

GLOBAL COMMISSION ON DRUG POLICIES



DRUG POLICY, CRIMINAL JUSTICE AND MASS IMPRISONMENT

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Executive summary

The last three decades have witnessed a global increase in the criminalization of improper drug use. Criminalization has resulted in increased use of harsh punitive sanctions imposed on drug offenders and dramatic increases in rates of incarceration. These policies have had limited impact on eliminating or reducing illegal drug use and may have resulted in adverse consequences for social and community health. The criminal justice system has proved to be an ineffective forum for managing or controlling many aspects of the drug trade or the problem of illegal drug usage. In recent years, some progress has been reported when governing bodies have managed drug use and addiction as a public health problem which requires treatment, counseling and medical interventions rather than incarceration.

Primarily as a result of drug policy, the number of people currently incarcerated worldwide is at an all time high of ten million.

In the United States, the prison population has increased from 300,000 in 1972 to 2.3 million people today. One in 31 adults in the United States is in jail, prison, on probation or parole. The American government currently spends over 68 billion dollars a year on incarceration.

Drug Policy and the incarceration of low-level drug offenders is the primary cause of mass incarceration in the United States. 40% of drug arrests are for simple possession of marijuana. There is also evidence that drug enforcement has diverted resources from law enforcement of violent crimes and other threats to public safety.

Incarceration of low-level drug offenders has criminogenic effects that increase the likelihood of recidivism and additional criminal behavior.

Enforcement of drug policy against low-level users and small scale trafficking has been racially biased and fueled social and political antagonisms that have undermined support of drug policy.

Growing evidence indicates that drug treatment and counseling programs are far more effective in reducing drug addiction and abuse than is incarceration.

Needle exchange, compulsory treatment, education, counseling, drug substitutes like Methadone or Naxolene have proved highly effective in reducing addiction, overdose and the spread of HIV and Hepatitis C.

The last three decades have witnessed a global increase in the criminalization of improper drug use. Criminalization has resulted in increased use of harsh punitive sanctions imposed on drug offenders and dramatic increases in rates of incarceration. These policies have had limited impact on eliminating or reducing illegal drug use and may have resulted in adverse consequences for social and community health. The criminal justice system has proved to be an ineffective forum for managing or controlling many aspects of the drug trade or the problem of illegal drug usage. In recent years, some progress has been reported when governing bodies have managed drug use and addiction as a public health problem which requires treatment, counseling and medical interventions rather than incarceration. Most experts agree that drug-related HIV infection, the spread of infectious diseases like Hepatitis C and related public health concerns cannot be meaningfully addressed through jail and imprisonment and are often aggravated by policies which are primarily punitive. This paper briefly reviews this

issue and identifies some of the costs of over-reliance on incarceration and outlines new strategies.

Criminal justice policy and increased use of sanctions and incarceration for low-level drug offenders

The Criminalization of Drugs and the Legacy of Mass Imprisonment

Criminalization of possession and illegal use of drugs compounded by mandatory sentencing and lengthy prison sanctions for low-level drug use has become the primary cause of mass incarceration. The global prison population has skyrocketed in the last three decades with ten million people worldwide now in jails and prisons. The extraordinary increase in the number of people now incarcerated has had tremendous implications for state and national governments dealing with global recession and a range of economic, social and political challenges. Research indicates that resources that would otherwise be spent on development, infrastructure, education and health care have been redirected over the last two decades to incarcerating drug offenders, many of whom are low-level users. The trend toward mass incarceration has been especially troubling in the United States. In the last thirty-five years, the number of U.S. residents in prison has increased from 330,000 people in jails and prisons in 1972 to almost 2.3 million imprisoned people today.¹ The United States now has the highest rate of incarceration in the world.²

Over five million people are on probation and parole in America.³ Currently, one out of 100 adults is in jail or prison and one out of 31 adults is in jail, prison on probation or parole.⁴ The consequences of increased incarceration and penal control strategies have been dramatic and costly. Many states spend in excess of \$50,000 a year to incarcerate each prisoner in a state prison or facility, including non-violent, low-level drug offenders. Corrections spending by state and federal governments has risen from \$6.9 billion in 1980 to \$68 billion in 2006 in America.⁵ During the ten year period between 1985 and 1995, prisons were constructed at a pace of one new prison opening each week.⁶

The economic toll of expansive imprisonment policies has been accompanied by socio-political consequences as well. Mass incarceration has had discernible impacts in poor and minority communities which have been disproportionately impacted by drug enforcement strategies.⁷ Collateral consequences of drug prosecutions of low-level offenders have included felon disenfranchisement laws, where in some states drug offenders permanently lose the right to vote.⁸ Sociologists have also recently observed that the widespread incarceration of men in low-income communities has had a profound negative impact on social and cultural norms relating to family and opportunity. Increases in the imprisonment of poor and minority women with children have now been linked with rising numbers of displaced children and dependents.⁹ Drug policy and the over-reliance on incarceration is seen by many experts as contributing to increased rates of chronic unemployment, destabilization of families and increased risk of reincarceration for the formerly incarcerated.¹⁰

There are unquestionably serious consequences for community and public health when illegal use of drugs is widespread. Addiction and other behavioral issues triggered by drug abuse have well known consequences for individuals, families, communities and governing bodies

trying to protect public safety. Governing bodies are clearly justified in pursuing policies and strategies that disrupt the drug trade and the violence frequently associated with high-level drug trafficking. Similarly, drug abuse is a serious problem within communities that threatens public health and merits serious attention. However, some interventions to address drug abuse are now emerging as clearly more effective than others. Consequently, interventions that reduce drug dependence and improve the prospects for eliminating drug addiction and abuse are essential if measurable improvements on this issue are to be achieved in the coming years.

Drug Policy and the Criminal Justice System

Many countries have employed the rhetoric of war to combat the drug trade. While there are countries where violent drug kingpins have created large militias that have necessitated more militarized responses from law enforcement, most drug arrests are directed at low-level users who have been the primary targets in the “war on drugs.” States have criminalized simple possession of drugs like marijuana and imposed harsh and lengthy sentences on people arrested. Small amounts of narcotics, unauthorized prescription medicines and other drugs have triggered trafficking charges that impose even lengthier prison sentences. The introduction of habitual felony offender laws has exacerbated drug policy as it is not uncommon for illegal drug users to accumulate multiple charges in a very short period of time. Under the notorious “three strikes laws” that have become popular in America, drug offenders with no history of violence may face mandatory minimum sentences in excess of 25 years in prison. Thousands of low-level drug offenders have been sentenced to life imprisonment with no chance of parole as a result of these sentencing laws.

In the United States, drug arrests have tripled in the last 25 years, however most of these arrests have been for simple possession of low-level drugs. In 2005, nearly 43% of all drug arrests were for marijuana offenses. Marijuana possession arrests accounted for 79% of the growth in drug arrests in the 1990s.¹¹ Nearly a half million people are in state or federal prisons or a local jail for a drug offense, compared to 41,000 in 1980.¹² Most of these people have no history of violence or high-level drug selling activity.

The “war on drugs” has also generated indirect costs that many researchers contend have undermined public safety. The federal government has prioritized spending and grants for drug task forces and widespread drug interdiction efforts that often target low-level drug dealing. These highly organized and coordinated efforts have been very labor intensive for local law enforcement agencies with some unanticipated consequences for investigation of other crimes. The focus on drugs is believed to have redirected law enforcement resources that have resulted in more drunk driving, and decreased investigation and enforcement of violent crime laws. In Illinois, a 47% increase in drug arrests corresponded with a 22% decrease in arrests for drunk driving.¹³ Florida researchers have similarly linked the focus on low level drug arrests with an increase in the serious crime index.

In prison, as a result of the increased costs of incarceration, most drug addicts are less likely to receive drug treatment and therapy. The increasing costs of mass imprisonment have eliminated funds for treatment and counseling services even though some of these services have proved to be very effective. In 1991, one in three prison inmates was receiving treatment while incarcerated, today the rate is down to one in seven.¹⁴ The decline of treatment and counseling services makes re-offending once released much more likely. This is one of the ways in which incarceration and criminal justice intervention has proved costly and less

effective than other models of managing illegal drug use.

Racially Discriminatory Enforcement of Drug Laws

In the United States, considerable evidence demonstrates that enforcement of drug policy has proved to be racially discriminatory and very biased against the poor. America's criminal justice system is very wealth sensitive which makes it difficult for low-income residents to obtain equally favorable outcomes as more wealthy residents when they are charged with drug crimes. Targeting communities of color for enforcement of drug laws has added to the problems of racial bias in American society and generated some of the fiercest debates about the continuing legacy of racial discrimination. Illegal use of drugs is not unique to communities of color and rates of offending are not higher in these communities than they are in non-minority communities. African Americans comprise 14% of regular drug users in the United States, yet are 37% of those arrested for drug offenses and 56% of those incarcerated for drug crimes.¹⁵ Black people in the United States serve almost as much time in federal prison for a drug offense (58.7 months) as whites serve for a violent crime (61.7 months), primarily as a result of the racially disparate sentencing laws such as the 100-1 crack powder cocaine disparity.¹⁶ For years, the sentences for illegal possession or use of crack cocaine, which is more prevalent in communities of color, were 100 times greater than possession or use of equivalent amounts of powder cocaine, leading to dramatically longer prison sentences for African Americans. In 2010, Congress amended this law and reduced the disparity from 100-1 to 12-1. However, the failure to make the law retroactive has left the costly and troubling racial disparities uncorrected. Hispanic people are also disproportionately at much greater risk of arrest and prosecution for drug crimes than are whites in the United States.

Discriminatory enforcement of drug laws against communities of color has seriously undermined the integrity of drug policy initiatives and frequently these policies are perceived as unfair, unjust and targeted at racial minorities. Enforcement of drug laws tends to be directed at low-income communities or residential and social centers where residents have less political power to resist aggressive policing and engagement. Even some reforms aimed at shielding low-level drug offenders from incarceration have been skewed against the poor and people of color. Some data show that people of color are more likely to be redirected back to the criminal courts if drug court personnel have discretion. Similarly, many community-based programs that permit drug offenders to avoid jail or prison have significant admission fees and costs that many poor people simply cannot afford. Discriminatory enforcement of drug policy has undermined its effectiveness and legitimacy and contributed to continuing dysfunction in the administration of criminal justice.

There is Growing Evidence that Drug Treatment is More Cost Effective than Incarceration and Incapacitation Strategies

One of the clear consequences of mass incarceration directed at low level drug offenders has been to acculturate and socialize illegal drug users into criminality through extended incarceration. This criminogenic effect has been seen in studies that examined rates of recidivism among drug offenders who are given probation and not sent to jail or prison and drug offenders who are incarcerated for the same offenses.¹⁷ In purely human terms, these findings reveal that incarceration may be dramatically more costly than other approaches.

However, the economic analysis of approaches to low level drug offending that avoid

incarceration are even more compelling. Whatever the measure, data indicates that drug treatment is more cost effective than incarceration. In California, a study has recently shown that spending on drug treatment is eight times more likely to reduce drug consumption than spending on incarceration. Corresponding decreases in drug-related crime were also documented when comparing drug treatment programs with incarceration. In a RAND analysis study, treatment was estimated to reduce crime associated with drug use and the drug trade up to 15 times as much as incarceration. These findings have been reflected in other studies that have also found that drug treatment is more cost effective in controlling drug abuse and crime than continued expansion of the prison system when looking at low level drug offenders.

Consequently, many states have now started to shift their management of drug offenders to drug courts that have discretion to redirect people who illegally use drugs away from jail or prison and into community-based treatment, counseling and therapeutic interventions. The early signs suggest that these innovations are saving states millions of dollars and accomplishing improved public safety. For the first time in 38 years, 2010 saw a slight decrease in the national state prison population in the United States. Significant reductions will need to continue to deal with a global recession and decreasing resources available for incarceration.

New and more effective strategies for managing low-level drugoffenders are emerging

Proponents of “Harm Reduction” have long argued that a more effective way to combat illegal drug use is to spend more on public education, treatment and interventions that view illegal drug use as a public health problem rather than continued spending on incarceration and harsh sanctions. Supporters of harm reduction acknowledge that the use of incarceration and sanctions will be necessary when illegal drug trafficking or distribution threatens public safety, however, they contend that most drug arrests don’t directly implicate public safety. States are beginning to recognize the benefits associated with harm reduction and in recent years have begun to reallocate resources with surprisingly good outcomes.

Sentencing Reform

In recent years, states have begun to retreat from mandatory sentences and other harsh strategies for enforcing drug laws and moved to alternative models that involve probation, treatment, counseling and education. Between 2004 and 2006, at least 13 states expanded drug treatment or programs which divert drug offenders away from jail or prison into community-based programs.¹⁸ States like Michigan have recently amended statutes that required a mandatory sentence of life imprisonment without parole for distribution of cocaine or heroin.¹⁹ With over 5 million people on probation or parole in the United States, drug use on parole or probation has become the primary basis by which thousands of people are returned to prison. These technical violations of parole or probation account for as many as 40% of new prison admissions in some jurisdictions. In recent years, states have restricted the length of incarceration imposed when formerly incarcerated people test positive for recent drug use. These new statutes and direct formerly incarcerated drug users into drug therapy and counseling programs.

The federal government has amended mandatory sentencing laws for drug offenders and seen

a dramatic reduction in the number of people facing long-term incarceration for low-level drug use. These sentencing reforms are considered critical to containing the costs of mass imprisonment in the United States and for generating resources necessary to approach drug addiction and abuse as a public health problem.

Drug courts have also emerged in the last decade to play a critical role in redirecting low-level drug offenders away from traditional, punitive models of intervention for illegal drug use. Drug courts have been set up in hundreds of communities. Court personnel have discretion to order drug treatment and community-based programs where offenders must receive counseling and treatment and receive education concerning drug addiction and abuse. By shielding thousands of drug offenders from incarceration and transfer to overcrowded prisons, drug courts have reduced the collateral consequences of illegal drug use, saved millions of dollars and had more favorable outcomes for people who have been identified as illegally using drugs. Drug court participants can avoid a criminal record and all the disabling collateral consequences associated with a criminal record.

Reducing the penalties for some low-level drug crimes, giving judges more discretion to avoid unwarranted and lengthy mandatory sentences and retreating from the rhetoric of war and unscientific policy analysis could substantially reduce incarceration rates and provide additional resources for treatment options that are more effective at eliminating drug abuse.

Medical and Public Health Models for Drug Abuse Intervention

The risk of criminal prosecution has had many unintended consequences, especially for people with addiction problems who also have critical medical issues that require treatment and intervention. HIV infection and AIDS continue to threaten many countries with tragic and devastating effect. Intravenous drug users are primary targets for infection and have extremely elevated risks of illness from sharing needles. Rather than facilitating less hazardous practices for this community, criminal justice interventions have forced people with addiction underground and infection rates have spiraled. Providing clean needles and other strategies associated with needle exchange have had a significant impact on reducing the rate of HIV infection and offering people with addiction issues an opportunity for treatment. Creating safe zones where people struggling with drug addiction can safely come has also greatly increased the ability of public health officials to provide education, counseling and treatment opportunities that are scientifically proven to be effective to the population with the greatest needs. For example, where needle-exchange has been implemented, the results have been extremely promising for controlling illegal drug use and reducing public health threats.

Policies that make it permissible for people to safely admit to drug addiction problems are well-established to be more effective at managing drug addiction. In 2006, there were 26,000 deaths in the United States from accidental drug overdose, the highest level ever recorded by the Centers for Disease Control.²⁰ Accidental death through overdose is currently the leading cause of injury-related death for people between the ages of 35-54. This extraordinarily high level of death through overdose can only be meaningfully confronted with public education efforts and improving treatment options for people who are abusing drugs.

Criminalization has created huge and complex obstacles for people motivated to eliminate their drug dependence to seek or obtain necessary health care and support. When public health options are made available, studies have reported dramatic declines in drug dependence,

mortality and overdose. Medical developments have proved extremely effective in reducing drug dependence and addiction. A range of maintenance therapies are available for people with addiction problems. Methadone maintenance has been cited as the primary intervention strategy for people with heroin addiction. Drugs like Naloxone have been utilized in an extremely effective manner to save lives when people ingest too many opiates. However, these very cost effective treatments are not possible without providing safe opportunities to report drug and overdose issues to health care providers who are free to treat rather than arrest people with addiction and drug dependence.

Conclusion

Mass imprisonment, the high economic and social costs of incarcerating low-level drug offenders and the ineffectiveness of criminalization and punitive approaches to drug addiction have had poor outcomes in many countries. Governing bodies have available dozens of new, scientifically tested interventions which have been proved to lower rates of drug abuse and addiction without incarceration. Reducing illegal drug use and disrupting the sometimes violent drug trade will require new and more effective strategies in the 21st century. The politics of fear and anger that have generated many of these policies must be resisted and adoption of scientifically established treatment protocols that have been found effective and successful should be pursued vigorously.

1. THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 1 (2005), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>; Press Release, U.S. Dep't of Justice, Bureau of Justice Statistics (Oct. 23, 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/press/p04pr.htm>.

2. Marc Mauer, *Comparative International Rates of Incarceration: An Examination of Causes and Trends, Presented to the U.S. Commission on Civil Rights* 2 (June 23, 2003), available at www.sentencingproject.org/pdfs/pub9036.pdf; INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Chesney-Lund eds., 2002).

3. Lauren E. Glaze & Seri Palla, *Probation and Parole in the United States, 2004*, BUREAU OF JUSTICE STATISTICS BULLETIN 1 (Nov. 2005), available at www.ojp.usdoj.gov/bjs/pub/pdf/ppus04.pdf.

4. "1 in 31: The Long Arm of Corrections," Pew Charitable Trusts Report (2009).

5. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 31ST EDITION (2008), available at www.albany.edu/sourcebook.

6. See MARC MAUER, RACE TO INCARCERATE 1, 9 (1999) ("[m]ore than half of the prisons in use today have been constructed in the last twenty years."); see also Michael Tonry & Joan Petersilia, *American Prisons at the Beginning of the Twenty-First Century*, in PRISONS 1, 12 (Michael Tonry & Joan Petersilia eds., 1999).

7. One-third of black males born today likely will spend at least some part of their lives behind bars; nearly one-tenth of black males in their twenties already live in prison; and almost one out of three black males in their twenties currently remains in jail, prison, on probation or parole, or otherwise under criminal justice control. Marybeth Lipp, *A New Perspective on the "War on Drugs": Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 1022 (2004). The annual arrest rate among African-Americans is more than two and a half times the white rate. D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 454 (2003). Some scholars have argued that mass imprisonment presents an institutional impediment to progress and equality for African Americans that has historical antecedents in slavery and American racial apartheid laws. See Loic Wacquant, *From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the US*, 13 NEW LEFT REV. 41 (2002).

8. Many states strip people who have been convicted of felonies from voting rights even while they are on probation or parole. Fourteen states permanently bar voting rights for some or all ex-felony offenders unless they are pardoned. Marc Mauer & Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States* (Feb. 2005), available at <http://www.sentencingproject.org/pdfs/barredforlife.pdf>.

9. The number of women serving sentences in state and federal prisons in the United States skyrocketed from 5635 in 1970 to 92,751 in 2003. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 31ST EDITION (2003), available at www.albany.edu/sourcebook. As of 1997, 65% of women incarcerated in state prisons and 59% of women in federal prisons had minor children. More than two-thirds of those mothers lived with their children prior to being incarcerated. In 1999, almost 1.5 million American children had a parent in prison; over half of these children were African-American. Christopher J. Mumola, U.S. Department of Justice, Bureau of Justice Statistics, *Incarcerated Parents and Their Children* 2, 4 (Aug. 2000), available at www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf.

10. Some have argued that mass incarceration has lowered crime rates and that reduced crime is a substantial upside worth some acknowledgment. See, e.g., Eli Lehrer, *The Left's Prison Complex: The Case Against the Case Against Jail*, NATIONAL REVIEW, Oct. 9, 2000; James Q. Wilson, *Remarks at the Independent Institute's Independent Policy Forum*, Jan. 19, 1995, <http://www.independent.org/events/transcript.asp?eventID=63#2>. However, even that alleged benefit is fiercely debated. While incarceration rates have risen and crime rates have decreased across the country, states where the growth of incarceration is below-average have seen their violent crime rates decline at twice the rate of states with above-average increases in incarceration. Jenni Gainsborough & Marc Mauer, *Diminishing Returns: Crime and Incarceration in the 1990s* (Sept. 2000), available at <http://www.sentencingproject.org/pdfs/9039.pdf>. The overwhelming increase in the numbers of imprisoned people is primarily due to the incarceration of drug offenders and people convicted of non-violent crimes: while the number of incarcerated violent offenders almost doubled between 1980 and 1998, the number of nonviolent offenders tripled and the number of drug offenders increased 1040%. Vincent Shiraldi, *Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Correctional Costs*, 14 FED. SENT. R. 332 (2002). The impact of increased incarceration in these crime categories has so far demonstrated little societal benefit and very little reduction in crime. Quite to the contrary, as Congress recognized in passing the Prison Rape Elimination Act of 2003, violence in prison makes "brutalized inmates" more likely to commit crimes

upon release. *See* 42 U.S.C. § 15601(8). The evidence also suggests that prison overcrowding, which has increased with the rising incarceration rates, results in higher rates of recidivism. David P. Farrington & Christopher P. Nuttall, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 J. CRIM. JUST. 221, 230 (1980).

11."A 25-Year Quagmire: The War on Drugs and Its Impact on American Society," The Sentencing Project (Sept. 2007), pg. 2.

12.Id.

13.Id., "The ' War on Drugs' Distorts Law Enforcement Priorities in Fighting Crime," pg. 5.

14."Drug Use and Dependence, State and Federal Prisons, 2004, Bureau of Justice Statistics, (Oct. 2006).

15. Sentencing Project Report, Sept. 2007, pg. 2.

16.Id, at 2.

17.Spohn and Holleran, "The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders," *Criminology*, Vol. 40 (2002).

18. Ryan King, "Changing Direction: State Sentencing Reform, 2004-2006," Sentencing Project 2007.

19. "The War on Drugs," Sentencing Project, pg. 25.

20.The Drug Police Alliance, "Preventing Overdose, Saving Lives" (DPA 2009).