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REPORT OF THE TASK FORCE ON THE USE OF CRIMINAL SANCTIONS TO THE KING COUNTY BAR ASSOCIATION BOARD OF TRUSTEES

INTRODUCTION

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

The Task Force and the King County Bar Association's Drug Policy Project's principal focus is the class of substances that the "War on Drugs" is currently targeting. This Report, therefore, mainly discusses those drugs,¹ that the possession and sale of is prohibited by current law. Alcohol, tobacco, and prescription drugs are mentioned in passing, particularly for 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 Furthermore, the Task Force reviewed the War on Drugs'

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." RAYMOND P. SHAFER ET AL., NAT'L COMM'N ON MARIJUANA & DRUG ABUSE, *DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE* 9 (1972). 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 & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 31 (1992). 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." *Id.* at 32. For purposes of the discussion in this Report, however, 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 and the offender's criminal history;
- 2) promotion of justice and respect for the law;
- 3) commensurate treatment of similarly-situated offenders;

harmful side effects 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. 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.

I. 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:

A. Current Criminal Sanctions Related to Drugs

- Criminal sanctions imposed in Washington for the possession and sale of drugs are 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 that Washington sentences to prison are indigent and homeless. These individuals' offense was the sale of a very small amount 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

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.

WASH. REV. CODE § 9.94A.010 (1998).

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 ninety percent of federal drug convictions are for non-violent offenses. Reports classify only eleven percent of federal drug offenders as high-level dealers.
- As a result of amendments to state and federal 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 courts reduce prison time and provided addiction treatment. Fewer than twenty-five percent of all drug offenders receive that option, however, and Washington continues to incarcerate thousands of drug offenders without any treatment.

B. 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 either have remained relatively steady or have increased.
- Rates of drug use, especially 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. *Alcohol*, however, 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 ma-

jority—fifty-nine 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 fifteen 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 forty percent of murders, and over fifty 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 state and federal expenditures on an annual basis for drug law enforcement have risen from about \$10 billion in the mid-1980s, to about \$35 billion in 2001.
- 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 also have failed to satisfy the core objectives of the criminal justice system. The toughening of drug-related penalties has neither resulted in enhanced public safety in deterring drug-related crime, nor in reducing recidivism by removing drug offenders from the community (the “incapacitation effect”).

C. 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 it has inhibited physicians 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. Consequently, it has perpetuated and exacerbated the social conditions that gave rise to drug abuse in the first place.
- Stepped-up drug law enforcement has compromised citizens' constitutional rights, 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 United States 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. United States-led efforts to eradicate crops and to fight drug enter-

prises have brought about political and economic destabilization and environmental destruction.

D. 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.

E. 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 aim at reducing the *harm di-*

rectly 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 reports have consistently shown to be much more cost-effective responses to the problems created by drugs in society. Washington could obtain funding for those programs from the substantial cost savings that will accrue from no longer relying on the use of criminal sanctions.

F. 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 the 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 states 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 states 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 that 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.

II. 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 Washington adopted complementary state legislation, the Uniform Controlled Substances Act, drafted in 1970 by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), on May 21, 1971.⁴ Nearly all other states have adopted the Uniform Controlled Substances Act.⁵

The goal of the uniform state and federal 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.⁶ The statutes distinguish "improper" uses of controlled substances from uses that are "essential for public health and safety."⁷

The NCCUSL intended that the uniform controlled substances statutes provide a foundation for a coordinated system of drug control. Although the statutes describe prohibited activities in detail, they allow for state discretion in prescribing specific fines and/or

3. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 801 (1995)). 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(2).

4. 1971 Wash. Laws 1st Ex. Sess., ch. 308 (codified at WASH. REV. CODE § 69.50).

5. See, e.g., ARIZ. REV. STAT. §§ 36-2501 to -2553 (1993); COLO. REV. STAT. ANN. §§ 18-18-101 to -605 (West 2002); DEL. CODE. ANN. tit. 16, §§ 4701-4796 (1995); N.Y. PUB. HEALTH LAW §§ 3300-3396 (McKinney 1993); WIS. STAT. §§ 961.01-961.115 (1998). For a detailed listing and link to all the states that have adopted the Uniform Controlled Substances Act, see the Legal Information Institute website, at <http://www.law.cornell.edu/uniform/vol9.html#consb> (last visited Jan. 15, 2003).

6. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. 2 (amended 1994), available at <http://www.law.upenn.edu/blil/ulc/fnact99/1990s/ucsa94.pdf> (last visited Jan. 15, 2003).

7. *Id.*

sentences. Thus, the criminal sanctions for violating those statutes differ between the state and federal levels and among the states.

A. 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.⁸ Only the possession of forty grams or less of marijuana is a misdemeanor.

A determinate sentencing system governs felony sentencing in Washington, which intends to ensure that offenders who commit comparable crimes and have comparable criminal histories receive equivalent sentences.⁹ 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, guides the sentencing court’s discretion.¹⁰ The way this grid works is the more serious the offense and the more convictions in the offender’s criminal history (also known as the offender “score”), then the longer the sentence. Although this systems permits courts to impose “exceptional” sentences outside the prescribed standard range, in practice, ninety-five percent of all sentences fall within the standard range.¹¹

In Washington’s felony sentencing grid, the legislature has assigned “seriousness levels” for some drug offenses¹² that are significantly higher than for other, non-drug offenses, including some

8. Drug-related criminal penalties are most harsh in Michigan, New York, Nevada, and other states in the South. Washington’s drug laws also impose stiff penalties. See N.Y. PUB. HEALTH LAW §§ 3300-3396; NEV. REV. STAT. §§ 453.005-.730 (2000); see also WASH. REV. CODE § 69.50.401-.609. 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. Compare 21 U.S.C. § 844, with WASH. REV. CODE § 69.50.401-.403.

9. WASH. REV. CODE § 9.94A.505.

10. Washington’s sentencing grid may be found at WASH. REV. CODE § 9.94A.510. Felony sentences are ranked by their level of seriousness in WASH. REV. CODE § 9.94A.515. The rules for scoring an offender’s criminal history are found in WASH. REV. CODE § 9.94A.525.

11. STATE OF WASH. SENTENCING GUIDELINES COMM’N, FISCAL YEAR 2000 STATISTICAL SUMMARY OF ADULT FELONY SENTENCING vii (2001) [hereinafter FISCAL YEAR 2000 STATISTICAL SUMMARY].

12. 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. WASH. REV. CODE § 9.94A.030(18)(a). In this Report, however, 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.

violent offenses. The following is a comparison of current sentence lengths for various offenses committed by FIRST-TIME OFFENDERS:

TABLE I SERIOUSNESS LEVELS AND STANDARD RANGE SENTENCES SELECTED FELONIES		
Offense	Seriousness Level ¹³	Standard Range* (Midpoint) ¹⁴
Methamphetamine Manufacture (Any Amount)	X	5 years
Kidnapping 1° ("Serious Violent" Offense)	X	5 years
Child Molestation 1° (Violent Offense)	IX	5 years
Robbery 1° (Violent Offense)	IX	3 years
Heroin/Cocaine Delivery (Any Amount)	VIII	2 years
Arson 1° (Violent Offense)	VIII	2 years
Burglary 1° (Violent Offense)	VII	1.5 years
Drive-by Shooting (Violent Offense)	VII	1.5 years
Unlawful Possession of a Firearm 1°	VII	1.5 years
Incest 1°	VI	1.08 years
Robbery 2° (Violent Offense)	IV	6 months
Assault 2° (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

13. *Id.* § 9.94A.515.

14. *Compare id.* § 9.94A.515, with *id.* § 9.94A.510.

the amount of drugs involved in the drug offense.¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸ For example, multiple convictions for heroin or cocaine delivery would prompt the following sentences, *regardless of the amount of drugs involved in each case*:

15. 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. *Id.* § 9.94A.570. The "three strikes" provision requires life imprisonment without the possibility of release after three convictions of "most serious offenses," which includes robbery in the second degree and assault in the second degree, but not any drug offenses. *Id.* § 9.94A.030(32). Nevertheless, an individual conviction of robbery in the second degree or assault in the second degree carries only a six-month jail sentence for a first-time offender. *Compare id.* § 9.94A.515, with *id.* § 9.94A.510(1).

16. *See id.* § 9.94A.515 (providing the seriousness levels table for the pertinent crimes).

17. *Id.* § 9.94A.525 (12).

18. *Id.* Along with drug offenses, violent and sex offenses are assigned more than one point per conviction. *Id.* § 9.94A.525 (8), (9), (16). Prior violent offenses such as robbery and assault earn two points and prior "serious violent" offenses, such as murder in the first degree and rape in the first degree, count for three points, as do most prior sex offenses. *Id.* Otherwise, most offenses score only one point. *Id.*

TABLE II	
Heroin/Cocaine Delivery	Prison Sentence (Midpoint of Standard Range) ¹⁹
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 legislature doubled the statutory maximum 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.²⁰

A number of systemic factors lead to sentence lengths that the Task Force believes are disproportionate to the social harm caused by drug offenses. Drug offenders, as a group, have the highest recidivism rate among all classes of offenders,²¹ 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.

A look at some average sentences imposed in Washington reveals the following:²²

19. Compare *id.* § 9.94A.510, with *id.* § 9.94A.510(1).

20. *Id.* § 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. *Id.*

21. SENTENCING GUIDELINES COMM'N, STATE OF WASH., RECIDIVISM: AN ANALYSIS OF ADULT FELONS 14, 39 (2001) [hereinafter RECIDIVISM]. 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. *Id.*

22. FISCAL YEAR 2000 STATISTICAL SUMMARY, *supra* note 11, at 12-20.

TABLE III AVERAGE SENTENCES IMPOSED IN WASHINGTON SELECTED FELONIES (2000)		
Offense	Average Sentence Length	Number of Cases
Heroin/Cocaine Delivery (School Zone Enhancement ²³)	5 years, 7.8 mon.	36
Methamphetamine Manufacture	4 years, 10.4 mon.	40
Arson 1° (Violent Offense)	4 years, 1.8 mon.	19
Heroin/Cocaine Delivery (Repeat Offense)	4 years, 0.3 mon.	374
Child Molestation 1° (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° (Violent Offense)	1 year, 9.4 mon.	276
Theft of a Firearm	1 year, 6.4 mon.	53
Assault 2° (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 that 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 thirty-three percent reduction in confinement time.²⁴ Even after drug offenders’ term of confine-

23. The “school zone enhancement” does not require the defendant to be accused of selling drugs to minors. WASH. REV. CODE § 69.50.435(a)(3). 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. *Id.* The use of the school zone enhancement is available for prosecutors to use against accused drug offenders in almost every part of Seattle, because 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. *Id.* Task Force members noted that the possible addition of two 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.

24. *Id.* § 9.94A.728.

ment, however, the Department of Corrections must supervise them for a nine- to twelve-month period.²⁵ 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.²⁶ Supervisors impose sanctions, including imprisonment, for violations of conditions of community custody.²⁷

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.²⁸ 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 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.

B. 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 offender’s conviction history.²⁹ The federal sentencing system, however, is different from Washington’s because the former considers the types and amounts of drugs involved in determining the seriousness of the offense and the sentence imposed.³⁰ Federal law also provides for many more mandatory minimum sentences for drug offenses than Washington.³¹

Many individuals, especially federal judges have long criticized federal mandatory minimum sentences for their arbitrariness.³² For drug offenses in particular, Congress enacted mandatory mini-

25. WASH. ADMIN. CODE § 437-20-010 (2001).

26. WASH. REV. CODE §§ 9.94A.715, 9.94A.720.

27. *Id.* § 9.94A.737.

28. Many of the Task Force members provided this information from their own personal experiences.

29. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 235 (a)(1), 18 Stat. 1987 (1984) (codified at 18 U.S.C. § 3553 (1995)).

30. *Id.*

31. *Id.*

32. See, e.g., Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 347-51 (1995) (noting that the Sentencing Reform Act was intended to standardize the federal sentencing system by “embracing the shift toward deterrence and incapacitation as the primary purpose of punishment.”).

mums in 1986 with no formal fact-finding: “No hearings, no consideration by the federal judges, no input from the Bureau of Prisons . . . even [the] DEA didn’t testify.”³³

Examples of mandatory minimum sentences for federal drug offenses include the following:

TABLE IV FEDERAL DRUG MINIMUM PENALTIES SELECTED OFFENSES ³⁴			
Drug Offense	Quantity	First Offense	Second Offense
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 ³⁵	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

33. *Frontline: Snitch* (PBS television broadcast, Jan. 12, 1999), available at <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/etc/script.html> (last visited Jan. 15, 2003).

34. 21 U.S.C. § 841(b) (1995); U.S. SENTENCING COMM’N, OFFENSES INVOLVING DRUGS: GUIDELINES MANUAL 110-18 (2001).

35. Federal law distinguishes between powder cocaine and “crack” cocaine, with a hundred-to-one 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. 21 U.S.C. §§ 841(b), 844(a); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 158-60 (1995), available at <http://www.ussc.gov/CRACK/EXEC.HTM> (last visited Jan. 15, 2003). 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. 21 U.S.C. §§ 841(b), 844(a). This controversial provision has long been criticized as having a disproportionately adverse effect on the inner-city poor and racial minorities. See, e.g., Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179, 189-90 (1996); Cristian M. Stevens, Note, *Criticism of Crack Cocaine Sentences Is Not What It Is Cracked Up To Be: A Case of First Impression Within the Ongoing Crack vs. Cocaine Debate*, 62 MO. L. REV. 869, 872-75 (1997). Even in the face of equal protection and due process challenges, however, the law has been upheld in the federal courts. See, e.g., *United States v. Frazier*, 981 F.2d 92, 94 (3d Cir. 1992); *United States v. Harding*, 971 F.2d 410, 411 (9th Cir. 1992); *United States v. Watson*, 953 F.2d 895, 896 (5th Cir. 1991).

In addition to imprisonment, federal law can fine drug offenders in amounts up to \$8 million for an individual, or up to \$20 million for organizations or enterprises.³⁶

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:

TABLE V AVERAGE TIME SERVED IN FEDERAL PRISON SELECTED FELONIES (1997) ³⁷		
Offense	Mean	Median
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 United States District for Eastern Washington, the mean sentence length for drug offenders is about fifty-eight months,³⁸ while in the United States District for Western Washington, the mean sentence length is about forty-five to fifty-eight months, depending on the crime.³⁹ Consistent with national trends, average sentences for federal drug offenders in Washington are longer than for most other federal offenses.⁴⁰

36. 21 U.S.C. §§ 841(b), 844(a).

37. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1997, at 88 (1999).

38. U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT, & CIRCUIT: EASTERN WASHINGTON 10 (2001) [hereinafter *FEDERAL SENTENCING STATISTICS, EASTERN WASHINGTON*], available at <http://www.ussc.gov/JUDPACK/2001/wae01.pdf> (last visited Jan. 15, 2003).

39. U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT, & CIRCUIT: WESTERN WASHINGTON 10 (2001) [hereinafter *FEDERAL SENTENCING STATISTICS, WESTERN WASHINGTON*], available at <http://www.ussc.gov/JUDPACK/2001/waw01.pdf> (last visited Jan. 15, 2003).

40. See *FEDERAL SENTENCING STATISTICS, EASTERN WASHINGTON*, *supra* note 38, at 10; *FEDERAL SENTENCING STATISTICS, WESTERN WASHINGTON*, *supra* note 39, at 10; U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT, & CIRCUIT: MIDDLE TENNESSEE 10 (2001), available at <http://www.ussc.gov/JUDPACK/2001/tnm01.pdf> (last visited Jan. 15, 2003); U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT, & CIRCUIT: OREGON 10

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. A closer look at federal drug offender sentencing, however, reveals a different picture. According to the United States Sentencing Commission, fifty-nine percent of all crack drug defendants are low-level offenders, such as street sellers, and only about five percent are classified as high-level dealers.⁴¹ 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.⁴² Ninety percent of convictions on federal drug charges that year were for non-violent offenses.⁴³

Federal authorities have also not confined their efforts at drug control to the most potent or deadly substances. In 1999, marijuana offenses accounted for thirty-one percent of all federal drug cases, compared with twenty-eight percent for powder cocaine, fifteen percent for crack cocaine, fifteen percent for methamphetamine, and only seven percent for all opiates, including heroin.⁴⁴

C. 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.⁴⁵ In 1988, Congress established the same mandatory minimum sentences for those convicted of conspiring to commit a drug offense.⁴⁶ In Washington, the Omnibus Drug Act of 1989 signifi-

(2001), *available at* <http://www.ussc.gov/JUDPACK/2001/or01.pdf> (last visited Jan. 15, 2003).

41. U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS COCAINE AND FEDERAL SENTENCING POLICY 158 tbl. 18 (1995), *available at* <http://www.ussc.gov/CRACK/EXEC.HTM> (last visited Jan. 15, 2003).

42. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL DRUG OFFENDERS, 1999, WITH TRENDS 1984-99, at 4 (2001) [hereinafter *FEDERAL DRUG OFFENDERS*].

43. *Id.*

44. *Id.*

45. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841(b) (1999)).

46. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at 21 U.S.C. § 846).

cantly 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 two year sentence “enhancement” for drug offenses in the vicinity of schools, parks, and bus stops.⁴⁷

As a result of these statutory changes, the number of persons in prison for drug offenses and the average confinement time has grown enormously. Between 1984 and 1999, the average prison time served by federal drug offenders more than tripled.⁴⁸ 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.⁴⁹

Since 1989, Washington’s prison population has increased by over 125 percent, far exceeding the twenty-one percent increase in the state general population during the same period.⁵⁰ The increased prison admissions for drug offenses and property offenses related to drugs, as well as by the longer sentences served by drug offenders, significantly fueled prison population growth.⁵¹ According to the state Department of Corrections, a non-violent drug crime is the most serious charge for about twenty-four percent of current prison inmates, compared with about seventeen percent of inmates in 1990.⁵²

47. Sub. H.B. 1793, 51st Leg., Reg. Sess. (Wash. 1989); WASH. REV. CODE §§ 69.50.408 (1997) (discussing second offenses generally), 69.50.435(a) (1997) (supporting the second year enhancement).

48. FEDERAL DRUG OFFENDERS, *supra* note 42, at 7. Federal prosecutors charged 29,306 people with drug offenses in 1999, compared to 11,854 in 1984. *Id.* The median prison term for federal drug offenders increased from about two years in 1986 to about 3.5 years in 1999. *Id.*

49. H.B. 2628, 55th Leg., Reg. Sess. (Wash. 1998); WASH. REV. CODE § 69.50.401. Before 1989, first-time offenders convicted of heroin or cocaine delivery faced a twelve to fourteen month prison sentence. Compare 1989 Wash. Laws ch. 271 §§ 101-111, with WASH. REV. CODE § 9.94A.510(1) (changing the seriousness levels from VI to VIII). Today, such first-time offenders are subject to a maximum of ten year prison term. WASH. REV. CODE § 9.94A.510(1). More recently, the legislature has also increased penalties for other drug offenses. For instance, a first-time conviction for manufacturing methamphetamine now calls for up to a ten-year prison sentence. *Id.* § 69.50.401(a)(1)(ii).

50. Compare CASELOAD FORECAST COUNCIL, ADULT CORRECTIONS CASELOAD FORECASTS 1 (2001), available at http://www.wa.gov/cfc/Pubs/Adult_Corrections_2001.pdf (last visited Jan. 15, 2003), with U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU STATE AND COUNTY QUICK FACTS: WASHINGTON (2002), available at <http://www.quickfacts.census.gov/qfd/states/53000.html> (last visited Jan. 15, 2003).

51. CASELOAD FORECAST COUNCIL, *supra* note 50, at 2.

52. WASH. DEP’T OF CORR., OFFENDER-BASED TRACKING SYSTEM REPORT AS OF DECEMBER 31, 2000, at 5 (2000).

Some recent amendments to the controlled substances statutes have had the effect of reducing prison time for some drug offenses. At the federal level, Congress recently created certain exemptions from mandatory minimum sentences in 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 provided eligible offenders who successfully complete a drug treatment program while incarcerated with the opportunity for early release (up to one year).⁵³

In Washington, recent changes have also reduced prison time for some drug offenses. In particular, the legislature enacted the Drug Offender Sentencing Alternative ("D.O.S.A.") in recognition of the close link between drug addiction and non-violent drug offenses, and of the need to address the drug dependencies that the legislature thinks will prompt those offenses.⁵⁴ D.O.S.A. gives courts the discretion to cut the term of confinement in half and to mandate addiction treatment for eligible offenders.⁵⁵ In the beginning, fewer than fifty offenders per year participated in the D.O.S.A. program because of limited eligibility. In 1999, the legislature extended D.O.S.A. eligibility 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.⁵⁶ In the last two years, courts have sentenced over 2,500 drug offenders to the D.O.S.A. program, with over 1,000 coming from King County and almost 500 from Pierce County.⁵⁷ This, however, amounts to less than twenty-five percent of all convicted drug offenders.⁵⁸ Furthermore, offenders given the D.O.S.A. option still serve a considera-

53. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No 103-322, 108 Stat. 1796 (1994).

54. H.B. 1549, c. 268 (1995), *amended by* Sub. H.B. 1006, c. 352, 56th Leg., Reg. Sess. (Wash. 1999).

55. *Id.* D.O.S.A. 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. *Id.* Offenders failing to complete drug treatment are returned to prison to serve the remainder of the original sentence. *Id.*

56. WASH. REV. CODE § 9.94A.607 (1999).

57. Interview with Kristein Skipworth, D.O.S.A. Program Manager, Washington Department of Corrections, in Wash. (Aug. 21, 2001).

58. *Id.*

ble amount of prison time—an average of 15.7 months for male offenders and 13.6 months for female offenders.⁵⁹

A major innovation in the last decade has been the “drug court”—a local-option program of deferred prosecution coupled with court-supervised drug treatment.⁶⁰ Drug court participants agree to waive certain rights in exchange for dismissal of criminal charges upon successful completion of drug treatment.⁶¹ These courts use drug testing through urinalysis to ensure compliance.⁶² Discussed in detail below, drug courts are currently the principal drug policy reform being implemented.⁶³

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.⁶⁴ In Washington, authorities continue to incarcerate all offenders convicted of drug delivery charges, irrespective of the amount of drugs involved in any case.⁶⁵ Additionally, they only offer rehabilitative sentences, including drug treatment, to about one quarter of all drug offenders in Washington’s prisons.⁶⁶ 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.⁶⁷

59. *Id.*

60. See *infra* notes 262-281 and accompanying text.

61. RICHARD S. GEBELEIN, U.S. DEP’T OF JUSTICE, THE REBIRTH OF REHABILITATION: PROMISE AND PERILS OF DRUG COURTS 4 (2000).

62. *Id.* at 3.

63. See *infra* Part IV.B.2.

64. FEDERAL DRUG OFFENDERS, *supra* note 42, at 8. In 1999, twenty-one percent of federal drug offenders were exempted from mandatory minimum sentences, but were still sentenced to multi-year prison terms. *Id.* at 9.

65. Drug delivery offenders are ineligible for the “First-time Offender Waiver,” a discretionary option for non-violent offenders that allows an alternative to incarceration. WASH. REV. CODE § 9.94A.650(1)(b)-(d) (2002).

66. According to the Washington Department of Corrections, about 2,500 inmates have participated in the D.O.S.A. program, of whom about 1,000 have been released. Interview with Kristein Skipworth, *supra* note 57. Today, there are about 750 D.O.S.A. participants in prison, out of about 3,175 drug offenders in prison. *Id.* The county-level drug courts have diverted a much smaller percentage of offenders away from jail or prison—only about ten percent in King County, for example. *Id.* In the county jails themselves, there are very few opportunities for drug treatment. *Id.*

67. The Washington Department of Corrections estimates that only about one-fifth of all offenders needing drug treatment actually receive it. *Id.* Meanwhile, both in prisons and county jails, virtually no *non-drug* offenders with chemical dependency problems receive any treatment. *Id.* 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. KING COUNTY BAR ASS’N, RE-

III. 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 the heavy reliance on criminal sanctions has been effective in reducing drug abuse and its attendant costs.⁶⁸ 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.

A. Drug Use, Drug Abuse, and Drug Addiction

Most individuals derive estimates of drug use from survey data, a somewhat unreliable measurement tool because illegal activity tends to be under-reported. Recently, the National Academy of Sciences further highlighted 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.⁶⁹ Nevertheless, the Task Force has examined available data on drug consumption to ascertain whether

PORT OF THE TASK FORCE ON DRUG ADDICTION TREATMENT TO THE KING COUNTY BAR ASSOCIATION BOARD OF TRUSTEES 13-14 (2001).

68. 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.

69. CHARLES F. MANSKI ET AL., NAT’L RESEARCH COUNCIL, INFORMING AMERICA’S POLICY ON ILLEGAL DRUGS: WHAT WE DON’T KNOW KEEPS HURTING US 75-136 (2001) (finding 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), *available at* <http://www.nap.edu/books/0309072735/html/> (last visited Jan. 15, 2003). 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 any way of knowing whether, and to what extent, it is having the desired result.” Press Release, National Academy of Sciences, National Research Council, Data Sorely Lacking on Effectiveness of Nation’s Drug-Enforcement Pro-

there have been any changes in drug use patterns, and whether recent toughening of drug-related criminal sanctions might attribute to those changes.

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:⁷⁰

TABLE VI			
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

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 forty percent of the U.S. population.⁷¹

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.⁷² As far as recent use is concerned, 55.9 percent of adults in Washington report using alcohol in the last thirty days from the date they were surveyed, whereas only 4.7 percent of adults in Washington report such recent use of marijuana.⁷³

grams (Mar. 29, 2001), *available at* http://www.usembassy.it/file2001_03/alia/a1032908.htm (last visited Jan. 15, 2003).

70. OFFICE OF APPLIED STUDIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY OF FINDINGS FROM THE 1999 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE G-5, G-21 (2000), *available at* http://www.samhsa.gov/oas/nhsda/2kdetailedtabs/Vol_1_Part_1/sect1v1.htm#1.1a (last visited Jan. 15, 2003).

71. *Id.*

72. DAVID H. ALBERT, WASH. STATE DEP'T OF SOCIAL & HEALTH SERVS., TOBACCO, ALCOHOL, AND OTHER DRUG ABUSE TRENDS IN WASHINGTON STATE, 2002 REPORT 45, 48 (2002), *available at* <http://www1.dshs.wa.gov/dasa/pdf/trends02.pdf> (last visited Jan. 15, 2003).

73. *Id.* Although no data is available from Washington regarding past thirty-day use of “hard” drugs, 4.3 percent of adults in Washington report having used “hard” drugs in the last year before they were surveyed. *Id.* at 51.

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 1992.⁷⁴ Cocaine use increased in the 1980s, peaking around 1985, and after declining, has begun to rise again since 1993.⁷⁵ By contrast, although there has been a slight increase since the mid-1990s, the prevalence of heroin use has remained low.⁷⁶ 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.⁷⁷ Considering these findings, criminal sanctions cannot have reduced drug use in the general population.

Drug use is difficult to measure, but measuring drug abuse is even more problematic; the problem begins with the difficulty in defining it.⁷⁸ The state and federal controlled substances statutes refer merely to the "improper use" of drugs, avoiding the definitional issue by equating any use of proscribed drugs with abuse,

74. OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, *DRUG USE TRENDS 2* (1999) [hereinafter *DRUG USE TRENDS*], available at <http://www.whitehousedrugpolicy.gov/publications/factsht/druguse/index.html> (last visited Jan. 15, 2003).

75. *Id.*

76. *Id.* at 3.

77. *Id.* at 2. The phenomenon of a decline in drug use *prior* to the imposition of criminal sanctions has occurred before in the United States. See DAVID COURTWRIGHT, *DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940*, at 1-2, 9-11 (1982) (discussing the history of opium in America); DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 3-4 (1987) (discussing the history of narcotic drugs in America). Opium consumption declined significantly in the first decade of the 20th century, in advance of the passage of the Harrison Narcotics Act of 1914. See COURTWRIGHT, *supra*, at 1-2, 9-11 (discussing drug usage before and after the Harrison Narcotics Act of 1914); MUSTO, *supra*, at 3-4, 5 n.13 (discussing drug usage before and after 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. MUSTO, *supra*, at 3-4, 5 n.13.

78. 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, *THE RETURN OF THE DANGEROUS CLASSES: DRUG PROHIBITION AND POLICY POLITICS* 9 (1994). 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." ZIMRING & HAWKINS, *supra* note 1, at 32.

apparently on the presumption that all illicit drug use causes harm.⁷⁹ The Task Force rejects this statutory approach and believes that authorities cannot measure the extent of drug abuse by estimating the number of persons using drugs.⁸⁰ They also believe that 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.⁸¹

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, United States health agencies have reported that less than one percent of those who have ever used cocaine become daily users, and that most cocaine users are not regular consumers of the drug.⁸² There is even a significant number of heroin users who are not addicted, just as there is a large population of non-addicted drinkers.⁸³

Over the past century, the percentage of the population experiencing serious drug addiction has remained very low. 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.⁸⁴

79. Federal regulations that predate the Controlled Substances Act, specifically 21 C.F.R. § 166.2(e)(3) that have since been repealed expressed 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.” *State v. Albert Lee Bur*, 509 P.2d 105, 107-08 (Wash. Ct. App. 1973) (citing 21 C.F.R. § 166.2(e)(3)).

80. Peter Reuter, *Drug Use Measures: What Are They Telling Us?*, NAT’L INST. JUST. J., Apr. 1999, at 12, 12-18 (discussing the use of various drug use indicators and what they assert), available at <http://ncjrs.org/pdffiles1/jr000239.pdf> (last visited Jan. 15, 2003).

81. 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.

82. DAN WALDORF ET AL., *COCAINE CHANGES 2* (1991).

83. JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* 33 (1983).

84. Peter Reuter, *The Limits of Supply-Side Drug Control*, MILKEN INST. REV., 1st Quarter 2001, at 16.

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.⁸⁵

Meanwhile, in Washington's more rural areas there has been a proliferation of methamphetamine manufacture, with severe social and environmental consequences.⁸⁶ 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.⁸⁷

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

85. SEATTLE-KING COUNTY DEPT. OF HEALTH, HEROIN TASK FORCE REPORT: CONFRONTING THE PROBLEM OF HEROIN ABUSE IN SEATTLE AND KING COUNTY 4, 12-13 (2001), *available at* <http://www.metrokc.gov/health/subabuse/heroin/heroinreport.pdf> (last visited Jan. 15, 2003).

86. David Fisher, *Youth Summit Aims to Tackle Growing Meth Problem*, SEATTLE POST-INTELLIGENCER, May 30, 2002, at B1, *available at* http://www.seattlepi.nwsource.com/local/72549_meth30.shtml (last visited Jan. 15, 2003). Washington ranks second in the nation behind California in methamphetamine manufacture. *Id.* According to the Washington State Department of Ecology, almost 1,500 methamphetamine "laboratories" and dump sites were reported in Washington in 2000, a thirty-fold increase in the last decade. Press Release, Department of Ecology, Meth Labs Hit Another Record in 2000 (Feb. 1, 2001) [hereinafter Press Release, Record in 2000], *available at* <http://www.ecy.wa.gov/news/2001news/2001-020.html> (last visited Jan. 15, 2003); Press Release, Department of Ecology, Meth Cleanups Surpass 2000 Record (Oct. 4, 2001) [hereinafter Press Release, Surpass 2000 Record], *available at* <http://www.ecy.wa.gov/news/2001news/2001-177.html> (last visited Jan. 15, 2003). These sites present a danger to human health and cause extensive environmental damage, especially in King and Pierce counties. *See* Press Release, Record in 2000, *supra* (discussing the record number of meth labs that were cleaned up in King and Pierce counties).

87. ELLIOTT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 20, 21 (1993). 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. ALBERT, *supra* note 72, at 46, 49, 52.

the lengthening of their sentences seem, at the very least, not to have stemmed the increases in drug use or drug abuse.

B. The Public Cost of Drug Abuse

One report estimated the total economic cost of drug abuse, including alcohol, at \$2.54 billion annually in Washington.⁸⁸ Public costs related to the abuse of alcohol and other drugs amount to about \$1.5 billion annually.⁸⁹ In 1998, Washington spent about \$274 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.⁹⁰

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.⁹¹ That report shows that alcohol, not illegal drugs, gives rise to the vast majority of those public costs.⁹²

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.⁹³ Alcohol continues to be the major cause of public spending *even after factoring in the cost of law enforcement and incarceration of*

88. THOMAS WICKIZER, *THE ECONOMIC COSTS OF DRUG AND ALCOHOL ABUSE IN WASHINGTON STATE*, 1996, at 63 (1999).

89. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, *SHOVELING UP: THE IMPACT OF SUBSTANCE ABUSE ON STATE BUDGETS* 75 (2001).

90. *Id.* 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. KING COUNTY BAR ASS'N DRUG POLICY PROJECT, *REPORT OF THE TASK FORCE ON DRUG ADDICTION TREATMENT TO THE KING COUNTY BAR ASSOCIATION BOARD OF TRUSTEES* 15-21 (2001), *available at* http://www.drugpolicy.org/docUploads/KCBA_treatment.pdf (last visited Jan. 15, 2003).

91. WICKIZER, *supra* note 88, at 63-69.

92. *Id.* at 17, 22, 62. For example, alcohol accounted for eighty percent of diseases resulting in economic loss, seventy percent of premature deaths (overdoses and motor vehicle accidents), and ninety-five percent of non-medical motor vehicle accident costs (insurance, administration, vehicle damage). *Id.*

93. *Id.* at 41.

drug offenders. Alcohol accounts for fifty-nine percent of the total economic cost of drug and alcohol abuse combined.⁹⁴

National data from hospital emergency room visits show an increasing “mention” of drugs such as cocaine, heroin, marijuana, and methamphetamine,⁹⁵ but alcohol still accounts for most emergency room visits, a total of about forty percent of which are drug or alcohol-related.⁹⁶ 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:

TABLE VII ANNUAL CAUSES OF DEATH IN THE UNITED STATES	
Tobacco (Average from 1990 to 1994)	430,700 ⁹⁷
Alcohol (1996)	110,640 ⁹⁸
Adverse Reactions to Prescription Drugs (1994)	106,000 ⁹⁹
Suicide (1998)	30,575 ¹⁰⁰
Homicide (1998)	18,272 ¹⁰¹
Licit and Illicit Drug-Induced Deaths (1998)	16,926 ¹⁰²
Non-steroidal Anti-inflammatory Drugs (1992)	7,600 ¹⁰³
Marijuana	0 ¹⁰⁴

94. *Id.* at ix.

95. OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, DRUG USE TRENDS 4 (1999).

96. 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. *All Things Considered* (NPR Radio Broadcast, Sept. 21, 2001) (interview with Dr. Larry Siegel, District of Columbia Department of Health), available at <http://www.discover.npr.org/rundowns/rundown.jhtml?prgId=2&prgDate=september/21/2001> (last visited Jan. 15, 2003). 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. *Id.*

97. The United States Centers for Disease Control and Prevention notes that “Cigarette smoking remains the leading preventable cause of death in the United States.” Ctr. for Disease Control & Prevention, *Perspectives in Disease Prevention and Health Promotion Smoking-Attributable Mortality and Years of Potential Life Lost—United States, 1984*, 46 MORBIDITY & MORTALITY WKLY. REP. 444, 449 (1997).

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.¹⁰⁵

While some drug users are involved in illegal activity beyond the mere possession or sale of drugs, property crimes (for example, theft, forgery, and low-level burglary) do not seem to account for most of drug users’ illegally obtained income.¹⁰⁶ 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 prosti-

98. NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, NUMBER OF DEATHS AND AGE-ADJUSTED DEATH RATES PER 100,000 POPULATION FOR CATEGORIES OF ALCOHOL-RELATED MORTALITY 1 (1999), available at <http://www.niaaa.nih.gov/databases/armort01.txt> (last visited Jan. 15, 2003).

99. Jason Lazarou et al., *Incidence of Adverse Drug Reactions in Hospitalized Patients: A Meta-Analysis of Prospective Studies*, 279 JAMA 1200, 1205 (1998). 106,000 is the mean number of fatalities caused by adverse reactions to prescription drugs. *Id.* The higher and lower ranges are 76,000 and 137,000, respectively. *Id.*

100. Sheila L. Murphy, *Deaths: Final Data from 1998*, 40 NAT’L VITALS STAT. REP., July 24, 2000, at 1, 53 tbl 10.

101. *Id.*

102. *Id.* at 1, 10. “The category ‘drug-induced causes’ includes not only deaths from dependent and nondependent use of drugs (legal and illegal use), but also poisoning from medically prescribed and other drugs.” *Id.* Additionally, “[i]t excludes accidents, homicides, and other causes indirectly related to drug use.” *Id.*

103. Robin Tamblyn et al., *Unnecessary Prescribing of NSAIDs and the Management of NSAID-Related Gastropathy in Medical Practice*, 127 ANNALS INTERNAL MED. 429, 429-38 (1997).

104. No deaths have ever been recorded as having been directly induced by marijuana because its use is not generally associated with increased mortality. MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 109 (Janet E. Joy et al. eds., 1999). It is important to consider, however, that it may cause other serious health concerns. *Id.* at 109-27.

105. OFFICE OF NAT’L DRUG CONTROL POLICY, THE WHITE HOUSE, DRUG-RELATED CRIME 1, 1-5 (2000) [hereinafter DRUG RELATED CRIME]. 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.” *Id.*

106. PETER REUTER ET AL., MONEY FROM CRIME: A STUDY OF THE ECONOMICS OF DRUG DEALING IN WASHINGTON, D.C. ix, 63-66 (1990) (discussing the demographics and statistics of drug dealing in Washington, D.C.).

tution.¹⁰⁷ A significant number of drug addicts—possibly the majority—are legitimately employed.¹⁰⁸ 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, as of December 31, 2000, Washington's prisons housed a growing number—almost 5,400—of non-violent offenders who were convicted of both drug offenses and property offenses.¹⁰⁹

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.¹¹⁰ 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."¹¹¹ 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 reports link crime 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.¹¹² About forty percent of all offenders at the state level were using alcohol at the time of the offense for which courts convicted them, and state authorities report alcohol as a factor in more than forty percent of murders and almost fifty percent of assaults.¹¹³ Data from 1996 in Washington reveals that 1,801 arrests for felonious assault were alcohol-

107. *Id.*

108. KAPLAN, *supra* note 83, at 54; MARK MOORE, BUY AND BUST: THE EFFECTIVE REGULATION OF AN ILLICIT MARKET IN HEROIN 70-92 (1977); REUTER ET AL., *supra* note 106, at 55-46, 62-64.

109. See WASH. DEP'T OF CORR., *supra* note 52, at 1-3 (providing statistics for Washington's correction system as of December 31, 2000).

110. See NAT'L RESEARCH CTRS. BRANCH & UNIV. OF CAL., BERKELEY, ALCOHOL AND DISINHIBITION: NATURE AND MEANING OF THE LINK 208-13 (Robin Room & Gary Collins eds., 1983) (discussing the general public's notion that the use of alcohol causes expressions of aggression and sexuality).

111. DRUG RELATED CRIME, *supra* note 105, at 4.

112. STEVEN BELENKO, THE NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., BEHIND BARS: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 31 (1998), available at http://www.casacolumbia.org/publications1456/publications_show.htm?doc_id=5745 (last visited Jan. 15, 2003).

113. LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, ALCOHOL AND CRIME: AN ANALYSIS OF NATIONAL DATA ON THE PREVALENCE OF ALCOHOL INVOLVE-

related, while only 144 were related to other drugs (of a total of 6,003 arrests that year).¹¹⁴

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 state and federal levels. At the federal level, over eighty percent of the increase in the federal prison population from 1985 to 1995 was due to increased drug convictions;¹¹⁵ drug offenders in 1998 constituted over fifty-eight percent of all federal inmates, a significant increase from the decade before.¹¹⁶ The number of drug offenders sentenced at the federal level more than doubled from 1990 to 1998, from 30,470 to 63,011.¹¹⁷

At the state level, arrests for drug offenses nationwide increased by over thirty-five percent between 1990 and 1999.¹¹⁸ By contrast, during the same period there was a notable *downward* trend in arrests nationwide for driving while intoxicated (a twenty-seven percent decrease).¹¹⁹ 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

MENT IN CRIME 20-21 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ac.pdf> (last visited Jan. 15, 2003).

114. WICKIZER, *supra* note 88, at 27.

115. CHRISTOPHER J. MUMOLA & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 1996, at 11 (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p96.pdf> (last visited Jan. 15, 2003).

116. ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 1999, at 12 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p99.pdf> (last visited Jan. 15, 2003).

117. *Id.*

118. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIMES IN THE UNITED STATES 1999, at 216 (2000), available at http://www.fbi.gov/ucr/Cius_99/99crime/99c4_01.pdf (last visited Jan. 15, 2003). Arrests for state-level "drug abuse violations" increased from 589,944 to 805,024 during the 1990s. *Id.*

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

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.¹²⁰ Since the mid-1980s, arrests 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.¹²¹ Arrests for drug offenses, however, have continued to rise at a much faster pace.¹²²

Records of arrests for various offenses since 1985 reveal the following:¹²³

TABLE VIII ARRESTS FOR SELECTED OFFENSE CATEGORIES WASHINGTON STATE			
Offense	1985 Arrests	1998 Arrests	% Change
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.¹²⁴ It is evident, however, 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.

120. See Sub. S.B. 6259, Reg. Sess. (Wash. 1990). It increased criminal penalties for assault first degree and other "serious violent" offenses, increased the mandatory minimum term for rape first degree, 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. *Id.*

121. Compare WASH. ASS'N. OF SHERIFFS & POLICE CHIEFS, CRIME DATA 1 (2001), available at http://www.wa.gov/cfc/Cjdata/crime_data.htm (last visited Jan. 15, 2003), with U.S. CENSUS BUREAU, *supra* note 50.

122. WASH. ASS'N. OF SHERIFFS & POLICE CHIEFS, *supra* note 121.

123. *Id.*

124. U.S. CENSUS BUREAU, *supra* note 50.

D. 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.¹²⁵ 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.¹²⁶ In 1996, the most recent year for which data is available, law enforcement costs related to illegal drugs, including investigation, arrest, and interdiction amounted to \$202 million.¹²⁷ Legal and adjudication costs arising from drug cases that year amounted to \$22 million, or eighty-three percent of all court costs related to drug and alcohol cases.¹²⁸ 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 1990.¹²⁹ 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, Congress has increased the Federal Bureau of Prisons' budget by 1,350 percent, from \$220 million in 1986 to over \$3.2 billion today.¹³⁰ The federal budget for drug control in 2001 was \$18 billion (President George W. Bush requested \$19.2 billion for the 2002 fiscal year), and combined state and federal expenditures for the drug control program now total approximately \$35 billion annually, a 250 percent increase from the mid-1980s when combined state and federal spending for drug control totaled about \$10 billion.¹³¹

125. See Julia Hanna, *Locking Down Crime?*, HARV., July-Aug. 2001, at 9 (stating that nationwide, 236,000 drug offenders were sent to state prisons in 1998, compared to only 19,000 in 1980) (citing Anne M. Piehl et al., *The Crime Control Effects of Incarceration*, (forthcoming)).

126. WICKIZER, *supra* note 88, at 41.

127. *Id.* at 27-30.

128. *Id.* at 30.

129. *Id.* at 35.

130. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, at 20 (1997); OFFICE OF NAT'L DRUG CONTROL POLICY, THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: FY 1997 BUDGET SUMMARY 111 (1997).

131. Reuter, *supra* note 84, at 16.

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 sheriff's departments and prosecutors' offices.¹³² 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.¹³³

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:

TABLE IX REDUCING SOCIETAL COSTS OF COCAINE USE ¹³⁴	
Investment of Additional \$1 in:	Societal Benefit Received:
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.¹³⁵ 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.

132. GORDON, *supra* note 78, at 38.

133. MARK THORNTON, *THE ECONOMICS OF PROHIBITION* 143 (1991).

134. C. PETER RYDELL & SUSAN S. EVERINGHAM, *CONTROLLING COCAINE: SUPPLY VERSUS DEMAND PROGRAMS* xvi-ii (1994). This study defines "societal benefits" as including reductions in crime, violence, medical costs, and productivity losses. *Id.* at xv-xvi, 36.

135. *Id.* at 11-12.

E. Serving the Purposes of the Criminal Law

In addition to evaluating specific effects on drug use and drug crime, individuals should also evaluate whether current drug policy 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.

1. 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.”¹³⁶

Law enforcement is intended to protect society from drug-related crime, for example, property crime to support drug addiction, as well as the public disorder and violence that is associated with drug trafficking and illegal drug “markets.”¹³⁷ 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.¹³⁸ Finally, to the extent that the state is acting *in loco parentis*, the state intends enforcement of drug laws to protect citizens from the ad-

136. *Shea v. Olson*, 53 P.2d 615, 619 (Wash. 1936). “Police power” has been defined by the Washington courts as an “essential element of the power to govern, and a function that cannot be surrendered,” in exercise of which the state may prescribe laws intended to “promote the 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.*” *Peden v. City of Seattle*, 510 P.2d 1169, 1171 (Wash. Ct. App. 1973) (emphasis added) (citing *Shea*, 53 P.2d at 619 (defining police power)). Discussions of the shifting balance between police power and individual rights in America date back a century. See, e.g., RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 3-16 (1993) (discussing whether police power must be limited); ERNST FREUND, *POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 17-22 (1904) (discussing police power in comparison to citizen’s rights).

137. MARK A. R. KLEIMAN, *AGAINST EXCESS: DRUG POLICY FOR RESULTS* 12-16, 127-30 (1992).

138. *Id.*

verse health, economic, and social consequences of their own drug use.¹³⁹ 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.”¹⁴⁰ 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.¹⁴¹ 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.¹⁴² It is apparent that the use of criminal sanctions has failed to achieve the public safety goals of drug policy.

2. Retribution

A core principle of Washington’s determinate sentencing is “just desserts,” or the notion that the “punishment should fit the crime.”¹⁴³ From this perspective, given the relatively severe penalties assigned, the Washington legislature should consider drug offenses among the most serious crimes, i.e., those that cause a great amount of harm. A number of stakeholders in Washington’s criminal justice system, however, have questioned whether the punishment related to drugs is in proper proportion to the seriousness of the conduct.¹⁴⁴ Part of the difficulty in arriving at a comparatively

139. *Id.*

140. *Id.* at 27.

141. DRUG USE TRENDS, *supra* note 74, at 2-3.

142. Mitchell Rosenthal, *In Opposition to Drug Legalization*, 24 U.C. DAVIS L. REV. 637, 643 (1991).

143. WASH. REV. CODE § 9.94A.010(3) (1998) (stating that the Washington Sentencing Reform Act was created to insure that sentences are “commensurate with the punishment imposed on others committing similar offenses.”).

144. SENTENCING GUIDELINES COMM’N, STATE OF WASH., THE SENTENCING REFORM ACT AT CENTURY’S END 5-6 (2000). 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. *Id.* at 13-14. 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. *Id.*

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 commentators consider drug-related punishment 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.¹⁴⁵ 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.¹⁴⁶ One can see the retributive function of drug-related criminal sanctions as offset by the harm caused to society by the criminalization of non-violent or first-time drug offenders.

3. *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, the legislature intended criminal sanctions to ensure that the individual’s costs 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. Criminal sanctions are unlikely to deter persons addicted to drugs from continued use, because “their craving renders them incapable of a rational calculation of the costs and benefits of drug-taking behavior.”¹⁴⁷ In addition, many hard-core drug addicts have little left to lose to threats

145. Spencer, *supra* note 32, at 370.

146. *Id.* at 370-71.

147. GORDON, *supra* note 78, at 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, *supra* note 137, at 47.

of imprisonment, having already lost, or never had, stable families, employment, or property.¹⁴⁸

Those involved in the sale of illegal drugs are likely to undertake a similar balancing of cost and benefit. For some, the risk of arrest does not offset the financial benefit of selling drugs. 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.

A 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.¹⁴⁹ The report also found that drug offenders tend to re-offend quickly after release from confinement, and that eighty-five percent of the time their subsequent offense is another drug offense or a property offense that authorities usually assume is related to drug addiction.¹⁵⁰ California drug offenders who receive treatment in lieu of incarceration under the new Proposition 36 guidelines¹⁵¹ have had an *average* of sixteen previous arrests.¹⁵² 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.

Criminal sanctions might deter casual drug users to a greater extent than addicted drug users. There are millions of casual drug users in the United States, for whom the risk of being arrested by the police for drug possession is very small.¹⁵³ Furthermore, because authorities estimate drug addicts to consume over eighty percent of all drugs, any attempt to deter casual users neither diminishes overall demand, nor deters most drug use.¹⁵⁴

148. See STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RE-THINKING OUR TRAGIC CRUSADE AGAINST DRUGS* 10 (1993) (discussing drug addicts demographics and characteristics).

149. RECIDIVISM, *supra* note 21, at 14, 39.

150. *Id.* at 14, 20.

151. See *infra* notes 255-261 and accompanying text.

152. Fox Butterfield, *New Drug Offender Program Draws Unexpected Clients*, N.Y. TIMES, Sept. 29, 2001, at A6.

153. DUKE & GROSS, *supra* note 148, at 224-28. The chances of being arrested for drug possession have been estimated at about one in 2400. *Id.* at 226.

154. *Id.* at 10. Addicts include both daily and weekly users. *Id.*

4. 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. Researchers measure the “incapacitation effect” by the effect of incarceration on recidivism rates.¹⁵⁵

In the 1980s, the Federal Drug Enforcement Administration (“DEA”) 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.¹⁵⁶ Incapacitating all of those buyers and sellers had no effect on the demand for or the availability of crack, however, because 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.¹⁵⁷

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.¹⁵⁸ Researchers found a significant incapacitation effect with the robbery and burglary offenders, but not with the drug trafficking or drug possession offenders.¹⁵⁹ 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.¹⁶⁰ 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 courts send away to prison.¹⁶¹

5. Rehabilitation

Rehabilitation is the process of changing or “reforming” the behavior of offenders so that they will not commit further offenses.

155. Spencer, *supra* note 32, at 371.

156. ROBERT M. STUTMAN & RICHARD ESPOSITO, DEAD ON DELIVERY: INSIDE THE DRUG WARS, STRAIGHT FROM THE STREET 207-26, 232-33 (1992). This operation was known as Operation *Clean Heights*. *Id.* at 212.

157. *Id.* at 212, 225-26.

158. Jacqueline Cohen et al., *Hierarchical Bayesian Analysis of Arrest Rates*, 93 J. AM. STAT. ASS’N 1260, 1260 (1998).

159. *Id.* at 1263-69.

160. *Id.* at 1265.

161. GORDON, *supra* note 78, at 35.

Rehabilitation was at one time the primary goal of sentencing, but since the late 1970s the pendulum has swung toward punishment and incapacitation.¹⁶² After the rapid proliferation of drug offenses in the 1980s and 1990s, the pendulum began to swing back again, as states established “drug courts” as an alternative to the incarceration of drug offenders.¹⁶³ 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.¹⁶⁴

The emphasis on addiction treatment for drug offenders is currently the major drug policy reform the United States is implementing (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.¹⁶⁵ 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.”¹⁶⁶

6. Restoration

The concept of restoration involves the “use of the criminal justice processes to rebuild relationships [between an offender, the victim, and the community] disrupted by crime.”¹⁶⁷ The criminal justice process holds offenders accountable for their actions before the community and the victim, and offenders rehabilitate themselves as they repair the harm to the victim and the community.¹⁶⁸

The “restorative justice” approach has been effective with some types of non-violent offenders, particularly juvenile offenders.¹⁶⁹ Its relevance and applicability to drug offenders is negligible, however, because drug offenses per se are “consensual” or “victimless” crimes. They are, therefore, not amenable to the potential for healing and forgiveness between the perpetrator of a crime, the

162. GEBELEIN, *supra* note 61, at 2.

163. *See id.* at 2-3 (explaining how rehabilitation gained its importance as drug courts provided an improved model).

164. *Id.* at 4.

165. *Id.* at 2-3.

166. *See, e.g.,* Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1480 (2000) (discussing the startling fact about the vast emergence of drug courts as fixtures of jurisprudence, that no empirical evidence exists that they actually work).

167. GEBELEIN, *supra* note 61, at 2.

168. *Id.*

169. *Id.* at 4.

victim of the crime, and the larger community. The concept of restorative justice, however, highlights the approach taken by civil courts to the harms associated with drug abuse. For example, in family court proceedings it is common for a judge to order parties to participate in drug treatment as a way of restoring family relationships.

F. Summary

William J. Bennett, former White House drug "czar," stated recently that the War on Drugs once worked and that it can work again.¹⁷⁰ 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."¹⁷¹ As the findings in this Report convey, however, 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.¹⁷² In fact, the last decade has seen unprecedented drug-related law enforcement activity and incarceration of drug offenders.¹⁷³

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 neither 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

170. William J. Bennett, *The Drug War Worked Once. It Can Again*, WALL ST. J., May 15, 2001, at A26.

171. *Id.*

172. See *supra* notes 88-90 and accompanying text; see also FEDERAL DRUG OFFENDERS, *supra* note 42, at 7 (stating that incarceration of drug offenders has more than doubled).

173. See *supra* notes 88-90 and accompanying text.

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 repeatedly confine 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 they have not realized this policy's promised benefit.

IV. PROBLEMS AND PROSPECTS FOR CURRENT DRUG POLICY

A. 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 drug-related crimes. 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 the current drug policy.

1. *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 that become more costly because of drug prohibition.¹⁷⁴ On the supply side, the prohibition of illegal drugs has exempted the drug trade from regulation and control, and the resulting black market for 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, drug dealers often conduct business by force or threat of force. For example, somewhere between twenty and forty percent of murders in

174. David R. Henderson, *A Humane Economist's Case for Drug Legalization*, 24 U.C. DAVIS. L. REV. 655, 659 (1991). 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. See *supra* Part III. Researchers have found explicit empirical evidence that drug prohibition is directly related to crimes other than illegal drug sale and use. See, e.g., BRUCE D. JOHNSON ET AL., *TAKING CARE OF BUSINESS: THE ECONOMICS OF CRIME AND HEROIN ABUSERS* 46-47 (1985).

the United States take place because of the black-market drug business.¹⁷⁵

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.¹⁷⁶ 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."¹⁷⁷ At the same time, those interdiction efforts have failed to stop the flow of drugs needed to meet consumer demand.¹⁷⁸

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 fifty percent, and the price of heroin has declined by about seventy percent.¹⁷⁹ 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.¹⁸⁰

175. DUKE & GROSS, *supra* note 148, at xvii; WILLIAM WEIR, IN THE SHADOW OF THE DOPE FIEND: AMERICA'S WAR ON DRUGS 253 (1995).

176. See Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 426-27 (1995) (discussing the benefits of legalizing drugs).

177. RAND Institute Study Slams Drug War, DRUG POL'Y NEWS, June 29, 2001, available at http://216.239.57.100/search?q=cache:bI2fQ0BGc9AC:www.drugpolicy.org/news/06_29_01rand2.cfm+%22RAND+Institute+Study+Slams+Drug+War%22&hl=en&ie=utf-8 (last visited Jan. 15, 2003); Reuter, *supra* note 84, at 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. EVA BERTRAM ET AL., DRUG WAR POLITICS: THE PRICE OF DENIAL 11-31 (1996).

178. In the 1970s, seizures of up to 200 pounds of heroin were considered impressive, but recently there have been individual seizures of over fifteen tons of cocaine. *Venezuelan Authorities Destroy More than 15 Tonnes of Cocaine*, AGENCE FR. PRESS, Aug. 30, 2001, at Int'l News. 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 thirteen percent of heroin shipments and between twenty-eight and forty percent of cocaine shipments. U.N. OFFICE FOR DRUG CONTROL & CRIME PREVENTION, GLOBAL ILLICIT DRUG TRENDS 1999, at 51, U.N. Sales No. E.99.XI.16 (1999) [hereinafter GLOBAL ILLICIT DRUG TRENDS], available at http://www.undcp.org/pdf/report_1999-06-01_1.pdf (last visited Jan. 15, 2003).

179. GLOBAL ILLICIT DRUG TRENDS, *supra* note 178, at 86.

180. U.N. INT'L DRUG CONTROL PROGRAMME, UNDCP TECHNICAL SERIES No. 6, ECONOMIC AND SOCIAL CONSEQUENCES OF DRUG ABUSE AND ILLICIT TRAFFICKING

2. *Undermining Public Health*

The War on Drugs, in a number of ways, has exacerbated the damage to public health inflicted by drug abuse. First, drug users transmit AIDS and other diseases by using contaminated needles.¹⁸¹ Drug users often inject drugs rather than take them in a safer way because the drugs' cost prompts users to attempt to achieve the same effect using less of the substance.¹⁸² Second, in the unregulated drug market, drug sellers may dilute a drug substance with chemicals more harmful than the drug itself.¹⁸³ Third, in response to intensified law enforcement activity, the smuggling of purer and higher-potency drugs has increased, allowing smugglers to transport substances in smaller, more easily concealed quantities.¹⁸⁴ 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.¹⁸⁵

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, suppliers produce powerful, synthetic opiates with chemical compositions that they can change to avoid criminal punishment.¹⁸⁶ Another health-damaging response to drug prohibition is the substitution of lower-priced for higher-priced illegal drugs.¹⁸⁷ In Washington and elsewhere, the current proliferation of methamphetamine, which is produced in varying and unpredictable degrees of quality and po-

at 3 (1998), available at http://www.unodc.org/pdf/technical_series_1998-01-01_1.pdf (last visited Jan. 15, 2003).

181. ALBERT, *supra* note 72, at 85. A special exception to the trend of injection-related transmission of HIV/AIDS applies to Washington State, and to Seattle-King County in particular. *Id.* 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 four percent, the lowest in the nation. *Id.*

182. DUKE & GROSS, *supra* note 148, at 9, 193-94.

183. *Id.* at 194-97.

184. GLOBAL ILLICIT DRUG TRENDS, *supra* note 178, at 86-87 (stating that the mean purity level of heroin was around six percent in 1987, but up to thirty-seven percent by 1997, and as high as sixty percent in New York City).

185. THORNTON, *supra* note 133, at 89-92. 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." *Id.* at 103-05.

186. *Id.* at 109.

187. *Id.* at 108. For instance the use of cocaine instead of marijuana because they are both the same price, but cocaine is more potent. *Id.*

tency, 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.¹⁸⁸

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.¹⁸⁹ 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.¹⁹⁰ There is also some indication that society stigmatizes drug users and that they receive a lower standard of medical care when their illness is related to their known drug use.¹⁹¹

The criminalization of drugs also impairs the ability of doctors to practice effective medicine. The Federal Drug Enforcement Administration audits primary care physicians and other health professionals who prescribe controlled substances, especially opiates, to treat pain. Even if a prescription meets the standards of the medical board that regulates the physician's license, the DEA can determine that the medical board should take away the federal license to prescribe controlled substances.¹⁹² 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.

188. Fisher, *supra* note 86, at B1; Press Release, Record in 2000, *supra* note 86; Press Release, Surpass 2000 Record, *supra* note 86.

189. See, e.g., *Manhattan: Needle Suit Can Proceed*, N.Y. TIMES, Aug. 1, 2001, at B5 (discussing the frequency with which injection drug users have been arrested for possession of syringes that they obtained or intended to return to needle exchange sites).

190. DUKE & GROSS, *supra* note 148, at 193, 197-99.

191. See Brian R. Edlin et al., *Is it Justifiable to Withhold Treatment for Hepatitis C from Illicit Drug Users?*, 345 NEW ENG. J. MED. 211, 211-14 (2001) (discussing the withholding of medical treatment for drug users).

192. See Letter from Howard Heit, M.D., F.A.C.P., F.A.S.A.M., to United States Senator Ron Wyden (Sept. 29, 2001) (discussing physician's fear of losing license and right to prescribe), available at http://www.asam.org/pain/pain_relief_promotion_act.htm (last visited Jan. 15, 2003). 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 [P]ractitioners prescribe controlled substances in ways that will reduce the likelihood of investigation." *Id.*

3. *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 it has diverted judicial attention 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.¹⁹³ In Washington's courts, judges unduly delay civil cases 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 must also be devoted to other criminal and civil cases.¹⁹⁴ Approximately forty percent of the cases filed in King County courts each year—over 3,800—are controlled substances cases.¹⁹⁵ In addition, almost twenty percent are “acquisitive” property cases, such as theft and burglary.¹⁹⁶ Although impossible to determine the exact number, it is reasonable 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.¹⁹⁷

4. *Social Dislocation and Racial / Class Divisions*

The War on Drugs has taken a particularly hard toll on disadvantaged communities, both because of intensified law enforcement activity in those communities and the incarceration of residents from those communities.¹⁹⁸ The focus of drug enforcement on the

193. Dan Baum, *Just Say Nolo Contendere: The Drug War on Civil Liberties*, NATION, June 29, 1992, at 887; Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1136 (1995) (reiterating a warning by Chief Justice Rehnquist “that incautious federalization of criminal law threatens to overwhelm the federal justice system.”).

194. SHIQUAN LIAO, KING COUNTY SUPERIOR COURT, CRIMINAL DEPARTMENT STATISTICAL REPORT 6 (2000).

195. *Id.*

196. *Id.*

197. *Id.* at 2.

198. 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

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.¹⁹⁹ 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.²⁰⁰

Drug abuse (though not drug use) is closely related to the conditions of social deprivation and community breakdown common in disadvantaged neighborhoods. 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.²⁰¹ 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. Approximately two million minor children in America have at least one parent in jail or prison.²⁰² Almost seventy percent of women in local jails and state prisons have minor children, and courts have incarcerated almost half of the women in local jails or state prisons on drug charges.²⁰³ Maintaining parent-child relationships is extremely difficult for many offenders in prison, because a significant majority of parents in state and federal prisons are incarcerated more than one hundred miles from their last place of residence.²⁰⁴

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

and of the repeated and/or lengthy incarceration of minorities and the poor for violations of drug laws.

199. CURRIE, *supra* note 87, at 19.

200. KLEIMAN, *supra* note 137, at 15, 149-50; TAL KLEMENT & ELIZABETH SIGGINS, HARVARD UNIV., A WINDOW OF OPPORTUNITY: ADDRESSING THE COMPLEXITIES OF THE RELATIONSHIP BETWEEN DRUG ENFORCEMENT AND RACIAL DISPARITY IN SEATTLE 39-40 (2001).

201. KLEIMAN, *supra* note 137, at 149-50.

202. LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, Special Report: WOMEN OFFENDERS 8 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf> (last visited Jan. 15, 2003).

203. *Id.* at 7-8.

204. CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 5 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (last visited Jan. 15, 2003).

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.²⁰⁵

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.²⁰⁶

5. *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.²⁰⁷ In addition, courts have waived the reasonable suspicion requirements for “street sweeps” by law enforcement, whereby flanks of police officers conduct intensive stops and searches in targeted areas of a city.²⁰⁸

No comparable law enforcement effort has involved more wiretaps, home searches and other encroachments on individual privacy than the War on Drugs.²⁰⁹ Nine out of ten police departments in the United States have paramilitary units that patrol urban areas and serve drug-related search warrants, which are usually “no-

205. WICKIZER, *supra* note 88, at 38.

206. See Spencer, *supra* note 32, at 371 (discussing the effectiveness of incarceration for drug offenders).

207. *United States v. Sokolow*, 490 U.S. 1, 11 (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. Robyn E. Blumner, *Amtrak: The Great American Snitch Train*, ST. PETERSBURG TIMES, June 24, 2001, at 1D. 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.” *Id.* Such profiles have been shown in other contexts to be based on invidious criteria such as an individual’s race. *Id.*

208. John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 584-85 (1991).

209. For example, about three-quarters of federal wiretaps are drug-related. ELEC. PRIVACY INFO. CTR., 1969-2001 FEDERAL SURVEILLANCE 35 (2001).

knock” entries into private homes.²¹⁰ The dedication of such a high level of resources toward drug-related law enforcement, along with the 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 of 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 required for an asset seizure, and some federal circuits have even upheld asset seizures despite the owner’s eventual acquittal of drug charges.²¹¹ Critics of the practice say it is “hardly distinguishable from punishment without trial,” where people are deprived of their criminal procedural rights.²¹² Civil asset forfeiture is also available to Washington’s law enforcement 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.²¹³ 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.”²¹⁴

Persons convicted of felonies in Washington, including drug offenders, lose the right to vote,²¹⁵ to hold public office,²¹⁶ and to serve as jurors.²¹⁷ Washington may also disqualify convicted per-

210. Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, SOC. PROBS., Feb. 1997, at 1.

211. See *United States v. Currency in the Amount of \$228,536*, 895 F.2d 908, 916 (2d Cir. 1990) (holding that the government has the burden of proving only that there is probable cause for belief that a substantial connection exists between the money to be forfeited and the exchange of a controlled substance).

212. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 49 (1998).

213. Sub. H.B. 1995, 57th Leg., Reg. Sess. (Wash. 2001). This legislature directed that the state bears the burden of proving whether seized assets were derived from illegal drug activity. *Id.* § 1(e). Previously, this had not been the case with *personal* property (cars, cash, boats, etc.). Substituted House Bill 1995 also provided for the award of attorneys’ fees to parties who successfully challenge the government’s forfeiture action. *Id.* Finally, the bill called for a legislatively-created work group to study further possible changes to Washington’s drug forfeiture statutes. *Id.* § 4(1).

214. Blumenson & Nilsen, *supra* note 212, at 56.

215. WASH. CONST. art. VI, § 3 (amended 1988); WASH. REV. CODE § 29.01.080 (1993).

216. WASH. CONST. art. II, § 7, art. III, § 25; WASH. REV. CODE § 29.65.010(3).

217. WASH. REV. CODE § 2.36.070(5).

sons from acting as a personal representative²¹⁸ or guardian.²¹⁹ 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.²²⁰

Access to higher education is another “right” put in jeopardy during the course of federal drug law enforcement. An amendment to the Higher Education Act of 1998 mandates that students convicted of drug charges become ineligible for federal financial aid and guaranteed student loans.²²¹ Yet, 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. Since 2000, 87,637 students in the United States have lost their eligibility for educational financial assistance due to drug convictions.²²² Critics of this provision assert that the rule is biased against the poor.²²³

The extent to which drug law enforcement has impinged upon civil liberties is most evident in the prisons—the United States now leads the world in per capita imprisonment. By way of comparison, France imprisons about ninety-five per 100,000 population for all offenses, and the United States imprisons about 150 per 100,000 *for*

218. *Id.* § 11.36.010.

219. *Id.* § 11.88.020(3).

220. See ELEC. PRIVACY INFO. CTR., *supra* note 209, at 36. 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. Telephone interview with R. Peggy Smit, Director of Research, Washington Department of Corrections (Aug. 15, 2001).

221. Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (1998).

222. ACLU DRUG POLICY LITIG. PROJECT, AM. CIVIL LIBERTIES UNION, COLLATERAL CONSEQUENCES OF THE WAR ON DRUGS 1 (2003), *available at* <http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=11706&c=77#FileAttach> (last visited Jan. 28, 2003).

223. See, e.g., Diana Jean Schemo, *Students Find Drug Law Has Big Price: College Aid*, N.Y. TIMES, May 3, 2001, at A12 (discussing the law’s affect on college students who commits minor offenses).

drug offenses alone.²²⁴ As former federal drug "czar" Barry McCaffrey has stated, "We have created an American gulag."²²⁵

6. 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.²²⁶ 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*.²²⁷ Approximately half of all police officers convicted in FBI-led corruption cases nationally between 1993 and 1997 were for drug-related offenses.²²⁸ Corrupt practices include knowingly conducting unconstitutional searches and seizures, stealing money and drugs, selling stolen drugs, protecting drug operations, and submitting false crime reports.²²⁹

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."²³⁰ 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.

224. Reuter, *supra* note 84, at 16-17.

225. General Barry R. McCaffrey, Keynote Address at the Opening Plenary Session of the National Conference on Drug Abuse Prevention Research at the National Institute on Drug Abuse, Washington, D.C. (Sept. 19, 1996).

226. See *Supreme Court Order Opens Way for Possible Impeachment of Judge*, WASH. POST, Apr. 6, 1993, at A4 (discussing the possible impeachment of a federal judge). Official corruption related to drugs has touched the federal bench, resulting in the impeachment and removal from office of United States District Court Judges Nixon (Miss.), Hastings (Fla.), and Aguilar (Cal.).

227. U.S. GEN. ACCOUNTING OFFICE, LAW ENFORCEMENT: INFORMATION OF DRUG-RELATED POLICE CORRUPTION 36-37 (1998).

228. *Id.* at 35.

229. *Id.* at 8.

230. BRUCE L. BENSON & DAVID W. RASMUSSEN, THE INDEPEN. INST., INDEPENDENT POLICY REPORT: ILLICIT DRUGS AND CRIME 33 n.33 (1996).

7. *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.²³¹

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.²³² 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.²³³ The Colombian government is cooperating, although there have been vociferous objections to the spraying of chemicals near rural villages, and some recent calls from Colombian elected officials for the legalization of drugs.²³⁴

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.²³⁵

231. DUKE & GROSS, *supra* note 148, at 6; KEVIN JACK RILEY, SNOW JOB? THE WAR AGAINST INTERNATIONAL COCAINE TRAFFICKING 101-244 (1996) (discussing the corruption of foreign nations that arises from the War on Drugs).

232. See, e.g., Christopher Marquis, *New Drug Plan Shifts Focus in Latin America*, N.Y. TIMES, May 17, 2001, at A8 (discussing the United States plan to combat drug in Latin America by addressing their social and economic consequences); Kirk Semple, *Powell Calls Colombia an Ally vs. Terror, US Refocuses Aid to Combat Rebels*, BOSTON GLOBE, Dec. 5, 2002, at A45.

233. Marquis, *supra* note 232, at A8; Semple, *supra* note 232, at A45.

234. See *World Briefing: The Americas: Colombia: Crop Eradication Can Resume*, N.Y. TIMES, Aug. 7, 2001, at A6 (discussing the objection to the spraying of crops by the United States by Colombian Amazons).

235. See Ethan A. Nadelmann, *Commonsense Drug Policy*, 77 FOREIGN AFF., Jan./Feb. 1998, at 111, 112-13 (discussing America's Drug Policy).

a. *Special Note on Drug Trafficking and International Terrorism*

Since the catastrophic terrorist attacks in New York, Washington D.C., and Pennsylvania on September 11, 2001, 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.²³⁶ 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.²³⁷ 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.²³⁸

The links between illegal drug producers, organized crime syndicates, and terrorist groups have 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.²³⁹ These groups have included the Shining Path in Peru, the Revolutionary Armed Forces of Colombia ("FARC"), Autodefensas Unidas de Colombia ("AUC"), and Ejercito de Liberación Nacional ("ELN") rebels in Colombia.²⁴⁰ With the end of the Cold War and the fi-

236. *JI Chief 'Was In Bali To Give Nod For Bar Bombs'*, SYDNEY MORNING HERALD, Jan. 27, 2003, at 4; *Senator Decries 'Myth' of Domestic Security*, Hous. CHRON., Jan. 25, 2003, at A27.

237. *War: Part Three the Aftermath—Drugs, Drought, Warlords, Mayhem. Peace is Dangerous, Bloody and Costly; The Experience of Afghanistan Suggests British Forces Would Need To*, INDEP. SUNDAY, Jan. 26, 2003, at 24 [hereinafter *Aftermath—Drugs*].

238. Evidence that Osama bin Laden was replenishing his coffers with money from drug trafficking was first reported on *CBS News* (CBS Television Broadcast, May 31, 2000).

239. See *Aftermath—Drugs*, *supra* note 237, at 20; see also *infra* notes 240-242 and accompanying text.

240. Mo Mowlam, *Comment & Analysis: Fight Terror: Legalise the Drugs Trade: Prohibition Only Fuels Criminality, Corruption and Violence*, GUARDIAN, Sept. 19, 2002, at 22 (discussing the connection between terrorist organizations and the Shining Path), available at <http://www.guardian.co.uk/drugs/Story/0,2763,794710,00.html> (last visited Jan. 15, 2003); *Major Armed Players in Colombia*, PHILA. INQUIRER, Dec. 11, 2002, at Int'l News (providing a brief summary of the Colombian rebels and their association to drugs and terrorism); Kirk Semple, *Farmer's Unrest Imperils U.S. Drug Fight in Peru*, BOSTON GLOBE, Dec. 2, 2002, at A1 (discussing the Peruvian Government's plight against the drug war and Shining Path group). Other armed groups deriving some funding from drug trafficking have included the Kosovo Liberation Army, the Irish Republican Army, and over thirty other groups on four continents. See R. Thomas Naylor, *Loose Cannons: Covert Commerce and Underground Finance in the Modern Arms Black Market*, 22 CRIME, L. & SOC. CHANGE 1, 45-47 (1995) (discussing the connection between armed groups and drug traffickers).

nancing of proxy wars by the United States and the Soviet Union, armed groups have turned to the illegal drug business for funding.²⁴¹ Interpol's chief drug control officer, Iqbal Hussain Rizvi, stated in 1994: "Drugs have taken over as the chief means of financing terrorism."²⁴²

8. *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 also drug use, drug dependence, and addiction are all on the rise, as are drug offenses and other crimes related to drugs. Furthermore, the devastating array of the drug enforcement system's harmful side effects outlined above overshadows its shortcomings. 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.

B. Reforming Drug Policy—Current Efforts

An increasing number of jurisdictions have attempted to reform their drug laws in recent years. Legislatures have effected most of these reforms at the local and state levels. At the federal level, the United States Department of Justice has provided local "drug courts" with assistance, but otherwise, the federal government has limited changes in federal drug policy to increasing the severity of penalties.²⁴³

241. Interview by Jawed Naqvi, Reuters News Agency with Iqbal Hussain Rizvi, Interpol's Chief Drugs Officer in New Delhi, India (Dec. 15, 1994).

242. *Id.*

243. See U.S. SENTENCING COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES v, 65-70 (Nov. 27, 2001 & Jan. 24, 2002) (discussing proposed amendments to the Federal Sentencing Guidelines), *available at* <http://www.ussc.gov/2002guid/2002N&Jpro.PDF> (last visited Jan. 15, 2003). For instance, the United States Sentencing Commission has recommended that equivalency value for the substance MDMA, commonly known as "Ecstasy," be raised from thirty-five grams to one kilogram of marijuana—a 2857% increase over prior sentencing valuations. 2 U.S. SENTENCING COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES i, 2 (Jan. 21, 2002), *available at* <http://www.ussc.gov/2001guid/userfrjan01.PDF> (last visited Jan. 15, 2003). The proposed amendment treats Ecstasy as being of comparable seriousness to heroin, and with heavier sanctions than powder cocaine. *Id.*

States have implemented drug policy reforms 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, 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.²⁴⁴ 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.²⁴⁵ At this point, any enacted changes have not been truly fundamental reforms, but only measures relating to discrete issues within the existing drug control system.

1. *Replacing Incarceration with Treatment— State Ballot Initiatives*

Two of the most dramatic drug policy reforms have taken place in Arizona and California, where voter initiatives changed the sanctions for drug law offenses.²⁴⁶ In both cases, the electorate

244. NORM MALENG, *BEYOND THE 'WAR': USING THE CRIMINAL JUSTICE SYSTEM TO BRING ADDICTS INTO TREATMENT* § 3-4 (2001) (stating that although incarceration may have lessened crime and drug sales, incarceration alone does not solve the issue of drug addiction or abuse), available at <http://www.metrokc.gov/proatty/Policies/Drugleg.htm#I> (last visited Jan. 15, 2003).

245. See, e.g., Gilbert Gallegos, *Governor to Pursue Changes in Drug Policy*, ALBUQUERQUE TRIB., Jan. 5, 2001, at A1 (stating that John Kane, senior judge of the U.S. District Court of Denver is part of New Mexico's Governor's Drug Policy Advisory Group that advocates for drug reform).

246. Robert Collier & Bill Wallace, *State Follows San Francisco's Lead in Drug Rehab*, S.F. CHRON., June 24, 2001, at A1 (discussing both Arizona's Proposition 200, that mandated treatment for non-violent first and second drug possessor's rather than incarceration, and California's Proposition 36, which allowed treatment in similar circumstances); Ethan A. Nadelmann, *Second Thoughts on the War on Drugs; Across the Country, the Drug Policy Reform Movement is Having Legislative and Ballot Victories*, PITT. POST-GAZETTE, Nov. 30, 2000, at A31; Peter Slevin, *Arizona's Anti-Drug Gamble: Taking Jail out of the Equation*, WASH. POST, Oct. 20, 2000, at A03. Other states have also passed drug policy reform measures by voter initiative. For instance, Alaska, Arizona, California, Colorado, Maine, Nevada, Oregon, and Washington—have enacted medical marijuana statutes by voter initiative. Similarly, citizen initiatives in Oregon and Utah have been enacted that restrict the civil forfeiture of assets

voted in favor of a system where treatment of drug addiction, and not imprisonment, is the primary response to illegal drug use.

The electorate approved Arizona's Proposition 200,²⁴⁷ the Drug Medicalization, Prevention and Control Act in 1996 with sixty-five percent of the popular vote.²⁴⁸ 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.²⁴⁹ The measure further requires the state to make eligible for parole all persons convicted and sentenced to prison terms for drug possession *before* the enactment of the new law, so long as they would have otherwise been eligible for probation under the statute.²⁵⁰

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.²⁵¹ With resources made available under Proposition 200, 98.2 percent of probationers received drug treatment, and 77.5 percent of them tested negative for drug use during fiscal year 1998.²⁵² Reporting on the cost savings under Proposition 200,

in connection with drug enforcement. For a summary of each state's reforms, see the Drug Policy Alliance website, at <http://www.drugpolicy.org/statebystate> (last visited Jan. 15, 2003).

247. ARIZ. SEC'Y OF STATE, 1996 BALLOT PROPOSITIONS: YOUR FUTURE . . . YOUR CHOICE. VOTE! 40 (1996) [hereinafter PROPOSITION 200], available at <http://www.sosaz.com/election/1996/General/1996BallotPropsText.htm> (last visited Jan. 15, 2003).

248. ARIZ. SEC'Y OF STATE, GENERAL ELECTION/UNOFFICIAL RESULTS (1996), available at <http://www.sosaz.com/results/1996General/GEN5600.htm> (last visited Jan. 15, 2003). 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 United States Congress. H.B. 2518, 43rd Leg., 1st Reg. Sess., (Ariz. 1997), available at <http://www.azleg.state.az.us/legtext/44leg/2r/bills/hb2518s.pdf> (last visited Jan. 15, 2003). Popular response to this move by the Arizona legislature came in 1998 in the form of Proposition 300, which, by a fifty-seven percent to forty-three percent margin, invalidated HB 2518 and restored Proposition 200. ARIZ. SEC'Y OF STATE, GENERAL ELECTION/UNOFFICIAL RESULTS (1998), available at <http://www.sosaz.com/results/1998general/BM300.htm> (last visited Jan. 15, 2003). Opposition to Proposition 300 came largely from law enforcement and pharmaceutical interests, while statements in support came largely from judges, attorneys, and physicians. PROPOSITION 200, *supra* note 247, at 28-40.

249. PROPOSITION 200, *supra* note 247, at 28.

250. *Id.* at 40.

251. ARIZ. STATE SUPREME COURT, DRUG TREATMENT AND EDUCATION FUND LEGISLATIVE REPORT, FY 1997-98, at 7-8 (1999), available at <http://www.courtinfo.ca.gov/programs/drugcourts/documents/arizona.pdf> (last visited Jan. 15, 2003).

252. *Id.* at 7, 9.

the Arizona State Director of Adult Probation stated that “probation with treatment works . . . [and that] the next step is to ensure that effective treatment is available to all who need it (probationers), with emphasis on attendance in and completion of court-ordered substance abuse treatment programs.”²⁵³ 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 reduce crime than any other state program, and saving taxpayer dollars at the same time.’”²⁵⁴

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 sixty-one percent of the popular vote.²⁵⁵ Similar to Arizona’s initiative, Proposition 36 mandates treatment in lieu of incarceration for first- and second-time drug possession offenses.²⁵⁶ 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.”²⁵⁷ Proposition 36 also directed the California legislature to allocate \$120 million annually for drug treatment as an alternative to incarceration and,²⁵⁸ like Arizona’s Proposition 200, requires annual reports on the effectiveness of the measure in reducing crime and public expenditures.²⁵⁹

While the effects of Proposition 36 are yet to be determined, the California Legislative Analyst’s Office estimates a total net savings for the local and state governments of \$100 million to \$150 million

253. DOUGLAS R. NORTON, STATE OF ARIZ. OFFICE OF THE AUDITOR GEN., REPORT TO THE ARIZONA LEGISLATURE: PERFORMANCE AUDIT: ADULT PROBATION PROGRAMS Introductory Letter (1999); BARBARA BRODERICK, THE ARIZONA EXPERIENCE: PROBATION WITH TREATMENT PROTECTS THE COMMUNITY (1999) (testifying before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, Committee of Government Reform, Arizona House of Representatives), available at <http://www.supreme.state.az.us/asd/testimony.htm> (last visited Jan. 15, 2003).

254. Hector Tobar, *California and the West; Drug Diversion Law in Arizona Paying Dividends; Treatment: Early Results Indicate Low Recidivism, Reduced Cost to Taxpayers Compared with Jailing Offenders. But Critics Say Statistics are Misleading*, L.A. TIMES, Apr. 21, 1999, at A3.

255. CAL. CAMPAIGN FOR NEW DRUG POLICIES, PROP 36 SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000 [hereinafter PROPOSITION 36], at <http://www.drugreform.org/prop36> (last visited Jan. 15, 2003).

256. *Id.* § 5 (to be codified at CAL. PENAL CODE § 1210.1 (b)(1) (West 2001)).

257. *Id.* (to be codified at CAL. PENAL CODE § 1210.1(d)).

258. *Id.* § 7 (to be codified at CAL. HEALTH & SAFETY CODE 10.8 § 11999.5).

259. *Id.* (to be codified at CAL. HEALTH & SAFETY CODE 10.8 § 11999.11).

per year, plus an estimated one-time cost savings of between \$475 million and \$575 million attributable to the avoidance of additional prison construction.²⁶⁰ The estimated savings do not include specific amounts from fees paid by offenders or savings in prosecution-related expenses, each of which may potentially be millions of dollars statewide.²⁶¹

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, they cannot measure the prevention of social disruption and emotional harm to individuals and their families in objective economic terms.

Other jurisdictions, including Washington, have filed or are considering similar voter initiatives.

2. *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.²⁶²

There are currently more than 785 drug courts in the United States, with an additional 453 in the planning stage.²⁶³ 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 Justice Programs Office estimated participant reten-

260. CAL. CAMPAIGN FOR NEW DRUG POLICIES, CALIFORNIA TAXPAYERS AND THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT A CALIFORNIA VOTER INITIATIVE — NOVEMBER 2000, AT 1 (2000), available at <http://www.drugreform.org/prop36/pdf/taxpayers.pdf> (last visited Jan. 15, 2003).

261. *Id.*

262. See GEBELEIN, *supra* note 61, at 2 (discussing the progress of drug courts in the United States).

263. JUSTICE PROGRAMS OFFICE, AM. UNIV., OJP DRUG COURT CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJECT (2001): SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY 46 (2002) [hereinafter SUMMARY OF DRUG COURT ACTIVITY 2001].

tion rate at greater than seventy percent.²⁶⁴ All fifty states and a number of American territories now have drug courts operating or in the planning stage.²⁶⁵

In Washington, there are at least twenty-two adult, juvenile, and tribal drug courts in operation and there are another thirteen planned.²⁶⁶ The first drug court in Washington began in King County in August 1994.²⁶⁷ Under the rules governing the King County drug court, eligible defendants can elect to proceed with the traditional court process or they may participate in the drug court, which 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."²⁶⁸ Defendants who satisfy the requirements for all three levels of the program graduate from the program and the court dismisses their charges.²⁶⁹ The court terminates from the program defendants who fail to make progress and sentences them on their original charge.²⁷⁰

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.²⁷¹ An ongoing study of Washington's six major adult drug court programs has been underway since 1999, conducted by the University of

264. JUSTICE PROGRAMS OFFICE, AM. UNIV., OJP DRUG COURT CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJECT (1999); DRUG COURT ACTIVITY UPDATE: SUMMARY INFORMATION § II (1999).

265. SUMMARY OF DRUG COURT ACTIVITY 2001, *supra* note 263, at 46.

266. *Id.* at 44.

267. KING COUNTY SUPERIOR COURT CLERK'S OFFICE, KING COUNTY DRUG DIVERSION COURT PROGRAM (2001), *available at* <http://www.metrokc.gov/kcsccl/drugcourt/> (last visited Jan. 15, 2003).

268. *Id.*

269. *Id.*

270. *Id.*

271. M. M. BELL, KING COUNTY DRUG COURT EVALUATION: FINAL REPORT 4 (1998). 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). *Id.* at 5. Nine percent of drug court "graduates" were re-arrested for a felony, compared to thirty-three percent of offenders who opted not to participate in the drug court program. *Id.* at 4-5. Statewide, drug courts have been estimated to save Washington taxpayers approximately \$2.45 for each dollar spent. WASH. STATE INST. FOR PUB. POLICY, CAN DRUG COURTS SAVE MONEY FOR WASHINGTON STATE TAXPAYERS? 2 (1999).

Washington's Alcohol and Drug Abuse Institute.²⁷² 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.²⁷³ The study's core findings show drug court "graduates" with fewer re-arrests following drug court than any of the other offender groups.²⁷⁴ Throughout Washington, the rate of imprisonment in the post-drug court referral period is near zero.²⁷⁵ In King County, the drug court graduation rate is twenty-nine percent (number of graduates/number of offenders entering the program) and the retention rate is forty-one percent [(graduates + active participants) / admissions].²⁷⁶

Due to fiscal constraints and eligibility restrictions, the drug court program has diverted a relatively small fraction of drug offenders. Each year since the program's inception in 1994, criminal courts have found eligible and referred to the drug court approximately 900 offenders, or twenty-one percent of all drug cases filed in King County in one year.²⁷⁷ Of those who are eligible, approximately one-third have chosen the drug court option.²⁷⁸

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.²⁷⁹ Drug courts may incarcerate on the original charge without trial participants who fail to

272. GARY COX ET AL., UNIV. OF WASH., DRUG COURT EVALUATION PROJECT FINAL REPORT vi (2001).

273. *Id.* at 9-23.

274. *Id.* at 9.

275. *Id.* at vi.

276. Telephone Interview with Mary C. Taylor, Administrator, King County Drug Diversion Court Program (Aug. 21, 2001).

277. *Id.*

278. 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. *Id.*

279. See KING COUNTY SUPERIOR COURT CLERK'S OFFICE, *supra* note 267 (discussing the drug court's requirements).

remain drug-free (which is not uncommon among drug-addicted individuals).²⁸⁰

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.²⁸¹ 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.

3. 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 legislature recently expanded the Drug Offender Sentencing Alternative program, providing an abbreviated prison sentence and drug treatment to eligible offenders.²⁸² 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 Connecticut,²⁸³ Indiana,²⁸⁴ Louisiana,²⁸⁵ Nevada,²⁸⁶ New Mexico, and New York.²⁸⁷

280. *Id.*

281. *See supra* Part III.A.

282. WASH. REV. CODE ANN. § 9.94A.660 (supp. 2002).

283. 2001 Conn. Acts No. 01-99, Sub. S.B. 1160 (Reg. Sess.) (giving judges discretion to waive the state's mandatory minimum sentences for drug offenders in individual cases).

284. IND. CODE ANN. § 12-23-6-1 (Michie 2001) (permitting 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.").

285. 2002 La. Acts 239, enacted this year, reduced sentences for drug offenses and other offenses.

286. Nevada recently reduced penalties for marijuana possession. A.B. 453, 2001 Leg., 71st Sess. (Nev. 2001).

287. There have been efforts to ameliorate New York State's mandatory minimum sentences known as the "Rockefeller-era drug laws," although no measure has yet been enacted. *See* Somini Sengupta, *A New Plan to Roll Back Drug Terms*, N.Y. TIMES, Mar. 13, 2001, at B1 (discussing the proposal to lessen New York's mandatory

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, they introduced ten drug policy reform bills.²⁸⁸ Five of those bills passed into law: syringe availability,²⁸⁹ anti-opioid overdose treatment,²⁹⁰ early release of prison inmates convicted of non-violent drug offenses,²⁹¹ restoration of voting rights for ex-offenders,²⁹² and expanded funding for treatment for drug addiction.²⁹³

Two bills that did not pass in New Mexico in 2001 related to medicinal use of marijuana²⁹⁴ and civil asset forfeiture.²⁹⁵ Three other bills that the legislature 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.²⁹⁶ The court would reduce the criminal offense in such cases to a misdemeanor and it would have resulted in conditional discharge (i.e., probation).²⁹⁷ 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.²⁹⁸

"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."²⁹⁹ Senate Bill 313 would have amended the habitual offender statute in New Mexico by restoring judicial discretion in determining whether to try defendants as habitual offenders in cases involving past or present use or sale of controlled substances.³⁰⁰

drug sentencing and more judicial discretion to impose treatment rather than prison time).

288. Gary Johnson, *Drug Policy Reform Proposals 2001 Regular Session of the New Mexico State Legislature*, Mar. 2, 2001.

289. S.B. 320, 45th Leg., 1st Sess. (N.M. 2001).

290. H.B. 813, 45th Leg., 1st Sess. (N.M. 2001).

291. S.B. 200, 45th Leg., 1st Sess. (N.M. 2001).

292. S.B. 204, 45th Leg., 1st Sess. (N.M. 2001).

293. S.B. 628, 45th Leg., 1st Sess. (N.M. 2001).

294. H.B. 431, 45th Leg., 1st Sess. (N.M. 2001).

295. S.B. 314, 45th Leg., 1st Sess. (N.M. 2001); H.B. 18, 45th Leg., 1st Sess. (N.M. 2001).

296. S.B. 317, 45th Leg., 1st Sess. (N.M. 2001).

297. *Id.*

298. *Id.*

299. Johnson, *supra* note 288.

300. S.B. 313, 45th Leg., 1st Sess. (N.M. 2001).

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.³⁰¹ 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.³⁰² 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 court.³⁰³ The person receiving the citation could also appear in magistrate's court in a civil proceeding to contest the citation.³⁰⁴ Money collected from such citations would go into the state general fund.³⁰⁵

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 legislature introduced and seriously considered the bills.

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 Senate Bill 317 in that it mandated treatment instead of incarceration for non-violent drug offenders.³⁰⁶ The King County Bar Association endorsed this bill.³⁰⁷ A committee amendment to the bill, however, 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.³⁰⁸ The

301. S.B. 315, 45th Leg., 1st. Sess. (N.M. 2001).

302. *Id.* § 1(A).

303. *Id.* § 1(B).

304. *Id.* § 1(C).

305. *Id.* § 1(G).

306. S.B. 5419, 57th Leg., Reg. Sess. (Wash. 2001) (original form); see H.B. 1722, 57th Leg., Reg. Sess. (Wash. 2001); see also S.B. 317, 45th Leg., 1st Sess. (N.M. 2001); PROPOSITION 36, *supra* note 255.

307. Letter from the King County Bar Association to the Judiciary Committee of the Washington State Senate, Re: Drug Law Reform—2001 Legislative Session, (Feb. 8, 2001) (on file with author).

308. Compare S.B. 5419, § 3 (original form), with S.B. Rep. No. 5419 (explaining that the bill, as finally enacted would reduce the length of incarceration for some drug delivery offenses rather than merely mandating treatment).

legislature was to allocate moneys saved by shortened prison terms to drug treatment programs.³⁰⁹

The drafter and primary promoter of the amended Senate Bill 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,
- 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.³¹⁰

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.”³¹¹ The criminal justice system, however, still supervises drug treatment, rather than leaving it 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 still only intends to modify the current system of criminal sanctions.

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. As this important debate continues, however, it remains to be seen

309. S.B. 5419, § 2. Savings from imposing shorter prison terms on drug offenders were to be placed in a Criminal Justice Treatment Account. *Id.*

310. MALENG, *supra* note 244, § 1.

311. *Id.* § 2.

whether legislatures will enact more fundamental reforms or merely tinker around the edges of current drug policy.

V. 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 it has also 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."³¹² Many scholarly studies, including the work of other bar associations, have come to the same conclusion.³¹³

312. UNIFORM CONTROLLED SUBSTANCES ACT, 9 U.L.A. 2 (amended 1994), *available at* <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ucsa94.pdf> (last visited Jan. 15, 2003). 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." *Id.*

313. *See, e.g.,* ASS'N OF THE BAR OF THE CITY OF N.Y., A WISER COURSE: ENDING DRUG PROHIBITION: A REPORT OF THE SPECIAL COMMITTEE ON DRUGS AND THE LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 3-5 (1994) [hereinafter *A Wiser Course*], *available at* <http://www.beyond-the-illusion.com/files/Mirrors/HyperReal-Archive/drugs/politics/legalization/wiser.course/> (last visited Jan. 15, 2003); JOINT COMM. OF THE AM. BAR ASS'N & THE AM. MED. ASS'N ON NARCOTIC DRUGS, DRUG ADDICTION: CRIME OR DISEASE?: INTERIM AND FINAL REPORTS 15-23 (1961).

Commentator Herbert Packer concluded in 1968 that:

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.

A. 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.³¹⁴ 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.³¹⁵ The lack of meaningful dialogue on drug policy has largely precluded the design of

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- (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 [African-Americans] 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.
 - (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, *THE LIMITS OF THE CRIMINAL SANCTION* 332-33 (1968) (emphasis added).

314. A recent national opinion poll found that seventy-four percent of Americans see the War on Drugs as a losing cause. THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *INTERDICTION AND INCARCERATION STILL TOP REMEDIES: 74% SAY DRUG WAR BEING LOST* 1 (Mar. 21, 2001), available at <http://www.people-press.org/reports/print.php3?ReportID=16> (last visited Jan. 15, 2003). The same poll, however, revealed that about fifty 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. *Id.* 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 (fifty-two percent) believe that drug use should be treated as a disease, compared to thirty-five percent who favor treating it as a crime. *Id.*

315. See Ethan A. Nadelmann, *Thinking Seriously About Alternatives to Drug Prohibition*, 121 DAEDALUS, Summer 1992, at 85, 89-94 (discussing alternatives to drug prohibition). 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.” *Id.* Although the latter two groups are not amenable

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. Drug use, however, 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:

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 aim 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 for courts to impose on persons who use drugs to the detriment of their dependents (children and the elderly) and

to compromise, considerable common ground could be found between the other two factions. *Id.*

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 the court can determine that a chemical dependency contributed to the offense. The courts, however, should provide those offenders with 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. The legislature could obtain funding for those programs from the substantial cost savings that will accrue from no longer relying on the use of criminal sanctions.

B. 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, drug policy reform clearly needs one or more such alternatives.

Federal law should permit the states to develop their own drug control strategies and structures, using the 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. The 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.³¹⁶

316. 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'

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 a new, state-level regulatory structure for controlled substances, whereby an extensive network of laws and regulations would govern manufacturing, sale, labeling, and advertising. Additionally, 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 states would regulate and tax marijuana 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.

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.

W. GOVERNOR'S ASS'N, POLICY RESOLUTION 00-024: DRUG POLICY IN THE WEST § B2 (2000), *available at* <http://www.westgov.org/wga/policy/00/00024.htm> (last visited Jan. 15, 2003). A central recommendation of the Association of the Bar 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." A WISER COURSE, *supra* note 313, at 572.

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.

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 Washington Revised Code § 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.³¹⁷

The Task Force believes it is possible for the people of Washington to fashion a similar general policy with regard to other drugs, a

317. WASH. REV. CODE § 70.96A.010 (2002).

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. Drug policy sorely needs change, and its form should be widely debated and implemented with all deliberate speed.

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