Ineffective, Unjust and Inhumane:
Mandatory Prison Sentences for Drug Offences

John Howard
THE JOHN HOWARD SOCIETY OF CANADA
La SOCIÉTÉ JOHN HOWARD DU CANADA

Brief to the Senate Standing Committee on Legal and Constitutional Affairs regarding Bill C-15, An Act to amend the Controlled Drugs and Substances Act and to make consequential amendments to other Acts

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Mission Statement of the John Howard Society of Canada: *"Effective, just and humane responses to the causes and consequences of crime."*

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Ineffective: Bill C-15 is likely to worsen existing conditions in the illicit drug market because it fundamentally misunderstands the nature of the drug market by presuming that users and traffickers will be deterred by mandatory minimum sentences. A large body of evidence, particularly from the United States where mandatory minimum sentencing regimes *are currently being repealed,* contradicts the thrust of Bill C-15. American experience further demonstrates that mandatory sentences will have unintended consequences which will *exacerbate* the conditions Bill C-15 seeks to address. Mandatory minimum sentences will have little effect on drug-market crimes because harsh sentences do not address the demand drivers. Mandatory minimum sentences will, however, grow prison populations as they have in the U.S.; accelerate the spread of blood-borne diseases through needle sharing in prisons; further burden already over-extended provincial justice systems; fill to bursting provincial correctional and remand facilities; impose fiscal costs on provincial correctional systems; and brutalize those persons subjected to mandatory minimum sentences. Bill C-15 will, if the American experience teaches anything, be costly and ineffective with minimal effect on drug market activity.

Unjust: Bill C-15 will produce unjust sentencing outcomes, unnecessarily adding to the burden of suffering that already characterizes a prison sentence, and thereby making successful reintegration more difficult. The American experience reveals that mandatory minimum sentences for drug market related crimes fall disproportionately on those persons at the bottom of the drug-market hierarchy – while having minimal effect on the "kingpins" who profit from the economics of drug prohibition. Bill C-15 will likely target persons who are already marginalized as a consequence of ethnicity, race, socio-economic origins, mental illness and addictions. Mandatory minimum sentences have been shown by international experience to produce excessively harsh sentences which offend against principles of proportionate sentencing by sentencing the *crime* rather than the *offender* – a distortion of our justice system – while shifting judicial discretion to police and prosecutors as criminal justice officials surreptitiously conspire to ameliorate the disproportionately harsh consequences of sentencing regimes regarded by practitioners as unjust.

Inhumane: Unjust sentences are inhumane, in and of themselves, because they destroy the lives of drug users and their families and undermine the integrity of the criminal justice system by imposing ethical burdens on the officials who work in it. Mandatory minimum sentences in the United Sates are largely responsible for the explosion of that country's prison population – which has had the consequence of brutalizing many hundreds of thousands of non-violent offenders, greatly complicating successful reintegration. Sentencing non-violent offenders to mandatory minimum sentences is, in effect, to condemn them to permanent stigmatization through a criminal record, making them pay for youthful indiscretion or bad luck for the balance of their natural lives, denying them opportunities to which they would otherwise be entitled. Mandatory sentences will harm the mental and physical health of drug users by exposing them to inhumane conditions of confinement where treatment is rare and inadequate. Typically, the burden of mandatory minimum sentencing will fall hardest on persons – predominantly minority Aboriginal and Black – already disadvantaged by birth, education, place of residence, socio-economic status and sheer luck.

Recommendations

1. As Bill C-15 targets crimes arising from business transactions surrounding illicit drugs – but misunderstands the nature of these transactions – The John Howard Society of Canada, in keeping with our values and principles for effective, just and humane criminal justice policy and practice, calls on the Government of Canada to launch a royal commission to investigate and make recommendations on the best way to respond to violent crimes arising from illicit drug-business transactions. The commission should call witnesses of international stature and should, in its recommendations, be driven by peer-reviewed evidence and comparative historical experience of drug prohibition, the crime arising from drug transactions under conditions and prohibition, and resulting legislative responses. All deliberations and reports should be published in full.

2. The JHSC calls on the Senate Standing Committee on Legal and Constitutional Affairs to commission a panel of independent experts to conduct an evidence-based evaluation of international experience with mandatory minimum sentencing practices to evaluate (a) their effectiveness for violent crimes arising from drug prohibition business transactions; (b) their agreement with principles of fundamental justice and human rights; (c) their concordance with principles of proportionate sentencing; (d) their potential consequences for exacerbating re-offending by persons subjected to a mandatory minimum sentence; and, (e) their public health implications for exacerbating the conditions of drug addicted offenders and the families and communities to which they return. All deliberations and analyses should be published in full.

3. In keeping with the government's commitment to accountability in public spending, The JHSC calls on the Senate Standing Committee on Legal and Constitutional Affairs to commission the Parliamentary Budget Officer to expedite a cost-benefit analysis of the projected fiscal implications for provincial justice – including legal aid – and correctional systems of the effects of mandatory minimum sentences in Bill C-15, and to publish this analysis in full.

4. In keeping with the government's commitment to accountability in public spending, The JHSC urges the Senate Standing Committee on Legal and Constitutional Affairs to amend Bill C-15 to mandate a cost-benefit analysis by the Parliamentary Budget Officer of the projected crime reduction outcomes of mandatory sentences as envisioned by Bill C-15 no later than 2012 and to publish this evaluation in full.

Introduction: The John Howard Society's Mission and Principles

The John Howard Society of Canada (JHSC) is Canada's oldest voluntary sector non-governmental charitable organization committed to safer communities and reduced re-offending through pro-social reintegration of prisoners at the end of their sentences.

JHSC's Mission is *"effective, just and humane responses to the causes and consequences of crime."*[1]

Sixty-five offices across Canada – with the contribution of thousands of volunteer hours – deliver best-practices services and programs to offenders and their children, as well as crime prevention services and programs to at-risk youth and their parents.

Each John Howard Society affiliate, including the JHSC itself, is governed by a volunteer board of directors according to the highest ethical standards mandated by Canada's *Voluntary Sector Initiative.*[2] All fundraising is conducted in full compliance with *Imagine Canada's* ethical criteria.

The long experience of The John Howard Societies is that crime reduction is best accomplished through targeting conditions that give rise to crime in the first place – the communities and contexts from which criminal behaviour arise – and by rehabilitating persons the better to cultivate and encourage pro-social and crime-free lifestyles upon release from incarceration.

The JHSC is not "soft on crime" nor "tough on crime." The JHSC endorses policies and practices that are ***smart on crime.***

The JHSC partners with Correctional Services Canada (CSC) both to realize *The Purposes* of the Corrections and Custodial Release Act[3] (CCRA) and to ensure that CSC is held to the highest possible standard of service and program delivery consistent with the Charter of Rights and Freedoms, the purposes of the CCRA, and Canada's obligations under the United Nations Declaration of Human Rights.

The JHSC believes that criminal justice policy – *precisely because it is a defining feature of Canadian civilization* – ought to be the concern of all democratic citizens, not just their leaders, and that it is the obligation of NGOs like the JHSC to ensure that governments of all kinds adhere to the values of "effective, just and humane" in accordance with the principles of fundamental law and consistent with the best evidence on what works to create a safer society in which crime is managed according to the best available research in the scientific literature. The JHSC is not "soft on crime" nor "tough on crime." The JHSC endorses policies and practices that are ***smart on crime.***

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[1] See JHSC's *Mission, Core Statements and Principles* at http://www.johnhoward.ca/jhsmiss.htm

[2] http://www.vsi-isbc.org/eng/index.cfm

[3] "The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community" at http://laws.justice.gc.ca/en/showdoc/cs/C-44.6/bo-ga:l_I-gb:s_3//en#anchorbo-ga:l_I-gb:s_3

Ineffective: Bill C-15 will not have its intended effects and is likely to worsen existing conditions in the illicit drug market

Nothing in the American experience, where mandatory minimum sentences have been widely used, or in the research literature conducted over the last forty years gives reason to think that mandatory sentencing for drug market crimes, as envisioned by Bill C-15, will achieve its intended objectives because the premise upon which Bill C-15 is founded is false and contradicted by experience. Indeed, evidence on mandatory minimum sentencing from the U.S. shows that mandatory minimums actually *increase* crime and re-offending by released prisoners, and *encourage* the spread of blood borne diseases by drug addicted prisoners. Not only are mandatory minimum sentences ineffective in regard to drug offences, a survey of international experience conducted for the Department of Justice judged mandatory minimum sentences "to be *least effective* in relation to drug offences."[1]

> "Mandatory minimum sentences seem to be *least effective* in relation to drug offences." (Gabor and Crutcher, 2002)

A Short History of Mandatory Minimum Sentences

Public policy and scientific knowledge concerning mandatory sentencing practices "have long been marching in different directions" – at least since the death penalty debates of 18th-Century England – when juries sometimes refused to convict for capital crimes by exercising their right to convict for a lesser offence.[2] Additionally, as more capital offences were created, the courts narrowed their procedural and evidentiary rules to get around unduly harsh penalties, resulting in more acquittals on technicalities. Accordingly, the actual proportion of convicted offenders sentenced to death actually declined throughout the late 18th-Century even as capital offences increased in number. Mandatory penalties, in practice, provoked a variety of adaptive responses from juries, prosecutors and judges. They either refused to convict, devised technical procedures to discharge cases or widened their discretionary use of pardons and other post-conviction measures to avoid carrying out excessively harsh sentences.[3] In short, for as long as mandatory minimum sentences have been around, so have efforts to blunt their impact.

> "Basic new insights concerning application of mandatory penalties are unlikely to emerge … We now know what we are likely to know, and what our predecessors knew, about mandatory penalties. As instruments of public policy, they do little good and much harm." (Tonry, 1990)

So discredited is the concept of mandatory minimum sentences, for drug-related crimes in particular, that even New York State's Rockefeller Drug Laws – the template for the

[1]Emphasis added. Thomas Gabor and Nicole Crutcher, "Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures," (Department of Justice, Research and Statistics Division: January 2002) online at http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2002/rr02_1/rr02_1.pdf

[2]Michael Tonry, "Learning from the limitations of deterrence research," in Tonry, Ed., *Crime and Justice: A Review of Research,* Volume 37, (The University of Chicago, 2008), p. 279.

[3]Michael Tonry, "Mandatory Penalties," in Tonry, Ed., *Crime and Justice: A Review of Research,* Volume 15, (The University of Chicago, 1992), pp. 246-9.

American experiment in mass incarceration – have been repealed.[1] The combination of fiscal crisis, severe and inhumane overcrowding, racial injustice and the unintended consequences for crime rates of mass incarceration, have compelled 31 American states to reform their sentencing regimes.[2] Key to the amendments in the repeal of the Rockefeller Drug Laws[3] is eliminating mandatory minimum sentences, *precisely the opposite of what Bill C-15 proposes to enact,* by turning sentencing discretion back to judges.

This gives rise to JHSC's first critical observation in regard to Bill C-15; that the legal regime of which Bill C-15 is a part – *i.e.,* drug prohibition through supply suppression and punishment – cannot be made to 'work better' than it currently is -- and has, in fact, been discredited in theory and practice. Even long-time American jurisdictions with mandatory minimum sentences for drug-related crimes – including states with "three-strikes" rules – are beginning to extricate themselves from mandatory minimum sentencing regimes because they do not produce the outcomes in crime reduction for the social and economic costs they incur (See Appendix E). Indeed, there is gathering evidence that mandatory minimum sentences may *cause* crime and *exacerbate* re-offending. Instead of seeking to enact harsher sentences in a futile attempt to make drug prohibition do what it cannot – *i.e.,* curtail drug use through supply suppression strategies – the government should refocus its energies on demand reduction, harm reduction, treatment, research, education and anti-poverty initiatives grounded in scientific evidence.

Key to the amendments in the repeal of the Rockefeller Drug Laws is eliminating mandatory minimum sentences: *precisely the opposite of what Bill C-15 proposes to enact.*

Drug prohibition through supply suppression and punishment – of which Bill C-15 is a component – cannot be made to 'work' any better than it currently is.

Faulty Theory Leads to Unintended Outcomes

Deterrence-based sentencing practices, such as the mandatory sentences Bill C-15 envisions, rest upon a theory borrowed from microeconomics by which a prison sentence is akin to a "price in a market for crime." Crime is assumed to be like any other activity for which incentives and costs can be manipulated to achieve desired outcomes. In this view, derived from Gary Becker's "price theory of crime," a mandatory minimum sentence is comparable to adding $10,000 to the price of a pizza.[4] Since no rational person would choose to pay $10,000 for a pizza the deterrent effect is presumed to create an incentive to choose an alternative, because a rational person always seeks to maximize

[1] http://www.drugpolicy.org/news/pressroom/pressrelease/pr040309.cfm

[2] See Appendix D: "State Responses to Mandatory Minimum Laws" and Ryan S. King, "The State of Sentencing 2008: Developments in Policy and Practice," *The Sentencing Project* (Washington, DC: February 2009) online at http://www.nicic.org/Library/023571

[3] See Madison Gray, "New York's Rockefeller Drug Laws," *Time Magazine,* April 2, 2009.

[4] Gary Becker (1968). "Crime and Punishment: An Economic Approach". *The Journal of Political Economy* 76: pp. 169–217.

their utility (however they define that) in compliance with the laws of supply and demand.

The challenge then – if crime is presumed to be an activity in a market like any other market – is "to get the prices right" (see Appendix A). The problem is that most of the crimes for which mandatory sentences have been enacted are not comparable to other kinds of choices in other kinds of markets – and the offenders who commit such crimes do not display the essential rationality that the theory requires in order to operate as expected. Nor is information sufficiently available to dissuade potential offenders even if they *were* rational enough to be deterred by the price of a mandatory sentence. Many offenders simply don't believe they will be caught even when they have already served a sentence for the same or similar crime.[1] Consider Conrad Black: well educated, rational, well informed and a sophisticated calculator of his interests. Though otherwise intelligent, rational and successful, he refused to behave the way deterrence theory predicts. Like Livent's founders Garth Drabinsky and Myron Gottlieb, Conrad Black simply believed he would never get caught.

A large body of research argues that offenders at whom mandatory sentences are targeted doubt they will be caught, hence the deterrent effect is inoperative.

The deterrent value of a mandatory sentence is diminished unless the likelihood of apprehension is greater than the benefit of the crime (see Appendix C). Where drug market crimes are concerned, the likelihood is usually smaller than the potential for profit from any given drug market transaction. This is in the nature of market transactions in a context of prohibition.

The greater error, of which Bill C-15 is only an instance, is in the attempt to respond to the failure of drug prohibition by doing more of what isn't already reducing drug-market crime. This error derives from a failure of logic in the National Anti-Drug Strategy: the inability to distinguish between crimes that arise *from the possession and use* of drugs from crimes that arise *as a result of the prohibition* of drugs. The National Anti-Drug Strategy falls into this error by refusing to acknowledge that a great percentage of drug trafficking – for which the Strategy proposes prison sentences – is conducted in order to maintain an addiction, for which the Strategy offers treatment. So the National Anti-Drug Strategy promises to do two contradictory things to the same person at the same time – punish and rehabilitate – while simultaneously de-funding and dismissing evidence-based scientific and public health strategies including needle exchange and harm reduction measures. An even greater logical error derives from the fact that the National Anti-Drug Strategy, even assuming the enactment of Bill C-15, can alter the iron laws of supply and demand that govern economic relationships under conditions of prohibition. The drug economy operates much like any other economic enterprise – except that it is considerably more profitable due to the effect of criminal prohibition on prices to end users. Our drug laws, premised upon supply suppression and punishment,

Bill C-15 makes a specific error – based on the ineffectiveness of deterrence through mandatory minimum sentences – and is itself embedded in a greater error; that mandatory minimum sentences can trump the laws of supply and demand.

[1] See John J. Donohue III, "Economic Models of Crime and Punishment," in *Social Research,* "Punishment: The U.S. Record," Volume 74:2 (Summer 2007), pp. 379-412.

produce what has been called "the alchemy of prohibition" – turning low value processed agricultural products into commodities worth literally more than their weight in gold.

According to a recent analysis from the United Kingdom, the current mark up in value from farm gate to end user is conservatively estimated at 1,191% per kilo for cocaine and 2,220% per kilo for heroin on the streets of England and Wales.[1] As Milton Friedman wrote to President Nixon, "so long as large sums of money are involved – and they are bound to be if drugs are illegal – it is literally hopeless to expect to end the traffic or even to reduce seriously its scope."[2] So Bill C-15 makes a specific error based on the ineffectiveness of deterrence through mandatory minimum sentences, and is itself embedded in a greater error; that mandatory minimum sentences can trump the laws of supply and demand.

"I can't think of a criminal justice strategy that has been more unsuccessful than the Rockefeller Drug laws." (Gov. David Paterson, *Time Magazine,* April 2, 2009)

This error is well understood by drug policy experts in government. The director of Prime Minister Blair's Anti-Drug Coordination Unit claimed that

> what was truly depressing about my time in the Anti-Drug Coordination Unit was that the overwhelming majority of professionals I met, including those from the police, the health service, the government and voluntary sectors held the same view: the illegality of drugs causes far more problems for society and the individual than it solves.[3]

A United States Senator recently confided to the editor of *Foreign Policy* that "most of my colleagues know that the war on drugs is bankrupt, but for many of us, supporting any form of decriminalization of drugs has long been politically suicidal."[4]

Bill C-15 fundamentally misunderstands how drug prohibition fails and so reproduces this error in its presumption that harsher sentences will alter the behavour of drug market actors. It is *drug prohibition* – not the drugs themselves – that ensures that the business of drug trafficking remains profitable. As long as drug trafficking is profitable it will attract new entrants because mandatory prison sentences cannot annul the economic law that demand creates supply. Therefore, initiatives like the National Anti-Drug Strategy, which emulate long discredited supply-side enforcement efforts, will reproduce the failure of all prohibition-based policies because the strategy focuses on supply rather than demand.

"Like first-world-war generals, many will claim that all that is needed is more of the same. In fact the war on drugs has been a disaster, creating failed states in the developing world even as addiction has flourished in the rich world. By any sensible measure, this 100-year struggle has been illiberal, murderous and pointless. That is why *The Economist* continues to believe that the least bad policy is to legalise drugs." (*The Economist,* March 5, 2009)

[1] *A Comparison of the Cost-effectiveness of the Prohibition and Regulation of Drugs,* Transform: Drug Policy Foundation (April 2009), p. 24 at www.tdpf.org.uk

[2] *Newsweek*, May 1972.

[3] Julian Critchley in "Ex-drugs policy director calls for legalisation," *The Manchester Guardian,* Wednesday, August 13, 2008.

[4] Moisés Naím, "Wasted: The American prohibition on thinking smart in the drug war," *Foreign Policy,* May/June 2009, online at http://www.foreignpolicy.com/story/cms.php?story_id=4861

"Becker's model was brilliant and would be unassailable if the model fully captured the calculus of potential criminals and the factors influencing the decision to commit crime, and if criminals were fully rational, well informed, sufficiently solvent to be responsive to high monetary sanctions and risk neutral. Unfortunately, none of these conditions are true." (Donohue, 2007)

Mandatory minimum sentences for drug crimes will change nothing in the drug-market behaviour of traffickers and addicted users. A University of Chicago econometric analysis of imprisoning drug offenders concluded that although drug offenders in the United States comprise 33% of all inmates in state and federal prisons as of 2004, the overall reduction in violent and property crimes between 1980 and 2000 was in the range of 1 – 3%.[1] Note that this analysis covers the 20 years when mandatory minimum sentences for drug crimes were a feature of all state and federal sentencing regimes.

The American Experience with Mandatory Sentencing Regimes

Canadians have the unique advantage of living across the border from a natural experiment in the use of mandatory minimum sentencing for drug related crimes. Not only have our American neighbours made extensive use of mandatory sentences, they have done so in a manner that facilitates numerous kinds of comparative and before-and-after evaluations (see Appendix B). No less than five major analyses have evaluated mandatory sentencing practices throughout post-war U.S. history[2] – to say nothing of the numerous peer-reviewed studies in the scholarly literature. Among their consensus findings (see Appendix D) are two of particular relevance to Canada. Mandatory sentencing practices: (a) shift discretion from judges to prosecutors and police officers; and (b) produce high trial rates and unacceptable disparities in sentencing outcomes,[3] which fall most heavily on members of minority communities and the very people already at a disadvantage *vis-à-vis* the criminal justice system. There is no obvious reason to suppose that the same disparities would not be reproduced in Canada.

"The national movement toward mandatory minimum sentences has been a symbolic campaign [with] little if any effect on the criminal justice system or public safety. With regard to crime reductions, the law has had minimal impact." (Austin, *et al.,* 1999)

Indeed, in the United States – like in 18th-Century England – "there is considerable evidence that police, prosecutors, judges and juries alter their behaviour to offset the effects of punishment policy changes with which they disagree, thereby undermining the likelihood of achieving marginal deterrent effects."[4]

"studies [of mandatory minimum sentences] do not provide a basis for inferring that increasing the severity of sentences is capable of enhancing deterrent effects." (von Hirsch, 1999)

[1] Ilyana Kuziemko and Steven Levitt, "An empirical analysis of imprisoning drug offenders," *Journal of Public Economics* 88 (2004), p. 2062.

[2] *U.S. Sentencing Commission* of 1991, *Joint Committee on New York Drug Law Evaluation* of 1978, *The Michigan Felony Firearm Statute on Judicial Dispositions* of 1979, and two evaluations of the Massachusetts mandatory prison sentence for the carrying of a firearm from 1977.

[3] *U.S. Sentencing Commission,* 1991, p. 76.

[4] Tonry, "Learning from the limitations of deterrence research," p. 280.

The United States today incarcerates approximately 1% of its adult population – or 2.38 million Americans – outstripping even Russia and China, with another 5 million on probation or parole, many of them convicted for the very crimes Bill C-15 targets. This historic development has provoked the creation of a *National Criminal Justice Commission Act 2009* – under Senator Jim Webb – to examine all aspects of the American prison crisis including the role of mandatory penalties.[1]

Senator Webb is responding to the fact that existing practices – especially mandatory penalties and limits to judicial discretion – have resulted in the incarceration of people for non-violent, mostly drug possession or trafficking, crimes through what is known as the "net-widening effect." Though formally targeted at drug "kingpins," mandatory minimum sentences, in practice, seldom affect these persons because higher-level drug dealers can almost always plea-bargain a lesser charge by turning over lower level dealers (see Appendix F). Lower level dealers and users, by contrast, seldom have such contacts and therefore have little with which to bargain. Hence mandatory minimum sentences in the United States have been responsible for incarcerating low-level non-violent users and traffickers – the small fish – but have been much less successful at catching the "kingpins."[2] Additionally, drug prices have continued their long decline while availability and purity have continued to climb since the Reagan-era proliferation of mandatory sentences modelled on the Rockefeller Drug Laws.

> "What we've done with the laws we passed over the last 20 years is thrown our net out there too widely and picked up too many little fish. We filled our prisons with non-violent, first-time offenders, and with no noticeable increase in public safety." (State Sen. Stewart Greenleaf (R-PA) NCSL Roundtable September 26, 2008)

Mandatory minimum sentences – as instruments of crime control – have also shown themselves to be subject to the law of diminishing returns, by which

> the larger the group of offenders scooped up by prisons, the lower the payoff in terms of crime reduction. It certainly pays to remove the most prolific offenders from the streets. But once they are locked up, more incarceration grabs the second and third and tenth tier offenders who are less likely to commit as many crimes. So gradually, the crime-prevention payoff declines.[3]

It turns out that mass incarceration – fuelled by mandatory minimum sentencing regimes – has had only a modest effect on crime reduction, which rates have been trending downward in any event since their peak in the early 1990s. Recent scholarship estimates

[1] See http://webb.senate.gov/

[2] Molly Gill, "Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums," Families Against Mandatory Minimums (September 2008) online at http://caliber.ucpress.net/doi/abs/10.1525/fsr.2008.21.1.55

[3] Pew Center on the States, *One in 31: The Long Reach of American Corrections* (Washington, DC: The Pew Charitable Trusts, March 2009), p. 18.

that, at best, the American experiment in mass incarceration might account for 25% of the overall decline in violent crime – leaving full 75% to be explained by other factors.[1]

The incarceration of non-violent offenders drains justice system resources and distracts attention from repeat and violent offenders. Yet incarceration of drug traffickers has not curtailed drug-related business because of the "replacement effect" – the widely replicated phenomenon for a new drug dealer to immediately replace an incarcerated one.[2] Mandatory penalties do not deter drug crimes: what they do accomplish is the growing of prison populations and the wasting of justice system resources on warehousing of non-violent and first time offenders. That is the American experience and the challenge that Senator Webb has assumed. The historical record shows that it is the wide proliferation of mandatory sentences that accounts for the explosion in rates of incarceration in the United States[3] – even as the overall crime rate was trending downward. Despite the proliferation of mandatory minimum sentences across the United States, there is little credible evidence that changes in sanctions affect crime rates by enhancing deterrence (see Appendix E).

> "Drugs are a tragedy for addicts. But criminalizing their use converts that tragedy into a disaster for society, for users and non-users alike. Our experience with the prohibition of drugs is a replay of our experience with the prohibition of alcoholic beverages." (Milton Friedman, 1979)

Summing up the evidence as of 1999, von Hirsch concluded that "the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects."[4]

Counterintuitive Conclusions

Mandatory minimum sentences for drug related crimes such as those in Bill C-15 are presumed to reduce drug-market activity through the deterrent effect of a harsh sentence. But surprising conclusions emerge from studies of drug market operations in the United States: police disruption of established drug markets through increased arrest rates provokes competition between unaffected drug traffickers for the remaining market share, thereby leading to *increases* in violence between remaining criminal groups and individuals.[1] This is what is currently happening on the streets of Vancouver: rival suppliers are shooting it out with

> "If locking up those who violate the law contributed to safer societies, then the United States should be the safest country in the world. In fact the United States affords a glaring example of the limited impact that criminal justice responses may have on crime." ~ Bob Horner MP, *Crime Prevention in Canada: Toward a National Strategy* (Ottawa: House of Commons, 1993).

[1] Marc Mauer, "Lessons of the 'Get Tough' Movement in the United States," Presented at the International Corrections and Prison Association's 6th Annual Conference in Beijing, China, 25 October 2004, p. 3. Online at http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=429

[2] See http://www.sentencingproject.org/Admin/Documents/publications/inc_iandc_complex.pdf

[3] Pew Center on the States, *One in 31: The Long Reach of American Corrections* (Washington, DC: The Pew Charitable Trusts, March 2009).

[4] Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney and P-O. Wikstrom, "Criminal Deterrence and Sentence Severity: An Analysis of Recent Research," 1999 online at http://members.lycos.co.uk/lawnet/SENTENCE.PDF

each other over control of the market which has been disrupted by arrests and prosecutions of drug traffickers. This is predicted by economic theory because it is precisely what happens in other – legal – markets when a competitor goes bankrupt: other suppliers compete to fill the resulting market vacuum.

The law of unintended consequences produces another perverse outcome. As Sanho Tree observes,

> "Get tough" policies have caused the drug economy to evolve under Darwinian principles. By escalating the drug war, the kinds of people the police typically capture are the ones who are dumb enough to get caught. Thus, law enforcement tends to apprehend the most inept and least efficient traffickers. Conversely, the kinds of people law enforcement tends to miss are the most cunning, innovative and efficient traffickers.[2]

This finding is endorsed by Harvard economist Jeffrey Miron. After evaluating international rates of violence associated with enforcement of drug prohibition laws, Miron concludes that contrary to conventional wisdom "the degree of enforcement of drug prohibitions across countries is positively related to national rates of violence."[3]

Canadians cannot hope to win a war on drugs when our policies ensure that only the most efficient traffickers survive. Not only do they survive, but they thrive because law enforcement has destroyed the competition for them by picking off the unfit and letting the most evolved take over. Drug prohibition has the unintended outcome of weeding out the less efficient and less brutal traffickers, and we are watching this unfold on the streets of Vancouver.

Stricter enforcement of drug prohibition leads to more violence, not less. (J. Miron, 2001)

Post-Incarceration Consequences of Harsh Sentences

What does the research literature reveal about the post-incarceration effects of imprisoning drug users? This is a question that greatly interests The John Howard Societies across Canada, as it is our mission to clean up on the after effects of incarceration. Again, the United States supplies the necessary lessons as a consequence of its historic growth in incarceration.

[1]Edward Shepard and Paul Blackley, "Drug Enforcement and Crime: Recent Evidence from New York State," *Social Science Quarterly,* 86:2 (June 2005), p. 336.

[2]Sanho Tree, Director of Drug Policy Project for the *Institute for Policy Studies* in Washington, DC at http://www.ips-dc.org/staff/sanho

[3]Jeffrey Miron, 2001, "Violence, Guns and Drugs: A Cross-Country Analysis," *Journal of Law and Economics,* 44(2, pt 2): pp. 615-34.

"Harsher prison conditions are associated with significantly more post-release crime." (Chen & Shapiro, 2006)

Although mass incapacitation does suppress certain kinds of crime for short periods of time, there is now abundant evidence that, on balance, "" because inmates "acquire skills, learn of new prospects, or develop criminal contacts" during incarceration.[1] The old wisdom of prisons being "universities of crime" – through the peer learning effect – turns out be true. A U.S. study of "peer-learning" in prison found that – rather than suppressing rates of crime – "exposure to peers with a history of committing a particular crime increases the probability that an individual *who has already committed the same type of crime* recidivates with that crime."[2]

Second: "Research has consistently found that longer prison terms do not reduce recidivism."[3] This result has been studied in numerous jurisdictions across the United States, most recently in California where the *Center on Juvenile and Criminal Justice* was able to compare results in neighbouring communities with differing rates of incarceration across different age groups. The authors concluded that "if greater imprisonment reduces crime,"

> we would expect that age groups whose imprisonment rate rose the fastest — that is, those ages that had the most criminal members removed from their populations through incarceration — would show the biggest reductions in crime. The opposite is the case."[4]

Recommendation No. 1:

As Bill C-15 targets crimes arising from business transactions surrounding illicit drugs – but misunderstands the nature of these transactions – The John Howard Society of Canada, in keeping with our values and principles for effective, just and humane criminal justice policy and practice, calls on the Government of Canada to launch a royal commission to investigate and make recommendations on the best way to respond to violent crimes arising from illicit drug-business transactions. The commission should call witnesses of international stature and should, in its recommendations, be driven by peer-reviewed evidence and comparative historical experience of drug prohibition, the crime arising from drug transactions under conditions and prohibition, and resulting legislative responses. All deliberations and reports should be published in full.

[1]M. Keith Chen and Jesse M. Shapiro, "Does Prison Harden Inmates? A Discontinuity-based Approach," (National Bureau of Economic Research, December 4, 2006) Online at http://sentencing.nj.gov/downloads/pdf/articles/2007/Jan2007/document08.pdf

[2]Patrick Bayer, Randi Pintoff and David Pozen, "Building Criminal Capital Behind Bars: Social Learning in Juvenile Corrections," (Yale University, Economic Growth Centre, July 2003) online at www.nber.org/papers/12932

[3]Barbara S. Vincent and Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, United States Federal Judicial Center, 1994, p. 12 online at http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf

[4]Research Update: "Does more imprisonment lead to less crime?" October 2008, http://www.cjcj.org/index.php

Unjust: Bill C-15 will result in unjust sentencing outcomes, unnecessarily adding to the burden of suffering that characterizes a prison sentence

Mandatory minimum sentences conflict with fundamental principles of sentencing. They sentence *the crime* as a class rather than *the offender* as a person – a violation of proportional sentencing which is regarded as a bedrock principle of criminal justice in Canada. Mandatory minimum sentences forbid judges from considering a variety of relevant details, such as the defendant's age, employment history, family ties and responsibilities, public service, and charitable works. Those sentenced under mandatory minimum sentencing rules are stripped of their individuating traits (both good and bad), placed into uniform groups that belie real differences, and then crammed into pigeonholes of punishment. Prosecutors, not judges, become the true sentencers in the criminal justice system.

> Sentencing the crime *as a class* rather than the offender as an individual produces disparities which, if the American pattern holds, will fall disproportionately upon already marginalized and socially disadvantaged minority populations, such as aboriginal youth.

The great flaw of mandatory minimum sentences – as envisioned by Bill C-15 – is that the most qualified and knowledgeable decision-makers in the criminal justice system on the details of any given case are rendered impotent at sentencing while politicians, far from the circumstances of the crime, the context and the offender, sentence by remote control.

> "It may salve the desire to punish. But don't get that confused with rehabilitation. Don't make the mistake of believing that punishment will help anything." (Robert L. Johnson, MD, New Jersey Medical School, 2007)

Mandatory minimum sentencing has fueled the explosion of incarceration in the United States. But our American neighbors have not enjoyed a reduction in crime commensurate with their rate of incarceration – and the experiment with mass incarceration has proven to be extremely costly to individuals, families and communities. Overreliance on prison will make Canada – like it has the United States – *less* safe rather than more because when offenders are sent to prison they may be more likely to re-offend than if they serve probation or a community-based sentence. This is particularly true for non-violent offenders who may actually *become* violent as a consequence of their incarceration. So the injustice of a mandatory minimum sentence is a burden not only to the sentenced offender but also to the community to which that offender is released if the experience of incarceration turns a non-violent offender into a violent one. We have shown that a preponderance of evidence concludes that incarceration tends to harden and embitter offenders, particularly through sentences in provincial remand facilities where there is limited pro-social programming, overcrowding and high turnover of prisoner population.

> The injustice of a mandatory minimum sentence is a burden not only to the sentenced offender but also to the community to which that offender is released if the experience of incarceration turns a non-violent offender into a violent one.

Increasingly, scholars of the American criminal justice system are coming to the appreciation that *prison itself* is criminogenic – that it encourages or teaches offenders to

commit further offences – and that, on balance, prison makes worse what is already bad. Summing up a study of youth incarceration conducted for the *Centres for Disease Control,* Dr. Robert Johnson observed that "not only does [incarceration] not deter youth crime, it actually makes youth more violent."[1]

It is inhumane to subject young persons – who may show promise of rehabilitation – to an environment that is likely to make them more violent through the imposition of a mandatory penalty.

Mandatory sentencing schemes have been shown to play a significant role in generating informants and, particularly, jailhouse informants. Informant evidence is precisely the kind of evidence that has been responsible for the wrongful conviction of Donald Marshall Jr., David Milgaard, Guy Paul Morin – and who knows how many others? Furthermore, American experience reveals that some accused will turn informant while others will confess to crimes they could not possibly have committed to avoid the prospect of a mandatory sentence.

"Not only does [incarceration] not deter youth crime, it actually makes youth more violent." (RL Johnson, 2007)

Unjust and Arbitrary Sentencing Outcomes

The soul of a justice system resides in its ability to deliver sentences proportionate to the crime and balanced against the circumstances of the offender and the context in which the crime was committed. Mandatory minimum sentences obliterate this requirement by introducing a degree of arbitrariness that undermines the legitimacy of the rule of law and subverts the principles of proportionate sentencing. Chief Justice Beverly McLachlin has written that the "absence of arbitrariness requires that punishment be tailored to the acts and circumstances of the individual offender."[2] It is for this reason that – as stated by the Report of the Canadian Sentencing Commission – mandatory sentencing guidelines "meet with extreme resistance from judges as well as from most professionals involved in the administration of criminal law."[3] It is unwise – the John Howard Society contends – to enact laws which are likely to provoke resistance from the very officials charged with administering them particularly where, as the US experience demonstrates, they will not have demonstrable crime reducing or offender deterring effects. Additionally, any practice that has been shown by experience to generate inequities and arbitrariness in sentencing is likely to violate the principle of restraint in the use of the criminal justice system.

The JHSC affirms that sentencing is an individual process that must reflect the specifics of the offence and the offender.

[1] http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf

[2] McLachlin C.J., Chief Justice, Supreme Court of Canada. Sauve v. Canada (Chief Electoral Officer) 2002 SCC 68.

[3] *Sentencing Reform: A Canadian Approach* (Ottawa: Report of The Canadian Sentencing Commission, 1987), p. 294.

The reluctance to impose punishments that repeat the crime on the offender is what separates us morally from the act of the criminal. It is for this reason that the *Criminal Code* does not define punishment solely in relation to the harm suffered by the victim. Proportionality is achieved when the gravity of the offence, along with the degree of responsibility of the offender, is used to establish where a sentence should fall in relation the relative severity of other sentences. And it is for this reason that sentences must be done by those who hear the case – judges – because parliament cannot consider individual circumstances and without such consideration the penalty is likely to be arbitrary and potentially unconstitutional.

> "Politicians often support mandatory sentencing laws because such sentences are said to send a denunciatory message and because harsh penalties are supported by large numbers of the general public, even if they cost a great deal and accomplish little." (Sheehy, 2001)

Looked at from the historical experience of the United States, the wide introduction of mandatory sentencing regimes in that country now appears to have been motivated by a failure of imagination and – more seriously – a failure to ask the right questions. Instead of asking "What can we do to reduce our level of incarceration?" American policy makers at all levels asked "What can we do to appear 'tough on crime'?"

Their answer – greater use of mandatory sentences – was the wrong answer, but it was the answer consistent with the (wrong) question.

Closing Thoughts

In a powerful speech before the American Bar Association in August 2003, United States Supreme Court Justice Anthony M. Kennedy questioned the fairness and effectiveness of mandatory minimum sentences:

> I can accept neither the necessity nor the wisdom of mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust. Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to [prosecutor] often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.[1]

[1]Quoted in Charles R. Alexander and Rebecca Carroll, "We're Supposed to Sentence Individuals, Not Crimes" -- *A Survey of Commonwealth of Pennsylvania Court of Common Pleas Judges on Mandatory Minimum Sentencing Statutes* (October 4, 2006)

Recommendation No. 2:

The JHSC calls on the Senate Standing Committee on Legal and Constitutional Affairs to commission a panel of independent experts to conduct an evidence-based evaluation of international experience with mandatory minimum sentencing practices to evaluate (a) their effectiveness for violent crimes arising from drug prohibition business transactions; (b) their agreement with principles of fundamental justice and human rights; (c) their concordance with principles of proportionate sentencing; (d) their potential consequences for exacerbating re-offending by persons subjected to a mandatory minimum sentence; and, (e) their public health implications for exacerbating the conditions of drug addicted offenders and the families and communities to which they return. All deliberations and analyses should be published in full.

Recommendation No. 3:

In keeping with the government's commitment to accountability in public spending, The JHSC calls on the Senate Standing Committee on Legal and Constitutional Affairs to commission the Parliamentary Budget Officer to expedite a cost-benefit analysis of the projected fiscal implications for provincial justice – including legal aid – and correctional systems of the effects of mandatory minimum sentences in Bill C-15, and to publish this analysis in full.

Inhumane sentences undermine the integrity of the criminal justice system

Mandatory minimum sentences, particularly when they involve long periods of incarceration are incompatible with the Fundamental Principle of Sentencing as set out in section 718.1 of the Criminal Code, specifically that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

As such they are liable to give rise to inhumane sentences – particularly where the offender is a drug user who cannot get adequate treatment under conditions of incarceration.

Mandatory sentences are inconsistent with the other Principles of Sentencing contained in section 718.2 of the *Criminal Code.* In particular the following principles may not be applied under Bill C-15:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
> (b) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
> (c) an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances; and that,
> (d) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The Government of Canada should not take action that would promote and reinforce unfounded distrust in our judiciary. If the judicial system of courts and appeals cannot be trusted to give appropriate sentences within current principles and precedence, then it would be difficult to explain why they should be trusted in any other circumstance.

Respect for the criminal justice system will never be achieved by measures that breed distrust in our judiciary.

Measures that would eliminate the discretion of the court and replace it with one that is inherently arbitrary and irrational cannot generate public confidence in either the judicial or the political systems. If ordinary people serving on juries and competent thoughtful judges would not give sentences required under Bill C-15, then it is likely that the justice system will lose credibility as it is viewed increasingly as being premised primarily on rigid political considerations rather than judicial ones.

Public Health Implications of Mandatory Minimum Sentences

The mandatory minimum sentences for drug-related crimes proposed in Bill C-15 misunderstand the nature of such crimes – which are essentially crimes over the business of drug trafficking. But harsh sentences have implications for public health which are exacerbated by a prohibitionist legal regime. For most of Canada's recent history, federal drug control strategy has explicitly recognized that substance abuse is primarily a health issue and that law enforcement interventions usually worsen rather than ameliorate drug addiction and substance abuse problems.[1] That changed with the October 2007 introduction of the National Anti-Drug Strategy from which the concepts "harm reduction," "public health" and "evidence-based" best practices were excised from official texts, public speeches and policy documents. The National Anti-Drug Strategy effectively ignores science-based public health interventions towards illicit drugs while importing from the United States a suite of ideological assumptions and policy prescriptions that have proven themselves bankrupt.[2]

Bill C-15 falls into the ideological trap of presuming that doing more of what we're doing now – *i.e.,* making drug prohibition work better – can produce the kinds of outcomes we all seek; reducing demand for drugs, drug use-related harms, reducing drug-business crime, improving the health of drug users and minimizing the employment of the criminal justice system as an instrument of social control. Notably, Bill C-15 – by doing more of what isn't working now – will contribute to what is already an epidemic of blood-borne diseases in Canada's prisons and remand centres. In re-emphasizing law enforcement, the National Anti-Drug Strategy distances Canada from evidence-based, public health approaches – which approaches have yielded important insights and advancements for this minority of problematic drug users.

> "Higher arrest rates for the manufacture and/or sale of hard drugs are associated with increases in all types of crime." (Shepard and Blackley, 2005)

The evidence speaks with one voice: greater incarceration of people who use drugs is bad public health and offends human rights principles. The incarceration of injection drug users contributes to and exacerbates Canada's HIV and Hepatitis C epidemics. In Canada's federal prison system, the number of reported HIV cases rose from 25 in 1989 to 170 in 1996 to 204 in 2005 – and this number is likely to understate the real incidence of infection, as many HIV-positive prisoners may be unaware of their disease status. Overall, according to data supplied by Correctional Services Canada, HIV prevalence is approximately 10 times higher than the Canadian population as a whole – and even higher in provincial prisons as recent studies in British Columbia, Ontario and Quebec have revealed.[3]

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[1]Editorial, "Policing as public health menace in the policy struggles over public injecting," *International Journal of Drug Policy* 16 (2005), pp. 203-06.

[2]See the conservative *The National Review* of February 1996, "The War on Drugs is Lost," at http://www.nationalreview.com/12feb96/drug.html or, more recently, *The Economist*, March 5, 2009, "How to stop the drug wars: Prohibition has failed; legalisation is the least bad solution," online at http://www.economist.com/opinion/displaystory.cfm?story_id=13237193

[3]C Poulin, *et al.,* "Prevalence of HIV and hepatitis C virus infections among inmates of Quebec provincial prisons," *Canadian Medical Association Journal,* (177:3) July 31, 2007, pp. 252-56 and L

Incarceration may even *lead* to injection drug use among some prisoners who were not injecting before they were incarcerated. This startling finding emerged from a study of the unintended consequences of random urinalysis testing in Joyceville (a medium security prison in Ontario). The two prison doctors who conducted the study found that inmates were migrating to drugs that were harder to detect – because they cleared the body faster – and away from drugs (specifically cannabis) that lingered in urine.[1] Correctional Services Canada has acknowledged that an estimated 80% of their inmate population have substance abuse histories and that almost 4 in 10 report having used drugs since arriving at their institution, 11% of these were injecting.[2]

> "The sole proponents of mandatory minimum sentencing in Canada appear to be politicians whose positions on the advantages of these laws are without a clear basis in either research or policy." (Elizabeth Sheehy, 2001, *Osgoode Hall Law Journal,* 39:2-3), 262.

Inmates are prohibited from possessing needles by correctional policies, so the syringes present within prisons are contraband. Used syringes (commonly referred to as "rigs") circulate endlessly and are used by many inmates. Since they are in extremely limited supply, they are valued by those who do possess them and efforts are made to keep them operational. Parts may be replaced and the points may be resharpened. Rather than using a syringe and disposing of it, passing rigs from one user to another is the norm rather than the exception. The number of inmates injecting drugs greatly outnumbers the rigs present.[3]

In the context of hostility to meaningful harm reduction – *i.e.,* the removal of these words and concepts from the National Anti-Drug Strategy – it is our persistent concern that mandatory minimum sentences will encourage the spread of blood borne diseases among inmate populations. This is clearly inhumane and a serious threat to public health both inside a prison and in the community to which prisoners return.

Conclusion: More of the same will get us more of the same

Drug prohibition – a thoroughly discredited experiment in social engineering – has led us into a gruesome blind alley. Drugs are cheaper than ever before and one can buy them anywhere. As British Columbia's police agencies struggle to keep up the good fight, the drug barons rake in more than enough to buy bullet proof cars, assault weapons, and bullet proof vests while still maintaining profit margins beyond imagining.

Calzavara, *et al.,* "Prevalance of HIV and hepatitis C viris infections among inmates of Ontario remand facilities," *Canadian Medical Association Journal,* (177:3) July 31, 2007, pp. 257-61.

[1]Ford PM, Pearson M, Sankar-Mistry P, *et al.,* HIV, hepatitis C and risk behaviour in a Canadian medium-security federal penitentiary. Queen's University HIV Prison Study Group. *QJM* 2000;93:113-9.

[2]Correctional Service Canada, 1995 National Inmate Survey: Final Report (Ottawa; CSC, 1996).

[3]Will Small, *et al.,* (2005) "Incarceration, Addiction and Harm Reduction: Inmates Experience Injecting Drugs in Prison," *Substance Use & Misuse,* 40:831–843.

Governments at all levels are desperate to be seen to be doing something – and that is to be expected – but they are trapped in a dead-end ideology that advocates deterrence and "doing more of the same" through the mechanism of the criminal justice system.

> "We in Canada are constantly hearing from our leaders expressions that begin, 'we believe...' with not a shred of factual evidence presented. Blind ideologically driven public policy preserves failed policy or creates the adoption of disastrous new initiatives that lurch from one 'belief based' assumption to the next."
> ~ Letter to *The Sunday Edition,* CBC Radio, April 19, 2009

Bill C-15 is the next instalment in this tragic saga of simply doing more of what isn't already working.

Evidence of the futility of drug prohibition mounts ever higher – higher, in fact, than the mountain of evidence that deterrence-based sentencing does not work for drug business crimes. In the cautious language of social scientists, Shepard and Blackley conclude that "there do not appear to be published studies with statistical evidence that drug enforcement has reduced crime."[1]

In plain language that translates as drug prohibition is bankrupt.

In 1997, after a thorough econometric analysis of mandatory sentences for drug crimes, the authors of a widely cited Rand Corporation study concluded that,

> Long sentences for serious crimes have intuitive appeal. They respond to deeply held beliefs about punishment for evil actions, and in many cases they ensure that, by removing a criminal from the streets, further crimes that would have been committed will not be. But in the case of black-market crimes like drug dealing, a jailed supplier is often replaced by another supplier.

They go on to argue – making use of the best evidence at hand – that treatment is far more cost efficient *if the real objective is to reduce drug use and the crime* that attaches to drug-market crime;

> Limited cocaine control resources can, however, be profitably directed toward other important objectives – reducing cocaine consumption and the violence and theft that accompany the cocaine market. If those are the goals, more can be achieved by spending additional money arresting, prosecuting, and sentencing dealers to standard prison terms than by spending it sentencing fewer dealers to longer, mandatory terms.

But that's a big "if" – as we know – since mandatory sentences are NEVER advanced on the basis of evidence that they work to reduce crime or re-offending.

At least they don't work as intended – that much is clear from evidence – though they have worked rather well to grow the US prison population to its world-breaking levels.

[1]Edward M Shepard & Paul Blackley, "Drug Enforcement and Crime: Recent Evidence from New York State," *Social Science Quarterly,* 86:2 (June 2005), p. 328.

But if anything, mandatory sentences may actually undermine themselves on the one target group on whom they do appear to work – the highest-level traffickers. Even here, however, the evidence should induce caution:

> The researchers found an exception in the case of the highest-level dealers, where sentences of mandatory minimum length appear to be the most cost-effective approach. However, it is difficult to identify those dealers solely by quantity of drug possessed. It might be easier to identify them if, in passing sentence, the criminal justice system could consider additional factors, e.g., evidence regarding a dealer's position in the distribution hierarchy. Such factors, ignored by mandatory minimums, can be taken into account by judges working under discretionary sentencing.[1]

Recommendation 4:

In keeping with the government's commitment to accountability in public spending, The JHSC urges the Senate Standing Committee on Legal and Constitutional Affairs to amend Bill C-15 to mandate a cost-benefit analysis by the Parliamentary Budget Officer of the projected crime reduction outcomes of mandatory sentences as envisioned by Bill C-15 no later than 2012 and to publish this evaluation in full.

[1]The Rand Corporation: http://www.rand.org/pubs/research_briefs/RB6003/index1.html

Appendix A: "Price Theory" and the Deterrence of Crime

In reviewing the research literature on price theory and the deterrence of crime, The John Howard Society of Canada concludes that the theory has been shown to be:

1. **Ineffective:** The application of price theory to understanding criminal behaviour has proven to be of limited value for reducing crime or re-offending;
2. **Unjust:** Because price theory seems to offer one-size-fits-all solutions to crime, it distracts policy makers from more effective, just and humane policy options;
3. **Inhumane:** Price theory's emphasis on punitiveness and harshness results in inhumane sentencing practices that brutalize offenders and the public without deterring crime or making communities safer.

Background | History | Context

Price theory is a model of economic behaviour arising out of rational choice theory in which a crime is understood to be similar to any other activity in any other kind of market. Developed by Gary Becker at the University of Chicago,[1] price theory holds that all human beings are *in principle* identical: they seek to maximize their individual advantage (called utility) at the lowest possible price – the way shoppers always look for the best bargain in a market. Crime is no different: if the price of the crime (*i.e.,* the penalty) is perceived to be less than the benefit, crime results. If, however, the price is perceived to outweigh the benefit then a potential criminal will be deterred.

This leads to the prediction that if you raise the price of an undesirable behaviour you will get less of it, the same way market demand falls for a pizza priced at $10,000.

The criminal justice system has one price-setting mechanism; the sentence. Hence finding the right sentence – *i.e.,* price – for a crime determines how much of that crime one will get. A harsh sentence – a steep price – is presumed to deter more effectively than a lenient sentence. The price theory of crime has the virtue of being easy to understand and explain because it relies on familiar notions of supply and demand. Price theory attained enormous influence as a consequence of Becker's Nobel Prize – and the theory supported a strong intellectual stimulant to the massive increase in incarceration which was achieved through more frequent and longer sentences in the United States.

Not for the first time, however, there arose a mis-alignment between Becker's theory of how sentencing deters crime and its translation into public policy. The nuances that Becker's theory included – *i.e.,* Becker himself preferred fines over incarceration – were ignored by legislators looking for an apparent quick fix to crime rates. Becker's arguments for social development rather than incarceration were largely ignored.

Becker's theory of human behaviour – that all humans respond to changes in price – has not survived empirical tests where criminal behaviour is concerned. Like all economic

[1] http://research.chicagogsb.edu/pricetheory/index.aspx

theories, it rests upon critical elements that are seldom present: perfect information, risk-neutrality and an ability to rationally calculate costs and benefits.

But the theory's inability to capture the real-life calculus of criminal behaviour, coupled to the less-than-rational behaviour of criminals themselves, did nothing to impair the political appeal of Becker's theory, particularly with regard to deterrence of illicit drug use. Nor has the failure of Becker's predictions – harsher sentences leads to fewer drug takers – put a dent in the political appeal of price theory as a deterrent to criminal behaviour. In study after study, scholars from across the ideological spectrum have observed that illicit drug prices have fallen, purity has increased and availability has grown even while greater numbers of drug users are sentenced to harsh penalties.

Reviewing the record of price theory for reducing drug related crime, Donohue writes that

> to the extent that the war on drugs was encouraged by Beckerian thinking about raising the price of undesirable behaviour, the economic model as applied to drug policy may have been both counterproductive (the costs of drugs have fallen) and astonishingly costly in both human and social terms.[1]

[1] John J. Donohue III, "Economic Models of Crime and Punishment," in *Social Research,* "Punishment: The U.S. Record," Volume 74:2 (Summer 2007), p. 405.

Appendix B: Mandatory Minimum Sentences

Mandatory Minimum Sentences are;

1. **Ineffective:** there is no evidence that Mandatory Minimum Sentences reduce crime or re-offending or deliver the results that proponents claim for them; in fact, U.S. experience demonstrates that harsher sentences appear to *exacerbate* the conditions they are intended to redress;
2. **Unjust:** Mandatory Minimum Sentences offend the principle of proportionate sentencing as they require judges to sentence the *crime* rather than the *offender*; and,
3. **Inhumane:** Mandatory Minimum Sentences, by their nature, fall disproportionately on lower-level offenders, since serious or violent offenders would *already* be serving the maximum sentence.[1]

Definitions | Theory | Historical Experience

A mandatory minimum sentence (MMS) is an instrument of public policy with which the criminal justice system communicates its condemnation for criminal behaviour. A MMS is intended to educate through denunciation and to deter potential future offenders. The stigma that attaches to a MMS, *i.e.,* a harsh sentence, is presumed to deter individuals from crimes that are likely to attract a harsh sentence. The theory behind MMSs is the conviction that all humans calculate their best interests and act to maximize these.[2] Humans are programmed much as a computer is to seek pleasure and avoid pain. Since deprivation of liberty via a harsh penalty is presumed to be painful, a rationally calculating person will always seek to avoid the pain of a prison sentence. Accordingly, the harsher the sentence the stronger the impulse to avoid it. The threat of a MMS, then, is presumed to deter persons from committing crimes they would otherwise commit: this is called *general* deterrence[3] when targeted at all persons and *specific* deterrence when targeted at persons who have already been convicted of the same or a similar crime.

While Canada has employed mandatory minimum sentences for some years, most historical experience with their actual operation comes from the United States where they proliferated following President Reagan's "war on drugs" in 1986. By the end of the 20th-Century, virtually every state in the union had passed MMSs. From the standpoint of the criminal justice system – prosecutors, judges, prison guards – they were regarded as a win-win-win. They enabled prosecutors to appear to be 'getting tough' and 'cracking down' which is essential for successful re-election. They did the same for judges. And they produced a boom in prison construction and rates of incarceration, which was good for correctional unions. MMSs for drug crimes spawned a "prison-industrial complex" in

[1] Our guiding principles and core statements are at http://www.johnhoward.ca/jhsmiss.htm#core

[2] A full explanation of "rational choice theory" is here: http://en.wikipedia.org/wiki/Rational_choice_theory

[3] General deterrence measures include the existence of laws, police, courts, penalties and prisons.

the United States contributing to its emergence as the world's leading incarcerator of non-violent offenders.[1]

Though targeted at "kingpin" drug traffickers, the net was widened and MMSs have been responsible for incarcerating many non-violent and minority offenders who would have been better suited to community service. Our knowledge of how they work – *particularly whether they work as intended* – comes from long American experience with them.[2] As well, the American experience is instructive because the introduction of MMSs was staged so that it is possible to evaluate the effect of their introduction and operation in jurisdictions over time and according to differences in population and geographic region. The United States, therefore, constitutes a "natural laboratory" for the study of MMSs as they operate in practice.

Ten Lessons from the American Experience with Mandatory Minimum Sentences

1. MMSs conflict with fundamental principles of sentencing. They sentence *the crime* as a class rather than *the offender* as a person – a violation of proportional sentencing which is regarded as a bedrock principle of criminal justice systems in democratic societies. As such, they are unjust.

2. MMSs distort the meaning of "proportionality." Guidelines are enacted by legislators that require judges to pass sentences according to criteria created by legislators – *i.e., not necessarily according to legal, evidence-based criteria or the circumstances of the crime itself* – the effect of which is to impair the ability of courts to pass sentences according to the specific circumstances of the offence and offender. MMSs have contributed to making the United States the world's leading incarcerator – but without the benefit of a proportionately reduced crime rate or declining use of drugs.

3. MMSs could be arbitrary and excessive, which undermines the integrity of justice. In the words of Chief Justice Beverly McLachlin, the "absence of arbitrariness requires that punishment be tailored to the acts and circumstances of the individual offender."[3] The American lesson is that MMSs affect most severely the least serious offenders in circumstances that have the greatest mitigating circumstances (while having little or no effect on the most serious offenders who would attract longer sentences anyway).

4. MMSs exacerbate racial bias. In the American experience, MMSs have tended to fall most heavily on members of minority populations, which adds to the existing burden of discrimination in the criminal justice system but does not make communities safer as a consequence. In Canada, the burden of discrimination

[1]http://www.theatlantic.com/doc/199812/prisons

[2]See http://www.famm.org/ -- *Families Against Mandatory Minimums*.

[3]McLachlin C.J., Chief Justice, Supreme Court of Canada. Sauvé v. Canada (Chief Electoral Officer) 2002 SCC 68.

already falls on Aboriginal peoples who comprise 1 out of every 5 federally sentenced offenders – though less than 3% of the Canadian population.

5. Confidence in the justice and political systems will decline. If the judicial system of courts and appeals cannot be trusted to give appropriate sentences within current principles and precedence, then it would be difficult to explain why they should be trusted in any other circumstance. MMSs encourage politicians to pass sentences – as it were – by remote control and from the vantage point of ignorance as to the individual circumstances of a crime or offender.

6. Harsh penalties encourage recidivism. Though counter-intuitive, the evidence from the U.S. experience, where MMSs were (until recently) widespread, is that harsh sentencing practices encourage re-offending; precisely the opposite of what proponents of MMSs claim.[1] And this has been known to criminologists since at least the early 1970s: "the inmate who has served a longer amount of time, becoming more *prisonised* in the process, has had his tendencies toward criminality strengthened and is therefore more likely to recidivate than the inmate who has served a lesser amount of time."[2] In fact, a detailed American analysis found that "excessively harsh penalties may simply backfire by fostering hostility and despair."[3]

7. The introduction of new MMSs will be difficult to control. MMSs have a "feel good" quality to them for whatever crime is currently on the front pages.[4] MMSs permit politicians to be seen to be "doing something." But "feel good" politics is not necessarily good public policy – and Canadians should resist the temptation to enact "feel good" sentencing practices unless they can be demonstrated by evidence to reduce crime or re-offending.

8. Discretion will shift from the judge to the crown or police. In theory, MMSs limit the discretion of judges – but in practice MMSs merely shift discretion to prosecutors and police, provoking plea reductions and backlogs of cases. As Thomas Gabor concluded: "there is no evidence that either discretion or disparities are reduced by MMSs. While judicial discretion in the sentencing process is reduced (not removed), prosecutors play a more pivotal role as their charging decisions become critical."[5]

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[1]Paul Gendreau, Claire Goggin and Francis T. Cullen, "The Effects of Prison Sentences on Recidivism," (Ottawa: Public Works and Government Services Canada, 1999) at http://www.prisonpolicy.org/scans/gendreau.pdf

[2]D. R. Jaman, R. M. Dickover & L.A. Bennett, "Parole outcome as a function of time served," *British Journal of Criminology,* 12 (1972), p. 7.

[3]President's Commission on Law Enforcement and Administration of Justice (Washington, D.C., 1967).

[4]As Jeffrey Simpson correctly observes, "Mandatory minimum sentences for gun-related or other kinds of crime are almost completely useless, although they certainly sound frightening," in "Stop the presses! Crime rates are falling," *The Globe and Mail,* 23 July 2008.

[5]Thomas Gabor and Nicole Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures* (Carleton University, Research and Statistics Division, January 2002), p. 31.

9. International experience does not show that MMSs reduce crime. Numerous jurisdictions in the United States – including Michigan, New York, Florida and California – have begun dismantling their MMS regimes because (a) they don't reduce crime and (b) they fill prisons with non-violent offenders.

10. Research, most of which comes from the American experience of MMSs, shows MMSs to be ineffective: "basic new insights concerning application of mandatory minimum penalties are unlikely to emerge … We now know what we are likely to know, and what our predecessors knew, about mandatory penalties. As instruments of public policy, they do little good and much harm."[1]

[1]Michael Tonry, "Mandatory Penalties," in *Crime and Justice: A Review of Research* (1990), pp. 243-4.

Appendix C: Rational Choice Theory in Correctional Policy

JHSC's Position:

1. **Ineffective:** Rational choice theory as applied to correctional policy encourages programs that are cost-oriented and predisposed toward punishment and deterrence. Punishment-oriented programs do not target dynamic criminogenic factors for change – they take them as alterable only by changing costs;

2. **Ineffective:** Not only do policies grounded in rational choice theory fail to reduce crime, they also constrain thinking about *benefits-oriented* correctional options;

3. **Inhumane:** Large-scale studies of cost-oriented programs premised on rational choice theory show they have either no effect on re-offending – because they do not target dynamic factors for change – or actually *increase* re-offending.

Definitions | Background | History

Rational choice theory holds that people freely choose their behaviour and are motivated by the avoidance of pain and the pursuit of pleasure; that crime is a personal choice, the result of individual decision-making processes; that offenders weigh the potential benefits and consequences of committing an offence and then make a rational choice on the basis of this evaluation. The central premise of this theory is that people are rational calculators whose behaviour can be modified by the threat of punishment.

Rational choice is derived from classical micro-economic theory according to which every person is presumed to be:

1. a rational maximizer of their best interests, however they calculate these;
2. constantly calculating the costs *vs.* benefits of every decision, criminal or otherwise;
3. sensitive to changes in the costs of crime *vs.* benefits of crime; and,
4. knowledgeable about which sentences are attached to what crimes.

Rational choice theory enjoys the advantage of being easy to understand and explain: a prison sentence is comparable to adding $10,000 to the cost of a pizza. A rational person will be deterred from committing a crime if there is a chance of a prison sentence. If they do commit a crime, it's because the prison sentence (*i.e.,* the price of crime) is not high enough to effectively deter: hence rational choice theory generates policies that focus on making sentences (or prices) harsher and more punitive to achieve deterrence. Since the 1970s, when rational choice came into fashion, a large number of programs have sprung up premised on the belief that punishment deters re-offending. The best known of these include "scared straight," "boot camps," "shock incarceration" and "intensive supervision probation." These programs are premised on the belief that if one passes a harsh enough sentence, one can deter most offenders. For reasons relating to political culture, such

policies have great appeal in the United States – though they have been implemented in other English-speaking jurisdictions too, including the UK, Canada and Australia. Their longevity, particularly in the United States, affords us an opportunity to assess how well they actually reduce re-offending by people who have experienced penalties premised on rational choice theory.

To the extent the research supports the rational nature of crime, it is confined primarily to *instrumental* crime, such as property and drug offences. There is some support in relation to violence, where youth use violence to protect themselves in situations where they feel they lack power. The foundational assumption behind the theory that offenders conduct a cost-benefit analysis before deciding to engage in crime is not, however, supported by research. While some thought goes into offending, the planning tends to focus on the immediate events (e.g., the choice of which house to enter), not the long-term consequences of their actions (e.g., whether to commit a crime at all). Youth in particular do not routinely consider the long term; they tend to be impulsive and to focus on the immediacy of the rewards associated with offending. Even if youth do consider the criminal justice consequences, most find them irrelevant – as they believe it is unlikely they will be apprehended.

The Evidence: The Disappointment of Deterrence

There are a number of ways to evaluate the success of correctional programs. The most powerful is meta-analysis, which sums together the findings from multiple high-quality studies and calculates their respective 'effect sizes.' The result is a sophisticated overview of the impact of such programs. Meta-analysis is the gold standard of comparative research, yielding robust and reliable conclusions.

The evaluative verdict on deterrence-based programs is not encouraging: either they show little effect on re-offending or they actually increase re-offending by people who participate in them.

Doris Layton MacKenzie, professor of criminology at the University of Maryland, has done more than anyone else to puncture the myth of rational choice in correctional policy. Her detailed meta-analyses and follow up evaluations of boot camps – in particular – have cast these punishment-based models into serious disrepute.[1]

[1]See a sample of her work at http://unjobs.org/authors/doris-layton-mackenzie

Appendix D: A Pattern of Consistent Findings on Mandatory Penalties[1]

Three major evaluations of American mandatory minimum sentencing regimes are on the public record:

1. *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (United States Sentencing Commission, 1991);[2]
2. *Final Report of the Joint Committee on New York Drug Law Evaluation* (United States Department of Justice, 1978)[3]
3. *The Michigan Felony Firearm Statute on Judicial Dispositions* (1979)

The following generalizations can be drawn these evaluations of deterrence-based sentencing through mandatory penalties:

1. Lawyers, judges and prosecutors will subvert the imposition of laws they consider unduly harsh;

2. Dismissal rates can be expected to increase as practitioners attempt to shield some defendants from the law's reach;

3. Defendants whose cases are not dismissed or diverted are likely to make more vigorous efforts to avoid conviction, thereby increasing case processing times and consuming criminal justice resources;

4. Defendants who are convicted of the target offence will likely be sentenced more severely than they would have been in the absence of the mandatory penalty provision; and,

5. Because declines in conviction rates for those arrested tend to offset increases in imprisonment rates for those convicted, the overall probability that defendants will be incarcerated can be expected to remain about the same after the enactment of harsher sentencing regimes.

General Conclusion: mandatory minimums are unnecessary because,

> "all of the intended purposes of mandatory minimums can be equally or better served by guidelines without compromising crime control goals."[4]

[1] Tonry, "Mandatory Penalties," p. 253.
[2] Online at http://www.ussc.gov/r_congress/MANMIN.PDF
[3] http://www.eric.ed.gov:80/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/3a/05/8a.pdf
[4] *United States Sentencing Commission,* (1991), p. 33.

Appendix E: Recent Developments in American Mandatory Sentencing Reforms

The historical record from the United States[1] shows a pattern of seeking to evade or reform mandatory minimum laws once enacted as their harm and cost become apparent.

Connecticut

In 2001, Connecticut legislators gave courts some leeway to relax mandatory minimum sentencing laws for sale or possession of drugs for "good cause," even within a "drug-free school zone."

Delaware

Delaware legislators in 2001 reduced the mandatory minimum prison terms for trafficking cocaine from three years to two and increased the weight amount that would trigger the penalty from five grams to ten.

Indiana

In 2001, Indiana legislators eliminated the state's mandatory 20-year prison sentences for drug offenders arrested with three grams or more of cocaine, giving courts authority to sentence drug offenders who sell drugs to support their habit to treatment instead of prison. They also modified the "three-strikes" law to provide an exception in the case of habitual substance abusers, as well as in cases where the third offense is a misdemeanor charged as a felony because of prior convictions.

Louisiana

Louisiana's legislators repealed mandatory minimum sentences for simple drug possession and many other non-violent offenses in 2001, and cut minimum sentences for drug trafficking in half. The possibility of parole, probation, or suspension of sentence was restored for a wide range of non-violent crimes – from prostitution to burglary of a pharmacy. The bill allowed for already-sentenced prisoners to apply for an early release recommendation from a "risk-review" panel." If recommended, their case goes to the pardon board, and is then sent to the governor and parole board for release consideration.

Maine

In 2003, Maine legislators reduced the mandatory minimum sentence for murder from 25 to 20 years, and authorized courts to suspend other mandatory prison sentences altogether if they are found to create a "substantial injustice" and if doing so would not diminish the gravity of the offense nor endanger public safety.

Maryland

In 2007, the Maryland General Assembly reformed mandatory minimum provisions by restoring parole eligibility for people convicted of a burglary or daytime housebreaking prior to October 1, 1994.

Mississippi

In 2001, the Mississippi legislature amended the sweeping truth-in-sentencing law enacted in 1994 to allow non-violent first-time offenders to regain parole eligibility after serving one-quarter of their prison sentence. These changes made more than 2,000 of the

[1]Courtesy *Families Against Mandatory Minimums*

state's prisoners parole-eligible in 2001 and, by April 2003, 900 had been released, saving the state $12 million in prison costs.

Michigan

Sweeping reforms of Michigan's mandatory minimum drug penalties were passed in 1998 and 2003. In 1998, the changes provided parole eligibility for people sentenced before 1998 under the "650 lifer" law and eliminated the mandatory life without parole penalty moving forward. In 2003, the legislature passed a law that repealed almost all of the drug mandatory minimums, changed lifetime probation to a five-year probationary period, reformed mandatory consecutive sentencing laws, and implemented new sentencing guidelines. The *Detriot Free Press* estimated that the reforms would save Michigan $41 million over the first few years.

Nevada

In 2007, the Nevada legislature repealed mandatory sentencing enhancements and expanded "good time" eligibility for certain offenses.

New Mexico

In 2002, the New Mexico legislature repealed a mandatory sentence enhancement that had been required if a prosecutor charged a defendant with a previous drug conviction as a habitual offender. The drug enhancement is now discretionary, allowing judges to determine whether or not it would be appropriate in a particular case.

New York

The New York legislature passed the Drug Law Reform Act of 2004, which doubled the quantity of drugs necessary to trigger a Class A-1 felony from four to eight ounces, while a Class A-II felony was increased from two to four ounces. The law also allowed people currently serving a prison sentence for an A-1 felony to petition for resentencing and provided judges with the discretion of assign a defendant directly to the state's prison-based Comprehensive Alcohol and Substance Abuse Treatment program. The law was expanded in 2005, to allow for the discretionary re-sentencing of certain Class A-II drug offenders.

North Dakota

North Dakota lawmakers repealed a one-year mandatory minimum sentence for first-time drug offenders in 2001 and called for a study of other mandatory minimum laws.

Pennsylvania

In 2007, after the Pennsylvania House noted that mandatory minimum sentences "significantly increase the cost of corrections," Pennsylvania lawmakers directed the Sentencing Commission to study the effectiveness of mandatory minimum sentences and their impact on recidivism, cost-efficiency, and fairness in sentencing.

Appendix F: The Consequence of Mandatory Minimum Sentencing for Drug Crimes in the United States[1]

Drug Offenders Are Now Serving Longer Prison Terms

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

Most Drug Offenders in Prison Are Not Drug Kingpins

A primary rationale provided for federal prosecution of high-level drug offenses is that the federal system is equipped with the level of resources necessary to handle these cases. One would therefore expect that federal drug cases on average should be composed of high-level offenders. Research conducted by the U.S. Sentencing Commission, though, documents that in 1992, only 11% of federal drug defendants consisted of high-level dealers, while 55% were either street-level dealers or mules, and 34% mid-level dealers. While there are no comprehensive data on drug offenders prosecuted in state courts, it is likely that they are even more disproportionately low-level offenders since high-level offenders have a greater likelihood of being prosecuted in federal court.

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

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

Prison Inmates Are Less Likely To Be Receiving Drug Treatment

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

[1] "Drug Policy and the Criminal Justice System," The Sentencing Project (Washington, DC, 2001) online at http://www.sentencingproject.org/Admin/Documents/publications/dp_drugpolicy_cjsystem.pdf