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**DRUG POLICY AND THE CRIMINAL JUSTICE SYSTEM
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DRUG POLICY AND THE CRIMINAL JUSTICE SYSTEM

No issue has had more impact on the criminal justice system in the past two decades than national drug policy. The “war on drugs” that was declared in the early 1980s has been a primary contributor to the enormous growth of the prison system in the U.S. since that time and has affected all aspects of the criminal justice system. As a response to the problem of drug abuse, national drug policies have emphasized punishment over treatment and have had a disproportionate impact on low-income communities and minorities.

I. DRUG POLICIES HAVE INCREASED ARRESTS AND PRISON POPULATIONS

Drug Arrests Have Tripled Since 1980

Responding to a perceived problem of high rates of drug abuse in the late 1970s, the Reagan administration and other political leaders officially launched a “war on drugs” policy in 1982. Within a few years, both funding for drug law enforcement and a political focus on the drug war had increased substantially. As a result, there was a surge of arrests for drug offenses in the 1980s. The total of 581,000 arrests in 1980 nearly tripled to a record high of 1,584,000 by 1997 and continues close to that level with 1,532,300 in 1999.¹ In 1999, four of five (80.5%) drug arrests were for possession and one of five (19.5%) for sales. Overall, 40.5% of drug arrests were for marijuana offenses.²

While rates of drug use were relatively high in 1979 just prior to the inception of the drug war, they had begun to decline even prior to the formal inception of the “war” several years later. This decline parallels similar reductions in smoking and consumption of high fat foods, as many Americans have become increasingly interested in leading a healthy lifestyle. The heightened level of drug arrests continued even as drug use further declined and then stabilized. Government household surveys of drug use indicate that 14.1% of the population were monthly drug users in 1979. This figure declined by more than half to 6.6% by 1991 and remained in that range throughout the 1990s.³ More than half (57%) of all persons who use drugs monthly use marijuana but no other drugs.⁴ Against this overall decline, the number of arrests continues at record levels.

Drug Offenders Represent a Rising Proportion of Offenders In Prison

As seen in the figure below, in 1980 there were 19,000 offenders in state prisons for drug offenses and 4,900 in federal prisons, representing 6% and 25% of all inmates respectively. By 1999, a more than twelve-fold increase in drug offenders in state prisons led to a total of 251,200, constituting 21% of the inmate population. Dramatic increases occurred in the federal system as well, as the number of drug offenders rose to 68,360 representing 57% of all inmates.⁵

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

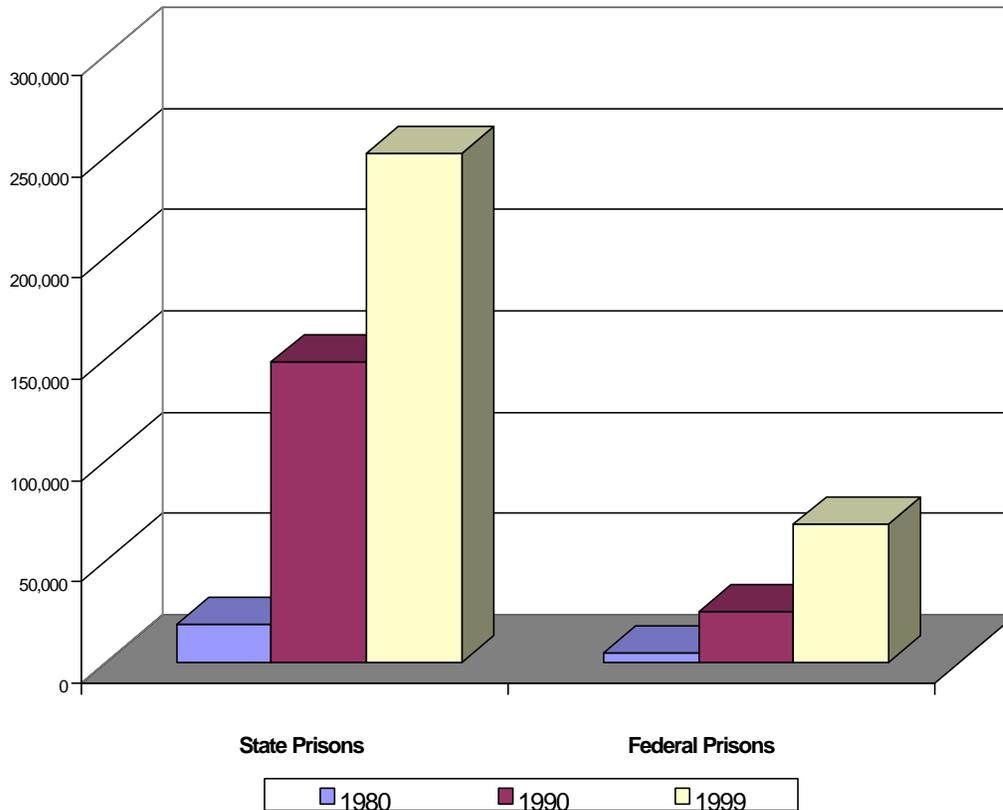
² FBI, *Crime in the United States, 1999*, p. 221.

³ Substance Abuse and Mental Health Services Administration (SAMHSA), *Summary of Findings from the 1999 National Household Survey on Drug Abuse*, November 2000, p. 13.

⁴ *Ibid.*, p. 67.

⁵ Bureau of Justice Statistics (BJS), *Correctional Populations in the United States, 1994, 1996*, pp. 10-13, and BJS, *Prisoners in 2000*, pp. 11, 12.

DRUG OFFENDERS IN STATE AND FEDERAL PRISONS, 1980-1999



As drug offenders swelled the nation's prisons, the proportion of prison space used to house violent offenders declined. In 1986, states were using 55% of their prison space for offenders convicted of a violent offense; by 1999, that proportion had declined to 48%.⁶

Harsher Sentencing Laws Have Contributed to the Increased Number of Drug Offenders in Prison

Along with the stepped-up pace of arrests in the 1980s, legislatures throughout the country adopted harsher sentencing laws in regard to drug offenses. Today, every state and the federal system have some type of mandatory sentencing laws requiring imprisonment, most often used for drug offenses.⁷ These laws remove discretion from the sentencing judge to consider the range of factors pertaining to the individual and the offense that would normally be an integral aspect of the sentencing process.

Largely as a result of these laws, the chances of receiving a prison term after being arrested for a drug offense rose dramatically – by 447% -- between just 1980 and 1992.⁸

⁶ BJS, *Survey of State Prison Inmates, 1991, 1993*, p. 4, and BJS, *Prisoners in 2000*, p. 11.

⁷ Bureau of Justice Assistance, *1996 National Survey of State Sentencing Structures*, 1998, pp. 4-5.

⁸ BJS, *Prisoners in 1994, 1995*, p. 13.

The prosecution of many drug offenders is discretionary and can be subject to either state or federal jurisdiction. In recent years there has been a dramatic increase in the number of drug prosecutions brought in federal court, a rise of 233% in the period of 1985-99.⁹ This has led to more offenders being brought under the scope of the mandatory minimum penalties adopted by Congress in 1986 and 1988, among the most severe in the nation. These laws require a mandatory five-year prison term for possessing as little as five grams of crack cocaine (the weight of two pennies).

In recent years there have been some modest signs of legislative bodies reconsidering the wisdom of mandatory sentencing laws. In 1998, the Michigan Legislature substantially scaled back a twenty-year-old law that mandated imprisonment of life without parole for distribution of 650 grams of cocaine or heroin. The penalty was the same as for first degree murder in Michigan and applied even to first offenders. After more than 200 offenders were sentenced under the law, changes were enacted that now permit parole consideration after fifteen years.

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

II. MANY DRUG OFFENDERS ARE INAPPROPRIATELY INCARCERATED

Drug Offenders Are Now Serving Longer Prison Terms

In addition to resulting in the sentencing of greater numbers of drug offenders to prison, mandatory sentencing laws have also increased the average time served in prison for drug offenders since they eliminate the possibility of parole. In the federal system, for example, drug offenders released from prison in 1986 who had been sentenced before the adoption of mandatory sentences and sentencing guidelines had served an average of 22 months in prison. Offenders sentenced in 1999, after the adoption of mandatory sentences, were expected to serve almost three times that length, or 62 months in prison.¹⁰

Most Drug Offenders in Prison Are Not Drug Kingpins

A primary rationale provided for federal prosecution of high-level drug offenses is that the federal system is equipped with the level of resources necessary to handle these cases. One would therefore expect that federal drug cases on average should be composed of high-level offenders. Research conducted by the U.S. Sentencing Commission, though, documents that in 1992, only 11% of federal drug defendants consisted of high-level dealers, while 55% were either street-level dealers or mules, and 34% mid-level dealers.¹¹

⁹ Bureau of Justice Statistics, *Federal Drug Case Processing, 1985-91*, March 1994, p. 1. and *Federal Criminal Case Processing, 1999*, February 2001, p. 10.

¹⁰ Bureau of Justice Statistics, *Federal Criminal Case Processing, 1999*, February 2001, p. 1.

¹¹ United States Sentencing Commission, *Cocaine and Federal Sentencing Policy*, 1995, p. 172.

A 1992 report by the Department of Justice reached similar conclusions, finding that 36% of all federal prison inmates serving drug sentences were low-level offenders.¹² While there are no comprehensive data on drug offenders prosecuted in state courts, it is likely that they are even more disproportionately low-level offenders since high-level offenders have a greater likelihood of being prosecuted in federal court.

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

While approximately 450,000 inmates in prison and jail are currently incarcerated for a drug offense (possession or sale of drugs), additional numbers are incarcerated for drug-related offenses. These could include a burglary committed to obtain money to buy drugs or an assault committed under the influence of drugs. More than half (57%) of state prison inmates in 1997 had used drugs in the month prior to their arrest, and about one-sixth committed their offense in order to obtain money to buy drugs. Violent offenses were more likely to be committed by someone under the influence of alcohol (42%) than drugs (29%).¹³

Prison Inmates Are Less Likely To Be Receiving Drug Treatment

Although there are a greater number of substance-abusing offenders in prison than in past years, the proportion of such inmates receiving treatment while in prison has declined. In state prisons, one in ten (9.7%) inmates in 1997 had participated in treatment since in admission to prison, down from one in four (24.5%) inmates in 1991. Similar declines occurred in the federal prison system, with only 9.2% of inmates in 1997 receiving treatment, compared to 15.7% in 1991.¹⁴

III. THE WAR ON DRUGS AND RACE

Drug Policies and Enforcement Have Disproportionately Affected African Americans

While African Americans use drugs on a regular basis at a slightly higher rate than other groups (7.7% current users compared to 6.6% for whites and 6.8% for Hispanics¹⁵), their smaller numbers in the population results in their comprising 13% of monthly drug users. Whites represent 72% of users, Hispanics 11% and others 4%.

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

As a result, African Americans who use drugs are more likely to be arrested than other groups, and then to penetrate more deeply into the criminal justice system. While African Americans constitute 13% of the nation's monthly drug users, they represent 35% of those persons arrested

¹² Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, 1994, p. 7.

¹³ BJS, *Substance Abuse and Treatment, State and Federal Prisoners*, 1997, 1999.

¹⁴ *Ibid.*, p. 10.

¹⁵ Data calculated from SAMHSA, pp. 6-3 and 6-13.

for drug crime, 53% of drug convictions, and 58% of those in prison for drug offenses.¹⁶ Higher arrest rates of African Americans generally reflect a law enforcement emphasis on inner city areas, where drug sales are more likely to take place in open air drug markets and fewer treatment resources are available.

Once in the criminal justice system, African American drug offenders are often treated more harshly than other racial groups. The best documented area in which this takes place is in regard to sentencing for crack cocaine offenses. Crack cocaine and powder cocaine have the same chemical composition, but crack is marketed in less expensive quantities and so is more often used in low-income and minority communities. Under federal law, and similar statutes in some states, offenders convicted of crack cocaine offenses are punished more severely than those convicted of powder cocaine offenses. Thus, in federal court an offender selling five grams of crack cocaine receives the same five-year mandatory minimum sentence as does an offender selling five hundred grams of powder cocaine. As of 1999, 85% of all offenders sentenced in federal court for crack offenses were African American.¹⁷

IV. NEED FOR A CHANGE IN DRUG POLICY

Drug Treatment Is More Cost Effective Than Mandatory Sentencing

A series of studies in recent years have demonstrated that drug treatment – both within and outside the criminal justice system – is more cost-effective in controlling drug abuse and crime than continued expansion of the prison system. A RAND analysis of these issues concluded that whereas spending \$1 million to expand the use of mandatory sentencing for drug offenders would reduce drug consumption nationally by 13 kilograms, spending the same sum on treatment would reduce consumption almost eight times as much, or 100 kilograms. Similarly, expanding the use of treatment was estimated to reduce drug-related crime up to 15 times as much as mandatory sentencing.¹⁸

Studies of drug treatment in prisons have also concluded that inmates who receive treatment are significantly less likely to recidivate than those who do not. One of the oldest such programs is the Stay'n Out program in New York State, established in 1977 as a prison-based therapeutic community. Evaluations of the program have found that 27% of its male graduates are rearrested after parole, compared with 40% of inmates who received no treatment or only counseling.¹⁹ Women's rearrest rates were generally lower than for men.

The War on Drugs Has Distorted Law Enforcement Priorities in Fighting Crime

Since there are no “cost-free” choices in public policy, the emphasis on drug enforcement since the early 1980s has created a set of unintended consequences for crime policy as well. These include:

¹⁶ Most current data from available sources: drug use – SAMHSA, 1999; arrests – FBI, 1999; convictions – BJS, 1996; prisoners – BJS, 2000.

¹⁷ United States Sentencing Commission, *1999 Sourcebook of Federal Sentencing Statistics*, p. 69.

¹⁸ Jonathan P. Caulkins, et al., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?*, RAND, 1997, pp. xvii-xviii.

¹⁹ Center on Addiction and Substance Abuse, *Behind Bars: Substance Abuse and America's Prison Population*, 1998, p. 130.

- *Diverting law enforcement resources from other crime problems* – Increased law enforcement attention to low-level drug offenders inevitably results in fewer resources devoted to other types of offenses. Economists at Florida State University found that a 47% increase in drug arrests by Illinois law enforcement officers between 1984 and 1989 coincided with a 22.5% decline in arrests for drunk driving.²⁰ They concluded that increased traffic fatalities could result from the more limited attention devoted to drunk driving.
- *Asset forfeiture laws threatening civil liberties and distorting priorities* -- As a result of federal asset forfeiture legislation passed by Congress, both federal and local police agencies can seize any “drug-related” assets of suspected drug dealers and use any seized funds to augment law enforcement agency budgets even if the suspect is never charged with a crime. As of 1994, local police forces had received almost \$1.4 billion in assets,²¹ while 80% of asset seizures failed to result in a criminal conviction.²² By depositing funds directly into law enforcement accounts, asset forfeiture laws create an incentive for police agencies to favor drug law enforcement over other categories of crimes.
- *Impact on women and children* – Women in prison are considerably more likely than men to have been convicted of a drug offense. As of 1998, 34% of women offenders had been convicted of a drug offense, compared to 20% of men,²³ and two-thirds have children under 18. As a result of the federal welfare legislation of 1996, there is now a lifetime ban on the receipt of welfare for anyone convicted of a drug felony, unless a state chooses to opt out of this provision. As of 1999, half (24) the states are fully enforcing the provision,²⁴ which means that drug offenders will have an even more difficult transition back into the community than ex-offenders generally. Eight states have chosen to opt out of the ban and another 18 have modified it, such as exempting persons convicted of possession offenses. The criminal penalties attached to drug use by pregnant women in some states present an additional problem for women by creating disincentives to seek treatment.

More Rational Drug Policies Could Readily Be Implemented

A substantial body of research now exists that documents the injustices and inefficiencies of drug policies that emphasize enforcement and incarceration over prevention and treatment. The war on drugs has contributed substantially to a vastly expanded prison system and exacted a heavy toll on minority communities in particular. Despite advances in treatment and innovations such as drug courts, 30% of inmates sentenced to prison have been convicted of a drug offense.

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

- *Shift funding priorities* – Since the 1980s, two-thirds of federal anti-drug funds have been devoted to law enforcement and just one-third to prevention and treatment. Although the

²⁰ Bruce L. Benson and David W. Rasmussen, *Illicit Drugs and Crime*, The Independent Institute, 1996, p. 32.

²¹ Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, University of Chicago Law Review, Vol. 65, No. 1, 1998, p. 64.

²² *Ibid.* p. 77.

²³ *Prisoners in 1999*, p. 10.

²⁴ Legal Action Center, *Steps to Success: Helping women with alcohol and drug problems move from welfare to work*, 1999, p. 83.

federal drug budget is composed of various appropriations, a coordinated effort by the Administration and Congress could result in a shift toward a more pro-active and preventive strategy.

- *Repeal mandatory sentencing laws* – The legislative modifications to mandatory sentencing in Michigan and through the federal “safety valve” demonstrate that overly harsh sentencing laws can be altered without legislators suffering political consequences. Given that 25% of federal offenders are now sentenced under the safety valve, Congress should, at a minimum, examine the potential for expansion of that provision to additional offenders. At both the federal and state levels, legislators should reassess the wisdom and necessity of mandatory sentencing laws when other sentencing and treatment options exist.
- *Increase treatment options within the criminal justice system* – An increasing proportion of prison admissions in recent years consists of probation and parole violators, often as a result of drug use. More than one-third (37%) of offenders admitted to prison in 1998 consisted of such violators, double the rate (17.6%) in 1980.²⁵ While political leaders in recent years have issued calls for mandatory drug testing of offenders under community supervision, in many jurisdictions treatment resources for this group are very inadequate.

Drug courts that divert defendants into treatment have expanded considerably in recent years, with more than 300 such courts now in operation. Their use could be expanded to additional jurisdictions as well as to an expanded group of defendants in many systems by eliminating unnecessary restrictions on eligibility.

- *Fund defense intervention services* – Defender offices often provide the first opportunity for criminal justice personnel to assess defendant needs. Far too many such offices lack the resources to prepare adequate assessment and service plans for their clients. State and county officials can fund enhanced defender services that can aid the court system in directing appropriate substance-abusing defendants into treatment services either as a diversion from the court system or as a component of a sentencing plan.
- *Approach drug abuse primarily as a community problem* – Although there are laudable programs within the criminal justice system for responding to problems of substance abuse, the criminal justice system was never designed as a social services agency. While substance abusers with adequate resources generally make use of private treatment providers to address their problems, low-income drug users are more likely to become involved in the criminal justice system due in part to the shortage of treatment options available to them. The public health model favored by middle class persons is one that could be extended to all communities given the political will to do so. Federal and state funding could be expanded to make treatment more widely available without the prerequisite of arrest and involvement in the criminal justice system.

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²⁵ Bureau of Justice Statistics, *Prisoners in 1999*, August 2000, p. 11, and, *Correctional Populations in the United States, 1995, 1997*, p. 13.