

II The U.S. Criminal Justice System and the Drug War – circa. 2000

i) The Lawyers and Judges Perspective

135. While throughout the '60's and '70's the United States of America was seen as the bastion of freedom and the "land of free", frequently as a result of the decisions of the United States Supreme Court under **Chief Justice Earl Warren**, most of those progressive advances have either been rolled back or eliminated or at least severely compromised by subsequent U.S. Supreme Court decisions, as well as Republican legislation in Congress and other developments, to the point where it would now be more accurate to describe the United States as the "land of the unfree". To quote a prominent Seattle defence attorney:

“...it has been compromised, contaminated, and corrupted by the War on Drugs”.

“Pot Bust at, on (or Near) the Border”, by Jeffrey Steinborn, May 18, 2000, p. 5.

136. As an example of a few recent shocking rulings of the United States Supreme Court there are, **United States v. Ursery (1996)** which held that when the U.S. Federal Government takes everything that you own because you have committed a crime with it or to get it, you are not being “punished”; **Herrera v. Collins (1993)** in which the Court held that actual innocence was not grounds to review a death sentence if the defendant had already received a “fair trial”; and **United States v. Watts (1997)** which held that a defendant could be punished for conduct of which the jury had acquitted him.

“Pot Bust at, on (or Near) the Border”, by Jeffrey Steinborn, May 18, 2000, p. 11.

137. While the trial process in **State courts** continues to be reasonably fair and the penalties reasonably consistent with the offence, nevertheless the conviction of a felony carries with it substantial economic consequences for the individual's future. But if the **U.S. Federal Government** should take an interest, Mr. Steinborn paints a completely different picture. He describes the Federal criminal justice system as “an insane, mindless, heartless, cruel car-cursing, home seizing, family-destroying monster out

of control". He points out how Federal judges have been rendered toothless by a legislative and appellate judicial decisions that have given the prosecution and the police everything they wished for over the last 30 years.

"Pot Bust at, on (or Near) the Border", by Jeffrey Steinborn, May 18, 2000, pp. 5 & 6.

138. There is a legal presumption that you will be detained without bail for most drug offences. Consequently, most offenders charged in **Federal court** will start serving time the day that they are arrested. The federal trial process is now so coercive because of the powers now given to the Federal government that it is now rare for a federal drug case to go to trial and even the most active Federal defence attorneys only try 2 or 3 cases a year. According to Steinborn, defence attorneys now describe the federal trial system as "trial by ambush". This is because the Federal Government (unlike the state governments) has no duty to disclose who their witnesses will be and is not required to make them available to the defence to be interviewed. Frequently, the defence does not find out the case against the accused until shortly before the witness testifies. Dismissal of a case on constitutional grounds is now extremely rare due to the so-called "good faith" exception. In addition, there is a major problem in the U.S. criminal justice system whereby government witnesses are given huge sentence reductions, large cash payments, freedom for their relatives and loved ones and new identities and lives in exchange for their testimony. Steinborn describes the trend in this regard as a "silent stampede". On the other hand, if a defence attorney attempts to purchase testimony with any currency he or she risks suspension from practice.

"Pot Bust at, on (or Near) the Border", by Jeffrey Steinborn, May 18, 2000, pp. 7 - 10.

139. In the result, most of the practice of criminal law in the Federal system involves discussions between the Federal district attorneys and defence lawyers on sentencing issues. In particular, the discussion centres around how to avoid the incredibly harsh results of the **Sentencing Guidelines** and the **mandatory minimum terms of imprisonment** required by Federal law. The prosecutor determines the sentence by deciding which crime to charge the individual with and thereafter the judge can only evaluate the categories and rubber-stamp a predetermined sentence. Most of the discussion, according to Steinborn, is whether the sentence should be a mandatory minimum 20 years or a slightly less guideline sentence of 18 ½ years. With respect to marijuana specifically, he points out that while the sentencing levels vary from State to State, under

Federal laws the standards are pretty extreme and 100 plants or 100 kilos will net you a mandatory minimum of 5 years whereas 1,000 plants or 1,000 kilos, a mandatory minimum of 10 years. While there are a few exceptions, the only general way to avoid such sentences is to become an informant. One can cut one's sentence in half by cooperating with the Government and seeking a specific departure downward under the United State's Sentencing Guidelines.

“Pot Bust at, on (or Near) the Border”, by Jeffrey Steinborn, May 18, 2000, pp. 10 & 11.

140. Mr. Steinborn in his article confirms the attitude of the U.S. police as experienced by Ms. Boje. Until you get a lawyer, you are considered to be a “victim to be bullied; a target to be threatened; a source to be exploited; a mouth to shove words into”. He underscores the importance of immediately contacting counsel and the consequences of not doing so. Nevertheless, he expresses the view that the odds of being acquitted in a drug case in the United States Federal criminal justice system is “somewhere between hitting an inside straight and finding a silver dollar rolling uphill against the wind”. As Mr. Steinborn concludes:

“If you don't live in the United States you probably can't imagine the cruelty of the war on marijuana. Nor can you imagine the Alice in Wonderland quality of some of our criminal laws and procedures. When drugs are involved reason and civility flee from the justice system. So don't think for a minute that because the drug war is fatally flawed, because there is nothing wrong with the responsible adult use of marijuana, because our Canadian neighbors have gone well down the path of intelligent tolerance, because the American public has voted overwhelmingly to make marijuana a medicine – don't be lulled into believing that it's safe to bring this magnificent herb into the United States. Unless you are ready to do some serious prison time in a system that thinks weight rooms are a luxury too good for prisoners, don't do it.”

“Pot Bust at, on (or Near) the Border”, by Jeffrey Steinborn, May 18, 2000, pp. 13 - 17.

141. Lest it be thought that these criticisms of the United States criminal justice system are limited to coming from defence counsel, it should be recognized that these same criticisms are being levelled at the system by not only Americans from all walks of life but, in particular, many Federal judges, some former United States Attorneys General and a number of policemen and police organizations. Many Federal judges have taken a

stand against mandatory minimum sentencing. Apparently, over 86% call for the outright abolition of such sentencing. Some senior Federal judges have refused to hear drug cases because of their lack of discretion in sentencing and the lengthy sentences that are mandatorily required to be imposed. A collection of some of the dissents by Federal judges are recorded on the internet.

See <http://www.november.org/Judges.html>, “Dissenting Opinions of Federal Judges”, pp. 1 – 4.

142. In **1927**, nine prominent New York City attorneys formed an organization called the “**Voluntary Committee of Lawyers**”. It supplied legal expertise to opponents of the **Eighteenth Amendment** (Alcohol Prohibition) and the **Volstead Act** in the United States of America. It existed from 1927 until 1933 when alcohol prohibition was repealed. It then quietly disbanded. It has since been resurrected “to promote, within the legal profession and beyond it, informed and honest discussion about the objectives of the Drug War and its costs to our cherished institutions of liberty and justice”. While modelled after the original group involved in alcohol prohibition, its focus is drug policy and its impact on the criminal justice system and constitutional law. It is affiliated and cooperates with the **Partnership for Responsible Drug Information** and **Scientists and Physicians for Responsible Drug Education**. Among its founders are included **George E. Bushnell**, past **President of the American Bar Association**; the **Honourable Nicholas DeB. Katzenbach** and the **Honourable Elliot Richardson**, both **former U.S. Attorney Generals**; the **Honourable A. Leon Higgenbotham, Jr.**, **former Chief Judge of the U.S. Court of Appeals, Third Circuit**. Its **Board of Advisors** includes, amongst others, **Norvall Morris**, Esq., former Dean of the Law School in Chicago. Its current President is **Charles D. Adler** from New York and its Board of Managers and Executive Committee includes various doctors and lawyers including **Samuel Dash**, Esq., **Eric Sterling** and **Kevin Zeese**. The activities of the Committee are coordinated by **Michael D. Cutler**.

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 3, Exhibit “B” and paragraph 5, Exhibit “G” by Richard M. Evans.

143. This collection of decisions, articles and public statements by Federal court judges illustrate how the United States criminal justice system has been transformed into an unjust, oppressive and unfair system. In summary, these examples illustrate the following:
- a) How injustices can occur when a court is bound by mandatory minimum Sentencing Guidelines that compel American judges to

make inappropriate dispositions because the Court is unable to take into account all of the facts and circumstances pertaining to the offender and to do individual justice in the circumstances of each case;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 7, Exhibit "I" by the Honourable Judge Harold A. Baker, U.S. District Court, Central District, State of Illinois.

- b) How the courts are required to impose mandatory minimum sentences mandated by federal sentencing laws when in the opinion of the court, the sentence will be of excessive length and illustrates the lack of wisdom in such sentencing policies in the context of the "War on Drugs";

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 8, Exhibit "J" by the Honourable Judge Myron Bright, U.S. Court of Appeals, 8th Circuit.

- c) How the sentencing statutes and guidelines operate in practice resulting in non-judicial persons in reality sending people to jail. The prosecutor determines the charge and the probation officer the numbers for the court and the judge is then required to sentence the offender according to the numbers which frequently focus on the weight of the drugs involved and not the offenders culpability;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 8, Exhibit "J" by the Honourable Judge Myron Bright, U.S. Court of Appeals, 8th Circuit.

- d) How the Drug War has had a significant impact on the taxpayers of the United States, a draconian impact on non-violent drug offenders with minimal criminal histories, rates of imprisonment in the United States and how brutally long sentences can be meted out in drug cases where the offender is only a minor player;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 8, Exhibit "J" by the Honourable Judge Myron Bright, U.S. Court of Appeals, 8th Circuit.

- e) 86.4% of the District (Federal Trial) judges support changing the current sentencing rules to increase the discretion of the judge.

70.4% support repealing most of the mandatory minimum sentencing laws and 82.8% of all District judges feel that judges are more appropriate decision makers regarding the nature and severity of sanctions to be imposed in criminal cases;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 8, Exhibit “J” by the Honourable Judge Myron Bright, U.S. Court of Appeals, 8th Circuit.

- f) More than half of the judges would eliminate Sentencing Guidelines and these are not “softheaded judges” but judges that have served on the front lines of the criminal justice system from President Eisenhower through President Clinton;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 8, Exhibit “J” by the Honourable Judge Myron Bright, U.S. Court of Appeals, 8th Circuit.

- g) How the Sentencing Guidelines produce harsh results that are patently unfair because they failed to take into account individual circumstances in mitigation.

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 9, Exhibit “K” by the Honourable Judge Harry T. Edwards.

- h) How games are played under the Guidelines and mandatory minimums because of the enormous power placed in the hands of United States prosecutors enabling them to replace judicial discretion with a prosecutorial discretion;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 9, Exhibit “K” by the Honourable Judge Harry T. Edwards, U.S. Court of Appeals, D.C. Circuit.

- i) The enormous power given to probation officers under the Guidelines to act as investigator and fact finder for circumstances that may add years of confinement to a jail term and how these non-judicial officers are not accountable;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 9, Exhibit “K” by the Honourable Judge Harry T. Edwards, U.S. Court of Appeals, D.C. Circuit.

- j) How the Guidelines have not eliminated sentencing discretion but have merely transferred it from the judges, who are at least impartial arbiters who made their decision on the record and subject to public scrutiny and appellate review, to the less neutral parties such as the prosecutor and the probation officer that are rarely called upon to account for their discretion;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 9, Exhibit "K" by the Honourable Judge Harry T. Edwards, U.S. Court of Appeals, D.C. Circuit.

- k) How the Guidelines are intended to produce uniformity and fairness and, in fact, present the opposite and, namely, unfair sentencing and lack of uniformity;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 9, Exhibit "K" by the Honourable Judge Harry T. Edwards, U.S. Court of Appeals, D.C. Circuit.

- l) The long list of cases from various judges of various circuits and courts criticizing the Guidelines and mandatory minimum sentencing and their constitutionality or lack thereof;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 9, Exhibit "K" at pp 6 & 7 by the Honourable Judge Harry T. Edwards, U.S. Court of Appeals, D.C. Circuit.

- m) How the Sentencing Guidelines and mandatory minimums result in tremendous disproportionality that many senior and not so senior judges, active judges, State and Federal judges from all sides of the political spectrum, including those appointed by Presidents Bush and Reagan, have spoken out against the Drug War and these effects on the criminal justice system, from their perspective as individuals on the front lines of the criminal justice system;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 10, Exhibit "L" by the Honourable Judge Nancy Gertner, U.S. District Court, Boston.

- n) How the current approach of sentencing guidelines and mandatory minimums has resulted in extensive injustices being inflicted upon

citizens of the United States and how this oppression can be ended by more reasonable and rational alternative (non-penal) approaches;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 11, Exhibits “M”, “N”, “O”, “P” and “Q” by the Honourable Judge James P. Gray, Orange County Superior Court, California;

See also Affidavit of Valerie A. Leveroni Corral, sworn the 12th day of May, 2000, p.4.

- o) How a large number of people are disenchanted with the United States criminal justice system because it is seen as excessively expensive, conceptually confused, increasingly unfair and pervasively ineffectual;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 12, Exhibit “R” by the Honourable Judge John L. Kane, Jr.

- p) How every judge knows or should know that the War on Drugs has eviscerated the protections that the U.S. Constitution guaranteed against Government invasion and the seizure of homes and property and how public resources need to be used pragmatically rather than hysterically and flexibly rather than with rigidity and with a view to protecting the values that have pointed the United States towards the ideal of a free and just society;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 12, Exhibit “R”, the Honourable Judge John L. Kane, Jr., Senior Judge, U.S. District Court, Denver.

- o) How the Drug War has undermined civil liberties in the United States and how they need to be restored and how the first casualty of the Drug War has been the truth;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 13, Exhibit “S” by the Honourable Judge John L. Kane, Jr., United States Senior District Judge.

- p) How, with respect to marijuana, the Federal Government has absurdly exaggerated and lied about the situation and how its current strategy is the height of folly having transformed a chronic

medical problem by lies and scare tactics into a bottomless political pit that costs federal taxpayers in excess of \$17 billion per year;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 13, Exhibit "S" by the Honourable Judge John L. Kane, Jr. United States Senior District Judge.

- q) How a democratic government has pursued "for eight decades a failed policy that has produced tens of millions of victims and trillions of dollars of illicit profits for drug dealers, cost taxpayers hundreds of billions of dollars, increased crime and destroyed inner cities and fostered widespread corruption and violations of human rights and all with no success in achieving the stated and unobtainable objective of the drug free America";

The eminent economist, Milton Friedman, as quoted by the Honourable Judge John L. Kane, Jr., Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 13, Exhibit "S" at p. 3.

- r) How after 20 years on the bench, judges are calling for an unequivocal end to drug prohibition, a dethroning of the drug czar and are finding federal drug laws to be a disaster;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 14, Exhibit "T", by the Honourable Whitman Knapp, Senior United States District Judge for the Southern District of New York.

- s) How before the Sentencing Guidelines, the House and Senate of the United States believed that there was unwarranted disparity in sentencing that was excessively influenced by the personal views of sentencing judges and how after many years on the bench, judges are concluding that the "reform" system has resulted in the imposition of many sentences that are neither just nor effective and, in fact, how the current system produces injustices as the predecessor system and how it is caused by the removal of judicial discretion and its transfer to prosecutorial and probation officer discretion and how the judges are unwilling executioners of mandatory minimums;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 15, Exhibit "U", by the Honourable Judge Morris E. Lasker, U.S. District Court, Southern District of New York.

- t) How mandatory minimums need to be eliminated and judicial discretion re-established so that persons can be sentenced by judges uninfluenced by political considerations that cause injustice;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 15, Exhibit "U", by the Honourable Judge Morris E. Lasker, U.S. District Court, Southern District of New York.

- u) How the American criminal justice system is a disgrace to a civilized nation that prides itself on decency and the belief and intrinsic worth of every individual;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 16, Exhibit "V", by the Honourable Judge Donald P. Lay, Chief Judge, U.S. Court of Appeals, Eighth Circuit.

- v) How the current criminal justice system is a complete failure involving unbelievable financial waste and the commission of intolerable crimes against those victimized by the system;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 16, Exhibit "V", by the Honourable Judge Donald P. Lay, Chief Judge, U.S. Court of Appeals, Eighth Circuit.

- w) How the Drug War contradicts reason and imperils respect for the law as law enforcement has overcome reason and how the social impact of decriminalization would result in a better quality of life and justice in the United States of America;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 17, Exhibit "W", by the Honourable Judge James C. Paine, U.S. District Court, Southern District of Florida.

- x) How the Sentencing Guidelines and mandatory minimum sentences have not only been ineffective and exorbitantly costly but have created a system that many federal judges reject as unfair, inefficient and ineffective in eliminating drug use and drug related crime;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 18, Exhibit "X", by the Honourable Judge Robert W. Pratt, U.S. District Court, Southern District of Iowa.

- y) How some federal judges have resigned rather than take part in an immoral, unjust and failed system;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 18, Exhibit "X", by the Honourable Judge Robert W. Pratt, U.S. District Court, Southern District of Iowa.

- z) How the Sentencing Guidelines and mandatory minimums focus on the weight of the drug and the container in which it is found and how that impacts on the length of sentence instead of the actual conduct of the defendant, the context in which it arises and the particular mitigating aspects of the defendant's background;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 19, Exhibit "Y", by the Honourable Judge Richard Posner, Circuit Judge, joined by Bauer, Chief Judge and Cummings, Wood, Jr. and Cudahy, Circuit Judges, dissenting.

- aa) How many drug law offenders are being sentenced to imprisonment periods greater than justified by the facts; how the Sentencing Commission guidelines are nonsensical in nature, inconsistent and arbitrary, particularly when sentences imposed on violent offenders are compared to those imposed upon non-violent offenders.

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 20, Exhibit "Z", by the Honourable Judge Stanley Sporkin, Judiciary Committee, September 9, 1997.

- bb) How the American criminal justice system is in crisis largely because of drug prosecutions and how some senior federal judges have exercised their option not to try minor drug cases because of the mandated and unnecessarily harsh sentences for minor drug offenders which fail to deter drug use and distribution;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 21, Exhibit "AA", by the Honourable Judge Jack B. Weinstein, U.S. District Court, Brooklyn.

- cc) How some judges perceive the situation that has developed in the '80's and '90's as cruel and self-defeating resulting in them becoming increasingly despondent;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 21, Exhibit "AA", by the Honourable Judge Jack B. Weinstein, U.S. District Court, Brooklyn.

- dd) How reality and reason require a start to be made to ending the criminal prohibition of drugs and beginning to seek more effective, non-penal methods for controlling drug abuse;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 22, Exhibit "BB", by the Honourable Judge Robert W. Sweet, U.S. District Court, New York.

- ee) How legislators and the executive branch officials see the problem of the Drug War from an overall policy perspective influenced by public opinion and public fears, whereas professors and other researchers see the issue from the vantage point of their various disciplines, and advocacy groups see the issue from their particular point of view;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 23, Exhibit "CC", by the Honourable Judge Juan R. Torruella, Chief Judge, U.S. Court of Appeals, First Circuit.

- ff) How lawyers and judges who participate in drug litigation see the issue on a case by case basis and after a number of cases see the mosaic, but lawyers see the case from the standpoint of a prosecutor or a criminal defendant whereas judges see both sides;

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 23, Exhibit "CC", by the Honourable Judge Juan R. Torruella, Chief Judge, U.S. Court of Appeals, First Circuit.

- gg) The current United States policy is basically unfair in its application, has had a devastating impact on the rights of individual citizens, and the costs are seriously threatening the preservation of values that are central to democracy.

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 23, Exhibit "CC", by the Honourable Judge Juan R. Torruella, Chief Judge, U.S. Court of Appeals, First Circuit.

- hh) How mandatory minimum sentences and non-discretionary guidelines have caused a substantial number of individual injustices that have resulted in the rule of law being debased by the imposition of disproportionate criminal sanctions.

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 23, Exhibit “CC”, by the Honourable Judge Juan R. Torruella, Chief Judge, U.S. Court of Appeals, First Circuit.

- ii) How even former federal prosecutors who have gone to the bench are saying that the current strategy is futile and ineffective, useless and expensive and wrong.

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 24, Exhibit “DD”, by Volney V. Brown, Jr., Former U.S. Magistrate, Los Angeles (1982 to 1995).

- jj) How there is a clear political dispute between the State of California and the United States Federal Government with respect to issue of the provision of medical marijuana under the California Compassionate Use Act and how this dispute is a highly charged political issue.

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 27, Exhibit “GG”, The New England Journal of Medicine, August 7, 1997, Vol. 337, No. 6, “Reefer Madness – The Federal Response to California’s Medical-Marijuana Law” by George J. Annas.

- kk) How the consistent theme of the comments of these imminent jurists is that the “Drug War” constitutes an irrational and anti-democratic policy that has created far more harm as a policy than the harm that (drug abuse) it was designed to deter and how it is anti-democratic because it has vastly expanded the power of government to violate the privacy and autonomy of its citizens over matters that are uniquely personal and how the punishments imposed by statutory fiat rather than individual circumstances are grossly unfair and susceptible to unrevealable calibration by political appointees, namely prosecutors.

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 28.

- ll) How the current U.S. Government policy is entirely political and unrelated to matters of public health and safety or any other matter of legitimate governmental concern and how these offences have become a matter of politics or of a political nature or character.

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 28.

- mm) **Judge Charles W. Halleck** of the District of Columbia Court of General Sessions testified before the U.S. House of Representatives Special Subcommittee on Alcoholism and Narcotics on September 8, 1969. He said:

“I can’t do it. So I put him on probation or I suspend the sentence and everybody says the judge doesn’t care. The judge doesn’t care about drugs, lets them all go. You just simply can’t treat these kings of people like that”.

Affidavit of Paul David Wolf, sworn the 8th day of May, 2000, paragraph 10 (e)

- nn) Fed up with mandatory sentences, about 50 senior federal judges have refused to hear any more drug cases. Others have disobeyed sentencing rules and a few have resigned in protest. “You get a kid who makes a mistake. If he’s involved with enough drugs then it’s a 10-year minimum mandatory sentence and he has to do 8-1/2 years. To me, that’s ludicrous,” says **J. Lawrence Irving**, who quit the federal bench in San Diego in 1990”

Affidavit of Paul David Wolf, sworn the 8th day of May, 2000, paragraph 10 (f) and Newsweek, June 14, 1993.

144. Recently, **Judge James P. Gray** of Orange County, California, called for the “legalization of drugs” in an interview given in the **The Guardian (UK)** on **Saturday, June 10th, 2000** in an article by **Duncan Campbell** from Los Angeles entitled, “**The restricted sale of heroin, cocaine and cannabis ‘ would break the vicious cycle of violence’**”. In this interview, Judge Gray indicated that he was writing a new book which would contain the names of more than 20 judges who would favour a change in drug policies and even legalization that are prepared to say so publicly. He indicated that three times that number of judges had given him permission to quote them by name. Many others had told him privately of their similar beliefs. Judge Gray was a former prosecuting attorney. His book, soon to be published, is entitled “**Why our Drug Laws have failed and What we can**

do about it". Judge Gray emphasized that the message from the judges was not that the use of drugs was good but that the existing laws were causing more harm than good. The article indicated that the United States is now building a new prison every week to cope with the people serving mandatory minimum sentences for drug possession. The U.S. prison population has risen from just under 200,000 in 1996 to 2 million in the year 2000. It accounts for a quarter of the entire world's prison population. Further, **Professor Craig Reinman** of the **Institute for Policy Studies** at Washington, D.C., published the findings of a citizens' Commission on drug policy entitled, "**The War on Drugs: Addicted to Failure**" and in the forward to that publication states:

"Drugs are richly functional scapegoats. They provide the public with a restricted aperture of attribution in which only the chemical bogey man or lone deviant come into view and the social causes of a cornucopia of complex problems are out of the picture."

Harry Belafonte was the chairperson of the Commission. He pointed out that in California five African-Americans are in jail for every one in a state university. He called General McCaffrey's "War on Drugs" a "monumental failure" and recommended the end of mandatory minimum sentences for drug cases and called on President Clinton to revise the drug laws. During the same week, **Human Rights Watch** announced that 482 out of every 100,000 African-American men are in prison for a drug crime compared with 36 out of every 100,000 white men. **In Illinois**, a black man is 57 times more likely to be jailed for drugs than a white man.

The Guardian (UK), Saturday, June 10, 2000 – "**The restricted sale of heroin, cocaine and cannabis 'would break the vicious cycle of violence'**" by **Duncan Campbell** in Los Angeles.

ii) The Police and Military Perspective

145. The law enforcement community is also suffering from a growing disillusionment with the War on Drugs. This disillusionment has resulted in growing support within this community for reform, including reform of the "war mentality" that is contradictory of a police officer's intended role as an officer of the peace.

Nick Pastore was police chief of New Haven, Connecticut from 1990 to 1997. Pastore, who does not support current drug policies' effects, expressed his views in a 1998 interview with Rob Stewart of the Drug Policy Foundation:

“The drug war is detrimental to policing because it treats the police officers like military in combat and it treats everyone else like the enemy....All too often the attitude is: Lock ‘em up”.

“Cops against the Drug War - An interview with Nick Pastore”,
www.drcnet.org/cops/pastore.html.

146. Pastore implemented new approaches to law enforcement, believing that an emphasis needed to be placed on human rights and education. He implemented “sensitivity training” which created an awareness of special populations such as the homeless, people living with HIV, and addicts. A strong emphasis was placed on understanding the composition of society and why people behave like they do. In order to develop this understanding, officers had to live in a homeless shelter, serve food at the food banks and meet HIV infected people at hospices. Their findings from these experiences were presented to the chief in a thesis before they were allowed to pass.

This resulted in a more effective police force that handled itself in a less reactionary way – it checked an officer’s trained reflex to first pull out a gun – and the surprise that “the community wants to work with the police”. During the 7 years that Pastor was police chief, the crime rate dropped 22% while the force was only “slightly bigger”.

“Cops against the Drug War - An interview with Nick Pastore, former police chief of New Haven, Connecticut”, Drug Policy Foundation, Number 36, Spring 1998, p. 18.

147. The War on Drugs’ policies affects more than law enforcement. Members of the community, once charged with an offence, suffer the damaging effects of drug policies. Pastore, in response to being asked why the U.S. national drug policy should be changed, notes:

“Reforming the drugs laws is part of understanding what policing is. We do more damage by criminalizing people. Drug users are already marginalized, and, when they get into the criminal justice system, they’re in bigger trouble. If you’ve been arrested, you can’t be a police officer, a firefighter, or a teach. You’re branded. Why is the recidivism rate so high? when you come out of prison, all the doors are closed in your face.

Every drug user should have some place to go and be embraced when there. But that is often not the way it is. If they have no friends or family, the first person an addict should feel comfortable going to is a police

officer. We should police to be engineers of social change and improvement”.

“Cops against the Drug War - An interview with Nick Pastore”,
www.drcnet.org/cops/pastore.html.

148. Edward Ellison, former Head of Scotland Yard’s anti-drugs squad, spent 7 years of his life on the squad and 4 as its Head. He now wants to see all drugs legalized. He says he saw too many youngsters die and the misery that drug abuse can cause. He saw first hand the squalor and the wrecked lives and deaths and saw the immense amount of money being made by the dealers, importers and organizers. In his view, all that happened as a result of prohibition was that the Courts became clogged with thousands of cases of small, individual users and the generation of young people grew up to think of the police as their enemy. The Drug War consumed all of the police resources, leaving nothing to fight other crime. He is convinced that legalization of drugs would result in less drug abuse, and not more, as it would put the criminals out of business.

“Cops against the Drug War – Statement of Edward Ellison, former Head Scotland Yard’s anti-drug squad”, London Daily Mail, March 10, 1998.

149. On November 19, 1995, Dr. Joseph McNamara, a veteran of the New York City Police Department and the former chief of police of Kansas City and San Jose, who is currently a research fellow at Stanford University’s Hoover Institution, addressed the 9th International Conference on Drug Policy Reform at Santa Monica, California. Dr. McNamara expressed the view that both political parties in America are playing dead on drug reform because it is easier to be tougher on drugs than your opponent. The question arose as to what would happen if some of the politicians received some support for drug reform from the police community. This resulted in the establishment of the Hoover Law Enforcement Summit which invited top leaders in American law enforcement, more than 50 agencies, to participate. Speakers at the Summit included Ethan Nadelmann, who gave an overview on drug policy in the United States and what was happening internationally. Criminologists Jerry Skolnick from Berkeley and Al Blumstein from Carnegie Mellon University also attended. Dr. McNamara corroborated Mr. Blumstein’s work, pointing out how the Drug War had resulted in enormous increases in juvenile violence, doubling the homicide rate by firearms among teenagers that was directly related to drug commerce and the easy availability of guns in the inner city. He confirmed that the War was an assault on the African-American community and pointed to police tactics routinely used there that would

not be tolerated in white, middleclass neighbourhoods. Baltimore mayor, Kurt Schmoke, also attended the Summit and received a standing ovation from the audience of police chiefs. The evaluation of the conference by these chiefs of police afterwards found that 90% of the police leaders repudiated and did not support the Federal War on Drugs. They were clearly against the War and unanimous in taking the position that it was not a matter for the criminal law but a matter of social and medical health. They called for more treatment and more education as being more effective and more arrests and more prisons. They called for a blue ribbon panel to study the harm done by the Drug War and alternative methods for dealing with drugs. Apparently, these chiefs of police had never had an opportunity to hear the information presented and to speak out. All previous conferences that they had attended were funded by the Federal Government. Dr. McNamara pointed to the decentralization of law enforcement across the United States and how 70% of the arrests by this group were for possession of drugs. He pointed to how some law enforcement agents go after ordinary citizens and bid them up to higher levels in order to ensure that they get a 10 to 15 year mandatory sentence. Dr. McNamara lamented the amount of police misconduct and corruption that was now coming out as a result of the Drug War. He points to police officers being involved in armed robberies, beating people, framing drug dealers and selling drugs into the community. Police officers and murdered their partners and store owners and significantly falsifying evidence. The former chief of police of Detroit is in prison for stealing drug funds and many sheriffs have been convicted of dealing in drugs. Even the DEA agent that arrested Noriega is now in prison for stealing laundered drug money. While acknowledging that the great majority of police officers are honest and not racist, nevertheless the code of silence in those agencies allows the corrupt officers to do what they do. He said that public opinion polls over the last 10 years have shown a steady erosion of the credibility of law enforcement, particularly among the African-American and other minority communities.

**“Cops against the Drug War – Address of Dr. Joseph McNamara”,
London Daily Mail, March 10, 1998.**

150. Dr. McNamara also points out that telling police officers that they are soldiers in a Drug War that destroys the concept of the citizen as a peace officer whose fundamental duty is to protect life and be a community servant. A soldier's duty is to kill the enemy. When police are pushed into a war that they will never win can't win and are told to think of themselves as soldiers, they develop a mentality that they can do anything in order to try and achieve their objectives. Police who have been caught committing crimes inevitably rationalize their position by pointing to the criminals as the enemy or as animals. "It's a war, after all". L.A. police chief Daryl

Gates even went so far as to tell Congress that all casual drug users should be taken out and shot. His rationalization was because we are in a war.

“Cops against the Drug War – Address of Dr. Joseph McNamara”, London Daily Mail, March 10, 1998.

151. Of all the types of misconduct, Dr. McNamara points to the most serious being those who routinely violate the Fourth Amendment and commit perjury. He marvels at how many alleged consent searches occur and how many times defendants are said to be cooperative in plain view. He asserts that the courts should develop a healthy skepticism.

“Cops against the Drug War – Address of Dr. Joseph McNamara”, London Daily Mail, March 10, 1998.

152. The Law Enforcement on Drug Policy invited 50 participants representing 49 law enforcement agencies. The invitees names were selected from rosters of the Police Executive Research Forum, the Major Cities Police Chiefs Association and the California Police Chiefs Association. 26 of the 38 participants who completed an evaluation form on the conference stated that they were basically opposed to the Drug War. Four said that they basically supported the Drug War and 8 responses could not be interpreted. 18 said that their opinions had been changed slightly as a result of the conference and 17 said that their opinions had been changed significantly. Brian Brady, police chief of Novato, who attended as a representative of the California Police Chiefs Association was one whose view had been altered. As a result of the conference, he was now prepared to sit down and lean in the direction of the decriminalization of marijuana.

“Cops against the Drug War – Police Chiefs Question Merits of Drug War Policies”, Stanford University’s Campus Report, May 17, 1995;

“Cops against the Drug War – Summary of responses to the Hoover Law Enforcement Summit, Stanford, May 9 – 10, 1995”;

See also “Shootings by Police – Broken Trust – When officers engage in questionable conduct, both police and public must practice restraint”, by Joseph D. McNamara, San Jose Mercury News, Sunday August 1, 1999;

See also “Drug Peace” by Joseph D. McNamara, San Jose Mercury News, Wednesday, May 17, 1999;

See also “Reinventing the LAPD” by Joseph D. McNamara, Los Angeles Times, October 8, 1995;

See also “Has the Drug War Created an Officer Liars’ Club?” by Joseph D. McNamara, Los Angeles Times, February 11, 1996;

See also “End the War” by Anthony Lewis, New York Times, November 3, 1995;

See also “Cops view of the ‘drug war’”, San Francisco Examiner, April 9, 1995.

153. A group of citizens and scholars from Stanford’s Hoover Institution have been working on a process to cause the reexamination and redesign of U.S. drug laws. The resultant resolution states:

“our society must recognize drug use and abuse as the medical and social problems that they are and that they must be treated with medical and social solutions”.

“The Hoover Resolution”, www.lycaeum.or/drugwar/hoover.html, p.1.

154. A 1992 study by the University of Southern California School of Business estimated that drug abuse cost the U.S. economy \$76 billion in 1991. The U.S. Chamber of Commerce estimates that this cost is closer to \$160 billion, including lost productivity, higher medical bills, absenteeism, theft and injury. Mandatory minimum sentencing contributes to this cost by swamping the courts and overwhelming the prison system. Congressman Don Edwards summarizes the need for changing the U.S. approach to drug abuse:

“We have already tried what is politically popular and the result has been ruined lives, devastated communities and overcrowded prisons. Now it is time to focus on policies that will work.”

“The Hoover Resolution”, www.lycaeum.or/drugwar/hoover.html, p.2.

155. This opinion is echoed by the U.S. military. “Veterans for More Effective Drug Strategies” is a group of veterans that also favour the return of the drug problem to the domain of the medical profession. In their open letter to General Barry McCaffrey, they note that U.S. hospitals are experiencing record high overdose deaths and emergency room mentions of drugs

because of inexpensive, available high purity cocaine and heroin. Conversely, 57% of those who need treatment are unable to get it even though the RAND Corporation estimates that treatment is 10 times more cost effective than interdiction in reducing cocaine consumption.

“Veterans For More Effective Drug Strategies”, in particular “Open Letter to Gen. McCaffrey”, www.vetsformeds.org.

iii) The Current System and Its Consequences

156. On May 31st, 2000, **Michael Hedges** of the **Scripps Howard News Service** reported on the recent release by the **U.S. Bureau of Justice Statistics** of the first ever comprehensive compilation of federal arrest data. The report portrayed a growing federal law enforcement presence in the United States with increases in the number of federal agents, prosecutions and convictions. Curbing illegal immigration and the expanding War on Drugs fuelled the increase in federal criminal court cases by nearly 13% between 1997 and 1998. **Federal agents arrested 106,139 in 1998**. Almost half of them were for drug law and immigration violations. **43,000 people went to federal prisons** for sentences averaging almost five years. There were **83,000 federal law enforcement officers** in existence of which 33,000 were with the Justice Department agencies that conduct three quarters of the federal criminal investigations, namely the FBI, the DEA and the INS and the U.S. Marshalls Service. There were only 69,000 federal agents in 1993 and only 24,000 of them were with the FBI, DEA, INS and U.S. Marshalls.

Michael Hedges, Scripps Howard News Service, May 31, 2000.

157. From 1997 to 1998 the number of people brought to trial in the Federal court rose from 69,351 to **78,172**, a 12.7% increase. **87% of them were convicted, usually as a result of a guilty plea**. 71% were incarcerated. Since 1990, the number of people being held in federal jails awaiting trial or deportation has grown from just of 140,000 to more than 200,000. The number of inmates **in federal prisons** is up more than 90% over the same period from 57,000 to **109,000**.

Michael Hedges, Scripps Howard News Service, May 31, 2000.

158. The striking figure in the **Bureau of Justice statistics** report, according to U.S. legal experts, is the high number of guilty pleas – more than 8 out of

10, among people being prosecuted by federal attorneys. **Joseph diGenova, a former U.S. attorney in Washington, D.C.**, is quoted as saying that the mandatory minimum prison sentences passed by Congress several years ago have changed the dynamic of federal prosecutions and most defendants now try to aggressively challenge an indictment but, once charged, immediately plea bargain rather than risk stiff sentences.

Michael Hedges, Scripps Howard News Service, May 31, 2000.

159. Some U.S. legal experts, such as **Tim Lynch** of the Cato Institute, indicate that the statistics confirm **the “federalization” of the law enforcement in America**. Under the U.S. constitutional system the Federal Government was supposed to have a very limited crime fighting role, but for the past 20 years every session of Congress has escalated the Drug War which has, in turn, led to an increase in the number of federal agents, federal prisons and the federal court system. Mr. Lynch described the growing numbers as representing a self-fulfilling prophecy. The success of the bureaucracy increased as they federalized more crimes and expanded federal law to increase the number of arrests and convictions.

Michael Hedges, Scripps Howard News Service, May 31, 2000.

160. The consequences of these U.S. Criminal Justice policies and their interrelationship with politics and the media are authoritatively collected in a recently published book entitled, **“Race to Incarcerate”** by **Marc Mauer**, the **Assistant Director of The Sentencing Project**, a national organization based in Washington, D.C. In his introduction, Mr. Mauer discloses that the **United States national prison population has risen nearly 500% since 1972**, far greater than the 28% rise in the national population during the same period of time. In the 10 year period beginning in 1985, Federal and State governments have opened a new prison a week due to the flood of prisoners. After tracing the history of the penitentiary from the Quakers in the 1700’s up to the present, he remarks on how little the institutional model has changed since the 19th century and that the basic concept of imprisoning people in cages remains the central feature of the system. The prison cell, he notes, has endured after two centuries.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 1 / Introduction.

161. **Mauer** describes how the criminal justice system and its punitive orientation have become the model of choice in dealing with “crime” and “criminals” and how it is intimately connected with perceptions of race and class. As Professors **Chambliss**, **Chomsky** and **Shelden** pointed out, one approach is taken towards “them” and yet another when it is “us”. Mauer illustrates how this is particularly true of the Drug War. During the last quarter century the United States has produced a wave of building and filling prisons that is virtually unprecedented in human history. In 1972, the prison population was just under 200,000. The number of inmates in U.S. prisons has increased by nearly 1 million, rising to almost **1.2 million by 1997**. With more than half a million inmates in local jails, either awaiting trial or serving short sentences, there is a remarkable total of **1.7 million Americans behind bars as of 1998**. It is **now over 2 million**.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 1 / Introduction.

162. During the decade from 1990 to 2000, more people have been incarcerated than at any other time with a total of **2,000,000 Americans behind bars**. The U.S. maintains 25% of the world’s prisoners while it has only 5% of the world’s population. Over half of the people in prison are non-violent offenders. In two decades California has increased in prison population by eight-fold.

Affidavit of Valerie A. Leveroni Corral, sworn the 12th day of May, 2000, p. 2 and The Sentencing Project, AP/CBC: “Prison Population Doubled Under Clinton – 60% Jailed for Drugs”.

163. The U.S. rate of incarceration per capita dwarfs almost all nations of the industrialized worlds. The U.S. locks up offenders at a rate 6 to 10 times that of most comparable countries. It competes only with Russia for the dubious distinction of maintaining the world lead in the world incarceration rate. The fact that most of the prisons used today have been constructed in the last 20 years and can be expected to endure for at least another 50 years, virtually guarantees a national commitment to high rates of incarceration. There are more than **600,000 prison and jail guards, administrators and service workers and other personnel** that represents a powerful political force. With the addition of privatization of prisons, the prison industry has become a major growth industry.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 1 / Introduction.

164. This, Mr. Mauer points out, is occurring at a time when crime rates are in decline. The impact of this policy on African-Americans is particularly significant. Three out of ten boys growing up in the African-American community will spend time in prison. One quarter of the black men in some States cannot vote as a result of a felony conviction. He notes with concern that these U.S. policies and models now appear to be affecting social policy abroad, thereby impacting not only on the domestic U.S. “underclass” but also on the democratic rights and traditions of peoples internationally.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 1 / Introduction.

165. In **chapter 2** entitled “**The Incarceration ‘Experiment’**”, Mr. Mauer takes us to **1972** when the moratorium on prison construction movement took the position that the 196,000 inmates in Federal and State prisons in that year, yielding an incarceration rate of **93 per 100,000** population in the United States, together with approximately 130,000 inmates in local jails, resulting in an overall rate of about **160 per 100,000 population, or 1 out of every 625 Americans** was egregiously high. However, it should be recalled that in the 45 year period leading up to the 1970’s, there was a remarkable stability in the rate of incarceration, averaging about 110 per 100,000 (excluding the jail population). However, by **1997**, the number of inmates in U.S. State and Federal prisons had skyrocketed to 1,159,000 by 1997, a 500% increase. At the local jail level, the numbers escalated from 130,000 to 567,000, for a total of more than 1.7 million inmates. There were 5 times as many U.S. citizens locked up as there were 25 years ago. **The overall rate of incarceration is 645 per 100,000 population or about 1 out of 155 Americans.** In addition, more than 100,000 juveniles are locked up in youth facilities across the nation. The figure of 1 in 155 refers to the total U.S. population, including newborns and senior citizens so the rates for those in their peak “prison years” of 20 – 40 is much higher and for African-Americans is astronomical.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 2, pp. 16 – 19;

See also “Americans Behind Bars: A Comparison of International Rates of Incarceration”, by Marc Mauer, The Sentencing Project, Jan. 1991, generally;

See also “Americans Behind Bars: One Year Later”, by Marc Mauer, The Sentencing Project, February 1992, generally;

See also “The Use of Incarceration in the United States: A Look at the Present and the Future”, by Lynn S. Branham, American Bar Association, Criminal Justice Section, generally;

See also Affidavit of Valerie A. Leveroni Corral, sworn the 12th day of May, 2000. in particular James Macallair, Associate Director of the Center on Juvenile and Criminal Justice, p. 4.

166. In comparison to other nations, the United States is second only to Russia in its rate of incarceration among the 59 nations in Europe, Asia and North America. Rates of incarceration in the U.S. are about **6 to 10 times higher in general than other industrialized nations**. In **1995, 1 in 3 young African-American males was under the control of the criminal justice system**. Based on victim-crime surveys, U.S. rates for property crimes are not out of line with comparable nations. With respect to violent crimes, a different picture emerges. With respect to homicide, the 1996 rate of 7.4% in the United States was 54 times the rate of most industrialized nations. That was a 30 year low. Juvenile arrest rates were similar for property crimes between the U.S. and **Canada** and arrest rates for violent crimes in the U.S. were double that of Canada and for murders, 6 times that of the Canadian rate. A substantial number of U.S. murders were committed with firearms. U.S. homicide rates were, in 1988, 5.6 times higher than those of England and Wales. However, there were only 2.4 times those of **England and Wales** when firearms were excluded. In comparing **Seattle** and **Vancouver** where over 42% of Seattle households possess handguns, compared to just 12% in Vancouver, the relative availability of guns appeared to be the predominate factor contributing to the crime differential. Burglary rates were nearly identical, aggravated assaults were higher in Seattle. Assaults with knives, clubs and fists were virtually the same but the firearm assault rate in Seattle was 8 times higher than in Vancouver. Handgun availability was significant upon an examination of homicide rates as a major contributing factor to violent crimes. There were 388 homicides over a 7 year period in Seattle and only 204 in Vancouver. Those committed by knives and other weapons, excluding firearms, were virtually the same. Consequently, the difference between the two cities appeared to be due to the more widespread availability of firearms in Seattle.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 2, pp. 29 - 30.

167. Mauer goes on to examine the crime rates in the United States of America based on **victim surveys** and shows that the rise in violent crime was not responsible for the continuing race to incarcerate and the doubling of the

prison population since 1973. Political considerations beginning in the '80's with the crime policies of the **"get tough" movement** were responsible. The great majority of persons imprisoned as a result of these policies have been non-violent offenders. In many cases, these figures are a result of legislatively enacted **mandatory sentencing policies** which have been applied particularly to **drug offences**. The increase in incarcerated drug offenders rose 478% between 1985 and 1995. **3 out of every 5, or 61%, of the new inmates added to the system in that decade were incarcerated for non-violent drug or property offences.** Drug offences alone accounted for 74% of the rise in the federal inmate population between 1985 and 1995. Research has demonstrated that the changes in criminal justice policy rather than changes in crime rates have had the most significant contributory impact, leading to the rise in the state prison population. A study by the California legislature concluded that as many as ¼ of the incoming inmates to the prison system could be dealt with by diversion to community based programs. This would have saved 17% to 20% of the corrections operating budget for new prison admissions. **What distinguishes the United States from other industrialized nations is its higher rates of violent offences and harsher criminal justice policies for some offences.** U.S. drug offenders were considerably more likely to be sentenced to prison and for longer periods of time. The United States incarcerates more and for longer periods of time those convicted of property crimes than any other similar nation. Mauer notes how a society's level of incarceration may be related to its political or economic structure. In other words, the society's penal climate or its level of punitiveness is often reflected in the scale of punishments used. The United States, with a greater disparity of wealth than any other industrialized nation, is therefore likely to display harsher cultural attitudes towards sentencing policy than a nation with a broader social welfare outlook and system.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 2, pp. 30 - 40.

168. In **chapter 3**, entitled **"The Development of the "Tough on Crime" Movement – The Rise and Decline of Rehabilitation"**, Mr. Mauer traces the origins of the "race to incarcerate" from the political currents and socio-economic changes in the '60's through the decline in confidence in the rehabilitative ideal, both from the left and the right, indeterminate and then determinate sentencing, the enlarged role of the U.S. Federal Government in crime and crime fighting, the impact of the baby boom generation and the three drug epidemics, including heroin in the '60's, cocaine in the '70's and crack cocaine in the '80's, all of which led to a significant harshening of the criminal justice policy. Ultimately, the **"tough on crime"** movement triumphed with the development of **mandatory minimum sentencing**

laws and, ultimately, the **1984 Sentencing Reform Act** which established the **Federal Sentencing Commission** and its guidelines that carry a heavy presumption in favour of imprisonment for most offenders with little regard for mitigating circumstances. While evaluations of mandatory sentencing statutes found such legislation to be wanting in terms of impact on crime control and in the distortions that they produce within the criminal justice system, the dye was cast in the **Reagan – Bush** years by the development of the new “War on Drugs” which was used to expand the federal role in crime policy, thereby enabling the Federal government to send out moral messages. As Mauer’s chapter 4 is entitled, this was the beginning of “**Crime as Politics**”.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 4, pp. 50 - 61.

169. The Reagan administration began to provide more resources to federal drug agencies and to the Federal court system. The number of federal drug prosecutions increased dramatically. **From 1982 to 1988, drug prosecutions rose by 99% while federal prosecutions for all non-drug offences increased by less than 4%.** Unlike most crimes that are prosecuted at a local level, there is a great deal of discretion involved in how drug cases are charged. The offence may involve a violation of either federal or state law and may or may not be of sufficient seriousness to warrant prosecution. Traditionally, federal prosecutors took on the more complex and high level offences because they had greater resources available than local prosecutors. However, the scale of increase during this period was far greater than any actual rise in drug offences and reflected a political directive to enhance these activities.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 4, p. 61.

170. The War on Drugs began to explode in dramatic fashion with the advent of crack cocaine in the mid-’80’s. A media frenzy developed over the death of basketball star, **Len Bias**, even though many of the reports and information relied upon by the media later proved to be inaccurate. Congress adopted a series of mandatory sentencing laws, prescribing stiff mandatory prison terms for a variety of drug offences thereby superseding the work of the United States Sentencing Commission. The **Anti-drug Abuse Act of 1988** contained even more mandatory sentencing laws and declared a national policy to create a drug free America by 1995. Needless to say, it did not achieve its goals by any stretch of the imagination.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 4, pp. 62 - 63.

171. To illustrate the politicization of the crime issue at that time, a memorandum by **Assistant Attorney General William Bradford Reynolds** in the last year of the Reagan presidency, sent to key Justice Department officials and entitled, “**A Strategy for the Remaining Months**” proposed that the administration attempt to “polarize the debate” on a variety of public health and safety issues such as drugs, AIDS, prisons and others and that the administration should “not seek ‘consensus’, we must confront ...in ways designed to win the debate and further our agenda”. With respect to prisons, the memo said that the issue should be polarized and those that take the opposite view attacked in name and that, overall, the administration should make the case that “public safety demands more prisons”.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 4, p. 63.

172. As Mr. Mauer points out, these themes clearly resonated with the **George Bush** 1998 election campaign and his use of **Willy Horton** during the campaign is now well known history. The Department of Justice was intent on ensuring that the Federal Government played a leading role in promoting ever harsher punitive policies on crime and developed a full scale public relations campaign to enhance prison construction. This was so even though the administration was in possession of research which indicated that incapacitation did not appear to achieve large reductions in crime while causing enormous increases in prison population. Even in the face of clear evidence demonstrating flawed pieces of Government produced research relied upon by the Department of Justice, these critiques were ignored and other reports released to the media that were exactly to the contrary.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 4, pp. 64 - 66.

173. By the end of the one year reign of **Attorney General William Barr** in 1993, drug arrests in the U.S. nationally exceeded a million a year and harsher sentencing policies were being adopted across the country. Between 1980 and 1993, Federal spending on employment and training programs had been cut in half while corrections spending had increased by 521%.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 4, pp. 67 - 68.

174. While the early months of the **Clinton** administration in 1993 gave room for some cautious optimism because of the various statements of the new **Attorney General, Janet Reno**, one year later the situation had been transformed into a repressive criminal justice climate rivalling any of the preceeding 20 years. According to Mauer, no single factor explained this dramatic reversal. What occurred was the creation of a vicious cycle of reaction composed of “political grandstanding, media sensationalism, and organized advocacy by “law and order” proponents”. According to a study conducted by the **Centre for Media and Public Affairs**, television coverage of crime more than doubled from 1992 to 1993 while the murder coverage rate tripled during that period and despite the fact that crime rates were essentially unchanged.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 4, pp. 71 - 72.

175. Federal mandatory minimum sentencing have come under some criticism over several years, including a **1991 U.S. Sentencing Commission Study** that documented the disparities and injustices caused by these policies and statements from all 12 judicial circuits opposing mandatory sentencing, along with several prominent judges resigning or refusing to hear such cases. Nevertheless, a report that was completed in August of 1993 was not released until February of 1994 because the administration had not been able to determine the appropriate “spin” to place on it. It was ultimately released late on a Friday afternoon guaranteeing minimum media coverage. These and other studies revealed that **more than 1/3 (36%) of all incarcerated drug offenders were low level offenders**, characterized by limited criminal histories, the absence of violence in their offences and minimal roles in the drug trade. This group of prisoners constituted **1/5 of the entire federal prison population**.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 4, pp. 74 - 75.

176. The **Clinton** administration brought in the “**three strikes and you’re out**” law which was initially intended for violent offenders and was quickly broadened to incorporate drug offences. A six year, \$30 billion legislative package heavily weighted towards law enforcement and incarceration was ultimately passed by Congress which provided \$8 billion in funding towards prison construction and \$8.8 billion for policing. It expanded the federal death penalty, eliminated grants for higher education to prisoners

and created fiscal incentives for States to increase prison terms. As the former **Deputy Attorney General Phillip Heymann** said in describing the **Clinton approach**, it was “the most careful political calculation, with absolutely sublime indifference to the real nature of the problem”.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 4, p. 77.

177. **U.S. corrections systems** spending now approaches **\$40 billion a year** nationally. The quarter century long prison build-up has resulted in a sextupling of the prison population which is unprecedented in American history. It is probably unprecedented for any modern nation to use this institution as a means of crime control to such an extent. The belief that this increasing prison population has resulted in reductions in crime does not stand up under close scrutiny. Overall crime rates generally rose in the '70's, declined from 1980 to 1984, increased again from 1984 to 1991 and then declined through 1995. Each of these phases occurred during a time when the prison population was continually rising. Thus, the prison population has twice coincided with periods of increase in crime and twice with declines in crime. **While there was a 328% increase in the rate of incarceration from 1970 to 1995, property crime rates reached a 20 year low in 1995 but were still higher than in 1970 before the prison build-up began.** Similarly, **violent crime, with the exception of murder, was still consistently higher in 1995 than in 1970.** Decline in murder rates of 20% by 1995 to 8.2 per 100,000 population from a peak of 10.2 per 100,000 population in 1980 on close examination show that **the murder rate in 1995 was essentially the same as the rate in 1970.** Thus, rates of murder were no worse in 1995 than in 1970 despite the addition of nearly one million prison inmates. Mauer concludes that in looking at **crime rates** over all over the 25 year period of rising incarceration, there is **no dramatic decline despite the unprecedented increase in the number of prisoners.**

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 5, pp. 83 – 84 and 91.

178. Mauer also points out that despite the significant declines in crime in the 1990's, public opinion polls still show that the public continues to be substantially concerned about crime and violence and thinks that violent crime is increasing. The barrage of media depictions is one source of explanation. The failure to look at other alternatives is another. For example, **a 1997 RAND study** examined the relative benefits derived from spending an additional one million dollars to cut drug consumption and drug related crime through different policy interventions, such as drug

treatment. The analysts concluded that **spending the funds on reducing drug consumption through drug treatment would reduce serious crimes 15 times more effectively than incapacitating offenders by funding more mandatory prison terms.**

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 5, pp. 93 - 94.

179. While delineating the **“Limits of the criminal justice system on crime control”** in **chapter 6** because of its “reactive” nature, the “funnel” system that misses most crimes, the principle of diminishing returns, demographics and the “replacement” effect, Mauer goes on in **chapter 7**, entitled **“African-Americans and the Criminal Justice System”** to illustrate the massive disproportionate effect of the U.S. criminal justice system on the African-American community. **In 1989, nearly 1 in 4 black males in the age group 20 to 29 was under some form of criminal justice supervision on any given day – either in prison, jail, or on probation or parole. By 1995, this had increased to almost 1 in 3.** A black boy born in 1991 stood a 29% chance of being imprisoned at some point in his life, compared to a 16% chance for a Hispanic boy and 4% chance for a white boy. **Between 1985 to 1995, there was a 204% growth in the number of black women in Federal and State prisons – a much greater number than the 143% increase for black males with 126% increase in the over all inmate populations.** He concludes his analysis by pointing out that sentencing policies, whether motivated by a desire to “get tough” or to reduce disparity, have unfairly impacted on low income people and minorities. The “War on Drugs” made these policies pale in significance.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapters 6 and 7 generally and p. 140.

180. **Chapter 8** deals with **“The War on Drugs and the African American Community”**. Since 1980, no policy has contributed more to the incarceration of African-Americans than the “War on Drugs”. As a national policy, it has exacerbated racial disparities in imprisonment while failing to have any sustained impact on the drug problem. At the outset, he notes that one’s socio-economic class is clearly relevant to whether or not the “Drug War” will have an impact upon you and, secondly, that because there are no direct victims, drug law enforcement is far more discretionary than for other offences and police can decide when and where they will seek to make arrests and what priority they will place on enforcing the drug law.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 8, pp. 142 - 143.

181. In 1980, there were 581,000 arrests for drug offences. By 1990, this number had nearly doubled to 1,090,000. **By 1995, 1,476,000 drug arrests were made.** During this time, the data showed that drug use had been declining since 1979 from 14.1% of the population to 6.7% by 1990 and 6.1% by 1995. Consequently, one would have thought that drug arrests would have declined as well. However, as Mauer points out:

“But all things are not equal when it comes to crime and politics. Instead, heightened political and media attention, and increased budgets for law enforcement all contributed to a greater use of police resources to target drug offenders. At the same time, police increasingly began to target low income, minority communities for drug law enforcement.”

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 8, p. 145.

182. While African-Americans constituted 13% of the U.S. population in 1980, they accounted for 21% of drug possession arrests nationally. That number rose to 36% in 1992, until it dropped to somewhere around 33% in 1995. Similar trends were observed for juveniles. Televisions newscasts and weekly news magazines would depict the drug problem as particularly involving the black population. However, a **Substance Abuse and Mental Health Services Administration** survey from the **Department of Health and Human Services** disclosed that while African-Americans were slightly more likely to be monthly drug users than whites or Hispanics, the much greater number of whites in the overall population determined that they were the vast majority of drug users. The **SAMHSA** data indicated that whites represented 77% of current drug users, African-Americans 15% and Hispanics 8%. In other words, they represented 15% of the current drug users but 33% of the arrests for drug possession.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 8, pp. 145 - 147.

183. The same survey also disclosed that 43% of the population in 1996 said it was fairly or very easy to obtain cocaine in their neighbourhood and 39% said it was easy to obtain crack. This discloses the relative ease of obtaining drugs after 15 years of massive increase in law enforcement resources devoted to the Drug War.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 8, pp. 149 - 150.

184. In so far as sentencing for drug offences is concerned, data from the **Bureau of Justice Statistics** shows that the chances of receiving a prison term after being arrested for a drug offence increased by 447% between 1980 and 1992. This is likely due to mandatory minimum sentencing laws and punitive attitudes towards drug offenders. Before 1990, drug offenders served an average of 30 months in prison. After the introduction of mandatory drug laws in 1990, most of them served an average of 66 months. Combined with the greatly increased number of federal drug prosecutions, this resulted in the proportion of federal prisoners who were drug offenders increasing from 25% in 1980 to 60% by 1995. **Mandatory sentencing laws** have not only increased the proportion of arrested drug offenders who were sentenced to prison, but has increased the length of time that the offenders serve in prisons. **Between 1985 and 1995, the overall number of drug offenders in prison increased by 478% compared to 119% for all offences.** During that period, drug offenders constituted 42% of the rise in the black state prison population. The number of white drug offenders increased by 306% on the 10 year period, while for blacks the increase was 707%.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 8, pp. 151 - 152.

185. In **chapter 9** entitled, “**What’s Class Got to Do With It?**”, Mauer clearly demonstrates the intersection between race and class in the U.S. criminal justice system. He demonstrates the potential of using economic opportunity as a strategy for crime reduction but how policy makers simply don’t respond or respond in a completely different manner. He illustrates this by noting that in **Clinton’s** first term in office, experts were recommending a \$60 billion economic package to stimulate job creation and economic development in Los Angeles after the riots. Due to the political climate, the administration proposed a \$30 billion package. **The House** passed a \$16 billion bill which was promptly killed by **the Senate** in favour of a \$5 billion allocation for unemployment insurance and some other domestic programs. A year later, **Congress** allocated \$30 billion towards these communities. However, this time the appropriation took the form of a massive crime bill loaded with 16 new death penalty offences, \$8 billion in prison construction, “three strikes” sentencing and other provisions certain to escalate the prison population. The result of this legislation was to incarcerate impoverished young black and Latino men.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 9 generally and pp. 169 – 170.

186. In chapter 10 entitled “**Give the Public What It Wants’: Media Image and Crime Policy**”, Mr. Mauer illustrates the role of the media as a critical factor in influencing the direction of crime policy. Media images and information have, in a variety of ways, converged to shape public perceptions of crime, offenders and incarceration policy in ways that are often misleading. Most images of the crime problem communicate, anxiety, and a distorted sense of the actual extent of the problem. This tends to overwhelm intelligent or informative discussion of the issues. The electronic media’s influence has been particularly significant. **The Centre for Media and Public Affairs**, a Washington based monitoring organization reported in 1993 that crime stories on network television had doubled from 1992 with murder stories tripling. 1 out every 8 stories featured on the evening news was a crime story. By 1995, the networks featured more than 2,500 crime stories on the evening news, a 52% increase over the 1993 high. While the O.J. Simpson trial contributed to this total, overall coverage had still risen dramatically, even excluding that story. Murder stories, excluding Simpson, rose by 336% from 80 stories in 1990 to 375 by 1995, a period in which the actual murder rates had declined by 13%.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 10, pp. 171 - 172.

187. Apparently, the most heavily watched news programs are the late local news shows. In virtually every major city in the country, crime stories dominate the coverage. In **Philadelphia**, crime news represented almost 1/3 (31%) of the stories on the local evening news and 3/4 (76%) of the crime stories were featured in the first segment of the news before the first commercial break. Crime makes for good visual effects and is relatively inexpensive to produce.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 10, pp. 172 - 173.

188. A study by the **Berkeley Media Studies Group** examined news content of a week of local news broadcasts on 26 stations throughout **California**. They found that violence was the single most frequent story topic featured in that more than 1/2 (55%) of the stories on youth involved violence, while more that 2/3 (68%) of the stories on violence involved youths. At that time, juveniles represented less than 20% of arrests for violence and,

consequently, young people were being portrayed as contributing far more to the problem of violence than they actually did. The study also found that reporting was far more likely (84%) to be “episodic” (focused on events) rather than “thematic” (providing a context for the events). However, print media, too, have contributed to the distortion of crime and justice issues. A study in the **American Journal of Health** concluded that the print media’s representation of deaths caused by tobacco, alcohol and illicit drugs were very inconsistent with actual mortality rates for each of the substances. While 4% of mortality news text was devoted to tobacco in 1990, deaths attributed to tobacco constituted 19% of the actual deaths that year. Conversely, while illicit drugs were only responsible for 1% of all deaths, they represented 16% of the print coverage.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 10, pp. 174 - 175.

189. **From 1980 to 1995, the number of women in prison increased by 417% compared to a 235% increase for men.** Most of these women are being locked up for drug offences and at greater rates than men. As of 1991, 1/3 of females state prison inmates were incarcerated for drug offences compared to 1/5 of male inmates. 3/4 of the women in prison in 1991 were mothers and 2/3 had children under the age of 18. Many of them were single parents. It is estimated that 1.5 million children have parents in prison. **The National Council on Crime and Delinquency** found that over 1/2 the women never received a visit from their children since their admission to prison. Primarily, this was because of the distance from the children’s homes to prisons.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 11, p. 185.

190. The **Sentencing Project** and **Human Rights Watch** in **1998** conducted a study on the loss of **voting rights** and concluded that an estimated 3.9 million Americans, or 1 in 50 adults, was either currently or permanently disenfranchised as a result of a felony conviction. **1.4 million of them were African-American males representing 13% of black men. 1 in 4 black men are permanently disenfranchised in Alabama, Florida, Iowa, Mississippi, New Mexico, Virginia and Wyoming.** It is likely that as many as 30% to 40% of African-American men will lose the right to vote for some or all of their adult lives. Consequently, not only are criminal justice policies resulting in the disproportionate incarceration of African-Americans, imprisonment itself is reducing the black political ability to influence these policies.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 11, p. 186.

191. U.S. policies, in this regard, remain out of line with international norms. No other democratic nation bars ex-offenders from voting for life or keeps such a significant proportion of its citizens from voting as a result of a felony conviction.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 11, p. 187.

192. In his concluding **chapter 12** entitled “**A New Direction for a New Century**”, Mr. Mauer points to the **March 1998** conference held in **Kingston, Ontario, Canada**, entitled “**Beyond Prisons**” which was an international symposium that brought together 100 leaders of prison systems, non-governmental organizations and academia to discuss the idea that “increased reliance on incarceration is not only unsustainable financially, but also largely ineffective in preventing future crime compared to other forms of intervention”. What Mr. Mauer found remarkable was that the event was sponsored by the **Correctional Service of Canada** despite the many similarities and geographical proximity of Canada to the United States.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 12, p. 189.

193. Mauer points out that if we examine crime rates in the late 1990’s compared to just prior to the inception of the prison rise in the early ‘70’s, the best that can be said is that **crime rates in some categories are no worse than they were when only 1/6 as many inmates filled the nations prisons**. While murder rates have declined to their levels of 25 years ago, rates of reported violence are higher than at that time for rape, armed robbery, and aggravated assault. The **Justice Department** victimisation studies indicate that violent crime neared a 20 year high in 1994 before finally declining. Meanwhile, the cost in both fiscal and human terms has been phenomenal. The United States is now second only to Russia in the degree to which it imprisons its citizens and the cost of corrections approaches \$40 billion annually. There are other industrialized nations with lower rates of violence than the U.S. that have accomplished this without incarcerating huge numbers of its citizens and have, instead, maintained lower rates through regulation of firearms, lower levels of concentrated poverty and other means. The toll on the number of people in prison, those who have passed through and the millions from

their families, not to mention the impact on the African-American community, the Latino community and women of colour has been phenomenal. One would think that might cause those in power to question whether prison “works”. However, as Mauer concludes, **“thirty years of politically inspired rhetoric, wilful ignorance of research and programmatic developments and constrained policy options have conspired to make the United States choose the most punitive of responses”**.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 12, pp. 190 - 193.

194. The number of drug offenders since 1985 has escalated by 605% from 39,000 to 275,000, costing taxpayers more than \$5 billion annually. Notwithstanding these figures, in 1997 **Barry McCaffrey**, the **Director of the Office of the National Drug Control Policy**, confirmed that the War on Drugs has not been effective. He said “...if measured solely in terms of price and purity, cocaine, heroin and marijuana proved to be more available than they were a decade ago”. While there are many ways to change the situation, the major constraint is the political establishment influenced by the mass media.

Race to Incarcerate – The Sentencing Project, by Marc Mauer, the New Press, New York, 1999, chapter 12, pp. 190 - 193.

iv) The Impact on Women and Children

195. With respect to the impact on women in particular, a November 1999 report by the **Sentencing Project** entitled **“Gender and Justice: Women, Drugs and Sentencing Policy”** by **Marc Mauer, Cathy Potler** and **Richard Wolf**, tells the story. The introduction discloses the following:

“Since 1980 the number of women in prison has increased at nearly double the rate for men. Nationally, these are now nearly seven times as many women in state and federal prisons as in 1980, an increase from 12,300 in 1980 to 82,800 by 1997, or **a rise of 573%**. This compares to an increase of 294% in the male prison population during this period. As a result the female proportion of the national prison population increased from 4.1% in 1980 to 6.4% in 1997. In addition, 63,000 women are incarcerated in local jails

either awaiting trial or serving short sentences, yielding a total of 146,600 female inmates.

As is true of men in prison, women inmates are disproportionately low-income, with low levels of educational attainment and high rates of substance abuse and mental illness. In a **1997 survey** of state and federal prison inmates, three quarters (74%) of the women reported that they had used drugs regularly and three fifths (62%) had used drugs in the month prior to their offense. Nearly a quarter (24%) of women in state prisons are identified as mentally ill. Women inmates are also 50% more likely than men to be HIV positive (3.4% of female inmates compared to 2.2% of male inmates).

Women in the criminal justice system have experienced dramatically high levels of physical and sexual abuse. More than half (57%) of the female state prison population has been abused, including 47% being physically abused and 39% sexually abused (with many being victims of both types of abuse). A third (33%) of the women had been raped prior to their admission to prison. Of the women incarcerated in state prisons, those who had been abused were considerably more likely to be incarcerated for a violent offense than those who had not been abused (34% as compared to 21%).

The dramatic rise in the women's prison population has called attention to the consequences of imprisoning ever-larger numbers of women. The social impact of higher rates of women 's imprisonment is different from men in several regards. The most significant of these relates to women's roles as mothers and caregivers. While many incarcerated women previously had parenting difficulties due to their involvement in drugs or crime, imprisonment often exacerbates problems with their children."

The Sentencing Project, "Gender and Justice: Women, Drugs and Sentencing Policy" by Marc Mauer, Cathy Potler and Richard Wolf, p. 1.

196. A **key factor** in the rise in the women's prison population has been the impact on the "**War on Drugs**". The report's key findings are as follows:
- "Drug offenses accounted for half (49%) of the rise in the number of women incarcerated in state prisons from 1986 to 1996, compared to one-third (32%) of the increase for men.

- The number of women incarcerated in state prison for a drug offense rose by 888% from 1986 to 1996, in contrast of a rise of 129% for non – drug offenses.
- Drug offenses account for a dramatic proportion of the rise in the number of women sentenced to prison from 1986 to 1995:
 - 91% of the increase in **New York**
 - 55% of the increase in **California**
 - 26% of the increase in **Minnesota**
- Women drug offenders in 1995 were more likely to be sentenced to prison than in 1986. In contrast to a rise in drug convictions of 256% and 177% in New York and Minnesota respectively, the increase in prison sentences for drug offenses was considerably higher, 487% in New York and 400% in Minnesota.”

The Sentencing Project, “Gender and Justice: Women, Drugs and Sentencing Policy” by Marc Mauer, Cathy Potler and Richard Wolf, pp. 2 - 3.

197. The report analyzes the situation in three States; **New York, California and Minnesota** between 1986 and 1995, which coincides with the escalation of the “War on Drugs” nationally. By 1986, arrests for drug offences had increased by 42% to 824,100 over the total of 580,900 for 1980. They reached 1,476,100 in 1995 and have now surpassed 2 million by the year 2000. The rate at which women use drugs actually declined during this period. The rate of 9.5% of women using drugs on a monthly basis in 1985 fell by 1/2 to 4.5% by 1995.

The Sentencing Project, “Gender and Justice: Women, Drugs and Sentencing Policy” by Marc Mauer, Cathy Potler and Richard Wolf, p. 7.

198. The study calls **New York** a drug driven criminal justice system. In 1986, one of every 20 women arrested for a drug offence was sentenced to prison. By 1995, that ratio had increased to 1 in 7. While total arrests increased by 15% from 1986 to 1995, drug arrests rose by 61%. Drugs constituted nearly 2/3 (63%) of the increase in female arrests. Drug offences accounted for 82% of the total increase in women’s convictions. By 1995, 156% more received prison sentences than in 1986, compared to a 49% increase for men. Drug offences constituted 91% of the 1,114 additional prison commitments in 1995 over 1986. **The effect of mandatory sentencing policies and limited treatment options resulted in a 487% rise in prison sentences for drugs, nearly doubling the 256% increase in drug convictions. 6 out of every 10**

women in New York state prisons are serving sentences for drug convictions. Notwithstanding the above, the majority of drug convictions do not result in prison sentences because mandatory sentencing laws are widely used to induce plea agreements to a lesser charge to avoid the mandatory minimum. However, because of lack of treatment and other positive interventions, these first time offenders are often rearrested and receive harsh prison terms for the second felony.

The Sentencing Project, “Gender and Justice: Women, Drugs and Sentencing Policy” by Marc Mauer, Cathy Potler and Richard Wolf, pp. 8 - 11.

199. With respect to **California**, there was a 532% increase in its inmate population from 25,000 in 1980 to 158,000 in 1997, nearly double the national increase of 278%. The growth of women offenders far outpaced that of men and drug offences disproportionately contributed to that rise. Drug offences were not as significant, however, as in New York. While the total number of arrests increased at approximately the same rate as New York, the increase in California was not primarily filled by drug offences. While drug arrests increased by 7%, the rate of increase for women was 10 times that of men, a 31% rise for women compared to 3% for men. While the increase in prison sentences more than doubled, the increase for women was 149% compared to 108% for men. **The number of women sentenced for drug offences increased by 316% compared to 223% for men.** Drug arrests only rose by 31% during that period so that the propensity to incarcerate women for drug offences was remarkable, rising 10 times faster than the increase in arrests. Drug offences accounted for 55% of increase in the number of prison terms for women, compared to 46% for men. Women are significantly more likely than men to be serving prison terms for drug offences with 42% of women and 26% of men incarcerated for a drug offence. Nearly a 316% increase in the number of women sentenced to prison for drug offences was dramatic. It is 10 times the rate of women arrested for these offences.

The Sentencing Project, “Gender and Justice: Women, Drugs and Sentencing Policy” by Marc Mauer, Cathy Potler and Richard Wolf, pp. 12 - 15.

200. **Minnesota**, on the other hand, is known as a more moderate State. Drug offences comprise a much smaller portion of the court and prison population. Nevertheless, arrests for drug offences increased, rising 174% between 1986 and 1995, compared to the overall arrest increase of 41%. There was still a 279% increase in arrests of women for drug offences, from 438 to 1,661 while the rate for men was 162% during this period. Drug offences accounted for 26% of the increased number of prison terms for women and 30% for men.

The Sentencing Project, “Gender and Justice: Women, Drugs and Sentencing Policy” by Marc Mauer, Cathy Potler and Richard Wolf, pp. 16 - 18.

201. Consequently, the rate of arrest and imprisonment of women in **New York, California** and **Minnesota** increased at a significantly faster rate than that for men during the period in question. Women sentenced in New York and California in 1995 were much more likely than men to have been convicted of a drug offence. This was not the case in Minnesota. While in New York the entire increase in the women’s prison population over the period was driven by drug arrests and prosecutions, the increases in California and Minnesota, while substantial, were not as overwhelming. The increase in prison sentences in all three States outpaced arrests and convictions. In New York, the rate of increase for prison sentences nearly doubled the conviction increase, in California the differential was 10 times and in Minnesota, 1 1/2 times. The use of prosecutorial discretion in relation to mandatory sentencing laws illustrates how prosecutors now have the discretion to determine what will happen in a case, instead of judges.

The Sentencing Project, “Gender and Justice: Women, Drugs and Sentencing Policy” by Marc Mauer, Cathy Potler and Richard Wolf, pp. 19 – 23.

202. In conclusion, the report makes several public policy recommendations. They include repealing mandatory sentencing laws, expanding treatment options, focusing resources on women and children, repealing the denial of welfare and education benefits to ex-offenders, investigating the relationship between drug use/sales and arrests and maintaining a uniform criminal justice data. The dramatic growth of women in the criminal justice system affects a series of social and economic problems, as well as a change in criminal justice policy. The “War on Drugs” has played a disproportionate role. The large number of women inmates who are single parents with children with under the age of 18 shows that these sentences clearly have an impact beyond the individual woman offender. The racial disparities are reflective of national drug policy.

The Sentencing Project, “Gender and Justice: Women, Drugs and Sentencing Policy” by Marc Mauer, Cathy Potler and Richard Wolf, pp. 24 – 26.

203. Women represent the fastest growing and the least violent segment of the prison population - **85.1% of all female inmates have not been arrested for violent crimes nor acts of violence**. In America, the state spends more money building prisons than is spent on building universities.

Affidavit of Valerie A. Leveroni Corral, sworn the 12th day of May, 2000, p. 2 and Maurer, Marci & Hauling, Tracey, “Young Black Americans and the Criminal Justice System: Five Years Later”, The Sentencing Project, 1995.

204. With respect to the **impact on children**, a recent report released by the **U.S. Justice Department’s Bureau of Justice Statistics** disclosed that nearly 1.5 million U.S. children, 2% of the nation’s 72 million minor children, have a mother or father in a federal or state prison. **1,498,800 children under the age of 18 had a parent in prison at the end of 1999.** This is up 60% since 1991, an increase of 562,300 from 936,500 back then. The percentage of prisoners with children has remained the same at roughly 57%. In 1999, 721,500 inmates were parents of a minor child. 58% of the children were under 10 years old. The average was 8 years of age. Further, a majority of state inmates, 57% of fathers and 54% of mothers, reported never having had a personal visit with their children since being locked up. Among the federal prison population, 44% of the fathers and 42% of the mothers reported no such visits. As of 1997, 62% of state prisoners and 84% of federal ones were held more than 100 miles from their last place of residence. 17% of state prisoners and 7% of federal prisoners were housed within 50 miles of their last home. The overall prison population has overwhelmingly male at 93% and they are predominately held in state prisons (89%) rather than federal (11%). 80% of all inmate parents have a child living with the other parent and about 20% with grandparents or other relatives. 2% had a child in a foster home or institution. Some inmates have more than one child with different custodians. Half of the parents in prison are African-American and 1/4 are white and about 1/5 are Hispanic. It is estimated that there were 767,200 African-Americans, 384,500 white Americans and 301,600 Hispanic children of prisoners in 1999.

“Almost 1.5 million U.S. children have a parent in prison, study shows”, by Terry Frieden, CNN Interactive, August 30, 2000;

“1.5M Kids Have Parent in Prison”, Associated Press, August 30, 2000.

v) Conclusion: A Colossal Failure

205. The United States has spent over \$19 billion on international drug control and interdiction efforts to reduce the supply of illegal drugs over the past

ten years. The cultivation of drug crops has not been reduced significantly and cocaine and heroin and other illegal drugs remain readily available in the United States. The amount of cocaine and heroin seized between 1990 and 1996 made little impact on the availability of illegal drugs in the United States and on the amount needed to satisfy the estimated U.S. demand of about 300 metric tons per year

The United States General Accounting Office, “Drug Control – Status of U.S. International Counternarcotics Activities”, Testimony before the Subcommittee on National Security, International Affairs, and Criminal Justice, Committee on Government and Oversight, House of Representatives, Statement for the Record by Benjamin F. Nelson, Director, International Relations and Trade Issues, National Security and International Affairs Division, March 12, 1998, GAO/T-NSIAD-98-116.

206. For a more detailed review of the “Successes and Failures of George Bush’s War on Drugs”, see the article by that name by Dan Check. He reviews the detailed history, the plan and the initial results. He shows how the Federal Government coerced State Governments into expanding their crime fighting budgets at risk of threats to funding and other federally funded areas, much like the trade and other strong arm tactics used internationally. He points to the resultant overcrowded jails and other social ills and gives the particular example of the results in New York City. He shows how the DARE program type of educational approach is not successful and how interdiction has been a colossal failure. He concludes that the emphasis should have been on reducing demand through treatment and factually correct education. The war has been disproportionately taken out on the poor.

“The Successes and Failures of George Bush’s War on Drugs”, by Dan Check, www.drugsense.org.

207. On Tuesday, August 22, 2000 at 2:19 p.m., the Federal Government had spent \$11,549,850,127 on the War on Drugs and the State Governments had spent \$12,904,860,477 for a total of \$24,454,710,604. As of that date and time, 993,540 had been arrested for drug offences since the start of the year 2000.

“Drug War Clock”, www.drugsense.org.