

January 24, 2009

# Substance Abuse in America: Then and Now

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# Substance Abuse in America: Then and Now

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## I. Introduction

In 1971, President Richard M. Nixon officially declared “war” on drugs because of an increasing drug problem in America.<sup>1</sup> The federal government immediately initiated legislation and commenced funding various drug treatment programs to combat the drug problem.<sup>2</sup>

Treatment Alternatives to Street Crime (TASC) was one of the first successful programs to emerge.<sup>3</sup>

Shortly thereafter, the federal government commissioned an evaluation of drug use in America by funding the Monitoring the Future (MTF) study.<sup>4</sup> MTF was a comprehensive study of drug use in high schools conducted through personal interviews of students.<sup>5</sup> The federal government reacted to results obtained in MTF by, among other things, funding Drug Courts.<sup>6</sup>

Congress enacted criminal legislation as an alternative solution to treatment as funding for

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<sup>1</sup> David Masci, *Preventing Teen Drug Use: Is the “Get-Tough” Approach Effective?*, 12 CQ RESEARCHER 217, 227 (2002).

<sup>2</sup> See Mary A. Toborg et al., TREATMENT ALTERNATIVES TO STREET CRIME (TASC) PROJECTS: NATIONAL EVALUATION PROGRAM, PHASE I SUMMARY REPORT vii (1976).

<sup>3</sup> See *id.*

<sup>4</sup> See Lloyd D. Johnston et al., MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975-2006, VOL. I, Pub. No. 07-6205 (2007).

<sup>5</sup> *Id.*

<sup>6</sup> See David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 JOURNAL OF EXPERIMENTAL CRIMINOLOGY 459, 459 (2006).

various studies and treatment programs was occurring.<sup>7</sup> The success of Congress's efforts may be evaluated by an analysis of the rise and fall of recidivism rates.<sup>8</sup>

The purpose of this paper is to provide: a historical review of drug diversion programs, an assessment of the effectiveness of various drug treatment programs, a review of the past and present sentencing structures, an outlook into the future drug problem in America.

## **II. Drugs and Congressional Funding**

“The United States has the western world’s most serious drug problem, whether expressed in (per capita) terms of addiction to illicit drugs, crime or IVDU (intravenous drug use)-related HIV (human immunodeficiency virus).”<sup>9</sup> The problem originated in part from the use of cocaine and opium in medicines, tonics, and even Coca-Cola in 19<sup>th</sup> and early 20<sup>th</sup> century America.<sup>10</sup> The extent of drug use in the United States was not really known until President Nixon’s 1970’s anti-drug policy inspired funding for drug treatment programs and drug use studies.<sup>11</sup>

### **A. Treatment Alternatives to Street Crime (TASC) Program**

The TASC program was created in 1972 to assist existing agencies’ efforts to interrupt the “arrest-release-rearrest cycle” often associated with drug abusers.<sup>12</sup> Among other things, “[t]he TASC model screens arrested individuals to identify drug abusers and refers those who meet local eligibility standards to a community-based treatment facility where their progress is

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<sup>7</sup> William Spade Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1249 (1996).

<sup>8</sup> John R. Hepburn, *Recidivism Among Drug Offenders Following Exposure to Treatment*, 15 CRIM. JUST. POL’Y REV. 237, 237-38 (2005). *See infra*.

<sup>9</sup> Douglas B. Marlowe, *Effective Strategies for Intervening With Drug Abusing Offenders*, 47 VILL. L. REV. 989, 989 (2002).

<sup>10</sup> Masci, *supra* note 1, at 226.

<sup>11</sup> *See* Peter Katel, *War on Drugs: Should Nonviolent Drug Users be Subject to Arrest?*, 16 CQ RESEARCHER 481, 491 (2006).

<sup>12</sup> Toborg *supra* note 2, at xi; *See* Appendix E.

monitored.”<sup>13</sup> Identification usually occurs through screening of arrestees during the booking process. Those who test positive for drug use, who manifest symptoms of drug abuse, who are charged with drug related crimes, or are referred by attorneys, probations officers and other sources are considered for admittance.<sup>14</sup> A person that meets entrance requirements and accepts treatment becomes “a client” and is referred to the TASC treatment program.<sup>15</sup>

At the treatment facility, the client is diagnosed and treatment is recommended.<sup>16</sup> The client’s progress and compliance with program requirements is largely monitored through urinalysis.<sup>17</sup> A violation of the terms and conditions of their release occurs with possible incarceration if the client does not comply with requirements or drops out of the program.<sup>18</sup> TASC helped interrupt the “arrest-release-re arrest cycle”,<sup>19</sup> but did little to explain the extent or cause of drug use in America. Nationwide studies of both arrested individuals and the general population were conducted and contrasted in order to determine the extent of drug use in America.

## **B. Trends in Drug Use**

Starting in 1975, nationwide surveys analyzed trends in drug use within the United States population.<sup>20</sup> For example, in 1972 the estimated number of incarcerated drug related offenders was 3,384 in federal prisons, 19,996 in state prisons 15,300 in jails for a total of 38,680.<sup>21</sup> In the 2002, the numbers grew to 63,898 in federal prisons, 252,249 in state prisons, 164,372 in jails for

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<sup>13</sup> Toborg *supra* note 2, at vii.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.*; See Appendix E.

<sup>16</sup> Toborg *supra* note 2, at 3.

<sup>17</sup> M. Douglas Anglin et al., *Treatment Alternatives to Street Crime: An Evaluation of Five Programs*, 26 CRIM. JUST. & BEHAV. 168, 170 (1999).

<sup>18</sup> *See id.*

<sup>19</sup> Toborg, *supra* note 2, at xi; See Appendix E.

<sup>20</sup> See Michael R. Gottferdson & Carolyn Uihlein, *Drug Testing In the Workplace: A View From the Data*, 33 WM. & MARY L. REV. 127, 130 (1991).

<sup>21</sup> Jonathan P. Caulkins & Sara Chandler, *Long-Run Trends in Incarceration of Drug Offenders in the United States*, 52 CRIME & DELINQ. 619, 626 (2006).

a grand total of 480,519.<sup>22</sup> Caveat: the numbers do not account for growth in populations, but nonetheless demonstrates incarceration for drug offenses has risen dramatically.<sup>23</sup> The investment for drug related incarceration in 2002 was \$13.5 billion.<sup>24</sup>

Some other examples are: studies concerning arrests and convictions,<sup>25</sup> trends in drug-related incarcerations,<sup>26</sup> the National Survey on Drug Use and Health formerly called National Household Survey,<sup>27</sup> and the National High School Senior Survey, also known as Monitoring the Future (MTF).<sup>28</sup> MTF was one of the first nationwide surveys selected for government funding because of its depiction of factors and dynamics which drive young adolescents to drug use.<sup>29</sup> Adolescent drug use was considered a good predictor of future adult drug use.<sup>30</sup>

The MTF concluded marijuana was the most used unlawful drug in the United States for the period 1970 to 2007; cocaine is running a close second.<sup>31</sup> The results obtained in the ADAM program (see *infra* at 5 for discussion of ADAM program), confirms this trend.<sup>32</sup> Congress took steps to alleviate the drug problem identified in the MTF and ADAM studies by funding the Drug Treatment Courts.

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<sup>22</sup> *Id.* at 627.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 630.

<sup>25</sup> See Michael R. Gottferdson & Carolyn Uihlein, *Drug Testing In the Workplace: A View From the Data*, 33 WM. & MARY L. REV. 127, 130 (1991).

<sup>26</sup> Jonathan P. Caulkins & Sara Chandler, *Long-Run Trends in Incarceration of Drug Offenders in the United States*, 52 CRIME & DELINQ. 619 (2006).

<sup>27</sup> Gottferdson, *supra* note 25.

<sup>28</sup> *Id.*

<sup>29</sup> See Johnston, *supra* note 4, at 1.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at tbl. 4-1b.

<sup>32</sup> See U.S. DEP'T OF JUSTICE, 2000 ARRESTEE DRUG ABUSE MONITORING: ANNUAL REPORT 140-75 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/193013.pdf>.

### C. Drug Treatment Courts (DTCs)

“Drug treatments courts (DTCs) developed in the late 1980s in response to a justice system overburdened by drug crimes.”<sup>33</sup> The first one was in Miami, Florida, in 1989.<sup>34</sup> Since then, 1,750 more have been introduced in the United States that handles approximately 70,000 clients per year.<sup>35</sup>

Drug Courts bring relevant stakeholders together for the common good of the Criminal Justice System and help minimize disputes.<sup>36</sup> It is characterized by a strong judicial component to referee differences and provide clarity to the decision process.<sup>37</sup> Drug Courts provide an integrated public health/public safety strategy that produces a more meaningful and consistent reduction in criminal recidivism.<sup>38</sup> A key reason for this benefit is that the CJS maintains substantial supervisory control over offenders and has enhanced authority to respond rapidly and consistently to violations of probation.<sup>39</sup> DTCs identify arrestees of drug-related crimes, and provide an opportunity to participate in drug treatment programs instead of incarceration.<sup>40</sup> The court supervises progress and compliance with program requirements and imposes sanctions for violations.<sup>41</sup>

This concept is very similar to the early 1970 TASC model. Successful clients have their current criminal charges expunged in pre-plea drug court or avoid a sentence in a post plea drug

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<sup>33</sup> Gottferdson, *supra* note 25, at 3.

<sup>34</sup> See Peter Katel, *War on Drugs: Should Nonviolent Drug Users be Subject to Arrest?*, 16 CQ RESEARCHER 481, 485 (2006).

<sup>35</sup> *Id.*

<sup>36</sup> See Appendix D.

<sup>37</sup> *Id.*

<sup>38</sup> Douglas B. Marlowe, *Effective Strategies for Intervening With Drug Abusing Offenders*, 47 VILL. L. REV. 989, 990 (2002).

<sup>39</sup> *Id.*

<sup>40</sup> See Gottferdson, *supra* note 25, at 12.

<sup>41</sup> *Id.* at 13.

court.<sup>42</sup> Failure results in conviction and sentencing to an intensive probationary supervision or incarceration.<sup>43</sup>

Noteworthy, Drug Court clients that remain in treatment longer, demonstrate superior reduction in drug use (approx. 20%) lower recidivism (10-30%) and less unemployment.<sup>44</sup> A client's supervision and treatment ends upon successful completion of the program, subject to approval of local authorities.<sup>45</sup> While DTCs and TASC are similar, each model varies its levels of treatment and supervision dependent upon the policy of local officials.<sup>46</sup>

A key difference is the expertise offered by DTCs stakeholders which was absent with TASC.<sup>47</sup> The stakeholders are essentially the same; both include the judge, prosecutor, law enforcement, probation officer, and drug treatment programs.<sup>48</sup> However, DTCs provide training in drug diversion concepts that was absent with TASC.<sup>49</sup> The stakeholders under DTCs (called DTC's teams), develop expertise in the field which enhances success with clients.<sup>50</sup> In addition, the DTC model includes external influences such as family, friends, and employers.<sup>51</sup> As a result, DTC's are viewed as more successful and demonstrate lower recidivism rates (see discussion of recidivism below in Part IV of this paper).<sup>52</sup> Due to its perceived success, the DTC model is growing at a rapid pace.<sup>53</sup>

Nevertheless, not all arrestees meet the participation requirements or even have DTC programs available in their area. Unfortunately, they remain subject to traditional criminal justice

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<sup>42</sup> Douglas B. Marlowe, *Effective Strategies for Intervening With Drug Abusing Offenders*, 47 VILL. L. REV. 989, 1010 (2002); *See* Appendix D.

<sup>43</sup> Marlowe, *supra* note 42, at 1010.

<sup>44</sup> *Id.* at 1011.

<sup>45</sup> *See* Gottferdson, *supra* note 25, at 13.

<sup>46</sup> *See id.*

<sup>47</sup> *See* Appendix E.

<sup>48</sup> *See* Appendices D and E.

<sup>49</sup> *See* Appendix E.

<sup>50</sup> *See* Appendices D and E.

<sup>51</sup> *See* Appendix D.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

system remedies; a poor alternative to effective drug treatment.<sup>54</sup> The federal government created the Arrestee Drug Abuse Monitoring (ADAM) program to understand the circumstances of arrestees not eligible for drug treatment.

#### **D. Arrestee Drug Abuse Monitoring (ADAM) Program**

The ADAM program, formally known as the Drug Use Forecasting Program, was created in 2000 to assist policymakers shaping United States drug policy.<sup>55</sup> Under ADAM, the arrestee is asked a series of preliminary questions relating to prior drug use and prior drug treatment, whether they were insured or had a place to live, and whether they received a high school diploma.<sup>56</sup> Also the arrestee's age, offense charged, and the drug used at the time of arrest is ascertained. Finally, all the information gathered is graphed to illustrate the correlating features of each piece of data,<sup>57</sup> and the results published for use in formulation of drug policy.<sup>58</sup>

The ADAM program is not a drug treatment program; it accumulates and assesses information to support drug policy. ADAM provided a vast amount of information demonstrating the nexus between drug use and crime committed to support addiction.<sup>59</sup> This drug-crime connection sparked interest among social scientists and led to many other empirical studies and findings.<sup>60</sup>

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<sup>54</sup> See Gottferdson, *supra* note 25, at 4.

<sup>55</sup> U.S. DEP'T OF JUSTICE, 2000 ARRESTEE DRUG ABUSE MONITORING: ANNUAL REPORT, *supra* note 28.

<sup>56</sup> See *id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *id.*

<sup>60</sup> Graham C. Ousey & Matthew R. Lee, *Investigating the Connections Between Race, Illicit Drug Markets, and Lethal Violence, 1984-1997*, 41 J. RES. CRIME & DELINQ. 352, 352 (2004).

## E. Drug-Crime Nexus

Many policymakers and social scientists alike have passionately asserted that there is a link between drug use and crime.<sup>61</sup> In fact, the link between drugs and crime is widely documented.<sup>62</sup> However, the precise nature of the relationship remains elusive.<sup>63</sup> Nevertheless, the results of these studies make such an impression upon policymakers and people that it is all but impossible to believe that a strong casual link exists.

For example, more than half the sample of 10,000 adults (both men and women) in 34 urban areas in 2000 tested positive for drugs in 34 urban areas when arrested.<sup>64</sup> Also, in 1996, one-third of jail inmates questioned said they were under the influence of drugs at the time of their offense.<sup>65</sup> Even more interesting is drug link to homicides.

“Many scholars have speculated that the dramatic rise of homicide rates in the late 1980s and their subsequent decline in the 1990s was driven by the expansion and contraction of illegal drug markets and law enforcement attempts to regulate these markets.”<sup>66</sup> Proponents of this theory argue that violence is more likely to occur among individuals with poor social and economic status because they have limited access to the law.<sup>67</sup> Also, since such individuals are most likely dealing with illegal drugs, the law is unavailable to resolve violent disputes from a drug deal gone wrong.<sup>68</sup> Drug users who commit property crimes to support their drug habit

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<sup>61</sup> Helene Raskin White & D.M. Gorman, *Dynamics of the Drug-Crime Relationship*, 1 CRIM. JUST. 151, 152 (2000).

<sup>62</sup> *See infra*.

<sup>63</sup> White, *supra* note 61, at 152.

<sup>64</sup> John R. Hepburn, *Recidivism Among Drug Offenders Following Exposure to Treatment*, 15 CRIM. JUST. POL'Y REV. 237, 253 (2005).

<sup>65</sup> *Id.*

<sup>66</sup> Graham C. Ousey & Matthew R. Lee, *Investigating the Connections Between Race, Illicit Drug Markets, and Lethal Violence, 1984-1997*, 41 J. RES. CRIME & DELINQ. 352, 352 (2004).

<sup>67</sup> *Id.* at 354.

<sup>68</sup> *See id.* at 352.

compound this problem by provoking violence with their criminal actions.<sup>69</sup> Given the breadth of problems associated with drugs, it is important to analyze the response from the state and federal government.

### **III. Government Reaction: Federal and State Intervention**

President Richard Nixon “feared that drugs were sapping the morale of society”.<sup>70</sup> He said, “[i]t is doubtful that an American parent can send a son or daughter to college today without exposing the young man or woman to drug abuse.”<sup>71</sup> This fear led the country to pursue comprehensive legislation to quell the problem.<sup>72</sup>

#### **A. Federal Legislation: Congressional Response to Drug Abuse**

The first Congressional legislation applicable to controlled substances in America was promulgated in 1914 with passage of the Harrison Act.<sup>73</sup> The Harrison Act required certain producers and distributors of opium and marijuana to pay taxes and tariffs.<sup>74</sup> The Act required those dealing with opium to register with the Internal Revenue Service (IRS) which would make them subject to the tax, and failing to register or pay the tax would violate the federal statute.<sup>75</sup>

In 1937 Congress passed the Marihuana Tax Act which restricted the possession of marijuana to those who paid the expensive tax stamp.<sup>76</sup> The Act, like the Harrison Act, required those transferring or dealing marijuana to register with the IRS. Under the Act the tax came in two forms: a tax on transfers of marijuana or an occupational tax for those dealing the drug.<sup>77</sup>

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<sup>69</sup> White, *supra* note 61, at 153.

<sup>70</sup> David T. Courtwright, *The Controlled Substances Act: How a “Big Tent” Reform Became a Punitive Drug Law*, 76 SCIENCE DIRECT 9, 11 (2004).

<sup>71</sup> *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> See Mark Parts, Comment, *Disease Prevention as Drug Policy: A Historical Perspective on the Case for Legal Access to Sterile Syringes as a Means of Reducing Drug-Related Harm*, 24 FORDHAM URB. L.J. 475, 483 (1997).

<sup>74</sup> *Id.*

<sup>75</sup> *Linder v. U.S.*, 268 U.S. 5, 12 (1925).

<sup>76</sup> Masci, *supra* note 1, at 226.

<sup>77</sup> *Leary v. U.S.*, 395 U.S. 6, 14 (1969).

Congress repealed the Harrison Act and the Marihuana Tax Act in 1970 and replaced them with the Comprehensive Drug Abuse Prevention and Control Act (CDAPCA) of 1970.<sup>78</sup> Upon promulgation of the Act, Congress declared that “[t]he illegal importation of, manufacture, distribution, and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people”.<sup>79</sup> The CDAPCA makes it unlawful for anyone to possess, distribute, or manufacture any of the controlled substances listed in statutory schedules unless otherwise allowed by law.<sup>80</sup>

In 1970 Congress also enacted the Controlled Substances Act (“CSA”), codified at 21 U.S.C. § 801, as part of the CDAPCA to make comprehensive anti-drug legislation the policy of the time.<sup>81</sup> The centerpiece of the CSA was its organization which divided controlled substances into one of five schedules. A controlled substance is defined by 21 U.S.C. § 802(6) as “... a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V....”<sup>82</sup> The schedules ranged from Schedule I which contained a list of prohibited drugs to Schedule V which contained a list of easily accessible prescription drugs.<sup>83</sup>

To compliment the scheduling feature of the CSA, the legislation provided a review mechanism permitting the addition of new drugs or rescheduling of existing drugs when appropriate.<sup>84</sup> This flexibility created a comprehensive and coherent piece of legislation

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<sup>78</sup> See Robin Lash, Comment, *Industrial Hemp: The Crop for the Seventh Generation*, 27 AM. INDIAN. L. REV. 313, 322 (2002).

<sup>79</sup> 21 U.S.C. 801(2)

<sup>80</sup> Gregory W. Watts, Note, *Gonzales v. Raich: How to Fix a Mess of “Economic” Proportions*, 40 AKRON L. REV. 545, 558 (2007).

<sup>81</sup> See Courtwright, *supra* note 70, at 9.

<sup>82</sup> 21 U.S.C. § 802(6)

<sup>83</sup> Courtwright, *supra* note 70, at 11.

<sup>84</sup> *Id.* at 9.

designed to contain the drug problem.<sup>85</sup> However, the comprehensiveness of the CSA presented constitutional issues which had to be addressed.<sup>86</sup>

In *Gonzales v. Raich*, the United States Supreme Court considered whether Congress violated the Interstate Commerce Clause, Article I, § 8, of the United States Constitution, when CSA was used to prohibit the local cultivation and use of marijuana after California legalized marijuana for medicinal purposes.<sup>87</sup>

Angel Raich and Diane Monson were using marijuana for medicinal purposes, pursuant to California law, but when federal agents came to Monson's home they destroyed her marijuana plants pursuant to the CSA.<sup>88</sup> Raich and Monson brought an action to prohibit the CSA insofar as it interfered with their lawful right, under California law, to use marijuana.<sup>89</sup>

The Court relied on *United States v. Morrison* which held "where economic activity substantially affects interstate commerce, federal legislation regulating that activity will be sustained."<sup>90</sup> In light of *Morrison*, the Court in *Raich* found federal regulation of certain intrastate commerce affects interstate commerce and is therefore a valid exercise of Congressional power.<sup>91</sup>

The *Raich* decision permits Congress to impose certain federal regulations on activities which are solely conducted within a State. Accordingly, if a state legalizes marijuana, an individual in legal possession of marijuana in that state could still be in violation of federal law. The CSA provided an important step in attacking the drug problem in America; however, more action was required to deal with the ever increasing drug problem.

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<sup>85</sup> *Id.*

<sup>86</sup> *Gonzales v. Raich*, 545 U.S. 1, 5 (2005).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 7.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 25.

<sup>91</sup> *Id.* at 26.

## B. Federal Sentencing: Congressional Proscription of Penalties

Congress passed the Sentencing Reform Act of 1984 (SRA), in an attempt to achieve uniformity in sentencing.<sup>92</sup> The SRA, codified at 18 U.S.C. § 3551, created the United States Sentencing Commission.<sup>93</sup> The Commission was granted broad authority to structure sentences and provides judges discretion to determine punishment on an individual basis.<sup>94</sup> Shortly after promulgation, SRA was challenged as a violation of the United States Constitution's separation of powers and also as an unconstitutional delegation of legislative authority to the independent, judicial-based, Sentencing Commission.<sup>95</sup>

The United States Supreme Court upheld the delegation of power in *Mistretta v. United States*, stating that nothing in the Constitution's implicit structure prohibited Congress from using the judiciary's knowledge and expertise to create policy or sentencing guidelines.<sup>96</sup> With a strong Constitutional footing "[t]he SRA brought about a number of important changes in sentencing procedures; such as, making the Federal Sentencing Guidelines ("Guidelines") binding on courts, making sentences determinate, allowing limited appellate review of sentencing decisions, and rejecting the rehabilitative goals of imprisonment."<sup>97</sup> Before the Sentencing Commission promulgated its guidelines, Congress passed an interesting piece of legislation.

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<sup>92</sup> Criminal Law – Federal Sentencing Guidelines – Congress Amends the Sentencing Guidelines in an Attempt to Reduce Disparities. – Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT), 117 HARV. L. REV. 751, 751 (2003) [hereinafter PROTECT].

<sup>93</sup> See Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L. REV. 1773, 1773 (1992).

<sup>94</sup> See *id.*

<sup>95</sup> *Mistretta v. United States*, 488 U.S. 361, 370 (1989).

<sup>96</sup> *Id.* at 412.

<sup>97</sup> PROTECT, *supra* note 92, at 752.

The Anti-Drug Abuse Act of 1986 (ADAA) was promulgated to reflect society's strong view of the evils of crack cocaine.<sup>98</sup> The ADAA created disparate sentencing guidelines between powder cocaine and crack cocaine with a 100-to-1 ratio. It is intended to penalize the crack dealer more than the dealer of cocaine powder. The 100-to-1 ratio, equates one hundred grams of powder cocaine to one gram of crack cocaine for sentencing purposes.<sup>99</sup> The ratio results in sentences three to six times longer for crack cocaine offenses involving the same amount of powder cocaine.<sup>100</sup> Consequently, a major dealer of powder cocaine receives a shorter sentence than a dealer of substantially smaller amounts of crack cocaine.<sup>101</sup> The ADAA established two levels of mandatory minimum sentences of five and ten years, respectively, for first time offenders, based on the type and quantity of drug involved.<sup>102</sup> The Sentencing Commission is not legally required to follow the ADAA (the Commission reports directly to Congress which created it), but it did decide to incorporate the ratio into its first promulgation of Guidelines.<sup>103</sup>

In 1987 the Sentencing Commission introduced the Federal Sentencing Guidelines: a 258-cell grid requiring judges to use certain factors when deciding the range in which a defendant could be sentenced.<sup>104</sup> For example, according to the 2005 Sentencing Table the horizontal axis is the criminal history rating, consisting of six levels, of the offender with the

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<sup>98</sup> Brief for The NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae Supporting Petitioner, *Kimbrough v. United States*, 128 S. Ct. 558 (2007) (No. 06-6330).

<sup>99</sup> *Kimbrough v. United States*, 128 S. Ct. 558, 566 (2007).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1251 (1996).

<sup>103</sup> Steven L. Chanenson et al., *Federal Cocaine Sentencing in Transition*, 19 FEDERAL SENTENCING REPORTER, 291, 291 (2007).

<sup>104</sup> Douglas B. Bloom, *United States v. Booker and United States v. Fanfan: The Tireless March of Apprendi and the Intracourt Battle to Save Sentencing Reform*, 40 HARV. C.R.-C.L. L. REV. 539, 540 (2005).

vertical axis being the offense level of the crime, ranging from one to forty-three.<sup>105</sup> The grid works like a multiplication table where the judge is to find where the criminal history rating and offense level meet—that point will provide a time period into which the sentence must fall.<sup>106</sup> Shortly after its enactment, the constitutionality of the Guidelines was challenged.

Starting with *Apprendi v. New Jersey*, the United States Supreme Court found the Guidelines violated the Sixth Amendment's right to a jury trial when it removed from the trier of fact an opportunity to consider an increase in a sentence imposed beyond the proscribed maximum.<sup>107</sup>

Apprendi fired his gun into the home of an African-American family and pled guilty to second-degree possession of a firearm for an unlawful purpose which carried a sentence ranging from five to ten years.<sup>108</sup> A New Jersey statute allowed a judge to increase a sentence for any hate crime if the judge found by a preponderance of evidence a purpose to intimidate.<sup>109</sup> The judge found that the shooting was a hate crime and sentenced Apprendi to twelve years in prison—two years greater than the sentence range.<sup>110</sup>

The constitutional violation occurs because the jury is no longer making a determination that the sentence should be extended beyond the maximum.<sup>111</sup> The Guidelines become automatic and in effect that portion of the case is no longer being tried by a jury as required by the United States Constitution.<sup>112</sup> Based on *Apprendi*, the Supreme Court concluded in *United*

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<sup>105</sup> United States Sentencing Commission, <http://www.ussc.gov/2005guid/5a.htm>

<sup>106</sup> *Id.*

<sup>107</sup> 530 U.S. 466, 490 (2000).

<sup>108</sup> *Id.* at 469-70.

<sup>109</sup> *Id.* at 468.

<sup>110</sup> *Id.* at 471.

<sup>111</sup> Bloom, *supra* note 104, at 541.

<sup>112</sup> *Id.*

*States v. Booker* that in order to maintain the constitutionality of the SRA the Guidelines must be advisory.<sup>113</sup>

Freddie Booker was charged with intent to distribute fifty grams of crack cocaine which, according to the Guidelines, required the judge to deliver nothing higher than a sentence of twenty-one years and ten months.<sup>114</sup> However, the District Court judge, after a post-trial sentencing hearing, gave Booker a thirty year sentence, and the ruling was challenged as a violation of the Sixth Amendment's right to a jury.<sup>115</sup>

The Sentencing Commission in 1995, recognized the problem with the 100-to-1 ratio and proposed amendments to change it to a 1-to-1 ratio, but Congress rejected the amendments.<sup>116</sup> In 2007, the Sentencing Commission again proposed amendments to the 1986 Act, but instead of waiting for congressional action it simply adopted an ameliorating change in the Guidelines.<sup>117</sup> The change, which brought crack sentences down to just two to five times longer than those for an equal amount of power, was minimal and only slightly reduced the sentence length for those who possessed crack cocaine.<sup>118</sup> This negative attitude of the Sentencing Commission toward the 100-to-1 ratio was a major factor considered by the United States Supreme Court in its 2007 decision to resolve the crack/powder sentencing disparity.<sup>119</sup>

In *Kimbrough v United States*, the Supreme Court considered whether a sentence issued contrary to the mandatory 100-to-1 ratio, was per se unreasonable<sup>120</sup> and held much like the Guidelines in *United States v. Booker*, that it is merely advisory.<sup>121</sup> The *Kimbrough* decision

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<sup>113</sup> 543 U.S. 220, 245 (2005).

<sup>114</sup> *Id.* at 227.

<sup>115</sup> *Id.* at 245.

<sup>116</sup> *Kimbrough v. United States*, 128 S. Ct. 558, 569 (2007).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 564

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

provides judges with flexibility in sentencing, but maintains the maximum sentence set by a federal or state legislature as required by *Apprendi v. New Jersey*.<sup>122</sup>

The importance of *Kimbrough* is that judges have discretion to impose a reasonable sentence without strictly adhering to the 100-to-1 ratio.<sup>123</sup> Graham Boyd, director of the Drug Law Reform Project for the American Civil Liberties Union, stated “[t]he court has taken the handcuffs off and told judges that ‘you are free to apply your mind’.”<sup>124</sup> Federal regulation is not the only arena where a battle has raged against the drug problem, the State’s have taken steps as well.

### **C. State Legislation: A Brief Look at California’s Approach**

The concept of “dual sovereignty” permits both the Federal and a State government to prosecute the same offense without violating the Constitution’s Double Jeopardy Clause.<sup>125</sup> Under dual sovereignty, a federal law regulating drug offenses does not necessarily preempt a State law that regulates the exact same offense.<sup>126</sup> Accordingly, an individual in California can be convicted of violating a California drug law and can also be convicted of violating a federal drug statute.

California commenced its experiment with drug diversion programs with adoption of Penal Code 1000 (P.C. 1000) in 1972. Policy makers understood the problems encountered with prosecution and incarceration of non-violent drug users charged with minor offenses.<sup>127</sup> The courts were congested, if incarcerated there was little chance at rehabilitation and a person relatively free from crime is placed with hardcore criminals who further corrupt the novice.

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<sup>122</sup> See Linda Greenhouse, *Court Restores Sentencing Powers of Federal Judges*, N.Y. TIMES, Dec. 11, 2007, at A1.

<sup>123</sup> *Kimbrough v. United States*, 128 S. Ct. 558, 576 (2007).

<sup>124</sup> Greenhouse, *supra* note 122, at A28.

<sup>125</sup> Dan Huade, Comment, *Ohio’s New Sentencing Guidelines: A “Middlegroup” Approach to Crack Sentencing*, 29 AKRON L. REV. 607, 607 (1996).

<sup>126</sup> *Id.*

<sup>127</sup> See Appendix E.

Under P.C. 1000, the judgment is deferred until successful completion of probation.<sup>128</sup>

Probation consists of successful completion of a drug treatment program and a specified period of abstinence.<sup>129</sup>

Disenchanted with the results of P.C. 1000, the public adopted proposition 36, a people's initiative, that amended the Penal Code.<sup>130</sup> Proposition 36 has its detractors as well.<sup>131</sup> The asserted problems with proposition 36 is their over emphasis of the medical model, its permissiveness - test positive 3 times - before disqualification, and its relatively high recidivism rate.<sup>132</sup> In late 1991, the Drug Court was introduced to Alameda County, California. It is characterized by a high degree of supervision which proponents assert is lacking under P.C. 1000 and Proposition 36.<sup>133</sup> The stakeholders include the courts, prosecution, defense bar, drug treatment programs, family, and employers.<sup>134</sup> Consensus seems to be that DTCs are a viable solution and tough on crime prosecutors agree.<sup>135</sup> Today's Drug Court seems to embody all the elements of the early TASC concept; uniting interested stakeholders in a concerted effort to end the cycle of drug abuse, crime and jail.<sup>136</sup>

#### **IV. Recidivism**

Recidivism is “[a] tendency to relapse into a habit of criminal activity or behavior”.<sup>137</sup>

There are two main strategies that target recidivism rates of criminals: TASC and DTCs.<sup>138</sup>

Reduced recidivism rates are sometimes seen with individuals who don't receive drug treatment

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<sup>128</sup> CAL. PENAL CODE § 1000; *See* Appendix E.

<sup>129</sup> *Id.*

<sup>130</sup> CAL. PENAL CODE § 1201

<sup>131</sup> *See* Appendices A,B and C.

<sup>132</sup> *See* Appendices B and C.

<sup>133</sup> *See* Appendix D.

<sup>134</sup> *See* Appendices B, C and D.

<sup>135</sup> *See* Appendices B and C.

<sup>136</sup> *See* Appendix E.

<sup>137</sup> *Black's Law Dictionary* 596 (3d pocket ed. 2006).

<sup>138</sup> *See* Hepburn, *supra* note 8, at 237.

but who are deterred only by the prospect of incarceration. Some observers believe drug treatment programs, whether in the form of TASC or DTCs are at least moderately effective, but the results tend to vary based on the offender and the nature of the crime.<sup>139</sup>

### **A. TASC**

Obtaining sufficient data to evaluate the effectiveness of the TASC program is difficult because the program operates uniquely in each jurisdiction.<sup>140</sup> An evaluation conducted in the 1970's of five different TASC programs produced mixed results, suggesting the recidivism rates depend on how effectively TASC is carried out.<sup>141</sup> Four cities monitored in the late 1990's showed a reduction in recidivism, but the reduction was expressed in terms of "predicted probabilities" which makes the results difficult to truly gage.<sup>142</sup> Uncertainty in results makes it difficult to provide a reliable indication of whether the drug programs are actually effective at reducing recidivism.<sup>143</sup>

### **B. Drug Courts**

The results of drug courts is more consistent, showing offenders in drug courts are less likely to reoffend than those on probation.<sup>144</sup> Such findings are based on a study showing approximately a 26 percent reduction in recidivism for those offenders who used drug courts.<sup>145</sup> This study notes that some flaws existed in the research design and that a 26 percent reduction must be viewed as a tentative conclusion.<sup>146</sup> The study, at the very least, shows that drugs courts have potential to be effective.<sup>147</sup> In San Bernardino County, California the recidivism rate was a

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<sup>139</sup> *Id.* at 241

<sup>140</sup> Marlowe, *supra* note 9, at 1008.

<sup>141</sup> *See id.* at 1008-09.

<sup>142</sup> *See id.* at 1009.

<sup>143</sup> *Id.* at 1009-10.

<sup>144</sup> Wilson, *supra* note 6, at 479.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

relatively low rate of 22% during the years 2004-2006.<sup>148</sup> The trend suggests that those who receive and complete drug treatment are the most successful; those that fail to complete treatment have less success, and those that fail to accept treatment had the least amount of success.<sup>149</sup> The logical conclusion for reducing recidivism in the future is to provide successful, effective drug treatment programs.

## V. Predictions and Conclusions

Recidivism rates are reducible by broadening existing treatment programs.<sup>150</sup> The most successful treatment programs are integrated with close criminal justice supervision.<sup>151</sup> Rehabilitation programs that require at least eighteen to twenty-four months of treatment have a significant impact on recidivism.<sup>152</sup> Drug-related crimes account for over 80 percent of those incarcerated; but the majority of such inmates do not receive sufficient drug and alcohol treatment while in prison.<sup>153</sup> The lack of funding is improvident especially when over 90 percent of prison wardens supported an increase in the use of drug treatment programs.<sup>154</sup> Experienced officials in the criminal justice system seem to agree.<sup>155</sup>

Certain treatment programs save the taxpayer money by reducing incarceration and the associated costs needed to sustain those institutions.<sup>156</sup> In 2007, the Texas and Kansas legislatures funded treatment programs in response to the skyrocketing growth of the prison

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<sup>148</sup> See Appendix D.

<sup>149</sup> Hepburn, *supra* note 8, at 252.

<sup>150</sup> Harvey Shrum, *No Longer Theory: Correctional Practices That Work*, 55 J. CORR. EDUC. 225, 226 (2004).

<sup>151</sup> Marlowe, *supra* note 9, at 990.

<sup>152</sup> Shrum, *supra* note 150, at 233.

<sup>153</sup> *Id.* at 226.

<sup>154</sup> *Id.* at 232.

<sup>155</sup> See Appendices A, B, and C.

<sup>156</sup> See Crystal Garland, *Increasing Public Safety and Reducing Spending: Applying a Justice Reinvestment Strategy in Texas and Kansas*, 69 CRIMINAL JUSTICE PERIODICALS 64 (2007).

population.<sup>157</sup> The funding is expected to reduce the prison budgets by tens of millions in both states.<sup>158</sup>

Given the results, it is logical to conclude that a greater number of drug treatment programs with close supervision by the criminal justice system are required to reduce drug-related crimes. Moreover, in order to get the most out of treatment programs, and reduce recidivism, it is extremely important that family, employers, in concert with correctional, educational, spiritual, and psychiatric staff provide support inside and outside of the prison cell.<sup>159</sup>

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<sup>157</sup> *See id.*

<sup>158</sup> *See id.*

<sup>159</sup> Shrum, *supra* note 150, at 233; *See* Appendices B, C and D.

# Impressions

## Appendix A

### Impressions of Carlos Moreno<sup>160</sup> Associate Justice California Supreme Court

#### INTRODUCTION

Justice Moreno was nominated to the California Supreme by Governor Gray Davis and was sworn in on October 18, 2001. He commenced his career as a deputy city attorney with the Los Angeles City Attorney's Office in 1975. He joined the law firm of Mori & Ota (now part of the law firm Kelley, Drye & Warren) in 1979 to practice commercial litigation. Governor George Deukmejian appointed Justice Moreno to the Los Angeles Municipal Court in 1986 and Governor Pete Wilson appointed him to the Los Angeles Superior Court in 1993. He was nominated to the Federal District Court, Central District of California by President Clinton in 1998.

Justice Moreno served as President of the Mexican American Bar Association, a member of the California Judges Association, on the Presiding Judges Association, and the Municipal Court Judges Association of Los Angeles. In 1997 he received the Criminal Justice Superior Court Judge of the Year Award and in 2003 the Roger J. Traynor Appellate Justice of the Year Award. Justice Moreno is the Chair of the California Blue Ribbon Commission on Children in Foster Care.

Justice Moreno earned his J.D. (1975) from Stanford University and a B.A. (Political Science) from Yale University (1970). He is married with two children and resides in the Los Angeles area.

#### SUBSTANCE ABUSE

Justice Moreno became acquainted with substance abuse and the criminal justice system in 1975 as a prosecutor with the Los Angeles City Attorney. At that time the legislature enacted a drug diversion statute, Penal Code 1000, applicable to first time offenders and minor violators. The decision to divert was made by the court with input from the prosecutor, defense counsel and treatment programs. Prosecution was stayed (a guilty plea was not required) as long as the participant remained in the program. Broad disenchantment with P.C. 1000 and a failure of the legislature to tackle the substance abuse problem led to Proposition 36, an initiative by the people, which amended P. C. 1000. Under Proposition 36 non-violent offender were required to enter a guilty plea at the onset and then faced sentencing if disqualified from the program. Proposition 36 failed to resolve California's concerns in part because of its relatively easy treatment of repeat offenders. For example, once in the program, a participant could fail three times before disqualification and the offender returned to face prosecution. Another drawback, according to Justice Moreno, was the requirement that the offender not have a non related offense charged with the drug offense. For example, if you were arrested for possession of a

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<sup>160</sup> Interview with Carlos Moreno, Associate Justice California Supreme Court, in Pasadena, Cal. (Feb. 11, 2008).

controlled substance while also arrested for driving under the influence of alcohol you were ineligible for participation in Proposition 36 programs. Arguably, such a person is just the one that should be admitted for drug diversion under Proposition 36. Justice Moreno recalls that recidivism under proposition 36 as very high around 60-70%.

A key reason for the drug abuse problem is lack of resources. Funding is required to sustain the components of the system such as the courts, law enforcement, prosecution, probation, and the drug treatment facilities. Despite the failure to resolve the intractable problem of drug abuse, Justice Moreno believes continued efforts are warranted. He cites the seriously overcrowded jails/prisons, domestic violence, family deterioration, and persistent collateral criminal problems caused by drug dependent people supporting drug addiction. The forgoing undermines the allocation of finite resources and diverts funding from other important pressing problems of society.

Justice Moreno believes efforts to decriminalize marijuana possession for personal use should be continued. He recognizes marijuana use is still a problem but criminalization should be focused on sellers of marijuana not users of small amounts. He believes drug diversion programs should be expanded to aid those motivated to rehabilitate. In order to minimize recidivism, education and job training must be part of the equation.

## SENTENCING

Justice Moreno believes the judiciary should have discretion in sentencing. Sentencing is the province of the judiciary as contemplated in the United States Constitution via the Separation of Powers Doctrine. The federal guidelines imposing a required minimum sentence for possession of drugs without considering the extent of individual culpability seems unfair. For example, should a person arrested for irrigating 1000 marijuana plants (i.e. an employee) receive the same sentence as the owner of the plants? Under the federal guidelines that could be the result because each was in possession of the same amount of the drug. Yet the irrigator may be a first time offender with a relatively small stake in the operation.

He also believes the disparity in sentences between crack cocaine and powder cocaine is unwarranted. In California the sentence depends on the weight of the drug and not the form of the drug. The sentence for crack and powder is the same subject to a range much less disparate than the federal guidelines. For example, it might be between 3-5 years for a minimum sentence as compared to a mandatory minimum of 10 years under the federal system.

Justice Moreno does not believe the disparate sentencing guidelines between crack and powder is racially motivated, but agrees that the result falls heavier on the Afro American community. Initially crack cocaine was considered to be much more addictive and therefore a harsher sentence was justified. That proposition has not been clinically proven and the disparity seems unjustified. Crack cocaine is cheaper and thus easier to acquire by low income residents found more so in Afro American communities than Anglo communities. He does point out that methamphetamine is a drug as serious as crack cocaine. Yet there isn't the same harsh length of sentence for those offenders.

## Appendix B

### Impressions of Grover Trask<sup>161</sup> Former District Attorney Riverside County, California

#### INTRODUCTION

Grover Trask is special counsel in Best Best & Krieger LLP's Municipal and Redevelopment Law Practice Group. He leads the firm's Public Policy and Ethics Group. Mr. Trask served for nearly a quarter century as the elected District Attorney for Riverside County, California and was a prosecutor for 32 years. As District Attorney he implemented innovative programs targeting local gangs, drug dealers, child and elder abusers, and domestic violence and influenced state policy on juvenile crime reform and tougher laws on drug dealers. He was appointed by Governor Dukemejian to chair a statewide Blue Ribbon Commission on Prison Reform in 1990 and by Governor Wilson to chair the California Task Force to review Crime and the Juvenile Justice Response.

#### SUBSTANCE ABUSE

Grover Trask believes the substance abuse problem is far too complex for the criminal justice system to resolve. More emphasis should be placed on external factors such as the motivated individual and familial support. It's been his experience that approximately 80% of crime is drug related. Drug addicts must support their habit and most do not hold jobs that generate sufficient cash to pay for the drugs. Hence they turn to crime to obtain the money they need. Once caught, they become part of the criminal justice system and there is not much you can do to shake them of their dependence while incarcerated. Although well intentioned, Mr. Trask believes the numerous treatment programs and half way houses available to the system don't work. Short term gains are touted but they exist only while the addict is in the program under supervision. Once released, tracking is lost and the addict finds the revolving door back to incarceration.

Mr. Trask did acknowledge one program he visited in San Francisco, California that is an exception to his perception that most drug treatment programs are ineffective. The Delaney House is a self contained corporation that imposes stiff eligibility guidelines and rigid termination policy for the unmotivated. Mr. Trask was impressed, among other things, with the requirement that participants must work for the financial benefit of the corporation. This creates responsibility, self respect and self worth for the participants as well as financial independence for the program. He recounted a discussion with a participant that impressed him; the person is a federal parolee (armed robbery) and a serious drug addict. He woke up one day and realized that he didn't want to live the horrible life of an addict anymore. The only way out of the vicious cycle of drug abuse, crime, prison and back again was to take seriously the cure offered by the Delaney House. The participant did just that and is now on staff and clean for years. Mr. Trask offers this example of what can be accomplished if a person is properly motivated and also

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<sup>161</sup> Interview with Grover Trask, Former District Attorney, Riverside County, California, in Riverside, Cal. (Feb. 15, 2008).

receives proper drug treatment. He believes correct identification of those highly motivated to kick the habit is crucial to success. The problem of course is identifying those who want to rehabilitate themselves from those who just wish to temporarily stay out of jail.

Mr. Trask believes decriminalization of marijuana is a mistake. He cites clinical studies that show users of marijuana are 26 times more likely to use more serious drugs and become addicted. Once a person is addicted the cycle of crime commences. The U.S. Department of Justice asserts decriminalization of marijuana increases crime rates rather than decreases crime long term. Mr. Trask believes the medical marijuana initiative passed by the people of California is unnecessary. Law enforcement efforts are directed at major sellers of marijuana and not casual users. Since passage of the medical marijuana initiative, dispensaries have turned into million dollar profit centers rather than concerned outlets for needy medical patients. He asserts that organized crime is now infiltrating the operations. Mr. Trask notes that some European countries, such as England and the Netherlands, which decriminalized certain drugs, have become disenchanted with the results and are now reevaluating that decision.

## SENTENCING

As a state prosecutor Mr. Trask was not very familiar with the disparity in sentencing for crack cocaine and powder, but he does not believe it was intended to target the Afro American Community. He would rather see higher sentences for powder cocaine than a reduction in the sentences for crack cocaine. He also shares concern with the potential release of thousands of federal prisoners due to the recent changes in sentences for those convicted of crack cocaine. Their release will be largely unsupervised, without treatment programs or job placement. Consequently, those released will just go back to what they did before and the crime rate will immediately go up. The public will suffer as a result.

Penal Code Section 1000, historically the primary diversion program in California, was adopted by the legislature in early 1970s and amended by a people's initiative (prop. 36). Mr. Trask believes P. C. 1000 programs are not successful. He recalls for example that Proposition 36 has about an 80% recidivism rate. Mr. Trask feels the problem is an over emphasis on the medical component and a permissive 3 strikes before a participant is terminated. He believes the relatively new drug court concept is a good one that it appears to be successful.

In addition to identification of motivated addicts, Mr. Trask believes the emphasis should be on the young offenders. Those not yet hardened by the vicious cycle of drug abuse, crime, and prison. Here the opportunity for success is very good because the system is not trying to cure the seriously dependent drug abusers, but instead interrupting the cycle and preventing the addiction. As Riverside County District Attorney, Mr. Trask instituted a "youth accountability program" that focused on first time offenders guilty of crimes such as petty theft, truancy, minor drug use and gang activity. He instructed his deputies to select young offenders, have them sign a contract in lieu of prosecution, and work with school officials, probation department, social workers and family members to resolve the problem. In Mr. Trask's view, the family is the key to success. Family must be involved and they must show the young offender they care. He's very satisfied with the success of the youth accountability program and continues to support its efforts.

## Appendix C

Impressions of Benjamin Gonzales<sup>162</sup>  
Chief Deputy District Attorney  
San Bernardino County, California

### INTRODUCTION

Mr. Gonzalez is one of five Chief Deputy's in the San Bernardino District Attorney's office. He joined the office directly out of Law School and worked his way up the hierarchy over his 32 year tenure with the office. He was a trial deputy prosecuting a wide range of felony crimes including drug violations and the associated property crimes drug dependent criminals commit to support their habit. As a high ranking member of the office, his responsibilities include logistics, budgets, personnel and office policy. He is a veteran trial attorney with extensive involvement in drug cases by way of trials, case depositions, and filing responsibilities.

### SUBSTANCE ABUSE

Mr. Gonzalez personally assisted in the establishment of a Drug Court in Fontana, California in 2003. He is a tough on crime prosecutor that harbored serious reservations about the concept. The Drug Court is an alternative to immediate incarceration for drug offenders. California has several levels of drug diversion concepts. They are California Penal Code Section 1000, Proposition 36 and the Drug Court. The level of intensity, supervision and success seems to flow in an ascending order as presented above. P.C. 1000 is usually for first time offenders and less serious charges. The Drug Court is a high supervisory concept requiring extensive time from the court and the Probation Department. The prosecution, law enforcement and defense bar are also vital cogs in the machinery. All must cooperate for the concept to work. In Fontana, Mr. Gonzales concluded the Drug Court concept was successful and worth the effort of criminal justice stakeholders and society.

The Drug Court process commences with the filing of charges against the offender. A screening process determines whether the offender is a candidate for the program. Violent offenders, major sellers of drugs, and those not inclined to kick their habit are excluded. Typical participants are those that engage in various non violent property crimes to support their habit. For example, identification theft, forgery, larceny, petty theft, and fencing are common crimes committed by participants. The object of the drug court is to provide a chance for drug dependent criminals to obtain treatment, kick their habit, receive vocational training and evade the revolving door to incarceration. Society benefits with a reduction in the prison population and its attendant costs and with a reduction in the number of crimes the citizenry experiences as victims of addicts trying to support their habit.

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<sup>162</sup> Interview of Benjamin Gonzales, Chief Deputy District Attorney, San Bernardino County, California in San Bernardino, Cal. (Feb. 8, 2008).

Mr. Gonzales was surprised law enforcement did not oppose the Drug Court concept. At least in Fontana, they recognized the criminal justice system is a revolving door for drug dependent criminals. To the extent diversion minimizes that problem through treatment, rehabilitation, education and job placement, it is worth pursuing.

## SENTENCING

Mr. Gonzales is a state prosecuting attorney and is not bound by federal sentencing guidelines. He is familiar with the federal guidelines and the crack vs. powder issue. In California indeterminate sentencing is a statutory policy that permits judicial discretion for most crimes. For example, in California the sentence for possession of cocaine – either crack or powder- depends on the amount by weight. So 1 gram of either will permit a sentence of 3 – 5 years. Unlike the Federal guidelines, it does not matter whether its crack or powder. Moreover, the range of the sentence is only two years rather than five to life in the Federal System. Mr. Gonzales understands the argument supporters of lengthy sentencing for crack advance. But he does not agree that it warrants a 100 - 1 ratio. In relation to cocaine powder, he also shares the concern of U.S. Attorney Federal Mukasey regarding the immediate release of thousands of incarcerated drug offenders. Without the treatment, counseling, education, rehabilitation available, such as that provided by the Drug Court, these individuals will just commit crimes again. Society will more than likely see a surge of criminal activity when they are back on the street seeking a source of revenue for their insatiable appetite for drugs.

Finally, Mr. Gonzales does not believe the federal sentencing guidelines are a conscious racial bias. Crack cocaine is the drug of choice in the Afro American community and powder is the choice in more affluent communities. He suggests it is more economics rather than a conscious racial bias. He points out that methamphetamine is the choice of Anglos and heroin still plagues the Hispanic community. Drug abuse is a serious societal problem no matter which one is preferred. All should be sanctioned and/or treated through responsible alternatives to incarceration. If the disparity is great between crack cocaine and powder cocaine, than reduce the disparity. He would rather increase the penalty for powder rather than decrease it for crack.

## APPENDIX D

Impressions of Deborah Cima<sup>163</sup>  
Treatment Courts Coordinator  
Superior Court, San Bernardino, California

### INTRODUCTION

Ms Cima has been involved with Drug Diversion programs for fifteen years. Her Current assignment is Treatment Courts Coordinator, for San Bernardino Superior Court, San Bernardino, California. In this capacity Ms. Cima provides training of Drug Court stakeholders, sets policy for Drug Court programs, provides co-ordination among the Drug Court stakeholders, insures implementation and sustainability for established programs, and provides general administrative assistance.

Ms. Cima earned a Bachelors of Science in Sociology from Long Beach State College and a Masters of Science in Counseling/Psychology from Fullerton State College. She has worked in Social Services for twenty-five years and Child Protective Services for two years. Ms Cima joined the San Bernardino Department of Behavioral Health (Alcohol & Drugs Services) for four years, 1994-1997. She joined the San Bernardino Superior Court as the Treatment Courts Coordinator in 1997. Ms. Cima teaches a class at San Bernardino Valley College, Drug and Alcohol Studies Program and has been a member of the National Drug Court Institute faculty for six years.

The Drug Court Concept originated in the late 1980's in Miami Florida as a response to the cocaine epidemic. The State's Attorney General, Janet Reno conceived the idea as a response to the over crowding of jails due to non-violent drug arrests. It was modeled after the TASC program of the 1970's. The stakeholders include the Court, Drug Treatment Programs, Probation Department, Prosecution, Public Defenders, Law Enforcement, Family & Spiritual leaders, and the Business Community.

The Drug Court has improved on the TASC model in several respects. TASC lacked an administrative leader to control the program. Depending on the geographic location, the Court, the Probation Department or the Prosecution would take the lead and that was not necessarily because of an altruistic commitment. Consequently, TASC results were hard to measure and success intermittent. The Drug Court places control in the Court which leads to strong authoritative consistency.

Under TASC there was little if any formal training for stakeholders. Judges, prosecutors, law enforcement, treatment programs all knew their roles but did not learn or seem to care about the other stakeholders. The National Drug Court Institute (NDCI) was created to remedy that problem. The NDCI trains Drug Court stakeholders in various key components of the program, such as overall philosophy & goals; value of judicial review hearings, evidenced based treatment programs, frequent and random drug testing, incentives and sanctions for compliance and

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<sup>163</sup> Interview of Deborah Cima, Treatment Courts Coordinator, Superior Court, San Bernardino County, California in San Bernardino, Cal. (May 20, 2008).

accountability, roles of each stakeholder and importance of collaboration on how the process works, i.e.- how long, what phases, how to obtain political support, relations with the public and business community, funding sources, etc. Moreover, the stakeholders are assigned to the Drug Court Program to ensure expertise, continuity, and administrative effectiveness which were missing in the TASC model.

Ms Cima is a strong proponent of the Drug Court concept. She has witnessed its success since its infancy and participated in its growth. San Bernardino currently has seventeen drug treatment courts. Under her guidance the Drug Courts in San Bernardino continue to improve and provide enhanced services. For example, in addition to drug and alcohol treatment they include treatment for mental health problems, vocational/employment counseling and family counseling. The model is now used in Dependency Court for child and neglect cases due to alcohol and drug use.

Ms Cima credits the Drug Court with much of the success in the war against drugs. During the years 2004-2006 recidivism was a relatively low at 22%. Drug use by Drug Court clients lowered as did the associated crimes. Congruent with these outcomes, employment increased, children were returned home from foster care, fewer babies were born non-drug exposed and a significant number enrolled in GED or higher education programs.

The Drug Courts impose tight supervision over the client and provides a combination of incentives and punishment to ensure compliance with the requirements of the program. For example, if a client refuses a drug test the court will impose a short term sanction such as a weekend in jail called "flash incarceration". If non compliance continues a graduated system of sanctions is in place to shape behavior. This could include tighter supervision by the Probation Department, additional drug treatment, more frequent drug testing, more required meeting for narcotics anonymous & alcoholics anonymous, more frequent court appearances, more jail time and finally termination in the program and imposition of the sentence by the court. Conversely, the successful client will receive positive reinforcement from the judge, applause from friends and relatives in the court room, gift certificates from business participants, reduced court appearances, less program supervision, more freedom and eventual graduation from the program. The policy is to permit some margin of error for the client but maintain accountability and control. Successful completion of the Drug Court Program permits the client to return to society, obtain employment, return to their family and be a productive member of society.

## APPENDIX E

Impressions of Edward J. Perez<sup>164</sup>  
Visiting Professor of Law  
University of La Verne College of Law

### INTRODUCTION

Professor Perez graduated from San Diego State University in 1967 with a Bachelor's of Science Degree in Marketing and from University of San Diego in 1975 with a Juris Doctorate. In 1974, while attending law school, Professor Perez worked for the San Diego County Board of Supervisors as a legal intern. One of his assignments was to oversee a proposed drug diversion program called Treatment Alternative to Street Crime (TASC). TASC was sponsored by the National Institute of Mental Health and one of the first major national efforts to implement drug diversion programs.

Professor Perez explains that natural conflicts occur among stakeholders in the criminal justice system with regard to drug addiction and drug convictions. In pre drug diversion days, law enforcement and prosecutors just wanted to convict those violating drug laws. Drug treatment programs wanted to cure and rehabilitate drug users rather than have them incarcerated. The defense bar fought convictions and only seemed to care about treatment programs if it meant freedom for their clients with minimal strings attached. Prisons and jails were overflowing with drug users. The courts were congested and overworked judges just wanted to clear their calendars. Minimal coordination existed among the parties, with suspicion and acrimony rampant. Virtually no mechanism was available to bring the stakeholders together in a common effort to close the drug addiction's revolving door – drug addiction, crime to support the habit, arrest and conviction, release and repeat. Professor Perez concedes the forgoing is an over simplification for a very complex problem, but contends that was the historical landscape of the criminal justice at the time.

TASC in its original form was an administrative tool designed to bring the criminal justice system together for the common good. It provided leadership by demonstrating how effective management of the Criminal Justice System could identify drug diversion candidates most likely to succeed, place them in an appropriate treatment program, help rehabilitate, and thereby reduce crime, unclog the courts and jails and enable all the stakeholders to benefit. The bottom line is that society and the public interest are well served.

As part of the TASC concept, Professor Perez led a team of county officials in a study of the San Diego County Jail population. All arrestees over four consecutive weekends were interviewed regarding their booking charge, personal demographics, use of drugs and source of payment for their use. The purpose was to attempt to prove the long held belief that many prison inmates arrested for property crimes were drug dependent people and they committed their

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<sup>164</sup> Impressions of Edward J. Perez, Visiting Professor of Law, University of La Verne College of Law, San Bernardino County, California in Ontario, Cal. (Aug. 8, 2008).

crimes to support their habit. Once that was established, drug diversion programs could be developed to resolve the problem. TASC has morphed over the years and is now called The Drug Courts; a very successful approach to mitigating the drug problem in America.

Professor Perez was a Los Angeles City Prosecutor from 1975-1978 where he handled many drug related cases. He prosecuted drug users under California Penal Code 1000 and its associated drug diversion programs. In his view, California Penal Code 1000 and proposition 36, although well intentioned, did not seem to work well. Minor offenders were housed with hard core criminals further corrupting the novice. Jails and prisons were overcrowded creating difficult housing conditions and an environment not conducive for rehabilitation. He does believe the Drug Court concept is relatively successful and it is so in large part because it professionalizes the participants. He recalls how drug cases were assigned to stakeholder participants without regard to experience, interest or training with drug cases. Under the Drug Court concept, judges, prosecutors, public defenders, and law enforcement personnel are trained in the drug problem and fill positions that are dedicated to the drug court. The result is expertise, efficiency, compassion and good results. Recidivism for drug court participants is far lower than for those that don't participate. Although there still is much room for improvement, the Drug Court is a very effective tool in the fight against the war against drugs.