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1995]

THE SENTENCING BOOMERANG: DRUG PROHIBITION POLITICS AND REFORM

ERIC E. STERLING*

I. INTRODUCTION

SENTENCING is the bottom line of the criminal justice system. The expression “bringing the offender to justice” is used not only to mean that we will locate an offender and then try him or her for a particular crime, but also that we will actually punish the offender for the crime. In addition, the nature of the punishment determines the degree of justice. Thus, the aphorism, “let the punishment fit the crime,” intuitively describes justice.

This aphorism is also the seed of the sentencing controversy over punishment and policy in the war on drugs.¹ The phrase “let the punishment fit the crime” has become the slogan of Families Against Mandatory Minimums (FAMM).² FAMM was created in

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1. See, e.g., Stephen Chapman, *Does the Punishment Fit the Crime?* ORLANDO SENTINEL TRIB., Mar. 23, 1993, at A11 [hereinafter Chapman, *Does the Punishment Fit the Crime?*]. According to Mr. Chapman, federal judges handing down sentences under the federal drug laws are questioning whether they are giving out suitable punishments. *Id.* For example, he quotes one federal judge as saying, “I resent the fact that Congress has forced me . . . to sentence a young man . . . to jail for 10 years for a crime that doesn’t deserve more than three or four.” *Id.* In another article, he quotes a different judge as saying, “I’ve always been considered a fairly harsh sentencer, but it’s killing me that I’m sending so many low-level offenders away for all this time.” Stephen Chapman, *An Insult to Justice: Large Sentences for Small Crimes*, CHI. TRIB., Mar. 21, 1993, at C3; see also Mark A. Cohen, *Explaining Judicial Behavior or What’s “Unconstitutional” About the Sentencing Commission?*, 7 J. L. ECON. & ORGANIZATIONS 183, 186-87 (1991) (observing that for many judges “the ability to exercise discretion is . . . one of the most rewarding aspects of [their job]”); *News National Report: Supreme Court Justice Faults Sentencing Laws*, S.F. CHRON., Mar. 10, 1994, at A6 (quoting Supreme Court Justice Kennedy as stating, “I think I am in agreement with most judges in the federal system that mandatory minimums are imprudent, unwise and often unjust mechanism for sentencing”). *But see* Fred A. Bernstein, *Discretion Redux — Mandatory Minimums, Federal Judges, and the “Safety Valve” Provisions of the 1994 Crime Act*, 20 U. DAYTON L. REV. 765 (1995) (explaining “safety valve” provision enacted by Congress allowing judges to avoid applying mandatory minimum sentences for many first time drug offenses).

2. Bernstein, *supra* note 1, at 765 (stating that, according to FAMM, drug crimes are favorite target of “mandatory minimum” sentences and that FAMM in-

1991 to urge Congress to repeal the mandatory minimum sentences created by the Anti-Drug Abuse Act of 1986.³ The members of FAMM assert that mandatory minimum sentences do not fit their crimes.⁴

On the other hand, those opposed to the system of drug prohibition altogether are making a broader assertion. They argue that the conduct that constitutes an act of drug use, or even the many acts of drug use that are the pattern of addiction, should not be punished at all.⁵ Thus, no punishment could properly fit the crime.

The policies of public office holders provide another way of looking at the aphorism "let the punishment fit the crime." To the public, an office holder who argues for and achieves greater punishments appears more "serious" about the problem of crime, or perhaps more precisely, more sensitive to public fear of and anger about crime.⁶ Consequently, public office holders have a great in-

tends to continue to fight guidelines by reporting effects of sentences on minor drug offenders serving lengthy sentences).

3. *Id.*; see also Joseph F. Weis, Jr., *The Federal Sentencing Guidelines—It's Time for a Reappraisal*, 29 AM. CRIM. L. REV. 823 (1992) (discussing how Federal Courts Study Committee has also urged Congress to repeal mandatory minimum sentences and expressing concern that they "create penalties so distorted as to hamper federal criminal adjudication").

4. Chapman, *Does the Punishment Fit the Crime?*, *supra* note 1, at A11 (recognizing that federal law allows no parole and requires at least five years in prison for small scale crimes such as possession of five grams of crack, which weighs less than a quarter). FAMM considers the federal laws unfair for minor offenders. *Id.*

5. See Michele H. Kalstein et al., Comment, *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.-C.L. L. REV. 575, 612-13 (1992) (discussing how Congress has essentially ignored possibility of rehabilitating drug offenders by imposing mandatory minimum sentences). See generally JAMES B. BAKALAR & LESTER GRINSPON, *DRUG CONTROL IN A FREE SOCIETY* (1984); GEORGETTE BENNETT, *CRIMEWARPS: THE FUTURE OF CRIME IN AMERICA* (1987); STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993); ROD L. EVANS & IRWIN M. BERENT, *DRUG LEGALIZATION: FOR AND AGAINST* (1992); JAMES A. INCIARDI, *THE DRUG LEGALIZATION DEBATE* (1991); RUFUS KING, *THE DRUG HANG-UP: AMERICA'S FIFTY-YEAR FOLLY* (1972); MELVYN B. KRAUSS & EDWARD P. LAZEAR, *SEARCHING FOR ALTERNATIVES: DRUG CONTROL POLICY IN THE UNITED STATES* (1991); ALFRED R. LINDESMITH, *THE ADDICT AND THE LAW* (1965); STANTON PEELE, *DISEASING OF AMERICA: ADDICTION TREATMENT OUT OF CONTROL* (1989); THOMAS SZASZ, *CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS AND PUSHERS* (1974); THOMAS SZASZ, *OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET* (1992) [hereinafter SZASZ, *OUR RIGHT TO DRUGS*]; MARK THORNTON, *THE ECONOMICS OF PROHIBITION* (1991); ARNOLD TREBACH, *THE GREAT DRUG WAR: RADICAL PROPOSALS THAT COULD MAKE AMERICA SAFE AGAIN* (1987) [hereinafter TREBACH, *THE GREAT DRUG WAR*]; ARNOLD TREBACH, *THE HEROIN SOLUTION* (1982) [hereinafter TREBACH, *THE HEROIN SOLUTION*]; STEVEN WISOTKY, *BREAKING THE IMPASSE IN THE WAR ON DRUGS* (1986); Symposium, *A Symposium on Drug Decriminalization*, 18 HOFSTRA L. REV. 831 (1990).

6. See Jeffrey Hoff, *Prison Overcrowding Poses Tough Issues; Mandatory Sentencing*

centive to push for harsher sentences.

In the past decade, the general prison population has increased and, in particular, the prison population of drug offenders has increased dramatically.⁷ From 1980 to 1989, federal drug offenders sentenced to incarceration shot up 262%, from 3,675 to 13,306.⁸ For 1993, the total number of drug offenders sentenced to incarceration was 18,698, almost 50% higher.⁹

These longer sentences arise from the adoption of "tougher" criminal justice policies, authorization of extensively lengthened sentences and creation of mandatory minimum sentences.¹⁰ Ultimately, these increases reflect the value politicians reap from both dramatizing the drug problem and demonstrating their steadfastness against drug use and drug trafficking.¹¹

for Drugs Questioned, N.Y. TIMES, Feb. 24, 1991, at 12NJ1 (quoting New York State Senator Gabriel M. Ambrosio as stating that, "[a]s soon as you raise questions [about sentencing reform], you run the risk of being called soft on crime"); Kate Maletz, *About Brooklyn/The City; Alternatives to Prison*, NEWSDAY, June 4, 1995, at N57 (acknowledging that "[i]n New York State, politicians often decline to back alternative sentencing programs for fear of appearing soft on crime."); see also Susan Yoachum, *Drug War Tax Backed by Feinstein; Candidates Are Beginning to Define Their Differences*, S.F. CHRON., Sept. 11, 1990, at A1 (detailing candidates' efforts to appear "tough on crime" in their campaign advertisements).

7. See *Packed Prisons: Nations's Inmate Population Climbed to 703,687 Last Year*, ST. LOUIS POST-DISPATCH, May 21, 1990, at 8A [hereinafter *Packed Prisons*] (stating that "[t]he number of federal and state prison inmates zoomed to a record 703,687 last year, a 12.1[%] increase over 1988." (quoting BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUGS, CRIME AND THE JUSTICE SYSTEM 190 (Dec. 1992)). According to the Department of Justice, sentences given for drug offenses "account for a large number [of the new prison inmates], including 49[%] of the inmates committed to federal prisons in the last 10 years." *Id.* For example, while the number of defendants disposed of for violations of the Drug Abuse Prevention and Control Act related to marijuana increased by about 500 from 1990 to 1993, the number of those defendants imprisoned increased by about 900. See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 212 (114th ed. 1994).

8. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUGS, CRIME AND THE JUSTICE SYSTEM 190 (Dec. 1992).

9. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 212 (114th ed. 1994).

10. See *Does the Punishment Fit the Crime?*, *supra* note 1, at A11 (stating that even possession of very small amounts of drugs may require at least five years "mandatory minimum" sentence); Hoff, *supra* note 6, at 12NJ (recognizing that many hold mandatory drug sentences responsible for "skyrocketing" prison population); Maletz, *supra* note 6, at N57 (quoting representative of nonprofit organization which seeks alternatives to prison for women, saying that since mandatory sentences for drug offenses have become rule "population in women's prisons has exploded"); *Packed Prisons*, *supra* note 7, at 8A (reporting agency attributing cause of increase in prison population to adoption of tougher criminal justice policies).

11. See Hoff, *supra* note 6, at 12NJ1 (declaring that there is political reluctance to rescind mandatory drug sentences because lawmakers desire to appear tough on crime); Maletz, *supra* note 6, at N57 (describing politicians in New York State as having fear of appearing soft on crime); see also Yoachum, *supra* note 6, at A1

This article will look squarely at current U.S. drug prohibition policy and politics.¹² In Part II, this article will furnish an abbreviated overview of historical theories on crime and punishment.¹³ Part III will raise some questions relating to the proper role of the courts in U.S. drug policy.¹⁴ Next, Part IV of this article will give a brief history of U.S. drug prohibition policy and discuss the language of the drug policy debate in the context of the “war on drugs.”¹⁵ Part IV will also provide a glossary of current drug policy reform terms and a paradigm of current drug enforcement.¹⁶ In Part V, the article will discuss the history of mandatory minimum sentences, in the context of the sentencing debates surrounding the Anti-Drug Abuse Act of 1986 and the 1994 Crime Bill.¹⁷ Lastly, in Part VI, this article will conclude by making a series of recommendations for reform of U.S. drug policies.¹⁸

II. CRIME AND PUNISHMENT: AN ABBREVIATED OVERVIEW OF THEORY

Historically, the concepts of crime and punishment have been tied together. Cesare Beccaria (1738-1794), in his treatise *ON CRIMES AND PUNISHMENTS*, concluded that, in order to prevent the commission of crimes, there must be proper punishments for crimes.¹⁹ There is an initial harm to society — the individual’s crime.²⁰ There is a second harm: to the individual — punishment.²¹ But, when punishment is inflicted to a degree proportional

(pointing out candidates’ desire to appear tough on crime because not to could harm their public perception).

12. For a discussion of current U.S. drug prohibition policy and politics, see *infra* notes 119-63 and accompanying text.

13. For a discussion of historical theories on crime and punishment, see *infra* notes 19-46 and accompanying text.

14. For a discussion of the proper role of the courts in U.S. drug policy, see *infra* notes 47-48 and accompanying text.

15. For a discussion of U.S. drug prohibition policy and the language of U.S. drug policy in the context of the “war on drugs,” see *infra* notes 49-66 and accompanying text.

16. For a discussion of current drug policy reform terms and a paradigm of current drug enforcement, see *infra* notes 67-118 and accompanying text.

17. For a discussion of case histories, policy, politics and the sentencing debate, see *infra* notes 119-63 and accompanying text.

18. For further discussion of recommendations for new drug enforcement policies, see *infra* notes 164-208 and accompanying text.

19. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 62-64 (Henry Paolucci trans., 1963) (1764); see also STEPHEN BROWN ET AL., *CRIMINOLOGY: EXPLAINING CRIME AND ITS CONTEXT* 216-21 (1991) (discussing Beccaria’s theories on crime and punishment).

20. BROWN ET AL., *supra* note 19, at 219.

21. *Id.* at 221.

to the crime, it deters people from undertaking crime in the first place.²² Thus, the government justifies punishing the individual by balancing the two harms.²³

Beccaria was an advocate of crime prevention.²⁴ His theory was deterrence through the threat of punishment.²⁵ He acknowledged that the potential infliction of pain or harm for making the criminal choice deters only the rational actor.²⁶ Therefore, for effective deterrence, Beccaria identified three necessary principles of punishment: certainty,²⁷ celerity (speed)²⁸ and severity.²⁹ Certainty meant that the laws needed to be clear, broadcast to prevent ignorance of the law, and enforced in a consistent manner.³⁰ Speed was based on the presumed importance of quickly associating the crime with the punishment in the mind of the offender and with the public.³¹ Severity was based on a principle of proportionality; the punishment should exceed the profit from the crime, but just barely.³² Accordingly, excessive punishment is a waste.³³

Philosopher Jeremy Bentham (1748-1832), the father of “utilitarian” philosophy, wrote at the time of the founding of the American Republic.³⁴ He adopted Beccaria’s punishment principles and added two others: sensibility and exemplarity.³⁵ Sensibility described the specific characteristics of the offender — such as age, gender, strength, health and wealth — which, Bentham argued, should be weighed when choosing punishment.³⁶ Exemplarity was the appearance of the punishment to potential offenders.³⁷ Ben-

22. *Id.* at 219-21.

23. *Id.* at 221.

24. *Id.* at 219 (“It is better to prevent crimes than to punish them.” (quoting Beccaria, *supra* note 19, at 93)).

25. *Id.*

26. *Id.* at 219-21.

27. BECCARIA, *supra* note 19, at 58-59, 93-99; BROWN ET AL., *supra* note 19, at 220-21.

28. BECCARIA, *supra* note 19, at 55-57; BROWN ET AL., *supra* note 19, at 220-21.

29. BECCARIA, *supra* note 19, at 58-59, 93-99; BROWN ET AL., *supra* note 19, at 220-21.

30. BROWN, *supra* note 19, at 221.

31. *See id.* (stating that procrastinations in regard to punishment lead to increased probability of future violations).

32. *Id.*

33. *Id.* Beccaria felt severity of punishment was justifiable, but only to accomplish desired effect, because “[a]ll beyond this is superfluous and for that reason tyrannical.” *Id.* (quoting BECCARIA, *supra* note 19, at 43).

34. *Id.* at 223-24.

35. *Id.* at 224.

36. *Id.*

37. *Id.*

tham argued that, from a crime prevention perspective, actual punishment was less important than the appearance that severe punishment would be likely.³⁸

The principle of exemplarity might support the opposite of what is today being touted in Congress as "truth in sentencing."³⁹ Following Bentham's theory, it might be more desirable for the government to sentence an offender for many years but not make the offender actually serve his or her full sentence. The government would merely make the general public and potential offenders *believe* that the full sentence would actually be served.

The advocates of "truth in sentencing" are adamant that the long sentences that are often imposed in systems of indeterminate sentencing actually be served.⁴⁰ This position relies on two arbitrary absolutes. First, advocates of "truth in sentencing" argue that a defendant must serve at least 85% of the imposed sentence in prison.⁴¹ This threshold percentage was arrived at arbitrarily: no research suggests that the public thinks 85% would be more "true" than 100% or 50%.⁴²

38. *Id.* ("Perceptions of punishment by those contemplating crimes is more important than the actual punishment imposed.")

39. See Truth in Sentencing Incentive Grants, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20102 (1994) (establishing requirements for sentencing which states must meet in order to receive federal grant money for prisons); see also Leslie Phillips, *Winners, Losers in Legislation*, USA TODAY, Apr. 22, 1994, at 4A (discussing progress of House of Representatives anti-crime bill and stating that proponents of "truth in sentencing" lost effort to require states to imprison inmates for 85% of their sentences in order to receive federal funding); Mary Jo Pitzl, *Lawmakers Vow 100-Day Session; Leaders to Focus on Major Issues*, ARIZ. REPUBLIC, Jan. 10, 1993, at B1 (discussing progress of "Truth in Sentencing" legislation in Arizona state legislature).

40. See 140 CONG. REC. H2240 (daily ed. Apr. 13, 1994) (statement of Rep. Bill McCollum). Representative Bill McCollum, a leading Republican of the House Committee on the Judiciary, stated:

If we are going to provide money and, yes, we should provide money for prisons, for States to build more prisons to house these violent criminals, then we should provide some eligibility requirements to ensure that the States are going to change their laws to guarantee that those who commit violent crimes and are repeat violent offenders serve at least 85[%] of their sentences instead of getting out after serving only a fraction.

Id.

41. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, VIOLENT OFFENDER INCARCERATION AND TRUTH IN SENTENCING INCENTIVE GRANT PROGRAM: INTERIM FINAL RULE 5 (1994) (explaining that to be eligible for funding under Truth in Sentencing Grant Program, states must meet certain sentencing requirements). To be eligible to receive funding under the Federal Truth in Sentencing Program, a state must either (1) ensure that violent offenders "serve not less than 85% of their sentences, or (2) meet other requirements that ensure that violent offenders, and especially repeat violent offenders, remain incarcerated for substantially greater percentages of their imposed sentences." *Id.*

42. See Weis, *supra* note 3, at 823 (stating that imprisonment terms are arbitrary).

Second, advocates of “truth in sentencing” maintain that “truth in sentencing” should apply *only* to violent crimes (defined or redefined for political purposes to include various drug offenses), and that the *only* means for expanding the punishment capacity for violent offenders is to build new high security prisons.⁴³ Consequently, the advocates of “truth in sentencing” reject the approach of diverting non-violent offenders to facilities or programs that would have the effect of freeing up prison space.⁴⁴

On the other hand, perhaps “truth in sentencing” itself could be used as a sentencing gimmick, to serve Bentham’s principle of exemplarity.⁴⁵ Assume that the United States adopts “truth in sentencing” and spends tens of billions of dollars on new prison construction, but then quietly plans to cease operating those new prisons — which are enormously expensive to operate — after five or ten years.

If, for the next five or ten years, the government successfully makes potential criminals aware of the new prisons and longer imprisonments of the “truth in sentencing” approach, the exemplarity principle (the modern deterrence theory) would predict that these measures would reduce the overall crime rate. According to Bentham’s theories, individuals would choose not to commit crimes out

trarily set by Congress, often as response to perceived public call to be “tough on crime”).

43. See 140 CONG. REC. H2442-50 (daily ed. Apr. 19, 1994) (debating, in House of Representatives, amendment to H.R. 4092 offered by Rep. Bill McCollum of Florida). This proposed amendment provided billions of dollars to the states to construct or operate prison space for violent offenders if these states changed their laws to require violent offenders to serve at least 85% of their sentences and passed “three strikes and your’re out” laws. *Id.* at H2444; see also Nkechi Taifa, “Three Strikes and You’re Out”—Mandatory Life Imprisonment for Third-time Felons, 20 U. DAYTON L. REV. 717 (1995) (explaining that such provisions impose mandatory life sentence without parole on offenders convicted of third violent offense).

44. Representative William J. Hughes proposed a substitute for the McCollum amendment in § 601(b) of H.R. 4092, by providing in section 601(b)(4) for: assurances that the State or States have a comprehensive correctional plan which represents an integrated approach to the management and operation of correctional facilities and programs and which includes diversional programs, particularly drug diversion programs, community corrections programs, a prisoner screening and security classification system, prisoners rehabilitation and treatment programs, prisoner work activities (including, to the extent practicable, activities relating to the development, expansion, modification, or improvement of correctional facilities), and job skills programs, a pre-release prisoner assessment to provide risk reduction management, post-release assistance, and an assessment of recidivism rates

140 CONG. REC. H2443-44 (daily ed. April 19, 1994) (statement of Rep. Hughes).

45. For a further discussion of Bentham’s exemplarity principle, see *supra* notes 37-38 and accompanying text.

of fear of serving really hard time in the new prisons. Then, in order to avoid bankruptcy, in five or ten years the U.S. could quietly restore parole in varying degrees of control, including release with home confinement.

At that time, the United States might need to adopt another sentencing gimmick in order to carry forward the illusion of serious punishment. Excellent candidates for such gimmick punishments include caning, whipping, stocks and pillories, mutilation and so forth. Essentially, the United States could use the threat of a series of severe punishments to maintain public fear of punishment.

In this sense, "truth in sentencing" can be analogized to the Reagan-era build-up of U.S. weaponry. The United States threatened to use a punishment — its well-funded and newly enlarged military — against the Soviet Union. This threat in turn may have helped the United States win the "cold war" with the Soviet Union. With the crumbling of the Soviet Union, the United States no longer needed this threat and, therefore, adopted a new program with the Soviet Union — one of mutually destroying national weaponries. In the same fashion, the United States could loudly adopt one punishment gimmick to instill fear of severe punishment in potential criminals, such as the construction of many new prisons or some form of corporal punishment, and then quietly wait for the need to actually inflict the punishment to pass. However, crime is likely to increase steadily for the next fifteen years as the population of teenagers and young adults increases.⁴⁶ The prospect that prisons and punishments will not be used is absurd.

III. ROLE OF THE COURTS

What role the courts should play in the U.S. drug policy raises some preliminary questions:

1. Can we distinguish justice from law enforcement? Is it the role of the courts to be part of the crime fighting establishment, or merely to assure procedural fairness and justice are maintained in that fight? Should a judge be an ally of the police and the prosecution, or an independent actor from those establishments?
2. Further, does the concept of "the criminal justice system" erroneously blur important distinctions between the

46. Malcolm Gladwell, *Baby Boom's Urban Cradle Braces for Future Rocked by Crime*, WASH. POST, May 26, 1994, at A25 (stating that criminologists predict another crime wave in early part of next century when crest of current baby boom reaches late adolescence).

roles of judges, police agencies, prosecutors and correctional personnel? Or, does the concept appropriately help to unify them with a common mission? In other words, should the courts be independent agents of justice, or just another component of the entire investigation, prosecution and punishment system?

3. What should we do if there is a difference between what may be an "appropriate punishment" today and a sentence that may have the very hard-to-measure potential of preventing future crime?⁴⁷

These questions help to point out that in thinking about the controversy over sentencing, where one stands depends upon where one sits. A judge that imposes a sentence is almost always also imposing a punishment.⁴⁸ For this reason, a judge's belief relating to the proper role of the courts in the U.S. drug enforcement program can be important.

IV. DRUG POLICY

A. *A Brief History of American Prohibition Policy*

Prior to 1914, the sale, manufacture, possession and use of

47. Congress has statutorily delineated the factors for federal judges to consider when imposing a sentence:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE. — The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider —

(2) the need for the sentence imposed —

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

18 U.S.C. § 3553(a) (1985 & Supp. 1995).

48. There are, of course, exceptions. One example is the Florida case of Kenny and Barbra Jenks, a couple convicted of growing marijuana to relieve the wasting syndrome of AIDS, from which they both were suffering. *Jenks v. Florida*, 582 So. 2d 676, 677 (Fla. Dist. Ct. App. 1991). The First District Court of Appeals of Florida held that the defendants satisfied the common law requirements of a medical necessity defense, thereby reversing the lower court's sentence of probation. *Id.* at 680. The Florida Circuit Court had rejected the defendant's common-law medical necessity argument and sentenced the defendants to unsupervised probation with the condition that they care for each other. *Id.* at 678.

drugs were legal under federal law. For example, throughout the nineteenth century, opium was available as a drug in patent medicines. The drug's use became fairly widespread during the Civil War and grew in the latter half of the nineteenth century. A tariff was even imposed on its importation.

Further, prior to 1914, the use and manufacture of morphine and cocaine was also permitted under federal Law. Scientists isolated morphine, the most powerful alkaloid in opium and, with the development of the hypodermic syringe, doctors began to use the drug in medicine to relieve pain.⁴⁹ After it was isolated from the coca plant in the mid-nineteenth century, cocaine was also widely used. Physicians and drug companies, who had compounded it into many forms, prescribed the drug.

By 1900, there were an estimated 250,000 narcotics addicts in the United States.⁵⁰ The addict population included persons of all races and classes. At the same time, however, the public generally identified addicts as either foreign or domestic minorities.

Chinese immigrants were identified with opium smoking, as part of an alleged Chinese effort to undermine American society.⁵¹ Southern African-Americans were identified by whites with cocaine addiction. One historian writes that "[t]he South feared that [African-American] cocaine users might become oblivious of their prescribed bounds and attack white society."⁵² The historian further states, "[o]ne of the most terrifying beliefs about cocaine was that it actually improved pistol marksmanship. Another myth, that cocaine made blacks almost unaffected by mere .32 caliber bullets, is said to have caused Southern police departments to switch to .38 caliber revolvers."⁵³

Simultaneous to the rise in concern over narcotics use was a rise in persecution of these groups associated with narcotics use. The United States Congress began acting to exclude Chinese labor-

49. See DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 2 (1973). Musto relates that morphine manufacture from crude opium was undertaken in Philadelphia beginning in 1832. *Id.*

50. *Id.* at 5, 253 n.13; see also DAVID T. COURTWRIGHT, *DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940* 9 (1982) (estimating that opiate addiction reached peak in 1914 — with 313,000 addicts — and then began steady decline).

51. MUSTO, *supra* note 49, at 6, 254 n.14 (citing E.C. SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1939)).

52. *Id.* at 6. "Examination of the *Atlanta Constitution* (27 Dec. 1914) also reveals a frequently claimed association between cocaine use and the Negro; by 1914 the Atlanta police chief was blaming '70% of the crimes on drug use.'" *Id.* at 254 n.15.

53. *Id.* at 7.

ers, and attacks on Chinese immigrants and Chinese travelers occurred in the United States. In response to this persecution, Chinese merchants in China began an embargo against American goods in 1905. Similarly, Southern white fear of cocaine use by African-Americans led to "lynchings, legal segregation, and voting laws all designed to remove [their] political and social power"54

At the same time, the United States also became concerned about Filipino opium use. The United States acquired the Philippine Islands from Spain after the war in 1898. Prior to this time, Spain had operated an opium monopoly. After the Filipino independence movement was crushed, an effort to re-establish this monopoly was stymied by political opposition in the United States, culminating in 1905, when Congress prohibited opium use by native Filipinos. Congress did not apply this ban to non-native Filipinos (largely ethnic Chinese) for another three years.⁵⁵

Outside of the United States, concern about opium use was also rising. Opium had been shipped to China by the British since before the Opium Wars of the mid-nineteenth century. As a result, opium had been a major source of revenue to the government of India, and thus the United Kingdom. In January of 1906, however, the Liberal Party took control of the British government and pledged to eliminate the opium trade to China. In the same year, the Dowager Empress of China issued regulations to curb the use of opium.⁵⁶ In the minds of the Chinese, opium trade and addiction were increasingly associated with the evil of foreign domination.

Not surprisingly, President Theodore Roosevelt quickly supported a proposal from an anti-narcotics crusader for an international conference to assist China in resisting opium. President Roosevelt named Dr. Hamilton Wright to organize this effort for the United States. Dr. Wright sought to strengthen his hand at the international conference by getting federal anti-narcotics legislation enacted. Because a comprehensive law would have offended pharmacists, pharmaceutical companies and physicians, he was only partially successful. On February 9, 1909, Congress enacted a ban on the importation and possession of smoking opium.⁵⁷

54. *Id.*

55. *Id.* at 25-27.

56. *Id.* at 29.

57. Smoking Opium Exclusion Act, 21 U.S.C.A. §§ 176-185 (1909) (repealed 1970); see also COURTWRIGHT, *supra* note 50, at 81-83 (explaining significance of Smoking Opium Exclusion Act); MUSTO, *supra* note 49, at 30-35 (describing events leading up to adoption of Act).

Following the Shanghai Opium Commission, Dr. Wright encouraged the passage of much broader federal anti-drug legislation. He began promoting the danger of cocaine, especially as it was being used by African-Americans in the South.⁵⁸ In his official report to Congress, Dr. Wright concluded, "it has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by the [African-Americans] of the South and other sections of the country."⁵⁹

Eventually, Wright was successful in persuading Congressman David Foster, a Republican from Vermont and Chairman of the House Committee on Foreign Affairs, to introduce a complex drug prohibition law, in the guise of a revenue measure, on April 30, 1910. Wright's plan began to unravel when, after eighteen years of Republican control, the Democrats took control of the House of Representatives in the 1910 election. After a day of hearings in which many industries that would be affected testified, opposition grew, and the Foster bill ultimately died in February of 1911.⁶⁰

In December of 1911, the International Conference on Opium convened in the Hague. Bishop Charles Henry Brent, an American, chaired the conference of twelve nations. Germany attacked the U.S. delegation, asking what assurances existed that Congress would enact legislation to implement the international controls. In response, Wright gave his assurance.⁶¹

Back in the United States, the Democrats took over both the White House and the Senate in the 1912 elections. The newly unified Congress convened in March of 1913, and on June 10, 1913, the Harrison Narcotics Act (Harrison Act) was introduced, incorporating many compromises from the failed Foster bill.⁶² Unlike the Foster bill, this legislation passed both houses of Congress. On December 17, 1914, President Wilson signed the Harrison Act into law.⁶³

58. MUSTO, *supra* note 49, at 43-44. Dr. Wright emphasized the importance of legislation to curtail the spread of cocaine among African-Americans, relying on public perceptions that African Americans were most likely to commit crime due to their use of cocaine. *Id.*

59. MUSTO, *supra* note 49, at 43-44, 264 & n.40 (citing HAMILTON WRIGHT, REPORT ON THE INTERNATIONAL OPIUM COMMISSION AND ON THE OPIUM PROBLEM AS SEEN WITHIN THE UNITED STATES AND ITS POSSESSIONS, *in* Opium Problem: Message from the President of the United States, S. DOC. NO. 377, 61st Cong., 2nd Sess. 47 (1910)).

60. MUSTO, *supra* note 49, at 44-48.

61. *Id.* at 49-51.

62. *Id.* at 270 & n.1.

63. *Id.* at 59-61.

Unfortunately, cynical exploitation of racial fear and hatred became a central legislative strategy in the enactment of narcotics prohibition. The legislative treatment of cannabis serves as a further example. Cannabis had been included in the early drafts of the narcotics legislation, although its inclusion was opposed by the pharmaceutical industry and it was eventually dropped from the enacted version of the Harrison Act. An historian writes that “[n]ot even the [prohibitionists] claimed, in the pre-World War I hearings and debates over a federal antinarcotic act, that cannabis was a problem of any major significance in the United States”; in fact, “[f]ear of cannabis, or marihuana, as it was beginning to be known, was minimal throughout most of the nation in the 1920s.”⁶⁴ At the same time, however, “[i]n areas with concentrations of Mexican immigrants, who tended to use marihuana as a drug of entertainment or relaxation, the fear of marihuana was intense Although employers welcomed [Mexicans] in the twenties, Mexicans were also feared as a source of crime and deviant social behavior.”⁶⁵ With the beginning of the Great Depression, Mexicans, “who had been welcomed by at least a fraction of the communities in which they lived, became an unwelcome surplus in regions devastated by unemployment”⁶⁶ To a great extent, attitudes in the United States toward Mexican-Americans led to prohibiting cannabis use.

B. *The Language of Drug Policy from the Perspective of the War on Drugs*

For some time, people have used the phrase “the war on drugs” or “the drug war” to describe the status quo in the United States.⁶⁷ As of 1988, Representative Charles Rangel, a Democrat from New York and former chairman of the House Select Committee on Narcotics Abuse and Control from 1981 to 1993, has said that the United States had hardly declared a war on drugs.⁶⁸ Further,

64. *Id.* at 216-17.

65. *Id.* at 219.

66. *Id.* at 219-20.

67. See DUKE & GROSS, *supra* note 5, at 200-31 (detailing different approaches by United States to stop drug use and concluding that, if anything, drug war has made things worse in United States); TREBACH, *THE GREAT DRUG WAR*, *supra* note 5, at 1-5 (describing war on drugs waged by Reagan administration and recognizing that it has done nothing to make America better place); WISOTSKY, *supra* note 5, at 3 (stating that at least two administrations have declared a “war on drugs” in attempt to stop spread of drug use with no positive results).

68. *Legalization of Illicit Drugs: Impact and Feasibility, Hearings Before House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 2d Sess. 1-3 (1988) [hereinafter *Legalization Hearings*] (stating that there has hardly been war on drugs because “it has not been the policy of [the Reagan] administration to fund local state law

although the Clinton administration declined to label the current effort a "war," it is still a fairly massive one, involving the arrest of more than one million persons in 1993 for drug abuse violations by state and local police.⁶⁹ In comparison, only about 750,000 persons were arrested for all violent offenses in 1993.⁷⁰

Since the first term of the Reagan presidency, the phrase "the war on drugs" has been used as a metaphor for an intense governmental effort to "combat" drug abuse and drug trafficking, much like the effort intended by President Johnson when he declared a "war on poverty."⁷¹ In October of 1982, President Reagan ran up the United States "battle flag" against the drug problem. He announced an eight-point anti-drug program, including a major increase in funding to fight "organized crime drug trafficking."⁷²

In the early 1980s, efforts in the United States to combat drug use began to reflect the military flavor of anti-drug use rhetoric. In the early 1980s, the conflict between Colombian and Cuban drug traffickers for primacy in the South Florida cocaine wholesale markets was fought in a number of day-light machine gun battles, and with assassinations and drive-by shootings. This led to the heightened sense that the drug traffickers — alliteratively called the "cocaine cartel" or the "Colombian cartel" — were an armed, military threat. In response, in December of 1981, Congress amended the Department of Defense Authorization Act for fiscal year 1982 to permit U.S. military forces to provide assistance to law enforcement agencies for drug enforcement purposes.⁷³ Vice President Bush was then chosen to head the task force to combat illicit drug traffic

[drug] enforcement" (opening statement of Rep. Charles B Rangel, Chairman, Presiding)).

69. The actual number was 1,126,300 in 1993. U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 1993, UNIFORM CRIME REPORTS 217 (1994).

70. *Id.* Violent offenses include murder, non-negligent manslaughter, forcible rape, robbery and aggravated assault. *Id.*

71. See Bill Farr & Carol McGraw, *Drug Enforcers Losing Nation's Cocaine War*, L.A. TIMES, Sept. 21, 1986, at 1-1 (outlining nation's ever-increasing effort to win war on drugs even though it has been thoroughly beaten by sheer numbers). It is interesting to note the contrast between the martial language used to describe U.S. efforts to control drug use and the kinds of language routinely used to describe other aspects of the drug problem. Words used in the latter context often have medical or religious implications. For example, medical terms such as "epidemic," "pandemic," and "plague," or religious terms such as "scourge" are routinely used to describe the severity of the drug abuse problem.

72. President's Message Announcing the Federal Initiatives Against Drug Trafficking and Organized Crime Program, 18 WEEKLY COMP. PRES. DOC. 1311 (Oct. 14, 1982).

73. 10 U.S.C. § 374 (1994); see also *Military Cooperation with Civilian Law Enforcement: Hearings Before the Subcomm. on Crime of House Comm. on the Judiciary*, 99th Cong., 1st Sess. 1-2 (1985) (outlining feasibility and appropriateness of further

in South Florida.⁷⁴

In April of 1986, President Reagan, in another escalation of rhetoric into action, signed a National Security Decision Directive identifying drug traffickers as a national security threat.⁷⁵ With this directive, the administration sought to bring military, intelligence and other national security assets more fully into the anti-narcotics effort.⁷⁶

During the 1980s, public officials frequently compared U.S. anti-drug use efforts to a military campaign. On various occasions, public officials declared that although they had not lost any constituents to the Soviets, they were losing hundreds of constituents to cocaine and crack.⁷⁷ They often noted that, if the single engine airplanes routinely flying into and violating the U.S. airspace with loads of cocaine had been carrying *bombs* instead of *drugs*, a military response would be required.⁷⁸

This rhetoric, too, escalated into action. In 1986, Representative Duncan Hunter, a Republican from California and a member of the Armed Services Committee, successfully offered an amendment calling upon the President and the military forces to stop

substantial military assistance for drug law enforcement (statement of Rep. William J. Hughes, Chairman, Presiding)).

74. STAFF CONGRESSIONAL RESEARCH SERVICE OF SENATE COMM. ON GOVERNMENTAL AFFAIRS (HARRY HOGAN), 100TH CONG., 2D SESS., REPORT ON DRUG CONTROL AT THE FEDERAL LEVEL: COORDINATION AND DIRECTION 965 (Comm. Print 1988).

75. PETER D. SCOTT & JONATHAN MARSHALL, COCAINE POLITICS: DRUGS, ARMIES AND THE CIA IN CENTRAL AMERICA 102 (1991).

76. *Id.*

77. New York City Mayor Edward I. Koch stated:

Isn't that drug pusher, drug smuggler, doing more to injure this country than the Soviet Union? . . . But I am telling you at this particular moment, there's probably little danger that [the Soviet Union is] going to send terrorists over with bombs or weapons, little danger But the drug pusher is coming in every day, and the drug smuggler, every day. Eighteen thousand plane loads. Thousands of boats.

Military Cooperation with Civilian Law Enforcement: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 109 (1985) (statement of Edward I. Koch, Mayor of New York City). The mayor further stated, "[d]rug pushers are terrorists as much so as people who come in. We are being bombed by the drug pushers. Should we not repel drug invaders with the same vigor that we repel military invaders? They are killing the country, they are the scourge of America." Id. at 110.

78. Florida Governor Bob Graham stated that "[a]s a nation, we cannot tolerate low-flying aircraft penetrating our borders from foreign countries. Incidents of this nature are serious, because just as these aircrafts [sic] are landing with drugs today, they could land with enemy troops tomorrow." *Id.* at 231 (statement for the record of Bob Graham, Governor of Florida, on behalf of National Governor's Assoc.).

drug smuggling in forty-five days.⁷⁹ In 1989, Congress turned responsibility for the detection and monitoring of aerial and maritime transit of illegal drugs over to the United States Department of Defense.⁸⁰

By the mid-1980s, however, the term “the drug war” was being used to describe not only the government’s response to the drug problem, but also the problem itself.⁸¹ Members of Congress would talk about what we were doing about the “drug war”: they referred to what was taking place on America’s streets, which were riddled by drug-related violence.⁸² In open-air drug markets, drug dealers would use violence — to pay back those who had taken advantage of them and to deter others from taking advantage of them in the future — and to resolve conflicts with suppliers or distributors about payments or quality of goods.⁸³ The increased penalties being enacted by Congress only raised the stakes for drug dealers.⁸⁴ The murder rate rose dramatically in Washington, D.C., and the hyperbole of the “drug war” — really a kind of “drug market civil war” — was used evermore irresponsibly.⁸⁵

At the same time, the “drug war” label transformed those who used drugs — ostensibly those who were supposed to be helped by

79. SCOTT & MARSHALL, *supra* note 75, at 102; 132 CONG. REC. H6662-70 (daily ed. Sept. 11, 1986) (roll call vote no. 367 on Hunter Amendment 237-177, 17 not voting).

80. 10 U.S.C. § 124 (1994).

81. See Farr & McGraw, *supra* note 71, at 1-1 (discussing federal effort to deal not only with importation of illicit drugs but also problem of debilitating effect of wide-spread use among U.S. citizens).

82. See SCOTT & MARSHALL, *supra* note 75, at x.

In some areas of Los Angeles, the scene resembles a public market, with competing dealers loudly hawking their wares on the sidewalk, telling passers-by that their cocaine is better than the next dealers. In some areas, armed dealers make house calls in pickup trucks equipped with telephones to take orders.

Id. at x.

83. *Id.*

84. Patrick Cockburn, *Semi-Automatic Weapons Fuel D.C. Way of Death*, OTTAWA CITIZEN, Oct. 24, 1993, at A3. Mr. Cockburn quotes William Chambliss, a criminologist at George Washington University, as saying that the “mandatory sentences for drug offenses have driven up the number of murders.” *Id.* Chambliss continues:

The increase in the penalty for drugs means that it always makes sense for a drug dealer to kill a rival or an informant and the two are often the same. A life sentence for homicide means that you get an average of 16 to 18 years in prison. A mandatory sentence for selling drugs may put you inside for 40 years. For a professional criminal, killing makes sense.

Id.

85. See *id.* (“[T]he record of the U.S. capital as one of the most dangerous cities in the world looks secure.”)

drug laws — into the enemy and then into a subhuman category of “the druggies” or “druggers.” They ceased to be people with drug problems, chemical disorders, or brain disease, and became the “bad guys,” as the public’s hatred of drugs grew into a hatred of druggies. For the Drug Enforcement Agency (DEA), and DEA personnel who train State and local police, this hatred translated into a variety of practices: druggies and their families could be rousted, humiliated, terrorized, jailed, hurt, threatened with being shot, or even, if necessary, shot.⁸⁶

C. Glossary of Drug Policy Reform Terms

Understanding the critique of current drug policy requires familiarity with the meanings of some frequently used terms. For one thing, terms such as “legalization” are very ambiguous. For another, the terms have different meanings when used or heard by different people. Definitions of frequently used drug policy terms follow:

1. *Legalization (used by proponents)*

Ethan Nadelmann argued in 1988⁸⁷ and in 1989⁸⁸ that this term means several things. First, and probably most ambiguously,

86. See, e.g., MIKE TIDWELL, IN THE SHADOW OF THE WHITE HOUSE: DRUGS, DEATH, AND REDEMPTION ON THE STREETS OF THE NATION’S CAPITAL 193-99 (1992) (detailing Bureau of Alcohol, Tobacco and Firearms (ATF) raid on citizens of neighborhood based on “suspected” drug possession and use); TERRY WILLIAMS, CRACKHOUSE: NOTES FROM THE END OF THE LINE 89 (1992); Tony Mauro, *The War on Drugs; Are Our Rights on the Line?*, USA TODAY, Nov. 15, 1989, at A1 (reporting that police shot and killed suspected drug user while executing a search warrant based on an informant’s tip that was 20 months old); Don Terry, *Philadelphia Shaken by Criminal Police Officers*, N.Y. TIMES, Aug. 28, 1995, at A1 (discussing police corruption whereby police “pocket[ed] more than \$100,000 in cash they robbed from suspected drug dealers through beatings, intimidations, illegal searches and denying suspects their constitutional rights”).

Citizens, who sought police protection in neighborhoods where drug dealers operated, “found they had asked to be victimized themselves, as police quickly showed that a different constitutional standard applies to minority citizens even in their own neighborhoods. In Harlem and Washington Heights, at one point, people were stopped because they ‘looked like drug dealers.’ For some police officers, this meant any black or Latino driving a late-model car; others, it was later discovered, thought racially mixed couples looked like drug dealers.” WILLIAMS, *supra*, at 89.

87. Ethan A. Nadelmann, *The Case for Legalization*, 92 THE PUBLIC INTEREST, Summer 1988, at 3-31 [hereinafter Nadelman, *The Case for Legalization*]; see also Ethan A. Nadelmann, *U.S. Drug Policy: A Bad Export*, 70 FOREIGN POLICY, Spring 1988, at 83-108 (reprinted in *Legalization Hearings*, *supra* note 67, at 457-70) (outlining prospective drug legalization in America and its possible implications).

88. Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 SCIENCE, Sept. 1, 1989, at 939-47.

“legalization” means only that the “war on drugs” should be subject to a cost-benefit analysis.⁸⁹ To advocate “legalization of drugs” is to say that the war on drugs (or drug prohibition) is ineffective, counter-productive, or at least very costly, and that “alternatives” should be studied.⁹⁰

Second, “legalization” is used to refer to a policy that now illegal drugs should be available legally to users in order to reduce violence and crime, the abuses of drug enforcement and violation of civil liberties, as well as the large criminal profits. The terms of that availability are not specified; it is usually left unsaid. For example, what drugs, what dosage forms, what circumstances and which classes of users, would be subject to “legalization.”⁹¹ Other commentators use the term in other ways, usually with different assumptions about the legalization scheme.

Third, “legalization,” as used by non-specialists, commonly refers to drugs would be or should be legal in the same manner as alcohol or tobacco. Usually this implicitly includes a prohibition on sales to minors and, often, a prohibition on advertising. This term usually refers only to marijuana, even sometimes when the speaker calls for the “legalization of drugs.” The National Task Force on Cannabis Regulation, chaired by Richard M. Evans, an attorney in Northampton, Massachusetts, drafted a bill in December of 1982 to legalize marijuana in the same manner as alcohol, but with a ban on all advertising.⁹²

89. For example, a bill was considered in the New Hampshire Assembly Committee on Health, Human Services and the Elderly on January 10, 1990. It had been introduced by Representative Michael Weddle, a Democrat from Portsmouth, to establish a 17-person committee to study the benefits and consequences of legalizing all illegal drugs. Christopher Comfort, *Bill Would Provide Look at Legalizing Drugs*, PORTSMOUTH HERALD, Jan. 9, 1990, at A1; Tom Fahey, *Study on Legalized Drugs Sought*, UNION-LEADER, Jan. 11, 1990, at 18; Linda Goetz, *Legalized Drugs Sparks Debate*, CONCORD MONITOR, Jan. 11, 1990, at B1; Gary Rayno, *Weddle Drug Bill Elicits Impassioned Debate*, FOSTER'S DAILY DEMOCRAT, Jan. 12, 1990, at 3.

90. See, e.g., *Legalization Hearings*, *supra* note 68, at 180-211 (arguing that cost of “war on drugs” might far outweigh that of decriminalization of drugs (testimony of Kurt L. Schmoke, Mayor of Baltimore)).

91. Nadelman, *The Case for Legalization*, *supra* note 87; see also *Legalization Hearings*, *supra* note 68, at 303-07 (arguing that, because present U.S. drug policy is “absolute failure,” country should decriminalize and then control use of marijuana, cocaine and heroin (testimony of William J. Chambliss)); *id.* at 314-65 (stating that current U.S. drug policy is national tragedy and calling for drastic changes from current policies (testimony of Arnold S. Trebach)); *id.* at 409-56 (endorsing relaxation of drug laws in some areas and intensification in other areas (testimony of Steven Wisotsky)).

92. THE NATIONAL TASK FORCE ON CANNABIS REGULATION: REPORT ON THE REGULATION AND TAXATION OF CANNABIS COMMERCE 18-42 (1982). The bill was introduced by Senator Milton Street in the Pennsylvania Senate as the Penn-

Fourth, the term sometimes suggests a sophisticated system of regulation with a variety of regulations and controls. An example of a bill with a set of regulations and controls was introduced in the New York Senate in 1988 (and re-introduced in 1989) by Senator Joseph L. Galiber.⁹³

Fifth, libertarians use the word “legalization” to indicate a policy of free-market distribution of drugs. Under a variation on this type of legalization proposed by Ethan Nadelmann, drugs would be available to adults by mail-order, to avoid local resales that would offend local sensibilities.⁹⁴ A pure libertarian, psychiatrist Thomas Szasz, M.D., vehemently denounces those who, like myself, argue for the legalization of drugs, for using the fourth meaning of legalization.⁹⁵ Szasz argues that almost all of the advocates of legalization simply argue for a different species of state control of drug distribution and use.⁹⁶ He even characterized me as a “chemical communist.”⁹⁷

Sixth, *when used by opponents*, the term “legalization” generally refers to the libertarian, free-market model characterized as the unrestrained, irresponsible and void-of-conscience distribution of dangerous drugs to those who are vulnerable to being hurt by them. Dr. Lee Brown, for example, sees legalization as the transformation of society into an “open-air drug park,” like the needle park that operated for a year in Zurich.⁹⁸ Advocates of legalization, it is said,

sylvania Marijuana Cultivation Act of 1983. Missouri Representative Elbert Walton introduced a similar bill, H.B. 1820 in 1990.

93. S. 8176, introduced on April 18, 1988, would establish a State Controlled Substances Authority of five members, authorized to regulate the manufacture of controlled substances, to prohibit the sale of controlled substances in a time of emergency, and to prescribe licenses. The bill was reintroduced in 1989 as S. 1918 and in 1995 as S. 4771. See Joseph Galiber, *A Bill to Repeal Criminal Drug Laws: Replacing Prohibition With Regulation*, 18 HOFSTRA L. REV. 831-80 (1990); Nancy Lord, *A Practical Model for Drug Regulation*, in *DRUG POLICY 1989-1990: A REFORMER'S CATALOGUE* 371-99 (Arnold Trebach & Kevin Zeese eds., 1989).

94. See Ethan A. Nadelmann, *Thinking Seriously About Alternatives to Drug Prohibition*, DAEDALUS, Summer 1992, at 85-132 (discussing possible variations to drug legalization and their advantages against drug prohibition).

95. See generally SZASZ, *OUR RIGHT TO DRUGS*, *supra* note 5. Szasz is a most compelling and original thinker. His book *CEREMONIAL CHEMISTRY*, *supra* note 5, is one of the most illuminating presentations about hidden issues in drug policy. Other people who advocate the legalization of drugs in a similar fashion as I — and attacked by Dr. Szasz — include Ethan Nadelmann, Judge Robert Sweet and Lester Grinspoon, M.D.

96. See SZASZ, *OUR RIGHT TO DRUGS*, *supra* note 5, at 95-110.

97. *Id.* at 107.

98. Lee P. Brown, *The Dangerous Illusions of Drug Legalization*, WASH. TIMES, May 24, 1994, at A19.

have no plan and cannot answer questions about how they would legalize drugs other than marijuana.

2. *Medicalization*

This term has been adopted by Baltimore Mayor Kurt Schmoke and United States District Court Judge Robert Sweet, of the Southern District of New York, to refer to a policy where drug addicts would be able to get drugs such as heroin, and maybe cocaine, from a physician, a clinic or a special drug dispensary.⁹⁹ Dr. Arnold Trebach suggests that medicalization would include studying whether heroin addicts should be able to obtain medical grade heroin for maintenance,¹⁰⁰ and whether drug addicts who inject drugs should be able to get clean needles.¹⁰¹ The essential feature of medicalization is that the drug addict would *not* be criminally liable for obtaining the drug from a licensed source. This is very similar to the system of Dr. John Marks of the Merseyside Regional Health Authority that serves Liverpool, England.¹⁰²

However, major elements of medicalization as advanced for the United States are typically unclear. Would those who are “addicted” to barbiturates, amphetamines, Valium® or methaqualone (Quaaludes®) also be able to get drugs from a non-physician source? Would the addict be subject to any kind of dose limitations? Could the addict get enough drug to “get high?” What would be the relationship between the distribution scheme and drug treatment?

The use of the term medicalization — and the policy it reflects — is a politically more acceptable way of describing the fourth type of legalization:¹⁰³ the remedy is directed at those who currently have “drug problems.” Typically, this approach does not address providing drugs to new initiates, which would remain illegal. In this sense, it is also like decriminalization, described below. To my

99. *Legalization Hearings*, *supra* note 68, at 204 (stating that it would be up to physicians to determine whether persons requesting drugs were addicts or not (testimony of Kurt L. Schmoke, Mayor of Baltimore)).

100. TREBACH, *THE HEROIN SOLUTION*, *supra* note 5, at 292; TREBACH, *THE GREAT DRUG WAR*, *supra* note 55, at 383-84.

101. TREBACH, *THE GREAT DRUG WAR*, *supra* note 5, at 384; *see also Legalization Hearings*, *supra* note 68, at 205 (testimony of Kurt Schmoke, Mayor of Baltimore).

102. *See, e.g., Legalization Hearings*, *supra* note 68, at 555-62 (outlining method used by facility to rehabilitate drug addicts (testimony of Russell Newcombe and Allan Parry concerning the Merseyside Harm-Reduction Model)).

103. For a discussion of the fourth type of legalization, see *supra* note 93 and accompanying text.

knowledge, however, no one has drafted a model medicalization bill.

3. *Harm Reduction*

This term means that a drug regulatory approach's goal should be to minimize the harms to which U.S. drug policy currently contributes, such as continuing pain, spread of the AIDS virus, and other conditions. The term is widely used in the Netherlands and the United Kingdom, and is the subject of international conferences. In application, this approach would include medical system distribution of drugs, similar to medicalization, and the exchange of clean needles. This approach, although less often, would also include the distribution of marijuana for medical purposes. The prime value of this approach is in public health protection, not protection of civil liberties, establishment of public order, or crime control. Its model is the distribution of condoms and safer sex education for prevention of the spread of sexually transmitted diseases, or the installation of seat belts in automobiles.

4. *Decriminalization*

This term was used in the recommendation regarding marijuana made by the National Commission on Marijuana and Drug Abuse (known as the Shafer Commission, appointed by President Nixon) in its first report.¹⁰⁴ In that context, decriminalization meant: "Possession of marihuana for personal use would no longer be an offense, but marihuana possessed in public would remain contraband subject to summary seizure and forfeiture. Casual distribution of small amounts of marihuana for no remuneration, or insignificant remuneration not involving profit would no longer be an offense."¹⁰⁵ The Shafer Commission thought decriminalization would benefit the United States by:

- symbolizing a continued societal discouragement of use;
- facilitating the deemphasis of marihuana essential to answering dispassionately so many of the unanswered questions;
- permitting a simultaneous medical, educational, religious and parental effort to concentrate on reducing irresponsible use, and remedying its consequences;

104. NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE, *MARIJUANA: A SIGNAL OF MISUNDERSTANDING* 150-52 (1972).

105. *Id.* at 152.

- removing the criminal stigma and the threat of incarceration from a widespread behavior (possession for personal use) which does not warrant such treatment;
- relieving the law enforcement community of the responsibility for enforcing a law of questionable utility and difficult enforcement, thereby allowing concentration on drug trafficking and other more serious crimes;
- relieving the judicial calendar of a large volume of marijuana possession cases which delay the processing of more serious cases; and
- maximizing the flexibility of future public responses as new information comes to light.¹⁰⁶

In the mid-1970s, the National Organization for the Reform of Marijuana Laws (NORML) also advanced decriminalization. NORML argued that the United States should not subject marijuana users to the indignity, expense, stigma and numerous other consequences of being arrested for a misdemeanor or felony. Instead, the United States should eliminate arrests, arrest records and imprisonment of those who possessed small amounts (personal use quantities) of marijuana. The group argued that marijuana use is not a serious offense.¹⁰⁷

Under the decriminalization laws of eleven states, a person found by the police to be in possession of less than one ounce of marijuana (50 or 100 grams in some states) typically is issued a citation and faces a maximum penalty of a fine, ranging from \$100 to \$500.¹⁰⁸ However, these state laws did not legalize cultivation, sale or importation of marijuana, which remained felonies. There is no evidence that marijuana use increased in "decrim" states, or that marijuana use decreased more slowly than in non-decriminalization states.¹⁰⁹

106. *Id.* at 150.

107. *See, e.g.*, RICHARD J. BONNIE, MARIJUANA USE AND CRIMINAL SANCTIONS: ESSAYS ON THE THEORY AND PRACTICE OF DECRIMINALIZATION 43-59 (1980).

108. *Id.* at 49. Decriminalization laws were adopted by Alaska, California, Colorado, Maine, Minnesota, Mississippi, Nebraska, New York, North Carolina, Ohio and Oregon, between 1971 and 1979. *See* ALASKA STAT. § 17.12.010 (repealed 1982); CAL. HEALTH AND SAFETY CODE § 11357 (West 1991); COLO. REV. STAT. § 12-22-412 (repealed 1981); ME. REV. STAT. ANN. tit. 22, § 2383 (West 1964); MINN. STAT. ANN. § 152.15 (West 1989) (repealed 1989); MISS. CODE ANN. §§ 41-29-139, 41-29-149 (1972 & Supp. 1995); NEB. REV. STAT. § 28-416(9) (Supp. 1992); N.Y. PENAL LAW § 221.05 (McKinney 1989); N.C. GEN. STAT. § 90-95 (1994); OHIO REV. CODE ANN. § 2925.03 (Supp. 1994); OR. REV. STAT. § 167.202 (1971) (repealed 1977).

109. D. Maloff, *A Review of the Effects of the Decriminalization of Marijuana*, 10 CONTEMPORARY DRUG PROBLEMS 307, 308 (1981) (reporting that decriminalization

The principal drawback of decriminalization is that it protects the demand side of a criminal market, leaving the supply side in criminal hands. One scholarly analyst, concluded that: decriminalization is likely to prove to be the worst of all possible policies when it comes to the drug-dealing aspect of the marijuana problem. Adding more demand to a multibillion-dollar illicit industry will have disadvantages: more untaxed income, more economic activity outside legal control, and probably more corruption and violence.¹¹⁰

Today, the narrow meaning of the term decriminalization given by the Shafer Commission is not typically used. As one writer pointed out, "decriminalization is in some ways a compromise between maintaining prohibition and full legalization."¹¹¹ Thus, the word is sometimes used as a synonym for a heavily regulated form of legalization or medicalization. Under this type of policy, the drug user is not subject to criminal sanction for his or her use. Although eleven states passed marijuana decriminalization laws between 1973 and 1979, no bills to decriminalize at the federal level have been introduced since the 96th Congress in 1979-1980.¹¹²

5. *Prohibition*

This term accurately describes the status quo. Individuals are prohibited from using drugs, even in the privacy of their own homes. They are prohibited from growing drug plants such as marijuana, poppies or coca for their own use, even if there is no affect upon interstate or foreign commerce. Physicians are prohibited from prescribing marijuana or heroin for any medical purpose to sick or dying persons who might benefit from those drugs. Sick persons are prohibited from using drugs like marijuana to maintain their vision or to control their pain or spasticity, even when they find that marijuana is the only drug that is effective with minimal or

of marijuana in Oregon did not lead to a substantial increase in use); *id.* at 320-21 (revealing study of 11 states that have decriminalized or substantially reduced penalties for marijuana use found, at most, only a minimal effect on consumption).

110. MARK KLEIMAN, *AGAINST EXCESS* 269 (1992).

111. *Id.*; see also *Legalization Hearings*, *supra* note 68, at 180-211 (recording testimony of Kurt Schmoke, Mayor of Baltimore, concerning his 1988 "decriminalization" proposal).

112. See S. 1722, 96th Cong., 1st Sess. (1979); H.R. 6915, 96th Cong., 2d Sess. (1980). The House subcommittee on criminal justice recommended reduced penalties for the possession of small quantities of marijuana. H.R. REP. NO. 1396, 96th Cong., 2d Sess., at 386 n.2 (1980). However, the full House Judiciary Committee acted to restore the current law penalty despite this recommendation. *Id.*

acceptable side effects.¹¹³

Current law in the United States is erroneously designated as a policy of “controlled substances.” The traffic and use of most of the drugs listed in the act is, in reality, out of control. Even though the overwhelming bulk of regulated drugs are distributed and consumed in an orderly manner, it is hardly accurate to describe the status quo regarding schedule I and many schedule II drugs as “drug control.”

The term “prohibition” brings to mind the problems and historical lessons of alcohol prohibition: the growth of organized crime, widespread corruption, violence, disrespect for the law, lost tax revenue, jeopardized civil liberties and rapid growth of law enforcement enterprises. These problems are also a part of today’s drug prohibition status quo. Ironically, however, alcohol prohibition at the federal level was very similar to the decriminalization policy recommended by the Shafer Commission — personal use was not subject to federal prosecution.

D. *Current Drug Enforcement Paradigm*

A crime is committed. An investigation is commenced. Witnesses are interviewed and evidence is collected. A suspect is identified and charged. A trial is conducted. In most instances, a conviction is obtained. A sentence is imposed. Justice is done. For centuries, it is these steps that constituted the processes of the criminal justice system.

After a great deal of drug enforcement, however, the United States has streamlined this process. Now, a suspect is identified first.¹¹⁴ Next, an investigation is commenced and evidence is gathered. And, *then*, at the appropriate moment, the crime is finally committed.¹¹⁵ After the commission of the crime, the suspect may be apprehended, charged, almost certainly convicted and definitely sentenced.

When the government investigates important drug cases, it typ-

113. See LESTER GRINSPOON AND JAMES B. BAKALAR, MARIHUANA, THE FORBIDDEN MEDICINE 24 (1993) (describing research into medical conditions for which marijuana has value).

114. See Chapman, *Does the Punishment Fit the Crime?*, *supra* note 1, at A11. Mr. Chapman details the arrest and conviction of Keith Edwards, “a 19-year-old, small-time New York City drug dealer.” *Id.* First, law enforcement agents set up a trap. *Id.* Then, Mr. Edwards committed his crime and was arrested. *Id.* He was then sentenced to 10 years of prison under a mandatory minimum law. *Id.*

115. *Id.*

ically follows this streamlined process.¹¹⁶ At a Christmas party at the headquarters of the DEA in the mid-1980s, I was standing with Dave Westrate, a top DEA executive, who was conversing with reporters from the *Washington Post* and *USA Today*. The *Post* reporter asked Mr. Westrate, "Why do you like drug enforcement?" The DEA executive replied, "What I like about drug enforcement is that the government gets to control the commission of the crime." In other words, at the time that a drug seller makes the deal with a government agent, the government simultaneously obtains the evidence necessary to obtain a conviction for the commission of a crime. Those words, "the government gets to control the commission of the crime," describe one of the most corrosive aspects of the enforcement of drug prohibition: the effective, "proactive" enforcement of drug laws requires the government to create the crimes that are going to be prosecuted.

It is interesting to note that those who oppose the current U.S. drug policy include representatives of a wide variety of ideologies. The most outspoken opponents are libertarians. They are well-represented by Thomas Szasz, M.D.¹¹⁷

Other opponents to prohibition can be classified ideologically as contemporary liberals. They have concluded that drug prohibition as a policy, after a cost-benefit analysis, creates more harm than it ameliorates. Perhaps Baltimore Mayor Kurt L. Schmoke, might be identified in this position. My proposal is outlined in Part VI of this article.¹¹⁸

Still other critics of prohibition include well-known ideological conservatives. For example, William F. Buckley, Richard Brookhiser and former Secretary of State George P. Shultz fall into this group of anti-prohibitionists.

116. See ARTHUR D. HILLMAN, *LAWS AGAINST MARIJUANA: THE PRICE WE PAY* 60-168 (1975) (stating "the most valuable tools in the enforcement of marijuana laws are undercover agents and informers and the deceptive practices that are an essential part of their activities"). Naturally, investigations into "opportunistic" cases, where a drug possessor is accidentally apprehended in a motor vehicle stop, or a street corner dope dealer is apprehended at the scene, proceed in the historical manner.

117. See generally SZASZ, *OUR RIGHT TO DRUGS*, *supra* note 5.

118. Dr. Szasz, however, has virulently attacked my approach to legalization, even characterizing it as "chemical statism *über alles*." *Id.* at 107.

V. CASE HISTORIES

A. *History of the Mandatory Minimum Sentences of the Anti-Drug Abuse Act of 1986*

The Controlled Substances Act (Act) sentencing provisions were completed by the House Judiciary Subcommittee on Crime on August 12, 1986, just five weeks after the initial announcement that an anti-drug bill was to be developed.¹¹⁹ Events prior to the final proposal of this Act elucidate why this bill was completed in such an unusually short time and why the fundamental flaws of the Act were not corrected.

The shocking drug-related death of National Collegiate Athletic Association (NCAA) basketball star Len Bias brought the U.S. drug problem to the forefront of the nation's attention.¹²⁰ During the Fourth-of-July recess at home in Boston, the Speaker of the House, Thomas P. "Tip" O'Neill, Jr., was confronted with constituent shock over Bias' death. When he returned to Washington, he announced that the House Democrats would develop an omnibus anti-drug bill.¹²¹ He set a five-week deadline for the conclusion of all committee work on this bill.

The development of this particular bill was extraordinary. Typically, members of the House introduce bills which are referred to a subcommittee. Then, hearings are held on the bills where comment is invited from the Administration, the Judicial Conference, and other organizations and the affected public that have expertise or opinions on the issue. Next, a "markup" is held on a bill. Amendments are then offered and, lastly, a clean bill is re-introduced and accompanied with a report. However, for this particular bill, much of the above procedure was circumvented. In essence, the careful, deliberate procedures of Congress were set aside in order to expedite passage of the bill.¹²²

119. H.R. REP. NO. 845, 99th Cong., 2d Sess., pt. 1, at 11 (1986).

120. Roy S. Johnson, *All-American Basketball Star, Celtic Choice, Dies Suddenly*, N.Y. TIMES, June 20, 1986, at A1. Len Bias died on June 19, 1986, after an overdose of alcohol and cocaine. *Id.* He was celebrating his new contract with the Boston Celtics. *Id.*

121. The House Democrats had hoped that the introduction of this bill would preempt crime and drug issues from the Republicans, who had used these issues very effectively in the 1984 election. However, the preemptive effort failed because the Republicans responded with proposed amendments for longer sentences, death penalty provisions and elimination of the exclusionary rule to enforce Fourth Amendment protection against warrantless or unreasonable searches and seizures.

122. The development of this mandatory sentencing bill was the sole instance, during the eight years that I served as a staff member of the Subcommittee

Notwithstanding the intensity of this legislative haste, it is testimony to the integrity of the Chairman of the Subcommittee on Crime, William J. Hughes, a Democrat from New Jersey, that the subcommittee attempted to develop a new sentencing scheme for drug offenses in a rational manner in the amount of time available. The subcommittee determined that it wanted to create incentives for the Department of Justice to direct its "most intense focus" on "major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs."¹²³

In pursuit of this goal, the subcommittee directed its staff to consult "with a number of DEA agents and prosecutors about the distribution patterns of drugs which if possessed by an individual would likely be indicative of operating at such a high level."¹²⁴ Furthermore, the subcommittee "determined that a second level of focus ought to be on the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping pcp [sic] in aluminum foil, and doing so in substantial street quantities."¹²⁵

The above concepts, and implementation plans for these concepts, were developed during four meetings of the subcommittee. To determine appropriate quantity thresholds for classification purposes, the subcommittee tried several approaches. First, the subcommittee consulted individual law enforcement officers for their input based on personal experience. They also considered the classification system used by the DEA to classify the most serious traffickers. Finally, however, the subcommittee adjusted the quantity thresholds, on the basis of individual member's perceptions of what quantity of drugs constituted an important drug case in their jurisdiction.¹²⁶

In attempting to develop appropriate quantity thresholds, the subcommittee did not determine the relative harmfulness of different drugs. The subcommittee failed to develop a "harmfulness equivalent" among drugs so that quantities of drugs subject to the same level of punishment would reflect an equivalent measure of

on Crime, that I did not see the usual procedure of the introduction of a bill and subsequent hearings on it followed by the subcommittee.

123. H.R. REP. NO. 845, 99th Cong., 2d Sess., pt. 1, at 11-12 (1986).

124. *Id.* at 12.

125. *Id.*

126. This ad hoc process decreased the required quantities for major level traffickers in 21 U.S.C. § 841(b)(1)(A) (1988). Furthermore, this process departed from a national or international classification standard.

social harm or transgression. Rather, the subcommittee geared punishment levels to crude assessments of what constituted “major” and “serious” traffickers.

Without a determination of the relative harmfulness of various drugs, the resulting legislation did not take into account degrees of danger posed to society by different drugs and differing distribution patterns. For example, it did not consider that the number of transactions between LSD chemists and consumers is far fewer than between heroin chemists and consumers.¹²⁷ Further, it necessarily assumed that a high-level LSD distributor inflicts the equivalent social harm as a high-level heroin, cocaine or PCP distributor.

In determining the appropriate length of minimum and maximum sentences, the subcommittee’s approach contained fundamental flaws. Some members of the subcommittee erroneously believed that unfettered judicial discretion in the federal system was a problem that needed to be addressed. They mistakenly believed that parole still existed at the federal level.¹²⁸ Further, the subcommittee did not consult any of the agencies that had expertise in the sentencing area, such as the Bureau of Prisons, the Parole Commission, the new United States Sentencing Commission¹²⁹ or the Judicial Conference. Finally, the subcommittee set the sentencing thresholds on the uninformed impressions of what its members thought were high-level or important traffickers. The underlying purpose was to direct the Department of Justice to concentrate its prosecutions on high-level and major traffickers.¹³⁰

As flawed was the work of the Subcommittee on Crime in developing the mandatory minimum sentences, however, it was much more deliberative than the overall Congressional environment in which the anti-drug legislation was being considered in August, September and October of 1986.

The terrible consequences of mandatory minimum sentences are now well known to the Judiciary, the Bureau of Prisons, the Bar,

127. LSD is manufactured in the United States and distributed in relatively tight networks. Heroin is manufactured principally in Thailand, Pakistan, Afghanistan, Mexico and Colombia, and resold repeatedly as it moves to the U.S. market.

128. Parole was abolished by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2027 (1984) (codified as amended at 28 U.S.C. § 3624 (1994)).

129. The United States Sentencing Commission was created by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended at 28 U.S.C. § 991(a) (1988)). The Sentencing Commission was, at the time, developing a sentencing guideline structure. However, the subcommittee set sentence levels without regard to the effect on the Sentencing Commission’s efforts.

130. H.R. REP. NO. 845, 99th Cong., 1st Sess. 11-12, 16-17 (1986).

and the nation at large. Congress recognized this problem in 1990 and requested a study of mandatory minimum sentences.¹³¹ In August of 1991, the United States Sentencing Commission issued its report to Congress on mandatory minimum sentences.¹³² The Commission concluded that the adoption of the mandatory minimum sentences had frustrated the very purpose of the Sentencing Reform Act of 1984 by “creat[ing] unwarranted disparity in sentencing.”¹³³ The disparate application of the mandatory minimum sentences seemed to discriminate against non-whites. Moreover, the Fifth Circuit District Judges Association found that mandatory minimum sentences “often require[d] the imposition of sentences which [were] manifestly unjust.”¹³⁴

Contrary to the subcommittee’s original intent, the imposition of mandatory minimum sentences for small quantities of drugs has encouraged the DEA and other federal law enforcement agencies to prosecute relatively easy targets — low level dealers. Thus, these federal agencies are squandering their time and resources on the most easily replaced component of the drug hierarchy. Furthermore, these low-level dealers are typically poor, black, urban youth.

In support of the above contention, the United States Sentencing Commission’s special report to Congress, in 1995, concluded that 59.6% of crack cocaine defendants sent to federal prison were street-level operators,¹³⁵ and overall, 88% were black.¹³⁶ Additionally, 39% of powder cocaine defendants were just local-area operators.¹³⁷ In total, over 40% of federal drug defendants were local-area operators¹³⁸ and 66% were either street-level operators or “mules.”¹³⁹ Surprisingly, only 11.2% of federal drug defendants

131. Crime Control Act of 1990, Pub. L. No. 101-647, § 1703, 104 Stat. 4805-46 (1990).

132. U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) (responding to statutory directive that Sentencing Commission examine compatibility of sentencing guidelines and mandatory minimum penalties, effect of mandatory minimums on federal system, and alternatives to mandatory minimums for Congress to direct sentencing policy).

133. *Id.* at ii.

134. *Id.* at G-10. Appendix G sets forth the resolutions of the Judicial Conference and the twelve Circuit Courts of Appeals, which were all critical of mandatory minimum sentences.

135. U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 172 tbl. 18 (1995) [hereinafter U.S. SENTENCING COMMISSION: COCAINE AND FEDERAL SENTENCING POLICY].

136. *Id.* at 161 tbl. 13.

137. *Id.* at 170 tbl. 17.

138. *Id.*

139. *Id.* at 172 tbl. 18.

were high-level operators.¹⁴⁰ These statistics reflect an enormous waste of federal resources, which have been channelled into prosecuting relatively minor offenders.

B. *The 1994 Crime Bill¹⁴¹ and the Debate Over Longer Sentences and More Prisons: How Much is Enough?*

As the value of crime as a political issue has grown in the past dozen years, so too has the debate about more prisons and longer sentencing. The political value of longer sentencing fully blossomed in 1993 with a Washington State initiative (passed on November 2, 1993) — a mandate of life imprisonment without parole after three convictions for serious felonies. The next day, the United States Senate began consideration of an omnibus anti-crime bill, without a day of hearings.¹⁴²

Senator Biden, Chairman of the Committee on the Judiciary, introduced the original Democratic bill,¹⁴³ which provided for \$200 million in grants to states for corrections. Senator Hatch introduced the Republican bill,¹⁴⁴ which provided for \$3 billion for prisons — \$2 billion for construction of new federal prisons and \$1 billion for grants to operate and maintain state prisons. The Democrats responded with a new bill,¹⁴⁵ designed to match the Republican bill, it authorized \$2 billion in grants for state boot camp prisons or regional prisons.

While some senators were engaged in conferences behind closed doors about the level of spending, firearms provisions and the death penalty, other senators simply added amendments as the thought occurred. Often, these amendments were triggered by the current day's news. Consider the crime of arson, for example. Senator Dole watched the Cable News Network (CNN) one night and, after seeing wild fires raging in California and hearing the Governor of California discussing arson, offered an amendment to double the maximum sentences and the mandatory minimum sentences for the federal crimes of arson.¹⁴⁶

140. *Id.*

141. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

142. 139 CONG. REC. S14,940 (daily ed. Nov. 3, 1993) (statement of Sen. Hatch). S. 1607 was 471 pages when introduced and 960 pages on November 19 when finally passed.

143. S. 1488, 103d Cong., 1st Sess. (1993).

144. S. 1356, 103d Cong., 1st Sess. (1993).

145. S. 1607, 103d Cong., 1st Sess. (1993).

146. In his explanation, the Senator Dole did not mention doubling

On November 4, 1993, Senator Byrd, the then-Chairman of the Appropriations Committee, offered an amendment to transfer \$22.268 billion to a violent crime trust fund.¹⁴⁷ The newly hatched amendment, Senator Byrd explained, would spend \$3 billion for federal construction of regional prisons for mostly state prisoners, \$1 billion for construction of jails, boot camps and other state and local correctional facilities, and \$500 million for secure juvenile facilities.¹⁴⁸ For some reason, the amendment as printed included \$2 billion — not \$1 billion — for boot camps and state prisons.¹⁴⁹ Nevertheless, within a few hours, the amendment overwhelmingly passed.¹⁵⁰

On November 8, 1993, less than a week after the “three strikes and you’re out” initiative, Senator Gramm introduced an amendment to impose life imprisonment on drug felons and violent criminals convicted for a third time.¹⁵¹ Senator Hatch offered a substitute.¹⁵² The result was complete confusion.¹⁵³ A few minutes later, after adopting an amendment to allow parents to be sentenced to community service for the crimes of their minor children, the “three strikes and you’re out” amendment was brought up and passed without any further debate or a recorded vote.¹⁵⁴ Apparently, no deliberation could be too short and no proposal too far-reaching, once the Senate undertook a “serious” effort to be “tough on crime.”

But the touchstone of the toughness in Congress was more imprisonment. \$5.5 billion for more prisons had been the high bid by the end of the Senate consideration. A number of organizations

mandatory minimum sentences from five years to 10 years and from 10 years to 20 years. 139 CONG. REC. S15,027 (daily ed. Nov. 4, 1993).

Senator Feinstein stated, without offering any evidentiary support, “[t]here is no question that the current penalties for arson are not sufficient to deter this crime Hopefully, enhanced penalties of this kind will send a signal, both in California and elsewhere, that the people of this country are not going to tolerate this kind of behavior.” *Id.* at S15,028. The amendment then passed on voice vote. *Id.* at S15,051 (as codified in 18 U.S.C. § 844(f), (h)-(i) (1994)).

147. 139 CONG. REC. S15,030 (daily ed. Nov. 4, 1993) (statement of Sen. Byrd).

148. *Id.*

149. *Id.* at S15,052.

150. *Id.* at S15,070 (stating that amendment passed by vote of 94-4, with two Senators not voting).

151. 139 CONG. REC. S15,342-43 (daily ed. Nov. 8, 1993) (amendment no. 1130 offered by Sen. Gramm).

152. *Id.* at S15,282-83 (amendment no. 1131 offered by Sen. Hatch).

153. Senator Biden embodied the mood of the day when he uttered, “I want to figure out what is going on. I yield the floor.” *Id.* at S15,284.

154. *Id.* at S15,286.

have recently issued reports proclaiming the need for more prisons.¹⁵⁵ The main contention of these reports is that more imprisonment is needed; therefore, more prisons are needed. Notably lacking is an analysis of exactly how many prisons should be constructed. These reports simply argue for “more.”

The reports extolling the benefits of more prisons are all founded on a similar premise, that crime is a much more serious problem today than it was in the past.¹⁵⁶ However, this premise is built upon a shaky foundation of misused facts and data.¹⁵⁷ The Republican “Contract with America,” for example, states that “[e]very year, nearly five million people are victims of violent crime.”¹⁵⁸ What the report fails to mention is that over 50% of the “violent crime” incidents were just simple assault cases.¹⁵⁹ Furthermore, over 25% of the assaults were not even reported to the police because the victims characterized the assaults as “private or personal matter[s].”¹⁶⁰ Of course, the commission of an assault is a serious matter; however, it is not a compelling argument for constructing more prisons to house perpetrators of simple assaults, 25% of which are not reported to the police.

155. See, e.g., HOUSE REPUBLICAN CONFERENCE, CONTRACT WITH AMERICA (1994) [hereinafter HOUSE REPUBLICAN CONFERENCE] (arguing for construction of more prisons); AMERICAN LEGISLATIVE EXCHANGE COUNCIL, REPORT CARD ON CRIME AND PUNISHMENT (1994) [hereinafter AMERICAN LEGISLATIVE EXCHANGE COUNCIL] (same); NATIONAL RIFLE ASSOCIATION CRIMESTRIKE, THE CASE FOR BUILDING MORE PRISONS (1994) (same).

156. See, e.g., AMERICAN LEGISLATIVE EXCHANGE COUNCIL, *supra* note 155, at 10 (“Perhaps never before in history had Americans experienced such a collapse of social order. Never before had the fear of crime so altered their lives.”). However, studies indicate that numerous periods during the early and mid-19th century were quite violent, although not as violent as the 1980s, thus refuting the American Legislative Exchange Council’s generalized assertions. See Fox Butterfield, *Historical Study of Homicide and Cities Surprises the Experts*, N.Y. TIMES, Oct. 23, 1994, at A16 (noting violent periods during 19th century); ROGER LANE, ROOTS OF VIOLENCE IN BLACK PHILADELPHIA 2-3 (1986) (same); ROGER LANE, VIOLENT DEATH IN THE CITY: SUICIDE, ACCIDENT, AND MURDER IN NINETEENTH CENTURY PHILADELPHIA 7-8 (1979) (noting that in Philadelphia, before Civil War, young gangs “terrorized honest citizens while battling with each other”).

157. See, e.g., HOUSE REPUBLICAN CONFERENCE, *supra* note 155, at 6 (citing expert estimating that “20-year old black male has a greater chance of being murdered on the streets than a soldier in World War II stood of dying in combat”). The misuse of facts and data is profoundly exemplified by the fact that this expert’s estimate was made in 1974 — 20 years earlier. AMERICAN LEGISLATIVE EXCHANGE COUNCIL, *supra* note 155, at 10.

158. HOUSE REPUBLICAN CONFERENCE, *supra* note 155, at 6.

159. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 246 tbl. 3.1 (1993) [hereinafter BUREAU OF JUSTICE STATISTICS]. In 1992, there were 6.6 million victims of violent crime; 3.4 million were simple assault cases. *Id.*

160. *Id.* at 254 tbl. 3.8.

As enacted, the 1994 Crime Bill includes \$8.8 billion for state and local police officers, \$7.9 billion for new prison construction and more than \$5 billion for so-called crime prevention programs.¹⁶¹ Yet, the Contract with America argues that the Crime Bill essentially failed to address the U.S.'s fundamental crime problem.¹⁶² Not surprisingly, the Contract with America's solution is to spend more money on new prison construction — an additional \$2.6 billion and eliminate crime prevention and police programs.¹⁶³ Setting aside the rhetoric of the Contract with America, how can anyone conclude that a quantitative difference of \$2.6 billion in new prison construction will amount to a qualitative difference in addressing the "fundamental crime problem in our country"?

VI. THE FOUNDATIONS OF A REALISTIC DRUG STRATEGY: TWELVE PRINCIPALS FOR MANAGING THE DRUG PROBLEM

The United States needs to implement a more realistic drug strategy. The most effective program would recognize individual rights as well as responsibilities, respect civil liberties, strengthen our nation's economy, and be committed to achieving public safety. To accomplish these goals, we must entrust regulation of the drug business to the rule of law. Accordingly, the strategy should take the drug business out of the hands of criminals, turn it over to consumers and law-abiding business people, and subject it to appropriate regulation.

In pursuit of a more realistic drug policy, I propose twelve principles to guide the United States drug policy:

- (1) *Insist upon genuine drug and alcohol user accountability and responsibility.*

People who hurt or endanger others must be held responsible for their actions. Drug or alcohol use is not an excuse for criminal or negligent conduct. In critical safety situations (i.e. pilots, drivers or physicians), we should require performance tests to detect actual impairment by drugs, legal and illegal and exhaustion or other cause of impaired performance. Following any kind of accident, it would be perfectly appropriate to immediately test the blood of pilots, engineers, bus drivers and surgeons for evidence of alcohol or

161. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended at 42 U.S.C. § 13701 (1994)).

162. See generally HOUSE REPUBLICAN CONFERENCE, *supra* note 155.

163. *Id.*

other drug use. This would be appropriate not only for transportation accidents, but also for medical accidents, such as administering medications improperly or making mistakes in surgery. However, it would not be appropriate to use tests showing past use of drugs to determine current safety qualifications or to deny licenses to those who have used drugs in the past without also showing a proximate threat to safety.

The United States should encourage increased professional responsibility and peer supervision of professional fields such as medicine and airline piloting, to police against on-the-job recklessness involving alcohol or drug use. Suspected misconduct that threatens public safety must be investigated and prosecuted where criminal recklessness has occurred.

Drug and alcohol use should be considered privileges. Drug use may be subject to licensing, which can be revoked for misuse. This idea has been suggested by Mark A. R. Kleiman at the Kennedy School.¹⁶⁴ Persons who use drugs or alcohol could even be required to get special liability insurance coverage. It should not be presumed that persons over twenty-one years of age are responsible alcohol or drug users.

(2) *Insist upon venter accountability and responsibility.*

Violence, corruption, product adulteration, tax evasion, illegal campaign contributions and antitrust violations by drug, alcohol and tobacco sellers are crimes that the United States should investigate and punish. Adulteration and mislabelling of drugs and alcohol should also be subject to product liability civil law remedies. Vendors must be required to comply with reasonable regulations and inspections, pay taxes, and resolve market place conflicts through utilization of the law, not violence. Compliance with these requirements could be more easily investigated and enforced in a regulated environment than under prohibition.

Further, bans on sales to minors of tobacco, alcohol and other drugs must be enforced. Sales to those who have lost their alcohol or drug use privileges should be prohibited. Like alcohol dramshop laws, over-the-counter sales of drugs to those who are already intoxicated should not be permitted. Promotion of alcohol, tobacco and drug use should be severely limited.

164. KLEIMAN, *supra* note 110, at 98-101, 249-52, 277-79.

(3) *Set appropriate priorities and undertake achievable social goals.*

The United States should minimize the harms and maximize the benefits of drug and alcohol use. In 1995, the principle harms to reduce in the near term are the spread of AIDS, trafficking violence, corruption — domestically and internationally — and tax evasion. All of these harms are exacerbated by prohibition.¹⁶⁵

Part of setting appropriate priorities requires that we refocus domestic law enforcement by both refocusing crime prevention and corrections policies. We must make crime prevention a community-oriented policing effort, making the streets safer and preventing crime by involving the community in the policing effort.¹⁶⁶ State and local law enforcement and prosecutors should concentrate on directing drug trafficking indoors, off the street and out of residential neighborhoods, commercial districts during business hours, playgrounds, parks and schools.¹⁶⁷

Our corrections policy must be reformed by assuring that repeat, serious, violent offenders are incarcerated. Record keeping must be automated and accurate to assure that repeat offenders are identified and not mistakenly released. Prisons, however, should not be used for simple drug possessors and users, or for non-violent

165. See THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 1 (1989) [hereinafter NATIONAL DRUG CONTROL STRATEGY] (stating that “intravenous drug use is now the single largest source of new HIV/AIDS virus infections” and “[t]he number of drug related emergency hospital admissions increased by 121[%] between 1985 and 1988”); see also HODDING CARTER III, *We’re Losing the Drug War Because Prohibition Never Works*, in DRUG LEGALIZATION: FOR AND AGAINST 91, 92 (Rod L. Evans & Irwin M. Berent eds., 1992) (stating that net profits for drug traffickers is estimated at \$40-\$100 billion per year and that prohibition creates competition for these profits); WILLIAM J. CHAMBLISS, *The Consequences of Prohibition: Crime, Corruptions, and International Narcotics Control*, in DRUGS, LAW AND THE STATE 15-32 (Harold H. Traver & Mark S. Gaylord eds., 1992) (stating that history of drug prohibition suggests that some form of legalization is only way to deal rationally with drug problem).

166. See James Q. Wilson & George Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29-38 (pointing out that rules of street can affect crime rate).

167. Drug-free school zones can be accomplished by sustained enforcement in and around schools and by heightened sentencing for sales that take place at schools as a matter of prosecutorial policy. However, enforcement operations that lure traffickers to make cocaine into “crack” to deliver into school zones to create longer sentencing have been properly characterized by judges as “sentencing entrapment” and “sentencing manipulation” and are unjust and dishonest. See *United States v. Jones*, 18 F.3d 1145, 1153 (4th Cir. 1994) (“[S]entencing manipulation [is] outrageous government conduct that offends due process.”); *United States v. Barth*, 990 F.2d 422, 424 (8th Cir. 1993) (“[S]entencing entrapment [is] outrageous conduct which overcomes the will of an individual predisposed only to dealing in small quantities for the purpose of increasing the amount of drugs and the resulting sentencing of the entrapped defendant.”).

drug offenders. Unfortunately, 21% of the federal prison population is now non-violent, first-time drug offenders.¹⁶⁸ These offenders should have their sentencing commuted to community supervision.

In addition, we need to strengthen international law enforcement. The United States Department of Justice and Treasury should devote greater attention to the highest-level and international traffickers, arms dealers and money laundered whose violence and corruption is undermining governments and the global financial system. These are complex cases requiring the reassignment of law enforcement agents and prosecutors away from minor level offenders. Currently, the majority of the productivity of United States law enforcement is the imprisonment of street-level dealers, bodyguards and couriers (55.2%), and only a very small fraction are high-level dealers (11.2%) or international scope traffickers (23.7%).¹⁶⁹

Addiction and intoxication, per se, are less serious harms;¹⁷⁰ thus, reducing them should be an important, but secondary goal. As we have witnessed in public health campaigns addressing tobacco, alcohol and physical fitness, well-designed education and social controls are very effective and critically important as prevention programs.

A tertiary goal should be to obtain revenue from commerce in drugs and alcohol to help cover social costs. Even at today's low rate, alcohol taxation raised more than \$12 billion in 1989.¹⁷¹ Taxing marijuana as we do alcohol or tobacco could raise \$10-20 bil-

168. An internal Department of Justice report was prepared for then-Attorney General Philip Heymann in 1993. It revealed that 16,300 federal prisoners at that time were "low-level" drug offenders with no record of violence, no involvement in sophisticated criminal activity and no serious prior convictions. "These 16,300 - 21% of the entire federal drug prisoners — were serving an average of six years in prison." Stuart Taylor, Jr., *Courage, Cowardice on Drug Sentencing*, LEGAL TIMES, Apr. 24, 1995, at 27.

169. U.S. SENTENCING COMMISSION: COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 135, at 172 tbl. 18.

170. Dr. Dawn Day has estimated the risk of African-Americans dying from AIDS at 14,400 new cases per year in 1994, compared to 2000 overdose deaths of African-Americans in 1992. DAWN DAY, HEALTH EMERGENCY: THE SPREAD OF DRUG-RELATED AIDS AMONG AFRICAN-AMERICANS AND LATINOS 4, 18-20 (Oct. 11 1995). This statistic was based on her analysis of drug-induced mortality data from the National Center for Disease Prevention and Control in Atlanta, Georgia. *Id.*

171. INSTITUTE FOR HEALTH POLICY, BRANDEIS UNIVERSITY, SUBSTANCE ABUSE: THE NATION'S NUMBER ONE HEALTH PROBLEM 54 (1993) [hereinafter SUBSTANCE ABUSE] (noting that federal and state tobacco excise taxes raised more than \$11 billion in Fiscal Year 1992).

lion yearly for the states and federal government.¹⁷²

(4) *Recognize that there are no magic solutions.*

The problems of crime, violence and drug abuse in the United States cannot be easily solved. There will be addicts and crime no matter what we do. Although we must change our strategy, we must do so cautiously. A regulatory, management-style approach to the myriad of drug problems should be tailored to specific issues and adopted incrementally.

Discussions of these complex problems should be free of excessive rhetoric and simplistic approaches such as prohibition. Prohibition has failed to reduce crime or addiction, and a “drug-free” society seems totally unrealistic.¹⁷³ Prohibition’s concomitant strategy of punishing drug addicts is akin to expelling from school students with learning disabilities. To attempt to take the profits out of a \$50 billion per year business through the forfeiture of \$750 million in property per year is absurd.¹⁷⁴ Even sales taxes would be more effective.

A good example of a complex drug regulatory scheme is alcohol regulation. Alcohol regulation has constantly evolved since 1933 and is still changing today. There are countless alcohol laws currently in existence, reflecting multiple goals from revenue collection to reducing consumption. Alcohol-focused laws extensively regulate its sale, advertising, taxation, places of distribution and consumption; further, they vary from jurisdiction to jurisdiction depending on whether the substance is beer, wine or whiskey.¹⁷⁵ Of

172. See Nadelman, *The Case for Legalization*, *supra* note 87, at 23 (stating that legalization of drugs would bring into public treasuries “at least \$10 billion per year and possibly much more”); NATIONAL DRUG CONTROL STRATEGY, *supra* note 165, at 2 (stating that estimated gross drug sales total \$110 billion per year, “more than our total gross agricultural income and more than double the profits enjoyed by all the *Fortune 500* companies combined”); NATIONAL GOVERNOR’S CONFERENCE CENTER FOR POLICY RESEARCH AND ANALYSIS, MARIJUANA: A STUDY OF STATE POLICIES AND PENALTIES 38 (1977) (stating that drug users spend approximately \$4 billion annually on marijuana and that 50% of amount spent is profit to seller).

173. Congress directed the establishment of a “National Commission on Measured Responses to Achieve a Drug-Free America by 1995” in section 7604 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4508-4510.

174. See NATIONAL DRUG CONTROL STRATEGY, *supra* note 165, at 77, 164 (reporting that Department of Justice Asset Forfeitures in 1993 were \$555.7 million, and Department of Treasury Asset Forfeitures were \$168 million; and that costs in 1993 to Department of Justice alone of its Asset Forfeiture program were \$246.5 million).

175. For example, whiskey is sold in state stores in Pennsylvania and Virginia, private liquor stores in New Jersey, Maryland and the District of Columbia, and county-run liquor stores in Montgomery County, Maryland. Wine is sold in state stores in Pennsylvania, private liquor stores in Maryland and Washington, D.C.,

course, it would take time for the United States to develop a sufficiently comprehensive regulatory scheme for a dozen major classes of drugs now illegal.

- (5) *Be comprehensive and consistent among all drugs now legal and now illegal.*

We should focus on the drug "abuse" problem — not just the "illegal" drug problem. "Illegal" drug use does not exist in legal or social isolation. Treatment professionals recognize cross-addiction and poly-drug abuse. Prevention professionals recognize a "gateway" relationship between use of legal and illegal drugs.¹⁷⁶

As a result of the inter-relationships between different types of substance abuse, tightening alcohol and tobacco regulations for adults as well as children, would help reduce the use and abuse of other drugs as well. Specifically, the United States could delay the onset of teen alcohol and tobacco use, which would delay the onset of other drug use, by controlling the promotion and availability of tobacco and alcohol to children.

- (6) *Adopt a public health approach.*

The United States needs to adopt a public health — not criminal — approach toward all drugs and drug users. Sensible drug policy should include expanded and honest anti-drug education, because honest comprehensive prevention programs work. According to the United States Surgeon General, cigarettes are as addictive as heroin or cocaine.¹⁷⁷ However, forty-four million cigarette smokers have quit smoking.¹⁷⁸ A massive public health campaign has succeeded without jailing or urine-testing cigarette smokers,¹⁷⁹ all despite billions of dollars of tobacco-use promotion annually.¹⁸⁰

As part of a public health approach to drug use, quality medi-

and supermarkets in Virginia. Beer is sold in packages in taverns and wholesalers in Pennsylvania, in private liquor stores and small "delis" in Maryland and Washington, D.C., and in supermarkets in Virginia.

176. SUBSTANCE ABUSE, *supra* note 171, at 22.

177. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL vi (1988) (showing that cigarettes and other forms of tobacco are addicting in same sense as drugs such as heroin and cocaine); *see generally* ERICH GOODE, DRUGS IN AMERICAN SOCIETY 255-62 (1993).

178. SUBSTANCE ABUSE, *supra* note 171, at 28.

179. *Id.* at 28, 54. Forty-two percent of the U.S. population smoked cigarettes in 1965, which amounted to 4,345 cigarettes per adult per year. *Id.* at 12. By 1992, only 26% of the population smoked, and per capita consumption dropped to 2,629 cigarettes per year. *Id.*

180. *See* Carl E. Bartecchi et al., *The Global Tobacco Epidemic*, SCI. AM., May

cal care and drug abuse treatment should be easily available for heroin and crack addicts, the mentally ill, the homeless, the uninsured and for everyone at risk of catching or spreading contagious diseases. This would simultaneously help to halt the transmission of disease and reduce the use of illegal drugs as pain killers for untreated disease.

Further, to stop the spread of blood borne disease among injecting drugs addicts, clean needles should be exchanged for used ones. Presently, distribution of hypodermic syringes without a prescription is a crime in nine states and the District of Columbia.¹⁸¹ These laws should be repealed. Thirty years ago, distribution of condoms to teenagers was unthinkable, as was the sale of condoms in supermarkets and convenience stores. With *Griswold v. Connecticut*¹⁸² in 1965, the United States Supreme Court opened the door for distribution of condoms.¹⁸³ Now, for the widely-accepted public health purpose of fighting sexually transmitted disease, condoms are widely and freely distributed.

Finally, as part of a public health approach to drug use, treatments like Nicorette® gum which enable cigarette addicts to more easily break their addiction should be cheaper and more freely available. After all, cigarettes are only crude, disposable ingestion devices (and therefore of the most dangerous kind) for the drug nicotine.¹⁸⁴

(7) *Remember that the purpose of drug policy is to help people, not hurt them.*

We should not demonize those with drug problems, as they are usually in some kind of pain. Addicts should not be excluded from society as Old Testament lepers were.¹⁸⁵ Let us be compassionate.¹⁸⁶ Heroin addicts who won't quit ought to be able to get clean, affordable opiates to prevent crime and disease — without, of

1995, at 47 (finding that United State tobacco industry spent more than \$5 billion on advertising in 1992).

181. George Judson, *Study Finds AIDS Risk to Addicts Drops if Sale of Syringes is Legal*, N.Y. TIMES, Aug. 30, 1995, at A1. Syringe possession is illegal in states "with the most drug users and highest incidence of AIDS among them: California, New York, New Jersey, Illinois, Pennsylvania and Massachusetts." *Id.*

182. 381 U.S. 479 (1965).

183. *Id.* at 485 (holding that it is unconstitutional for states to prohibit use of condoms by married couples).

184. Cigarettes are a "nicotine delivery system," according to a Philip Morris Company's draft report. Alix M. Friedman, *Philip Morris Likens Nicotine to Cocaine*, WALL. ST. J., Dec. 8, 1995, at B1.

185. See *Leviticus* 13:45-46.

186. See *Matthew* 10:8 (enjoining of Jesus' disciples to "cleanse lepers"); *Luke*

course, disregarding the user accountability principle.¹⁸⁷

When addicts “get clean,” society as a whole benefits. Anyone who wants to quit using drugs should be able to receive appropriate publicly-funded treatment.¹⁸⁸ Addicted single parents need residential treatment that will not break up families.¹⁸⁹ Pregnant addicts especially need treatment, not imprisonment.¹⁹⁰ Today, however, most treatment programs will not accept pregnant addicts.¹⁹¹ Similarly, HIV-positive addicts should be the top priority for treatment, yet currently many programs will not take HIV-positive people. All drug-addicted prisoners should get treatment, but no one should be prosecuted or imprisoned simply to get treatment.

5:12-13 (recounting one of Jesus' works on Earth as healing leper by touching him).

187. For a discussion of the user accountability principle, see *supra* note 164 and accompanying text.

188. See NATIONAL OPINION RESEARCH CENTER AT THE UNIVERSITY OF CHICAGO, EVALUATING RECOVERY SERVICES: THE CALIFORNIA DRUG AND ALCOHOL TREATMENT ASSESSMENT (CALDATA) 3 (1994). The cost of treating approximately 150,000 persons for drug and alcohol abuse in 1992 was \$209 million, while the benefits received during treatment and in the first year afterwards were worth approximately \$1.5 billion in savings to taxpaying citizens, due mostly to reductions in crime. *Id.* Each day of treatment paid for itself (the benefits to taxpaying citizens equaled or exceeded the costs) on the day it was received, primarily through an avoidance of crime. *Id.* Reported hospitalizations decreased by approximately one-third from before treatment to after treatment. *Id.* Treatment for problems with the major stimulant drugs (crack cocaine, powder cocaine and methamphetamine) was found to be just as effective as treatment for alcohol problems and somewhat more effective than treatment for heroin problems. *Id.*; see Sheryl Stolberg, *Drug Treatment Saves \$1.5 Billion*, S.F. CHRON., Aug. 29, 1994, at A3 (reporting that cost of crimes tied to group in treatment dropped by \$1 billion within 15 months after treatment).

189. See Judy Licht, *Pregnant Addicts: A Call for Treatment, Not Punishment*, WASH. POST, June 29, 1993 (Health Section), at 13 (“The average woman seeking help with a substance abuse problem is 27 years old and has three or four other children.”).

190. *Offer Treatment, Not Fear of Prosecution*, AM. MED. NEWS, Sept. 7, 1992 (Editorial), at 21 (finding that at least 165 women across nation were criminally charged for exposing their fetuses or infants to exposed substances).

191. See Kathleen Teltsch, *In Detroit, A Drug Recovery Center That Welcomes the Pregnant Addict*, N.Y. TIMES, Mar. 20, 1990, at A13. Pregnant addicts are “the client nobody wants,” according to Beverly J. Chisolm, the director of the Eleonore Hutzel Recovery Center in Detroit. *Id.* In New York city, a city of 78 drug treatment centers found that 87% exclude pregnant users of crack. *Id.* Pregnant addicts of any color are likely to get “runaround” if they seek help. Robert Zimmerman, *Try Intervention for Addicted Mothers*, SAN DIEGO UNION, June 16, 1991, at C5. According to Dr. Loretta Finnegan, a senior adviser on women’s issues to the National Institute on Drug Abuse, “[t]he alcohol and drug treatment people will tell her they don’t know anything about pregnancy, so go to an obstetrician. The obstetricians tell her they don’t know anything about substance abuse, so go to a treatment program.” *Id.*

Many currently prohibited drugs could be used to help people. Marijuana has medical uses.¹⁹² Heroin relieves pain for some people who obtain no relief from other drugs.¹⁹³ Those who can benefit from either of these drugs should be able to get it legally from their doctors.¹⁹⁴ This doesn't mean these drugs are "good" or "better" than other drugs, but that they are useful for some people.

Those who can benefit from drugs should not be denied them because medical use of these drugs allegedly sends the "wrong message." First, drug users are not listening for the message. Cocaine, Valium® and Dilaudid® have uses in medicine, but the addicts who abuse those drugs do not care. Second, there is not a single good value for our children, such as honesty, thrift, industry, chastity, responsibility, moderation or non-violence, that is not constantly bombarded by conflicting messages. Despite this, teenagers everyday successfully sort out the conflicting messages. Exaggerating the dangers of wrong messages when it comes to drugs is irrational.

(8) *Maximize the reach of the law and respect for the law.*

Drug and alcohol buyers should not purchase from criminals. Criminals may not legally sell alcohol now,¹⁹⁵ and they should not be allowed to sell other drugs either. Marijuana, the most widely consumed illegal drug, should be taxed and sold to adults with warning messages but without the pernicious effects of unbridled advertising permitted by alcohol and tobacco companies.¹⁹⁶

Ending exclusive control of drug sales by criminals would keep the tens of billions of dollars in annual profits away from organized crime.¹⁹⁷ Today, growing one's own marijuana is a felony¹⁹⁸ for

192. Lester Grinspoon & James B. Bakalar, *Marihuana as Medicine: A Plea for Reconsideration*, 273 JAMA 23, 1875, 1876 (1995) (affirming that marijuana is medically useful); see also LESTER GRINSPOON, M.D., & JAMES B. BAKALAR, J.D., *MARIHUANA: THE FORBIDDEN MEDICINE* (1993) (discussing marijuana's historical and possible future uses in medical field).

193. TREBACH, *THE HEROIN SOLUTION*, *supra* note 5, at 59-84.

194. See generally 130 CONG. REC. S26,063-96 (daily ed. Sept. 19, 1984) (debate on the Compassionate Pain Relief Act, H.R. 5290).

195. See 26 U.S.C. § 5551(b)(1)-(2) (1988) (stating that a person who has been convicted of "any felony under a law of any state" cannot receive authority to sell alcohol legally).

196. For a discussion of advertising for the tobacco industry, see *supra* note 180 and accompanying text.

197. For a further discussion of the annual profits of the drug business in the United States, see *supra* note 174 and accompanying text.

198. See 21 U.S.C. § 841(b)(1) (1988) (providing that anyone who manufactures (which is defined to include cultivation) marijuana without authorization is

which the government may seize one's home or land.¹⁹⁹ As a result, every marijuana user today has great incentive to patronize criminals. Perhaps the United States should encourage home cultivation for personal use to reduce commercial opportunities for criminals.

It is important to note that few police officers or revenue agents are killed or injured enforcing the liquor laws.²⁰⁰ It seems logical, therefore, to assume that we would not be similarly jeopardizing the lives of government employees by adopting a policy of management and regulation of the drug trade.

(9) *Respect other peoples, other cultures and other nations.*

It is irresponsible for the United States to blame other countries for its drug problems and useless for the United States to intimidate minority groups such as Latin-Americans or Asian-Americans. Calling peyote use by members of the Native American Church "drug use" is like calling Catholic consumption of sacramental wine at Communion drug use.²⁰¹ There is no peyote abuse problem destroying American youth or cities to justify its differentiation.²⁰² Indians in Peru and Bolivia chew coca leaf, and professionals drink coca tea: these are both harmless practices. It makes no sense for coca users in Peru and Bolivia to be considered international outlaws in violation of the Single Convention on Narcotics.²⁰³ The United States should recognize that some harmless

subject to imprisonment, depending on quantity, from five years to life imprisonment).

199. 21 U.S.C. § 881 (1988) (providing that "[t]he following shall be subject to forfeiture . . . [a]ll real property, including any right, title, and interest . . . which is used, or intended to be used . . . to commit, or to facilitate the commission of, a violation of this subchapter.").

200. BUREAU OF JUSTICE STATISTICS, *supra* note 159, at 401 tbl. 3.154 (listing law enforcement officers killed from 1978-1992 under different circumstances at the scene of incident and showing no officers killed while enforcing liquor laws).

201. The Supreme Court upheld the disqualification of a member of the Native American Church from receiving unemployment compensation, having been discharged from employment in a drug treatment program for failing to be "drug-free" because he took peyote, the sacrament of his church. *See* *Employment Div. v. Smith*, 494 U.S. 872 (1990).

202. The American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (1994), protects the use, possession and transportation of peyote by an "Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion" from any prohibitions by Federal or State law. *Id.* Congress found that "for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures." *See* 42 U.S.C. § 1996a(a) (1994).

203. Article 26 of the Single Convention on Narcotics permits cultivation of

practices are the business of other societies and not of ours.

- (10) *Recognize that drugs are a major commodity in international trade.*²⁰⁴

Drugs have been a major commodity in international trade since tobacco, coffee, tea, chocolate and spices were introduced to Europe centuries ago.²⁰⁵ A ban has not stopped — and cannot stop — this trade. Instead of trying to enforce a useless ban, the United States needs to take control of this enormous trade away from criminals and corrupt customs officials, by regulating and taxing it.

Simultaneously, the United States needs to renounce increasing cigarette exports as a major objective of trade policy.²⁰⁶ It is criminal and immoral to push an addictive drug on others. By pushing tobacco use, America acts similarly to Great Britain when it forced China to accept Indian opium in the nineteenth century.

- (11) *Be creative and flexible to meet our goals.*

Through regulation, we must encourage means of drug administration that are less harmful as well as easier to control physically, socially, culturally and legally. We must be wary of more harmful or harder-to-control means. For example, we might concentrate on trying to limit the smoking of drugs such as nicotine, cocaine, heroin and marijuana, because smoking gives intense “rushes” but is more harmful and harder to control than other forms of ingestion.

the coca bush only under regulation. Illegally cultivated coca bushes must be destroyed. Article 27 permits the continued use of coca leaves for the preparation of a flavouring agent, which shall not contain any alkaloids (i.e. cocaine). Article 49 provides for certain transitional reservations for coca leaf chewing, but paragraph 2(e) requires that coca chewing must be abolished within 25 years of the effective date of the Single Convention under Article 41. The Convention became effective on December 13, 1964. Thus, on December 13, 1989, coca chewing in Peru ceased to be legal under the Single Convention on Narcotics. *United Nations Commentary on the Single Convention on Narcotic Drugs of 1961*, U.N. Doc. (1973).

204. See Terry Atlas, *Shultz Asks Nigerians to Halt Drug Trade*, CHI. TRIB., Jan. 13, 1987, at C12 (recognizing that “[t]he drug business is creating a new generation of millionaires here who have turned this city’s international airport into an active transshipment point for heroin coming to the United States from Pakistan, India and Southeast Asia”); *Santa Marta’s Dollar-Spinning Grass*, THE ECONOMIST, Dec. 9, 1978, at 75 (stating that “[t]he huge fortunes made by the successful [Colombian drug producers] ensure that there is no shortage of recruits to the drug business”).

205. OAKLEY RAY & CHARLES KSIR, *DRUGS, SOCIETY, & HUMAN BEHAVIOR* 215-23 (5th ed. 1990); see also GOODE, *supra* note 177, at 255-62 (describing tobacco as potent drug).

206. See GOODE, *supra* note 177, at 257 (“Marlboro, the most popular cigarette brand in the world, now sells more cigarettes abroad than in the United States.”).

At the same time, oral ingestion of coca leaf and cannabis preparations are less intense, habit-forming and harmful.²⁰⁷ Perhaps we could encourage oral ingestion as an alternative when appropriate.

(12) *Reduce the intensity of all drug messages.*

Drugs should neither be promoted nor hysterically attacked. We should prevent drug advertising from being aimed at youth. Drugs should not be advertised, for example, via "Spuds MacKenzie" (the dog promoting Bud Light® beer) or Camel cigarette's "Joe Camel" character.²⁰⁸

At the same time, anti-drug messages should be kept reasonable and truthful. The famous television public service announcement which states "This is your brain; this is your brain on drugs: any questions?" and features frying eggs in a skillet certainly attracted attention, but it was also ludicrous and misleading. It invited contempt from the people it was supposed to positively influence. Marijuana users are associated with a greater tolerance for deviance; they may also have a greater inclination toward risk-taking, and transgression.²⁰⁹ To bombard children with the message that "the most important thing in the world is that you should not do drugs" could end up only serving as an enticement.

VII. CONCLUSION

No matter what we do, drug use and drug abuse will continue. As a result, a prohibition-based drug policy cannot succeed in fundamentally reducing use or reducing the collateral harms from prohibition. It is time to recognize that prohibition of drugs in the United States has failed and begin to implement a new approach to control drug use.

If it establishes a new drug policy, the United States could ameliorate some of the problems which have arisen out of prohibition. By continuing to think about drug use as a moral crusade and by maintaining prohibition, the United States has exempted the drug

207. RAY & KSIR, *supra* note 205, at 127, 335.

208. "In 1988, R.J. Reynolds fashioned 'Old Joe Camel,' a cartoon character who shoots pool, rides motorcycles and associates with attractive women as he smokes cigarettes. Three years after the campaign began . . . one study showed six-year-olds knew the character as often as they picked out Mickey Mouse. Teenagers were likewise influenced. Surveys done in 1988 and 1990 show that the proportion of teenage smokers who bought the Camel brand increased from 0.5% to 32%. In this same period, it is estimated that Camel cigarette sales to minors soared from \$6 million to \$476 million." Bartecchi et al., *supra* note 180 at 47.

209. GOODE, *supra* note 177, at 193.

trade from any regulation and control. This, in turn, has maximized the violence and disease associated with drugs. In addition, by keeping drugs inordinately profitable, the government has continuously tempted people to sell them for easy money. In the end, our country should not “legalize” drugs for legalization’s sake; rather, we should do so because legalized drug markets are more easily and effectively controlled, regulated and policed.

