State of Washington, Caseload Forecast Council (1999), *Inmate Population Forecast*, Olympia, WA.

³⁹ Washington Department of Corrections, Offender-Based Tracking System report, as of December 31, 2000

⁴⁰ Pub.L. 103-322, Sept. 13, 1994, 108 Stat. 1796.

In Washington, recent changes have also reduced prison time for some drug offenses. In particular, the Drug Offender Sentencing Alternative (“DOSA”) was enacted in recognition of the close link between drug addiction and non-violent drug offenses, and of the need to address the drug dependencies that are thought to prompt those offenses.⁴¹ DOSA gives courts the discretion to cut in half the term of confinement and to mandate addiction treatment for eligible offenders.⁴² In the beginning, fewer than 50 offenders per year participated in the DOSA program because of limited eligibility. In 1999, DOSA eligibility was extended to all non-violent drug offenders and even to non-drug offenders found by the court to have a chemical dependency directly related to their offense.⁴³ In the last two years, over 2,500 drug offenders have been sentenced to the DOSA program, with over 1,000 coming from King County and almost 500 from Pierce County. This amounts, however, to less than 25 percent of all convicted drug offenders. Furthermore, offenders given the DOSA option still serve a considerable amount of prison time – an average of 15.7 months for male offenders and 13.6 months for female offenders.⁴⁴

A major recent innovation in the last decade has been the “drug court,” a local-option program of deferred prosecution coupled with court-supervised drug treatment. Drug court participants agree to waive certain rights in exchange for dismissal of criminal charges upon successful completion of drug treatment. Drug testing through urinalysis is used to ensure compliance. Discussed in greater detail below, drug courts are currently the principal drug policy reform being implemented.

Despite recent changes, imprisonment is still the fate of almost all convicted drug offenders. Ninety percent of all federal drug offenders still serve time in prison.⁴⁵ In Washington, all offenders convicted of drug delivery charges continue to be incarcerated, irrespective of the amount of drugs involved in any case.⁴⁶ Rehabilitative sentences, including drug treatment, are still only offered to about one quarter of all drug offenders in Washington’s prisons.⁴⁷ In summary, despite the availability of alternative sanctions for some drug offenses, the vast majority of drug offenders in both the state and federal systems still serve long prison terms, most without any drug treatment.⁴⁸

⁴¹ SHB 1549, c. 268, Laws of 1995, amended by E2SHB 1006, c. 352, Laws of 1999.

⁴² DOSA offenders are sentenced to serve the first half of their sentence in total confinement and the second half in “community custody,” supervised by the Department of Corrections, and are required to complete a program of drug treatment that begins in prison and is continued in the community setting. Offenders failing to complete drug treatment are returned to prison to serve the remainder of the original sentence.

⁴³ See RCW 9.94A.607.

⁴⁴ Information obtained from the DOSA Program Manager at the Washington Department of Corrections.

⁴⁵ U.S. Department of Justice (2001), *op. cit.* In 1999, 21 percent of federal drug offenders were exempted from mandatory minimum sentences, but were still sentenced to multi-year prison terms.

⁴⁶ Drug delivery offenders are ineligible for the “First-time Offender Waiver,” a discretionary option for non-violent offenders that allows an alternative to incarceration. See RCW 9.94A.650(1)(b),(c) and (d).

⁴⁷ According to the Washington Department of Corrections, about 2,500 inmates have participated in the DOSA program, of whom about 1,000 have been released. Today, there are about 750 DOSA participants in prison, out of about 3,175 drug offenders in prison. The county-level drug courts have diverted a much smaller percentage of offenders away from jail or prison – only about 10 percent in King County, for example. In the county jails themselves, there are very few opportunities for drug treatment.

⁴⁸ The Washington Department of Corrections estimates that only about one-fifth of all offenders needing drug treatment actually receive it. Meanwhile, both in prisons and county jails, virtually no *non-drug* offenders with chemical dependency problems receive any treatment. The issue of lack of treatment opportunities for incarcerated persons is discussed at length in the report of the King County Bar Association’s Task Force on Drug Addiction Treatment.

II. How Effective Are Drug-Related Criminal Sanctions?

After thirty years of a confinement-intensive policy intended to reduce drug abuse, and especially considering the recent increase in the number of drug offenders spending longer periods in prison, it seems both timely and important to evaluate whether criminal sanctions have served their stated purpose. That is the charge of this Task Force – to determine whether our heavy reliance on criminal sanctions has been effective in reducing drug abuse and its attendant costs.⁴⁹ The Task Force has reviewed available data from the last dozen years in an attempt to determine whether the increased penalties enacted in the late 1980s have been associated with any reduction in drug abuse or drug-related crime. Specific indicators include the levels and rates of drug use and abuse, the levels and rates of arrests and convictions for drug offenses, and changes in public costs related to drug abuse and drug-related crime.

Drug Use, Drug Abuse and Drug Addiction

Estimates of drug use are derived from survey data, a somewhat unreliable measurement tool because illegal activity tends to be under-reported. The National Academy of Sciences recently highlighted further, more profound methodological difficulties in measuring drug consumption and the cost of drugs, and how the inadequacy of current data hampers the analysis of the effectiveness of drug policy.⁵⁰ Nevertheless, the Task Force has examined available data on drug consumption to ascertain whether there have been any changes in drug use patterns, and whether those changes might be attributed to the recent toughening of drug-related criminal sanctions.

A snapshot from the 1999 National Household Survey on Drug Abuse compares illegal drug use in the United States with the use of legal drugs, *i.e.*, alcohol and tobacco:⁵¹

Substance	Ever Used	Past Year	Past Month
Alcohol	180 million	138 million	105 million
Cigarettes	159 million	67 million	57 million
Marijuana	76 million	19.5 million	11 million
Cocaine	25 million	3.6 million	1.5 million
Crack	6 million	1 million	413,000
Heroin	3 million	403,000	208,000

⁴⁹ Task Force members acknowledge that the “effectiveness” of criminal sanctions cannot be assessed in any scientifically valid manner, but believe that statistics related to drug use, drug-related crime and the direct and indirect costs of law enforcement are, at the very least, instructive in considering the utility of drug-related criminal sanctions.

⁵⁰ National Research Council (2001), *Informing America’s Policy on Illegal Drugs: What We Don’t Know Keeps Hurting Us*, National Academy Press, Washington, D.C. The report found that, in the absence of reliable data on drug consumption, it has been difficult to assess whether criminal enforcement of drug laws has had any effect in reducing the overall problem. The chair of the National Research Council panel that issued the report, economist Charles F. Manski, stated: “It is unconscionable for this country to continue to carry out a public policy of this magnitude and cost without knowing whether it is having the desired result.” National Research Council news release, March 29, 2001

⁵¹ U. S. Department of Health and Human Services (2000), *Summary of Findings from the 1999 National Household Survey on Drug Abuse*, Substance Abuse and Mental Health Services Administration, Rockville, MD, pp. G-5, G-21.

In a nation of more than 270 million people, it is difficult to characterize the extent of the use of “hard” drugs like cocaine, crack and heroin as anything other than slight. Frequent users of “hard” drugs constitute less than one percent of the general population, compared, for instance, with frequent alcohol users, who comprise about 40 percent of the U. S. population.⁵²

In Washington, the prevalence of alcohol and other drug use is similar to the national trends, as 92.4 percent of adults have used alcohol and 38.6 percent of adults have used marijuana at some time in their lives.⁵³ As far as recent use is concerned, 56 percent of adults in Washington report using alcohol in the last 30 days, whereas only 4.7 percent of adults in Washington report such recent use of marijuana.⁵⁴

The popularity of different drugs has varied over time. For instance, marijuana use peaked around 1978, declined markedly during the 1980s and has risen again since 1992. Cocaine use increased in the 1980s, peaking around 1985, and after declining has begun to rise again since 1993. By contrast, the prevalence of heroin use has remained low, although there has been a slight increase since the mid-1990s.⁵⁵ In general, illicit drug use has increased since 1992, reversing a decline that began in the late 1970s.

It is noteworthy that the apparent upward trend in drug use since the early 1990s occurred during the same period of intensified drug-related law enforcement and incarceration brought on by the amendments in the late 1980s to the state and federal controlled substances statutes. In fact, drug use generally declined *before* the toughening of criminal sanctions in the 1980s and has since risen *after* the increase in those penalties.⁵⁶ Considering these findings, criminal sanctions cannot be said to have reduced drug use in the general population.

Drug use is difficult to measure, but measuring drug *abuse* is even more problematic, beginning with the difficulty in defining it.⁵⁷ The federal and state controlled substances statutes refer merely to the “improper use” of drugs, avoiding the definitional issue by equating any use of proscribed drugs with abuse, apparently on the presumption

⁵² *Ibid.*

⁵³ David H. Albert (2001), *Tobacco, Alcohol, and Other Drug Abuse Trends in Washington State, 2001 Report*, Washington State Department of Social and Health Services, Division of Alcohol and Substance Abuse, Olympia, WA, pp. 41, 44.

⁵⁴ *Ibid.* Although no data are available from Washington regarding past 30-day use of “hard” drugs, 4.3 percent of adults in Washington report having used “hard” drugs in the last year. *Ibid.*, p. 47.

⁵⁵ Executive Office of the President, Office of National Drug Control Policy (1999), *Drug Use Trends*, p. 3.

⁵⁶ The phenomenon of a decline in drug use *prior* to the imposition of criminal sanctions has occurred before in the United States. Opium consumption declined significantly in the first decade of the 20th century, in advance of the passage of the Harrison Narcotics Act of 1914. The growing public understanding of the harmful effects of opium seemed to have more effect on use than criminal penalties. See David F. Musto, M.D. (1987), *The American Disease: Origins of Narcotic Control*, p. 3; and David Courtwright (1982), *Dark Paradise: Opiate Addiction in America Before 1940*, Harvard University Press, Cambridge, MA.

⁵⁷ From a public health perspective, drug abuse has been defined as the “regular or compulsive ingestion of illicit drugs taken in substantial doses or concentrated form.” Diana R. Gordon (1994), *The Return of the Dangerous Classes: Drug Prohibition and Policy Politics*, W. W. Norton & Co., New York, p. 9. Other definitions of drug abuse include the notion of addiction and dependence, whereby drug use “assumes a functional importance for the individual concerned, such that it renders his or her other social roles and preferences increasingly unimportant.” Franklin E. Zimring and Gordon Hawkins (1992), *op. cit.*, p. 32.

that all illicit drug use causes harm.⁵⁸ The Task Force rejects this statutory approach and believes that the extent of drug abuse cannot be measured by estimating the number of persons using drugs.⁵⁹ Further, the Task Force believes the conflation of “use” with “abuse,” and the imposition of criminal sanctions for both, impairs a consistent and useful analysis of the relation of criminal sanctions to the problem of drug abuse.⁶⁰

Not all drug users become drug addicts, and in fact, available data suggests that only a small percentage of drug users need addiction treatment. For instance, U. S. and international health agencies have reported that less than one percent of those who have ever used cocaine become daily users, and other scholars have found that most cocaine users are not regular consumers of the drug.⁶¹ There are even a large number of heroin users who are not addicted, just as there is a large population of non-addicted drinkers.⁶²

Over the past century, the percentage of the population experiencing serious drug addiction has remained very low, at or just above one percent.⁶³ Seen from this perspective, the problem of drug abuse and drug addiction in America is “narrow and static,” according to RAND Senior Fellow Peter Reuter:

No more than 2.5 million Americans have substantial problems with cocaine and/or heroin – less than one-fifth the number for alcohol. Those with problems are heavily concentrated in urban minority communities. Methamphetamine abuse remains a much smaller problem, while marijuana dependence, a real phenomenon involving many more people, has much less consequence for those who experience it.⁶⁴

By contrast, from a local perspective, the contemporary drug abuse problem can take many forms and appear more serious. For example, issues related to heroin and methamphetamine have recently aroused public concern in Washington. The Seattle-King County Health Department recently released the report of its Heroin Task Force, finding a growing prevalence of heroin use and a rise in heroin-related public health costs.⁶⁵

⁵⁸ Federal regulations that predate the Controlled Substances Act express the assumption that the non-medical use of controlled substances is, *ipso facto*, abuse, stating that “a substance has the potential for abuse [if]...individuals are taking the drugs on their own initiative rather than on the basis of medical advice.” 21 C.F.R. § 166.2(e)(3) (repealed).

⁵⁹ See Peter Reuter (1999), “Drug Use Measures: What Are They Telling Us?” *National Institute of Justice Journal*, no. 239, April 1999.

⁶⁰ The Task Force discussed at length how the blurred line between drug use and drug abuse under the law raises fundamental normative and moral questions that are at the center of the debate over current drug policy, highlighting the tension between the exercise of individual liberties and the coercive power of the state.

⁶¹ Robert Curley (1995), “Addiction Insights,” *Alcoholism and Drug Abuse Weekly*, April 3, 1995, p. 3; D. Waldorf, C. Reinerman and S. Murphy (1991), *Cocaine Changes*, Temple University Press, Philadelphia, PA., p. 2.

⁶² John Kaplan (1983), *The Hardest Drug: Heroin and Public Policy*, University of Chicago Press, Chicago, p. 33.

⁶³ This does not include the five or more percent of the population addicted to alcohol. David F. Musto, M.D. (1987), *op. cit.*, p. 261.

⁶⁴ Peter Reuter (2001), “The Limits of Supply-Side Drug Control,” *The Milken Institute Review*, Vol. 3, No. 1, p. 16.

⁶⁵ Seattle-King County Department of Health (2001), *Confronting the Problem of Heroin Abuse in Seattle and King County*, Heroin Task Force Report, Seattle, WA.

Meanwhile, in Washington's more rural areas there has been a proliferation of methamphetamine manufacture, with severe social and environmental consequences.⁶⁶ From the perspective of economically disadvantaged urban communities, people seriously addicted to "hard" drugs face a narrow range of treatment options, which has been very costly in both human and economic terms in neighborhoods already struggling with poverty and social dislocation.⁶⁷

Once again, it seems significant that the lack of improvement, and even a worsening, in the rate of drug use and drug abuse in Washington and across the nation have occurred during the same period of increased criminal enforcement of drug laws. The increased arrest, convictions and incarceration of drug offenders and the lengthening of their sentences seem, at the very least, not to have stemmed the increases in drug use or drug abuse.

The Public Cost of Drug Abuse

The total economic cost of drug abuse, including alcohol, has been estimated at \$2.5 billion annually in Washington.⁶⁸ Public costs related to the abuse of alcohol and other drugs amount to about \$1.5 billion annually.⁶⁹ In 1998, Washington spent about \$275 million on health care related to addiction, overdoses and drug-related diseases, about \$140 million on social services related to economic and housing assistance and about \$145 million on mental health services.⁷⁰

Alcohol is the drug that causes most of public spending attributable to substance abuse. A recent study prepared for the state Division of Alcohol and Substance Abuse reported an increase during the 1990s in the cost of addiction treatment and medical care and an increase in the incidence of disease and death. That report shows that alcohol, not illegal drugs, give rise to the vast majority of those public costs.⁷¹

⁶⁶ Washington ranks second in the nation behind California in methamphetamine manufacture. According to the Washington State Department of Ecology, almost 1,500 methamphetamine "laboratories" and dump sites were reported in Washington in 2000, a 30-fold increase in the last decade. These sites present a danger to human health and cause extensive environmental damage, especially in King and Pierce counties.

⁶⁷ See Elliott Currie (1993), *Reckoning: Drugs, the Cities, and the American Future*, Hill and Wang, New York, p. 20. Although drug abuse is a serious concern among minorities and the poor, the notion that such problems are *concentrated* in urban communities is not well founded. Recent data from Washington's Division of Alcohol and Substance Abuse shows a higher incidence of drug use among those who are employed and/or living above the poverty line. David H. Albert (2001), *op. cit.*, pp. 41, 44, 47 and 48.

⁶⁸ Thomas Wickizer (1999), *The Economic Costs of Drug and Alcohol Abuse in Washington State, 1996*, Department of Social and Health Services, Division of Alcohol and Substance Abuse, Olympia, WA., p. 63.

⁶⁹ National Center on Addiction and Substance Abuse (2001), *Shoveling Up: The Impact of Substance Abuse on State Budgets*, Columbia University, New York, p. 75.

⁷⁰ *Ibid.*, p. 75. There are also non-public costs related to drug abuse that are harder to measure, such as increased health insurance premiums related to drug abuse and the loss of and damage to property. Community fragmentation, fear, isolation and other "quality of life" concerns are even less tangible, though no less real. The report of the King County Bar Association's Task Force on Drug Addiction Treatment more thoroughly examines the costs related to drug abuse.

⁷¹ Thomas Wickizer (1999), *op. cit.* For example, alcohol accounted for 80 percent of diseases resulting in economic loss and 70 percent of premature deaths (overdoses and motor vehicle accidents) and 95 percent of non-medical motor vehicle accident costs (insurance, administration, vehicle damage). pp. 17, 22 and 62.

Public costs related to illegal drugs have also increased, but most of those increased costs have been due to increased law enforcement and incarceration of drug offenders, *not* from medical or other social service demands arising from the use of the drugs.⁷² Alcohol continues to be the major cause of public spending *even after factoring in the cost of law enforcement and incarceration of drug offenders*. Alcohol accounts for 59 percent of the total economic cost of drug and alcohol abuse combined.⁷³

National data from hospital emergency room visits show an increasing “mention” of drugs such as cocaine, heroin, marijuana and methamphetamine,⁷⁴ but alcohol still accounts for most emergency room visits, a total of about 40 percent of which are drug or alcohol-related.⁷⁵ Tobacco use also gives rise to enormous public health costs, as does the misuse of and adverse reactions to prescription drugs. A survey of some of the causes of death in the United States reveals the following:

<u>Annual Causes of Death in the United States</u>	
Tobacco (average from 1990 to 1994)	430,700⁷⁶
Alcohol (1996)	110,640⁷⁷
Adverse reactions to prescription drugs	32,000⁷⁸
Suicide (1998)	30,575⁷⁹
Homicide (1998)	18,272⁸⁰
Licit and illicit drug-induced deaths (1998)	16,926⁸¹
Non-steroidal anti-inflammatory drugs (1992)	7,600⁸²
Marijuana	0⁸³

⁷² Thomas Wickizer (1999), *op. cit.*, p. 41.

⁷³ *Ibid.*, p. ix.

⁷⁴ Executive Office of the President, Office of National Drug Control Policy (1999), *Drug Use Trends*, p. 4.

⁷⁵ The District of Columbia recently reported that most of the drug and alcohol-related emergency room visits are related to alcohol and not to other drugs. Its survey also revealed that seven percent of the population of the District was addicted to alcohol, compared with 1.8 percent addicted to cocaine and 0.6 percent addicted to heroin. Public Broadcasting System (2001), interview with Dr. Larry Siegel from the D.C. Department of Health, *All Things Considered*, September 21, 2001.

⁷⁶ The U.S. Centers for Disease Control notes that “Cigarette smoking remains the leading preventable cause of death in the United States.” CDC (1997), “Smoking-Attributable Mortality and Years of Potential Life Lost,” *Morbidity and Mortality Weekly Report*, vol. 46, no. 20, p. 449.

⁷⁷ National Institute on Alcohol Abuse and Alcoholism (1999), “Number of deaths and age-adjusted death rates per 100,000 population for categories of alcohol-related mortality,” Alcohol Epidemiologic Data System, Rockville, MD.

⁷⁸ J. Lazarou, B. H. Pomeranz and P. N. Corey (1998), “Incidence of adverse drug reactions in hospitalized patients: a meta-analysis of prospective studies.” *Journal of the American Medical Association*, vol. 279, pp.1200-1205.

⁷⁹ Sheila L. Murphy (2000), “Deaths: Final Data from 1998,” *National Vitals Statistics Reports*, National Center for Health Statistics, Hyattsville, MD., vol. 48, no. 11, p. 53, Table 10.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, pp. 1, 10. “Drug-induced” causes of death include not only deaths from the use of legal drugs (excluding alcohol and tobacco) and illegal drugs, but also poisoning from prescribed and other drugs. Accidents, homicides and other causes indirectly related to drug use are not included.

⁸² Robin Tamblyn *et al.* (1997), “Unnecessary Prescribing of NSAIDs and the Management of NSAID-Related Gastropathy in Medical Practice,” *Annals of Internal Medicine*, American College of Physicians, Washington, D.C., vol. 127, pp. 429-438.

⁸³ No deaths have ever been recorded as having been directly induced by marijuana. See Janet E. Joy, Stanley J. Watson, Jr. and John A. Benson, Jr. (1999), *Marijuana and Medicine: Assessing the Science Base*, Institute of Medicine, Division of Neuroscience and Behavioral Research, National Academy Press, Washington, D.C.

Drug-Related Crime

The term “drug-related crime” is another phrase that evades a standard definition. Two types of drug-related crime are generally distinguished from one another: 1) “drug-defined” offenses, comprising violations of laws prohibiting the manufacturing, sale or possession of illegal drugs; and 2) “drug-related” offenses, which include crimes resulting from the pharmacological effect of drugs, property crimes and drug sales to support drug addiction and violence associated with the illegal drug market.⁸⁴

While some drug users are involved in illegal activity beyond the mere possession or sale of drugs, property crimes (*e.g.*, theft, forgery and low-level burglary) do not seem to account for most of drug users’ illegally-obtained income. Many drug addicts seem able to avoid having to commit such “acquisitive” crimes altogether, supporting their habits exclusively through drug sales, or through a combination of drug sales, pimping and prostitution. A significant number of drug addicts – possibly the majority – are legitimately employed.⁸⁵ Criminologists and criminal justice officials acknowledge what seems to be a close link between illegal drug use and property crime, but the impact of drugs on the level of any particular crime is not theoretically predictable. Nevertheless, Washington’s prisons currently house a growing number – almost 1,000 – non-violent offenders who were convicted of both drug offenses and property offenses.⁸⁶

Just as it is difficult to show a causal relationship between drug use and property crime, there is no reliable way to show how the pharmacological effects of drugs cause criminal behavior, or any other specific behavior.⁸⁷ The White House Office of National Drug Control Policy concedes that “it is impossible to say quantitatively how much drugs influence the occurrence of crime.”⁸⁸ It is important to acknowledge that although a high percentage of crime is associated with drug use, the converse is not true – most drug use is *not* associated with crime.

While causation may be difficult to prove, it is useful, nevertheless, to observe the association of crime with certain substances. From that perspective, it is apparent that crime is linked with alcohol far more than any other substance. Alcohol is especially associated with violent crime much more than any illegal drug, including cocaine, crack cocaine and heroin.⁸⁹ About 40 percent of all offenders at the state level were using alcohol at the time of the offense for which they were convicted, and alcohol is reported to have been a factor in more than 40 percent of murders and almost 50 percent of assaults at

⁸⁴ The White House drug policy office also refers to the so-called “drug-using lifestyle,” in which the likelihood and frequency of involvement in illegal activities are increased because of participation in the “illegitimate economy.” Executive Office of the President, Office of National Drug Control Policy (2000), *Drug-Related Crime*, p. 1.

⁸⁵ See Peter Reuter, Robert MacCoun and P. Murphy (1990), *Money From Crime: A Study of the Economics of Drug Dealing in Washington, D.C.*, RAND Corporation, Santa Monica, CA; John Kaplan (1983), *op. cit.*, p. 54; and Mark Moore (1977), *Buy and Bust: The Effective Regulation of an Illicit Market in Heroin*, Lexington Books, Lexington, MA.

⁸⁶ Information obtained from the Washington Department of Corrections’ Offender-Based Tracking System.
⁸⁷ See, *e.g.*, R. Room and G. Collins, eds. (1983), *Alcohol and Inhibition*, National Institute of Alcohol Abuse and Alcoholism, Washington, D.C.

⁸⁸ Executive Office of the President, Office of National Drug Control Policy (2000), p. 4.

⁸⁹ Joseph Califano (1998), *Behind Bars: Substance Abuse and America’s Prison Population*, National Center on Addiction and Substance Abuse, Columbia University, New York.

the state level.⁹⁰ Data from 1996 in Washington reveals that 1,801 arrests for felonious assault were alcohol-related, while only 144 were related to other drugs (of a total of 6,003 arrests that year).⁹¹

As distinguished from crime *related* to drug use, available data on drug offenses *per se*, including the manufacture, sale and possession of drugs, show marked increases over the last decade in arrests, convictions and incarceration at both the federal and state levels. At the federal level, over 80 percent of the increase in the federal prison population from 1985 to 1995 was due to increased drug convictions;⁹² and drug offenders in 1998 constituted over 58 percent of all federal inmates, a significant increase from the decade before.⁹³ The number of drug offenders sentenced at the federal level more than doubled from 1990 to 1998, from 30,470 to 63,011.

At the state level, arrests for drug offenses nationwide increased by over 35 percent between 1990 and 1999.⁹⁴ By contrast, during the same period there was a notable *downward* trend in arrests nationwide for driving while intoxicated (a 27 percent decrease).⁹⁵ It is useful to note that drug offenses increased significantly after the toughening of drug-related criminal sanctions, whereas drunk driving seemed to decline during the same period, which featured a concerted community and media campaign to alter the norms around drunk driving, along with some increases in DUI-related penalties. This may suggest that *social* sanctions, such as the disapproval of peers and the stigma attached to potentially hazardous activities, have been more effective than criminal sanctions in reducing the harms related to substance abuse.

In Washington, the trends in arrests, convictions and incarceration over the last decade reveal a distinct divergence between drug offenses and other offenses. In 1989 and 1990, the state legislature not only increased sentence lengths for drug offenses, but also for many violent and sex offenses.⁹⁶ Since the mid-1980s, arrests and convictions for homicide have declined in absolute terms and arrests and convictions for rape, robbery and assault have risen, but at a rate roughly commensurate with the rate of increase in the size of the general population. However, arrests and convictions for drug offenses have continued to rise at a much faster pace.

⁹⁰ Lawrence A. Greenfield (1998), *Alcohol and Crime: An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime*, U.S. Department of Justice, Washington, D.C., pp. 20-21.

⁹¹ Thomas Wickizer (1999), *op. cit.*, p. 27.

⁹² U.S. Department of Justice (1997), *Prisoners in 1996*, Bureau of Justice Statistics, Washington, D.C.

⁹³ Allen J. Beck (2000), *Prisoners in 1999*, U.S. Department of Justice, Washington, D.C., p. 12

⁹⁴ U.S. Department of Justice (2000), *Crime in the United States 1999*, Uniform Crime Reports, Federal Bureau of Investigation, Washington, D.C., p. 216. Arrests for state-level “drug abuse violations” increased from 589,944 to 805,024 during the 1990s.

⁹⁵ *Ibid.* DUI arrests nationwide declined from 1,021,753 to 749,454 during the 1990s.

⁹⁶ See especially E2SSB 6259, c. 3, Laws of 1990, which increased criminal penalties for Assault 1° and other “serious violent” offenses, increased the mandatory minimum term for Rape 1°, established “triple scoring” of prior sex offenses in criminal history and reduced the amount of earned early release time available for “serious violent” and Class A sex offenses, among other measures.

Records of arrests for various offenses since 1985 reveal the following:⁹⁷

Arrests for Selected Offense Categories – Washington State

<i>Offense</i>	<i>1985 arrests</i>	<i>1998 arrests</i>	<i>% change</i>
Homicide	220	204	- 7%
Robbery	1,346	2,172	+ 61%
Rape	839	948	+ 13%
Assault	4,280	6,400	+ 49%
Drug Offenses	7,802	26,902	+ 345%

Considering these figures, the increase in penalties for the most serious violent and sex crimes in Washington has arguably had some effect in holding steady the rate of incidence of those crimes, considering the significant population increase in Washington during the 1980s and 1990s. However, it is evident that the increase in drug crime penalties has been associated only with a continued and dramatic rise in drug offenses during the same period. While the drug-taking behavior of citizens has changed only marginally over time, expensive and time-consuming law enforcement activity related to drugs has intensified dramatically.

The Cost of Criminal Justice

The last twenty years have seen a 1,200 percent increase in the number of drug offenders in state prisons, and criminal justice costs have risen very sharply as a result.⁹⁸ As noted above, Washington's costs related to illegal drugs have increased, but mostly due to increasing drug law enforcement and the incarceration of drug offenders, and not because of any dramatic rise in social service, health care or other, non-criminal justice costs.⁹⁹ In 1996, the most recent year for which data are available, law enforcement costs related to illegal drugs, including investigation, arrest and interdiction amounted to \$202 million. Legal and adjudication costs arising from drug cases that year amounted to \$22 million, or 83 percent of all court costs related to drug and alcohol cases. The cost of incarcerating drug offenders in 1996 amounted to \$36 million for local jails and more than \$97 for state prisons, more than double the cost in 1990.¹⁰⁰ These criminal justice costs have surely continued to rise since 1996 with the continued incarceration of more and more drug offenders.

The federal criminal justice system has also spent increasing amounts on the War on Drugs over the last dozen years. For example, since the enactment of mandatory minimum sentences for drug offenses, the budget for the federal Bureau of Prisons has

⁹⁷ Washington State Caseload Forecast Council (2001), adjusted arrest data from the Washington Association of Sheriffs and Police Chiefs. 1998 is the last year for which arrest data are currently available.

⁹⁸ Nationwide, 236,000 drug offenders were sent to state prisons in 1998, compared to only 19,000 in 1980. See Anne M. Piehl, Raymond V. Liedka and Bert Useem (2001), *The Crime Control Effects of Incarceration*, manuscript in publication.

⁹⁹ Thomas Wickizer (1999), *op. cit.*, p. 68.

¹⁰⁰ *Ibid.*, pp. 27-36.

increased by 1,350 percent, from \$220 million in 1986 to over \$3.2 billion today.¹⁰¹ The federal budget for drug control is currently \$18 billion (President Bush has requested \$19.2 billion for the upcoming fiscal year), and combined federal and state expenditures for the drug control program now total approximately \$35 billion annually, a 250 percent increase from the mid-1980s when combined federal and state spending for drug control totaled about \$10 billion.¹⁰²

The cost of criminal justice related to drug control includes the explicit costs of law enforcement, prosecution, defense, courts and corrections. With the intensification of criminal sanctions related to drugs, the number of personnel employed in each of those agencies has risen markedly, especially in corrections and in special drug enforcement units in police and sheriffs departments and prosecutors' offices.¹⁰³ Beyond these explicit costs, however, are significant implicit public costs, such as the opportunity cost of the courts and prisons and increased crime and corruption resulting from drug prohibition (discussed below in more detail).¹⁰⁴

Criminal sanctions have not proven to be cost-effective as a means to reduce the societal costs of drug abuse, including crime, violence, medical care and lost productivity. A recent study compared the costs and benefits of varying approaches to drug control, arriving at the following findings:

<u>Reducing Societal Costs of Cocaine Use</u> ¹⁰⁵	
<i>Investment of additional \$1 in:</i>	<i>Societal benefit received:</i>
Source-country control	a LOSS of 85 cents
Interdiction	a LOSS of 68 cents
Domestic Enforcement	a LOSS of 48 cents
Treatment	a GAIN of \$7.46

The same study found that an investment in drug treatment reduces drug consumption by four times as much as spending the same amount on law enforcement and seven times as much as spending the same amount on longer prison sentences.¹⁰⁶ These findings, in addition to all the other findings outlined in this section, leave little, if any, room to dispute that current drug policy has been ineffective in achieving its objectives, as tough criminal sanctions for drug offenses have failed to reduce drug use, drug-related crime and their associated costs.

¹⁰¹ U.S. Department of Justice (1997), *Sourcebook of Criminal Justice Statistics 1996*, Bureau of Justice Statistics, Washington, D.C., p. 20; *see also* Executive Office of the President, Office of National Drug Control Policy (1997), *National Drug Control Strategy 1997, Budget Summary*, Washington, D.C., p. 111.

¹⁰² Peter Reuter (2001), *op. cit.*, p. 16

¹⁰³ Diana R. Gordon (1994), *op. cit.*, p. 38.

¹⁰⁴ Mark Thornton (1991), *The Economics of Prohibition*, University of Utah Press, Salt Lake City, p. 143.

¹⁰⁵ C. P. Rydell and S. S. Everingham (1994), *Controlling Cocaine*, RAND Corporation, Santa Monica, Cal., p. xvii. "Societal benefits" include reductions in crime, violence, medical costs and productivity losses.

¹⁰⁶ *Ibid.*, p. 1.

Serving the Purposes of the Criminal Law

In addition to evaluating specific effects on drug use and drug crime, current drug policy should also be evaluated as to whether it has generally served the purposes of the criminal law. Even though drug-related criminal sanctions have failed to reduce levels and rates of drug use and drug offenses and the respective costs of each, other objectives such as the promotion of justice, specific deterrence, incapacitation and rehabilitation may nevertheless have been advanced and are worth examining. The following discussion touches upon each of the key objectives of the criminal law to determine whether current drug policy has satisfied them.

Public Safety

The promotion of public safety is an overriding objective of the criminal law, served by the deterrence, incapacitation and rehabilitation strategies outlined below. The authority to preserve public safety through law enforcement is founded on the traditional police power of the state – promoting “health, welfare, safety and morals.”¹⁰⁷

Law enforcement is intended to protect society from drug-related crime, *e.g.*, property crime to support drug addiction, as well as the public disorder and violence that is associated with drug trafficking and illegal drug “markets.” Criminal law enforcement is also aimed at protecting society from crimes that result from drug use, which include drug-related violent crime, destruction of property and traffic injuries and fatalities. Finally, to the extent that the state is acting *in loco parentis*, enforcement of drug laws is intended to protect citizens from the adverse health, economic and social consequences of their own drug use. The rationale for governmental intervention is the belief that intoxication and addiction reduce capacities for self-control and rational behavior, and that drugs are different from other commodities in that drug users are “less capable of protecting their own interests.”¹⁰⁸ This reasoning does not clarify, however, why the imposition of *criminal* sanctions is the most appropriate way to protect citizens who use or abuse drugs.

The findings in this report indicate that criminal law enforcement has not adequately protected society from the adverse effects of drugs. Drug use and abuse, drug offenses and drug-related crime have all increased during the recent period of intensified law enforcement. Drug abusers and their children continue to place inordinate burdens on social welfare and child protective services, and they contribute to the rising cost of health care.¹⁰⁹ It is apparent that the use of criminal sanctions has failed to achieve the public safety goals of drug policy.

¹⁰⁷ “Police power” has been defined by the Washington courts as an “essential element of the state’s power to govern which cannot be surrendered, in exercise of which the state may prescribe laws intended to promote health, peace, morals, education, good order and the welfare of the people, and the only limitation upon which is that it *must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the Constitution.*” [emphasis added] *Peden v. City of Seattle*, 510 P.2d 1169, 9 Wash.App. 106 (Div. 1, 1973), review denied 82 Wash.2d 1010. Discussions of the shifting balance between police power and individual rights in America date back a century. See Ernst Freund (1904) *Police Power, Public Policy and Constitutional Rights*, Callaghan & Co., Chicago, IL; and more recently, Richard A. Epstein (1993), *Bargaining with the State*, Princeton University Press, Princeton, NJ.

¹⁰⁸ Mark A. R. Kleiman (1992), *Against Excess: Drug Policy for Results*, Basic Books, New York, p. 27.

¹⁰⁹ Mitchell Rosenthal (1991), “In Opposition to Drug Legalization,” 24 *University of California, Davis L. Rev* 3, pp. 637, 643.

Retribution

A core principle of Washington's determinate sentencing is "just deserts," or the notion that the "punishment should fit the crime."¹¹⁰ From this perspective, given the relatively severe penalties assigned, drug offenses should be considered among the most serious crimes, *i.e.*, those that cause a great amount of harm. However, a number of stakeholders in Washington's criminal justice system have questioned whether the punishment related to drugs is in proper proportion to the seriousness of the conduct.¹¹¹ Part of the difficulty in arriving at a comparatively just punishment is that, unlike most crimes, drug cases rarely have specific, unwilling "victims."

The discussion of the proportionality of criminal sanctions to illegal drug activity is fraught with disagreement and confusion. Some consider drug-related punishment to be disproportionate to the offense, but prison or jail, as seen from other perspectives, is hardly threatening or punitive. Some may believe that the risk of arrest and incarceration is an unavoidable aspect of drug use and participation in the drug trade. Still others may consider indigent drug offenders to be "lucky" to have food, shelter, clothing, health service, recreation and relative levels of physical safety as an improvement over life in an environment of urban blight.¹¹² Moreover, many low-level drug offenders may develop relationships with more experienced drug offenders while in prison, and may receive an education in "advanced drug trafficking" or other illegal undertakings.¹¹³ The retributive function of drug-related criminal sanctions could be seen as offset by the harm caused to society by the criminalization of non-violent or first-time drug offenders.

Deterrence

A central purpose of criminal law enforcement is deterrence, the notion that the risk of a criminal record and the loss of personal liberty are disincentives to crime. Deterrence is either specific (directed toward the particular offender) or general (directed toward the general population). In the context of drug crime, criminal sanctions are intended to ensure that the costs to the individual of the use or sale of illegal drugs will outweigh the benefits.

Among drug offenders, there is little evidence that the threat of criminal sanctions has much deterrent effect. Persons addicted to drugs are unlikely to be deterred from continued use by the threat of sanctions, because "their craving renders them incapable of a rational calculation of the costs and benefits of drug-taking behavior."¹¹⁴ In addition,

¹¹⁰ See the statement of purpose in Washington's Sentencing Reform Act, which states that the punishment must be proportionate to the seriousness of the offense and to the offender's criminal history. RCW 9.94A.010(1).

¹¹¹ Washington's Sentencing Guidelines Commission is considering whether some punishments for drug offenses are out of proportion to the seriousness of those offenses, and is examining whether a new approach is necessary to deal with drug crime in general. The Commission is considering making new distinctions between different types of drug crimes and drug offenders, including the concept of a sliding scale or a series of degrees of drug crime. State of Washington, Sentencing Guidelines Commission (2000), *The Sentencing Reform Act at Century's End*, Olympia, WA, pp. 5-6.

¹¹² Hon. Margaret P. Spencer (1995), *op. cit.*, p. 370.

¹¹³ *Ibid.*, p. 371.

¹¹⁴ Diana R. Gordon (1994), *op. cit.*, p. 106. Similarly, Mark Kleiman has also asserted that the "bite of conscience and the fear of punishment are the two great deterrents," but that drug use "quiets the conscience and dims foresight," reducing the deterrent value of shame or punishment. Kleiman (1992), *op. cit.*, p. 47.

many hard-core drug addicts have little left to lose to threats of imprisonment, having already lost, or never had, stable families, employment or property.¹¹⁵

A similar balancing of cost and benefit is likely undertaken by those involved in the sale of illegal drugs. For some, the financial benefit of selling drugs is not offset by the risk of arrest. For others, it is unlikely that the threat of criminal sanctions has sufficient influence to deter selling drugs where there is no other sufficiently well-paid means of earning a living. The same can be said of low-level drug sellers who are addicts themselves and who participate in the drug trade to support their own dependency.

An important recent study by the Washington Sentencing Guidelines Commission reported on the recidivism rates of various classes of offenders, finding that drug offenders have the highest recidivism rate. The report found further that drug offenders tend to re-offend quickly after release from confinement (within one year), and that 85 percent of the time their subsequent offense is another drug offense or a property offense that is usually assumed to be related to drug addiction.¹¹⁶ California drug offenders who receive treatment in lieu of incarceration under the new Proposition 36 guidelines (described below) have had an *average* of 16 previous arrests.¹¹⁷ Again, there is little, if any, room to dispute that drug dependence and addiction (along with poverty) nearly eliminate the deterrent effect of the threat of criminal punishment.

Casual drug users might be deterred to a greater extent than addicted drug users. However, there are millions of casual drug users in the United States, for whom the risk of being arrested for drug possession is very small.¹¹⁸ Furthermore, because drug addicts are estimated to consume over 80 percent of all drugs, any attempt to deter casual users neither diminishes overall demand nor deters most drug use.¹¹⁹

Incapacitation

The intent of incapacitation is to remove an offender from the community to prevent that person from committing other offenses and to reduce the incidence of crime in the community. The “incapacitation effect” is measured by the effect of incarceration on recidivism rates.¹²⁰

In the 1980s the federal Drug Enforcement Administration attempted to shut down crack markets in New York’s Washington Heights neighborhood by arresting hundreds of drug sellers and by seizing the cars of over one thousand white drug buyers from the suburbs who came into the neighborhood to buy drugs. Incapacitating all of those buyers and sellers had no effect on the demand for or the availability of crack, however, because

¹¹⁵ Steven B. Duke and Albert C. Gross (1993), *America’s Longest War: Rethinking Our Tragic Crusade Against Drugs*, G. P. Putnam’s Sons, New York, p. 10.

¹¹⁶ State of Washington, Sentencing Guidelines Commission (2000), *Recidivism of Adult Felony Offenders*, Olympia, WA.

¹¹⁷ Fox Butterfield, “New Drug Offender Program Draws Unexpected Clients,” *New York Times*, September 29, 2001.

¹¹⁸ The chance of being arrested for drug possession has been estimated at about 1 in 2400. Steven B. Duke and Albert C. Gross (1993), *op. cit.*, p. 226.

¹¹⁹ *Ibid.*, p. 10

¹²⁰ Hon. Margaret P. Spencer (1995), *op. cit.*, p. 371.

both buyers and sellers in the drug trade could not be arrested or imprisoned in sufficient numbers to make a difference in drug abuse or drug-related crime.¹²¹

A more recent study in Los Angeles examined the arrest records of offenders convicted of drug trafficking, drug possession, robbery and burglary in an attempt to determine the number of crimes avoided through incarceration. A significant incapacitation effect was found with the robbery and burglary offenders, but not with the drug trafficking or drug possession offenders. Taking burglars and robbers off the street resulted in a decrease in burglary and robbery, but the incarceration of the drug offenders simply created more business opportunities for other drug sellers.¹²² Incapacitating drug offenders does not reduce the incidence of drug offenses because there is a continuous supply of potential drug offenders to take the place of those who are sent away to prison.¹²³

Rehabilitation

Rehabilitation is the process of changing or “reforming” the behavior of offenders so that they will not commit further offenses. Rehabilitation was at one time the primary goal of sentencing, but since the late 1970s the pendulum swung toward punishment and incapacitation.¹²⁴ After the rapid proliferation of drug offenses in the 1980s and 1990s, the pendulum began to swing back again, as “drug courts” were established as an alternative to the incarceration of drug offenders. Drug courts defer prosecution to allow drug users to receive addiction treatment under criminal justice supervision, and the threat of criminal sanctions and a criminal record serve as leverage to compel illegal drug users to participate in treatment.

The emphasis on addiction treatment for drug offenders is currently the major drug policy reform being implemented in the United States (discussed in greater detail below). The initial hope for programs such as drug courts derives from their rehabilitative focus – concentrating on one behavior problem (addiction) that is causally related to crime committed by one group of offenders.¹²⁵ Evaluations of court-ordered drug treatment have shown some reductions in drug use and recidivism, but no study has yet reliably demonstrated that drug courts “work.”¹²⁶

Restoration

The concept of restoration involves the use of the criminal justice process to rebuild relationships between an offender, the victim and the community disrupted by crime. Offenders are to be accountable for their actions before the community and the victim and, as the harm to the victim and the community is repaired, the offender is rehabilitated.¹²⁷

¹²¹ Robert M. Stutman and Richard J. Esposito (1992), *Dead on Delivery: Inside the Drug Wars, Straight from the Street*, Warner Books, New York.

¹²² Jacqueline Cohen, Daniel Nagin *et al.* (1998), “Hierarchical Bayesian Analysis of Arrest Rates,” *Journal of the American Statistical Association*, vol. 93, no. 444, pp. 1260-1270.

¹²³ Diana R. Gordon (1994), *op. cit.*, p. 35.

¹²⁴ Hon. Richard S. Gebelein (2000), *The Rebirth of Rehabilitation: Promise and Perils of Drug Courts*, U.S. Department of Justice, National Institute of Justice, Office of Justice Programs, Washington, D.C., p. 2.

¹²⁵ *Ibid.*, p. 3.

¹²⁶ *See, e.g.*, Morris B. Hoffman (2000), “The Drug Court Scandal,” 78 *North Carolina L. Rev.* 5, p. 1480.

¹²⁷ Hon. Richard S. Gebelein (2000), *op. cit.*, p. 2.

The “restorative justice” approach has been effective with some types of non-violent offenders, particularly juvenile offenders. However, its relevance and applicability to drug offenders is negligible, because drug offenses *per se* are “consensual” or “victimless” crimes and are therefore not amenable to the potential for healing and forgiveness between the perpetrator of a crime, the victim of the crime and the larger community. However, the concept of restorative justice does highlight the approach taken by civil courts to the harms associated with drug abuse. For example, it is common in family court proceedings for parties to be ordered to participate in drug treatment as a way of restoring family relationships.

Summary

William J. Bennett, a former White House drug “czar,” stated recently that the War on Drugs once worked and that it can work again. Bennett decried the increase in drug use in the 1990s, comparing it with the decline in drug use in the 1980s, which he attributed to “vigorous law enforcement and interdiction, coupled with effective prevention and treatment.”¹²⁸ However, as the findings in this report convey, Bennett’s statement bears little relationship to what has actually occurred in the last decade. Drug-related law enforcement activity and the increasing incarceration of drug offenders did not slack off during the 1990s, when drug use was on the rise again. In fact, the last decade has seen unprecedented drug-related law enforcement activity and incarceration of drug offenders.

The increasing arrest and incarceration of drug offenders and the lengthening of prison sentences since the late 1980s has failed to reduce the prevalence of drug use, the problem of drug abuse, the incidence of drug offenses and drug-related crime and the related public costs. Furthermore, the increased criminal sanctions related to drugs have not satisfied any of the core objectives of the criminal justice system. The toughening of penalties related to drugs has not contributed to increased public safety, nor has it succeeded in deterring drug-related activity or reducing drug-related recidivism rates through incapacitation.

Recent rehabilitative options for drug offenders have largely been a reaction to the perceived ineffectiveness of criminal sanctions. Although some encouraging reports have come from the nation’s drug courts, there are still doubts about their long-term effectiveness. Meanwhile, the large majority of drug offenders at the state and federal levels continue to serve long prison terms, most without any rehabilitative component to their sentences. Drug offenders in Washington have more rehabilitative options than drug offenders in other states, but the majority of offenders in need of treatment still do not receive it. The people of Washington continue to spend hundreds of millions of dollars annually to confine repeatedly a class of non-violent offenders who have the highest recidivism rate because of their drug dependence. The cost of drug-related criminal sanctions has been high, but the promised benefit of this policy has not been realized.

¹²⁸ William J. Bennett (2001), “The Drug War Worked Once. It Can Again,” *Wall Street Journal*, May 17, 2001, p. 12.

III. Problems and Prospects for Current Drug Policy

Damaging Collateral Effects of the War on Drugs

The findings described in this report indicate that the War on Drugs has been ineffective in reducing levels of drug use, drug abuse, drug offenses or other crimes related to drugs. In addition, it has caused collateral damage that has rippled through America's disadvantaged communities and the American economy at large, as well as the international economy and the drug-producing nations of the world. What follows is a brief summary of some of the most serious negative side effects of our current drug policy.

Promoting crime – trade unfettered by law

The War on Drugs has actually increased crime and enhanced the profits made in the black market drug trade. Those who produce, deliver and use illegal drugs commit crimes merely by engaging in those activities. Many drug users turn to other types of crime in order to afford drugs, which are made more costly because of drug prohibition.¹²⁹ On the supply side, the prohibition of illegal drugs has exempted the drug trade from regulation and control, and the resulting black market in the distribution of drugs has spawned high levels of violence. Where there is no recourse to the law to settle disputes or to protect the trade from competitors, business is often conducted by force or threat of force. For example, somewhere between 20 and 40 percent of murders in the United States take place because of the black-market drug business.¹³⁰

For the larger-scale drug sellers who operate above the street level, very high profits from the drug trade are a strong incentive to make “easy” money in a market that is not regulated or controlled.¹³¹ The high profits are a direct result of government attempts to restrict the supply of illegal drugs. Interdiction and enforcement efforts that reduce drug supply thus have become tantamount to “taxpayer-funded price supports for organized crime.”¹³² At the same time, those interdiction efforts have failed to stop the flow of drugs needed to meet consumer demand.¹³³

¹²⁹ David R. Henderson (1991), “A Humane Economist’s Case for Drug Legalization,” 24 *U. California, Davis. L. Rev.* 3, p. 659. As discussed in the previous section of this report, non-drug crime committed by drug users is difficult to measure, but it is a very real phenomenon. Researchers have found explicit empirical evidence that drug prohibition is directly related to crimes other than illegal drug sale and use. See, e.g., B. D. Johnson, P. J. Goldstein *et al.* (1985), *Taking Care of Business: The Economics of Crime and Heroin Abusers*, Lexington Books, Lexington, MA.

¹³⁰ William Weir (1995), *In the Shadow of the Dope Fiend: America’s War on Drugs*, Archon Books, North Haven, CT., p. 253; see also Steven B. Duke and Albert C. Gross (1993), *op. cit.*, p. xvii.

¹³¹ Eric E. Sterling (1995), “The Sentencing Boomerang: Drug Prohibition Politics and Reform,” 40 *Villanova L. Rev.* 2, pp. 426-27.

¹³² Peter Reuter (2001), *op. cit.*, p. 22. The so-called “profit paradox” has been highlighted as one of the fundamental flaws in current drug control strategy, whereby the high cost of illegal drugs – a reflection of the risk of having to evade law enforcement – leads to higher profits, which, in turn, create stronger incentives to continue doing business in illegal drugs. See Eva Bertram, Morris Blachman *et al.* (1996), *Drug War Politics: The Price of Denial*, University of California Press, Berkeley, CA, pp. 11-31.

¹³³ In the 1970s, seizures of up to 200 pounds of heroin were considered impressive, but recently there have been individual seizures of over 15 tons of cocaine. At least three-quarters of all drug shipments would have to be intercepted in order to reduce the profitability of the international drug trade, but it is estimated that current efforts only intercept about 13 percent of heroin shipments and between 28 and 40 percent of cocaine

Retail prices of illegal drugs have actually declined significantly in recent years. In the United States over the last decade, the price of cocaine has fallen by about 50 percent and the price of heroin has declined by about 70 percent.¹³⁴ This indicates that the War on Drugs has not kept supply from outstripping increased demand. Despite the drop in retail prices, the international illicit drug business has continued to realize enormous profits, generating about \$400 *billion* in trade each year.¹³⁵

Undermining public health

The War on Drugs has exacerbated the damage to health inflicted by drug abuse in a number of ways. First, AIDS and other diseases are transmitted by the use of contaminated needles.¹³⁶ Drugs are often injected rather than taken in a safer way because the drugs' cost prompts users to attempt to achieve the same effect using less of the substance.¹³⁷ Second, in the unregulated drug market, a substance may be diluted with chemicals more harmful than the drug itself. Third, in response to intensified law enforcement activity, the smuggling of purer and higher-potency drugs has increased, allowing substances to be transported in smaller, more easily concealed quantities.¹³⁸ The combination of more potent drugs and more frequent adulteration of drugs has rendered the quality of the drug supply extremely unpredictable, making the consumption of drugs much more dangerous in terms of overdoses, poisoning and possibly their addictive potential.¹³⁹

In addition to the increase in the potency of known drugs, criminalization has also brought about the formulation of new, and often highly potent, *synthetic* drugs. For instance, powerful, synthetic opiates are produced with chemical compositions that can be changed by suppliers to avoid criminal punishment.¹⁴⁰ Another health-damaging response to drug prohibition is the substitution of lower-priced for higher-priced illegal drugs.¹⁴¹ In Washington and elsewhere, the current proliferation of methamphetamine, which is produced in varying and unpredictable degrees of quality and potency, is an example of the synthesis of a new drug that is cheaper and often more potent than other drugs such as cocaine or other stimulants, and potentially much more hazardous to the user's health.

shipments. See U.N. Office for Drug Control and Crime Prevention (1999), *Global Illicit Drug Trends 1999*, New York, p. 51.

¹³⁴ *Ibid.*, p. 86.

¹³⁵ U.N. Office for Drug Control and Crime Prevention (1998), *Economic and Social Consequences of Drug Abuse and Illicit Trafficking*, New York, p. 3

¹³⁶ A special exception to the trend of injection-related transmission of HIV/AIDS applies to Washington State, and to Seattle-King County in particular. Washington was a pioneer in the early 1990s in allowing for needle exchanges, which has dramatically reduced the rate of injection-related AIDS transmission to about 4 percent, the lowest in the nation. David H. Albert (2001), *op. cit.*, p. 259.

¹³⁷ Steven B. Duke and Albert C. Gross (1993), *op. cit.*, p. 9.

¹³⁸ For instance, the mean purity level of heroin was around six percent in 1987, but up to 37 percent by 1997, and as high as 60 percent in New York City. U.N. Office for Drug Control and Crime Prevention (1999), *op. cit.*, p. 86.

¹³⁹ Mark Thornton (1991), *op. cit.*, pp. 89, 145. The relationship between prohibition of drugs and the reduced quality and higher potency of drugs was evident during Prohibition in the 1920s, when bootleggers sometimes used wood alcohol or other substances that resulted in a "powerful poison." *Ibid.*, p. 105.

¹⁴⁰ *Ibid.*, p. 109.

¹⁴¹ *Ibid.*, p. 108.

The criminalization of drug use has arguably discouraged people from seeking medical attention to address their medical needs, including their drug addiction; and the risk of criminal sanctions has prevented or discouraged some drug users from taking necessary steps to protect themselves from disease.¹⁴² Drug abuse can lead some people to neglect their health, but it is also conceivable that the risk of detection and criminal prosecution is a disincentive to seeking medical care. There is also some indication that drug users are stigmatized and receive a lower standard of medical care when their illness is related to their known drug use.¹⁴³

The criminalization of drugs also impairs the ability of doctors to practice effective medicine. Primary care physicians and other health professionals who prescribe controlled substances, especially opiates, to treat pain are audited by the federal Drug Enforcement Administration. Even if a prescription meets the standards of the medical board that regulates the physician's license, the DEA can determine that the federal license to prescribe controlled substances should be taken away.¹⁴⁴ Although physicians are not subject to criminal sanctions, but only license revocation, in such instances, the criminalization of drugs has created an environment of fear that inhibits doctors from providing competent medical care.

Slowing the wheels of justice

The dramatic expansion of law enforcement activity related to drugs in the last dozen years has clogged the court system to such an extent that judicial attention has been diverted away from the processing of civil cases and non-drug criminal cases. The federal courts have been so overwhelmed with drug prosecutions that Chief Justice Rehnquist has expressed exasperation at the burdening of federal courts with petty drug cases.¹⁴⁵ In Washington's courts, civil cases are unduly delayed because of the need to process the large bulk of drug cases, which have priority because they are criminal matters.

In the King County courts, the volume of drug cases has overloaded the dockets and consumed scarce resources that also must be devoted to other criminal and civil cases.¹⁴⁶ Approximately 40 percent of the cases filed in King County courts each year – over 3,800 – are controlled substances cases. In addition, almost 20 percent are

¹⁴² Injection drug users have frequently been arrested for possession of syringes that they obtained or intended to return to needle exchange sites. *See, e.g.*, “Manhattan: Needle Suit Can Proceed,” *New York Times*, Metro Briefing, August 1, 2001.

¹⁴³ *See, e.g.*, B. R. Edlin, K. H. Seal *et al.* (2001), “Is It Justifiable to Withhold Treatment for Hepatitis C from Illicit Drug Users?” *New England Journal of Medicine*, vol. 345, pp. 211-214.

¹⁴⁴ A highly-regarded physician who is a pain treatment specialist recently stated that “one of the primary reasons for the ineffective treatment of pain is a palpable level of fear among physicians about potential loss of their state medical licenses or federal registrations to prescribe controlled substances...Practitioners prescribe controlled substances in ways that will reduce the likelihood of investigation.” Howard Heit, M.D., F.A.C.P., F.A.S.A.M., letter to U. S. Senator Ron Wyden, September 29, 2001.

¹⁴⁵ Dan Baum (1992), “The Drug War on Civil Liberties,” *The Nation*, June 29, 1992, p. 887; *see also* Kathleen F. Brickey (1995), “Criminal Mischief: The Federalization of American Criminal Law,” 46 *Hastings L. Journal* 2, p. 343.

¹⁴⁶ The King County Executive recently estimated a \$41 million budget shortfall for the upcoming fiscal year, including a \$10 million cut to criminal justice and the courts.

“acquisitive” property cases such as theft and burglary.¹⁴⁷ Although impossible to determine the exact number, it is not unreasonable to assume that many, if not most, property cases are drug-related, and therefore, that at least half of King County’s criminal caseload is drug-related. Controlled substances cases (excluding drug court cases) also make up the largest share of pending cases – almost 900 – which partially explains why the active pending criminal caseload has been rising for the last five years.¹⁴⁸

Social dislocation and racial/class divisions

The War on Drugs has taken a particularly hard toll on disadvantaged communities, both as a result of intensified law enforcement activity in those communities and the incarceration of residents from those communities.¹⁴⁹ The focus of drug enforcement on the poor and near-poor has resulted in a massive “prisonization” of disadvantaged young men, to the point that more poor people are now housed within the correctional system than in public housing.¹⁵⁰ Law enforcement efforts to stop the drug trade in one location have only displaced “markets” from one neighborhood to another, and the combination of open-air retail drug sales, the threat of violent turf battles and heavy police presence have imposed a sense of disorder and danger on those neighborhoods.¹⁵¹

Drug abuse (though not drug use) is closely related to the conditions of social deprivation and community breakdown not uncommon in disadvantaged neighborhoods.¹⁵² In addition to drug abuse, the increase in law enforcement and incarceration because of drugs has perpetuated and exacerbated the social conditions that help give rise to drug abuse in the first place. The effects of incarceration on the family structure have been particularly disruptive, imposing large and apparently unmanageable burdens on single-parent families and the foster care system. Two million minor children in America have at least one parent in jail or prison.¹⁵³ Almost 70 percent of women in local jails and state prisons have minor children, and almost half of the women in local jails or state prisons are incarcerated on drug charges.¹⁵⁴ Maintaining parent-child relationships is extremely difficult for many offenders in prison, as a significant majority of parents in state and federal prisons are held more than 100 miles from their last place of residence.¹⁵⁵

¹⁴⁷ Shiquan Liao (2000), *King County Superior Court, Criminal Department Statistical Report*, Report # CRM-2000-09, Seattle, WA., p. 6.

¹⁴⁸ *Ibid.*, p. 2.

¹⁴⁹ Another task force of the King County Bar Association’s Drug Policy Project is examining the disproportionate imposition of state authority over certain racial, ethnic and socioeconomic segments of the population in connection with the War on Drugs, including consideration of possible targeting or “profiling” by law enforcement and of the repeated and/or lengthy incarceration of minorities and the poor for violations of drug laws.

¹⁵⁰ Elliott Currie (1993), *op. cit.*, p. 19.

¹⁵¹ Tal Klement and Elizabeth Siggins (2001), *A Window of Opportunity: Addressing the Complexities of the Relationship Between Drug Enforcement and Racial Disparity in Seattle*, John F. Kennedy School of Government, Harvard University, Cambridge, MA, p. 48; and Mark A. R. Kleiman (1992), *op. cit.*, p. 15.

¹⁵² Mark A. R. Kleiman (1992), *op. cit.*, p. 103.

¹⁵³ Lawrence A. Greenfield and Tracy L. Snell (1999), *Women Offenders*, U.S. Department of Justice, Bureau of Justice Statistics, Washington, D.C., p. 8, Table 18.

¹⁵⁴ *Ibid.*, pp. 7 and 8, Tables 17 and 18.

¹⁵⁵ Christopher J. Mumola (2000), *Incarcerated Parents and Their Children*, U.S. Department of Justice, Bureau of Justice Statistics, Washington, D.C., p. 5.

The incarceration of minorities and the poor has further eroded the economic security of families in those communities, resulting in the loss of educational, employment (through job disqualification due to criminal records) and training opportunities, as well as losses in seniority. Drug-related incarceration has also exacted an economic cost from poor communities through lost worker productivity. In Washington in 1996, impairment of gainful employment due to the incarceration of drug offenders resulted in over \$70 million in lost worker productivity.¹⁵⁶

The War on Drugs has also distorted the political, economic and civic cultures in poor communities. The loss of the right to vote of those in the custody of the corrections system has arguably deepened their political alienation and the sense of impotence in their local communities. The “normalization” of prison time and the strengthened links between prison and the street have also limited the chances of success in the regular economy for many of those who come out of prison.¹⁵⁷

Erosion of civil rights

Another consequence of rising drug enforcement in the last dozen years has been the compromise of citizens’ constitutional rights, particularly the relaxation of standards for search and seizure and invasions of individual privacy. One example is the United States Supreme Court’s ratification of the use of highway drug courier profiles to justify random checkpoint stops.¹⁵⁸ In addition, reasonable suspicion requirements have been waived for “street sweeps” by law enforcement, where flanks of police officers conduct intensive stops and searches in targeted areas of a city.¹⁵⁹

No comparable law enforcement effort has involved more wiretaps, home searches and other encroachments on individual privacy than the War on Drugs.¹⁶⁰ Nine out of ten police departments in the United States have paramilitary units that patrol urban areas and also serve drug-related search warrants, which are usually no-knock entries into private homes.¹⁶¹ The dedication of such a high level of resources toward drug-related law enforcement, along with the primary focus on drugs as a motive for vehicle and personal stops by the police, has put civil liberties at risk and has antagonized wide segments of our citizenry. The concentration on the War on Drugs has also drained police resources away from the fulfillment other public safety responsibilities.

One of the most controversial features of the War on Drugs is the authority of law enforcement to seize the assets of those arrested on drug charges. No conviction is

¹⁵⁶ Thomas Wickizer (1999), *op. cit.*, p. 38.

¹⁵⁷ Hon. Margaret P. Spencer (1995), *op. cit.*, p. 371.

¹⁵⁸ *United States v. Sokolow*, 109 S. Ct. 1581 (1989). In a related development, the Drug Enforcement Administration recently persuaded rail carrier Amtrak to grant computer access to passenger records, which most passengers likely assume to be held in confidence by Amtrak. As reported in the news media, Amtrak’s incentive is a ten percent share of any cash or property seizures made from its customers who fit a “drug courier profile.” Such profiles have been shown in other contexts to be based on invidious criteria such as an individual’s race. See “Amtrak: the great American snitch train,” *St. Petersburg Times*, June 24, 2001.

¹⁵⁹ John A. Powell and Eileen B. Hershenov (1991), “Hostage to the Drug War: The National Purse, the Constitution and the Black Community,” 24 *U. California, Davis L. Rev.* 3, p. 584.

¹⁶⁰ For example, about three-quarters of federal wiretaps are drug-related. Electronic Privacy Information Center (2001), *1969-2001 Federal Surveillance*, Washington, D.C.

¹⁶¹ P. Kraska and V. Kappeler (1997), “Militarizing American Police: The Rise and Normalization of Paramilitary Units,” *Social Problems*, vol. 44, no. 1.

required for an asset seizure, and some federal circuits have even upheld asset seizures despite the owner's eventual acquittal of drug charges.¹⁶² Critics of the practice say it is "hardly distinguishable from punishment without trial," in which people are deprived of their criminal procedural rights.¹⁶³ Civil asset forfeiture is also available to law enforcement in Washington in connection with arrests for drug offenses. Although the provisions of the state asset forfeiture statute were amended recently by the legislature, it is still possible for a property owner's assets to be seized without the owner being found guilty by a court of any wrongdoing.¹⁶⁴ In addition, law enforcement agencies keep the assets they seize, which creates a conflict of interest that allows them to distort law enforcement goals to maximize funding for their operations.¹⁶⁵

Persons convicted of felonies in Washington, including drug offenders, lose the right to vote,¹⁶⁶ to hold public office¹⁶⁷ and to serve as jurors.¹⁶⁸ Convicted persons may also be disqualified from acting as a personal representative¹⁶⁹ or guardian.¹⁷⁰ In addition to formal consequences of criminal conviction, one of the harshest effects of a felony record is the social stigma that poses barriers to employment and can give rise to other unpleasant and embarrassing situations. A great deal of confusion surrounds the process of restoring civil rights after the completion of the sentence, and many offenders are unable to get their civil rights restored after release from custody, due to unpaid financial obligations in connection with their sentence.¹⁷¹

Another "right" put in jeopardy during the course of federal drug law enforcement has been access to higher education. An amendment to the Higher Education Act of 1998 provided that students convicted of drug charges become ineligible for federal financial aid and guaranteed student loans.¹⁷² No other criminal offense renders students ineligible for student loans. Accordingly, a student convicted of robbery or murder is eligible for federal financial aid for college, but a student convicted of simple drug possession is not eligible. Thus far in 2001, over 35,000 students in the United States have lost their eligibility for educational financial assistance due to drug convictions. Critics of this provision assert that the rule is biased against the poor.¹⁷³

¹⁶² See, e.g., *U.S. v. Currency in the Amount of \$228,536*, 895 F.2d 908 (2d Cir. 1990).

¹⁶³ Eric Blumenson and Eva Nilsen (1998), "Policing for Profit: The Drug War's Hidden Economic Agenda," 65 *U. Chicago L. Rev.* 35, p. 49.

¹⁶⁴ Substitute House Bill 1995, enacted in the 2001 legislative session, directed that the state bears the burden of proving whether seized assets were derived from illegal drug activity. Previously, this had not been the case with *personal* property (cars, cash, boats, etc.). SHB 1995 also provided for the award of attorneys' fees to parties who successfully challenge the government's forfeiture action. Finally, the bill called for a legislatively-created work group to study further possible changes to Washington's drug forfeiture statutes.

¹⁶⁵ Eric Blumenson and Eva Nilsen (1998), *op. cit.*, p. 56.

¹⁶⁶ WASH. CONST. art VI, § 3 (amended 1988): RCW 29.01.080.

¹⁶⁷ WASH. CONST. art. II, § 7; *Id.* at art. III, § 25; see also RCW 29.65.010(3).

¹⁶⁸ RCW 2.36.070(5).

¹⁶⁹ RCW 11.36.010.

¹⁷⁰ RCW 11.88.020(3).

¹⁷¹ According to the Washington Department of Corrections, over 3,000 offenders were officially "discharged" in 2000, whereby their civil rights were restored; but about 10,000 offenders were "terminated," unable to get their civil rights restored because of unpaid legal financial obligations.

¹⁷² Pub.L. 105-244, Oct. 7, 1998, 112 Stat. 1581.

¹⁷³ Diana Jean Schemo (2001), "Students Find Drug Law Has Big Price: College Aid," *New York Times*, May 3, 2001, p. A12.

The extent to which drug law enforcement has impinged upon civil liberties is most evident in our prisons: the United States now leads the world in per capita imprisonment. By way of comparison, France imprisons about 95 per 100,000 population for all offenses, and the U. S. imprisons about 150 per 100,000 *for drug offenses alone*.¹⁷⁴ As former federal drug “czar” Barry McCaffrey has stated, “We have created an American gulag.”¹⁷⁵

Official corruption /abuse of power

One type of crime that has risen dramatically during the War on Drugs has been corruption among criminal justice officials, even federal judges.¹⁷⁶ Scandals involving corruption related to drug enforcement have been uncovered in police departments in at least a dozen major metropolitan areas, although *not in Seattle or King County*.¹⁷⁷ About half of all police officers convicted in FBI-led corruption cases nationally between 1993 and 1997 were convicted for drug-related offenses.¹⁷⁸ Corrupt practices include knowingly conducting unconstitutional searches and seizures, stealing money and drugs, selling stolen drugs, protecting drug operations and submitting false crime reports.¹⁷⁹

Corruption is more likely when the potential payoff is high and the risk of being detected is low. In this context, public officials have a host of opportunities to benefit secretly from the illicit drug trade, as the profitability of that trade has afforded drug traffickers the means to attempt to corrupt public officials. As the War on Drugs has expanded and intensified, the opportunities for corruption have seemed to grow equivalently. The illicit drug trade has been described as “the most lucrative source of police corruption that has ever existed in the United States”¹⁸⁰ While the integrity of local law enforcement in Seattle and King County has not been called into question in this regard, drug-related corruption among public officials has caused considerable damage in other communities in the United States.

International destabilization

The enormous profits and corruption brought about by the War on Drugs has had particularly adverse effects on developing countries, especially those countries where the raw materials for illegal drugs, such as coca and opium, are cultivated and processed. The resources at the disposal of illegal drug enterprises in those countries have allowed them to corrupt their own governments, or alternatively to create their own private armies to terrorize local officials into permitting continued drug production.¹⁸¹

¹⁷⁴ Peter Reuter (2001), *op. cit.*, pp. 16-17.

¹⁷⁵ Gen. Barry R. McCaffrey (1996), Keynote Address, Opening Plenary Session, National Conference on Drug Abuse Prevention Research, National Institute on Drug Abuse, Washington, D.C., Sept. 19, 1996.

¹⁷⁶ Official corruption related to drugs has even touched the federal bench, resulting in the impeachment and removal from office of U.S. District Court Judges Nixon (Miss.), Hastings (Fla.) and Aguilar (Cal.).

¹⁷⁷ U.S. General Accounting Office (1998), *Law Enforcement; Information of Drug-Related Police Corruption*, USGPO, Washington, D.C., pp. 36-37

¹⁷⁸ *Ibid.*, p. 35

¹⁷⁹ *Ibid.*, p. 8.

¹⁸⁰ Bruce L. Benson and David W. Rasmussen (1996), *Illicit Drugs and Crime*, The Independent Institute, Oakland, CA, p. 33, n. 32.

¹⁸¹ Steven B. Duke and Albert C. Gross (1993), *op. cit.*, p. 6.; *see also* Kevin Jack Riley (1996), *Snow Job? The War Against International Cocaine Trafficking*, Transaction Publishers, New Brunswick, NJ, for an account of the corruption of foreign nations that arises from the War on Drugs.

The United States has demanded the cooperation of the governments in drug-producing countries to prosecute the drug producers under their own laws, to eradicate poppy, coca and marijuana crops, to destroy drug processing facilities, and otherwise to make it costly for drug producers and exporters to operate. The current effort of the United States in Colombia and other Andean nations involves the spraying of herbicide on croplands as well as substantial financial and military assistance to governments fighting drug producers, left-wing rebel groups and right-wing militias, all of whom profit handsomely from the drug trade.¹⁸² The Colombian government is cooperating, although there have been vociferous objections to the spraying of chemicals near rural villages, and also some recent calls from Colombian elected officials for the legalization of drugs.¹⁸³

Unfortunately, source-country drug enforcement efforts by the United States have not had long-term success in halting drug cultivation and processing, but instead, have worsened local environmental conditions, corrupted and destabilized foreign militaries and disrupted foreign economies and cultures.¹⁸⁴

Special Note on Drug Trafficking and International Terrorism:

Since the catastrophic terrorist attacks in New York and Washington, D.C., the United States and its growing coalition of allies have been attempting to track down leading terrorists and their organizations in the effort to prevent any future incidents. A significant part of that effort has been to find and freeze the assets of terrorist organizations. There is considerable evidence that terrorist organizations throughout the world have been partially financing their operations with the use of funds derived from illegal drug trafficking. For instance, the heroin-producing poppy fields of Afghanistan have helped to fund Al-Qaeda, the network of terrorist groups led by Osama bin Laden.¹⁸⁵

The links between illegal drug producers, organized crime syndicates and terrorist groups are spread worldwide. With the assistance of local drug producers, insurgent and terrorist groups in source countries such as Colombia, Thailand and Pakistan have been supplying drugs to international criminal organizations in exchange for weapons, or for cash to purchase weapons. These groups have included the Shining Path in Peru and the M-19 rebels in Colombia.¹⁸⁶ With the end of the Cold War and the financing of proxy wars by the United States and the Soviet Union, armed groups have turned to the illegal drug business for funding. Interpol's chief drug control officer, Iqbal Hussain Rizvi, stated in 1994: "Drugs have taken over as the chief means of financing terrorism."¹⁸⁷

¹⁸² See, e.g., Christopher Marquis (2001), "New Drug Plan Shifts Focus in Latin America," *New York Times*, May 17, 2001, p. A8.

¹⁸³ New York Times (2001), *World Briefing: Colombia: Crop Eradication Can Resume*, August 7, 2001.

¹⁸⁴ Ethan A. Nadelmann (1998), "Commonsense Drug Policy," *Foreign Affairs*, vol. 77, no. 1, pp. 112-113.

¹⁸⁵ Evidence that Osama bin Laden was replenishing his coffers with money from drug trafficking was first reported by CBS News on May 31, 2000.

¹⁸⁶ D. Berthiaume, H. P. Klepak and G. Aureano (1997), "Hemispheric Addiction: Canada and Drug Trafficking in the Americas," *The Focal Papers*, Canadian Foundation for the Americas, vol. 5, p. 17. Other armed groups deriving some funding from drug trafficking have included the Kosovo Liberation Army, the Irish Republican Army and over 30 other groups on four continents. See R. T. Taylor (1995), "Loose Cannons: Covert Commerce and Underground Finance in the Modern Arms Black Market," *Crime, Law & Social Change*, vol. 22, no. 1, pp. 45-47.

¹⁸⁷ Jawed Naqvi, Interview of Iqbal Hussain Rizvi, Reuters News Agency, New Delhi, India, December 15, 1994.

Summary

Any public policy has the potential to bring about unwanted side effects, but the extent of the collateral harm arising from the War on Drugs raises fundamental questions as to whether its policy goals are attainable without unacceptable costs. The basic finding in this report is that the War on Drugs has been extremely costly and has totally failed to fulfill any of its major objectives. Not only are drugs cheaper, purer and more available, but drug use and drug dependence and addiction are all on the rise, as are drug offenses and other crimes related to drugs. Furthermore, the shortcomings of the current drug enforcement system are overshadowed by the devastating array of its harmful side effects outlined above. The time is ripe for reform of the current drug policy, but the question remains as to what kind of reform will be adequate to address the profound problems plaguing the current system.

Reforming Drug Policy – Current Efforts

An increasing number of jurisdictions have attempted in recent years to reform their drug laws. Most of these reforms have been effected at the state and local levels. At the federal level, the U.S. Department of Justice has provided assistance for local “drug courts,” but otherwise, changes in federal drug policy have been limited to increasing its severity.¹⁸⁸

Drug policy reforms have been in reaction to both the fiscal and the human costs of the War on Drugs. Public officials and the public at large have expressed increasing concern and discomfort over the continuing rise in the public expense of arrest, prosecution and imprisonment for drug law violations, as well as the disproportionate impact of the current system on racial minorities and the poor and the perpetuation of social decay that the drug laws were ostensibly meant to prevent.

Some public officials, including the King County Prosecuting Attorney, have stated publicly that incarceration itself does little to resolve the harm of individual drug abuse.¹⁸⁹ In general, however, policymakers have had to confront the political risks, both perceived and real, of being outspoken on the need for drug policy reform, and this has slowed the pace of change. The most forceful calls for reform have come from the more politically insulated public officials, such as the tenured judiciary and elected officials facing term limits. At this point, changes that have been enacted have not been truly fundamental reforms, but only measures relating to discrete issues within the existing drug control system.

¹⁸⁸ In a number of cases, federal criminal penalties related to drugs have continued to increase. For instance, the United States Sentencing Commission has recommended that equivalency value for the substance MDMA, commonly known as “Ecstasy,” be raised from 35 grams to 1 kilogram of marijuana – a 2857% increase over prior sentencing valuations. The proposed amendment treats Ecstasy as being of comparable seriousness to heroin and with heavier sanctions than powder cocaine. United States Sentencing Commission (2001), *Proposed Amendments to the Sentencing Guidelines*, January 24, 2001, p. 2.

¹⁸⁹ See Norm Maleng, King County Prosecuting Attorney (2001), *Beyond the ‘War’: Using the Criminal Justice System to Bring Addicts Into Treatment, A Bold New Approach to Fighting Drug Abuse*, testimony before the 2001 Washington State Legislature.

Replacing Incarceration with Treatment – State Ballot Initiatives

Two of the most dramatic drug policy reforms have taken place in Arizona and California, where sanctions for drug law offenses were changed by voter initiative.¹⁹⁰ In both cases, the electorate voted in favor of a system where treatment of drug addiction, and not imprisonment, is the primary response to illegal drug use.

Arizona's Proposition 200, the Drug Medicalization, Prevention and Control Act, was approved in 1996 with 65 percent of the popular vote.¹⁹¹ Proposition 200 bars the incarceration of persons convicted of possession of a controlled substance, and instead mandates probation with treatment for the first and second such offenses. The measure further requires that all persons convicted and sentenced to prison terms for drug possession *before* the enactment of the new law be made eligible for parole, so long as they would have otherwise been eligible for probation under the statute.¹⁹²

To date, Arizona's Proposition 200 is the only statute with a track record that mandates treatment as government's primary response to drug use. By replacing incarceration with treatment, state officials estimate that Arizona saved more than \$2.5 million in its first fiscal year.¹⁹³ With resources made available under Proposition 200, 98.2% of probationers received drug treatment and 77.5 % of them tested negative for drug use in urine testing during fiscal year 1998.¹⁹⁴ Reporting on the cost savings under Proposition 200, the Arizona State Director of Adult Probation stated that "probation with treatment works....The next step is to ensure that effective treatment is available to all who need it, with emphasis on attendance in and completion of court-ordered substance abuse treatment programs."¹⁹⁵ Some members of the Arizona judiciary have expressed similar opinions: "Opponents of Proposition 200 said this was a 'pro-drug' initiative," said Arizona Appellate Court Judge Rudy Gerber. "As it turns out, [the law] is doing more to

¹⁹⁰ Other drug policy reform measures have likewise passed by voter initiative. Eight states – Washington, Alaska, Arizona, Colorado, Oregon, California, Nevada and Maine – have enacted medical marijuana statutes by voter initiative. Similarly, citizen initiatives in Utah and Oregon have been enacted that restrict the civil forfeiture of assets in connection with drug enforcement.

¹⁹¹ Arizona Secretary of State, *1996 election results*. Presidential votes in 1996 were split almost evenly between Bill Clinton and Bob Dole – with nearly 8% of the popular vote in Arizona going to Ross Perot. Following the passage of Proposition 200, the Arizona State legislature passed House Bill 2518, which partially reversed the ballot initiative by barring physicians from prescribing schedule I drugs, such as marijuana, without the approval of the federal Food and Drug Administration and the U. S. Congress. Popular response to this move by the Arizona legislature came in 1998 in the form of Proposition 300, which, by a 57% to 43% margin, invalidated HB 2518 and restored Proposition 200. Opposition to Proposition 300 came largely from law enforcement and pharmaceutical interests, while statements in support came largely from judges, attorneys and physicians.

¹⁹² Arizona Proposition 300.

¹⁹³ Arizona State Supreme Court (1999), *Drug Treatment and Education Fund Legislative Report, FY 1997-98*, Adult Services Division, Administrative Office of the Courts, p. 7.

¹⁹⁴ *Ibid.*

¹⁹⁵ Arizona Auditor General (1999), *An Evaluation of the Adult Probation Programs*, March 1999; see also Barbara Broderick (1999), *The Arizona Experience: Probation with Treatment Protects the Community*, testimony before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, Committee of Government Reform, Arizona House of Representatives.

reduce crime than any other state program, and saving taxpayer dollars at the same time."¹⁹⁶

The other significant drug policy reform enacted by statewide initiative was California's Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, which garnered 61 percent of the popular vote. Similar to Arizona's initiative, Proposition 36 mandates treatment in lieu of incarceration for first- and second-time drug possession offenses.¹⁹⁷ A key feature of the California initiative is that successful completion of court-ordered treatment leads to dismissal of the criminal charges, as the defendant is "released from all penalties and disabilities resulting from the offense of which he or she has been convicted."¹⁹⁸ Proposition 36 also directed the California legislature to allocate \$120 million annually for drug treatment as an alternative to incarceration and, like Arizona's Proposition 200, requires annual reports on the effectiveness of the measure in reducing crime and public expenditures.¹⁹⁹

While the effects of Proposition 36 are yet to be determined, the California Legislative Analyst's Office estimates a total net savings for the state and local governments of \$140 million to \$190 million per year, plus an estimated one-time cost savings of between \$450 million and \$550 million attributable to the avoidance of additional prison construction.²⁰⁰ The estimated savings do not include specific amounts from fees paid by offenders or savings in prosecution-related expenses, each of which are estimated to be potentially millions of dollars statewide.²⁰¹

Neither Arizona's evaluation of its early fiscal savings nor California's official estimates took into account the potential economic benefits of a reduction in recidivism, increases in employment of probationers and the avoidance of social welfare costs from not removing parents and wage-earners from the community. In addition, the prevention of social disruption and emotional harm to individuals and their families cannot be measured in objective economic terms.

Similar voter initiatives have been filed or are being considered in other jurisdictions, including in Washington.

¹⁹⁶ "Arizona Finds Cost Savings In Treating Drug Offenders," *New York Times*, April 21, 1999.

¹⁹⁷ California's Proposition 36, "The Substance Abuse and Crime Prevention Act of 2000," amended California Penal Code § 8.

¹⁹⁸ California Penal Code § 1210.1(d).

¹⁹⁹ California Penal Code § 7

²⁰⁰ California Legislative Analyst's Office (November 2000), *Proposition 36: Drug Treatment Diversion Program Initiative Statute*, Figure 1.

²⁰¹ *Ibid.*

Replacing Incarceration with Treatment – Judicial Reform

The most prominent drug policy reform effected at the local level has been the “drug court,” which has signaled the beginning of a paradigm shift away from a predominantly punitive orientation toward substance abuse and drug-related crime to a focus on treatment and investment in human potential. The drug court model involves a new working relationship between the criminal court and health and treatment systems, carried out within the boundaries of the criminal court’s jurisdiction.²⁰²

There are currently more than 650 drug courts in the United States, with an additional 450 in the planning stage.²⁰³ By June 1999, when only 381 drug courts were in operation, an estimated 140,000 defendants had been involved in adult drug court programs and the participant retention rate was estimated at greater than 70%.²⁰⁴ All 50 States and a number of American territories now have drug courts operating or in the planning stage.²⁰⁵

In Washington, there are at least 16 adult, juvenile and tribal drug courts in operation and another 15 are planned.²⁰⁶ The first drug court in Washington began in King County in August 1994.²⁰⁷ Under the rules governing the King County drug court, eligible defendants can elect to proceed with traditional court process or they may participate in the program that gives them the opportunity to receive drug treatment in lieu of incarceration. Defendants who choose to participate in the program come under the court's supervision and are required to attend treatment sessions, undergo random urinalysis and appear before the drug court judge on a regular basis. Defendants who meet the requirements of each of the three levels of the program graduate from the program and their charges are dismissed. Defendants who fail to make progress are terminated from the program and are sentenced on their original charge.²⁰⁸

An initial evaluation of the King County drug court program completed in 1998 was encouraging, showing significantly lower recidivism and drug relapse rates among its participants, compared to other drug offenders who did not participate in the program.²⁰⁹ An ongoing study of Washington’s six major adult drug court programs has been

²⁰² See Hon. Richard S. Gebelein (2000), *The Promise and Perils of Drug Courts*, *op. cit.*

²⁰³ Drug Court Clearinghouse and Technical Assistance Project (2001), *Summary of Drug Court Activity by State and County*, Justice Programs Office, The American University, Washington, D.C., p. 34.

²⁰⁴ Drug Court Clearinghouse and Technical Assistance Project (1999), *Drug Court Activity Update: Summary Information*, Justice Programs Office, The American University, Washington, D.C., § II.

²⁰⁵ Drug Court Clearinghouse and Technical Assistance Project (2001), *Summary of Drug Court Activity by State and County*, *op. cit.*

²⁰⁶ *Ibid.*, p. 33.

²⁰⁷ King County Superior Court Clerk's Office, *King County Drug Diversion Court Program*, April 12, 2001.

²⁰⁸ *Ibid.*

²⁰⁹ Evaluation of King County’s drug court in 1998 showed an annual cost avoidance of \$522,000 (including costs that would have occurred if the cases had been adjudicated in the traditional manner, as well as savings associated with reduced recidivism). Nine percent of drug court “graduates” were re-arrested for a felony, compared to 33 percent of offenders who opted not to participate in the drug court program. See M. M. Bell, Inc. (1998), *King County Drug Court Evaluation: Final Report*, Seattle, WA. Statewide, drug courts have been estimated to save Washington taxpayers approximately \$2.45 for each dollar spent. See Washington State Institute for Public Policy (1999), *Can Drug Courts Save Money for Washington State Taxpayers?*, Olympia, WA.

underway since 1999, conducted by the University of Washington's Alcohol and Drug Abuse Institute. The study has been evaluating re-offense, new conviction and re-incarceration rates of offenders eligible for drug court who declined to enter or who terminated treatment, compared with "graduates" of the drug court program. The study's core findings show drug court "graduates" with fewer re-arrests following drug court than any of the other offender groups. Throughout Washington, the rate of imprisonment in the post-drug court referral period is near zero.²¹⁰ In King County, the drug court graduation rate is 29 percent (number of graduates/number of offenders entering the program) and the retention rate is 41 percent [(graduates + active participants) / admissions].²¹¹

Due to fiscal constraints and eligibility restrictions, a relatively small fraction of drug offenders have been diverted through the drug court program. Each year since the program's inception in 1994, approximately 900 offenders, or 21 percent of all drug cases filed in King County in one year, have been found eligible and referred to the drug court. Of those who are eligible, approximately one third have chosen the drug court option.²¹²

A significant difference between the drug court model and the diversion programs established under Arizona's Proposition 200 and California's Proposition 36 is that drug courts retain more authority to sanction or terminate drug offenders' participation for violation of required conditions, often resulting in incarceration. In order to be eligible for the drug court program, defendants must waive the right to a speedy trial and the right to confront witnesses, and they must also stipulate to the facts of the case as stated in the police report, essentially deferring a guilty verdict in the hope of successful completion of drug treatment. Drug court participants who fail to remain drug-free (which is not uncommon among drug-addicted individuals) may be incarcerated on the original charge without trial.

There is no way to demonstrate whether individual defendants who succeed in drug court could have succeeded in treatment without arrest and the threat of incarceration. For defendants less amenable to drug treatment – coerced or voluntary – addressing drug use through the criminal courts, rather than through the public health system, often results in non-violent offenders facing lengthy periods of incarceration that may often compound the health and social problems associated with their addiction. Individual drug court judges are specially trained and especially sensitive to these pitfalls, but the drug court model still does not resolve the underlying problems created by a system that attempts to address drug use as a criminal justice matter rather than as a public health matter.

Sentencing Reform – State Legislation

Relatively recently, a few state legislatures have attempted to reduce the severity and expense of incarceration of drug offenders and to increase opportunities for drug treatment. In Washington, as mentioned above, the Drug Offender Sentencing Alternative program has been recently expanded, providing an abbreviated prison sentence and drug

²¹⁰ University of Washington (2001), *Fact Sheet: Criminal Justice and Earned Income Findings*, Northwest HIDTA/DASA Drug Court Evaluation, Alcohol and Drug Institute, January 10, 2001.

²¹¹ Information provided to the Task Force by the King County Drug Diversion Court program administrator.

²¹² 4,258 drug cases were filed in King County in 2000, of which 1,281 were drug delivery cases and 2,607 were drug possession cases. Figures provided by the King County Drug Diversion Court program administrator.

treatment to eligible offenders.²¹³ No state has yet shifted the primary responsibility for addressing drug-related harms from law enforcement to the health system, but there has been some movement in that direction in various states, including New Mexico, Nevada,²¹⁴ New York,²¹⁵ Connecticut,²¹⁶ Louisiana²¹⁷ and Indiana.²¹⁸

New Mexico has made the most comprehensive attempt in the nation to reform its drug laws. In its 2001 legislative session, with the active support of Republican Governor Gary Johnson, ten drug policy reform bills were introduced. Five of those bills passed into law: syringe availability, anti-opioid overdose treatment, early release of prison inmates convicted of non-violent drug offenses, restoration of voting rights for ex-offenders and expanded funding for treatment for drug addiction.

Two bills that did not pass in New Mexico in 2001 related to medicinal use of marijuana and civil asset forfeiture. Three other bills that were considered but did not pass directly addressed the state's system of criminal sanctions for drug related offenses. Senate Bill 317 would have provided for treatment instead of incarceration for first- and second-time drug offenders in cases involving one to eight ounces of marijuana or two grams or less of cocaine, heroin or other controlled substance.²¹⁹ The criminal offense in such cases would have been reduced to a misdemeanor and resulted in conditional discharge (*i.e.*, probation). New Mexico judges would have had discretion to require offenders to participate in drug treatment, thereby preserving limited treatment services for those truly drug-addicted.²²⁰

Current law in New Mexico provides that if a prosecutor charges an offender as a "habitual offender," the sentencing judge must apply an enhancement to the person's sentence.²²¹ The habitual offender statute in New Mexico would have been amended by Senate Bill 313 to restore judicial discretion in determining whether to try defendants as habitual offenders in cases involving past or present use or sale of controlled substances.²²²

The third fundamental reform considered but not enacted in New Mexico in 2001 was Senate Bill 315, which would have decriminalized possession by adults of one ounce or less of marijuana. While marijuana would have remained illegal, there would have been no criminal penalty for its possession, but instead a \$100 fine for a first violation and \$500 fine for subsequent possession charges. A law enforcement officer could issue a warning or a citation requiring the offender to pay the fine by mail or in person at a magistrate's

²¹³ RCW 9.94A.660, amended by E2SHB 1006, c. 352, Laws of 1999.

²¹⁴ Nevada recently reduced penalties for marijuana possession.

²¹⁵ There have been efforts to ameliorate New York State's mandatory minimum sentences known as the "Rockefeller drug laws," although no measure has yet been enacted.

²¹⁶ Connecticut Public Act No. 01-99, Substitute Senate Bill No. 1160, gives judges discretion to waive the state's mandatory minimum sentences for drug offenders in individual cases.

²¹⁷ Louisiana Senate Bill 239, enacted this year, reduced sentences for drug offenses and other offenses.

²¹⁸ House Enrolled Act No. 1892, Indiana General Assembly, 112th Indiana General Assembly (2001), permits drug-dependent defendants charged with or convicted of drug law violations to receive treatment instead of prosecution or imprisonment with "the consent of the authorities concerned."

²¹⁹ Senate Bill 317, New Mexico, 45th Legislature, First Session 2001.

²²⁰ *Ibid.*

²²¹ Governor Gary Johnson (2001), *Drug Policy Reform Proposals to the 2001 Regular Session of the New Mexico State Legislature*, March 2, 2001.

²²² Senate Bill 317, New Mexico, 45th Legislature, First Session 2001.

court. The person receiving the citation could also appear in magistrate's court in a civil proceeding to contest the citation. Money collected from such citations would go into the state general fund.²²³

Although these three proposals that would have reformed criminal sanctions for drug offenses in New Mexico were not ultimately enacted, none lost a committee or floor vote. This alone evidences a significant shift in attitude among elected officials in that state, as does the mere fact that the bills were introduced and seriously considered.

In the 2001 session of the Washington Legislature, there was also an attempt to reform sentencing in drug offense cases. Senate Bill 5419, in its original form, was similar to California's Proposition 36 and New Mexico's SB 317 in that it mandated treatment instead of incarceration for non-violent drug offenders.²²⁴ The King County Bar Association endorsed this bill.²²⁵ However, a committee amendment to the bill removed all reference to treatment for non-violent drug offenders as an alternative to incarceration. In its place was substituted a provision that would slightly reduce the length of incarceration for some drug delivery offenses, retaining the basic policy of incarcerating drug offenders.²²⁶ Moneys saved by shortened prison terms were to be allocated to drug treatment programs.²²⁷

The drafter and primary promoter of the amended SB 5419 was the King County Prosecuting Attorney, who called for a new policy:

A new approach to drug policy must look to law enforcement and the criminal justice system to play three critical roles:

- First, to apprehend and incarcerate those who profit from the misery of drugs. This includes the importers, manufacturers and dealers.
- Second, the criminal justice system can provide an effective intervention point to leverage drug addicts into treatment. We have learned over the last decade that courts can coerce addicts into treatment. In many cases, it takes an arrest and the threat of incarceration to bring about the motivation and self-realization for an addicted person to confront the fact and consequences of their own addiction; and
- Third, our society must provide a consistent message to our youngest citizens that drug use is wrong and harmful. This message can be delivered in a variety of ways within a school curriculum. It must be reinforced by maintaining laws against illegal drug use.²²⁸

²²³ *Ibid.*

²²⁴ SB 5419 (original draft); *see also* HB 1722.

²²⁵ King County Bar Association (2001), letter to the Judiciary Committee of the Washing State Senate, Re: Drug Law Reform – 2001 Legislative Session, February 8, 2001.

²²⁶ E2SSB 5419, § 3.

²²⁷ Savings from imposing shorter prison terms on drug offenders were to be placed in a Criminal Justice Treatment Account. E2SSB 5419, § 4.

²²⁸ Norm Maleng, King County Prosecuting Attorney (2001), *op. cit.* p. 1.

Observing that “drug treatment works,” the King County prosecutor has lamented the inadequacy of addiction treatment opportunities, commenting that, “with the notable exceptions of drug courts ... and the Drug Offender Sentencing Alternative ... the criminal justice system has no treatment alternatives to incarceration.”²²⁹ Drug treatment, however, is still supervised by the criminal justice system, rather than left in the hands of medical service providers and drug treatment specialists. While recommending a much-needed expansion of rehabilitative options for drug offenders, the latest reform proposal for Washington is still only intended to modify the current system of criminal sanctions.

Senate Bill 5419, as originally introduced, would have made drug treatment the primary response to drug use. Later versions of SB 5419 provided for some less harsh sentences and greater resources for treatment of drug offenders, but still reaffirmed the long-standing primacy of criminal sanctions in the attempt to discourage drug use. Even in its most conservative form, SB 5419 failed to pass the Washington State Legislature in 2001. As the 2002 legislative session approaches, there is still a high level of interest in drug policy reform, both because of the potential cost savings and because of the prospect of a more effective means to address the drug abuse problem. However, as this important debate continues, it remains to be seen whether the legislature will enact more fundamental reform or merely tinker around the edges of current drug policy.

²²⁹ *Ibid.*, p. 2.

IV. Toward a More Effective Drug Policy

In its examination of criminal sanctions related to drugs, the Task Force considered whether current drug policy is serving essential public policy objectives. Among the most important of those objectives are:

1. **Enhanced public order and reduced crime**
2. **Improved public health**
3. **Protection of children**
4. **Efficient use of scarce public resources.**

This report finds that the War on Drugs has not only failed to fulfill any of these objectives, but also has exacerbated the very problems it was designed to address.

Unfortunately, the findings in this report are neither new nor surprising. From the very beginning of the modern era of drug control, it was recognized that “law enforcement may not be the ultimate solution to the drug abuse problem.”²³⁰ Many scholarly studies, including the work of other bar associations, have come to the same conclusion.²³¹

²³⁰ The drafters of the Uniform Controlled Substances Act expressed this reservation and hoped for an expansion of research related to “rehabilitation, treatment and educational programs for addicts, drug dependent persons and potential drug abusers.” See Prefatory Note to the Uniform Controlled Substances Act (1970), U.L.A., vol. 9, part IV, p. 645.

²³¹ See, e.g., the report of the Bar Association of the City of New York (1994), “A Wiser Course: Ending Drug Prohibition,” *The Record*, vol. 49, no. 5.; and the Joint Committee of the American Bar Association and the American Medical Association on Narcotic Drugs (1961), *Drug Addiction: Crime or Disease?*, Interim and Final Reports, University of Indiana Press, Bloomington, IN.; See also the work of commentator Herbert Packer, who concluded in 1968:

The results of ... reliance on the criminal sanction have included the following:

- (1) Several hundred thousand people, the overwhelming majority of whom have been primarily users rather than traffickers, have been subjected to severe criminal punishment;
- (2) An immensely profitable illegal traffic in narcotic and other forbidden drugs has developed;
- (3) This illegal traffic has contributed significantly to the growth and prosperity of organized criminal groups;
- (4) A substantial number of all acquisitive crimes... have been committed by drug users in order to get the wherewithal to pay the artificially high prices charged for drugs on the illegal market;
- (5) Billions of dollars and a significant proportion of total law enforcement resources have been expended in all stages of the criminal process;
- (6) A disturbingly large number of undesirable police practices... have become habitual because of the great difficulty that attends the detection of narcotics offenses;
- (7) The burden of enforcement has fallen primarily on the urban poor, especially Negroes and Mexican-Americans;
- (8) Research on the causes, effects and cures of drug use has been stultified;
- (9) The medical profession has been intimidated into neglecting its accustomed role of relieving this form of human misery;
- (10) A large and well-entrenched enforcement bureaucracy has developed a vested interest in the *status quo*, and has effectively thwarted all but the most marginal reforms; and
- (11) Legislative invocations of the criminal sanction have automatically and unthinkingly been extended from narcotics to marijuana to the flood of new mind-altering drugs that have appeared in recent years, thereby compounding the pre-existing problem.

A clearer case of the misapplication of the criminal sanction would be difficult to imagine.

Herbert L. Packer (1968), *The Limits of the Criminal Sanction*, Stanford University Press, Palo Alto, CA.

The Shift from Criminal Justice to Public Health

Although the vast majority of citizens acknowledge the failure of current drug policy, there is no consensus about alternatives.²³² Furthermore, the polarization of the drug policy debate between the “prohibitionists” and the “legalizers” has prevented measured and dispassionate consideration of the complex issues surrounding criminal sanctions for non-medical drug use.²³³ The lack of meaningful dialogue on drug policy has largely precluded the design of alternative means to enhance public safety and public health more effectively. In the search for more effective alternatives, it is essential to identify workable approaches that can help to build common ground between those who currently hold differing views on drug policy.

The Task Force supports the fundamental proposition that any sanction related to drug use should result in less harm than the use of the drug itself. Accordingly, a shift from the current system of *punitive* drug control towards a system of *regulatory* drug control would greatly reduce the harm that has resulted from the use of criminal sanctions. As an alternative to the criminal justice response, a public health response to drug use would shift resources away from the expensive and ineffective practices of arrest and incarceration and more towards an expansion of addiction treatment, drug education and research. A more compassionate response to drug abuse, coupled with comprehensive and honest drug education for both youth and adults, should ultimately result in more well-informed and responsible attitudes towards drugs.

Drug use can result in significant harm to the drug user, although many, if not most, drug users do not experience serious adverse consequences from drug use. To the extent that drug use harms the user, a public health response is appropriate. However, drug use can result in harm to *other* persons or property. When that occurs, either criminal or civil remedies may be appropriate, and the focus of the legal process should be where the harm is the greatest.

Based on its thorough review of the use of criminal sanctions in connection with drugs, the Task Force arrived at the following conclusions:

²³² A recent national opinion poll found that 74 percent of Americans see the War on Drugs as a losing cause. However, the same poll revealed that about 50 percent of Americans believe that interdiction of the drug supply and the arrest of illegal drug sellers are still the most effective anti-drug policies. Looking more specifically at *users* of illegal drugs, as opposed to those who profit from the drug trade, the poll found the public to be “more compassionate than condemnatory,” as a majority of Americans (52 percent) believe that drug use should be treated as a disease, compared to 35 percent who favor treating it as a crime. The Pew Research Center for the People and the Press, *Drug War Report*, March 21, 2001.

²³³ There are actually more sophisticated distinctions between interest groups in the drug policy debate, characterized by one commentator as the “progressive legalizers,” the “progressive prohibitionists,” the “reactionary prohibitionists” and the “hardcore libertarians.” Although the latter two groups are not amenable to compromise, considerable common ground could be found between the other two factions. See Ethan A. Nadelmann (1992) “Thinking Seriously About Alternatives to Drug Prohibition,” *Daedalus*, Journal of the Academy of Arts and Sciences, vol. 121, no. 3.

- 1) **The use of criminal sanctions is an ineffective means to discourage drug use or to address the problems arising from drug abuse. Further, the use of criminal sanctions is extremely costly in both financial and human terms, unduly burdening the taxpayer and bringing about significantly more harm than the use of drugs themselves.**
- 2) **Rather than criminally punish persons for drug use *per se*, any state sanction or remedy should be aimed at reducing the *harm directly caused to others by persons using drugs*. As is currently the case with alcohol abuse, civil remedies are already available to be imposed on persons who use drugs to the detriment of their dependents (children and the elderly) and others. Such civil remedies, supported by a court's contempt power, are used in the context of dependency proceedings, paternity and dissolution actions and in cases of domestic violence.**
- 3) **Criminal sanctions should continue to be imposed upon persons who commit *non-drug* criminal offenses, even if it can be determined that a chemical dependency contributed to the offense. However, those offenders should be provided the opportunity to receive addiction treatment.**
- 4) **The shift away from the use of criminal sanctions requires that the state significantly expand its investment in drug addiction treatment, drug education and drug abuse prevention programs, which have consistently been shown to be much more cost-effective responses to the problems created by drugs in society. Funding for those programs could be obtained from the substantial cost savings that will accrue from no longer relying on the use of criminal sanctions.**

Future Considerations

A major impediment to fundamental drug policy reform in Washington (and throughout the country) is the breadth of federal drug law. The Task Force shares the widespread recognition that existing system is a very costly failure, but believes that federal regulation of drug use has been and is so pervasive as to "preempt the field," inhibiting the development and testing of alternatives. Yet, one or more such alternatives are clearly needed.

Federal law should permit the states to develop their own drug control strategies and structures, using our federal system to allow the states to be laboratories for change and improvement of public laws and institutions. Allowing Washington and the other states to design and build (and, as appropriate, redesign and rebuild) legal and regulatory structures for drug control will enable the experimentation with strategies and systems in search for an effective means to deal with the problems that accompany drug use. Our present system is a failure, and there is no widespread agreement about what system would be best. Experimentation is necessary, and the states should be free to do it. Hopefully,

the experimentation will produce successful strategies and structures that all the states could adopt.²³⁴

In the context of greater state control over drug policy, the Task Force discussed a range of long-term options for reform, including the notion of developing of a new, state-level regulatory structure for controlled substances, whereby an extensive network of laws and regulations would govern manufacturing, sale, labeling and advertising, and strict licensing requirements would apply to those dispensing controlled substances. In such a system, revenue from taxation could cover the cost of regulation and contribute to the cost of addiction treatment and drug abuse prevention. In addition, replacing the punitive system with a regulatory system would create a different incentive structure that would help encourage drug addicts to seek treatment.

The Task Force considered the regulatory approach particularly appropriate at this time for marijuana, for which the cost of current criminal sanctions far outweighs any societal benefit received. If marijuana were regulated and taxed in the same manner as alcohol, including tight control over manufacture and sale, strict prohibition of availability to minors and restrictions on advertising, numerous societal benefits would accrue, including: 1) a separation of the market for marijuana from the market for other more harmful drugs; 2) severely curtailing or eliminating the black market for marijuana, thereby putting out of business those dealers who sell to youth; and 3) a reduction in the consumption of more harmful drugs, such as alcohol and cocaine.

The Task Force also examined other thorny issues, including the use of drug testing, the use of non-penal sanctions and questions about the regulation and control of prescription drugs. Without arriving at any specific conclusions, the Task Force nevertheless envisioned the next stage in the consideration of drug policy reform options.

The present charge has been to assess the effectiveness of criminal sanctions related to drugs, and the Task Force has concluded that such sanctions are ineffective. The next challenge is to devise a workable alternative system that achieves the key policy objectives of promoting public health, preserving public order and protecting children in a cost-effective manner.

²³⁴ The notion that states should assume more authority over drug control seems to be gaining ground, at least in the western United States. The Western Governors' Association, of which Washington is a member, issued the following policy statement in June 2000: "States, rather than the federal government, are in a better position to understand the substance abuse problem confronting them. The federal government needs to work closely with the states to provide the resources necessary to meet the individual and unique needs of each state rather than approaching the issue in a one-size-fits-all manner." Western Governors' Association (2000), *Drug Policy in the West*, Governors' Policy Statement, Denver, CO, p. 2. A central recommendation of the Bar Association of the City of New York in 1994 also presupposed the end of federal control over drug policy and "permitting states to devise alternatives to prohibition....[A] new approach to drug policy should leave state and local governments free to employ the full panoply of coercive penal sanctions when drug use is relevant to conduct affecting others." Bar Association of the City of New York, Committee on Drugs and the Law (1994), "A Wiser Course: Ending Drug Prohibition," *op cit.*, p. 572.

As a framework for the development of a more effective, less costly and more humane drug policy, the Task Force proposes the following guiding principles:

- 1) **Any public policy toward drug use should result in no more harm than the use of the drugs themselves.**
- 2) **Any public policy toward drug use should address the underlying causes and the resulting harms of drug abuse instead of attempting to discourage drug abuse through the use of criminal sanctions.**
- 3) **The state should regulate the use of drugs in a manner that recognizes a citizen's individual liberties while answering the need to preserve public health, public safety and public order.**
- 4) **The state should regulate the use of drugs in a manner that uses scarce public resources as efficiently as possible.**

Any reform of drug policy will likely be incremental, not only to allow for the phasing in of new measures, but also to provide opportunities to evaluate their effectiveness. Other, more fundamental reforms may be developed and implemented at a later stage, particularly after a sufficient infrastructure for the delivery of drug treatment services is in place.

Where criminal sanctions are an ineffective and inappropriate means to address the problems that arise from drug abuse, the Task Force looked to Washington's current policy toward *alcohol* use, articulated by the general proposition in RCW 70.96A.010:

It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages but rather should, within available funds, be afforded a continuum of treatment in order that they may lead normal lives as productive members of society.

The Task Force believes it is possible for the people of Washington to fashion a similar general policy with regard to other drugs, a fiscally responsible policy that would carefully balance the exercise of individual civil liberties with the effective preservation of public order, while also providing compassionate treatment to those in need. The Task Force believes, as well, that there is a great need for comprehensive education of the public and open-minded dialogue about the very complex and serious issues addressed in this report. Both inside, but especially outside, of government, very bright lights should be shone on the failure of our drug policies and the tremendous costs, both human as well as financial, they have exacted on our society and on the societies of many other nations. Change is sorely needed, and its form should be widely debated and implemented with all deliberate speed.

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