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# Drug Policy: A Smorgasbord of Conundrums Spiced by Emotions Around Children and Violence

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# DRUG POLICY: A SMORGASBORD OF CONUNDRUMS SPICED BY EMOTIONS AROUND CHILDREN AND VIOLENCE

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## I. INTRODUCTION

Violent crime is so widespread in America's cities that the sound of gunfire is an hourly occurrence in hundreds of neighborhoods.<sup>1</sup> For the past five years, teenage use of drugs has increased—especially the use of marijuana.<sup>2</sup> Criminal gangs enrich themselves by selling drugs and enlist young members by offering brotherhood and identity in a world of isolation. Parents are in anguish and some march in the streets against the threat to their children of drugs, gangs, and guns. Simultaneously, state legislatures hear the parents and wrestle with the use of marijuana to treat those struggling with the nausea of cancer chemotherapy or the wasting of AIDS. Congress regularly holds angry hearings

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1. MIKE TIDWELL, IN THE SHADOW OF THE WHITE HOUSE: DRUGS, DEATH, AND REDEMPTION ON THE STREETS OF THE NATION'S CAPITAL 40 (1992) ("What, you've never heard a gun go off at night before?" . . . 'They're not shooting at you, man. Those are dope fiends shooting at each other. Stay out of their way and be cool—that's all you've got to do. You're in the ghetto now, man. You've got to get used to it.');" *Life in a Shooting Gallery: Mother, Girls Pray A Lot in Deadly Neighborhood*, MIAMI HERALD, Feb. 9, 1997, at 1A ("Bullets fly through this neighborhood every day," says 13-year-old sister, Bertha . . . The area . . . was named Germ City more than 20 years ago because of crowding and unsanitary conditions.").

2. The annual survey of student drug use sponsored by the U.S. Department of Health and Human Services is "Monitoring the Future," conducted by the Institute for Social Research of the University of Michigan. Current use of drugs is considered use at least once in the past 30 days. The percentage of 8th graders reporting use of marijuana in the past 30 days increased from 3.2% in 1991 to 11.3% in 1996. University of Michigan News & Info. Servs., *The Rise in Drug Use Among American Teens Continues in 1996*, Dec. 19, 1996, at tbl.1 (on file with author). The percentage of 10th graders increased from 8.7% in 1991 to 20.4% in 1996, and the percentage of 12th graders increased from 13.8% in 1991 to 21.9% in 1996. *Id.* The percentage of 8th graders reporting use of "any illicit drug" in the past 30-days increased from 5.7% in 1991 to 14.6% in 1996. *Id.* The percentage of 10th graders reporting use of "any illicit drug" in the past 30 days increased from 11.6% in 1991 to 23.2% in 1996. The percentage of 12th graders reporting use of "any illicit drug" in the past 30 days increased from 16.4% in 1991 to 24.6% in 1996. *Id.* Alcohol consumption by children in junior high and high school is illegal in all states, and this illegality is taught in most anti-drug education programs. This fact may effect this answer even though the researchers define illicit drug in terms of 10 classes of drugs, and self-reporting of alcohol consumption by such students exceeds the use of "any illicit drug" for all age groups and years. See *infra* note 11 for a discussion of statistics relating to alcohol consumption by minors.

about drug issues. To the observer in Washington, it feels as though a swirling thundercloud of new programs and political charges crashes over the political landscape with the crack of lightning, thunder, high winds and torrential rains. In 1996, for example, the President was repeatedly attacked by his Republican opponents for being AWOL in the "war on drugs." Yet the voters in two states, despite warnings from the nation's "drug czar" that these initiatives would lead to the "legalization" of drugs, passed initiatives supporting the medical use of marijuana. At the end of 1996 and at the beginning of the new term, the highest profile issue before the nation's drug czar was his counterattack against those successful efforts at the ballot box.

This Article weaves through the disparate issues surrounding kids, guns, gangs, and drugs. The principal thread is that rhetorical concern for children has overthrown the analysis of drug policy issues in a variety of contexts. The rhetorical concern is not directly related to the well-being of children, but to political positioning. First, this Article, in commenting upon the proposals of Professors Polsby and Kleiman in this symposium, looks at issues surrounding "price" versus "availability" of drugs, the assertion of "zero-tolerance" of drug-use by children, the assertion of a "right" to use drugs, the violence of the crack markets, the broad social issues that need to be addressed for changing drug-using or drug-selling behavior, and the triumph of punishment over persuasion. In a second subdivision, this Article questions the effectiveness of the myriad of strategies to address urban violence as long as they are constrained by the conventional wisdom regarding drugs. The final subdivision of this Article is an overview of the current status of the conflict over medical marijuana. It analyzes the text of the California and Arizona propositions, the political and regulatory attack lodged against them, and describes the litigation that has been filed in support of the propositions. A cornerstone of federal opposition to medical marijuana (and even the 1984 proposal to allow heroin to be dispensed to terminal cancer patients) has been that changing the law would send the wrong message to children.

## II. COMMENTS ON TWO ARTICLES

### A. *Comments on Ending the War on Drugs and Children* by Daniel D. Polsby

Professor Polsby's provocative Article may satisfy those who see the conundrums of drug policy as lush ground for an intellectual romp, for it is filled with thought experiments and sweeping pronouncements that are sure to upset many who are concerned about the issues. In a manner that may be particular to a certain academic style, the Article is in turn dismissive of other scholars, picayune in its quibbles, sweeping in its generalizations, obscure in its language, and self-assured in its pronouncements, and overall inconclusive. The

author takes the position of the devil's advocate in favoring the decriminalizing of drugs, and immediately condemns two better known advocates of that position for "lack[ing] an appreciation for the tragic dimension of the problem."<sup>3</sup> That attack is undeserved.<sup>4</sup>

In the best contrarian style, instead of arguing that decriminalization will be an improvement, he insists that decriminalization would do harm by "materially increasing the amount of experimental, and also chronic, use by minors."<sup>5</sup> This assertion is not necessarily true. But Professor Polsby insists that this increased use is a problem because "[c]ategorically, children must not use recreational drugs at all, and if we weaken (let alone abolish) criminal sanctions on adult use, that must undermine that object, and we shall have more of that which (we say) we would like to have none at all."<sup>6</sup> Both parts of this slippery assertion are false.

3. Daniel D. Polsby, *Ending the War on Drugs and Children*, 31 VAL. U. L. REV. 537 (1997).

4. Dr. Trebach began his 1982 opus on heroin by quoting Dr. Peter G. Bourne, then advisor to then presidential-hopeful, Jimmy Carter:

What was once the "American Disease" has become a worldwide affliction. Heroin addiction has become a major problem in a dozen new countries, with the number of addicts continuing to increase by several thousand every month. Not only are those who are becoming addicted for the most part the children of the social and intellectual elite of these countries, but the massive amounts of money now involved in trafficking have corrupted many high level officials and undermined already unstable economies.

ARNOLD S. TREBACH, *THE HEROIN SOLUTION I* (1982). Trebach then commented:

The years that have passed since that time [1976] have shown, sadly enough, that Dr. Bourne's remarks understated the dimensions of the problem. The number of new addicts in the world every month is becoming enormous, unknown to be sure, but certainly more than "several thousand." In any event, there is no doubt that heroin addiction has become, as Dr. Bourne said, a worldwide affliction.

*Id.*

This is hardly a lack of an appreciation of the problem of heroin addiction. Trebach frequently has described the problems of the abuse of drugs, noting, for example, the shock of parents in discovering that their children are abusing drugs. ARNOLD S. TREBACH, *THE GREAT DRUG WAR* 136 (1987). He notes that in his concept of "drugpeace," the police would "continue . . . to apprehend the often despicable people involved in the illicit drug trade. . . ." *Id.* at 355.

Dr. Nadelmann reflects that "All the benefits of legalization would be for naught, however, if millions more Americans were to become drug abusers." Ethan A. Nadelmann, *The Case of Legalization*, THE PUB. INTEREST, Summer 1988, at 3, 24. He observes that "China's experience with the British opium pushers of the nineteenth century, when millions became addicted to the drug, offers one worst-case scenario." *Id.* at 28. "There is no question that legalization is a risky policy, one that may indeed lead to an increase in the number of people who abuse drugs. But that risk is by no means a certainty." Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 SCI. 939, 946 (1989).

5. Polsby, *supra* note 3, at 537.

6. *Id.* at 538.

The second part regarding the weakening of criminal sanctions relies upon the cheap technique of argument, highly unusual in academic analysis, of muddying distinctions instead of refining them, namely to assert that there is no analytical value in distinguishing between the “legalization” and “decriminalization” of drugs. As I explained elsewhere, these terms need to be defined carefully when they are used seriously for they carry a variety of meanings.<sup>7</sup> There are broadly at least four different approaches to drug control that are sometimes meant when labeled as legalization, and what is called decriminalization is a fifth. Since every drug control regime that attempts to control drug use and behavior under a system of regulation is a retreat from the absolutism of the current approach it is both fairly labeled legalization and fairly examined for the details of its control mechanisms.

#### 1. “Price” Analysis of Drug Availability Ignores Regulatory Controls

Professor Polsby says to simply eliminate the criminal sanction and begin the analysis. This position omits the effects of the large body of social conditioning that affects behavior, such as taxation, licensing, and other regulations, as well as the role of education and custom. To discuss alternatives to the current prohibition regime in any depth, one must consider at least some of the variety of controls that have been proposed to be substituted for the current *non sequitur* called the “Controlled Substances Act.” (Overall, the least controlled substances in the American economy today are the “controlled substances.”) The conceptual flaw of this analysis is that it poses drug policy as the choice between two stark opposites, prohibition and legalization—simple and unmediated. The latter approach, advocated by Dr. Thomas Szasz, would eliminate all types of regulation of drugs.<sup>8</sup> Yet, almost every aspect of commerce in America is regulated and that regulation is at various points on the spectrum between prohibition and free-market legalization. Almost everything is regulated in some fashion. The American system has demonstrated a genius for regulation. My arguments that drugs must be carefully regulated, neither prohibited nor sold in a free market has led Dr. Szasz, to characterize me as a “chemical communist,” and to criticize Dr. Ethan Nadelman’s “use of the term [drug legalization] to describe a program of more, not less, government control over drugs.”<sup>9</sup> However, to set aside the likelihood of post-prohibition regulation is a large leap to make in order to insist upon an assumption that juvenile drug use will increase.

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7. Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 399-405 (1995).

8. THOMAS SZASZ, *OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET* (1992).

9. *Id.* at 106-07.

Alcohol distribution is an obvious example of a regulatory scheme between the poles of prohibition and non-regulation. Today, alcohol regulation comes with a high price of relatively easy evasion, which in part is due to a lack of public attention to its enforcement, and extensive promotion to minors.<sup>10</sup> Alcohol use by minors who are not permitted to acquire or consume alcohol legally remains at very high levels, on a national basis,<sup>11</sup> but with fluctuations by community, and other social markers. The typical regulations require identification of buyers for proof of age. Many of the younger-appearing purchasers are typically asked to produce proof of age as a condition to purchase. The consequences to adults for furnishing alcohol to minors who are not their children are usually minor. The offenses are rarely investigated or enforced. In the eyes of the police in many parts of the country, alcohol consumption by minors is a minor matter.<sup>12</sup> Public education against juvenile alcohol use is frequently flat and boring compared to the advertising on television promoting the use of beer and wine, much of which is targeted at young consumers, namely the Budweiser frogs, the Stroh's dog, Bud Light's Spuds McKenzie, et cetera.<sup>13</sup>

Almost every jurisdiction regulates sales by limiting the time of day of permissible sales, often by day of week, limiting Sunday sales. In some jurisdictions there are quantity purchase limitations. In Pennsylvania, for example, the retail purchase of beer at taverns is limited to two six-packs at one time—a form of rationing. The manner and place of advertising is also limited. Zoning regulations limit the proximity of alcohol retail outlets to schools, churches, and other facilities.

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10. See Seth Schiesel, *On the Web, This Bud's for Your Children*, N.Y. TIMES, Mar. 7, 1997, at A1.

11. Very high percentages of teenagers report that they used alcohol (redefined as a "drink" instead of "more than a few sips" in 1993) in the past 30 days, and these percentages have increased over the past four years: for 8th graders from 24.3% in 1993 to 26.2% in 1996; for 10th graders from 38.2% in 1993 to 40.4% in 1996; and for 12th graders from 48.6% in 1993 to 50.8% in 1996. University of Michigan News and Info. Servs., *supra* note 2, at tbl.1. Asked whether they have been drunk in the past 30 days, last year an astonishingly high percentage of teenagers responded affirmatively: 9.6% of 8th graders, 21.3% of 10th graders, and 31.3% of 12th graders. *Id.* Asked if they engaged in binge-drinking at any time in the past two weeks (defined as consuming five or more drinks at one occasion), 15.6% of 8th graders, 24.8% of 10th graders, and 30.2% of 12th graders responded affirmatively last year. *Id.* at tbl.1a. Asked, "How difficult do you think it would be for you to get alcohol if you wanted some?", the percentages responding "fairly easy" or "very easy" to get alcohol were 75.3% for 8th graders, and 90.4% for 10th graders. *Id.* at tbl.10. Twelfth graders were not asked. *Id.*

12. Liquor law violations constituted only 15.5% of all alcohol offense arrests in 1994. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 1995 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 431 tbl.4.29 (1996). There was a very wide variation in the rate among the states. *Id.*

13. See Bruce Horovitz & Melanie Wells, *Ads for Adult Vices Big Hit with Teens*, USA TODAY, Jan. 31, 1997, at A1.

Professor Polsby, by proposing for analysis a hypothetical of a totally unregulated distribution approach, and an approach that disregards alternative social sanctions, assumes that use will therefore increase. However, eliminating the opportunity for regulation eliminates the opportunity to impose mechanisms which, for alcohol and tobacco, have resulted in reductions in consumption over recent decades. Tobacco and alcohol consumption have varied in the past two decades in part because of modifications of regulations which include taxation and limitations upon the time, place and manner of consumption. Taxation policies have been found to reduce the consumption of alcohol and tobacco.<sup>14</sup> So it is a mistake to suggest that the options in drug distribution controls are simply between two remote poles, and to make one's argument concerning assumptions about one of those poles.

Having dismissed the varieties of controls that have been proposed by "legalizers," Professor Polsby characterizes all of them. They are all governed exclusively by "price theory," namely drugs in a legalized regime will be cheaper, and hence more accessible—to adults and to children. But as Mark Moore has pointed out, the difficulty in acquiring drugs is an important factor in considering the true "cost" of drugs as is the actual dollar price.<sup>15</sup> "Drug availability" is a more important variable and much broader than simply price.<sup>16</sup>

In a regulated market, availability can be controlled by mechanisms in addition to dollar cost. For example, while the dollar price of drugs sold to a licensed drug buyer could be substantially less than the current black market price, satisfying the qualifications for obtaining a license to buy drugs could involve overcoming substantial obstacles. License qualifications could include age restrictions, knowledge requirements, training in use under supervised conditions, a probationary period before a full license is extended, insurance requirements, agreeing to close oversight by a reviewing authority, and maintenance of job and family responsibilities. The price could be quite low, but availability might be quite limited.

The abuse of drugs is a threat to public safety. Another instance of great public concern about public safety is in air travel. The public is very worried

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14. "Just one year after California raised its cigarette tax 25 cents in 1989—earmarking some of it for anti-smoking campaigns—per capita consumption declined 9%. Researchers estimate that a 50-cent tax increase would result in 2.5 million fewer smokers." INSTITUTE FOR HEALTH POL'Y, BRANDEIS UNIV., *SUBSTANCE ABUSE: THE NATION'S NUMBER ONE HEALTH PROBLEM: KEY INDICATORS FOR POLICY* 54 (1993).

15. MARK H. MOORE, *BUY AND BUST* (1977).

16. For an extensive discussion of the factors comprising heroin availability, see CHARLES FAUPEL, *SHOOTING DOPE* (1991).

about the safety of commercial airplanes, and the people who fly them. Yet the general public pays relatively little attention to how private pilots are licensed—even though the errors of such pilots endanger other aircraft and people on the ground. Despite rigorous licensing, there were 730 deaths of general aviation pilots, passengers and persons in 1994, the lowest number of general aviation fatalities in the past dozen years.<sup>17</sup> Nevertheless, there is no loud public call for banning general aviation or modifying the way in which private pilots are trained or licensed.

But, as is obvious to all but scholars, purchasing decisions involve many considerations other than price. Attitudes about commodities or experience can greatly affect behavior. For some persons, fears about air travel are greater impediments than price. One can fly to many destinations within 300-400 miles in a general aviation plane much less expensively than in a commercial aircraft. Yet, most people, if offered the choice of “hitch-hiking” by private plane from their hometown to where they want to go, at bargain rates, would not do so. Sky-diving is probably affordable to most of the middle-class, but it remains a sport with very limited participation.

Communication to children about the risks of drug use (or drug dealing as Professor Kleiman reminds us) affects decision making. The leading researchers into juvenile drug use—the Institute for Social Research at the University of Michigan—believe that the primary factor affecting juvenile drug use is the perception of the danger of drug use.<sup>18</sup> Communication about risk is affected by legal status, but the persons at greatest risk for making the high-risk decision may be least influenced by legal status.

## 2. Drug Use by Children—the Potential Benefits

Professor Polsby categorically claims that “children must not use recreational drugs at all.”<sup>19</sup> At the superficial level, this is as non-controversial as asserting that children should not play with lice infected with typhus. But when the statement is made by one who is arguing for decriminalizing drugs, the statement might be seen as a reflexive defense. Since Professor Polsby is asserting that children are likely to have increased access to drugs, he must insist that this is bad. Those who object to “decriminalization” or “legalization” often assert that those who propose such approaches are indifferent to the “inevitability” of second graders injecting heroin, and fifth-graders smoking crack.

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17. National Transportation Safety Board, *Accidents, Fatalities, and Rates, 1982 through 1996, U.S. General Aviation* (visited Feb. 21, 1997) <<http://www.ntsb.gov/Aviation/Stats.htm>> .

18. University of Michigan News & Info. Servs., *supra* note 2, at 6.

19. Polsby, *supra* note 3, at 538.



Of course, Professor Polsby's otherwise non-objectionable assertion is presented with a clever twist: identify a potential benefit and discount it. Professor Polsby insists that the enjoyment children might have from drug use cannot be counted as a benefit in the same economic sense that the enjoyment that a bank robber takes in the act of robbery cannot be counted as a benefit. However, the economist does count the money obtained by the robber as a benefit.

As "cover" for taking his contrarian position, Professor Polsby probably offers this injunction with a different intention than those who state a rule such as "children shouldn't play with matches," or "children shouldn't play with guns." Those rules, of course, are about the risks to the very young and to the unsupervised children. But, in fact, many parents teach their children how to use matches and how to use firearms. Many parents would consider themselves negligent for failing to do so. There are many parents, for example, who make alcohol or tobacco available to their teenage children, in circumstances under their control because they believe that the children will better learn responsible patterns of use under their tutelage than in the context of the forbidden and unknown. In many Jewish families, the ritual use of wine by children is believed to be a cultural inoculation against alcohol abuse. Even a parent who never uses tobacco might reasonably believe that permitting a child to experiment with cigarettes separates smoking from association with being independent from the parents or with rebellion against parental rules, and thus perhaps stripping cigarette smoking as a practice from any benefit whatsoever. Very simply, Professor Polsby's assertion fails to consider the potential educational value of the experience.

A similarity might also be drawn to the parents who provide sex education to their teenagers to demystify sex with the objective that the child not engage in sex ignorantly, recklessly or dangerously. Some parents might provide their children with birth control technology or condoms to minimize the risks of sexual experimentation. This is a form of "harm reduction," a term often used in contemporary discussions of drug policy. A classic example is to provide injecting drug users with sterile injection equipment to prevent the transmission of HIV, hepatitis and other blood-borne diseases.

Probably most parents would readily agree that they do not want their children to engage in sex, to drink alcohol, to smoke cigarettes or to use drugs. But it would be a much smaller fraction that would insist that their children must not engage in sex *at all—ever*, or that their children must never drink alcohol *ever*, or that their children must never, ever try a cigarette; and that in the face of that absolute, all parents must be barred from taking any approach that permits supervised experimentation. There is no *a priori* reason to believe that parents who permit their children the opportunity to smoke marijuana at age

sixteen in order to eliminate the rebellion incentive to use it are logically incorrect.

There is data associating teenage marijuana use to high-risk behaviors or pathology. But this data, to my knowledge, does not distinguish the circumstances of the initiation to teenage marijuana use. It may be that those teenagers who experience less serious consequences in their marijuana use first used marijuana in less dangerous or less emotionally loaded circumstances, such as under parental supervision.

In the Native American Church of North America, teenagers use the peyote sacrament in worship. Peyote contains mescaline, a Schedule I controlled substance, often described as being similar to LSD. The federal regulations that permit peyote use in the Native American Church<sup>20</sup> do not bar children from use of the sacrament. I am not aware of any literature that condemns this experience. But when given the label “drug,” the dominant culture categorically enjoins the experience and asserts that, *a priori*, it is bad.

Not only is the absolute injunction against teenage drug experimentation a flawed principle when compared to teaching young people about the other risky activities in the universe, but the recent evaluation data regarding abstinence-based anti-drug programs reveals them to be counter-productive.<sup>21</sup> Children do not believe abstinence-based educational messages. When they try marijuana, for example, and find that it does not have the consequences that they have been taught, they tend to disregard the more justified warnings regarding cocaine or opiates. Indeed, when they are taught that alcohol is a drug, in a manner that is alien from the realities of American life, and witness adult alcohol consumption, they are left believing that in a matter of vital importance to them—the question of drug use—they are being lied to. Brown and his colleagues have found students becoming alienated from other educational programs as a consequence.<sup>22</sup>

Is there, perhaps, some valuable experience in “being bad,” in breaking the rules? Is there not frequently learning associated with driving a car too fast? Many teenagers at some time in their early driving career drive very fast (90 or 100 m.p.h.), notwithstanding the law and their teaching, to know what it and their car feel like, or simply to have done it. Most teenagers who do so survive

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20. See Native American Church, 21 C.F.R. § 1307.31 (1995).

21. Joel H. Brown et al., *Students and Substances: Social Power in Drug Education*, 19 EDUC. EVALUATION & ANALYSIS 65, 79-80 (1997). See also Marianne D’Emidio-Caston & Joel H. Brown, *The Other Side of the Story: Student Narratives on the California Drug, Alcohol, Tobacco Education Program*, (unpublished manuscript, on file with author).

22. See Brown et al., *supra* note 21, at 79.

and then typically drive at speeds generally accepted as “safe” (60 to 70 m.p.h.), even if they are commonly in excess of the posted speed limits. As novelist Mark Helprin has written about transgressions:

Were the world perfect it would always be wrong to trespass, but as the world is not perfect, sometimes one must. And when you do, you live, you break free, you fly. But you must do it responsibly, you must not injure the innocent. Then, at least before they catch you, it works.

I know that this is true, and the reason it is true, I believe, is that the spark of transgression comes directly from the heart of God.<sup>23</sup>

It is not, as Professor Polsby insists, “simple.”

### 3. Drug Use and The First Amendment—A Right?

Professor Polsby draws an interesting parallel between pornography and drug use. His argument is designed to make the point that even when a thing might be appropriate for adults but is an evil for children (books or motion pictures with adult content), we do not ban adults from using the material. We should not child-proof the world, he notes approvingly. He anticipates the rebuttal that this is “a First Amendment case to be sure,”<sup>24</sup> which suggests a wholly different point regarding the First Amendment.

In an important respect, drugs are like speech or they are like books—and their use should be protected by the First Amendment. The purpose of the First Amendment is to protect our ability to make up our mind. The purpose was not simply to protect the printing business—it was to protect our ability to obtain information and ideas. We have extended the protection of the Freedom of Speech and of the Press beyond the reach of the words in the amendment to include poetry, song, motion pictures, paintings, photographs, the internet, expression of all kinds, even when the expression is obtuse, obscure, or offensive. The purpose of the amendment is ultimately to protect the ability of the viewer, the listener, or the experiencer to have the ideas, thoughts, experiences, or emotions the expression might generate. The purpose is not simply to protect the maker of the sounds or images. We protect the ability of the audience members, the readers, the listeners, and the experiencers to be uplifted by music, to be enthralled by opera, to be made joyful, to be saddened, to be enraged, to empathize as a consequence of the external stimulation we

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23. MARK HELPRIN, MEMOIR FROM ANTPROOF CASE 273 (1996).

24. Polsby, *supra* note 3, at 539.

characterize now as “expression.” The purpose is to provide for whatever emotional or intellectual experience humans are capable of that can contribute to making up one’s mind. The taking of various drugs triggers the same kinds of experiences.<sup>25</sup>

In a more concrete sense, when a person reads, watches or listens, the sensory signals to the eyes or ears are converted into chemical signals that are transmitted through the central nervous system to various parts of the brain and provide stimulation of thoughts, memory and meaning. Drugs do the same thing. Drugs affect the chemical signals that are transmitted through the central nervous system. They are another form of stimulation of the mind. If constitutionally protected speech makes a person laugh, should not the person have a protected right to choose the direct chemical stimuli that they believe will make them laugh, using marijuana or nitrous oxide, for example? If a person can choose a work of philosophy to try to understand meaning and existence, is not the choice of ingesting a chemical that *may have* the same effect protected? If constitutionally protected advertising can stimulate appetite, should not the person who is the target of the advertising—often unwilling or unwitting—have the right to chose a chemical means to directly stimulate appetite?

Our law, our courts, and our society condemn censorship when forms of expression are banned, recognizing that such measures violate the First Amendment to the Constitution. We fully appreciate the outrage of the audience deprived by censorship of their right to receive information, as well as the outrage of the author at the suppression of his or her work. Rarely is the audience prosecuted. For example, those who went to hear Lenny Bruce or 2-Live Crew did not risk being arrested. However, in punishing drug users for the simple possession of drugs, we not only deprive an audience which chooses the stimulation, we persecute it.

But the analogy to censorship is much too limited. As noted above, peyote is a schedule I controlled substance which is the sacrament used in the worship of the Native American Church of North America. When people are denied the right to use these kinds of compounds under the drug laws for these kinds of purposes, these laws become indistinguishable from religious persecution.<sup>26</sup>

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25. See Thomas B. Roberts, *Academic and Religious Freedom in the Study of the Mind*, in *ENTHEOGENS AND THE FUTURE OF RELIGION* 137, 141 (Robert Forte ed., 1997); Eric E. Sterling, *The Bill of Rights: A Casualty of the War on Drugs*, *VITAL SPEECHES OF THE DAY*, Nov. 1, 1990, at 45-46.

26. Eric E. Sterling, *Law Enforcement Against Entheogens: Is it Religious Persecution?*, in *ENTHEOGENS AND THE FUTURE OF RELIGION* 165, 169 (Robert Forte ed., 1997).

Those who insist that they have the right and the power to deny other citizens the right to experiences in and of their minds—in order to protect them from “drug abuse”—are usually proud that they have never used drugs. It is as though we entrusted prosecution, judgment and sentencing in obscenity cases to those who never actually looked at the material in question.

Neuro scientists have located throughout the brain anatomical structures, called receptors, which react uniquely to various drugs, including tetrahydrocannabinol (THC), the principal active ingredient in marijuana. Researchers have found the chemical that is endogenously produced which uniquely activates that receptor, which the discoverers have named anandamide. The brain is filled with receptors that are activated uniquely by THC and its endogenously produced twin. When these receptors are activated, and they can be activated only by these chemicals, then a person has the experience of being intoxicated by marijuana. If one believes that humans have been created by God, including all of the intricate structures in our body such as the eye and the brain, then one might say, “we have been hard-wired by God to get stoned.” In essence, those who claim the power to prohibit the use of drugs such as marijuana claim the power to declare portions of the brain of other citizens to be “off limits” to them.

Of course, this asserted First Amendment right to use drugs is unrecognized. It is unrecognized in the same manner that the right of women to vote was not recognized or protected until the Nineteenth Amendment took effect in 1920. What is the scope of this right? I suggest that the right to use drugs is subject to regulation in some respects to protect the public just as the First Amendment is limited by libel law, or newspapers are regulated by antitrust law.

If we find that there seems to be much in the drug experience that is cheap or base, it is perhaps because the cheap and base is the greater share of human experience. If we examine the totality of the popular literature, popular music, or other arts, we would find that the mediocre outnumbers the outstanding. For most forms of expression, quality is extolled and promoted. If a musical composition or performance is especially pleasing, we are delighted and we recommend it. Similarly, if a poem, a prayer, a play, or a novel is well-done or inspirational, we recommend it and encourage its reproduction. A bad work of art disappears as lacking popular appeal.

However, the situation involving good and bad drug experiences is largely reversed. Bad drug experiences are well-recorded and frequently well-reported. The newspapers are quick to report drug overdoses and poisonings. The exaggeration of these experiences is deliberate. United States Senator Abraham Ribicoff, commenting at hearings on LSD in the 1960s said, “Only when you

sensationalize a subject matter do you get a reform. Without sensationalizing, you don't."<sup>27</sup> At their most catastrophic, unsuccessful drug experiences are referred to the emergency rooms of hospitals, or to morgues and medical examiners. While unsuccessful First Amendment experiences are rarely so severe, clinicians report that persons are disturbed by motion pictures they witness and from other protected speech. At another level, those writings that led to the holocaust and World War II, such as Adolf Hitler's *Mein Kampf*, are found in libraries throughout the United States.

Because a good drug experience is illegal, the role of drug use in the experience is often hidden, disregarded or discounted. How often does the discoverer, the scientist, or the inventor announce that his or her insight was aided by using LSD or marijuana? To do so would risk having the result discounted, no matter what its objective merit. Therefore, the drug experience is usually hidden. To argue that the use of a drug had a positive effect is sure to elicit the inevitable rejoinder, "what about the addicts, the crimes, the lives wasted?"

Yet in 1995, Dr. Kary Mullis, the 1993 Nobel Prize laureate in chemistry said, "I think I might have been stupid in some respects, if it weren't for my psychedelic experiences."<sup>28</sup> When an idea is expressed as the fruit of a drug experience, the idea is attacked *a priori* as inferior or ridiculous, and the speaker is attacked as "pro-drug."

Inevitably, all non-prohibition drug policy ideas are now challenged with, "what about crack cocaine?" Indisputably, crack cocaine is *viewed* as the great demonic drug of our time. The image of the most degraded drug addict is no longer associated with heroin, but with crack. It is the image of the "skeezer," a coke whore who will routinely and repeatedly perform fellatio for \$10 to buy a rock of crack.<sup>29</sup> Of course, in the public mind, the crack addict is not a person deserving pity or empathy (or the opportunity for treatment), but an object for revulsion, disgust, contempt and malevolence. Society is quite comfortable kicking a man when he is down if he is a crack addict. The public image of crack is hard-core cocaine addiction,<sup>30</sup> and all the worst social disorder associated with addiction to prohibited drugs. There is a great deal of

27. JAY STEVENS, *STORMING HEAVEN: LSD AND THE AMERICAN DREAM* 276 (1987).

28. 5 MAPS BULL., Summer 1994, at 43 (reporting a telephone conversation between Dr. Kary Mullis & Rick Doblin in the Spring of 1994).

29. See TIDWELL, *supra* note 1, at 67-71.

30. See Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 JAMA 1580, 1583 (1996).

violence in the crack markets.<sup>31</sup> But much of crack's status is the result of media exaggeration.

Given crack's bad reputation, is there a First Amendment right to use crack, *per se*? The Supreme Court has upheld prohibition of obscene speech on the ground that obscenity does not convey any ideas.<sup>32</sup> One might ask, what "ideas" does someone get from using crack? A First Amendment absolutist might say, "The use of crack is part of a right to choose the stimulation of one's central nervous system and the impressions one feels irrespective of the drug chosen or the feeling generated." One inclined to avoid being quoted making a socially outrageous claim might say, "While the right to seek and achieve such stimulation may apply to the use of entheogens or psychedelic drugs, crack use as it is actually experienced is such a different kind of drug use that it is not so protected."

#### 4. Crack Markets and Violence

In analyzing the crack cocaine retail market, it is important to note that not only is crack sold in very small batches—a few inhalations per vial—but also that the active addict buys the drug many times during the day. While a marijuana smoker might buy pot weekly or several times monthly, or a heroin user might buy heroin once or twice a day, a crack user might buy crack five times in a day. The addict is frequently running out to get more crack while on a "mission."<sup>33</sup> It is the enormous frequency of purchases that leads to the many retail markets.

Professor Polsby sweepingly states:

[T]he war on drugs *cannot plausibly be blamed for the development of the crack cocaine trade*, but more or less coincident with the arrival of crack, the budget for the war on drugs began to skyrocket, ultimately *sextupling* in a matter of only a dozen years. Obviously the

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31. Paul J. Goldstein et al., *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 CONTEMP. DRUG PROBS. 651, 652-53 (1989); Paul J. Goldstein et al., *Volume of Cocaine Use and Violence: A Comparison Between Men and Women*, 21 J. DRUG ISSUES 345-67 (1991).

32. See *Miller v. California*, 413 U.S. 15, 34-36 (1973); *Roth v. United States*, 354 U.S. 476, 484-85 (1957).

33. A "mission" is a "trip out of the crackhouse to obtain crack; a visual mission is to look for possible sale locations or for a person from whom crack-cocaine or freebase can be acquired (term from *Star Trek*)." TERRY WILLIAMS, *CRACKHOUSE: NOTES FROM THE END OF THE LINE* 150 (1992).

war on drugs must have *created*, even if transiently, a *window of economic opportunity for young men willing to put up with the rapidly increasing risks, legal and illegal, of drug dealing*.<sup>34</sup>

Several points need to be made about this position. First, to some extent the crack phenomenon was a marketplace response to the opportunities created by the anti-marijuana programs of the war on drugs in the early 1980s. The Reagan Administration's earliest anti-drug initiatives to blockade the maritime export of marijuana from Colombia were successful in disrupting the supply. Marijuana was bulky and pungent, and thus fishing boats, yachts, merchant freighters, or other vessels concealing marijuana were relatively easy to stop and search. The 1982 Department of Defense Authorization Act, which had the effect of modifying the applicability of the Posse Comitatus Act,<sup>35</sup> enabled the United States Navy to assist the Coast Guard and the Customs Service in maritime drug interdiction operations. The use of military aircraft to scan maritime traffic in the Caribbean and the Gulf of Mexico was authorized. Vice-President George Bush was appointed to direct a South Florida Task Force to coordinate the use of military and law enforcement interdiction assets. This initiative was a powerful incentive for Colombian drug exporters to shift their exporting from bulky marijuana shipments via a highly vulnerable maritime traffic to compact powder cocaine shipments via rapid, harder-to-detect aircraft to destinations in Florida or elsewhere in the Southeastern United States. The drug market violence in South Florida in the early 1980s was a conflict for control between the traditional Cuban managers of the cocaine trade and the ambitious Colombian interlopers. The initial war on drugs measures of the Reagan Administration had the consequence of favoring cocaine exports over marijuana exports.

Culturally, the values of the Reagan Administration were much more consistent with cocaine use than with marijuana use. Marijuana use had been associated with the pacifist, laid-back, non-materialistic values of the youth culture of the late 1960s and 1970s. Cocaine was different. An effect of the use of cocaine is a feeling of aggressiveness, feeling sharp, feeling like one is *numero uno*. The Reagan Administration, inaugurated in 1981 with an armada of limousines, ushered in a reinvigorated cultural value of profit-making, of economic growth, of appreciation of, if not worship of, competition. The pumped-up feeling one gets when using cocaine is harmonious with that self-image. The Reagan years rang out "America is number one," and individuals who wanted to follow suit wanted to feel like they were "number one." The new cultural paradigm of the Reagan years was a renewed encouragement to

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34. Polsby, *supra* note 3, at 540-41 (emphasis added).

35. 18 U.S.C. § 1385 (1994).



achieve the status of number one—the biggest real estate developer, the highest volume broker, the most successful litigator, or the richest doctor. Whether one was a professional athlete or a salesman, cocaine was a shortcut to feeling invincible. And many people believed that if one felt he or she was invincible, such a belief was half of what was necessary to achieve such success. The first half of the 1980s were a time for which cocaine was the perfect drug.

Simultaneously, the program to eradicate marijuana cultivation in California and elsewhere in the United States was successful in curbing large-scale marijuana cultivation. The growers' response was to plant fewer plants but to grow them more carefully and to produce a higher value yield. This resulted in the development of plant breeding, and *sinsemilla* marijuana, female marijuana plants grown so that they are not fertilized and do not develop seeds. *Sinsemilla* is more potent than marijuana plants grown in fields where the males are permitted to mature and fertilize the females. Coupled with the scarcity of Colombian marijuana, the high quality domestically grown marijuana could be sold for much higher prices than in the late 1970s. Street markets that once sold marijuana in "nickel" and "dime" bags disappeared. By the mid-1980s, the drug-using ethos in the middle class had become passe, and anti-drug and drug-free attitudes were ascending. Drug testing in the workplace had become commonplace. First lady Nancy Reagan had made juvenile and teenage drug use prevention her major public issue. Cocaine consumption by the rich was beginning to diminish. The market need for new outlets was matched by the market opportunities now opened to sell inexpensive units of drugs. Cocaine imports, notwithstanding the control measures, were coming into the country in ever increasing quantities, and cocaine's availability was growing in more and more communities.

For many years, cocaine aficionados knew that cocaine could be "smoked" in the form of freebase. Preparing powder cocaine with baking soda and water and cooking the mixture yielded freebase without the risk of fire or explosion, such as that which seriously burned comedian Richard Pryor. Crack filled a market niche that was in many respects created by the war on drugs.

The war on drugs also created new opportunities for the youth to enter the crack business. The enactment of mandatory minimum sentences in the Anti-Drug Abuse Act of 1986,<sup>36</sup> triggered by the distribution of at least five grams of crack cocaine,<sup>37</sup> or at least fifty grams,<sup>38</sup> set the stage to substitute underage workers for adults in the drug market. The Anti-Drug Abuse Act of

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36. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1987).

37. Five year mandatory minimum. Anti-Drug Abuse Act of 1986 §1002, 21 U.S.C. § 841(b)(1)(B) (1994).

38. Ten year mandatory minimum. 21 U.S.C. § 841(b)(1)(A).

1988 applied the mandatory minimum sentences to attempts to distribute and to all members of conspiracies that distributed at least five grams or fifty grams.<sup>39</sup> The potential incarceration costs for adults to take low level jobs in the crack distribution organizations were too high for many to continue, but these costs were not applied to youths not subject to adult-level sentencing, even though there were now special new penalties for employing minors in the trafficking in drugs.<sup>40</sup>

Alfred Blumstein saw 1985 as the watershed year for crime and violence among the young because of the onset of crack cocaine. Cocaine powder was usually sold in quantities of multiple doses, whereas crack was much more often purchased one dose at a time. This led to a dramatic increase in the number of transactions, which required many more sellers, which helped lead to the recruitment of kids as sellers. Kids have little sense of risk, or concern about arrest or imprisonment. In the drug market the dealers have to carry guns to protect themselves from being robbed, and so the kids recruited also carried guns.

Kids are highly networked compared to adults. They are extremely concentrated, going to the same schools, belonging to the same kinds of clubs, and hanging out on the same streets (in contrast to adults who are much more mobile and diverse). The practice of carrying guns for protection or for status rapidly diffused among the non-drug selling kids. Guns in the 1990s are what sneakers were in the 1980s—accessories for fashion and status. Kids have always fought with each other. But now, as a consequence of the rise of the crack market, guns have replaced fists.<sup>41</sup> Children are now offered drugs, and are now enticed into selling drugs. A reform of drug policies that goes beyond simply changes in statutes may protect more children from more serious drug use or death in drug trade violence.

*B. Comments on Reducing the Prevalence of Cocaine and Heroin Dealing  
Among Adolescents by Mark A.R. Kleiman*

Professor Kleiman's paper is a sophisticated analysis that helps break up the paradigms that limit drug policy discussion such as "enforcement equals supply

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39. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470, 102 Stat. 4377 (codified at 21 U.S.C. §§ 846, 963 (1994)).

40. See Pub. L. No. 100-690, § 6454, 102 Stat. 4372 (1986) (directing the Sentencing Commission to set certain penalties). See also Juvenile Drug Trafficking Act of 1986, Pub. L. No. 99-570, § 1102, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 861 (1994)).

41. Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995); Eric E. Sterling, *Anti-Crime Strategies for the 1990s: A Report on the Campaign for an Effective Crime Policy Conference*, NEWSBRIEFS, Dec. 1994, at 10.

reduction,” and “treatment and prevention equal demand reduction.” Professor Kleiman draws an important, subtle distinction in police anti-drug activity. Unfocused “street sweeps” that have been notably unsuccessful in Washington, D.C., for example, are contrasted with “market disruption” enforcement that has a marketplace objective of minimizing the number of completed drug transactions. Professor Kleiman also draws distinctions between different types of drug buyers and recognizes that society is better rewarded when the ability of highly committed drug users to buy drugs is disrupted.

Professor Kleiman asks intriguingly, “Why will drug dealers hire people that McDonald’s would not touch, often trusting them with cash or valuable drug inventories?”<sup>42</sup> His answer focuses on the consequence of current laws and enforcement practices, but one should consider the sociological analysis of Philippe Bourgois.<sup>43</sup> Bourgois’ in-depth interviews with his neighbors on a block in New York’s East Harlem demonstrates that the crack dealers, as boys, were very hard workers. They did errands, carried bags and hustled for legitimate income. But when they sought full-time employment as adults, the employment they could obtain was often in profound cultural conflict with the street culture in which they had shaped their values and identity:

Workers like Caesar and Primo appear inarticulate to their professional supervisors when they try to imitate the language of power in the [white collar] workplace . . . . They cannot decipher the hastily scribbled instructions—rife with mysterious abbreviations—that are left for them by harried office managers on diminutive Post-its. The “common sense” of white-collar work is foreign to them; they do not, for example, understand the logic in filing triplicate copies of memos or for postdating invoices. When they attempt to improvise or show initiative, they fail miserably and instead appear inefficient—or even hostile—for failing to follow “clearly specified” instructions.

Their interpersonal social skills are even more inadequate than their limited professional capacities. They do not know how to look at their fellow service workers—let alone their supervisors—without intimidating them. They cannot walk down the hallway to the water fountain without unconsciously swaying their shoulders aggressively as if patrolling their home turf. Gender barriers are an even more culturally charged realm. They are repeatedly reprimanded for offending co-workers with sexually aggressive behavior.

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42. Mark A.R. Kleiman, *Reducing the Prevalence of Cocaine and Heroin Dealing Among Adolescents*, 31 VAL. U. L. REV. 551, 556 (1997).

43. PHILIPPE BOURGOIS, IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO (1996).

The cultural clash between white “yuppie” power and inner-city “scrambling jive” in the service sector is much more than superficial style. Service workers who are incapable of obeying the rules of interpersonal interaction dictated by professional office culture will never be upwardly mobile. In the high-rise office buildings of midtown Manhattan or Wall Street, newly employed inner-city high school dropouts suddenly realize they look like idiotic buffoons to the men and women for whom they work. This book’s argument—as conveyed in its title—is that people like Primo and Caesar have not passively accepted their structural victimization. On the contrary, by embroiling themselves in the underground economy and proudly embracing street culture, they are seeking an alternative to their social marginalization. In the process, on a daily level, they become the actual agents administering their own destruction and their community’s suffering.<sup>44</sup>

Bourgeois tells of a thirteen-year-old boy who wants to grow up to be a cop, but as the years pass he becomes steadily entangled in the drug business as a runner and errand boy.<sup>45</sup> The future of the children in *El Barrio* is profoundly limited. Angel and Manny, ten and eight years old, are “my two favorite shiny-eyed street friends.”<sup>46</sup> After their mother became a crack addict, Bourgeois happened to find them at home in the dark (electricity bill unpaid) “scraping peanut butter out of an empty jar,” their mother passed out from her last crack binge.<sup>47</sup> Several years later, Angel was earning \$100 per night selling crack, until he was placed on five years probation for shooting at a cabdriver in a bungled hold-up. Now he’s cleaning a restaurant downtown—off the books. He still lives with his mother whose crack-selling boyfriend stores crack in the apartment. Angel’s girlfriend moved in with him and their baby.<sup>48</sup> The challenge that Professor Kleiman poses for reducing the role of juveniles in drug markets requires much more sophisticated economic and social changes than getting prosecutors to agree to abandon mandatory minimum sentencing tools.

Professor Kleiman is correct in identifying the social dimensions to the alternatives to drug dealing, but perhaps he is somewhere between realistically and excessively cautious in noting that “it seems implausible that anything we are likely to do with respect to youth employment will have a major impact on dealing.”<sup>49</sup> The creation of meaningful youth employment may have important

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44. *Id.* at 142-43.

45. *Id.* at 265-66.

46. *Id.* at 263.

47. *Id.*

48. *Id.* at 335.

49. Kleiman, *supra* note 42, at 558.

indirect effects on dealing that are not easily visualized through the drug policy lens because their primary impact is upon status and gender relationships.

He makes a very important point regarding all anti-drug persuasion programs: the messages that are developed are designed first to appeal to adult anti-drug leaders and the political constituencies to which they respond, and the likelihood that the anti-drug messages will resonate with the adolescents to whom they are ostensibly directed is in the realm of the accidental.<sup>50</sup> Professor Kleiman is on the right track in trying to identify what features of the drug dealing life attract young men. He is correct that in many instances the actual salary realized from drug dealing is not great, notwithstanding the mythology of riches.<sup>51</sup> Many young men in the barrios and ghettos probably recognize that fact—but it is a job that pays an off-the-books salary, and has other important benefits such as ready access to drugs and girls. His persuasion campaign would probably benefit by highlighting the features of the work that are repellent.<sup>52</sup>

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50. See Joel H. Brown & Marianne D'Emidio Caston, *On Becoming "At Risk" Through Drug Education: How Symbolic Policies and Their Practices Affect Students*, 19 EVALUATION REV. 451 (1995). The authors posit:

[B]y implementing mass-application services, [school] district personnel can say they have complied with DATE [Drug, Alcohol and Tobacco Education] service delivery requirements. This study supports other recent evidence showing that formative policy language provides the symbolic rationale for mass delivery of ineffective services like those found in DATE . . . it is difficult to escape the conclusion that use of the risk-based model of substance use and abuse does not appear to help these students [who individually need help].

*Id.* at 481.

51. Bourgeois makes this point clear:

Street dealers tend to brag to outsiders and to themselves about how much money they make each night. In fact their income is almost never as consistently high as they report it to be. Most street dealers, like Primo, are paid on a piece-rate commission basis. In other words, their take-home pay is a function of how much they sell. When converted into an hourly wage, this is often a relatively paltry sum. According to my calculations, Ray's workers, for example, averaged slightly less than double the minimum wage—between seven and eight dollars an hour. . . . It took me several years to realize how inconsistent and meager crack income can be.

BOURGOIS, *supra* note 43, at 91-93. The author reported that Primo earned \$40 for a long night's work. *Id.*

52. Bourgeois also speaks to this point:

. . . [w]orking conditions are also often inferior to those found in the legal economy. Aside from the obvious dangers of being shot, or of going to prison, the physical work space of most crackhouses is usually unpleasant. The infrastructure of the Game Room [the principal crackhouse in which Bourgeois did his research], for example, was much worse than that of any legal retail outfits in East Harlem: There was no bathroom, no running water, no telephone, no heat in the winter and no air-conditioning in the summer. . . . Indeed, the only furnishings besides the video games were a few grimy milk crates and bent aluminum stools. Worse yet, a smell of urine and vomit usually permeated the locale.

C. "Persuasion" or "Punishment"

Unfortunately, I suspect that many of the "professional persuaders" in our society do not see much future for persuasion. In October, 1996, I debated the school board president of one of the nation's largest school districts on *The Diane Rehm Show* on National Public Radio, regarding "zero tolerance" drug policies in the schools. The issue was the appropriateness of a four-month suspension of an eighth grade student, Kimberly Smartt, from Baker Junior High School in Fairborn, Ohio. Smartt had been ordered expelled from September to February for taking two *Midol* tablets from the school nurse and giving one to a classmate.<sup>53</sup> The classmate was suspended for ten days and ordered to undergo a psychiatric evaluation.<sup>54</sup> The penalties were later reduced. I suggested that expulsion and suspension were excessive penalties for these offenses and, since the students were honor students, simply explaining to the students what they did wrong would be sufficient to correct the problem, but the school board president protested that that would be totally inadequate. They do not listen, she explained, they only understand punishment. I thought she was describing a primitive way of training donkeys, not educating the children we are raising to lead America into the Twenty-First Century. Persuasion is no longer conducted "retail" in the United States, except in the courtroom perhaps, or in one-on-one sales. Most persuasion today is in mass advertising or manipulation, or by virtue of the threat of extreme sanctions adopted by the school board president and school principals.

Whether addressing children in *El Barrio* or honor students, our society is caught in the middle between not doing enough or doing too much. The real conditions get ignored for the children in *El Barrio* and the honor students get suspended because punishment has become the prevailing educational paradigm, not respect for students or their capacity to reason.

### III. URBAN REDEVELOPMENT VENTURES AND THE HANDICAP OF DRUG PROHIBITION

The neighborhoods of hourly gunfire are the ones with the highest unemployment, the most rundown housing, the most abandoned businesses and

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*Id.* at 93-94.

53. *Girl's Expulsion for Legal Drug Is Reduced*, WASH. POST, Oct. 8, 1996, at A4.

54. James Hannah, *School Cuts Term of Suspension on Same Day It Is Named in Bias Suit*, WASH. POST, Oct. 9, 1996, at A3; *Teen Barred for Legal Pills*, WASH. POST, Oct. 3, 1996, at A18. At about the same time, another case near Houston, Texas involved the suspension of a junior high school honor student, Brooke Olson, for inadvertently carrying the over-the-counter pain medication, *Advil*, in her backpack. The school principal, Steve Busch, said that *Advil* was "just the tip of a potentially lethal drug iceberg." *Student Suspended for Carrying Advil; Girl Says Punishment 'Too Severe'*; *Texas School Defends Policy*, WASH. POST, Oct. 10, 1996, at A13.

empty factories and workplaces.<sup>55</sup> These are the precincts with the highest rates of teenage pregnancy and infant mortality. These are the communities with the rundown schools and the high rates of truancy and dropping out. The great challenge of American domestic policy for over thirty years—since the days of the war on poverty—has been to restore the vitality of our cities. But those policy initiatives, by and large, have utterly failed.<sup>56</sup>

One must wonder why our cities have been so resistant to restoration. With a largely intact infrastructure of utilities and transportation, and with neighborhoods inhabited by an eager and educable workforce close to markets, there do not seem to be obvious economic obstacles to revitalizing our urban industrial and commercial centers. With initiatives for public-private partnerships, and with substantial public investment, we must ask why our cities are resistant to rebirth. One answer may be that those who would manage such ventures, and those who would make such investments, see the ever-present threat of violence and crime. Why should a businessperson choose to locate his or her business where—of all possible locations—there is a real daily risk of being mugged on the way to lunch or in the parking lot? Indeed, of the most highly trained, competent or inspired teachers, how many choose to risk orphaning their own children by teaching in neighborhoods where violence is almost inescapable? Which developers would bring new housing to blocks where theft from the construction site is a nightly occurrence? Ultimately, the greatest bar to the numerous individual acts that create real urban development—in contrast to large scale public expenditures—is the real and perceived threat of crime and violence which are the consequence of drug prohibition. While the number of actual killings are very low for teachers or the few investors in the inner cities, the fear is real and the danger of robbery is great.

In thinking about urban violence, it is commonplace to associate that violence with drugs. Indeed, politicians and pollsters typically use a unitary term, “crime and drugs.” The police, of course, will tell you that where drugs are sold there is the increased likelihood of violence. Drug dealers carry guns

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55. Steve Lopez, *As Bullets Whiz By, A Priest Stands Up in a Parish No Stranger to Violence*, PHIL. INQUIRER, Nov. 17, 1996, at A3 (“On Thursday, the bullets flew once, then stopped, then flew again. You duck, you say thanks, and you go about your day. . . . Without better schools and more jobs, the neighborhoods, and the cities, are doomed.”); Heidi Van Zant, *Gunshot Detectors May Stay*, SAN JOSE MERCURY NEWS, Dec. 18, 1996 at 1B (“[T]here is anecdotal evidence that the number of random gun firings has dropped since the sensors were installed.”).

56. See BOURGOIS, *supra* note 43, at 57-74; Larry Bivins, *The Killing and Stuff Can Be Right Beside You*, DET. FREE PRESS, Dec. 27, 1992, at 6G (“The neighborhood [in Washington, D.C.] of renovated row houses and restored mansions . . . has seen 15 homicides since January. [Residents are frustrated at the failure of the police] to take back their middle-class neighborhood from the drug dealers who hawk their goods openly.”).

and have body guards because they carry or have access to prodigious sums of cash or valuable drugs. Until we end the violence in poor neighborhoods, it will be impossible to substantially rebuild the housing, to invest in the businesses that will create employment, or to substantially improve our schools.

Our national murder rate is dropping right now. Nationally, between 1991 and 1995, the murder rate fell by 16.3%.<sup>57</sup> Police chiefs are taking credit for having adopted new strategies. Some federal officials point to the expansion of police forces under the 1994 Crime Bill. Other officials point to expanded prison population and claim that we are locking up our way to safety. Yet, in over seventy-five of the nation's metropolitan areas, the homicide rate has increased between 1991 and 1995.<sup>58</sup> Nowhere does anyone dare claim that the violence of the drug trade has been reduced to insignificance. Indeed, following the current strategies in which there is the greatest investment—prison construction and operation, and drug enforcement—violence is unlikely to be significantly reduced. In fact, 1996 witnessed repeated warnings that a new wave of violence, fueled by the growth in the teenage population over the coming decade, will unleash hundreds of thousands of new “super-predator” violent criminals. Is there a strategy that can substantially address the factors that drive much of the urban violence?

While many drug dealers are immoral if not outright evil people, their use of violence is ultimately practical, and indeed they feel it is necessary.<sup>59</sup> There are three fundamental facts that must be understood in this regard. First, the illegal drug trade is a business—a business that engages in between \$45 billion

57. KATHLEEN O'LEARY MORGAN ET AL., *CITY CRIME RANKINGS: CRIME IN METROPOLITAN AMERICA* 60 tbl.12 (1995).

58. *Id.* The murder rate increased by more than 100% in Oklahoma City, Okla.; Eugene-Springfield, Or.; Spokane, Wash.; Lafayette, Ind.; Boise, Idaho. *Id.* at 60. It increased by more than 50% in Trenton, N.J.; Tucson, Ariz.; Green Bay, Wis.; and Minneapolis-St. Paul, Minn. *Id.* It increased by more than 15% in Boulder-Longmont, Colo.; Naples, Fla.; Charlottesville, Va.; Phoenix-Mesa, Ariz.; Honolulu, Haw.; Binghamton, N.Y.; Madison, Wis.; Salt Lake City-Ogden, Utah; Lansing-East Lansing, Mich. *Id.* In Baltimore, Md., the murder rate increased by 6.7%. *Id.*

59. WILLIAM M. ADLER, *LAND OF OPPORTUNITY: ONE FAMILY'S QUEST FOR THE AMERICAN DREAM IN THE AGE OF CRACK* 318 (1995). The author stated:

The final secret of their success [the Chambers brothers crack cocaine organization] was discipline . . . it was necessary to come up with rules. . . . Well, the rules are empty unless there is a way to enforce those rules. . . . The Chambers brothers had what is called a wrecking crew or beat-up crew. The purpose . . . was to beat up or wreck people who worked for the Chambers or people who competed with the Chambers.

*Id.* at 318-19.



and \$50 billion in commerce in the United States every year.<sup>60</sup> This business is in the same league as the largest markets in America. In 1994, the total retail sale of furniture and home furnishings was \$119 billion; gasoline service stations revenues were \$142 billion, clothing and apparel sales amounted to \$110 billion.<sup>61</sup> These revenues are comparable to the largest corporations in America. In 1995, the Chrysler Corporation's revenues were \$53 billion (ninth largest corporation's revenues in the United States), Philip Morris—\$53 billion, Prudential Insurance—\$41 billion, State Farm Group—\$41 billion, Du Pont—\$38 billion, Texaco—\$37 billion, Sears Roebuck—\$35 billion.<sup>62</sup> The second fact is that illegal drugs are extremely valuable. For example, in 1996, gold was selling for \$400 per ounce. By March 1997, it was selling for \$350 per ounce. In 1993, marijuana was retailing for \$341.70 per ounce.<sup>63</sup> In 1993, cocaine was retailed in a range between \$20 and \$151 per pure gram or between \$3402 and \$4280 per ounce.<sup>64</sup> At wholesale, an ounce of cocaine sold in the range of \$1200. That is, cocaine is between three times and ten times more valuable than gold on an ounce for ounce basis. And third, crack cocaine users make many purchases during the course of a day—perhaps a half-dozen—compared to purchasers of heroin (once or twice a day), or marijuana (once a week, or even less frequently).<sup>65</sup> Crack cocaine, with its many daily transactions requires a much larger retail sales force than other drugs.

Every business in America has conflict. Car buyers get stuck with lemons. Hollywood actors decide not to go ahead with a movie deal. Computer makers sue others for violating the antitrust laws that regulate competition. Customers do not pay what they owe to sellers. Sellers sell defective goods. In every one of these cases, there is a well understood body of law that governs how business is to be done, conventions about the common language of the business, and the courts are open to all market participants to nonviolently resolve conflict. This situation is true for every business in America but the illegal drug business. If I contract to obtain a mortgage to buy a house and agree to pay three points, everyone understands that we are talking about 3% of the amount of the loan. If my mechanic charges me for replacing six points in my car, we understand that he is referring to automobile parts. If I am unsure about a transaction, I have an obligation to find out what the terms of the deal are.

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60. OFFICE OF NATIONAL DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, WHAT AMERICA'S USERS SPEND ON ILLEGAL DRUGS, 1988-1993, at 3 (1995) ("In 1993, Americans spent \$49 billion on these drugs: \$31 billion on cocaine, \$7 billion on heroin, \$9 billion on marijuana, and \$2 billion on other illegal drugs and legal drugs used illicitly. . . . Between 1988 and 1993, the expenditures on cocaine and heroin appear to have fallen.").

61. U.S. DEP'T OF COMMERCE, INFORMATION PLEASE ALMANAC 59 (1997).

62. *Id.* at 60.

63. OFFICE OF NATIONAL DRUG CONTROL POLICY, *supra* note 59, at 20.

64. *Id.* at 18.

65. *Id.* at A-24; WILLIAMS, *supra* note 33, at 63-70.

But the drug business operates under severe handicaps. First, there are limitations in the clarity of the terms of transactions. Since the transactions are illegal, conversations about them—in person, in writing, or over the telephone—are evidence that can be used to prosecute the parties. Thus, drug dealers try to minimize their conversations, and to communicate as indirectly as possible. The parties speak vaguely or in code attempting to make any conversation less incriminating. Such conversations increase the likelihood of misunderstanding. Misunderstandings in legitimate business can be resolved by arbitration or a lawsuit. Misunderstandings in the drug business cannot be resolved in court. A drug dealer cannot sue a customer to collect on a debt. A drug buyer cannot sue for breach of contract if the cocaine is not delivered on time, or has been “cut” to lower than expected purity. The only way that these conflicts are resolved is through violence or the threat of violence. A study of homicides in New York City in the late 1980s by epidemiologist Paul Goldstein and his colleagues found that of the drug-related homicides, they were overwhelmingly in connection with the drug trade, not the result of someone getting high on drugs (except for those high on alcohol), nor the result of someone killing to get the money to buy drugs.<sup>66</sup>

The second salient fact is the enormous value of the illegal drugs. By comparison, gold is kept in Fort Knox, in bank vaults, or highly secured jewelry stores. Gold is surrounded by guards, and by security systems. If someone robs a jewelry store, there are automatic alarm systems, video cameras, and armed guards. The police will be immediately summoned and respond almost instantly. Insurance investigators will soon follow, and their investigative powers are not limited by the Bill of Rights. If one should rob a retail store, one would get away with lots of checks and credit card receipts which are almost impossible to liquidate. One would not rob a car dealership, because almost no one buys a car with cash. But why rob gold jewelry if you can rob cocaine worth three to ten times as much?

Drugs are almost always paid for in cash at the retail level.<sup>67</sup> The drug spot does not take checks with two pieces of identification, and they do not accept American Express (unless you actually leave your card). The drug sellers have a product that is worth three to ten times the price of gold or cash receipts for selling such valuable merchandise—thus they are a prime target for robbers. Drug sellers, like all cash businesses, need protection from robbery. But they cannot hire licensed security guards from the Pinkerton Agency,

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66. Goldstein, *supra* note 31, at 662. “The majority (n=162) of the drug-related homicides [n=218], about 74%, were classified as systemic.” *Id.*

67. Drug dealers in Baltimore are accepting payment in ground beef, steaks or other meats in exchange for drugs. Joe Mathews, “Need a Fix? Bring Some Hamburger,” *BALT. SUN*, Sept. 22, 1996, at 10A.

Wackenhut, or off-duty police officers. Drug dealers have to hire their own security. What are the best employment qualifications to be a guard at a crack market? A proven willingness to shoot people. Talk is cheap. An applicant may claim that he is willing to shoot at a robber, but the best deterrent to robbery is to have guards who have a street reputation as shooters—preferably killers. One of the largest businesses in America has the need to routinely hire killers. And people are looking for the work. When an underling in the Chambers brothers crack cocaine organization stole \$50,000 from the organization, numerous people sought the head of the organization, Larry Chambers, asking for the “contract” to kill the thief.<sup>68</sup>

The large number of transactions in the crack trade means a large sales force which means lots of young men carrying guns. Acclaimed criminologist Alfred Blumstein has explained the dramatic rise in teen violence to the spread of crack cocaine in the late 1980s. As the number of kids carrying guns increases, other kids carry guns strictly for self-defense, and still other kids start to carry guns as a perverse kind of fashion statement. Teenagers have always fought. Now, however, instead of fighting with fists, knives, or zip guns, they fight with the tools of the drug trade—assault weapons, semi-automatic handguns and sawed-off shotguns.

#### IV. ISSUES AND CONFLICT IN THE MEDICAL MARIJUANA DEBATE

Marijuana has been used in medicine for over 5000 years. Between 1840 and 1900, European and American medical journals published more than 100 articles on the therapeutic uses of marijuana. One of world’s most famous physicians, Sir William Osler, recommended marijuana as the most satisfactory remedy for migraine in 1913. During the twentieth century, however, marijuana’s medical use fell from fashion, and after the passage of the Marihuana Tax Act of 1937, its use in medicine became legally complex and rare.<sup>69</sup>

Marijuana was placed on Schedule I of the schedules of the Controlled Substances Act of 1970 by Congress. The Controlled Substances Act establishes a procedure for moving drugs from one schedule to another by petition to the Attorney General by any party,<sup>70</sup> and in May 1972 the National Organization for the Reform of Marijuana Laws (NORML) filed such a petition to reschedule

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68. ADLER, *supra* note 58, at 282 (“Larry cared for neither the brazen theft nor the showy way Poole spent the money. Larry: ‘My beeper was steady jumpin’ three zeroes’—the code for ‘smoking’ Poole. ‘Guys were *begging* me: ‘Lemme smoke him.’”).

69. Lester Grinspoon & James B. Bakalar, *Marihuana As Medicine: A Plea for Reconsideration*, 273 JAMA 1875 (1995).

70. 21 U.S.C. § 811(a) (1994).

marijuana so that it could be used in medicine. The Drug Enforcement Administration (DEA), delegated the authority by the Attorney General to rule on such petitions, declined to act for many years. The history of the agency's obstruction and lack of good faith in complying with the statutory requirement for a hearing, and in failing to comply with court orders directing it to hold such hearings is a shocking instance of bureaucratic indifference to the rule of law. It is also important background to the reaction of the federal government to the actions of the California and Arizona voters on November 5, 1996.

*A. The DEA's Obstruction of the Hearing Process and Disregard of the Orders of the U.S. Court of Appeals for the District of Columbia Circuit*

In 1974, the U.S. Court of Appeals for the District of Columbia Circuit ordered the DEA to act, and to separately consider each category of marijuana constituents identified by NORML.<sup>71</sup> Twenty months later the DEA published an order in the Federal Register denying the petition "in all aspects," even though the DEA acknowledged that all of the marijuana components covered by the NORML petition could be rescheduled from Schedule I consistent with United States treaty obligations.<sup>72</sup> Ruling in NORML's appeal, the District of Columbia Circuit was critical of the DEA's failure to obtain the scientific and medical evaluation by the Department of Health, Education, and Welfare (DHEW) of the NORML petition required by the Controlled Substances Act.<sup>73</sup> The NORML petition was referred to the DHEW Controlled Substances Advisory Committee which considered the petition in March 1978 and recommended that two marijuana components be rescheduled from Schedule I. But no formal action was taken on the committee recommendation. On March 28, 1979, NORML filed suit in the U.S. District Court for the District of Columbia against the Department of Health, Education, and Welfare, but the DHEW quickly acted and a joint stipulation of dismissal was accepted by the court on June 21, 1979. The DHEW had concluded that all the marijuana components covered by the NORML petition could be classified in Schedule I or Schedule II, but recommended that they be retained in Schedule I.<sup>74</sup> Ten days after receiving the DHEW evaluation, the DEA denied NORML's petition again.<sup>75</sup> NORML again appealed. On October 16, 1980, the U.S. Court of Appeals issued its third decision remanding the matter, ordering that the NORML petition be reconsidered "in its entirety" and ordering the Department of Health and Human Services (HHS) to make "scientific and medical findings"

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71. NORML v. Ingersoll, 497 F.2d 654, 660-61 (D.C. Cir. 1974).

72. 40 Fed. Reg. 44,164, 44,167-68 (1975).

73. NORML v. DEA, 559 F.2d 735, 747-48 (D.C. Cir. 1977); 21 U.S.C. § 811 (a)-(c) (1995).

74. 44 Fed. Reg. 36,127 (1979).

75. 44 Fed. Reg. 36,123 (1979).

on "all substances at issue . . . consistent with this order and prior orders of this Court."<sup>76</sup> The Court also reprimanded the agency respondents.

The agencies took no action. On June 22, 1981, NORML filed a petition to compel compliance with the previous orders of the court. The agencies claimed they were taking action, and three days later filed a New Drug Application for synthetic THC. The Food and Drug Administration (FDA) responded to the court that it planned a "legislative-type hearing" concerning natural marijuana. Nine months later (and seventeen months after the last court order) an FDA spokesperson told NORML's attorneys that he had no idea of the timing of a proposed rule. In March 1982, the FDA published a proposed recommendation regarding THC.<sup>77</sup> The FDA insisted that THC remain in Schedule I until a New Drug Application (NDA) was approved. However, the Court of Appeals in 1977 had ruled that the NDA was not necessary to precede the rescheduling matter.<sup>78</sup> This was another stalling tactic. In April 1982, NORML filed another petition to compel compliance. The Court of Appeals then ordered the DEA and the HHS to submit a report to the court every ninety days on the progress of the NORML petition.<sup>79</sup> In May 1983, HHS recommended to DEA that natural marijuana remain in Schedule I. On April 1, 1986, the DEA Administrator sent a letter to DEA Administrative Law Judge Francis L. Young to conduct hearings on marijuana's rescheduling. This letter resulted from NORML's threat to request hearings on DEA's plans to reschedule synthetic THC. The hearings on natural marijuana were announced in the Federal Register.<sup>80</sup>

Prehearing conferences with the filing of written testimony took place on August 21, 1986, December 5, 1986, February 20, 1987, and October 16, 1987. Hearings for the purpose of cross-examination were held in New Orleans on November 18 and 19, 1987, in San Francisco on December 8 and 9, 1987, and in Washington on January 5, 6, 7, 26, 27, 28, and 29, and February 2, 4, and 5, 1988. Oral arguments were held on June 10, 1988 in Washington.

The government had insisted that the testimony of patients as to the efficacy of marijuana was not relevant. DEA's attorney Charlotte Mapes insisted that there was nothing "in the legislative history, in the Statute, in any

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76. *NORML v. DEA*, No. 79-1660 (D.C. Cir. 1980).

77. 47 Fed. Reg. 10,080 (1982).

78. *NORML v. DEA*, 559 F.2d 735, 750 n.65 (D.C. Cir. 1977).

79. *NORML v. DEA*, No. 79-1660 (D.C. Cir. 1982).

80. 51 Fed. Reg. 22,946 (1986).

of the background that would support acceptance by the public as determining medical use. . . . It is not the patients that determine the drugs that they are going to take. It is not the patients that practice medicine."<sup>81</sup>

On September 6, 1988, Judge Young ruled. The ultimate issue was whether the drug "has a currently accepted medical use in treatment in the United States."<sup>82</sup> The record demonstrated scores of published studies establishing that marijuana had medical efficacy. It included the testimony of many doctors and patients. Judge Young ruled that:

The overwhelming preponderance of the evidence in this record establishes that marijuana has a currently accepted medical use in treatment in the United States for nausea and vomiting resulting from chemotherapy treatments in some cancer patients. To conclude otherwise, on this record, would be unreasonable, arbitrary and capricious.<sup>83</sup>

The preponderance of the evidence here . . . does not establish that a respectable minority of physicians has accepted marijuana for glaucoma treatment.<sup>84</sup>

[T]he administrative law judge concludes that, within the meaning of the Act, 21 U.S.C. 812(b)(2)(B), marijuana "has a currently accepted medical use in treatment in the United States" for spasticity resulting from MS and other causes. It would be unreasonable, arbitrary and capricious to find otherwise. The facts . . . uncontroverted by the Agency, establish beyond question that some doctors in the United States accept marijuana as helpful in such treatment for some patients. . . . Nothing more can reasonably be required. That some doctors would have more studies and test results in hand before accepting marijuana's usefulness here is irrelevant.

[H]yperparathyroidism [sic] from which Irvin Rosenfeld suffers<sup>85</sup> . . . is so rare, and so few physicians appear to be familiar with it, that acceptance by one doctor of marijuana as being useful in treating

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81. *In the Matter of Marijuana Rescheduling Petition, No. 86-22*, in 2 MARIJUANA, MEDICINE & THE LAW 391 (R. C. Randall ed., 1989) (publishing a transcript of the hearing of June 10, 1988) [hereinafter *Marijuana Rescheduling Petition*].

82. *Id.*

83. *Id.* at 427 (publishing the Opinion & Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge).

84. *Id.* at 430.

85. Irvin Rosenfeld actually suffers from Pseudo Pseudo Hypoparathyroidism (yes, two pseudos). 1 MARIJUANA, MEDICINE & THE LAW 261 (1988).

it ought to satisfy the requirement for a significant minority. . . .<sup>86</sup>

Based upon the facts established in this record and set out above one must reasonably conclude that there is accepted safety for use of marijuana under medical supervision.<sup>87</sup>

There are those who, in all sincerity, argue that the transfer of marijuana to Schedule II will "send a signal" that marijuana is "OK" generally for recreational use. This argument is specious. It presents no valid reason for refraining from taking an action required by law in light of the evidence. If marijuana should be placed in Schedule II, in obedience to the law, then that is where marijuana should be placed, regardless of misinterpretation of the placement by some. The reason for the placement can, and should, be clearly explained at the time the action is taken. The fear of sending such a signal cannot be permitted to override the legitimate need, amply demonstrated in this record, of countless sufferers for the relief marijuana can provide when prescribed by a physician in a legitimate case.<sup>88</sup>

Four plants in their natural state are currently used as drugs in the United States: *Digitalis purpurea*, *Rauwolfia serpentina*, *Rhamnus purshiana*, and *Atropa belladonna*. Three other plant materials, provided they meet the standards for potency and purity of the *United States Pharmacopeia*, are used as drugs as well: *Datura stramonium*, ipecac extract, and opium extract.

### *B. Recent Medical Marijuana Research Programs*

Throughout the 1980s, research was undertaken regarding the medical use of marijuana. Six states—New Mexico,<sup>89</sup> California,<sup>90</sup> Georgia,<sup>91</sup>

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86. *Id.* at 438.

87. *Id.* at 444.

88. *Id.* at 445.

89. ROBERT P. MCNEILL, N.M. HEALTH & ENV'T DEP'T, THE LYNN PIERSON THERAPEUTIC RESEARCH PROGRAM: A REPORT ON PROGRESS TO DATE (1983); N.M. HEALTH & ENV'T DEP'T, THE LYNN PIERSON THERAPEUTIC RESEARCH PROGRAM: ANNUAL REPORT TO THE LEGISLATURE (1984).

90. ANNUAL REPORT OF THE RESEARCH ADVISORY PANEL PREPARED FOR THE GOVERNOR AND LEGISLATURE OF CALIFORNIA (1980-86).

91. MICHAEL H. KUTNER, EMORY U. EVALUATION OF THE USE OF BOTH MARIJUANA AND THC IN CANCER PATIENTS FOR THE RELIEF OF NAUSEA AND VOMITING ASSOCIATED WITH CANCER CHEMOTHERAPY AFTER FAILURE OF CONVENTIONAL ANTI-EMETIC THERAPY: EFFICACY AND TOXICITY (1983).

Tennessee,<sup>92</sup> Michigan,<sup>93</sup> and New York<sup>94</sup>—conducted human trials under the supervision of the FDA. Smoked marijuana was found to be superior to prescription drugs such as *Torecan* and *Compazine* in the control of nausea and vomiting in two of the studies.

The Food and Drug Administration also operated a research program involving single patients (an n = 1 study) called the Compassionate Investigational New Drug (IND) program which allowed physicians to apply to prescribe smoked marijuana to their patients. Early patients were Robert Randall and Elvy Musikka who used the marijuana to treat their glaucoma. Other patients were admitted to the program: Irvin Rosenfeld for the treatment of pseudo pseudo hypoparathyroidism which results in bone spurs growing all over the body which could become malignant at any time; Barbara Douglass for the treatment of multiple sclerosis; George McMahon for the treatment of nail-patella syndrome; and Kenny and Barbara Jenks for the treatment of AIDS wasting syndrome.

By the time the Jenks were admitted to the program following their criminal prosecution and reversed conviction,<sup>95</sup> the medical benefits of marijuana were becoming well-known to the AIDS community. The Compassionate IND program was deluged with new applications beginning in 1989. In June 1991, the Public Health Service announced that it was suspending the program. The principal justification was that providing marijuana to sick people would send the wrong message about the dangers of marijuana.<sup>96</sup> The belief that making marijuana available as medicine would send the wrong message also underlay the Clinton Administration's refusal to re-open the Compassionate IND program in 1994.

### C. *Medical Marijuana Initiatives of 1996*

The California legislature twice sent bills to Governor Pete Wilson to create a system for controlling the medical use of marijuana, including a proposed affirmative defense to a criminal prosecution. Governor Wilson vetoed both

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92. STATE OF TENN., EVALUATION OF MARIJUANA AND TETRAHYDROCANNABINOL IN TREATMENT OF NAUSEA AND/OR VOMITING ASSOCIATED WITH CANCER THERAPY UNRESPONSIVE TO CONVENTIONAL ANTI-EMETIC THERAPY: EFFICACY AND TOXICITY (1983).

93. JOHN R. F. INGALL, MICH. DEP'T OF PUB. HEALTH, EVALUATION OF MARIJUANA AS AN ANTI-EMETIC IN PATIENTS BEING TREATED WITH CANCER CHEMOTHERAPY, Trial A (1982).

94. Vincent Vinciguerra et al., *Inhalation Marijuana as an Anti-Emetic for Cancer Chemotherapy*, N.Y. ST. J. OF MED., Oct. 1988, at 525.

95. *Jenks v. State of Florida*, 582 So. 2d 676 (Fla. Dist. Ct. App. 1991).

96. Michael Isikoff, *HHS to Phase Out Marijuana Program: Officials Fear Sending "Bad Signal" by Giving Drug to Seriously Ill*, WASH. POST, June 22, 1991, at A14; Grinspoon & Bakalar, *supra* note 68, at 1876.



bills.<sup>97</sup> In 1996, pursuant to the California Constitution, citizens circulated petitions to place an initiative on the general election ballot that came to be known as Proposition 215, to provide for a medical use defense to a prosecution of marijuana possession, distribution, or cultivation. During the fall election season, General Barry McCaffrey, Director of the Office of National Drug Control Policy, twice traveled to California to speak out against the initiative, and to rally opposition to it.<sup>98</sup> The Attorney General of California, Dan Lungren, also campaigned against the measure. He even called a press conference to attack the *Doonesbury* comic strip by Garry Trudeau, which mocked his opposition to the initiative, and mocked a raid Lungren instigated against a San Francisco "club" that was distributing marijuana, ostensibly to medical patients.<sup>99</sup> Despite the opposition, the measure passed by a 55% margin on November 5, 1996, and became law on 12:01 a.m., Wednesday, November 6, 1996, adding section 11362.5 to California's Health and Safety Code.<sup>100</sup>

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97. The legislature approved S.B. 1364 on August 18, 1994. Letter from Dale Gieringer, NORML, to Author 1 (Mar. 25, 1997) (on file with the *Valparaiso University Law Review*). Governor Wilson vetoed the bill on September 30, 1994. *Id.* The next year, the legislature approved A.B. 1529 on September 12, 1995. *Id.* Governor Wilson vetoed that bill on October 15, 1995. *Id.*

98. Sabin Russell, *U.S. Drug Czar Visits Haight, Denounces Medical Uses of Pot*, S.F. CHRON., Aug. 16, 1996, at A8; *Drug Chief Says No to Pot Plan*, WASH. POST, Sept. 11, 1996, at A2.

99. G.B. Trudeau, *Doonesbury*, WASH. POST, Sept. 30-Oct. 5 & Oct. 21-26, 1996, at Style Section; Greg Lucas, *Lungren Isn't Laughing*, S.F. CHRON., Oct. 2, 1996, at A1; Jennifer Warren, *Lungren Fumes Over Satire in 'Doonesbury'*, L.A. TIMES, Oct. 2, 1996, at A3; Tim Golden, *California Law Chief Takes Drug Fight to 'Doonesbury'*, N.Y. TIMES, Oct. 3, 1996, at A14.

100. CAL. SECRETARY OF STATE, CAL. VOTER INFO., PROPOSITION 215. (Gen. Election, 1996) [hereinafter Proposition 215]. Section 1 of the Act provides, *inter alia*:

- (b) (1) (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.
  - (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.
  - (C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.
- (2) Nothing in this act shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.
- (c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.
  - (d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of

In Arizona, a group of leading citizens successfully placed a more comprehensive measure on the ballot. The sponsors obtained the endorsements of former U.S. Senators Barry Goldwater (Republican) and Dennis DeConcini (Democrat), and the support of other leading citizens in the state. Proposition 200 passed by a vote of more than 65% of the voters in that state.<sup>101</sup> Section 7 of Proposition 200 would authorize Arizona physicians to prescribe marijuana, and other drugs controlled in Schedule I of the Arizona Controlled Substances Act, to a "seriously ill patient" or a "terminally-ill patient."<sup>102</sup>

Other provisions in the Arizona initiative attacked the prevailing drug policy paradigm more broadly. In the early 1990s, Phoenix police chief Ruben Ortega had been an advocate of a policy called "do drugs, do time." This initiative rejected that approach. Persons convicted of simple possession of drugs would now be sentenced to probation and treatment or education.<sup>103</sup> They cannot be imprisoned. Instead of a mandatory minimum sentence of imprisonment, this provision was a mandatory maximum sentence of probation. Persons currently serving sentences for "personal possession or use" of a controlled substance would be paroled.<sup>104</sup> The initiative also created an Arizona Parents Commission on Drug Education and Prevention to "increase and enhance parental involvement" to address the problems of substance abuse.<sup>105</sup> A key provision denied parole to any person convicted of a crime of violence committed while under the influence of a controlled substance.<sup>106</sup>

*D. The Government's Rhetorical Attack on the Arizona and California Propositions*

The morning after Thanksgiving weekend, on December 2, 1996, the U.S. Senate Committee on the Judiciary held a hearing to attack the passage of these

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the patient upon the written or oral recommendation or approval of a physician.

- (e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this act who has consistently assumed responsibility for the housing, health, or safety of that person.

101. *Medical Marijuana Measures Pass November 5th Ballots in California and Arizona, Legal Distribution Systems Debated*, NEWSBRIEFS, Dec. 1996, at 3.

102. ARIZ. SECRETARY OF STATE, ARIZ. VOTER INFO., PROPOSITION 200 (Gen. Election, 1996) [hereinafter Proposition 200].

103. *Id.* § 10.

104. *Id.* §§ 8, 9.

105. *Id.* § 4.

106. *Id.* § 5.

initiatives.<sup>107</sup> The lead witness was General McCaffrey, and his statement opened:

Having worked with the Congress and members of this committee for nine months to reduce drug use and its consequences in America, I share your concern that these two measures threaten to undermine our efforts to protect our children from dangerous psychoactive drugs. *It would not be an exaggeration* to say that the very essence of our National Drug Control Strategy—our resolve to prevent the 68 million Americans under the age of 18 from becoming a new generation of drug addicts—could be undone by these imprudent, unscientific, and flawed initiatives.<sup>108</sup>

He later said, “No clinical evidence demonstrates that smoked marijuana is good medicine,” and “alternative therapies are adequate.”<sup>109</sup>

On December 30, 1996, General McCaffrey held a news conference with Attorney General Janet Reno and Secretary of Health and Human Services Donna Shalala to unveil the Administration’s legal response to the two propositions. It focused on the fact that teenage drug use has been rising since 1991. Secretary Shalala said, “In California and Arizona, voters sent very confusing messages to the teenagers in those states and to young people all across the country. . . .”<sup>110</sup>

### *E. The Rise in Teenage Drug Use and Its Causes*

Teenage drug use has been rising since 1991. Of eighth graders, 6.2% reported use of marijuana at least once in the last year in 1991.<sup>111</sup> This percentage increased to 18.3% in 1996. Of tenth graders, 16.5% reported use of marijuana in the past year in 1991.<sup>112</sup> This percentage increased to 33.6% in 1996.<sup>113</sup> Use at least once in the past thirty days is considered “current

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107. *Senate Tackles State Propositions Allowing Use of Illegal Drugs*, N.Y. TIMES, Dec. 3, 1996, at A13; Glen Martin, *Prop. 215 Attacked in U.S. Senate, Stricter Enforcement of Federal Pot Laws Urged*, S.F. CHRON., Dec. 3, 1996, at A1.

108. General Barry R. McCaffrey, Director, ONDCP, Statement Submitted for Record to Senate Committee on the Judiciary 1 (Dec. 2, 1996) (transcript on file with the *Valparaiso University Law Review*).

109. *Id.* at 3.

110. General Barry R. McCaffrey, Director, ONDCP et al., *Webwire Holds News Conference to Discuss the Administration’s Response to State Initiatives for Legalizing the Medical Use of Marijuana 5* (Dec. 30, 1996) (transcript on file with the *Valparaiso University Law Review*).

111. University of Michigan News & Info. Servs., *supra* note 2, at tbl.1.

112. *Id.*

113. *Id.*

use,” and the number of high school students who are “current users” of marijuana has shown very significant increases as well. Of eighth graders, 3.2% reported marijuana use in the past thirty days in 1991—this figure increased to 9.1% in 1995 and 11.3% in 1996.<sup>114</sup> For tenth graders the percentages were 8.7% in 1991, 17.2% in 1995, and 20.4% in 1996.<sup>115</sup> It should be noted that past year and current use of tobacco increased markedly during the same periods, growing about 50% among eighth and tenth graders from 1991 to 1996.<sup>116</sup> Daily cigarette smoking among tenth graders grew by 25% from 1991 to 1995 to a rate of one in six.<sup>117</sup> Daily cigarette smoking is five to ten times more prevalent than daily marijuana smoking.

The rates of teenage alcohol use have remained relatively steady, increasing slightly in some age groups and decreasing slightly in others, but the rates themselves are shockingly high. Teenage binge drinking—that is drinking more than five drinks at one time—is very high. In 1996, one in four tenth graders and almost one in three twelfth graders reported binge drinking *in the past two weeks*.<sup>118</sup> One in three high school seniors reported they were drunk in the last month, and one in five tenth graders report the same.<sup>119</sup> Teenage drunkenness is a major factor in automobile accidents, in the spread of sexually transmitted disease, and in acts of violence. One thing that is striking is the emphasis on the marijuana use rates among public officials and the news media.<sup>120</sup> While practitioners of substance abuse prevention and scholars in the field note the inter-relationships in the use of tobacco, alcohol and marijuana, public officials speaking about this often have blinders regarding tobacco and alcohol.

There are numerous explanations offered for the increases in teen drug, alcohol, and tobacco use. During the past five years, we have heard the many explanations from political figures, and they are empty and dishonest. The Republicans blamed President Clinton in 1995,<sup>121</sup> and again when the 1996

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *E.g.*, Christopher S. Wren, *Adolescent Drug Use Continues to Rise*, N.Y. TIMES, Dec. 20, 1996, at B12; Brad Hahn, *U.S. Study: Teens More Tolerant of Marijuana*, CHI. TRIB., Dec. 20, 1996, § 1, at 18.

121. *Congressional Republican Drug Policy Task Force Formed; Senate Committee Holds Hearings on Drug Policy*, NEWSBRIEFS, Feb. 1996, at 4 (Senate Majority Leader Robert J. Dole stated, “Our children are using more dope, more cocaine, and more heroin [than] at any time in recent memory” because of a lack of leadership from the White House.); William H. Zelif, Jr., *Missing Leader in the Drug War*, WASH. POST, Dec. 15, 1995, at A25 (Representative Zelif (R-N.H.) was chairman of the House Government Reform and Oversight Subcommittee on National

Household Survey on Drug Use was released in August, 1996,<sup>122</sup> even though the upswing started in 1991 during the Bush Administration. The President does not make enough speeches against drugs they say, and his policies are flawed, his Republican critics argue.<sup>123</sup> If Presidential speeches were the key ingredient for stopping teenage drug use, they would be a uniquely effective and inexpensive government program. But there is no evidence that this is the case.

Frequently the motion picture, television, and music industries are blamed —“Hollywood’s glamorization of drugs.” But there is no evidence of causation or association between entertainment and drug use nor is there any year to year comparison of the volume or content of “pro-drug messages” of one year’s movies or music with another year’s that might be linked to changes in teen drug use. There are, of course, as always, simply anecdotes. Parents recognize that the cultural “glamorization” is much greater for cigarettes and alcohol than for illegal drugs.<sup>124</sup>

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Security, International Affairs and Criminal Justice).

122. Richard Keil, *Dole Urges Guard Role in Halting Narcotics*, STAR LEDGER (Newark, N.J.), Sept. 2, 1996, at 4; Peter Slevin, *Military Antidrug Role Questioned*, PHILA. INQUIRER, Aug. 31, 1996, at A3 (President Clinton had “surrendered” in the war against drugs, said Bob Dole, Republican candidate for President.); Bradley Graham, *Military Role in Drug War Debated*, WASH. POST, Aug. 30, 1996, at A6.

123. Jack Nelson, *Teenagers, Parents Tolerate Illicit Drug Use, Poll Finds*, L.A. TIMES, Sept. 10, 1996, at A7 (“Today, we got yet another report from the field showing the terrible casualty count from Bill Clinton’s failure to wage a real war on drugs,’ Dole’s campaign said in a statement.”).

124. NATIONAL CTR. ON ADDICTION AND SUBSTANCE ABUSE, COLUMBIA U., NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE II: TEENS & THEIR PARENTS 69 (1996) [hereinafter CASA]. In the CASA survey, parents were asked the following questions and gave the following responses:

28. Do you think American culture—I mean, movies, music, TV, fashion—glamorizes smoking cigarettes?  
65% DOES  
33% DOES NOT  
2% DON’T KNOW/NO RESPONSE
29. Do you think American culture glamorizes drinking alcohol?  
84% DOES  
15% DOES NOT  
1% DON’T KNOW/NO RESPONSE
30. Do you think American culture glamorizes the use of illegal drugs?  
53% DOES  
46% DOES NOT  
1% DON’T KNOW/NO RESPONSE
31. Do you think American culture glamorizes women and girls being quite thin?  
92% DOES  
7% DOES NOT  
1% DON’T KNOW/NO RESPONSE.

Dr. Eric Voth, Chairman of the International Drug Strategy Institute, and Stephanie Haynes, President of Drug Watch International, argue that a major factor in the rise of marijuana use by youth is a public relations campaign financed by advocates of drug legalization.<sup>125</sup>

Another explanation that was offered in 1996 was that “baby boomer” parents are at fault. Parents either are failing to talk with their children about drugs, or when they do talk to their children, they are ambivalent and resigned to the use of drugs by their children.<sup>126</sup> These typical explanations of the *increase* in teenage drug use offered by public figures do not stand up to analysis. None of the public figures attempting to explain the increase in teen drug use suggested that the effectiveness of the government funded prevention programs should be questioned. None of the public figures expressed any awareness that such programs had in fact been evaluated.

Since teenage drug and alcohol use are rising, any responsible approach to that problem ought to include an inquiry into the effectiveness of programs specifically designed to prevent such behavior. In fact, U.S. taxpayers have paid for such evaluations. But listening to the Administration and professional anti-drug spokespersons, one would never know it. In fact, the most logical explanation of the rise in teen drug and alcohol use is that our most popular teenage drug education programs are failures. The nation’s number one teenage drug prevention program, Drug Abuse Resistance Education (D.A.R.E.), has been studied repeatedly and recently all of these studies were reviewed and analyzed pursuant to a Department of Justice contract. In September 1994, the reviewers found conclusively that D.A.R.E. was ineffective. This was the conclusion of independent research contractors at Research Triangle Institute who examined all the methodologically sound D.A.R.E. studies. D.A.R.E. does

125. *House Crime Subcommittee Holds Hearings on Marijuana Use*, NEWSBRIEFS, Apr. 1996, at 16 (reporting on a hearing held on Mar. 6, 1996).

126. *Baby Boomers Blamed, Parents ‘Resigned’ to Teens Drug Use*, DES MOINES REG., Sept. 10, 1996, at 1A; Roberto Suro, *Boomers Expect Teen Drug Use, Survey Finds*, WASH. POST, Sept. 10, 1996, at A3; Jack Nelson, *Teenagers, Parents Tolerate Illicit Drug Use, Poll Finds*, L.A. TIMES, Sept. 10, 1996, at A1. See also CASA, *supra* note 123, at 76. The question, “If you had to guess, do you think your teenager will ever try use [sic] illegal drugs?” was the last question of a 67 question poll. *Id.* (emphasis added). In response, 46% responded yes, 50% responded no. *Id.* Although 1166 parents were questioned in the survey, the report does not indicate how many parents answered all questions. *Id.* Teenagers of these parents were also questioned. The last question asked of them was, “And, for my final question, how likely do you think it is that at some point in the future you will try an illegal drug: is it very likely, somewhat likely, not very likely, or will it absolutely never happen?” *Id.* at 62. In response, 10%, said very likely, 12% said somewhat likely, 27% said not very likely, 51% said it would never happen. *Id.* Therefore, the most “hyped” conclusion of the “study” was the least dependable, and one for which there was significant disagreement between children and their parents.

not reduce teenage drug use.<sup>127</sup> However, D.A.R.E. costs about \$400 million in federal funds annually, and has been estimated to cost another \$300 million in state, local, and private funds. However, D.A.R.E. is a sacred cow—no public official will criticize it.

Why is D.A.R.E. so popular? First, D.A.R.E. is a police-sponsored and operated program, and public officials are loath to criticize the police. Police work is hard, dangerous, and often heroic. Public officials are eager to associate with such persons and professions. Police are crime fighters, and most public officials are eager to associate themselves with crime fighting. Recognizing the hazards of police work, most of us would not do it, and most of us have been trained not to criticize those who do a job we would not do. Historically, the police have been generally respected. Unless one has been the relatively rare victim of police misconduct, most citizens do not want to criticize the police.

Second, D.A.R.E. does not cost cash-strapped school districts any money. The police departments pay the salaries, and obtain the funds for the distributed materials. School systems do not need to purchase or evaluate curricula, and teachers do not need to be paid. Effective programs such as Project STAR designed at the University of Southern California (taught in Kansas City and Indianapolis), or Life Skills Training (LST) designed at Cornell University Medical College, cost money and they require the involvement of parents, community leaders, the news media, teachers, and the students. They require a greater commitment of a school system's time and effort than does D.A.R.E. Most importantly, they require skilled and well-trained teachers.<sup>128</sup> Unfortunately, however, a great many students simply do not believe the content of current anti-drug programs, according to the findings of Dr. Joel Brown and his colleagues.<sup>129</sup>

Health and Human Services Secretary Donna Shalala has repeatedly said we must provide a "consistent" message to our children about drugs.<sup>130</sup> She is

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127. Susan T. Ennett et al., *How Effective Is Drug Abuse Resistance Education? A Meta-Analysis of Project DARE Outcome Evaluations*, 84 AM. J. PUB. HEALTH 1394 (1994).

128. MATHEA FALCO, *THE MAKING OF A DRUG-FREE AMERICA: PROGRAMS THAT WORK* 41-44 (1992).

129. See Brown et al., *supra* note 21.

130. Donna E. Shalala, Secretary of Health and Human Servs., Statement at Press Conference to Release Monitoring the Future Survey (Dec. 19, 1996) (transcript on file with the *Valparaiso University Law Review*). Secretary Shalala stated:

The holiday season is always a time for cherishing children. But it is also a time to save them. That's why now . . . we must give our children clear and consistent messages to stay away from drugs, alcohol and tobacco. . . .

. . . .

saying in effect that our education about drugs must be “politically correct.” Unsurprisingly, the truth is rarely politically correct. The latest Monitoring the Future report provides more evidence that “politically correct” anti-drug education is a failure. To many of our youth, anti-drug education fails the test of truth-telling that children detect and demand. To be credible with children, anti-drug education must report accurately about drugs. Teachers must be able to give honest answers to hard questions. Anti-drug education must conform to the general standards of education. We teach children how to discriminate, when to draw distinctions, and what are accurate similarities. D.A.R.E. and similar types of anti-drug education blur real and important differences between drugs and behaviors. In effect, anti-drug education blurs reality, and what does that sound like?

When important programs seem to be so profoundly ineffective, they must be subject to very careful review. When they are found to be ineffective, they must not be funded. The taxpayers have paid to have these programs studied. Now they are paying for anti-drug programs that have been proven to be ineffective and leave their children more vulnerable to using drugs, alcohol, and tobacco.

*F. Does Teenage Marijuana Use Increase Because of Medical Marijuana Programs or Debate?*

It is a tenet of government anti-drug officials that providing marijuana for the sick and dying will increase teenage marijuana use.<sup>131</sup> Upon a moment’s reflection, the claim that teenage marijuana use has risen or will rise because sick people are permitted to use marijuana is absurd. In the public “debate” about why teenage marijuana use has risen between 1991 and 1996, almost no observer attributed the increase to claims or experience regarding medical marijuana.<sup>132</sup> The historical record completely contradicts the claim. From 1979 until 1991, teenage marijuana use steadily declined. Yet during that period of time, there were numerous medical marijuana programs in place. On the order of thirty-six states enacted laws that either set up state therapeutic

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But we have to do much more because our nation cannot afford to go down the dangerous road to drug legalization as two states have done. That means we must oppose the dangerous and misguided effort to legalize marijuana and other drugs. We must send clear and consistent messages to young people that marijuana is dangerous, illegal and wrong.

*Id.* at 1-2.

131. General Barry R. McCaffrey, *supra* note 107, at 2 (“Coming at a time that marijuana use has doubled among our youth, these initiatives [Propositions 200 and 215] threaten to undermine our efforts to prevent drug use by our children. Labeling marijuana as ‘medicine’ sends the wrong message to children that it is a safe substance.”).

132. See text accompanying *supra* notes 110-29.



marijuana research programs, or that permitted doctors to prescribe marijuana. Almost all of these laws were enacted in 1978, 1979, 1980, or 1981—that is at the very time that teenage marijuana use started its steady decline.<sup>133</sup> A half dozen states were engaged in clinical research using marijuana.<sup>134</sup>

From 1976 to 1986, the National Institute on Drug Abuse shipped a total of 160,700 marijuana cigarettes for human studies,<sup>135</sup> and teenage marijuana use continued downward. In 1987 and 1988 public hearings were held in which the evidence regarding medical marijuana was publicly presented.<sup>136</sup> In 1988, the DEA Administrative Law Judge ruled that marijuana should be rescheduled as a Schedule II controlled substance on the ground that it had a medically accepted use in treatment.<sup>137</sup> And still teenage marijuana use continued to decline. It was 1991 when the Bush Administration announced that it was suspending the medical marijuana Compassionate IND program, in order to stop “sending the wrong message” to teenagers about marijuana—and teenage marijuana use started to increase. The program was permanently closed in 1992, and the Clinton Administration refused to reopen it in 1994—and teenage marijuana use continued to increase.

There is no evidence that shows that teenagers start smoking marijuana because it is provided to seriously ill or terminally ill medical patients. The Monitoring the Future survey shows that there is an association between the perception of harmfulness of marijuana and its use—the less harmful it is perceived, the more youth use the drug.<sup>138</sup> By keeping marijuana outside the category of medicines, it is therefore in the category of “recreational” drugs like alcohol and tobacco. If marijuana is not a medicine, then what is it? “It’s a party drug!” our youth will respond. The authors of the Monitoring the Future study in their discussion of the erosion of peer norms against drug use noted several explanations, but the medical use of marijuana was not one.<sup>139</sup>

If a close association is created by news accounts, public service advertisements, and anti-drug education between marijuana and people dying of fearful diseases such as cancer and AIDS, or people in great pain or with limited mobility such as paraplegics and multiple sclerosis patients, it would almost

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133. MARIJUANA POL’Y PROJECT, MARIJUANA POLICY REP. 6-7 (May-June 1996). By 1996, the laws of five states had expired, and nine states repealed their laws. *Id.*

134. *See supra* notes 88-93.

135. *Marijuana Rescheduling Petition, supra* note 80, at 248.

136. *See text accompanying supra* notes 79-80.

137. *See text accompanying supra* notes 82-87.

138. University of Michigan News & Info. Servs., *supra* note 2, at 5-6. (“This research team has shown that, in general, when young people come to see a drug as more dangerous, or more disapproved by their peers, they are less likely to use it.”).

139. *Id.* at 6-7.

inevitably be “deglamorized.” Let the Partnership for a Drug-Free America broadcast and publish images and messages that create a close association between marijuana and the people who are the least athletic, the least “attractive” (in the Madison Avenue sense), and measure the effect upon teenage marijuana use.

*G. What the Medical Marijuana Propositions Do*

The California proposition is not well-drafted. Regarding the provisions in the California Health and Safety Code prohibiting the possession and cultivation of marijuana, the proposition provides that the state prohibitions “shall not apply to a patient, or to a patient’s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.”<sup>140</sup> At a minimum, this provision permits persons being tried for violating the prohibitions to offer evidence that they are a seriously ill patient (or the caregiver of such a patient) and that a physician recommended or approved the patient’s use of marijuana to treat the patient’s disease. If such evidence is credible, it should result in a dismissal of the charges in state court. Section 11362.5(b)(1)(B) provides that:

The people of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: . . . To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

This provision might be understood as a bar to prosecution, but it is not a bar to an investigation. It may well be construed to authorize police officers and district attorneys to make inquiries following an arrest but before trial to satisfy themselves that the suspect marijuana possessor or cultivator is a patient with a physician’s approval or recommendation. This was recently the case in Santa Clara County. For example, the police in Mountain View, California, arrested a forty-three-year-old electrician who was using marijuana to treat AIDS-related symptoms with the recommendation of his physician and seized marijuana plants and growing equipment from his home. After five hours, and discussion with the Santa Clara County District Attorney’s office, the police released the man, and returned the plants and growing equipment.<sup>141</sup>

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140. Proposition 215, *supra* note 99, § 1(d) (codified at CAL. HEALTH & SAFETY CODE § 11362.5(d) (West 1996)).

141. Emelyn Cruz Lat, *Cops Give Back AIDS Patient’s Pot Plants in 1st-Ever Case: Mountain View Police Relent Because of Medical Need*, S.F. EXAMINER, Mar. 2, 1997, at A1.

Proposition 200 in Arizona authorizes the prescription only (not the "recommendation" or "approval" of the use) of Schedule I controlled substances "to treat a disease, or to relieve the pain and suffering of a seriously ill patient or terminally ill patient . . . [by a medical doctor in compliance] with professional medical standards."<sup>142</sup> This proposition has been attacked by the Office of National Drug Control Policy at the White House and the DEA because Schedule I controlled substances, in addition to marijuana, include heroin and LSD.<sup>143</sup> Heroin is lawfully used to treat pain in the United Kingdom<sup>144</sup> and Canada.<sup>145</sup> Legislation to permit the use of heroin in the treatment of intractable pain was considered in the U.S. House of Representatives in 1984.<sup>146</sup> Prior to being outlawed, research into the therapeutic uses of LSD was reported in a number of papers to be useful as an adjunct to psychotherapy and in the treatment of alcoholism.<sup>147</sup> Whether a psychiatric patient (who must be "seriously ill" to qualify for treatment under Proposition 200) ought to get LSD therapy is certain to be highly controversial. Whether an alcoholic who has remained uncured by conventional treatments is a "seriously ill patient" within the meaning of this law would need to be determined before LSD therapy for such patients could be undertaken in Arizona.

The most important point is that none of the Schedule I substances are available at a pharmacy, thus there is no lawful way that a prescription can be filled. Proposition 200 does not, on its face, permit a physician to "dispense" a Schedule I controlled substance. Drugs, if they are introduced into interstate commerce, are regulated by the Federal Food, Drug and Cosmetic Act of 1938.<sup>148</sup> Essentially, all drugs are so regulated. Therefore, until the federal controls on Schedule I drugs that exist under the authority of the Federal Food, Drug and Cosmetic Act of 1938 (notwithstanding the controls of the Controlled Substances Act of 1970), are modified or struck down as applied, the Arizona proposition in this regard is likely to have little effect.

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142. Proposition 200, *supra* note 101, § 7 (codified at ARIZ. REV. STAT. § 13-3412.01.A (1996)).

143. *Hearings on "A Prescription for Addiction?"*, 104th Cong. (statement of Thomas Constantine, Administrator, DEA). "[H]ow are prison officials in Arizona expected to maintain order and discipline with the inmates high on heroin, marijuana, LSD or other Schedule I drugs?" *Id.*

144. *Misuse of Drugs Act*, 1971, ch. 38 § 10 (Eng.).

145. *Narcotics Control Act*, R.S.C., ch. N-1, § 65(7) (1985) (Can.).

146. H.R. 5290, 98th Cong., 130 CONG. REC. H9760 (1984).

147. See LESTER GRINSPOON AND JAMES B. BAKALAR, *THERAPEUTIC USES IN PSYCHEDELIC DRUGS RECONSIDERED 192-237* (1979). See also MARTIN A. LEE & BRUCE SHLAIN, *ACID DREAMS: THE COMPLETE SOCIAL HISTORY OF LSD* (1985); STANISLAV GROF, *LSD PSYCHOTHERAPY* (1994).

148. Pub. L. No. 76-780 (1938).

*H. The Administration's Legal Attack on the Propositions*

The key to the utility of Proposition 215 is that physicians recommend the use of marijuana to their patients. If physicians are constrained from doing so, the proposition will have no consequence. The Administration formally responded to the propositions by convening an inter-agency working group and publishing a response in the Federal Register.<sup>149</sup> The first point in the Administration's response is to threaten physicians with the loss of their federal license to prescribe controlled substances.

*I. Physicians Registration and the Authority to Suspend or Revoke*

Almost every physician needs to be able to write prescriptions for pain-relieving medication in order to remain in business. In 1984, to prevent the diversion of controlled substances from legitimate medical uses to those who abuse drugs, Congress strengthened the authority of the DEA to suspend or revoke the federal controlled substance prescription license, known as a "registration," if the DEA found that the registrant "has committed such acts . . . inconsistent with the public interest as determined" under Section 823.<sup>150</sup> The concern was that the "retail level is believed to be the principal source from which drugs are 'diverted' from legitimate medical uses to drug abusers."<sup>151</sup> Legal prescription drugs—whether pain killers, psychiatric medications, weight loss medications, tranquilizers, et cetera—were "the predominant source of the drug use that brought a person to a hospital emergency room."<sup>152</sup> The concern was that criminal syndicates financed the establishment of "clinics" for the purpose of distributing prescription drugs or issuing prescriptions for such drugs under the cover of a legitimate medical practice. A report from the Judiciary Committee stated:

The physicians employed by such syndicates are instructed to conduct examinations and compile records to create the artifacts of a bona fide medical practice. These clinics have been difficult to investigate on the part of either Federal or State authorities. Often, "patients" will be directed to a pharmacy that is controlled by the operators of the scheme. Typically, between one and five million dosage units of drugs can be diverted through such an operation. . . . Another major source of diversion are physicians who prescribe excessively or

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149. Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164-66 (1997).

150. Dangerous Drug Diversion Control Act of 1984, Pub. L. No. 98-473, § 511, 98 Stat. 2073 (1984) (codified as amended at 21 U.S.C. § 824(a)(4) (1994)).

151. H.R. REP. NO. 98-835, pt. 1, at 7 (1984).

152. *Id.* at 8.

carelessly because of their own problems (e.g., alcoholism, drug abuse, mental illness, senility) or because of lack of adequate knowledge concerning the effects of the drugs, or of the law.<sup>153</sup>

The Administration had wanted broad power to deny, suspend, or revoke registrations. The Administration wanted simply to consider "such other factors as may be relevant to and consistent with the public safety."<sup>154</sup> But the American Medical Association, the American Pharmaceutical Association, and the American Veterinary Medical Association expressed concern at such a broad formulation. The Judiciary Committee agreed and limited the factor to apply to "such other conduct which may threaten the public health and safety."<sup>155</sup> Revocation or suspension of registration of a practitioner may be made upon a finding that the registrant "has committed such acts as would render his [sic] registration under section 823 [(f) of the Controlled Substances Act] inconsistent with the public interest as determined under such section."<sup>156</sup>

#### *J. Administration Published Policy*

After the 1996 medical marijuana initiatives passed, the Administration declared that:

Department of Justice's (DOJ) position is that a practitioner's action of recommending or prescribing Schedule I controlled substances is not consistent with the 'public interest' (as that phrase is used in the Federal Controlled Substances Act) and will lead to administrative action by the Drug Enforcement Administration (DEA) to revoke the practitioner's registration.

DOJ and Department of Health and Human Services (HHS) will send a letter to national, state, and local practitioner associations and licensing boards which states unequivocally that DEA will seek to revoke the DEA registrations of physicians who recommend or prescribe Schedule I controlled substances. This letter will outline the authority of the Inspector General for HHS to exclude specified individuals or entities from participation in the Medicare and Medicaid programs.<sup>157</sup>

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153. *Id.*

154. *Id.* at 9.

155. *Id.* at 10.

156. 21 U.S.C. § 824(a)(4) (1994).

157. Administrative Response to Arizona Proposition 200 and California and Proposition 215, 62 Fed. Reg. 6164, 6164 (1997).

The Clinton Administration is now in the anomalous position of insisting that the laws adopted by majorities of the Arizona and California voters in the 1996 general election are contrary to "the public interest." If the voters decide the public interest, the term has no intelligible meaning.

In addition, "Treasury will recommend that the IRS issue a revenue ruling, to the extent permissible under existing law, that would deny a medical expense deduction for amounts expended for illegal operations or treatments and for drugs, including Schedule I controlled substances, that are illegally procured under federal or state law."<sup>158</sup>

Regarding drug testing of "safety-sensitive transportation workers," those who test positive "may not under any circumstance use state law as a legitimate medical explanation for the presence of prohibited drugs. DOT [Department of Transportation] is encouraging private employers to follow its example."<sup>159</sup>

All general contractors and grantees of the federal government must maintain drug-free workplaces. "Each Federal agency will issue a notice to its grantees and contractors to remind them . . . that any use of marijuana or other Schedule I controlled substance remains a prohibited activity; and . . . failure to comply with this prohibition" will make the grantees or contractors ineligible for federal grants or contracts. "Further, Federal agencies will *increase their efforts to monitor compliance* with the Provisions of the Act . . . *with special priority given to states enacting drug medicalization measures.*"<sup>160</sup>

Federal civilian workplace rules will be reinforced, the Department of Defense will specially notify its contractors, the Nuclear Regulatory Commission "will continue to demand drug-free employees. . . ." <sup>161</sup> The Occupational Safety and Health Administration "will send letters" to California and Arizona agencies "reiterating the dangers of drugs in the workplace."<sup>162</sup>

To protect children from marijuana availability and use, HHS and the Department of Education will "educate the public in both Arizona and California about the *real* and proven dangers of smoking marijuana."<sup>163</sup> The Department of Education will reiterate to all "local education agencies" that they must continue to "ensure that programs supported by and with Federal Safe and Drug

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158. *Id.*

159. *Id.* at 6165.

160. *Id.* (emphasis added).

161. *Id.*

162. *Id.*

163. Administrative Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6165 (1997) (emphasis added).

Free Schools funds convey the message that the illegal use of alcohol and other drugs, including marijuana, is wrong and harmful."<sup>164</sup> Also:

[The Department of] Education will develop a model policy to confront 'medical marijuana' in schools. . . .

. . . .

ONDCP, HHS and DOJ will work with Congress to consider changes to the Federal Food, Drug, and Cosmetic Act and the Controlled Substances Act, as appropriate, to limit the states' ability to rely on these and similar medical use provisions. . . . We will also consider additional steps, including conditioning Federal funds on compliance with the Controlled Substances Act and the National Drug Control Strategy.<sup>165</sup>

The Administration is looking to every conceivable device to coerce doctors to disregard these changes in state law, and to coerce the states to abandon or reject these approaches, even though they were adopted by substantial majorities.

#### K. *Litigation Filed Against McCaffrey and Others*

On January 13, 1997, thirteen physicians, five patients, and several medical organizations sued General McCaffrey, DEA Administrator Thomas Constantine, Attorney General Janet Reno, and HHS Secretary Donna Shalala in San Francisco arguing that the Administration's threat interfered with the ability of doctors and patients to discuss medical treatments in violation of the First Amendment.<sup>166</sup> This suit was a major news story.<sup>167</sup> The physicians are very well-known and very respected practitioners in California.

A challenge by persons associated with the Life Extension Foundation and the American Preventive Medical Association, making broader claims of the unlawfulness of the Administration's position, was filed on March 6, 1997. The plaintiffs allege not only a violation of the First Amendment, but that the Federal policy violates the Ninth Amendment, the Tenth Amendment, and the

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164. *Id.* at 6166.

165. *Id.* (emphasis added).

166. *Conant v. McCaffrey*, No. C 97-0139 FMS (N.D. Cal. Jan. 13, 1997).

167. Harriett Chang, *State Doctors Sue over Medical Pot Rules*, S.F. CHRON., Jan. 15, 1997, at A20; Tim Golden, *Marijuana Advocates File Suit to Stop U.S. Sanctions*, N.Y. TIMES, Jan. 15, 1997, at A10; Jenifer Warren, *Doctors Sue over Marijuana*, L.A. TIMES, Jan. 15, 1997, at B1.

Commerce Clause.<sup>168</sup> The plaintiffs allege that the state laws authorizing physician prescription or recommendation of marijuana create statutory rights retained by the plaintiff physicians and plaintiff patients, that Congress has not authorized preemption of state law permitting physician prescription and recommendation of marijuana or patient use or home cultivation for personal medical use in accordance with state law, and thus the federal policy violates the Ninth Amendment. They allege that the policy preempts state law without a specific congressional mandate and attempts to regulate the conduct of state law enforcement officials. Also that the federal policy invades state police powers and health and safety regulation and supplants them in violation of the Tenth Amendment. The plaintiffs also allege that the intrastate medical recommendation and prescription of marijuana and the intrastate cultivation and consumption of marijuana for medically recommended and prescribed use is not "commerce" within the meaning of the Commerce Clause.

#### *L. Legislation to Punish Doctors for Recommending Medical Marijuana*

United States Senator Lauch Faircloth (R-N.C.), joined by Senators Jesse Helms (R-N.C.) and James Inhofe (R-Okla.), introduced a bill to prohibit physician registrants with the Drug Enforcement Administration from offering advice, or responding to a request for advice, that suggests the use of marijuana, while acting in the course of his or her professional capacity. Current offenses by registrants carry a maximum sentence of four years imprisonment.<sup>169</sup> This bill would authorize an eight year term of imprisonment for making this recommendation. It would require mandatory revocation of the physicians registration with DEA. This would be the only ground for mandatory revocation of registration. It is called the "Drug Use Prevention Act of 1997," and was recently co-sponsored by Representative Robert C. Smith (R-N.H.).<sup>170</sup>

#### *M. Conclusions Regarding Medical Marijuana*

The intense controversy over the medical uses of marijuana will continue at a highly energized level. On February 19 and 20, 1997, the National Institute on Health (NIH) convened a two-day scientific workshop to review current knowledge regarding the medical uses of marijuana. The scientific advisory panel recognized that there was significant potential for medical benefit but that smoking the drug was highly problematic. The panel also observed that the nature of marijuana is such that conducting research with it will be particularly

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168. *Pearson v. McCaffrey*, No. 97CV462 (D.D.C. Mar. 6, 1997).

169. 21 U.S.C. § 843(d) (1994).

170. S. 40, 105th Cong. (1997).



difficult. The active ingredients are not water soluble. Finding placebos and developing controls will be very challenging.

The convener of the conference, Dr. Alan Leshner, stressed repeatedly that NIH welcomes proposals for well-designed research. It was unclear whether NIH would cooperate with privately-funded research programs in making available research grade marijuana from the stocks that it controls.

As a measure to expedite this research, marijuana should be rescheduled to Schedule II. Since there is no FDA approval of marijuana, rescheduling would not open up every corner drug store to become a distributor of marijuana. Rescheduling would permit well-designed research to go forward without the near-crippling bureaucratic obstacles posed by the Drug Enforcement Administration.<sup>171</sup> The Compassionate IND program for n=1 studies should be reopened to physicians willing to do such research. The greatest need for marijuana medically is for those who have very rare disorders, such as nail-patella syndrome, or pseudo pseudo hypoparathyroidism, or those who do not respond to conventional medications.

Members of the Bar, concerned about the nature of justice, and the due administration of justice, should insist that sick people not be arrested if they use marijuana as a treatment for a serious medical condition. Together with the nation's physicians, they should insist upon a moratorium on the prosecution of all persons who have good faith claims that they are using marijuana medically. Lawyers, doctors, and educators should unite to make clear that permitting marijuana to be used medically is not an endorsement of its use recreationally, or a rejection of the scientific evidence that its abuse can be harmful, especially to children.

## V. CONCLUSION

Drug prohibition has increased the value of drugs to phenomenal levels. Yet drug crops are easy to grow and to process. Drugs are thus widely available, at very high prices. Yet the illegality of drugs results in the entire drug marketplace operating outside the law. The conflicts in the "ordinary course of business" in the market cannot be resolved through the courts, and thus the disputants resort to violence. The valuable commodities are tempting targets for theft, and thus the criminals who run the markets require armed guards for the most elementary protection.

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171. See 21 U.S.C. § 823(f) (1994).

The ever-harsher sentences imposed for drug trafficking results in ever-more desperate strategies to minimize the risk of being apprehended. All of these factors lead to the recruitment of children into the drug trade and its associated violence.

The most fundamental drives of the society are to protect its children. The drive to protect children from the abuse of drugs has created a “zero-tolerance” paradigm that has overwhelmed consideration of other strategies for protecting children, and other vital interests as well. Yet the desire to protect children from the “menace” of drugs exceeds the desire to protect children from many other dangers.

In twelve step programs of recovery from alcoholism (Alcoholics Anonymous) and drug addiction (Narcotics Anonymous), one of the most important lessons for recovery is to learn to detach. Twelve-steppers are taught to “let it go, give your problem up to God.” As a nation, we are “addicted” to the “war on drugs.” Perhaps if our nation is to recover from the obsession of the anti-drug effort, we need to acquire some greater detachment. As long as policy is driven by what seems “most infuriating,” and not what is most logical or most effective, our ability to fundamentally address these problems is minimal.

