

The Value of Sentencing Drug Offenders: a critical analysis of law and policy

Thesis for the MPhil of the University of East Anglia

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Synopsis

The intention of sentencing is to achieve justice for all those involved in a crime, the offender, the victim, and society. In this thesis the value of sentencing drug offenders is assessed through three components: its appropriateness, proportionality, and its effectiveness.

The thesis first describes the concept of Proportionality, which lies at the heart of contemporary sentencing law. Second, the drug situation in England & Wales and prohibition of drugs, upon which sentencing law is based, are outlined. The third chapter outlines... the drugs laws and their application, followed by a review of the empirical effectiveness of the procedures and outcomes of sentencing of convicted drug offenders in the non-custodial and prison settings with a commentary on five prisons' annual reports, and with an examination of some appeal cases in drug cases. This is followed by a consideration of diversionary schemes and their effectiveness. Then finally the thesis discusses the evidence in the preceding parts and presents the conclusions. It is clear that sentencing law fails to distinguish adequately between the types of 'Drug Offenders': traffickers and major suppliers should be subject to and punished under the criminal law, but users by contrast, including those who produce or grow controlled drugs, for their own use, or meet together on non-profit making premises, are punished too severely and should be diverted out of the criminal justice system and, if necessary, cared for by the health services.

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Background to the Project

My professional background is in Public Health Medicine; that is in the promotion of good health, prevention of illness and facilitating the measures to deal with them when they occur. After retirement from my appointment as Director of Public Health to the District Health Authority for Gt Yarmouth and Lowestoft, I worked as an Advisor in Disability to the Department of Work and Pensions. Here I saw many young people suffering the ill effects of illegal drug usage: ulcerated limbs, thrombosed veins, hepatitis and AIDS, prostitution, and thieving, all of which I knew, as a public health doctor, could have been prevented or the effects ameliorated. Many too had criminal or prison records and all were unemployed. Their attendance at the detoxification centres was irregular, they often felt that those places were under police surveillance, and if they were on probation, that was rarely checked on either.

When this work came to an end, I did the course for the Diploma in the Philosophy of Medicine. This was followed with research, through the University of East Anglia Medical School, into the morality of illegal drug taking, and the measures in place to prevent it. That led me to thinking about how the legal profession in England & Wales deals with drug offenders, and this Thesis, with the help and guidance of my tutors at the Law School of the University of East Anglia, is what I found.

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ANNEX A: Acknowledgments

Introduction

This thesis examines the value of sentencing drug offenders, value being defined as its appropriateness, proportionality, and effectiveness. The methodology of research was a systematic review, critical appraisal and analysis of the relevant sentencing law, and recent relevant research reports which could be useful in evaluating the subject.

I start with outlining the bases for this evaluation. The first chapter explains the concept of proportionality upon which the Drug Offences Sentencing Guideline depends. The second chapter describes the drug scene today in England and Wales and compares the debates in the House of Commons in 1970 and 2017, which illustrate clearly how the understanding of the morality of recreational drug usage is changing. The third chapter outlines relevant sentencing laws relating to the punishment of drugs offenders.

Having thus described the foundations of the thesis, it continues with an analysis of reports of prison inspections and a selection of Court of Appeal judgements on mandatory sentences for repeat drugs offences, to assess how far sentencing, that is its value, achieves the aims of being appropriate, proportionate, and effective. Chapters dealing with sentencing, censure, and punishment, and Diversion Schemes are followed by a discussion on their effectiveness.

A key argument of the thesis is that a bifurcated approach to drug offenders, much more sharply defined than at present, is needed. Drugs offenders are in two groups and this is not sufficiently reflected in the Drug Offences Sentencing Guideline. On the one hand there are the traffickers and major suppliers who are in it for the profits they can make and undoubtedly cause harm. On the other hand, there are the users of psychoactive drugs who usually cause little or no harm unless, in becoming addicted, they harm themselves, have become ill, and then need not punishment but treatment.

The conclusion is that sentencing is appropriate and proportionate for drug traffickers and major suppliers, though good evidence of its effectiveness in preventing reoffending is scant. Sentencing and the stigma of a criminal record is not appropriate and disproportionate for drug users, and minor suppliers, and decriminalisation would be more appropriate. It is shown in the thesis that this is, in effect, already the case in many police areas. If necessary, and until the law changes, users would be best processed through deferred prosecution diversion schemes or public health channels.

Chapter 1 Proportionality

1.1. Introduction

It is said that:

*“Proportionality is one of the key principles of the rule of law aiming to protect people from cruel or inhumane treatment...the core requirement of proportionality is that an individual’s rights and freedoms may only be limited to the extent that it is appropriate and necessary for achieving a legitimate aim.”*¹

This is the position of the United Nations’ Office on Drugs and Crime which called on all countries to adopt proportionate penalties for drug offences.²

Proportionality implies that the severity of the sentence should approximate the gravity of the crime. This has two attractions: firstly, a sentencer can focus his* attention on the two concepts, severity and gravity, and not overly concern himself with other theories of justice such as deterrence, rehabilitation, predictive and others. Secondly the public would feel it reasonable that an offender’s actions should be punished as the crime deserves.³ The concept of proportionality has arisen out of the ‘Desert Theory’ of punishment; comments on why it is of central importance in sentencing law will be described next.

1.2. Desert Theory of Punishment

This implies that the offender should get ‘his just deserts’, meaning that the punishment should fit the crime based on its gravity, defined as the offender’s blameworthiness and the harm caused. Desert Theory is deontological,⁴ based on the ethics of duty and rights.⁵ A citizen has the right to live in peace and others have the duty not to infringe that. The State has the duty to protect⁶ its citizens and if offended to take action and punish the offender appropriately. It has the right to expect the citizen to support it.⁷

*I have used the male gender throughout in the interests of clarity of expression.

¹ Lai G (2012) *Drugs, crime and punishment; the proportionality of sentencing for drug offences* p.1 in Transnational Institute: Series of Legislative Reform of Drug Policies Nr 20 June 2012. United Nations Office for Drugs of Abuse.

www.harm-reduction.org/.../drugs-crime-and-punishment-proportionality-sentencing-...

² United Nations Office on Drugs and Crime (UNODC)(2010) *Drugs Control, crime prevention, and criminal justice: A Human Rights Perspective* unodc.org/documents/commissions/ also see UNODC (2012) *The promotion and protection of human rights*. unodc.org/.../justice.../UNODC_Human_rights_position_paper_2012

³ Bonneau A.B (2013) *Offensive drug offences* Boston University Paper. ‘If a wrongdoer chooses to violate society’s rules, then retribution is deserved, and if the wrongdoer harms other people retribution is also deserved.’ bu.edu/bulareview/files/2013/10/Bonneau.

⁴ The philosophical approach is that punishment is *deontological*, that is looking back at the offence, and awarding the proportional punishment, and *teleological* deciding what is to happen next to the offender. The Sentencing Act (2020) section 57(2) makes this clear. Retribution as deserved by the offender is the deontological punishment and the other subsections all look to the future, rehabilitation, deterrence, protection of the public etc.

⁵ Roff H (2013) *Global Justice, Kant and the Responsibility to Protect*. Essays on the Philosophy of Immanuel Kant Oxford University Press, 2007: ix–x. <https://doi.org/10.4324/9780203073834> Roff comments that ‘If, a State is, as Kant says, a “moral person,” then duties of justice towards the citizens of the State would be like having duties of justice to oneself.’

⁶ The State’s Duty of protecting the citizen overlaps with the duty to protect him from *potential harm* This is well seen in the Drug Offences Guideline which takes ‘harm’ to be the weight or quantity of an illegal drug. As such it hasn’t caused any harm to the citizen until he has started to use it, but then does have the potential to do so. This ‘stewardship’ duty of the State is explored later.

⁷ That is through taxes, military service and so on.

The theory implies that the offender deserves to be punished because of his offence, for that would be a just outcome. The gravity of the crime, defined by the culpability of the offender and the harm caused to the victim, has to be proportional to the severity of the sentences to be awarded. But how should culpability, harm and proportionality of punishment be defined? Each of these will be examined in detail, because for drug offenders there are particular problems.

1.3. Culpability

In the Drug Offences Definitive Guideline⁸ which is the key source of appropriate sentencing practice for all drugs offenders (including dealers and possessors), culpability is graded by the offender's role in the offence as being Leading, Significant or Lesser. Culpability, the offender's blameworthiness, is defined as responsibility for a fault or wrong. The offender's culpability might have been influenced by his character and background, deprivation, poor education, unemployment, drug, or alcohol excess. If under eighteen, he might be too young, or if very elderly developing senile dementia, to understand society's normal moral attitudes. These change over time, and actions considered wicked or sinful in the past may not be so nowadays. As the attitudes of society change so do the understanding of moral values.⁹ There may be cultural, national or racial influences; then an individual may have personality impairment¹⁰, mental illness, with a limited appreciation of normative values, or a manifestation of immaturity and selfishness.¹¹

Many of these factors may be deterministic,¹² that is the offender might himself be a victim of factors over which he has limited or no control, thereby reducing the blameworthiness of his offence, which as 'mitigating factors' might affect the ensuing sentence. A spontaneous act might be considered less blameworthy.

Then there are 'aggravating' factors when culpability influences sentencing; did he instigate the crime, or was he coerced or provoked into it? Or as a member of a gang,¹³ affecting his normal moral inhibitions and leading him into criminal acts?

1.4. Harm

An offence may cause harm to an individual victim through loss of life or through physical or mental injury. He may have material loss or damage of his property and his privacy invaded. He may be offended or humiliated and have the feelings that he has been 'wronged'. The offence may cause harm to his family and friends and the effects of the incident may be

⁸ Sentencing Council (2012) *Drug Offences Definitive Guideline* page 4 (and see Chapter 4).

⁹ slavery is an example; a major UK trade in the XVIIIth Century, became outlawed here though it still exists in some Eastern and African countries. In the XXth Century attitudes towards suicide and homosexuality changed, Parliament altered its laws, and the legal profession no longer prosecutes people for what had been previously considered to be offences. See Chapter 2 and the comparison between the debates in 1970 and 2017

¹⁰ Alexander P (1922) *Philosophy of Punishment*, p238 et seq Journal of Criminal Law and Criminology vol 13 Issue 2 Article 5. Here Professor Alexander expresses his opinion that 90% of criminals have a personality defect or 'flattened affect' in that they lack the appreciation of normative values. As such the potential for 'educational improvement' or 'corrective treatment' may be limited.
<http://scholarlycommon.law.northwestern.edu/jclc>

¹¹ Sammons A (date not given) *Eysenck's theory of the criminal personality*
www.psychotron.org.uk/newResources/.../A2_AQB_crim_EysenckTheory.pdf

¹² Encyclopaedia Britannica (undated) *Determinism* <https://www.britannica.com/topic/determinism>

¹³ Winans S C (2002) *Mob Psychology*. www.ncbi.nlm.nih.gov/pmc/articles/PMC1348

very far reaching. It can even happen that the house of a murderer is pulled down because of its unwelcome connotations.¹⁴

Harm may be assessed by the situation and circumstances of the victim, considered in three living standards levels: subsistence, minimal well-being and adequate well-being, these being the level a victim's life could be reduced to, as the result of harm.¹⁵ In the Sentencing Guideline harm is expressed as *potential* harm, in the weight or quantity of the drug concerned.¹⁶

Drug possession too,¹⁷ is an offence in law. However, if the user, has only taken drugs casually, the chance of harm is very little,¹⁸ but if he becomes addicted, then he is ill and needs medical care, yet his offence still exists. There is a debate in criminal law theory about the extent to which drug possession is a victimless crime. The great majority of casual drug users do not become addicted¹⁹, no harm is incurred and so is it a victimless crime?²⁰ Victimless crimes are behaviours that violate the criminal law but inflict no harm on the consenting parties. The concept has been debated with some commentators arguing that behaviours are not considered criminal unless they result in victimisation. Some illegal acts are 'crimes without victims' if they involve the willing exchange of services or commodities producing little or no harm to participants.²¹ This is also discussed at paragraph 4.10.²² But, of course, the drug user who has become addicted does cause harm. To himself, physically and mentally and to his family, for having become incapacitated and unable to work he cannot provide for them as he should. Then he is harming society for it has to pay for his care, and will no longer be benefitting from the work and taxes which he has been providing as a citizen should. Finally, the drug user causes harm in encouraging others into providing him with illegal substances, leading them into criminal behaviour.²³

The thesis does not revisit the debate about whether drug use is a victimless crime. It recognises that there is indirect harm resulting from drug possession. However, it will argue that drug possessors need to be treated in a much less severe way than they are under the current Sentencing Guideline, which emphasises punishment and imprisonment even for minor acts. There is the added problem of defining the harmfulness of drugs. The Misuse of Drugs Act 1971 classified drugs in Classes A, B & C²⁴ in degrees of harmfulness as it was believed to be then. Subsequent research has shown Class A to include some of the least dangerous,²⁵

¹⁴ BBC (2016) *Where is 10 Rillington Place? Does Christie house still exist?* (the house was demolished, and the street renamed.) radiotimes.com/news/2016-12-16/does-rillington-place-still-exist

¹⁵ von Hirsch A (2009) pp142 et seq *Seriousness, Severity and the Living Standard* in *Principled Sentencing* 3rd ed (2009) von Hirsch A, Ashworth A & Roberts J eds Oxford and Portland.

¹⁶ Sentencing Council (2012) *Drug offences definitive guideline* p 4 *category of harm*.

¹⁷ Sentencing Council (2012) *ibid* p 19 *Possession of a controlled drug*.

¹⁸ See 2.12. *Drug Classification by Harmfulness*.

¹⁹ 2.6. *Addiction Rates*

²⁰ Coomber R, Donnermeyer J, McElrath K & Scott J (2018) *Victimless Crime* in *Key Concepts in Crime and Society*. <https://dx.doi.org>

²¹ Schur E (1965) *Crimes without victims: deviant behaviour and public policy, abortion, homosexuality and drug abuse*. [https:// repository.law.umich.edu/cgi>viewpoint](https://repository.law.umich.edu/cgi/viewpoint)

²² HMIC (2014) *Crime recording: A matter of fact: an interim report of the inspection of crime data integrity in police forces in England and Wales*. Here the advice was that an offence should not be recorded as a crime unless a victim could be identified.

²³ Holland A (2020) *An ethical analysis of UK drug policy as an example of a criminal justice approach to drugs: a commentary on the short film Putting UK Drug Policy into Focus* *Harm Reduction Journal* volume 17, Article number: 97 (2020) [https://harmreductionjournal.biomedcentral.com > articles](https://harmreductionjournal.biomedcentral.com/articles)
'A more compelling argument would be to suggest that buying illegal drugs is morally wrong because it provides funding to criminal organisations ...'

²⁴ And class D for unclassified drugs which can still attract punishment if used.

²⁵ Wodak A & Warhaft G (2015) *Ecstasy the least dangerous drug*.
Guardian Newspaper 8 December 2015 also see 2.4. *Ecstasy*.

and rigid interpretation of the ‘harmfulness’ of Class A drugs, might result in a disproportionately severe sentence.

1.5. Punishment: why, to whom and how much?

Why should an offender be punished, have harm inflicted upon him, and what right has the State to do that? It seems intuitively right that if man has transgressed the social contract²⁶ of peaceful coexistence with his neighbours²⁷ that he should be punished for doing so and hopefully reformed, in order that he does not offend again. Thus hardship, limitation of liberty and other sanctions are inflicted on the offender as he has infringed another’s privacy and stolen or damaged his property. So, the offender is harmed as he has harmed the victim, but do two wrongs make a right?

The answer must be yes, for otherwise the offender gains unjustifiably at the expense of the victim, and that wrong must be redressed to re-establish the equilibrium²⁸ for: “*punishment is a necessary evil, the necessity stemming from the presence in the community of those who unjustifiably subvert the volition and interest of other people.*”²⁹

Another viewpoint is that punishment has no benefit for the person affected unless it is accompanied by useful activities such as rehabilitation or reform.³⁰ Yet others argue that the harm inflicted by punishment *does* have a justification in that it should strengthen and enhance an offender’s moral sense of normative values.³¹ It seems to be obvious that the offender must be punished for the harm that he has caused. Unfortunately, others may suffer too as explained at 4.3, yet less if the sentence is non-custodial.³² Apart from protecting the public by incarceration or community sentence measures such as curfew, restriction orders, whilst punishing by giving hardship to the offender, punishment includes the utilitarian purposes of benefit whilst he is undergoing the period of imprisonment or has community orders imposed upon him, through increasing his opportunity of successful reintegration into the community.³³

Would it be appropriate to punish a drug trafficker for the potential harm he might cause? The answer must be yes, in retribution, and to protect the public by imprisoning the trafficker. By contrast a casual drug user has caused no-one any immediate harm³⁴ and so it may be inappropriate morally to punish him, yet it would be justifiable as the law must be obeyed³⁵. What is striking about the current sentencing guideline is that the sentences

²⁶ Hobbes T (1588-1651) quoted in Warburton N (2013) *Philosophy* 5th ed. Routledge London

²⁷ Parker H et al (2002) *The Normalization of 'Sensible' Recreational Drug Use*

The NW England Longitudinal Study continues to monitor normalization based on abstainers’ tolerant or approving attitudes about drug takers. Therefore the ‘social contract’ has not been breached and sentencing is not warranted. <https://journals.sagepub.com> > doi

²⁸ Ashworth A (2009) *Desert* p 102 in von Hirsch A et al (2009) *ibid*

²⁹ Morris N (1974) quoted in von Hirsch A et al (2009) *ibid*; Bottoms A, *Reform and Rehabilitation* Chapter 1.2 in von Hirsch A et al (2009) *ibid*

³⁰ Bottoms A (2009) *Reform and Rehabilitation* Chapter 1.2 in von Hirsch A et al *ibid*

³¹ Warburton N (2013) *ibid* p 98 here Rawls’ utilitarian concept is explained in that the harm the punishment causes to the prisoner is considered to be outweighed by the good it should do him in enhancing his moral tone and normative values. See Forsythe-Yorke W (2015) *Permit or Prohibit Chapter 2 Is it morally wrong to take illegal drugs?*

³² 5.7. and footnote J Morgan J (2014) *Children affected by the imprisonment of a family.*

³³ If drug detoxification is to be a utilitarian justification for punishment, custodial or community, of a drug offender, it has been shown that treatment is significantly more successful in the non-legal environment see 6.8. and footnote Disley E, Kei I, Strang L, Kruithof K & Davies M (2016) *Study on alternatives to coercive sanctions (ACS) as response to drug law offence and drug related crimes* p72 Study of all European countries for the European Commission. Coercive sanctions here mean those imposed through force of the law and voluntary implies those methods used outwith the law.

https://ec.europa.eu/files/docs/acs_final_report_new_ec_template_en

³⁴ It could be said that the drug user is blameworthy in having led the supplier into criminality and has provided a market for his illegal activities.

³⁵ As Bonneau said. See 1.1. and footnote Bonneau *Disagreement with the law is no excuse for disobeying it.*

prescribed for mere possession are framed in terms of punishment, focusing on the number of weeks in custody, length of a community order, or amount of a fine. The guideline insufficiently distinguishes possessors from dealers.

How severe should be the sentence for drug offenders? The idea of Parsimony implies that: “.... *the least restrictive sanction necessary to achieve the defined social purpose should be imposed*”³⁶ This concept is also that a custodial sentence is not imposed unless the seriousness of the offence warrants it³⁷ and goes on to ask whether a non-custodial sentence cannot be justified.³⁸ The ‘defined social purpose’ implies protection of the public from the danger posed by the offender³⁹ being balanced against the right of him not to be imprisoned longer than is deserved or necessary.⁴⁰

According to the Sentencing Council’s definitive guideline, for the casual drug user, who has caused no harm, the sentence is a fine with or without a custodial or non-custodial punishment.⁴¹ A non-custodial sentence might be imposed,⁴² It is doubtful whether mere possession is so serious that no other sentence can be justified.⁴³ He will inevitably gain a criminal record with all the disadvantages already described. The conclusion must be that it is appropriate to punish a drug trafficker severely but there is no quantum or type of punishment which is appropriate for all users.

The State has the duty in governance to exercise stewardship over its citizens,⁴⁴ and to take measures to protect their rights. Thus, if a person’s rights are infringed through an offence, the State has the duty to do something about it⁴⁵. And if the offender is found to be guilty of his wrongdoing, the State is obliged to punish him in order to redress the wrong. The State and society express their disapproval of the offender’s actions with judgement through

³⁶ Morris N (1974) *The future of imprisonment* quoted p137 in von Hirsh et al (2009) *ibid*

³⁷ Sentencing Act 2020 s 231 *Length of discretionary custodial sentences: general provision*

(2) The custodial sentence must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of—

(a) the offence, or (b) the combination of the offence and one or more offences associated with it.

³⁸ Sentencing Act 2020 s 204 *Exercise of power to impose community order*

³⁹ Here also to be considered is the

Rehabilitation of Offenders Act 1974 ([www.legislation.gov.uk > ukpga > 1974](http://www.legislation.gov.uk/ukpga/1974)) Chapter 53. *An Act to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years, to penalise the unauthorised disclosure of their previous convictions, to amend the law of defamation, and for purposes connected therewith.*

Yet with an Enhanced Security Check the amendments of the Act may be overridden. This level of check shows full details of a criminal record, including Cautions, Warnings, Reprimands, spent and unspent convictions. It can also search the children and vulnerable adults ‘barred list’ to see if the applicant is prohibited from working with these groups.

⁴⁰ Morris N (1974) p136 in von Hirsch A et al (2009) *ibid*

⁴¹ Sentencing Council (2012) *Drug Offences Sentencing Guideline* p30 for a Class A drug is a Band A fine - 51 weeks’ custody, to a Class B drug (cannabis being the usual one) a starting point of a Band B fine with a Category range of discharge-26 weeks’ custody

⁴² Sentencing Act (2020) s204 *Exercise of power to impose community order: general considerations*

(1) This section applies where a community order is available.

(2) The court must not make a community order unless it is of the opinion that—

(a) the offence, or

(b) the combination of the offence and one or more offences associated with it, was serious enough to warrant the making of such an order.

⁴³ Sentencing Act (2020) s 230 *Threshold for imposing custodial sentence*

(2) *The court must not pass a custodial sentence unless it is of the opinion that—*

(a) the offence, or

(b) the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.

⁴⁴ Travis P (2009) *Governance and stewardship*. www.who.int/healthinfo/paper48.pdf⁴⁵ See Forsythe-Yorke W (2015) *ibid* 3.4.4

⁴⁵ See Forsythe-Yorke W (2015) *ibid* 3.4.4

censure (see below) and reducing his privacy through punishment involving hardship and suffering in like measure to the offender's actions which had invaded the victim's privacy and caused him to suffer harm. Through these restrictions placed upon him it is to be hoped the offender will develop the wish to undertake a form of secular penitence,⁴⁶ with expiation of his guilt for his wrongdoing and with the intention of reintegrating peacefully into his society and not to continue offending.

However, in expressing State disapproval of criminal behaviour, the factors which caused him to offend have to be taken into account. Many criminals come from those environments where they are sociologically deprived⁴⁷; and punishment may harden their attitudes setting them more firmly against the society which has condemned them.

There is also the risk that a minor offender in prison may learn more about the skills needed to be a successful offender from the more experienced inmates.⁴⁸ Furthermore, having been in prison or otherwise punished may enhance a young offender's standing in his gang.⁴⁹

1.6. Cardinal and Ordinal Proportionality

The law requires that the guilty offender is punished, and retributive punishment is implied.⁵⁰

However, in Proportionality Theory there are two concepts: firstly, the offender's crime and the judge's actions, and secondly the proportionality of the offence in relation to other offences, and the sanctions to be imposed in relation to other sanctions. Thus, proportionality has been described as having two axes. The one the horizontal axis, cardinal proportionality, implies as stated, that the gravity of the offence to be reflected in the severity of the sentence, as in Desert Theory. Ordinal proportionality on the other hand, the vertical axis or scale, implies that different offences are ordered on a scale of gravity as a mirror image of the scale of penal sanctions ordered in their different degrees of severity.

It may be conceived as two ladders opposite each other with the rungs of the offences ladder approximating to the rungs of the sentences ladder. The rungs of the first could be considered to represent the mean value of gravity which is under consideration in the case being heard. The spaces above and below each rung would therefore represent the mitigating or aggravating factors of the offence. The opposite ladder also has the rungs representing the mean or average sentence or 'starting point' for the sentence and the spaces above and below which allow the sentencer discretion of latitude to take into consideration before passing judgement. This discretion clearly reflecting the mitigating and aggravating factors in the opposite ladder, and other factors which might influence the sentence such as the defendant pleading guilty, showing remorse, or that he intends to 'go straight' in future and so on. In carrying out the

⁴⁷ Duff R A (2009) *Punishment, Retribution and Communication* page 135 et seq in von Hirsch A et al (2009) and see Sentencing Act 2020 s 57 *Purposes of sentencing*

⁴⁸ Lombroso C (1835-1909) quoted in Alexander J P (1922) *Philosophy of Punishment* Journal of Criminal Law and Criminology vol 13 Issue 2 Article 5

⁴⁹ Damm A P & Gorinas C (2020) *Prison as a Criminal School: Peer Effects and Criminal Learning behind Bars* <https://www.journals.uchicago.edu> > doi > abs
The authors' research shows that in prison there is enhancement of prisoners' skills in criminal activities, if those prisoners had been involved in planned offences. That was not the case for those who had been imprisoned for spontaneous offences.

⁵⁰ Becker H (1963) *Labelling Theory*. Personal communication Lowe, Gordon, a senior social worker, explained to me that young gang members look up to older members who have gained a criminal record, and may strive to achieve the same status. Moreover, once that has been achieved the motivation is to live up to it and may commit more offences with that aim. (see Acknowledgements) and see Hutcherson D (2013) *When Crime Pays*. <https://www.npr.org> > transcripts .

⁵¹ Verdant s (2013) *when crime pays: prison can teach some to be better criminals*. In which Professor D Hutcherson of Ohio University, "spending time in prison leads to increased criminal earnings," .

sanction the sentencer would clearly not stray above or below the appropriate rung, for that would render the sentence disproportionate.

In this analogy the ladders are opposite each other, and it has to be determined exactly which rungs are exactly opposite each other. Thus ‘*anchoring points*’ have to be agreed; that a paradigm offence X really warrants sentence Y and none other; that another paradigm offence A warrants sentence B and so on. Such points of anchoring would be a matter of opinion and judgement made by people experienced in the judicial field. Thus, the risk of sentences ‘straying’ into the space of the rung above or below is avoided, so avoiding the risk of a *disproportional* sentence being awarded.

Other theories of justice, rehabilitative, predictive, and deterrent, will be briefly considered and it will be outlined why they seem to be less suitable as the primary system, though acceptable in modifying proportionality.

Retributive punishment of drugs offenders is the essence of Desert Theory. It looks back at the offence and implies severity of sentence to be accorded to the offender, proportional to the harm he has caused to the victim. First to be considered is the harm caused by traffickers. The Sentencing Guideline indicates the weight or quantity of a drug implying the *potential* harm it might cause. Yet this is based upon consensual opinion, for no harm has actually been caused until the user takes the drugs. Has harm been caused by user? Again, this is a matter of opinion for a casual user will cause *no* harm, a habitual user might, and an addict will harm himself, and because of that will harm his family and society, and the state too because of the costs incurred through legal and medical proceedings. However, a user can be said to cause harm by stimulating the illegal supply to provide him with the drugs he wants.⁵¹ How much retribution that should deserve is clearly also a matter of opinion. All other punishment forms, Rehabilitative, Predictive, and Deterrent are teleological, forward-looking, and discussed next.

1.7. Rehabilitative, Predictive, and Deterrent Sentencing

Rehabilitation as a penal sanction could well set no limit to the length of the punishment. It might be the case that the prisoner through not wishing to undergo ‘corrective training’ or making unduly slow progress might have his release date deferred. This might be to coerce him into attending rehabilitation sessions, or as a punishment, or the prison might feel that he has not been rehabilitated sufficiently to warrant his release.⁵²

There are other matters which should be considered;⁵³ attempting to alter a prisoner’s attitude of mind may to some people imply authoritarianism, brainwashing, or paternalism and attempts at ‘correction’ and reform, may be coercive infringing a prisoner’s rights to autonomy to decide what he wants to do. Then the prisoner may be only feigning his response to correction to achieve early release, or he may be unable to appreciate the value of the normative values rehabilitation is intended to impart, especially if he has a personality impairment⁵⁴.

The sentencer might feel that the convicted person’s offence is so serious that he deserves imprisonment until he has shown himself to be fully rehabilitated or has expressed remorse adequately (in the opinion of the parole board.) Desert Theory and the concept of retribution avoids such subjectivity.

⁵¹ Holland A (2020) *An ethical analysis of UK drug policy as an example of a criminal justice approach to drugs*. [https://harmreductionjournal.biomedcentral.com > articles](https://harmreductionjournal.biomedcentral.com/articles)

⁵² National Conference of State Legislatures(2012)*A Report of the NCSL Sentencing and Corrections Work Group Principles of Effective State Sentencing and Corrections Policy*
www.ncsl.org/research/civil.../principles-of-sentencing-and-corrections-policy.aspx

⁵³ Ashworth A (2009) *Rehabilitation* p.1 et seq in *Principled Sentencing* ibid

⁵⁴ See Chapter 2.16.

A prisoner upon release may 'go straight' because of his rehabilitation, or he might have done so even if he had not undergone rehabilitation. Yet some empirical evidence shows that under certain circumstances rehabilitation is effective,⁵⁵ though that has been disputed.⁵⁶

However, many feel that humanitarianism should at least offer rehabilitation to those incarcerated in prison.⁵⁷

Predictive sentencing is based on the premise that the offender might/might not respond well to corrective sanction, whether in prison or not, and may/may not reoffend thereafter. Risk assessments of convicted defendants are being introduced in some places with the object of reducing imprisonment rates.⁵⁸

However, until the science of risk assessment has developed sufficiently it might be felt that the introduction of such a Predictive Sentencing policy could result in *disproportionate and unquantifiable* punishments. Proportionality based upon Desert Theory provides a system of punishments understandably fairer.

Deterrence through sentencing of would-be offenders sounds intuitively attractive, but perhaps less so if it is appreciated that only one in five offences are ever detected.⁵⁹ Thus it seems unreasonable to suppose that the young potential miscreant would think of the possible sentence and the risk of appearing before a magistrate in a few months' time.⁶⁰ If, however, he sees a police officer in the street before shoplifting, that might be a more effective deterrent; certainty of punishment being more effective than severity.⁶¹ Deterrence in sentencing may be considered as specific to the individual offender and general to the public, and both have ethical as well as empirical problems.⁶²

Thus, a sentence referring to an individual has to be based on the judge's assessment of the offender's background extrapolating that to what he thinks the effectiveness of the sentence might be in deterring future offending. As has been pointed out the empirical evidence of positive outcome is sparse, not least because of the multiple factors involved. If the severity of sentence is intended to deter others (an 'exemplary sentence') that too is problematic, and ethically unsound for the prisoner would be punished as means to the ends of others not himself.⁶³

⁵⁵ Home Office (2009) *The Halliday Report making Punishment Work: Report of a Review of the Sentencing Framework for England and Wales* (London Home Office)
webarchive.nationalarchives.gov.uk/+/...homeoffice.../halliday-report.../chap-1-2-hall...

⁵⁶ Bottoms A (2009) *Empirical Research Relevant to Sentencing Frameworks: Reform and Rehabilitation* pp 16 & 17 in *Principled Sentencing* ibid

⁵⁷ The Howard League (2016) *We've tried expecting prisons to rehabilitate and reform*. howardleague.org/blog/

⁵⁸ Barry-Jester A M, Casselman B & Goldstein D (2015) *Should Prison Sentences Be Based On Crimes That Haven't Been Yet Committed?*. Crime and Justice 538 (The Marshall Project)

⁵⁹ Government Publications (2015) *Crime Outcomes in England & Wales*
<https://www.gov.uk/.../statistics/crime-outcomes-in-england-and-wales-2014-to-2015>

⁶⁰ Robert J & Ashworth A (2009) *Deterrence* p46 in *Principled Sentencing* ibid
where they postulate four circumstances in which deterrence might be affected

- (1) if the potential offender feels that the risk of detection is so low as to make the threat of the penalty seem too remote and thus readily discounted
- (2) the potential offender thinks that the offence being planned is a risk worth taking, or in an impulsive offence, he might never actually think about the risk of detection
- (3) the potential offender might consider what impact it would have upon his family if he were to be detected, which might have a deterrent action upon him
- (4) There is a very high 'attrition rate' in the criminal justice system; few crimes are ever detected, and the consequence is that the courts impose a sentence on only 2% of all offenders in the year

⁶¹ Wright, V (2010) *Deterrence in Criminal Justice; Evaluating Certainty vs Severity of Punishment*. The Sentencing Project. www.publications.parliament.uk/pa/.../cmsselect/cmsstech/1031/1031.

⁶² House of Commons publications (2006) *Drug classification: making a hash of it?* Science and Technology Select Committee Report of 2006

'We have found no convincing evidence for the deterrent effect, which is widely seen as underpinning the Government's classification policy'

⁶³ Kant I (1724-1804) *Der Kategorische Imperativ* "Handle so, daß du die Menschheit, sowohl in deiner Person als in der Person eines jeden andern, jederzeit zugleich als Zweck, niemals bloß als Mittel brauchst" (*Behave*

General deterrence also has problems; if it is too harsh, the warnings are too dire, that might harm people in causing them anxiety or mental problems. In the past punishments, public executions, flogging and stoning, whilst still carried out in some cultures, are now considered too barbaric in western democracies. They might have had some deterrent effect upon an unsophisticated crowd.

It is believed that most cases of robbery are done on impulse and without rational calculation, a spontaneous action without thought to the possible consequences, and often under the influence of alcohol or drugs.⁶⁴

1.8. Sentencing: Censure & Punishment.

Sentencing in Proportionality Theory has two elements: censure and punishment, which will be examined in turn.

The purposes of censure⁶⁵ are:(a) to castigate the convicted offender and (b)to allow the judge to express his other opinions.

Firstly, censure directed towards the convicted offender. The judge expresses the opprobrium of society and, in expecting the offender, in looking back at the crime, to express remorse for his misdemeanour, appealing to his moral sense to recognise the wrong⁶⁶ he has committed,⁶⁷ with the intention of reparation to society and the victim (and restitution if relevant) with a promise of improvement in moral tone and attitude during the time of his punishment.

Censure also explains to the victim that the hurt, loss or other harm he has experienced as a result of the offender's actions, is taken seriously by society, and its representatives, the judiciary. The victim and his family will be thus reassured that society is determined that the offender will suffer as the victim has suffered. In addition, censure is directed to the police to assure them that their efforts at bringing the offender to trial have been worthwhile. It is also the judge's justification of the punishment he is about to order. Finally, the act of censure serves to provide the judge with a self-audit, ensuring that all the relevant factors have been considered, and the punishment to be pronounced fits correctly into the guidelines. The details of censure may also be used as audit in an Appeals Court should that ensue.

There could exist the situation that the offender is too young to understand what is being said, or too old and senile. The offender may express remorse⁶⁸ and recantation for his wrongdoing with an intention of penitence. Or he may feign such sentiments. He may be so incorrigible that the expressions of opprobrium have no impact, or his moral tone might be so impaired that he sees nothing wrong in what he has done. Even if the offender does not understand or care, the viewpoint of the victim or his family must not be overlooked.⁶⁹

in such a way that the humanity of yourself as well as other people is always used as an end in itself and never as a means to an end) (translation WF-Y) www.3sat.de/delta/62470/index.html

⁶⁴ Robert J & Ashworth A (2009) *Deterrence* p45 in *Principled Sentencing* 3rd ed ibid
and see US Department of Justice (1994) *Drugs and Crime Facts* . Here it is stated that 59% of all offenders were under the influence of drugs and/ or alcohol at the time of their arrest
<https://www.bjs.gov/content/pub/pdf/dcf.pdf>

⁶⁵ Sentencing Act 2020 s 52 *Duty of Court to give reasons for and explain the sentence*
This not the same of Censure though both could be combined

⁶⁶ *Normative values in a moral situation such as the use of illegal drugs are difficult to define. It is wrong to use them in the UK because the law says so. However, in most mainland European countries it is legal to possess such drugs for personal use. So where does the wrongness or rightness actually lie? This matter is explored further in Chapter 2*

⁶⁷ Duff R A (2009) Chapter 4.3. *Punishment, Retribution and Communication* paragraph 1 *Principled Sentencing*

⁶⁸ see 6.3. where remorse is discussed further.

⁶⁹ The Crown Prosecution Service (undated) *The Victim Personal Statement* - <https://www.cps.gov.uk> › files › legal. guidance

10. All victims of crime must be offered the opportunity to make a VPS. The decision on whether to make one must, however, be entirely a matter for the victim. Victims should be given information to help them make as informed a decision as possible but should neither be encouraged nor dissuaded from doing so.

However, in expressing the ‘opprobrium’ of society, problems may arise. As discussed in 2.15 and 2.18 society’s mores change and the heinous offence of yesteryear, for example homosexual behaviour lawfully resulting in imprisonment, may now be considered entirely normal and not even deviant.⁷⁰ So, it is with drug usage: drug possession is unlawful and may result in imprisonment, but many consider it to be entirely normal and have expressed that so in Parliament⁷¹. Censure would have no retributive impact upon a person whose offence is drug possession, if he believes, as does much of society nowadays,⁷² that there is nothing wrong with it⁷³.

The second aspect of sentencing is punishment, and in proportionality sentencing punishment is retributive alone. It therefore has a tariff which is limited in length and intensity in accordance with the principles of ordinal proportionality. There is of course flexibility within the limitations of its place on the ordinal scale. Mitigating and aggravating factors will be considered, and these may involve the offender on the factors which determine his culpability, on the extent of the crime and even on the contribution to the crime of the victim himself.

Unless there are significant circumstances (which the judge would have to justify) flexibility does not allow the punishment to stray above or below its place on the guideline scale⁷⁴. Over-punishment should not be possible, if is correctly adjusted to what the penal value of the offence was. Under-punishment is always possible too, but as that does not infringe the rights of the prisoner, it is of lesser importance.⁷⁵

Other qualities of sentencing such as restorative justice, deterrence or rehabilitation do not alter the overall severity or length of the retributive punishment⁷⁶. They could be used to hybridise the concept of proportionality. In fact, they usefully make sense of the prisoner’s time, in re-educating him, the better to reintegrate into society upon his release.

However intentionally attempting to change an offender’s moral position, may infringe his own rights to autonomy. Coercion, ‘brain-washing’⁷⁷, should not be envisaged, even if the prisoner upon release, is no different than how he was upon his committal to prison. A particular point of difficulty is where a religiously or ideologically motivated offender⁷⁸ is still committed to his cause, as the time of his release approaches. Proportionality would not normally permit extension of his sentence beyond the designated limits.⁷⁹

Desert theory sentencing and proportionality limits the quantum of punishment but not its nature, which may be imprisonment, fines a suspended sentence or a community sentence and parole. Thus, if social services provide the main custodian of the ex-offender with rehabilitation and good conduct the aims, the quantum of punishment still has to be completed.

⁷⁰ Yale Law Faculty (1966) *Notes on the Devlin-Hart Debate* in which changing perceptions on homosexuality resulted in the law being changed.

faculty.ycp.edu/~dweiss/phl347.../devlin%20and%20hart%20notes.pdf

⁷¹ 2.16. House of Commons Debate (2017) and footnote Debbonaire

⁷² 4.10. *Is decriminalisation developing in England & Wales?*

⁷³ 2.16. House of Commons Debate (2017) and footnote Blunt

⁷⁴ Drug Offences Definitive Guideline (2012) p4 states when the maximum sentence may be exceeded

⁷⁵ Under-punishment may of course infringe the rights of the victim, and this may lead to an Appeal (see Chapter 4, and the case of *R v Farish* (2006) Attorney General reference No 6 of 2006 and others)

⁷⁶ Tiarks E (2019) *Restorative Justice, Consistency and Proportionality: Examining the Trade-off* Criminal Justice Ethics Volume 38, 2019 - Issue 2

This discusses the relativity of the absoluteness of retributive justice

⁷⁷ Knox A (2017) *How Prisons Use Cult Tactics to Brainwash ...* <https://www.vice.com › Home › Identity USA. The author, an atheist, tells of how the prison authorities tried to convert her to Christianity as part of her rehabilitation.>

⁷⁸ House of Commons Library (2016) *Radicalisation in prisons in England and Wales - CEP Probation* <https://probation.org › uploads ›>

⁷⁹ Metro News (2017) *Imprisonment for Public Protection* <https://metro.co.uk › News> IPP (now discontinued) was a sentence designed for offenders that posed a serious threat to the public.

1.9. Offences which are clearly wrong & others defined by statute

Some offences are clearly a *wrong*, thus rape, burglary, murder, or others, where the offence has been *defined by statute*.⁸⁰ These may be based on convenience, such as driving regulations, or on morality for example the usage of recreational illegal drugs and as the perception of morality changes so Acts of Parliament repeal the legislation.

The examples used above to illustrate the philosophy of proportionality are almost all in the '*wrong*' group. They have a clearly defined offender, a criminal act and a victim who has been in one way or another harmed. In offences outside the core meaning of 'criminal', the matter is not so clear. If a car driver is not wearing his seat belt, no harm has been caused *but it might be*, if he were to be involved in an accident, which is why the law was enacted.

In drug usage the matter becomes even more complex. The user of a 'soft drug' in general does no harm. Ecstasy usage, if pure, unadulterated and of normal concentration, has caused no deaths and is not addictive⁸¹, yet it is classified as a Category A drug⁸², and the user may be imprisoned for many years for trafficking in fairly harmless drugs under the Guideline, but is it proportionate or just? The use of 'hard drugs' may well result in addiction and harm to the user and to his family, but does he need prison or medical care if he has become a patient on account of the addiction?

The ordinal and cardinal aspects of proportionality are subjective opinions which change with time and place, thus: "...*how can one discern the principle's (that is proportionality) criteria for application? These are ultimately questions of moral philosophy.*"⁸³

Proportionality can never be fully objective as has been pointed out, "...*Ultimately ...proportionality can only be the manifestation of society's opinions and moral assumptions*" yet it is an applaudable attempt at an ideal form of justice.⁸⁴

The Drug Offences definitive sentencing guideline issued by the Sentencing Council sets out clearly the proportionality of the sentences to the gravity (culpability together with the potential harm) of the offences, based upon the collective wisdom noted above.

Yet if it can be imagined that the collective wisdom *might* be wrong as it has been in the past, then the question should be put: is the criminal law and the stigma to the offender, a proportionate response to the offence of drug possession? Furthermore, if desistance from the criminal behaviour, which is often associated with addiction, is the purpose of sentencing, then it follows that the most effective treatment must be best for society.

1.10. Conclusions

Proportionality is a logical and clearly understandable way of expressing what the severity of sentencing should be in respect of an offence. For drug offences there are problems: it is based upon a drug classification which may have been acceptable in 1971 when the Misuse of Drugs Act was initiated. Numerous reports and research since then have shown it to be wrong and likely to result in miscarriages of justice. The other problem is that it is debateable whether it is appropriate to subject people in personal possession of drugs to the criminal law, and this

⁸⁰ Husak D (2010) *Malum Prohibitum and Retributivism* Chapter 16 in *The Philosophy of Criminal Law*, Oxford University Press 2010 (UEA Library)

⁸¹ 2.14. *ACMD advice and resignations* and footnote Stevens A (2011)

⁸² 2.10. Legal Classification: Misuse of Drugs Act (1971)

⁸³ von Hirsch A (1992) *Principled Sentencing* 2nd ed ibid p56

⁸⁵ Goh J (2013) *Proportionality- An Unattainable Ideal in the Criminal Justice System* pp 41-68 humanities.manchester.ac.uk/medialibrary/law ⁸⁶ Sentencing Council (2012) *Drug Offences, Response to Consultation* <https://www.sentencingcouncil.org.uk/uploads/Drug...>⁸⁶ Called narcotics in the USA

is discussed in Chapter 4. If sentencing *is* inappropriate, then the law as it stands is disproportionate in sentencing a person for behaviour which should not be criminalised or, if it is criminalised, should be considered much less serious than it currently is in the definitive guideline.

Chapter 2. Psychoactive drugs, the criminal law, and the Misuse of Drugs Act 1971.

2.1. Introduction.

This chapter is in two parts: in the first, those prohibited drugs which are covered in the Drug Offences Sentencing Guideline, are discussed. An overview will be given of their actions, usage rates, the harm they can cause and the death rates, mentioning that the UK has the highest drug-related death rate in Western Europe. The second part describes the Misuse of Drugs Act 1971, for the laws on drug offences are based on it. What follows will be an account of how the societal concept of morality of drug usage has changed over the fifty years since then, exemplified by several reports critical of the Act. It will be shown how scientific and popular opinions are now in conflict with it. I will argue that this is important for our understanding of the sentencing of drugs offenders, and helps advance the thesis's overall argument: that sentencing guidelines for drugs offenders fail to distinguish drug dealers/traffickers from mere users.

2.2. Definition

Drugs of addiction act on the brain, are mind altering and are termed 'psychoactive drugs.'⁸⁶ The World Health Organisation defines them thus: *Psychoactive substances are substances that, when taken in or administered into one's system, affect mental processes, e.g., cognition or affect.*⁸⁵ Psychoactive substances which are legal (caffeine, alcohol, and nicotine) will, at times, be referred to. Medicinal drugs, with psychoactive properties, referred to as '*psychotropic drugs*', and may cause addiction, are not included, nor are illegal substances, which are not psychoactive drugs such as barbiturates and steroids⁸⁶, or inhalants.⁸⁷

2.3. Actions of Psychoactive Drugs

Drugs exert their action on the brain and through environmental circumstances. The brain has 'reward centres' situated in the cortex, which if stimulated give a person the feelings of happiness, satisfaction, and peace.⁸⁸ Impulses received through the senses from pleasurable situations initiate brain activity to generate neural or humeral activity which stimulate these reward centres. However, some people have impaired pathways to the reward centres or a diminution of sensitivity to the stimulation. In these cases, the centres are underactive, and a person does not feel as much happiness as they might. This deficiency could be the result of trauma, illness or have a genetic basis. In these situations, the drug compensates for the deficiency in enjoyment and happiness. If the drug is not available to satisfy that absence, a

⁸⁶ Called narcotics in the USA

⁸⁵ World Health Organization (1993) *Psychoactive substances*
www.who.int/substance_abuse/terminology/psych...

⁸⁶ government legislation (1973 with amendments 1985 and 2001) *Misuse of Drugs Regulations*
These regulations require some controlled drugs to be kept under locked conditions or cabinets, documented and accountable. Such drugs are divided into five schedules

Schedule 1. Drugs which have no therapeutic usefulness and are only used for research. May not be possessed except under special licence from the Home Office

Schedule 2. Psychoactive drugs used therapeutically, must be held in locked conditions and issued only by authorised persons

Schedule 3 minor stimulants, barbiturates, tramadol gabapentin

Schedule 4 anabolic steroids, benzodiazepines. Do not require locked storage and registers to be kept

Schedule 5 certain controlled drugs such as codeine used in small strengths.

⁸⁷ government legislation (1999) *The Cigarette Lighter Refill (Safety) Regulations 1999*
<https://www.legislation.gov.uk/1999/contents/made>

These Regulations prohibit the supply of cigarette lighter refill canisters containing butane to persons under the age of eighteen. Inhalation induces a 'high' and is popular with children.

⁸⁸ Volkow N D (2014) *Drugs, Brains, and the Science of Addiction* National Institute of Drug Abuse
drugabuse.gov/publications/drugs-brains...addiction.

craving⁸⁹ for it is felt, and that may lead to addiction, in that the drug becomes essential to make up for the absence of reward stimulation. The point of significance is that some people have a proclivity to addiction on grounds not under their own control. It is also one reason why some people, once addicted can never, despite treatment, become permanently abstinent.⁹⁰

Environmental circumstances also play a large part,⁹¹ and family background is significant: if the parents are users, that influences their children. Social circles too, for example where a young person wants to conform to the drug taking habits of their elders or peers.⁹² Poverty is important; a deprived person may have little to enjoy and turns to drugs to compensate, finding solace and escape from life's drabness in drug related dreams. Unemployment is a factor, for people then may occupy their time with drugs, alcohol, and smoking.⁹³

Stress may lead to a need for relaxation; film stars and politicians have been addicts.⁹⁴ Students, who had the occasional 'spliff' did better in their examinations than those who did

⁸⁹ Addiction Centre (2020) *Obsessive Compulsive Disorder and Addiction*
www.addictioncenter.com > Addiction

There is often an association between drug craving and OCD in adults, and those who have developed the craving have often had OCD or some form of it in their early life.(about 25%) The distinction is important, for in the case of the dual diagnosis, addiction together with OCD, it is important that the OCD is treated and resolved first, bearing in mind that the reason for the drug taking may have been to ameliorate the symptoms of the OCD. See also 5.3. *Preparation of prisoner for rehabilitation*.

OCD is treated with psychotherapy and medication, usually selective serotonin reuptake inhibitors (SSRIs).

⁹⁰ Damore E (2008) *Cocaine and the brain: the neurobiology of Addiction*
serendipstudio.org > exchange > serendipupdate > cocaine see also Professor Cseste (Cseste J (2010) *From the mountains; what the world can learn from the drug policy changes in Switzerland*)reported on the Heroin Assisted Trial carried out in Zürich by Professor Uchterhagen, a trial of one thousand severely dependent addicts who had failed to respond to other treatment programmes; it was evaluated from 1994-6 and the project report showed that many patients' health, social and employment situation were much improved and no relapses occurred. Stabilisation on heroin was achieved in three months with no increase of dose needed. 40% of clients moved into methadone therapy and 25% became abstinent. And see also Fischer B, Schlechter M. Strang J, Oviedo-Joekes E, Blancken P, Haasen C, Rehm J, and van den Brink W (2007) *Heroin-assisted Treatment (HAT) a Decade Later: A Brief Update on Science and Politics* They also quoted the J Urban Health. 2007 Jul; 84(4): 552-562

⁹¹ DWP Research Project No 640 www.gov.uk/.../problem-drug-users-experiences-of-employment
 Which gives a very comprehensive profile of Problematic Drug Users and the measures needed to provide care and treatment for them

⁹² Bauld L et al (2010) *Problematic Drug Users' Experiences of Employment and the Benefit System*
<https://www.gov.uk/government/uploads/system/uploads/.../rrep640.pdf> also see Kaplan B, Stevens S and Robbins C (1984) *Pathways to Adolescent Drug Use: Peer Influence, Self-Derogation Weakening of Social Controls, and Early Substance Use*. Journal Health and Social Behaviour Vol.25, No3 pp 270-289

⁹³ Stevens A (2011) *Drugs, Crime and Public Health, the political economy of drug policy* Routledge, Oxford.
 in Chapter 2 *Afflictions of inequality, the social distribution of drug use, dependence, and related harms:* Stevens makes the point

'that social inequality and poverty are the most important factors for the reasons people start on drugs and stay with them; programmes to eradicate the use of drugs will fail if this is not taken into account'

Personal experience: when I was the Director of Public Health for the Great Yarmouth & Waveney Health Authority, I used to visit the detox centres there and talk to their clients. I learned that they got into drug taking through boredom; busy all summer with the holiday camps, funfairs and hotels, there was little work available and little to do for the rest of the year except to sit around, smoke, take drugs and drink.

⁹⁴ Rennell T (2013) *New book reveals how Marilyn Monroe, President Kennedy and Elizabeth Taylor were drug addicts*. www.dailymail.co.uk/

not,⁹⁵ and wartime air-force pilots needed them.⁹⁶ Some use drugs in religious⁹⁷ and ritualistic activities.⁹⁸ In summary people take drugs⁹⁹ for many different reasons.¹⁰⁰

2.4. Drugs frequently used,¹⁰¹ as in the Drug Offences Sentencing Guideline.¹⁰²

- a) Opiates: opium, morphine, diamorphine (**heroin**)¹⁰³, fentanyl, codeine. Increase pleasure, creativity, cause euphoria.¹⁰⁴ are the most addictive and harmful drugs¹⁰⁵.
- b) Stimulants: include **cocaine**¹⁰⁶ causing euphoria, energy, talkativeness, violence.¹⁰⁷ It is taken by inhalation, smoking or injection. It is highly addictive.
- c) Addictive. Amphetamine¹⁰⁸ stimulant with action as cocaine, but milder.
- d) Empathogen: Ecstasy MDMA¹⁰⁹ (methylene-dioxy-methamphetamine)¹¹⁰ produces feelings of love, emotion, serenity, and happiness.¹¹¹ Usually imported from China.
- e) Hallucinogens: **LSD** (Lysergic acid diethylamide), mescaline, peyote, and psilocybin.¹¹² Can cause trances, psychonautics, entheism¹¹³, dreams.¹¹⁴

⁹⁵ Swiss Federal Office of Public Health (2008) (*Eidgenössische Kommission für Drogenfragen*) (*Lagebeurteilung und Empfehlungen der Eidgenössischen Kommission für Drogenfragen*)

In 2008 the Swiss Federal Office of Public Health brought out a new report on the social and health problems linked to cannabis use. It concluded that politically driven claims of extreme danger were unfounded. Occasional cannabis use appeared to give rise to no problems. A survey of 5,000 students at the University of Lausanne who were occasional users showed that they obtained better grades than those who abstained. Might this have been due to the fact that they were able to relax a bit?

⁹⁶ Cornum R, Caldwell J, Cornum K (1991) *Stimulant Use in Extended Flight Operations* (in the Gulf War). www.airpower.maxwell.af.mil/airchronicles/apj/apj97/.../cornum.html

⁹⁷ Feuerlicht R S (1975) *Whirling Dervish: Still Mysterious and Exotic* The New York Times www.nytimes.com/1975/10/19/archives/whirling-de...

⁹⁸ Carmona M (2020) *What is Peyote? Is it Addictive & What are the Side Effects?*

www.therecoveryvillage.com/peyote-addiction-who-describes-the-use-of-peyote-a-mescaline-like-hallucinogen.

⁹⁹ Release (2020) *Cutting Agents* Refers to the inert substances added to illicit drugs to bulk out the drug [Releasehttps://www.release.org.uk/cutting-agents](https://www.release.org.uk/cutting-agents)

¹⁰⁰ Fieser J (2014) *The Practice of Morality: Drugs* Ch 3-5 the arguments for and against legalisation <https://www.utm.edu/staff/jfieser/class/300/3-drugs.htm>

¹⁰¹ This thesis concerns psychoactive drugs used for 'recreational and social purposes alone. Other uses: Medicinal as anxiolytics, anaesthetics, analgesics, and for epilepsy treatment. Spiritual and Ritualistic use in some religious cults Socially acceptable nicotine in tobacco, caffeine in tea and coffee, alcohol.

¹⁰² Sentencing Council (2012) *Drug Offences Definitive Guideline* p4

¹⁰³ Main source Afghanistan. Economist Newspaper (2021) *What does Taliban control mean for Afghanistan's opium crops...* <https://www.economist.com/Afghanistan-produces-90%-of-the-worlds-illegal-opium>

¹⁰⁴ de Quincey T (1859) *Confessions of an English opium-eater* <https://archive.org/details/confessions>

¹⁰⁵ See 2.12. *Drug Classification by Harmfulness*

¹⁰⁶ Main source is Columbia Wikipedia(undated) *Cocaine trade in Colombia* https://en.wikipedia.org/wiki/Illegal_drug_trade_in_cocaine. 'According to Bloomberg News, as of 2011, studies show that Colombia is the world's largest cocaine producer'

¹⁰⁷ N S Miller N S, Gold M S, & Mahler J C (1991) *Violent behaviours associated with cocaine use: possible pharmacological mechanisms* Int J Addict Oct;26(10):1077-88. And personal communication: Lynford Brunt, who used to be an official at Norwich prison told me that they say: 'give them cannabis and they'll love you, let them use cocaine and they'll fight you' See Acknowledgement Brunt, Lynford

¹⁰⁸ Main source is Syria: Chulov M (2021) *'A dirty business': how one drug is turning Syria into a narcostate* <https://www.theguardian.com/world/drug-captagon>. Guardian Newspaper Syria is a narco-state with two primary drugs of concern: hashish and the amphetamine-type stimulant Captagon."

¹⁰⁹ JM Mitchell J M et al (2021) *MDMA-assisted therapy for severe PTSD: a randomized, double-blind, placebo-controlled phase 3 study*. This recent multicentred project has shown good results in SSRI-resistant treatment of Post Traumatic Shock Disorder. Nature Medicine volume 27, pages1025–1033 (2021)

¹¹⁰ known as Ecstasy, XTC, superman, and others

¹¹¹ Weil A. (1998). "MDA The Love Drug". *The Marriage of the Sun and Moon*. Houghton Mifflin Co. (Norwich City Library) this gives a full account of the author's experiences in using Ecstasy. *Ecstasy is the commonest used on mainland Europe where it is known as the 'dance drug'*

¹¹² also known as psychedelics, and delirants.

¹¹³ Self-identification with God

¹¹⁴ Huxley A (1954); *Doors of Perception*, Chatto and Windus, for a detailed account of Mescaline usage Anonymous (2008) *Timothy Leary, LSD, & the Sacred Sacraments & Yoism* www.yoism.org/?q=node/52

- f) **Cannabis**¹¹⁵ is from herbal or artificial cannabinoids fortified with THC (Tetrahydrocannabinol)¹¹⁶ Used as a relaxant, with no deaths when used alone.^{117 & 118}, addiction is very rare¹¹⁹; the most frequently used drug.¹²⁰
- g) **Dissociatives: Ketamine**,¹²¹ phencyclidine, and dextromethorphan. They cause hallucinogenic, dream-like states, trances, and bodily unawareness.

2.5. Harms from drug usage Psychoactive drugs have the potential for causing harm in different ways: mental and physical harm, the tendency to addiction, and harm to family, community and society. It can also have long-term unpredictable effects.¹²² Personal harm depends on how the drug is used; if intravenously in heroin and cocaine use, acute cardiac or respiratory failure may result. Inhalation of cannabis smoke may cause lung cancer; nasal inhalation of cocaine may cause damage to the nasal sinuses. Mental illness may result¹²³. Harm may result from contaminated syringes and needles,¹²⁴ and from impure¹²⁵ or over-concentrated drugs.¹²⁶ Intoxication from drugs may be the cause of traffic accidents.¹²⁷ Harm is also caused through the casual user stimulating the development of criminal agencies to supply him.¹²⁸ Addiction, resulting in personal neglect, is a feature of all drugs as explained. As the WHO stated:

Substance abuse is not a failure of will or of strength of character but a medical disorder¹²⁹ that could affect any human being. Dependence is a chronic and relapsing disorder, often co-occurring with other physical and mental conditions. 130

The harm caused to the addict's family results from his neglect of it, unemployment, with crime or prostitution to pay for his habit. Society, harmed by the expense of health care, the

¹¹⁵ BMJ (2021) *Medical cannabis or cannabinoids for chronic pain* (09 September 2021)

Cannabis is used medicinally in different illnesses and also as an alternative to opiates in pain relief. This edition has several articles describing the current views on the medical uses of cannabinoids

¹¹⁶ known as *spliff, hashish, grass, weed, marijuana, and some fifty other synonyms*. Cannabis fortified with THC is known as *spice*, or *skunk*, and see Snow J (2015) How I got stoned on skunk Channel 4 a very dramatic account of the unpleasant effects of taking skunk News <https://www.channel4.com/news/jon-snow/blogs>

¹¹⁷ Ashton C H (2001) *Pharmacology and effects of cannabis: a brief review* (British Journal Psychiatry) bjp.rcpsych.org/content/178/2/101.full

¹¹⁸ Causes of Death in the United States (2014) *Drug War Facts* (quoting facts from 2013)

www.drugwarfacts.org/cms/Causes_of_Death

¹¹⁹ see chapter 5.4 and footnote HMP Hollesley Bay where cannabis was being used in the treatment of hard drug addiction.

¹²⁰ Black C (2020) *Report* quoting ONS 2019 numbers of users of illegal drugs Cannabis users 2,572,000

¹²¹ known as *pap, DXM*. Ketamine is used by medical practitioners and veterinarians as an anaesthetic.

¹²² Koppleman A (2006) *Drug Policy and the Liberal Self*. P.288 footnote 44 North Western University Law Review. (2006) <https://litigation-essentials.lexisnexis.com/.../app?Rev>

This describes the remarkable *Good Friday experiment* where twenty-five years later drug usage was still exerting its effects.

¹²³ Gould TJ (2010) *Addiction and Cognition*. (NCBI) <https://www.ncbi.nlm.nih.gov/articles/PMC3120118>

¹²⁴ Personal experience: When I worked as a Disability Advisor for the DWP, I frequently saw clients with thrombosis of veins or arteries, HIV, AIDS or hepatitis

¹²⁵ All drugs 'sold on the street' are impure, that is they have been 'cut' diluted with agents, to maximise the profits to the supplier. However, the cutting agents may well be toxic.

¹²⁶ 2.8. *Deaths from drug use* see footnote Cockburn A-M (2014) *5742 days, a mother's journey through loss*

¹²⁷ National Institute on Drug Abuse (2019) *Drugged Driving Drug Facts* <https://www.drugabuse.gov/publications/drugged-driving>

¹²⁸ Holland A (2020) *An ethical analysis of UK drug policy as an example of a criminal justice approach to drugs* <https://harmreductionjournal.biomedcentral.com/articles>

The author rejects this on the grounds of circularity of argument

¹²⁹ Mino A & Arsever S (1996) *J'accuse les mensonges qui tuent les drogues* Calmann-Levy, which tells of the two Swiss doctors who were perhaps the first to realise the fact that drug addiction was an illness and wrote their 'J'accuse' pamphlet. (See Acknowledgements Amon, Eunice.)

¹³⁰ WHO (2004) *The Neuroscience of Psychoactive Substance Use and Dependence* .google.co.uk>books?

police, judiciary, and prisons; a total cost to society of approximately £3 billion a year,¹³¹ is also harmed through the loss of taxes if a person being addicted is unable to pay them.

2.6. Deaths from drug usage¹³² Overdose of drugs may result in death.¹³³ Death can occur from longstanding chronic illnesses caused by drugs or from the equipment used¹³⁴, or as a result of malnutrition from debility or self-neglect. The UK drug-related death rate for 2017 at 74 deaths/million, is the highest in Western Europe, (average 22/million),¹³⁵ Scotland being the highest with 231/million). There are several reasons¹³⁶ amongst which may be the more comprehensive treatment provided in mainland Europe.¹³⁷ Death from heroin accounted for 61.2% of all drug related deaths,¹³⁸ cocaine 10.4%, cannabis, 2.0% and ecstasy 1.71%. Death from impure/over-concentrated substances accounted for 78.4% of all deaths, suicide for 12.6% and indeterminate causes 8.5%¹³⁹ A twenty-year study of teenage drug users found that accidental poisoning caused the majority of deaths (64.3%)¹⁴⁰. Opiates accounted for about two-thirds of those deaths, while suicide accounted for 11.4% of teenage-specific deaths.¹⁴¹

The key point here is that it is users who are suffering, rather than causing immediate harm. Those who traffic drugs are the ones who are at the highest level of culpability, for the contribution they make to the social problem of drug use is enormous. In terms of the criminal law and sentencing, what we have is a social problem which necessitates a public health response rather than the imposition of punitive sanctions on those who need help: the users of drugs, who are the ones who suffer as a result of the actions of the traffickers and dealers. The definitive sentencing guideline is failing to take appropriate account of the extent to which users are in fact in need of help rather than punishment.

2.7. The Misuse of Drugs Bill 1970.

¹³¹ House of Commons Debate October 2015

¹³² Office of National Statistics (2018) *Deaths related to drug poisoning in England and Wales* www.ons.gov.uk/deaths/methodologies/deaths-related-to-drugs.

¹³³ BBC (19 July 2014) *Martha Fernback ecstasy death: Mother calls for drugs legalisation* - www.bbc.co.uk/news/uk-england-oxfordshire-27811553 and see also Cockburn A-M (2014) *5742 days; a mother's journey through loss* (2014) Infinite Ideas ISBN 1908984244 *In this book the author describes how her daughter took an ecstasy tablet of double the normal concentration of active ingredient, suffered a cardiac arrest and died*

¹³⁴ Illnesses such as hepatitis, AIDS, thrombosed blood vessels. This is one of the reasons I got involved in drugs (see the Background to the thesis)

¹³⁵ TABLE 5 ECMDDA Country Reports (2019) *European Drug Death rate*

	UK	CZ	NL	P	D	A	BE	DK	F	SP	I
Population millions 15 – 64 years	42.2	7.0	11.1	6.7	54	5.8	7.3	4	41.7	30.7	38.9
Drug-related deaths per million	74	5	22	4	21	26	8.2	55	7	16	8
Drug Offences per million	106	5.5	18	16.9	32.5	42.5	51.7	26.7	22.3	38.9	73.8

*Scotland (2018) 1,187 deaths(pop5.5million) 215.8/million

UK (2018) 3,256 deaths (pop 42.2 million) 74.8 /million deaths. The table doesn't show E&W separately.

¹³⁶ Forsythe-Yorke W (2015) *ibid* pp100-104

¹³⁷ 8.2. *The Drug Scene* and footnote *ECMDDA (2020) Annual Report for 2020*. This shows that the UK (England, Wales and Scotland, not N. Ireland) has by far the highest drug-related death rate in Europe.

¹³⁸ ACMD (2017) *Reducing Opioid Related Deaths in the UK* see 4.4.

¹³⁹ St Georges Hospital (2018) *Drugs Unit Annual Report*

¹⁴⁰ Oyefeso A, Ghodse H, Clancy C, Corkery J, Goldfinch R (1999) *Drug abuse-related mortality: a study of teenage addicts over a 20-year period* Soc Psychiatry Psychiatr Epidemiol. (1999) Aug;34(8):437-41

¹⁴¹ Office of National Statistics (2018) *Deaths related to drug poisoning in England and Wales* where the ONS gives an analysis of causes of death

Before the Misuse of Drugs Bill 1970 was debated, the government received a report, commissioned from the Advisory Committee on Drugs of Dependence, known as the Wootton Report¹⁴² which recommended that cannabis should not be considered a ‘dangerous drug’, but should be treated as is tobacco. The debate about the bill illustrates well the social and historical contingency of drugs regulation and attendant sentencing policies.

The bill was introduced by the then Home Secretary, James Callaghan. He stated that drug usage was a *scourge*¹⁴³ and an *evil*¹⁴⁴ and that there was an increasing need for a concerted effort in the legal, social and medical fields to deal with it. There had been an increase in drug use with 2,000 registered heroin addicts.¹⁴⁵ He said:

*‘These addicts are very sick people, unable to face the problems of life, unable to come to terms with life or with their fellows. These people need help and understanding and treatment.’*¹⁴⁶

Much of the addiction, he said, was due to doctors overprescribing¹⁴⁷, existing statutes being weak and inefficient, and the new Bill has as its purposes:

1.To establish an Advisory Council on the Misuse of Drugs (ACMD) to make recommendations to the Home Secretary.

2.To establish an Expert Committee to check how far drugs are necessary for medical or scientific purposes.¹⁴⁸

3.To allow rapid action in response to the ACMD and the Expert Committee.

4.To take action against irresponsible doctors and pharmacists¹⁴⁹.

5.To establish a four-tier classification of drugs to allow for punishment according to their dangers and harmfulness.¹⁵⁰

Offences to be included in the Act would be unlawful trafficking, supply or production of drugs, occupation of premises for using drugs, and offences of possession, with increased penalties.

Of great relevance for the present thesis, was that no explanation was given in Parliament for the maximum sentences set out for each of the new offences, except for the statement except for the statement *‘The courts have usually gone well under it.’*¹⁵¹ We can glean from the limited attention given to the framework for sentencing the beginnings of incoherence in our modern

¹⁴² Hansard (1969) *Cannabis: Wootton Report*

<https://api.parliament.uk › commons › jan › cannabis>

¹⁴³ House of Commons Debate (1970) *ibid Callaghan J p1*

¹⁴⁴ House of Commons Debate (1970) *ibid Callaghan J p2*

¹⁴⁵ House of Commons Debate (1970) *ibid Callaghan J p 1*

¹⁴⁶ House of Commons Debate (1970) *ibid Callaghan J p2*

¹⁴⁷ It is interesting that once this had been suppressed *the addiction rate increased*. Addicts prefer the anonymity of seeing their GP rather than going to the local detoxification centre. And that some addicts didn’t like going to them, because, they said, they thought they were under police supervision. It is also worth noting in this context The Story of Dr Marks of the Wirral in Hari J (2015). *It’s the illegality of heroin which leads to the deaths among users*. pp10-12, The Spectator, 9 May 2015

Dr Mark’s experiences were studied by Professor Uchterberger of Zurich who initiated his Heroin Assisted Trial see 2.3. *Actions of Psychoactive Drugs* and footnote Damore E (2008) *Cocaine and the brain: the neurobiology of Addiction* see also 2.16. House of Commons Debate on the Drug Strategy 2017 and footnotes House of Commons Debate (2017) *Drugs Policy* *ibid* Flynn p 35 and Mann, who pointed out that when treatment of addicts was in the hands of GP’s the addiction rates were less.

¹⁴⁸ No evidence has been found of this committee’s activities, presumably incorporated into the ACMD.

¹⁴⁹ Berridge V (1984) *Drugs and Social Policy: The Establishment of Drug Control in Britain 1900–30*. British Journal of Addiction. 1984; 79(4): 17–29.

The author describes the actions to be taken by doctors in prescribing psychoactive drugs and the conditions imposed by the Dangerous Drugs Act 1920

¹⁵⁰ Class A. All the internationally controlled narcotics including nine hallucinogens regarded by the WHO as especially dangerous. Class B Cannabis and cannabis resin and the five most important central nervous system stimulant drugs, about which the WHO expert committee has also expressed concern. Class C. Nine less potent central nervous system stimulant drugs controlled under the 1964 Act. Class D unclassified drugs.

¹⁵¹ House of Commons Debate (1970) *ibid Callaghan J p6*

response to drugs offenders. From the outset, modern drugs policy in England and Wales, including the classification of drugs and the appropriate penal response to different categories, has lacked coherence. The current sentencing guideline is dependent for its structure on a classification of drugs which lacks clarity or sense, which stems from this 1970 bill.

Speakers in the debate proposed that international gangs importing drugs must be dealt with firmly to prevent the drug problem worsening.¹⁵² Prison sentences should be increased for suppliers of drugs especially if that is done near a school and for the use of premises.¹⁵³ Yet the Government said that detention is inappropriate for young persons in possession of drugs, and addicts should not be imprisoned.¹⁵⁴

There is clear evidence from the debate that Parliamentarians were somewhat divided in their approach to cannabis. There is always the risk that if cannabis is clamped-down on, as has happened abroad, people turn to heroin instead.¹⁵⁵ Where young people, who use cannabis, are concerned, particular care would be needed.¹⁵⁶ Its use is very widespread,¹⁵⁷ with 30,000 to 1 million users, and a widely accepted social habit,¹⁵⁸ mainly young people, seeing little wrong in it.¹⁵⁹ During the passage of the Bill, one member felt that:

*'It is the right of young people to establish an independent view and to experiment and this is one of the elements of experiment we have to face'.*¹⁶⁰

Furthermore, there is no evidence that it leads on to heroin use.¹⁶¹ If evidence were to be found to prove otherwise, then it should be subject to the law¹⁶². If not, it shouldn't.¹⁶³ Cannabis, unadulterated, does not cause lasting harm¹⁶⁴. Other speakers disagreed and felt more research was needed on its long-term effects.¹⁶⁵ Some Parliamentarians felt that if a person using cannabis is put into prison for an act which he feels is moral and is not criminal, his confidence in the law may be eroded, and he may indeed become a real criminal after the experience.¹⁶⁶

¹⁵² House of Commons Debate (1970) *ibid Iremonger T L p40*

¹⁵³ House of Commons Debate (1970) *ibid Short R p 38*

¹⁵⁴ House of Commons Debate (1970) *ibid Short R p 39-40*

¹⁵⁵ House of Commons Debate (1970) *ibid Jackson P M p 45*

see 5.4. The converse may be true too. At HMIP&P inspection of HMP Hollesley Bay heroin addiction was treated with cannabis substitution see Chapter 5

¹⁵⁶ House of Commons Debate (1970) *ibid Deedes W F p8*

¹⁵⁷ Wikipedia *List of British politicians who have acknowledged cannabis use* [en.wikipedia.org › wiki ›](https://en.wikipedia.org/wiki/List_of_British_politicians_who_have_acknowledged_cannabis_use)

¹⁵⁸ House of Commons Debate (1970) *ibid Deedes W F p9*

¹⁵⁹ House of Commons Debate (1970) *ibid Deedes W F p11* "There is a crisis of confidence between us and the young people of this country"

¹⁶⁰ House of Commons Debate (1970) *ibid Blenkinsop A p12*

¹⁶¹ House of Commons Debate (1970) *ibid Jackson P p29 see footnote on Wootton Report p 44* 'there appears to be no evidence of addiction' That soft drug use did not lead to hard drugs (the 'gate-way theory') was also the conclusion of the Baan and Hulsmann commissions in the Netherlands in the 1960's.

¹⁶² The Advisory Committee on Drugs of Dependence (1969) *The Wootton Report*,

<https://peopleofstort.files.wordpress.com/2014/09/woottonreport1969.pdf>

Mr Jackson referred to Paragraph 29, but in fact it was para 51 which stated, 'It can be clearly argued on the world picture that cannabis does not lead to heroin addiction. So far as the UK is concerned no comprehensive survey has yet been made but a number of isolated studies have been published, none of which demonstrate significant lines of progression'

¹⁶³ House of Commons Debate (1970) *ibid St John-Stevas N p15-18 and Winstanley M P p33*

¹⁶⁴ The Advisory Committee on Drugs of Dependence (1969) *Wootton Report para 29* 'Having reviewed all the material available to us we find ourselves in agreement with the conclusion reached by the Commission appointed by the Government of India that the long term consumption of cannabis in moderate doses has no harmful effects'

¹⁶⁵ House of Commons Debate (1970) *ibid Iremonger T L p41*

¹⁶⁶ House of Commons Debate (1970) *ibid Foot M p25* this is in effect a variation on Becker's Theory

What can we learn from the Bill's passage about the morality of drug use at that time?¹⁶⁷ Was it a feature of society's moral decay, the 'permissive society'?¹⁶⁸ Some of the debate focused on the law's credibility, noting that the law cannot be enforced unless it is accepted as having credible backing,¹⁶⁹ with public opinion behind it.¹⁷⁰ Was there malaise in society with people needing drugs to be able to cope with the day's stresses? Might the fact that youth living in the shadow of the atomic age of mass destruction, account for their nihilistic behaviour?¹⁷¹

If so, sufferers should be treated with compassion, humanity, understanding; penal legislation by itself is sure to fail.¹⁷² The prevalence of addictive drugs due to overprescribing by GPs, about which several members commented and over which the police and the General Medical Council appeared powerless.¹⁷³ The new Act provided for this.¹⁷⁴

The debate revealed other themes. Education was seen as an essential component in preventing the use of illegal drugs; not only for the young but also for the parents, for if they enjoy the legal drugs, alcohol or cigarettes, why shouldn't their children use cannabis?¹⁷⁵ People must be educated on the dangers of drugs but how?¹⁷⁶

Rehabilitation of offending addicts was considered a vital component of sentencing.¹⁷⁷ Some saw the weakness of the law was that it did not deal with treatment of addicts.¹⁷⁸ Rehabilitation was essential if recovered addicts are not to relapse, especially after prison.¹⁷⁹ Some hostels for recovery already existed and others are planned.¹⁸⁰ The social problems of drug addicts needed care and compassion.¹⁸¹

In summary, the Bill put drugs into Classes A, B and C and formed the Advisory Council on the Misuse of Drugs (ACMD) to provide guidance to the Home Secretary who has statutory authority to alter the grouping of drugs or the insertion of new ones. An Expert Committee would advise him on the medical applications of drugs, and he would have disciplinary authority over irresponsible prescribing and dispensing of addictive drugs.

2.8. Misuse of Drugs Act 1971

Class	Drug	Possession	Trafficking, Production, Supply
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¹⁶⁷ Forsythe-Yorke W (2015) *ibid* Chapter 2.

¹⁶⁸ House of Commons Debate (1970) *ibid Price J T p 34*

House of Commons Debate (1970) *ibid St John-Stevas N p15*

¹⁶⁹ House of Commons Debate (1970) *ibid St John-Stevas N p15&16*

¹⁷⁰ House of Commons Debate (1970) *ibid Worseley M p 47*

House of Commons Debate (1970) *ibid Price JT p35*

¹⁷¹ House of Commons Debate (1970) *ibid Winstanley M P p33*

¹⁷² House of Commons Debate (1970) *ibid Winstanley M P p33& 34*

¹⁷³ House of Commons Debate (1970) *ibid Callaghan pp 1,3 & 6, Deedes pp 9 &10, Ogden p 20*

¹⁷⁴ House of Commons Debate (1970) *ibid Winstanley M P pp 30-33* It is unclear whether Dr Winstanley really meant unnecessary prescribing by GPs, or were they actually prescribing what the patient needed for stabilisation before initiating treatment?

¹⁷⁵ House of Commons Debate (1970) *ibid Miscarmichael N p21*

¹⁷⁶ House of Commons Debate (1970) *ibid Iremonger T L p42-43 and Worseley M p 48*

¹⁷⁷ House of Commons Debate (1970) *ibid Irvine B G p26*

¹⁷⁸ House of Commons Debate (1970) *ibid Oakes G p28*

¹⁷⁹ House of Commons Debate (1970) *ibid Short R P40*

¹⁸⁰ House of Commons Debate (1970) *ibid Morgan E p 50*

¹⁸¹ House of Commons Debate (1970) *ibid Worseley M p 49*

A	Heroin, cocaine, crack cocaine, ecstasy, LSD, <i>magic mushrooms</i> * (psilocybin), methadone	Up to 7 years in prison, an unlimited fine or both	Up to life in prison, an unlimited fine or both
B	amphetamines, barbiturates, cannabis, codeine, methylphenidate (Ritalin), synthetic cannabinoids, synthetic cathinones (e.g., mephedrone, methoxetamine)	Up to 5 years in prison, an unlimited fine or both	Up to 14 years in prison, an unlimited fine or both
C	diazepam, ketamine*, piperazines, most tranquillisers and sleeping tablets, khat, new psychoactive substances (NPS)	Up to 2 years in prison, an unlimited fine or both (except anabolic steroids)	Up to 14 years in prison, an unlimited fine or both
D	unclassified drugs	None, but police can take away a suspected temporary class drug	Up to 14 years in prison, an unlimited fine or both

Table 6. Legal classification of drugs of abuse 1971

*drugs added since 1971 *Source Misuse of Drugs Act 1971* (182)

Placing drugs in these grades thus depended upon historical tradition, advice by the ACMD, or political expediency by the Home Secretary.¹⁸³ This gave rise to anomalies, for the Act allows him to amend the grading of psychotropic drugs by his own decision. Thus, magic mushrooms,¹⁸⁴ ecstasy and LSD were placed in Grade A, despite the fact that all have a low addiction rate, cause minimal harm and have a virtually non-existent death risk¹⁸⁵, and should have been placed more appropriately into Grade C. Another example was how in 2008 the Prime Minister, Gordon Brown, decided to upgrade cannabis from Grade C to Grade B,¹⁸⁶ rejecting the ACMD's recommendation,¹⁸⁷ reversed the advice of the ACMD to the previous Prime Minister, who had agreed to the re-classification of cannabis into Group C.¹⁸⁸ The

¹⁸² Misuse of Drugs Act 1971

www.legislation.gov.uk/ukpga/1971/38/pdfs/ukpga_19710038_en.pdf

¹⁸³ Gov.UK (2016) *Controlled drugs list. Misuse of Drug's Act (1971) additions to the list* <https://www.gov.uk/...>

¹⁸⁴ House of Commons publications(2006) *Drug classification: making a hash of it?* Science and Technology Select Committee Report of 2006 www.publications.parliament.uk/pa/.../cmselect/cmsctech/1031/1031. *see para 20 and the Committee's scathing comments.*

¹⁸⁵ See 2.12

¹⁸⁶ House of Commons publications(2006) *Drug classification: making a hash of it?* *ibid* see Summary 'In addition, we have expressed concern at the Government's proclivity for using the classification system as a means of 'sending out signals' to potential users and society at large'

¹⁸⁷ Winnett R (2008) *Should cannabis remain a Class C drug?* – Daily Telegraph 1 April 2008 Mr Brown said "I believe that we are sending out a signal particularly to teenagers, and particularly those at the most vulnerable age, young teenagers, if we in any way find cannabis acceptable, given all that we now know about the changes in the way cannabis is being sold in this country, that it is not the right thing to do."

¹⁸⁸ *when cannabis was downgraded from Grade B to C, consumption fell, because, it is said, young people felt that taking it now lacked challenge. When it was then regraded to B again, consumption, for the same rationale it is said, again rose.* It is illuminating that Mr Brown came to precisely the opposite conclusion to that of the Dutch Health Minister, Irene Vorik, who in the 1970's said of drug usage: "...we oldies may not like what

sentencing guideline inevitably reflects the uncertainty and opacity of drugs policy, by necessarily following the Misuse of Drugs Act's classification when it comes to separating categories of offence.

2.9. The Runciman Report¹⁸⁹

The lack of a rational, scientific basis for drugs classification has led to reviews, including one in 2000 by the Police Foundation, which enquired into the Misuse of Drugs Act 1971 and called for the classification to be based on the scientific evidence of the harm caused by the drugs. If cannabis possession were to be a non-arrestable offence, it would reduce the number of "otherwise law-abiding, mainly young people" being criminalised. It would also remove friction between the police and the community¹⁹⁰ and would free up police time.

2.10. Drug Classification by Harmfulness

In 2007 the ACMD grouped drugs into hard, intermediate and soft drug categories of harm¹⁹¹. The data in the survey was gained from a group of consultant psychiatrists who on the register of the Royal College of Psychiatrists as addiction specialists, and a second group of people with great experience in the field.

the young people are doing nowadays, but they are going to do it anyway, so we've got to make it as risk free as possible." That ushered in the era of cannabis clubs and 'coffee-shops', where young people could indulge unbothered by the police and by the street sellers of drugs outside. The outcome was that in the Netherlands although cannabis usage may be high, hard drug usage is very low, as is the drug-related death rate. The explanation is that if a person's craving is satisfied by a soft drug, he then doesn't need a hard drug.

¹⁸⁹ Independent Inquiry for the Police (2000) *Drugs and the law*: (Runciman Report)

www.police-foundation.org.uk › publication › inquiry and see page 4 paragraph 17 *we recommend that the classes provide a more accurate hierarchy of harm and commensurate sanctions. We recommend the following transfers between classes:*

- (i) cannabis from B to C (a recommendation first made in 1979 by the ACMD).
- (ii) cannabinol and its derivatives from A to C.
- (iii) ecstasy from A to B (a recommendation made to us by the ACPO among others)
- (iv) LSD from A to B.
- (v) buprenorphine from C to B.

¹⁹⁰ see 4.9. and footnote Stevens

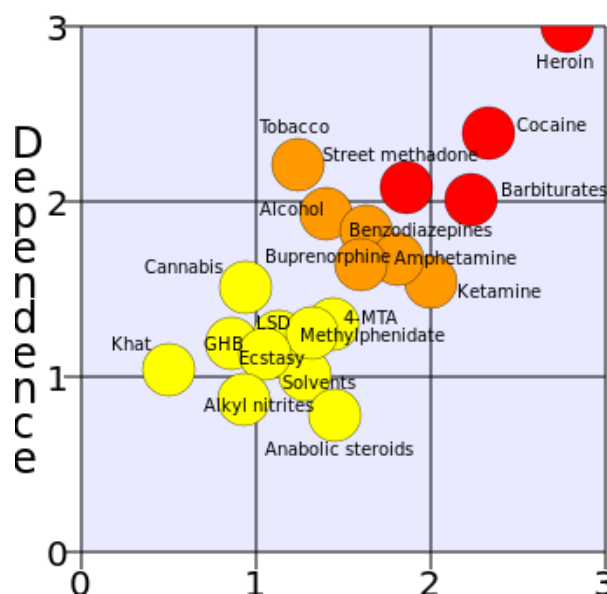
¹⁹¹ Nutt D, King LA, Saulsbury W, Blakemore C (2007) *Development of a rational scale to assess the harm of drugs of potential misuse Lancet* **369** 1047-1053 Nutt et al categorised harm as

Physical harms: morbidly and morality of users and injury to non-users

Psychological harm: dependence

Social harm to others as the result of a drug user's addiction

Thus the ‘hard group’ comprises heroin, Cocaine, * medicinal methadone (bought on the street) and barbiturates. In the ‘intermediate’ group are ketamine, tobacco, alcohol, amphetamines and buprenorphine (Subutex) used as an opiate substitute¹⁹². The ‘soft group’ of drugs contains cannabis, ecstasy¹⁹³, LSD, and khat, harmless in small doses.



2.11. ACMD advice and resignations

Further discord arose in 2009 when the ACMD advised the Home Secretary to downgrade Ecstasy from Class A to Class B. This recommendation was based on extensive empirical evidence which

Harm

showed conclusively that Ecstasy drugs

National Scale of the harm of

(Nutt et al 2007) and

LSD were not nearly as dangerous as had been believed.¹⁹⁴ The Chairman, Professor Nutt, was instructed by the Home Secretary (Jacqui Smith) to change his mind, so when he refused, she dismissed him from his appointment saying:

“I cannot have public confusion between scientific advice and policy and have lost confidence in your ability to advise me as the chair of the Advisory Council.” ¹⁹⁵

Most of the Advisory Council resigned too, for they felt they could not continue simply act as spin doctors for the government.

2.12. The changing attitude towards drug usage.

Public sentiment, as reflected by the parliamentarians, was changing¹⁹⁶ as was the scientific community’s attitude; the British Medical Journal (2010)¹⁹⁷ observed that drug markets could remain in the hands of unregulated criminal profiteers, or they could be controlled and regulated by appropriate government authorities. The Bar Council concurred,¹⁹⁸ as did the President of the Royal College of Physicians¹⁹⁹ and the House of Lords.²⁰⁰

2.13. House of Commons Debate on the Drug Strategy 2017

Before the debate, the ACMD had provided a report,²⁰¹ describing the high UK drug-death rate, a 50% increase in the past five years, proposing:

¹⁹² Buprenorphine (Subutex) is an opioid used to reduce the severity of withdrawal symptoms

¹⁹³ MDMA and ecstasy are the same

¹⁹⁴ Stevens A (2011) *Drugs, Crime and Public Health* ibid p78

¹⁹⁵ Kmietowicz Z (2009) *Home secretary accused of bullying drugs adviser over comments about ecstasy*. BMJ 338: 260.b601.doi

¹⁹⁶ See 2.16. and the views of Parliamentarians in the 2017 debate

¹⁹⁷ Rolles S (2010) *An alternative to the war on drugs*. BMJ 17July2010 vol341 pp127-8

¹⁹⁸ Brown A (2010) *The Chairman of the Bar Council ‘Personal drug use should be legalised’, said the leader of the country’s barristers*, it is right to say we should consider decriminalising drugs’ Daily Telegraph

¹⁹⁹ BBC News (2010) *Top doctor Sir Ian Gilmore calls for drugs law review* bbc.co.uk/2/hi/uk_politics/

²⁰⁰ House of Lords Debate 17 October 2013 <http://www.publications.parliament.uk/>

²⁰¹ ACMD (2016) *Reducing Opioid-Related Deaths in the UK*

- (a) wide provision of opioid substitution treatment.
- (b) naloxone (opioid antidote) available to people who use opioids, to their families and friends.
- (c) provision of medically supervised drug consumption clinics,²⁰² in localities with many injecting drug users.²⁰³

The Parliamentary Under-Secretary of State stated the government's drug policy aimed to

- 1) restrict the supply of drugs
- 2) reduce the demand for drugs
- 3) support people to recover from the effects of drug addiction.
- 4) integrate with action against drugs globally²⁰⁴

The Minister said the 2017 policy intended to further develop those aims with increased integration and programmes based upon firm evidence of effectiveness. The introduction of the Psychoactive Drugs Act 2016²⁰⁵ has had positive effects and, she said, drug use by young adults in England & Wales has decreased recently.²⁰⁶ The government policy recognised the recent increase in drug related deaths,²⁰⁷ believed in part to be due to drug users surviving longer.²⁰⁸ There is now better understanding of the relationship between mental illness and drug usage, cannabis and psychosis in young people in particular²⁰⁹, as well as the effects of drugs (especially 'spice'²¹⁰) on homeless people and 'troubled families.' Law enforcement had effectively closed 'head shops' following the Psychoactive Substances Act (2016), with fortified cannabis 'spice' being banned under the Misuse of Drugs Act (1971).²¹¹ However, she reiterated that decriminalisation would not be acceptable; for it is the Government's intention to prevent the harms that result from drugs necessitating legal restrictions on their availability which needed to be backed with punishment. She stressed the multi-pronged approach to drugs policy: there will be a statutory requirement in schools to ensure that all children understood the risks of taking drugs.²¹² Law enforcement would be toughened to

²⁰² Flensburg Avis (2015) *Fixerum er en success: ingen dode trods 301 overdoser* (Fixer rooms are a success; no deaths despite 301 overdoses) Flensburg Avis 28May 2015. The article reports that since the opening in 2010 of Drug Consumption Rooms in Copenhagen, Odense and Aarhus (Denmark) 355,000 clients have visited, there have been 301 overdoses and no deaths. Proof it claims that many deaths would have occurred on the street if there hadn't been the Rooms staffed with alert medics.

WHO's United Nations Office for Drugs and Crime recommend a Drug Injecting Centre to provide the following.

- 1. Needle and syringe exchange programmes
- 2. Opioid Substitution Therapy
- 3. HIV Counselling and Testing
- 4. Anti-Retroviral Therapy
- 5. Sexually Transmitted Infection Prevention.
- 6. Condom programme and provision for Injecting Drug User and Partner.
- 7. Targeted Information, Education, and Communication for Users and sexual partners.
- 8. Hepatitis diagnosis, treatment and vaccination for Hepatitis A, B and C
- 9. Tuberculosis prevention, diagnosis and treatment.

It goes on to state: 'The interventions in the comprehensive package are supported by a wealth of scientific evidence and refers to WHO/UNODC Evidence for Action series and policy briefs available at <http://www.who.int/hiv/pub/idu/en/>

²⁰³ ACMD (2016) *Reducing Opioid-Related Deaths in the UK* The Minister accepted none of the ACMD recommendations.

²⁰⁴ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 1

²⁰⁵ Government UK (2016) *Psychoactive Substances Act 2016*

<https://www.gov.uk/government/collections/psychoactive-substances> See 3.10. for details of the Act

²⁰⁶ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 1

²⁰⁷ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 2

²⁰⁸ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 9

²⁰⁹ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 3

²¹⁰ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 10

²¹¹ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 6

²¹² House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 10

restrict the supply of drugs, and traffickers' mobile phone lines closed down.²¹³ International drug control measures will be enhanced working through United Nations agencies,²¹⁴ and a 'National Recovery Champion' will be appointed to oversee, encourage and report back.²¹⁵

Following the Minister's policy statement, members' greatest concerns was the significant drug-related death-rate, the highest in Europe, proving the government's drug health policy was not working.²¹⁶ One member said that resulted from the removal of the ring-fenced funding for drugs treatment;²¹⁷ the Minister said it was for local authorities to allocate funds as felt appropriate within that ring fence.²¹⁸

Members observed that we have now the highest drug-related death rate ever; more than traffic accidents,²¹⁹ in part due to funding cuts.²²⁰ The drug-related deaths in England and Wales for 2015 were 2,479 an increase of 10.3% on the previous year, which itself was an increase of 19.6% on the year before, all part of the catastrophic 'war-on-drugs' policy started in 1971.²²¹ The death rate in Portugal is 1/10th that of the UK²²²; the Minister should find out why.²²³ In Scotland too the drug-related death rate is the highest ever.²²⁴

Other members pointed out that it was not the drugs killing people, but *prohibition*.²²⁵ The illegality of drugs leaves their supply in the hands of street-dealers, who have no interest in purity, so people don't know what they are buying.²²⁶ When the 1971 Act was promulgated, drug addicts in the country were less than 1,000, because people received their heroin from GPs. Now after 46 years of prohibition we have 320,000 addicts.²²⁷

Addicts' death rates were very significantly reduced when in their GPs' care, hospital admission became far fewer, and the local drug related crime rate plummeted.²²⁸ Towards the end of the debate two members were extremely critical, saying that most of the means of preventing death as outlined in the ACMD report, 'Reducing Opioid-Related Deaths in the UK 2016' have been ignored in the strategy, including the testing of drugs, as is provided by the

²¹³ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 10

²¹⁴ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 10

²¹⁵ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 11

The appointment has not yet been filled. See also

MacPherson G (2018) *Home Office delay in appointing 'recovery champion' in drugs fight is a disgrace says SNP MP Ronnie Cowan*. Dundee Courier 5 July 2018

<https://www.thecourier.co.uk/.../home-office-delay-in-appointing-recovery-champion...>

²¹⁶ House of Commons Debate (2017) *Drugs Policy* *ibid* Lamb p 2

²¹⁷ House of Commons Debate (2017) *Drugs Policy* *ibid* Johnstone p 2

²¹⁸ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p3

²¹⁹ House of Commons Debate (2017) *Drugs Policy* *ibid* Abbott p12

²²⁰ House of Commons Debate (2017) *Drugs Policy* *ibid* Abbott p14

Here Ms Abbott cites Barnsley and Middlesbrough which have amongst the highest drug related death rates and the greatest funding cuts.

²²¹ House of Commons Debate (2017) *Drugs Policy* *ibid* Blunt p 17

²²² *In fact, there had been a parliamentary visit to Portugal in 2014 just before the debate in Parliament. The visit report's recommendations were 'redacted', by order of the Prime Minister (Mrs May) for they proposed that similar partial decriminalisation and legalisation should be adopted in England and Wales.*

²²³ House of Commons Debate (2017) *Drugs Policy* *ibid* Lamb p 54

²²⁴ House of Commons Debate (2017) *Drugs Policy* *ibid* Day p23

²²⁵ House of Commons Debate (2017) *Drugs Policy* *ibid* Flynn p20

²²⁶ House of Commons Debate (2017) *Drugs Policy* *ibid* Blunt p20

²²⁷ House of Commons Debate (2017) *Drugs Policy* *ibid* Flynn p 35

²²⁸ House of Commons Debate (2017) *Drugs Policy* *ibid* Mann pp 71-74.

organisation Loop²²⁹, the provision of Drug Consumption Rooms²³⁰, and heroin-assisted treatments.²³¹

One member was against legalisation stating it wouldn't work; criminals always find way of circumventing the law in carrying out their criminal activities. Efforts must be increased to get rid of drugs.²³²

The other ten members who spoke on the matter put forward reasons in favour of decriminalisation of personal possession. If drugs are bought from criminals, you don't know what you are getting, but if you buy from a regulated source you do.²³³ One member put it thus:

*If we legalised and regulated cannabis, we would take it out of the hands of the dealers and reduce the opportunities for them to tempt users into experimenting with more dangerous drugs.*²³⁴

The death of 'Martha'²³⁵ (who took an overdose of ecstasy) would have been avoided if this rave drug had been obtained legally,^{236 237} or checked by 'Loop.'²³⁸ Other members cited Portugal, which allows all drugs in small quantity for personal possession,²³⁹ with reduced risk, harm and death rates.²⁴⁰ Members supported prevention of import and supply of illegal drugs,²⁴¹ others told how the presence of drug users and drug gangs, often young people, unsettled a neighbourhood, requiring more police activity to control it.²⁴²

In replying the Minister said that this is what the concept of joined up activity is all about. Starting with the relevant teaching, targeting vulnerable groups with especial attention to new psychoactive drugs and '*bearing down upon those who seek to benefit from the misery of others*'²⁴³

²²⁹ Edwards M (2018) *Inside the Loop the UK's First City Centre Drug Testing Facility*
https://www.vice.com/en_uk/.../inside-the-uks-first-city-centre-drug-testing-facility

NB Testing drugs for purity and concentration is standard procedure in the Netherlands. A rave or a Club is not permitted to function without a permit from the town hall certifying the presence of a qualified drug testing team and the availability of a first aid room

²³⁰ EMCDDA (2018) *Drug consumption rooms: an overview of provision*

www.emcdda.europa.eu/publications/pods/drug-consumption-rooms .See 2.16. footnote Flensburg Avis (2015)

²³¹ House of Commons Debate (2017) *Drugs Policy* *ibid* Debbonaire pp 77-81 and Haigh pp 89-90

²³² House of Commons Debate (2017) *Drugs Policy* *ibid* Atkins p 33

²³³ House of Commons Debate (2017) *Drugs Policy* *ibid* Lamb p 39

²³⁴ House of Commons Debate (2017) *Drugs Policy* *ibid* Smith J p 39 '*So when a person has a propensity towards craving for drugs, that craving can be satisfied by relatively harmless soft drugs such as cannabis. If a person had a physiological or psychological craving beforehand, when they leave the 'pot house' or in the Netherlands the 'coffee shop' the street dealers make no headway offering him the much more dangerous hard drugs. for their craving had been satisfied. That was the philosophical beginning in the 1970's of the successful drug policy in the Netherlands 'NB see Chapter 2 and the Nature of Drugs*

²³⁵ Cain K (2016) *Mum who lost 15-year-old daughter to ecstasy wants drugs to be legal.*

<https://www.thesun.co.uk/news/1530151/mum-who-lost-15-year-old-daughter-to-ecstasy-wants-drugs-to-be-legal/> Sun Newspaper *Martha Fernback died after taking an ecstasy tablet not knowing that it was highly over concentrated. When she developed seizures, her friends delayed calling the ambulance being scared of the police. Martha died in hospital. Her mother Anne-Marie Cockburn was present in the House of Commons throughout the debate. She wrote a book about her daughter's life and death 5742 Days: A Mother's Journey Through Loss*

²³⁶ House of Commons Debate (2017) *Drugs Policy* *ibid* Smith J p 37

²³⁷ House of Commons Debate (2017) *Drugs Policy* *ibid* Moran p85

²³⁸ Busby M (2018) *Drug testing facilities should be used at all UK festivals* Independent Newspaper

Dr Fiona Measham, Professor of Criminology at University of Durham, is director of The Loop, currently the UK's sole drug-testing charity at festivals and staffed by volunteers.

²³⁹ House of Commons Debate (2017) *Drugs Policy* *ibid* Blunt p 19 and p21see 1.9. footnote EMCDDA (2015) *Threshold quantities for drugs allowed for personal use.*

²⁴⁰ House of Commons Debate (2017) *Drugs Policy* *ibid* Blunt p 20

²⁴¹ House of Commons Debate (2017) *Drugs Policy* *ibid* Atkins p37 and Martin, p 69

²⁴² House of Commons Debate (2017) *Drugs Policy* *ibid* Davies M p4 and Graham p3

²⁴³ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 10

Also debated was the problem of acquisitive crime,²⁴⁴ generating much annoyance. The way of preventing such a crime would be for the addict to get his drugs on prescription, when he doesn't need to steal.²⁴⁵ Two thirds of all acquisitive crime is believed to be drug related.²⁴⁶ Others took a different approach and queried the purpose of prohibition and the law which enforced it:

*'...taking a criminal justice-led approach to drugs creates a vast criminal market, siphons resources away from health, shifts drug dealing and trafficking around, and stigmatises and drives people who use drugs away from seeking help. In other words, prohibition is a discredited and deadly way of making drugs stronger and more used.'*²⁴⁷

One member believed it was the law which caused the most harm explaining that the proposed policy:

*'...ignores the fact that many people take drugs recreationally, free from dependence they are at risk of causing harm to themselves and this harm arises from the criminal justice framework that we wrap around them'*²⁴⁸

Another member pointed out that it was the law itself that was diminished when

*'...large swathes of the population can see no difference between their recreational drugs of choice and their parents' recreational use of alcohol and tobacco'*²⁴⁹

One member, an ex-barrister, pointed out that the high-level criminal gangs are operated by very professional people. If their drug smuggling activities are stopped, they will diversify and turn to other modes of crime. Importing drugs can be easily replaced by smuggling in people, guns and ammunition. If action is to be taken it must be done on an international basis.²⁵⁰ She also described in detail the method of smuggling using 'mules.' If, after having ingested condoms filled with heroin or cocaine, they do not pass them *per anum*, the carrier may be cut open to retrieve the drugs, worth perhaps £50,000. The member pleaded for very firm punishment for offenders engaged in the trade.²⁵¹

The connection between mental illness, drugs and alcohol concerned many members.²⁵² One member²⁵³ expressed anxiety about mental illness being precipitated by cannabis used by young people. The risk of a person with mental illness resulting from his drug usage was always present²⁵⁴. Finally, there is the problem of people with a mental health affliction being unjustifiably punished because they use drugs not knowing better.

The best way to avoid a risk is not to take it, but people take drugs because they like them.²⁵⁵ To minimise the risks implies taking drugs out of the hands of criminals²⁵⁶ and legalising them, as discussed at 4.13, or to test for purity before usage,²⁵⁷ at clubs and at raves,²⁵⁸

²⁴⁴ House of Commons Debate (2017) *Drugs Policy* *ibid* Abbott p12

²⁴⁵ House of Commons Debate (2017) *Drugs Policy* *ibid* Mann pp 72 &73

²⁴⁶ House of Commons Debate (2017) *Drugs Policy* *ibid* Blunt p 22

²⁴⁷ House of Commons Debate (2017) *Drugs Policy* *ibid* Cowan R quoting UN Office on Drugs and Crime.

²⁴⁸ House of Commons Debate (2017) *Drugs Policy* *ibid* Debbonaire p 78

²⁴⁹ House of Commons Debate (2017) *Drugs Policy* *ibid* Blunt p 22

²⁵⁰ House of Commons Debate (2017) *Drugs Policy* *ibid* Atkins p32

²⁵¹ House of Commons Debate (2017) *Drugs Policy* *ibid* Atkins p 33

²⁵² House of Commons Debate (2017) *Drugs Policy* *ibid* Cunningham p1

²⁵³ House of Commons Debate (2017) *Drugs Policy* *ibid* Davies M p 3

²⁵⁴ Wollaston S (2014) in the debate in the House of Commons on 30th October 2014 spoke out that people should not be misled, long term use of cannabis can give rise to psychoses, especially if there is a family history of schizophrenia, and quoted from her own experience of the risk of cannabis precipitating psychotic illnesses. She mentioned that if a cannabis smoker has 1st degree relations with schizophrenia there is a 10-20% risk of doubling the chance of getting the illness themselves.

²⁵⁵ House of Commons Debate (2017) *Drugs Policy* *ibid* Debbonaire p78 and Smith J p40

²⁵⁶ House of Commons Debate (2017) *Drugs Policy* *ibid* Smith J p38 who asked, 'How are we to take the drug trade out of the hands of criminals?'

²⁵⁷ House of Commons Debate (2017) *Drugs Policy* *ibid* Debbonaire p76

²⁵⁸ House of Commons Debate (2017) *Drugs Policy* *ibid* Debbonaire p78 'The Loop' is quoted; it tests drugs voluntarily submitted to it by people at raves The Loop <https://weartheloop.org/>

especially important since the introduction of ‘spice’ or ‘skunk’.²⁵⁹ Drug Consumption Rooms²⁶⁰ were debated. Members described their usefulness in Glasgow.²⁶¹ They exist unofficially in the UK, and ‘*certainly save lives*’,²⁶² bringing ‘hard-to-reach’ people into treatment.²⁶³ No one has died from an overdose, anywhere in the world, ever, in a supervised drug consumption room.

The Minister said that with the New Psychoactive Drugs Act (2016)²⁶⁴, shops which sold them were now closed.²⁶⁵ Members expressed their doubts whether another prohibition would be any more effective, and pointed out that since the introduction of the Act, they²⁶⁶ are now being sold on the streets and on the internet.²⁶⁷

Several members believed that the government’s approach was wrong:

*‘It is time for us to recognise that our old approaches have not worked and to stop repeating the same mistakes of the so-called war-on-drugs time and again... I urge the Government: let us be brave and wake up. Prohibition doesn’t work’*²⁶⁸

Some felt that the carrying out of Drugs Policy should be in the hands of Public Health,²⁶⁹ for people are criminalised unjustifiably.²⁷⁰ Portugal was quoted where:

*‘The government are able to offer treatment programmes without having to drag users into the criminal justice system. The focus is public health; penalties are used only if considered necessary and productive.’*²⁷¹

In summarisation of the 2017 debate the Minister stated that drug policy starts with law enforcement to prevent the import and supply of illegal drugs. All speakers supported this, especially in respect of the mistreatment of ‘mules’ and the dangers to children involved in ‘county lines.’ Education of children is to be made compulsory in schools, the Minister said, though she didn’t say how its effectiveness should be measured.

Reducing the risk of taking drugs is the next principle, but this the Minister did not discuss, and rejected decriminalisation despite many members speaking in favour.

The third principle of the policy is to provide good medical care for people who have now become ill and are ‘patients.’²⁷² Here the Minister spoke of the need for local and interdepartmental co-operation working together on evidence-based activities to provide good effectiveness. This occasioned a great deal of debate for the outcome in the UK is bad, insofar that the drug-related mortality is one of the highest in Europe and still rising, showing that the UK’s drug policy is clearly ineffective.

Several members believed that since the initiation of the 1971 Act the current drug policy has failed. The numbers of addicts are now a hundred times what they used to be then, and the

²⁵⁹ House of Commons Debate (2017) *Drugs Policy* *ibid* Flynn p 36

²⁶⁰ EMCDDA (2018) *Perspectives on Drugs: Drug Consumption Rooms (DCR): an overview of provision and evidence.* One of their features is the presence of counsellors who can influence injecting users to go to detoxification clinics www.emcdda.europa.eu/system/files/.../POD_Drug%20consumption%20rooms

²⁶¹ House of Commons Debate (2017) *Drugs Policy* *ibid* Sweeney p54, Day p23 and Smith p 40

²⁶² House of Commons Debate (2017) *Drugs Policy* *ibid* Mann p70

²⁶³ House of Commons Debate (2017) *Drugs Policy* *ibid* Lucas C p 55

²⁶⁴ Government UK (2016) *Psychoactive Substances Act 2016*
<https://www.gov.uk/government/collections/psychoactive-substances>

²⁶⁵ House of Commons Debate (2017) *Drugs Policy* *ibid* Newton p 6

²⁶⁶ EMCDDA (2017) *Drug supply and the market* www.emcdda.europa.eu/trends-developments/html
Most of the new psychoactive substances are imported from China

²⁶⁷ House of Commons Debate (2017) *Drugs Policy* *ibid* Abbott p 16

²⁶⁸ House of Commons Debate (2017) *Drugs Policy* *ibid* Moran p 85

²⁶⁹ House of Commons Debate (2017) *Drugs Policy* *ibid* Mann p 5

²⁷⁰ House of Commons Debate (2017) *Drugs Policy* *ibid* Smith J p 41

²⁷¹ House of Commons Debate (2017) *Drugs Policy* *ibid* Blunt p 20

²⁷² World Health Organisation. *Department of Mental Health and Substance Abuse (MSD)*
www.who.int/nmh/about/msd/en/

drug-related death rate has soared. A Royal Commission was needed to hopefully lead to a new approach.

2.14. Misuse of Drugs Act 1971 and the debate of 2017 compared

Both debates were preceded by reports commissioned to inform them, which were almost completely ignored by the Home Office initiator of the debates. The Wootton Report, which made extensive recommendations on how cannabis should be dealt with,²⁷³ was largely rejected by the Home Secretary in the 1970 debate. The ACMD 2016 Report *Reducing Opioid-Related Deaths in the UK* on the high drug-related death rate and making recommendations, was also ignored by the Home Office in the debate.

The 1970 debate which set out the Misuse of Drugs Act 1971, had been welcomed by members of the government and the opposition. The 2017 debate emphasised that the policy aims should not be so much sentencing and punishment, rather risk reduction, treatment and rehabilitation of addicts.

The moral background to using drugs for recreation was a topic in both debates. In the first one the Home Secretary used biblical expressions, ‘evil’ and ‘scourge’, to describe his feeling about the drug scene, maybe influencing his actions in furthering the cause of prohibition and prosecution. Some thought drug usage was a sign of moral weakness, or of social evolution. Others felt it might be the result of the prevailing ambient threat of atomic war influencing moral opinions of young people.

It was emphasised by members that allowing older people to legally enjoy alcohol and tobacco, made little sense when it came to prosecuting younger people who want to enjoy recreational drugs such as cannabis.

In the 2017 debate the soaring UK death rates from drug use, one of the highest national rates in Europe, and addiction rates since the initiation of the 1970 Act was discussed at length and why it was that many mainland European countries had better health policy outcomes. How education was to be carried out in schools was asked in 1970 and in the 2017 the Minister indicated the intention to make it compulsory. Although the Minister said it had to be effective, she offered no suggestions on its assessment. Severe punishment for importing and supplying drugs proposed in the 1970 Act was supported by all members in both debates. Several members queried the justification in punishment for possession. Attention was drawn to the place of ‘mules’ (where compassion in handling and sentencing was called for) and child runners in ‘county lines,’ where progress had been made in closing down the mobile phone connections used.

Risk reduction through legalisation and official control of supply was firmly rejected by the Ministers in both debates. The 2017 debate commented on the voluntary organisation which had taken up drug testing at festivals. Reduction of harm by measures to reduce the death rate had not been ‘invented’ at the time of the Act, whereas the 2017 debate discussed measures such as persuasion or coercion into therapy (Opioid substitution Therapy and Heroin Assisted Therapy) and the provision of Drug Consumer Rooms.

There had been much discussion in the 1970 debate about the irresponsible prescribing by General Practitioners of psychoactive drugs which could or were being used for recreational purposes. In the 2017 debate one of the members²⁷⁴ commented on precisely the fact that in

²⁷³ As did the Baan Report in the Netherlands, which however resulted in the action being taken on a measure of legalisation of cannabis (and it may be surmised the start of the enlightened attitude which nowadays has resulted in such a successful health policy there)

²⁷⁴ House of Commons Debate (2017) *Drugs Policy* *ibid* Mann pp 70 et seq

the past the GPs were used to prescribing for their addicts, who thereby got their drugs ‘clean’, and didn’t suffer harm or death from adulterated street drugs; moreover, they didn’t have to steal to raise the money, and so kept out of the hands of the police.

The 1970 Act had been based upon the belief that prohibition and legal sanctions would be the solution to drug taking. On the contrary, the drug addiction and drug-related death rates have soared in the UK. Since then, the world-wide drug industry has developed with disastrous effects for the populations of many different countries.

It was clear that since the 1970 debate and the initiation of the Misuse of Drugs Act the mores of drug usage in the UK had changed significantly. In the 2017 Debate members expressed their conviction that the existing drug policy measures had failed, and a fresh approach should be explored.²⁷⁵

2.15. The Morality of illegal drug taking, criminalisation, and the legitimacy of sentencing.²⁷⁶

The question whether it is morally acceptable, that is right or wrong, to use psychoactive drugs for recreational purposes, and should users be sentenced or not, will not be examined in detail, as the focus of this thesis is on sentencing. However, a few brief observations are warranted.

The argument for prohibition is based upon the concept of moral governance,²⁷⁷ the duty of the state, which through paternalism and social protection, aims to govern the lives of its citizens and to enact the appropriate laws, balanced against the rights of the citizens (as in liberalism²⁷⁸) to live their lives as they would wish. There is a ‘social contract’ between the citizen and the State if they are to live peacefully with each other; the State has the duty to protect the citizen if necessary; the citizen, has the right to expect that.²⁷⁹ The State’s responsibility is in stewardship,²⁸⁰ that is in preventing or protecting a citizen from coming to harm,²⁸¹ and in looking after him if he does. This could be through paternalistic measures such as Public Health,²⁸² or coercion. These measures infringe autonomy.²⁸³ As the result of drugs being prohibited,

²⁷⁵ House of Commons Debate (2014) at this debate, initiated by Ms Caroline Lucas, many of the members who took part were also present at the 2017 debate, and much the same ground was covered. At the conclusion of the debate, it was resolved that

‘...the Government should conduct an authoritative and independent cost-benefit analysis and impact assessment of the Misuse of Drugs Act 1971 and to publish the results of those studies within the next 12 months.’

After the debate the Prime Minister and the Home Secretary expressed their views that they were satisfied with the status quo.

²⁷⁶ Forsythe-Yorke W (2015) *ibid* Chapter 2 *The morality of illegal drug taking*

²⁷⁷ Foucault M (d 1984) *Definition, Conceptual Elements, & Facts*. www.britannica.com › ... › Politics & Political System

‘Governmentality, an expression originally formulated by the 20th-century French philosopher Michel Foucault, combines the terms government and rationality. Government in this sense refers to conduct, or an activity meant to shape, guide, or affect the conduct of people.’

²⁷⁸ The political and social philosophy that promotes individual rights, civil liberties, democracy, and free enterprise.

²⁷⁹ Hobbes T (1588-1679) *Social Contract Theory* | Philosophy also *Leviathan* Chapter XIX (Penguin Edition)

²⁸⁰ Cambridge English Dictionary *Stewardship* meaning.
<https://dictionary.cambridge.org/dictionary/english/stewardship>

²⁸¹ Mill J S *ibid* who said that a person has sovereign rights over himself as long as he does not harm others, in which case the State has a right to interfere, and also if he is ‘planning a mischief’.

²⁸² Public Health exerts its activity mainly through paternalistic measures.

²⁸³ Stanford University (2003) *Autonomy in Moral and Political Philosophy*
plato.stanford.edu › entries › autonomy-morality

‘Individual autonomy is an idea that is generally understood to refer to the capacity to be one’s own person, to live one’s life according to reasons and motives that are taken as one’s own and not the product of manipulative or distorting external forces, to be in this way independent.’

the user is obliged to obtain them from criminals²⁸⁴. This has several harmful effects: the user has no knowledge of drugs purity or concentration.²⁸⁵ He has to associate with criminals to pay in cash, risking robbery and violence, being involved in an illegal transaction with the risk of arrest.²⁸⁶ He may get into acquisitive crime, supply drugs to other users,²⁸⁷ or take up prostitution,²⁸⁸ to raise the money to pay for the drugs. Even more pertinent is that there is no quality control and harm, or death may result from impurity, over-concentration, and overdose, and in this sense, prohibition causes harm.

Prohibition supporters say it is a price worth paying. The individual has sovereign rights over himself; if he is a rational adult, with his mind clear and thinking rationally.²⁸⁹ But once he has taken a psychoactive drug, he may no longer be in a state to decide such matters and he may be thinking irrationally²⁹⁰. It is then that the psychoactive substance has infringed his autonomy and rights²⁹¹, and taken away his freedom²⁹². Prohibition if effective, would increase a citizen's ability to avoid the harm which drugs might cause him, and also social and economic harm to his 'nearest and dearest' his *Nächste*²⁹³ as well as to the State and to the local community. It could be said it is a citizen's duty to avoid such a situation²⁹⁴, but some people are unable to do so²⁹⁵, for as explained in Chapter 2, the evidence has shown that some people have an involuntary proclivity through craving towards addiction. '*They can't help it*' somewhat in the

²⁸⁴ 2.16. and footnote House of Commons Debate (2017) *Drugs Policy* ibid Flynn

²⁸⁵ see 2.8 and footnote Cockburn A-M (2014)

²⁸⁶ Release (2013) *Drugs-it's time for better laws* p2 www.release.org.uk/blog/

A poignant story of a male staff nurse who had just collected a week-end's supply of ecstasy when he was arrested by the police for drug possession. As a result, he gained a Criminal Record, lost his job in the hospital, broke up with his fiancée, and spent many years in menial jobs

²⁸⁷ R v Afonso and others (2008) 1 Cr App R (S) 560 Rose LJ observed '*An unemployed addict has, in practical terms, only three means of financing his or her addiction: prostitution, theft or supplying others and sentencers should recognise that for in consequence his or her culpability is likely to be less than that of many other suppliers.*' With the introduction of the Drug Offences Sentencing Guideline (2012) the Afonso concept was superseded through the judgement in R v Dyer and others [2013] EWCA Crim 2114

²⁸⁸ Barnett R E (2009) *The Harmful Side Effects of Drug Prohibition* Georgetown (2009) Public Law and Legal Theory Research Paper No 12-037 www.scholarship.law.georgetown.edu/facpub/817

²⁸⁹ Kant I (1724-1804) MM 427-28(88-90) here Kant wrote: '*What's wrong with getting drunk, using drugs, and gross overeating? Everyone (quite properly) wants to be happy. To be healthy is an important part of happiness, and thus it is a matter of prudence for a person to use good judgment about eating and drinking. It's foolish to act contrary to prudence. Stupefying agents such as opium and other products of the plant kingdom . . . are misleading in that they produce for a while a dreamy euphoria and freedom from care, and even an imagined strength*

For then the user is exploiting themselves, which is immoral, for the person is using their body as a means for self-gratification. Indeed, it is foolish, especially when we speak of the risk of addiction. For we have a duty not to make ourselves: '...incapacitated for activities that require adroitness and deliberation in the use of our powers.' And afterwards depression and weakness follow and, worst of all, there results a need to take these stupefying agents again and even to increase the amount. . . . [They] make one taciturn, withdrawn, and uncommunicative (translation WFY)

²⁹⁰ US Department of Justice (1994) *Drugs and Crime Facts*. Here it is stated that 59% of all offenders were under the influence of drugs and/ or alcohol at the time of their arrest

²⁹¹ Hsiao T (2018) *The Libertarian Case for Drug Prohibition* p 1 Public Discourse Philosophy & Politics <http://www.thepublicdiscourse.com/2018/01/20650/>

²⁹² Warburton N (2004) *Philosophy Positive Freedom* 4th ed p79 et seq Routledge

²⁹³ *There is always a problem with defining who is one's neighbour.' In English a variety of words are used: spouse, partner, husband/wife, nearest-and-dearest, neighbour, friends, family circle and so on. Kant used the expression 'Der Nächste', literally the nearest and next person to you, which could be any of the above, yet could just as well be the drug-addled tramp in the doorway you are passing by on the way to your car after a good meal in a restaurant. Martin Luther in his translation of the Bible uses that expression in the Parable of the Good Samaritan. The original Greek word was πλησίον (St Luke's Gospel Ch10 vv25-37), translated 'neighbour', but meant in the collective sense as in German rather than as in English.*

²⁹⁴ Forsythe-Yorke (2015) ibid p38. *The morality of drug taking and the Virtue ethics aspect of normative values*

²⁹⁵ Forsythe-Yorke (2015) ibid p32 *The morality of drug taking, and The Kantian perspectives on Drugs.*

same way that sufferers with Obsessive Compulsive Disorder, ²⁹⁶ become enslaved to their condition.²⁹⁷

The case for allowing the use of psychoactive drugs for recreational purposes is based upon the concepts of freedom²⁹⁸, utilitarianism²⁹⁹ and contractualism.³⁰⁰ The case in support of sentencing for drug use is consequentialism³⁰¹ and the law³⁰² enacted in response to international agreements on prohibition³⁰³. The perception of morality changes, because society changes,³⁰⁴ and the moral codes likewise, and so does the law after a time lag. The empirical results from Manchester in 1994³⁰⁵ and the following studies in 2002,³⁰⁶ 2014³⁰⁷ and 2016³⁰⁸ showed that a significant increase in soft drug usage over recent years and increasing social acceptance by drug *abstainers* who now approved of, or tolerated, ‘sensible’ recreational drug use by others. Some people like consuming drugs; ecstasy makes the party go better, or people are soothed and relaxed by a ‘spliff’.³⁰⁹ If the demand is there, some people will pay for the supply,³¹⁰ and if laws enforce prohibition, profiteers find ways to circumvent them, or find the possibility of sentencing and punishment a risk worth taking³¹¹. The fact is that many people, especially young people, find drug using no different morally to what their parents do in smoking cigarettes or drinking.³¹² This was discussed at length in the 2017 debate in the

²⁹⁶ NHS (2019) *Obsessive Compulsive Disorder* www.nhs.uk › obsessive-compulsive-disorder-ocd ‘Obsessive compulsive disorder (OCD) is a common mental health behavioural condition’.

²⁹⁷ Newman T (2018) *Gambling addiction: Symptoms, triggers, and treatment*. Medical News Today <https://www.medicalnewstoday.com> › articles and see Teen Drug & Alcohol Rehab (2019) *Clinic in the Netherlands for Teen Gaming Addictions* <https://www.nextgenerationvillage.com> › blog › netherlands..

²⁹⁸ Mill J S (1806-73) *On liberty* where he posited that a person has freedom to do what he wanted to do with himself so long that others were not harmed.

²⁹⁹ Locke T (1632-1704) who formulated the concept that the best moral outcomes are those which achieve life, liberty and property (later altered to happiness).

³⁰⁰ Hobbes T (1588-1679) *Leviathan* where he developed the idea that people have a moral contract to live in harmony with each other and see Scanlon T (2018) *Rightness as justifiability moral contractualism* www.politika.io › notice › rightness-as-justifiability-tho.

³⁰¹ Locke (1632-1704) the idea of negative utilitarianism is that the consequences may be undesirable. In the case of drug use that the casual user might become an addict and that the State has the right to intercede to prevent that.

³⁰² Misuse of Drugs Act 1971

³⁰³ United Nations (1961) *Single convention on narcotic drugs*.

³⁰⁴ An example was the ‘evil’ of homosexuality, as it was perceived in Britain until the Wolfenden Report of 1957. The belief had been that the State had the right to interfere in a citizen’s private life, and this was upheld by the opinion of Sir Patrick Devlin, Lord Chief Justice of England, who said:

“...that even private acts should be subject to legal sanction if they were held to be morally unacceptable by the ‘reasonable man’, in order to preserve the moral fabric of society”

This is the argument in favour of the prohibition of homosexuality. Until H.L.A. Hart, in the famous Hart-Devlin debate, showed that, as John Stuart Mill had maintained, the law has no business in interfering in a citizen’s private acts if they harmed no-one else, the Government agreed and the law was changed in 1976.

³⁰⁵ Measham F., Newcombe, R. and Parker, H. (1994) ‘*The Normalisation of Recreational Drug Use Amongst Young People in North West England*’, *British Journal of Sociology* 45(2): 287–312

³⁰⁶ Williams L & Aldridge J (2002) *The Normalization of ‘Sensible’ Recreational Drug Use Further Evidence from the North West England Longitudinal Study...* University of Manchester

³⁰⁷ Williams L (2014) *The Normalization of ‘Sensible’ Recreational Drug Use*. www.researchgate.net › publication › 242157864

³⁰⁸ Parker H, Williams L & Aldridge J. (2016) *The normalisation of ‘sensible recreational drug use: further evidence from the North West Longitudinal Study* www.research.manchester.ac.uk › publications › export

³⁰⁹ see 2.3. and footnote *Swiss Federal Office of Public Health (2008)* where the students who had calmed their nerves with a ‘spliff’ did better in the examinations than those who didn’t.

³¹⁰ Merriam-Webster (undated) *Supply and Demand* www.merriam-webster.com › dictionary › supply

³¹¹ See previous comments on the *North West Longitudinal Survey*, which was started in 2002, and showed that the majority of non-drug users feel that there is nothing wrong in casual users taking them.

³¹² 2.16. and footnote House of Commons Debate (2017) *Drugs Policy* *ibid* Blunt

House of Commons, with many of the ‘law makers’ the Members of Parliament known to have experimented with drugs in their youth.³¹³

It is the unintended consequences of Prohibition which form the argument against it. Prohibition requires laws for its enforcement, and people who offend against them, if arrested and tried in a court and found guilty, are sentenced and become criminalised. However, there are those who ‘need’ drugs and a black market provides for that, fuelling criminal activity to raise the funds to pay for them. As was mentioned in the 2017 Debate,³¹⁴ 45% of all acquisitive crime is drug related,³¹⁵ costing the State annually £9.5 billion³¹⁶, and on a wider scale there is the impact of international drug smuggling.³¹⁷

Drugs prohibition can cause harm to society in less direct ways. For example, children may be recruited as runners in ‘county lines’ as noted:³¹⁸

*‘...young people’s involvement in the drug markets is on the increase it is easy to see why some teenagers start selling drugs, as a more exciting and rewarding alternative to slogging away for hours in a fast-food restaurant or supermarket and a way of earning two or three times more money.’*³¹⁹

Criminal gangs³²⁰ out of London, use teenagers as drug runners on trains.³²¹ Of the 2,800 street gangs in England & Wales it is estimated that 60% are involved in drugs.³²² Criminalisation of young people,³²³ through the legal processes and sentencing has resulted in 1,000,000 people³²⁴ awarded criminal records in the first decade of this century.³²⁵

³¹³ Wikipedia (undated) *list of British politicians who have acknowledged cannabis use* https://en.wikipedia.org/.../List_of_British_politicians_who_have_acknowledged_cannabis

³¹⁴ House of Commons Debate (2017) *Misuse of Drugs Bill* *ibid* Abbott D p12

³¹⁵ House of Commons Debate (2017) *Misuse of Drugs Bill* *ibid* Blunt

³¹⁶ Black, C. (2020). *Review of drugs: phase one report*. London: Home Office.£9.3 billion The estimated cost of recorded offences committed by drug users in England (2017/2018).

³¹⁷ BBC TV (2015) *This World; Secrets of Mexico’ Drug Wars* also see ITV Channel 4 (2 August 2018) Meet the Drug Lords. Inside the real Narcos.

A dramatic depiction of Mexico’s Sinaloa Drug Cartel, widely regarded as the world’s most powerful organised drug gang, a multi-billion-dollar international corporation with franchises in 58 countries (Radio Times 11th March 2015 p 94) The programme commented on the death rate of over 100,000 people and the widespread corruption in political and police circles in Mexico and see

House of Commons Debate (2017) *Misuse of Drugs Bill* *ibid* Blunt C p18 He stated that between 2006 and 2013 there were 111,000 deaths in Mexico as the consequence of the drug gang wars in the USA.

³¹⁸ Robinson G, McLean R & Densley J (2019) *Child Criminal Exploitation and Illicit Drug Dealing in Glasgow and Merseyside* <https://doi.org/10.1177/0306624X18806742> Kings College

³¹⁹ Campbell D (2005) *Revealed: Britain’s network of child drug runners* The Guardian Newspaper 15 Oct 2005 *The fullest survey yet into the UK’s crack and heroin trade shows it is fueled by children and teenagers*

³²⁰ Black C (2020) *Review of Drugs Executive Summary*

<https://assets.publishing.service.gov.uk/government/uploads>

‘There is a big overlap with these young people also being drawn into drug use – among children in contact with children’s services, those who are assessed as gang-affiliated and in need are eight times more likely to use drugs than other children. The Children’s Commissioner estimates that around 27,000 young people in England and Wales identify as gang members, and 2,000 teenagers from London alone have been identified as having a link to county lines.

³²¹ Copping A.(2014) *London gangs using children as drug mules as they seek to expand markets.* The Guardian Newspaper 5 Jan 2014 *Children as young as 11 are being used as mules to carry drugs on trains out of London more than road transport, as they are more anonymous than adults, and because the police can track suspect vehicles now with the recently introduced automatic number plate recognition technology.*

³²² Disley E (2016) *Local perspectives in ending gang and youth violence areas* <https://assets.publishing.service.gov.uk>

³²³ Black C (2020) *ibid*. Executive summary para 49

‘A conviction can have a lasting negative impact on a young person (and their wider life chances), risking them being caught up in a cycle of crime and violence. Those who receive a custodial sentence are also at risk of further exploitation by county lines gangs when in prison/youth offender institutes’

³²⁴ Eastwood N (2013) *Drugs: it’s time for better laws.* Release .release.org.uk/blog/drugs-its-time-better-laws *‘...in the last ten years alone nearly 1 million people have been cautioned or prosecuted in England and Wales for possession of drugs.’*

³²⁵ 3.6. footnote Criminal Background Checks: A checklist of the pros and cons Which give details of the types of employment which are barred as a result

International drug gangs recruit women to act as ‘mules’ for cross-border smuggling³²⁶. Comment was made³²⁷ in the 2017 House of Commons debate. Finally, perhaps the most serious of the harms caused to society is the cost of enforcing it estimated at £10.7 billion.³²⁸

Apart from the clear intention of prohibition, there are some less obvious benefits arising from it. The benefit to potential employers is that they may avoid engaging people purportedly unsuited to particular employments, having gained a criminal record following conviction for the use of a fairly harmless substance.³²⁹

Prohibition and the appropriate laws are good for politicians,³³⁰ for some believe government fulfils a moral duty in controlling the moral tone of society by legislation. Prohibition is a benefit to law enforcers for it justifies the judiciary, and all that pertains to prisons.³³¹ Over 50% of offenders are there because of acquisitive crimes or violence related to the drug,³³² not because of the drug as such. However, the greatest beneficiaries are drug producers and traffickers,³³³ whose multibillion-pound world-wide trade would cease if prohibition were abolished.³³⁴

These points about criminalisation are relevant to any discussion of sentencing, for if drug possessors were not sentenced there may be a resultant increase in use. However, not necessarily; in Portugal consumption fell,³³⁵ as it did in the Czech Republic.³³⁶ The illegal drug

³²⁶ United Nations Office on Drugs and Crime (2014) *Drug mules: Swallowed by the illicit drug trade* https://www.google.co.uk/?gws_rd=ssl UNODC Report www.unodc.org/.../drug-mules_-swallowed-by-the-illicit-drug-trade.html:

The Report quotes the following story: “My mother decided to meet with someone - I didn't know who that someone was. It was a man. She had sold me to a trafficker...”. “I was forced to swallow 86 balloons and taken to the airport. At the airport, one of the victims became very ill. She said to me that a balloon containing the drugs had popped. Flight attendants were unhelpful because they thought I was drunk, so I had no choice but to keep shut... She collapsed right there. It all happened so fast; I watched her die, it was painful and especially when you have drugs inside yourself too. I was crying and didn't know whom to turn to for help” DJ's story.

³²⁷ 2.16. see footnote House of Commons Debate (2017) *Drugs Policy* *ibid* Atkins

³²⁸ House of Commons Debate (2017) *Misuse of Drugs Bill* *ibid* Debbonaire T. p 82 e seq

³²⁹ Criminal Background Checks; A checklist of the pros and cons. www.courtcheck.com/pros.pdf pp 1-4 provides a very comprehensive list, which would be useful to employers and potential employees alike. Such professions are doctors and the ancillary medical branches, teachers, nurses, voluntary health and care workers, who deal with children; likewise, solicitors, accountants and the clergy, who have to have unblemished probity, may be unsuitable if they have a criminal record, which is what they would have gained if challenged by the police for possession of drugs. In the Armed Forces, Police and Fire Services, a criminal record may exclude those applicants who are known to have had contact with drugs. Most schools may expel drug users, and universities might not accept them as students

³³⁰ History (2017) *War on Drugs - Timeline in America, Definition & Facts ...*

www.history.com/topics/crime/the-war-on-drugs

‘...for they can show that they are ‘tough on drugs’ and are doing firm things about it. Being ‘soft on drugs’ might be unattractive to the electorate and lose the parliamentary votes.’

³³¹ Dronkers B (2014) *The history of cannabis use in Holland* www.kindgreenbuds.co/marijuana

It is said that when hashish was decriminalised in the Netherlands in the 1960's and the ‘coffee-shops’ opened, the fall in criminality was such that eight prisons closed.

³³² Pierce M, Hayhurst K, Bird S, Hickman M, Seddon T, Dunn M & Millara T (2015). *Quantifying crime associated with drug use among a large cohort of sanctioned offenders in England and Wales...* <https://www.ncbi.nlm.nih.gov/articles/PMC4768078>

³³³ Wikipedia quoting The United Nations Office on Drugs and Crime's World Drug Report of 2005 estimates the size of the global illicit drug market at US\$321.6 billion in 2003

³³⁴ Morris N (2007) *Britain's illegal drugs trade is worth up to £8bn a year, a Home Office report has revealed*. Independent Newspaper 21 November 2007

³³⁵ Stevens A (2012) *Portuguese Drug Policy shows that decriminalisation can work but only alongside improvements in health and social policies* (2012) LSE Comment 2012 acc 23092014

blogs.lse.ac.uk/euroblog/2012/.../Portuguese-drug-policy-alex-stevens.

³³⁶ Zabransky T, Mravcik V, Gajdosikova H, Miovsu M (2001) *Impact Analysis Project of New Drugs Legislation (the PAD Report)* for the Secretariat of the National Drug Commission Office of the Czech

industry might cease to exist, as might street level ‘pushers’, no longer attempting to induce people to buy drugs.³³⁷ If prohibition and sentencing were to be removed for personal possession, or growing for personal consumption, what would be the effect of lifting some of the legal sanctions? Then as happened in Portugal, the drug-related offences percentage fell from 40% to 21%.³³⁸ Most European countries now allow ‘threshold’ quantities and growing or production for personal possession, yet sentence and punish if they are exceeded.³³⁹ Finally, what might be the result if prohibition were to be lifted for the ‘soft’ drugs and retained for ‘hard’ drugs? Recent reports from Greece reveal that as cannabis consumption increases so opiate use falls,³⁴⁰ and from the USA that drug-related violence is reduced.³⁴¹

Is decriminalisation developing in England and Wales?³⁴² It seems so, for drugs testing at raves³⁴³ is accepted by the Home Office,³⁴⁴ and in County Durham the police are no longer arresting and charging street-level addicts who are supplying to other addicts.³⁴⁵ Several county police forces nowadays no longer carry out stop-and-searches of people they suspect of possessing cannabis for personal use or in small scale growing.³⁴⁶ The fall in numbers³⁴⁷

Government (with statistical and epidemiological advice and assistance from Florida University and the Open Society Institute, New York) www.druglawreform.info/.../787-impact-analysis-project-of-new-drugs-legislation

Following the fall of communism in 1989, the government returned to more humane and democratic values, including a law to abolish punishment for personal possession of illegal drugs. However, in 1997 parliament reintroduced criminal penalties for possession of any amount of drugs and ordered the Czech National Drugs Commission to audit the new law from 1999-2001, to ascertain the effects of criminalisation as against decriminalisation, and to determine whether the reintroduction of prohibition and sentencing of offenders resulted in a fall in drug consumption, addiction and drug-related criminality. (The ‘PAD’ project)

The survey showed that all these factors did not fall but increased, so consequently the Czech parliament passed laws decriminalising the personal possession of small amounts of each drug, the so-called ‘greater than small’ amount, implying that if that was exceeded the possessor might be prosecuted, otherwise not. The outcome was that the drug-related death rate in the Czech Republic was 1/10 that of the UK, and all other drug usage (with the exception of amphetamine) significantly less. (Source EMCDDA statistics 2014)

³³⁷ This is what happened in the Netherlands, when in the 1960’s, the Health Minister Irene Vorick, permitted the opening of coffee-shops, postulating that if the craving of young persons were to be satisfied by the relatively harmless cannabis, they would not feel the need to go out into the streets to use hard drugs. That was believed to explain the low drug-related death rate there.

³³⁸ Release (2011) *A Quiet Revolution: Drug Decriminalisation Policies in Practice Across the Globe* www.release.org.uk/.../quiet-revolution-drug-decriminalisation

³³⁹ EMCDDA (2015) *Threshold quantities for drug offences* www.emcdda.europa.eu › Countries › Legal topic overviews

³⁴⁰ Bouloutza P (2019) *Report sees addiction to cannabis up, heroin down in Greece* www.ekathimerini.com/241324/.../report-sees-addiction-to-cannabis-up-heroin-down

³⁴¹ Doward J (2018) *Legal marijuana cuts violence says US study, as medical-use laws ease* www.theguardian.com/.../legal-marijuana-medical-use-crime-rate-plummets-us-st...
Guardian Newspaper 13 Jan 2018 – ‘The introduction of medical marijuana laws has led to a sharp reduction in violent crime in US states...Homicides specifically related to the drug trade fell by an astonishing 41%.’

³⁴² Kilili S (2020) Policy Officer, Office of the Durham Police, Crime and Victims’ Commissioner (by email)
‘Heroin Assisted Treatment is something that the Police and Crime Commissioner, and the Chief Constable strongly advocate for, both in terms of reducing illicit street heroin use, and reducing crime’.

³⁴³ Pidd H (2014) *Manchester Warehouse Project Club introduces drug testing*. The article describes how Professor Fiona Measham provides a voluntary Ecstasy testing facility at the entrance to the Club. (Guardian Newspaper 1st December 2013)

³⁴⁴ Hymas C (2019) *Home Office backs free tests for purity of class A Drugs* Daily Telegraph 29th June 2019. *The piece goes on to write that the Home Office will accept licenced testing at raves and events*

³⁴⁵ Kilili S (2018) Durham Constabulary personal communication by email 290718. She wrote that acquisitive crime heroin injectors had committed 1,731 offences in the month before the OST Scheme started, falling to 547 crimes in the first month of treatment.

³⁴⁶ Paton C (2015) *Cannabis: Derbyshire, Dorset and Surrey police will no longer seek to arrest pot growers and smokers* www.ibtimes.co.uk › cannabis-derbyshire-dorset-surrey...

³⁴⁷ HMIC (2014) *Crime recording: A matter of fact: an interim report of the inspection of crime data integrity in police forces in England and Wales* www.hmic.gov.uk Possession stated not to be recorded in police audits for the following reason as explained at paragraph 1.7.

of arrests was because it was felt that arrest for possession was discriminatory,³⁴⁸ not warranting the criminalisation of young people.³⁴⁹ In 2018 the press reported on cannabis Members-only³⁵⁰ clubs,³⁵¹ approved by the police, and the National Police Chiefs' Council advised that apprehension of suspected drug possessors was to be a local decision.³⁵² It is legal to buy the seeds online,³⁵³ with advice given on growing,³⁵⁴ cautioning that more than nine plants are illegal,³⁵⁵ recommending growers join a cannabis club,³⁵⁶ claiming it is for medicinal purposes. Recent publications showed that following cannabis legalisation, opiate consumption reduced.³⁵⁷

It was in 1992 that the opinion given was³⁵⁸ that it would not be realistically possible at that time to change the law on the criminality of drug use.³⁵⁹ The forecast was that the criminal prohibition of recreational drug would be retained whilst failing to enforce the laws. This would retain *de jure* criminalisation whilst allowing *de facto* decriminalisation. The response to minor drug offences resulted in the formation of the Diversion Schemes described in Chapter 7.³⁶⁰

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- ³⁴⁸ Tapper J (2018) *Police 'decriminalising cannabis' as prosecutions fall away* Guardian 2018
'Last year only 15,120 people in England and Wales were prosecuted for possession of cannabis, a fall of 19% since 2015. Police issued cautions to 6,524 people in 2017 – 34% fewer than two years before. Police forces are in effect decriminalising cannabis'
- ³⁴⁹ James E (2019) *Green Light Police chief is letting off cannabis users as warnings are 'disastrous for their life chances'* Sun Newspaper *'West Midlands Chief Constable Dave Thompson told MPs he made the change to the force's policy on cannabis because he does not want to 'criminalise lots of young people'*
- ³⁵⁰ The Netherlands which has long allowed the use of cannabis in 'coffee-shops', although the supply has been dependent upon illegal sources. This has now changed with a ten-town experiment of approved cannabis farms supplying health and purity checked products to the coffee-shops see Holligan K (2019) *Cannabis trial: Dutch cities picked for café supply* describes a proposed trial of coffee-shops provided from approved cannabis farms compared with those supplied illegally.
 BBC Broadcast 30 August 2019 <https://www.bbc.com/news/world-europe-49508526>
- ³⁵¹ BBC News (2018) *Members-only 'cannabis lounge' opens in Ipswich* BBC News 19th Sep 2018 *'There are more than 70 cannabis clubs across the UK'*
- ³⁵² Doughty S (2019) *Individual chief constables can now decide whether to arrest and charge, caution or warn those caught with the drug – or simply let them go* Daily Mail 7th April 2019
- ³⁵³ Rhino Seeds (undated) *Cannabis Seeds Buy Marijuana Seeds from UK Online*
www.cannabis-seeds.co.uk
- ³⁵⁴ Royal Queen Seeds (2020) *Top 10 Tips For Growing Cannabis: Answers To Your FAQs*
www.royalqueenseeds.com/blog-10-tips-for-growing-...
- ³⁵⁵ Crime Dodge (2017) *How Some British Weed Growers Are Avoiding Prosecution*.
www.vice.com/Home/Drugs *nine or less plants, can be considered a "domestic operation."*
- ³⁵⁶ United Kingdom Cannabis Social Clubs (2017) *Collectives & Cultivation*
ukcsc.co.uk/collectives-cultivation
- ³⁵⁷ Doward J (2018) *Legal marijuana cuts violence says US study, as medical-use laws ease*
<https://www.theguardian.com/.../legal-marijuana-medical-use-crime-rate-plummets-us-st-...>
 Bouloutza P (2019) *Report sees addiction to cannabis up, heroin down in Greece*
www.ekathimerini.com/241324/.../report-sees-addiction-to-cannabis-up-heroin-down
 Anderson P (2018) *A new report points to an increase in the use of cannabis along with a significant decrease in that of heroin and other opioids*. Heroin Use Down, Marijuana Use Up in New SAMHSA (Substance Abuse in Mental Health Service Administration) Survey
<https://www.medscape.com/viewarticle/902140https://www.google.com/search?q=cannabis+u>
 Wendelboe A M, Mathew R, Chongsuwat T, Rainwater E, Wickersham E & Chou A F (2019) *Is there less opioid abuse in States where marijuana has been legalised?* www.ncbi.nlm.nih.gov/pmc/articles/PMC6827842
 See also Chapter 5. where it is described in the HMIP report that at HMP Hollesley Bay cannabis was used in the detoxification of heroin addicted prisoners.
- ³⁵⁸ Husak D N (1992) *Debate: drugs and rights* Cambridge Studies in Philosophy and Public Policy
www.tandfonline.com/doi/pdf
- ³⁵⁹ Carey G & Crimmond B (2015) *Action on the social determinants of health: views from inside the policy process* Social Science and Medicine 128 (2015)134-141 Where the matter of how policies become politics is discussed further.
- ³⁶⁰ Busby M (2019) *'You can't arrest your way out of record drug-related deaths say the police*

2.16. Conclusions on Chapter 2.

The Misuse of Drugs Act 1971 was based upon the then scientific knowledge of drugs, and the concepts of their morality. The law which resulted was based upon criminality of drug usage, less on treatment and risk reduction. Over the succeeding half century, the moral perceptions on drug use have changed markedly, as shown in empirical studies and in the attitudes of parliamentarians in comparing the two debates. It has also been shown that the 1971 classification, upon which the law is still based, has become significantly inaccurate. Subsequent reports have been ignored by the government. Recently measures of covert decriminalisation have been taking place, as well as a degree of legalisation, enhancing the safety of drug users. The drug laws are based upon enforcing prohibition. The next chapter examines key aspects of the sentencing law as it applies to drugs offenders.

Guardian Newspaper 24th April 2019

'...in what is effectively de facto drug decriminalisation, people caught in possession of personal amounts of controlled substances in a number of police areas are being directed towards treatment and education services through "diversion schemes", rather than facing prosecution'.

Chapter 3 The Drug Laws and Sentencing of Drug Offenders.

3.1. Introduction and the laws relevant to drug-related offences.

This chapter outlines the laws enacted against drug offenders and follows with a discussion on the appropriateness of sentencing.

- (a) The Misuse of Drugs Act 1971 sets the maximum sentence for the offences contained in the Act and was described in Chapter 2
- (b) The Sentencing Act 2020 was created with the intention of fulfilling the following aims: to consolidate existing sentencing legislation; help and support legal professionals in identifying and applying the law. To increase efficiency by reducing the risk of error, appeal, and delay currently within the sentencing process modernised sentencing, with a revised sentencing structure in sections.

The sections of the Act relevant to drugs offences are:

Section 30 *Pre-sentence report requirements.*

Section 52 *duty to give reasons for and to explain effect of sentence.*

Section 57 (2) *purposes of sentencing.*³⁶¹

Section 57 (3) *sets out exceptions*³⁶².

Section 58 *Offenders aged under 18.*³⁶³

Section 59 *Sentencing guidelines: general duty of court.*³⁶⁴

Section 118 *Availability of fines in the magistrates' court*

Section 120 *General powers of Crown Court to fine offenders*

Section 122 *The scale of fines for summary offences in the Magistrates' court.*

Section 152 *Deprivation order*³⁶⁵

Section 201 *Community order requirements table.*³⁶⁶

³⁶¹ Sentencing Act (2020) s 52(a) *Purposes of punishment* which are

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences

³⁶² Sentencing Act (2020) Section 57 (3) *sets out exceptions which are*

- (a) to an offence in relation to which a mandatory sentence requirement applies or
- (b) in relation to making any of applications under Part 3 of the Mental Health Act 1983

³⁶³ Sentencing Act (2020) Section 58 *Offenders aged under 18 the duties of the court* which are

- (a) to have regard to the principal aim of the youth justice system (which is to prevent offending (or re-offending) by persons aged under 18: (see section 37 of the Crime and Disorder Act 1998).
- (b) under section 44 of the Children and Young Persons Act 1933 (to have regard to welfare and in certain cases to take steps in relation to surroundings and provision of education etc).

³⁶⁴ Sentencing Act (2020) Section 59 *Sentencing guidelines: general duty of court* which are

- (1) Every court—
 - (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
 - (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function.
- (3) is not restricted by the sentencing guidelines if there are good reasons. (for example mental illness)

³⁶⁵ Sentencing Act (2020) s152 *Deprivation order* means an order which—

- (a) is made in respect of an offender for an offence, and
- (b) deprives the offender of any rights in the property to which it relates

³⁶⁶ TABLE 8 Sentencing Act (2020) Section 201 *Community order requirements table*

unpaid work	prohibited activity	attendance
rehabilitation activity	alcohol abstinence and monitoring	foreign travel prohibition
drug rehabilitation	curfew	exclusion
programme	electronic compliance monitoring	residence
alcohol treatment	electronic whereabouts monitoring	mental health treatment

Section 204(2) *restriction on community order*.³⁶⁷

Section 206 *Community order: available requirements to undergo mental illness treatment*.³⁶⁸

Section 208 *Community order: exercise of power to impose particular requirements*

Sections 213,214,215,216 *Obligations of responsible officer and offender*.³⁶⁹

Section 230 *threshold for imposing discretionary custodial sentence*.³⁷⁰

Section 231 *custodial sentence must be for shortest term commensurate with seriousness of offence*.³⁷¹

Section 232³⁷² (30) *Pre-sentence report requirements*.

Section 313. *Minimum sentence of 7 years for third class A drug trafficking offence*.³⁷³

This section will be discussed further at 4.6.

(c) The Coroners and Justice Act 2009

Section 120 *Sentencing guidelines*.³⁷⁴

³⁶⁷ Sentencing Act (2020) Section 204(2) *restriction on community order* – the court can only impose a community sentence if the offence(s) is serious enough to warrant such a sentence.

³⁶⁸ Sentencing Council (2020) *New guideline for sentencing offenders with mental disorders*
<https://www.sentencingcouncil.org.uk/news/item/n...>

Mental Health Treatment Requirements and new guidance to amend the Drug Offences Guideline

³⁶⁹ HM Inspector of Probation (2021) *A joint thematic inspection of community-based drug treatment*
<https://www.justiceinspectorates.gov.uk/inspections>

This report outlines the current failings of the Probation Service for drugs offenders and see

HM Inspector of Probation (2021) *Effective guide to working with drug users in probation*

<https://www.justiceinspectorates.gov.uk/2021/09PDF>

This document provides advice to the Probation Service officers responsible for drugs offenders.

³⁷⁰ Sentencing Act (2020) Section 230 *threshold for imposing discretionary custodial sentence*
a custodial sentence can only be imposed if the judge or magistrate considers the offence(s) is so serious than no other sentence can be justified. The length of a community order must be such as is commensurate with the seriousness of the offence and the content such as is most suitable for the offender.

⁴⁷¹ Sentencing Act (2020) section 231 *custodial sentence must be for shortest term commensurate with the seriousness of the offence*. The length of discretionary custodial sentences must be the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it. That provision encourages judges and magistrates to have regard to parsimony.

³⁷² Sentencing Act (2020) section 232(1) This section applies where, by virtue of any provision of this Code, the pre-sentence report requirements apply to a court in relation to forming an opinion

³⁷³ Sentencing Act (2020) section 313. *Minimum sentence of 7 years for third class A drug trafficking offence* which states at (2): the court must impose an appropriate custodial sentence for a term of at least 7 years unless the court is of the opinion that there are particular circumstances which-

(a) relate to any of the offences or to the offender, and

(b) would make it unjust to do so in all the circumstances

³⁷⁴ The Coroners and Justice Act 2009 section 120

(3) The Council must prepare—

(a) sentencing guidelines about the discharge of a court's duty under section 144 of the Criminal Justice Act 2003 (reduction in sentences for guilty pleas), and

(b) sentencing guidelines about the application of any rule of law as to the totality of sentences.

(1) When exercising functions under this section, the Council must have regard to the following matters—

(a) the sentences imposed by courts in England and Wales for offences.

(b) the need to promote consistency in sentencing.

(c) the impact of sentencing decisions on victims of offences.

(d) the need to promote public confidence in the criminal justice system.

(e) the cost of different sentences and their relative effectiveness in preventing re-offending.

(f) the results of the monitoring carried out under section 128

Section 121 *Sentencing ranges*.³⁷⁵

Section 125(1) *Sentencing guidelines: duty of court*.³⁷⁶

Section 128 *Monitoring*.³⁷⁷ It is of importance to note that this is not complied with³⁷⁸, thereby undermining the assessment of its effectiveness³⁷⁹.

(d)Psychoactive Drugs Act 2016 concerns new psychoactive drugs.³⁸⁰

3.2. Definition of Sentencing

Sentencing is the end point of the court procedure through which the judge censures the defendant, expressing the opprobrium of society for the harm he has caused³⁸¹ and informs³⁸² the defendant that he is to be punished, having pleaded guilty, or the court having found him to be guilty of the offence. Under s. 57 of the Sentencing Act 2020, when sentencing an adult offender the court must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.

³⁷⁵ The Coroners and Justice Act 2009 s 121 *Sentencing ranges*

(2) The guidelines should, if reasonably practicable given the nature of the offence, describe, by reference to one or more of the factors mentioned in subsection (3), different categories of case involving the commission of the offence which illustrate in general terms the varying degrees of seriousness with which the offence may be committed.

(3) Those factors are—

(a) the offender's culpability in committing the offence.

(b) the harm caused, or intended to be caused or which might foreseeably have been caused, by the offence.

(c) such other factors as the Council considers to be particularly relevant to the seriousness of the offence in question.

³⁷⁶ The Coroners and Justice Act 2009 section 125 *Sentencing guidelines: duty of court*

(1) *Every court*—

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.

³⁷⁷ The Coroners and Justice Act 2009 *Monitoring*

(1) The Council must—

(a) monitor the operation and effect of its sentencing guidelines, and

(b) consider what conclusions can be drawn from the information obtained by virtue of paragraph (a).

(2) The Council must, in particular, discharge its duty under subsection (1)(a) with a view to drawing conclusions about—

(a) the frequency with which, and extent to which, courts depart from sentencing guidelines.

(b) the factors which influence the sentences imposed by courts.

(c) the effect of the guidelines on the promotion of consistency in sentencing.

(d) the effect of the guidelines on the promotion of public confidence in the criminal justice system.

(3) When reporting on the exercise of its functions under this section in its annual report for a financial year, the Council must include—

(a) a summary of the information obtained under subsection (1)(a), and

(b) a report of any conclusions drawn by the Council under subsection (1)(b).

³⁷⁸ The Coroners and Justice Act 2009 section 120 (1)(c)(e) & (f)

³⁷⁹ 5.4. Conclusions on drug detoxification and rehabilitation and 6.2. The problems of measuring effectiveness.

³⁸⁰ Gov.UK (2016) *Psychoactive Substances Act 2016* makes it an offence to produce, supply, offer to supply, possess with intent to supply, possess on custodial premises, import or export psychoactive substances.
<https://www.gov.uk> > Crime, justice and law

³⁸¹ See 1.4.

³⁸² Sentencing Act 2020 section 52 *Duty to give reasons for and explain effect of sentence*.

3.3. The Ethics of Sentencing.

It is justified to sentence a wrongdoer, but then if he is punished, say by imprisonment, his family is stigmatised, the family income reduced, his partner ostracised as will be his children at school.³⁸³ Sentencing can result in ‘labelling’;³⁸⁴ a person becomes, in the eyes of others, and of himself a criminal, and may thereafter be expected or even motivated to follow the path of criminality. This is especially true of young offenders,³⁸⁵ especially of soft drug ‘experimenters’³⁸⁶. If sentencing can be avoided, with a person desisting from further offending, that is even better. If a person has committed a minor offence, there may be scope, in guiding him back to a lawful life. This, the Diversion Concept³⁸⁷, is discussed in chapter 7.

Is sentencing appropriate for a drugs offender? A trafficker causes harm, or at least potential harm, as explained in chapter 2. Moreover, drugs are often noxiously adulterated. Traffickers and suppliers have no interest in drug purity, the motive being only profit.³⁸⁸ It is appropriate to sentence them, and where proportional, severely³⁸⁹. But if he is only in possession? As discussed in Chapter 2, those in possession will be users, casual or habitual or addicts. All however contravene the law and may be sentenced. Yet casual users do no harm (usually)³⁹⁰, as is the case with habitual users,³⁹¹ except that they may harm themselves³⁹² and indirectly the State through needing treatment.³⁹³ Addicts harm themselves, their family³⁹⁴, and the State is harmed as has been discussed in Chapter 2, and they need medical help,

³⁸³ J Morgan J (2014) *Children affected by the imprisonment of a family* www.nicco.org.uk › userfiles › downloads

Having a parent or other family member in prison, can impact on a child's sense of identity and how they interact with their family and community. And note especially Section two: The potential impact of a parent or other family member's imprisonment

³⁸⁴ Knutsson J (1997) *Labelling Theory*, National Criminal Justice Reference Service www.ncjrs.gov › pdffiles1 › Digitization

³⁸⁵ Centre for Justice Innovation (undated) *Minimising labelling* justiceinnovation.org › default › files › media › documents *Labelling theory is a central rationale for youth diversion and suggests that contact with the criminal justice system may lead to further offending by triggering changes in self-concept, processes of social exclusion and participation in deviant groups*

³⁸⁶ Lowe G (2019) personal communication Mr Lowe, a Senior Probation Officer, told me how young people in a gang look up members who have gained a criminal record and seek to emulate them. Those who have the criminal record feel the need to live up to that status and commit more crimes to do so.

³⁸⁷ Gov.uk (2021) *Review of drugs part two*. The Dame Carol Black report part 3.5 p25
‘...drug diversion schemes like Checkpoint in Durham.... have delivered early interventions that divert individuals away from the criminal justice system.... should be expanded’

³⁸⁸ Europol(undated) *Drug Trafficking Crime Areas* www.europol.europa.eu › ... › Drug Trafficking ‘Drug trafficking is big business, bringing in a fifth of all profits from organised crime. It ravishes communities, endangers businesses, strains government institutions, and drags down the wider economy’

³⁸⁹ Sentencing Council (2012) *Drug Offences Sentencing Guideline* p16

³⁹⁰ Sentencing Council (2012) *Drug Offences Sentencing Guideline* p16 Class A drugs p17 for Classes B & C

³⁹¹ Harm from drug use may occur indirectly from a drug user causing an accident whilst intoxicated. See Sentencing Council (2015) *Drug driving guidance* and Government publications (2017) *Changes to drug driving law*

³⁹² 2.7 personal harm through injecting himself causing infection

³⁹³ 2.7 harm to the State through needing to be treated for personal harm. A habitual user may develop lung cancer from inhaling cannabis smoke or nasal cancer through ‘snorting’ cocaine, needing expensive treatment and all incurring costs to the State

³⁹⁴ Centre for Justice Innovation (2021) *National Website for Family Drug & Alcohol Courts*. <https://fdac.org.uk>
Child abuse is especially common where the parent(s) are drug addicts, and these courts seek to coerce addicts into treatment to protect their children.

not criminalisation and sentencing,³⁹⁵ which is inappropriate for users. Most mainland European countries have legalised personal possession of small quantities of drugs.³⁹⁶

3.4. The Sentencing Council's Guidelines

The Sentencing Council Guidelines were published in 2012. Under the Coroners and Justice Act 2009, s. 125, all courts must follow the Council's definitive sentencing guidelines, unless it is contrary to the interests of justice to do so. The guidelines have been devised on the principle of (cardinal) proportionality. For most offences for which early guidelines were prepared the structure of the guideline is as follows:

- a) higher culpability + greater harm = Category 1 offence with Severity 1 punishment
- b) lower culpability + greater harm or higher culpability + lesser harm = Category 2 offence with Severity 2 punishment
- c) lower culpability + lesser harm Category 3 offence with Severity 3 punishment.

The punishment severity equates with the 'anchor' points concept as described in the discussion on proportionality in chapter 1. There is the limited range above and below these anchor points, beyond which the sentencer is not normally allowed to go (although into these higher and lower ranges the sentence can go if to stay within the offence range would be contrary to the interests of justice).

3.5. The Drug Offences Definitive Guideline³⁹⁷

For drug offences the system is as described in the previous section (4.4). except that there are three grades of culpability (for the trafficking offences): Leading, Significant and Lesser roles and there are four grades of Harm (the quantity of the drug concerned) in Categories 1, 2, 3 and 4. This is plotted on a grid with the horizontal axis showing the Culpabilities (roles) and the vertical axis the Categories (harm). A line is dropped down from the appropriate culpability and taken horizontally from the Category meets at the place identifying the 'Starting point' for the punishment (equating with the 'anchor' point) and the Category range (equating to the range permissible³⁹⁸ which may not be exceeded by the judge³⁹⁹), aggravating and mitigating features of the offence determining where in that range the sentence is to lie. There are separate tables for Class A, B and C drugs. Types of offences in the drug offences guideline, are listed in the drug offences definitive guideline at page 2, and the Guideline continues with Steps 3-8.

3.6. Mandatory Sentencing for a third Class A drugs offence.

In some situations, drugs offenders will fall within the 'three strikes' provisions in English law, that are in addition to the sentencing guidelines. The Powers of Criminal Courts (Sentencing) Act 2000 section 110 requires that a minimum sentence of 7 years for third class

³⁹⁵ See 2.18. The Morality of illegal drug taking and the legitimacy of sentencing

³⁹⁶ See 2.5. Drug usage rates and footnote ECMDDA (2015) *Threshold quantities for drugs allowed for personal use*

³⁹⁷ Sentencing Council (2021) *New sentencing guidelines for drug offences*

published <https://www.sentencingcouncil.org.uk/news/item/n>. The new guidelines concern

1. Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug.

2. Permitting premises to be used.

3. Possession of a controlled drug with intent to supply it to another.

4. Producing a psychoactive substance

5. Production of a controlled drug/ Cultivation of cannabis plant

6. Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it

³⁹⁸ Sentencing Council (2012) *Drug Offences Sentencing Guideline* ibid p3 et al. explains that the sentence may exceed the permissible range, but justification would be required

³⁹⁹ Coroners and Justice Act (2009) s. 125(3) the statutory obligation on the sentencer is to stay within the offence range

A drug trafficking offence should be imposed,⁴⁰⁰ except where there are exceptional circumstances which:

(a) relate to any of the offences or of the offender and

(b) would make it unjust to do so in all circumstances

with the same requirement applying in the Sentencing Act 2020 section 313.⁴⁰¹

In the UK government sponsored research paper informing the debate for the Crime (Sentences) Bill 1996, which preceded the Act, comment had been guarded on its relevance.⁴⁰² It described how, in the USA, an offender having committed two felonies, on committing a third, whether a felony or a misdemeanour,⁴⁰³ is sentenced to a prolonged period of imprisonment. The judge has no discretion in the length of the sentence.⁴⁰⁴ The purpose of the legislation was to punish and deter serious habitual offenders especially traffickers and suppliers, their prolonged custody protecting the public. Its appropriateness was questioned, for offence rates in the USA did not fall, yet the incarceration rate rose.⁴⁰⁵

The sentencing to prison of a third-Class A trafficking offender, who might well have trafficked a small amount of fairly harmless drugs in Class A⁴⁰⁶, would derogate from the ethics of proportionality.⁴⁰⁷ Prison should be retained for those offenders who pose a significant threat of harm⁴⁰⁸ to potential victims. That description might or might not be applied to a street-level supplier⁴⁰⁹ or to a 'mule',⁴¹⁰ being both offenders and victims.

⁴⁰⁰ Powers of Criminal Courts (Sentencing) Act 2000 *Minimum sentence of 7 years for third class A drug trafficking offence*

⁴⁰¹ Sentencing Act 2020 section 313

⁴⁰² Baber M (1996) *Research Paper for the Crime (Sentences) Bill of 1996-7*

'Mandatory sentencing guidelines have been introduced for prisoners convicted in the federal courts in the USA and parole has been abolished for federal prisoners... most notoriously under the "three strikes and you're out" provisions introduced in California. These measures have often been introduced with the stated aims of ensuring greater consistency in sentencing and responding to public concern about the very high levels of violent crime in the USA. Critics have stated that their inflexibility has resulted in consistency at the expense of justice, with large numbers of offenders receiving long sentences for small-scale drug dealing and other relatively minor offences, such as the offender reported as having been sentenced to life imprisonment for stealing a pizza under California's "three strikes and you're out" law.

⁴⁰³ a felony is an offence which incurs a sentence of more than one year's imprisonment; a misdemeanour less than one year, and a wobbler one which could be either the one or the other.

⁴⁰⁴ Chemerinsky E (2003) *Cruel and Unusual: The Story of Leandro Andrade*

<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?httpsredir=1&article=2404...>

In this article Professor Chemerinsky describes how in 1995 Leandro Andrade, a war veteran and drug addict, stole 5 children's videos from a supermarket. He was arrested, charged and because of his past history of petty crime, was sentenced under California's 'Three strikes and you're out law' to 50 years in prison without parole. Professor Chemerinsky defended him, but without success in the State and Supreme Courts.

⁴⁰⁵ James B, Haas K, Siler B & Weatherby G A (2017) *Perceptions of Rehabilitation and Retribution in the Criminal Justice System* Department of Sociology & Criminal Justice, Gonzaga University. *'They also found that the Three Strike Laws were used far more often against crimes involving marijuana, not the violent crimes that they were intended to target. In fact, one study found that 85% of the uses of Three Strike Laws were applied to non-violent drug crimes. Three Strike Laws have also caused prison populations and costs to increase. Consequently, they are thought of as being unsuccessful. These policies have caused the prison lengths for all crimes, but especially those convicted of drug offenses, to increase dramatically. In turn, it has led the incarceration rates in the United States to climb to an all-time high. The United States has the highest percentage of incarcerated people in the world.'*

⁴⁰⁶ see 2.12. for example, ecstasy, LSD, magic mushrooms

⁴⁰⁷ 4.6. *Inadequate details*. And see R v Welford where one of the drugs was ecstasy

⁴⁰⁸ 4.1 (b). Sentencing Act (2020) s 230 *Threshold Custody Test*

⁴⁰⁹ 4.6. *Inadequate details* and see R v Afonso et al, where Judge Rose made the point that there are the down-and-out addicts who have no other means of earning the money to pay for their drugs, except through prostitution, criminality or selling drugs to other users.

⁴¹⁰ 3.5. and see footnote: United Nations Office on Drugs and Crime (2014) *Drug mules: Swallowed by the illicit drug trade*. A harrowing account of the exploitation of women coerced into becoming 'mules.'

In the Bill introducing the Crime (Sentences) Act 1997⁴¹¹, which promulgated the Powers of Criminal Courts (Sentencing) Act 2000, the then Home Secretary (Mr Jack Straw) argued the need to counter the decreasing conviction rates for drug-related crimes.⁴¹² In the House of Commons debate on the 30th July 1997 he said:

'Prison is necessary for those whose crimes and behaviour require it. I therefore intend to implement the mandatory minimum sentence of seven-year sentence for third-time drug traffickers later this year. In the 18 years since 1979, crime has doubled, yet the number of criminals convicted by the courts has dropped by a third. Such a record of failure cannot easily be reversed. This afternoon, therefore, I have outlined the first steps towards building a criminal justice system which the public have a right to expect: a system that is fair, swift and effective in tackling crime and disorder.'

The Law Lords were less convinced that mandatory sentencing was the right way to progress, and Lord Woolf LCJ gave his opinion thus:

'The bill promotes injustice because it intends that a sentence should be imposed regardless of the particular circumstances of a particular crime or a particular offender.'

and expressed misgivings,⁴¹³ and other critical comments were offered in *Principled Sentencing*.⁴¹⁴

Finally, there is the ethics of the law. If a mandatory sentence of 7 years custody is imposed, as required by the Powers of Criminal Courts (Sentencing) Act 2000 section 110 it may well be that the trigger 3rd offence is relatively trivial,⁴¹⁵ and disproportionate to the severity of a seven-year sentence, yet would imply that the cumulative effect might warrant the severity of punishment.⁴¹⁶ The same consideration would apply with the Drug Offences Definitive Guideline 2012 where the defendant receives the minimum sentence of seven years for a third Class A drug trafficking offence.⁴¹⁷

There is also the practical problem of what a Class A drug actually is; Class A drugs, now comprise a range of drugs, hard, medium and soft.⁴¹⁸ Thus a judge might sentence disproportionately for an offence involving a drug of little harm.⁴¹⁹

⁴¹¹ Crime (Sentences) Act 1997 - *Legislation.gov.uk Table of Contents Part 1*
www.legislation.gov.uk/ukpga/1997/43/contents

⁴¹² Hansard Debates (1997) *House of Commons 30 July 1997*

⁴¹³ Hansard Debates (1997) *House of Lords 27 January 1997 Crime Sentencing Bill* Lord Woolf LCJ said
'It will result in injustice. It involves profligate expense of public money
It will give rise to undesirable constitutional implications. It will result in dishonest sentencing
It will damage the prison system. It is unnecessary'

⁴¹⁴ Ashworth A (2009) in *Techniques of Reducing Sentence Disparity: Mandatory and Mandatory Minimum Sentences* quoting Tonry M pp122-253 in *Principled Sentencing* von Hirsch A, Ashworth A & Roberts J
(i) The purposes of mandatory sentences are to reduce crime, increase deterrence and public protection, and to reduce judicial discretion, so as to increase the certainty of punishment.
(ii) However, there are problems arising from them which are
(a) there is little basis for believing that they deter serious crime.
(b) there is considerable scope for unjustly severe sentences being imposed. The risk of that is reduced by the use of 'particular circumstances,' negating the purpose of mandatory sentences.
(c) the injustice potential leads judges to circumvent mandatory rules.
(d) there are fewer guilty pleas where the sentence is mandatory, for defendants will rather take their chance with a jury trial, increasing court costs and delays.

⁴¹⁵ Spohn C (2009) *Criticism of Mandatory Minimums* in von Hirsch A et al *ibid*

⁴¹⁶ Ashworth A (2009) *Techniques for Reducing Sentence Disparity* in von Hirsch et al *ibid* Chapter 6.2.

⁴¹⁷ Drug Offences Definitive Guideline (2012) p5 for Trafficking, p9 for Supplying p17 for Production, p 23 for Permitting premises to be used

⁴¹⁸ That is heroin and cocaine (hard), amphetamine (medium), ecstasy, LSD and magic mushrooms (soft).

⁴¹⁹ And contrary to the CPS threshold test for custodial sentences

In order to examine the impact of the Act of 2000 and the Sentencing Guideline of 2012, twenty-three Appeal Court drug cases,⁴²⁰ were selected from those heard after the introduction of the former and then the latter. The aim was to examine how the appellate courts have interpreted and applied the ‘three strikes’ provision in s. 110. The analysis is necessarily impressionistic. The cases were examined partly to assess whether the definitive sentencing guideline was that different from the preceding law, including the use of the mandatory sentence.

In terms of the selection of the cases, a search on the Westlaw database was conducted. From s. 110 listed on Westlaw, the ‘key cases’ identified by Westlaw were noted and read. These are the ones analysed in this section. In terms of methodology, it is important to stress that this part is not intended to be an analysis of all aspects of the Court of Appeal’s judgments. Rather, it serves to provide a broad sense of the Court’s approach to those appeals in which appellants have argued that the imposition of the mandatory sentence under s. 110 was inappropriate. It also gives a sense of the Court’s approach to the sentencing guideline. One way in which this thesis could be developed further, in to a PhD, is by a closer study of the cases, including coding them according to offence type, appellants’ demographic characteristics, judge, aggravation and mitigation, and other contextual factors, to the extent that it is possible to identify them.

Did the Powers of Criminal Courts (Sentencing) Act 2000 enhance the justice and the value of sentencing 3rd time Class A drugs traffickers?

Yes, in my opinion it did in the cases of Hickson, Lucas T and Porter. *R. v. Porter D J* (offences 2004 and Appeal 2005) exemplifies how the Court of Appeal has appropriately applied the mandatory sentence for drugs offenders who deal. The appellant ran a small drug distribution organisation involving five people: the appellant, a courier and a driver, a recipient and a supplier. It had been under police surveillance for some time. The Appeal Court’s sentence was 6 years imprisonment. This would have conformed with the 2012 Guideline. The Culpability of the offender would be graded as Leading Role, and the Category of harm between Category 2 and Category 3. The sentence starting point would have been 7 years’ custody. This being irrespective of the Category A seven year minimum for it was the offender’s first offence.

⁴²⁰ These were

(a) after 2000

R v Hickson J [2001] EWCA Crim 1595

R. v Willoughby A S [2003] EWCA Crim 208

R v Hickson J [2004] EWCA Crim 2240

R v Pearce L J [2004] EWCA Crim 2029

R v Kesler A J [2005] EWCA Crim 939

R v Turner J M [2005] EWCA Crim 2363

R v McDonagh M D [2005] EWCA Crim 274

R v Porter D J [2005] EWCA Crim 3474

R v Tafafoul M A [2005] EWCA Crim 2481

R v Farish M J (2006) Attorney General’s Reference (No.6 of 2006) EWCA Crim 1043

R v Lucas T H [2006] EWCA Crim 1362

R v Reid G [2008] EWCA Crim 202

R v Welford J [2008] EWCA Crim 2845

R v Darling J W [2009] EWCA Crim 1610

R v Lucas K [2011] EWCA Crim 2806

(b) after 2012

R v Taylor J O [2012] EWCA Crim 2600

R v Timperley D M [2012] EWCA Crim 1782

R v Goodale G [2013] EWCA Crim 1144

R v Gallone P [2014] EWCA Crim 1140

R v Densham N J [2014] EWCA Crim 2552

R v Chaplin C [2015] EWCA Crim 1491

R v Shucksmith A B [2015] EWCA Crim 843

R v Usherwood W [2018] EWCA Crim 1156

In the cases of Farish, Lucas K, and McDonagh, the Appeal court agreed that the *exceptional circumstances* applied, and the Sentencing Guideline would have come to the same conclusion. R.v. Farish M (2006) Attorney General's Reference (No.6 of 2006) EWCA Crim 1043, is an example: at the Crown Court the offender, having pleaded guilty, he was awarded a 20% exemption of the mandatory 7 year sentence for the 3rd Class A drugs offence. However, as he fulfilled the criteria of section 110(2)(a)&(b), he was tried and sentenced under section 144, with his guilty plea discount being awarded there too. The Appeal Court's decision was that it was inadmissible to award the guilty twice for the same offence. Moreover, the exemptions of section 110(2) (a) & (b) would have applied equally under the 2012 Sentencing Guideline. The sentence awarded in the Appeal Court of 4½ years, as it was in the Crown Court, yet considered too lenient in the Attorney General's reference, was in my opinion correct, by virtue of the criteria outlined in the exemption subsections.

In the cases of Willoughby, Darling and Others, Tafafoul, & McDonagh where the offender was a drug addict *in possession with intent to supply* and was doing so to fund his habit, the so called *Afonso*⁴²¹ type offenders, the Appeal Court's decisions were of poor value, using the criteria of appropriateness and proportionality, and might have better handled under the 2012 Sentencing Guideline.

R v Darling, Weatherston and Punton [offences 2008 Appeal Court 2009] EWCA Crim 1610, were all addicts who were funding their habit by low-level supplying of small quantities of Class A drugs. Darling had committed 27 offences including 11 drugs offences and Weatherston had 48 previous convictions including 4 drugs offences. Punton's offending history was not given in the Appeal Report. The Appeal Court's decision was to uphold the Crown Court's 7 year sentences, (reduced on account of having pleaded guilty) and reduced them further in view of the offences, with the precise reasons not being given.

Under the 2012 Sentencing Guideline the offenders would all have fulfilled the Lesser role of culpability and harm less than Category 4, and would have been sentenced with a Starting Point of 18 months' custody and a Category range of the High level community order-3 years' custody. To what they would have been sentenced can only be surmised, but considering appropriateness and proportionality in these cases, and is clear that neither would apply, and provision with OST, probation and the DRR would probably have been more effective and much less expensive than imprisonment.

Cases which had come to the Appeal Court on account of miscalculations in sentencing were Farish (2006), Lucas T, (2006), Tafafoul (2005), Taylor (2012), Welford (2008), Goodale (2012), Chaplin (2015) and Shucksmith (2015). The miscalculations were not typical of the 2000 Act and would not have been avoided with the 2012 Guideline.

In the case of R. v. Reid G (offence 2007 and Appeal Court 2008), no grounds for the Appeal were given in the report. The offence had been that the offender had offered to provide heroin

⁴²¹ R v Afonso & Others | [2004] EWCA Crim 2342 | Judgment <https://www.casemine.com> › ... › 2004 › September. In his judgement Rose L J said at (3):

'But there is a group of offenders who supply Class A drugs for whom we believe that the level of sentence indicated by Djabit and Twisse, namely in the region of six years following a trial is disproportionately high and we think that some review is called for. These are the offenders who are out of work drug addicts, whose motive is solely to finance the feeding of their own addiction, who hold no stock of drugs and who are shown to have a few retail supplies of the drug to which they are addicted sold to undercover police officers only. An unemployed addict has in practical terms, three means of financing his or her addiction: prostitution, theft, or supply to others and sentencers should take into account that in consequence his or her culpability is likely to be less than that of many other suppliers'

With the introduction of the Drug Offences Sentencing Guideline (2012), the Afonso concept was superseded through the judgement in R v Dyer and others [2013] EWCA Crim 2114

and cocaine to an undercover police officer, who had paid him £20 in advance. However, when Reid returned, but without the drugs, for he claimed that he had recognised him as an officer, he was arrested for pretending to possess drugs and for intending to steal £20 from the officer. He was a long-standing addict, with 100 other convictions and 3 previous offences of offering to supply Class A Drugs. The Crown Court sentenced Reid to 7 years in prison reduced on the plea of guilty. The Appeal Court quashed the sentence, and substituted 12 months in prison, abated on account of the time spent on remand, on a charge of deception.

In terms of the conclusions, we can draw on the mandatory sentencing for 3rd Class A drug trafficking offences, it is acknowledged that the law must be obeyed as per s. 313 (the current legislative provision in the Sentencing Act 2020, which replaces s. 110 of the PCCSA) with the objects of punishing the major traffickers. Yet few of the above really were of that category, moreover those listed above deserved sentencing, but seven years seems manifestly excessive for the limited culpability and harm that some of the case facts involved.⁴²²

In my contacts with chronic addicts,⁴²³ incarceration justified neither the offender's culpability, for he was ill, nor the State's expense of the imprisonment. In these cases, the severity and cost of the sentence had been disproportionate to the gravity of the offence,⁴²⁴ with repeated re-offending reflecting badly on the failure of offender rehabilitation.⁴²⁵ The clause that enables judges to avoid imposing the mandatory sentence, in the Powers of Criminal Courts (Sentencing) Act 2000 section 110(2)(a)⁴²⁶ should have been used more often, and the offenders awarded suspended non-custodial sentences, ordered to attend drug detoxification under probation, sustained supervision and support. Research shows its effectiveness.⁴²⁷

⁴²² St Ives Chambers (2020) *The Sentencing Act 2020*
<https://www.stiveschambers.co.uk/content/2020/12PDF>

In explaining the reasons for the introduction of the 2020 Act, the following statement appears to concur with the findings on the Appeals examined in this chapter.

'A study from 2017 found over a third of sentences that were considered by the Court of Appeal involved an unlawful sentence of some kind. Moreover, the Law Commission Report on the Sentencing Code revealed there was a disproportionate number of legal errors and unlawful sentences being imposed by judges. A concerning statistic from 2013 showed that 95 of 262 randomly sampled cases before the Criminal Division of the Court of Appeal involved an unlawful sentence. These issues have stemmed from the overarching problem that the law was too complex.'

⁴²³ Personal opinion: during my time as a Disability Assessor for the DWP I saw very many clients claiming benefits who had severe illnesses as well as being addicted to drugs.

⁴²⁴ 4.5. The Coroners and Justice Act (2009) s 125 *Sentencing guidelines: duty of court* states
 (11) *When exercising functions under this section, the Council must have regard to the following matters (e) the cost of different sentences and their relative effectiveness in preventing re-offending.*

⁴²⁵ in my opinion, but not presumably the line of reasoning of the Appeal Court judges, who would have considered the correctness of the sentencing tariffs, yet not taking into account their ineffectiveness

⁴²⁶ Powers of Criminal Courts (2000) section 110(2)(a) *The court shall impose an appropriate custodial sentence for a term of at least seven years except where the court is of the opinion that there are particular circumstances which—*

(a) relate to any of the offences or to the offender; and

(b) would make it unjust to do so in all the circumstances

⁴²⁷ Csete J (2007) *What the World Can Learn from Drug Policy Changes in Switzerland*
www.countthecosts.org/sites/default/files/From_the_Mountains.pdf and see Fischer B, Schlechter M. Strang J, Oviedo-Joekes E, Blancken P, Haasen C, Rehm J, and van den Brink W (2007) *Heroin-assisted Treatment (HAT) a Decade Later: A Brief Update on Science and Politics* and see also

Strang J, Groschka T, Metrebian N, (2012) *EMCDDA Insights into new heroin-assisted drug treatment*. An update which showed that criminal activity of participants decreased by 60%.

Wright V (2010) *Deterrence* ibid at page 7 observes that non-custodial sentences have a 7% lower recidivism rate compared with short custodial sentences.

This outline of some relevant Court of Appeal decisions is limited in that it does not purport to provide a definitive analysis of the legal issues relating to the mandatory minimum sentence or the application of the sentencing guideline for drugs offences. We know that, in practice, the guideline may have somewhat ameliorated the impact of the mandatory minimum for three drugs trafficking offences: the guideline sets out factors that the court should take into account when assessing whether there are exceptional circumstances justifying the non-imposition of the seven year minimum term. Where the seriousness of the combined offences is such that it falls below the custody threshold, or where there has been a significant period of time between the offences, the court may consider it unjust to impose the statutory minimum sentence. In terms of offence-related factors, the court should consider any strong personal mitigation; whether there is a realistic prospect of rehabilitation; whether custody will result in significant impact on others. What remains unclear, and where there is a need for further research, is how courts are interpreting and applying the guideline in this respect. A further research study is needed to collate detailed information on those cases in which the court is obliged to consider imposing the mandatory sentence, to identify factors that lead to its imposition. That would reveal, amongst other things, the extent to which courts feel the definitive sentencing guideline adequately provides them with the appropriate range of sentences for the offending behaviour covered by the mandatory provision.

3.7 Mental Health and Mental Disorder: The Mental Health Act 1983 and Sentencing Act 2020 section 232

Mental ill-health can lead to drug use and to addiction, and drug use can lead to mental illness; there is a close interlinkage. If the judge believes the defendant to have a mental health problem, he may seek the opinion of a psychiatrist⁴²⁸, but does not have to be constrained by it, and may consider the offence on its own features. Yet he will need to consider and take into account⁴²⁹ the extent to which the mental disorder may have contributed to the offence, what the defendant's need for treatment is, on the punishment which might be ordered, and the need for public protection⁴³⁰. Learning difficulties and personality disorders⁴³¹ of a defendant are not deemed to be mental disorders in the legal sense, unless very severe

⁴²⁸ Sentencing Act 2020 s232 *Additional requirements in case of offender suffering from mental disorder*

⁴²⁹ Sentencing Act 2020 section 30 *Pre-sentence report requirements*

⁴³⁰ Sentencing Act 2020 section 59 *Sentencing Guidelines* (3)

'Nothing in this section or section 60 or 61 is to be taken as restricting any power (whether under the Mental Health Act 1983 or otherwise) which enables a court to deal with an offender suffering from a mental disorder in the manner it considers to be most appropriate in all the circumstances.'

⁴³¹ . Department of Health, (2011) *'Positive Practice, Positive Outcomes'* The D of H guidance is

'What is a learning disability? ...The Department of Health defines a learning disability as: - A significantly reduced ability to understand complex information or learn new skills (impaired intelligence) - A reduced ability to cope independently (impaired social functioning) - A condition which started before adulthood (18 years of age) and has a lasting effect. Department of Health, 'Valuing People' White Paper (2001) Whereas, 'a specific learning difficulty is defined by specific problems processing certain types of information. It does not affect the overall intelligence ('IQ') of a person. It is common for a person to have more than one specific learning difficulty and/or other conditions'

<https://www.gov.uk/government/publications/positive-practice-positive-outcomes>

and also see Talbot J (2009) *Fair Access to Justice?* - Prison Reform Trust This estimates that between 5% and 10% of the adult offender population has a learning disability

www.prisonreformtrust.org.uk/portals/0/documents/fairaccesstojustice.pdf

aggression or irresponsibility is involved.⁴³² They may be taken in mitigation.⁴³³ Drug or alcohol addicts⁴³⁴ are not deemed to be mentally ill merely by virtue of having an addiction.⁴³⁵

Significant numbers of prisoners are mentally affected, and a report was submitted the government,⁴³⁶ and that further examination would be reported. This showed that progress has been made,⁴³⁷ though insufficient.⁴³⁸ Table 9 shows the recent state of mentally disordered offenders in prison.

	Mental illness in year before imprisonment	Personality disorder	Anxiety or depression	Attempted suicide at some time
Men	16%	62%	23%	21%
Women	26%	57%	49%	46%

Table 9 Mental conditions of people in prison. source Prison Reform Trust2017⁴³⁹

3.8. The pre-sentencing report⁴⁴⁰ for the court includes a statement of the defendant's use or addiction to drugs. Apart from drug-related offences, often crimes are committed by drug

⁴³² Mental health Act (1983) section(2A) *But a person with learning disability shall not be considered by reason of that disability to be (a)suffering from mental disorder for the purposes of the provisions mentioned in section (2B) below; or (4). In subsection (2A) above, "learning disability" means a state of arrested or incomplete development of the mind including significant impairment of intelligence and social functioning.*

⁴³³ Drug Offences Definitive Guideline (2012) pp7,14 et al *Factors reducing seriousness or reflecting personal mitigation: Mental disorder or learning disability*

⁴³⁴ Mental health Act (1983) section (3) Dependence on alcohol or drugs is not considered to be a disorder or disability of the mind for the purposes of subsection (2)

⁴³⁵ Talbot J (2009) *ibid 75% of adult prisoners have a dual diagnosis (mental health problems combined with alcohol or drug misuse).*

⁴³⁶ The Bradley report (2009) *Lord Bradley's review of people with mental conditions*
<http://lx.iriss.org.uk/content/bradley-report-lord-bradleys-review-people-mental-health-problems>

⁴³⁷ Durcan G, Saunders A, Gadsby B & Hazard A (2014) *The Bradley Report five years on. An independent review of progress to date and priorities for further development*
www.mentalhealthchallenge.org.uk/library-files/MH... Significant progress has been made in

(a) *Prevention and early intervention: when people come into contact with police or when the police are called to deal with emergencies under the Mental Health Act.*

(b) *Police custody: The development of liaison and diversion services*

(c) *Courts: Liaison and diversion services also support people in courts and can bring substantial benefits, for example in preparing court reports.*

(d) *Prisons and resettlement: Prison mental health services are developing a broader focus despite the absence of a national blueprint. Responsibility for prison healthcare now lies with NHS England, which has the opportunity to develop a more standardised model for mental health support in prisons.*

(e) *There has been some progress in improving access to hospital care for prisoners requiring specialist treatment.*

⁴³⁸ Gov pubs (2021) *Justice Committee calls for root and branch reform of prison mental health support.*
<https://committees.parliament.uk/committee/news/j...>

'Roughly 10% of the prison population are receiving treatment for mental illness, however as many as 70% may be suffering from mental health issues. The Committee says that too many offenders are sent back into prison because community orders with mental health requirements are unavailable in many areas.

The Committee heard evidence that 1 in 12 prisoners do not receive a health screening appointment within 24 hours of arrival in prison, and that BAME prisoners are less likely to have a mental health condition identified than white prisoners.'

⁴³⁹ Prison Reform Trust (2017) *Mental health in prisons*
prisonreformtrust.org.uk/WhatWeDo/ProjectsResearch/Mentalhealth

⁴⁴⁰ Kenton O & Moore R (2020) *The quality of pre-sentence information and advice provided to courts* Probation services - Criminal Justice Inspectorates

users to pay for their drugs.⁴⁴¹ The court may order the offender to attend rehabilitation,⁴⁴² and further sanctions imposed if the offender fails to comply.

3.9. Why are there so many offences and so few prosecutions?

3.2 million people take drugs⁴⁴³ annually in England and Wales, yet there are only 106,862 drug offences reported.⁴⁴⁴ What has happened to the other 3.09 million offenders? Why have they not all been prosecuted and sentenced?⁴⁴⁵ – The answer is the gradual decriminalisation of drugs over the past 30-40 years,⁴⁴⁶ as described in Chapter 2 and the reduction in numbers of Stops-and Searches for drugs as described. In the late 1970's and early 1980's the numbers arrested for possession rose sharply. In 1986 drug-related stops-and-searches in the UK were 32,500 and arrests 6,200. In 2006/7 there were 406,500 stops-and-searches and 33,000 arrests.⁴⁴⁷ Total stops-and-searches (for all reasons but mainly for suspicion of drugs) in 2013 were 1,100,000 with 9% arrests of doubtful cost-effectiveness, in the opinion of the College of Policing,⁴⁴⁸ confirmed by HM Inspectorate of Constabulary,⁴⁴⁹ and later in 2019.⁴⁵⁰ The government then initiated a review of the matter, so for police officers on street duty:

*'There will be a presumption in favour of a verbal warning for adults found in possession of quantity of cannabis deemed to be for personal use. However, individuals must be arrested if the amount of cannabis, its packaging or other circumstances suggest the possibility of an intention to supply.'*⁴⁵¹

⁴⁴¹ Andrew A (2014) *Britain divided: how we really feel about drugs* The Guardian quoting Home Office. <https://www.theguardian.com/.../-sp-britain-divided-how-we-really-feel-about-drugs>

⁴⁴² Sentencing Act 2020 c. 17 Schedule 9 Community orders and suspended sentence orders: requirements Part 2 Rehabilitation activity requirement

⁴⁴³ Black C (2020) *Report* quoting ONS 2019 numbers of users of illegal drugs
Cannabis 2,572,000 LSD 119,000 Amphetamines 188,000 Steroids 62,000
Ecstasy 524,000 Ketamine 261,000 Opiate addicts 341,576 (numbers of users were not given)

⁴⁴⁴ EMCDDA (2018) *Statistical Reports 2017 UK*

⁴⁴⁵ Office of National Statistics (2017) The crime statistics were
141,714 drug offences committed. Of these,
25,175 offences were for the trafficking of drugs and
116,539 offences were for possession.

⁴⁴⁶ BBC (2019) *SNP formally backs decriminalisation of drugs*: www.bbc.co.uk/news/uk-scotland
Government publications (2019) *Problem drug use in Scotland*
publications.parliament.uk/cmselect/cm/scotaf

'Professor Catriona Matheson, University of Stirling: decriminalisation is a pragmatic and an effective response to problem drugs'

Abbott D (2019) *Labour to 'consider legalising all drugs'* Independent Newspaper
www.Independent.co.uk/UK/politics

⁴⁴⁷ van Beuren G & Woolley S *Stop and think: a critical review of the use of stop and search powers in England and Wales* (2011) - Equality and Human Rights Commission.
www.equalityhumanrights.com/sites/default/.../stop_and_think_again.pdf

⁴⁴⁸ Quinton P, Tiratelli M & Bradford B (2013) *Does more stop-and-search mean less crime?* College of Policing, Universities of Manchester and Oxford

⁴⁴⁹ HMIC (2014) *Stop and search powers: are the police using them effectively and fairly?*
www.justiceinspectors.gov.uk/hmic

'The report concluded that stop and search powers were rarely targeted at priority crimes in particular areas and there was very little understanding in forces about how the powers should be used most effectively and fairly to cut crime. Of the records HMIC examined in 2013, 27 percent did not include sufficient grounds to justify the lawful use of the power. Fewer than half of forces complied with the requirements in Code A of the Code of Practice governing the use of stop and search powers'

⁴⁵⁰ Conservative drug policy reform group (2019) *Changes in UK Policing Attitudes to Drug Offences*
static1.squarespace.com/static/.../Changes+in+Policing

'The administrative and financial burden on police forces of processing cannabis-related offences is substantial. In 2015, more than a million police hours were spent on processing cannabis-related offences, and it has been estimated that taxpayers pay at least £13.5 million for the cost of police forces locking up people for 12 hours or more after arresting them for possession.'

⁴⁵¹ May T (2014) *Stop and search: Comprehensive package of reforms of stop and search*. Speech in House of Commons 30th April 2014 <https://www.gov.uk/.../stop-and-search-comprehensive-package>

The other aspect is that drug-suspected stops-and-searches appear racially discriminatory;⁴⁵² black people being stopped-and-searched at 8.7 times the rate of white people. Yet findings show the percentage of black people reported to use drugs is similar to that of white people.⁴⁵³ It is little wonder then that there is widespread distrust of the police among minority communities where stop-and-search is often seen as a divisive tool employed to harass more often than to investigate.⁴⁵⁴

3.10. *De facto* partial decriminalisation.

Several police forces no longer carry out stops-and-searches for suspected cannabis possession for personal use or small scale growing.⁴⁵⁵ The fall in numbers⁴⁵⁶ arrested for possession implies *de facto* decriminalisation;⁴⁵⁷ possession did not warrant the criminalisation of young people.⁴⁵⁸ In 2018 it was reported cannabis ‘members only’ clubs were opening,⁴⁵⁹ approved by the police.⁴⁶⁰ The NPCC recommended in 2019 that it was for individual Chief Constables

⁴⁵² Woolley S (2021) *Our drug laws are racist, and doctors must speak out* (BMJ September 2021)

Lord Woolley’s essay outlines all the many examples of racial discrimination in stops-and-searches of black people. He does not however examine *why* it is that the police is racially discriminatory.

⁴⁵³ Stevens A (2011) *Drugs, Crime and Public Health* p96 he noted that there was no clear reason apparent to him for the apparent ethnic discrimination, and that rates of possession are almost the same in all ethnic groups. Stops-and-searches were strongly associated with racial discrimination in the police force. Black/White disproportion with drug offences is significant and whatever the reason, the ethnic discrimination led to significant disharmony between the police and the community, and the seemingly biased stops-and-searches may well have contributed to the Brixton riots of 2011. see also

Prasad R (2011) *Reading the Riots: ‘Humiliating’ stop-and-search a key factor*. Guardian Newspaper
Dodd V (2011) *Police up to 28 times more likely to stop and search black men; black people six times more likely to face drug arrest*. Guardian Newspaper

⁴⁵⁴ HM Chief Inspector of Constabulary (2017) *State of Policing: The Annual Assessment of Policing in England and Wales* and see Williams P (2020) *Community empowerment approaches — The key to overcoming institutionalised racism in work with black, Asian and minority ethnic people in contact with the criminal justice system* [www.clinks.org/publication.community-empowerment](http://www.clinks.org/publication/community-empowerment)

⁴⁵⁵ Paton C (2015) *Cannabis: Derbyshire, Dorset and Surrey police will no longer seek to arrest pot growers and smokers* www.ibtimes.co.uk/cannabis-derbyshire-dorset-surrey...

⁴⁵⁶ HMIC (2014) *Crime recording: A matter of fact: an interim report of the inspection of crime data integrity in police forces in England and Wales* www.hmic.gov.uk Possession started not to be recorded in police audits for the following reason as explained at paragraph 1.7. ‘A factor of public concern, and a probable cause for scepticism about national crime figures, is the culture in the police – as in other major government organisations – of pursuing targets and being under pressure to demonstrate good performance. In the Glossary it is made clear that if there is no victim, then there is no crime, at least not one to be recorded: ‘Glossary the test applied to determine whether an event occurred according to whether, on the evidence, the occurrence of the event was more likely than not; the HOCR state that: “An incident will be recorded as a crime (notifiable to the Home Secretary) for offences against an identified victim’

⁴⁵⁷ Tapper J (2018) *Police ‘decriminalising cannabis’ as prosecutions fall away* Guardian Newspaper
‘Last year only 15,120 people in England and Wales were prosecuted for possession of cannabis, a fall of 19% since 2015. Police issued cautions to 6,524 people in 2017 – 34% fewer than two years before. Police forces are in effect decriminalising cannabis’

⁴⁵⁸ James E (2019) *Green Light Police chief is letting off cannabis users as warnings are ‘disastrous for their life chances’* Sun Newspaper 6th April 2019

West Midlands Chief Constable Dave Thompson told MPs he made the change to the force’s policy on cannabis because he does not want to ‘criminalise lots of young people’

⁴⁵⁹ BBC News (2018) *Members-only ‘cannabis lounge’ opens in Ipswich*

BBC News 19th Sep 2018 ‘There are more than 70 cannabis clubs across the UK’

⁴⁶⁰ Price S (2020) *Police boss says UK should regulate cannabis and allow home grows* Medical Cannabis Network. Mr Arfon Jones, the Police and Crime Commissioner for North Wales has long advocated the legalisation of drugs, beginning selling cannabis in pharmacies, and assist those with previous drug convictions to help them back into work. “People should be allowed to grow their own cannabis the legalisation of drugs would help to reduce organised crime. Cannabis should be sold in pharmacies, and those with previous drug convictions assisted to help them back into work. My view is there are probably hundreds of thousands of people in this country who grow cannabis in their own homes now. They’re not harming anybody else and there is no reason why they should be punished through the criminal justice system.

“What I am clear about is that chasing and prosecuting recreational users of cannabis should not be a police priority when they are causing absolutely no harm to anybody else”

www.health.europa.eu/police-boss-says-uk-should-reg

whether a suspected drug possessor was to be apprehended.⁴⁶¹ ‘Community Resolution’ is used by many, thus avoiding gaining a criminal record, a proportionate resolution.⁴⁶² The response to possession, and possession-with-intent-to-supply (by addicts) resulted in the formation of Diversion Schemes described in Chapter 7,⁴⁶³ and eight Police Forces are presently implementing or developing such programmes.⁴⁶⁴ &⁴⁶⁵

3.11. Conclusions.

This chapter was concerned with sentencing; it described the drug laws relevant to sentencing offenders, followed by a discussion on its appropriateness. Is sentencing appropriate for a drugs offender? A trafficker causes harm, or at least potential harm, as explained in chapter 2. Moreover, drugs are often noxiously adulterated. The trafficker and supplier have no interest in drug purity, his motive being only profit. It is appropriate to sentence drugs traffickers, and where proportional, severely. Where does this fit in? The conclusion is that it was appropriate to sentence traffickers but not users of drugs. The Drug Offences Sentencing Guideline procedure was outlined. It was pointed out that monitoring was not carried out as required,⁴⁶⁶ thereby rendering impossible the accurate assessment of the effectiveness of sentencing. Attention was given to the mental health problems of drug users. Finally, the discrepancy, between the numbers of drug offences and offenders being sentenced, was explored. The finding was that there has been a gradual decriminalisation of drugs over the past 30-40 years⁴⁶⁷ and that for drug users there has in effect developed a degree *de facto* decriminalisation. A court sentence, if the offender is found to be guilty, can be either a suspended sentence, or a non-custodial sentence or custody and this will be described in the next chapter.

⁴⁶¹ Doughty S (2019) *Individual chief constables can now decide whether to arrest and charge, caution or warn those caught with the drug – or simply let them go* Daily Mail 7th April 2019

⁴⁶² Hymas C & Kirk A (2020) *Cannabis at risk of being 'decriminalised' as police let users off*. Daily Mail ‘...community resolutions have been used ten times as often in the past three years’

⁴⁶³ Busby M (2019) *You can't arrest your way out of record drug-related deaths say the police* Guardian Newspaper 24th April 2019

‘...in what is effectively *de facto* drug decriminalisation, people caught in possession of personal amounts of controlled substances in a number of police areas are being directed towards treatment and education services through “diversion schemes”, rather than facing prosecution’.

⁴⁶⁴ Conservative drug reform group (2019) *Changes in UK Policing Attitudes to Drug Offences* static1.squarespace.com › static ›

⁴⁶⁵ Durham Police which initiated the principal Diversion Scheme, gained approbation for it from HMIOFC’s annual inspection and was awarded a grading of ‘Outstanding’

⁴⁶⁶ 4.5. The Coroners and Justice Act (2009) s 128 *Monitoring*

⁴⁶⁷ 2.18. *Is there de jure criminalisation and de facto decriminalisation?*

Chapter 4 Sentencing and Punishment of Drug Offenders.

4.1. Definition of sentencing.

In law the final act in a trial is the judge (representing society) sentencing the defendant, if guilty. The act of sentencing, is through:

- a) Censure (defined at 1.8.), and
- b) Statement of punishment, which may be custody, a community sentence, a fine, the confiscation of assets, a combination of penalties or deferred.

4.2. Censure and Punishment of drug offenders

Censure is the State's condemnation of the offender, communicating to him its collective disapproval of his actions. For some desert theorists,⁴⁶⁸ censure reflects proportionality: the State communicating a commensurate degree of condemnation to the offender. The effectiveness of Censure is assessed through its impact upon the offender: whether he expresses remorse or indicates the wish to restore the harm or damage caused.⁴⁶⁹ The other purposes of censure do not concern the offender.⁴⁷⁰

Punishment is ordered as described above at 4.1(b), as in the Sentencing council's Drug Offences Definite Guideline, fines may be imposed and assets confiscated, particularly apposite in the case of drug trafficking offenders.

One of the three criteria for the definition in this thesis of the value of Sentencing Drugs Offenders is its effectiveness. That will be measured through the rehabilitation of prisoners with an appraisal of five annual reports by Her Majesty's Inspectors of Prisons.

4.3. Punishment and rehabilitation of drug offenders in custody

There are two main types of rehabilitation: firstly, general: educational and vocational rehabilitation, to retain skills, develop new ones, or to improve numeracy and literacy. These are not specific to drug offenders and so will not be discussed further. Secondly there is the specific rehabilitation (detoxification) for offenders with drug problems and that will be the subject of the discussion.

First to be noted are the numbers of drug offenders in prison.⁴⁷¹ Approximately 55% of all convicts have a drug problem,⁴⁷² 17% are there on account of drug trafficking offences and 3% have been convicted for drug possession offences. Most will have come from the Crown Courts; others having defaulted on community orders. 75,000 people with drug problems enter prison each year,⁴⁷³ and additionally 37% of male prisoners obtain drugs in prison as

⁴⁶⁸ von Hirsch A et al (2009) *ibid* pp 116 et seq *Censure and Penal Desert*

⁴⁶⁹ Zedner L (2009) *Reparation and Retribution: are they reconcilable?* Chapter 5.3 in von Hirsch A et al *ibid* '...less tangible but none the less important is what we might call "symbolic reparation". This might be an apology made by the offender to the victim or other attempts at reconciliation.'

⁴⁷⁰ See 1.8. *Censure addressed to others*

⁴⁷¹ Government publications (2020) *Percentage of sentenced prison population by offence type*

⁴⁷¹ Government publications (2020) *Percentage of sentenced prison population by offence type*
<https://data.justice.gov.uk/prisons>

⁴⁷² Perraudin F (2020) *Proportion of UK prisoners with drug problem doubles in five years.* www.theguardian.com/society/jan/proportion Guardian Newspaper interview with the prisons minister, Rory Stewart

⁴⁷³ Patel of Bradford (2010) *The Patel report: Reducing drug-related crime and rehabilitating offenders* Department of Health and Social Care with 80% reporting some misuse. Levels of drug dependency for males were between 43% and 51% and for females between 41% and 54%.

do 31% of women prisoners.⁴⁷⁴ – HMIP’s estimate is similar.⁴⁷⁵ For prisoners undergoing drug treatment, no distinction is made whether they were sentenced for drug or other offences. This makes it difficult to carry out a treatment follow-through or outcome assessment of specifically drug-offence prisoners.⁴⁷⁶ – Rehabilitation is in fact a servo system, having three components: input, procedure and outcome, where the effectiveness of the latter affects the procedure.⁴⁷⁷

The preparation of a prisoner for rehabilitation is influenced by his mental health, which may require treatment,⁴⁷⁸ for there may be dual diagnosis,⁴⁷⁹ and a low level of education⁴⁸⁰. Information is gathered on his skills and intentions for work after prison with the Offender Assessment System (OASys).⁴⁸² – Then arrangements would be made for course attendance and modified Herzberg⁴⁸³ principles could be used. The rehabilitators must be

⁴⁷⁴ Ntanos L (2019) in *Fifty facts everyone should know about crime and punishment* p184 et seq
Treadwell J & Lynes A Bristol University Press ‘Prisoners on day release would bring them in, or visitors did, sometimes it was the action of corrupt prison staff, or the drugs were thrown over the prison walls by accomplices outside’.

⁴⁷⁵ Gov. uk (2018) *Prison health*. House of Commons Health and Social Care Committee (evidence from HMIP) at paragraph 77 states that

‘Many prisoners report having a drug problem on arrival (42% of women and 28% of men). Worryingly, 13% of men and 8% of women reported they had developed a problem with illicit drugs while in prison.’

<https://publications.parliament.uk/cmhealthPDF77>.

⁴⁷⁶ It would be difficult to do so, though not impossible, and in fact is not done.

⁴⁷⁷ Servo system in rehabilitation of drugs offenders.

The expression is used in mechanics and in management, and can equally well be employed in understanding treatment, or in this context, rehabilitation.

There are three components:

- (1) the input, that is the quality and quantity of the prisoners,
- (2) the quality of the rehabilitation procedures, that is their relevance to the objectives and the quality of the persons providing them
- (3) the effectiveness of attainment of the aim.

Each of these needs to be defined in the prison setting.

- (1) prisoners would be assessed though the OASys, for the criminogenic background to their offences, for is it those matters which need to be remedied, either through general rehabilitation, drug detoxification, or social interventions.
- (2) procedures; are they relevant to the forgoing, are they being adequately provided, and are the rehabilitators trained and competent, are all matters which need to be assessed.
- (3) the effectiveness is measured by how well the aim, (which has to be defined) is being achieved.

The servo system thus implies that the measure of achievement will influence (1) and (2). Namely, is the assessment being done correctly, and then are the rehabilitation procedures satisfactory? It is a continuous feed-back from rehabilitators assessing the outcomes, and acting on what they find, and participants assessing the rehabilitators and rehabilitation for competence and relevance. Finally (3) will be achieved, and because of the continuous feed-back, should become more and more effective.

⁴⁷⁸ Patel of Bradford (2010) *ibid* mentions 10% of all prisoners have a serious mental health problem. Of prisoners who are drug users 74.5% have mental health problems

⁴⁷⁹ 2.3. *Drug action on the brain* and see footnote Addiction Centre (2020) *Obsessive Compulsive Disorder and Addiction* where the close association is described between OCD and drug addiction

⁴⁸⁰ Creese B (2016) *Major study finds poor literacy and numeracy among prisoners*. Education Media Centre educationmediacentre.org/newsreactions/majorstud.

The study revealed the poor literary and numeracy skills of prisoners

11 year’s literacy 11 year’s numeracy

Prisoners	50%	43%
General Population	86%	50+%

⁴⁸¹ Shannon Trust, voluntary organisation teaching reading to prisoners .The programme was piloted at HMP Wandsworth in 2001, and now works with all prisons in England, Wales and Northern Ireland, reaching thousands of learners and mentors each year.

⁵⁸⁹ Government Publications (2019) *OASys Risk assessment of offenders, Offender Assessment System*

⁴⁸³ Kuik A (2018) *The two-factor theory of motivation by Frederick Herzberg*
<https://www.toolshero.com/Psychology/Theories of Motivation>

good teachers. They should not resort to coercion, but firm paternalism⁴⁸⁴ might be necessary, considering the prisoner's rights and autonomy.⁴⁸⁵

Upon arrival a prisoner is screened for physical and mental health, substance misuse and risk of self-harm. The first of these is significant for many drug addicts have serious health conditions.⁴⁸⁶ A substance misuse assessment, conducted by a health professional experienced in substance misuse management, follows a positive drug test from the initial healthcare screen. A decision is then made about the prisoner's treatment needs which is carried out through the National Treatment Agency for Substance Abuse (NTA) This was established by the government in 2001 to coordinate the health programme for drug-misuse offenders, and to ensure consistency in prisons as the Integrated Drug Treatment System (IDTS) working with the National Offender Management Service and with the Ministry of Justice. It provides counselling, assessment, advice, referral and through-care service. (CARATS). 'Through-care' service implies the planned continuity of care when the offender is released. The ACMD 2019 report was disparaging about its effectiveness,⁴⁸⁷ pointing out that there is always a chance of relapse and repeated after-care in psychological reinforcement is needed for continuing care by a GP or local detoxification centre.⁴⁸⁸

There are three elements of treatment for drug addicts, Pharmacotherapy, Psychotherapy and Support Schemes. Addicts are either primary drug offenders, or have addiction secondary to other offences; the treatment is the same for both. First, pharmacotherapy. Stabilisation⁴⁸⁹ has first to be achieved, and when the therapist deems it safe to start reducing it; detoxification, psychotherapy, and support therapy follow. Drug-reduction programmes (detoxification) may vary from a few weeks to many months or years and abstinence never achieved. Timing of dose reductions or the duration of the treatment vary.⁴⁹⁰ Concurrent group and support therapy may be used.

⁴⁸⁴ see 3.2. The Argument for Prohibition and footnote *Paternalism*

⁴⁸⁵ Rotman E (1986) *Do Criminal Offenders have a constitutional right to refuse?* [https://core.ac.uk > download > pdf.](https://core.ac.uk/download/pdf) *The author's reasoning expresses a coercive concept of rehabilitation may be opposed against the basis of a prisoner's inherent rights*

⁴⁸⁶ such as hepatitis, AIDS, ulcerated limbs and thrombosed blood vessels (from injecting), and may need not only individual treatment, but a measure of barrier care on account of their illnesses being transmittable to others. Mental ill-health may be a particular problem (see 4.7. either a priori or as a result of the addiction and may well need psychiatric care before treatment starts. See also

Black C (2021) *Review of drugs: phase two report* by Professor Dame Carol Black, where she comments of the importance of this. [https://www.gov.uk > ... > Drug misuse and dependency](https://www.gov.uk)

⁴⁸⁷ ACMD (2019) Report on Custody-Community Transitions (CCT) Letter to Home Secretary 12 June 2019 *This revealed that recent research showed the 'pick-up' of drug offenders having gone through-the-gate was very poor, negating the drug rehabilitation which they had received in prison. Proper and firm management should prevent this.*

⁴⁸⁸ Black C (2021) *Review of drugs: phase two report* by Professor Dame Carol Black where she comments of the importance of this and emphasises the importance of monitoring it. [https://www.gov.uk > ... > Drug misuse and dependency](https://www.gov.uk)

⁴⁸⁹ Stabilisation implies giving prescribed medications in order to assuage an addict's needs, thereby enabling him to reach a psychological state of peace. Once that has been achieved, his thoughts should be clear enough to engage with psychotherapy. Methadone, buprenorphine, Lofexidine or Naltrexone are the opiate substitutes normally used.

⁴⁹⁰ Maintenance therapy implies keeping addicts on prescribed drugs for as long as is necessary and safe (in the opinion of the therapist and patient) before starting detoxification treatment. This is one of the 'through-the-gate' problems; an addict on maintenance therapy, may, on discharge from prison, not obtain the drugs that he needs, which can precipitate a dangerous medical crisis for him. See also Gonzales M (2015) *How long does rehab take?* [https://www.drugrehab.com > treatment > how-long-does-rehab-take.](https://www.drugrehab.com)

'The length of rehab varies on a case-by-case basis. Brief treatment involving detox, therapy and supportive care may be effective for some people but treating substance use disorders is a complex process that could last years. While it may seem desirable to get through rehab as quickly as possible, research shows that longer stays in rehab lead to lower relapse rate.'

Second, psychotherapy. The procedures usually employed are motivational interviewing⁴⁹¹ and cognitive behavioural therapy,⁴⁹² which aim to change the behaviour of a drug addict. Third, support schemes. The ones most used are: The Therapeutic Community Scheme, the 12 Steps Scheme and Group Support.⁴⁹³ The Scheme has provided good positive empirical conclusions.⁴⁹⁴

Abstinence is generally accepted to be the target⁴⁹⁵, followed by a prolonged period of rehabilitation, when support therapies may be needed. If then relapse has been avoided for three years, evidence suggests there is still a 34% chance of it happening, which if the client is drugs free reduces to 14%.⁴⁹⁶

Major improvements in drug care in prisons were reported in 2007,⁴⁹⁷ and a further report in 2010⁴⁹⁸ recommended closer interdepartmental integration, improving continuity of care between prison and the outside community and clearer commissioning of services based upon targets and outcomes. The Parliamentary Home Affairs Committee in 2012⁴⁹⁹ stated that good progress was being made with treatment of drug addicts in prison; random drug testing had shown a 68% fall in positive tests over the same time span and reoffending of drug misusers had fallen 13% in the years 2001-2006. The National Offenders Management Service reported that for the year 2012-13 prison treatment course starters numbered 3675, and satisfactorily completed were 3058.⁵⁰⁰ More recent reports do not comment on the outcome of treatment of drug addicted prisoners,⁵⁰¹ and on the whole recent reports have been disappointing.⁵⁰² There is clearly room for improvement.⁵⁰³

⁴⁹¹ motivational interviewing *Five Principles of Motivational Interviewing*

Express empathy through reflective listening.

Develop discrepancy between clients' goals or values and their current behaviour.

Avoid argument and direct confrontation.

Adjust to client resistance rather than opposing it directly.

Support self-efficacy and optimism.

⁴⁹² cognitive behavioural therapy *focuses on changing the automatic negative thoughts that can contribute to and worsen emotional difficulties, depression, and anxiety. These spontaneous negative thoughts have a detrimental influence on mood.*

⁴⁹³ The 'Therapeutic community' is established as a participative, group-based approach, to treat the effects of mental illness and substance abuse. Therapeutic Communities provide prisoners with a range of therapy so they can understand and address their offending behaviour and live with their peers and staff.

The Twelve Steps Scheme provides mental and moral strengthening for people who have achieved abstinence, with the intention of maintaining it. It works by guiding abstainers through a graduated system of promises of self-commitment.

⁴⁹⁴ UK Addiction Treatment Centres (2020) *How 12-Step Therapy Works*

<https://www.ukat.co.uk/12-step-therapy>

⁴⁹⁵ abstinence is the easily measurable target, but it is simplistic to leave it there. Other aims are a return to 'normal' life, to family, to employment and full integration into the community.

⁴⁹⁶ Melemis S M (2015) *Addiction: Relapse Prevention and the Five Rules of Recovery*
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4553654>

⁴⁹⁷ Price Waterhouse Coopers (2007) *The role of drug treatment in tackling crime.* National Treatment Agency
www.nta.nhs.uk/uploads/nta_criminaljustice_0809.pdf

⁴⁹⁸ Patel of Bradford (2010) *ibid*

⁴⁹⁹ Parliamentary Home Affairs Committee (2012) item 190 *Drug Addiction Treatment in Prison.*

⁵⁰⁰ National Offender Management Service (NOMS) *Annual Report 2012/13: Management Information for the Ministry of Justice* page 34 <https://www.gov.uk/government/uploads/.../mi-addendum.pdf>

⁵⁰¹ Ministry of Justice (2019) *HMPPS Annual Report and Accounts 2017-18*
<https://www.gov.uk/government/uploads/.../hmpps-annual-report-and-accounts-2017-18>

⁵⁰² Roberts J, Hayes A J, Carlisle J, Shaw J (2007) *Review of Drug and Alcohol Treatments in Prison and Community ...* The University of Manchester
www.ohm.nhs.uk/resource/Research/SMreview

⁵⁰³ McKeganey N, Russell C, Hamilton-Barclay T et al. (2016) *Meeting the needs of prisoners with a drug or alcohol problem: No mean feat.*

4.4. HMIP reports on drug treatment in prisons

Having outlined the procedures which should be followed in prisons, HMIP inspection reports were studied for five prisons: HMPs Wayland, Bure, Warren Hill, Hollesley Bay and Norwich⁵⁰⁴ to ascertain how the different prisons complied with the requirements.⁵⁰⁵ These were selected on the basis of geography: they are most of the male prison establishments in Norfolk and Suffolk. They are different types of prison, covering all categories of offenders other than category A. They are of different sizes. They are merely a sample of prisons in England and Wales and one methodological note is that they may not be representative of the whole prison estate. One noticeable aspect of the selection is that they are all house male prisoners, so a further research study into the treatment of female drugs offenders would be an additional research topic which would enrich our understanding of this area.

HMIP's reports on the five prisons deal with all aspects of prison governance, and so those features relevant to the care of drugs addicts are scattered throughout the reports. It should also be accepted that HMIP's interests are directed not specifically to drugs matters and so are probably far less comprehensive than might have been wished by the writer of this thesis.

It has to be pointed out though that the initiative of the National Offender Management Service (now the Her Majesty's Inspectorate of Prisons and Probation Services⁵⁰⁶), to centralise all the management of the prison under the Governor, was only promulgated *after* some of the reports were written, as was the Integrated Drug Treatment Service which brought together all the different aspects of the health and rehabilitation care, including through-care, required by the prisoners.

HMIP's requirements for the drug strategy and its compliance are⁵⁰⁷:

'The required procedure should be that prisoners with drug problems are identified at reception and receive effective treatment and support throughout their stay in custody.'

The recommended procedures are for Substance misuse that the prison should develop self-help support and ensure that groups such as AA are accessible to prisoners regardless of their location.

The mandatory drug test programme should be adequately resourced to undertake the required level of target testing.

Substance misuse services should be sufficiently resourced to provide accessible, consistent, and well-coordinated care to prisoners with substance-related problems, and there should be better integration between substance misuse and safer custody services

This is now based upon the Integrated Substance Misuse Treatment Service in Prisons.⁵⁰⁸ The Programme provides a beginning-to-end support system for drug-misusing offenders. From arrest into prison, by through-care, which enables tailor-made treatments based on an individual's health and support needs to be provided is led by the Counselling, Assessment, Referral and Throughcare teams (CARATS) into the after-care hands of the Criminal Justice Integrated Teams (CJIT) in the community, thus avoiding gaps of care in the system. Aftercare

⁵⁰⁴ These prisons were selected for my study, by my tutors. They are all in East Anglia, have all different inmate populations and would be expected to have different problems.

⁵⁰⁵ An editorial point: in all the reports 'procedures' were referred to as 'outcomes.' It cannot be imagined why that should be so. It is good to know that there *is* a procedure to deal with a situation, but it would always be better to know *what the result of dealing with it eventually was*; that is what the *outcome* is, for with that known the improvements to the procedure can begin to be made.

⁵⁰⁶ HMIP&PS Her Majesty's Inspector(ate) of Prison & Probation Service(s)

⁵⁰⁷ Government Publications (2017) *Drug misuse and dependence*
<https://assets.publishing.service.gov.uk/uploads/file>

⁵⁰⁸ NHS publications (2018) *Integrated Substance Misuse Treatment Service in Prisons*
<https://www.england.nhs.uk/wp-content/uploads/2018>

involves support with help finding somewhere to live, rebuilding family relationships, managing money and getting ready for employment.

Convicted offenders sentenced to non-custodial punishment are taken into care directly by the CJIT, which supervises the implementation of their Drug Rehabilitation Requirements (DRR) in the community. Rehabilitation comprises general training to equip an offender for his release, and literacy and numeracy teaching, where required, these being characteristically impaired in many offenders. They will not be considered further, not being specific of drugs offenders. The third method is detoxification.

Detoxification is carried out through pharmacotherapy, psychotherapy and by support measures. These procedures will be described next in the phases of evaluation, stabilisation, detoxification and maintenance measures. It is these procedures which will need to be assessed to evaluate effectiveness, as well as what the long-term effect is upon the one-time prisoner. They will be described separately although, to an extent, they overlap.

1.Evaluation

This is carried out when the offender enters prison or into non-custodial probation. It is concurrent with support being provided.

- (a) Identification of the offender's drugs. This is done by blood sampling. The offender-addict's drug is usually heroin, though he may top up with cocaine and/or cannabis
- (b) Mental Health state. About half of all drugs-addicted prisoners have personality defects or mental disorder, either as one of the reasons for the addiction having developed, or as a result of it. It is necessary for treatment for mental illness to be undertaken before detoxification is started.⁵⁰⁹
- (c) General physical state. Many addicts have acquired health problems such as thrombosed arteries or veins, hepatitis A or B, HIV, venereal diseases or tuberculosis, and ulcerated injection sites. Treatment has to be initiated.
- (d) Background to the addiction. The factors which have predisposed a user of drugs to become addicted and essentially the same as the criminogenic background to a non-drugs offender. It is for this reason that Durham police area engaged in joint work with the Public Health Department. It is summarised in the OASystem. Many of the background problems cannot be dealt with, at least not immediately, but is necessary they are, if it is possible.

2.Stabilisation.

As soon as possible after entry into prison or on probation the addict-offender should be stabilised on the drugs which the blood tests indicate are appropriate. This will guard against the drugs crises which characterise the offender-addict's situation at that time. He should be kept under close supervision with the opioid antidote Naloxone available. Once physiological stabilisation has been achieved the offender should have sufficient peace of mind to be receptive to motivational interviewing, the first step in the psychotherapeutic treatment to follow. Support continues either from the offender's own dedicated prison official, or from volunteers such as the Samaritans, Friends, RAPtrust members, NA, or Listeners organisation.

⁵⁰⁹ At HMP Wayland the report notes

The personality disorder unit (PDU) assessed prisoners for around five months and then progressed onto the psychologically informed planned environment unit (PIPE) as part of their care.

and see Kuester L, Freestone M, Seewald K, Rathbone R & Bhui K (2022) *Evaluation of Psychologically Informed Planned Environments (PIPEs) Assessing the first five years*

Centre of Psychiatry, Wolfson Institute of Preventive Medicine, Queen Mary University of London Ministry of Justice Analytical Series

3. Detoxification

This is through pharmacotherapy, and psychotherapy and support as noted above continues.

- (a) Pharmacotherapy. This starts when the situation is assessed by the therapist to be appropriate for detoxification of the addict to start. Methadone, buprenorphine or other medication is substituted in increasing doses to replace the reducing heroin to which the patient is addicted.

The process is frequently accompanied by a variety of withdrawal symptoms, physical, mental or psychological. The therapist needs to be alert to them, and treat where indicated. Support will help.

- (b) Psychotherapy. The motivational interviewing would, hopefully, have prepared the addict to be ready to accept Cognitive Behavioural Therapy.
- (c) support as noted above continues.

The outcome of detoxification may be abstinence, a slower detoxification progress, or inability to become abstinent. This last may necessitate the addict to remain so. He may then be given medication on prescription (Opiate Substitution Therapy: OST), which at least will not necessitate the addict to undertake criminal activity to provide the funds to pay for his habit.

- 4. Maintenance. This is necessary in most cases, from entry into prison until release and beyond into civilian life, and similarly in the non-custodial setting. Addiction is a 'chronic' disease and the patient may relapse at any time. Organisations such as Narcotics Anonymous cater for him, and procedures such as the 12 Steps Scheme are helpful for some people in motivating to remain abstinent.

In terms of evaluating the treatment of offenders, these are some of the key questions. Is treatment that offenders receive timely and comprehensive? And is the offender-prisoner's monitor identified rapidly? What is the outcome of 1(b) and (c) and how quickly are measures started? Is 1(d) carried out comprehensively; it may be difficult to assess, but if the offender-addict simply returns to the addictogenic and criminogenic environment from which he came, he will inevitably relapse. How soon is the prisoner brought into contact with his support? In terms of stabilisation, had that been rapidly initiated? Were there any problems, and was Naloxone available, just in case there were? When was the motivational interviewing initiated? Is support being maintained? With detoxification, how many addict-offenders are going ahead with this, as a percentage of those prisoners who might do so? What is the drop out rate? How many achieve full abstinence? Is there any record kept of withdrawal symptoms and how were they handled? Finally, with maintenance, how many prisoners, having undergone detoxification are being maintained as such, and what measures are there to ensure it?

What are the findings from the reports?

- (a) Evaluation. All prisons seemed to be meeting the new prisoners in reception in a welcoming manner. Comment was not made though whether addicts had been adequately provided with maintenance therapy during the transfer. In most cases staff officers identified with the prisoners and saw them through the first few days⁵¹⁰ and into what was required for their medical care. Addicts are extremely vulnerable at such times, with a high risk of self-harm, and suicide. The participation of 'Listeners'⁵¹¹ and Samaritans was noted in some of

⁵¹⁰ see 4.7. Gov pubs (2021) *Justice Committee calls for root and branch reform of prison mental health support*. Where the comment made was that in many cases prisoners with mental health problems (very common with drugs offenders) were often not or assessed to be seen within the first fortnight of their imprisonment.

⁵¹¹ Listeners are prisoners trained by the Samaritans to provide confidential emotional support to fellow prisoners.

the reports. Interviews with prisoners in drug treatment, could provide an insight into the practical operation and effectiveness of such schemes⁵¹².

- (i) At HMP Warren Hill the inspectors noted *'Excellent relationships between staff and prisoners...started on arrival where the informal and friendly reception area sent a clear message to arriving prisoners about the ethos of the prison. All prisoners...were allocated a personal officer or key worker.'*

Ninety-one percent of prisoners said a member of staff could help them with a problem, and 77% said they could speak to a Listener. The Report noted that the key worker allocated to the prisoner would direct him to the Therapeutic Community⁵¹³ if necessary.

- (ii) At HMP Hollesley Bay the comment was: *'Those arriving were received well into the prison and our survey most prisoners indicated that they felt safe'*

A nurse carried out health care screening upon arrival. Seventy-three percent of prisoners knew their personal staff officer. Needs relating to substance misuse were identified in reception and appropriate referrals made. Listeners were available.

- (iii) At HMP Norwich the comment was *'Arrangements for supporting newly arrived prisoners had improved'*. A prison officer assessed new arrivals in prison on the first day. Listeners worked in reception. 'A' wing was the induction centre for addicts on their first night and stabilisation was carried out there.

- (iv) At HMP Bure the inspectors reported that: *'Prisoners experienced very good reception processes. They were treated with respect and felt safe on their arrival into prison'*. Listeners checked on their welfare; 87% of prisoners knew who their personal officer was. Upon arrival prisoners saw a nurse and individuals with substance misuse problems were referred to the RAPtrust for a detailed assessment.

- (v) HMP Wayland's inspectors report did not mention the admission procedures, but said that the prison was *'Very well led, moving in the right direction and was confronting problems of illicit drugs with some success.'*

Prisoners with drug problems are identified at reception by an experienced RAPt team which provided effective treatment and support.

(b) Stabilisation.

This was rarely mentioned, though that did not mean that it was not carried out. There were no comments on the availability of Naloxone. HMP Wayland's report observed that prisoners requiring stabilisation on opiate substitute treatment were managed safely with consistent officer cover to ensure appropriate supervision of methadone and buprenorphine taking. HMP Hollesley Bay reported no deaths since the last report, so it could be assumed that there was an effective stabilisation programme there.

(c) Detoxification.

- (i) HMP Warren Hill. The report stated that opiate substitution had not been introduced, but all prisoners could access the appropriate drug services for detoxification if necessary. Clinical substance misuse and dual diagnosis expertise was available.

⁵¹² Black C (2021) *Review of drugs: phase two report* p11 Recommendation 24 where she comments on the need for monitoring.

⁵¹³ Rawlings B (1998) *Research on the Therapeutic Communities in Prisons*
www.dldocs.stir.ac.uk/rawlings/documents.

In her paper she quotes Gunn et al (1978 & 1988) who found that 37% of male prisoners had psychiatric disorders and see Pompidou Group (2021) *Handbook on Prison-based Therapeutic Communities*
<https://www.coe.int> > ... > Criminal Justice and Prison

Modern Therapeutic Communities (TCs) complement drug treatment systems in prisons and offer detained people with substance use disorders an environment in which they can reorganize their lives without crime and addictions.

- (ii)HMP Hollesley Bay, reported that Phoenix Futures Services⁵¹⁴ provided psychosocial services and Care UK⁵¹⁵ delivered clinical treatment. Eleven prisoners were receiving opiate substitution therapy. No mention was made of RAPt support or CARATS teams.
 - (iii) HMP Norwich Virgin Care⁵¹⁶ provided substance substitution therapy. One hundred and thirty-one prisoners were receiving opiate substitution treatment, with supervision by nurses and support from RAPt members.
 - (iv)HMP Bure. Virgin Care provided substance substitution therapy , and is it assumed psychological therapy, with access to GP services if needed. There was only one prisoner receiving opiate substation therapy
 - (v)HMP Wayland. Virgin Care provided substance substitution therapy, and is it assumed psychological therapy, thought this was not stated. Support was given by the RAPt team. An average of 62 prisoners were treated with 2/3 reducing their dosage or completing the treatment.
- (d)Maintenance of abstinence and of those unable to become so, is important in the health of prisoners. It should be continued under supervision until the prisoners is ready to leave. The ‘through-the-gate’ procedure should be completed with a full handover with the civilian health authorities. HMIP reported as follows:
- (i)HMP Warren Hill
Forty prisoners undergoing detoxication were accommodated in a Therapeutic Centre followed by post-treatment consolidation in the PIPE (Psychologically informed planned environment) centre with RAPt members to support them there. No details were provided of through-the-gate activities.
 - (ii)HMP Hollesley Bay
No mention was made of post-detoxification maintenance. Release planning however was said to be good with Naltrexone.⁵¹⁷ Through-the-Gate procedures were said to be correct and maintenance support mentioned, but no details were provided.
 - (iii) HMP Norwich.
RAPt teams supervised the through-the-gate liaising the hand-over with trained social workers from Adobe House, Norwich, as part of the Norfolk Recovery Partnership, which provides community drug and alcohol services. In the previous six months 185 referrals have been made and 144 appointments kept. Adobe House are alert to defaulters and will follow them up. They enter the prison as part of the ‘meet-and-greet’ scheme. Prisoners are provided with a seven-day supply of medication
 - (iv)HMP Bure
A Through-the Gate support service was available from the RAPt team. It arranged pre-discharge support and linked into community teams, to ensure that good substance misuse after-care arrangements were available following release

⁵¹⁴ Phoenix Futures (2018) HMP Bure
<https://www.phoenix-futures.org.uk>

We provide residential, prison, community and specialist services in prisons and in the community.

⁵¹⁵ Care UK (2018) *Healthcare, Social Care & Home Care Provider*
<https://www.careuk.com>

Care UK provides modern, comfortable care homes, homecare, GP Services and treatment centres for the NHS and mental health & learning disability services

⁵¹⁶ Virgin Care (2018) *HMP Wayland*
<https://www.cqc.org.uk>

Virgin Care Services Limited is commissioned by NHS England to provide a range of primary health care services to prisoners. This includes nursing, GP, clinical substance misuse services and pharmacy services

⁵¹⁷ UK Addiction (2016) *Naltrexone Treatment for Addiction Detox*
<https://www.carek.com>

Although Naltrexone is commonly used to treat an Opioid addiction, it may not stop drug cravings. For this reason, Naltrexone has the highest chance for success when an individual has completed the withdrawal stage and is motivated to continue on in the recovery process.

(v)HMP Wayland

There was evidence of detailed release plans for those with substance misuse issues, and links with the community service providers to facilitate post release support. Details were not provided.

Conclusions on the HMIP's reports.

It is to be remembered that the drugs-offenders related details of the reports are only a minor part of the whole report. Insofar as they can be assessed for comprehensiveness of their procedures, they do appear to be satisfactory. What they do not provide, however, is empirical evidence of the effectiveness of their undertakings.

How does this relate to the value of sentencing? Sentencing as discussed above has two parts: censure and the award of punishment. Both have deontological elements, that is looking back at the offence to justify the retribution to come, and teleological elements, that is looking forward to the time the offender has expiated his offence and the rehabilitation which should be taken to enable him to re-integrate fully into society. The purposes of punishment as outlined in the Sentencing Act 2020 s 57 are set out clearly. Subsection (a) identifies Retribution and subsection (b) Rehabilitation. Rehabilitation has to be effective to be fully useful and it is clear from the analysis of the HMIP's reports on the five prisons that it cannot be assumed to be the case. There is evidence that schemes are in place to address addictions, but the extent to which these are effective is unclear from the reports. In terms of evaluating sentencing, the emphasis within the definitive sentencing guideline on imprisonment as the main option for dealing with offenders suggests a lack of joined-up thinking across the criminal justice system. The sentencing framework emphasises punishment in custodial institutions, with little regard at sentencing to the likelihood that imprisonment will, in fact, reduce reoffending by addressing drug addictions or, more broadly, the causes of participation in drugs offending. There is clearly a need for better understanding on the part of sentencers about the impact of custody on offenders and reoffending, as well as more information on the effectiveness of alternatives to imprisonment, such as intensive community orders.

4.5. Drug Offenders awarded a non-custodial sentence

90% of drug offenders fulfil the community sentence threshold⁵¹⁸ and are dealt with in the magistrates' courts.⁵¹⁹ Under the Sentencing Council's 2012 Definitive Guideline for Drug Offences some drug offenders may be awarded a community order of a severity proportional to the gravity of his offence. However, not all offences have community orders within the offence range in the relevant guideline. When a community order is available, they are graded High, Medium and Low⁵²⁰ and may be accompanied with a fine. The guideline details what requirements would be appropriate for a community order at each of those three levels.

The community order must include at least one community order requirement imposed for the purpose of punishment,⁵²¹ that obligation not applying if the court also imposes a fine⁵²², or there are exceptional circumstances.⁵²³ In forming its opinion, the court must take into

⁵¹⁸ See Sentencing Act (2020) section 204 *Exercise of power to impose community order: general considerations*

(2) The court must not make a community order unless it is of the opinion that... it was serious enough to warrant the making of such an order.

⁵¹⁹ Mann R & Birmingham R (2020) *Non-custodial sentences* Research Briefings. [post.parliament.uk>Research](https://post.parliament.uk/research-briefings/cmr5789/)

⁵²⁰ Sentencing Council (2012) p33 *Drug offences Definitive Guideline* Annex A Community Orders

⁵²¹ Sentencing Act (2020) s. 208(10) and s 201 *Community order requirements table* which lists all the possible requirements and especially Part 10 *drug rehabilitation requirement*

⁵²² Sentencing Act (2020) s. 208(11)(a)

⁵²³ Sentencing Act (2020) s. 208(11)(b)

account all the information that is available to it about the circumstances of the offence,⁵²⁴ or of it and the associated offence or offences, including any aggravating⁵²⁵ or mitigating factors⁵²⁶. In this context the pre-sentence report may be very important.⁵²⁷

With guidance from the CPS⁵²⁸ the magistrate's court will decide whether the drug offence is appropriate to its jurisdiction and if so, follow the Sentencing Guideline indications. The court could refer the case to the Crown Court, or proceed to trial, and then either dismiss the case if not guilty, or award a Community Order.

Where a person aged eighteen or over is convicted of an offence, the court will consider a Pre-sentencing Report (PSR) before sentencing, for guidance in adjusting the community sentence treatment requirements (CSTR) in the Community Order to be imposed on him. If the CSTR requires it, the Drug Rehabilitation Requirement (DRR) is applied under the terms of Sentencing Act 2020 Part 10.⁵²⁹

The aims of the DRR are:⁵³⁰ (a) stopping or reducing drug use or the harms from drug use (b) preventing reoffending or reconviction (c) social re-integration, accommodation, employment, basic skills. It is these factors which identify what is to be sought for and how effectiveness is to be assessed.

The three aspects of treatment: pharmacotherapy and substitution, psychotherapy and coping therapies⁵³¹ are the same procedures as in the prison setting. Abstinence is generally accepted to be the target, followed by a period of rehabilitation,⁵³² with psychological therapy and support from 'Therapeutic Communities'⁵³³, 12-Step treatments, and Group Therapies, to consolidate the client's resolve to remain abstinent, which may take up to a year.⁵³⁴ The possibility of relapse always remains possible as has been described. A recovered drug addict and university lecturer's advice is pertinent.⁵³⁵ Other requirements of the community sentence may, or may not be relevant to drug offenders, and as they usually are not integral to the offence will not be discussed further, except to list them (see 4.1.)⁵³⁶

⁵²⁴ Sentencing Act (2020) s. 30 *Pre-sentence report requirements*

⁵²⁵ Sentencing Act (2020) s 71. *Supply of controlled drug near school premises or involving children*

⁵²⁶ Sentencing Act (2020) Chapter 3 s 63 et seq and especially s 72 *Supply of psychoactive substance in certain circumstances* and Mitigating factors especially s73 *Reduction in sentence for guilty plea* and s.74 *Reduction in sentence for assistance to prosecution*

⁵²⁷ Sentencing Act (2020) s30 *Pre-sentence report requirements*

⁵²⁸ Crown Prosecution Service (2018) *Code for prosecution*

⁵²⁹ Sentencing Act 2020 Part 10 namely

(a) requirement 20 authorises the court to require the offender, if the court is satisfied that the offender is an addict or misuser of drugs, that he is susceptible to treatment, that treatment is available and suitable, and that the offender is willing to comply with the treatment.

(b) requirement 21 is for the offender to attend the court in person, unless authorised otherwise.

(c) requirement 22 instructs the court to take action if the offender fails to comply with its requirements. In which case:

(i) the court may revoke the community order or,

(ii) re-sentence the offender or,

(iii) may impose a custodial sentence.

⁵³⁰ Disley E et al (2016) *ibid ACS Study* p68

⁵³¹ McSweeney T, Turnbull P & Hough M (2008) *ibid* p5

⁵³² Gonzales M (2015) *How long does rehab take?* <https://www.drugrehab.com/treatment/how-long-does-rehab-take>

⁵³³ Modern Therapeutic Communities (TCs) complement drug treatment systems in prisons and offer detained people with substance use disorders an environment in which they can reorganise their lives without crime and addictions. They are manned by prison staff usually assisted by prisoners recovered from addiction.

⁵³⁴ The Community Orders span is three years.

⁵³⁵ Grinspoon P (2018) *Does addiction last a lifetime?* Harvard Medical School Harvard <https://www.health.harvard.edu/author/peter-grinsp...>

⁵³⁶ Sentencing Act (2020) s. 201 *Community order requirements* see 4.1.(b)

The Community Order DRR compares favourably with a DRR in a short custodial sentence. The Prison Reform Trust stated that:

*‘... research, comparing similar offenders and similar offences, shows that community sentences are now outperforming short prison sentences and are 8.3% more effective in reducing re-offending rates.’*⁵³⁷

Supervision of the Community Order⁵³⁸ is the responsibility of an officer from the Probation Service, designated as the offender’s Responsible Officer⁵³⁹. In addition to supervising the drug offender’s adherence to the requirements and completion of the Community Order,⁵⁴⁰ the Responsible Officer has the opportunity to monitor the offender’s financial and social activities and to provide him with guidance in them.⁵⁴¹

When the ‘structural aspects’ of the Community Order and of the DRRs are taken into account, there remains the human aspects of them. Treatment and supervision are human processes, interactions between the drug offenders⁵⁴² and the enforcers, subject to the characteristics of both sides of the intervention; those delivering and those receiving.⁵⁴³ The exercise of paternalism is a matter requiring considerable skill and experience, in handling a drug addict. He may have a very labile, unpredictable, and sensitive nature particularly so when stressed during detoxification, and likely to act aggressively if provoked.⁵⁴⁴ Drug testing is usually a required part of the DRR, but reservations have been expressed,⁵⁴⁵ and for intensive supervision,⁵⁴⁶ and punitive approaches may be counterproductive to a recovering drug addict.⁵⁴⁷ What is effective will be discussed in Chapter 6.

My conclusions on DRR in the community are that an offender with a drug problem sentenced to a community order may have drugs as the primary feature of the offence (the

⁵³⁷ Prison Reform Trust (undated) *ibid* p2

‘...the elements that work particularly well are intensive supervision, community payback, restorative justice, developing personal responsibility, and dealing with support needs such as housing, employment, addictions, mental health and learning disabilities and difficulties’

⁵³⁸ HM Inspector of Probation (2021) *Effective guide to working with drug users in probation*

This publication amplifies and updates the obligations of the responsible officer.

⁵³⁹ Sentencing Act (2020) s 213 *The responsible officer*

⁵⁴⁰ Sentencing Act (2020) s 214 *Obligations of the responsible officer*

(2) The responsible officer must—

(a) make any arrangements that are necessary in connection with the requirements imposed by the order,

(b) promote the offender’s compliance with those requirements

⁵⁴¹ Sodexo (2020) *Probation Service Officer/Responsible Officer* sodexo Jobs <https://www.sodexo.co.uk/jobs>

⁵⁴² Sentencing Act (2020) s 215 *Duty of the offender to keep in touch with of the responsible officer*

(2) The offender must keep in touch with the responsible officer in accordance with any instructions the responsible officer may give the offender from time to time

⁵⁴³ McSweeney T, Turnbull P & Hough M (2008) *ibid* p44

⁵⁴⁴ Heard C (2015) *Community sentences since 2000* Centre for Crime and Justice p2

<https://www.crimeandjustice.org.uk/sites/crimeandjustice>

⁵⁴⁵ Magistrates Association (2019) *Drug testing as part of a review of a Drug Rehabilitation* ...<https://www.magistrates-association.org.uk/drug-testing>...

Drug testing is central to DRR. Individuals must provide regular urine samples in order to allow the sentencing court to check the progress of the individual. ...

The courts are authorised to sentence plans if the individual is not managing to control their drug habit. Instead of only focusing on drug tests as a way of reviewing a DRR, the MA would prefer a less prescriptive approach that ensured general information was provided about compliance with the order, as well as any changes in behaviour which might indicate a positive outcome.

While testing offers one way of monitoring the success of the DRR, it is not the only way, and it should be noted that a reduction in substance abuse that does not involve complete abstinence could still be viewed as a successful outcome, especially if it results in a reduction of offending behaviour.

⁵⁴⁶ McSweeney T, Turnbull P & Hough M (2008) *ibid* p26

⁵⁴⁷ Snoek A (2013) *We should stop punishing addicted people for being addicted*. Macquarie University <http://blog.practicaethics.ox.ac.uk/2013/11/we-should...>

subject of this study, sentenced according to the Sentencing Guideline) or incidental to it.⁵⁴⁸ Both would be subject to a community order with the need to fulfil the requirements appropriate to the offence. There is thus:

- a) no way of separating out the two different groups of offenders.
- b) no way of estimating the outcome effectiveness of the drug offenders' treatment for specific input/output statistics are not kept.

4.6. The protection of the public

If a defendant is in custody the public is protected from him, except that some offenders engage in drug dealing whilst in prison. Of the five prisons surveyed HMPs Wayland, Warren Hill had problems as did Hollesley Bay, where HMIP&P stated: 'In our survey, 37% of respondents said that it was easy to get drugs at the prison' and at HMP Norwich the comment was:

'Drugs and associated debt remained a significant problem. Illicit items were repeatedly being thrown into the prison over the perimeter. CCTV was due to be installed to improve the physical security of these areas. The main challenge was reducing the drug supply and managing the disorder caused by drug use. In our main survey more prisoners than at our previous inspection said it was easy to get illegal drugs.'

If the offender is serving a Community Sentence, then adhering to the requirements of the Sentencing Act 2020 should offer protection to the public through curfew, exclusion and prohibited activity requirements. Protecting children from their drug addicted parents, is a particular problem.⁵⁴⁹ The public is also indirectly protected through the activities of the FDAC.⁵⁵⁰

4.7. The making of reparation by offenders to their victims

One of the statutory aims of sentencing set out in s. 57 of the Sentencing Act 2020 is the making of reparation to people affected by the offence. If victims can be identified, reparation might be possible from an offender subject to a Community Order.⁵⁵¹ Some key points to note though are:

- a) Reparation by drug offenders in prison, is essentially impossible.⁵⁵²

⁵⁴⁸ Drug Wise (2015) *How much crime is drug related?*

'Costs of drug-related crime.

Examples of users needing £15,000 to £30,000 a year to fund drug habits have often been given. To make such amounts of money for stolen goods place often suggests multiplying by three, on the basis that stolen goods will fetch about one third of their normal values. There are estimates of about 306,000 heroin and/or crack users in England, with around 200,000 of them in treatment in any one year. That is a lot of theft, burglary, fraud or shoplifting if all are stealing to pay for things. This has led some people to suggest that up to half of all acquisitive crime is drug-related and the market value of good stolen involved could be between £2-2.5 billion each year'. www.drugwise.org.uk > how-much-crime-is-drug-related

⁵⁴⁹ Centre for Justice Innovation (2021) *Family drug and alcohol courts (FDAC)*

<https://justiceinnovation.org> > areas-of-focus > family-d.

FDACs provide an innovative way of supporting parents to overcome the substance misuse, mental health and domestic abuse problems which lead to their children being taken into care.

Although this matter is not covered by the law as it is, it seems to be an effective way of protecting the public, that is the children of addicts, from the activities of their parents.

⁵⁵⁰ Centre for Justice Innovation (2021) *National Website for Family Drug & Alcohol Courts*

FDAC<https://fdac.org.uk> FDACs are an alternative family court for care proceedings where child-molesting parents who are addicts are under court encouragement to desist.

⁵⁵¹ See 3.2. and footnote *There is always a problem with defining who is one's neighbour.*

⁵⁵² It could be said that reparation to the State is exercised through the imposition of fines through the Sentencing Act 2020 s 120, and through deprivation orders s 152

- b) Reparation by drug offenders sentenced to Community Orders include the requirement for unpaid work from 40 to 300 hours, and this can be directed to the community in which the offender lives utilising his/her particular skills.⁵⁵³
- c) Drug users are both offenders and victims and so reparation is problematic.
- d) Secondary victims and others such as county-line runners and 'mules' who are both offenders and victims and other 'secondary' victims such as an offender's family, reparation is not possible, but support is.⁵⁵⁴

4.8. Conclusion on Sentencing and Punishment of Drug Offenders

This chapter described the procedures of sentencing, that is censure and the award of punishment to drug offenders. Punishment may be carried out in a custodial or non-custodial setting, and to illustrate the former HMIP&P inspections of five prisons were evaluated and assessed. Similarly, the functioning of the Probation Service was examined in respect of Drug Offenders serving a Community Order. Evaluation of the outcomes and their effectiveness will be discussed in Chapter 6: The effectiveness of sentencing.

⁵⁵³ Scapens A (2017) *What will Wayne Rooney do for community service?* Manchester Evening News

He'd originally been sentenced to two weeks in jail following the infamous 'kung-fu kick' on a Crystal Palace fan in January 1995. But the punishment was reduced to 120 hours unpaid work and carried out in 60 two-hour sessions coaching children at Manchester United's training ground.

⁵⁵⁴ Government Publications (2019) *Supporting relationships between prisoner and their families*

A summary of evidence relating to the impact of imprisonment on families

www.gov.uk › Crime, justice and law › Reoffending and rehabilitation see also

Shilson-Thomas A (2019) *Community sentences could be making a comeback*. Chartered Institute of Public Finance and Accounting

www.publicfinance.co.uk › opinion › 2019/01 › community-sentence and see also

Centre for Crime and Justice Research (2017). *Supporting Prisoners' families; what can schools do?*

University of Glasgow. www.familiesoutside.org.uk › content › uploads › 2017/12 › Families...

Chapter 5. The effectiveness of sentencing.

5.1. Introduction and the definition and aim of sentencing drug offenders

One of the three parts of the definition of the value of sentencing is its effectiveness, which this chapter examines.

5.2. Problems of measuring effectiveness

The main problem is that although there is audit of the *procedures* of sentencing,⁵⁵⁵ there is no monitoring of their *effects*,⁵⁵⁶ contrary to the requirement of the Coroners & Justice Act 2009 section 128(1) which states:

The Council must

- (a) monitor the operation and effect of its sentencing guidelines, and*
- (b) consider what conclusions can be drawn from the information obtained by virtue of paragraph (a).*

which is reiterated in the Sentencing Guidelines subparagraph (11).⁵⁵⁷

This lack of monitoring,⁵⁵⁸ to assess whether the Guidelines are indeed effective, was criticised⁵⁵⁹ asking whether the Council's failure to tackle the question of "effectiveness" is its biggest weakness, remarking that the Sentencing Council had devised the Guidelines on historical usage, without displaying any forward thinking in doing so. The aim of the guideline is to assist judges to accede to the requirements of the Sentencing Act 2020 section 57⁵⁶⁰, and to attain consistency in sentencing, but judges sentence without knowing whether what they are doing has the effect it is meant to have.⁵⁶¹

To assess the effectiveness of sentencing it is necessary to measure:

- a) the offender's situation at the beginning of his time in custody or at the start of the non-

⁵⁵⁵ Criminal and Justice Act (2009) s 128 *Monitoring*

⁵⁵⁶ see 4.1(c).

⁵⁵⁷ Sentencing Guidelines subparagraph (11) which states that:

When exercising functions under this section, the Council must have regard to the following matters:

(e) the cost of different sentences and their relative effectiveness in preventing re-offending.

(f) the results of the monitoring carried out.

⁵⁵⁸ See 4.7. Gov.Pubs.(2021) *Justice Committee calls for root and branch reform of prison mental health support* Chair of the Justice Committee Sir Robert Neill MP said: 'The true scale of the mental health crisis is not well understood because data collection, on the extent of mental health issues and spending on treatment, is poor. Without this benchmark data it is not possible to develop strategies to improve support or assess the current quality of intervention programmes.'

The treatment of mental illness in drugs offenders is, next to detoxification, their most important rehabilitation

⁵⁵⁹ Allen R (2016) *The Sentencing Council for England and Wales Transform* www.transformjustice.org.uk ›

⁵⁶⁰ Sentencing Act 2020 section 57 *Purposes of sentencing: adults*

⁵⁶¹ Author's comment: writing as a (retired) consultant in Public Health Medicine, I can say with confidence that it would be unthinkable nowadays to propose any form of medical therapy without first undertaking research and pilot studies to see if the project would work and be effective. That would all be peer reviewed and then the therapy would be introduced, incorporating further rigorous reassessments of its effectiveness. One could think of therapies such as cholesterol or blood pressure lowering, the wearing of car seatbelts, fluoridisation of water in the prevention of dental caries, cervical and breast screening in the prevention of cancer, vaccination in the prevention of dangerous illnesses, the list is endless. All would require conclusive evidence of effectiveness before a procedure becomes common and acceptable practice.

It is astonishing that a judge or a magistrate proposes or prescribes a social measure such as punishment with no idea whether it is effective, has no feedback and does not express concern about that.

- b) custodial order (using the OASys)⁵⁶² then,
- c) the processes needed to carry out the Sentencing Act s.57 and finally,
- d) the outcome assessed at release from prison or at the end of community order and at regular intervals thereafter.⁵⁶³

5.3 The effectiveness of censure of drug offenders.

The general aims of Censure have already been discussed.⁵⁶⁴ They are not the same as the requirement for the judge to explain to the offender the reasons for the punishment he is going to award.⁵⁶⁵ If the defendant is a drug trafficker, he might or might not, pay heed to the judge's censure, but if he is a user, it may have no impact on him.⁵⁶⁶ Censure has a different emphasis in the Crown compared with the Magistrates' Court. In the Crown Court the offence is by nature more serious with punishment to be awarded on the principles of retribution⁵⁶⁷. The offender, in the Magistrates' Court, having committed a less serious crime, would probably be censured in directing him towards detoxification, rehabilitation, reparation and resolution, so that he desists from criminality and lives peacefully in the community.

The effectiveness of censure is made by assessing its impact upon the defendant's attitude. Does he show truculence, or blame others, or does he express regret? Does he indicate that he, as only a user, has harmed no-one and is blameless? does he feel he has done no wrong and there is nothing to feel remorseful about?⁵⁶⁸ Or does he really express remorse, and an indication of the wish to restore the harm or damage caused? ⁵⁶⁹

⁵⁶² Offender Assessment system (OASys) Gov.UK (2019) *Risk assessment of offenders* The aim is to
 Assess how likely an offender is to re-offend
 Identify and classify offending-related needs
 Assess risk of serious harm, risks to the individual and other risks
 Inform the development of a plan to manage the risk of harm presented by the offender
 Link the assessment to the supervision or sentence plan
 Indicate the need for further specialist assessments
 Measure change during the period of supervision/sentence

There are nine issues associated with offending behaviour to be assessed:

- 1.unstable accommodation
- 2.unemployment
- 3.no positive recreation activities
- 4.poor personal relationships
- 5.alcohol misuse
- 6.drug misuse
- 7.impulsivity and poor emotional control
- 8.anti-social peers
- 9.attitudes that support crime

⁵⁶³ the effectiveness of the outcome would then influence the sentencing thereby improving its relevance.

⁵⁶⁴ 1.8. *Censure and its purposes*

⁵⁶⁵ Sentencing Act (2020) section 52 *Duty of court to explain sentence*

⁵⁶⁶ 2.18.

⁵⁶⁷ Bibas S & Bierschbach R A (2004) *Integrating Remorse and Apology into Criminal Procedure* The Yale Law Journal Vol. 114, No. 1 (Oct., 2004), pp. 85-148 <https://www.jstor.org/stable>
 'Remorse and apology are valuable ways to heal wounded relationships; vindicate victims; and educate, reconcile, and reintegrate offenders into the community. Criminal procedure should encourage and use remorse and apology to serve these substantive values at every stage, from before arrest through charging to pleas and sentences.'

⁵⁶⁸ Drugs and Crime footnote *House of Commons Debate (2017)* Debbonaire p 78 *ibid* Blunt p 22 ⁵⁶⁹ A

⁵⁶⁹ A drug user, of course may not feel he has done anything wrong, and has no reason to feel remorse. Then again, he may have harmed no-one except for himself.

Has this apparent remorse influenced the judge? And does the judge believe it, is the defendant feigning remorse, has he been advised by his lawyer what to say?⁵⁷⁰ The judge might accept a plea of guilty,⁵⁷¹ reassess the defendant's culpability, or his motivation, especially if accepting treatment for drugs,⁵⁷² and accept mitigating factors which might reduce the sentence.⁵⁷³ If the victim hears the defendant expressing remorse, and believes it, he may feel some amelioration of the wrong he has been caused.⁵⁷⁴ A survey found that remorse was the single most common mitigating factor in sentencing.⁵⁷⁵ Judges do not however normally keep records of their censures⁵⁷⁶, and so its effectiveness is rarely assessable. Magistrates are considerably influenced by the response to the censure,⁵⁷⁷ and so it can be said to be effective, but records are not kept.

5.4. The purposes of punishment.

Following censure, the judge awards the offender his punishment⁵⁷⁸ and that relevant to drug offenders will now be discussed.

5.5. The effectiveness of retributive punishment

A drug trafficker⁵⁷⁹ sentenced appropriately,⁵⁸⁰ would almost certainly have calculated the economic risk beforehand.⁵⁸¹ He might well be contemplating the wrongfulness of his planning rather than that of his conduct.⁵⁸² He might desist, or he might start to plan his next operation better. Retributive punishment is based upon the concept of proportionality (see Chapter 1)

⁵⁷⁰ Canton R (2018) *How remorse alone can sometime change the past for those who have been wronged* Leicester University. [g.yahoo.news.com.>how-remorse-alone-can-sometimes](http://g.yahoo.news.com/>how-remorse-alone-can-sometimes)

⁵⁷¹ Sentencing Council (2012) *Drug Offences Definitive Guideline* p 8 Step 4 guilty plea and discount.

⁵⁷² Jacobson J & Hough M (2007) *Mitigation the role of personal factors in sentencing* p23 Reform Trust <http://www.prisonreformtrust.org.uk/documents> '...It seems that the most crucial point considered by sentencers with respect to both alcohol and drug misuse is whether there are prospects of effective treatment of dependency. If this is deemed to be the case, the sentence may be passed with reference to the offender's present/future, and the prospects of treatment will mitigate in the sense that a rehabilitative rather than punitive sentence is passed. Conversely, evident lack of willingness to address a drug or alcohol problem maybe an aggravating factor within the same category'.

⁵⁷³ Sentencing Council (2012) *Drug Offences Definitive Guideline* p7

⁵⁷⁴ Duff R A (2009) *Restoration and Retribution* Chapter 5.2. in von Hirsch A (2009) *ibid*

'The offender's expression of remorse in response to the Censure may well be accepted as a form of restorative justice, by the victim, and as a measure of the effectiveness of Censure.'

⁵⁷⁵ Sentencing Council (2013) *Crown Court Sentencing Survey Annual Publication* p 18 It is pointed out that the 20% reduction as a result of the expression of remorse in response to censure refers to all crimes tried in the Crown courts, but not specifically to drug offences. There were too few of them (trafficking and supply) in those courts to survey. It may be reasonable to extrapolate the 20% to drug offences as well.

⁵⁷⁶ Judges keep records of the reasons for the punishment they have awarded.

⁵⁷⁷ Brunt L (2020) *personal communication*. He told me that after the censure, he would retire with his 'wingers' to discuss what they'd heard and then return to the court to award the punishment. (see *Acknowledgements*)

⁵⁷⁸ Sentencing Act (2020) Section 52(2) *The purposes of punishment* which are:

(a) the (retributive) punishment of offenders,
(b) the reduction of crime (including its reduction by deterrence),
(c) the reform and rehabilitation of offenders,
(d) the protection of the public, and
(e) the making of reparation by offenders to their victims.

<https://www.legislation.gov.uk/ukpga/2003/44/section/142>

⁵⁷⁹ Kingman J (2019) *Rip-on/Rip-off Smuggling* Agricensus
an interesting account of how major drug smuggling is carried out.

⁵⁸⁰ Sentencing Council (2012) *Drug Offences Definitive Guideline* pp3-28 *Import or Export of a controlled drug, Supplying or offering to supply or Possession with intent to supply to another, Production of a controlled drug, Cultivation of cannabis plant, permitting premises to be used for gain.*

⁵⁸¹ Hudson B A (2009) *Doing Justice to Difference* p369 in von Hirsch et al (2009) *ibid*

⁵⁸² Encyclopaedia of Crime and Justice (2002) *Crime Causation: Sociological Theories: the economic theory of crime* www.encyclopaedia.com/law/legal

and if the severity of the punishment is proportional to the gravity of the offence, then its effectiveness can be said to have been achieved.⁵⁸³

Possessors-with-intent-to-supply may be not deserving of criminal sanctions and retribution but may be diverted into a DRR on conditions.⁵⁸⁴ They may be more ill than guilty⁵⁸⁵, retribution may be irrelevant, as is the matter of proportionality and so effectiveness cannot be assessed.⁵⁸⁶

County lines runners, being usually juveniles, are dealt with⁵⁸⁷ in youth courts. Mules' blameworthiness depends upon the nature and circumstances of the offence, and thus retribution may or not be appropriate, and so effectiveness cannot be assessed. Their blameworthiness may be reduced having been compelled or coerced into supplying drugs, but where the duress defence is not available to them.⁵⁸⁸ There would appear to be no grounds for considering retribution to be an appropriate form of punishment in the offence of simple possession of illegal drugs.(though this is changing.⁵⁸⁹) Use of illegal drugs on 'premises' is also illegal under the Sentencing Guideline,⁵⁹⁰ but if the users do not deserve retribution, it follows that here sentencing would also be inappropriate.

However, the law will have been broken in both possession and the (non-commercial) use of premises and must be upheld.⁵⁹¹

5.6. Effectiveness through deterrence

After the Misuse of Drugs Act (1971) had been in force for about thirty years the Runciman report expressed its opinion on deterrence:

⁵⁸³ In the opinion of the judge, guided by the Sentencing guideline; it is however a subjective opinion, and others might believe the judge and the guideline to be inaccurate. This is really a circular logic, and would need to be developed further; moreover, what would the public think about their taxes paying for years of imprisonment of traffickers? See the discussion in Chapter 1.

⁵⁸⁴ See Chapter 7 where it is described how such offenders are handled in the diversion scheme

⁵⁸⁵ *R v Afonso and others* (2008) 1 Cr App R (S) 560 Rose LJ observed '*An unemployed addict has, in practical terms, only three means of financing his or her addiction: prostitution, theft or supplying others and sentencers should recognise that for in consequence his or her culpability is likely to be less than that of many other suppliers.*'

With the introduction of the Drug Offences Sentencing Guideline (2012) the Afonso concept was superseded through the judgement in *R v Dyer and others* [2013] EWCA Crim 2114

⁵⁸⁶ The fact that their offences had got as far as the Appeal Court., at presumably considerable expense to the public, seems to me more a reflection of the ineffectiveness of rehabilitation, than on their criminality.

⁵⁸⁷ Sentencing Act (2020) section 58 *Purposes etc. of sentencing: offenders aged under 18.*

⁵⁸⁸ The Crown Prosecution Service (2018) *Duress and Necessity* <https://www.cps.gov.uk/legal-guidance/defences-duress> *The defence of duress is available where the defendant was forced to commit a crime. It exists to prevent a person being guilty of crime they would never commit. Duress can be used as a defence for all types of crimes except, Murder, Attempted Murder and Treason see also*

Government Publications (2018) *Controlling or Coercive Behaviour*. <https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour>.

Coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.

⁵⁸⁹ Andrews K (2021) *Class A drug possession 'effectively decriminalised'* <https://www.thetimes.co.uk/article/class-a-drug-possession>.

'in Scotland Class A drug possession 'effectively decriminalised', and police give only a warning'

⁵⁹⁰ Premises may be used

(a) as in private accommodation for drug usage with friends

(b) in accommodation where fees are charged

(c) at the county end of a county lines operation, where a flat is being used ('cuckooing') as a deposit for drugs before dissemination locally. The person thus 'cuckooed' may be paid for it or may be an addict or an innocent person coerced into allowing it.

⁵⁹¹ See Chapter 1 and footnote Bonneau A.B (2013)

‘... such evidence as we have assembled about the current situation and the changes that have taken place in the last 30 years all point to the conclusion that the deterrent effect of the law has been very limited.’⁵⁹²

Further evidence, quoted in *Principled Sentencing*⁵⁹³, showed that deterrence had only a small effect in reducing crime; the certainty of apprehension being a far more effective than the severity of sentence.⁵⁹⁴ The deterrent effect of confiscation at Step 6 of the guideline,⁵⁹⁵ if vigorously enforced, is said to have a powerful deterrent effect on main supplying offenders.⁵⁹⁶ Punishment might not have much effect upon them for they would view it as a profit generating business and would estimate the risks of being caught, against the gains which might be enormous, (throughout Western Europe estimated as €30 billion annually)⁵⁹⁷ as a risk worth taking. Deterrence may be marginal in drug supply offences; in a survey of eighty cocaine supply convicted offenders,⁵⁹⁸ only two had thought about the possibility of apprehension and being sentenced. Moreover, as they thought that they would not be apprehended, the severity of possible punishment would have had little impact upon them.⁵⁹⁹

For the street-level traffickers and all those who are addicted to drugs, deterrence would have little effect not least because many of them would have an impaired capacity to understand the significance of their actions.⁶⁰⁰ Drugs ‘mules’ too, as low-level traffickers (see chapter 2) have a less than 5% chance of being caught and so may not be deterred or may consider the risk of being caught sufficiently low when weighed against both the potential financial or other benefits and the avoidance of pain that might be inflicted by those coercing them into committing drugs offences.⁶⁰¹

Deterrence may have counter effects: if something is forbidden it may become a challenge to young people to test their prowess.⁶⁰² Other agencies found deterrence to be ineffective: The House of Commons Science and Technology Select Committee’s 2005 report reported ‘no solid evidence to support the existence of a deterrent effect,’⁶⁰³ and a British Medical Association’s report agreed. Finally, a 2014 Home Office report which compared the legal

⁵⁹² Runciman Report (2000) *Independent Inquiry into the Misuse of Drugs Act 1971* a report for the Police on an Independent Inquiry into the Misuse of Drugs Act 1971 (the ‘Runciman Report’) under sponsorship of the Joseph Rowntree Foundation 1999

<http://www.police-foundation.org.uk>

⁵⁹³ von Hirsch A et al (2008) in *Principled Sentencing Ibid Deterrent Sentencing as a Crime Prevention Strategy* Chapter 2.3. pp 56 et seq

⁵⁹⁴ 1.7. and see footnote Wright V (2010). “*Deterrence in Criminal Justice; Evaluating Certainty vs Severity of Punishment*”

⁵⁹⁵ Drug Offences Definitive Guideline (2012) page 15 Step 6 *Confiscation and ancillary orders*

⁵⁹⁶ Collinson P (2019) personal communication. Mr Collinson QC a barrister experienced in drug offences, told me that the best way to punish traffickers was through confiscations of their assets. And see Proceeds of Crime Act (2002) Gov.uk [https://assets.publishing.service.gov.uk/uploads/](https://assets.publishing.service.gov.uk/uploads/Proceeds%20of%20Crime%20Act%202002) ‘*The Proceeds of Crime Act 2002 sets out the legislative scheme for the recovery of criminal assets with criminal confiscation being the most commonly used power. Confiscation occurs after a conviction has taken place*’

⁵⁹⁷ European Monitoring Centre (2019) *EU Drug Markets Report 2019* <https://www.emcdda.europa.eu/files>

⁵⁹⁸ Doob A & Webster C (2009) in *Principled Sentencing* ibid p 71 and quoting Waldorf D & Murphy S *Deterrence and offenders’ thought processes*

⁵⁹⁹ Wright V.(2010) *Deterrence in Criminal Justice p 1* The Sentencing Project November 2010 Washington DC

⁶⁰⁰ Wright V.(2010) ibid p2 quoting *Christopher Mumola in Substance Abuse and Treatment, State and Federal Prisoners 1997, Bureau of Statistics Special Report 1999, she stated that it is unlikely that such persons are deterred from offending for at least half of all prisoners were under the influence of drugs or alcohol at the time of their arrest*

⁶⁰¹ United Nations Office on Drugs and Crime (2014) *Drug mules; swallowed by the illicit drugs trade* UNODC Report www.unodc.org/.../drug_mules

⁶⁰² Becker H S (1963) *Labelling Theory*.

Becker’s idea was that members of a youth gang ‘gained their badge of acceptance’ through undertaking some criminal act. <https://www.britannica.com/topic/labelling-theory>

⁶⁰³ Government publications (2005) *Drug classification: making a hash of it?* <https://assets.publishing.service.gov.uk/uploads/filePDF>

framework of fourteen different countries concluded that there was: ‘...no obvious relationship between the toughness of a country’s law enforcement against drug possession and levels of drug use in that country.’⁶⁰⁴ The key factors in achieving deterrence are immediacy and certainty of detection together with certainty and severity of punishment, the first two being the most important.⁶⁰⁵

5.7. Effectiveness of rehabilitation of drugs offenders in prison.

Apart from punishing an offender as he deserves, it must be the logical aim to reform him so that he can become reintegrated into society, whether in custody or in the community. Moreover, given that so many offenders have severe problems with drugs, it would be unethical not to utilise the opportunity that imprisonment provides for treatment and rehabilitation.

The Halliday Report of 2001⁶⁰⁶ estimated that a 5-15% reduction of the current rate reoffending (which is 56% within 2 years of release from prison) would be possible through rehabilitation. However, this was also considered by others to be questionable,⁶⁰⁷ and unless the offender’s criminogenic background is remedied, considered essentially unrealisable.⁶⁰⁸

The problems of measuring effectiveness are twofold: firstly, *all* offenders upon arrival at prison will undergo the same assessments, as described in Chapter 5, and will proceed to general rehabilitation (including education) and drug stabilisation and detoxification therapy when appropriate. No distinction is made whether they are drugs-offenders or offenders with a drug problem. 70% of all convicts have a drug problem before entering prison, 3% have been convicted for drug possession offences and will, most probably, need drug treatment, and 17% are in prison on account of drug trafficking offences, who most probably will not need drug treatment. Secondly no input-output records are kept of progress in rehabilitation, whether general or drug treatment.⁶⁰⁹ Finally, what is the outcome sought of the drug treatment⁶¹⁰? Abstinence is ideal, but often not attainable and frequently stabilisation only can be achieved. How long would that so remain, and is the ex-prisoner able to return to a ‘normal’ life in the community without re-offending? Should

the aim be stabilisation only and success measured by the Opiate Substitution Therapy⁶¹¹

⁶⁰⁴ Home Office (2014) *Drugs International Comparators* assets.publishing.service.gov.uk

⁶⁰⁵ Wright V (2010) *Deterrence in Criminal Justice: Evaluating Certainty vs Severity of Punishment* www.sentencingproject.org/publications/deterrence

⁶⁰⁶ Halliday J (2001) *Report of a review of the sentencing framework of England and Wales* <https://webarchive.nationalarchives.gov.uk/+/.../halliday-report.../chap-1-2-halliday>.

⁶⁰⁷ Bottoms A (2008) *Empirical Research Relevant to Sentencing Frameworks: Reform and Rehabilitation* pp16&17 in von Hirsch A et al (2008) *ibid*

⁶⁰⁸ Carlen P (2012) *Against Rehabilitation: For Reparative Justice* Centre for Crime and Justice Studies <https://www.crimeandjustice.org.uk/resources/against...>

Professor Carlen argues a very strong case against rehabilitation as such, pointing out that the majority of offenders, not drug offenders, but offenders in general come from deprived backgrounds, and to the deprived background they will return upon release from their sentence. Until that is sociologically improved, they will again offend.

⁶⁰⁹ Department of Health (2006) *ibid*. Individual records are kept of drug users entering prison and throughout their drug treatment course, but these are not collated into a prison-whole record.

⁶¹⁰ NCBI (2006) *Physical detoxification services for withdrawal from specific substances*. <https://www.ncbi.nlm.nih.gov/books/NBK64116>

Detoxification usually implies opiates, for they are the most common causes of addiction, and withdrawal is the most likely to give rise to problems. Cocaine addiction, though common, does not in its detoxification give rise to serious problems. The NCBI article deals with all drugs of addiction, including alcohol.

⁶¹¹ Opiate Substitution Therapy: *Many addicts are unable to respond to detoxification by becoming abstinent and are usually maintained on Methadone (opiate substitute). However, in the ‘through-the-gate’ phase they are*

maintained ex-prisoner who has returned to wife, family and work?⁶¹²

HMIP's requirements for the drug strategy and its compliance⁶¹³ outlined how to attain the required outcome. However, it was reported that little is known about what works and for whom.⁶¹⁴ Answers to even basic questions regarding throughput and output were not available.⁶¹⁵ What can be said is that between a half and a third of all new entrants to prison each year are estimated to be problem drug users,⁶¹⁶ and about 51,520 start a detoxification or maintenance prescribing programme⁶¹⁷. The proportion who successfully completed it was 28% in 2003 and 44% in 2007⁶¹⁸. Those who do complete the course have a reconviction rate of 53% against the 91% reconviction rate of those who fail to finish the treatment. A more recent survey suggests more research on effectiveness to be needed.⁶¹⁹

Despite the commitment to evidence-based practice, there is a dearth of independent, systematic and careful evaluations of drug services in UK prisons.⁶²⁰ The greatest threat to success comes from the throughcare and aftercare⁶²¹ ('through-the-gate') arrangements,⁶²² when

particularly unstable and liable to overreact to drugs. It is for that purpose that the partner should have been trained in the use of the antidote Naloxone, and for injecting drug addicts the availability of DCR becomes especially important.

⁶¹² Uchterhager A (2010) *Heroin-assisted treatment in Switzerland* pubmed.ncbi.nlm.nih.gov >

Strang J, Groschka T, & Metrebian N (2012) *New heroin-assisted drug treatment. Recent evidence and current practice of supervised injecting heroin treatment in Europe and beyond*. www.researchgate.net/.../26279694

Frank V (2013) *New heroin-assisted drug treatment* EMCDDA INSIGHTS 11, New heroin-assisted drug treatment ...https://www.tandfonline.com > ... > Volume 20, Issue 2 further updates

⁶¹³ See 5.4.

⁶¹⁴ United Kingdom Drug Policy Commission (2008) *Reducing Drug Use, Reducing Reoffending* p6 www.ukdpc.org.uk>wp-content>uploads

⁶¹⁵ HMIP (2019) *Too much violence, drugs and inactivity in prisons but independent scrutiny having more impact* - Chief Inspector in 2018-19 report. In his annual report, Mr Clarke asks: "How do we independently assess accountability in the inevitably closed world of prisons?"

⁶¹⁶ UKDPC (2008) *ibid* page 1

⁶¹⁷ UKDPC (2008) *ibid* page 6

⁶¹⁸ *This is the problem: why is there such a large drop out? What is being done about it?*

⁶¹⁹ Powis B (2014) *Drug Recovery Wings Set Up, Delivery and Lessons* gov.uk https://assets.publishing.

Drug Recovery Wings (DRWs) were launched in five adult prisons in June 2011. The issues identified by the study provide some valuable lessons for future development and running of DRWs.

'However, further research is still needed to establish whether the examples of developing good practice described in the study translate into reduced reoffending and continuation towards abstinence'

. It is of interest to note that figures on input and output were not provided.

⁶²⁰ Harrison L, Cappello R, Alaszewski A, Appleton S & Cooke G (2003) *The effectiveness of treatment for substance dependence within the prison system in England: a review*. University of Kent, Centre for Health Services Studies

⁶²¹ Government Publications (2015) *Licences and licence conditions* -

Justice. Gov.uk https://www.justice.gov.uk > psipso > psi-

A drug-offending prisoner is released on licence, one of the conditions being that he has to report to Probation within five days. At the same time Probation is informed, so if he does not report, they will have to seek him out to ensure that the drug-related supervision is continued. Thus, the onus for initial action is upon the drug offender, who may of course be very unreliable. I am grateful to Mr Lynford Brunt (see Annex Acknowledgement) for this information.

⁶²² Government publications (2017) *An Inspection of Through the Gate Resettlement Services for Prisoners Serving 12 Months or More* A joint inspection by HMIP&P 2017 https://www.justiceinspectorates.gov.uk *There are certain key tasks for the CRCs delivering resettlement services. They must:*

(a) prepare a resettlement plan, within five working days of the screening being completed by prison staff

(b) help prisoners to find accommodation

(c) help prisoners retain employment held before, gain employment or training opportunities post-release

(d) provide help with finance, benefits and debt

(e) provide support for victims of domestic abuse and sex workers

released drug addict prisoners are at their most vulnerable.⁶²³ ⁶²⁴A recent ACMD report (2019) was very condemnatory:⁶²⁵ *'Custody as an opportunity to reduce drug problems and offending was often squandered by failure to provide support on release'*.⁶²⁶

The effectiveness of the different methods of drug rehabilitation⁶²⁷ will now be assessed.

(a) Pharmacotherapy is effective⁶²⁸

Once stabilised prisoners⁶²⁹ receive decreasing doses of oral methadone⁶³⁰ over a seven-day period, minimising withdrawal and the risk of illegal drug use, or in some cases of suicide. Acupuncture may have a place here.⁶³¹ There are some injecting heroin addicts whose only effective treatment is to continue injecting under supervision.⁶³²

(b) Psychotherapy⁶³³

Motivational enhancement (Interviewing) is an effective introduction to cognitive behavioural therapy.⁶³⁴ The evidence is strongest for interventions based on behavioural principles. Thirty English probation areas use cognitive behavioural programmes, yet there appears to have been no evaluative research there or in prison. However, of patients treated (in the USA) with Cognitive Behavioural Therapy, 60% remained abstinent at 52-week follow-up.⁶³⁵

(c) Support Schemes are useful and moderately effective.

Group work⁶³⁶ has been favoured in the treatment of substance problems and has been in use within the English prison system since the 1960s. Treatment involved 72 hours of group therapy. Reconviction rates 2 years after release indicated no significant difference between the treatment and control groups. The 12 Steps programme results were comparable to

⁶²³ PHE (2018) *Report Deep Dive; Continuity of care for adult prisoners with a substance misuse need* <https://assets.publishing.service.gov.uk> › file › Co...

Only 12 clients across the 5 areas were met at the gate on release, by a community representative only 32.1% of people assessed as needing treatment when they leave prison enter treatment in the community within 21 days of release.

⁶²⁴ Chilvers, L. (2021) *Change Grow Live: Norfolk Alcohol and Drug Behaviour Change Service*. She told me that what they do at Adobe House is to send one of their workers into the prison to 'meet-and-greet' the drug addict so that they can be registered on their community list before they are discharged from prison. Thus, a seamless continuity is achieved over the 'through-the-gate' period.

⁶²⁵ ACMD (2019) *Report on Custody-Community Transitions (CCT) Letter to Home Secretary 12 June 2019*

⁶²⁶ this is a major issue which warrants more prominence. The point is this: the guidelines are based heavily on imprisonment as the main option, but a great threat to successful reintegration is the lack of support post-release. With more focus on community sentences as effective alternatives to imprisonment, offenders can build links during their sentence as they receive treatment. They will be less vulnerable too.

⁶²⁷ 5.3.

⁶²⁸ Pharmacotherapy is used as substitute medication, as in heroin addiction (the vast majority in prison), but medication can also be prescribed if required, to help to alleviate discomfort experienced as part of the withdrawal process, from for example 'spice' or cocaine addiction.

⁶²⁹ National Institute on Drug Abuse (2016) *How is cocaine addiction treated?* ...<https://www.drugabuse.gov> › research-reports › cocaine *It is not known how many prisoners cocaine addicts there are.*

⁶³⁰ *Lofexidine, a non-opiate treatment, may be used for opiate withdrawal which, while it may be less effective than methadone in the early stages, has less serious side effects*

⁶³¹ *Acupuncture: there was no support for the claim that acupuncture by itself was an effective treatment for addiction, although it may have a useful placebo effect during drug withdrawal.*

⁶³² Strang S (2018) *Heroin-Assisted Treatment: the RIOTT trial and its findings*. Professor Sir John Strang. National Addiction Centre, King's College London, UKfoundationshealthcare.co.uk › uploads › 2018/09 › 9-

⁶³³ See 5.3. *Rehabilitation for drug addicts* for details of Motivational Enhancement (Interviewing) Therapy and Cognitive Behavioural Therapy

⁶³⁴ Rubak S, Sandbaek A, Laitzen T & Christensen B (2005) *Motivational interviewing: a systematic review and meta-analysis* Br J Gen Pract. 2005 Apr 1; 55(513): 305–312

⁶³⁵ McHugh R K, Hearon B. A. & Otto M.W. (2010) *Cognitive-Behavioural Therapy for Substance Use Disorders* Psychiatr Clin North Am. 2010 Sep; 33(3): 511–525. This study was carried out in the non-prison setting, but it is not unreasonable to suppose that it would be effective in prison as well.

⁶³⁶ Narcotics Anonymous has meetings in prison <https://ukna.org>

cognitive behavioural approaches which have been much more extensively evaluated. Project MATCH found that its effectiveness was 'modest'.⁶³⁷

Therapeutic Community⁶³⁸ activities exist in many prisons and reports are promising; the National Institute of Drug Abuse-sponsored *Drug Abuse Treatment Outcome Study* examined effectiveness. Participating for at least 3 months was associated with better outcomes at 1 year. Participants who showed improved behaviour after 1 year continued to do so after 5 years. They had reduced usage of weekly, or more frequent, cocaine use by 50%, decreased illegal activities by 50%, and increased full-time employment by 10% compared with the year before entering treatment.

A summary of the effectiveness of drug rehabilitation of addicts in prison shows that some interventions can be effective in reducing illicit drug use and offending behaviours.⁶³⁹ The best is a combination of all three therapies.⁶⁴⁰ The problem remains that as input-output figures are not collected, the degree of effectiveness cannot be estimated, and it is not known what works best.

5.8. The effectiveness of rehabilitation of drug offenders in the community.

Most drug offenders are punished with non-custodial orders and this paragraph will contain an assessment of the effectiveness of drug rehabilitation for them. In 2016 there were 102,000 people sentenced, cautioned, or given a penalty notice for drug offences or a cannabis/khat warning. Of these 93,000(91%). were punished with non-custodial sentences.⁶⁴¹

Who are the drug offenders sentenced to community orders? 90% of drug offenders, fulfil the relevant criteria for the magistrates' courts to impose a Drug Rehabilitation Requirement (DRR)⁶⁴² as part of a community order. The DRR is carried out in the community with the same procedures as in prison, namely pharmacotherapy, psychotherapy, and the use of support services, but under the supervision of the probation services⁶⁴³. Usually, an offender has to submit the probation officer's report for scrutiny by the judge, who may if the report is deemed

⁶³⁷ Cutler R.B. & Fishbain D.A. (2005) *Project MATCH Drug and Alcohol Findings* Findings.org.uk > PHP

⁶³⁸ National Institute of Drug Abuse (2015). *What Are Therapeutic Communities?*

www.drugabuse.gov > publications > research-reports and see

Rawlings B (2017) *Therapeutic communities and planned environments* <https://www.cambridge.org/bjpsych-advances> > article 'Several English prisons contain therapeutic communities (TCs) for serious substance misusers. The article describes how these are organised and comments on how they are specifically tailored and accredited for use in custodial settings. It also describes 'psychologically informed planned environments' (PIPEs), offender pathways for those with personality disorders and psychopathy which provide additional support for psychological treatment. It ends by explaining how 'enabling environments' are assessed, since these are now becoming widely adopted in prisons to reverse toxic environments – which affect staff, the prison and the outside world as well as the individual prisoner – and to counter negative learning found in custodial institutions.

⁶³⁹ UK Drug Policy Commission (2008) McSweeney T, Turnbull P J & Hough M *The treatment and supervision of drug-dependent offenders* King's College London Institute for Criminal Policy Research

⁶⁴⁰ Home Office Research Study 267 (2003) *Prisoners' drug use and treatment: seven research studies*

ed Ramsey M <http://www.dldocs.stir.ac.uk> > documents > hors267 Commenting on prisoners who had undertaken detoxification in prison and had re-offended, the editor stated that: 'Opiates were the most popular drug of choice, used by almost a third (31%) of offenders while 28% stated crack/cocaine as their drug of choice, and almost a fifth (19%) cited poly-drug use. Alcohol was the drug of choice for 14%, while 1.5% stated gambling as their problem addiction and the remaining 6.5% used other drugs including amphetamines, tranquillisers, LSD and cannabis.'

⁶⁴¹ Cuthbertson P (2017) *Who goes to prison; an overview of the prison population in England & Wales* Civitas

⁶⁴² Report of the Comptroller and Auditor General (2004) HC 366 Session 2003-4 *Drug Treatment and Early Lessons* www.nao.org.uk/wp-content/uploads/2004/03/0304366.pdf

⁶⁴³ Black C (2021) *ibid* para3.1 p21 states 'The drug treatment and recovery workforce has deteriorated significantly in quantity, quality and morale in recent years' notes that caseworkers often have to handle between 50 and 80 cases, sometimes as many as 100, which makes it impossible to carry out the supervision satisfactorily. She stated that the cases should number about 40 (the background to this she mentioned previously is the unsettled background to the probation services and the lack of funding)

to be unsatisfactory or the Community Order breached,⁶⁴⁴ commit the offender to prison. However, it has to be pointed out that those on DRR may be primary drug offenders or other offenders with drug addiction (61% of persistent and prolific offenders have been assessed as having a drug issue⁶⁴⁵), and the Probation Service does not make a distinction when it comes to treatment and supervision.

The aims of the DRR, by which its effectiveness is to be assessed, are

- a) stopping or reducing drug use or the harms from it.
- b) preventing reoffending or reconviction.
- c) social re-integration, accommodation, employment, basic skills.

A meta-analysis⁶⁴⁶ described the factors influencing the effectiveness of a DRR. One measure is in its completion, for that results in higher abstinence, lower crime rate, lower relapse and higher employment compared to those who have dropped out.⁶⁴⁷ Completing the course of treatment is associated with higher abstinence, lower crime rate, lower relapse and higher employment compared to those who have dropped out (2). Treatment course completion rates vary, though they are improving over time.⁶⁴⁸

A national survey of 753 offenders who had committed 17,000 offences in the ninety days before starting treatment, reported that 50% committed no offences at the one-year point after completion of the treatment.⁶⁴⁹ The Community Order DRR out-performs the short custodial sentence DRR, as shown by the Prison Reform Trust,⁶⁵⁰ outlining the reasons.⁶⁵¹

The Ministry of Justice research showed similar figures. In the one-year follow-up period, a higher proportion of offenders released between 2008 and 2011 reoffended⁶⁵² having been sentenced to under 12 months custody than other, similar offenders given a community order (around 3% higher) or a suspended sentence order (around 7% higher).⁶⁵³

In summarising the factors which influence the outcomes of the procedures involved in providing DRRs, McSweeney et al commented ‘we are not aware of any research currently

⁶⁴⁴ Criminal Justice Act (2003) Schedule 8 *Breach, revocation or amendment of community order*

⁶⁴⁵ Ministry of Justice & Home Office (2009) *Prolific and other priority offender programme*
<https://www.justiceinspectorates.gov.uk/media>

⁶⁴⁶ McSweeney T, Turnbull P & Hough M (2008) *The treatment and supervision of drug dependent offenders*. Institute for Criminal Policy Research King’s College London p33

‘The first measure to be considered is how many participants in a DRR complete the course, and why people drop out. Different reasons have been given lack of motivation, fear of treatment failure and interpersonal conflicts have been reported as the reasons, therefore, with proper detection and removal of such obstacles, and with better probationary supervision the outcome should be improved further’.

⁶⁴⁷ Hoseinie L, Gholami Z, Shadloo B, Mokri1 A, Amin-Esmaili M & Rahimi-Movaghar A (2015) *Drop-out from a drug treatment clinic and associated reasons*⁶⁴⁸

⁶⁴⁸

(a) National Probation Service (2003) 28%

(b) National Probations Service (2006/7) 44%

(c) Mc Sweeney et al (2008) 50%

(d) Drug Policy Facts (2010) 46%

⁶⁴⁹ Gossop M, Marsden J, Stewart D & Rolfe A (2000) *Reductions in acquisitive crime and drug abuse after treatment of addiction problems:1 year follow up*. The National Treatment Outcome Study Drug and alcohol dependence Vol 58, No 1-2 p 165-172

⁶⁵⁰ Prison Reform Trust (undated) *ibid* p2 in its response to the Ministry of Justice consultation, *Punishment and reform: effective community sentences*, being 8.3 % more effective in reducing re-offending rates.

⁶⁵¹ Prison Reform Trust (undated) *ibid* p2 ‘elements that work particularly well are intensive supervision, community payback, restorative justice, developing personal responsibility, and dealing with support needs such as housing, employment, addictions, mental health and learning disabilities and difficulties.’

⁶⁵² A proven reoffence is defined as any offence committed in a one-year follow-up period that leads to a court conviction, caution, reprimand, or warning in the one-year follow-up or within a further six-month waiting period to allow the offence to be proven in court. (Ministry of Justice 2019)

⁶⁵³ Eaton G & Mews A (2019) Ministry of Justice Analytical Series 2019 *The impact of short custodial sentences, community orders and suspended sentence orders on reoffending*

being undertaken into the processes and impact of the DRR arrangements.⁶⁵⁴ This remains a significant gap in the literature.

In 2016 a study for the European Commission and surveying all the member countries showed that there was no conclusive evidence that judicially imposed drug regimes were more effective than voluntary treatment. In fact, voluntary detoxification is more effective than judicial DRR.⁶⁵⁵ This had been first reported in the British Journal of Criminology in 2006⁶⁵⁶, with an analysis of ‘coerced’ drug treatment outcomes at six and eighteen months for court-mandated treatments (DTTOs and DRRs), compared with patients ‘voluntarily’ submitting themselves to treatment.⁶⁵⁷ The criteria used to determine outcomes were: considerable and sustained reduction in substance use, injecting risk, offending, and mental health state. Finally, they concluded that:

*‘...when other factors are statistically controlled ...the drug treatment that is ordered by the criminal justice system does not have significantly different outcomes to voluntary treatments.’*⁶⁵⁸

Community sentenced drugs offenders would be obliged to undertake the relevant requirements and in particular, on account of the close interlinkage between drugs and mental disorder, the mental health requirement.⁶⁵⁹ This is, however, poorly implemented.⁶⁶⁰

5.9. The effectiveness of protection of the public

The public is protected from the offender by imprisoning him or by restricting him through a community order.⁶⁶¹ How effectively is the public protected though? If the drug offender is incarcerated the public outside the prison walls is protected from him. However, the ‘public’ inside is certainly not. In Chapter 5 it was described how, in HMIP’s inspection reports, evidence was found that in four of the five prisons visited drug trading was being carried on. It cannot be said therefore that those in custody were being adequately protected. In addition, prison staff can face violence and abuse from prisoners who are drug intoxicated.⁶⁶² It is also said prison enhances an offender’s expertise in crime.⁶⁶³

⁶⁵⁴ McSweeney T, Turnbull P & Hough M (2008) *ibid* p33

⁶⁵⁵ Disley E, Kei I, Strang L, Kruithof K & Davies M (2016) *Study on alternatives to coercive sanctions (ACS) as response to drug law offence and drug related crimes* p72 Study of all European countries for the European Commission. Coercive sanctions here mean those imposed through force of the law and voluntary implies those methods used outwith the law.
https://ec.europa.eu/files/docs/acs_final_report_new_ec_template_en

⁶⁵⁶ McSweeney T, Stevens A, Hunt N & Turnbull P (2006) *Twisting Arms or a helping hand? Assessing the impact of ‘coerced’ and ‘voluntary’ drug treatment options* British Journal of Criminology (2006)

⁶⁵⁷ See above: Swanswell (2014). 83% detox course completion with 90% abstinent six months later. (Swanswell was a private clinic)

⁶⁵⁸ McSweeney et al (2006) *ibid* p16

⁶⁵⁹ Sentencing Act (2020) s 201 *Community order requirements table* and Part 9 *mental health treatment requirement*.

⁶⁶⁰ See 4.7. Gov.Pubs.(2021) *Justice Committee calls for root and branch reform of prison mental health support* Chair of the Justice Committee Sir Robert Neill MP said: ‘No one should be in prison simply because mental health support in the community is not available. Too many offenders are sent back in prison because community orders with mental health requirements are unavailable in many areas.’

The treatment of mental illness in drugs offenders is, next to detoxification, their most important rehabilitation
⁶⁶¹ How long an offender is to be incapacitated depends upon what the sentencing authority feels to be proportionate and correct, a subjective decision. Similarly, the prisoner has the right not to be incapacitated for longer than he deserves, and his opinion might well be different to that of the sentencer.

⁶⁶² Randex Testing (2017): *Drug Use in Prison Linked to Increase in Violence*
<https://www.randoxtestingservices.com>

‘A significant contributor to the surge in violence has been attributed to the widespread use of legal highs such as Spice. The Chief Inspector of prisons Peter Clarke has said that much of the violence and bullying that did exist was, in his view linked to a ‘significant drug problem and yet the prison lacked an effective drug strategy.’

⁶⁶³ Samenow S (2011) *Do Prisons Really Make Offenders Worse?*

There are two ways in which the public is protected in the case of drug offenders under a community order: through complying with the relevant requirements,⁶⁶⁴ and through undertaking and completing the DRR, the public is protected because treated offenders' proclivity to offend is reduced.⁶⁶⁵ It is posited that the public would not be at risk of harm and therefore *not* in need of protection from primary drug offenders who fulfil the sentencing criteria for a community order, though if a drug user becomes intoxicated, he might be a danger to other people.⁶⁶⁶

5.10. The effectiveness of making reparation

Reparation by offenders in custody is theoretically possible under certain circumstances.⁶⁶⁷ Reparation by drug offenders sentenced to community orders is through complying with the requirements, and the unpaid work to be carried out. Drug offenders probably do not have identifiable victims but would be able to carry out the unpaid work requirement as community 'pay back.'

The effectiveness of drug offenders' reparation could be estimated through the community orders' completion rates which in one study was 79%,⁶⁶⁸ though whether they were primary drugs-offenders or offenders who had a drugs problem is not known.

5.11. Conclusions on the effectiveness of sentencing drug offenders.

There are two main problems in coming to conclusions, which are firstly: no distinction is made, in prison or non-custody, between drugs-offenders and others who have committed offences to obtain drugs. Thus, although facts on the treatment of drug addicts are obtainable, it cannot be separated out which of the two groups of offenders are being dealt with. The second problem is the lack of records which could be properly audited. For example, in the HMIP&P inspection reports the rehabilitation procedures (misleadingly called 'outcomes') appear on the whole to be adequate, but no actual *outcome* figures of *effectiveness* are provided, so what works best cannot be determined.

Sentencing of drug offenders involves censure and the statement of punishment; the weakness in assessing the effectiveness of censure is that no records are kept of it, or of its effects. Surveys of its importance have indeed been made,⁶⁶⁹ but not of a measure of effectiveness. For the five parts of punishment what can be said is that Retribution can be said

www.psychologytoday.com › inside-the-criminal-mind

'Prisons have long been described as "schools for crime" or "breeding grounds for crime." The central idea is that incarcerating offenders makes them worse because they learn new "tricks of the trade." There is an inevitability to the perception that if you land in prison, you will turn into an even more corrupt or violent person when you leave'

⁶⁶⁴ Community Order requirements (d) prohibited activity, (e) curfew, (f) exclusion and (g) a residence requirement

⁶⁶⁵ National Offender Management Service (2014) *Supporting Community Order Treatment Requirements* page 2 Gov.uk [https://assets.publishing.service.gov.uk › uploads › file](https://assets.publishing.service.gov.uk/uploads/file) 'Drug users are estimated to be responsible for between a third and a half of acquisitive crime and treatment can cut the level of crime they commit by about half.' And see

Burkinshaw P, Knight J, Anders P, Eastwood B, Musto V, White M & Marsden J.(2017) *An evidence review of the outcomes that can be expected of drug misuse treatment in England* page 8 (for Public Health England) Gov.uk [https://assets.publishing.service.gov.uk › uploads › file](https://assets.publishing.service.gov.uk/uploads/file) Treatment is associated with a 47% reduction in convictions among those who successfully completed the course or remained on treatment for two years

⁶⁶⁶ Sentencing Guideline (2012) namely possession only may become a danger if driving

⁶⁶⁷ Ministry of Justice (2010) *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* Page 16 paragraph 58

'Deductions to be taken from low-risk prisoners earning higher wages while working on licence prior to discharge in the community, making reparation to victims and communities.'

⁶⁶⁸ Cattell J et al (2014) *ibid* p 32 et seq

⁶⁶⁹ see 6.4. and footnotes Canton, Duff, and Sentencing Council.

to be effective if its proportional in severity to the gravity of the offence. But this is a measure of subjective opinions on what should be the 'just desert' of the offence. If sentencing and retributive punishment is not appropriate as in the case of drugs users, then it cannot be assessed for effectiveness, except that the law, having been broken, has to be upheld. Deterrence has been shown not to result from drugs laws in respect of either traffickers or users, and so it cannot be said to be effective.

Rehabilitation, both general and detoxification, is extensive both in the prison and non-custodial setting, but as mentioned above input-output statistics are not kept, so what works well or best is not known, and an estimation of effectiveness cannot be made. However, reoffending is less for those who have completed the DRR in prison than those who have not. Evidence has however been adduced that the detoxification programmes have better outcomes in the voluntary sector than in a judicial setting. However, the observations at 6.7. and footnotes Carlen and ACMD (2019) *Report on Custody-Community Transitions*⁶⁷⁰ are a cautionary note of warning, in that effectiveness cannot be attained until the causes are dealt with.

Protection of the public is achieved when the offender is in prison by virtue of his incarceration, yet incomplete on account of the drugs trading carried there. In the non-custodial setting, protection of the public is through the enforcement of the Community Order's requirements. Some estimate of its effectiveness may be inferred from their rates of breach. Reparation to victims by offenders is not possible when incarcerated, but there is scope in the context of the Community Sentence requirements for community pay-back. Records are not kept, save in the completion rates of Community Orders, which do not specify which concern the drug offenders.

⁶⁷⁰ Gov.UK (2019) *ACMD report: Custody-community transitions* This report from the ACMD provides advice on how to reduce drug-related harms that occur when people move between custody and the community <https://www.gov.uk> › ... › Drug misuse and dependency and see Gov.UK (2019) *The Government's response to the ACMD report on 'Custody-Community Transitions'*. <https://www.gov.uk> › ... › Prisons and probation This shows a positive response to the ACMD report.

Chapter 6 Diversion Schemes. Introduction

Diversion Schemes⁶⁷¹ are not concerned with sentencing. On the contrary their aim is to avoid court, which is particularly apposite in the case of minor drugs offenders, especially those with addiction problems. At 6.8 it was argued that voluntary detoxification is more effective than that ordered in the custodial or non-custodial setting. However, good overall outcomes can also be achieved in reducing reoffending if minor drugs offenders can be guided into desisting from further criminal behaviour, through Out of Court Disposals (O OCD), and deferred prosecution schemes, Diversion Schemes, the subject of this chapter.

6. 1. Out of court disposal (O OCD).

O OCD⁶⁷² allows the police to deal quickly and proportionately with low-level, often first-time, offending which does not merit prosecution at court.⁶⁷³ The Association of Chief Police Officers⁶⁷⁴ produced two gravity scoring matrices listing offences for both adults and young offenders.⁶⁷⁵ The score is adjusted by aggravating or mitigating and other factors.⁶⁷⁶ The matrices ensure consistency in decision making. There must be an admission of guilt by the offender in an O OCD for it to proceed with a conditional caution.⁶⁷⁷ If the requirements are not fulfilled or broken, then the offer of a conditional caution is withdrawn, and prosecution follows.⁶⁷⁸

⁶⁷¹ Black C (2021) *ibid* see 3.5. page 25 ‘Police-led out-of-court disposal and drug diversion schemes, like Checkpoint in Durham.... have delivered early interventions that divert individuals away from the criminal justice system and into drug education, support and treatment. These schemes should be expanded.’

⁶⁷² Home Office (1984) *The Police and Criminal Evidence Act 1984*

[www.gov.uk > guidance > police-and-criminal-evidence-act-1984-pac...](http://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pac...)

O OCD came into effect in 1984 when cautions by police inspectors were introduced. Further decisions were by the Crown Prosecution Service (CPS), but in 2013 that was passed to the Police Station duty officer, as long as the CPS criteria are fulfilled. No moves are made to find out why an arrested person had offended, and support to help offenders is not offered

⁶⁷³ Greater Manchester Police Briefing Paper (2007) *Out of court disposals used by Greater Manchester Police* www.gmpcc.org.uk > 2014/07 > GMP-Briefing-Paper-on-O OCD

(a)cannabis and khat warning.

(b)fixed penalty notice: driving, vehicle, traffic infringements.

(c)penalty notice for disorder, minor damage, disorderly behaviour, drunkenness, minor theft, noise, littering, fly posting, graffiti.

(d)simple caution upon admission of guilt.

(e)community caution.

(f)community resolution

⁶⁷⁴ now called the National Police Chiefs' Council (NPCC) as from 1st April 2015.

⁶⁷⁵ NPCC (2017) *Charging and out-of-court disposals* www.npcc.police.uk >

⁶⁷⁶ aggravating factors, such as committing a theft whilst carrying a knife, and reduced by mitigating factors, such as a person being coerced into committing the offence. Other factors that influence the decision are the criminal history of the offender, previous use of out- of-court disposals and the willingness of the offender to engage with the process.

⁶⁷⁷ Criminal Justice and Courts Act (2015)Pt.3 (c. 2), ss. 17(8)(a), 95(1); S.I. 2015/778, art.3,Sch. 1 para. 13 *Conditional cautions*

(1) An authorised person may give a conditional caution to a person aged 18 or over.

(2) In this Part “conditional caution” means a caution which is given in respect of an offence committed by the offender, and has conditions attached with which the offender must comply.

(a)facilitating the rehabilitation of the offender.

(b)ensuring that the offender makes reparation for the offence.

(c)punishing the offender.

The conditions which may be attached to a conditional caution include—

(a)a condition that the offender pay a financial penalty.

(b)a condition that the offender attend at a specified place at specified times.

Conditions attached may not require the offender to attend for more than 20 hours in total, not including any attendance required by conditions attached for the purpose of facilitating the offender's rehabilitation.

⁶⁷⁸ Thus, like the way a magistrate handles a minor offender’s case; see Chapter 6

6.2. Diversion Schemes.

The first deferred prosecution scheme, Operation Turning Point, was in the West Midlands Police Area in collaboration with the School of Criminology of Cambridge University.⁶⁷⁹ Durham⁶⁸⁰, North Wales⁶⁸¹, Thames Valley⁶⁸², Bristol,⁶⁸³ and Avon & Somerset⁶⁸⁴ followed. That in Durham will be described for it illustrates most completely the methodology of the project.

6.3. The Checkpoint Programme in Durham

This arose out of a Public Health and Police Joint Strategic Needs Assessment⁶⁸⁵ in which poverty and deprivation⁶⁸⁶ were examined as the precursors of the population's ill-health, drug use⁶⁸⁷ and criminality.⁶⁸⁸ In Durham County substance misuse, drug-related deaths and hospital admissions were higher than the average in England.⁶⁸⁹ As poverty is often a precursor to criminality, a team of Durham police officers was tasked to look into this further to identify possible solutions to reducing reoffending rates as well as aiming to improve people's lives. The police team consulted Public Health authorities and other organizations such as probation, employment and substance misuse agencies, to investigate methods and solutions of intervention, with the aim of agreeing a new way of joint working with offenders, diverting them from the criminal justice system, reducing their reoffending and improving their lives. It was realised that the solution was not simply going to be about crime and disorder; but also, about life chances, health and well-being, community confidence and cohesion.⁶⁹⁰

⁶⁷⁹Hobday J & Slothower M (2011) *The Turning-Point Project*. whatworks.college.police.uk>

⁶⁸⁰Weir K, Routledge G & Kilili S (2019) *Checkpoint Reduce reoffending Durham PCC*
Policing: A Journal of Policy and Practice. <https://doi.org/10.1093/police/paz015>

⁶⁸¹Hemmings J (2018) *Heroin users, low level dealers and petty offenders could avoid prosecution under new scheme*. North Wales News. *Minor criminals who sign 'contract' with police and commit to rehab or therapy won't go to court as North Wales Police look to cut reoffending rates*.
www.dailypost.co.uk > News > North Wales News > Crime

⁶⁸²Spyt W, Barnham L & Kew J (2019) *Diversion; going soft on drugs?* Thames Valley Police
journal.thamesvalleypcc.neighbourhoodalert.co.uk > New_Drugs_Diversion_...

⁶⁸³Armstrong C (2020) *Families and Education, Policies and Politics Bristol and Durham Show UK First Steps Towards Drug Decriminalisation* volteface.me > uk-decriminalisation

⁶⁸⁴Mann J (2018) *Avon & Somerset Drug Education Programme*
justiceinnovation.org > project > drugs-education-programme-dep

⁶⁸⁵Public Health (2011) *Joint needs assessment and joint health and well-being explained: commissioning for populations* www.gov.uk > Health and social care > Public health
'The purpose of this document is to support emerging health and wellbeing boards as they engage with Joint Strategic Needs Assessments and develop their preparatory joint health and wellbeing strategy'

⁶⁸⁶Jarman B (1991) *General practice, the NHS review and social deprivation* Br J Gen Pract. p 850
www.ncbi.nlm.nih.gov > pmc > articles > PMC1669472

'It was originally designed to measure need for primary care and has sometimes been used as a proxy for deprivation. It has been used by the Department of Health to determine additional 'deprivation' payments to GPs. The scores were re-calculated for the 1991 census, using the same census variables as 1981'.

⁶⁸⁷ACMD (1998) *Drug Misuse and the Environment* DrugWise<https://www.drugwise.org.uk> > uploads > ACMD The report emphasised the disproportionately high numbers of problematic drug users, and the lesser treatment available in deprived areas.

⁶⁸⁸Newburn T (2016) *Social disadvantage, crime, and punishment*. LSE Research ...<http://eprints.lse.ac.uk>

⁶⁸⁹Lynch A (2018) *County Durham Drug Strategy 2014 - 2017*

⁶⁹⁰Weir K, Routledge G & Kilili S (2019) *ibid*

A pilot study was initiated between Durham Constabulary and the University of Cambridge School of Criminology,⁶⁹¹ to explore the hypothesis that a minor offender may desist from further offending if he is sufficiently supported.⁶⁹² The methodology of the pilot study was a Randomised Controlled Trial comparison of OOCDC subjects in a Durham Constabulary Police Division compared with offenders who undertook the Checkpoint programme.⁶⁹³ Outcomes would be measured.⁶⁹⁴

6.4. The Aim and Methodology of Checkpoint⁶⁹⁵

The aim was to assist minor offenders to return to a life without crime, in offering support and help outside the judicial system.⁶⁹⁶ Seeking to achieve this, together with the offender, is the 'Navigator'⁶⁹⁷ specially trained people, qualified in Sociology or Psychology or having had personal experience having themselves been offenders in the past.

Following arrest, the local police station duty officer books the offender in, and ascertains that the offence meets CPS criteria,⁶⁹⁸ meets the Checkpoint admission eligibility,⁶⁹⁹ with the offence minor and falling within the Checkpoint list.⁷⁰⁰ If these conditions are fulfilled, offers him the Checkpoint scheme with the alternative of proceeding to prosecution. If the

⁶⁹¹ Routledge G (2015) *A Protocol and Phase I Experimental Trial: The Checkpoint Desistance Programme in Durham*. Gillian Routledge was sent to Cambridge University to undertake a Master's course of research which was in effect the pilot study for Operation Checkpoint.

⁶⁹² Routledge G (2015) *ibid* the abstract is:

The movement from punishment to support for offenders is not new, and whilst research has continually built on the theoretical basis around deterrence and desistance, policy decisions appear to have moved much more slowly. As a consequence, there have been several calls to conduct more experiments in determining what actually works in reducing reoffending. Applying the theories of deterrence and supported desistance, this paper describes a protocol for conducting an experiment in the form of 'Checkpoint', a Randomised Control Trial in a police and partner setting. It will cover who will be eligible, what the treatment provision should be and why; what implementation considerations need to be addressed and how the outcomes can be collected and analysed. It will also describe and summarise Phase One of Checkpoint, which is the setting up of the experimental environment and securing and testing the treatment.

⁶⁹³ However, as the Office of National Statistics does not keep such OOCDC records, resource had to be made to the relevant section of the Police National Computer for 2012-2013, and a random sample of the records of three hundred OOCDC offenders was taken for comparison with the Checkpoint subjects.

⁶⁹⁴ The outcomes to be measured would be the:

- (a) re-offending rates in the year following course completion.
- (b) re-offended victims' harm as measured by the Office of National Statistics Crime Severity Score.
- (c) cost of the arrest, crime and Checkpoint programme, derived from the New Economy, (now the Unit Cost) website.
- (d) 'critical pathway' assessment by the offender. In this he is asked to assess the effectiveness of the pathway (see below for the discussion of this) he had negotiated with the Navigator, scoring it 1-10.

⁶⁹⁵ Cambridge (2018) *11th International Conference on Evidence-Based Policing Transforming Police Outcomes with Research and Evidence-Based Policing in Durham*

<https://www.crim.cam.ac.uk/2018-archive-events>

in which Gillian Routledge gives a video presentation on Operation Checkpoint

⁶⁹⁶ Gov.uk (2020) *A Smarter Approach to Sentencing*
assets.publishing.service.gov.uk/attachment-data/file

where it seems as if the trend is towards prevention, or at least investigating the causes of crime.

⁶⁹⁷ Routledge G (2015) *ibid*

⁶⁹⁸ Crown Prosecution Service (1984) *Codes for Prosecution (1) Full Code Test (2) Threshold Test*

⁶⁹⁹ Routledge G (2015) *ibid* page 14 *Checkpoint eligibility criteria, the suspect*

has to live in the Durham Constabulary area

has be aged over 18 years

has have committed an offence which would fulfil the OOCDC criteria

has not to be currently under a Community Order, Suspended Sentence Order or on bail

has not to have committed the current offence more than three months previously

⁷⁰⁰ Routledge G (2015) *ibid* pages 15, 16 and 17

suspect accepts that and pleads guilty, he is bailed, and an appointment made to meet a 'Navigator.'

The 'Navigator' reinforces the offer made to the offender of an alternative to the normal Criminal Justice procedure and suggests that he should enter into a four-months' contract, one of the terms being that he would not reoffend, but if he did re-offend, then prosecution would immediately ensue.⁷⁰¹ During this time the Navigator and offender would work jointly in a 'social bond' to establish the reasons for the offence and help the offender resolve these problems.⁷⁰²

The Navigator's work starts with jointly assessing the offender's needs and problems helping him to visualise an alternative future, the '*pathways to desistance*'.

He explains that the offender in desisting:

- (a) needs to have a desire to change.
- (b) has the opportunity to do so in the four months of the Course.
- (c) has to visualise a life away from crime and adopt new attitudes and behaviour incompatible with reoffending.
- (d) has to welcome the development of a 'social bond'⁷⁰³ with the Navigator who is skilled in 'redemption' conversation that will assist the offender in visualising an 'alternative self'.

If the offender agrees to these conditions, he signs a contract:⁷⁰⁴

- a) not to offend in the four months of the course.
- b) engage with the victim (if the victim agrees)⁷⁰⁵ to initiate restoration.
- c) accept interventions which the Navigator may feel to be needed,
- d) undertake 18-36 hours of voluntary work and maybe wear a GPS tag.

Upon agreement to the contract, the offence is classed as a *deferred prosecution*, which can be revoked at any point during the four-month period, should the offender breach the conditions of the contract. When the offender has successfully completed the Checkpoint scheme, he exits the criminal justice system with *no criminal record*.⁷⁰⁶

Once the contract has been agreed and signed, Offender and Navigator work together to:

⁷⁰¹ The Sword of Damocles concept:

The Checkpoint programme recognised that most offenders place a higher value on the immediate gain or risk rather than what the consequences in the future might be.

Thus, the prospect of immediate punishment, if that becomes warranted, the so-called 'Sword of Damocles' is a very powerful deterrence for it implies that threat of swift and certain action is more important than a distant threat of sentencing and punishment in the Courts.

Although that is a rather superficial form of deterrence, yet it was always kept in the mind of the offender. Achieving lasting deterrence was the aim of reducing reoffending, requiring behavioural changes on his part.

⁷⁰² Bloomfield S & Wilkinson (2020). *Piloting of Motivation and Engagement as a stand-alone intervention: findings from a small-scale qualitative study* Ministry of Justice https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892497/piloting-motivation-engagement-intervention.pdf

⁷⁰³ Costello B (2009) *The legacy of Travis Hirschi's Social Control Theory (1969)* www.annualreviews.org/doi/abs/ammurev-criminol

Hirschi's concept of the "social bond" is comprised of the following four elements:

- (1) attachment, (refers to the symbiotic linkage between a person and society)
- (2) commitment,
- (3) involvement, and
- (4) beliefs.

⁷⁰⁴ Routledge G (2015) *ibid* page 18

⁷⁰⁵ Centre for Justice Innovation (undated) *Community Resolutions : Quick Guide* <https://www.justiceinnovation.org/media/document/PDF>

⁷⁰⁶ If the offender fails to complete the contract or re-offends at any time throughout the duration of the contract, he will be submitted for prosecution and the courts will be informed of the circumstances of the failure to complete the contract

- a) identify the antisocial drivers or causes for offending (drugs,⁷⁰⁷ alcohol, attitude etc.),⁷⁰⁸ the ‘critical pathways’,
- b) expose them to ‘the hook’, (that is the prime factor which would lead the offender to return to a lawful life),
- c) ensure they have the correct attitude and self-concept,
- d) secure the services of providers who have programmes to meet the needs of offenders,
- e) ensure they are there to support and encourage pro-social bonds
- f) celebrate the successful completion of Checkpoint in a positive and interactive way.

At the same time the Navigator reminds the offender of the threat or ‘Sword of Damocles’: that if they *do* offend, or break the contract conditions, there will be quick and certain action to prosecute.

6.5. Checkpoint Outcomes

It is anticipated that Cambridge University will publish the full outcome paper in 2022⁷⁰⁹. Interim information available⁷¹⁰ is that:

- a) re-offending rate after two years is 15% less amongst those who did Checkpoint course
- b) 2,660 offenders have been involved in the trial, but only 166 (6%) have reoffended.
- c) cost: Checkpoint costs the force £480,000 a year, but an internal estimate suggests that for every 1,000 offenders it saves at least £2m a year in reduced crime.

6.6. Conclusions⁷¹¹

It is better to deter a person from offending, rather than to sentence and punish him once he has offended. This ‘*prevention is better than cure*’ philosophy, the bedrock of Public Health Medicine⁷¹², is what stimulated the Durham Constabulary to emulate the local health authority in which health and social resources are directed to where the needs are greatest. The Checkpoint Scheme interrupts an offender’s early start on a criminal path, by finding

⁷⁰⁷ Meechan S (2017) *Drug addicts who sell heroin to fund habit won't be prosecuted.* www.chroniclive.co.uk Durham Constabulary Newcastle Chronicle
‘Durham’s police chief says not prosecuting addicts caught with drugs will mean police have more resources to tackle the criminal gangs who sell large amounts of narcotics. Drug addicts who sell small amounts of heroin to fund their habits will not face prosecution; they are sad people rather than bad, and we want to stop their addiction. Then we can focus on the really bad people’. And went on to say
“What’s the point in an addict going to court and getting a £50 fine? If they pay it at all, they will only steal or sell five bags of heroin to fund it. How does that help us?”

⁷⁰⁸ This is based upon the OASys (Offender Assessment System) which identifies the criminogenic factors.
 Education, lack of Mental and/or physical ill health Drug and /or alcohol use
 Unemployment Attitudes and self-doubt Institutionalisation and lifestyle
 Financial problems and debts Housing problems Family problems Sexual exploitation

⁷⁰⁹ Guardian Newspaper in interview with Kilili S of Durham Constabulary
 www.theguardian.com>uk-news>feb.durham –pioneering-police

⁷¹⁰ Halliday J (2020) *ibid*

⁷¹¹ Robin-D’Cruz C & Ely C (2020) *Pre-court diversion for adults: evidence briefing.* The Centre for Justice Innovation justiceinnovation.org › publications › pre-court-diversion
Provides an England & Wales-wide perspective on how diversions schemes are going

⁷¹² Personal opinion: Public Health Medicine has three overriding principles: health promotion, prevention of ill-health and multidisciplinary coordination to organise health services

out *why* he offended and *how* he could be helped to desist. In this scheme it is specially selected *non-uniformed persons*, the ‘Navigators’, who help guide offenders back to a lawful life.⁷¹³ Outcome assessments are being undertaken jointly between Durham Constabulary⁷¹⁴ and Cambridge University School of Criminology. A final analysis will be available in 2022, but interim results are positive.⁷¹⁵

Chapter 7 Discussion

⁷¹³ Black C (2012) *ibid* p7,13 at (1) and others. Dame Carol is an enthusiastic support of the Diversion concept and quotes Durham’s example.

⁷¹⁴ In 2016 Durham Constabulary was awarded the Howard League for Penal Reform community award and in 2019 the international Goldstein award in the USA in respect of the Checkpoint scheme. In 2019 Durham Constabulary gained three Outstanding gradings in their annual inspection reports, the highest such grading of all police forces in England and Wales.

⁷¹⁵ Halliday J (2020), *Durham’s Pioneering Police Scheme Slashes Reoffending Rates*, <https://www.theguardian.com/uk-news/feb/durham> Guardian Newspaper
‘Under the Durham programme, called Checkpoint, offenders spend four months with a police supervisor who helps them access support for issues including mental health, to drug or alcohol use, homelessness and communication skills. Of the 2,660 offenders involved in the trial to date, only 166 (6%) have reoffended. The first results of the trial, seen by the Guardian, found a 15-percentage point drop in reoffending after two years among those who took part in rehabilitation compared with those who did not.’ See also

Hymas C (2020), *‘Violent Offenders and Thieves Avoid Prosecution as Police Bid to Rehabilitate Rather than*

Criminalise’, Telegraph, 17 January 2020

What Works Blog (2018), *‘How are Experiments in the Midlands Leading to Safer Streets?’*, 4 May 2018

Weir K et al (2019) *‘Checkpoint: An Innovative Programme to Navigate People Away from the Cycle of Reoffending: Implementation Phase Evaluation’*, Policing: A Journal of Policy and Practice, 18 March 2019

Cuthbertson P (2019) *Ending Short Prison Sentences*, Civitas, February 2019

7.1. The drug problem in England & Wales

England & Wales has the second highest drug-related death⁷¹⁶ rate in Europe⁷¹⁷, at 74 deaths/million, almost three times the European average.⁷¹⁸ Only Scotland is higher at 215 deaths/million.⁷¹⁹ Furthermore the rate of addiction⁷²⁰ in England & Wales has, since the introduction of the Misuse of Drugs Act (1971), increased three hundred times,⁷²¹ and drug use has greatly increased especially for younger people.⁷²² In the 2017 House of Commons debate members demanded a change of policy,⁷²³ and in 2019 its Health and Social Care Committee concurred.⁷²⁴ The drug problem is immensely complex and can best be understood as two pictures, one showing the ‘Drug Scene,’ the other the ‘Drug Policy.’

7.2. The Drug Scene In the first, the Drug Scene, are the 3.2 million adults⁷²⁵ who have taken drugs⁷²⁶ in the past year.⁷²⁷ The great majority, 2,000,000 regular users, take cannabis,⁷²⁸ a soft drug,⁷²⁹ with a low harm and addiction rate.⁷³⁰ Most people take drugs for recreational purposes⁷³¹

⁷¹⁶ Office of National Statistics 2018 *Drug-related deaths definition*

[www.ons.gov.uk › deaths › methodologies › deaths-related-to-drugs](http://www.ons.gov.uk/deaths/methodologies/deaths-related-to-drugs)

‘There is no internationally agreed definition of what constitutes a drug-related death. Therefore, the figures reported in this statistical bulletin are based on the current National Statistics definition of deaths related to drug poisoning’.

This definition is significant for there are many other causes of death which can be related to drug taking; illnesses transmitted through infected syringe use, accidents through injecting, driving accidents the result of drug intoxication, and of course all the people who have died as a result to the inter-gang related drug conflicts, a major cause of death in South American countries.

⁷¹⁷ 2.16. ACMD Report Reducing *Opioid-Related Deaths in the UK* One of the main points in the report presented at the 2017 debate was the extremely high death rate.

⁷¹⁸ 8.2. *The Drug Scene* and footnote ECMDDA (2020) *Annual Report for 2020*

⁷¹⁹ 2.16. Day N (2017) *House of Commons Debate on the Drugs Strategy 2017*

⁷²⁰ 2.6. and see footnote *The Difference Between Addiction and Dependence*

⁷²¹ 2.16. Flynn P (2017) *House of Commons debate on the Drug Strategy 2017*

“...in 1971 when the Act was promulgated drug addicts in the country were less than 1,000, now after 46 years of prohibition we have 320,000 addicts”. His statement was confirmed in the ECMDDA report 2017: *United Kingdom drug situation: Focal Point annual report 2017* [assets.publishing.service.gov.uk › attachment_data › file](http://assets.publishing.service.gov.uk/attachment_data/file)

page 5 Table 1.1 shows England and Wales to have 350,153 addicts in 2016 at a population rate for England of 8.57 per 1,000 and Wales 25.3 per 1,000. In treatment at that time were 244,971 people.

⁷²² Black C (2021) *ibid* 3.3.p24 *Treatment for young people. ‘Drug usage among children (aged 11 to 15) has increased by over 40% since 2014.’*

⁷²³ 2.16. Moran L (2017) *House of Commons debate on the Drug Strategy 2017*

“It is time for us to recognise that our old approaches have not worked and to stop repeating the same mistakes of the so-called war-on-drugs time and again... I urge the Government: let us be brave and wake up. Prohibition doesn’t work” see also comments by Flynn, Blunt and others.

⁷²⁴ UK Parliament (2019) *Drugs policy inquiry 2019* and see 9 4 for the quotation.

⁷²⁵ Office of National Statistics (2018) *Crime in England and Wales: year ending March 2018*

[www.ons.gov.uk › releasecrime › englandandwales](http://www.ons.gov.uk/releasecrime/englandandwales) see also

United Nations Office on Drugs and Crime (2019) *World drugs report 2019*. An estimated 271million people were using illegal drugs in 2017, about 5.5% of the world population aged 15 to 64.

⁷²⁶ 2.2 *Definition* Drugs of addiction act on the brain are mind altering and are termed ‘psychoactive drugs.’ The World Health Organisation description.

⁷²⁷ 2.4. *Drugs frequently used.* see Black C (2020) *Report* quoting ONS 2019 numbers of users of illegal drugs.

⁷²⁸ 2.4.

⁷²⁹ 2.12. and see ACMD classification into hard, intermediate and soft drugs

⁷³⁰ 2.4. & 2.6.

⁷³¹ 2.3. & 2.4.

but other uses are mental therapy,⁷³² stimulation,⁷³³ artistic inspiration,⁷³⁴ and religious rituals.⁷³⁵ Some take drugs casually, others habitually and others become addicted and drug dependent.⁷³⁶ Of these about 44% are in treatment,⁷³⁷ and some die,⁷³⁸ many more in the UK than in mainland Europe.⁷³⁹

In the background of this picture are the drug growers, amateurs,⁷⁴⁰ professionals⁷⁴¹ and producers⁷⁴², the international traffickers,⁷⁴³ their profits⁷⁴⁴ the drug cartels,⁷⁴⁵ with finally, the county lines⁷⁴⁶ and street suppliers, often out-of-work addicts raising money to pay for their addiction.⁷⁴⁷

7.3. The Drug Policy

The other picture displays the Drug Policy. There are four main subjects in it: drug prevention, drug avoidance, risk and harm reduction, treatment, and recovery.

(a) Prevention In this part of picture are the organisations which seek to prevent drugs from reaching the public; Border Force, police and the laws, and lawgivers, the judges,

⁷³² Such as in the treatment of ADHD with Ritalin, (methylphenidate) a class B drug

⁷³³ Cornum R, Caldwell J, Cornum K(1991) *Stimulant Use in Extended Flight Operations*(in the Gulf War) www.airpower.maxwell.af.mil/airchronicles/apj/apj97/.../cornum.html

and see footnote Renell T (2013) *New book reveals how Marilyn Monroe, President Kennedy and Elizabeth Taylor were drug addicts.*

⁷³⁴ John Keats being a user in 1819, Thomas de Quincy wrote his *Confessions of an English Opium Eater* in 1821, Elizabeth Barrett Browning was writing poetry under its influence as did Dickens, and Shelly. The drug habits of Modigliani, van Gogh, Edvard Munch and Salvador Dali are well documented. Then there are Cellini and Michelangelo; more recently there were the Beatles with their song to LSD: 'Lucy in the Sky with Diamonds.' Many feel that addiction to drugs has enriched the world. If Berlioz's doctor had succeeded in stopping his addiction, perhaps his genius might have fizzled out, and we might never have had the brilliant, intoxicated inspiration of the *Symphony Fantastique*.

⁷³⁵ 2.3. and footnotes Carmona M (2020) *who describes the use by Peyote native Americans of a mescaline-like hallucinogen* and Feuerlicht R A (1975) *who describes the use of cannabis by the 'whirling dervishes'*

⁷³⁶ 2.6. and table *Addiction Rates*

⁷³⁷ ECMDA Country Reports (2019)

⁷³⁸ 2.8. and footnote Oyefeso A, et al (1999) *Drug abuse-related mortality: a study of teenage addicts over a 20-year period* who found that accidental poisoning caused 64.3% of deaths

⁷³⁹ TABLE 10 ECMDA (2020) *Annual Report for 2020* This shows that the UK (England, Wales and Scotland, **not** N. Ireland) has by far the highest drug-related death rate in Europe

	UK	Germany	Turkey	Sweden	Spain	Netherlands
Total deaths	6568	1276	1314	1132	874	262 (2019 Report)
Deaths per million	98.5	15.4	16.0	11.1	18.6	22

⁷⁴⁰ 2.18. and footnote *Rhino Seeds (undated) Cannabis Seeds: Buy Marijuana Seeds from UK Online*

⁷⁴¹ Lynn News (2020) *Four arrested as police discover 'substantial' cannabis factory near Downham Market* www.lynnnews.co.uk/news/four-arrested-as-police-...

⁷⁴² ECMDA (2017) *Drug supply and the market* www.emcdda.europa.eu/trends-developments/html

Most of the new psychoactive substances are imported from China

⁷⁴³ Kingman J (2019) *Rip-on / Rip-off Smuggling- Commodity Conversations* commodityconversations.com/2019/04/29/rip-on-ri... *Smuggling drugs in legitimate containers is known as "Rip-on/Rip-off." or Gancho Ciego (meaning blind hook, referring to the fake seal which closes the container with the drugs.)*

⁷⁴⁴ Jackson G (2017) *Import of Drugs.* Financial Times 21st August 2017

'The Office for National Statistics revised its estimates for UK trade on Monday, saying that depending on the year, between £300m and £2.2bn more illegal drugs were smuggled into the country than initial estimates had suggested.'

⁷⁴⁵ 3.3. *The unintended consequences of Prohibition* and footnote BBC TV (2015) *This World; Secrets of Mexico's Drug Wars*

⁷⁴⁶ 3.5 .and footnote Campbell D (2005) *Revealed: Britain's network of child drug runners* and Copping A. (2014) *London gangs using children as drug mules as they seek to expand markets* The Guardian Newspaper 5 Jan 2014 *Children as young as 11 are being used as mules to carry drugs on trains out of London.*

⁷⁴⁷ 4.6. *Afonso' cases*, and footnote Rose R v Afonso and others (2008) 1 Cr App R (S) 560

and courts to sentence and punish those who seek to circumvent them.⁷⁴⁸ Sentencing of traffickers is appropriate and justified in preventing their trade. Sentencing of drug users is inappropriate for casual users for they cause little harm and addicts are ill people needing harm reduction facilities. Indeed, sentencing and punishment may impede the recovery of an addict⁷⁴⁹ undergoing detoxification.⁷⁵⁰

(b) Drug avoidance . This is taught⁷⁵¹ in schools, clubs, and colleges,⁷⁵² but it is in the nature of young people to take risks⁷⁵³, including experimenting⁷⁵⁴ with drugs⁷⁵⁵, which although these days being generally acceptable,⁷⁵⁶ have the potential of harming the user. It is the State's duty to protect its citizens from harm.⁷⁵⁷

(c) Risk and harm reduction. Risk reduction, the next subject in this picture, can be enhanced if drugs are tested for purity, as on mainland Europe,⁷⁵⁸ or at the entrance to raves and night-clubs, accepted by the Home Office in the UK.⁷⁵⁹ Should drug markets be controlled and regulated by appropriate government authorities?⁷⁶⁰ Legal growing of cannabis destined for recreational drug use is being trialled in the Netherlands.⁷⁶¹

There are the harm reducing facilities: needle-and-syringe exchange,⁷⁶² drug recovery rooms⁷⁶³, needed in Scotland with its high drug-death rate, but rejected by parliament in London, and the wide usage of Naloxone, by users, police and ambulance crews.

(d) Treatment and recovery. Treatment: voluntary, in prison, as DRR in non-custodial sentences, in Diversion Schemes, or Opioid Substitution is recommended. Recovery

⁷⁴⁸ Government publications (1998) *Tackling Drugs to Build a Better Britain*. This had four overarching aims: young people (education and prevention); communities (reducing crime and anti-social behaviour); treatment (improving access and participation); and availability (action on supply)

⁷⁴⁹ Personal communication. See background to the project: patients I saw said they were reluctant to go to the detox centres fearing that the police were keeping an eye on them there.

⁷⁵⁰ See 6.9. and footnote McSweeney T, Turnbull P & Hough M (2008) *ibid* p26

⁷⁵¹ Black C (2021) *ibid* p 12 *Recommendation 28* where the author recommends monitoring of the teaching given to children on drug usage.

⁷⁵² Gov.scot (2016) *What Works in Drug Education and Prevention?* - https://www.gov.scot/publications/pages/A_review_of_the_evidence_of_effectiveness_of_different_types_of_drug_prevention_and_education_for_children_and_young_people.

⁷⁵³ McIntosh J, MacDonald F & McKeganey N (2005) *Why do children experiment with illegal drugs?* Addiction Research & Theory Volume 14, 2006 Issue 3 See also : British Drug Survey 2014 *Reasons for starting drugs*. This shows that 65% of children start through curiosity, 14% to fit in with friends

⁷⁵⁴ Black C (2012) *ibid* p 24 para 3.3. *Treatment for young people* where the author observes that drug taking by school children has increased by 40% since 2014.

⁷⁵⁵ 2.4. *Cannabis use*. And see footnote *House of Commons Debate (1970) ibid* Blenkinsop A

⁷⁵⁶ Measham, F., Newcombe, R. and Parker, H. (1994) *'The Normalisation of Recreational Drug Use Amongst Young People in North West England'*, Williams L & Aldridge J (2002) Williams L (2014) Parker H, Williams L & Aldridge J. (2016): *further evidence from the North West Longitudinal Study*

⁷⁵⁷ 1.2. *The State's Duties*: The State's duty of protecting the citizen from harm and potential harm.

⁷⁵⁸ Jellinek (2018) *Facebook Bij Jellinek in Amsterdam kun je anoniem drugs laten testen. Drugstesten als coke, XTC. Wij testen pillen, poeders en meer soorten drugs* (at Jellinek's in Amsterdam, you can have your drugs tested anonymously. We test for coke, ecstasy, pills, powders and many sorts of drugs) see Annex Acknowledgements Dr phil Sophie Elpers

⁷⁵⁹ 2.16. and footnote Edwards M (2018) *Inside the Loop* and also footnotes Pidd, Hymas and Measham

⁷⁶⁰ 2.16. 2House of Commons Debate (2017) *Drugs Policy ibid* Smith J p 39 *who asked, 'How are we to take the drug trade out of the hands of criminals?'*

⁷⁶¹ 2.18. *Is decriminalisation developing in England & Wales?*

⁷⁶² Fowler N (1991) *Ministers decide: a personal memoir of the Thatcher years* Chapman London

⁷⁶³ ECMDDA (2018) *Drug Injecting Centre and overview of staffing and equipment*. Where details are given of these places in mainland Europe, their equipment and staffing and the point made that not only do drug using injectors do it safely, but they are also directed to treatment and counselling. <https://www.ecmda.europa.eu/topics/pods/drugs>

is enhanced through coordination of all the different agencies involved, at both national and local level.⁷⁶⁴

Having provided the context in which sentencing of drug offenders is a feature, its value will now be discussed.

7.4. The appropriateness of sentencing drug offenders

The groups of drug offenders where sentencing might be appropriate are:

- (a) traffickers, major suppliers, organisers of county lines;
- (b) middle-group suppliers: mules, PWITS, ‘cuckoos’ and county lines runners.

If the law’s suitability or correctness for the offences is what is implied, then how should that be defined? The correctness is the rightness of wrongness of a situation and the criteria have been outlined in Chapter 2.⁷⁶⁵

But what society feels to be morally acceptable is surely correct, and reference is made to the North Western Longitudinal Study mentioned previously. Here, over time, it has been empirically shown that more and more people, now over 75%, accept the casual use of drugs to be normal. The law, when it comes to matters of morality, is formed upon the parliamentarians’ understanding of the societal perception of morality. Can it be argued that the law has to catch up?

Drugs can and do cause harm if used in excess⁷⁶⁶, and it is appropriate for the State to attempt to prevent that. Traffickers seek to make a profit and are not usually concerned with the effect drugs have on their customers. At 8.2. it was illustrated how the millions of casual drug users, especially of the soft drugs,⁷⁶⁷ do not come to harm, but *might* if they become habitual users or finally addicts⁷⁶⁸. Then they may well harm themselves, their family, and by incurring expenses in the law and treatment for themselves causing harm through unnecessary expense to the State.⁷⁶⁹ But the criminal law should not interfere with

⁷⁶⁴ Black C (2021) *Review of drugs part two, prevention, treatment and recovery* see page 3.
‘This problem can only be solved through coordinated action by multiple departments including the Home Office, Department of Health and Social Care, Department for Work and Pensions, Ministry of Housing, Communities and Local Government and the Ministry of Justice. To move forward these departments must work together.....’

⁷⁶⁵ They could be summarised as follows

- (a) The word of God as laid down in Scripture.
- (b) Through philosophical analysis, in this case the normative theories of deontology, consequentialism and virtue ethics.
- (c) The law of the land, which has to be followed and obeyed because it is the law passed by parliament. However, that is based upon the parliamentarians’ perception of morality at the time of the law’s enactment, and that can change. They could all be considered as ‘contractualist.’ Moral contractualism being the view that the rightness and wrongness of our conduct is somehow to be understood in terms of some kind of agreement.

⁷⁶⁶ Which is true of course of legal psychoactive drugs too. Most heavy smokers die from that, and many legal drinkers become alcoholics and in need of treatment

⁷⁶⁷ 2.12. *Drug classification by harmfulness*

⁷⁶⁸ 2.6. *Addiction rates*

⁷⁶⁹ Should this action, causing harm to the family, be considered an act subject to the criminal law? Are the Criminal Justice and Courts Act (2015) Sections 20 to 25 *wilful neglect offences*, applicable here? The meaning of ill-treatment or wilful neglect: in *R v Sheppard* [1981] A.C. 394 the Court held that the primary meaning of wilful is “deliberate.” In *R v Turbill and Broadway* [2014] 1 Cr.App.R. 7, the Court applied the meaning of “wilful neglect” means deliberately refraining from acting or refraining from acting because of not caring whether action was required or not.

a person's rights to his own body and actions; and if he becomes addicted as a result, that is a medical matter⁷⁷⁰ and treatment is needed⁷⁷¹ not punishment through the law.⁷⁷²

Then how appropriate is sentencing for major drug traffickers? It is appropriate to sentence them for they fulfil the criteria of *mens rea* and *actus reus*.⁷⁷³ The seriousness of their offending means the most serious sanction that the state can impose is justified and appropriate; it censures the offender, conveying the community's condemnation through the deprivation of liberty.

For minor drug traffickers and suppliers such as 'mules', county lines runners, street dealers and those in possession-with-intent-to-supply, the appropriateness is less clear. Each should be assessed individually; 'mules' may be victims coerced into their offence or may be doing it voluntarily.⁷⁷⁴ County lines runners, usually youngsters, sentenced accordingly,⁷⁷⁵ may have been coerced into offending. Street-dealers and those in possession-with-intent-to-supply are probably addicts, may well be in the 'Afonso' category,⁷⁷⁶ need treatment rather than punishment and might be better handled through a diversion scheme.⁷⁷⁷

A key problem with English sentencing law is that it has to deal with offenders who may fall short of qualifying for the duress defence, given how tightly that defence is drawn, denying the possibility of duress as a defence if the person ought to have known that they may be the subject of compulsion by the person that has threatened him. Sentencing then becomes the only place at which their coercion into offending can be accommodated, yet the guideline gives this limited weight⁷⁷⁸. Drug users should not be sentenced, and it is inappropriate to do so. They harm only themselves⁷⁷⁹, unless they become addicted, when they 'harm' the community and the State through incurring the costs of treatment.

The central argument is that a bifurcated approach is needed, which emphasises the relevance of sentencing for trafficking and serious offences of supplying, but which also encourages the use of non-custodial sentences and the use of diversion schemes for other offenders. Punishing those who merely possess drugs creates or compounds the personal harm that users experience from drugs, by exposing them to the deleterious effects of the prison environment. They too should be diverted into schemes such as Checkpoint.

⁷⁷⁰ Mino A & Arsever S (1996) *J'accuse les mensonges qui tuent les drogues (I accuse the liars who kill the drug takers)* Calmann-Levy, Rouen. It was Drs Mino and Arsever, of Geneva, who were perhaps amongst the first to appreciate that addiction to drugs was an illness, needing treatment, and not a crime to be punished. (Acknowledgements Kokrasett, Eunice)

⁷⁷¹ 2.3. *Drug action on the brain* and see footnote Addiction Centre (2020) *Obsessive Compulsive Disorder and Addiction*

⁷⁷² Fieser J (2017) *Drugs (The practice of Morality) from Moral Issues that Divide Us and Applied Ethics* www.utm.edu/staff/jfieser/class

'Some people consider addiction to be a moral matter, others a matter of disease. Thus, the moral model implies the person to have sufficient will power or lack of it to overcome or succumb to addiction. In other words, virtue or vice, and that is the rationale of the concept of 'sinful' behaviour. Others believe that addiction is a disease/ or mental impairment related to underlying factors'

⁷⁷³ *mens rea* and *actus reus* meaning guilty intention and guilty action.

⁷⁷⁴ Assessed in accordance with the Drug Offences Sentencing Guideline.

⁷⁷⁵ Sentencing Act (2020) section 58 *Purposes of sentencing: offenders under 18*

⁷⁷⁶ 4.6. and see footnote Rose

⁷⁷⁷ 7.4. and footnote Meecham. where this is described in the Durham Checkpoint scheme

⁷⁷⁸ Sentencing Guideline for Drug Offences (2012) p4 Culpability Lesser Role *engaged by pressure, coercion, intimidation* and p7 et seq Factors reducing seriousness or reflecting personal mitigation. *Involvement due to pressure, intimidation or coercion falling short of duress.*

⁷⁷⁹ What is less obvious is that the casual drug users stimulate the development of a criminal supply facility, thereby harming society. The 'harmless' activity of the casual drug user in a provincial town, may indirectly result in traffickers setting up a county lines operation.

7.5. The proportionality of sentencing drug offenders.

The question is whether the severity of their sentences matches the gravity of the offences? Proportionality is not objective; it is subject to the mores and relativity of society of the time, to secular, sacred, and racial influences, and to public and political pressures. The Drug Offences Sentencing Guideline of 2012, updated in 2020 may reflect well the proportionality of the gravity of the offences and the severity of the sentences, in the opinion of those devising them at the time of doing so.

Mandatory Sentencing requirements might be said to distort the principles of proportionality and may thwart attempts to engage with offenders and address their underlying psychological problems and issues of dependency, in favour of an approach that prioritises deterrence, backed by a paucity of evidence.

Harm is, as *potential harm*, expressed as an ‘indicative’ quantity of drug concerned (upon which the starting point is based) and identifies the drugs.⁷⁸⁰ This reflects back to the inherent fallibility of the Misuse of Drugs Act (1971), where harmless drugs are included in Class A. An example of this is given, which resulted in a misguided judgement.⁷⁸¹ Others might have been included. Minor traffickers such as ‘mules’, ‘county line ‘runners’, and possessors-with-the-intention-to-supply offenders, all of which may or may not fulfil the proportionality criteria. Indeed, the last two may be considered to reflect the State’s failure to rehabilitate.

If it is accepted that it is inappropriate to punish minor drug users,⁷⁸² then the question of proportionality does not arise. If that is *not* accepted, the offences that *might* be considered for punishment are: personal possession,⁷⁸³ production or cultivation of a controlled drug for personal use⁷⁸⁴ and permitting premises to be used for non-commercial activities⁷⁸⁵. Yet all these offences appear to fall within the police non-apprehension procedures outlined in Chapter 4⁷⁸⁶. If, however the police *do* apprehend and charge the offender, he may be arrested, for he had broken the law, and might thereby gain a criminal record,⁷⁸⁷ creating more harm than it prevents.⁷⁸⁸

The central argument is that the guideline is too heavily focused on matching offences to months or years in prison, paying scant regard to the effectiveness that particular sentence types might have in reducing reoffending. While this is a problem inherent in the formation and structure of sentencing guidelines under the Coroners and Justice Act 2009, for drugs offences the problem becomes particularly acute given the central importance of helping offenders move away from drug-taking and towards sobriety.

⁷⁸⁰ Sentencing Council (2012) *Drug Offences Definitive Guideline* p4 et seq heroin, cocaine, ecstasy, LDS, amphetamine, cannabis, and ketamine. As argued in Chapter 1 the State has the duty to protect its citizens not only from harm but also from potential harm.

⁷⁸¹ 4.6. where the case of R.v. Welford was mentioned for he received the mandatory sentence having committed a 3rd Class A drug offence, on the one occasion having used ecstasy one of the most harmless of the psychoactive drugs included in the Misuse of Drugs Act (1971) table as a Class A drug.

⁷⁸² Of course, it is also argued that the law is the law, and anyone who breaks it *must* be punished. See Chapter 1 and footnote Bonneau

⁷⁸³ Sentencing Council (2012) *ibid* p29 *Possession of a controlled drug*

⁷⁸⁴ Sentencing Council (2012) *ibid* p17 *Production of a controlled drug & Cultivation of cannabis plant*

⁷⁸⁵ Sentencing Council (2012) *ibid* p23 *Permitting premises to be used*

⁷⁸⁶ 4.9. *Why are there so many drug offences and so little sentencing?* and 4.10. *De facto partial decriminalisation*

⁷⁸⁷ The Information Hub (undated) *Finding out about your criminal record* [https://hub.unlock.org.uk > knowledgebase > finding-o...](https://hub.unlock.org.uk/knowledgebase/finding-o...)

⁷⁸⁸ Release (2013) *Drugs: it’s time for better laws; the effects of gaining a criminal record.* www.release.org.uk/blog/ *This is a salutary account of the personal story of an offender’s fallibility.*

7.6. The problems of sentencing drug offenders through censure and punishment.

The Crown Court judge does not record details of censure,⁷⁸⁹ so its effectiveness cannot be accurately assessed, however its importance should not be underestimated⁷⁹⁰. In the magistrates' courts, where the majority of drug offenders are sentenced, censure and remorse influence the sentencing decision,⁷⁹¹ especially when it comes to mitigation.⁷⁹² The impact upon the victim hearing the offender's remorse is important too.⁷⁹³ There is also always the possibility that the offender may feel he has done nothing wrong and that there is no reason to feel remorseful.⁷⁹⁴ The judge, whether in the Crown or Magistrates' court, makes his statement of punishment in conformity with the Drug Offences Sentencing Guideline (2012), where the severity of the sentence is based upon the principle of proportionality and retribution, and in accepting the purposes of punishment as given.⁷⁹⁵

7.7. Retributive punishment of drugs offenders

For major traffickers, the severity⁷⁹⁶ of the punishment is proportional to the gravity of the offence, as laid out in the Guideline, and its effectiveness has been achieved. That defines the value of the sentence to the offender.

What though is the value to the community and to the State? How much should the State consider the offender's incarceration to be cost-effective, and how long should the community be willing, through taxation, to fund it? It has to be born in mind that imprisonment does not apparently deter major traffickers.

The types of minor drugs offenders have been discussed above, and in consideration of the cost of imprisonment, non-custodial sentences are always preferable to retributive punishment. The same discussion of the subjectivity of proportionality as outlined above, defines the retributive effectiveness to the offender. In most offenders' cases fines, as an alternative to retributive punishment would probably be ineffective for their poverty would make it impossible to pay them, and if fines were to be imposed the offender would probably have to steal to raise the money.

⁷⁸⁹ 6.3. *Censure* Judges do not keep a record of the Censure but do of the reasons why they award punishment Sentencing Act 2020 s 52..

⁷⁹⁰ Sentencing Council (2013) *Crown Court Sentencing Survey Annual Publication* p 18 'It is pointed out that the 20% reduction as a result of the expression of remorse in response to censure refers to all crimes tried in the Crown courts, but not specifically to drug offences. There were too few of them (trafficking and supply) in those courts to survey. It may be reasonable to extrapolate the 20% to drug offences as well.'

⁷⁹¹ 6.3. *The effectiveness of censure in the magistrates' courts.* and see footnote Brunt

⁷⁹² 6.3. and see footnote Jacobson J & Hough M (2007) 'the prospects of treatment will mitigate in the sense that a rehabilitative rather than punitive sentence is passed.'

⁷⁹³ 6.3. *The effect of remorse upon the victim.* and see footnote Duff R A (2009) *Restoration and Retribution* Chapter 5.2. in von Hirsch A (2009) *ibid*

'The offender's expression of remorse in response to the Censure may well be accepted as a form of restorative justice, by the victim, and as a measure of the effectiveness of Censure'.

⁷⁹⁴ 6.3. *The impact of censure upon the defendant.* and footnote *Alcohol and Tobacco the most important drugs*

⁷⁹⁵ 6.1. Sentencing Act (2020) s 57(2) *the purposes of sentencing.*

⁷⁹⁶ This is of course subjective, for it depends upon the views of the initiators of the Guidelines, and on how their understanding of morality is at that time.

There is also the great risk of being overly punitive,⁷⁹⁷ having a counter-productive effect through antagonising the drug addict.⁷⁹⁸

7.8. The value of deterrence of drugs offenders

As discussed above,⁷⁹⁹ sentencing has some deterrent effect upon major drugs traffickers, in confiscating their assets.⁸⁰⁰ On the other hand the chance of apprehension is small, and the majority of traffickers are believed to consider the risk to be worthwhile.⁸⁰¹ Lesser traffickers and street-level drugs offenders, being usually addicts, may well have impaired rationality during their offending, and would not think about the risk of being caught.⁸⁰² Many of those in simple possession of drugs, consider that there is little wrong in using them,⁸⁰³ as appears to be the perception of the public.⁸⁰⁴ In addition, the police nowadays often ignore usage,⁸⁰⁵ resulting in little attention being given to deterrence by users.

7.9. The value of sentencing and rehabilitation.

It was pointed out at 8.6., no distinction is made on entry into prison between primary or secondary drug offenders. All would be assessed for rehabilitation, general and educational,⁸⁰⁶ and specific in respect of their drugs problem.⁸⁰⁷ It is a reasonable assumption that drugs traffickers would not be in need of either form of treatment; in any event the relevant records are not maintained. The minor drugs offender, under a community sentence, would be subject to the requirements,⁸⁰⁸ and in particular that of consent to treatment.⁸⁰⁹ Again collective records defining the primary and secondary drugs offenders are not kept, so their effectiveness cannot be established. Each addict would be expected to undergo the DRR forms of treatment.⁸¹⁰ All are known to be effective, (although not totally), either in stabilisation or in abstinence, so that the aims the DRR can be achieved,⁸¹¹ although that may take a long time and is more effective than if carried out

⁷⁹⁷ 5.5. *Community Orders(b) Supervision of the DRR and of Community Orders* and see footnotes Heard C (2005) and du Mont S & Redgrave H (2017) *Community Sentences: where did it all go wrong?* The Crest Report reveals that community sentences:

‘....are implemented in a way that bears little resemblance to the evidence of what works: they are neither intensive, swift, nor punitive enough to act as a proper deterrent’

⁷⁹⁸ See 6 5. This is a good example of the nuanced form of paternalism; the responsible probation officer bearing down on the drug addict offender so that he *does* attend the detoxification he needs.

⁷⁹⁹ 6.6. *Reduction of crime through deterrence.*

⁸⁰⁰ 6.6. *Specific deterrence of drugs offenders* and footnote Collinson H (2019) and Proceeds of Crime Act (2002) Gov.uk [https://assets.publishing.service.gov.uk › uploads ›](https://assets.publishing.service.gov.uk/uploads)

⁸⁰¹ 6.6. see footnotes Office for National Statistics (2008) *Crime and Justice* and Wright V. (2010) *Deterrence in Criminal Justice*

⁸⁰² 6.5. see footnote Wright V. (2010) *ibid* p2 quoting *Christopher Mumola in Substance Abuse and Treatment, State and Federal Prisoners 1997, Bureau of Statistics Special Report 1999, she stated that it is unlikely that such persons are deterred from offending for at least half of all prisoners were under the influence of drugs or alcohol at the time of their arrest.*

⁸⁰³ 2.18. *The Morality of Illegal Drug Taking*

⁸⁰⁴ 2.18. and see footnotes Measham, F. et al (1994) *‘The Normalisation of Recreational Drug Use Amongst Young People in North West England’* Williams L et al (2002) Williams L et al (2014) Parker H et al (2016)

⁸⁰⁵ 2.18. *de facto decriminalisation in England & Wales?*

⁸⁰⁶ 5.3. and see footnote Creese B (2016)

⁸⁰⁷ The point being that as primary and secondary drugs offenders are dealt with together, individual input and output records are not available, and so no assessment is possible of the effectiveness of treatment of the primary drugs offenders.

⁸⁰⁸ 5.5. *Community Order Requirements*

⁸⁰⁹ Sentencing Act 2020 s 201 Part 10 s20 (5) *The consent condition is that the offender expresses willingness to comply with the requirement.*

⁸¹⁰ 5.5. *DRR forms of treatment*

⁸¹¹ 5.5.

in prison.⁸¹² Completing the course of treatment is associated with higher abstinence, lower crime rate, lower relapse and higher employment compared to those who have dropped out.⁸¹³

Under the Community Order DRR, the addict works together with the probation officer⁸¹⁴, who encourages the development of self-discipline and reduces the external pressures, as is the case in Diversion Schemes.⁸¹⁵ If on the other hand attendance at detoxification is entirely voluntary⁸¹⁶, it is because the addict's wish to succeed is paramount, and when abstinent is more likely to stay so. There may be other factors involved: the neurological and psychological damage caused by the addiction,⁸¹⁷ might well have impaired the patient's moral strength, and at the same time increased his feelings of aggression towards the authority of those trying to help him.⁸¹⁸

To define the effectiveness of rehabilitation comprehensive records of output must be kept, and this is not done either in the custodial or non-custodial setting, or indeed in the transition into the community and return to normal life.⁸¹⁹ By focusing on months or years in prison, the guideline may promote consistency and ensure cases can be dealt with speedily, but in doing so opportunities to reduce reoffending through effective interventions are relegated to secondary considerations.

7.10. The value of sentencing in protection of the public

This has been discussed above,⁸²⁰ and is achieved, save that within most prisons the drug trade exists, and drug officials are often subjected to assaults by offenders under the influence of drugs.⁸²¹ The public is protected from drugs offenders in the community⁸²² by the enforcement of the requirements, and the fact that abstinence reduces the need to offend, implies the public protection.⁸²³

7.11. The value of sentencing in ensuring reparation to victims

Reparation is initiated with the offender's statement of remorse in response to the judge's censure.⁸²⁴ It is of value to the victim hearing the offender's expression of regret for the harm he has been caused⁸²⁵, and it may also influence the judge in providing him

⁸¹² 6.6. *Effectiveness of Community Orders* (a) Community Order DRR compared with a short custodial sentence DRR

⁸¹³ 6.7. *Measurement of effectiveness*

⁸¹⁴ 5.5. *Supervision of Community Order and DRR*

⁸¹⁵ 7.4. & 5. *The navigator's work & the offender's contract*. Which is a sort of half-way method of detoxification, but the point is that it seems to work.

⁸¹⁶ The ECMDDA study of 2016 showed that voluntary detoxification was even more successful. See 6.8. Voluntary detoxification more effective than judicial DRR. and footnote Disley E et al (2016)

⁸¹⁷ 2.7. *Personal harm*

⁸¹⁸ Black C (2021) *ibid*. In her Report she repeatedly recommends that those actually affected, that is reformed ex-users, should be invited to participate in policy formulation.

⁸¹⁹ Black C (2021) *ibid* This is the main thrust of Professor Black's paper, in that drug-offenders will never returned to a life of legality unless they are helped to do so.

⁸²⁰ 6.9. *The effectiveness of protection of the public*

⁸²¹ Personal communication from Brunt L (2018) (see acknowledgments), whose comment was: "...give them cocaine and they'll fight you; give them cannabis and they'll love you"

⁸²² Family Drug and Alcohol Courts by coercing addicts' parents, protect children from abuse

⁸²³ 6.5. and see footnote Burkinshaw P et al (2017)

⁸²⁴ 5.2. *Censure*

⁸²⁵ 6.4. *The effect of remorse upon the victim*

with mitigating information before awarding⁸²⁶ the punishment, especially in the magistrates' courts⁸²⁷.

The problems of drug offences are that there may be no victims to whom to provide reparation, and that as the offender may feel he has done no wrong, there may be nothing about which he feels he should express remorse.⁸²⁸ Reparation by offenders in custody, as explained,⁸²⁹ is not possible, so its value is not relevant. Reparation by drug offenders sentenced to Community Orders is possible as drugs-offenders can carry out the unpaid work requirement, as community 'pay back'.

7.12. Conclusions

Conclusions will be drawn in detail in Chapter 9, but the general conclusions to this chapter are that for drugs traffickers, sentencing is appropriate, and proportional, although subjective, but effectiveness cannot be determined, for accurate records are not kept, contrary to the requirements to do so placed upon the Sentencing Council. For drug users, and for minor traffickers, as defined, it is inappropriate to subject them to the criminal law and disproportionate to label them as 'criminals' and to sentencing; medical care is what is required, supported by the law if necessary if there is deliberate defaulting from treatment. As sentencing is not appropriate, proportionality and effectiveness are not relevant.

⁸²⁶ 6.4 *The effect of the expression of remorse upon the judge*

⁸²⁷ 6.4. *The effectiveness of censure in the magistrates' courts*

⁸²⁸ 6.5. *The effectiveness of making reparation*

⁸²⁹ 5.7.(a) the imposition of fines through the Sentencing Act 2020 s 120, and through deprivation orders s 152

Chapter 8 Conclusions.

8.1. The appropriateness, proportionality and effectiveness of sentencing

The aim of the thesis was to determine the Value of Sentencing Drug Offenders, through examining its appropriateness, proportionality and effectiveness. It has been shown that it is appropriate to sentence drug traffickers and the major suppliers; they may cause substantial harm to the population and seek only to make profits out of the folly of others. The Sentencing Guideline is proportional in its severity of punishment, though as proportionality is a subjective concept, based upon the mores of the Sentencing Council at the time of its instigation, this may change. The effectiveness cannot be measured reliably for good records to assess this are kept in neither the custodial nor non-custodial environment. There is the ‘middle group’ of drugs offenders,⁸³⁰ who should be tested against the CPS criteria⁸³¹, and if found to be appropriate, prosecution should follow in accordance with the Guideline. If not appropriate, the offender should be handled in accordance with the Diversion procedures as in Chapter 7.

It has also been shown that sentencing has little or no value or indeed place in punishing drug users. A person has sovereign rights over himself, and the State’s duty is to respect and defend that, rather than infringe his liberty. Most drug users do not become addicted and those who do need medical help and treatment not punishment, which may well aggravate their infirmity and, as has been shown, impair their recovery.⁸³² Sentencing, that is censure and punishment, is inappropriate for a drug user because casual use is not inherently any more harmful to the individual or wider society than the use of other licit recreative psychoactive substances. Thus, proportionality is irrelevant, and the effectiveness has been shown not to be accurately measurable.

8.2. The Drug Offences Sentencing Guideline’s strengths and weaknesses

Its strength is that it is easy to understand and to implement, and because of that it ensures consistency of sentencing. The eight steps of procedure are logical and clearly stated. The severity of punishments is proportional to the gravity of the offences in respect of trafficking and major supply. There are three principal weaknesses: firstly, it is based upon a drug classification, which is inaccurate and significantly out of date. It may well have been correct when enacted in the Misuse of Drugs Act (1971), but multiple empirical studies since have shown it to have very little relation to scientific understandings of the harmfulness of the prohibited substances.

The second weakness is that although it purports to be the ‘Definitive Guideline’, it relates mainly to the Crown Courts, in which the vast majority of drug offenders do *not* appear, attending as they do the magistrates’ courts. Censure is not mentioned though it has an important part to play in sentencing, especially in the magistrates’ courts.

The third weakness is that sentencing and punishment is ordered with no consideration given as to what effect that might have. The directions issued to the Sentencing Council had been to monitor and audit the outcome of sentencing, and this they have failed to do.

⁸³⁰ ‘Minor’ traffickers such as ‘mules’, ‘county line ‘runners’, and possessors-with-the-intention-to-supply offenders.

⁸³¹ The Crown Prosecution (2018) *The Code for Crown Prosecutors*.
<https://www.cps.gov.uk/publication/code-crown-prosecution>

⁸³² see 5.5. *Drug Offenders awarded a non-custodial sentence* and see footnote *Heard C* (2015) *Community sentences since 2000*

8.3. The changes needed in the Sentencing Guideline.

These are contingent to the weaknesses. The Misuse of Drugs Act's classification needs to be updated and made relevant to today's requirements. The Guideline should be presented appropriate to the needs of the magistrates' courts. Censure⁸³³ should be mentioned in the Guideline; unquantifiable admittedly, but important none the less, especially in eliciting remorse and possibly influencing the judge in mitigation. The ignorance about sentencing's effectiveness⁸³⁴ should be remedied by accurate record keeping and measurement of outcomes, which should feed back to amendments to the Guideline and reviews of the sentencing procedure and the actions of the judges.⁸³⁵ Ideally this would take place as a routine review every few years. Finally, as sentencing is inappropriate for users, all related material should be removed.

8.4. How can sentencing of drug offenders be improved?

The House of Commons Health and Social Care Committee:

*'...recommends a radical change in approach to UK drugs policy, moving from the current criminal justice approach to a health approach, with responsibility for drugs policy moving from the Home Office to the Department of Health and Social Care.'*⁸³⁶

Implementation of the sentencing changes as recommended would go some way to meeting the House of Commons Committee's criticism. The 'radical change' referred to would imply not sentencing alone, but a far wider approach to drugs policy, which is not part of this thesis.

⁸³³ 1.8. Where is described how Censure is directed not only towards the offender, but also to the victim and Others. See also 5.2.

⁸³⁴ Sentencing Council (2012) *Research into the effects of the draft offences' guideline on sentencing practice* Analysis and research bulletin. Nowhere is the effectiveness of sentencing mentioned.

⁸³⁵ This is the 'Servo System' characteristic of all commercial and most professional activities, but strangely enough, as shown here, not in the Law.

⁸³⁶ Government Publications (2019) *Radical change needed in approach to UK drugs policy* <https://committees.parliament.uk/committee/news>

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