

## **ALTERNATIVES TO INCARCERATION FOR DRUG-INVOLVED OFFENDERS**

Mr. Chairman:

Thank you for the opportunity to speak today. I should state that my testimony represents my personal views, not those of any colleague, organization, or funder. With your permission, I would like to place into the record a paper I co-produced with Peter Reuter and Eric Sevigny that provides technical details to amplify my statement here.<sup>1</sup>

This is a portentous moment for both criminal justice and drug policy. We have a national drug strategy. Health reform and parity legislation are changing the financial landscape of substance abuse treatment and preventive services. State and local budget crises lead citizens to question policies that result in high incarceration rates with greater urgency. The same fiscal pressures are damaging a variety of services serving the criminal justice population. Growing attention paid to drug courts, interventions such as Hawaii HOPE, and ballot initiatives such as California's Proposition 36 reflect the widespread view that American drug policy has lost its way.

New approaches are surely needed. Crime rates have been relatively low for more than a decade. Major heroin and cocaine epidemics have ebbed. Yet we still incarcerate more people for drug offenses than Western Europe incarcerates for all crimes.<sup>2</sup> Offenders continue to enter prison with high rates of drug use disorders. We continue to see high rates of criminal activity and high rates of re-incarceration among recently-released offenders.

Across the political spectrum, Americans seek strategies to safely reduce the financial and human costs of incarcerating so many drug users and sellers. Available research underscores the difficulty, but also the necessity of this task. This will be hard, in part, because drug-involved offenders have longer and more serious criminal records than one might suppose. Yet many of these offenders are treated more harshly than is warranted by their likely future offending. Particularly if one's focus is on violent offenses, a better balance can be struck.

I would emphasize five points today.

1. Current drug courts and other diversion programs do much good for individuals and are cost-effective. They will not appreciably reduce the prison population because most drug-involved offenders are not eligible for them.
2. The population of drug-involved offenders is aging faster than other offending populations. As drug-users get older, they receive increasingly harsh sentences even as their violent offending declines.
3. Pre-sentencing diversion must be complemented by effective reentry programs to better help and monitor offenders in community settings.
4. Offenders' everyday experience will be the decisive factor in program effectiveness.
5. We lack strong data to evaluate the most common or the most promising interventions. Rigorous evaluation is therefore essential.

**Drug courts and related diversion programs provide better help and monitoring for individual offenders. They do not—and probably cannot, as currently configured—markedly reduce the U.S. prison population.**

An array of diversion programs have been fielded based on two well-documented premises: (a) Treatment can significantly reduce drug use, and (b) Reduced drug use produces marked reductions in crime. Interventions built on these two premises encourage or coerce drug-involved offenders into treatment. A large research literature shows that these interventions indeed reduce drug use and associated criminal activity and are highly cost-effective.<sup>3,4</sup> Expanding and improving these programs deserves high policy priority.

Yet these programs, as currently configured, have inherent limitations. One must consider these limitations in evaluating some disappointing correctional trends. There has been little overall decline in the population of incarcerated drug users. Indeed, the number incarcerated for drug offenses has increased every year since 1980. As noted in the accompanying materials, the number of prisoners with drug problems markedly increased from 1986 to 2004.

These patterns are especially dismaying given the declining number of Americans who maintain costly use of heroin, cocaine, or methamphetamine over the past two decades. Why is it so hard to reduce the number of incarcerated drug-involved offenders? Focusing in particular on drug courts, why have these diversion efforts had such little numerical impact at the population level?

In my view, three obstacles must be noted:

First, *the overall capacity of such programs is limited.* The drug court movement is almost twenty years old. More than 2,300 separate programs have been created.<sup>5</sup> Yet only about 55,000 offenders are processed in such courts.<sup>6</sup> To put this in context, more than million drug-involved offenders enter the criminal justice system each year. Most jurisdictions lack the administrative capacity to implement drug courts at-scale.

Second, *these programs generally serve relatively low-risk populations rather than the (larger) high-risk populations most likely to experience the greatest net reduction in crime.* Bhati and colleagues report that “only 12% of drug courts accept clients with any prior violent convictions. Individuals facing a drug charge, even if the seller is drug-dependent, are excluded in 70% of courts for felony sales and 53% of courts for misdemeanor sales. Other charges that routinely lead to exclusion include property crimes commonly associated with drug use (theft, fraud, prostitution), and current domestic violence cases (only 20% accept domestic violence cases).”<sup>6</sup>

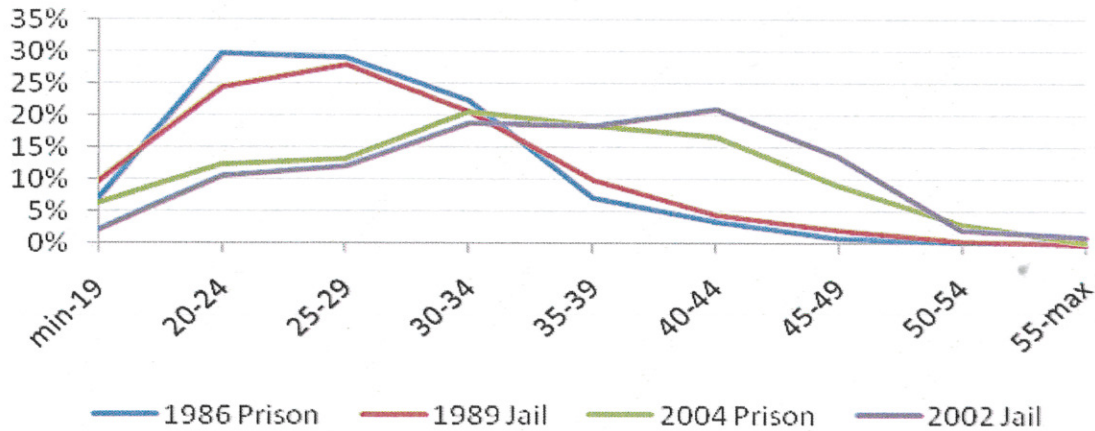
We find in our own statistical work that drug court eligibility requirements typically exclude 70 percent of newly-sentenced offenders with heroin, cocaine, or methamphetamine disorders. Many offenders who *do* participate in drug courts would receive relatively light sentences absent the intervention. Well-implemented drug courts can be quite effective for these participants. As currently configured, drug courts will not markedly reduce the prison population, which is disproportionately shaped by serious offenders who serve the longest sentences.

Third, *there is a systematic mismatch between sentencing practices and actual criminal careers among drug-involved offenders.* As criminally-active drug users get older, they are treated

increasingly harshly for each successive offense. They have longer criminal histories, longer records of unsuccessful treatment, and worse employment histories. Thus, not only are they less eligible for diversion programs, they also receive longer sentences.

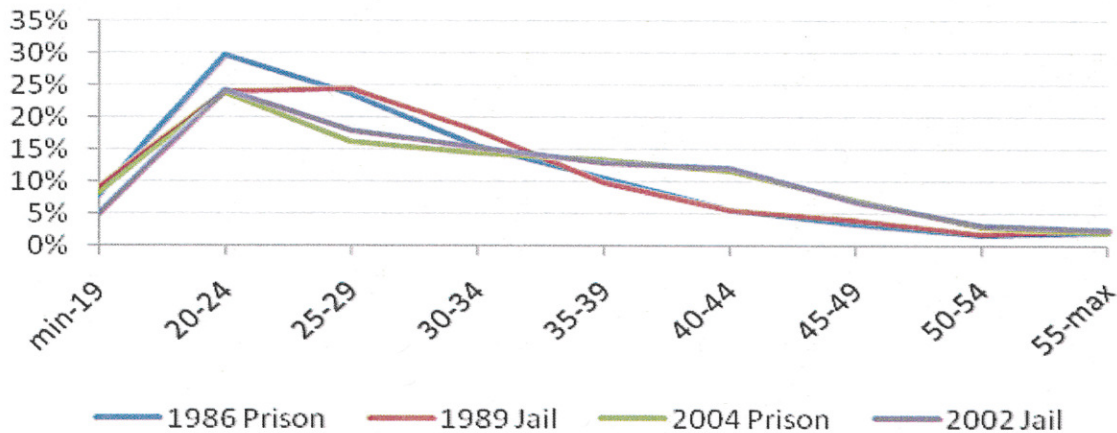
**The population of drug-involved offenders is aging faster than other offending populations.** Let me amplify that last point a bit. Below, I reprint Figure 7 from my joint paper with Reuter and Sevigny. It shows the age distribution of newly-incarcerated jail and prison inmates who

**Figure 7. Age Distributions of Newly-Incarcerated Inmates Reporting Cocaine Abuse**



indicated cocaine problems in the month before their arrest. Between 1986 and 2004, the median

**Figure 9. Age Distributions of Newly-Incarcerated Inmates Reporting No Drug Abuse**



age of newly-admitted prison inmates with cocaine disorders increased by almost eight years. (The change look even larger when one focuses on older ages, including the rapidly growing geriatric population.) We see similar (though less dramatic) patterns for heroin and methamphetamine. We find no similar upward age drift in the population of newly-incarcerated inmates who did not report drug problems. (See Figure 9.)

**Older offenders are less likely to be violent, but are more likely to receive long sentences.**

These demographic patterns are especially important given the concentration of violent offending among younger offenders. Many drug-involved offenders have long criminal careers which include property crime, failed drug tests, and other violations of parole and probation requirements that create the risk of incarceration. They are therefore progressively more likely to be disqualified from diversion programs, even as their probability of violent offending declines.

Table 1 shows these patterns among newly-sentenced drug users in 2004 prison survey data. Compared with inmates over the age of 35, inmates younger than 25 were twice as likely to have committed a violent crime. Yet these young offenders were half as likely to be labeled habitual offenders or to face sentence enhancements for their current crime.

Substance used within one month of incarceration	Incoming state prison inmates younger than age 25			Incoming state prison inmates older than age 35		
	Probability of current offense being violent	Prob of "Habitual offender" label	Probability of sentence enhancement for current offense	Prob of current offense being violent	Prob of "Habitual offender" label	Prob of sentence enhancement for current offense
Cocaine	40%	7%	16%	16%	24%	37%
Methamphetamine	41%	5%	21%	18%	23%	32%
Heroin	42%	11%	11%	18%	38%	50%

If the goal of correctional policy is to prevent future violence, policymakers would be wise to explore alternative sentencing, diversion, and post-release monitoring policies for older offenders who have not committed recent violent offenses. For example, some commentators have proposed to "sunset" offenses after a defined period of non-offending.

We also should explore the expansion and improvement of intensive programs that for young drug users who are the most violent segment of the offending population. Using data from the National Treatment Improvement Evaluation Studies, Anirban Basu, David Paltiel, and I explored the economic value of drug treatment interventions in preventing armed robbery.<sup>7</sup> Judged by standard clinical criteria, young drug-involved offenders achieved relatively poor treatment outcomes. These were difficult clients. Yet the economic and social benefits of treatment were very large for young offenders, because even highly imperfect treatment prevented many armed robberies in this criminally active group.

**Pre-sentencing diversion must be complemented by effective reentry programs to better help and monitor offenders in community settings.**

Given the above findings, "front end" diversion programs should be complemented by improved interventions to address the large population of offenders on parole and probation. These individuals display high rates of re-offending. Research by Stephen Raphael indicates that the annual re-incarceration rate for typical parolees in 2005 was more than double the rate observed in 1980. Numerical simulations indicate that reducing these re-incarceration rates to 1980 levels



would reduce the long-term incarcerated population by more than 20 percent.<sup>8</sup> Improved supervision of individuals who are already in community settings may also prove more politically sustainable than early release or pre-sentencing diversion.

This committee is discussing the impressive results from Hawaii HOPE. Compared with a control group, probationers assigned to HOPE were significantly less likely to produce positive drug tests or to be arrested over a 12-month study period. They were less likely to miss probation appointments. Although these offenders received more intensive and intrusive monitoring, they spent many fewer days in prison due to revocations or new convictions. HOPE and similar interventions seem especially promising for people who satisfy criteria for substance abuse who are not actually dependent, and for those who would otherwise lack access to effective treatment.

For opiate-dependent offenders, strengthening immediate linkages into post-release methadone maintenance also appears promising. Similar linkages of drug-involved offenders into long-term residential treatment and therapeutic communities are also associated with reduced reoffending. Within-prison treatment is valuable. Yet the small existing literature suggests that the benefit is quickly lost without prompt linkages into services upon release. A remarkable *New England Journal of Medicine* study by Binswanger and colleagues<sup>9</sup> documented a large spike in overdose mortality within the first two weeks post-release. Many of these overdoses occur before ex-offenders receive a single social or medical service. Addressing these service gaps remains a key challenge.

**Offenders' everyday experience will be decisive in determining program effectiveness.**

Researchers and policymakers often search for some breakthrough program model or theoretical perspective in making better interventions. Studies of many behavior change interventions suggest that the quality of implementation is no less important. Offenders quickly learn from their everyday experience whether programs respond predictably, swiftly, and credibly to their behavior. If the program does not, one's ability to change behavior through incentives and sanctions quickly erodes. HOPE appears successful, in large part because it is well-implemented and includes a passionate champion committed to its success. The same principles apply to other behavior change interventions. Understanding the impact of specific components of drug courts and other diversion programs remains a key challenge.

**We lack strong data to evaluate the most common or the most promising interventions.**

**Strong evaluations are therefore essential.**

The published literature includes hundreds of evaluations. Drug courts are probably the best-studied of these interventions. Only a handful of true experiments have occurred even with these interventions. Recent systematic review identified only four studies that had used random assignment; two of these experienced high attrition rates.<sup>10</sup> As noted above, we need better interventions that serve two particular populations: young offenders who require better help and monitoring to protect public safety, and older offenders we may no longer need to lock up.

More generally, we need to perform rigorous intervention trials which serve offenders unlikely to participate or to be deemed eligible for traditional diversion efforts. Expanding the scope of current efforts will not be easy. It is essential to reach the main populations of drug-involved offenders. Federal support is essential to undertake this effort.

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